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21st May 2020

Joanne Hetherington
(Legal Aid Research & Project Manager)
HM Attorney General's Chambers
Belgravia House
34-44 Circular Road
Douglas
IM1 1AE

Dear Ms Hetherington,

Re: Civil Legal Aid Consultation

The stated purpose of this consultation is to develop policy options for the sustainable provision of legal aid in the Isle of Man, which:

1. Maintain or improve access to justice;
2. Support the delivery of quality services;
3. Provide value for money for the tax payer.

The Legal Aid Committee ("the LAC") in their 2018-19 Report identify that legal aid is a vital part of the justice system and we aim to deliver a world class legal aid service, which is affordable, sustainable and fair. They say that they want to make sure that people, who are unable to pay for an Advocate, have access to legal advice and representation when they need it. The LAC consider access to justice to be a fundamental human right. At times when people are most vulnerable, lack of access to justice can have long-term and life changing consequences.

The Isle of Man Law Society ("the IOMLS") sets out herein its response to the consultation with these aims very firmly in mind. This exercise of review should not be about saving money but ensuring access to justice. As a society we are judged on how we treat the most vulnerable members of our society, and the Isle of Man has built a very strong international reputation based on our ability to ensure access to justice for all. We should be mindful of the damage that may be done to our international reputation by restricting access to justice to only those who can afford it. Our response to this consultation is not based upon increasing profit margins for our members, but on ensuring that members of our society have access to a world class legal system as and when they need it.

Further, when looking at sustainability, the IOMLS is very mindful that this consultation and reductions to the current legal aid system have been hanging over the heads of our members for several years. Our members have raised concerns with us with regard to their ability to expand their practices, as a result of their fears that legal aid is soon to be removed. Additionally, since March 2020, our members have suffered additional concerns with regard to the security of their

jobs and practices, due to the global health pandemic, with many of our members being ineligible for Government support.

Background

In 2014, the LAC, a body established under Section 23 of the Legal Aid Act 1986, began a consultation process into the operation of legal aid in the Isle of Man.

The LAC asked the public to let it know whether they believed there could be refinements, new alternative solutions, or indeed where they felt the system was working well.

In particular, the LAC requested comments regarding the ability of the current system to provide:

1. Fairness and equity in access to justice;
2. Effective use of limited resources and value for money;
3. Transparency, simplicity and efficiency;
4. Professionalism and continuous quality improvement in practice; and
5. A service shaped around the needs of its customers, clients, and users.

The LAC encouraged respondents to be unhindered by the operation of the existing arrangements and to provide ideas and express options for alternative approaches which may deliver the above principles more effectively.

The LAC stated that:

“it had been 14 years since the last fundamental review of how legal representation is provided to those without the means to pay for it themselves and it was inevitable that, with such a long time since a fundamental review took place, the responses were many and wide ranging, varying from simple changes to administrative processes through to suggestions for major policy changes which may fundamentally affect the manner in which access to justice is publically [sic] funded.”

The LAC prioritised a number of suggestions and these have now been implemented, such as:

- Production of a "Legal Aid Handbook" giving detailed guidance to Advocates on the operation of the legal aid scheme, and consolidating the "Panel Letters" into an easily accessible document;
- Formal guidelines and set fees for mediation, with standard application forms;
- Phased introduction of specific time and cost legal aid certificates, although these proved only to slow down the administration of legal aid and increase costs and have now been put back to how they were originally;
- A scheme for delegation from the Legal Aid Certifying Officer ("LACO") to officers in respect of certain emergency matters; and
- Revised reporting and performance management for the LACO.

The LAC considered the responses to the consultation and, in April 2016 produced their interim report, together with a whole range of ideas which could promote change, to be further considered and researched.

It appears that the Council of Ministers Report from May 2007 following the report of the Legal Services Commission and its conclusions were ignored by the LAC entirely.

Following the 2016 LAC interim report, there was a further consultation in relation to the ideas generated by and set out in the interim report. The IOMLS provided a detailed response, a copy of which is annexed hereto in full (**Appendix 1**).

In the IOMLS response, it was made clear that before any ideas could be moved forward, significant research and further information needed to be obtained by the LAC. To the best of the IOMLS's knowledge, no such further research has been undertaken and reported on publicly.

Since 2017 the IOMLS has been asking for the LAC to publish the responses to the LAC's 2016 consultation; however such requests were repeatedly refused. Eventually, in April 2019, the LAC published a summary of the responses to its 2016 consultation, but only those received from the IOMLS, the DHA and the judiciary in full. Notably, these three responses published in full all made it clear that there was insufficient information available for proper consideration of a public defender scheme ("PDS"), fixed fees and/or a civil legal advice centre. The current consultation does nothing to redress the lack of qualitative or quantitative information which was absent from the 2016 consultation, yet notwithstanding that, respondents to the consultation are expected to pass reasoned comment on such ideas (save for the civil legal advice centre which may be covered in a separate consultation).

Following the 2016 LAC consultation, the LAC has done nothing to move the matter forward.

In 2017, the Isle of Man Treasury launched the 'Securing Added Value and Efficiencies' (SAVE) initiative. As part of the SAVE initiative the establishment of a PDS was suggested.

Response to the Consultation

Generally, the consultation sets out a brief description of what civil and family legal aid covers and how the same is assessed. This response has been produced following representations and comments received from our membership. Naturally, there are a variety of views that have been received and not everyone within the membership of the IOMLS may agree with everything set out herein. Notwithstanding, this response fairly represents the majority view of our members, as is fair in a democratic society.

We did receive one response which is wholly different to all other responses received. These views, where they differ from all other responses received have not been included, as it is known to the IOMLS that the Advocate concerned has separately responded to the consultation and therefore their views will be taken into account in any event.

The consultation poses a number of questions without any information to guide the respondent. Therefore, in such cases the answers received to the consultation are likely to be of limited effect, as respondents are being asked for their views on an undefined concept, which has been posed in such a way that would impact the response given, question 15, for example.

As a result, it is our opinion that the consultation is not written in a clear and unbiased manner, and gives a clear impression that the purpose of the consultation is purely to save money. When commenting on Manx Advocates' views of certain proposals, the consultation unfairly focusses only on the potential financial impact to Advocates and not all of the other, very good reasons, why Advocates do not consider certain proposals would work in the Isle of Man.

We set out very clearly that the only figures that can and should be considered, from a cost saving perspective, is the net costs paid to Advocates. VAT and disbursements should not be taken into account, as these will either be payable or lost as revenue regardless.

Notably, in 2018/19 the total sum paid to Advocates for civil legal aid was only £239,861.00, down from £400,162.65 in 2014/15 and the total paid to Advocates for family legal aid was only £993,567.97, down from £1,098,179.98 in 2014/15.

Over a period of 5 years, the average annual amount paid to Advocates for civil legal aid was £308,580.98, and the average amount paid to Advocates for family legal aid was £1,178,448.40.

In some questions, the Isle of Man position has not been presented at all, but details of other jurisdictions have been set out, again giving the impression of costs savings. This is unfortunate and does not properly inform the respondent which as a result does not enable the respondent

to properly formulate an informed response. The divorce section before question 30 is just one example.

The IOMLS believes that the questionnaire is presented in such a way, in relation to fixed fees and legal advice centres, as to invite a positive response on the question of the establishment of a PDS. It is not at all evident that potential respondents have been provided with sufficient information to allow them to provide an informed and unbiased response.

The following quote, from the Commonwealth Lawyers Association is extremely poignant when considering these issues:

“One recalls the scholarly argument of Dr EJ Cohn³³:

Our law makes access to the Courts dependent on the payment of fees and renders assistance by skilled lawyers in many cases indispensable. Under such a legal system the question of legal aid to those who cannot pay must not be allowed to play a Cinderella part. Its solution decides nothing less than the extent to which the State in which that system is in force is willing to grant legal protection to its subjects. Where there is no legal protection, there is in effect no law. Insofar as citizens are precluded from access to the Courts, the rules of the law which they would like to invoke are for them as good as non-existent.”

https://www.commonwealthlawyers.com/wp-content/uploads/2020/05/The-Commonwealth-Lawyer-April-2020.pdf?utm_medium=email&utm_campaign=Commonwealth%20Lawyers%20Association%20-%20Latest%20Journal%20Edition&utm_content=Commonwealth%20Lawyers%20Association%20-%20Latest%20Journal%20Edition+CID_8d7c52fa62f81e456cf86a0bb4f9434a&utm_source=ThinkMailer&utm_term=Click%20Here%20to%20Read

There are concerns with regard to a lack of access to legal aid generally, and these concerns are not held solely by the IOMLS:

“The people solicitors have to turn away will reappear in other public services, but only after their problems have spiralled out of control, says Steve Hynes, director of the Legal Action group.”

