

THE SCOTTISH LEGAL AID BOARD

MINUTE OF A MEETING OF THE LEGAL SERVICES POLICY COMMITTEE HELD AT 10.00 AM ON MONDAY 29 MARCH 2010 AT 44 DRUMSHEUGH GARDENS, EDINBURGH

Present: Joseph Hughes (Convener)
Iain Robertson
David Nicol
Lindsay Montgomery
Graham Watson
Kieran Burke (item 13 only)

In attendance: Tom Murray, Director of Legal Services and Applications
Elizabeth Cushieri (item 8 only)
Nicola Cameron, Board Solicitor (item 9 only)
Kingsley Thomas, Head of Criminal Legal Assistance (item 7 only)
Kieran Burke, Support to the Director of Legal Services and Applications
James Mudie, Board Solicitor (item 13 only)
Colin Lancaster, Director of Policy and Development (items 11 and 12 only)
Stuart Drummond, Policy Officer (item 12 only)
Marie-Louise Fox, Head of Secretariat and Chief Executive's Office
Stuart Foster, Board Administrator

1. APOLOGIES FOR ABSENCE

Kenneth Ross, Elaine Rosie, Graham Bell.

2. DECLARATIONS OF INTEREST

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

Joseph Hughes declared a non-financial interest in relation to item 11 (Best Value Review: Mental Health) in that his firm undertook work in that field. The nature of the interest did not require him to leave the meeting.

In accordance with Board policy, David Nicol and Iain Robertson took no part in the discussion or decision relating to item 13 (Legal Aid Application) as they had been present at the meeting of the Legal Services Cases Committee when the application had originally been considered.

3. DRAFT MINUTE OF MEETING HELD ON 1 FEBRUARY 2010

The draft minute of the Legal Services Policy Committee held on 1 February was approved.

4. DRAFT MINUTE OF THE LEGAL SERVICES CASES COMMITTEE HELD ON 1 FEBRUARY

The draft minute of the Legal Services Cases Committee held on 1 February was noted. It was reported that the Legal Services Cases Committee's request for the Legal Services Policy Committee to address issues relating to the terms of the Civil Legal Aid for Defamation or Verbal Injury Proceedings (Scotland) Direction 2008 had been put on hold pending the outcome of a court challenge in England.

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 the Board's response to the Lord President's consultation on Judicial Conduct had been submitted.

6. DIRECTOR'S REPORT

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

7. GUIDANCE ON VERIFICATION OF FINANCIAL ELIGIBILITY OF ADVICE AND ASSISTANCE & ABWOR

The Committee considered a paper by Kingsley Thomas updating the position regarding the requirement for solicitors to verify the financial eligibility of clients they admitted to criminal advice and assistance and ABWOR, together with draft guidance for the profession.

It was reported that an opinion of counsel had been requested and received, and it supported Board officials' view on when it was "necessary" for solicitors to see financial verification before admitting clients to criminal advice and assistance or criminal ABWOR. The draft guidance was based on counsel's opinion, and set out the exceptional circumstances in which obtaining verification was not necessary or practicable.

In discussion, the view was expressed that solicitors should not undertake work for clients who had not provided verification and, if they did, it was appropriate that they should bear the financial risk of doing so. However, consideration could be given to the possibility of introducing a small capped fee to cover urgent work for a client without verification.

After discussion, it was AGREED:

- to accept and adopt the terms of counsel's opinion;
- to approve the draft guidance subject to some minor re-wording, condensing it to four pages in length, adding an introductory summary, and making more reference to legal aid online, with the revised version to be emailed to members;
- to share the revised guidance with the Law Society on the basis that the Board supported the principle of requiring verification but was keen to make it practically workable for solicitors to implement, and in particular that the requirement for verification should be applied equally across the profession.

ACTION: KT

8. CHILDREN HEARINGS (SCOTLAND) BILL: REQUEST FOR WRITTEN EVIDENCE

The Committee considered a paper by Elizabeth Cuschieri, together with draft written evidence, responding to a request by the Scottish Government Education, Lifelong Learning and Culture Committee for the Board to provide written evidence regarding the general principles of the Children's Hearings (Scotland) Bill.

It was noted from the draft response that there were a number of legal aid issues requiring to be brought to the Scottish Government's attention. These included the long-standing difficulties concerning the payment of safeguarders and curators *ad litem*, which the Bill provided an opportunity for the Government to clarify and resolve.

After discussion, it was AGREED:

- to insert a paragraph commenting on the Financial Memorandum and advising that the Board provided estimated costs per case, but had concerns that the Government's estimated number of cases could be too low;
- to expand and explain further section 7 of the response, to the effect that the Board could not envisage a situation in which counsel would be required to appear before a children's hearing, that it should be the Board that takes the decision on whether public funds should be used to employ counsel and to further clarify and explain the Board's concerns regarding the wording of s78 (3) (c) of the Bill;
- in relation to safeguarders and curators to bring out the cost consequences;
- amend the wording of section 8 to reflect the Board's view.

