

**THE SCOTTISH LEGAL AID BOARD
MINUTE OF A MEETING OF THE LEGAL SERVICES POLICY COMMITTEE
HELD AT 10.30 AM ON MONDAY 6 SEPTEMBER 2010 AT 44 DRUMSHEUGH
GARDENS, EDINBURGH**

Present: Joseph Hughes (Convener)
Iain Robertson
Bill McQueen
Sheriff Ray Small
Lindsay Montgomery
Graham Watson
Elaine Rosie

In attendance: Catriona Whyte, Head of Legal Services - Civil
Colin Lancaster, Director of Policy and Development (items 9-10 only)
Kieran Burke, Support to the Director of Legal Services and
Applications
Andrew McIntosh, Corporate Support Manager
Stuart Foster, Board Administrator

1. APOLOGIES FOR ABSENCE

Alastair Kinroy QC.

2. DECLARATIONS OF INTEREST

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

Iain Robertson declared a non-financial interest in relation to the legal aid review applications on the agenda in that he had been present at the meeting of the Legal Services Cases Committee when the applications had originally been considered. He did not leave the meeting.

Bill McQueen declared a non-financial interest in relation to the item on options for tribunal reform in that he had in the past been a lay member of the Employment Tribunal. He did not leave the room.

3. DRAFT MINUTE OF MEETING HELD ON 26 JULY 2010

The draft minute of the Legal Services Policy Committee held on 26 July 2010 was approved.

4. DRAFT MINUTE OF THE LEGAL SERVICES CASES COMMITTEE HELD ON 19 JULY 2010

The minute of the Legal Services Cases Committee held on 19 July 2010 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.

6. LEGAL AID APPLICATION

The Committee considered a paper by Alison Granger concerning an application to review a refusal of civil legal aid to judicially review a decision of the Board to refuse an application for civil legal aid for proceedings before the Supreme Court. The case related to the applicant's application for asylum.

After discussion, it was AGREED:

- the application for civil legal aid be referred to the Sheriff of Lothian and Borders at Edinburgh in terms of section 14 (4) of the Legal Aid (Scotland) Act 1986 for a final determination.

ACTION: CAW

8. LEGAL AID APPLICATION

The Committee considered a paper by Catriona Whyte concerning an application for civil legal aid in respect of judicial review proceedings referred to the Legal Services Policy Committee on review following refusal at first instance by the Legal Services Cases Committee. The applicant was seeking legal aid to petition for judicial review to challenge a number of grants of planning permission by Aberdeenshire Council.

In discussion, reference was made to Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002 and the view was expressed that the regulation applied because it appeared there were other persons who had the same interest in the judicial review as the applicant.

After discussion, it was AGREED:

- the application for civil legal aid be refused on the basis that the terms of regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002 applied;
- as a separate issue and unconnected to the case, the opinion of senior counsel be obtained on the wording of regulation 15 (b).

ACTION: CAW

9. DOMESTIC ABUSE (SCOTLAND) BILL: REQUEST FOR WRITTEN EVIDENCE BY THE JUSTICE COMMITTEE

The Committee considered a paper by Catriona Whyte and Colin Lancaster which set out draft written evidence to be provided to the Justice Committee on proposals in the Domestic Abuse (Scotland) Bill to remove the need for any financial eligibility tests where a pursuer lodges an application for civil legal aid seeking a protective order.

In discussion, members expressed concern about the significant costs to the Legal Aid Fund that would occur if the financial eligibility tests were removed: solicitors would be able to include a crave for a domestic interdict in divorce cases and so provide "free" divorces

After discussion, it was AGREED:

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10. OPINION IN NOTES OF OBJECTIONS

The Committee considered a paper by Douglas Haggarty concerning the Opinion of the Lord Ordinary in a Note of Objections to the decisions of the Auditor of Court in relation to the taxation of counsels' fees resulting from the Board being unable to meet counsels' expectations regarding fees claimed for providing civil legal aid in two cases in the Court of Session.

The crux of the Opinion was that the Auditor had carried out his task in both taxations with due regard to the statutory framework and used the fees prescribed by the Table of Fees as his starting point. Nevertheless, he had misdirected himself in law by stating that he considered the amount which he had allowed did not constitute reasonable fees for the work done by counsel, the Lord Ordinary being of the opinion that counsel were entitled to "reasonable" remuneration in the general, wider sense, rather than being restricted to what was deemed to be reasonable in line with the level of the prescribed fees from time to time. In sustaining the Note of Objections the Lord Ordinary had remitted taxation of the fees of counsel in both cases back to the Auditor for reconsideration in the light of his Opinion.

In the meantime, the Scottish Government was aware of the potential implications for the Fund arising from the Lord Ordinary's decision and the Board was assisting with the revision of the regulations in order to update the Table of Fees.

The Committee noted the position.

11. LEGAL AID FEE RATES IN PERJURY CASES

The Committee considered a paper by Steven Carrie concerning an application submitted by defence counsel and supported by the Faculty of Advocates in relation to a forthcoming high profile case which stated that in light of the extraordinary circumstances of the case the present fee arrangements did not represent reasonable remuneration. The Cabinet Secretary for Justice had asked for the Board's advice on whether it would be appropriate to elevate the category of perjury where the case was being prosecuted in the High Court of Justiciary.

The Faculty of Advocates sought an elevation of perjury as a category of offence from (c) to (a) with a corresponding increase in fees payable.

The Committee noted that one of the counsel acting in the case was a member of the Scottish Legal Aid Board (but not a member of the Legal Services Policy Committee) and, although other counsel involved had withdrawn from acting because of perceived "inadequacy" of the prescribed fee levels, the member had stated that he would not withdraw from acting. Accordingly, no Board member had any interest to declare in discussion of and decision on the issue before the Committee.

After discussion, it was AGREED to recommend to the Scottish Government that:

- in view of the uniqueness of the case it was preferable, rather than re-categorising perjury, that the Board be granted limited discretion to increase a fee where the prescribed fee was demonstrably not a reasonable fee in the circumstances of the case. Any increase in fees would be negotiated around the equivalent of an elevation in the category of offence, and the fee in the case concerned would be negotiated at around the category (b) level;
- the definition of an exceptional case should be tightly drawn so as to preclude inappropriate applications for exceptional case status, and only the Board should have the authority to grant exceptional case status.

12. FUTURE OPTIONS FOR PDSO

The Committee considered a paper by Colin Lancaster which set out the costs and benefits of a range of options for future development of the PDSO.

It was noted that, while the paper suggested that further development of PDSO could achieve significant benefits, any decisions on this were for Ministers.

After discussion, the Committee noted the position.

DATE OF NEXT MEETING: Monday 6 September 2010 at 10.30a.m.

The meeting ended at 12.30 p.m.