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Dear Sirs

Thank you for your letter dated 25th April 2016 enclosing the Interim Consultative Report of the Legal Aid Committee in relation to the Review of Developments in Legal Aid.

This response can be taken to be generally indicative of the views of both the Judiciary and Officers within the General Registry.

This response should be considered alongside our previous responses dated 10th July 2014 and 26th November 2014, copies of which are enclosed for ease of reference.

General Comments

Great care needs to be taken in making changes to the provision of legal aid that costs and delays are not increased elsewhere. Parties acting in person, both in criminal and civil cases often cause delays and additional time in cases where intervention of advice or representation from an advocate would result in the matter being resolved more quickly or the issues requiring to be determined being narrowed.

It is important that the Isle of Man, in making changes in respect of the provision of legal aid does not replicate the much reported adverse situation which has arisen in the criminal and civil courts in England & Wales. The provision of effective legal aid is vitally important to the administration of justice, the maintenance of the rule of law and hence to the international reputation of the Isle of Man.

Citizens of this Island must have the ability to enforce the rights given to them by Tynwald and by the common law. A right of access to the courts is as fundamental as the right to education or to free health care.

It is clearer than ever from what has happened in England and Wales as a result of recent legal aid cuts that those who are left unrepresented cause significant delays and thus extra expense to the justice system. It is the experience of every judge in this island that an unrepresented litigant requires significantly more time in terms of administrative and judicial time expended than if he or she were represented. Delays are invariably caused to other litigants and other cases have to wait longer to be heard. Some areas of law and the circumstances of some cases are so legally complex that skilled legal representation is vital. It is wrong to assume that in such instances the system can in some way be made "user

friendly" for those who are unrepresented. There is a significant risk that serious instances of injustice will increase unless there is a maintenance or increase in the current levels of legal representation. The knock on effect of such incidents on the public purse is enormous.

Accordingly, in order to ensure that effective access to justice is in place for those with limited means, the Committee is encouraged to review the existing means test criteria and thresholds.

Specific Comments

Part 1 – Critical assessment of the current system Weaknesses (page 11)

The Report lacks necessary detail in order to allow consideration of the issues identified, for instance:

"Civil/Criminal inconsistencies" – What are the issues?

"Lack of Regulations" – Where are the Regulations lacking? What issue or issues need to be regulated?

"We are trying to run a much higher quality system than is necessary" – We are concerned by this comments and further explanation is required.

"The current system provides value for money, is cost effective and the administrative practices enable easier access and simpler decision making" – Whilst these are laudable aspirations, in some circumstances the experience of practitioners (with consequent issues for the courts, such as requests for adjournments) can be affected by inefficiency and delay which must have an inevitable cost impact.

Threats (page 12)

Whilst we do not agree that this section is appropriately titled, a further issue to the existing system is the impact of litigants in person ("LIP"). LIP's are more common within the court system than ever before and whilst a high percentage of LIP deal with their cases without issue, a minority will have significant impact on the costs of legal aid (where their opponent is an assisted person) and on court time. This is a factor widely recognised in the adjacent jurisdictions.

The following is an extract from the recently reported Manx case of Mrs T v Mr T, FAM 2011/309, (Judgment of His Honour Deemster Corlett dated 10th February 2016):

9. Unfortunately, as is so often the case with litigants in person, the Respondent has failed in his duty of full and frank disclosure, has made no real attempt to educate himself about the applicable law and has become fixated with irrelevant issues. His correspondence with the Applicant's advocates is characterised by obfuscation. All of this has led to the incurring of substantial, wholly unjustified costs. Incredibly, I was faced at the hearing with 1,183 pages of documents which, I was told by Miss Tomlinson, had to be prepared at the Respondent's insistence. The most egregious example of the Respondent's litigation misconduct was his disclosure during the course of the hearing itself of two years of accounts of X Ltd, and some further bank statements which were of material significance.

Taking the above into account, it is respectfully suggested that should the LAC take steps to reduce the scope of the provision of civil legal aid within the Isle of Man that consideration is

given as to whether this may be counterproductive as a result of an increase to the number of LIP's and further time and costs being incurred due to lack of a legal representative

Part 2 – Progress to Date

6. Time and duration limitations on Legal Aid certificates (page 14)

The second sentence of the second paragraph is factually incorrect. There were many instances where court fees previously formed part of the bill of costs presented for assessment and payment from the Legal Aid Fund, albeit it is accepted that the claiming of court fees was inconsistent.

