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Dear Ken and Julia

COP26 CONFERENCE – ENHANCED CRIMINAL LEGAL AID FEES

I have received a range of correspondence regarding the position of solicitors in respect of the upcoming COP26 conference and the longer term sustainability of criminal defence agents. I am also aware of a range of social media and other media communications from your members.

The correspondence and communication identify three key issues; COP26 arrangements, weekend and holiday custody courts and the longer term sustainability of the profession. Comments have also been made about the level of engagement between the Scottish Government and the profession on these matters. I think it is helpful to clarify the position on each of these issues.

Enhanced Fees during COP26

In July this year a working group to consider COP26 related fees was established by the Scottish Legal Aid Board (SLAB) and attended by representatives from Law Society of Scotland (LSS) as well as representatives of individual Bar Associations. The purpose of the group was to facilitate early planning, full engagement and transparency for those providing the criminal legal assistance services required over the duration of this important international conference.

I understand that following the first meeting in July the group met on a number of occasions over the summer. I am advised that the LSS representatives on the working group developed a model for enhanced criminal legal assistance fees during the conference on the

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basis of those discussions, and those were shared with members of the working group, including a representative from the Glasgow Bar Association. The proposals provided for a generous package of enhanced fees for COP26 related cases during the conference. These proposals were submitted to Ministers and were approved without amendment. It was understood that those representatives of the profession who formed part of the working group would ensure the wider legal profession would be kept informed of these discussions. I also understand that when the proposals were circulated through the separate Legal Aid Engagement Group (LAEG) that, whilst clarification was sought on the operation of the fees, there were no specific concerns raised around the proposed enhanced fee levels for the conference period.

The proposals for enhanced criminal legal assistance fees had to be negotiated and approved ahead of any confirmation from the UK Government that the associated costs will be met as part the overall cost to the United Kingdom of hosting the conference. However, the Scottish Government recognised the need to provide reassurance to the profession that the fees would be payable and to aid planning for duty schemes.

As part of the planning for the COP26 conference, the Scottish Courts and Tribunals Service have confirmed that weekend custody courts will operate in a small number of locations during the period of the conference. This was an operational decision for the Courts and senior judiciary following dialogue with justice partners. In addition to fees for specific COP26 work, therefore, the proposal for weekend custody courts led to us agreeing a further package of enhanced fees for solicitors. In the absence of proposals from the LAEG, a fee model, based on that used for police station duty, was proposed. It became clear that these were not acceptable to the profession and the LAEG was informed on 13 October that Ministers would consider a further enhancement and that decision would be taken on this as soon as possible, and this message was directly relayed to members of the profession by SLAB. I confirmed acceptance of that on 20 October and that has again been communicated to the profession by SLAB.

The Scottish Legal Aid Board and Scottish Government have engaged with the representatives of the legal profession in good faith over the past few months to agree an enhanced package of legal aid fees to ensure that access to necessary legal representation would be available during the period of the COP26 conference. Scottish Ministers have agreed the specific proposals and requests from the representatives of the profession. We are, therefore, surprised and disappointed by the decision of individual Bar Associations not to participate in the COP26 duty scheme on the basis of the enhanced fee package approved in line with the LSS's own proposals.

Whilst I recognise it is a choice for individual practitioners, given the agreement of enhanced fees for non-COP26 cases, I am also disappointed that many in the legal profession have indicated that they will refrain from representing their named clients in weekend custody courts whilst these are running during the limited period of the conference.

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Public Holiday Custody Courts

Although not part of the COP26 fee package, the correspondence from representatives of the legal profession have also raised the issue of the request for enhanced funding for custody courts held on public holidays. Again, as you know, decisions on the holding of custody courts on public holidays are a matter for the Court Service and senior judiciary, not Ministers. However, following this issue being raised previously by the profession – including following the decision by some solicitors not to represent their clients in public holiday courts earlier this year - my officials have worked collaboratively through the LAEG to review fees payable for public holiday custody courts. In September, officials asked representatives of the profession to submit specific proposals for a possible fee model for public holiday courts for consideration. We await these specific proposals and have committed to respond seriously to these proposals, once received.

Review of Fees and wider Legal Aid Reform

Members of the profession have also restated their wider concerns about the overall level of legal aid fees and about the capacity within the profession to engage with the justice Recover, Renew and Transform programme which is aiming to deal with the backlog in criminal cases that built up during the COVID-19 pandemic. We recognise and value the role of the legal profession in the recovery programme and have acknowledged the additional demands that this is placing on the justice system.

During my tenure as Minister I have, to date, introduced a 3% increase to all legal aid fees in 2019, a further 5% uplift to all such fees in the current year along with a commitment to bring forward an additional 5% increase next year. During 2021 the Scottish Government has directed £9m of grant support to legal aid providers, including to assist their participation in the RRT programme, and we are providing £1m of funding over this year and next to support the costs of employing trainee solicitors. This equates to a financial package of over £20m; and to date all that remains to be implemented is the second 5% uplift.

The proposal from a representative of the profession that Ministers should agree to a further immediate, permanent and substantial increase to all legal aid fees – additional to the specific enhanced fees already agreed - to allay concerns that legal practitioners have in participating during the COP26 conference is not something that any Government could agree to.

However, we have already committed to revisit with the profession fee reform for summary and solemn criminal legal assistance as well as to work on longer-term wider reform of the legal aid system. There has been no resistance, or lack of commitment from the Government, to taking forward these issues.

My officials established the LAEG with representatives from the SSBA and the LSS and a commitment was made to engage with that group on substantive decisions in respect of legal aid. That group steered the establishment and criteria for the allocation of the remaining resources from the £9m fund to help support participation in the RRT programme. More recently, options for early criminal fee reforms, to be taken forward through secondary

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legislation, have been discussed. This includes a number of the specific reforms that representatives of the LSS and SSBA raised at the recent roundtable session with the Parliament's Criminal Justice Committee. Members of the profession agreed to provide written feedback on proposals for these criminal fee reforms. That feedback is awaited and officials stand ready to respond productively to what is put forward by your representatives.

In addition to these early reforms, following the independent review of legal aid by Martyn Evans and public consultation in the last session of Parliament, we committed in our recent Programme for Government to engage with the legal profession and others within the justice system to complete a wider review of the Legal Aid system and to introduce a Legal Aid Reform Bill in this Parliament, ensuring that the system is flexible, easy to access and meets the needs of those who use it. Following the publication earlier this year of the report of the Legal Aid Payment Advisory Panel, we have also committed to working with the profession to further identify the evidence base for the future setting of legal aid fees. We have made clear that we are open to practical and evidence-based proposals that can help inform the setting and review of legal aid fees on a sustainable basis.

As noted above, given the way in which the significantly enhanced legal aid fees for the COP26 were developed, I am disappointed that a number of Bar Associations have decided not to participate in the COP26 or non-COP26 weekend duty schemes, despite the proposals from LSS being agreed in full. I am also disappointed and concerned about the way in which the Government's engagement with the profession on this issue and wider legal aid matters has been presented by some in the profession.

I would welcome the opportunity to meet you both as senior representatives of the profession to discuss the way these matters have been presented and how we can ensure on-going effective engagement on important issues relating to legal aid and the sustainability of the legal profession.



ASH REGAN

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