

**THE SCOTTISH LEGAL AID BOARD**

**MINUTE OF A MEETING OF THE LEGAL SERVICES POLICY COMMITTEE HELD  
AT 10.30 AM ON MONDAY 25 JUNE 2007 AT 44 DRUMSHEUGH GARDENS,  
EDINBURGH**

Present: Kenneth Ross (Convener)  
Joseph Hughes  
Iain Robertson  
Lindsay Montgomery  
Graham Watson  
Elaine Rosie  
David Nicol  
Mahendra Raj

In attendance: Tom Murray, Director of Legal Services and Applications  
Wendy Dalglish, Board Solicitor (item 7 only)  
Catriona Whyte, Head of Legal Services – Civil (items 9-10 only)  
Philip Shearer, Board Solicitor (item 8 only)  
Ian Middleton, Director of Audit and Compliance (item 11 only)  
Kingsley Thomas, Head of Criminal Legal Assistance (items 13-14 only)  
Steven Carrie, Senior Technical Specialist (Accounts) (item 13 only)  
Douglas Haggarty, Head of Legal Services (Technical) item 13 only  
Eleanor Campbell, Legal Assistant to the Director of Legal Services and Applications  
Marie-Louise Fox, Legal and Policy Support to the Chief Executive  
Stuart Foster, Board Administrator

**1. APOLOGIES FOR ABSENCE**

Graham Bell.

**2. DECLARATIONS OF INTEREST**

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

David Nicol and Iain Robertson declared interests in relation to items 9 and 10 as they had been party to the decisions of the Legal Services Cases Committee to refuse the applications at first instance.

**3. DRAFT MINUTE OF MEETING HELD ON 22 MAY 2007**

The draft minute of the Legal Services Policy Committee held on 22 May was approved.

**4. DRAFT MINUTE OF THE LEGAL SERVICES CASES COMMITTEE HELD ON 22 MAY**

The draft minute of the Legal Services Cases Committee held on 22 May was noted.

**5. MONTHLY ACTION POINTS**

The Committee considered a paper by Tom Murray setting out progress with the implementation of actions arising at the previous meeting.

The Committee noted the position.

## **6. DIRECTOR'S REPORT**

The Committee considered a paper by Tom Murray reporting on matters of interest which had arisen since the previous meeting. The following matters were reported on: civil quality assurance; advice and assistance – financial verification and documentary evidence; Judicial Studies Committee; Law Society Education consultation; summary criminal legal aid reforms.

After discussion, it was AGREED:

- there was a need to monitor and report further on progress with improving the quality of reporting to the Board by solicitors in relation to satisfying themselves as to their clients' eligibility for advice and assistance.

**ACTION: TCM**

## **7. LEGAL AID APPLICATION (Ref. CI/01/4009784)**

The Committee considered a paper by Wendy Dalglish concerning a review of a refusal of legal aid by the Legal Services Sub-Committee which had been considered by the Legal Services Committee at its meeting on 27 September 2005.

The paper set out the history of the application, which stemmed from the contention that the Determination of the sheriff at a Fatal Accident Inquiry did not accurately reflect the evidence heard, and involved continuation of the application to obtain a copy of the transcript of the evidence, together with a supplementary opinion on the prospects of success by counsel.

It was reported that the applicant's solicitors had discussed the terms of counsel's opinion, which was not supportive, with their client and had decided not to go ahead with the judicial review proceedings. Accordingly, the application had been abandoned.

The Committee noted the position.

## **8. LOW INCOME, LOW ASSET – A NEW ROUTE TO BANKRUPTCY**

The Committee considered a paper by Philip Shearer concerning a consultation paper issued by the Accountant in Bankruptcy on proposed regulations to accompany the commencement of parts of the Bankruptcy and Diligence etc (Scotland) Act 2007 relating to personal bankruptcy. The paper contained a proposed response to the consultation.

It was noted that the most significant consequence of the Act for legal aid was that the debtor would now make an application to the Accountant in Bankruptcy instead of to a sheriff, so transforming a court process into an administrative one, and thereby removing the need for ABWOR. Accordingly, it was proposed that the ABWOR regulations be amended to reflect the new position and in order to prevent disputes arising with solicitors. The Justice Department had been alerted to the need for possible legislative change.

