



## CASE HANDLING PROCEDURES

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### 2.0 STAGE 2 REVIEW

**NB: not all the procedures in this section are prescriptive: in most areas a level of discretion is afforded to legal officers and Committees in their conduct of investigations, to account for the individual circumstances in each case.**

- 2.1 Where the Board decides to accept an application for a stage 2 review, the Chief Executive, taking into account the workload of each legal officer and each Committee, confirms the allocation of the case to a legal officer (which will normally be the legal officer to whom the application was allocated initially) and a Committee.
- 2.2 **Within three working days from the confirmation of the allocation**, the legal officer emails (or writes to) the applicant and their representative, telling them that the application has been accepted, and allocated to them, for a stage 2 review and enclosing the Commission's terms of service.
- 2.3 The administration officer emails the Crown Office and the single point of contact at Police Scotland (SPOC at PS), and emails (or writes to) the solicitors

who hold the defence papers, to request that they preserve, for the duration of the Commission's review, the case papers that they hold.

- 2.4 The legal officer carries out an examination of the papers the Commission has obtained, identifying any further papers that require to be obtained. Early requests for papers from Crown Office, Police Scotland and trial agents should be made and, where appropriate and subject to the agreement of the Chief Executive or committee, transcription of the trial proceedings should be ordered. Where there is no note of the evidence in a summary case, the legal officer may, after obtaining the agreement of the Chief Executive or Committee, write to the presiding sheriff or JP requesting a note of the evidence. (Reminders for transcripts should be issued after four weeks and for papers after two weeks (in writing) and then by telephone after three weeks.) The legal officer will conduct any other preliminary inquiries – eg, they may interview the applicant at this stage. All papers received should be downloaded as necessary to preserve them and saved to the Commission's case management system.
- 2.5 In most cases, the legal officer prepares a case plan, in which they set out the case history, the summary grounds of review and their recommendations about how to address the grounds of review. The case plan reproduces the information relative to reasonable adjustments (see para 1.5 of Stage 1 Review) and these matters are kept under review throughout the stage 2 review. The case plan is sent to the Committee for discussion.
- 2.6 In some cases – where, for example, the legal officer indicates that the grounds of review can be addressed without the need to prepare a case plan – the legal officer simply proceeds to prepare the draft statement of reasons to refer or not to refer the case to the High Court for determination (see para 2.14 below and **Stage 3**).

### Committee Meetings

- 2.7 Committees are made up of three or four of the Board Members, the Chief Executive and the legal officer. The purpose of Committee meetings is to allow the Members to whom the case is allocated, the Chief Executive and the legal officer to discuss the progress of a case.
- 2.8 The first Committee meeting takes place **within two months from the date of allocation to the legal officer**. The Committee considers the case regularly – and a maximum of **three months** elapses between each calling of the case at the Committee.
- 2.9 The legal officer prepares a committee report for each meeting to update the Committee on the progress of the review and particular lines of inquiry. The Members and the Chief Executive assist and advise the legal officer on strategic matters, including whether expert witnesses need to be instructed, as well as suggesting further lines of inquiry. The committee report also addresses any relevant unusual risks pertaining to the case (see also para 1.16 of the Stage 1 Process) as a means of keeping such issues under review.

- 2.10 Where the legal officer identifies a particularly complex issue in a case, they consult with the Chief Executive, who may request the assistance of a particular Member. The committee may also refer the issue/ case to the Commission's next Board or Policy meeting for discussion. Where any policy issues arise, the matter may be referred to the Commission's next Board or Policy meeting.
- 2.11 Decisions of the Committee are noted in the committee minutes. After each meeting, the legal officer emails (or writes to) the applicant and their representative to update them about the progress of the case.
- 2.12 In addition to his role on the Committee, the Chief Executive reviews the progress of each case after it is allocated to a legal officer, monitoring that both the progress and quality of review are in line with the Commission's set targets, aims and objectives.
- 2.13 The senior administration officer updates monthly case target sheets, which the Chief Executive reviews as part of the allocation process and general performance management arrangements.
- 2.14 At the end of the Committee process, the legal officer prepares a draft statement of reasons to refer or not to refer the case to the High Court. **In drafting the statement of reasons, the legal officer considers whether the names of any individuals in it should be anonymised.**
- 2.15 The document is sent to the Committee for consideration. The Committee decides whether the draft statement of reasons is suitable to be placed before the Board for its consideration.
- 2.16 Where it is a conviction (or conviction and sentence) case, the Commission aims for the Board to consider the statement of reasons **within eight months from the date of the confirmation of the allocation of the case to the legal officer.** Where it is a sentence-only case, the Commission aims for the Board to consider the statement of reasons **within four months from that date.**

