

DRAFT

THE SCOTTISH LEGAL AID BOARD

**MINUTE OF A MEETING OF THE LEGAL SERVICES POLICY COMMITTEE HELD
AT 10.30 AM ON MONDAY 18 FEBRUARY 2008 AT 44 DRUMSHEUGH GARDENS,
EDINBURGH**

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

In attendance: Tom Murray, Director of Legal Services and Applications
Elizabeth Cuschieri, Board Solicitor (items 8-9 only)
Helen Bell, Board Solicitor (item 7 only)
Catriona Whyte, Head of Legal Services - Civil (item 11 only)
Philip Shearer, Board Solicitor (item 10 only)
Eleanor Campbell, Legal Support to the Director of Legal Services
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.

Joseph Hughes, David Nicol, Tom Murray and Iain Robertson declared interests in relation to item 7 (House of Lords application). Joseph Hughes also declared an interest in relation to item 9 (Safeguarders and Curators in Children's cases).

3. DRAFT MINUTE OF MEETING HELD ON 17 DECEMBER 2007

The draft minute of the Legal Services Policy Committee held on 17 December 2007 was approved.

4. DRAFT MINUTE OF THE LEGAL SERVICES CASES COMMITTEE HELD ON 17 DECEMBER 2007

The draft minute of the Legal Services Cases Committee held on 17 December 2007 was noted.

5. MONTHLY 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. DIRECTOR'S REPORT

The Committee considered a paper by Tom Murray reporting on matters of interest which had arisen since the previous meeting. The following matters were reported on: the civil register; civil quality assurance; and the decision of the Sheriff Principal to refuse a firm's application for legal aid to judicially review the Board in relation to prisoners' voting rights.

The Committee noted the position.

7. HOUSE OF LORDS APPLICATION (Ref. 7813128307)

The Committee considered a paper by Helen Bell recommending that the Committee adhere to an earlier decision of the Legal Services Cases Committee to refuse an application for legal aid to appeal a decision of the Court of Session to the House of Lords. The case related to whether the applicant's daughter required a co-ordinated support plan in terms of the relevant legislation.

The review application was supported by an opinion of counsel, which argued that provision of the support plan would have practical benefits for the child.

In discussion, members were of the view that the plan would have limited benefit for the child. Consideration was given to the extent to which the case raised wider issues. However, it was decided that the case in question was not a suitable vehicle for doing so because of the lack of prospects of success of the action proposed.

After discussion, it was AGREED:

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

ACTION: HB

8. CONSULTATION: DRAFT LOOKED AFTER CHILDREN (SCOTLAND) REGULATIONS

The Committee considered a paper by Elizabeth Cuschieri which considered and set out a draft response to a Scottish Government (SG) consultation paper inviting views on proposed regulations relating to looked after children - i.e. children in care.

It was noted that the new regulations would seek to make the child and his or her needs the starting point of the legislation, and would apply to all looked after children and their carers. The SG saw independent advocates as a means of involving looked after children in decisions about their care.

Discussion took place regarding the status and function of independent advocates (IAs) and the possible implications for legal aid expenditure.

It was noted that the IAs' Association defined the IA's role as an information provider who could not give legal advice. This meant that the appointment of an IA would not necessarily preclude children, their parents or carers, and other relevant persons from seeking advice from a solicitor, at potential cost to the Legal Aid Fund (although it was recognised that the regulations relating to the availability of other rights and facilities could still apply, depending on what the solicitor was being called on to do).

It was suggested that if these regulations came into force they should be classed as diagnostic advice and assistance in order to ensure that legal assistance was provided only where legal advice was sought and required.

After discussion, it was AGREED:

- to amend the proposed response to reflect the issues raised in discussion and to seek clarification on the role of IAs as envisaged by the SG (without which it was not possible to estimate the potential impact on legal aid expenditure) and whether the costs of such advocates would be grant funded, as they could not be funded by way of legal aid.

ACTION: EEC

9. SAFEGUARDERS AND CURATORS IN CHILDREN'S CASES

The Committee considered a paper by Elizabeth Cuschieri which set out the current difficulties surrounding the appointment and payment of safeguarders and curators *ad litem*, and suggested a way forward.