<https://www.bbc.co.uk/news/uk-46357169>

See also the following reports:

<https://www.amnesty.org/download/Documents/EUR4549362016ENGLISH.PDF>

<https://www.equalityhumanrights.com/sites/default/files/the-impact-of-laspo-on-routes-to-justice-september-2018.pdf>

As a result, the IOMLS does not propose to respond to the consultation by reference to each question set out, but covers herein, the major themes and issues arising in the civil legal aid system, as follows.

Neighbouring Jurisdictions

ENGLAND AND WALES

To be eligible for legal aid in a civil case, an applicant must pass three tests:

- The case must be within the scope for legal aid.
- The applicant must have at least a 50:50 (or thereabouts) prospect of winning the case (merits test).
- The applicant must fulfil the financial eligibility criteria (the means test).

Access to civil legal aid was significantly restricted by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“LASPO”). Under LASPO, cases fall within the scope for legal aid only if

they are of a type set out in part 1 of schedule 1 to LASPO (and subject to the exclusions in part 2 of that schedule). Types of cases in scope include: inquests, welfare benefit appeals to upper tribunals, certain immigration cases, family law in cases of domestic violence or some cases involving children, mental health.

Debt cases were almost entirely removed from scope except where there is an immediate risk to the home. All employment law cases were removed from scope. All private family law cases were removed from scope except in cases where there is evidence of domestic violence or child abuse. Housing matters, except homelessness assistance and cases where the home is at immediate risk, were also removed. Non-asylum immigration cases were entirely removed. Welfare benefits cases were entirely removed apart from appeals on a point of law in the Upper Tribunal.

This has had a significant detrimental impact on access to justice

A telephone gateway which was established to administer over-the-phone advice on social welfare law issues is overburdened and unable to meet demand for assistance in matters related to debt, special educational needs and discrimination.

Mediation was intended to plug the gap created by cuts in private family law proceedings. It has failed to do so.

Exceptional case funding ("ECF") was introduced under section 10 of LASPO as a safety net to protect those who would not qualify for legal aid under the new rules but whose human rights would be breached under the Human Rights Act 1998 or an enforceable EU right relating to the provision of legal services if funding was not made available. The take-up of ECF funding has been staggeringly low (per the report of the Justice Committee, 'Impact of changes to civil legal aid', March 2015).

Despite the changes introduced by LASPO, in 2015/6 the administrative costs of the Legal Aid Agency ("LAA") increased to over £100m i.e. around a fifth of the amount then allocated to civil and family legal aid and more than the LAA's entire expenditure on civil legal help.

In public law children cases (applications for care and supervision orders under Children Act 1989) those with parental responsibility for the subject child or children are entitled to legal aid whatever their means or the merits of the case.

The means test rules are set out in the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 (as amended). The upper limit of disposable capital is £8,000, save in immigration matters, where it is capped at £3,000. The upper income limit is £2,657 gross per month (if the applicant has more than 4 child dependants, £222 is added to this figure for the fifth and each subsequent child) or £733 disposable income per month.

Regarding the merits test, the regulations were amended in July 2015 after a successful legal challenge. Civil legal aid may now be granted in some cases with a "poor" or "borderline" prospect of success, if providing legal aid would prevent a breach of the applicant's rights under the ECHR or EU law.

Damages based agreements

From 1st April 2013 damages-based agreements ("DBAs") became permissible in relation to proceedings before the English courts. The use of DBAs was very limited. The Ministry of Justice published in February 2019 the results of its post-implementation review of LASPO. It noted that DBAs were rarely used and accepted that the Damages-Based Agreements Regulations 2013 would benefit from additional clarity and certainty to allow DBAs to become a more viable funding method for a greater number of cases. Redrafted regulations were proposed in October 2019.

Whilst the 2013 regulations were based on something called the Ontario model, the 2019 proposals adopt the success fee model, under which the successful legal team is paid the DBA percentage payment together with their recoverable costs. Under the Ontario model the recoverable costs were offset against the DBA payment. Furthermore, under the proposed regulations, hybrid DBAs would be permitted, although the Ministry of Justice has concerns about this. Hybrid DBAs can ensure that in a long-running matter a solicitor has at least some money coming in.

SCOTLAND

An application for legal aid needs to be made by a solicitor registered for legal aid work with the Scottish Legal Aid Board ("SLAB") on behalf of the applicant.

The SLAB decides if an applicant qualifies for civil legal aid. The criteria considered are:

- whether the applicant has a plausible case;
- whether it is reasonable in all the circumstances that civil legal aid is made available;
- whether the applicant meets the financial eligibility criteria.

When considering the reasonableness of the case, the board considers if the applicant has a reasonable chance of winning and, if it involves money or property, if there is a reasonable chance of recovering that money or property.

Civil legal aid is available for all cases before the courts listed in part 1 of schedule 2 of the Legal Aid (Scotland) Act 1986 ("the Act"). This does not include representation at most tribunals. Part 2 of schedule 2 in the Act lists cases where civil legal aid is not available which includes small claims cases in the Sheriff courts, simplified divorce applications or proceedings wholly or partly concerned with defamation. Legal aid for advice and assistance or assistance by way of representation may be available however.

Scottish solicitors are required to verify the financial circumstances of the client before making an application for legal aid. This includes disposable income (including passported benefits) and disposable capital. The financial limits are set out on the SLAB website. The upper limit of disposable capital is £13,017. If an individual has disposable capital of more than £7,853, they may have to pay a contribution towards the cost of their case. If a person's disposable capital is £7,853 or less, they do not have to make any contribution. The upper limit of income is £26,239 disposable per annum. If a person's disposable income exceeds £3,521, they may have to make a contribution towards the cost of their case.

Separate parts of the legal aid scheme run by SLAB provide legal aid funding for cases which are not within the criteria for civil legal aid. These include:

- Legal aid for children's hearings (a form of tribunal convened to consider criminal and civil aspects of the law).
- Advice and assistance schemes which provide help for people to pay for written or oral advice from a solicitor on any matter of Scots law.
- Advice by way of representation which allows for legal aid funding to pay for a solicitor to appear in a court or tribunal not covered by the other legal aid schemes in particular circumstances.

Solicitors in Scotland can currently enter into 'speculative fee arrangements' which are akin to CFAs in that a client is only required to pay his solicitor's legal fees if the litigation is successful. An enhanced fee is normally charged in the event of success. Success fees are calculated as a percentage of legal fees and not on the amount recovered by the client. In the event of the client's success, the fees element in the solicitor's account of expenses can be increased by a maximum of 100%. Although entering into a speculative fee agreement means that a client will not have to

pay his own solicitor anything if he loses the case, he still runs the risk of having to meet the other side's expenses. Currently, the only way of addressing this risk is through purchasing ATE insurance.

Unlike in England and Wales, DBAs cannot currently be enforced by solicitors in Scotland and Scottish advocates are expressly forbidden by the Faculty of Advocates from entering into them. Some firms of solicitors have set up separate claims management companies, which are currently unregulated in Scotland, so that they can offer DBAs to their clients.

The primary objective of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 is to reform the system of civil litigation funding in Scotland. There are draft regulations that focus on personal injury claims currently before the Scottish Parliament. These relate to "success fee" agreements and the amount which a claimant can be asked to pay to their solicitor under such an agreement. Success fee agreements cover speculative fee agreements where, if the claim is successful, in addition to the costs recovered from the defendants, the solicitor will be able to charge an uplift on those costs which is paid by the claimant from the damages obtained. They also cover damages based agreements where, if the claim is successful, in addition to the costs recovered from the defendants, the solicitor will receive an agreed percentage of the damages recovered. The draft regulations place a cap on the level of success fee. Defendant insurers fear that the courts will be influenced to increase the level of damages, particularly for future losses, by the knowledge that the claimant will have to pay some of those damages to their solicitor and therefore may not have sufficient to cover their future needs.

NORTHERN IRELAND

Civil legal aid is available for proceedings before certain courts and tribunals set out in paragraph 2 of Schedule 2 of the Access to Justice (Northern Ireland) Order 2003. These include cases in the main civil courts: the county court (including the Family Care Centre), the High Court and appeals to the Court of Appeal and Supreme Court. It is not available for proceedings in the Coroners court and many tribunals or cases involving defamation. Paragraph 1 of Schedule 2 sets out the exclusions from advice and assistance and paragraph 4 lists the exclusions from representation.

There are two forms of civil representation: Representation (Higher Courts) and Representation (Lower Courts). The latter used to be known as ABWOR (assistance by way of representation). The merits tests are the same for both, the means tests differ. The solicitor assesses the latter, the Legal Aid Agency the former.

To qualify for legal aid in Northern Ireland an application is subject to two tests:

- financial eligibility
- the merits of the case

The merits test considers whether there are reasonable grounds for taking, defending or being party to the proceedings and whether it is reasonable for legal aid to be granted in the case. The Legal Aid Agency also applies the private client test i.e. the principle that public funding should only be granted in circumstances where a client of moderate means paying privately would be advised to litigate.

