

Government Report Number 16/07

Council of Ministers



Isle of Man
Government

Reillys Ellan Vannin

Legal Aid Services

Legal Services Commission

A Report by the Council of Ministers

May 2007

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To: Hon N Q Cringle, President of Tynwald, and the Honourable Council and Keys in Tynwald assembled.

In January 2002 the Council of Ministers appointed the Legal Services Commission. Its over-riding objective was to maximise access to justice while at the same time ensuring that any public provision gives value for money. The Commission had the following terms of reference –

“to consider the provision and administration of Legal Aid and legal advice and assistance in the Isle of Man in the context of recognised best practice and in particular to report, with any relevant recommendations, on :the legal framework (both primary and subordinate legislation), including eligibility (financial and otherwise) for Legal Aid and legal advice and assistance, the administrative arrangements, and the availability and quality of the service provided and the fee structure for those providing the service”.

The Council of Ministers recognises that the members of the Commission carried out the terms of reference with diligence and sincere thanks are extended for their work.

This Council of Ministers Report is the progress made on the recommendations of the Commission.

Recommendation

That the action taken by the Council of Ministers in response to the Legal Services Commission be noted and endorsed.

Hon J A Brown, MHK
Chief Minister
May 2007

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PURPOSE AND INTRODUCTION

- 1.1 This report sets out the progress made on the Recommendations of the Legal Services Commission and their legal, financial and policy implications together with the Government's policy pertaining to Legal Services. Appendix 1 summarises the current Legal Aid Scheme. Appendix 4 is the executive summary of the Legal Services Commission's Report.
- 1.2 In January 2002 the Council of Ministers appointed the Legal Services Commission. Its over-riding objective was to maximise access to justice while at the same time ensuring that any public provision gives value for money.
- 1.3 In May 2003 the Commission submitted its Report to the Council of Ministers. There were a number of matters which required further development, consultation or research before Council would be in a position to approve the Report's publication and submission to Tynwald. The Commission's Chair was invited to produce an executive summary. The Report was also referred to the General Registry for costings and comment. The members of the Commission were advised of the General Registry's views and given the opportunity to revise its recommendations. The legality of reconvening was questioned by one member and the Commission did not reconvene.
- 1.4 Council considered the Report again in Feb 2004, July 2005, April 2006 and Feb 2007, together with the costed Implementation Plan and responses from the General Registry, Department of Health and Social Security, the Attorney General's Chambers regarding Human Rights and the Law Society regarding certain issues. The consultation responses have been incorporated into the Report.

2. GOVERNMENT POLICY PERTAINING TO LEGAL AID

- 2.1 The Government identifies Legal Aid Reform as a high priority and stated in its 2006 plan that:-

The Council of Ministers is continuing to review the findings of the Commission of Inquiry into legal services, and recognises the need for the system to be reformed at the earliest opportunity. The resource implications of the Commission's proposals are substantial and will clearly need to be considered against Government's other competing priorities.

- 2.2 The actions identified were:-

- Review the findings of the 2003 Legal Aid Commission (CSO)
- Introduce simplified Legal Aid Regulations by 31st December 2006 (Gen Reg)

- 2.3 As signatories to the European Convention on Human Rights the Island agrees that:-

- Everyone charged with a criminal offence has the following minimum rights: (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

3. COUNCIL OF MINISTERS ACTIONS ON THE LEGAL SERVICES COMMISSION'S RECOMMENDATIONS

- 3.1 The Legal Services Commission's Report (May 2003) found that the present system of Legal Aid is in urgent need of improvement if it is to provide equal access to justice. In addition, the Commission was concerned that people seeking Legal Aid would find the scheme both complex and difficult to understand.
- 3.2 The main recommendations of the Commission relate to the means of access to the justice system both through advice and financial eligibility, the problems of providing legal advice, the need to provide appropriate remuneration for advice and for any administration of the system to be above perceived conflicts of interest or in contravention of Human Rights. In reaching its findings and recommendations the Commission consulted a wide range of people and organisations.
- 3.3 The Commission's recommendations are set out below together with any consultations with the General Registry, Treasury, the Attorney General's Chambers and the Law Society. Council of Ministers Actions taken to date are then shown. For Members' information Table 1 (at page 25) of this Report is a summary of the Commission's recommendations, consultations and the actions taken by the Council of Ministers together with a brief explanation of their implications.

For ease of reference each Recommendation is notated with green or red.

- **Green** – Action has been taken or will be taken;
- **Red** – The recommendation is not being progressed and the reasons for this.

The narrative below explains the actions taken by the Council of Ministers on each of the recommendations of the Commission in detail. Recommendations of the Commission are highlighted in bold followed by a report on progress to date and concludes with the action being taken by the Council of Ministers in bold.

3.1 **ADVICE AND GUIDANCE**

In general the Commission found that there was a lack of information and guidance for the public. To improve this problem they made recommendations for the Green Form scheme and the introduction of a mediation scheme.

Legal Advice and Assistance (Green Form) Scheme

- 3.1.1 **The Commission found that the Green Form scheme to enable persons to receive initial advice or a quick resolution to a legal matter is comparatively straightforward and cost effective but under used. It recommended that access to information is assisted by user friendly leaflets and that the production of these leaflets is enabled by cooperation between the Law Society and the Office of Fair Trading. The Commission recommended that the rates of payment for Advocates should be made consistent across all Legal Aid schemes. The General Registry has supported this and the Law Society has supported a standardisation for the Green Form Scheme.**

3.1.2 **Consultations** - General Registry is fully supportive of this recommendation and further suggests that Advocates rates for provision of the service are standardised.

3.1.3 **Action – The Green Form scheme for legal advice will be more widely promoted by the Office of Fair Trading (OFT) and the Law Society (LS) and is publicised through the production of leaflets enabled by cooperation between the OFT and the LS by May 2008.**

Council of Ministers has agreed that Advocate’s rates for the Green Form scheme and all other Legal Aid rates of pay will be standardised by inclusion in the Criminal Legal Aid Order. Subordinate Legislation is being prepared to action this during 2007/08.

Mediation Service

3.1.4 **The Commission recommended the introduction of a Mediation Service. A Mediation Service tries to resolve disputes. The disputes can revolve around a number of issues but mediation has been used to good advantage in cases arising from marital/relationship breakdown where children are involved principally relating to contact and residence issues. Mediation can potentially save court time. The Courts have power to enable mediation if both parties are in agreement.**

3.1.5 **Consultations** - The General Registry supports an independent Mediation Service for a variety of cases including marital/relationship breakdown and it is one of the actions proposed in the Children and Young People’s Strategy for cases concerning children. The General Registry further comment that whilst family matters represent the most appropriate starting point for conciliation services it should be recognised that the use of professional conciliation as a means of resolving civil matters before the need for expensive Court proceedings has substantial potential benefits. It was suggested that in drafting new High Court Rules the General Registry should seek to incorporate a conciliation phase in relation to civil matters.

3.1.6 It is also understood that the First Deemster would support a Mediation service.

3.1.7 **Action – General Registry will review during 2008 the Mediation Services available including family mediation in order to make it more widely used and report to Council of Ministers.**

3.2 MERITS AND MEANS TEST FOR CIVIL LEGAL AID AND STATUTORY CHARGES

Overall the Commission found that:

- The Legal merits test appears to need reviewing and to be applied consistently.
- The thresholds for financial eligibility are wholly unrealistic and exclude persons who could not otherwise afford legal advice. They are not updated sufficiently frequently.

- Regulations which govern the assessment of means lack transparency, are complex and difficult to comprehend.
- There is no appeal against refusal on the grounds of means.
- Parents in care proceedings are not granted Legal Aid regardless of means, as they are in the UK.
- No provision for Courts to award costs against a legally-aided person.

Merits Test

3.2.2 The Commission whilst stating that the 'merits test' which an applicant for Legal Aid must satisfy under the present arrangements should continue in full force, also qualified this statement by commenting that the merits test needs reviewing and to be applied consistently.

3.2.3 Consultations - The General Registry considers that the current system is working well and they cannot find evidence of anything in other jurisdictions that would seem to be an improvement. The current merits test matches that of the adjacent jurisdictions and is supported by much case law, therefore no legislative change is proposed. However it is recognised that due to both the legal complexity and personal emotiveness of such issues the application of the merits test is not always clear. It is therefore proposed that the General Registry should provide clearer information and guidance in this regard.

3.2.4 The Law Society support and endorse the retention of the merits test but would like to see greater clarification of the merits test set out in the Legal Aid Regulations in order to give greater guidance to both the Legal Aid Certifying Officer and on appeal from decisions of the Legal Aid Certifying Officer and the Legal Aid Committee.

3.2.5 Action – General Registry will provide clearer information and guidance on the 'merits test' by April 2008.

Means Test - Thresholds for financial eligibility

3.2.6 The Commission stated that the thresholds of financial eligibility for access to civil Legal Aid are regrettably low, so low that those in need are being denied access to justice. It recommends that to achieve equal access to justice income eligibility thresholds be raised substantially without delay.

3.2.7 The Commission recommended several criteria be added to a complicated system which if implemented would raise the threshold for civil Legal Aid entitlement from £8,000 to £18,000 a year before deductions.

3.2.8 The Isle of Man Law Society suggested to the Commission an adaptation whereby an amount equal to the applicant's income tax allowance may be deducted from income before determination. This would have the effect of raising the thresholds significantly and introducing a regular appraisal of the amounts without significant additional complexity.

3.2.9 Consultations - The General Registry agrees that the current means test thresholds are too low and that the system needs a thorough review. It

considers that the current calculation is over complicated as are the proposed alternatives and suggest that what is needed is a simple, understandable system.

3.2.10 The Law Society endorses and supports a new, simple system for financial eligibility for Legal Aid. The Law Society believes that it is important that the financial limits for eligibility for Legal Aid be increased substantially as there are presently circumstances in which a large number of individuals and families do not qualify for Legal Aid but are not in a financial position to afford the costs of litigation.

3.2.11 In addition, The Law Society consider the financial limits of Legal Aid are now somewhat outdated and are believed to be below benefit levels in the United Kingdom.

