

Does the system of legal aid in the Isle of Man require reform and if so in which respects?

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It is a fundamental tenet of civilised society that all individuals have the right to a fair trial and that fairness requires equality of arms. Legal aid is seen to be crucial to ensuring equal representation and it is telling that even some countries suffering civil war at least nominally aspire to operating a functioning legal aid system¹. It should therefore be applauded that the Isle of Man has and continues to operate a comprehensive legal aid system in these times of fiscal restraint on government. That said, it is my belief that the legal aid system in the Isle of Man could be improved and reformed without jeopardising certain core features of its function.

Given the fundamental division of administration of Legal Aid in civil and criminal matters in the Isle of Man, it makes sense to consider Manx legal aid as two separate entities springing from the same concept. Consideration will be given to the benefits and drawbacks of both types of legal aid and ways in which these could be improved. Indeed, one of the proposed reforms touted is the development of centralised administration of Legal Aid and this is discussed in greater depth below.

Criminal Legal Aid- benefits and burdens of the current system

It is unarguable that the area of primary importance to legislators when considering legal aid is the area of criminal liability and this is only right given personal liberties are at stake. Therefore, consideration will be given to criminal legal aid first. At the present time, the Isle of Man is experiencing an unprecedented level of scrutiny in relation to the legal profession generally and legal professionals are expected to justify their existence to a level not previously demanded². However,

¹ United Nations Office on Drugs and Crime, October 2016, Global Study on Legal Aid: Global Report, accessed 2 June 2019 <[https://www.unodc.org/documents/justice-and-prisonreform/LegalAid/Global Study on Legal Aid - FINAL.pdf](https://www.unodc.org/documents/justice-and-prisonreform/LegalAid/Global%20Study%20on%20Legal%20Aid%20-%20FINAL.pdf)>

² TC (17 October 2017) 43, 24 - 65, accessed 2 June 2019 <<http://www.tynwald.org.im/business/OPHansardIndex1618/1230.pdf>>, Tynwald, 22 February 2018, Regulation of Legal Services: Advocates Disciplinary Tribunal - Call for evidence, accessed 2 June 2019 <<http://www.tynwald.org.im/about/news/Pages/1813.aspx>>, Tynwald, 25 April 2018, Rights of audience in the Island's Courts: Call for evidence, accessed 2 June 2019 <<http://www.tynwald.org.im/about/news/Pages/1834.aspx>> and Standing Committee of Tynwald Court,

this has also opened up an opportunity for the legal profession in the Isle of Man to prove to its detractors the reasons why professional legal expertise is required to effectively and efficiently manage disputes and allegations at every level. The Isle of Man has had legal aid of one type or another for criminal matters since the Criminal Code Amendment Act 1921³. The current arrangement works well, in that all individuals have the benefit of professional legal advice at no charge during those crucial early stages of a prosecution⁴.

Thereafter, means and merit testing begins to have an impact. Some argue that means testing in itself is inherently unfair⁵ and that legal aid should not be limited in such a manner. In a utopian idyll that may be correct, but in reality means testing in itself is not necessarily unfair. Indeed, one could say that disapplying means testing is itself inequitable. Requiring those who would be capable of paying for their own representation to pay for it themselves is crucial to avoiding an overwhelming burden on government finances and therefore squeezing other areas of vital public services. However, this is an extremely finely balanced exercise requiring frequent assessment and re-assessment and it is in this regard that the current system could be seen to be becoming inequitable.

Merits testing in criminal matters can be summarised very quickly. Criminal Legal Aid, granted by the court upon first appearance, is subject to a merits test focused on the risk of incarceration to the defendant and the legal complexity of the case they have to face. If there is a substantial risk of incarceration or the issues to be covered are deemed to be more complex than the average litigant in person can deal with, Legal Aid will be granted for the proceedings, subject to pre-approval of large disbursements such as experts' fees by the Legal Aid administration⁶.

It is perhaps inevitable that this aspect of Legal Aid will be examined in greater depth as part of any sweeping reforms, so the ways in which this could be refined will need to be considered.

