

ISLE OF MAN LAW SOCIETY



LEGAL AID CONSULTATION SUBMISSION

November 2016

Isle of Man Law Society – Legal Aid Consultation Submission

INTRODUCTION

The Legal Aid Committee

The Legal Aid Committee (“the LAC”) is a body established under Section 23 of the [Legal Aid Act 1986](#).

Their mission statement aims to promote access to justice in a manner which is fair, equitable, transparent and professional and which uses public resources carefully and effectively.

Following recommendations by the Legal Services Commission (“the LSC”) and a Tynwald Select Committee, the LAC was reconstituted and its remit changed in 2013, as a result of the Legal Aid (Amendment) Act 2012, to:-

- set the strategic direction and to determine policy which shapes the development of the provision of legal aid in the Isle of Man;
- overview its effective delivery;
- review, as necessary, the actions of the Legal Aid Certifying Officer and their deputy.

Statutory Functions:

- to determine and review legal aid legislation in the Isle of Man;
- to oversee and review the actions of the Legal Aid Certifying Officer (“LACO”) (including their deputy);
- to deal with complaints outside of the remit of the Legal Aid Tribunal;
- to identify appropriate regulatory amendment or management action within the constraints of the Legal Aid Act 1986.

Principles:

By implementing improvements to the current system and in proposing different approaches to the provision and use of legal aid in the future the LAC will endeavour to promote the principles of:-

- fairness and equity in access to justice;
- effective use of limited resources and value for the taxpayers money;
- transparency, simplicity and efficiency;
- professionalism and continuous quality improvement in practice;
- shaping the service around the needs of its customers/clients/users.

Priorities:

The following will be subject to regular review and consideration by the LAC:-

1. The existing legal aid schemes and processes, identifying areas for streamlining, simplification and improved efficiency through legislative or regulatory amendment or management action;
2. The current structure of legal aid certification and delivery and exploration of other managerial structures to balance independence and support/direction;
3. The cost of the legal aid budget and exploration of alternative approaches and whether they would deliver better value for money and service;
4. Exploration of alternative forms of dispute resolution enabling early agreed settlement rather than adversarial court cases;
5. The fairness, equity and social implications of legal aid and ascertaining how to ensure it is targeted at those in greatest need and is accessible to vulnerable groups;
6. The position of legal aid within the wider justice system to ensure broader developments take into account and are influenced by the LAC's principles and priorities;
7. Informing and educating politicians, professionals and the public about legal aid and the challenges the LAC is tackling.

Current Consultation

In 2014, the LAC invited anyone with experience of the current legal aid system to let it know whether they believed there could be refinements, new alternative solutions, or indeed where they felt the system is working well.

It particularly 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 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 scheme, and consolidating the "Panel Letters" into easily accessible document;
- Formal guidelines and set fees for mediation, with standard application forms;
- Phased introduction of time and cost specific legal aid certificates;
- Scheme of delegation from the LACO to officers in respect of certain emergency matters;
- Revised reporting and performance management for the LACO.

The LAC considered the responses to the current 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 LSC (Appendix 1) and its conclusions has been ignored by the LAC entirely.

Isle of Man Law Society Involvement

In 2014, following the consultation being commenced by the LAC, the Isle of Man Law Society ("IOMLS") consulted its members and produced a detailed submission to the LAC dated 12 March 2014 (Appendix 2).

When the LAC produced its interim report, the Council of the Isle of Man Law Society appointed its own sub-committee ("IOMLS Committee") to consider the report and to engage with the LAC and its ongoing consultation. The interim report was circulated to all advocates and comments were requested.

The LAC held a presentation on 18 April 2016, at which it produced its interim report together with a summary of the proposals for potential changes to the existing legal aid system. It was clear from the presentation that the fundamental concern of the LAC was the cost of the service provision and Mr Swithenbank on numerous occasions stated that the current legal aid system had to be reviewed to make delivery cheaper and/or more cost effective. Mr Swithenbank has subsequently confirmed to the IOMLS Committee that his remit is not to cut cost and cull service provision but to ensure access to justice is maintained for those vulnerable members of the Isle of Man who require it.

When questioned, the LAC confirmed that they had come up with the proposed changes following review of the initial consultation responses but that no research had been undertaken by the LAC into such proposals, as they did not have the time or budget to undertake such research. The IOMLS immediately offered assistance to the LAC (during the presentation) to undertake research and to consider the proposals put forward.

Following the presentation the IOMLS Committee met and arranged small sub-groups to look into the LAC proposals for potential changes. Each sub-group was made up of legal aid advocates practising in the relevant areas, which advocates gave up their time free of charge and who have spent in excess of 200 hours

undertaking research and reporting back to the IOMLS Committee. The IOMLS Committee is extremely grateful to all advocates who have assisted with the process, particularly given the amount of time dedicated to the review, which will have no doubt placed an additional financial burden on such advocates.