3.2.12 Action - Greater access to justice will be given through increasing the numbers of those eligible for Civil Legal Aid by:-

- **Widening the criteria to include all people who are in receipt of income based benefits (currently those in receipt of Family Income Supplement and Income Support only are automatically financially eligible for civil Legal Aid) and**
- **Raising the thresholds for eligibility through the introduction of a new scheme aligned with that used to assess means by the DHSS for Family Income Supplement (FIS) which will:-**
 - **Give greater access to civil Legal Aid,**
 - **Is easier to understand and transparent,**
 - **Links to an established government financial system which is regularly reviewed and has minimal additional costs,**
 - **Is equitable to those who are/are not on benefits**
- **The Legal Aid Act 1986, the Legal Aid (Financial Resources) 1997 and the Legal Advice and Assistance Regulations 1997 will be amended to give effect to the above within the 2007/08 Legislative Programme.**
- **The new system for eligibility to civil Legal Aid and the thresholds will be reviewed one year after their implementation and will be reported to Council of Ministers**
- **The criteria for eligibility will be reviewed every 3 years.**

3.2.13 The FIS system allows a far higher allowance in respect of single and married couples, lower allowances for a first child, but higher allowances for two or more children, where they are under 15. It gives additional allowances for those in full time work, caps the allowance relating to housing costs, and child care costs, and does not include maintenance as an allowable deduction.

3.2.14 The paper attached at Appendix 2 gives examples of hypothetical applicants. From this it can be seen that in all cases quoted, applicants are in a better position under the proposals than they were on the existing system, except where maintenance payment costs are a significant percentage of salary (say 50%), and family incomes exceed £20,000 per annum (this scenario is considered extremely unlikely because if a person is in a position to fund such a high maintenance then their income would be substantial). The vast majority of applicants will be better off under the proposed new system.

Repayment of Contributions to Civil Legal Aid

- 3.2.15 The thresholds for free Civil Legal Aid are set, however there are always those whose means fall just outside eligibility. For those applicants there is a system whereby they can have access to Legal Aid but part or all is required to be repaid. The Commission made no recommendations on the current procedure for contribution to the repayment of all or part of Civil Legal Aid. However the current method does not achieve repayment contributions at an acceptable level. The current repayment of contributions is set out in Appendix 3-Table 1.
- 3.2.16 **Consultation** - No consultation has been carried out.
- 3.2.17 **Action - A new scheme of bands for repayment of contributions to facilitate access to Civil Legal Aid for those whose net resources are in the bands just above the levels which would permit free Legal Aid will be introduced. The contribution levels are set so as to require payment of 2 times the annual net resource excess figure (the amount above the free Legal Aid figure), with repayment being made over a four year period. Thus Civil Legal Aid is accessible to more but is treated, in effect, as an interest free loan. This is set out in Appendix 3-Table 2. The proposed method would achieve greater levels of recovery in a way which requires monthly contributions which are no greater than those required at present. This will be effected in the same manner as that proposed under 3.2.12 viz The Legal Aid Act 1986, the Legal Aid (Financial Resources) 1997 and the Legal Advice and Assistance Regulations 1997 will be amended to give effect to the above within the 2007/08 Legislative Programme.**

Means Tests Regulations

- 3.2.18 **The applicant's financial eligibility is considered by the Legal Aid Office in consultation with the DHSS where the applicant is in receipt of benefits. The Commission found that the regulations which govern the assessment of means lack transparency because they are unduly complex and difficult to comprehend by those most likely to be affected. Furthermore there is no appeal against refusal on the grounds of means.**
- 3.2.19 **Consultations** - The issue of complexity is not accepted per se by the General Registry. It considers that current regulations are relatively straightforward given the breadth of financial circumstances which applicants may have. The establishment of an appeal to a financial eligibility decision would be difficult, as it is a decision based entirely on facts. It may be possible to establish the means to have a decision reviewed if disputed. The General Registry does, as a matter of course, review such decisions if required in any event.
- 3.2.20 In the interest of openness and fairness the Law Society support the introduction of some form of appeal or review from a decision of the Legal Aid Certifying Officer in relation to financial limits. The present procedure is that the financial determination is made by the General Registry and conveyed to the Legal Aid Certifying Officer for onward transmission to the applicant for Legal Aid. There is

presently no right of appeal or review against a decision that Legal Aid should not be granted on financial eligibility grounds.

- 3.2.21 The Law Society feels that some form of appeal or review should be provided. Whether this is to the Legal Aid Committee or to some other forum will be a matter for consideration.

Action – The move to Family Income Supplement alignment for means tests should improve the clarity and transparency. On the issue of means test reviews, the General Registry will consider this further in consultation with the DHSS and report back to Council of Ministers by April 2008.

Parents in Care Proceedings

- 3.2.22 **The Commission noted that parents in care proceedings are not granted civil Legal Aid regardless of means, as happens in the UK. The Commission recommended that Legal Aid should be granted without means test to parents in care proceedings and also to Guardians ad Litem who represent the child’.**

- 3.2.23 **Consultations** - The Legal Aid Office comment that the implementation of this recommendation would require legislative change and that costs would be associated with this.

- 3.2.24 The introduction of a Mediation Service (see above) would go some way towards assisting parents in care proceedings. However in the interests of a consistent, fair and equitable approach Civil Legal Aid should be subject to a means test as in the civil and criminal proceedings.

- 3.2.25 **Action - The current legislation which allows parents in care proceedings to be considered for Civil Legal Aid subject to a means test is continued.**

Statutory Charge

- 3.2.26 **The Commission saw merit in the introduction of a statutory charge but did not suggest introduction at this time but wished to see this issue under close review.**

It is opportune to consider the introduction of statutory charges within this report. The statutory charge is a mechanism used in the UK and other jurisdictions whereby, in effect, Legal Aid funding for a civil case is by way of a loan, which is repayable upon successful conclusion of a case where costs are not recovered from the losing party. The UK has the ability to recover both by a deduction of monies obtained and by a legal charge against property. One of the most important aspects of this is that it puts the privately funded and the legally aided parties on an equal footing.

- 3.2.27 The example below illustrates that the introduction of statutory charges would enable an equitable and fair system to be introduced.

In matrimonial proceedings when both parties are legally aided and they could be disputing the share of the matrimonial home which could value £500,000.00. At

present at the conclusion of this matter the parties' legal costs would be paid by the Legal Aid fund (taxpayer), which may run into many thousands of pounds and the parties gain up to £250,000 each.

If a statutory charge was introduced then the parties' litigation would be funded, but upon conclusion would result in a net payment from the proceeds of sale.

- 3.2.28 **Consultations** - The General Registry comment that the provision of this service can be quite beneficial to Legal Aid funding, and early case resolution, but could be administratively cumbersome both for the Legal Aid office and the legal profession, however both are mainly supportive of the introduction of such.
- 3.2.29 The Law Society has no objection in principle to the introduction of a statutory charge with the intent obviously that monies are recouped for the general revenue. The Law Society does however have a number of concerns relating to further administrative costs in the Legal Aid Office and the General Registry and additional administrative costs to Advocates. It is obviously important that any recovery made by way of a statutory charge is more than the amount of the additional administrative costs and charges which may be incurred.
- 3.2.30 The Law Society is also concerned that the number of cases in which a statutory charge would be effective are fairly limited. In many cases, if a legally aided party is successful in litigation, they will recover their costs from the opposing party. There would therefore be no need for the statutory charge. If the legally aided party is unsuccessful they will not have recovered any asset against which the statutory charge can be applied.
- 3.2.31 In addition, the Law Society consider that it would be appropriate for there to be some form of judicial discretion for a Deemster sitting in the High Court to disallow the provisions of the statutory charge (if the same were to be introduced) if the Deemster felt in all the circumstances of a particular case the same was inequitable.
- 3.2.32 **Action –It is recognised that a statutory charge is merited, but also acknowledged that significant administration and therefore cost impact would result. The General Registry will seek to introduce legislation in 2008/09 to allow a phased introduction of the Statutory Charges to be made in consultation with the IOM Law Society.**

3.3 MEANS TEST FOR CRIMINAL LEGAL AID

- 3.3.1 **The Commission recommended that the means test in criminal proceedings served no useful purpose and should be abolished for criminal proceedings but that the Court should have discretion to order costs against a defendant in appropriate circumstances. It took the view that the abolition of the means test in criminal proceedings is necessary to comply with the European Council on Human Rights. It recommended this course of action for all summary offences punishable by imprisonment as well as all criminal proceedings in the High Court.**

3.3.2 Applications for criminal Legal Aid are made to the relevant court and are granted if the court feels that such a decision would be in the interests of justice and that the applicant is financially eligible. Applications for Legal Aid to mount an appeal to a conviction or decision are made to the Chief Registrar. If the applicant disputes the decision made regarding the grant or otherwise of Legal Aid, an appeal can be made to the court or to a Judge.

3.3.3 **Consultations** - The General Registry does not agree. It considers that the present system whereby applications for criminal Legal Aid are made to the Court works well and this should continue. If the current system was abolished then they cite an example of where a high earner may be allowed Legal Aid without having their means assessed. General Registry recommends that in the interests of equity, openness and fairness the same means tested rules that apply to civil Legal Aid should be applied and reported to the court.

3.3.4 The Registry also point out that in the case of criminal Legal Aid there is no recording on the criminal case files of where Legal Aid has been granted under what circumstances and for what amounts. This is not compliant with current auditing practices.

3.3.5 With regard to the Human Rights issue, Article 6(3) of the European Convention on Human Rights provides as follows:

*Everyone charged with a criminal offence has the following minimum rights:
(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*

3.3.6 There is no absolute right to free representation; only if you have insufficient means and the interests of justice require it. Provided the criminal Legal Aid scheme is flexible enough to take the complexity of the case into account when assessing whether a defendant has sufficient means to meet his costs, there is not any justification for providing free criminal Legal Aid to all defendants.

3.3.7 **Action - The means test for Criminal Legal Aid will remain.**

3.4 HUMAN RIGHTS

Legal Aid Office Service and Location

3.4.1 **The Commission made several comments and recommendations regarding the independence of the Legal Aid Certifying Officer, the provision of the service and the role of the Legal Aid Certifying Officer concluding that there is a perception of a lack of independence of the Legal Aid Certifying Officer because of the Civil Service line management system in the General Registry.**

3.4.2 **The Commission recommended that the Legal Aid Certifying Officer and her deputy no longer be subject to the line management of the Chief Registrar and that the staff of the Legal Aid Certifying Officer have the Legal Aid Certifying Officer as their line manager.**

In essence the Commission were questioning whether the services provided by the Legal Aid Office were open to challenge on human rights because of the physical/perceived location of the Legal Aid Certifying Officer in the General Registry and whether the lines of reporting for the Legal Aid Certifying Officer compromised their independent role.