It was noted that there was confusion about the status and function of safeguarders and curators, the appointment of solicitors to act in dual capacities in children's cases, and the rules and guidance relating to this area.

Despite the legislation requiring the appointment of a safeguarder to safeguard the interests of the child, and despite the fact that safeguarders and curators have the same functions, some Sheriffs, particularly in the West, were appointing curators instead of, or in addition to, safeguarders. There appeared to be no justification, or scope, for such appointments. There is a statutory payment mechanism for safeguarders but there is none for curators *ad litem*. Work carried out as a curator was not the provision of legal services by a solicitor and could not be paid from the Fund, as it did not fall under the definition of children's legal aid. More often than not, the person appointed to act as safeguarder and/or curator was a practising solicitor who chose to act as both safeguarder/curator and solicitor. There were also instances of solicitors appointed as safeguarders instructing other solicitors to act for them and apply for legal aid.

In discussion, the view was expressed that these issues should be brought to the attention of Sheriffs Principal and the Sheriffs Association. It was not clear whether or not the guidance contained in the Children's Legal Assistance Handbook was contrary to the child care and maintenance rules which prevent a solicitor acting as both a safeguarder and solicitor to a child. There also needed to be clearer guidance to the profession about this, including what work could and could not be charged for if carrying out a dual role.

After discussion, it was AGREED:

- to clarify the position in relation to the statutory rules, and produce draft detailed guidance to be inserted into the current children's legal assistance Handbook for consideration at the next meeting;
- thereafter, to bring any outstanding issues to the attention of the Sheriffs Principal, the Sheriffs Association and the Scottish Government, with the SCRA to be informed of any new approach, and with further consultations take place with the Scottish Government regarding legislative changes in the longer term.

ACTION: EEC

10. CONSULTATION: DRAFT CODE OF PRACTICE – ADULT SUPPORT AND PROTECTION

The Committee considered a paper by Philip Shearer which considered issues arising from a Scottish Government consultation on a draft Code of Practice for persons exercising functions under the Adult Support and Protection (Scotland) Act 2007, and set out a proposed response.

It was AGREED to approve the response as proposed, subject to: (a) highlighting the major problems and continuing difficulties with payment of safeguarders in other proceedings; and (b) whilst conveying positively the Board's willingness to ensure access to justice for persons appearing from custody in cases under the 2007 Act, to emphasise the need for appropriate regulatory provision to be put in place.

ACTION: PS

11. CIVIL LEGAL AID SIMPLIFICATION

The Committee considered a paper by Catriona Whyte which updated the position on the development of new forms to be used for civil legal aid applications.

After discussion, it was AGREED:

- to list alphabetically the list of experts on the sanctions application form, increase the amount for accountants for valuation of businesses in family cases, and otherwise approve the forms as presented;
- not to provide details of an applicant's address to an opponent but only to give the applicant's name and details of their solicitor;
- to monitor costs in respect of templated experts once the changed process was in place.

ACTION: CAW

12. SUMMARY CRIMINAL JUSTICE REFORM

The Committee considered a paper by Tom Murray concerning the latest proposals for the summary criminal legal assistance reforms.

It was reported that Board representatives had met with representatives of the Law Society and local faculties to discuss further payment options in light of the changes to the system model figures provided by the Crown in January.

The preferred option now emerging was to move to pre-trial case disposal fees in the Sheriff and Stipendiary courts. For the JP courts, the Society preferred to keep the differential between ABWOR and legal aid, as opposed to a case disposal fee. There were pros and cons with either approach. However, the Society's proposal, with a lower ABWOR figure of £110, would not remove the perverse incentive to plead not guilty and apply for legal aid.

In discussion, support was expressed for a differential fee system involving ABWOR and summary criminal legal aid in the JP courts, provided that the differential between each of the payments was appropriately balanced to promote removal of the perverse incentive to plead not guilty.

A paper was being finalised that would be circulated to the profession to enable consideration of the revised proposals in advance of a final meeting between the Cabinet Secretary and representatives of the Scottish Government, the Law Society, local faculties and the Board, and a further report would be made in due course.

The Committee noted the position.

DATE OF NEXT MEETING: Monday 31 March 2008 at 10.30 am.

The meeting ended at 12.10 pm.