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LEGAL AID PROPOSALS

I am writing to set out Scottish Ministers' formal response to your proposed further investment in legal aid fees, discussed in the meeting with the Cabinet Secretary for Justice and Veterans and I on 25 May.

In setting out this response, our aim remains to find a settlement that responds to the concerns raised by members of the profession, that builds on the increases to fees already introduced over the past 3 years, and which is affordable in the context of public finances and supports the on-going process of Justice recovery and transformation.

In the meeting the then President of the Law Society of Scotland (LSS) set out a proposed settlement request that had been agreed between the LSS and the Scottish Solicitors' Bar Association (SSBA), the details of which are as follows:

- A financial settlement that includes an across the board 15% increase to all criminal, civil and children's fees with two exceptions:
- Criminal summary and disposal fees to be uplifted to £750 (a 36% increase from the current fee of £550);
- The introduction of a section 76 fee at the level of £1,135.58 in the sheriff court and £1,149.48 in the High Court (compared with the current fee of £43.16 for preparation of a hearing under s76).

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- Agreement to a regular review of fees, the basis of which was to be agreed.

Taken together, our estimate of the costs of the package proposed by the profession once fully implemented, is around £27m each year, which means an increase of just under 22.5% to expenditure on legal aid solicitors' fees, on top of the increases to legal aid fees already introduced over the past 3 years and ahead of any subsequent further increases that may arise from the future review process. Other known factors that will lead to an increase in expenditure on solicitors' fees include an underlying increase in solemn business volumes and the work to address the backlog in criminal cases.

This was a counter proposal to our offer of an increase to summary and solemn criminal fees to deliver an increase in fees of £3.8m alongside an increase for all other areas of 5% - a fee package representing an additional annual investment of £6.4m - and the continuation of funding for the traineeship scheme of £1m over 2 years.

A commitment was made to consider these counter proposals and respond to them. It has been a complex set of proposals to consider and we did this in a context of a very challenging financial position for the Scottish budget and a number of contributory factors.

As you will know, the Cabinet Secretary for Finance and the Economy set out in her statement to Parliament on 31 May and in our Medium Term Financial Strategy, published on the same day, the significant financial pressures that the Scottish Government budget and wider public services face. This includes significant pressures associated with reductions to the overall level of the revenue budget and the cost of living crisis. In that context, prioritisation is having to be given to responding to the needs of the most vulnerable in our society.

In her statement, the Cabinet Secretary for Finance and Economy emphasised the need to focus on how publically funded services can reform to become more efficient, including constraining the size and costs of the public sector workforce, but also other efficiency options.

Legal aid fees are not subject to the same controls as public sector pay. Unlike for other Justice budgets, overall spending on the Legal Aid Fund is not cash limited. All eligible spending is met. We have acknowledged publically that there are legitimate arguments for uprating legal aid fees and indeed have implemented increases over recent years. However, in the context of the tight financial environment and the available evidence, we cannot agree to increases in fees at the scale proposed by the profession. Increases of this scale are not affordable in the current year or in future years, even given the demand-led nature of the Legal Aid Fund. While affordability is key, all settlements must also lead to improvements in service delivery, and improved outcomes for service users, and deliver longer term efficiencies.

However, as indicated previously, we are willing to make additional provision to support the work of the legal aid-funded profession and to respond to the priorities you identified for criminal legal aid fees:

- Our proposals for solemn fee reforms already include the commitment to a substantial increase in the section 76 fee for solemn criminal cases and we would be content to progress those reforms as proposed in February 2022. This is an increase of £1.98m (8.95%)

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- We had already proposed, as part of the summary fee reforms already shared with the profession, further increases to summary criminal fees. We note the preference to target increases towards the core fixed fee and we are content to further increase that fee within the fee reform proposals. In addition, based on the feedback received, we will alter the reform proposals in relation to the subsumption of hearings for deferred sentences and social enquiry reports. That is, instead of the proposal to subsume four hearings into the core fixed fee, we will revert to the current position of two hearings. We will also reinstate the mileage costs provision which had been removed at the time of the original reform proposals, thereby adding a further benefit. Revising the proposals in this way, improves the package from the £1.8m previously offered to £2.94m, with potential to increase this further by enhancing the core fee. The basic reforms increase summary fees by 8.8%. For each additional increase of £50 on the core fixed fee, this adds a further £3m, or 9.1%.
- We have indicated a willingness to provide a further general uplift to all fee types – in addition to the targeted fee reforms, within the remaining funds available.
- We have confirmed that we are happy to agree to develop an evidence-based mechanism for the on-going review of fees, in line with the recommendations of the Payment Panel.