The means test is based on disposable income and capital, with the current rates listed on the DOJ website. In 2011 a new statutory charge was introduced which can require people to reimburse any legal aid grant made in a case from their winnings from a case. The upper capital limit is £6,750 (£8,560 in personal injury cases). The upper income limit is £9,937 disposable per annum (£10,955 in personal injury cases).

In public law children order proceedings only very limited information is required to satisfy the legal merits test and most cases are exempt from means testing.

In private law children order proceedings the Legal Aid Agency applies the private client test when considering prospects of success and cost benefit.

Applications under the Hague Convention, which covers persons applying under the Child Abduction and Custody Act 1985, are non means tested and deemed to satisfy the merits test. Funding for those opposing the application is subject to means and merits criteria.

'No win, no fee' agreements are not available to fund civil litigation in Northern Ireland. Personal injury claims not reliant on legal aid are funded in a variety of ways, including commercial arrangements between lawyers and insurers, trade union support, and informal practices adopted by smaller firms.

Many personal injury cases in Northern Ireland operate under what are in practice CFAs, although they are not recognised as such. A successful claimant can only claim costs from a defendant to the extent that the claimant has incurred a liability to pay costs to his or her own solicitor. Solicitors overcome the problem of the prohibition on CFAs in civil litigation by notionally agreeing with their clients at the outset that the client is liable to pay their fees, but then waiving those fees if the case fails.

In September 2010 the Minister of Justice in the NI Executive announced a review to examine how people could best be helped to secure access to justice in a cost effective manner. A consultation in 2013 short-listed two options, both involving a conditional fee agreement with the success fee payable by the successful plaintiff or by the losing defendant. Both options were rejected, following further consideration, due to the significant additional costs incurred arising from the success fees and insurance premiums for ATE insurance.

A second report published following the Access to Justice Review Part II, A strategy for access to justice, made further recommendations for how to maintain access to justice while minimising the cost to legal aid. It proposed the introduction of CFAs in Northern Ireland in line with the Jackson reforms: *"Conditional fee agreements ("CFAs") have the potential to maintain and enhance access to justice for the whole population of Northern Ireland. In order to be effective and affordable in this jurisdiction CFAs should be introduced without any additional liabilities being imposed on defendants and with success fees payable from damages recovered. Claimants must be protected from adverse costs orders by one-way cost shifting. These recommendations are all in line with the Jackson reforms in England and Wales, the Taylor report in Scotland and the recommendations of the first Access to Justice Review."*

The report recommended that success fees should not be permitted in road traffic claims and success fees should be limited in all other cases to 20% of damages recovered.

A second consultation was opened on 30 November 2015 inviting comment on the recommendations made in 'A strategy for access to justice'. It closed on 19 February 2016. At the time of submitting this response, the IOMLS has not found any evidence that further progress has been made.

REPUBLIC OF IRELAND

The Legal Aid Board ("the Board") is a statutory body established under the Civil Legal Aid Act 1995. The Board provides legal aid and legal advice in civil cases to people who meet the criteria and provides a family mediation service.

The Board has a network of full-time and part-time law centres located throughout the country. The Board has also established panels of solicitors and barristers in private practice who provide legal aid and advice under the Act. If a barrister is required to deal with a case, the Legal Aid Board will appoint one.

The main areas of civil law in which the Legal Aid Board provides legal aid and advice are:

- i. Judicial separation
- ii. Divorce
- iii. Maintenance
- iv. Domestic Violence
- v. Custody of and access to children
- vi. Hire-purchase issues
- vii. Contract disputes
- viii. Applications for asylum, subsidiary protection or permission to remain in Ireland.

The Board can give legal advice in most areas but is generally prohibited from providing legal aid in the following categories of case:

- Defamation
- Land disputes
- Small claims
- Licensing
- Conveyancing
- Election petitions
- Claims made in a representative, fiduciary or official capacity
- Claims brought by a person on behalf of a group of persons to establish a precedent on a particular point of law (test cases)
- Any other group or representative action (class actions).

Legal aid and advice are not available if the applicant's disposable income is above €18,000 or his or her disposable capital (not including their home) is above €100,000.

If it is necessary to go to court, an Irish solicitor will apply for a legal aid certificate. The Board will consider the merits of the case before deciding whether or not to grant legal aid and will consider:

- Whether an average person (not a wealthy person) would be willing to go to court if they were paying with their own money.
- Whether a solicitor or barrister acting reasonably would recommend the client go to court, knowing they were paying for it themselves and based on the facts of the case.
- Whether there are grounds to take or defend the case.
- The likelihood of winning
- The cost to the taxpayer compared to the benefit the client might receive if he or she wins.

In care or custody cases, the Board does not take into account the merits of the case and does not perform a cost/benefit analysis.

No win, no fee arrangements are legal in Ireland but a solicitor is not permitted by the Law Society of Ireland to advertise such agreements.

JERSEY

Jersey has experienced a period of review of the legal aid system (from 2013-2019), culminating in a Legal Aid Review Report ("the Report") in April 2019. It is clear from that report that the legal aid system in Jersey has, until recently, operated very differently from other jurisdictions in that

it is operated and funded by the Jersey legal profession on a voluntary basis, although there is a legal aid vote administered by the Judicial Greffe in order to fund the more onerous cases.

It is understood by the IOMLS as at the time of submitting this response, that the draft law discussed in the Report (Access to Justice (Jersey) Law 2019) was adopted by the States on 1 May 2019. The new regime, however, is largely aimed at reforming the public (largely criminal) legal aid scheme. Private law legal aid (mostly family and personal injury cases) will continue to be provided by local law firms at their own expense using the existing “Tour de Role” system.

The basis for the existing legal aid scheme in Jersey is a professional obligation on locally qualified lawyers to carry out this task on behalf of “*widows, the poverty stricken, orphans and undefended persons*”. The obligation derives from an Oath and is defined by guidelines determined by the Jersey Law Society. The Jersey Law Society is a statutory body, and the Guidelines are a Code of Conduct obligation, enforceable by way of the Jersey Law Society’s statutory Disciplinary Committee. All Jersey lawyers of less than 15 years’ call who are in private practice are required to participate in the legal aid scheme.

Under this regime, the Bâtonnier (head of the Island’s legal profession) assesses each case on its own, in line with the eligibility criteria established by the 2010 Guidelines as laid out by the Law Society of Jersey.

Households applying for legal aid are thus subject to the following financial criteria:

- i. If a household possesses disposable capital over £15,000, then they will not qualify for legal aid.
- ii. If disposable capital is under £15,000, but gross household income is over £45,000 per annum, then they will not qualify for legal aid.
- iii. An income of more than £45,000 means that litigants are liable to pay up to 100% of fees.
- iv. £35,000 - £45,000 – liable to pay up to 75% of fees;
- v. £25,000 - £35,000 – liable to pay up to 50% of fees;
- vi. £15,000 - £25,000 – liable to pay up to 25% of fees;
- vii. Less than £15,000 – no liability
- viii. £2,100 will be deducted from the total if the person lives with another adult; and
- ix. £2,900 will be deducted per child where the child lives with the person more than 50% of the time.

A person in receipt of legal aid is assigned a lawyer from the Tour de Rôle system (lawyers that have practised for less than 15 years are automatically assigned to the system as stated above).

Conditional fee arrangements will be permitted but they cannot provide for a success fee. There is also a Citizen’s Advice Bureau on the island.

GUERNSEY

The current legal aid scheme in Guernsey was put in place following a complaint to the European Court of Human Rights in 1995, which resulted in the development of a statutory legal aid scheme, introduced through the Legal Aid (Bailiwick of Guernsey) Law 2003. The costs of the scheme are met largely by the States of Guernsey, with expenditure on legal aid payments amounting to around £2 million in 2016 (with criminal legal aid payments costing £812,000 and civil legal aid payments costing £1,173,000).

Legal aid services are currently delivered in Guernsey and Sark by way of an ‘opt-in’ system, whereby any qualified Guernsey advocate is able to take on legal aid matters. Other non-admitted lawyers (barristers and solicitors) and paralegals may also be accredited subject to the Legal Aid Administrator being generally satisfied that they have the necessary qualifications and

experience in relation to the work to be undertaken. The work is undertaken at agreed rates, which are subject to taxation of costs incurred. There are also fixed fee arrangements in some limited areas of work.

Legal aid, whether provided by way of Green Form or full certificate must be a last resort and all other possible avenues must be exhausted before turning to the public purse for information, advice or assistance. This means that the individual seeking help should first approach any other agency or body who may be able to assist e.g. Citizens Advice Bureau, Employment Relations Service, Housing, The Greffe and H.M Sheriff, Trading Standards, Channel Islands Financial Ombudsman and so on.

The Green Form is the process which covers the first appointment with an Advocate. However, unlike the Isle of Man's nine hours, the Green Form only covers two hours of work by an Advocate. If the matter is more complicated, a formal application for Legal Aid to the Administrator will be required to cover any further stages of proceedings. The Administrator is an independent statutory official appointed by the States of Guernsey and answerable to the Committee for Employment & Social Security.

