

**Memorandum of Understanding
between
The Ministry of Justice and the Official Solicitor to the Senior
Courts**

**Memorandum of Understanding
between
The Ministry of Justice and the Official Solicitor**

Foreword

1. The Official Solicitor to the Senior Courts is an independent statutory office holder appointed by the Lord Chancellor under section 90 of the Senior Courts Act 1981. The Public Trustee is an independent statutory office holder appointed by the Lord Chancellor under section 8 of the Public Trustee Act 1906. The Office of the Official Solicitor and the Public Trustee (OSPT) exists to support those two independent statutory office holders in carrying out their functions.

Aim of Memorandum

2. This memorandum (MOU) explains the roles and responsibilities of the independent statutory office holder, the Official Solicitor, and the relationships between (1) the Official Solicitor and the Ministry, and (2) between the Official Solicitor and the Public Trustee. It also describes the internal governance of the OSPT. It shall come into force on the second date set out at its foot. It can reviewed at the request of either the Ministry or the Official Solicitor.

Status and functions of the Official Solicitor

3.1 The Official Solicitor, who can be either a barrister or solicitor, has always occupied an "official" position within, and as an officer of, the superior courts. As such he consults and informs the President of the Family Division and Head of Family Justice, and as the President of the Court of Protection. The Official Solicitor is the court's own solicitor.

3.2 The Lord Chancellor also appoints under the Act a Deputy Official Solicitor who has power to act in the Official Solicitor's place when the Official Solicitor is not available because of his absence or some other reason or his office is vacant.

3.3 Through its Vote the Ministry provides the Official Solicitor with a staff of civil servants, office accommodation and a budget.

3.4 The Official Solicitor, as a senior civil servant, reports to the sponsoring Senior Civil Servant appointed by the Ministry of Justice.

3.5 The Official Solicitor's functions are imposed by statute, by rules of court, by direction of the Lord Chancellor, by the common law, or by established practice.

3.6 The Lord Chancellor's power to give directions as to the Official Solicitor's duties under section 90(3) of the 1981 Act is understood to mean that the Lord Chancellor may direct the Official Solicitor as to the classes of case taken, but not the conduct of individual matters. Where acting as litigation friend¹ or solicitor, the Official Solicitor is

¹ Or guardian ad litem or next friend and all references to litigation friend should be construed accordingly.

therefore able to act solely in the best interests of his clients and is in law answerable to those clients. His actions are taken on behalf of his clients not the Ministry.

3.7 The Ministry does not have ultimate responsibility for the performance of the Official Solicitor's functions as litigation friend or trustee, administrator or deputy, nor is it empowered to carry out those of the Official Solicitor's functions.

3.8 By virtue of section 92 of and Schedule 2 to the 1981 Act:

- the Official Solicitor holds his office during good behaviour.
- the power to remove the Official Solicitor from his office on account of misbehaviour may be exercised by the Lord Chancellor with the concurrence of the Lord Chief Justice.
- the Lord Chancellor may also, with the concurrence of the Lord Chief Justice, remove the Official Solicitor from his office on account of inability to perform the duties of his office.
- the Official Solicitor holds office until the end of the completed year of service in the course of which he attains the age of sixty-two years.
- where the Lord Chancellor considers it desirable in the public interest to retain in office the Official Solicitor after the time when he would otherwise retire, the Lord Chancellor may from time to time authorise the continuance in office of the Official Solicitor until such date, not being later than the date on which the Official Solicitor attains the age of sixty-five years, as he thinks fit.

3.9 While the Official Solicitor's independence in decision making in each and every case must be fully respected, he, together with the Public Trustee, are accountable to the Ministry for the effective and efficient use of the combined resources allocated to respectively to them.

3.10 But the Ministry would fully indemnify him in respect of any liability he might incur in respect of his acting as litigation friend, providing legal services or as trustee, administrator, deputy or registered contact in respect of any Child Trust Fund.