- 3.4.3 **Additional information on Services** - Section 14 of the Legal Aid Act 1986 requires Legal Aid Office staff to ensure that no persons, including members of the judiciary and Court staff are entitled to any information about a Legal Aid application without, in effect, the applicants authority.
- 3.4.4 An example of the need for this is where a legally aided party obtains authority to obtain a report which is not subsequently used. There are clear legal reasons why such information and indeed report should not be seen by the Court or any other party.
- 3.4.5 It should also be noted that the Certifying Officer may be considering applications to bring actions against the Isle of Man Government.
- 3.4.6 **Legal Challenge** - In the UK, due to the fact that the Courts and the Legal Aid authorities are two separate entities, it is not unusual for the Legal Aid authorities to seek to challenge the decisions of the courts through higher courts, this is not such an easy issue when the two functions are part of the same entity (General Registry), and there have been occasional matters where this could be an issue.
- 3.4.7 **Location** - As stated above, confidentiality is an extremely important issue for the division. The Legal Aid Office is now located in the Registries building as opposed to the Courthouse. This is a positive move, but it must still be noted that the current office is adjacent to further courtrooms, the entrance to which for Judiciary and staff is through the Legal Aid Office where there are confidential files and documents, telephone calls are also made there.
- 3.4.8 Legal advice is that the only issue of concern relating to the location of the Legal Aid Office is one of confidentiality. Provided this can be adequately addressed, there is no reason why the Office should not continue to be located within the General Registry buildings.

Action - The Legal Aid Office location will remain but be the subject of monitoring on confidentiality.

Legal Aid Certifying Officer

- 3.4.9 The Legal Aid Certifying Officer is appointed by the Governor. The Officer is accountable to the Legal Aid Committee. The Legal Aid Committee comprises the First Deemster, HM Attorney General, President of the IOM Law Society and Chairman of the Magistrates Association.
- 3.4.10 **Action - The Legal Aid Certifying Officer will remain as an appointee of the Governor and accountable to the Legal Aid Committee**

Legal Aid Committee

- 3.4.11 **The Commission highlighted a perception of a lack of independence in the Appeals process whereby the Legal Aid Committee is both the regulatory body and the body that hears appeals against the decisions of the Legal Aid Certifying Officer. It pointed out that as members of the Judiciary sit on the Committee there are potential conflicts of interest in subsequent legal proceedings relating to an appeal.**
- 3.4.12 **Consultations** - The Legal Aid Office and Legal Costs Division have made a recommendation that there be a move to a two Committee structure so that policy is determined by one body and the Committee that hears appeals is a different body. These changes overcome the Commissions concerns. The General Registry suggested that a Legal Aid Appeals Tribunal should be established under the Tribunals Act 2005.
- 3.4.13 **Action - A Legal Aid Appeals Tribunal should be appointed in pursuance of the Tribunals Bill and the present Committee should remain in place for consideration of policy issues. A Legal Aid Amendment Bill will be introduced within the 2007/08 Legislative Programme and an amendment to the Tribunals Act 2006.**

3.5 **ADVOCATES**

Advocates Fees Administration

- 3.5.1 The Commission stated that Advocates have difficulty getting paid in timely manner for Legal Aid work.
- 3.5.2 **Consultations** - The General Registry does not accept this. It points out that standard invoices are processed 1 month from receipt and sent to Treasury for payment. It also points out that in the UK solicitors can be paid up to 12 months in arrears. The introduction of the AXAPTA accounting system will ensure that invoices continue to be dealt with in a timely fashion.
- 3.5.3 The point is noted by the Law Society. At the time when representations were made by the Law Society to the Commission, there were delays being encountered in the assessment of Legal Aid Bills of Costs. The Law Society is happy to acknowledge that this problem no longer exists and that the General Registry now deal with the assessment of Legal Aid Bills of Costs (together with civil Bills of Costs generally) in a timely and expeditious manner. It is understood that changes are being introduced which will reduce further the time period between assessment and actual payment.
- 3.5.4 **Action - The issues in the Commission's report on difficulties for timely payment of advocate's fees no longer exists, therefore no action is required.**

Advocates Fees for Civil and Criminal Legal Aid Work.

- 3.5.5 **The Commission recommended that the fees paid to Advocates for Legal Aid work are too low and should be aligned to the commercial rate.**

- 3.5.6 **Consultations** - The General Registry accepts that the rates paid are too low and that if they continue at these rates it may become difficult to continue to offer the service. However it does not necessarily accept the accompanying argument that the Legal Aid rate should be more closely aligned to the commercial rate. They see Legal Aid work as part of the civil and social duty of the profession rather than a profit making enterprise.
- 3.5.7 The Law Society strongly supports the introduction of new and more substantial rates in respect of Legal Aid work. The Law Society is disappointed that it is proposed to introduce the same in a phased manner over a period of 3 to 5 years. The Law Society is more than happy to work in consultation in relation to agreeing such new rates and hope that some consultation can be commenced sooner rather than later.
- 3.5.8 The Law Society is also supportive of there being an annual review.
- 3.5.9 **Action – Council of Ministers has agreed that the hourly rates of pay to Advocates for Legal Aid work should be in accordance with the recommendation of the Commission on a phased 3 year basis Year 1 £120/£100; Year 2 £135/£115; Year 3 £150/£125 respectively for senior/junior Advocates. Effected by amendment to the Criminal Legal Aid Order during 2007/08. At the conclusion of the 3 year phasing this will be reviewed annually by Treasury.**

Higher Fees to UK Counsel

- 3.5.10 **The Commission suggested that fees paid to UK counsel for Legal Aid work is higher than that paid to Manx Advocates.**
- 3.5.11 **Consultations** - The General Registry point out that applications to license UK lawyers to work in Manx Courts are decided by Their Honours the Deemsters and are generally made by Manx Advocates on behalf of their clients. The circumstances in which these are given are strictly controlled through legislation and mainly involve the need for expert Counsel. Where specialist Counsel is required, the costs of engaging such are inevitably higher than that of those who do not possess such expertise. In cases where applications for licences are granted which do not require such expertise then local Legal Aid rates apply.
- 3.5.12 The Law Society is concerned that the representations which it made to the Commission may have been misunderstood. The Commission's comments appear to relate principally to the issue of the licensing of UK Counsel.
- 3.5.13 The concerns expressed by the Law Society were in relation to the rates paid to UK Counsel dealing with Legal Aid work. In many cases, UK Counsels are paid or it is perceived that they are paid at a higher Legal Aid rate than Isle of Man Advocates undertaking the same or similar work. In addition, uplifts in relation to complexity are agreed at the commencement of the instructions, rather than on assessment.
- 3.5.14 **Action – On the assumption that applications to licence Counsel will not be made unless expertise etc is required and that higher IOM rates are not given unless such is required, no action is needed.**

Duty Advocates Schemes

- 3.5.15 Two schemes currently run as follows:-
- Duty Advocate (Police Custody) Scheme 1998 which provides for an advocate on call to attend at a police station and
 - Duty Advocate (Courts of Summary Jurisdiction) which provides for an advocate to be available to give advice to anyone at a fixed criminal court. This advice is time limited but is not means tested and is therefore available to anyone.
- 3.5.16 **The Commission concluded that the rates, which were fixed in 1998, are now too low. It recommends that the advocate should be paid £150 for each on-call period during which he is available on the rota, and the Legal Aid rate for each hour or part of an hour he attends a police station to give advice to a suspect.**
- 3.5.17 **Consultations** - The Registry agrees that the current rates are too low.
- 3.5.18 The Law Society endorses and supports new and more substantial rates. The Law Society is disappointed that it is proposed to introduce the same in a phased manner over a period of 3 to 5 years. The Law Society is more than happy to work in consultation in relation to agreeing such new rates and hope that some consultation can be commenced sooner rather than later.
- 3.5.19 In addition, the Law Society would support the continuation of the current pay structure for the Police Station Duty Advocate Scheme whereby a fixed fee is paid for the Advocate being available on call together with a rate per hour when called out to attend the Police Station.
- 3.5.20 **Action – Council of Ministers had agreed that rates for Duty Advocates are too low and should be for a specific time period. Council have agreed to bring the rates for all schemes into line and will be reviewed in line with para 3.5.9**

Change of Advocate

- 3.5.21 **The Commission recommended that the decision to transfer a Certificate should be made by the Legal Aid Certifying Officer as at present, who should agree to this course of action only if she is satisfied that it is strictly necessary for the proper administration of justice'**
- 3.5.22 **Consultation** - The General Registry accepts this recommendation.
- 3.5.23 **Action - The decision to transfer a Certificate should be made by the Legal Aid Certifying Officer as at present, who should agree to this course of action only if she is satisfied that it is strictly necessary for the proper administration of justice'**

Panel of Advocates

- 3.5.24 The Commission recommended that the Panel of Advocates prepared to do civil Legal Aid work should always carry out the Legal Aid work that they hold themselves responsible for, other commitments permitting.
- 3.5.25 Action - This recommendation is accepted and is current practice

Standards of Advocates

- 3.5.26 The Commission recommended the introduction of a marshalling programme for the Deemsters and High Bailiff to improve the standard of advocacy at the junior bar.
- 3.5.27 Consultation - The General Registry comments that this is a matter for the Law Society.
- 3.5.28 Action - This is a matter for the Law Society and no further action will be taken by Government. Matter will be referred to the Law Society.

Voluntary or Compulsory for Advocates to undertake Legal Aid work

- 3.5.29 The Commission advised against a compulsory Legal Aid scheme and accepts the assurances of the Law Society that it will provide high quality legal services for the benefit of the Isle of Man.
- 3.5.30 Consultation - The General Registry agree with the recommendation
- 3.5.31 Action - A compulsory Legal Aid Scheme will not be introduced.

Disbursements

- 3.5.32 The Commission recommended that the Legal Aid Certifying Officer should approve all disbursements in civil matters with the Head of the Legal Aid and Legal Costs Division of the General Registry deciding criminal disbursements.'
- 3.5.33 It is assumed that the Commission intended the Legal Aid Certifying Officer to consider disbursements rather than approve them as a matter of course.
- 3.5.34 Consultation - The General Registry has no issue with this recommendation.
- 3.5.35 Action – The legislation will be amended so that the Legal Aid Certifying Officer will consider civil case disbursements. Effect will be given to this through an amendment to Legal Aid (General) Regulations 1997, Legal Advice and Assistance Regulations 1997 and the Criminal Legal Aid Regulations 1993 during 2007/08.

3.6 TRIBUNALS

3.6.1 The Commission pointed out that Civil Legal Aid is available for representation at certain Tribunals and not at others. The Commission is in favour of the provision of Legal Aid for [the Employment Tribunal and the Criminal Injury Compensation Tribunals] but only to ensure equality where a non legally aided party elects to use a lawyer. It recommends a fixed payment in each case to protect the Legal Aid fund and encourage conciseness.

