

## THE SCOTTISH LEGAL AID BOARD

### MINUTE OF A MEETING OF THE LEGAL SERVICES POLICY COMMITTEE HELD AT 10.30 AM ON MONDAY 22 JUNE 2009 AT 44 DRUMSHEUGH GARDENS, EDINBURGH

Present: Joseph Hughes (Convener)  
David Nicol  
Lindsay Montgomery  
Graham Watson  
Iain Robertson  
Elaine Rosie  
Graham Bell

In attendance: Tom Murray, Director of Legal Services and Applications  
Kieran Burke, Support to the Director of Legal Services and Applications  
Kingsley Thomas, Head of Criminal Legal Assistance (item 8 only)  
Steven Carrie, Senior Technical Specialist, Accounts (item 9 only)  
Catriona Whyte, Head of Legal Services – Civil (item 7 only)  
James Mudie, Board Solicitor (item 10 only)  
Marie-Louise Fox, Legal and Policy Support to the Chief Executive  
Stuart Foster, Board Administrator

#### 1. APOLOGIES FOR ABSENCE

Kenneth Ross.

#### 2. DECLARATIONS OF INTEREST

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

Tom Murray, Iain Robertson and David Nicol did not take part in the discussion of items 10 and 11 as they had been party to the initial decisions of the Legal Services Cases Committee in relation to those applications.

It was AGREED:

- to assist with ensuring meetings were quorate, a note be circulated to members to request that, where possible, declarations of interest be submitted to the Chief Executive's Office in advance of the relevant meeting.

**ACTION: SF**

#### 3. DRAFT MINUTE OF MEETING HELD ON 1 JUNE 2009

Subject to deleting the word "joint" from the bullet point at item 6 (Director's report), the draft minute of the Legal Services Policy Committee held on 1 June 2009 was approved.

The Director of Legal Services and Applications circulated a proposed draft response to a letter of 10 June from the President of the Glasgow Bar Association. The proposed response welcomed the approach made by the Petitioners and GBA membership, and stated that the Board was willing as a gesture of goodwill to the wider GBA membership not to seek expenses for the interim interdict hearing at which it had been successful, on the understanding that the Board's willingness to agree the disposal should not in any way be construed as a concession on the part of the Board. The Board remained confident of its position, and wanted the GBA membership to be made aware of this by making available to them a copy of the Board's response.

It was AGREED:

- the response be sent as proposed.

**ACTION: TCM**

#### **4. DRAFT MINUTE OF THE LEGAL SERVICES CASES COMMITTEE HELD ON 1 JUNE 2009**

The draft minute of the Legal Services Cases Committee held on 1 June was noted. The nature of the interests declared, and whether members had participated in discussion of those items, would be clarified at the meeting of the Cases Committee to be held later in the day.

#### **5. ACTION POINTS**

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

It was noted that the meeting to discuss sanction for counsel in criminal cases had now taken place.

It was AGREED:

- the terms of the proposed consultation on the review of the Duty Scheme be circulated to members of the Committee for comment prior to issue.

**ACTION: TCM**

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

Tom Murray reported on matters of interest which had arisen since the previous meeting.

It was noted that the report on Quality Assurance required to be updated.

#### **7. REASONABLENESS TEST IN CIVIL LEGAL AID**

The Committee considered a paper by Catriona Whyte about the existing guidance in relation to, and application of, the reasonableness test in assessing whether it was appropriate to make civil legal aid available at the outset of a case and throughout its lifetime, together with recommendations on potential changes and additions to the application of that test.

It was AGREED:

- to approve the recommendations, subject to rewording of the first and third to make them less prescriptive (using 1 – 10 banding as the indicative potential for success) and to avoid the Board fettering its own discretion,
- consult on the concept that legal aid funding should be viewed as a last resort for an individual wishing to bring a case, and, as such, consideration of “no win, no fee” arrangements should play a greater role in the assessment of civil legal aid applications;
- the Civil Legal Assistance Handbook on Reasonableness be amended in terms of the approved recommendations and a revised draft submitted back to the Committee;
- a paper be submitted to the next Board meeting on the approach being taken, the changes being made and the issues that were to be the subject of consultation.

**ACTION: CAW**

## **8. UNDUE HARDSHIP TEST FOR SOLEMN CRIMINAL LEGAL AID**

The Committee considered a paper by Tom Murray about changes made to the consultation paper as requested by the Committee at its meeting on 1 June. The paper set out an amended approach which was reflected in a revised consultation paper.

It was AGREED:

- to approve the proposed approach and the terms of the consultation, subject to re-running the figures to assess the impact on eligibility of using the High Court case cost proxy, and circulating the outcome to members of the Committee on the basis that if the impact was marginal, the sheriff court median should be used as the proxy; and further consideration being given to the treatment of redundancy payments.

**ACTION: TCM**

## **9. COUNSELS FEES IN CRIMINAL APPEALS AND REVIEW OF FIRST INSTANCE FEES**

The Committee considered a paper by Steven Carrie which provided an update on progress with the introduction of a revised table of fees for counsel in criminal appeals, the proposed changes to the Act of Adjournment in relation to criminal conviction appeals, and review of counsel’s fees in criminal first instance proceedings.

The Committee noted the position.

## **10. LEGAL AID APPLICATION (LSCC: 30/3/09 item 9)**

The Committee considered a paper by James Mudie regarding an application to review the decision of the Legal Services Cases Committee to refuse civil legal aid to oppose an application by a Chief Constable to make an order in terms of the Sexual Offences Act restricting the applicant’s movements on his release from prison. The Committee was also provided with a copy of the Depute Clerk of Justiciary’s letter of 26 May 2009 and the Court’s Interlocutor Sheet of the same date.

The review application raised a number of issues not identified in the original application relating to potential retrospective penalty and the potentially discriminatory nature of the proposed order.

In the course of discussion, members concluded that they needed further information to enable them to decide on the reasonableness of the application. The procedures involved in the making

of interim and final Sexual Offences Protection Orders (SOPOs), and the rights of those against whom they were made to oppose them, were, from the information available, unclear. It was also unclear what stage the criminal case concerning the applicant's breach of the interim order had reached and the position in relation to the applicant's imprisonment.

It was AGREED:

- the Committee be provided with a paper explaining the procedure for making SOPOs;
- it be established what had happened in the criminal case at the hearing on 16 March when a devolution minute was due to be considered and the position in relation to the applicant's imprisonment be established;
- a response be sent to the Depute Clerk of Justiciary to advise him that the Committee were considering the review application.

**ACTION: JM**

#### **11. LEGAL AID APPLICATION (LSCC: 30/3/09 item 15)**

The Committee considered a paper by Rona Mitchell regarding an application for review of a decision of the Legal Services Cases Committee to refuse an application for civil legal aid in relation to an appeal to the Inner House.

It was recommended that the decision of the Cases Committee be adhered to and the application be refused on the basis that the test of reasonableness had not been met, with the additional reason that the level of damages sought did not warrant proceedings in the Court of session.

It was AGREED:

- to refuse the application as recommended.

**ACTION: RM**

**DATE OF NEXT MEETING:** Monday 27 July 2009 at 10.30a.m.

The meeting ended at 12.45 pm.