Removal of the court fee exemption process was implemented to:

- a. Eliminate and overcome inconsistencies in billing and other practices relevant to court fees
- b. Enable a more accurate cost centre analysis to be in place for both the Court and Legal Aid services

The cost of court fees is insignificant in comparison to the actual cost of funding a case for which legal aid has been granted.

This paragraph suggests that time and duration limits have been sent on all legal aid certificates. We are aware that such limits have been set in civil proceedings but none have been set in respect of criminal legal aid matters.

We are aware that time and duration limits have caused delay in care proceedings and concerns have been expressed at the delays caused by a slow turnaround of applications for extensions of time/duration of legal aid certificates. If the introduction of duration/time limits is to be considered in criminal legal aid then there would need to be a changes to legal aid administration to allow a quick turnaround of applications for extensions.

Without more information it is also difficult to imagine how such limitations would apply in criminal proceedings and we would urge the LAC not to consider any changes which would cause delay in the administration of justice in the criminal courts.

11. Limited progress in recovering contributions – statutory charging orders are now feasible (page 15)

There is no connection between the imposition of a statutory charge and the payment/recovery of contributions. In adjacent jurisdictions these two issues are not linked. The position stated within the Report needs to be reviewed, considered and made clearer.

As far as we are aware there is no statutory charge in relation to the recovery of legal aid contributions in criminal cases.

At the moment the recovery of contributions from those who don't pay is all but impossible.

If weekly (or monthly payments) are not made there is a cumbersome procedure to be met before any enforcement action can be taken (see Form 8 and Form 9 in Schedule 1 of the Criminal Legal aid Regulations 1993). At the moment the only enforcement method is the

revocation of the legal aid certificate. It is not possible to enforce criminal legal aid contributions by an attachment of earnings order or other means.

The nature of summary criminal proceedings means that they are generally concluded relatively quickly, there is often insufficient time during the duration of the proceedings to take the necessary enforcement action. There is no provision which would allow action to be taken after the conclusion of the proceedings, nor is there any provision to prohibit the grant of legal aid to that same person in any subsequent proceedings. The money lost by the non-payment of contributions and the cumbersome and ineffective enforcement possibilities must be considerable.

Consideration should be given to enforcing such payments by way of an attachment of earnings order. The LAC should also consider a penal sanction for those who are convicted but who have not paid their contribution, i.e. a "days in default" order.

Part 3 – Consultation on current proposals

There are potential ways we would like you to engage with us in working on future developments (page 19).

It is respectfully suggested that the introduction of an exit survey should be included in this section. The views of persons who have received legal aid should be sought. The questionnaire would need to be carefully worded and responses would need to be considered carefully so as to differentiate between issues with the provision of legal aid and issues relevant to the outcome of the court action.

Proposals for changes to the existing system of Legal Aid which require further discussion and research.

1. Revision of Legal Advice and Assistance Scheme – The "Green Form" Scheme (page 19)

The proposal to head towards making the Scheme advice only would be to head in the opposite direction of the way adjacent jurisdictions use equivalent schemes.

The Scheme has been used in the past to allow an Advocate to appear in court providing it helped to resolve the issue and the time required was within the relevant limit. This effectively removed the necessity for a legal aid application to be submitted to cover such work and therefore allowed the matter to be dealt with more quickly and save administration time etc. relevant to the determination of a legal aid application. This is one of the most positive aspects of the Scheme and should be retained.

Careful consideration should be given with regards to the implications of reducing the scope of the Scheme, for instance, removing ability to have wills prepared by an Advocate could lead to longer term issues if wills are not properly drafted e.g. testamentary applications.

In relation to the proposal to introduce Civil Duty Advocate Scheme, further details are required as to how the Scheme would work in practice and whether the cost of setting up and maintaining such a scheme would provide benefits over and beyond those that exist at present.

It is respectfully suggested that the LAC may wish to consider alternative ways that advice could be provided e.g. via the development of partnerships with relevant voluntary organisations, as in other jurisdictions.

