

INTERIM REPORT OF THE LEGAL AID SUB-COMMITTEE 2004

1 Introduction

1.1 This is an interim report on the proposed reform of legal aid in Jersey. The report has been drafted at the request of the Committee of the Law Society of Jersey and is based on the following:-

- (a) the views of the members of the sub-committee after various discussions over a number of months. In recent weeks these have been supplemented by comments both from the Bâtonnier, the President of the Law Society and the Attorney-General;
- (b) the Opinion of Mr James Dingemans QC;
- (c) information supplied by the legal aid administrators in Guernsey & the Isle of Man;
- (d) research and experience of the working of the legal aid system in England & Wales. This has been supplemented by concerns in both the national and legal media of the current working of this system;
- (e) research on the Public Defenders System in Florida and New South Wales and comment regarding the English pilot scheme;
- (f) the European Convention on Human Rights ("ECHR") soon to have direct application in Jersey by virtue of the coming into force of the Human Rights (Jersey) Law 2000, which imposes certain obligations on the Member States including the provision of a legal aid system which is human rights compliant.

2 Aims & Objectives of any proposed reform of the current system

2.1 These are as follows:-

- (a) To deliver an effective legal aid system for users in the Island that is fully compliant with the Human Rights (Jersey) Law 2000;
- (b) To ensure that legal aid is administered in a cost-effective way that is not open to abuse by either users or lawyers;
- (c) To deliver a system that places a fair burden upon lawyers within the Island commensurate with their oath;
- (d) To deliver a system that ensures that there is sufficient access to the Courts.

3 The Current System

3.1 The membership of the Law Society of Jersey comprises Advocates and Solicitors of the Royal Court of the Island of Jersey. On admission to the Bar, or on being given authority to practice, Advocates and Solicitors are required to take oaths requiring them to represent "veuves, pauvres, orphelins et persons *indefendues*".

3.2 By resolution dated 20 August 1904 the Advocates resolved that the obligation to represent such persons should be undertaken by advocates of less than 15 years standing by way of a rota system administered by the Bâtonnier who is elected to represent the interests of Advocates (and not Solicitors). As a matter of practice, Solicitors have also been included in the legal aid system and by custom accept the authority of the Bâtonnier. The Bâtonnier is elected every three years.

3.3 In more recent years with the increase in the amount of legal aid work, the system is administered by a person appointed by the Bâtonnier, namely the Acting Bâtonnier. In practice, the Acting Bâtonnier's firm is

required to establish an office with its own reception, interview room, staff and security. Currently the Acting Bâtonnier is Advocate Claire Davies of Mourant du Feu & Jeune who has advised the Sub-Committee that the direct cost to that firm of administering Legal Aid is £140,000 per annum, although by way of partial compensation, she and three other lawyers from Mourants are exempted from legal aid work. The Acting Bâtonnier and his or her firm are expected to administer the scheme for two years at which point the burden is passed to the next firm in an informal rota of firms.

- 3.4 Applicants for legal aid attend the office of the Acting Bâtonnier. Their suitability for legal aid is assessed having regard to the legal problem and means. If legal aid is granted, a certificate is issued requiring a nominated Advocate or Solicitor to attend to the affairs of the applicant.
- 3.5 The certificate provides that the "Advocate/Solicitor appointed is entitled to charge a reasonable fee for his services depending upon my financial resources", and contains an undertaking by the applicant to provide financial information to the Advocate/Solicitor. If the person on legal aid is not able to make a contribution, the lawyer is expected to absorb the costs pursuant to his oath.
- 3.6 The Legal aid certificate also provides that it can only be withdrawn by the Bâtonnier. The applicant is told that if he elects to dismiss the Advocate appointed without prior reference to the Bâtonnier, he will not appoint another Advocate or Solicitor on a legal aid certificate.
- 3.7 The Advocate/Solicitor appointed is the next person on the rota. For the greater part of the last century when most lawyers were in general practice, the legal burden would be undertaken by each lawyer personally as part of his general practice. More recently, as part of the emergence of the Island as a leading offshore centre, some firms have chosen to specialise. Advocates/Solicitors working in specialist

departments began to delegate their legal aid work to more junior lawyers. More recently the larger firms (who represent the majority of Advocates/Solicitors on the legal aid rota) have created what in effect are legal aid departments staffed by lawyers and assistants whose interest lies in legal aid work and which carry out all of the legal work in respect of certificates issued to lawyers in that firm.

3.8 The Acting Bâtonnier does have discretion in practice to make exemptions to the rota where, for example, there is a conflict of interest, or the case is of sufficient complexity or severity, or where the lawyer concerned has recently dealt with an onerous case on legal aid. There is no guarantee however, that the lawyer appointed has experience in the area of law to which the certificate relates.