Constitutional and Legal Affairs Committee, 19 November 2018, accessed 3 June 2019

<<http://www.tynwald.org.im/business/hansard/20002020/clajls181119.pdf>>

³2.1 of Mr M Bishop QC, Mrs E Christian JP, Mrs A Craine JP, Mr B Moffatt, Mr P Wood, May 2003, Report of the Legal Services Commission 2002, accessed 2 June 2019 <<http://www.iomlawsociety.co.im/wp-content/uploads/2016/04/Appendix-11.pdf>>

⁴ 4.19 of Mr M Bishop QC, Mrs E Christian JP, Mrs A Craine JP, Mr B Moffatt, Mr P Wood, May 2003, Report of the Legal Services Commission 2002, accessed 2 June 2019 <<http://www.iomlawsociety.co.im/wp-content/uploads/2016/04/Appendix-11.pdf>>

⁵Cabinet Office, September 2017, Consultation on the High Level Policy for Means Testing: Summation of Public Response, accessed 2 June 2019 <<https://consult.gov.im/cabinet-office/means-testing-policy/results/response-on-high-level-means-testing.pdf-1>> and Politics Desk, IOM Today, 29 August 2017, We don't support means testing, accessed 2 June 2019 <<http://www.iomtoday.co.im/article.cfm?id=35626&headline=We%20don%27t%20support%20means%20testing§ionIs=NEWS&searchyear=2017>>

⁶5.4.8 of Legal Aid Handbook

Criminal Legal Aid - fundamental requirements and potential improvements

In recent months, the Attorney General has recommended to the Manx government that significant investigations take place into efficiencies in the Legal Aid system. A bold new plan has been proposed which would see the Manx Legal Aid system make a transition towards an American model, with a Public Defenders' Unit replacing independently employed defence advocates⁷. It has been suggested that this Unit could be staffed by as few as six full time Manx advocates with support staff and that this would result in a significant cost saving to the government⁸.

The Isle of Man Law Society is concerned about this proposal, as it believes that it is inherently unworkable. It says that the statistics supplied do not reflect the realities of criminal defence work at the Manx Bar and that in particular it would not be feasible to run the Unit on only six full time advocates⁹. It says that the economics of running such a Unit would mean that the current Legal Aid budget would be swallowed up and in fact exceeded. Given this is based upon economic projections created by qualified financial professionals, there appears to be no reason to disbelieve this evidence, although it may make sense to dig into the underlying statistics before any firm decisions were made.

One must wonder whether, and to what extent, there will be equality of arms if the PDU were introduced? Is the Manx government going to guarantee that public defenders will receive exactly the same resourcing as their prosecution counterparts? Anecdotal evidence in the USA suggests that their PDUs are drastically under resourced when compared with their prosecutorial arms and that as a result defendants do not experience equality of arms in criminal proceedings¹⁰.

⁷4.2 of Isle of Man Government, June 2018, Securing Added Value and Efficiencies (SAVE) Programme Progress Report, accessed 2 June 2019

<<http://www.tynwald.org.im/business/opqp/sittings/Tynwald%2020162018/2018-GD-0030.pdf>>

⁸Appendix 3 of Isle of Man Government, June 2018, Securing Added Value and Efficiencies (SAVE) Programme Progress Report, accessed 2 June 2019

<<http://www.tynwald.org.im/business/opqp/sittings/Tynwald%2020162018/2018-GD-0030.pdf>>

⁹Isle of Man Law Society, July 2018, Briefing to Tynwald: Introduction of a Public Defender's Scheme, accessed 2 June 2019 <<https://www.iomlawsociety.co.im/wp-content/uploads/2018/07/Briefing-Note.pdf>>

¹⁰Kwixuan H Maloof for the Fog City Journal, 20 July 2009, A Question of Parity?, accessed 2 June 2019

<<https://sfpublicdefender.org/news/2009/07/question-parity/>> and Rebecca Buckwalter-Poza for Center for American Progress, 8 December 2016, Making Justice Equal, accessed 2 June 2019

<<https://www.americanprogress.org/issues/criminal-justice/reports/2016/12/08/294479/making-justice-equal/>>

More fundamentally, the Law Society says that the removal of criminal Legal Aid in favour of a Public Defenders' Unit would give rise to an unacceptable curtailment of a defendant's right to a fair trial and to independent representation¹¹ and my view is the same. Although not frequent, there are occasions where the court is faced with a multi handed defence involving more than six defendants¹², each needing independent representation. If there are only six PDU advocates, how will this be achieved? The inevitable effect of removing criminal advocacy demands from private practice will be to remove this skill set from the general market as well, so it will not be possible to supplement the public defenders from private practices. Whilst there are ways round this, the reality of the situation is that the Isle of Man will become heavily reliant on assistance and/or recruitment from neighbouring jurisdictions which will substantially undermine the rule of law and domestic development of the legal profession within the jurisdiction.

Even if this problem could be addressed satisfactorily, one must wonder whether it is truly possible to have an impartial tribunal where a defendant is represented by the state, prosecuted by the state and a representative of the state sits in judgment. One would hope that sufficient safeguards would be built into the process that the advocate representing the defendant would not feel encouraged into a particular course of action in the interests of political expediency, but this could not be ruled out as a possibility¹³.

