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Minister for Community Safety
Scottish Government
St Andrew's House
Regent Road
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BY EMAIL

25 October 2021

Dear Minister,

Legal aid and COP26

Thank you for your letter of 22 October. I look forward to meeting with you today to discuss the issues you raise and in particular the way in which certain matters have been presented and how best we can engage effectively moving forward.

To ensure this is a constructive discussion around possible steps that can be taken, both regarding COP26 and the wider issues raised by the court recovery programme, I think it would be helpful to make clear the position of the Law Society on some of the specific matters you highlight.

However, I would start by emphasising that the decisions of individual bar associations not to engage with COP26 arrangements have at their core the fact that, for more than a generation, the Scottish Government has enjoyed the effective resources of the criminal defence bar without any significant additional investment in its funding. Solicitors are departing the legal aid sector at an alarming rate. The profession it seems has neither the resources nor the appetite to undertake additional work when they otherwise see themselves as undervalued.

You properly identify the 3% funding increase from 2019 as well as the additional 5% increase in March 2021, and the further planned 5% increase in March 2022, as agreed by the then Cabinet Secretary almost 12 months ago. The latter increases, however, as with the "resilience" and trainee fund, were a direct result of pleas made to the Government in the context of the COVID pandemic. These supports were acknowledged by the Society as only a start in addressing the crisis faced by a sector of the profession whose importance in supporting access to justice and the rule of law is ignored at the risk of peril.

COP26

We and others have engaged constructively with civil servants and made proposals on what could be seen as appropriate funding in the unusual, and inevitably onerous, context of COP26 courts. Concerns around the enhanced fees were however raised at a meeting of the Legal Aid Engagement Group (LAEG) on 5 October. This was a meeting convened



at the request of Scottish Government officials. Notwithstanding that the accepted fee structure was that which had been proposed, the concerns were wider than simple clarification, including:

- Work as a nominated rather than duty solicitor would fall outside the scope of the proposals.
- Work on cases taking place during the conference period but not related to the conference would not be included within scope.
- There would be no enhanced fees available for work through weekend courts, whether for directly COP26 related cases, or whether on a nominated or duty basis.
- The time period for the proposals did not include the full range of work expected through the conference period, with climate protests potentially taking place before the formal commencement of the conference period and bail undertakings courts being scheduled after that period potentially including COP26 related work.

So, whilst you correctly refer in your letter to the absence of concern regarding fee levels, there had been raised significant concerns about the scope of the feeing arrangements.

Your letter notes the absence of proposals from the LAEG. It is reported to me that these were not invited. The update to the LAEG, on 13 October, was to the extent only of:

“On the fees for weekend custody courts, we are aware that there is some resistance to what was proposed to us, and that there is an expectation of an enhanced fee. We are considering the financial impact of that and will confirm the final position as soon as possible; you will appreciate that this is not a decision we can take without liaison with other colleagues and Ministers.”

The further update to the LAEG on 14 October was to the effect:

“We are considering a revised fee model for weekend custody courts that may be held during COP26. This reflects our understanding from our meetings that what was proposed was insufficient.”

There has been no further update to the LAEG. Your “confirmed acceptance” of a “further enhancement” was not communicated to LAEG but was instead only published on the website of the Scottish Legal Aid Board and on 22 October.

We put forward proposals for the COP26 conference period in good faith, though we and other representatives did advise your officials that decisions on participation were ultimately for firms to take.

Public holiday custody courts

The issue of public holiday custody courts outside the conference period has been raised previously. I shared with you my own view - I think at one of our first meetings - that the issue of additional payment for holiday working would be impossible to resolve until reasonable levels of remuneration for normal working were in place.



This subject was considered at the LAEG meeting on 21 September, referred to in your letter. Specific proposals from representatives of the profession were I am assured not requested at this meeting (nor subsequently from the LAEG), though a willingness to work on these issues was confirmed by your officials. A follow-up email was sent by your officials on 21 September, agreeing to send a note of discussions in the coming days; this does not appear to have been received.

Review of fees and wider legal aid reform

Your letter also refers to engagement around solemn and summary fee reform. Both our Legal Aid Committee and subsequently LAEG has repeatedly shared its views on what has been proposed, most recently at the LAEG meeting on 21 September. Representatives of the profession remained unanimous in their view that the proposals were not acceptable. As your civil servants had been repeatedly told, this was because of the largely cost-neutral basis on which they were framed.

We have, for some years, asked that appropriate enhanced funds be made available in those solemn cases which are resolved utilising the procedure of s76 of the 1995 Act. Such a step would be all the more valuable in removing cases from an increasing trial backlog. A difficulty for the profession remains that any enhanced fee is simply balanced by savings (fee cuts) elsewhere. Our proposals, from as long ago as last year, for the introduction of a s76 fee without these wider changes was declined. The LAEG were, again, unaware that your officials had been delayed because a response was awaited. The suggestion of this comes as something of a surprise.

We would also like to highlight, particularly in reference to the evidence at the Criminal Justice committee in September and October, that the feedback from the profession in 2017 regarding these proposals was not as positive as described. Attendees at these feedback events did agree that a specific s76 fee may promote early resolution. They felt however that this should not be at the expense of other fees or the work that would be incorporated in that wider proposal.

Regarding the outcome of the legal aid fee review panel, we share the frustration expressed by your officials that there was not a clearer outcome agreed by that process. However, that shared frustration pales when considered against a resilient criminal defence bar which has been pushed to a critical point. As our legal aid conveners expressed in their letter to you on 19 October, while further research may help to inform best practice for the future, there is clearly a crisis now. The number of firms and solicitors registered for legal aid has declined by 25% and 26% respectively between 2011 and 2021. The number of firms receiving legal aid payments from SLAB declined by 10% in the year between 2019-20 and 2020-21 and the reduction in expenditure on the Legal Aid Fund by over 20% for the same period.

You may be aware of similar work to tackle the generational underfunding of legal aid in other jurisdictions that have seen the same challenges. An all-party parliamentary group in England and Wales reported last week, raising the same concerns around access to



justice in England and Wales, and recommending the reversal of fee cuts during the economic downturn and an increase in fees of 25%, corresponding to the real-terms cuts through inflation since 2011. When representatives of the profession, including our legal aid conveners, raise these issues, it is not to justify concerns around participation in COP26 plans, but to address the fundamental and generational problems of a lack of funding. Coverage for COP26 is just a specific instance of the wider issues we have asked and continue to ask you to address.

We have been urging action to avert this crisis consistently over the last decade and highlighted the increasing problems that are emerging as firms struggle to continue to provide access to justice and as gaps in provision arise, particularly in more rural parts of Scotland. Though your letter refers to measures you have taken to address these difficulties, it is clear as we have previously advised you, that these measures are not sufficient.

Yours sincerely,

**Ken Dalling,
President**