3.9 Legal Aid Guidelines were issued in March 2000 by the then Bâtonnier. The Legal Aid Guidelines provided that defamation and insolvency (save for making a declaration of *désastre*) fell outside the scope of legal aid. The guidelines also provide that curatorships, claims without merit and appeals without merit (save for those governed by Article 6(3)(c) of the European Convention of Human Rights ("ECHR")) were also excluded. Criminal offences not carrying the substantial risk of a custodial sentence or a risk of loss of livelihood or which are unlikely to carry a fine exceeding £500 were also excluded. Company claims and certain partnership disputes were excluded. Provision was made for the revocation of legal aid certificates if clients unreasonably refused to follow legal advice, did not provide instructions or if the claims became without merit. It was noted that if a legally aided client was successful an appropriate order for costs should be made,

3.10 The Legal Aid Guidelines issued in March 2000 were issued against a background of a marked increase in the amount of legal aid certificates being issued. In the year to the 31 December 2002, 2037 legal aid

certificates were issued (888 being criminal and 1,149 being civil) to the 111 Advocates and Solicitors on the scheme. This is an average of at least 18 legal aid certificates per annum for each lawyer, but it is also the case that with the development of precedent and the proliferation of legislation, the demands in respect of each certificate have substantially increased.

4 The Failings of the Current System

Human Rights

4.1 Advice has been taken from James Dingemans QC on whether the current legal aid system complies with ECHR. A copy of his opinion is attached. In general terms, he found that the criteria for granting legal aid under the current system does satisfy the standards in civil and criminal proceedings under Article 6 of the ECHR, although there may be exceptional circumstances which would require legal aid to be made available in both civil and criminal proceedings (paragraph 20 of his opinion). The Bâtonnier and the Acting Bâtonnier have seen a greatly increased awareness in applicants of their rights under the ECHR and future challenges are inevitable. However, there are two ways in which the current system may breach Article 6 of the ECHR identified by Counsel as follows:-

- (a) where legal aid cases are handled by those who are not competent to represent the client (paragraph 21 of this opinion);
- (b) if detailed and convincing evidence that the burdens of the current legal aid system continue to grow, lawyers under the scheme may challenge their obligations as being in breach of Article 4(2) of the ECHR, which provides that no-one shall be required to perform forced or compulsory labour (paragraph 22 and 23 of his opinion).

4.2 The Sub-Committee believes that lawyers currently under the scheme accept their obligations under the legal aid scheme. However, there are areas of concern to lawyers as follows:-

- a. There are many forthcoming pieces of legislation which will undoubtedly increase the existing burden on lawyers to an extent may become unfair- e.g. The Police Procedures & Criminal Evidence (Jersey) Law 2003 (PPCE), the Children Law, human rights and employment law legislation;
- b. As pressures increase on the courts to ensure that matters are dealt with expediently, there are occasions when law firms are expected to provide an Advocate to attend court even when all lawyers who specialise in that area of law are unavailable;
- c. PPCE requires criminal courts to sit at the weekend. The vast majority of lawyers who are on the Tour de Rôle are not prepared under the current scheme to do this and do not feel able to devote more of their time to fulfil this requirement;
- d. Where long and complex trials fall to be dealt with by the smaller firms or sole practitioners, the burden can have serious financial implications for those firms.

4.3 It is accepted that for each day in court, a day's trial preparation is required (quite separately from and in addition to earlier work that will have been done on the matter which may have been going on for months if not years), so that hearings of only 2 or 3 days can involve a lawyer in a week of unpaid work. Extend the hearing to 2 weeks or more, and the implications to those without the support of a larger firm could be significant and it is felt by the Sub-Committee, breach that lawyer's human rights. The implications are two fold; firstly the fact that the lawyer is unable to attend to his paying clientele who may leave his practice to seek advice elsewhere, and secondly, the fact that the work

is unpaid and therefore there can be a serious effect on cash flow. Exceptional orders for costs have been made in long trials to assist lawyers in this position but it is at the discretion of the Court concerned.

Failure of the Scheme to Allocate a Specialist Lawyer

- 4.4 As Counsel noted, there is an obligation under the ECHR to ensure that legal aid cases are handled by those who are competent, but a system based on a rota cannot ordinarily take competency into account, so that, for example, a lawyer who has no experience and practice of matrimonial law can be issued with a certificate to act in a divorce.
- 4.5 In the larger firms which have legal aid departments, there is more flexibility in the firm (as opposed to the Acting Bâtonnier) distributing the legal aid cases issued to lawyers in that firm to those within the department who have the appropriate experience, but it is in these departments that in practice the greater problems are currently being experienced. Large firms find it difficult to find and retain Advocates/Solicitors to staff their legal aid departments. This is attributable to the fact that working in such departments provides no career opportunity to progress in the firm as a whole, so that Advocates/Solicitors who see no prospects within their firm will tend to leave and join other firms where the career opportunities are greater, form small firms or to set up on their own. The result is that the departments are manned to a great extent by legal assistants of varying levels of qualification and experience who do the bulk of the work. This is not in any way intended to be a criticism of the work done by those legal assistants, but the fact is that applicants will rarely see an Advocate/Solicitor if they are appointed to lawyers working for the larger firms. In criminal cases, they will be dealt with by legal assistants and may only meet the Advocate shortly before and at the hearing for

the court, and in civil cases, they may never meet an Advocate/Solicitor. This is the underlying cause for the recent finding of the Court of Appeal in Barr – v – AG [2003]JCA158 in which it found that a legally aided applicant in a criminal case had received advice that was wholly inadequate.