3.6.2 The implications of this recommendation are unclear – for instance, what would happen where both parties to a case were legally aided? The principle of Legal Aid provision based upon decisions made by the other party to the case is questionable. The situation is further clouded by the fact that there is no other party in matters before the Criminal Injuries Compensation Tribunal.

3.6.3 It is clear that in the interests of equality and access to legal advice there should be an opportunity to apply for Legal Aid where this is appropriate, (Legal Aid for Tribunals is available in the UK) however Tribunals are not legal/court proceedings and by allowing Legal Aid then there is a risk that they are elevated to this status. Again there is an issue of possible contravention of the European Convention on Human Rights.

3.6.4 **Consultations** - General Registry wished to raise a linked issue for Tribunals which is that it is aware that it is becoming increasingly difficult to find legally qualified people to sit on the tribunals because of the low fee.

3.6.5 Appointments to Tribunals are made by a variety of agencies and no problem has been raised to the Chief Secretary's Office with regard to appointing people to serve on these Tribunals. An Appointments Commission has been established to appoint members of Tribunals. The issue of pay structure is being progressed by this body.

3.6.6 As regards the primary issue of Legal Aid for representation at Tribunals; the provision of Legal Aid in civil matters may, in certain circumstances, be implicit in the right of access to court guaranteed by Article 6(1) of the ECHR. Whether this is so depends on what is at stake in the proceedings, the complexity of the relevant law and procedure, and the capacity of the individual litigant to represent himself effectively. Case law shows that an applicant complained to the European Court of Human Rights regarding the absence of Legal Aid for judicial separation proceedings. The principles arising from this case required considerable importance be attached to the rights which are at stake for the individual in the litigation. Thus, litigation involving family separation or parental rights will generally require legal representation, as will a challenge to the lawfulness of detention.

3.6.7 In the Island Legal Aid is available for proceedings before the Mental Health Review Tribunal, the Advocates Disciplinary Tribunal and the Isle of Man Data Protection Tribunal. Apart from the Isle of Man Data Protection Tribunal the case is clear that these persons should be represented however the vast majority of Tribunals are unlikely to involve the issues considered by the case law given above. There is not an explicit reason to justify Legal Aid being made available across the board at this time.

- 3.6.8 The Employment Tribunal is a party tribunal, rather than an Administrative Tribunal, but the same principles apply. The Commission made specific reference to the Criminal Injuries Compensation Tribunal, this is not a tribunal in the judicial sense but a body administering an ex gratia scheme. In any case, changes are proposed to the present Scheme which will enable the costs of an applicant to be paid in respect of an appeal against an initial decision. There is therefore no need to include the Criminal Injuries Compensation Scheme in considerations regarding Legal Aid.
- 3.6.9 Action - Civil Legal Aid will not be available as a matter of course for representation at Tribunals. If an individual Tribunal wishes to make a case for Legal Aid to be available for the proceedings before it then the issues can be considered.**

4 CONCLUSIONS

- 4.1 The Council of Ministers has carefully considered and accepted the actions on the Recommendations of the Legal Services Commission.
- 4.2 The Council of Ministers considers that the Commission's over riding objective to increase access to justice will be met by the introduction of raised thresholds of eligibility for the vast majority of the Island's population. The new system:-
- Provides greater access to civil Legal Aid,
 - Is easier to understand and transparent,
 - Links to an established government financial system which is regularly reviewed, and
 - Has minimal additional costs
 - Is equitable to those who are/are not on benefits
- 4.3 Council shares the Commission's concern about the low rate of fees for Legal Aid work and the variance of Advocates fees between the four schemes providing advice and legal support. Progress has been made in this area as the rates have been increased and standardised across the four schemes. Council accepts that the rates need to be raised further in order to ensure that there are sufficient advocates willing to undertake Legal Aid work to meet the needs of the population.
- 4.4 The Council of Ministers has sought to meet the needs of those who need Legal Aid by introducing a fair and equitable scheme of repayment for those that can afford to repay. This not only ensures that there is access to Legal Aid for more people but also that the scheme gives value for money to the Taxpayer.
- 4.5 The Council of Ministers will review the new system for thresholds of eligibility twelve months after its introduction and the criteria for eligibility and rates of pay for advocates will be reviewed every 3 years and reported back to Council.
- 4.6 The recommendations that are still being investigated have a timescale and a further reports will be made to Council of Ministers.

SUMMARY OF ACTIONS TAKEN BY COUNCIL OF MINISTERS

- 1. Action – The Green Form scheme for legal advice will be more widely promoted by the Office of Fair Trading (OFT) and the Law Society (LS) and is publicised through the production of leaflets enabled by cooperation between the OFT and the LS by May 2008.**

Council of Ministers has agreed that Advocate's rates for the Green Form scheme and all other Legal Aid rates of pay will be standardised by inclusion in the Criminal Legal Aid Order. Subordinate Legislation is being prepared to action this during 2007/08. [Ref para 3.1.3]

- 2. Action – General Registry will review during 2008 the Mediation Service including family mediation available in order to make it more widely used and report to Council of Ministers. [Ref para 3.1.7]**
- 3. Action – General Registry will provide clearer information and guidance on the 'merits test' by April 2008. [Ref para 3.2.5]**
- 4. Action - Greater access to justice will be given through increasing the numbers of those eligible for Civil Legal Aid by:-**

- Widening the criteria to include all people who are in receipt of income based benefits (currently those in receipt of Family Income Supplement and Income Support only are automatically financially eligible for civil Legal Aid) and**
- Raising the thresholds for eligibility through the introduction of a new scheme aligned with that used to assess means by the DHSS for Family Income Supplement (FIS) which will:-**
 - Give greater access to civil Legal Aid,**
 - Is easier to understand and transparent,**
 - Links to an established government financial system which is regularly reviewed and has minimal additional costs,**
 - Is equitable to those who are/are not on benefits**
- The Legal Aid Act 1986, the Legal Aid (Financial Resources) 1997 and the Legal Advice and Assistance Regulations 1997 will be amended to give effect to the above within the 2007/08 Legislative Programme.**
- The new system for eligibility to civil Legal Aid and the thresholds will be reviewed one year after their implementation and will be reported to Council of Ministers**
- The criteria for eligibility will be reviewed every 3 years. [Ref par 3.2.12]**

- 5. Action - A new scheme of bands for repayment of contributions to facilitate access to Civil Legal Aid for those whose net resources are in the bands just above the levels which would permit free Legal Aid will be introduced. The contribution levels are set so as to require payment of 2 times the annual net resource excess figure (the amount above the free Legal Aid figure), with repayment being made over a four year period. Thus Civil Legal Aid is accessible to more but is treated, in effect, as an interest free loan. This is set out in Appendix 3-Table 2.**

The proposed method would achieve greater levels of recovery in a way which requires monthly contributions which are no greater than those required at present. This will be effected in the same manner as that proposed under 3.2.12 viz The Legal Aid Act 1986, the Legal Aid (Financial Resources) 1997 and the Legal Advice and Assistance Regulations 1997 will be amended to give effect to the above within the 2007/08 Legislative Programme. [Ref para 3.2.17]

6. Action – The move to Family Income Supplement alignment for means tests should improve the clarity and transparency. On the issue of means test reviews, the General Registry will consider this further in consultation with the DHSS and report back to Council of Ministers by April 2008. [Ref para 3.2.21]
7. Action - The current legislation which allows parents in care proceedings to be considered for Civil Legal Aid subject to a means test is continued. [Ref para 3.2.25]
8. Action –It is recognised that a statutory charge is merited, but also acknowledged that significant administration and therefore cost impact would result. The General Registry will seek to introduce legislation in 2008/09 to allow a phased introduction of the Statutory Charges to be made in consultation with the IOM Law Society. [Ref para 3.2.32]
9. Action - The means test for Criminal Legal Aid will remain. [Ref para 3.3.7-]
10. Action - The Legal Aid Office location will remain but be the subject of monitoring on confidentiality. [Ref para 3.4.8]
11. Action - The Legal Aid Certifying Officer will remain as an appointee of the Governor and accountable to the Legal Aid Committee [Ref para 3.4.10]
12. Action - A Legal Aid Appeals Tribunal should be appointed in pursuance of the Tribunals Bill and the present Committee should remain in place for consideration of policy issues. A Legal Aid Amendment Bill will be introduced within the 2007/08 Legislative Programme and an amendment to the Tribunals Act 2006. [Ref para 3.4.13]
13. Action - The issues in the Commission’s report on difficulties for timely payment of advocate’s fees no longer exists, therefore no action is required. [Ref para 3.5.4]
14. Action – Council of Ministers has agreed that the hourly rates of pay to Advocates for Legal Aid work should be in accordance with the recommendation of the Commission on a phased 3 year basis Year 1 £120/£100; Year 2 £135/£115; Year 3 £150/£125 respectively for senior/junior Advocates. Effected by amendment to the Criminal Legal Aid Order during 2007/08. At the conclusion of the 3 year phasing this will be reviewed annually by Treasury. [Ref para 3.5.9]

15. **Action – On the assumption that applications to licence Counsel will not be made unless expertise etc is required and that higher IOM rates are not given unless such is required, no action is needed. [Ref para 3.5.14]**
16. **Action – Council of Ministers had agreed that rates for Duty Advocates are too low and should be for a specific time period. Council have agreed to bring the rates for all schemes into line and will be reviewed in line with para 3.5.9. [Ref para 3.5.20]**
17. **Action - The decision to transfer a Certificate should be made by the Legal Aid Certifying Officer as at present, who should agree to this course of action only if she is satisfied that it is strictly necessary for the proper administration of justice. [Ref para 3.5.23]**
18. **Action - This recommendation is accepted and is current practice [Ref para 3.5.25]**
19. **Action - This is a matter for the Law Society and no further action will be taken by Government. Matter will be referred to the Law Society. [Ref para 3.5.28]**
20. **Action - A compulsory Legal Aid Scheme will not be introduced. [Ref para 3.5.31]**
21. **Action – The legislation will be amended so that the Legal Aid Certifying Officer will consider civil case disbursements. Effect will be given to this through an amendment to Legal Aid (General) Regulations 1997, Legal Advice and Assistance Regulations 1997 and the Criminal Legal Aid Regulations 1993 during 2007/08. [Ref para 3.5.35]**
22. **Action - Civil Legal Aid will not be available as a matter of course for representation at Tribunals. If an individual Tribunal wishes to make a case for Legal Aid to be available for the proceedings before it then the issues can be considered. [Ref para 3.6.9]**

4.7 Recommendation

That the action taken by the Council of Ministers in response to the Legal Service Commission be noted and endorsed.

