

THE SCOTTISH LEGAL AID BOARD

MINUTE OF A MEETING OF THE LEGAL SERVICES POLICY COMMITTEE HELD AT 10.30 AM ON MONDAY 1 FEBRUARY 2010 AT 44 DRUMSHEUGH GARDENS, EDINBURGH

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

In attendance: Tom Murray, Director of Legal Services and Applications
Catriona Whyte, Head of Legal Services - Civil (items 9 and 10 only)
Joe Kelly, Head of Civil Legal Assistance (item 6 only)
Kingsley Thomas, Head of Criminal Legal Assistance (item 7 only)
Kieran Burke, Support to the Director of Legal Services and Applications
Marie-Louise Fox, Head of Secretariat and Chief Executive's Office
Andrew McIntosh, Corporate Support Manager
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.

David Nicol and Iain Robertson declared non-financial interests in relation to items 9 and 10 (Legal Aid Applications).

3. DRAFT MINUTE OF MEETING HELD ON 14 DECEMBER 2009

The draft minute of the Legal Services Policy Committee held on 14 December was approved.

4. 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.

5. DIRECTOR'S REPORT

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

6. GUIDANCE ON VERIFICATION OF FINANCIAL ELIGIBILITY OF ADVICE AND ASSISTANCE & ABWOR IN CIVIL AND CHILDREN'S CASES

The Committee considered a paper by Joe Kelly about work undertaken to establish how solicitors currently satisfied themselves as to their clients' financial eligibility for Advice and Assistance/ABWOR in civil and children's cases, proposals for changes required to regulations as a result, and set out the basis for guidance to be issued to the profession.

The paper proposed that documentary evidence of financial eligibility should be obtained by the solicitor in all but some exceptional scenarios for civil and children's cases. It was also proposed that changes be made to the regulations in civil A&A/ABWOR cases to make it mandatory for the solicitor to obtain documentary evidence of financial eligibility.

Discussion took place on requiring solicitors to obtain mandates; the 7 day period for establishing financial eligibility, the potential implications for sole practitioners, and the guidance to be issued to the profession.

After discussion it was AGREED:

- to approve the general approach and the proposed guidance for consultation subject to:
 - making it clearer that the proposals were made in anticipation of regulatory change and recognising that the Board did not currently have sanctions for failing to use mandates;
 - any future requirement for the solicitor to obtain a mandate should not be in "all" but in the '*vast majority*' of cases;
 - to remove "as a minimum" from the middle of page 3 of the guidance.
 - Under 'Age of Documentary Evidence' clarification was needed whether solicitors should 're-assess' eligibility or 'complete' the eligibility assessment after receiving more up to date information.

ACTION: JK

7. REVIEW OF APPOINTED SOLICITOR ARRANGEMENTS

The Committee considered a paper by Kingsley Thomas updating the position on the review of the appointed solicitor arrangements in Criminal ABWOR custody cases introduced as part of the 2008 summary criminal legal assistance reforms, and recommending proposals to amend the arrangements.

After discussion, it was AGREED:

- to approve the proposed refresher guidance on the appointed solicitor arrangements for discussion with the Law Society and the individual solicitors concerned;
- to pursue the regulatory change necessary to enable the prior solicitor/client relationship to be with the firm and not just the individual solicitor concerned, in conjunction with the more stringent requirements for financial verification in ABWOR;
- in relation to multiple payments for the same accused, a reduced block fee should be considered where solicitors represented a client in relation to 2 or more unrelated complaints at the same time;

- the anomaly regarding fee payments for ABWOR in drug court cases should be removed;
- more evidence was needed in relation to the effects of differential payments in the JP court;
- more detailed proposals and costings be developed and reported to the Committee and the Scottish Government.

ACTION: KT

8. REGULATIONS APPLYING TO APPOINTED SOLICITORS

The Committee considered a paper by Tom Murray concerning the interpretation of the regulatory criteria in place to enable delegation under the appointed solicitor arrangements - specifically, whether the regulations might permit an interpretation which would allow an appointed solicitor to delegate the representation of the client at a court appearance where it was known prior to taking the instructions that they would not be in a position to appear personally.

The Director recommended that there was no scope to allow this without amendment of the regulation.

After discussion, it was AGREED:

- to continue to apply the regulation on the restricted interpretation of ‘another good reason’ set out in the paper;
- the Scottish Government be advised that the Board would continue to interpret the regulations in this way, but that there was an issue with the interpretation of the regulations that might be having unintended consequences on the intentions of the summary justice reforms;
- the regulation should be amended to allow a solicitor to take instructions and delegate in the knowledge that they are unable to appear personally to represent the client, and that the amendment should form part of a package of measures dealing with a range of issues arising from the monitoring of summary criminal legal assistance reform;
- no further action be taken in relation to the four cases previously identified in which the issue was solely one of delegation.

ACTION: TCM

9. LEGAL AID APPLICATION (LSCC MINUTE 1/6/2009 ITEM 8)

The Committee considered a paper by Gordon Tolland concerning eight applications for review of the decision of the Legal Services Cases Committee to refuse civil legal aid for the initial applications to raise actions for defamation.

In discussion, the view was expressed that the applications fell very far short of meeting the reasonableness test.

After discussion, it was AGREED:

- to adhere to the decision of the Legal Services Cases Committee to refuse the applications, on the basis that they failed to meet the existing criteria set down in the Civil Legal Aid for Defamation or Verbal Injury Proceedings (Scotland) Direction 2008,

and also because the reasonableness test had not been met, given a lack of information on prospects of success and details of quantum;

- exceptionality in line with the case of *Steel & Morris* had not been established in the review application concerned, so this was to be added to the reasons for refusal for that application;

ACTION: CAW

10. LEGAL AID APPLICATION (LSCC MINUTE 7/9/2009 ITEM 9)

The Committee considered a paper by Alison Granger concerning an application to review the decision of the Legal Services Cases Committee to refuse an application for civil legal aid to pursue an action for defamation in the Court of Session.

After discussion, it was AGREED:

- to adhere to the decision of the Legal Services Cases Committee to refuse the application, but to add failure to meet the reasonableness test because of a lack of information on prospects of success as a reason for refusal.

ACTION: CAW

11. JUDICIAL CONDUCT: RULES FOR INVESTIGATING AND DETERMINING MATTERS

The Committee considered a paper by Marie-Louise Fox concerning the Lord President's consultation proposing rules for investigating conduct of a member of the judiciary. The paper summarised the proposals and set out a draft response.

After discussion, it was AGREED to approve the draft response subject to:

- including comments on: paragraph 13 of the consultation paper as the behaviour being complained about may not relate to a case, therefore the number of the case and date of the hearing may not be relevant and paragraph 53 as information should be published regardless of the number of complaints.

ACTION: M-LF

DATE OF NEXT MEETING: Monday 29 March 2010 at 10.30a.m.

The meeting ended at 12.40 p.m.