Failure of the Scheme to Encourage Specialisation

- 4.6 Because legal aid work is in the main unremunerated, there is no incentive for Advocates/Solicitors to specialise in the areas of law which predominate, currently criminal and matrimonial. There are, for example, no lawyers in Jersey with expertise in asylum law (one area which is bound to give rise to cases in the future) and there is no incentive for lawyers to acquire such expertise. If it were possible for lawyers to make a living from such work through a fully funded legal aid system, then lawyers may have an incentive to set up firms specialising in those areas.

Failure of the Current System to Means Test

- 4.7 Under the current guidelines, there are no hard and fast rules as to who can and who should not receive legal aid. Therefore, it can be the case that a person on a fairly high income is given legal aid. The reason for this is partly because the guidelines allow all expenditure to be included against income, and partly because the current system is very lax with regard to assessing the means of the applicant at the point that legal aid is granted. In addition, because the legal aid certificate permits lawyers to charge for services if the applicant's financial resources permit, they will charge in accordance with the normal rates of that firm which leads to great inconsistency. An applicant appointed to a large law firm with a high charge out rate will be charged materially more than an applicant appointed to a small

firm. It also makes it very difficult for any accurate assessment to be given of the likely charges that will be made.

The Cost and Lack of Continuity in Administration

- 4.8 There is a lack of continuity in two respects, firstly in the office of Bâtonnier which changes every three years, and secondly, in the administration of the legal aid scheme, which changes every two years. When the Bar decided in 1904 how to administer legal aid, they could not have contemplated the burden that is now placed upon the firm of the Acting Bâtonnier. That burden cannot be placed upon small firms (who may be next on the informal rota of firms) so that in practice, it will always have to be undertaken by the larger firms which are not equitable. However, the main criticism is lack of consistency. The provision of legal aid is an important service and the interests of the applicants dictate that it should be administered centrally and on a consistent basis.

The Failure of the Scheme to Allow a Choice of Lawyer

- 4.9 The current scheme does not allow applicants to choose a lawyer, and where they do express a preference, it can be difficult to explain that they have no choice. A common desire is for female applicants to be seen by a female lawyer and the issue can become difficult if the applicants receive poor service and have clear ideas as to who they would like representing them.

- 4.10 In summary, the current legal aid system:-

- (a) is not fully compliant with ECHR;
- (b) does not always provide applicants with a lawyer competent to advise;

- (c) discourages specialisation by Advocates/Solicitors in the areas predominantly covered by legal aid, namely criminal and matrimonial law;
- (d) gives very restricted access to Advocates/Solicitors;
- (e) is administered on an inconsistent and inequitable basis;
- (f) does not give applicants a choice of lawyer.

5 Legal aid in other comparable jurisdictions

5.1 Consideration was given to the administration of the legal aid system in Guernsey, the Isle of Man and England & Wales.

5.3 Advocate Colley researched the current system in England & Wales and earlier this year attended a conference in London which among other topics considered the problems faced by lawyers in that jurisdiction dealing with publicly funded work. Consideration was given to a paper from the Lord Chancellor's Department 'Delivering value for money in the Criminal Defence Service' together with a paper on a 'Public Defenders Scheme'.

5.4 Main aspects of the Guernsey scheme

- (a) There are 2 types of legal aid (Green Form & Ongoing Representation);
- (b) For both types of legal aid there are strict financial limits (both income & capital);
- (c) It is envisaged that in the future, a system of financial contributions will be introduced;
- (d) For ongoing legal aid an opinion on the merit of the case is necessary;

- (e) The current rate of pay is £161 per hour for a Guernsey qualified lawyer (but subsequently pegged to the maximum amount recoverable on taxation);
- (f) The scheme is administered by a retired advocate and the costs of the administration borne by the States.

5.5 Main aspects of the Isle of Man scheme

- (a) The legal aid scheme is based on numerous pieces of legislation and delegated legislation dating back to 1986;
- (b) The scheme relies very heavily on the 'old' English scheme pre-legal aid franchising;
- (c) There are 2 schemes in operation – one for civil and one for criminal legal aid;
- (d) The cost of the scheme (which pays unrealistically low rates to lawyers) during 2002 was in excess of £1,000,000 for a population of around 70,000 (this does not include the cost of administering the scheme);
- (e) The civil scheme is divided into green form and full civil legal aid;
- (f) There are different rules regarding the criminal scheme;
- (g) Lawyers are paid badly for legal aid work and there is a current review underway by the Legal Services Commission. It can often be difficult to find a lawyer willing to act.

5.6 Main aspects of the current scheme in England & Wales

- (a) The Legal Services Commission was created under the Access to Justice Act 1999 to replace the Legal Aid Board;

- (b) The Community Legal Service replaced the old civil legal aid system from 1/4/00;
- (c) The Criminal Defence Service replaced the old system of criminal legal aid from 2/4/01;
- (d) The Legal Services Commission will only publicly fund those providers who meet their standards;
- (e) Personal injury claims can only now be pursued under a conditional fee agreement;
- (f) Civil legal aid is divided into 'legal help' (the old Green form scheme) and 'legal representation' (formerly civil legal aid). This is further divided into investigative help (an opinion on the merit) and full representation;
- (g) Very strict financial limits apply to civil matters. These are complex but broadly anyone with a gross income exceeding £2288 pm will not qualify. If the disposable income then exceeds £621 pm there will be no eligibility. Capital over £3,000 is also assessed;
- (h) For criminal matters the solicitor must hold a General Criminal Contract and criminal help is divided into 'advice & assistance' and 'representation'. Again both income and capital must be within certain limits.