After discussion, it was AGREED:

- to approve the response as proposed.

**ACTION: PS**

## **9. LEGAL AID APPLICATION (Ref. no.7801588307)**

The Committee considered a paper by Catriona Whyte concerning a review application considered and refused at first instance by the Legal Services Cases Committee.

The applicant had applied for civil legal aid to raise a petition for judicial review with craves for interdict against the Scottish Ministers, the Secretary of State for Scotland and the Electoral Registration Officer for Stirling in relation to the decision of the Scottish Minister to revoke the petitioner's licence and recall him to custody. As a result of his licence being recalled, he was prohibited as a detained prisoner from voting in the Scottish Parliamentary Elections in May 2007 in terms of the Representation of the People Act. The applicant challenged the lawfulness of the decision to revoke his release on licence and recall him to prison.

The application had been refused in the Outer House of the Court of Session, and an appeal against that decision refused by the Inner House. The application for review of the decision of the Legal Services Cases Committee had been submitted after the decision taken by the Inner House to refuse the appeal. The solicitors acting for the applicant had used the special urgency provisions to represent the applicant. These gave solicitors cover for work that had to be undertaken as a matter of special urgency before a legal aid application was determined. As work had been done under the special urgency provisions, the solicitors were proceeding with the review application even although all parties were already aware that the case had been unsuccessful in court. It was open to the Board to grant legal aid restricted to the work done if the steps taken were reasonable, having regard to all the circumstances. However, for the reasons already identified by the Cases Committee it was considered that the work done was not reasonable. This would be assessed by the Accounts Department when accounts were submitted.

In discussion, it was confirmed that on submission of a special urgency account, the test for compliance with the special urgency provisions was whether the work had been reasonably and necessarily done. The view was expressed that the solicitors had effectively spent £12,000 to pursue an award of £1,000, a course of action that a privately paying individual would not have taken.

After discussion, it was AGREED to adhere to the decision of the Legal Services Cases Committee and to refuse the application in full, including refusing cover for the work done under the special urgency provisions - notwithstanding the information provided in the applicant's solicitors' letter of 24 May 2007, there was nothing to suggest that it would be reasonable to make public funding available for the case which had been unsuccessful in both the Outer and Inner House of the Court of Session.

**ACTION: CAW**

## **10. LEGAL AID APPLICATIONS (Ref. nos.7801139407 and 7801135207)**

The Committee considered a paper by Catriona Whyte concerning review applications considered and refused at first instance by the Legal Services Cases Committee.

The applicants had applied for legal aid to raise petitions for judicial review against the Scottish Ministers, the Secretary for State for Scotland and the Electoral Registration Officer in Lanarkshire. The issues were similar to those in item 9 (above).The Cases Committee had unanimously refused the applications on the basis that it would not be reasonable to make legal aid available.

The cases had been unsuccessful in the Outer House. The application for review of the decision of the Legal Services Cases Committee had been submitted after the decision taken by the Outer House. The solicitors acting for the applicants had used the special urgency provisions to represent the applicants. As work had been done under the special urgency provisions, the solicitors were proceeding with the review applications even although all parties were already aware that the cases had been unsuccessful in court. It was open to the Board to grant legal aid restricted to the work done if the steps taken were reasonable having regard to all the circumstances. However, for the reasons already identified by the Cases Committee the work done was not considered to be reasonable.

After discussion, it was AGREED to adhere to the decision of the Legal Services Cases Committee, and to refuse the applications in full, including refusing cover for work done under the special urgency provisions - notwithstanding the information provided by the applicants' solicitors in their two letters of 24 May 2007, there was still nothing to suggest that it would have been reasonable to make public funding available for cases which had been unsuccessful in the Outer House of the Court of Session.

**ACTION: CAW**

## **11. CIVIL COURTS REVIEW**

The Committee considered a paper by Tom Murray which provided a broad overview of the scope of the Civil Courts Review that had been set up under the leadership of Lord Gill, and of the Board's involvement in the review process.

