



glasgow bar association
established 1959

Room 1.29
Glasgow Sheriff Court
1 Carlton Place,
Glasgow
G5 9DA

31st December 2020

By Email Only -

Cabinet Secretary for Justice – Mr. Humza Yousaf, MSP
Minister for Community Safety – Ms. Ash Denham, MSP

Dear Humza and Ash,

Scottish Government Support for Legal Aid Practitioners

Thank you for the correspondence from Humza on behalf of the Scottish Government dated 22nd December 2020, together with the follow up correspondence from the Head of Legal Aid Policy and Reform, Mr. Burke enclosing the draft SSI and the clarification correspondence from the Interim Deputy Director, Civil Law and Legal Aid System Division, Ms. Swanson received on 24th December.

I make no apologies for the length of this correspondence as this forms the detail of our submissions in relation to your offer and to assist with the drafting of the proposed SSI to be laid on 1st February 2021.

Like our colleagues at the Law Society of Scotland and Edinburgh Bar Association, the Glasgow Bar Association welcomes your public recognition of the contribution made by the legal profession to the good functioning of our justice system.

However, as stated in our meeting on 4th December, we recognise the value Legal Aid Practitioners add to Scottish Society and we invited you to do likewise with your offer.

Since our meeting, we have canvassed our members in three separate surveys.

I am writing to confirm that only five of our members are content with the offer now made to support our profession.

While this Government has accepted our status as key workers during this pandemic, you have failed to accept the arguments about equality of arms between us and our fully state funded colleagues in the Justice Partnership. This Government has made funding available to the extent of tens of millions of pounds for Jury Centres, for PPE around SCTS and the Police Service of Scotland, for IT investment and support in various platforms to ensure remote custody appearances, trials, civil proofs, Children's Panel cases and day to day business once reinstated by SCTS could continue. You have provided funds to women's support groups for instance without a moment's hesitation and it is extremely frustrating that we continue to experience delays, obfuscation and interference with the now stated goal of assistance to our profession.

We first brought our concerns about the impact of this pandemic to the attention of Colin Lancaster at the Scottish Legal Aid Board by telephone conference on 18th March 2020. We followed that up with correspondence to the Law Society of Scotland on 3rd June 2020 and this led to the Tripartite meetings. The fact that there has been no meaningful offer until Humza's intervention truly shows the feeling of contempt that we are persistently treated with. Please see the attached link via the Scottish Legal Aid Board which sums up this situation perfectly - <https://www.slab.org.uk/news/covid-19-abwor-grant-now-possible-without-physical-calling-of-case/>, published on 16th April 2020. This refers to the consideration of removal of the half fee for an appearance from custody where the accused is represented by the duty solicitor rather than their nominated solicitor. This was always viewed as an arbitrary regulation designed to save the fund money. We discussed the removal of this arbitrary regulation with Colin Lancaster and followed that up with written representations to him and to our professional body. To see this incorporated into the draft SSI is welcome, but in the meantime the continued imposition of this has necessitated nominated solicitors attending at Court during a pandemic to ensure they are not further financially disadvantaged.

To still be in the position of making the same or similar submissions for relief as we approach a new year is simply not good enough.

Turning now to the letter from the Cabinet Secretary for Justice, cogent submissions have been made about how the persistent lack of investment has led legal aid rates to fall substantially in real terms. For example, the most commonly used provision for criminal defence agents is summary criminal legal aid. The fixed fee was £500 when it was introduced in 1999. To see the value of this now, you get different results depending on what inflation calculator you use. The Bank of England states that £500 in 1999 is worth £873.03 in 2019. 2020 figures were not available at the time this note was produced. This is based on a rate of inflation of 2.8%. The Scottish Government website states that £500 in 1999 is worth £756. Please note that the current payment of the fixed fee is now £499.85, even after last year's 3% rise, due to an earlier reduction in the fixed fee. In summary, we are receiving less than we did in 1999. Please compare this with an MSP's salary. In 1999 when the modern Scottish Parliament was instituted, the basic salary of an

MSP was £32,422.00. Now it is £64,470.00. This is a 99% increase in salary. Please also compare this to the earnings of the Chief Executive of the Scottish Legal Aid Board with earnings of between £110,000 and £115,000 in the most recent annual report for 2019-2020 (leaving aside any pension entitlement). When summary criminal fixed fees were introduced in 1999, that annual salary was £70,000. This is a 64% increase in salary. We know of no other profession where this persistent underfunding would be allowed to continue when those professionals are working for the good and benefit of the public. The Scottish Government has to the start of December 2020 received £8.2 billion from the UK Government for Covid 19 measures.