3.11 Deputy Official Solicitor: section 90(4) of the 1981 Act provides that if

- the Official Solicitor is not available because of his absence or for some other reason; or
- his office is vacant,

then, during such unavailability or vacancy, any powers or duties of the Official Solicitor shall be exercisable or fall to be performed by any person for the time being appointed by the Lord Chancellor as deputy to the Official Solicitor (and any property vested in the Official Solicitor may accordingly be dealt with by any such person in all respects as if it were vested in that person instead).

Vision and Values

4.1 The Official Solicitor, where he provides last resort front line services, contributes to MoJ Strategic Objectives with delivering fair and simple routes to civil and family justice. In so doing the Official Solicitor provides access to the justice system to the vulnerable and support by way of litigation friend services and litigation services where

they are needed. In so doing the Official Solicitor contributes to Public Service Agreements by mitigating

- the disadvantage that his clients experience because of their disability or age and
- the vulnerability of his clients to social exclusion.

4.2 The Official Solicitor usually, but not invariably, acts as litigation friend on invitation by the court. He accepts appointment as last resort litigation friend and as last resort trustee, administrator and financial deputy in line with defined criteria.

4.3 The work of the Official Solicitor will be carried out by him and on his behalf by his staff with professionalism and integrity.

Aims and individual functions of the Official Solicitor

5.1 The Official Solicitor's aims are

5.2 to prevent injustice to the vulnerable by:

- acting as last resort litigation friend, and in some cases solicitor, for adults who lack mental capacity and children (other than those who are the subject of child welfare proceedings) in court proceedings because they lack decision making capacity in relation to the proceedings. As litigation friend the Official Solicitor "steps into the shoes" of the client who lacks litigation capacity. His role is to carry on the litigation on behalf of the client and in his best interests. For this purpose the litigation friend must make all the decisions that the client would have made, had he been able. The litigation friend is responsible to the court for the propriety and the progress of the proceedings.
- acting as last resort administrator of estates, trustee financial deputy in relation to Court of Protection clients.
- being appointed, in place of a parent, to act as the registered contact in the administration of the Government's Child Trust Fund scheme for looked after children in England and Wales when there is no other suitable person to do so.

5.3 to assist the High Court, Court of Protection and Court of Appeal by:

- acting as advocate to the court² providing advice and assistance to the court; and
- under *Harbin v Masterman*³ making enquiries on behalf of the court.

5.4 The Official Solicitor also through the International Child Abduction and Contact Unit (ICACU) carries out in England and Wales the operational functions of the Lord Chancellor, who is the Central Authority under the 1980 Hague and European Conventions on Child Abduction. ICACU processes both incoming and outgoing cases. For incoming cases ICACU assesses applications, arranges translations and makes referrals to panel solicitors in cases to which the Convention or the Council

² Pursuant to the Joint Memorandum of the Attorney General and the Lord Chief Justice of 19.12.01.

³ [1896] 1 Ch 351.

Requirements apply. For outgoing cases ICACU transmits completed applications with any necessary translations to the relevant Central Authority. Thereafter, ICACU will monitor the progress of the case, liaise with the Central Authority of the requested state and the applicant and do all that it properly can to help to bring the case to a successful conclusion. ICACU can provide a point of contact between the applicant or solicitor and the Central Authority of other participating states, but it cannot intervene in the due process of another jurisdiction. It will, however do all it properly can to press for a swift resolution, where experience suggests that this will produce a better result.

5.5 The Official Solicitor also through the Reciprocal Enforcement of Maintenance Orders (REMO) Unit carries out in England and Wales the operational functions of the Lord Chancellor who is the Central Authority for the reciprocal enforcement of international maintenance orders. The role of the unit is to transmit and receive applications to enforce maintenance orders, arranging translations where necessary. Incoming applications will be referred to the court for enforcement action. REMO does not provide legal advice to applicants or others; however it will provide general procedural guidance. The REMO system is based on mutual co-operation and the REMO Unit cannot intervene in the administrative or legal procedures of another jurisdiction, nor affect the enforcement measures that may be taken in that jurisdiction. Once an application has been transmitted to another jurisdiction it is dealt with according to the laws and procedures of that country. The role of the REMO Unit is to carry out the functions of an administrative Central Authority in accordance with legislation.