### Prison Visits and Video-links

- 2.17 Having regard to the Commission's environmental and personal safety policies, where a legal officer intends to interview a prisoner they should, by preference do so by video-link. In exceptional cases this may be done in person. In either case they follow the protocol that has been agreed between the Commission and the Scottish Prison Service (SPS).
- 2.18 In summary, the legal officer telephones or emails the relevant prison in advance of the proposed interview date, in order to book an interview or video-conference: the contact numbers/email addresses can be found at [Prisons \(sps.gov.uk\)](https://www.prisons.gov.uk) (HMP Barlinnie operate a drop-in arrangement for in-person visits, but for video-conferences and in all other prisons booking is required at least 24 hours and no more than five days in advance and are subject to availability.)

- 2.19 The legal officer, either by letter or through *Email a Prisoner - the hassle free way to keep in touch*, tells the prisoner about the visit date and time (remembering that the emails are read by SPS staff and must not contain any case related information).
- 2.20 Video-links are operated by the Scottish Legal Aid Board (SLAB) using WEBEX technology. The prison emails a unique link and PIN in advance of the meeting. (The relevant app may be installed on a mobile phone; it is also installed on the iPad of the DOCS). A valid ID is required for each type of visit.

### Evidence at Trial

- 2.21 Where it has been agreed that a transcript of evidence is required the legal officer asks the SPOC at JO to instruct transcribers.
- 2.22 Where the legal officer considers that they require to listen to the evidence, they email the SPOC at JO, or, where applicable, the appropriate sheriff court, telling them that they wish to attend Justiciary Office/sheriff court to listen to the recording of the evidence.

### Papers from an Individual or Organisation

- 2.23 Where the legal officer considers that an individual or organisation, including a solicitor or counsel, may have papers which may assist the investigation of the case they will email or write to the person or organisation to request the papers. Requests for papers from a solicitor or counsel will be accompanied by the signed mandate page from the application form and the FAQs for solicitors.
- 2.24 Where the Commission does not receive a response **within 21 days from the date of the initial email/letter** the legal officer may send a reminder letter by recorded delivery, telling the person about the Commission's statutory power to apply to the High Court for an order requiring the individual/ organisation to produce the papers (under s194I of the Criminal Procedure (S) Act 1995). Alternatively, the legal officer may first issue a reminder email or letter which does not refer directly to this power, or, where contact details are known, they may telephone the individual or organisation. The legal officer will report the matter to the committee if no response is received or if papers are not forthcoming.
- 2.25 Any failure of the individual or organisation to respond to legal officer's request – or where the individual/organisation has refused to send the Commission the papers – may result in the Commission's applying to the High Court for an order requiring the individual/organisation to produce the papers, or to provide the Commission with access to the papers (under section 194I of the Criminal Procedure (S) Act 1995). The Board decides whether to raise a court action against the individual or organisation.

- 2.24 Where the papers that are requested, including solicitors' files, are reported to be missing, the legal officer obtains from the prior holder of the papers a written explanation about the circumstances in which they were lost.