Perhaps of more concern is the fact that a perception of bias can be as damaging to the rule of law as the existence of real bias¹⁴. This can clearly be seen by the low uptake of Legal Aid in areas where there is a belief that the state interferes in the judicial process¹⁵ and could be exacerbated by the use of public defenders. In the circumstances, a lay client is more likely than not to conclude that they are not receiving a fair trial if a public defender is used and it is primarily for this reason that my view is that the establishment of a PDU in the Isle of Man would be a retrograde step in Legal Aid for criminal matters. Interestingly, it appears this plan has appeared in another guise in a set of government

¹¹Isle of Man Law Society, July 2018, Briefing to Tynwald: Introduction of a Public Defender's Scheme, accessed 2 June 2019 < <https://www.iomlawsociety.co.im/wp-content/uploads/2018/07/Briefing-Note.pdf> >

¹² R v Lewin and others - Crim 2011/71 (11 May 2012- PTR decision), unreported

¹³ Melanca Clark for Brennan Center for Justice, 1 October 2009, Brewing Storm over Nancy Foster and Defender Programs, accessed 2 June 2019 <<https://www.brennancenter.org/blog/brewing-storm-over-nancy-foster-and-defender-programs>>

¹⁴ In re Myers - 1921 - 51 MLR 331

¹⁵ United Nations Office on Drugs and Crime, October 2016, Global Study on Legal Aid: Global Report, accessed 2 June 2019 <https://www.unodc.org/documents/justice-and-prisonreform/LegalAid/Global_Study_on_Legal_Aid_-_FINAL.pdf>

proposals on Legal Aid dating back to at least 2014¹⁶. If it was viable, one has to wonder why it has not been moved forward before.

It now appears the body tasked with reviewing Legal Aid provisions is taking a step back from the PDU only approach to criminal Legal Aid, possibly because local jurisdictions who have introduced PDUs, for example Scotland and England, are using these as an incomplete, fall back solution. In these circumstances, it is difficult to see how the PDU remains a viable alternative; the projected costs savings were on the basis of only retaining the PDU and it appears unlikely both the PDU and advocates in private practice would result in a saving. Recruitment would also remain an issue.

However, it does appear that Legal Aid in criminal matters could benefit from some adjustments to make it more fit for purpose in the current climate. Often, very little information as to merits is available to the court at the point Legal Aid is granted, so perhaps it would be prudent to stringently enforce an ongoing monitoring system for merits testing in Legal Aid, requiring an advocate to keep under review the merits of their case on a regular basis. If at any stage, they believe the merits of the case are such that there is no longer a custody risk or the issues become more clear cut, they should be required to notify the courts and the funding situation should change.

Both the judiciary and private practice advocates have suggested that the means and merit testing ought to be adjusted to place an increased emphasis on the vulnerability of clients. There is a concern that less experienced advocates may miss the subtle signs of vulnerability which in turn may result in them failing to bring them to the court's attention. This is important because the court has a certain discretion to award Legal Aid in circumstances where they believe the client's vulnerability makes them incapable of properly representing themselves. The suggestion is that this should be incorporated as a key factor in means and merit testing to ensure adequate access to justice for such individuals and to ensure that all representation considers this issue.

From a public perspective, it may also be that limitations could be placed on entitlement to legal aid for repeat offenders. In essence, this would limit serial offenders in the representation they would receive to a certain number of instances within a set period for the same type of offence. Whilst not entirely attractive from a human rights viewpoint, one can understand how it could be attractive to the taxpayer and, if properly explained to the public, may act as a deterrent to those who would otherwise appear before the court on a very frequent basis for the same offences. My impression is

¹⁶ Page 5 of Legal Aid Committee, April 2016, Review of Developments in Legal Aid: Interim Consultative Report for the period 2013-2016, accessed 2 June 2019 <<https://www.gov.im/media/1351787/review-of-developments-in-legal-aid.pdf>>

that this type of rule, if properly constructed, could be a viable possibility, but much greater investigation would be required to establish the precise parameters and rules to be applied and to avoid offending human rights legislation.

Clarification of construction of the current Legal Aid rules is something which would be a relatively swift and minor amendment which could repay dividends in the longer term. Limited guidance is available to advocates, albeit this is much improved by the Legal Aid Handbook¹⁷. Such uncertainty can lead to some variation in understanding. The arguments for keeping the guidance broad is that a one size fits all approach can be adopted, but if the government were seeking a means by which costs could reduce, additional guidance would appear to be a good place to start.