Cost recovery - litigation

6.1 As last resort litigation friend, the Official Solicitor has never sought to, and indeed could not in many cases, recover his internal or administrative costs of being litigation friend.

6.2 The Official Solicitor may make his involvement in proceedings conditional on his costs of obtaining or providing legal services being secured from external sources, except in cases involving medical treatment, where his involvement has long been regarded a matter of necessity, or where he is invited by the court to provide an advocate to the court or make enquiries under *Harbin v Masterman*.

6.3 Those external sources may be:

- the Legal Service Commission where the Official Solicitor's client is eligible for public funding
- the client's own funds where the Court of Protection has given the Official Solicitor authority to recover the costs from the client
- a Conditional Funding Agreement (e.g. in personal injury claims)
- an undertaking from another party to pay the Official Solicitor's costs
- the funds in dispute where the case involves a trust or estate

Cost recovery - trusts, estates and deputyships

6.4 The Official Solicitor seeks to recover his costs of administering trusts, estates and acting as financial deputy on a time charge basis subject to assessment by the Senior Courts Costs Office. The National Audit Office, however, in its report of April 2004 acknowledged the difficulties faced by the Official Solicitor and the Public Trustee in striving to be both a trustee of last resort and achieve full cost recovery.

Cost recovery - child trust funds

6.5 The children for whom the Official Solicitor acts as the registered contact under the Child Trust Fund Act are “looked after” children in care. The Official Solicitor is funded for this work by Her Majesty’s Revenue and Customs (“HMRC”). There is a Memorandum of Understanding between the Official Solicitor and HMRC (see attached, Annex A).

Cost recovery - international work

6.6 The Official Solicitor funds this work out of his budget which includes elements for the international case workers, his lawyers’ input to the work and translations.

Administration and resources

7.1 The Official Solicitor (in his absence the Deputy Official Solicitor) and the Public Trustee are together responsible for the running of OSPT. The Office has a Head of Operations to whom the lay administrators report. The Official Solicitor, the Deputy Official Solicitor and the Public Trustee work with the Head of Operations, her team and the Senior Lawyers to run the office.

7.2 Permanent OSPT staff are all civil servants employed by the Ministry. They are subject to the Ministry’s employee terms and conditions.

7.3 The Official Solicitor is responsible for the line management of a number of lawyers who form part of the complement of staff at the OSPT. He does not line manage the lay case managers and staff whose function it is to undertake his work. The lay case managers are “supervised” in the discharge of their case management functions by the lawyers but line managed by Divisional Managers who in turn are line managed by either (1) the Head of the Trusts and Deputy Services team or (2) the Litigation Manager, who are in turn managed by the Head of Operations. The Head of Operations reports to the Public Trustee. Two of the lawyers (the trust lawyers) also provide legal services to the Public trustee.

7.4 It is therefore imperative that the Official Solicitor and the Public Trustee work effectively together and together with the Deputy Official Solicitor and Head of Operations to ensure the efficient running of the OSPT.

OSPT Management Advisory Board: Purpose, Composition and Procedure

7.5.1 The purpose of the Board is to advise the Official Solicitor and the Public Trustee so as to assist them in their decision making and monitoring in respect of:

- the strategy and direction of OSPT.
- finance matters.
- people resources.
- performance against budgets and plans - including risk management.
- compliance with principles of good corporate governance.

7.5.2 Membership of the Board:

- the Official Solicitor.
- the Public Trustee.
- the Deputy Official Solicitor.

- the Head of Operations.
- the Head of Trusts and Deputy Services.
- the Litigation Manager.
- the Head of CFO Finance.
- the Head of Corporate Services.