There are no set financial limits regarding income but if the "residual income" of the applicant's family unit is more than £200.01 per week then they will not be eligible for Legal Aid assistance. "Residual income" is the income left after income tax and social security payments, a housing allowance, any maintenance payments actually made, childminding costs and the weekly requirements for the applicant and any other dependent members of their family who live with them have been taken into account. Those on Income Support are automatically financially eligible for Legal Aid whilst in receipt of Income Support. All other benefits, except Severe Disability Benefit are means tested.

Conditional fee arrangements are not permitted in Guernsey. There are fixed rates for advocates in respect of recoverable costs. Commercial dispute resolution work is normally charged on a time-spent basis using hourly rates.

Current System in Isle of Man

Currently, in both civil and family legal aid cases, an Advocate is paid an hourly rate for work undertaken on a time taken basis. Therefore, if an Advocate completes a task within 15 minutes, then the Advocate is paid for the 15 minutes work undertaken only.

When a certificate is issued, the Advocate is limited in the tasks they may undertake and how long they may spend undertaking such tasks. The Advocate must make a request for an extension for each new task to be completed and set out the time the task will last. In recent times, the legal aid office has changed the procedure in relation to the limitation of legal aid certificates, to allow an Advocate to undertake multiple tasks at a time and to set out how long the tasks will, in fact, take them. Prior to this, and for several years, the time and tasks permitted were set out by the legal aid office on an arbitrary basis, which approach only served to waste a significant amount of time and cost due to a significant increase in administration and further slowed (and in some cases stopped) the progress of cases.

At the conclusion of the matter, the Advocate submits a bill for their work to the costs' assessor, who is employed by the Isle of Man Courts of Justice, together with their file. The costs assessor reviews all the work claimed on the bill against the file to ensure that there is sufficient evidence on the file of the work being completed. He then looks at the work authorised by legal aid in the certificates and will, if necessary, discount the bill to ensure that only properly authorised work is paid for, where there is evidence of such work being undertaken. This process is followed on every single matter, including Green Form matters and therefore the system is as fully safeguarded as it can be.

The expenditure is higher in relation to family legal aid than civil legal aid, because costs Orders are issued by the Court or are payable upon settlement of a case. Therefore, many legally aided claimants will use the legal aid certificate to cover the disbursement costs necessary to progress their case, recovering their costs only at the conclusion of the matter from their opponent. In such circumstances, where there has been no request for an interim payment from legal aid, the claimant's Advocate can recover costs at their usual hourly rate and not limited to the legal aid rate, per section 5 of the Legal Aid Act 1986.

If a legally aided claimant does not succeed in their claim, then costs will not be ordered to be paid by legal aid to the opponent, except in very rare circumstances.

Therefore, the reality of any review of legal aid expenditure is that the majority of expenditure is in relation to family law proceedings, where costs Order are not ordinarily made by the Court. Some of the proposals set out in the consultation, such as CFAs, would not work in the family law context in any event, and therefore significant costs will not be saved by their introduction.

Scope, Eligibility, Means Test and Merits Test – questions 10 - 16

The scope of services covered by legal aid currently, is generally quite wide. There are questions later in the consultation with regard to expanding the scope of legal aid into other areas, which is supported by the IOMLS and which is detailed later herein.

The eligibility for legal aid, however, results in the poorest of our citizens receiving legal aid funding, but leaves a huge gap in the middle. Many families cannot afford to pay for legal services but fall outside of the eligibility criteria, which means that there is limited access to justice for our middle earners.

The IOMLS would support a greater eligibility threshold being put in place, with contributions by middle earners, in order that they can access legal services when they need to, but pay their contribution over a period of time. This would provide a fairer system without significantly increasing the cost of delivery.

The eligibility criteria should be reviewed annually to stay in line with cost of living and inflationary rises to ensure the gap does not widen too far. Currently, the eligibility criteria is not reviewed often enough, it is submitted.

The means test should also be removed for certain types of cases (POCA, public law care and certain inquests) as detailed later herein.

The IOMLS submits that the merits test as it stands is appropriate and best evaluated by the Advocate and the legal aid certifying officer.

Statutory Charge – questions 17 - 20

The objective of the Statutory Charge is to place an assisted person in the same position as the unassisted person. This is only right and proper. It should ensure “an equality of arms” as between assisted and unassisted parties. However, the IOMLS is concerned that it is not being applied and enforced effectively by the Legal Aid Office.

Where those who have the benefit of Legal Aid successfully recover or preserve money or property and the legal costs of doing so are not recovered in full from another party, the Statutory Charge should be applied in accordance with the regulations upon that money or property. There should be an increased focus on this as it can only benefit the proper administration of the scheme.

The Statutory Charge is explained to a legally aided client by the Advocate when the legal aid form is being signed. The Statutory Charge is explained on a separate sheet, which must be signed by the Advocate confirming that they have explained the same, and the client confirming that they understand. Advocates are explaining the meaning of the Statutory Charge to their clients, however, the same is not being enforced, which may result in legally aided persons taking less notice of the warnings and explanations provided. The role of the Advocate is to advise their client in the same way as an Advocate would advise a fee paying client of reasonable means or a client who is subrogated by insurance. There should, therefore, be no difference in advice due to the nature of funding.

Currently, where a party is in receipt of Legal Aid in a case involving another party who is not, then the assisted party is potentially at an advantage in that they have no incentive to narrow the issues in a case or look to a settlement for fear of costs consequences. The current interpretation and application of the Legal Aid Statutory Charge causes this imbalance, as the Legal Aid Office is not using the Statutory Charge to recover costs where a legally aided party has acted unreasonably and has failed to recover some or all of their costs from the other side. This results in increased cost to the Legal Aid fund and/or the unassisted party, as well as straining court resources.

For example, the cost consequences of Part 7 Chapter 6 Offers are not currently being applied to assisted parties, namely that if an offer is rejected but ultimately is not beaten at trial, the inter partes cost consequences are not applied and enforced against the property recovered or preserved by the assisted party, as a result of the Legal Aid Office not applying the Statutory Charge and thus the court not making costs Orders. Advocates should seek permission from the Legal Aid Office to reject an apparently reasonable offer and will have to justify their advice to the LACO. If the LACO agrees with the Advocate, the legal aid certificate will continue. Costs Orders can, of course, be made against the Treasury (as a result of the conduct of a legally aided party) in certain circumstances.

Whilst an Advocate representing a party who is legally aided must continue to certify that the case has more than 50% prospects of success, and will report to the Legal Aid Office if a client is not prepared to accept a reasonable offer of settlement, without the added pressure of a costs Order being made against the legally aided party, and enforced via the Statutory Charge, there is not the same incentive to settle as there is on a non-legally aided party. That said, Advocates will advise their clients in such a situation that legal aid may be withdrawn if they do not behave unreasonably, which is too that a privately funded Advocate does not necessarily have available.

In family law financial matters, the Statutory Charge should apply against any property recovered or reserved and should be enforced, to ensure that the State is not paying for legal costs that could otherwise be paid by the individual concerned.

A proper application of and enforcement of the Statutory Charge would save cost to the Legal Aid fund, the administration of justice and unassisted litigants with no effect upon access to justice. It would ensure a proper "level playing field" in disputes.

The IOMLS however does not support the repayment of the Statutory Charge secured on an assisted person's main or only dwelling other than upon the sale of same as this can potentially lead to injustice to vulnerable members of society. If, however, there is no property upon which to secure the Statutory Charge, a repayment plan should be put in place or other mechanism agreed for the repayment of costs to legal aid. This should be actively monitored and enforced. There should, of course, be extreme caution exercised if the Statutory Charge is being repaid from damages/financial relief awarded, and care must be taken not to erode such damages/financial relief to an extent such to negate the purpose for which they were awarded.

POCA – questions 21 – 23

The IOMLS submits that individuals subjected to a Restraint Order under proceedings issued pursuant to the Proceeds of Crime Act 2008 (“POCA”) should have access to legal aid regardless of means or merits. Currently, the situation results in such individuals having no access to legal advice in relation to proceedings instigated against them by the State. Whether this is Human Rights Act compliant remains to be seen. This is compounded by the removal of the Adequate Consideration Defence in the Isle of Man. This prevents (or at least severely restricts) the ability of an Advocate to accept payment directly from the individual who is subject to the Restraint Order.

Regardless, any individual subjected to a Restraint Order should have access to legal advice and the ability to ensure all procedures have been properly followed in the Application process and be able to effectively challenge the granting of the Order.

POCA also specifically prevents the use of the restrained funds to challenge and defend Restraint Order proceedings, thus leaving no access to funding open.

If, however, funds are later released under the Restraint Order, then the individual can and should repay the Isle of Man Government those legal costs paid by legal aid.