2. Adoption of Telephone Advice Service for Duty Advocate Police Station work (page 20)

A detailed investigation as to the original intent of the Police Station Duty Advocate Scheme, how it currently operates and how current cost is incurred should be undertaken with a view to the introduction of a new, effective scheme. This would include consideration as to what matters and in what circumstances advice can be given by telephone.

It is suggested that consideration should be given to extending the live link procedure to the Police Station to allow face to face meetings through the live link from the facilities at Court, although this would have to be limited to the Court opening times. The Committee may wish to investigate the feasibility of advocates having video link from their offices to the Police Station.

Advocates would need to be physically present during police interviews in order to be able to intervene on behalf of their client when necessary and appropriate. The physical presence of an advocate is also likely to ensure that the interview is conducted appropriately.

A further problem which should be considered is the impact now, and in the future, of persons in custody whose first language is not English. The court is seeing an increasing number of those persons in custody or on bail that require the services of an interpreter. This causes delay (and cost) in the court proceedings but will also have a cost implication for legal aid as advocates will also require an interpreter to be present in any interview at the police station and after charge for instructions to be taken and advice given in respect of the progress of proceedings. The availability and effectiveness of having interpreters available via video link could also be examined by the Committee.

3. Introduction of a fixed price or time regime (page 21)

Under "current position" reference is made to this being relevant to criminal legal aid.

It is agreed that the introduction of a fixed fee regime has the potential to be efficient and cost effective particularly in straightforward cases to be heard in the summary court.

Fixed fees need to be reasonable and should not be set too low.

It is suggested that the fixed fees should be such as to encourage advocates to be efficient, not to request adjournments which may not be necessary or to undertake work which is not necessary to a just outcome of a case. There needs to be the ability to apply to have a fixed fee set aside in exceptional circumstances. Different fixed fees would need to be in place dependent upon how the case progresses e.g. guilty plea, not guilty plea however care must be taken to ensure that "not guilty" pleas are not entered simply to push the case into a higher fixed fee band. This could be dealt with perhaps by way of a penalty for the advocate if that "not guilty" plea later becomes a guilty plea without any change of circumstances.

Consideration should also be given to permit applications to extend/increase the fixed fee if the case involves interlocutory applications e.g. applications to stay, Newton Hearings etc. The reasonableness of such applications could be considered as part of that process.

As an alternative to a graduated fixed fee scheme consideration could be given to setting the fee to such a level to allow for a not guilty plea in simple cases on the basis that whilst advocates might gain in cases which are resolved early, that gain would be balanced by other cases where a not guilty plea is maintained. Costs would of course continue to be

awarded against the Prosecution in cases which resulted in an acquittal and therefore give the Prosecution incentive to ensure that cases are dealt with efficiently.

It is acknowledged that there are benefits from some form of fixed fees or fixed hours being introduced. The LAC will need to consider the benefits of introducing such a scheme.

4. Examination of the possibility of using Non Advocate, suitably qualified persons to carry out certain specific items of preparatory work (page 21).

Advocates regularly delegate preparation work to support staff. There is already a paralegal rate in place. How would this measure be controlled should Legal Aid Administration insist that certain types of work must be undertaken by support staff? The LAC would need to give careful consideration so as not to open up the door to other types of work being claimed under the certificate i.e. secretarial work. Consideration would also need to be given to the implications of such a measure on sole practitioners. As part of this proposal, the LAC may wish to consider whether it is feasible for legal aid certificates to be issued to right level of Advocate required for the work i.e. Senior or Junior.

5. Adoption of fixed time and costs per step and standard terms for Legal Aid Certificates (page 22)

From work undertaken in assessing legal aid bills it does not appear that the pilot scheme is not being administered consistently. There are regular legal aid cases for which a number of legal aid amendment certificates are being issued some of which contain fixed hours and deadlines and some of which contain none. This renders the exercise completely pointless. There is clear evidence that in cases where all of the funding in a particular matter has been controlled that the work has been focussed and effective. It also helps to eliminate the common perception that legal aid funding is open ended and not controlled. We would strongly urge the LAC to take the necessary steps to ensure that this policy is adopted and implemented consistently so as to ensure that all civil legal aid certificates contain a fixed time and set deadline, unless there are exceptional reasons for not doing so. Endorsing a deadline on each certificate ensures that cases progress swiftly and cost effectively.