Another area of criminal Legal Aid where minor changes could reap great dividends could be the enforcement of stricter controls governing the use of experts. Whilst the majority of advocates will undoubtedly only use expert evidence in criminal proceedings where absolutely necessary, there will also be isolated incidents where an advocate may misdirect themselves and seek prohibitively expensive expert evidence on an issue which does not need evidence at all¹⁸. At present, there is little to control this; the advocate obtains approval for the report from legal aid administration, then seeks the court's approval to rely upon the report and the court then considers whether to authorise the request. It would be rare that a request to rely upon an expert's report would be rejected.

Investigations would need to take place to identify the cost of administering these requests as opposed to the cost of the expert's involvement itself, but it may be that a way to reduce the cost is to require a cost benefit analysis of the relative cost versus benefit to the defendant of incurring this evidence. Such a more detailed breakdown would allow a more informed decision about whether the instruction were warranted and thus minimise the likelihood of Legal Aid funds being wasted. Again, this would need to be balanced against the need to permit the defendant to present the case as they see fit, but with appropriate measures, such as a fast tracked right of appeal to a Legal Aid tribunal, autonomy could be preserved whilst waste is reduced.

It is also somewhat surprising that Legal Aid advocates are paid for travel and waiting time, which could, although not necessarily does, result in abuses of the system. One suggestion, from an advocate at a recent round table meeting, was that travel and waiting could be abolished but court attendance

¹⁷ Civil Legal Aid Administration, April 2015, Legal Aid Handbook, accessed 2 June 2019
<<https://www.gov.im/media/1357220/legal-aid-handbook-first-edition-april-2015.pdf>>

¹⁸ R v Thomas - CRIM2009/78 (9/7/10), unreported

rates could be bolstered to account for this. Overall, that advocate believed a net saving could be made.

Tightening of the regulations surrounding court duty advocate attendance could also be helpful. The judiciary are aware of situations where entire criminal prosecutions are being completed under the Duty Advocate scheme due to a lack of adequate controls and ambiguity in the current rules. This is plainly unfair both to the accused in other cases and to the tax payer and a system should be devised to manage this.

It also seems to be rare that wasted costs orders in criminal matters are used to their fullest extent or that criminal advocates, either defence or prosecution, are penalised for inappropriate or incautious uses of public funds. It may be that the courts should be encouraged to consider these measures more often as a deterrent to overly enthusiastic advocates on either side who lose sight of the need to use public funds judiciously.

The Manx government should however be careful not to take too drastic a step at the present time. UK measures and the backlash against them¹⁹ are a cautionary tale and should discourage the Manx government from seeking sweeping reform without first attempting modest adjustments to see whether these can achieve the desired economies. Measures such as the PDU could well prove a false economy, as over-stretched or under-funded defence counsel could result in an escalation in cracked trials or errors. Retrials could be ordered, substantially escalating costs, and as a worst case, the public purse could be required to pay the costs of ineffective trials.

Civil Legal Aid - benefits and burdens of the current system

By contrast, civil Legal Aid is subject to its own independent administration and does not rely upon court resources. The range of services covered by civil Legal Aid is significant and an individual can obtain advice under the civil scheme for virtually any area of work, with the exception of commercial disputes or company formation and similar matters²⁰. Whilst this is a superb experience for the end user, the reality is that this wide range of resource is a heavy burden and significant drain upon the tax payer.

¹⁹ The Secret Barrister, 2018, *Stories of the Law and How It Is Broken*, Pan Macmillan, London and Owen Bowcott in The Guardian, 26 December 2018, Legal Aid: how has it changed in 70 years?, accessed 2 June 2019 <<https://www.theguardian.com/law/2018/dec/26/legal-aid-how-has-it-changed-in-70-years>>

²⁰ 3.1 of Civil Legal Aid Administration, April 2015, Legal Aid Handbook, accessed 2 June 2019 <<https://www.gov.im/media/1357220/legal-aid-handbook-first-edition-april-2015.pdf>>

Initial advice is provided under the green form scheme, which is essentially self regulated by the advocates' practice. Whilst this has the benefit of expediency for the client, there is the potential for abuse of the system in some circumstances. Again, receipt of one of the three qualifying benefits automatically entitles the client to Legal Aid without contributions, but any other client would be means tested to access the service²¹. The first stages of any advice cannot practically be merits tested, but there is an onus on the advocate to make an assessment of merits at the earliest opportunity and not to proceed further if prospects of success appear worse than 51%.

In the majority of situations, the green form entitles the user to three hours of work, with any disbursements incurred (except court fees²²) to be counted against the overall financial total for the three hours. In many cases, this means much less than three hours is available in reality. The green form is capable of being extended by application to the civil Legal Aid administration up to a maximum of 10 hours²³, but this takes time, during which further work cannot be incurred, and involves expense in administering the extension both on the part of the advocates' practice and the administration.