We are willing to make an offer of a package of funding worth £11m per annum. This is equivalent to a 10.3% increase in solicitors' fees: on top of the increases already introduced, this would bring the total recurring increase to legal aid fees since 2019 to over 25.2%.

Within the available funding we are content to discuss how this can be used to target resources between the priorities that you have identified for summary, solemn and other fees, including civil fees. As an example, the attached annex sets out a number of different ways in which this further increase to fees could be apportioned between these priorities and the resultant distribution of costs. There may be other options that the profession would wish to consider and we are happy to explore these with the LSS and SSBA.

In addition to the uplift in fees, the fee reform proposals also bring benefits to solicitors and SLAB. They simplify administration, are more predictable, and there is less scope for disputed assessment. They also deliver meaningful increases in payments.

On top of this funding offer, we will extend the traineeship scheme for a further two years at a cost of an additional £1m. This has been a very successful fund and will help to increase exposure to legal aid work and the capacity of firms. It is also proving to be successful in increasing gender diversity and we hope that will continue.

This is a substantial and credible offer. I must emphasise that there is no scope for further immediate increases beyond this offer.

In discussions we have agreed the need for a cycle of regular reviews of legal aid and we have indicated that we are willing to commit to that.

I began this letter by outlining the process for achieving agreement to reach financial settlements in areas which are funded by Scottish Government, and the need to ensure that these bring with them improved outcomes and service delivery. We have three key priorities that would provide that assurance and which we believe will also have a positive impact on

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those who rely on the legal aid system, solicitors and the operation of the justice system. These are:

Disruptive action

The current boycott of DASA cases has the potential to be damaging to clients, witnesses and complainers, as does other disruptive action. We would seek assurance from the LSS and the SSBA that they would actively support and promote with your members a cessation of all disruptive action and not support further disruptive action while the payment panel review of fees is ongoing and until an agreement on a model for fee reviews is reached.

Effective participation in the payment panel research

The need for further research and analysis on the appropriate level of legal aid fees was a recommendation of the payment panel and we would intend to move forward with that recommended analysis. That should enable us to agree the timing and form of regular reviews. The engagement of the profession is vital to that work being concluded and we would seek the active support of the LSS and SSBA in the necessary evidence gathering exercise that will be taken forward.

COVID Recovery

Working with justice partners and promoting your members' participation in the COVID recovery programme to ensure it is delivered, and that modernisation to the way in which the courts operate is progressed, with on-going engagement from representatives of the legal profession.

Providing assurance on these key outcomes will be important in making the case for this further investment.

As with other changes to legal aid fees, regulations would be required to implement any increases. If agreement can be reached on the allocation of funding and the criteria set out above, we would aim to bring forward necessary legislative changes as soon as practical following the parliamentary summer recess.

In addition to the above, if necessary, our offer of mediation with an independent mediator remains in place.

If it would be helpful, I would be happy to meet with you to discuss this further.

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Annex – Options for distributing additional funding

| | Example 1 | Example 2 | Example 3 |
|--------------------------------------------------------------|-----------|-----------|-----------|
| Baseline summary reform package ¹ | £2.94m | £2.94m | £2.94m |
| Further increase core summary fee to | - | £600 | £625 |
| Total cost of summary reforms | £2.94m | £5.18m | £6.7m |
| Solemn reforms ² | £1.98m | £1.98m | £1.98m |
| Total reform costs | £4.92m | £7.16m | £8.68m |
| Remaining funding for other areas ³ | £6.08m | £3.84m | £2.32m |
| % Increase in civil, children's and other criminal legal aid | 11.75% | 7.42% | 4.48% |
| Total Cost | £11m | £11m | £11m |

¹ As outlined in letter to presidents of 28 February 2022, *plus* reinstatement of payment for 3rd and 4th deferred sentences and Social Enquiry Reports and travel mileage payments.

² As outlined in letter of 28 February 2022, i.e. including reinstatement of full waiting time and adjustment of trial preparation to preserve pre-reform fee level for trial cases.

³ Includes all civil and children's advice and assistance and legal aid, and all aspects of criminal legal assistance not otherwise included in the reforms.

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