

**THE SCOTTISH LEGAL AID BOARD**

**MINUTE OF A MEETING OF THE LEGAL SERVICES POLICY COMMITTEE HELD  
AT 10.30 AM ON MONDAY 31 MARCH 2008 AT 44 DRUMSHEUGH GARDENS,  
EDINBURGH**

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

In attendance: Tom Murray, Director of Legal Services and Applications  
Elizabeth Cuschieri, Board Solicitor (item 10 only)  
Douglas Haggarty, Head of Legal Services (Technical) (item 8 only)  
Catriona Whyte, Head of Legal Services - Civil (item 7 only)  
Philip Shearer, Board Solicitor (item 9 only)  
Kingsley Thomas, Head of Criminal Legal Assistance (item 8 only)  
Stuart Foster, Board Administrator

**1. APOLOGIES FOR ABSENCE**

Graham Bell and Elaine Rosie.

**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 item 7 (Legal Aid Application).

**3. DRAFT MINUTE OF MEETING HELD ON 17 DECEMBER 2007**

The draft minute of the Legal Services Policy Committee held on 18 February 2008 was approved.

**4. DRAFT MINUTE OF THE LEGAL SERVICES CASES COMMITTEE HELD ON 18 FEBRUARY 2008**

The draft minute of the Legal Services Cases Committee held on 18 February 2008 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.

It was AGREED:

- Joseph Hughes be given a copy of the Board's amended response to the consultation on the Looked After Children (Scotland) Regulations submitted to the Scottish Government on 3 March 2008;

**ACTION: EEC**

- otherwise, to note 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: Quality Assurance Committee; and Summary Criminal Justice Reform.

A meeting with the Scottish Government and representatives from the Board and the profession to discuss and ideally reach agreement in principle on the revised proposals for summary criminal legal assistance had been held on 26 March. Although a constructive meeting, the profession still had concerns in relation to:

- the Crown Office assumptions;
- subsuming two deferred sentences into the payment blocks, and in particular, deferred sentences dealing with social inquiry reports;
- the grant of ABWOR by the Board in sheriff court cases (seen by the profession as representing a lack of trust of the profession);
- the removal of the list of case types for which solicitors could still self certify the grant of ABWOR; and
- the insistence on seeing disclosable summaries in all JP court cases and, where required, in the sheriff court.

The Board had considered these issues and made recommendations on them to the Scottish Government that:

- the provision to subsume two deferred sentences should not be removed but that work done in connection with social enquiry reports at a continued diet should be recognised and an additional payment of £25 made to the solicitor where that hearing results in resolution of the case;
- the Board would no longer insist that the disclosable summary is submitted in all JP Court applications; but would still have the right to continue a case for sight of this if felt appropriate;
- solicitors should be permitted to self-certify ABWOR in the sheriff and Stipendiary Magistrates courts, but the Board will have the right not to pay for grants incorrectly made;
- the proposals for paying on an exceptional basis for police custody visits be amended by reducing the current threshold of 4 hours to 2 hours for the work to be done.

It was reported that the Cabinet Secretary had now intimated that he was content with the recommendations made by the Board.

In discussion, it was noted that the Crown Office assumptions were the only aspects of the reforms that could be monitored at this stage, although the Board would be closely monitoring solicitor grants of ABWOR.

After discussion, it was AGREED:

- a paper be submitted on those aspects of the reforms it was intended to monitor both for internal and external consumption;
- a copy of the new ABWOR form be circulated to the members of the Committee for comment;
- to record the Committee's appreciation for the way Board staff involved had handled such a difficult and complex project.

**ACTION: TCM**

## **7. HOUSE OF LORDS APPLICATION (Ref. 7812156507)**

The Committee considered a paper by Anne Martin recommending that the Committee adhere to an earlier decision of the Legal Services Cases Committee to refuse an application for legal aid to appeal a decision of the Inner House of the Court of Session to the House of Lords. The case related to whether an applicant was entitled to seek compensation from the Criminal Injuries Compensation Authority (formerly the Criminal Injuries Compensation Board).

It was noted that the applicant's agents had submitted a letter supporting the joint opinion of counsel that the Inner House had erred in its decision, and that there were significant prospects of success in an appeal. The Legal Services Cases Committee had given as specific reasons for refusal that the opinion had not specifically addressed the decision made by the Inner House, and that it had not been demonstrated that the case was likely to succeed.

In discussion, members agreed that there was nothing in counsel's opinion to support the view that there were any real prospects of success in this case, and that a more robust approach towards counsels' opinions should be adopted in this regard: for example, by requesting them to state the prospects of success in percentage terms, and issuing more requests to attend hearings with the Cases Committee to explain their claims, where this appeared appropriate, with such measures to be contained in revised guidance to the profession.

After discussion, it was AGREED:

- to adhere to the decision of the Legal Services Cases Committee to refuse the application for the reasons stated;
- further consideration be given to the best means of assisting counsel to quantify and support their opinions in relation to prospects of success in House of Lords applications

**ACTION: CAW/ AM**

## **8. INTEREST ON COUNSEL FEES**

The Committee considered a paper by Douglas Haggarty summarising the current position regarding payment of interest to counsel under the provisions of the Late Payment of Commercial debts (Interest) Act 1998.

It was noted that on senior counsel's advice the Board had conceded the principle that counsel were entitled to payment of interest on their accounts in certain cases. The paper set out the implications of this for the Board, the circumstances in which statutory interest did and did not apply, and interim measures being taken to minimise exposure. However, there were fundamental payment issues relating to, for example, the point at which interest begins to apply and ceases to be applicable, about which the 1998 Act was unclear.