If the matter is not capable of being finalised within the green form, it is necessary to submit a full Legal Aid application. This is a much more involved process, requiring multiple supporting documents and a financial eligibility assessment. If in receipt of a qualifying benefit, the administration relies upon the means test undertaken by the relevant government Department and Legal Aid is automatically granted with no contributions. Up to £80.00 per week in disposable income, contributions are paid on a weekly basis on a sliding scale and thereafter the individual is no longer eligible for Legal Aid²⁴. The administration of the contributions process is an involved one, on the part of both advocates and Legal Aid administration, and can pose quite a burden when undertaking Legal Aid work, especially as the administration revisits financial eligibility every three months to check its accuracy.

A full Legal Aid certificate is also subject to the same merits test as a green form, with a certificate only awarded on the basis that prospects of success exceed 51%. This is assessed by means of an advocates' certification on the application form and a fuller statement of case explaining the background of the claim²⁵. It is expressed to be the advocate's responsibility to keep prospects under review and to notify

²¹ 4.1.6 of Civil Legal Aid Administration, April 2015, Legal Aid Handbook, accessed 2 June 2019
<<https://www.gov.im/media/1357220/legal-aid-handbook-first-edition-april-2015.pdf>>

²² 4.1.8 of Civil Legal Aid Administration, April 2015, Legal Aid Handbook, accessed 2 June 2019
<<https://www.gov.im/media/1357220/legal-aid-handbook-first-edition-april-2015.pdf>>

²³ 4.1.5 of Civil Legal Aid Administration, April 2015, Legal Aid Handbook, accessed 2 June 2019
<<https://www.gov.im/media/1357220/legal-aid-handbook-first-edition-april-2015.pdf>>

²⁴ 4.1.6 of Civil Legal Aid Administration, April 2015, Legal Aid Handbook, accessed 2 June 2019
<<https://www.gov.im/media/1357220/legal-aid-handbook-first-edition-april-2015.pdf>>

²⁵ 4.2.5 of Civil Legal Aid Administration, April 2015, Legal Aid Handbook, accessed 2 June 2019
<<https://www.gov.im/media/1357220/legal-aid-handbook-first-edition-april-2015.pdf>>

the administration as soon as they perceive that prospects of success dip below 51%, at which point Legal Aid is deemed to be withdrawn.

There is no lower financial limit upon the cost of claims, which means that in theory there is no bar to Legal Aid being granted and a claim pursued for only modest settlement amounts. One does wonder whether this is a benefit or burden to the system.

Generally, where an individual pursues a claim using Legal Aid and succeeds, they are expected to recoup their legal costs on an inter partes basis²⁶. Where an inter partes costs recovery is made, it would be unusual to see a claim against the Legal Aid fund in addition. For this reason, it is also unusual to find Legal Aid pursuing costs against the assisted party where an inter partes costs recovery has been made, but Legal Aid does have the option to recoup a contribution towards an assisted person's costs by way of the statutory charge²⁷. In reality, this is rarely enforced, probably because it carries quite a heavy administrative burden.

Therefore, the burden on the system is generally limited to those claims which are unsuccessful or only partly successful and the requirement to only act where prospects of success exceed 51% rules out a large portion of the more marginal claims, mitigating the cost to the taxpayer. Furthermore, there is an obligation on both an assisted person and the advocate to investigate alternative sources of funding²⁸ and Legal Aid is regarded as the last resort.

An advocate is permitted to incur modest disbursements under a Legal Aid certificate without the prior approval of the certifying officer, but the majority of disbursements will need prior approval, further escalating the costs of administration. Again, the request for such disbursement funding would be directed to the Legal Aid certifying officer to be approved, but approval is only rarely refused. Given a large proportion of the decision making is put down to the discretion of the certifying officer making the decision, there can be significant variation in the level of proofs required to justify disbursement funding, with a resultant uncertainty for the lay client as to timescale and tactical progression of their matter.

This historic lack of consistency could be a source of great frustration to an advocate as it means something considered acceptable in one case is unacceptable in another. It also makes it difficult for practitioners new to Legal Aid to develop their skills, as there is no real precedent to illustrate to them

²⁶ 4.2.11 of Civil Legal Aid Administration, April 2015, Legal Aid Handbook, accessed 2 June 2019
<<https://www.gov.im/media/1357220/legal-aid-handbook-first-edition-april-2015.pdf>>

²⁷ 4.2.11 of Civil Legal Aid Administration, April 2015, Legal Aid Handbook, accessed 2 June 2019
<<https://www.gov.im/media/1357220/legal-aid-handbook-first-edition-april-2015.pdf>>

²⁸ Declaration on Legal Aid application form

an acceptable standard. One hopes that with the advent of some of the recent measures implemented at civil Legal Aid administration, this will improve, but it is something which should be borne in mind for any future developments.