The Official Solicitor, the Public Trustee and MoJ take the view that challenge and constructive criticism from an external member fulfilling the role of 'critical friend' would be desirable. The Official Solicitor and the Public Trustee will explore the viability of recruiting and financing the addition of such a person to the Advisory Board.

7.5.3 Procedure:

- in normal course the Board will meet monthly and may determine its own procedure.
- meetings will be chaired alternately, subject to availability, by the Official Solicitor and the Public Trustee.
- others may attend the board to provide information relevant to the matters to be discussed.
- members of staff may attend the meetings as observers provided notice of their intention to do so has been given to the Board's secretary but may be required to leave any parts of meetings at which confidential issues are to be discussed.
- Corporate Services will provide a secretary
 - to circulate agendas.
 - to invite contributors.
 - to take minutes, including any confidential minutes.
 - to circulate minutes, except any confidential minutes, by placing them on the intranet.

Planning and budgeting (to include Business Plan and KPIs)

8.1 The Ministry delegates, to each of the Official and the Public Trustee a budget out of the Ministry's Vote.

8.2 The Official Solicitor and the Public Trustee jointly prepare an Annual Business Plan that sets out their respective key priorities, KPI targets and activity for the year ahead. The Business Plan also confirms the budget and staffing resources that the Official Solicitor and the Public Trustee will work within to deliver against the Business Plan.

8.3 OSPT has KPIs but despite its best endeavours, supported by the Ministry, it has not proved possible to identify KPIs which reflect measurable aspects of the qualitative nature of the work carried out and provide through target setting indications of the OSPT's efficiency and effectiveness in that regard. The KPIs accordingly only reflect some aspects of the work of the OSPT.

8.4 The Ministry appoints a sponsor of the Official Solicitor and of the Public Trustee who is responsible for the ratification of the OSPT annual Business Plan and KPIs on an annual basis and also signing off business cases for recruitment and additional resourcing as required throughout the year. The Ministry's appointed sponsor is accountable to the Ministry for monitoring OSPT's progress and delivery against agreed targets and objectives, via quarterly performance reviews.

8.5 The Official Solicitor and the Public Trustee have an annual Service Level Agreement under which they receive financial management services from the Finance Department of the Court Funds Office. The Court Funds Office Head of Finance attends the OSPT Management Advisory Board.

Relationships and Governance

9.1 The Official Solicitor and the Public Trustee are both sponsored by the Ministry of Justice.

9.2 The Official Solicitor is a statutory office holder appointed by the Lord Chancellor. He is provided with resources to carry out his role by the Ministry of Justice. He is also a Senior Civil Servant within the Ministry. As a Senior Civil Servant he is line managed by the Senior Civil Servant who sponsors both the OSPT and the Public Trustee on behalf of the Ministry.

9.3 The line management role encompasses performance appraisal and personal development. Although such assessment is supported by 360° feedback, the Official Solicitor and the Ministry both accept that it is very difficult for his line manager to gain any significant or accurate view of his performance as a legal practitioner and manager and so his appraisal cannot reflect performance in those regards (which form a major part of his functions) to any great extent. The line manager can assess the performance of the Official Solicitor in his role as leader of the organisation, including his efficient management of staff and resources.

9.4 The Official Solicitor's line manager does not seek to (and has no authority to) interfere with, direct, or otherwise influence the decisions the Official Solicitor makes in exercise of the functions of his office. Should any instances arise, they should be escalated, initially to the sponsoring Director General, then to the Permanent Secretary, and ultimately to the Lord Chancellor as the Minister responsible for appointing the Official Solicitor to his statutory post. In such circumstances, the Official Solicitor would need to inform and consult the President of the Family Division/Court of Protection.