It was noted that Lord Gill had asked, in advance of the formal consultation, for the Board's views on the scope of the review. The paper set out the official remit of the review and those aspects which it was considered should be drawn to the attention of the review team for inclusion.

After discussion, it was AGREED:

- to reply by letter to the review team, conveying the Board's support for the review and the expectation that the Board would have many points to make throughout the consultation process, but in the meantime drawing the review team's attention to the types of case and issues not specifically included in the current review remit, as set out in the paper and adding an additional point to the first bullet point on children's legal aid, to consider similar issues linked to the way in which adoption cases are processed.

**ACTION: TCM**

## **12. CODE OF PRACTICE: CONSULTATION RESPONSE**

The Committee considered a paper by Ian Middleton which set out the results of the consultation process for the revision of the Code of Practice for criminal legal assistance.

It was noted that the revised Code was issued for consultation to all interested parties, including registered firms, local faculties and bar associations in November 2006. The response had been disappointingly low. For example, there had been no response from the Law Society or the Edinburgh and Glasgow Bar Associations. The paper set out the suggested amendments received which it was proposed to adopt or reject.

After discussion it was AGREED:

- subject not to including the point about advising the Crown of adjournment, to approve submission of the revised Code to the Scottish Executive for the approval of the Cabinet Secretary, and publication of the responses received.

**ACTION: IGM**

### **13. SUMMARY CRIMINAL LEGAL ASSISTANCE REFORM – INDICATIVE COSTINGS OF MAIN REFORM PROPOSALS**

The Committee considered a paper by Tom Murray which provided a current assessment of the costs and savings which could result from the reform to summary criminal legal assistance. The assessment was largely based on current fees levels, used for demonstration purposes, as applied to the changing summary criminal justice model.

In discussion, it was noted that this was an evolving situation, and that there was a need to undertake sensitivity analysis of the assumptions. There was also a need for careful presentation of the proposals at the consultation stage, which would follow publication of the summary justice model.

After discussion it was AGREED:

- sensitivity analysis of the assumptions be undertaken and shared with relevant parties, with the next version of the assessment to be communicated to the Scottish Executive.

**ACTION: TCM**

### **14. UNDUE HARDSHIP – SUMMARY CRIMINAL LEGAL AID**

The Committee considered a paper by Tom Murray setting out a proposed approach to the undue hardship test under the summary criminal legal assistance reforms.

The Board had asked for the undue hardship test to be brought more in line with the financial test applied to advice and assistance, and for it to be based more on the applicant's actual ability to pay; to keep the applicant free from paying a contribution; to consider the effects on an applicant's ability to pay of a spouse/partner's resources without aggregating those resources, while at the same time creating a process which favoured neither ABWOR nor summary criminal legal aid. The paper set out proposed solutions.

It was noted that the current approach was based on the means test for civil legal aid. There were fundamental differences in the approach between criminal ABWOR and the current hardship test. Importantly, under ABWOR, the regulations prescribed that the resources of a spouse/partner were aggregated, and it was considered that if the resources of a spouse/partner were not taken into account under summary criminal legal aid, such an inconsistency risked applicants proceeding under legal aid because it would be easier to obtain, and thereby jeopardise a key element of the summary justice reforms: securing early appropriate pleas.

In discussion, some concern was expressed about it being easier to get summary criminal legal aid than civil, how the proposals might be interpreted by the profession, and about altering a long standing position of no aggregation of resources in criminal legal aid, in which regard the view was expressed that the previous Scottish Executive administration had failed to take the opportunity to address the issue. However, it was recognised that the paper represented the best possible pragmatic solution to the problem, and it was confirmed that no consultation would take place until the proposals had been signed up to by Ministers.

After discussion, it was AGREED:

- to adopt the approach proposed and consult the Scottish Executive on an informal basis prior to seeking the approval of the Board;
- further thought be given to the presentation of the proposals, first to Ministers (pointing out that it was a failure to address the aggregation issue by the previous administration that made the proposals necessary) and thereafter the profession.

**ACTION: TCM**

**15. DATE OF NEXT MEETING:** Monday 30 July 2007 at 10.30 am.

The meeting ended at 12.45 pm.