Civil Legal Aid administration can also be overwhelmed by the sheer volume of applications received, resulting in considerable delays and significant administration time being expended to obtain the necessary funding. One does wonder whether these areas could be improved by the provision of additional resourcing and the government in their reforms should consider not just the potential to save costs, but also the potential to improve the service.

Civil Legal Aid - fundamental requirements and potential improvements

It is uncontroversial that there are certain elements of civil Legal Aid which should be protected, such as the right to representation in family matters. A litigant should also be protected from unlawful interference with their employment rights and unlawful eviction from their property. Personal injury would also appear to be an important element to protect, subject to certain caveats discussed below.

Such assistance should be fairly wide ranging, in that Legal Aid should have the ability to permit such disbursements as appear to be required to properly manage the proceedings and, in the event of a dispute over whether an expert is required, for example, the parties should be entitled to apply to a tribunal to challenge the certifying officer's decision.

However, it is surprising that the Manx government has preserved the assisted person's entitlement to Legal Aid in relation to non contentious matters, such as preparation of Wills, for so long. The entitlement to use Legal Aid for these type of matters is not well known and would be likely to cause resentment amongst taxpayers if it were more widely known. There are a number of individuals who fall just outside the current entitlement to Legal Aid, yet do not have the benefit of a substantial disposable income, so are unable to afford private client services for themselves, yet are contributing to the Legal Aid fund for those who are not contributing to take advantage of. This hardly seems fair or equitable.

Equally, it would perhaps be sensible to enforce the concept of the costs benefit analysis into civil Legal Aid. Such measures have been implemented in the Isle of Man at least as long ago as the 2015 Handbook²⁹, but in practical terms do not seem to be being heavily enforced. Of course, issues such as the potential removal of a child from its parents should be of paramount importance, but in those areas which are more of a financial nature, for example personal injury or money claims, it may be

²⁹ 4.2.5 of Civil Legal Aid Administration, April 2015, Legal Aid Handbook, accessed 2 June 2019
<<https://www.gov.im/media/1357220/legal-aid-handbook-first-edition-april-2015.pdf>>

possible to require a litigant to justify the cost of their representation against the amount in dispute. This would prevent a litigant generating significant legal costs for issues which were relatively modest and serve to safeguard the public purse.

The same could be true of disbursement funding, but with disbursement funding this could be extended to encompass all areas. Essentially, the litmus test should be whether the benefit of obtaining this evidence justifies the cost of the evidence or whether the issues it addresses are sufficiently marginal that the cost is not justified. Whilst in the vast majority of cases, this is already adhered to, this is due to an advocate's personal judgment rather than robust enforcement by the Legal Aid administration. This is another area where historically Legal Aid policy has been inconsistent. Hopefully, this will be improved, but again, it is an area which could be refined rather more than it is at present.

It would appear that an adjustment to the scope of the current Legal Aid regime could relatively easily curtail spending on civil Legal Aid in a way which would safeguard the fundamental rights of assisted persons. This reduction in spending would probably not reach the optimistic projections desired by the Manx government, but would nevertheless represent a sustainable economy for the longer term.

The government appear to be suggesting that their preferred option would be to implement a civil Legal Advice Centre, similar to Citizens' Advice but staffed by qualified advocates³⁰. Although their current suggestions are sparse on detail, this would seem to throw up similar concerns to the PDU. They would probably be equally ambitious about the levels of staffing for the Legal Advice Centre, which would leave the Centre woefully under staffed when compared with the number of civil Legal Aid advocates on the island³¹. It would also be difficult for such staff to specialise in one particular area and they would more than likely struggle to keep abreast of developments in all areas of civil work to the level required for competent representation.

A lack of time would result in fewer matters being effectively dealt with by way of negotiation, opening the floodgates to an escalation in the number of matters being pushed through the courts. In turn, this would create a vicious cycle where the advocates would need to spend all their time in court, leaving no time to manage the papers effectively. Eventually, the system would reach a breaking point where either the work being supplied would not be able to be of a suitable standard or the Centre

³⁰ Legal Aid Committee, April 2019, Legal Aid Committee: Summary of consultation response, accessed 3 June 2019 <<https://www.gov.im/media/1365722/legal-aid-consultation-summary-results-report-april-2019-v3.pdf>>

³¹ Civil Legal Aid Administration, 7 March 2019, Legal Aid: Panel of Advocates, accessed 2 June 2019 <<https://www.gov.im/media/1364516/legal-aid-panel-07-march-2019.pdf>>

would have to start turning away work, depriving litigants of access to justice and forcing reliance on self representation or Mackenzie friends.