### **Information from a Witness**

- 2.25 Where the legal officer considers that a person, including a solicitor or counsel, may have information which may assist the investigation of the case, they email (or write to) the person, telling them that the Commission wishes to interview or obtain a statement from them. Per the Commission's environmental policy, such interviews should, by preference, be by video-link.
- 2.26 Where necessary, the legal officer explains to the witness the role of the Commission, enclosing the leaflet entitled 'Information for witnesses'. Where the legal officer considers that it may encourage co-operation, they may suggest that the witness is accompanied by a friend or relative, or the legal officer may approach Victim Support to facilitate any meeting.
- 2.27 When the person contacts the Commission, the legal officer arranges, date and time for the interview. (Where the interview is to be conducted face-to-face, rather than by video-link, it must take place at the Commission's office or another suitable location – eg, a local authority building, a sheriff court, a business premise or a police office.) All interviews must be conducted in accordance with the Commission's personal safety policy.
- 2.28 The legal officer may, with the agreement of the Chief Executive or the DOCS, reimburse expenses reasonably incurred by the interviewee in attending the interview.
- 2.29 Unless the legal officer considers that there are good reasons to justify a contrary approach, they arrange to have the interview digitally recorded. After the interview, they transfer a copy of the digital recording to the Commission's case management system and they may prepare a draft statement with reference to it. The digital recording may be disclosed in line with the Commission's Disclosure Policy.
- 2.30 After the interview, where they have prepared a draft statement, the legal officer emails (or writes to) the witness, enclosing their draft statement and asking them to confirm in writing their approval of its terms. The legal officer may ask the witness to sign their statement and to return the signed statement to the Commission. The signed statement may be disclosed in line with the Commission's Disclosure Policy.
- 2.31 Where a witness expresses concern at the prospect of the disclosure of their personal details to people outwith the Commission, and in particular to the applicant, the legal officer explains: (i) the Commission's practice is for a

witness's address to be given as 'c/o the Commission', and (ii) where the Commission is asked to disclose contact details for the witness, it will facilitate contact between the witness and relevant third parties.

- 2.32 Where the Commission does not receive a response **within 14 days from the date of the initial email/letter of inquiry**, or where the person fails to attend an interview previously arranged with the legal officer, the legal officer may send a reminder letter by recorded delivery, telling the person about the Commission's statutory power to take a precognition on oath before a sheriff. Alternatively, the legal officer may first issue a reminder email or letter which does not refer directly to the power to obtain precognition on oath, or, where contact details are known, they may telephone the witness.
- 2.33 Where the Commission does not receive a response **within seven days from the date of the reminder**, the legal officer, after obtaining the agreement of the Committee, sends a further letter by recorded delivery, telling the person that, if they do not contact the Commission within **14 days**, the Board will consider whether to seek a warrant to take a precognition on oath before a sheriff.
- 2.34 Where, owing to unacceptable delays by a solicitor, the legal officer is obstructed from progressing the case, the legal officer seeks the opinion of the Committee about whether the matter should be brought to the attention of the Board with a view to determining whether the solicitor should be reported to the Scottish Legal Complaints Commission (SLCC). The Board decides whether the solicitor should be reported to the SLCC.
- 2.35 Where, owing to unacceptable delays by the applicant's current representative, the legal officer is obstructed from progressing the case, the legal officer seeks the opinion of the Committee about whether to tell the applicant and his representative that a decision in the case may be taken on the information available to the Commission, or, even, that the case may be closed through want of insistence.

### **Instruction of a Third Party/Case-related Expenditure**

- 2.36 Where they identify that a chargeable service is required, the legal officer must obtain authorisation from the DOCS or the Chief Executive before instructing the expert or other third party to carry out the work.
- 2.37 The legal officer obtains quotes for the work from different experts/third parties where it is practicable and/or appropriate to do so.
- 2.38 At the stage of obtaining the quote from expert/third party, the legal officer normally does not disclose to them details about the case. Where the legal officer is required to do so in order to provide them with informed instructions, they must use the Commission's standard confidentiality agreement (see also para 2.47 below).

