

THE SCOTTISH LEGAL AID BOARD

MINUTE OF A MEETING OF THE LEGAL SERVICES POLICY COMMITTEE HELD AT 10.30 AM ON MONDAY 4 OCTOBER 2010 AT 44 DRUMSHEUGH GARDENS, EDINBURGH

Present: Joseph Hughes (Convener)
Alastair Kinroy QC
Bill McQueen
Sheriff Ray Small
Lindsay Montgomery
Graham Watson
Elaine Rosie

In attendance: Tom Murray, Director of Legal Services and Applications
Catriona Whyte, Head of Legal Services – Civil (items 7-8 only)
Colin Lancaster, Director of Policy and Development (items 10-11 only)
Douglas Haggarty, Head of Legal Services (Technical) (item 9 only)
Kieran Burke, Support to the Director of Legal Services and Applications
Marie-Louise Fox, Head of Chief Executive's Office and Communications Department
Andrew McIntosh, Corporate Support Manager
Stuart Foster, Board Administrator

1. APOLOGIES FOR ABSENCE

Iain Robertson.

2. DECLARATIONS OF INTEREST

No interests not previously registered in the Register of Board Members' Interests were declared.

Joseph Hughes declared a financial interest in relation to agenda item 10 (Best Value Review of Mental Health) in that he did business with the Board in the mental health field. He left the room and was not present during discussion of that item, for which Sheriff Ray Small took the chair.

3. DRAFT MINUTE OF MEETING HELD ON 6 SEPTEMBER 2010

Subject to minor amendment of item 8, the draft minute of the Legal Services Policy Committee held on 6 September 2010 was approved.

4. DRAFT MINUTE OF THE LEGAL SERVICES CASES COMMITTEE HELD ON 6 SEPTEMBER 2010

The draft minute of the Legal Services Cases Committee held on 6 September 2010 was noted.

5. ACTION POINTS

The Committee considered and noted a paper (the item numbering of which was inconsistent with the item numbering of the minute to which it referred) by Tom Murray setting out progress with the implementation of actions arising at the previous meeting.

6. DIRECTOR'S REPORT

The Committee considered and noted a report on matters of interest which had arisen since the previous meeting.

7. REVIEW OF SPECIAL URGENCY PROVISIONS FOR CIVIL LEGAL AID

The Committee considered a paper by Catriona Whyte and Derek Arthur reporting on the final research work undertaken in the conclusion of the major review of special urgency provisions in place for civil legal aid applications.

It was noted that the aim of the review was to determine the changes that could be made to try to ensure best use of public funds in relation to work undertaken in terms of regulation 18. The paper set out recommendations arising from all the work undertaken, some of which would require regulatory change to be implemented. The profession would be consulted on whatever proposals for change were agreed by the Committee.

In discussion, it was noted that there were elements of control over special urgency cases but that they were not sufficient. Concern was expressed in particular over the differing practice on court reports and the tendency to order reports in children's cases only where a party or parties were legally aided. It was, however, recognised that Reporters were being instructed more frequently to comment only on specific issues and speak to limited witnesses.

The view was expressed that Form 2 should be part of the verification process, and that Board - not the solicitor - should decide what was, or was not, special urgency, thereby effectively dispensing with the need to operate regulation 18 (1) (b).

After discussion, it was AGREED:

- to approve the recommendations subject to: allowing for exceptional circumstances in relation to repeat applications and in differentiating between failures by the solicitor and the client regarding verification;
- to proceed as far as possible to make operational changes while awaiting regulatory change;
- to re-engage with firms doing a large amount of work under Special Urgency;
- to explore the potential for making contributions online;
- to add the Court Service, the Sheriffs Principal and the Faculty of Advocates to the list of consultees.

ACTION: CAW

- the Chief Executive consider the need to raise with the Lord President the Committee's concerns about the practice of ordering of reports as a result of parties being legally aided, the expense of such reports and their variable quality/usefulness.

ACTION: LM

8. OUTCOMES IN CASES INVOLVING CIVIL LEGAL AID GRANTS

The Committee considered a paper by Catriona Whyte, the fourth in a series analysing findings from research into outcomes in cases involving civil legal aid grants.

It was noted that revised programmes were being developed to obtain more information about applications, including the use made of special urgency, sanction applications and stage reporting. The paper analysed a sample of applications in the context of factors such as category of case, court type and applicants' interest, prospects of success, and case costs.