This in turn would raise any number of concerns. Mackenzie friends are on the rise in the UK in civil litigation matters and this has caused both legal commentators³² and the courts³³ to express serious concerns about the competency of some of the individuals holding themselves out in this capacity, especially as the vast majority are entirely unregulated³⁴. Whilst the Manx courts seem to take somewhat of a harder line to assistance from third parties³⁵, this may be a difficult stance to maintain in the absence of a viable alternative representative and in any event additional court time will be eaten up by managing litigants' expectations in that regard.

In any event, an increase in either litigants in person or Mackenzie friends are likely to add to the court's administrative burden. The court would either fall behind in their listings or have to actively expand. Either of these options is undesirable and is likely to result in an additional cost to the courts' administration. Therefore, whilst a Legal Advice Centre would appear to deliver a significant costs saving, this is likely to prove a false economy as it would be unsustainable in the longer term or would result in the costs saving being eaten up by the increase in the cost to the courts.

General improvements to both types of Legal Aid

One area which presently appears to generate considerable duplication of effort is the lack of centralised administration for Legal Aid. There does not appear to have been any significant investigation into the staffing levels at each administrative department or the amount of time which is expended on Legal Aid by the judiciary which could usefully be deployed elsewhere. However, it would appear to be an area which could be ripe for reform, allowing one central department to carry out the functions of both administrative entities and eliminating any overlap.

³²Richard Collier for piBlawg, 19 March 2019, Word of warning for McKenzie Friends & Co, accessed 3 June 2019 < <http://www.piblawg.co.uk/post/2019/03/19/word-of-warning-for-mckenzie-friends-and-co2>> and Pink Tape: A blog from the Family Bar, 12 June 2017, Tip of the iceberg? You don't say ... the McKenzie Friend research, accessed 3 June 2019 <<http://www.pinktape.co.uk/rants/tip-of-the-iceberg-you-dont-say-the-mckenzie-friend-research/>>

³³ Hyde and Walters for the Law Society Gazette, 9 October 2018, Parents breach court order after 'advice' from McKenzie friend, accessed 3 June 2019 <<https://www.lawgazette.co.uk/news/parents-breach-court-order-after-advice-from-mckenzie-friend/5067868.article>> and Walters for the Law Society Gazette, 25 March 2019, Fresh call for McKenzie friends ban, accessed 3 June 2019 <<https://www.lawgazette.co.uk/news/fresh-call-for-mckenzie-friends-ban/5069741.article>>

³⁴Smith, Hitchings and Sefton, June 2017, A study of fee-charging McKenzie Friends and their work in private family law cases, accessed 3 June 2019 < https://www.barcouncil.org.uk/media/573023/a_study_of_fee-charging_mckenzie_friends.pdf>

³⁵ Abrahams v Avery SUM2016/75 (30 September 2016), unreported

Clearly, such a measure would need to be properly investigated and the cost of consolidation considered to assess its viability, but at first glance it would justify further investigations being undertaken. However, it should be noted that the judiciary and advocates alike are outspoken in their view that the initial grant or refusal of criminal Legal Aid should remain with the court, as the court by necessity has a good grasp of the likely issues at an early stage. It is centralisation of the back office functions following the initial grant of criminal Legal Aid which is envisaged.

Whilst means testing thresholds have recently been adjusted and 2019 figures issued³⁶, it is questionable whether the means testing thresholds arrived at are fit for purpose. Given the government has an obligation to deliver a Legal Aid system which is fit for purpose, it would appear sensible to use this consultation as an opportunity to review current means testing thresholds and to identify whether changes are required. If the intention is to keep the current system of contributions broadly the same, the contributions will invariably need to increase to take into account inflationary changes, but the government may elect to make some adjustments to contribution levels as part of any fiscal programme to be implemented.

Comparisons with other jurisdictions

The government is extremely keen to obtain facts and figures for Manx Legal Aid and cross compare with other jurisdictions. This is a source of some concern given the historic statistical information for Manx Legal Aid is best described as patchy. Furthermore the statistics on which the government are focussing are cost comparisons against population numbers³⁷, which could be said to be somewhat inaccurate due to very different population demographics. A more reliable comparator would appear to be a cost per assisted person or per Legal Aid application. It is also vital to distinguish between resident and non resident applicants to establish whether the system is delivering sufficiently to the domestic population.