(Source - <https://www.gov.scot/publications/foi-202000108809/>) We therefore cannot agree that this is a very challenging financial landscape, but we do acknowledge that compared to other sectors, on the face of it a 10% increase is not inconsequential, but it is when you see the figures detailed above.

Can I also take this opportunity to express how extremely disappointing and concerning it is that the Scottish Government's Fee Review Panel has failed to discharge its obligation to finalise and report its findings this year. When so many others in the legal profession have adapted so readily and admirably to new ways of working this year, there can simply be no justification for their failure to complete their task. This Government commissioned a Report from Martyn Evans in February 2017 on the issue of Legal Aid Reform. It cannot be acceptable that our profession will remain in limbo when we are crying out for a legitimate mechanism to independently review fees. We are willing and able to contribute to the mechanism for an evidence based system for fee reviews. Indeed, to proceed without valid input from our profession would be catastrophic to the legitimacy of the process.

We also welcome the package for trainees in principle and again are concerned about the lack of accompanying information relative thereto. A short term investment is not the solution. A meaningful long term investment is essential to secure the future of legal aid provision country wide for the people of Scotland.

In the absence of accompanying detail about the mechanics of a Covid Resilience Fund, it is very difficult to fully respond to this aspect of your correspondence. The detail of that should therefore be published promptly for our urgent consideration. Our concerns are that this will be so complicated to manage and administer, that many practitioners will not be eligible and that those in our profession who undertake their daily work as agents for us will be prevented from qualifying while being the hardest hit this year. The Law Society of Scotland has previously made submissions about using a simple formula for the administration of a support package for the profession and that would still be our preference. While the headline of a £9 million fund is enticing and appealing, we would simply prefer you to divide that in a reasonable manner among legal aid firms and legal aid practitioners. Not to do so fails to understand the hardships that have been suffered this year and how a lack of investment in IT and PPE will hinder our ability to meaningfully engage going forward. This is already being felt by the profession in for

example the laborious process introduced by the booking system introduced by the Lord President's PIDM process.

We would also be grateful if you would clarify your reference to "thinking about ways to import some of the essential design of public services into the delivery of legal aid as a public service on which the public and justice system can rely".

Turning now to the draft SSI, can I say at the outset how unfortunate and regrettable it is that the information produced is factually incorrect. The 2017 document was advertised as being "cost neutral". Provisions now being heralded as an increase cannot be seen to be making savings, nor clawing back from other areas of the fund. This would simply be disingenuous. Can I also state for the record that the details of the instrument were not discussed at our meeting, in every way they undermine the spirit of your offer and at this stage in the process, with a very small window to discuss this now because of the Parliamentary timetable, seek to impose further cutbacks on the profession at this, the most challenging time for us. The proposed cuts are unwelcome and are vehemently opposed.

We welcome the opportunity to meet further, to participate in discussions to move matters on and to reach a conclusion which is accommodating to the profession in recognition of our role in the justice system.

In essence, we welcome an overall increase in fees but as I have already referred to, we would want clarity that this extends to those undertaking court appointments for matters such as Child Welfare Reports. We are asking for this overall increase to be backdated to include the three percent rise to those who did not benefit from it on the last occasion. A simple direction to SLAB should be sufficient for this purpose although incorporation by way of legislative change would be preferable. Only this addition will finally allow this Government to legitimately state that all legal aid practitioners will benefit from this increase.

As detailed above, we welcome the abolition of the half fee for a not guilty plea by the duty solicitor. We also welcome the abolition of the other restrictive grants in relation to summary work.

We are however objecting to the proposal that we do more work for less. The proposed extension of the fixed fee to include up to four diets of deferred sentence is ill judged and not in keeping with the spirit of an increase. So is the abolition for the fee for consideration of a Criminal Justice Social Work Report. Abolishing the payment for those deemed vulnerable by virtue of their youth, in our respectful submission, sends out the wrong message. To reduce payments for subsequent days of trial (second day excepted) does not send out a message that the work we do is valued. Justice has to be seen to be done and that is undermined by this proposal. Amalgamating payments for multiple cases settling on the same day or representing multiple accused in a complaint are likewise an overall reduction in payments and are similarly opposed. Reduction in

travel costs compounds the issues about availability of your solicitor of choice and directly attacks access to justice. We cannot accept this.

