

THE SCOTTISH LEGAL AID BOARD

MINUTE OF A MEETING OF THE LEGAL SERVICES POLICY COMMITTEE HELD AT 10.30 AM ON MONDAY 29 SEPTEMBER 2008 AT 44 DRUMSHEUGH GARDENS, EDINBURGH

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

In attendance: Tom Murray, Director of Legal Services and Applications
Elizabeth Cuschieri, Board Solicitor (item 7 only)
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.

Kenneth Ross and Graham Bell declared non-financial interests in relation to item 9 of the draft minute of the meeting of the Legal Services Cases Committee held on 28 July 2008. The nature of their interests was such that they deemed it unnecessary to withdraw from the meeting.

3. DRAFT MINUTE OF MEETING HELD ON 28 JULY 2008

Subject to substituting *complainer* for "defendant" under Any Other Business, and recording Tom Murray's apologies, the draft minute of the Legal Services Policy Committee held on 28 July 2008 was approved.

4. DRAFT MINUTE OF THE LEGAL SERVICES CASES COMMITTEE HELD ON 28 JULY 2008

The draft minute of the Legal Services Cases Committee held on 28 July 2008 was noted.

5. 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.

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: civil register; quality assurance; counsel's fees; commencement of LPLA (Scotland) Act 2007 provisions; reform of summary criminal legal assistance. In addition, reference was made to the removal by the faculty of Advocates of the "mixed doubles" rule, and a report was made on progress on the Law Society's section 31 decision.

After discussion, it was AGREED:

- consideration be given to providing additional guidance to the profession over the concerns expressed about the requirement for vouching of income in ABWOR cases where the clients were aged sixteen or seventeen, or were appearing from custody where a plea had been entered and the case had been resolved (the latter being likely to encourage the solicitor to enter a not guilty plea in order to safeguard payment);
- such guidance should seek to make clear what steps a solicitor required to take if the client later failed to co-operate and how Board staff should handle the issue;

ACTION: TCM

- otherwise, to note the position.

7. STRENGTHENING THE FUTURE: A CONSULTATION ON THE REFORM OF THE CHILDREN'S HEARINGS SYSTEM

The Committee considered a paper by Elizabeth Cuschieri which considered the terms of the consultation and set out a proposed response.

It was noted that the consultation proposed a radical restructure of the current Children's Hearings system that had not been suggested in earlier consultations. The consultation recognised that substantial legislative change would be required, along with changes in practice.

Subject to the outcome of the consultation, the Scottish Government intended to introduce a Bill to establish a new national body, bringing together the functions currently carried out by the Scottish Children's Reporter Administration, 32 Children's Panels and associated bodies, the Scottish Government and local authorities, and to ensure that children's rights were properly upheld within the Children's Hearings system.

In discussion, concern was expressed about the response welcoming the proposal to subsume legal representatives within the proposed new national body: to be effective, it was considered essential that legal representatives were seen to be entirely independent and therefore ECHR compliant. In relation to the passing of responsibility for payment of legal representatives to the Board, the response should not indicate a preferred option but should simply explain the options available in this respect. It should also point out that if payment responsibility was to fall upon the Board then there would inevitably be consequences for the Legal Aid Fund, and that the Board would be happy to assist the Government with any future forecasting of increased costs. The figures provided in the draft response were considered to be excessive and required to be amended accordingly. It should also be pointed out that the requirement for representation should be expected to be infrequent, and that there should be a mechanism for deciding on the need for representation. It should be indicated that the Board had at the request of Sheriffs Principal issued written guidance for sheriffs on granting and terminating children's legal aid. The view of the Committee was that the power to grant legal aid should be moved from sheriffs to the Board and it was anticipated that there would be little, if any, opposition to this from members of the Justiciary. It was also stressed that it was important for the Board to be

represented on the anticipated Strategic Project Board which the Government intended to set up to oversee the development of the legislation.

After discussion, it was AGREED that:

- the proposed response be amended in terms of the discussion and the amended response submitted to the next meeting.

ACTION: EEC

8. UNDUE HARDSHIP TEST FOR SOLEMN CRIMINAL LEGAL AID

The Committee considered a paper by Tom Murray which presented a proposed approach to the assessment of the undue hardship test in solemn criminal legal aid.

The aim of the proposals was to establish a process that was seen to be fair and broadly consistent with other aid types, that assessed actual ability to pay and recognised the higher costs and more serious implications for applicants in solemn cases. As a starting point, it was proposed to adopt the agreed methodology for assessing undue hardship in summary cases. This would allow the Board to approach solemn and summary cases consistently and in a way that was familiar to those applying the process. Essentially, the proposals refined the summary approach by adjusting the capital threshold, the assessment of eligibility where the income and capital thresholds were exceeded, and the approach to calculating the cost of a case. It was proposed to consult on the proposals later in the year.

In discussion, there was recognition of the difficulty associated with using civil legal aid as a proxy for the proposed approach to solemn when it came to taking account of the contributory element involved in the assessment of financial eligibility for civil legal aid. On the one hand, because the undue hardship test was based on ability to meet the cost of a case, it was appropriate to take into account the monetary equivalent of the contribution; on the other hand, there was no legal basis on which to levy a contribution on an assisted person in receipt of criminal legal aid for solemn or summary cases. It was therefore important that there should be no implied suggestion of contributions or computation periods; the monetary equivalent calculation was not about getting money back, it was an extension of the ability to pay. On an associated issue, applying a standard condition to a grant which could result in termination of that grant where a guilty plea was entered could be seen as an incentive to proceed to trial.

It was AGREED:

- to proceed on the basis of the agreed methodology for summary criminal legal aid, but:
 - remove any adverse association with contributions or computation periods;
 - provide illustrative examples of how the approach would affect individual applicants in a range of scenarios; and
 - remove reference to possible termination where a guilty plea was entered and instead monitor such circumstances post-implementation to gauge whether special conditions should be applied;
- to resubmit an amended report for the next meeting covering these issues.

ACTION: TCM

DATE OF NEXT MEETING: Monday 20 October 2008 at 10.30a.m.

The meeting ended at 12.10 pm.