It was the belief of the Scottish Executive at the time that the provisions of the Act would not apply to legal aid cases, and that there would be no cost to the Fund. Payments of interest from the Fund therefore reflected an unintended consequence of the regulations, and the Board had specifically drawn to the Scottish Government's attention the need for early regulatory amendment as a high priority.

After discussion, it was AGREED:

- to approve the course of action currently being pursued in instructing and seeking to advance changes to the regulations, and meeting with Faculty with a view to discussing the issues raised by the legislation.

**ACTION: JDH**

## **9. INTEREST (SCOTLAND) BILL**

The Committee considered a paper by Philip Shearer which considered a Scottish Government consultation on the proposed Interest (Scotland) Bill, and set out a draft response.

It was noted that the Bill intended to create a general statutory entitlement to interest to run from the time when a sum of money becomes due by one person to another, whether by way of debt or damages.

Board representatives had met with the Bill team to express concerns, confirmed by an opinion of senior counsel, about the likely financial impact to the Fund, and other financial implications of the proposals. The Bill applied to all financial obligations and as such had significant operational implications across the range of the Board's functions. The Bill did not affect the existing provisions of the 1998 Act, which allowed counsel to claim interest on accounts at a punitive rate.

The proposed response to the consultation expressed concern at the range of operational implications arising from the draft Bill and called for Fund payments to solicitors and counsel to be exempted from payment of interest, either by express exclusion in the Bill or by Order if the Bill was passed.

In discussion, the view was expressed that the response should highlight the difficult and complex nature of legal aid accounting. As the Board can only make payment from the Fund where it is satisfied that work charged for has been properly incurred, clarification is needed as to the date from which interest would run. It was also felt that all parties would be put to extra work and expense by the Bill – for example, interest could be claimed by the Board when seeking refunds of overpayments made to solicitors. The response should include examples to demonstrate the unfairness of interest potentially being chargeable on overstated bills submitted by solicitors and counsel. Finally, consideration should be given to whether the problems created by the amendment of the Late Payment of Commercial Debts (Interest) Act 1998 in respect of payments to counsel can be addressed through regulations.

After discussion, it was AGREED:

- to approve the proposed response subject to amendment to reflect the points raised in discussion;
- to check that the Board's aims could be achieved by regulatory change, and come back with a specific proposal on what the Board intended to do.

**ACTION: PS**

## 10. SAFEGUARDERS AND CURATORS IN CHILDREN'S CASES

The Committee considered a paper by Elizabeth Cuschieri which addressed issues arising at the previous meeting in relation to the current difficulties surrounding the appointment and payment of safeguarders and curators in children's cases.

The paper provided clarification on the legal position when a solicitor carried out a dual role as both the solicitor and curator/safeguarder and the payment options open to such persons appointed to act. These, along with an explanation of what could and could not be paid for from the Fund, were set out in proposed draft guidance for insertion in the Children's Legal Assistance Handbook.

It was noted that liaison with the sponsor branch at the Scottish Government concerning the various problem areas including the apparent lack of payment mechanism for persons appointed to act as curators *ad litem*, would continue in the hope that there will be legislative change in this area.

It was explained that the proposed guidance related to children's legal aid i.e. proceedings under Part II Chapters 2 and 3 of the Children (Scotland) Act 1995 and did not apply to civil legal aid cases or indeed ABWOR cases such as mental health tribunals.

It had been noted at the last meeting that despite the legislation requiring the appointment of a safeguarder and despite the fact that in terms of Rule 3.8 a safeguarder has exactly the same powers and duties at common law as a curator, some Sheriffs were appointing curators.

In discussion, a view was expressed that it would be valuable to know the reasons why some Sheriffs appoint curators *ad litem* rather than safeguarders. This may be due to the erroneous assumption that a curator would be paid at higher rates from the Legal Aid Fund. It was considered, however, that irrespective of what Sheriffs were doing, it was essential that guidance was inserted into the Children's Legal Assistance Handbook explaining what could and could not be paid for from the Fund to a person appointed to act as a curator or a safeguarder because there was currently no guidance in the Handbook concerning this issue, and the previous guidance in the paper Handbook dated 2001 was brief and did not cover the position where a curator is appointed.

Further, it was discussed and explained that Accounts staff within the Board were currently assessing accounts in line with the proposed written guidance, namely: that where a solicitor chooses to act as both curator and solicitor to the child, payments from the Fund cannot be made for work carried out in his/her sole capacity as a curator.

After discussion, it was AGREED to:

- agree the proposed draft guidance for insertion into the Children's Assistance Handbook, clarifying the sentence relating to incapable adults, and using an alternative to the word "incompetent";
- include within the guidance the flowcharts produced to the Committee, subject to amending some of the wording within the charts;
- record one member's hesitancy expressed regarding issuing the guidance from the point of view that guidance could create other difficulties in relation to the possibility of practitioners attempting to obtain payment via other routes or mechanisms;
- advise the profession of this new guidance via Mailshot;

- write to Sheriffs Principal and the Sheriffs' Association regarding these issues and advise them of the new guidance, saying that these were the payment conditions as understood by the Board, but open to further discussion;
- monitor inappropriate appointments by Sheriffs thereafter;
- continue liaising with the Scottish Government regarding legislative change in this area;
- look at civil legal aid cases involving children, as opposed to children's legal aid cases, to see if similar issues arose;

**ACTION: EEC**

- clarify with Accounts Assessment how solicitors acting as curators at Mental Health Tribunals could be paid for acting in that capacity.

**ACTION: EEC/JC**

**DATE OF NEXT MEETING:** Monday 28 April 2008 at 10.30 am.

The meeting ended at 12.15 pm.