Whilst noting a respondent to the LAC had suggested that such measures indicate a lack of trust in how the Advocate fulfils their duties, it is our view that it must be correct that steps are introduced so that public funding is controlled and utilised in the best way.

It is argued that the assessment process acts as deterrent which prevents Advocates undertaking work which is unreasonable or unjustified. Whilst the independent assessment process involves a rigorous examination of the work undertaken, this takes place after the case has concluded. The major concern from opponents of assisted persons is that they have to react to the steps taken by the assisted person during the lifetime of the case. The assessment process therefore occurs too late as the opponent may have already had to incur significant costs paying their own Advocate to respond to what may be considered to be unreasonable actions of the assisted person. It is therefore imperative that legal aid certificates are limited and should specify what work can be undertaken, how much time can be spent and when the work should be completed by.

Legal Aid certificates should be written in plain English and where possible use of legal terminology should be removed. It is important that the assisted person and the opponent of the assisted person are able to understand exactly what legal aid has been granted for.

It is important that requests for limits to be extended are determined quickly by the Certifying Officers as a quick turnaround would engage the trust of Advocates in this principle and process. It is suggested that a range of clear performance indicators are put in place and published in support of such, these could include the length of time taken to determine applications, requests, etc...

6. Ensure that the Court, Advocates, Prosecutions and Police work collectively to make best use of limited resources.

We fundamentally disagree with the statement "Police, Prosecutors and Courts do not appear to be aware of the impact of their decisions on the Legal Aid allocation". We would refer the LAC to changes which have previously been made by the Summary Court:

1. Change from three fixed courts each week to two and by having only one Duty Advocate in those courts rather than the previous practice of having two.
2. Introduction of "Plea before Venue" provisions in the Summary Jurisdiction and Miscellaneous Amendment Bill 2013 mean that Defendants can now indicate their intention to plead guilty to serious offences at an early stage in the proceedings and to be committed to the Court of General Gaol Delivery for sentence in appropriate cases without the need for committal proceedings.
3. Introduction of a Summary Court User Group ("SCUG") attended by representatives from court administration, the Police, Attorney General's Chambers and the Law Society. The SCUG regularly discusses efficiency of the court process and the causes of any delays and where appropriate and possible, takes steps to improve them. On two separate occasions the LAC have been invited to make written submissions to the SCUG but have failed to respond to those invitations.

Proposed change

Legal Aid Committee to engage with the existing Court User Groups (page 23).

The range of user groups is in place primarily for those who regularly appear in the relevant courts, however if there are any matters which directly affect legal aid then steps are taken to engage with Legal Aid in that regard. Likewise, the LAC would have the opportunity to put forward issues for consideration by the relevant user group. Dependent upon the specific issues raised, the relevant Chairperson would consider if an invitation to attend a particular meeting was appropriate, however it would not be appropriate for the Legal Aid Committee to be represented on the court user groups as of right. In respect of the Summary Court User Group as highlighted in paragraph 3 above the Legal Aid Committee had been invited previously to raise specific matters in writing but nothing has been forthcoming.

Further issues to be considered (page 24)

Focus Police, Prosecutors and Judicial thought on access to justice and limitations arising from increasing costs.

From a Judicial perspective, whilst awareness of cost is important, the primary concern is implementing the rule of law.

Potential efficiency savings in the short term might be achieved by Summary Courts adopting a process of directions which dovetail with the limitations as to time and duration now applied to Legal Aid Certificates.

Criminal legal aid certificates are not limited by time and duration. If the plan is to do so, then such limitations would need to fall in line with the Summary Court process.

7. Review/modify/remove certain financial means test limits

Current position (page 24)

The cases exempt from financial means testing are noted. The Care Proceedings User Group are seeking to have the financial means test removed relevant to child care proceedings cases for the same reasons outlined in this section. Reference is made to a "Child Court User Group". Please note that the correct title for the User Group is the Care Proceedings User Group.

