

**THE SCOTTISH LEGAL AID BOARD**

**MINUTE OF A MEETING OF THE LEGAL SERVICES POLICY COMMITTEE HELD  
AT 10.30 AM ON MONDAY 27 JULY 2009 AT 44 DRUMSHEUGH GARDENS,  
EDINBURGH**

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

In attendance: Douglas Haggarty, Head of Legal Services (Technical)  
Kieran Burke, Support to the Director of Legal Services and  
Applications  
Kingsley Thomas, Head of Criminal Legal Assistance (item 10 only)  
Andrew McIntosh, Manager of the Chief Executive's Office  
Marie-Louise Fox, Legal and Policy Support to the Chief Executive  
Stuart Foster, Board Administrator

The Convener introduced Andrew McIntosh, who will be joining the Board as Corporate Support Manager in the Chief Executive's Office.

**1. APOLOGIES FOR ABSENCE**

Graham Watson, Elaine Rosie.

**2. DECLARATIONS OF INTEREST**

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

**3. DRAFT MINUTE OF MEETING HELD ON 22 JUNE 2009**

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

**4. DRAFT MINUTE OF THE LEGAL SERVICES CASES COMMITTEE HELD ON 22  
JUNE 2009**

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

**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 AGREED:

- that a report summarising the outcome of the legal aid review application considered by the Committee at its previous meeting be made to the next meeting;

**ACTION: TCM/JM**

- Stuart Foster ask members, if possible, to notify the Chief Executive’s Office of any declarations of interest in advance of meetings.

**ACTION: SF**

## **6. DIRECTOR’S REPORT**

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

It was AGREED:

- a reply be sent to the Scottish Government to the effect that the Board had no further comment to make regarding the Call for Evidence on the Interpretation & Legislative Reform (Scotland) Bill.

**ACTION: TCM**

## **7. OUTCOMES FROM PILOT ON MANAGEMENT OF HIGH COST CASES**

The Committee considered a paper by Owen Mullan regarding a proposed consultation on “High Cost Cases”.

After discussion, it was AGREED:

- not to follow through with full consultation;
- as soon as a case was recognised as a high cost case, the Board should alert the court clerks and COPFS; and whilst solicitors should be encouraged to contact the Board when they recognise a high cost case, only if it meets the criteria to obtain best value for the taxpayer will the case follow this procedure; and where the Board highlights a case as falling within the criteria, solicitors and counsel would be required to participate in the process;
- the consultation paper should make clear that the aim of this new process was not to interfere in any legal advice given to clients and it should make it clear that implementation of the proposals would help achieve Best Values for taxpayers;
- the consultation paper should avoid repetition; paragraph 3.6 should be broken up; there should be a capital ‘A’ at “accounts” in 6.5;
- we will consult with lawyers’ representative bodies and interest groups, for example, the Law Society, the Faculty of Advocates, the Family Law Association, APIL, the EBA and GBA, with guidance to be issued to the profession thereafter;
- a revised paper and consultation documents be submitted to the next meeting of the Committee.

**ACTION: OM**

## 8. REVIEW OF SANCTION FOR COUNSEL

The Committee considered a paper by Owen Mullan which set out proposed guidelines on sanction for employment of counsel in criminal applications.

In discussion, members made a number of comments on such issues as delegation, parity, the transfer of cases from solicitor to counsel due to illness, solicitor advocates, and cases no longer to be prosecuted in the High Court and the significance of a likely sentence.

After discussion, it was AGREED:

- not to follow through with full consultation;
- para 1.2 – explain what “solicitor of ordinary skills means” – that it is a solicitor with knowledge and experience in their particular field;
- para 2.1, 3<sup>rd</sup> bullet – delete “cross” in ‘cross-examining’; replace “dint” with ‘virtue’;
- para 2.2, 2<sup>nd</sup> bullet – as the circumstances have changed since Lord Bonomy’s report, severity of sentence should not in itself be a factor that justifies the use of counsel  
7<sup>th</sup> bullet – this point related only to parity amongst multiple accused. Reference to the Crown should be removed;
- page 6, 1<sup>st</sup> bullet – solicitors should make it clear up front what steps they have taken to arrange for another solicitor to take on their case and only if it has proved impossible will it be reasonable to employ counsel;
- page 11 – where the case is no longer being prosecuted in the High Court, make it clear in the guidance that a new application for counsel should be made;
- if a senior solicitor advocate is to be instructed, this should be a solicitor advocate qualified as a senior solicitor advocate under the Society of Solicitor Advocates’ Accreditation process;
- the proposed guidelines be amended in terms of the discussion, copied to Paul McBride, and re-submitted to the next meeting of the Committee.

**ACTION: OM**

## 9. REVIEW OF QUALITY ASSURANCE

The Committee considered a paper by Tom Murray which provided an update on discussions held with the Law Society on how the approach to quality assurance could be improved, and how it was proposed to take this forward.

It was noted that a number of themes had been agreed in principle at the meeting of the Quality Assurance Committee held on 8 June and the paper discussed how these should be developed.

In the meantime, issues that could be resolved in advance of the next cycle were being identified. It was considered that outcomes and emerging trends needed to be reported more frequently to the profession and public.

Subject to removing reference to the removal of files at paragraph 4.9 of the paper, the Committee noted the position.

## 10. REVIEW OF DUTY SOLICITOR SCHEME

The Committee considered a paper by Kingsley Thomas which provided an update on the proposed arrangements and the current timetable for the review of the duty solicitors’ scheme.

The paper reported on the main issues raised in responses to the Board's invitation to all key stakeholders and criminal practitioners to express views on how the duty plans currently operated. Board representatives had also attended a number of Local Criminal Justice Board meetings at which feedback had been obtained on how the local plans operated. These findings would be used to inform the issues to be raised in the consultation paper, a draft of which would be submitted to the next meeting of the Committee. The paper set out revised timescales for conducting and completing the review.

It was AGREED:

- subject to holding separate roadshows on the Duty Review and the implementation of the Criminal Quality Assurance scheme, to approve the revised timescales for conducting and completing the review.

**ACTION: KT**

## **11. QUALITY ASSURANCE AND JUDICIAL EXPENSES**

The Committee considered a paper by Tom Murray. The paper was supplementary to the paper presented to the Legal Services Policy Committee, on 1<sup>st</sup> June 2009. The previous paper outlined the current, strict operational approach taken, whereby solicitors were prohibited from also raising private fees against any client who was an assisted person. The basis for this approach was a narrow interpretation of Section 32 of the Legal Aid (Scotland) Act 1986 ("the Act"). A specific example of a solicitor seeking to also charge a legally aided client on a private client fee basis, had been narrated in the earlier paper.

It had been agreed that the wording of Section 32 of the Act could be considered ambiguous, and that the Opinion of Senior Counsel should be obtained to assist interpretation.

Counsel stated that the current operational view is not unstateable. Counsel's construction of Section 32 did not support the strict operational approach, and interpreted Section 32 as operating to prohibit a solicitor from taking private fees for anything done during the time that the solicitor was providing legal aid only.

After discussion, it was AGREED:

- that counsel's approach be adopted, and guidance for the profession be drafted for submission to the next meeting of the Committee, together with consideration of how different scenarios should be dealt with, for example, a case that begins on a "no win – no fee" basis and the client then makes an application for legal aid.

**ACTION: TCM**

**DATE OF NEXT MEETING:** Monday 7 September 2009 at 10.30a.m.

The meeting ended at 12.10 pm.