6 Recent Research

- 6.1 Advocate Colley recently approached the administrators of both the scheme in Guernsey and Isle of Man. it is clear from these discussions that the scheme in Guernsey is placing huge pressure on the public purse and is the subject of further political debate. The Law Commission in the Isle of Man has still not issued its report.

This appears to be mainly over the question of rates of remuneration for lawyers and the effect of this on the cost of the scheme to the public purse.

- 6.2 As far as England & Wales is concerned there has been growing concern over the current service provided. For example, The Times Law recently published a lengthy article entitled 'Community legal advice is in danger of drying up'. The article concludes:

"Whether or not the gradual disappearance of private firms from publicly funded work was predictable, the provision of legal advice in the community is now diminishing. It is now being left to the voluntary sector. Many worry that, faced with increased bureaucracy and regulation, forced into funding battles and operating in a desert where there are no private firms left, they too will be forced out-so that in ten years all that will be left will be the pro bono sector and a return to a 19th century ethos of private benevolence". (The Times 30th September 2003)

- 6.3 In recent months the 'Law Society Gazette' has carried comment on the possibility of 'GP style contracts' with community legal advice being given by employed lawyers and the not-for-profit sector.

7 Cost Orders in Criminal Cases

- 7.1 At the current time, Advocates appearing on legal aid in criminal appeals are awarded costs, if they win, at a higher rate, including Factor A and Factor B incorporating an element of profit and costs at a lower rate; being 5/6ths of Factor A if they lose. Costs are awarded in the Royal Court and the Magistrate's Court when the defendant is acquitted or discharged from the prosecution. The rate recoverable in the Royal Court is the same as applies to successful appeals and in the Magistrate's Court it is Factor A plus a flat rate of Factor B at 25%.

The total cost to the States of meeting these orders is as follows:-

Year/Court	Magistrate's Court	Royal Court and Court of Appeal	Total all Courts
2001	155,320.65	324,037.30	479,357.95
2002	226,772.46	624,779.48	851,551.94
Total 2001/2002	382,093.11	948,816.78	1,330,909.89
Jan to Oct 2003	103,720.00	461,860.53	565,580.53

8 The Options

8.1 For the reasons explained above, it does appear that there needs to be a reform of the Island's legal aid system. However, when discussing any reform it is imperative to recognise the problems of legal funding that are obvious in all the above jurisdictions. It is also important to recognise and preserve what is good about the current system and to be aware of the dangers of radical change unless this has been properly discussed and costed.

8.2 We have not included an option of 'no change' as we consider that everyone is in agreement that some reform is necessary. We have, however, attempted to mirror the whole possible spectrum of change within the options below.

There would appear to be the following options if change is accepted as follows:-

(A) Full Public Funding of Legal Representation

8.3 Once legal representation was required, the user would need to apply for full legal aid (civil or criminal). For this representation the user could choose his/her own lawyer from those local lawyers who were prepared to do this work. The States would need to fund this work at a

reasonable rate of remuneration. Again strict financial limits would need to be imposed on the user.

8.4 Consideration could be given as to whether lawyers being paid for publicly funded work should be expected to meet a certain standard (such as under the English scheme) and lawyers would need to be adequately trained (there may be an argument for a CPD system being introduced).

8.5 The main advantages of this option are:-

- (a) the user is able to choose their own lawyer under the scheme from a list of specialists;
- (b) the user could be assured that there would be a qualified lawyer involved in their case and that the work done by legal assistants was properly supervised;
- (c) law firms would not be obliged to offer legal representation under this option. This would allow firms to choose whether or not they wished to offer this service.

8.6 The main disadvantages of this option are:-

- (a) this would be an expensive scheme to administer from the point of view of the public purse;
- (b) there would inevitably be increased involvement by the States given the high levels of public funding that would be involved. This could lead to bureaucracy and over-regulation;
- (c) it is possible that insufficient firms would agree to participate in this scheme and the numbers of specialists in each area would be low;

(d) the door is left open for a public defenders type scheme in criminal cases. If this scheme cannot recruit locally qualified lawyers due to lack of take up, there will be a need to use lawyers who are not locally qualified, in which case those lawyers would need to be given rights of audience. There would also be all the resulting costs of this.

8.7 In terms of the cost of a fully funded scheme, the only statistics available are from the Isle of Man. The costs of that jurisdiction is in excess of £1,000,000 each year, but the figure is based upon:-

- (a) a smaller population than Jersey;
- (b) lawyers currently being paid unrealistically low rates;
- (c) very strict financial limits on the granting of certificates.