Further, the IOMLS Committee has on numerous occasions since July 2016, requested meetings with the LAC in order to discuss the consultation and the research being undertaken by advocates. The LAC asked whether its sub-groups could work together with the sub-groups put together by the IOMLS Committee, which request was accepted. Unfortunately, as at the date of this submission (which has been delayed by the IOMLS Committee in the hope of meeting with the LAC, to arrange a structured approach to research and reporting) the LAC had not met with the IOMLS Committee, until 21 November 2016, to discuss matters further.

The IOMLS Committee sent an email dated 31 August 2016 to the LAC as follows:

“We have been advised by the Jersey Law Society that a wholesale review of Legal Aid has been ongoing there for some time. I include below a link, by way of assistance, to their latest report into the review. They are due to publish their findings in October.

<http://www.statesassembly.gov.je/AssemblyReports/2016/R.85-2016.pdf>

The Isle of Man Law Society has always been concerned about the speed at which our own review was being undertaken and therefore would like to respectfully suggest that we take a step back at this stage and consider adopting a similar approach to Jersey. Clearly Jersey, like the Isle of Man, is a small jurisdiction with its own financial constraints. Given the similarities between the Islands we firmly believe that their model of approach is a good one to follow.

Therefore, what we would like to suggest, in the first instance, is a meeting of key stakeholders in order to ascertain how to conduct the review effectively. We would suggest that those stakeholders should be as follows:

*Isle of Man Law Society
Treasury
Legal Aid Certifying Officer
Courts of Justice
Dept of Home Affairs
Attorney General's Chambers
Police
Court Welfare Officers
Probation*

Thereafter a proper framework with working groups can be established and a timetable designed to move forward. The work already undertaken will not be lost and can form part of the work going forward. One of our concerns is that Advocates and the Legal Aid Office are not the only people who really need to be on board if we are to effect real change that ensures access to justice remains. We need all key stakeholders to be a part of this and to sign up to a more effective working system, whether that be tweaking and improving what we already have or designing a completely new look Legal Aid system. This is a work stream that the Criminal Justice Board have been looking at for a number of years, but from Legal Aid's perspective, this review should and must go across all Legal Aid services not simply criminal.

Whilst I fully appreciate that this appears to push back what the LAC are trying to achieve, this way the legacy of the LAC will be one that will be far more positive and effective and hopefully will serve the Island for a number of years to come. Also, by bringing in all other relevant stakeholders, we can cut the workload down as we are all struggling for resources!!

Please let me know what the LAC thinks and thereafter I will coordinate a stakeholder meeting."

The LAC has refused to proceed in the manner suggested and has asked the IOMLS Committee to produce this submission at the present time albeit, following the meeting on 21 November 2016, appears that the LAC do now wish to proceed as

suggested. A full copy of the correspondence had between the IOMLS Committee and the LAC is annexed hereto at Appendix 3.

Meantime, and since the inception of the IOMLS Committee, we have worked with the LAC and the LACO to establish a Legal Aid Users Group, which has now met on several occasions in order to discuss the current day to day issues being faced by both practitioners and the legal aid office. As a result of these meeting some small changes have been implemented in an effort to improve the current system and also has better educated the LACO and advocates as to what issues are being encountered on a day to day basis and how that impacts on case progress. In addition the Legal Aid Users Group has implemented, with the LACO on a trial basis, a new extension and reporting form to be used by all advocates in order to ensure that the LACO receives all relevant information required and can turn around requests for extensions to legal aid certificates quicker and in a more effective manner. This pilot appears to be working well. It is genuinely believed by the IOMLS Committee that the Legal Aid Users Group has gone to improving relations between the LACO and advocates and is a positive forum.

In addition to the LAC proposals for potential changes, the LAC has also asked the IOMLS Committee to look at and consider some other suggestions, such as proportionality in criminal cases, where it was suggested that cautions should be accepted by Defendants to cut down on trial and expert costs where they admitted that they had committed an act but were relying on a full legal Defence or lack of mens rea. The IOMLS Committee submitted a full response to such suggestion, which can be found at Appendix 4 hereof. Further, the LAC has suggested that advocates should be subject to a formal recruitment process in order to join the legal aid panel as well as pushing the IOMLS Committee for reasons as to why legal aid bills should not be presented for payment within a 3 month or 6 month period, failing which an advocate would be precluded from receiving any payment.

The IOMLS Committee has made requests of the LAC for the provision of certain costings, financial breakdowns, evidence and statistics deemed essential to reviewing the proposals for potential change and to evidence alleged issues arising in the current system, however as at the date of this submission a lot of this information

has not been produced as a result of the LAC not having been able to obtain the same.