Notably, even if the individual subjected to the Restraint Order successfully challenges the making of such Order, the legislation prevents them from seeking a costs Order against the Government. This too should be amended, to ensure that procedures are closely followed and to put in place a penalty if they are not.

Family Proceedings – questions 24 – 33

The IOMLS is of the view that the legal aid means test should be immediately removed in relation to public law care matters for all parents. This policy decision was taken and agreed over two years ago yet, for unexplained reasons, the required legislative changes have not been undertaken to ensure the same is effected. It is therefore extremely disappointing to see this issue appears now to be up for discussion and consultation once again, notwithstanding the same was previously agreed.

The removal of a child from their parents is a significant decision and one that should not be taken lightly. All people involved in that process should have access to legal advice and representation to ensure that the most draconian remedy of all, the removal of the child, is only undertaken in the most serious and appropriate cases.

These proceedings are necessarily complex and often involve the use of experts. The hearings last a long time and can be difficult for a legally unrepresented person to follow. The Department seeking the removal of the child, whether temporary or permanent, is always represented and therefore equality of arms should be afforded to all parties.

These proceedings often involve our most vulnerable members of society, for example drug addicts, the mentally ill and those with learning disabilities, but they can very easily involve every day hard working people, who may find themselves involved in a situation where their child has suffered an unexplained injury. Navigating such proceedings, with the ultimate threat of losing custody of your child, cannot be underestimated in terms of the mental strain and upset caused. The role of the Advocate in such proceedings is therefore vital and should be available in every case without more.

In relation to HMAG providing legal services to children in such cases, the IOMLS agrees that the child should be granted legal aid in every such case. It is appropriate for HMAG to be involved in the appointment of the Advocate; however, the cost of such engagement should properly be moved from the budget of HMAG and transferred to legal aid, with the legal aid budget being increased accordingly. There would be no increased cost for Government, as these costs are already being paid. In fact, HMAG pays Advocates at a higher rate than the current legal aid rate for undertaking this work, presumably in recognition for the difficult and testing nature of the same.

Civil and Tribunals – questions 34 – 43

The IOMLS does not support the restriction in scope of civil legal aid. The Manx people should have access to free legal advice, where they are eligible for the same.

There is, however, confusion as to why a limited number of tribunals are included within the scope of legal aid and others are not. Some, such as Mental Health, are abundantly clear as to their inclusion, others such as Financial Services and the Information Commissioner are not.

The IOMLS considers that an exercise should be undertaken to ascertain why some tribunals were included and others not, before any detailed submissions can be made on this subject. It would appear, on first blush however, that the Employment and Equality Tribunal should probably be included as well as those dealing with benefits.

Inquests – questions 44 – 49

The loss of a loved one is one of the most traumatic events anyone can experience. This can be greatly exacerbated when there is a coronial investigation. There is of course no place for the apportionment of blame or altering the fact-finding nature of Inquests.

Early signposting to the IOMLS and/or Legal Aid Panel of Advocates for help in finding an advocate is central, as is the provision of proper guidance on the procedural, legal and evidential process in inquests. This is specially so in relation to the death of persons in the custody of the State.

There are also inquests which, pursuant to Article 2 of the European Charter of Human Rights, investigate the subjective obligations of the State not to take life without justification and to do all that could be reasonably expected to avoid a real and immediate risk to life where the state knows or ought to know of the risk of a breach of Article 2.

It is the position of the IOMLS that there should be non means tested Legal Aid available in both “Jamieson Inquests” and “Middleton Inquests”. In addition, where it is determined that there is a wider public interest in the determination of any inquest, there should be non means tested Legal Aid available.

The central importance of the Right to Life requires that there be Access to Justice at the expense of the State in these inquests. Non means tested Legal Aid in this category will not result in a significant expansion of the cost to Legal Aid and the increase in expense is far outweighed by the interests of justice.

Legal Aid for other inquests should be available on a means tested basis.

Inquests are not an adversarial process but this does not mean that parties and indeed the Coroner does not benefit significantly from the involvement of Advocates on the behalf of Interested Persons. Advocates assist in the process and ensure that all relevant evidential and legal questions are brought to the attention of the Coroner.

There is a perceived imbalance in the system where the organs of the State and/or corporations are represented at inquests but the Interested Persons (generally, but not exclusively, the family of the deceased) are not.

Inquests often involve the consideration and investigation of complex factual and legal questions. Where an Interested Person is not legally represented, this only adds to their stress, upset and confusion. Justice must not only be done, but must be seen to be done.

In relation to the question as to whether more than one person should be granted Legal Aid for an inquest, where the circumstances warrant, Legal Aid should be granted. These circumstances will be case specific and accordingly it is difficult to provide specific guidelines. However, an obvious example of where consideration should be given to more than one person being granted Legal Aid is deaths involving possible suicide, whilst another is where there have been multiple related deaths caused in a single event. Both these circumstances potentially involve ethical conflict for the advocate involved and more importantly, conflicts of interest and/or stress as between the Interested Persons. The input of the Coroner in these circumstances should be sought in the determination of such an application for Legal Aid.

Conditional Fee Arrangements – questions 50 – 51

Currently CFAs are not permitted in the Isle of Man, as Advocates who enter into CFAs or other contingency arrangements will breach the Advocates' Practice Rules 2001, and thereby risk having their commission to practice removed. Similar restrictions have also been adopted and maintained by some of our neighbouring jurisdictions as set out above.

A CFA is an agreement with a legal representative which provides for his or her fees and expenses, or any part of them, to be paid only in certain circumstances - usually only if the client wins the case hence the 'no win, no fee' tagline.

Historically, all forms of contingency fees in litigation (whereby payment of the lawyer depended on the results) were considered to be unlawful and even immoral. It was felt that they could lead to a conflict of interest between the client and the lawyer. However, in the 1980s, the UK government started to review this position and eventually concluded that a particular form of contingency fee agreement, could be allowed, although all other forms of contingency fee agreements continued to amount to unlawful maintenance and champerty in contentious matters. Statutory provision for CFAs was first made in section 58 of the Courts and Legal Services Act 1990 of Parliament ("CLSA 1990").

Subsequently, on 1 April 2013, the majority of the Jackson/civil litigation reforms came into force in England and Wales. As a result of these changes, damages-based agreements (DBAs), another form of contingency fee agreements, are now permitted for all contentious business (except for criminal and most family matters) by section 45 of LASPO (which is referred to above). Section 45 provides for amendments to section 58AA of the CLSA 1990 to allow the use of DBAs without limiting this to employment matters (as was previously the case).

Section 58(2)(a) of CLSA 1990 defines a CFA as:

"an agreement with a person providing advocacy or litigation services which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances."

In other words, the agreement will be a CFA if the client will pay different amounts for the legal services depending on the outcome of the case. Generally, if the client loses the case, it will not be liable to pay for the fees and any expenses that are subject to the CFA (the conditional fees).

If the client wins the case, it will be liable to pay all fees and expenses, including the conditional fees, and the success fee, if a success fee is provided for in the CFA.

The definition in section 58(2)(a) of the CLSA 1990 refers to "expenses", as well as "fees", and it is clear that the payment of disbursements can be made conditional on the outcome of the case. However, many law firms have a policy of never making disbursements conditional under a CFA because they do not want to run the risk of not being reimbursed for disbursements if the client should lose. They will usually make an exception for counsel's fees if counsel has agreed that his fees will be subject to a separate CFA.

If the client wins the case, the opponent will generally be ordered to pay the client's costs, including the conditional fees (unless the CFA is unenforceable).

In the case of CFAs entered into before 1 April 2013, it is also possible to recover the success fee from the opponent. In the case of CFAs entered into on or after 1 April 2013, it is no longer possible to recover the success fee from the opponent, and it will have to be paid by the successful client, with a few exceptions.

This is one of the significant changes relating to funding implemented by the Jackson/civil litigation reforms. It followed recommendations made by Sir Rupert Jackson in his Final Report (Chapter 10). Sir Rupert Jackson considered that recoverability of success fees payable under a CFA (and after the event (ATE) insurance premiums) led to disproportionate costs and should be abolished.

The change to the recoverability of success fees was introduced by section 44 of LASPO which came into force on 1 April 2013 (in so far as it was not already in force). Section 44 amended sections 58 and 58A of the CLSA 1990. It abolished the recoverability of success fees (section 58A(6) CLSA 1990, as amended by LASPO). Section 44 also introduced additional conditions for CFAs that provide for a success fee and which relate to certain specified proceedings.

Similar changes came into force on 1 April 2013 in relation to the abolition of recoverability of ATE insurance premiums.

The abolition of recoverability of success fees created some uncertainties, including the following:

- There is no requirement in the legislation for a solicitor to give the client information on how the success fee has been calculated. The level of the success fee is simply a matter for agreement between the solicitor and the client (and there will be no need to show that it is reasonable in a costs assessment involving the losing side because it can no longer be recovered from the opponent).
- While CFAs are still available as a potential funding option for claimants and are still being widely used, they will not be viable in some cases. The anticipated amount of damages in lower value claims may not be sufficient to allow the claimant to fund the success fee and any ATE insurance premium now that they are no longer recoverable.