8.8 Assessing the cost of publicly funding the current legal aid service in Jersey is accordingly difficult, but it is possible to give an indication by taking as we have the cost of one large firm (Ogiers) of funding its share of the legal aid burden through its legal aid department and multiplying up that cost to equate to what the same lawyers within that department would have to charge, operating as a private firm, providing the same service and making a commensurate living. That exercise indicates a possible cost to the States of Jersey for a fully publicly funded scheme of between £4m and £6m per annum (given current costs).

8.9 There is a considerable element of risk to the States of Jersey in establishing a fully funded scheme, in that there would be no guarantee that lawyers in the private sector would be attracted to it. Paying unrealistically low rates as under the current system in the Isle of Man is clearly self-defeating. The States of Jersey would have to

ensure that the difficulties that have recently arisen in England & Wales where 'legal aid deserts' are now commonplace are avoided.

- 8.10 It should also be borne in mind that the eligibility limits that would be placed on any publicly funded scheme would result in a large number of applicants currently qualifying being unable to obtain legal aid.

(B) Partial Funding of Legal Representation

- 8.11 The current rota system would be maintained but the States of Jersey would subsidise the lawyers at an agreed rate for example, at the rate of one third of the cost of fully funding the system. If the indicative figures referred to above are correct, this would cost the States of Jersey between £1.3m and £2.0m per annum.

- 8.12 The main advantage of this would be to alleviate the financial burden upon lawyers, but:-

- (a) it would not allow applicants to choose their own lawyer from a list of specialists;
- (b) it would not ensure that the lawyer appointed was necessarily competent; and
- (c) the cost of administration would be the same as with a fully publicly funded scheme.

(C) Secondment to Centralised Office

- 8.13 In June 2003, four firms (Mourant, Ogiers, Carey Olsen and Bedell Cristin) met and discussed a proposal which was presented to the Sub-Committee on the 22 July 2003. The proposal considered both short and long term measures.

- 8.14 The short term proposals can be summarised as follows:-

- (a) No tribunal work to be covered by legal aid;

- (b) The vast majority of matrimonial work to be removed from the scheme. Only domestic violence injunctions and issues of 'real law' to remain;
- (c) Lawyers would not be provided for Saturday court or Bank Holiday sittings;
- (d) The current guidelines regarding eligibility to be made tighter;
- (e) The potential limitation of liability on legal aid matters.

8.15 The long term proposals include:-

- (a) A centralised office to deal with all legal aid work in the Island;
- (b) Lawyers would be seconded to this office by all firms with lawyers on the Tour de Rôle for 6 months. The firms would continue to pay the lawyers' salary during this period;
- (c) The administration would be paid for by the States and the office would have its own staff.

8.16 This option was discussed at the sub-committee meeting on the 22 July 2003 and strong concerns were expressed by the majority as follows:-

- (a) We do not see how removing the vast majority of family/ matrimonial work from the scheme would be acceptable either to many lawyers in the Island or to the public. There could possibly be a breach of the obligation to provide sufficient access to the courts in civil matters;
- (b) There could be numerous problems with conflicts of interest;
- (c) No mention is made of who would be responsible for paying for the legal assistants who would clearly still be necessary as well as the seconded lawyers;

- (d) It is not clear who would supervise the work and who would have ultimate responsibility for this supervision;
- (e) This is an option, as currently developed that favours the large firms to the detriment of not only the small firms but also medium sized firms too.

8.17 The proposal has not been currently pursued by the firms concerned.

8.18. A variant on the proposal would be for all firms to pay into a central fund an amount equivalent to the current cost each bears, and for a centralised office controlled by the members to use those funds to carry out the legal aid work within the Island. Such a system would have to bear the added costs of its own management. There would be no guarantee that it would attract lawyers, but it would inevitably be dominated by the firms making the largest contributions and would thus give rise to innumerable difficulties.

(D) Central Administration

8.19. For so long as members undertake legal aid substantially on an unremunerated basis, they must be in charge of its administration. However, the arguments for centralising that administration are strong. It could be transferred from the Bâtonnier to the Law Society (who represent all members) and a centralised office could be established combining;-

- (a) the work of the Law Society – in particular the work that will be imposed upon the Law Society under the proposed Law Society Law to deal with disciplinary matters;
- (b) the administration of legal aid with an appeal from decisions of the administrator to a sub-committee of the Law Society on legal aid as opposed to the Bâtonnier as at present.

8.20 Ogiers have produced a broad guide as to the cost of establishing and running such an office. It is estimated that such an office would cost £50,000 to set up and £300,000 per annum to operate.

8.21 The States of Jersey could contribute both in the provision of premises and an annual grant to fund the cost.

(E) Other Reforms to the Current System

8.22 Other reforms could be beneficially introduced as followed:-

- (a) Strict financial means testing;
- (b) Consideration of a green form or legal advice scheme with strict merit criteria for ongoing work including a complete review of the current guidelines
- (c) Uniform level of charging by firms where the financial resources of the applicant allow.

These reforms would be facilitated by centralised administration of the scheme.

8.23 Consideration could also be given through (it is suggested) a working party to:-

- (a) The extent to which a choice of lawyer would be possible under the current scheme;
- (b) The extent to which the expertise of the next lawyer on the rota could be taken into account;
- (c) The right of the applicant to appeal against the merit/means test;
- (d) The use of trained lawyer mediators in family cases (as appropriate).