Summary

It is not my view that legal aid reform in the Isle of Man is a necessity due to any inherent flaw in the system or fundamental unfairness. Admittedly, there are drawbacks with the current system, but generally it appears fit for purpose, delivering a fundamentally fair, quality service at a realistic cost. The only real motivator for legal aid reform would be a fiscal one, but it is acknowledged this is compelling justification in times where government is expected to make sweeping cuts to improve the

³⁶ Civil Legal Aid Administration, April 2019, Civil Legal Aid: Financial eligibility for legal aid: Prescribed Amounts 2019, accessed 2 June 2019 <<https://www.gov.im/media/1347568/20190429-financial-eligibility-prescribed-amounts-from-april-2019.pdf>>

³⁷ Legal Aid Review, Criminal Legal Aid Workshop, May 2019 (not yet publicly available but shortly to be published online)

economies and efficiencies of public services. If other aspects of public service are expected to cut their budgets, it is only right that Legal Aid should suffer some scrutiny. However, any decisions should not be quick ones made for reasons of political expediency or public optics, but should instead be measured and properly researched to ensure they will withstand long term strictures.

It is not my belief that the Isle of Man should be looking to fundamentally change the underlying structure of its Legal Aid system, especially in criminal matters, as the current system appears to be fit for purpose. Instead, government should, in my opinion, consider trimming the edges of the current Legal Aid system and measure the success of these changes before making any other decisions. This has happened historically³⁸ and it appears the present position is an improvement on that which has come before, so it would be reasonable to believe that cautious further revisions would achieve a sustainable, beneficial result. Drastic change is likely to have a dramatic destabilising effect which is likely to prove counter productive.

Furthermore, government should consider a positive increase to some aspects of the Legal Aid budget and should not confine themselves to considering restrictive proposals. Any economies should be thoroughly researched, as it may be that the economies proposed would be outweighed by the additional administrative burden they would generate, in which case there would need to be more than a fiscal justification for imposing them.

In particular, it is my belief that Legal Aid generally could benefit from the development of a centralised and expanded administration and a clearer and more regimented process of documented reviews of the merits of a case. Related to this should be a concerted effort to educate the general public as to the assistance available to them, as this has been proved to be key to a successful Legal Aid programme³⁹, and it is my belief that a large proportion of the Manx population are unaware of their rights in this regard, notwithstanding the expressed intentions of the 2002 report.

It is my view that criminal Legal Aid would specifically benefit from a greater refinement of the current rules and additional guidance as to their implementation, alongside stricter controls over expert involvement and the scope of the duty advocate scheme. Similarly, civil Legal Aid could be streamlined by limitations on the scope of Legal Aid, greater consistency in funding decisions and the introduction of costs benefit analysis into all aspects of civil Legal Aid, subject to the appropriate viability

³⁸Mr M Bishop QC, Mrs E Christian JP, Mrs A Craine JP, Mr B Moffatt, Mr P Wood, May 2003, Report of the Legal Services Commission 2002, accessed 2 June 2019 <<http://www.iomlawsociety.co.im/wp-content/uploads/2016/04/Appendix-11.pdf>>

³⁹ United Nations Office on Drugs and Crime, October 2016, Global Study on Legal Aid: Global Report, accessed 2 June 2019 <https://www.unodc.org/documents/justice-and-prisonreform/LegalAid/Global_Study_on_Legal_Aid_-_FINAL.pdf>

investigations. There may also be a case for a restriction on legal aid entitlement for repeat offenders in criminal proceedings, although this is less convincing as it is difficult to see how this could be achieved alongside compliance with human rights legislation. In my opinion, adopting a PDU or civil advice centre would be a false economy, in that it will fail to deliver for the public as a whole and will not save the levels of costs currently projected by the government. The government's most recent suggestion of employing the PDU alongside private practice appears even less justifiable, as it carries all of the projected costs with only limited benefits.

Any adjustments to the legal aid provision in the Isle of Man need to be balanced and sustainable, to avoid the English situation where costs are spiralling due to ineffective reform and the system is failing to deliver for those in need of assistance⁴⁰. Looking back at historic reviews undertaken in the Isle of Man, it is possible to see themes developing, such as a lack of public awareness and a slow response to economic change, which appear to be rather more a symptom of a lack of legislative time than a failure of the legal aid system itself. Encouragingly, however, with each cycle of reform it is possible to identify an overall improvement in the quality of the services offered, suggesting the system as a whole is moving in the right direction and the considered, incremental approach to adjustments to legal aid is proving appropriate.

⁴⁰Dominic Gilbert for BBC News, 10 December 2018, Legal Aid Advice Network 'Decimated' By Funding Cuts, accessed 3 June 2019 <<https://www.bbc.co.uk/news/uk-46357169>>