Table 1 Legal Services Commission - Summary of Council of Ministers Actions on Commission's Recommendations

Abbreviations LS –Law Society, GR – General Registry, Attorney General Chambers, OFT - Office of Fair Trading

Legal Services Commission Recommendation	Consultations and Action	Implications of Recommendation		
		Legal	Policy	Financial
<p><u>Advice and Guidance Green Form Scheme</u> Legal advice and Assistance (the Green Form scheme) is promoted by leaflets.</p>	<p>Green</p> <p>L S and G R agree. In addition they suggested that Advocates rates for the Green Form Scheme be standardised.</p> <p>Office of Fair Trading and Law Society will promote the Green Form Scheme more fully, Advocates rates for Green Form are standardised with the other Legal Aid rates. Timescale 2007/08</p>	<p>Subordinate (Legal Aid (Advice & Assistance) Scheme 1997, Criminal Legal Aid Order 2005</p>	<p>Open Transparent and promotes equal access to justice.</p>	<p>Yes, additional costs for rates of pay for advocates</p>
<p><u>Advice and Guidance Mediation Service</u> Introduction of a Mediation Service to try to resolve disputes mainly from marital/relationship breakdown where children are involved</p>	<p>Green</p> <p>GR supports an independent Mediation Service.</p> <p>General Registry will review Mediation Services to make them more widely available.</p>	<p>Yes through the General Registry</p>	<p>Agreed as part of the Children and Young People's Strategy</p>	<p>Yes A Mediation scheme will incur a revenue cost but could be offset by saving court time.</p>
<p><u>Legal Aid for Civil Cases Merits test</u> No change – Merits test to continue but clearer guidance required.</p>	<p>Green</p> <p>GR agree</p> <p>General Registry will review during 2007 the Mediation Service to make it more widely available and report to Council of Ministers</p> <p>General Registry will provide clearer</p>	<p>None</p>	<p>Open, transparent system</p>	<p>None</p>

		Implications of Recommendation		
Legal Services Commission Recommendation	Consultations and Action	Legal	Policy	Financial
	information and guidance on the 'merits test' by April 2008.			
<p><u>Legal Aid for Civil Cases Means Test</u> Income eligibility be raised substantially. Scheme suggested based on Applicant's income tax allowance etc would raise threshold from £8k to £18K</p>	<p>Green</p> <p>Greater access to justice will be given through increasing the numbers of those eligible for Civil Legal Aid by widening the criteria to include all people who are in receipt of income based benefits (currently those in receipt of Family Income Supplement and Income Support only are automatically financially eligible for civil Legal Aid) and raise the thresholds for eligibility through the introduction of a new scheme aligned with that used to assess means by the DHSS for Family Income Supplement (FIS). Legislative Programme 2007/08/</p>	<p>Primary (Legal Aid Act 1986) Sub (Legal Aid (Financial Resources) Regulations 1997) Legal Aid (Advice & Assistance Regulations 1997)</p>	<p>Meet the aim of social well being and substantially contribute to equal access to justice system.</p>	<p>Yes</p>
<p><u>Repayment of Contributions to Civil Legal Aid</u> Commission made no recommendation</p>	<p>Thresholds for free Civil Legal Aid are set - some fall just outside eligibility. Those applicants can have access to Legal Aid but part or all is required to be repaid. Current method does not achieve repayment contributions at an acceptable level.</p> <p>No consultation has been carried out. Introduce a new scheme of bands for repayment of contributions. New scheme would achieve greater levels of recovery in a way which requires monthly contributions</p>	<p>Legal Aid (Financial Resources) Regulations 1997) and Legal Aid (Advice and Assistance Regulations) 1997</p>	<p>Meet the aim of social well being and substantially contribute to equal access to justice system.</p>	<p>Yes potential to recover greater sums.</p>

		Implications of Recommendation		
Legal Services Commission Recommendation	Consultations and Action	Legal	Policy	Financial
	which are no greater than those required at present. Thus Civil Legal Aid is accessible to more but is treated, in effect, as an interest free loan.			
Means Tests Regulations Regulations which govern assessment of means lack transparency	Green GR agree that the rules are over complicated and suggest a simple, understandable system. The move to FIS alignment for means tests should improve clarity and transparency. On the issue of means test reviews, the General Registry will consider this further in consultation with the DHSS and to report back to Council of Ministers by April 2008.		Open, transparent and accountable government	None
Legal Aid Parents in Care Proceedings 'Legal Aid should be granted without means test to parents in care proceedings and also to Guardians ad Litem who represent the child'.	Red The introduction of a Mediation Service would go some way towards assisting parents in care proceedings. In the interests of a fair and equitable approach, Civil Legal Aid should be the subject of a means test. Parents and Guardians Ad Liteum involved in care proceedings will be eligible for Legal Aid on the same basis as other applicants using the same calculations for FIS. Thus raising the threshold levels. The means test will continue for parents in care proceedings	No	Equality of access	None

		Implications of Recommendation		
Legal Services Commission Recommendation	Consultations and Action	Legal	Policy	Financial
<p>Statutory Charge 'see merit in the introduction of statutory charge but no introduction but wish to see close review'</p>	<p>Green</p> <p>GR comment that current system is not considered equitable and fair. Statutory charge should be considered so that Government can recoup some Legal Aid costs.</p> <p>General Registry will seek to introduce legislation in 2008/09 to allow a phased introduction of statutory charges to be made.</p>	Yes if decision to proceed	Value for money	Yes – Increase in money being returned to public funds.
<p><u>Means Test for Legal Criminal Legal Aid</u> Means test should be abolished to comply with European Court of Human Rights (ECHR)</p>	<p>Red</p> <p>Means test should remain – Attorney General's Chambers comment with provisos that there is no justification for providing free criminal Legal Aid. GR strongly supports the retention of the means test.</p> <p>Means test for Criminal Legal Aid will remain.</p>	None	Meets equal access to justice and value for money	Yes
<p><u>Human Rights Legal Aid Office -service and location</u> Independence of the Legal Aid Office both in its location and the management of the Legal Aid Certifying Officer.</p>	<p>Red</p> <p>Attorney General's Chambers comment that provided confidentiality is addressed then location can remain. GR comment that confidentiality is addressed and do not see immediate need to relocate. Legal Certifying officer accountable to Legal Aid Committee.</p>	None	Open, transparent and accountable government	None

		Implications of Recommendation		
Legal Services Commission Recommendation	Consultations and Action	Legal	Policy	Financial
	The Legal Aid Office will remain in its present location but be subject of monitoring on confidentiality. Legal Aid Certifying Officer remains as appointed by the Governor			
<u>Human Rights Legal Aid Committee</u> Lack of Independence of Appeals process and potential conflict of interest for judiciary.	Green Legal Aid Office and Legal Costs Division recommend that there be a move to a two Committee structure, Policy and Appeals. These changes overcome the concerns. The GR comments that the Legal Aid Appeals Tribunal should be appointed in pursuant of the proposed Tribunals Act 2005. A Legal Aid Appeals Tribunal will be appointed in pursuance of the Tribunals Bill and the present Committee to remain in place for consideration of policy issues. Legislation within 2207/08	Yes General Registry to consider appropriate legislation	Open, transparent and accountable Government	
<u>Advocates Administration</u> 'Advocates have difficulty getting paid in timely manner for Legal Aid work.'	Green GR does not accept this. LS comment that this was a problem in the past but now resolved. Standard invoices are processed 1 month from receipt and sent to Treasury for payment. LS agree that the system has improved.	None	None	None

		Implications of Recommendation		
Legal Services Commission Recommendation	Consultations and Action	Legal	Policy	Financial
<p><u>Advocates</u> Civil and Criminal Legal Aid Work. The fees paid to Advocates for Legal Aid work are too low and should be aligned to the commercial rate. They should be closely aligned to the commercial rate.</p>	<p>Green</p> <p>GR accepts rates paid are too low and that if they continue at these rates it may become difficult to continue to offer the service. Does not agree that the Legal Aid rate should be more closely aligned to the commercial rate.</p> <p>The rate of pay for Advocates undertaking Legal Aid work will be revised in accordance with the recommendations of the Commission on a phased basis. Legislation Programme 2007/08</p>	Subordinate (Criminal Legal Aid Order 2005)	Accountable government	Yes
<p><u>Advocates</u> Higher fees to UK Counsel? Perceived unfairness in the payment of higher fees to UK Counsel acting in the Island</p>	<p>Red</p> <p>GR point out that applications to license UK lawyers to work in Manx Courts are decided by Their Honours the Deemsters and are generally made by Manx Advocates on behalf of their clients. The circumstances in which lawyers from the UK or other jurisdictions are allowed to work in the Island are strictly controlled through legislation and mainly involve the need for expert Counsel.</p> <p>No action</p>	None	None	None
<p><u>Advocates</u> Duty Advocates Schemes Rates, which were fixed in</p>	<p>Green</p> <p>GR agree that the current rates are too low.</p>	Subordinate (Duty Advocate Scheme 1997,	Equitable and accountable	Yes

		Implications of Recommendation		
Legal Services Commission Recommendation	Consultations and Action	Legal	Policy	Financial
1998, are now too low. Advocate should be paid £150 for each on-call period during which he is available on the rota, and the Legal Aid rate for each hour or part of an hour he attends a police station to give advice to a suspect. Travel expenses should be paid at the prevailing Government rate."	Rates for Duty Advocates are too low and should be for a specific time period. Rates for all schemes will be brought into line and reviewed (see Advocates' Rates of Pay detailed above).	Duty Advocate (Police Custody) Scheme 1998, Criminal Legal Aid Order 2005		
Advocates Change of Advocate Decision to transfer a Certificate should be made by the Legal Aid Certifying Officer as at present, who should agree to this course of action only if she is satisfied that it is strictly necessary for the proper administration of justice.	Green GR accepts this recommendation. Decision to transfer a Certificate should be made by the Legal Aid Certifying Officer as at present. She should agree to this course of action only if she is satisfied that it is strictly necessary for the proper administration of justice.	None	Equitable	None
Advocates Panel of Advocates Panel of Advocates prepared to do Civil Legal Aid work should always carry out the Legal Aid work that they hold	Green This is current practice. No action	None	None	None