(F) Remuneration for Hearings

- 8.24 It is in preparing and appearing at hearings before the courts in Jersey that an unfair burden can be placed upon lawyers under the current scheme, potentially in breach of their own human rights.
- 8.25 The rationale for paying more to lawyers who succeed in criminal cases before the Court of Appeal is not entirely understood but the system which applies in the Court of Appeal should be extended to both the Royal Court and the Magistrate's Court in all criminal cases. There is a strong argument for paying costs in all criminal cases that are legally aided.

(G) Exclusion of Personal Injury Work

- 8.26 Serious consideration should also be given to whether all personal injury work should be excluded from any legal representation scheme. Conditional fee arrangements could be used for this type of work as there are already a number of law firms who have specialists in this area of expertise. We believe that it is possible to arrange a fee with a client based on a 'no win - no fee' scenario as long as the only fee charged is based on that lawyer's normal hourly rate. We accept, at present, that we should not be considering any scheme involving an additional fee for winning a case as this would be gaining from the 'fruits of litigation' which is not permissible in the Island. This would reflect what in reality happens currently where legal aid certificates are issued in personal injury cases in that the lawyer only gets paid if he succeeds unless the applicant has significant other means.

IN THE MATTER OF THE HUMAN RIGHTS (JERSEY) LAW 2000
AND THE POLICE PROCEDURES AND CRIMINAL EVIDENCE
(JERSEY) LAW 2003

ADVICE

1. I have been asked to advise on issues raised by the Sub-Committee of the Law Society of the Island of Jersey relating to the compatibility of the legal aid system in Jersey with the provisions of the Human Rights (Jersey) Law 2000, 'the Human Rights Law', and the compatibility of article 54 of the Police Procedures and Criminal Evidence (Jersey) Law 2003, 'the PPACE', with the Human Rights Law.

BACKGROUND

2. The membership of the Law Society of Jersey comprises Advocates and Solicitors of the Royal Court of the Island of Jersey. On admission to the Bar, or on being given authority to practice, Advocates and Solicitors are required to take oaths requiring them to represent 'veuves, pauvres, orphelins et persons indefendues'.
3. By resolution dated 20 August 1904 the Advocates resolved that the obligation to represent such persons should be undertaken by advocates of less than 15 years standing by way of a rota system. As a matter of practice solicitors have also been included in the system.
4. The system is administered by an advocate known as the Acting Bâtonnier. He is appointed by the Bâtonnier (the head of the Bar).
5. Applicants for legal aid attend the office of the Acting Bâtonnier. Their suitability for legal aid is assessed (having regard to the legal problem

and means). If legal aid is granted a certificate is issued requiring a nominated Advocate or Solicitor to attend to the affairs of the Applicant.

6. The certificate provides that the 'Advocate/Solicitor appointed is entitled to charge a reasonable fee for his services depending upon my financial resources', and contains an undertaking by the Applicant to provide financial information to the Advocate/Solicitor. If a person on legal aid is not able to make a contribution the lawyer is expected to absorb the costs as part of his duties to the profession.
7. The legal aid certificate also provides that it 'can only be withdrawn by the Bâtonnier. If you elect to dismiss the advocate appointed without prior reference to the Bâtonnier he will not appoint another Advocate on a legal aid certificate'.
8. I am instructed that the Advocate/Solicitor appointed is the next person on the list. In larger firms the certificates are passed to junior lawyers. The Acting Bâtonnier does make exemptions to the rota systems where: there is a conflict of interest; the case is of sufficient complexity or severity; or the lawyer has recently dealt with an onerous case on legal aid. There is no guarantee that the lawyer has experience in the area of law to which the certificate relates.
9. Legal Aid guidelines were issued in March 2000. The Legal Aid Guidelines provided that defamation and insolvency (save for making a declaration of *désastre*) fell outside the scope of legal aid. The Guidelines also provided that curatorships, claims without merit and appeals without merit (save for those governed by Article 6(3)(c) of the European Convention on Human Rights, 'ECHR') were also excluded. Criminal offences not carrying 'the substantial risk of a custodial

sentence or a risk of loss of livelihood or which are unlikely to carry a fine exceeding £500' were also excluded. Company claims and certain partnership disputes were excluded. Provision was made for the revocation of legal aid certificates if clients unreasonably refused to follow legal advice, did not provide instructions or if the claims became without merit. It was noted that if a legally aided client was successful an appropriate order for costs should be made. I assume that such an order would be limited to the amount of fees which the client had agreed to pay (under the indemnity principle).

10. The Legal Aid Guidelines issued in March 2000 were issued against a background of a 'marked increase in the amount of legal aid certificates being issued'. It appears that the number of legal aid certificates remains significant. I am instructed that in the year to 31 December 2002, 2037 legal aid certificates were issued (888 being criminal and 1149 being civil) to the 111 Advocates and Solicitors in the scheme. This is an average of at least 18 legal aid certificates per annum for each lawyer. I am instructed that the operation of the system of legal aid has led to increased concern. Advocates and Solicitors suffer increasing burdens in terms of time written off to non paying legal aid work. Indeed one Advocate, Philip Sinel, was reprimanded by the Royal Court for misconduct in failing to represent two clients who had been referred to him under legal aid certificates. Concerns have also been expressed by, and on behalf of, clients about the abilities of junior lawyers to whom the work is delegated in larger firms and inequalities in charging rates.