A success fee is an additional amount payable for the legal services, over and above the amount which would normally be payable if there was no CFA, in specified circumstances (usually if the client wins the case). A success fee must be expressed as a percentage uplift on the amount that would be payable if there was no CFA. Under the Conditional Fee Agreements Order 2013 (SI 2013/689) (CFA Order 2013), the maximum uplift is 100% (Article 3).

There are a number of different types of CFAs, depending on the fee arrangements between the client and the law firm, which are in principle legal, including:

- CFAs with no success fee, also known as Thai-trading agreements, whereby the law firm agrees to forego all of its fees if the client loses, and will recover its ordinary costs (also known as base costs) if the client wins. This is a form of no-win, no-fee agreement.
- CFAs with a success fee, whereby the law firm agrees to forego all of its fees if the client loses, and will recover its base costs and a success fee calculated as a percentage uplift on the base costs if the client wins.
- CFAs with a discounted hourly rate, whereby the law firm will be paid at the discounted hourly rate whatever the outcome of the proceedings, but will forego the balance of its base costs if the client loses, and will recover all of its base costs with or without a success fee if the client wins. For examples of this kind of CFA with a success fee, see Standard documents, Discounted conditional fee agreement, where the success fee is not recoverable, and Discounted conditional fee agreement: an example (to be used in the excepted cases), where the success fee is still recoverable.
- A collective conditional fee agreement (CCFA), which is a CFA made between a law firm and a non-party, bulk purchaser of legal services, such as a trade union or the legal department of a multinational company. It provides for fees to be payable on a common basis in relation to a class of proceedings. CCFA's were a creature of the Collective Conditional Fee Agreements Regulations 2000 (SI 2000/2988), which were revoked on 1 November 2005, leaving no statutory reference to CCFA's. However, the revocation was not retrospective. Therefore, it is possible that, from time-to-time, individual cases will continue to be brought under a pre-November 2005 CCFA that will be governed by the Collective Conditional Fee Agreements Regulations 2000. Further, despite the absence of statutory reference to CCFA's, they continue to be a valid form of CFA, so there is no reason why parties should not continue to enter into CCFA's where appropriate. Note that under section 44(6)(b) of LASPO a success fee under a CCFA entered into before 1 April 2013 will only be recoverable from the losing side if advocacy or litigation services were provided before 1 April 2013.
- Simplified CFAs, also known as CFA lites, were introduced by the Conditional Fee Agreements (Miscellaneous Amendments) Regulations 2003 (SI 2003/1240), under which the legal representative agreed to receive no more than is awarded or paid. They were so called because there were fewer formal requirements to be complied with. Since the revocation of the Conditional Fee Agreements Regulations 2000, there are no longer any statutory manifestations of CFA lites, although it is clear from CPR 44.1(3) that costs under this type of CFA remain recoverable.

While a CFA protects a client from liability for their own legal costs if they should lose, it does not protect them from their opponent's legal costs. Legal expenses insurance can do this.

A solicitor should first check whether the client already has before the event insurance to cover this liability.

If the client does not have BTE insurance, the client should be told about the possibility of taking out ATE insurance. Securing ATE insurance on the Isle of Man for local cases is, however, very difficult and comes at a high cost.

As the success fee is no longer recoverable from the losing side, and must be paid by the successful client, there is no longer any additional liability to be paid by the losing side. Therefore, the success fee will not be assessed by the courts in a costs assessment of the successful (receiving) party's costs and the courts will take the same approach to assessment of costs incurred under a CFA, as if the work had been done under an ordinary retainer.

From April 2013, a regime of qualified one-way costs shifting (QOCS) for personal injury cases was implemented. QOCS means that if a claimant wins a case, they recover their costs, but claimants do not pay costs orders in favour of the other side, except up to the extent of any damages and interest awarded.

The implications for a client entering into a CFA include the following:

- Depending on the terms of the CFA, liability for the legal costs of their own solicitor will be significantly lower in that if the client wins, the opposing party will usually have to pay a significant part of the client's costs (in the usual way), although the client will have to pay any success fee. If the client loses, they will not have to pay those costs which are conditional.
- If the client loses, it is likely that they will be ordered to pay a significant part of the opponent's costs in the usual way. However, it is common to take out ATE insurance with a CFA to cover this potential liability. In those circumstances, if the client loses, they will have to pay the excess costs that are not covered by the ATE insurance, as well as the insurance premium, unless it is a contingent premium (and therefore not payable if the client loses).
- There is likely to be considerable front loading of costs because of the due diligence which has to be carried out to assess whether the case is suitable for a CFA and to calculate the success fee. This might include:
 - a full review of the core documentation;
 - production of preliminary proofs of evidence from key witnesses; and
 - obtaining counsel's opinion.

All of this work will usually have to be paid for under the terms of the solicitors' usual retainer, and there is no guarantee that the solicitors will then agree to take on the case under a CFA.

- If, under the CFA, the success fee is payable on an amount being awarded by the judge, as opposed to an amount being recovered from the other side, the client will be liable to pay the legal fees and the success fee if they win, even if the opposing party does not pay the judgment award. This could mean that the client is worse off than if they had lost.

Whilst, on the face of it, CFAs appear to be a good solution to funding civil cases, there are significant downsides to their use, which have been seen in England and Wales.

In England and Wales, the introduction of CFAs has seen a significant increase in satellite litigation in relation to the applicability, enforceability and costs of CFAs. This has resulted in increased court time being used, at a cost to other court users. Such satellite litigation should be avoided wherever possible, as it only serves to restrict access to justice. No win no fee, is not in fact what a CFA is and there will still be an exposure to costs for the client, who may have no ability to pay such costs. This means that vulnerable members of our society end up in debt when they can least afford to. It also results in potential clients deciding not to bring a claim when they should, for fear of incurring debt, no matter how remote the risk. This is limiting access to justice, not ensuring it.

Further, the introduction of a success fee gives an Advocate an interest and incentive in a case. This has resulted in claims that Solicitors have incorrectly advised and encouraged clients to settle cases at an undervalue or with issues not being addressed properly, in order that they can

receive payment. There is also evidence that Solicitors only take on guaranteed to win cases leaving a significant number of potential claimants, with good but difficult cases without representation, for fear of not being paid. There is a risk, particularly in medical negligence cases which are brought against Isle of Man Government, that these claimants would be left without representation at all, as the Government can use tactics to make cases unattractive to Advocates, by incurring significant costs in an environment where there will always be risks and uncertainty in claims succeeding. This situation does not arise in England and Wales. This imbalance of power and potential to interfere in access to justice, should not be allowed to occur, as it gives the impression (if not the reality) of bias. This therefore reduces access to justice and does not ensure it. The Legal Ombudsman in England and Wales has raised concerns in this regard, and the Isle of Man should be slow to blindly follow the practice and policy of England and Wales.

The introduction of CFAs in England and Wales saw Claims Management Companies increasing, together with the buying and selling of cases. People thought they had a choice in their representation, and that turned out not to be the case. Further, people thought they were dealing with a lawyer, when in fact they were merely dealing with a claims' handler. Claims to the ombudsman increased and litigants were left confused. A whole new market opened up, which was not for the benefit of the people for whose benefit it was said to operate.

If we are looking at the primary goals of this consultation and the review of legal aid, then the current system of legal aid being available in civil cases ensures fair and proper access to justice and legal advice. The costs paid by legal aid in civil cases that would fall into CFA territory is far smaller than the cost of overhauling the system and the price the vulnerable people of the Isle of Man will have to pay in not being able to access legal advice and the courts, when they should. Further, the IOMLS cannot support any system that results in Advocates recovering fees and/or success fees from the damages of a client, which damages have been awarded for a very specific purpose. To support such a system flies in the face of justice and all that is moral.

Self-Representation – questions 64 – 68

Everyone has the right to represent themselves in court or tribunal proceedings if they so choose.

However, it is a fundamental Human Right for them to have independent legal representation of their own choosing if they wish, and if they have insufficient means to pay for it, this must be provided free when the interests of justice so require. This is the bedrock of Access to Justice and indeed democracy. Without it, civil society is in grave danger.

The UK has seen drastic cuts in the funding and provision of criminal, civil and family Legal Aid. This has been a disaster and has left many people unable to secure legal representation.

The current system in the Isle of Man has not gone down this route which means that, there is still Access to Justice and legal representation, although the provisions are still capable of improvement. The cost to society of our current Legal Aid system is not disproportionate to its benefits and the need it meets. We do not want to limit this and go down the UK route.

It is an accepted fact that the impact of litigants in person places increased demands upon the court system in relation to time, costs and resources. Cases take longer and become more difficult to manage and conduct. This means increased cost to other parties and increased demands on the resources of the courts. This must be taken into account in assessing the true cost saving of any cuts in the provision of Legal Aid.