9.5 Any concerns of either party regarding financial delegations, allocation of resources, operational performance will first be discussed between the line manager and the Official Solicitor and, if it could not be resolved, escalated, initially to the sponsoring Director General, then to the Permanent Secretary and ultimately to the Lord Chancellor as the Minister who is responsible for appointing the Official Solicitor to his statutory post. In such circumstances, the Official Solicitor would need to inform and consult the President of the Family Division/Court of Protection.

9.6 The Official Solicitor and the Public Trustee receive guidance and support on governance issues from the Sponsorship and Performance Unit within the Ministry of Justice and the Ministry's Internal Audit Directorate.

9.7 The Official Solicitor and the Public Trustee will ensure that the Ministry is informed, both routinely via quarterly meetings with the sponsoring Senior Civil Servant and on an exception basis when the need arises, about operational activity including staffing and employee relations, Audit, Finance and any major project work.

Complaints

10. The Official Solicitor and the Public Trustee have formal complaints procedures that are advertised on the OSPT website. The time limits set out in the complaints procedure conform with those in relation to the Ministry's complaints procedures. The procedure varies dependent on the nature of the complaint

- complaints about decisions taken by the Official Solicitor in respect of his role as litigation friend cannot be escalated to Ministry officials or the Parliamentary Commissioner for Administration. Such complaints should be made to the court during the course of proceedings.
- complaints about the Official Solicitor's handling of complaints about the decisions he makes in relation to litigation can be made to the Parliamentary Commissioner.
- complaints about the administration of the OSPT can be escalated to the responsible Sponsor appointed by the Ministry of Justice.
- complaints about both the Official Solicitor's and the Public Trustee's actions as trustee or administrator can be made to the court or the Parliamentary Commissioner.
- complaints about the Official Solicitor's actions as a deputy can be made to the Public Guardian.
- complaints about the ICACU's and the REMO unit's actions with regard to the international work can be made to the Parliamentary Commissioner.

Risk management

11. The Official Solicitor and the Public Trustee maintain a strategic risk register and have a dedicated Risk and Compliance Manager. The Risk Register is submitted to the Ministry on a quarterly basis for scrutiny. Risk status forms an integral element of quarterly performance discussion between Official Solicitor and the sponsoring Senior Civil Servant. Black risks at 4x4 are escalated to the Access to Justice Board through the sponsoring Senior Civil Servant. The Official Solicitor and the Public Trustee work closely with the Ministry's Internal Audit Directorate to ensure risk management processes continue to be robust and meet the requirements of the developing business.

Confidentiality

12. The Official Solicitor will work closely with the Ministry to ensure that the practices and processes employed by the office meet best practice. However the Ministry has no entitlement to access information about clients represented by the Official Solicitor, save for the purposes of investigating administrative complaints (see paragraph 10 above).

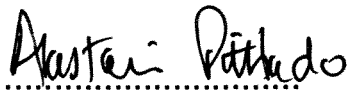
Annual Report and Accounts

13.1 The Official Solicitor and the Public Trustee jointly produce an annual report that describes performance for the previous year. The draft report will be provided to the Delivery Director by 30 May each year.

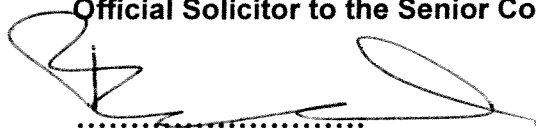
13.2 They are not required to produce audited accounts for OSPT. Their income and expenditure are an integral part of the Ministry's Resource Account.

13.3 The Official Solicitor and Public Trustee are each Accounting Officers, subject to the indemnification referred to above, in respect of third party funds they respectively hold. They are responsible for preparing stewardship accounts for all third party assets held by them in accordance with the accounts direction issued by the Ministry on 14 August 2009. The Stewardship Accounts are audited annually by the National Audit Office and reviewed by the Access to Justice Audit Committee, via the annual Statement of Assurance.

Signed:



Official Solicitor to the Senior Courts date 05.05.10



on behalf of the Secretary of State for Ministry of Justice date