- 2.39 When the legal officer receives the quote from the expert/third party, they complete the case-related expenditure Form 1, which they give to the DOCS or the Chief Executive to authorise the expenditure.
- 2.40 Where standard fees are in place, the legal officer still completes a Form 1, and obtains the necessary authorisation for expenditure before instructing the expert/third party.
- 2.41 The legal officer gives a copy of the Form 1 to the senior administration officer for finance purposes.
- 2.42 The legal officer writes to the expert to set out the terms of the instructions, enclosing the Commission's standard confidentiality agreement. **The expert/third party must sign the confidentiality agreement and return the signed agreement to the Commission before the legal officer instructs them to start the work.**
- 2.43 After the expert/third party completes the work, and the Commission receives their invoice, the legal officer completes the case-related expenditure Form 2, which they give to the senior administration officer, who makes sure that the appropriate payment is made.
- 2.44 The Commission will instruct the translation of documents, where required.

### Interviewing Jurors

- 2.45 Where the legal officer considers that one or more jurors may hold information relevant to the review, they raise the matter with the Committee. The Committee must approve any decision to interview a juror or jurors. Where the issues involved are complex, the Committee considers referring the matter to the Board as a discussion case.
- 2.46 Before agreeing to proceed, the Committee/Board satisfies itself that the proposed line of investigation relates to matters 'extrinsic' to the jury's deliberations, and that the material provided in support of the application meets 'the *McCadden* standard' (see also the Commission's position paper entitled 'Tribunal bias').
- 2.47 In order to obtain contact details for the juror/jurors, the legal officer obtains from the SPOC at JO a copy of the list of assize. Where necessary, the legal officer may instruct inquiry agents to obtain the address of any juror who appears to have moved house since the trial, although the legal officer should in that instance request that the agents act with the utmost discretion.
- 2.48 The legal officer tells the SPOC at JO that the Commission intends to conduct investigations into a jury-related matter. They obtain from the SPOC at JO one or more points of contact to whom the Commission can refer jurors in order to establish the good faith of the Commission's investigation.

- 2.49 Initial contact with jurors is made by recorded delivery letter. The letter explains, in general terms, the matters the Commission is entitled to discuss with the juror. It tells the juror that it may be unlawful to breach those parameters.
- 2.50 Where the juror does not respond to the initial contact letter, the legal officer sends a reminder letter. Where the juror does not respond to the reminder, the legal officer seeks instructions from the Committee about what steps, if any, they should take next.
- 2.51 A form of interview schedule is agreed between the legal officer and the Committee before any interview takes place. The Committee satisfies itself that the proposed lines of questioning are exclusively concerned with 'extrinsic' matters.
- 2.52 At the outset of any interview with a juror, the legal officer, with a view to preventing the accidental disclosure of 'intrinsic' matters, establishes ground rules for the discussion. The legal officer should stick closely to the agreed interview schedule.

#### **Case-related Information taken out of the Office**

- 2.53 **Where the legal officer takes case-related information out of the office, they must keep it on their password-protected, and encrypted, laptop** (see also the Commission's data protection policy).
- 2.54 Where the legal officer requires hard-copy case papers for reference, in order that they can, for example, interview an applicant or a witness who is in prison, the legal officer must obtain the approval of the Chief Executive or DOCS in advance, must keep the hard-copy papers securely and must return them to the Commission's office at the earliest practicable opportunity and confirm same to the Chief Executive or DOCS.

#### **Emails and Letters**

- 2.55 **Where sending case-related information electronically, all staff must do so using only a secure email system, such as 'Egress Switch' or 'CJSM'.**
- 2.56 Where sending a letter by post, all staff, having regard to the information contained therein, should consider whether the letter requires to be sent by special or recorded delivery.
- 2.57 All staff must take care that all correspondence and any accompanying documentation, whether sent by post or secure email, are sent to the intended recipient.

#### **Administration**

- 2.58 Where the applicant or their representative asks the Commission to disclose information about their case, the legal officer passes the request to the Data

Protection Officer. The request will be addressed in line with the Commission's disclosure policy.

**2.59 All staff must make sure that any case-related document they create, or any such document of which they take receipt, including any case-related email sent/received, is stored on the relevant file on the Commission's case management system.**

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