		Implications of Recommendation		
Legal Services Commission Recommendation	Consultations and Action	Legal	Policy	Financial
themselves responsible for, other commitments permitting				
<p>Advocates Standards of Advocates Introduction of a marshalling programme for the Deemsters and High Bailiff to improve the standard of advocacy at the junior bar.</p>	<p>Green GR comment that this is a matter for the Law Society. This is a matter for the Law Society and no further action will be taken. Matter will be referred to the Law Society</p>	None	None	None
<p>Advocates Voluntary/Compulsory for Advocates to undertake Legal Aid Advises against a compulsory Legal Aid scheme and accepts the assurances of the Law Society that it will provide high quality legal services for the benefit of the Isle of Man.</p>	<p>Green GR agree with the recommendation The Legal Aid Scheme will continue as a voluntary scheme.</p>	None	None	None
<p>Disbursements The Legal Certifying Officer should approve all disbursements in civil matters with the Head of the Legal Aid and Legal Costs Division of the General Registry</p>	<p>Green It is assumed that the Commission intended the Legal Aid Certifying Officer to consider disbursements rather than approve them as a matter of course. GR has no issue with this recommendation.</p>	Subordinate (Legal Aid (General) Regulations 1997	None	None

		Implications of Recommendation		
Legal Services Commission Recommendation	Consultations and Action	Legal	Policy	Financial
deciding criminal disbursements.	Legislation to be amended so that the Legal Certifying Officer will consider all disbursements in civil matters. Legislation Programme 2007/08			
<u>Tribunals</u> Legal Aid for Tribunals In principle in favour of the provision of Legal Aid for [the Employment Tribunal and the Criminal Injury Compensation Tribunals] but only to ensure equality of arms where a non legally aided party elects to use a lawyer. Recommend a fixed payment in each case to protect the Legal Aid fund and encourage conciseness."	Red GR comment that in the interests of equality and access to legal advice there should be an opportunity to apply for Legal Aid where this is appropriate, (Legal Aid for Tribunals is available in the UK) however Tribunals are not legal/court proceedings. T Attorney General's Chambers are of the view that there is there is no argument to justify Legal Aid being made available across the board at this time. On balance there should be no change to current practice. Specific Tribunals to make formal case for change as appropriate.	None	None	None

APPENDIX 1 - EXISTING LEGAL AID SYSTEM

Legal Aid was introduced into the Isle of Man for criminal appeals, by the Criminal Code Amendment Act 1921 and provided for defendants in criminal trials by The Poor Prisoners Defence Act 1933. Forty years later the Legal Aid (Isle of Man) Act 1973 introduced Legal Aid for civil proceedings (with some exceptions e.g. defamation).

The Legal Aid Act 1986 replaced the 1973 and 1933 Acts and those parts of the 1921 Act that dealt with Legal Aid. The 1986 Act introduced a scheme of legal advice and assistance ("the Green Form Scheme"), a more comprehensive scheme for criminal Legal Aid (but based on the existing scheme) and the introduction of the Duty Advocates Scheme.

The Legal Aid Committee

A Legal Aid Committee was established by the 1973 Act, comprising the First Deemster, the Attorney General, the President or Vice-President of the Isle of Man Law Society and the Chairman of the Isle of Man Magistrates Association.

The Committee's principal function is to make regulations to implement civil Legal Aid provisions and the Green Form Scheme. Such regulations require Tynwald approval. The Committee hears appeals against the refusal of Legal Aid in civil proceedings.

Legal Certifying Officer

Regulations provide for the appointment of a legally qualified Certifying Officer by the Lieutenant Governor. The administration of the civil Legal Aid scheme is effectively vested in the Certifying Officer, who is responsible for the issue of Legal Aid certificates. The Officer considers the legal merits of the application, but the financial eligibility is decided by the Legal Aid and Costs Division of the General Registry and in certain instances in consultation with the DHSS.

Civil Legal Aid

Applications for civil Legal Aid are made to the Legal Aid Certifying Officer by the applicant's advocate. The application is granted if it satisfies the legal merits test, which takes into account cost-effectiveness, and if the applicant is financially eligible: the financial criteria are laid down in the Legal Aid (Financial Resources) Regulations 1997.

A successful application is granted a Legal Aid Certificate, that certificate might be limited in the first instance but later amended or extended upon further application. Legal Aid for appeals is available on the same basis.

If Legal Aid is refused an appeal may be considered by the Legal Aid Committee under the Legal Aid (General) Regulations 1997. There is no right of appeal on the grounds that the applicant is not financially eligible.

The Civil Legal Aid Order 1999 made by the Treasury after consultation with the Deemsters, and approved by Tynwald, provides that remuneration for civil Legal

Aid work is paid at the same level as that for criminal work, with the exception of fixed fees for certain matrimonial proceedings.

If there has been no recovery of costs from the other party the advocate's costs are paid after assessment by the General Registry

Criminal Legal Aid

An application for criminal Legal Aid must be made to the relevant court, either by the applicant, with a request for an advocate, or by an advocate chosen by the applicant. The application will be granted if it is considered by the court to be in the interests of justice and if the applicant is financially eligible: The financial eligibility criteria are laid down in the Criminal Legal Aid Regulations 1993 made by the Legal Aid Committee and approved by Tynwald. An application for Legal Aid to appeal against sentence and/or conviction must be made to the Chief Registrar, except for proceedings before the Privy Council.

If Legal Aid is refused, there is a right of appeal to the court or a Judge.

An advocate is remunerated for criminal Legal Aid work at rates set out in the Criminal Legal Aid Order 2001, made by the Treasury and approved by Tynwald. Bills of costs must be assessed by the General Registry before payment.

Duty Advocates Scheme - advice and representation in criminal cases

There are two schemes that provide for legal advice and representation in criminal matters. They are the Duty Advocate Scheme 1997, which provides for an advocate to be available at fixed criminal courts, and the Duty Advocate (Police Custody) Scheme 1998, which provides for an advocate to be on call to a police station. The Isle of Man Law Society produces a panel and rota for the Schemes.

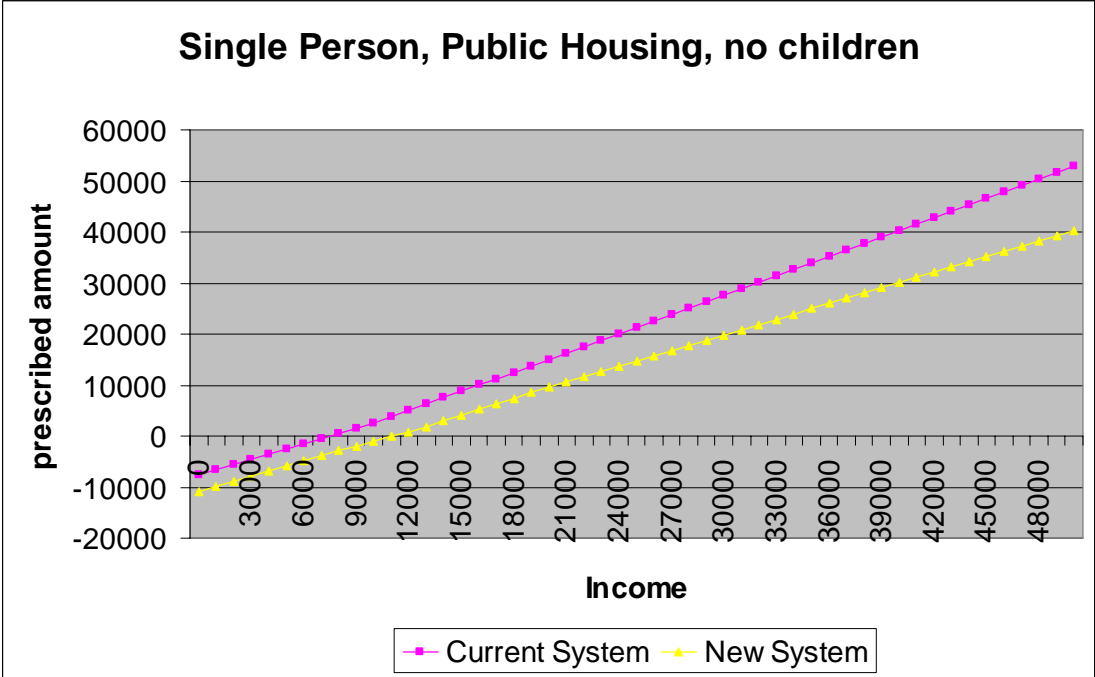
Neither scheme is means or merit tested. The advocate is remunerated according to the rates laid down by the Schemes and his costs are paid after consideration by the General Registry. Bills of costs must be assessed by the General Registry before payment.

Legal Advice and Assistance (Green Form)

Advice is available on almost every aspect of Manx law under the Legal Advice and Assistance (Green Form) Scheme, which is intended to provide either initial advice or quick resolution of a matter. The scope of the advice is limited to a maximum of approximately three hours work when petitioning for divorce or two hours for all other matters but the advocate may apply for extensions to those limits.

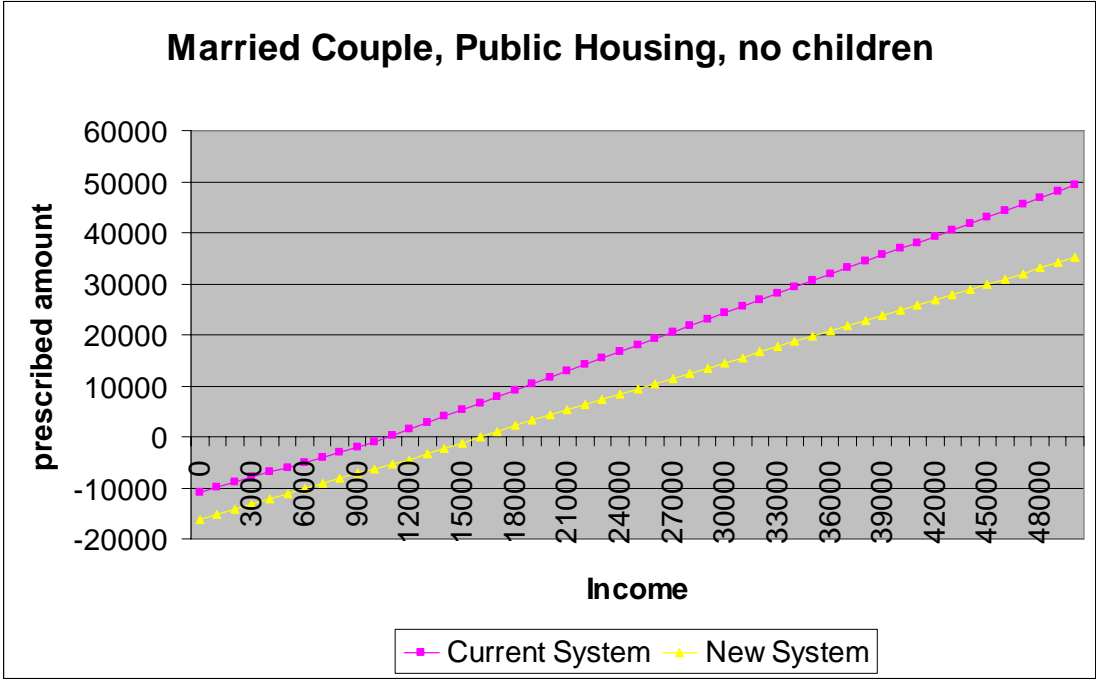
Applications for this type of Legal Aid are made to an advocate, who carries out a means and merits test. The financial criteria are laid down in the Legal Aid (Advice and Assistance) Regulations 1997.