ECHR

11. Article 2 of the Human Rights Law gives domestic effect in Jersey to the ECHR. Article 7 of the Human Rights Law provides that it is

unlawful for a public authority to act in a way which is incompatible with a Convention right. A Court is a public authority pursuant to the provisions of article 7(2)(a) and it seems to me that the Acting Bâtonnier, being responsible for the operation of legal aid, is also a public authority. In these circumstances the legal aid system must comply with the provisions of the ECHR.

12. Article 6 of the ECHR provides that everyone 'in the determination of his civil rights and obligations or of any criminal charge' has the right to a fair trial. Specific provision is made in article 6(3)(c) of the ECHR for representation in criminal proceedings. Everyone charged with a criminal offence has the right 'to defend himself ... 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'. There is therefore a distinction to be drawn between civil and criminal legal aid.

13. As to civil legal aid article 6 of the ECHR does not impose an absolute requirement that legal aid be made available to those in civil proceedings where the interests of justice so require, see Winer v UK 186 48 DR 154 and McVicar v UK 2002 35 EHRR 22 (no obligation to provide for legal aid to the applicant in a defamation action). However the circumstances can be such where legal aid is required to be made available, Airey v Ireland 1979 2 EHRR 305 was a case where the applicant wanted to apply for a judicial separation, had no means, and was outside the legal aid scheme. In the circumstances she had no effective right of access to the Court and legal aid was therefore required. The Court made it clear that there was no right to legal aid for civil disputes. It was only when the applicant could demonstrate that there was no effective right of access to the Courts in civil proceedings that there would be an infringement.

14. The 'interests of justice' referred to in article 6(3)(c) will require the provision of criminal legal aid depending on: the complexity of the case; the subjective ability of the accused to understand and present arguments; and the severity of the possible penalty, see Quaranta v Switzerland 1991 A/205 and compare Hinds v The Attorney General of Barbados 2002 1 AC 854. Where deprivation of liberty is at stake the interests of justice, in principle, call for legal aid, see Benham v UK 1996 22 EHRR 293.

15. The mere nomination of a lawyer for the purposes of legal aid (whether in civil or criminal proceedings) is not enough if the lawyer is manifestly unable to provide effective representation, see Artico v Italy 1980 3 EHRR I. In circumstances where a pupil advocate had been appointed it will sometimes be necessary to adjourn, see F v Switzerland 1989 61DR 171 and compare Godric v Italy 1984 6 EHRR 457. The incompetence of a legal aid lawyer can in extreme circumstances prevent a fair trial and amount to a denial of due process, see Boodram v The State 2002 1 Cr App R103 (lawyer in a retrial unaware of first trial and relevant evidence because of a failure to take instructions).

16. Similarly if the legal aid system creates a system where there are no lawyers willing to act, the safeguards of article 6 of the ECHR will be breached. In McLean and another v Buchanan 2001 UKPC D3 2001 1 WLR 2424 the Privy Council considered the effect of the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999. Under this scheme there was no doubt that in certain instances solicitors would not be paid a reasonable sum for the work to be performed. However the Privy Council held that, although this was not a satisfactory state of affairs, this did not of itself afford a sufficient ground for supposing that

if the solicitors continued to act, they would not discharge their professional duties to their clients. Therefore the provisions of article 6 of the ECHR were satisfied. It would be a different matter if solicitors withdrew and other solicitors could not be persuaded to take on the work.

17. Those charged with criminal offences are also entitled 'to have adequate time and facilities for the preparation of his defence'. This right (as with all ECHR rights) has to be 'practical and effective'. Whether it is practical and effective will depend on the particular circumstances of a case and the Courts will avoid theoretical considerations about whether rights might be infringed. The Courts are concerned with whether rights are or will be infringed as a matter of reality, see R v Commissioner of Police for the Metropolis ex parte M 2001 EWHC Admin 553, 2002 Crim LR 215. A denial of access to a lawyer at the initial stages of an investigation will infringe the provisions of article 6 if there are consequences (such as the drawing of adverse inferences on silence) which might be decisive for the defence, see Murray John v UK 1996 22 EHRR 29.

18. Lawyers themselves are entitled to protection of their rights. Article 4(2) of the ECHR provides that 'no one shall be required to perform forced or compulsory labour'. This provision was considered in Van der Mussele v Belgium 1984 6 EHRR 163. Under Belgian Law the Order of Advocates was required to make provision for the assistance of those in need of legal aid. This was part of a long standing tradition in Belgium, and certain other Convention countries, by which legal aid was provided by the profession on a voluntary basis rather than through publicly funded methods. The Applicant, a pupil, complained that he was compelled by regulations to represent clients without payment if so directed and alleged that this was 'forced or compulsory

labour' contrary to article 4(2). The Court adopted the definition in the ILO Forced Labour Convention 1930 as supplemented by the ILO Abolition of Forced Labour Convention. This defined forced labour as 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'.