ACTION: EEC

9. OVERVIEW OF CHANGES TO THE TRIBUNAL STRUCTURE

The Committee considered a paper by Nicola Cameron which set out how the legislative changes to the tribunal structure made by the Tribunals, Courts and Enforcement Act 2007 would affect the way state funded representation was provided before the new tribunals.

It was noted that the interim changes had been intimated to the profession. A further mailshot was being drafted to highlight the introduction of the new regulations and detailed guidance for the profession was being prepared. These would be shared with the Committee on completion. Thereafter, arrangements would be made to monitor the position and address any concerns raised by the profession.

The Committee noted the position.

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

The Committee considered a paper by Tom Murray which set out proposals for changing the approach to the sampling of cases for review under the Civil Quality Assurance Scheme, together with options for effecting such change.

In overall terms, for all publicly funded work carried out by firms, the current sampling system provided relatively low coverage. It was therefore proposed to restructure the initial file reviews to provide a more representative sample of the work done by firms and focus more on "at risk" areas of legal assistance.

It was reported that, since the issue of the paper, further information had been obtained which resulted in the recommendation of a fourth option. This was similar to option 2, but retained the requirement to sample a minimum of 5 files should the percentage approach not produce a meaningful result.

In discussion, it was noted that the cycle could not be started as proposed without amendment to the Memorandum of Understanding.

After discussion, it was AGREED:

- to approve an enhanced version of option 2 (i.e. to utilise funds earmarked but unspent as a result of the delayed start to the next cycle and extending that cycle from three to three and a half years, so covering 10% of at risk files and 4.5% of the remainder each year, with the proviso that a minimum of 5 files were sampled);
- for the next cycle, consideration be given to carrying out a small number of random reviews of firms that had passed the initial file review as a means of encouraging maintenance of the standard already achieved.

ACTION: TCM

11. BEST VALUE REVIEW: MENTAL HEALTH

The Convener having declared an interest, David Nicol took the Chair for this item.

The Committee considered a paper by Kieran Burke reporting on work undertaken and conclusions reached as part of the Best Value review of mental health. The purpose of the review was to identify if persons subject to the provisions of the relevant mental health legislation could access legal representation in a manner that represented best value for the Legal Aid Fund.

It was noted that solicitors' travel costs constituted a significant proportion of the yearly escalating costs of the public funding of legal services in the mental health field, and that this in part was attributable to a lack of provision, particularly in the Highlands, because the work was seen as insufficiently well paid. However, it also appeared that not all firms working in the field were optimising the use of local agents as a means of minimising travel costs. There were further concerns relating to the quality of legal advice, assistance and representation being provided, the cost of independent medical reports, and possible perverse incentives to proceed with hearings and appeal decisions.

In discussion, reference was made to the large amount of staff time which had been put into conducting the review, and the efforts which had already successfully gone into containing firm costs in the mental health field. Views were expressed that a system of block fees was preferable to contracting at this stage.

After discussion, it was AGREED:

- further analysis be carried out with the aim of changing fee structures to pay less for travel and more to incentivise firm behaviour to undertake mental health work in the Highlands through, for example, fixed fees;
- the Inverness CLAO proceed with allocating and recruiting staff to provide mental health legal services;
- consideration of contracting with mental health practitioners be deferred to the second stage of the review;
- the review work be developed into an action plan, incorporating priorities and monitoring arrangements, with a view to being shared with the Scottish Government;

- draft guidance for practitioners to be reviewed by Joseph Hughes and Ronnie Franks.

ACTION: KB

12. BEST VALUE REVIEW: ASYLUM AND IMMIGRATION

The Committee considered a paper by Stuart Drummond which reported on initial work undertaken as part of the immigration and asylum best value review, the emerging findings and proposals for action to address the issues identified.

It was reported that there had in fact been a threefold increase in grants at Dungavel - not sevenfold as stated in the paper.

It was noted that work on the review suggested that the current state of legal aid for asylum and immigration matters, with the exception of Dungavel, did not present a clear and wide-ranging cause for concern. Nevertheless, this was an area involving considerable public expenditure and a vulnerable client group, and there were issues, as set out in the paper, that needed to be addressed.

After discussion, it was AGREED:

- the recommended actions be taken forward in the form of an action plan, incorporating priorities and monitoring arrangements, with a view to being shared with the Scottish Government.

ACTION: SD/CL

13. LEGAL AID APPLICATION

In order for the meeting to remain quorate following declarations of interest in the application by two members of the Committee, members co-opted Kieran Burke, Legal Assistant to the Director of Legal Services and Applications onto the Committee for this item.

The Committee considered a paper by James Mudie concerning an application to review the decision of the Legal Services Cases Committee to refuse an application for legal aid to appeal a decision of the Inner House of the Court of Session to the Supreme Court.

After discussion, it was AGREED:

- to adhere to the decision of the Legal Services Cases Committee to refuse the application.

ACTION: JM

DATE OF NEXT MEETING: Monday 26 April 2010 at 10.30a.m.

The meeting ended at 12.20 p.m.