Appendix 2 – Examples of Hypothetical Cases under existing and new Legal Aid Eligibility systems.



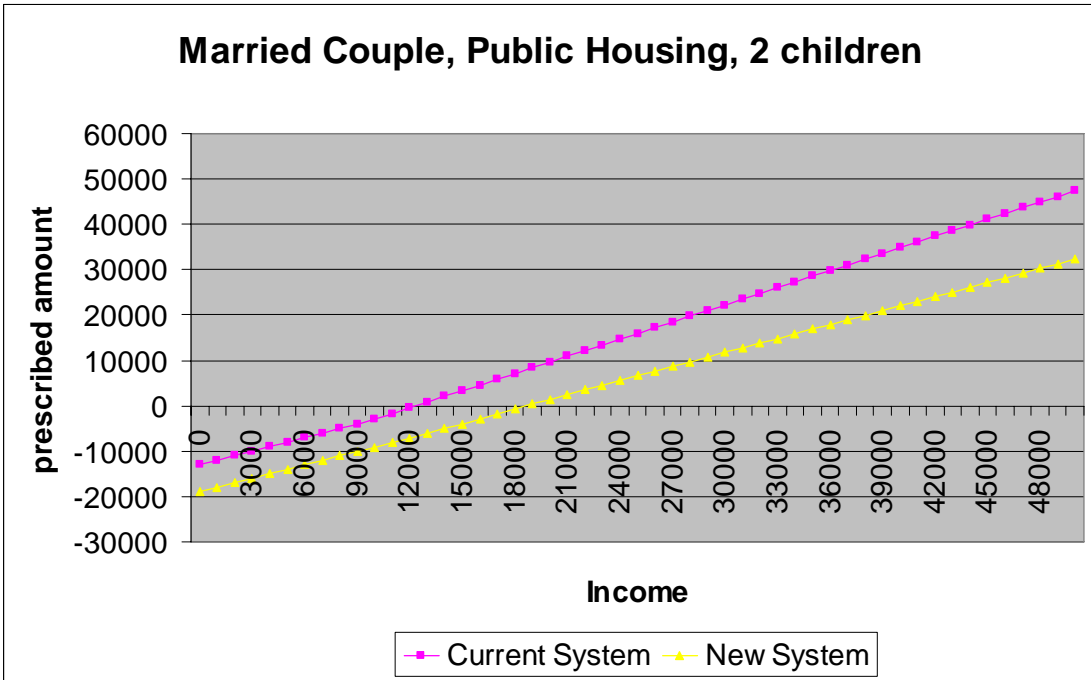
Status	SINGLE
Children	0
Working Full	
Time	N
Housing Cost	2860
Child Care Cost	0
Rates	700
Housing Type	RENTED
Maintenance	
Payments	0

Under the existing system free Legal Aid is available to those whose income is less than £7,560 per annum. This increases to £11,125 under the new system.



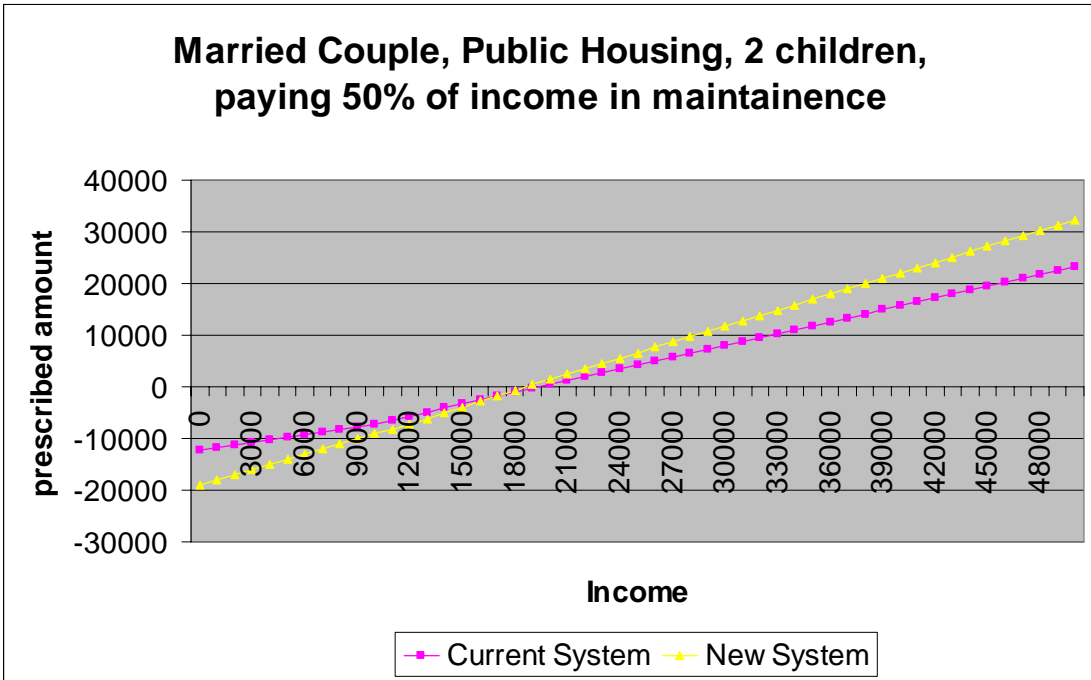
Status	MARRIED
Children	0
Working Full	
Time	Y
Housing Cost	2860
Child Care Cost	0
Rates	700
Housing Type	RENTED
Maintenance	
Payments	0

Under the existing system free Legal Aid is available to those whose income is less than £10,760 per annum. This increases to £16,050 under the new system.



Under the existing system free Legal Aid is available to those whose income is less than £11,710 per annum. This increases to £18,560 under the new system

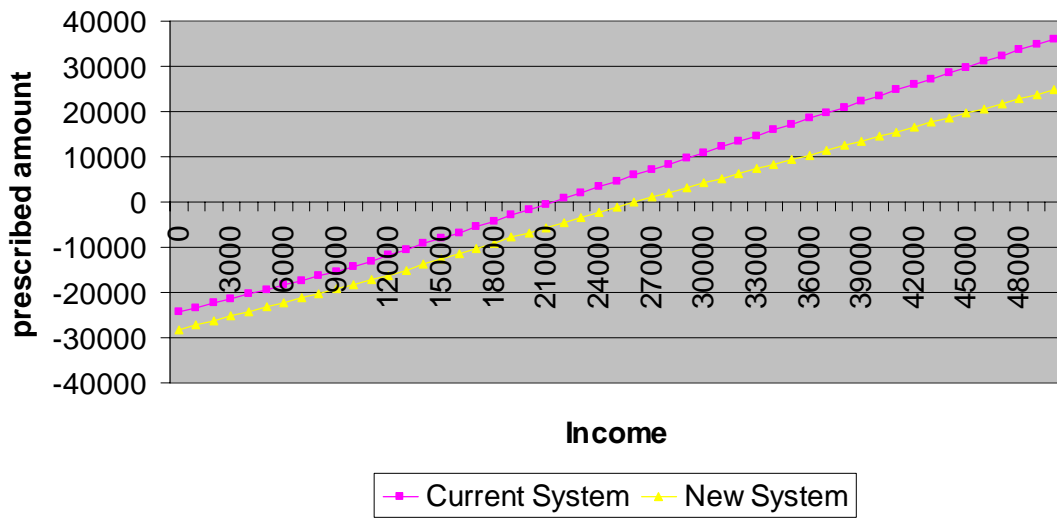
Status	MARRIED
Children	2
Working Full Time	Y
Housing Cost	2860
Child Care Cost	0
Rates	700
Housing Type	RENTED
Maintenance Payments	0



Under the existing system free Legal Aid is available to those whose income is less than £17,160 per annum. This increases to £18,560 under the new system

Status	MARRIED
Children	2
Working Full Time	Y
Housing Cost	2860
Child Care Cost	0
Rates	700
Housing Type	RENTED
Maintenance Payments	50%

**Married Couple, £10,000 pa Mortgage, 2 children,
£5,000 pa childcare**



Status	MARRIED
Children	2
Working Full Time	Y
Housing Cost	10000
Child Care Cost	5000
Rates	700
Housing Type	OWNER OCCUPIER
Maintenance Payments	0%

Under the existing system free Legal Aid is available to those whose income is less than £21,350 per annum. This increases to £26,090 under the new system

Appendix 3 – Eligibility for Partial Legal Aid and Repayment periods.

**Table 1
CURRENT SYSTEM**

RESOURCES		% CONTRIBUTION	MAX CONTRIBUTION	MONTHLY PAYMENT	PAYMENT PERIOD
£	£		£	£	MONTHS
4,000	5,000	10	500	42	12
5,000	6,000	25	1,000	84	12
6,000	7,000	50	1,500	126	12
7,000	8,000	75	2,000	168	12

**Table 2
PROPOSED
SYSTEM**

RESOURCES		% CONTRIBUTION	MAX CONTRIBUTION	MONTHLY PAYMENT	PAYMENT PERIOD
£	£		£	£	MONTHS
0,001	1,000	2 x NR (net resources)	2-2,000	42 (max)	1-48
1,001	2,000	2 x NR	2,002-4,000	84 (max)	24-48
2,001	3,000	2 x NR	4,002-6,000	126 (max)	32-48
3,001	4,000	2 x NR	6,002-8,000	168 (max)	36-48

Appendix 4 - EXECUTIVE SUMMARY

CHAPTER 1

INTRODUCTION

Background

1.1 - 1.5 Three Commissions of Inquiry have been created in the last fourteen years into legal services in the Isle of Man. The Clothier Commission's recommendations in 1990 led to the report of the Calcutt Commission in 2001 which identified shortcomings in the provision of legal aid and recommended further investigation. This has been carried out by the present Commission whose terms of reference are:

"to consider the provision and administration of legal aid and legal advice and assistance in the Isle of Man in the context of recognised best practice and in particular to review and comment, with any relevant recommendations, on:

the legal framework (both primary and subordinate legislation), including eligibility (financial and otherwise) for legal aid and legal advice and assistance,

the administrative arrangements, and

the availability and quality of the service provided and the fee structure for those providing the service".