The UK Ministry of Justice has put in place a Litigants in Person Grant over 2 years at a cost of £3.1m. The existing Litigants in Person Support Strategy, was put in place due to the increasing numbers of litigants in person following the Legal Aid reform in the UK. It Launched in October

2014 and is a collaborative project involving a number of legal support entities such as the Bar Pro Bono Unit and Access to Justice Foundation, however it is funded by the Ministry of Justice. (Appendix 2)

In addition, there is a negative impact on a party who is represented in a matter involving a litigant in person. Litigants in person often have limited understanding of procedural rules and legal principles and in family cases especially, have an understandably strong emotional attachment to their case. This can result in a too subjective assessment of their claim and a reluctance to settle or at least agree non-contentious issues that are not central to the matter in hand. This will result in an increase in cost and delay. Further, the court will expect the represented party's advocate to assist, in so far as they are ethically able, the unrepresented party. This will mean, for example, the court asking them to prepare all necessary bundles of documents, drawing up of Orders etc., notwithstanding the increased time that will be spent on correspondence, communication, written and oral argument by the represented party. The removal or reduction of legal aid will have a significant impact on this.

The Courts are now taking a less lenient approach to litigants in person and will dismiss applications where procedures have not been correctly followed. Therefore, this is not furthering fair access to justice and is in turn increasing costs.

<https://www.hempsons.co.uk/news-articles/the-attitude-towards-litigants-in-person-an-end-to-latitude/>

<https://www.theguardian.com/law/2011/feb/28/restrict-legal-access-of-rich>

Another problem is in relation to the proper instruction of experts, who are frequently central to cases. Where this is undertaken by litigants in person then due to their inexperience in securing the relevant expert input this is frequently more difficult and costly both for the represented party and the courts. Once again, this needs to be factored in to any possible cost savings in the restriction of Legal Aid.

It is commonplace for a litigant in person not to understand the distinction between evidence and submissions. As a result, many do not present their case properly, therefore prejudicing themselves and potentially the represented party. Once again this can involve the increased utilisation of court resources.

An Advocate's principal (overriding) duty is firstly to the court, secondly to their client and thirdly to the litigant in person where they are involved. There is invariably an increased cost and delay for the represented party when the advocate provides assistance to the litigant in person in accordance with their professional duties. There is frequently a fine line between properly acting on behalf of their client and being open to an allegation of taking unfair advantage of a party who is not represented. This frequently involves ethical conflicts and difficulties to advocates.

<https://www.hja.net/what-is-a-litigant-in-person-and-what-are-the-latest-developments/>

The UK Ministry of Justice has conducted research in this area – Research Summary 2/11 – Litigants in Person: a literature review. This concluded:

1. Litigants in person tended to be younger and have lower income and educational levels than those who have representation.
(Isle of Man Law Society comment - they are vulnerable members of society)
2. Litigants in person face problems in court; understanding evidential requirements, identifying legally relevant facts and dealing with forms, being overwhelmed in court.
(Isle of Man Law Society comment - they do not have proper Access to Justice)
3. Litigants in person caused extra work for court staff and the judiciary
(Isle of Man Law Society comment this causes increased pressure on court resources)

4. Cases involving unrepresented litigants took longer and were less likely to settle.
(Isle of Man Law Society comment – this increases the costs to other parties and increased pressure on court resources)

5. A lack of representation negatively affected cases outcomes.
(Isle of Man Law Society comment – this denies proper Access to Justice)

Access to Justice requires the broadest possible access to legal representation. Any measures to limit this will be prejudicial to the people of the Isle of Man, potentially infringe their Article 6 Human Rights and is likely to fail any cost benefit analysis regarding the overall administration of justice.

The best support any litigant can have is to be properly represented.

Hourly Rates and Fixed Fees – questions 69 - 75

A Junior Advocate (0 – 5 years PQE) can claim costs from legal aid at the hourly rate of £115. A Senior Advocate (5 years + PQE) can claim costs from legal aid at the hourly rate of £135. Trainee Advocates and other non-qualified staff can claim costs from legal aid at the hourly rate of £85. These rates were last reviewed in 2007 and have not increased since 2009, despite the Legal Services Commission making it clear to the Council of Ministers in 2007 that Advocates were not being properly and effectively paid for the services delivered. In that independent Report, there was a recommendation that the Advocates' hourly rate be immediately increased to £150 with the same reviewed annually thereafter.

In the 11 years since the Advocates' hourly rates were last reviewed, Government Advocates have had a year on year pay increase of between 1.4% and 2.5%.

The Court fees charged have increased as follows:

Court Matter	% increase	2009 amount	2020 amount
Small Claim Filing Fee (max)	948%	£14.50	£152.00
Small Claim Application notice	516%	£22.00	£135.50
Summary Procedure Filing fee (max)	950%	£55.00	£577.50
Ordinary Procedure Filing Fee (max)	8376%	£99.00	£8,391.50
Ordinary Procedure Application notice	307%	£55.00	£224.00
Divorce Application Filing Fee	119%	£131.00	£286.50
Appeal Filing Fee	69%	£200.00	£338.50

Advocates' outlay in costs have increased every year, at least in line with inflation if not more, with no increase in the hourly rates charged to legal aid. Whilst it is accepted that Government needs to ensure that it spends its money fairly and reasonably, the disparity in the manner in which Government Advocates are treated and costs within the justice system are increased, by comparison to the hourly rates paid to legal aid Advocates appears unfair and unjustified. Legal Aid Advocates are a vital part of the justice system, ensuring that access to justice is maintained and as such, they should be properly and fairly remunerated, with the hourly rates being reviewed (at least in line with inflation) every year.

Clients who privately pay for their legal advice are generally charged between £250 and £550 per hour, depending on the experience of the Advocate and the Firm.

Civil and family legal aid Advocates provide advice and assistance on a vast array of areas. Sometimes, the individual on each side of the case has the benefit of legal aid. Some areas covered by civil and family legal aid are very specialist areas and there are limited numbers of Advocates undertaking that type of work (medical negligence, public law care proceedings etc).

Of the Advocates currently listed on the legal aid panel, there are 21 family Advocates and 18 civil Advocates who routinely undertake legal aid work. Some Advocates listed on the panel are no longer practising and others only undertake a very small amount of legal aid work on an exceptional basis.

The consultation poses the question to respondents, as to whether they would be in favour of fixed fees. Respectfully, no one responding to the consultation can answer this question in an informed manner, as the consultation does not set out what the fixed fee system would look like. It is also stated that the use of fixed fees assists Government in its budgeting and cuts down on administration.

Civil and family legal aid cases always turn on their facts. Whilst there are Court processes and procedures in place, to be followed, the system is not transactional in nature and the process followed depends on the facts of each case. To try and set fixed fees for such a subjective area of law would be extremely difficult if not impossible, if Advocates are to be fairly compensated for the work that they undertake. The IOMLS submits that there would be more administration in a fixed fee system than the current system, as claims for exceptional payments would be routinely made.

The current system adequately allows the legal aid office to prepare budgets. The number of issued legal aid certificates is known as is the number of approved hours on each certificate. That information for budgeting purposes is, we would suggest, far more accurate than a fixed fee system where the tasks (thus fees) are unknown until the end of the matter.

A system that pays an Advocate for the time they actually take to complete a given task is not only a fair system but a far more cost-effective system in the long run. Ultimately, if the costs assessor does not believe that the time spent completing a given task is reasonable, he can reduce the time paid for.

The only neighbouring jurisdiction that uses a fixed fee system is that of Guernsey, however, the fixed fee system appears to apply only to the recovery of costs from an opponent, in an uncontested proceeding. The Isle of Man already applies such a fixed cost recovery system in uncontested proceedings, and the same has no bearing on legal aid. The IOMLS notes, of course, that the fixed fee system referred to in this paragraph, and set out at Part 11 of the Rules of the High Court of Justice of the Isle of Man 2009 (tables 1 to 3), has not been reviewed and increased since 2010, and it is similarly out of date.

The IOMLS cannot comment with any detail on a fixed fee system as no detail has been put forward for consideration. Should there be any fixed fee system proposals following this consultation, we would expect that the same be specifically consulted on and the IOMLS should be approached in advance for assistance.

Legal Advice Centres – questions 76 -79

The IOMLS cannot properly address and comment on a proposal for a legal advice centre as none has been set out. We refer to our submission in 2016, in this regard.

If a legal advice centre is being considered as an alternative to legal aid then there must be a proper consultation in relation to the same.

If a legal advice centre was to replace legal aid, and in essence become a Government legal advice office, the IOMLS would have a number of concerns. Firstly, it does not appear, given the annual civil and family legal aid spend, that the same would save any money. In order to run effectively, a minimum of 6 family Advocates would be required (to ensure representation could be given on both sides), at least 2 public law care Advocates would be required, and a minimum of 10 civil Advocates would be required to competently cover all of the different areas of law, allowing for representation on both sides, in some cases.