We are aware that requests have been made to remove the financial means test for families in care proceedings. Such proceedings are not only very emotionally charged but they also have the most serious consequences for a child and for the child's family. By allowing such families free access to an advocate not only are the proceedings likely to be conducted more efficiently and expeditiously but the court is assisted by being able to focus on the issues as identified by the advocates and not distracted by "red herring" points raised by a litigant in person. There are a limited number of care proceedings and so the financial impact is not likely to be substantial. The cost of a litigant in person conducting such proceedings can be considerable.

8. Review procedure for timely submission of bills and interim payment (page 25)

It is clear that certain issues exist resulting from the absence of a deadline in which to submit a legal aid bill of costs for assessment. These issues have been correctly identified within the Report. In addition, delays in billing may prohibit the successful recovery of liability from assisted persons.

It is suggested that the time period should be 3 months from the date of discharge, revocation or transfer. This is in line with the time period in which assessment proceedings should be commenced in private assessments and the prevailing legislation in that regard. The period in which to submit a bill should be subject to a maximum of a further 3 months upon receipt of application to extend and should only be granted in exceptional circumstances.

As part of this proposal the LAC should consider introducing a fixed fee for preparing a legal aid bill.

The LAC should take steps to encourage the submission of interim bills to be more frequent. The costs incurred to date should be considered by the LACO as part of any application to extend the remit of the legal aid certificate so as to place them in a better position as to whether the case is being run cost effectively and of course whether the costs are outweighing the benefit.

The ongoing test of whether it is reasonable for a private fee paying client of modest means to start or continue with a case cannot be considered properly without assessing how much the case is costing/will cost.

In relation to the points contained within "current position", this would not appear relevant to the issue of "timely submission of bills and interim payment". A response to these issues is therefore contained within the section of the report relevant to a Unified Legal Aid Service.

Areas of potential radical long term change currently under consideration by the Committee

1. Should a Public Defender Unit (PDU) be established (page 27)?

The potential benefits of a PDU are noted. A PDU would ensure that appropriately experienced criminal advocates are undertaking the work.

By way of background which the LAC may find useful, PDUs were established in England and Wales mainly in large city areas. Solicitors were employed in the PDU in Liverpool and they generally provided high quality advice. Savings to the public purse were perhaps not as high as was anticipated and that in particular the start-up costs were very high.

Our concerns if such a scheme was introduced in the Isle of Man would be whether or not there was sufficient work to justify the establishment of a PDU. In large city areas in England and Wales solicitors specialise much more than they do in this jurisdiction where most advocates deal with various areas of law. There would need to be a sufficiently large group of advocates working for the PDU to cover leave, potential conflicts of interest etc. The LAC suggests 10 advocates would be an appropriate number. We would question whether there is sufficient criminal legal aid work to justify the cost of a PDU with that number of advocates and maintain an independent bar if that is what is intended. It is significant to note that another small jurisdiction, Northern Ireland, has chosen not to go down the PDU route.

The primary duty of any advocate whether employed or not must be to their client, advocates employed by the PDU would be no different. Another difference to be considered is that in the Isle of Man the Attorney General's Chambers prosecute on behalf of other government agencies in addition to Police Prosecutions. It may provide a conflict if a PDU advocate employed by government was asked to defend against another government department or agency.

There needs to be a specific detailed review of how a PDU would work in the Isle of Man and it is suggested that this review is undertaken independently by someone who has experience in this area. Such a review would need to consider where structurally the unit would sit, how its service and Advocates would be managed and under what circumstances persons would/could choose not to use such.

2. Should publicly funded Legal Advice Centres be established? (page 31)

A Legal Advice Centre may be a better alternative to a PDU as it could allow advocates in the centre to advise and provide representation in all areas of law and so be a more cost effective method of dealing with low level simple matters. Provision would need to be included to an application for legal aid (criminal or civil as appropriate) to be made in more complicated cases.

The centres could include a combination of advocates, trainee advocates and paralegals covering appropriate levels of work where necessary under the supervision of a senior advocate.

Funding could be through the LAC to allow all funding of legally aided work to be under the governance of the same body.

In order to make access to centres more accessible then consideration could be given to having offices across the island, if necessary manned on specific days of the week. We would suggest that advice could be given on the basis of the Green Form scheme, i.e. not means tested but for there then to be means testing if the advice needed to be extended beyond an initial consultation or beyond a set number of hours.

