

THE SCOTTISH LEGAL AID BOARD

MINUTE OF A MEETING OF THE LEGAL SERVICES POLICY COMMITTEE HELD AT 10.00 AM ON MONDAY 26 APRIL 2010 AT 44 DRUMSHEUGH GARDENS, EDINBURGH

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

New members attending as observers (Apology: Ray Small)
Alastair Kinroy QC
Ray MacFarlane
Bill McQueen

In attendance: Tom Murray, Director of Legal Services and Applications
Catriona Whyte, Head of Legal Services - Civil (item 7 only)
Joe Kelly, Head of Civil Legal Assistance (item 8 only)
Kingsley Thomas, Head of Criminal Legal Assistance (item 8 only)
Owen Mullan, Head of Legal Services – Criminal (item 9 only)
Steven Carrie, Senior Accounts Specialist (item 11 only)
Douglas Haggarty, Head of Legal Services (Technical) (item 11 only)
Kieran Burke, Support to the Director of Legal Services and Applications
Marie-Louise Fox, Head of Secretariat and Chief Executive's Office
Stuart Foster, Board Administrator

1. APOLOGIES FOR ABSENCE

None.

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 29 MARCH 2010

The draft minute of the Legal Services Policy Committee held on 29 March 2010 was approved, subject to rewording to the effect that it was in observance of Board policy, as opposed to declaring interests in the application, that David Nicol and Iain Robertson had not taken part in the discussion or decision in relation to item 13 (because they had been present at the meeting of the Legal Services Cases Committee when the application had originally been considered).

4. DRAFT MINUTE OF THE LEGAL SERVICES CASES COMMITTEE HELD ON 29 MARCH 2010

In noting the draft minute of the Legal Services Cases Committee held on 29 March, reference was made to the requirement for a member declaring a financial interest to leave the meeting for that item. It was also noted that the Chief Executive had asked the Director of Legal Services and Applications to review how delegations applied for ex-gratia payments.

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 also noted that guidance to the profession on changes to the Tribunal Structure would be submitted to the Committee for approval prior to issue.

6. DIRECTOR'S REPORT

The Committee considered and noted a report on matters of interest which had arisen since the previous meeting. It was additionally reported that 3 weeks of roadshows on Quality Assurance for Criminal and the introduction of the new solemn fees regulations were about to commence.

7. REVIEW OF SPECIAL URGENCY PROVISIONS FOR CIVIL LEGAL AID

The Committee considered a paper by Catriona Whyte about a major review being undertaken by the Board of the special urgency provisions in place for civil legal aid applications.

The purpose of the review was to assess how the provisions of regulation 18 of the Civil Legal Aid (Scotland) regulation 2002 were being used by the profession, against a background of increasing use of regulation 18.

In discussion, the view was expressed that there were risks to the Fund arising from the fact that solicitors did not require the Board's authority to make use of some of the special urgency provisions and also because no merits test was applied.

It was AGREED:

- a further report be submitted to the Committee once the full review of the special urgency provisions had been completed.

ACTION: CAW

8. FINANCIAL VERIFICATION IN ADVICE AND ASSISTANCE / ABWOR IN CIVIL, CHILDREN'S AND CRIMINAL CASES

The Committee considered an amended paper by Joe Kelly and Kingsley Thomas reporting on feedback from consultation with the profession and a meeting with the Law Society, the preparation of revised guidance, and further proposals for addressing financial verification issues in these cases.

It was noted that the regulatory position was different for criminal cases, in which the solicitor was responsible for seeing financial verification. The draft guidelines had been amended to reflect agreement reached at the meeting with the Law Society. In relation to civil and children's cases, it was intended to amend the guidance and produce a commentary on the feedback received and issue this to the profession

After discussion, it was AGREED:

- in relation to the criminal A&A and ABWOR guidance, at paragraph 1 of Section 6: (a) to delete "normally" at line 5 and move it to line 4, saying: *you must not normally start to act* etc.; and replace "in the" with *having regard to* the (wider interests of the justice

system) at line 7; and in the final line (when you get) “it” with *the mandate / verification*; (b) to show nil incomes as 70% instead of 60% in Section 3; and (c) to add: *subject to being satisfied as to capital eligibility* to the wording of the first bullet point of section 12;

- subject to editing, and further consideration of the position if the client was in custody, to issue the two sets of guidance to the profession and respond to those who had submitted comments on the consultation.

ACTION: JK/KT

9. SANCTION FOR COUNSEL IN CRIMINAL APPLICATIONS

The Committee considered papers by Owen Mullan reporting on, and addressing concerns raised in, responses received from the Law Society and the Faculty of Advocates to draft guidance on Sanction for Employment of Counsel in Criminal Applications.

It was noted that both respondents were concerned that the intention of the proposals was to reduce the number of grants, when in fact the intention was to make it clearer when a grant would be made. This should reduce the number of *applications* being made, and lead to more applications being granted at first instance - but not to a reduction in the number of grants. The guidance would be amended to clarify this point.

In discussion, the view was expressed that, in general, the Law Society’s response did not make any substantive criticism of the proposals, and that the Faculty’s arguments were unpersuasive. However, it was acknowledged that counsel representation at the first diet was important and should be allowed. After discussion, it was AGREED:

- the draft guidance be amended in accordance with the discussion and published in the criminal Handbook and on the website, with hard copies sent to those consulted;
- replies be sent to both respondents to advise how the Board intended to take matters forward, stressing the ease and speed with which online applications could be granted.

ACTION: OM

10. CIVIL QUALITY ASSURANCE: OUTCOMES OF THE CIVIL PEER REVIEW PROCESS

The Committee considered a paper by Tom Murray reporting on the Law Society’s view of the Board’s proposals, agreed at the Committee’s previous meeting, for sampling files as part of the civil peer review process.

It was noted that, subject to substituting “at risk” cases involving adults with incapacity and employment for contact cases, the Law Society’s representatives on the Quality Assurance Committee would make a recommendation supporting the Board’s proposals to the Council of the Law Society. The paper set out sample case coverage figures recalculated to reflect the adjusted approach.

It was noted that the proposals would require changes to the Memorandum of Understanding between the Board and the Law Society.

After discussion, it was AGREED:

- to approve the adjusted approach to sampling files as proposed.

ACTION: TCM

11. COUNSEL'S FEES: TAXATION DECISIONS BY THE AUDITOR OF THE COURT OF SESSION

The Committee considered a paper by Steven Carrie and Douglas Haggarty concerning two recent taxation decisions by the Auditor of the Court of Session in relation to fees allowed to counsel, and the potential effect of these on the assessment of counsel's fees in legal aid cases in the Court of Session.

It was noted that the Schedule 4 Table of Fees had not been reviewed for 15 years. Nevertheless, fees had been subject to significant and increasing upward pressure in recent years as a result of higher fees being claimed by counsel and allowed by the previous Auditor. However, in two recent taxations, the new Auditor considered himself bound to follow the approach in the *Uisdean Mckay v HMA* case, which resulted in his decision to allow counsel significantly lower fees than his predecessor, and the counsel concerned lodging Notes of Objection to the auditor's report.

If the Auditor's decision was upheld by the court, this would significantly reduce the level of fees the Board would pay to counsel, and there was a risk of counsel declining instructions in legal aid cases in the Court of Session. Board officials had already been in contact with the Scottish Government to urge engagement with the Faculty of Advocates to introduce a new table of fees.

The Committee noted the position.

DATE OF NEXT MEETING: Monday 31 May 2010 at 10.30a.m.

The meeting ended at 12.00 p.m.