The overriding Objective

1.6-1.7 This is to maximise access to justice while at the same time ensuring that any public provision gives value for money.

Methodology

1.8 -1.10 We held 6 meetings over 15 months, received 40 written submissions and heard oral evidence over 3 days, and made our formal report to the Council of Ministers in May 2003.

Impressions

1.11-1.14 The burgeoning growth of the financial sector has vastly increased the number of

lawyers working on the island but few of them deal with legal aid cases. This means that it is becoming progressively more difficult to find a suitable lawyer prepared to do legal aid work. Our recommendations aim to strike a fair balance between the just claims of the public to be properly represented in legal matters and the expectations of the legal aid lawyer to be adequately remunerated. We have striven to be guided by the twin loadstars of simplicity and transparency. There should be a uniform hourly rate for the preparation and conduct of a case with a higher rate for more senior practitioners.

CHAPTER 2

THE EXISTING LEGAL AID SYSTEM

Background

2.1-2.6 Legal aid was introduced in 1921 with subsequent amendments. The Legal Aid Committee makes regulations for civil legal aid. The scheme is administered by the Certifying Officer. The Certifying Officer administers the civil legal aid scheme and considers the merits test; financial eligibility is determined by the Legal Aid Costs Division of the General Registry in consultation with the Department of Health and Social Security.

Criminal Legal Aid

2.7 – 2.9 This is granted or refused by the courts, with rights of appeal. There are financial eligibility tests and, to be granted, the application must be considered by the court to be “in the interests of justice”.

Duty Advocate Schemes

2.10-2.12 The schemes provide for an advocate to be available at certain criminal courts to give advice and to attend a police station to advise a suspect held in custody.

Civil Legal Aid

2.13-2.17 Civil legal aid is granted or refused by the Legal Aid Certifying Officer with appeals to the Legal Aid Committee. The remuneration rates are broadly similar as that for criminal work apart from certain matrimonial proceedings.

Legal Advice and Assistance (Green Form)

2.18-2.19 The Green Form scheme enables a lawyer to give initial advice upon almost every aspect of Manx law.

CHAPTER 3

THE SHORTCOMINGS OF THE SYSTEM

3.1 The present system is in urgent need of improvement, if it is to provide the access to justice intended.

Information and Access

3.2 Criminal and civil proceedings are dealt with by different bodies with different eligibility criteria.

3.3 The system is complex and difficult to understand.

3.4 The financial eligibility thresholds are wholly unrealistic.

3.5 The regulations governing eligibility are unduly complex.

3.6 Parents in care cases are not granted legal aid without a means test.

3.7 The Green Form scheme, which is cost effective, is underused.

3.8 Legal aid is not available for some Tribunals.

The Profession

3.9 Legal aid fees are too low when compared with commercial and routine private client work

3.10 Payment is slow. There is no provision for payment on account.

3.11 The administration is unduly bureaucratic.

3.12-3.13 These shortcomings mean that there are not enough advocates prepared to do legal aid work.

3.14 There is unjustified disparity between fees paid to United Kingdom counsel acting in the Isle of Man under legal aid and a Manx advocate.

3.15 There is a lack of effective quality control over advocates, unlike the United Kingdom.

Legal Aid Administration

3.16 There is a perception of a lack of independence of the Legal Aid Certifying Officer. A similar problem exists in the appeals process where the Legal Aid Committee is both the regulatory body and the body hearing appeals from the Certifying Officer. Since judges sit on the Committee the potential for conflicts of interest in subsequent legal proceedings exists.

3.17 There is no provision to 'claw back' the costs of litigation when money or property has been preserved or recovered but no costs order made.

3.18 The legal merits test appears to need reviewing and consistent application.

3.19 Certain aspects of the system may not be in accordance with the European Convention on Human Rights.

3.20 The Courts cannot award costs against a legally-aided person.

CHAPTER 4

DISCUSSION AND RECOMMENDATIONS

4.1 Since there is broad consensus among those most closely involved in the provision and administration of justice in the Island it is our earnest hope that our recommendations will receive prompt and favourable consideration by Tynwald and that they will be brought into force expeditiously.

Public Information and Access to Legal Aid

4.2 "User friendly" leaflets setting out what is on offer from the legal profession should be made available at locations used by the public. These leaflets should be jargon-free and written in plain English.

4.3 All advertising restrictions should be abolished.

Advice Surgeries

4.4 Help in form filling and settling of everyday consumer and neighbour disputes, debt management, and housing problems should be available in a pilot scheme of advice surgeries conveniently located.

Mediation

4.5 Mediation should be expanded to all appropriate disputes and it should no longer be necessary to start proceedings to invoke the mediation process.

Eligibility Criteria

4.6 Income eligibility criteria should be raised substantially.

4.7 The current merits test should continue in full force.

4.8 The present civil legal aid scheme provides free legal aid for those whose resources after deductions do not exceed £4000, provision for a contribution is then available on a sliding scale until a cut off point at £8000 is reached.

4.9 The Law Society has put forward a tax based eligibility scheme.

4.10 We recommend that eligibility for civil legal aid should closely follow the tax regime and operate on a sliding scale so that after deduction of all tax allowances the litigant will pay 10% of what he has left for each £1,000 with a cut-off point at £10,000.

4.11 Housing costs should form a deductible allowance from gross income including the interest element of a mortgage.

4.12 Worked examples are to be found at para. 4.12 at pp 19-20 of this Report.

4.13 The same allowances should apply to everyone irrespective of the source of their income.

4.14 There should be no discretion to grant legal aid for cases falling just above the financial limits.

Statutory Charge

4.15-4.16 The question of whether to implement the 'statutory charge' (by which the legal aid fund recovers the shortfall of litigation costs from the damages or property obtained or preserved as a result of the litigation) should be kept under close review and should our recommendations for streamlining legal aid not be successful, then this should be revisited.

Orders for costs against Legally-Aided persons

4.17 We are not in favour, for practical reasons, of making a costs order against an unsuccessful legally aided litigant, but the Court should consider carefully whether or not to make a costs order which is not to be implemented without leave of the court with a view to revisiting the matter were the litigant's position to change.

Eligibility for Criminal Legal Aid

4.18 The means test for criminal legal aid should be abolished, although the court should retain a discretion to award costs against a Defendant where appropriate.

4.19 The Duty Advocates Schemes should continue without a means test.

“Football Pools Order”

4.20 The court should retain its power to review its costs order should that turn out to be inappropriate.

Employment Tribunals and Criminal Injury Compensation Tribunals

4.21 Legal aid should be available for Tribunal hearings where a non-legally aided party uses a lawyer.

Rates

4.22 There should be an across the board hourly rate of £125 for an advocate of under ten years call and £150 for those over ten years. These should be reviewed annually.

4.23 Apart from the call out and stand-by fees in the Duty Advocates (Police Custody) Scheme, the same hourly rate should apply for the preparation, waiting, travel, and appearances in all cases.

Legal Aid Staff

4.24 The Legal Aid Certifying Officer and deputy should no longer be subject to the line management of the Chief Registrar. The staff of the Legal Aid Certifying Officer should have the Legal Aid Certifying Officer as their line manager.

Assessment and Payment of Bills

4.25 Hours claimed in legal bills should be accepted as bona fide provided they are accompanied by a certificate warranting their accuracy signed by the claimant personally, and no further time consuming investigation is necessary.

4.26 Within two months of the lodgement of the final bill there should be an entitlement to payment of 90% of all claimed costs plus disbursements. Each firm should be given a unique reference number and payment made through the BACS system.

4.27 Interim payments of 90% of claimed costs should be available for long cases, with any overpayments being taken into account when the final bill is assessed.

4.28 The people of the Island are entitled to high quality legal services. The chances of achieving this will be improved by dealing fairly with lawyers prepared to undertake legal aid work.

Disbursements

4.29 The Legal Aid Certifying Officer should approve all civil disbursements and the Head of the Civil Legal Aid and Costs Division of the General Registry should deal with criminal disbursements.

Change of Advocate

4.30 The transfer of a legal aid certificate should continue to be determined by the Legal Aid Certifying Officer who should, as at present, agree to this course only if satisfied that it is strictly necessary for the proper administration of justice.

Panel of Advocates

4.31 Members of the panel of advocates prepared to do legal aid should always carry out the legal-aid work they hold themselves out for, other commitments permitting.

Duty Advocates (Police Custody) Scheme

4.32 The duty advocacy scheme for legal advice for those in police custody both safeguards the rights of the individual and frees confessions from the taint of coercion and may shorten trials.

4.33 Advocates should be paid £150 for each on-call period plus the legal aid rate for each hour or part of an hour he advises at a police station. Travel Expenses should be at the prevailing Government rate. The rate for a senior advocate on call to advise more junior colleagues should be £300 for each seven day period

4.34 There should be full implementation of the statutory Duty Advocates Scheme, and which would result in the Scheme operating during working hours.

Community Legal Service/Public Defender

4.35 A Public Defender Service should not be instituted at present but if the improvements we propose do not result in increased access to justice then such a scheme may be the only available alternative.

Civil Legal Aid Appeals

4.36 Legal aid for appeals should be considered by an independent sub-committee of the Legal Aid Committee with an independent chairman. Criminal legal aid appellate procedure should continue as at present.

Child Care proceedings

4.37 Legal aid without a means test should be available for parents and Guardians ad Litem all care proceedings.

4.38 The welfare of the child in care cases and the rights of the parents require a full investigation which can only be done if each party is legally represented.

4.39 Careful consideration should be given to the enhancement provisions of the rates we have recommended.

Standards of Advocacy

4.40 A marshalling programme with the Deemsters and the High Bailiff should be instituted to improve the standard of advocacy at the junior bar and the Law Society should subject their training programme to continuing review.

A Voluntary or Compulsory Scheme?

4.41 We advise against a compulsory legal aid scheme for lawyers at present and accept the assurances of the Law Society that it will provide high quality legal services for the benefit of all the people of the island. Our recommendations, if implemented, will make good the shortcomings we have identified. We look to the legal profession to play its part in securing access to justice, which is the birthright of every Manxman.