Turning now to solemn fee issues, a section 76 remodel was first discussed 5 years ago. Again, because it suits the Government to encourage early pleas in the current climate, we welcome an increase but say this has been long overdue. To introduce other models in the current limited timeframe which effectively reduce remuneration is, again, not in the spirit of improving our terms and conditions. If anything, there should be a substantial increase in the communication fee given the extension to periods in custody. To sell this as being easier to administer, to facilitate faster payments and to provide for less abatements flies in the face of the purpose of the fee review panel and legal aid reform.

We cannot accept a reduction in waiting time. We have no control over when a case is called.

We also make the following comments with regard to the draft SSI –

The communication block is £206.00 for sheriff and jury matters. At present the prison block for sheriff and jury matters is £156.56. The communication fee for a category B High Court case is £515.00, the prison block is £313.12. The communication fee for a category A High Court case is £721.00, the prison block is £450.11. Furthermore, there is no option to opt out of these block fees which is the case at present if you do not feel the block fee is sufficient to cover the work undertaken.

We now receive a preparation fee of £458.35 for a sheriff and jury matter, £664.35 for a category B case and £870.35 for a category A case for a matter which proceeds to trial or a lesser plea is accepted, or the Crown withdraws the libel after the date set for trial. At present the payment is £156.56 for the first day of trial, and £39.14 per subsequent day to a limit of two additional days for sheriff and jury matters. For a category B case the payments are £293.55 and £117.42 and for a category A case £410.97 and £156.56. Although there is an increase in these payments there does not appear to be any mechanism to receive a payment for conducting a locus inspection, preparing the written records, framing documents or precognosing witnesses.

Please clarify if payments for ID Parades will continue to apply as these payments are not included in the original regulations.

We also receive a preparation fee for the case being disposed of by any other means. We do not receive such a payment at present. These payments are £329.60 in the sheriff court, £471.23 for a category B case and £561.35 for a category A case. Again this fee appears to remove any payment for precognitions, preparing written records, framing documents or locus inspections.

There appears to be no preparation fee for a hearing on a plea in bar of trial or a hearing raising a preliminary issue, where the preliminary issue would have the effect of excusing the accused person from trial unless either hearing results in the case being disposed of.

The block fees for preparing for, unless dealt with in the course of a First Diet or Preliminary Hearing, a devolution issue, compatibility issue, vulnerable witness application, specification of documents, a precognition on oath, evidence on commission, section 275 application, proof in mitigation or examination of facts have also been removed.

The perusal blocks for 250 sheets is £206.00. SLAB presently work off an unwritten rule of roughly 40 sheets per hour. Therefore, in that scenario you would claim a payment of 6 hours 15 minutes for 250 sheets which at present would be a total of £314.25.

The perusal fee for 250 minutes of video or audio evidence is also £206.00. At present we would charge 4 hours and 15 minutes which would be a total of £213.69.

SLAB may argue that the benefit is if we only peruse 100 sheets or view 100 minutes of video evidence then we would be receiving a higher payment. But these are solemn cases, where an accused is at risk of deprivation of their liberty for significant periods and inevitably there will be substantial documents to be disclosed. This proposal will result in practitioners being significantly worse off.

Some of our members have undertaken a cost comparison for a couple of their own cases. It may not surprise you to learn that they would generate less income under the “improved” scheme. We would be happy to demonstrate this.

In relation to the broad increase for civil practitioners, we submit that the Scottish Government should recognise the new ways we have been working remotely and the greater reliance on written submissions to assist the Courts in doing so. If there is any scope for an increase in those fees that would be most welcome at this juncture.

Such measures that seek to reduce legal aid provision when your stated aim is to increase provision will inevitably be seen as a gesture of bad faith. There has clearly been input from SLAB which is obviously divisive and negatively impacts on the goal you wish to achieve.

Finally, I must comment on the ongoing situation of inequality in remuneration for anti-social working, particularly around holiday custody courts. Having taken action at St. Andrew’s day, we are taking equivalent action for our holiday court on 2nd January as the Government has failed to make any offer in this regard. We are prepared to continue to have dialogue about improving this particular aspect of our terms and conditions and are deeply disappointed that this has been omitted from your proposals.

We have canvassed our criminal and civil members about their views on taking further direct action to express our concerns about the lack of meaningful investment in legal aid provision for decades, particularly keenly felt this year with the impact of Covid-19. We have a clear mandate from our members to pursue this. We would have no difficulty discussing that further to convey to you the strength of feeling that we have about our situation.

Please do not hesitate to contact me should you wish to discuss all or any matters arising.

In the meantime, I would like to extend my best wishes to you and yours for a happy and healthy 2021.

Kind regards,

A handwritten signature in black ink, appearing to read 'Fiona McKinnon', with a stylized, cursive script.

Fiona McKinnon,

President,

Glasgow Bar Association