After discussion, it was AGREED:

- further analysis be undertaken in relation to settled cases to see if there had been a satisfactory outcome for the applicant;
- further analysis be undertaken to establish what the money spent on cases had achieved, particularly where both parties were legally aided;
- to carry out further investigation of the 7% of cases described as having excellent prospects of success, but found against in court;
- a further report be submitted to the Committee in January 2011.

ACTION: CAW

9. JUDICIAL REVIEW: OPINION OF THE LORD ORDINARY

The Committee considered a paper by Douglas Haggarty concerning the terms and likely effect of the Opinion of the Lord Ordinary in a petition against the Board arising from a refusal of sanction for junior counsel in the sheriff court. The Committee was required to form a view on the disposal of the sanction application which the court had remitted for reconsideration, and to consider the basis on which to amend the Board's guidelines on sanction for the employment of counsel.

It was agreed in discussion that the Board would need to assess the request for sanction afresh. However, reference was made to the difficulties presented by the lack of a nominated solicitor under the criminal certificate to take forward any grant of sanction, and to which of the sanction applications reconsideration should apply, since the initial applications had been submitted on the basis of complexity, but when these had been refused, the argument had turned to one of volume of work.

The Board had now to consider whether it was appropriate that sanction for counsel be granted in the case, and cost considerations applied in the making of that decision, so that if the volume of work argument was accepted (as opposed to complexity), it may be appropriate to grant sanction for counsel on the basis that it was more economical for the nominated solicitor to employ junior counsel, rather than have two solicitors acting.

After discussion, it was AGREED:

- to clarify with the second solicitor if he was formally withdrawing from acting;
- given that the case had moved on, to obtain the views of all the solicitors concerned as to whether they considered that more than one legal representative was still required;
- to deal with the case as a high cost case;

- if the Committee was satisfied that more than one legal representative was justified, that this should be done in the most economical way, whether that was by a second solicitor, a non-qualified or junior counsel;
- to approve the proposals for amending the Board's guidelines for the employment of counsel, subject to stating that cost considerations applied.

ACTION: JDH

10. BEST VALUE REVIEW: MENTAL HEALTH

Having declared a financial interest, the Convener left the meeting for this item and was not present during its discussion, for which Sheriff Ray Small took the chair.

Members considered a paper by Tom Murray updating the position on specific aspects of the findings of the Best Value review of legal aid provision in the mental health field and sought views on options for change.

It was noted that regulations removing the means test from ABWOR for mental health tribunal proceedings, but not for A&A, had resulted in practical difficulties. For example, the Board had challenged accounts submitted by solicitors where there appeared to be grants of A&A with no means test applied, or accounts where ABWOR had been granted for what only appeared to be preparatory work so as to avoid the need for a means test.

After discussion, it was AGREED to:

- treat work appropriately falling within the ambit of ABWOR mistakenly categorised as A&A as ABWOR and process accounts for that work in the normal way;
- recommend to Scottish Government that regulations were introduced to remove means testing in A&A for these cases;
- not to pay for work done under a purported grant of A&A where no means test had been applied, in which the work done did not fall within the ABWOR definition;
- tighten up on the Board's approach to increases in authorised expenditure to ensure that proceedings were not brought prematurely or unnecessarily and to prepare and issue guidance to the profession about our approach;
- issue guidance to the profession to clarify the scope of ABWOR in these cases;
- meet with the Mental Health Commission as well as the Mental Health Tribunal to discuss the issue of firms proceeding immediately to the Tribunal.

ACTION: TCM

11. CIVIL JUSTICE ADVISORY GROUP CONSULTATION RESPONSE ON CIVIL JUSTICE

The Committee considered a paper by Colin Lancaster which set out a proposed response to the current consultation on ensuring effective access to appropriate and affordable dispute resolution issued by the Civil Justice Advisory Group.

It was noted that the consultation focussed on three elements of Lord Gill's report on the civil courts review: the proposed creation of the third tier court; the forms of assistance necessary to enable effective dispute resolution; and the place of alternatives to court, such as mediation.

In discussion, it was acknowledged that the use of plainer language had a role to play in rendering rules of procedure more comprehensible; however, it should not be expected to simplify the complex issues of substance to which the rules applied.

After discussion, it was AGREED:

- subject to including recognition of the importance of procedure in discussing complex cases, to approve the response as proposed.

ACTION: CL

DATE OF NEXT MEETING: Monday 15 November 2010 at 10.30a.m.

The meeting ended at 1.05 p.m.