



Ash Regan MSP
Minister for Community Safety
Scottish Government
St Andrew's House
Regent Road
Edinburgh EH1 3DG

BY EMAIL

12 November 2021

Dear Minister for Community Safety,

Legal aid

Thank you for your letter of 1 November 2021 in which you set out Government action to support legal aid practitioners and the broader system. Thank you also for your invitation to set out the specifics of the urgent action we believe must be taken to secure the future of the legal aid system. This letter forms a joint response by the Law Society and Scottish Solicitors Bar Association.

As Law Society President, Ken Dalling, set out in his letter of 25 October and in your subsequent meeting, the current crisis is a generation in the making. It is clear that the measures taken by the Scottish Government to date are insufficient to address the underlying issue of chronic underfunding and of the increasing imbalance between defence and prosecution practitioners.

Overall fee levels

We had raised previously the urgent need for a significant and immediate increase to legal aid fees for civil, children's and criminal legal aid. You will recall that we advised that an increase of significant scale was required last year to prevent the situation which is now materialising. An increase to fees that is calculated by reference to the impact of inflation through the generational underfunding of the system is required and you will be aware that the all-party parliamentary group on legal aid at Westminster recommended this measure in its report last month, recalibrating from 2011 forward.

For summary criminal legal aid, specific examples include:

- A revised summary fixed fee of £900 for Sheriff Court cases. In broad terms, this is an increase in line with inflation since 1999. We emphasise that the summary fixed fee would encompass the disposal fee.
- A fee for summary sheriff court trial £200 for day one, £300 for day two and £500 for any subsequent days
- Summary deferred sentences should be paid at £50 per legal aid certificate held (e.g. if an accused has three deferred sentences on one day, the fee would be £150). This should include first and second deferred sentences and should be automatic without the need to apply for an increase
- The full fee should be payable for all summary complaints with the exception of s27(1)(a) which should be paid at half rate
- A higher rate of fees for police station advice and VIPER work, and a larger enhancement for anti-social hours provision, particularly because of the pressures of sustaining capacity for this work while at the same time balancing the demands of additional court scheduling



For solemn criminal legal aid, specific examples include:

- An hourly rate of £90 for solicitor conducting a hearing

The joint Law Society/Scottish Solicitors Bar Association working group would wish to address specific aspects of solemn reform in more detail and they would be happy to meet to discuss this further with your civil servants.

It is crucial that there are commensurate increases for civil and children's work in line with those for criminal legal aid. Because of the wide range of legal areas within scope, and in courts, tribunals and children's hearings, with a wide range of fees involved in this work, we believe that a 50% increase to fees for civil and children's work is required. In a civil as well as a criminal context, firms have been required to cross-subsidise legal aid with privately funded work for far too long.

Holiday Courts and other anti-social courts

We recognise the challenges faced in tackling the current backlog of cases and the aims of the Recover, Renew Transform programme. The increase in workloads required to address the backlog will be extremely challenging for the profession to meet given the reduction of practitioners and the lack of additional capacity available. Where holiday courts, weekend courts and other business scheduled at anti-social hours is scheduled or proposed, we believe fees should be subject to at least 100% increase in payments to reflect the additional burden on practitioners.

Section 76 fees

We have long advocated for an adequate s76 fee to facilitate early resolution of solemn cases. Proposals have been advanced by Scottish Government to allow for this, though incorporating savings elsewhere in the fees for summary and solemn work. As we have already made clear, this is not acceptable and a fee that has not been funded by savings elsewhere is required. The fee available for s76 cases should be £1750. This fee would be payable in addition to any time and line or block elements that would normally be chargeable. Inevitably the reprioritising of an early resolution of a solemn case will produce overall system savings as well as obviating the need for work at a later stage of the case that is, thereby, unnecessary. That is the purpose of such a fee. However it would be wrong to reduce the general level of fees so as to fund an adequate s76 fee.

Periodic inflation-adjusted review

As we have previously advised, the current situation has been arrived at following a generation of static fee levels which have not taken account of inflation or the changing nature of the business carried out by practitioners. We seek assurances that any fee framework put in place should be adjusted periodically to take account of inflation at a minimum and to reflect any additional costs incurred by the sector in future.

Reversal of cuts during the economic downturn

We believe it is important to reverse the package of measures introduced in 2011, ostensibly in response to the financial constraints of the economic downturn. This includes half duty fees and half fees for travel. The latter has been particularly damaging to access to justice in more rural parts of Scotland, where in many places there are clear shortages in provision. If the justice system does intend to shift towards video proceedings, this makes the need for appropriate travel fees even more necessary, as the cases unsuitable for video will often involve vulnerable clients, complex cases or the most significant consequences, whether criminal or civil, for the parties involved. You will note that the all-party parliamentary group on legal aid in England and Wales had also recommended that cuts introduced in 2011 be reversed, again because of their



impact on access to justice.

Digital justice

The transition to remote hearings through the pandemic has changed the nature of work required for civil and criminal business. Though it remains uncertain to what degree these remote hearings will be deployed in the post-pandemic period, it is likely that a role will remain for them. We ask for a commitment to review these structural changes, to ensure that the fees for in-person and remote hearings remain sustainable. As an example, for civil legal aid, the fees for opposed motions, written submissions and block fees for residence and contact disputes given the number of telephone calls and letters or emails required which are not paid for need to be considered.

These are the principal measures that we believe are immediately necessary to ensure the viability of the sector and to meet the challenges that the Recover, Renew Transform has presented. We have discussed these with fellow representatives of the profession and are agreed that these are the steps required. We have outlined the majority of these measures to you or to your officials previously, though remain willing to engage around the detail of these.

Yours sincerely,

Ken Dalling, President of the Law Society of Scotland

Julia McPartlin, President of the Scottish Solicitors Bar Association