19. In Van der Musselle the Court held that there was no breach of the Convention. It was held that there was no physical or mental restraint and that the Applicant had voluntarily accepted the obligation by joining the profession, although regard was to be had to the burden imposed and the advantages attached to the future exercise of the profession.

ISSUES

20. It is against this background and these principles that it is necessary to consider the specific issues raised which relate to the legal aid system. It does seem to me that the criteria for granting legal aid will generally satisfy the standards in civil and criminal proceedings under article 6 of the ECHR. There may be exceptional circumstances which require legal aid to be made available in civil proceedings other than those specified in the Guidelines to provide effective access to Court. Similarly in criminal proceedings there may be cases where, for example, the complexity of the criminal proceedings, or the subjective ability of the accused to understand and present arguments, may require legal aid to be made available in circumstances where no provision would currently be made. However any challenges should await the appropriate cases rather than be argued on theoretical grounds.

21. If, however, legal aid cases are handled by those who are not competent to represent the client there may be breaches of article 6 of the ECHR. This is a point which becomes of more importance given the increasing complexity of litigation. Similarly if there is evidence that the current system of legal aid encourages a system of inadequate representation (for example improper pressure being brought to bear upon accused persons to plead guilty because the case is costing the lawyer time and therefore money, or a failure to make adequate investigations into the defence for similar reasons) there may be breaches of article 6. Again challenges on this ground will require proper evidence to avoid the fate of the appeal in McLean.

22. The requirements of Advocates and Solicitors to do legal aid work for free is unlikely to be found to breach article 4(2) of the ECHR It does seem to me that the work is earned out under threat of a penalty (as is part evidenced by Advocate Sinel's case) but it seems to me that it will not be possible to demonstrate that the work is not undertaken on a 'voluntary' basis (see the observations of the Legal Practice Committee chaired by Sir Godfray Le Quesne QC referred to on page 3 of the judgment in Advocate Sinel's case). It may be possible to show that the burden of the work has become disproportionate and beyond that which might reasonably have been contemplated when being admitted to the profession. If such evidence was forthcoming this might justify a challenge. The evidence would need to be detailed and convincing

23. If the burdens of legal aid have become disproportionate the profession itself want to review the extent of its obligations. On 30 April 2001 the Bar Council in England and Wales, when confronted with what were perceived to be unreasonably low rates of pay for legal aid in family cases, decided that all cases subject to family graduated fees were not deemed to be a proper professional fee for the purposes of

the cab rank principle, see paragraph 604 of the Code of Conduct. This meant in effect that barristers practising family law had no obligation to accept family legal aid cases. Any such review would obviously be a matter for the profession as a whole and would have to take into account many different factors. However if any such review resulted in the effective withdrawal of all or part of the current legal aid system there would, for the reasons given above, plainly be an obligation on the part of the State to create a new system of legal aid.

24. In this respect it should be noted that on 18 January 2002 there was a proposal for a European Union Council Directive 'to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid and other financial aspects of civil proceedings'. The extent to which the proposals are accepted in Europe, and the extent to which they might later be applied to Jersey, are all matters of speculation. It indicates, however, that the legal aid burden on lawyers is likely to continue to increase.

25. The final question to be addressed is the extent to which article 54 of the PPACE infringes article 6(3) of the ECHR. It does not seem to me that article 54 of the PPACE will be found, in the abstract, to breach article 16(3) of the ECHR. This is partly because of the effect of article 4 of the Human Rights Law, (which will enable the Court to interpret article 54 in a manner consistent with the Human Rights Law) and partly because the question is, at present, theoretical. However it seems to me that if those detained in police stations have no effective right to contact a lawyer (because they will not yet have been allocated one under the legal aid system) there will be a breach of article 54 of PPACE, as interpreted to comply with article 6(3) of the ECHR. For the reasons given in ex parte M it will be necessary to show some practical effect on the criminal proceedings. It seems likely

that the making of admissions which, if legal advice had been given, would not have been made would be a sufficient effect.

CONCLUSION

26. It seems to me that the criteria for civil and criminal legal aid in the Guidelines are, subject to the limited exceptions set out in paragraph 20 above, likely to comply with the provisions of the ECHR. However lack of experience and competence on the part of a legal aid lawyer may result in a breach of article 6 of the ECHR. The fact that lawyers are required to undertake legal aid work for no, or limited, fees is not likely to be found to breach article 4 of the ECHR without substantial evidence to show that the burden has become disproportionate and beyond that which might have been contemplated on admission to the profession. If the burden has become disproportionate the profession might want to consider amending its own requirements in relation to legal aid. In such circumstances proper provision for legal aid would need to be made to ensure continued compliance with article 6 of the ECHR. It seems to me that article 54 of the PPACE is likely to be interpreted in a manner consistent with the article 6 of the ECHR. There may be cases where it will be possible to show a breach of article 54 interpreted in that manner.

27. It seemed to me to be likely to be helpful to attempt to answer the specific questions raised by instructing solicitors and identify other potential issues in the Advice before meeting with instructing solicitors. In the light of the matters set out In the Advice it may now be sensible to discuss matters further. If instructing solicitors would like to discuss this matter please do not hesitate to contact me.

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29 May 2003