There needs to be a specific detailed review of how the advice would be provided which may include considering whether voluntary organisations could be utilised. We would enthusiastically support the provision of a properly funded and manned legal advice service such as a Citizens Advice Bureau or Personal Support Unit. The lack of such a service has been a major problem here for many years and should divert significant numbers of claims and grievances from the court system.

3. Should Alternative Dispute Resolution (ADR) and, in particular, Mediation be promoted or made mandatory?

The current position (page 36)

The Courts are supportive of the use of mediation but do not believe that a requirement to stay the proceedings in every matter is appropriate as it would diminish the ability for the courts to have a range of options available to apply pro-active court case management.

The 3rd bullet point is not understood and requires clarification.

Further issues to be considered (page 37)

It should be noted that the Small Claims Court and Tribunals are not Manx ADR-Type schemes.

4. Should a Unified Legal Aid Service be developed? (page 40)

If a Unified Legal Aid Service was developed there is potential for savings in cost however there would need to be an increase in staffing within Legal Aid Administration which may offset any cost savings.

At the moment criminal legal aid is granted by court of summary jurisdiction (the application and decision process is undertaken without cost to the legal aid budget). However, any disbursements are then authorised by the Legal Aid Certifying Officer. This dual approach has obvious disadvantages. In the interest of justice and openness, and given the small jurisdiction it may be considered to be inappropriate for the summary court who will hear a case to be the authority who decides whether or not legal aid should be granted to the defendant in that case. It also means that the summary court after granting legal aid then has no control over the costs of disbursements authorised and the person authorising the cost of disbursements has no knowledge of the case other than what they are told by the advocate representing the assisted person. The summary court at least has the opportunity to ask the Prosecutor to provide an outline of the case and from that is able to assess whether, for instance, there is a likelihood of a custodial sentence if convicted or if there are any legal issues to be considered. Consideration should be given to the same authority who grants legal aid also authorising future disbursements.

Schedule 3 of the Legal Aid Act 1986 defines the relevant authority in relation to the determination of criminal legal aid as the Court rather than the Chief Registrar.

The Court requires an independent Costs Officer to deal with Detailed Assessment Proceedings under the Rules of Court 2009. Detailed assessment proceedings require the Costs Officer to preside over what is in effect a High Court hearing and proceedings are demanding in terms of preparation time. There is no reason why the assessment of legal aid bills should not continue to be assessed by the Court Costs Officer.

The assessment of legal aid bills is a complex function. It is a rigorous examination of the work undertaken by the Advocate for the assisted person which includes consideration the Advocates full file of papers and the decisions/authority granted by the Legal Aid Certifying Officer during the lifetime of the proceedings. There is a clear difference between the decisions made by the LACO during the lifetime of the legal aid certificate and the decisions made by the Costs Officer, which occurs at assessment after the proceedings have been concluded or after the involvement of the particular Advocate has ceased.

The Costs Officer and function should be independent from Legal Aid Administration so as to allow them to properly consider what costs are reasonable to be paid under a legal aid certificate. There should be no ability to perceive that decisions made during a legal aid assessment are influenced from budgetary or financial pressure. This is also particularly relevant in cases where the opponent of the assisted person has been ordered to pay their costs.

In cases where the assisted person is liable for the costs incurred under a legal aid certificate (e.g. contributor, cases where certificate is revoked etc.), it should be the case that the assisted persons liability to the Legal Aid fund is determined by a Costs Officer who is independent from Legal Aid Administration.

It should be noted that reviews against decisions made at assessment are dealt with by the Legal Aid Certifying Officer, this should be amended to match the procedure for court assessments and enable more effective independence. The process could then be further enhanced by providing opportunities for parties and the Legal Aid authorities to make submissions to the assessment process and seek a review of the assessment decisions.

Conclusion

In conclusion we reiterate that the presence of effective legal aid is vitally important to the administration of justice, the implementation of the rule of law and the Island's reputation. We hope that our earlier responses and this response will assist the Legal Aid Committee in its future deliberations which are so important to the future of the administration of justice on this Island.

Yours sincerely



Stephen Cregeen
Chief Registrar