Given that this model would require the legal advice centre to act for both parties to a proceeding, strict conflict of interests measures would need to be put in place, which would necessarily require the employment of 2 Senior Advocates in both family and civil law, to oversee the teams representing all clients. There cannot be any cross contamination of information, without the potential for prejudice arising.

Legal advice centres, in all neighbouring jurisdictions where they have been implemented, work alongside private practice and legal aid and not in place of it. There is significant difficulty in maintaining legal advice centres in England and Wales, due to funding issues and they have now become limited in the services they can offer.

The consultation talks about accessing services and it is entirely unclear as to how moving to a legal advice centre would provide an increased legal service presence across the Island than the current offering of private law firms, who have offices in each of the North, East, South and West of the Island.

If there is a perceived issue of access to legal services, which has not been evidenced to the IOMLS despite request, then the Isle of Man Government needs to better signpost Island residents to the services on offer and the social benefits available to those who qualify. Our members advise that they routinely signpost individuals to services they need to access, when they are unclear as to what help they need and how to access the same. This work is all undertaken at no charge, as it is not legal work, and takes up significant time.

The IOMLS submit that legal advice centres is not a better or more cost effective alternative to the current legal aid scheme and the introduction of the same will not ensure better access to justice.

ADR – questions 80 – 84

ADR is routinely used by all Advocates both in the family law arena and the civil law arena. There is, however, a disparity in the funding of ADR by legal aid, with family mediation being limited in its use and scope by a restricted funding arrangement being in place. Such restrictions do not apply to civil mediation.

ADR when properly funded and accessed can save a significant amount of time and costs overall, and limit the issues (if any) that ultimately are placed before the Court for determination. For ADR to work, however, both parties need to be prepared to resolve their case in an amicable fashion outside of the Court room. Forced ADR does not work, because there is no spirit of cooperation and therefore costs are increased by paying lip service to the same.

ADR encompasses so much more than mediation, which is the focus of the consultation. ADR can be as simple as Advocate led negotiations, which can often resolve matters without the Court becoming involved, particularly in the civil litigation field.

Family mediation could be utilised to far greater effect, by the lifting of the funding cap in place and supporting mediators in offering the service. The training and ongoing regulatory costs of mediators are such that, under the current system, developing this type of practice is not

financially viable. With a lack of mediators comes a lack of mediation, and therefore the Courts are left to deal with the cases.

The introduction of a Family Drug and Alcohol Court, as trialled in England and Wales, could however, result in early intervention with problem families, offering the help and support needed at an early stage and thus preventing escalation into all of the Court areas (family, criminal and civil), which will ultimately save costs. The IOMLS is supportive of a specific consultation and trialling of a Family Drug and Alcohol Court in the Isle of Man, as it would be of huge benefit to our society.

Conclusion

"In opinion of the authors, after evaluating the jurisprudence of the Court of Human Rights, States should guarantee access to justice as a human right and not just in the context of the rule of law (Gruodytė and Kirchner, 2012, p. 43). In 1970, the European Conference of Ministers (1970) issued a declaration on legal aid and advice stating that access to justice is an essential feature of any democratic society and that its provision is an obligation of the community as a whole.

If up until the end of the 20th century it was not always clear for states what it means for states to have to guarantee a fair trial within the meaning of the Article 6 of the ECHR, the ECtHR has developed jurisprudence over the years which addresses various issues. For example, individuals are entitled to legal assistance in order to guarantee the right to a fair trial, "as providing for a general requirement of some measure of "equality of arms" between the state and the individual or between the parties in the case" (Public Interest law Institute, 2006, p. 2). Article 6 (3) (c) of the Convention requires effective assistance of a lawyer which means that a mere formal appointment is not sufficient. Meaningful access to justice can only be realized if individuals have an effective right in practice to enforce their legal rights and challenge unlawful acts (Esposito, 2001, p. 10)."

"The establishment of legal aid represented the beginning of a new stage in the relationship between law and society and was thus fundamental to the development of an inclusionary form of citizenship (Bean in Sommerland, 2004, p. 348). "Legal aid is an essential tool in ensuring access to justice [...] and [...]it is the duty of states and governments to guarantee organise and finance such legal-aid systems, which permit those with the least means to obtain access to justice["]" (The Legal Aid Directive, 2003)."

<https://www.sciencedirect.com/science/article/pii/S2351667415300081>

The IOMLS does not dispute that there are areas within the current Legal Aid system that can be reviewed and that there is scope to bring the system up to date in a manner that fairly and adequately remunerates Advocates and ensures there is Access to Justice for those in our society that need support. In doing this there may be ways in which costs can better be allocated without limiting the areas in which assistance will be provided.

In looking at this it must also be remembered that Legal Aid is only part of the Administration of Justice costs and it cannot be viewed and reviewed in isolation.

In order to do this, the IOMLS is willing to engage with other interested persons or agencies but in order to do so any proposals will need to be set out in such a way as to enable a meaningful response to be provided.

Yours sincerely,

Timothy John Swift
President
For and on behalf of
The Isle of Man Law Society

cc JLM Quinn QC, MLC
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Appendix 1

The Isle of Man Law Society Legal Aid Consultation Submission November 2016 can be found here: <https://www.iomlawsociety.co.im/wp-content/uploads/2016/04/Isle-of-Man-Law-Society-Legal-Aid-Consultation-Submission-November-2016.pdf>

Appendices to the November 2016 submission can be found here:

<http://www.iomlawsociety.co.im/wp-content/uploads/2016/04/Legal-Aid-Submission-Appendix.pdf>



Alex Chalk MP
Parliamentary Under-Secretary of
State for Justice

Sir Robert Neill MP
Chair of the Justice Select Committee
House of Commons
London
SW1A 0AA

MoJ ref: Sub 77602

23 April 2020

Dear Bob,

LAUNCH OF £3.1 MILLION LEGAL SUPPORT FOR LITIGANTS IN PERSON GRANT

I am pleased to inform you that a new two-year grant, which will invest £3.1m in support for litigants in person has now got underway. The commencement of the new grant is part of the vision set out in the Legal Support Action Plan to strengthen the breadth of support to people accessing the justice system, and look at different ways of intervening earlier to prevent their problems from escalating.

The Action Plan initially aimed to increase funding to the Ministry of Justice's (MoJ's) existing Litigants in Person Support Strategy (LIPSS), which has already provided close to £8m of funding for organisations providing services to litigants in person since 2015. The Action Plan's commitment was to enhance what has already been achieved under the LIPSS, by providing £3.1m of additional investment in support for litigants in person over a two-year period. Following further work and engagement with the sector after the Action Plan was published, we decided to meet this commitment through the creation of the new Legal Support for Litigants in Person Grant, of £1.55m per year. While the LIPSS works to draw together national organisations behind a single strategy, the new grant will make direct awards to individual services, which will help us to increase our understanding of how litigants in person move through the justice system.

I completely recognise the challenges being faced by organisations in the advice sector due to the impacts of the COVID-19 pandemic. I know that the fantastic legal support provided by advice sector organisations across the country is going to be even more important over the coming weeks and months, to help people deal with the problems they are facing. The work already undertaken to

establish the grant has been done in line with the objectives of the Action Plan, but we will remain as flexible as possible as we continue to deliver it.

This flexibility will be particularly applied to how we work with frontline advice sector organisations to scope new or expanded services. We will also remain open to adapting some of the goals of the grant, in order to look at where we can potentially support services that are specifically responding to the impacts of COVID-19.

Evaluation will also be central to the new grant, ensuring value for money and helping the MoJ build up our evidence base to make a robust case for sustained future funding. To measure the success of individual funded support services, we will work with each advice sector organisation in receipt of this funding to agree an evaluation approach that works for them, and is proportionate to their experience and capacity. We recognise that the impact of COVID on the advice sector and support services will need to be taken into account carefully.

We are delighted to be partnering with the Access to Justice Foundation to deliver the new Legal Support for Litigants in Person Grant. The MoJ already enjoys a productive working relationship with the Foundation through our work with them to deliver the LIPSS, but we are very pleased to be taking this partnership on a step further. We believe that, over its lifetime, our partnership approach to this new grant will serve as an exemplar for how we as a department can work even closer with the undoubted experience and expertise present within our advice sector.

Working closely with the Foundation, we will engage with those advice sector organisations who are likely to receive funding through the new grant over the coming months, being responsive to their need and retaining a flexible approach which I have outlined above. The Foundation will invite applications from organisations and work directly with them to design and finalise proposals for new and expanded support to litigants in person. The launch of the grant means that this process is now formally underway. I will continue to keep you and the Committee updated on how this work progresses.

I am placing a copy of this letter in the Libraries of both Houses.

A handwritten signature in black ink, appearing to read 'Alex Chalk'.

ALEX CHALK MP