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BY EMAIL ONLY

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Dear Fiona,

Thank you for your letter of 11 December.

Like you, I hope the Scottish Government responds this week with a substantial package of financial support for those working in legal aid. I am proud that the Law Society has worked so constructively with bar associations across the country and presented the Cabinet Secretary with such compelling evidence to justify both an across the board increase in fees as well as other support.

Nevertheless, I realise that you and your colleagues will want to consider your position carefully once the package is known, hopefully later today. To that end, I trust that the following answers to the specific questions you asked in your letter are helpful.

- 1. Guidance about our obligations as officers of the court and our obligations to our clients in the event that direct action is to be implemented for withdrawal of our services. If any associated professional regulations require to be amended to allow further action, please proceed to have those attended to.**

This has been considered carefully by the Law Society's Director of Professional Practice.

Rule 1.5.2 of the solicitor practice rules clearly states "you may decline to accept new instructions, whether from a new or established client, without giving a reason for doing so, provided the refusal to act is not motivated by discrimination in breach of rule 1.15".

This rule gives solicitors wide discretion in using their own professional judgment in deciding whether to act or not act for a client. The position would be different when a client from whom instructions have previously been accepted appears from custody on an outstanding warrant. This scenario was previously discussed by the Professional Practice Committee and the view taken was that the nominated solicitor (or someone instructed by the nominated solicitor) should appear as any other solicitor would have no knowledge of the background of the client or the case.



A solicitor could be criticised if they moved between acting, and not acting, in any particular case where legal aid had been granted. If a solicitor applies for legal aid for a client then they are offering to act on behalf of that client until the case concludes or the solicitor, for professional reasons, withdraws from it. The Professional Practice Department considers it difficult to see how that solicitor could decline to appear at a particular hearing but continue to act overall.

- 2. Please provide guidance to practitioners about remote Jury cases. We have received the Judicial Institute's link and SCTS video guide links. A guidance note from you is requested. We wish to avoid any complaint of defective representation for our members. Is the Society prepared to obtain Counsel's Opinion about a legal challenge by Defence Agents to the operation of these in the absence of such guidance?**

The use of remote courts, particularly for remote jury cases, presents novel challenges even for the experienced practitioner. We are looking at ways in which further support could be provided to members, probably through additional training. We have been considering how we can coordinate and disseminate the information, technical advice and activity produced to date from the Scottish Courts and Tribunal Service and the Judicial Institute. Issues have of course arisen with regard to virtual custody cases, where the timely availability of private consultation with the client or access to papers or to the Fiscal has proven difficult. It is of course always for a solicitor to exercise their judgement as to whether the procedure in any particular case is fair and just and to raise with the court any concerns.

Since existing client/solicitor responsibilities continue to apply, at this stage, we do not intend to request Counsel's opinion.

- 3. In the absence of sanctions for failure to complete a PIDM and in the absence of an enhanced fee from SLAB for this additional work, please confirm if the Society is prepared to seek counsel's opinion on the issue of a Defence challenge to this additional procedure?**

We did raise the need for an additional fee to take account of the PIDM requirement. The response from the Minister for Community Safety was that although there will be changes in the ways of working for defence solicitors, the burden of this work fell largely to the Crown.

As the PIDM process is required by Practice Note, solicitors should, as officers of the court, ensure that they discharge their responsibilities. A failure to follow the terms of a Practice Note, for instance by not engaging with a PIDM, will result in that fact being included as part of the report to the Court. This would be considered at the Intermediate Diet and fall to be dealt with by the Sheriff. Ultimately a failure to engage in the PIDM could potentially be considered as grounds for a complaint.



However, changes to criminal practice such as the introduction of PIDMs illustrate the wider need for legal aid implications to be properly considered before they are introduced. Too often, the practicalities of an increased burden on the solicitor and the absence of funding for that work is not accounted for. That was initially what happened with the requirement for written records which did require additional work and which have now been replaced by PIDMs.

We do not believe that counsel's opinion is required in respect of the introduction of PIDMs as normal professional responsibilities to the client and the court still apply.

4. Please confirm if the Society's media department is prepared to publicise further direct action?

Any direct action is a matter for individual solicitors to take. However, I issued a strong public statement in response to the last set of actions and recognised the deep concern being felt by those working in the legal aid sector. If the Cabinet Secretary fails to come forward with a meaningful set of proposals, then I would be extremely frustrated. Given where things stand, I would expect to express that frustration publicly.

Yours sincerely,

Amanda Millar
President