

THE SCOTTISH LEGAL AID BOARD

**MINUTE OF A MEETING OF THE LEGAL SERVICES POLICY COMMITTEE HELD
AT 10.30 AM ON MONDAY 28 JULY 2008 AT 44 DRUMSHEUGH GARDENS,
EDINBURGH**

Present: Kenneth Ross (Convener)
Graham Bell
Lindsay Montgomery
Graham Watson
David Nicol
Iain Robertson

In attendance: Douglas Haggarty, Head of Legal Services (Technical)
Ian Middleton, Director of Audit and Compliance (item 8 only)
Elizabeth Cuschieri, Board Solicitor (item 9 only)
Kingsley Thomas, Head of Criminal Legal Assistance (items 10-11 only)
Owen Mullan, Head of Legal services – Criminal (item 13 only)
Stuart Foster, Board Administrator

1. APOLOGIES FOR ABSENCE

Elaine Rosie, Joseph Hughes.

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 28 APRIL 2008

The draft minute of the Legal Services Policy Committee held on 28 April 2008 was approved.

4. DRAFT MINUTE OF MEETING HELD ON 23 JUNE 2008

Subject to inserting "single occupancy" in relation to the use of porta-potties at item 11 (Approach to "Slopping Out" Cases) the draft minute of the Legal Services Policy Committee held on 23 June 2008 was noted.

5. DRAFT MINUTE OF THE LEGAL SERVICES CASES COMMITTEE HELD ON 23 JUNE 2008

The draft minute of the Legal Services Cases Committee held on 23 June 2008 was noted.

6. ACTION POINTS

The Committee considered a paper by Tom Murray setting out progress with the implementation of actions arising at the previous meeting.

The Committee noted the position.

7. 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: Civil Register; Quality Assurance; Childrens Issues; Scottish Court Service Court Unification Programme; and Reform of Summary Criminal Legal Assistance.

It was reported that the level of not guilty pleas at Glasgow Sheriff Court had dropped by 20% since the introduction of the summary criminal reforms.

After discussion, it was AGREED:

- future reports on the Civil Register indicate changes in the numbers of firms and branches from the previous report;

ACTION: TCM

- otherwise, to note the position.

8. REVISED CODE OF PRACTICE FOR CRIMINAL LEGAL ASSISTANCE

The Committee considered a paper by Ian Middleton which proposed changes to the Code of Practice made necessary as a result of the summary criminal reforms.

It was noted that a revised version of the Code had been sent to the Scottish Government in July 2007 for approval, but no response had been received and the Code was therefore still a draft. The proposed changes resulting from the summary criminal reforms did not require further consultation with the profession.

After discussion, it was AGREED:

- subject to deleting reference to solicitor advocates at item 1.2 and breaking up the sentences at items 3.8.1 and 4.5.6.1, to approve the amendments proposed;

ACTION: IGM

- Douglas Haggarty write to Joseph Hughes to obtain his approval of the revised Code.

ACTION: JDH

- thereafter, to submit the revised Code to the Scottish Government for approval.

ACTION: IGM

9. BRIEFING NOTE FOR SHERIFFS

The Committee considered a paper by Elizabeth Cuschieri which presented a draft briefing note for Sheriffs on the granting and termination of children's legal aid.

It was noted that it was for the Sheriff, and not the Board, to grant and to terminate children's legal aid (except for appeals to the Sheriff Principal and Court of Session where legal aid applications were made to the Board).

As a result of uncovering a serious fraud involving children's legal aid, together with the increasing number of very expensive children's cases and concerns expressed by Sheriffs Principal and the Sheriff's Association, the Board had been reviewing the operation of children's

legal aid and considering ways to minimise future risk of fraud and control increasing legal aid costs, whilst ensuring its availability.

It had become apparent that some Sheriffs were not entirely clear of the statutory tests that required to be applied in relation to applications for children's legal aid and, in addition, that some Sheriffs were unaware that they had termination powers if, for example, an assisted party conducted themselves in an unreasonable manner. Sheriffs Principal had requested a Briefing Note from the Board detailing the statutory tests for granting children's legal aid and the circumstances where a Sheriff could terminate children's legal aid.

The Committee expressed satisfaction with the clarity of the draft Briefing Note, and it was AGREED:

- to issue it to Sheriffs Principal, the Sheriffs' Association and the Judicial Studies Group;

ACTION: EEC

- Lindsay Montgomery consult with Sheriff Principal Bowen on how best to distribute it to Sheriffs.

ACTION: LM

10. QUALITY ASSURANCE SCHEME FOR CRIMINAL LEGAL ASSISTANCE

The Committee considered a paper by Kingsley Thomas which updated the position on the development of the quality assurance scheme for criminal legal assistance and set out a proposed timetable for development and implementation.

It was noted that the Criminal Quality Assurance scheme would involve the use of peer reviewers reporting to a new Criminal Quality Assurance Committee comprised of 3 members from the Board, 3 from the Law Society, and 3 lay members. The committee would be convened by a legally qualified Board member and administered by Board officers.

The scheme and the peer review process would be based on the Quality Assurance Scheme for civil legal assistance. However, the criminal scheme would be based on the Board's legislation, and not the Law Society's rules. As such, unlike the civil scheme, the criminal scheme would be administered and run by the Board, with the Criminal Quality Assurance Committee being set up as a committee of the Board. The criminal scheme would focus on individual solicitors unlike the civil scheme which registered and monitored firms of solicitors.

The process would involve routine reviews of solicitors' case files being undertaken by the peer reviewers against criteria being developed and agreed with the Law Society for summary, solemn and criminal appeal cases.

The proposed timetable envisaged implementation of the scheme in January/February 2009.

After discussion, it was AGREED:

- to approve the timetable as proposed.

ACTION: KT

11. REVIEW OF UNDUE HARDSHIP TEST FOR SUMMARY AND SOLEMN CRIMINAL LEGAL AID

The Committee considered a paper by Kingsley Thomas which -set out the current position regarding the undue hardship test that was applied when the Board considered applications for summary criminal legal aid, and how this could be developed, both as a basis for the test to be applied for solemn criminal legal aid, (when the Board took on responsibility for considering these applications), and for bringing the tests more into line with the A&A/ABWOR financial tests.

It was noted that a process for applying the undue hardship test for solemn criminal cases would be worked up and consulted on over the autumn. There was an opportunity to address the differences in approach between the keycard financial eligibility test for criminal A&A / ABWOR and the current hardship test for summary criminal legal in the forthcoming Criminal Justice Bill in early 2009. This would enable changes to be made to ensure more consistent financial assessment tests in all summary criminal cases, as well as affording the opportunity to look at other related issues for possible change.

The paper set out a proposed timetable for developing the review of the undue hardship tests. A report would be made to the Committee following consultation in December.

After discussion, it was AGREED:

- subject to removing the mention of “laying” (of regulation changes) from the timetable, to approve the timetable as proposed.

ACTION: KT

12. CIVIL COURTS REVIEW

The Committee considered a paper by Catriona Whyte summarising the key issues raised in responses to the Scottish Civil Courts Review that concerned civil legal aid.

All responses to the consultation had now been lodged and an analysis of the responses carried out to date, together with a selection of more detailed comments, had been sent to the Chief Executive in his role as a member of the Civil Courts Review Policy Group to allow him the opportunity to consider the comments made by respondents relating to civil legal aid to assist the Group with its review.

A number of respondents had raised civil legal aid issues, particularly in relation to the effect of the availability of legal advice and assistance and legal aid on access to justice, and these included:

- “cherry picking” of work by firms that advertised themselves as undertaking legal aid work;
- modification of expenses;
- reduction in the number of people eligible for civil legal aid in terms of their financial position
- low legal aid fee rates
- the clawback provisions in relation to family cases
- difficulties with obtaining sanction for experts
- the process for seeking civil legal aid was overly bureaucratic

The Committee noted that Board officials would arrange to meet those who had raised concerns about the civil legal aid processes, and continue to examine analysed responses to determine if any further action was needed to correct misapprehensions about the operation of civil legal in Scotland, and that this would all be taken forward as an integral part of the Civil Simplification project.

13. SANCTION FOR COUNSEL IN CRIMINAL CASES

The Committee considered a paper by Owen Mullan regarding a review of the Board's policies and guidance in connection with the sanctioning of counsel in criminal cases.

It was noted that a project had been established to develop an approach to reviewing how the Board dealt with applications for counsel, how counsel were paid, and to the guidance on making sanction applications for counsel. The approach would be developed after internal research and analysis, which would be evaluated by a small pilot group, followed by consultation with key stakeholders in the autumn, and with a view to revised guidance being in place by the end of the year. An initial report on progress would be made to the September meeting of the Committee.

In discussion, views were expressed in relation to the appropriateness or otherwise of solicitors taking cases that they did not feel competent to run and then seeking sanction for counsel.

After discussion, it was AGREED:

- to approve the approach proposed, with Graham Bell and Joseph Hughes to be involved in the pilot exercise.

ACTION: OM

ANY OTHER BUSINESS

Reference was made to a recent newspaper article in which the complainer had criticised the award of legal aid granted to the accused. The view was expressed that it would have been helpful if the Board's response, as quoted in the article, had been fuller.

The Chief Executive would look into the circumstances of the case.

ACTION: LM

DATE OF NEXT MEETING: Monday 25 August 2008 at 10.30a.m. **IF REQUIRED.**

The meeting ended at 11.40 am.