The IOMLS Committee remains very concerned at the speed with which this consultation appears to be being progressed, the lack of formal and structured approach to the consultation, the fact that the LAC are making proposals without having undertaken any research and having no dedicated resources for undertaking full and proper research and the apparent primary focus of the LAC to cut the cost of legal aid provision and not retaining access to justice. It is clear that the LAC has a fundamental misunderstanding of how the current legal aid system actually applies. The LAC cannot, in reality, be criticised for its lack of understanding, given that it does not have the benefit of an advocate being on the LAC who has practised under the current legal aid system in the last 10 years or who currently practises under the current legal aid system. However, the proposals put forward make it clear that the LAC requires further education on the current legal aid system and how it actually operates, in order that the consequences of any changes are fully understood. The IOMLS Committee reserves the right to further respond in relation to this consultation. Moreover, the IOMLS Committee is dedicated to ensuring access to justice for the most vulnerable members of Isle of Man society is maintained and is therefore committed to working with the LAC going forward to ensure this happens.

LAC proposals for potential changes

The LAC set out at its presentation and in its interim report 8 factors for immediate implementation and 4 factors to be implemented in the long term.

The immediate factors are as follows:

1. Revision of the Green Form Scheme;
2. The adoption of a telephone advice service for Duty Advocate Police Station work;
3. Introduction of a fixed price or time regime;
4. Case preparation by non-advocates;
5. Adoption of standard terms to be used on all legal aid certificates;

6. Ensure that the courts, advocates, prosecution and police collaborate to demonstrate effective use of publicly funded resources and accountability to tax payers;
7. Review/modify/remove certain financial means test limits;
8. Review procedure for timely submission of bills and interim payments.

The long term factors were described as follows:

- a. Should a public defender unit ("PDU") be established?
- b. Should publicly funded legal advice centres be established?
- c. Should alternative dispute resolution and in particular mediation, be promoted or made mandatory?
- d. Should a unified legal aid service be developed?

IOMLS COMMITTEE RESPONSES

Taking each of the proposals in turn the IOMLS Committee sets out below its initial response to each proposal as well identifying what, if any, further work is likely to be required in order for the LAC to fully consider each proposal.

Further, the IOMLS puts forward proposals and recommendations with regard to the hourly rates paid to advocates undertaking legal aid work, as the Council of Ministers Report dated May 2007, has not been fully implemented and we are now almost 10 years on from the same being published.

Green Form Review

Current System

The LAC rightly notes that the Green Form Scheme does not currently extend to formal legal representation before the courts.

The current Green Form Scheme operates on the basis that, provided a person is financially eligible, advice and assistance can be given by an advocate for a period of 3 hours (4 hours if a divorce matter), which time can be extended to up to 9 hours (10 hours if a divorce matter) in total. Such time limit includes the cost of any disbursements incurred, in order that the total outlay under a Green Form will be

£1,035 (in the case of a junior advocate) or £1,215 (in the case of a senior advocate). Extensions are not automatic and cannot be applied retrospectively. If an extension is required the same must be applied for and the Client file sent to legal aid.

There is no restriction on what the advice under a Green Form can cover, save that it must relate to the application of Manx law to any particular circumstances which have arisen in relation to the person seeking the advice. Further, it includes advice as to any steps which a person might appropriately take (whether by way of settling any claim, bringing or defending any proceedings, making any agreement, Will or other instrument or transaction, obtaining further legal or other advice or assistance, or otherwise) having regard to the application of Manx law to those circumstances, and applies to any assistance given by an advocate to any person taking any such steps as are mentioned above, whether the assistance is given by taking any such steps on his behalf or by assisting him in taking them on his own behalf. Green Form can only be used by an individual person and not a company or other entity and cannot be used for the purpose of conveyancing. One Green Form can be used for a matter, and an individual cannot sign another Green Form for the same matter with another advocate.

The LAC wishes to consider the following possible changes:

- a) The Committee wishes to explore the suggestion that a Civil Duty Advocate Scheme could be set up to replace the Green Form Scheme to give preliminary advice or court representation in more straightforward matters with time limits broadly in line with current Green Form limits.
- b) Civil Duty Advocate Scheme could operate on the basis of advocates being paid a fixed annual fee for providing Legal Aid advice on set dates and times of the week or at specific courts where people could make appointments to go and see them. Advice might not be means tested and voluntary contributions may be encouraged.
- c) As part of the current consideration of the proposal to establish Legal Advice Centres (on which consultation is sought further in this text) the Committee will explore the impact this may have on the parameters and continuing need

for the Green Form Scheme i.e. whether a potential Civil Duty Advocate Scheme could be incorporated into Legal Advice Centres.

- d) It may be that to gain early intervention a referral system could be put in place with bodies such as Relate, Citizens Advice etc. Again, the Committee would welcome input from interested parties.

Law Society Response to the above possible changes:

Firstly, the IOMLS agrees that the Green Form Scheme should be extended to allow representation before the courts, but only in respect of preliminary and directions hearings. By extending the scope of the Scheme to allow for an initial appearance before the court, access to justice can be maintained at a lesser cost to the public purse than currently.

The reality of what happens every day is that an individual will take legal advice prior to issuing proceedings. The initial advice, where the individual is eligible, will be given pursuant to the Green Form Scheme and an application for full legal aid will be made, prior to proceedings being issued. There are some cases where, as a result of impending deadlines that would prevent a claim being made being pursued (i.e. under the Limitation Act 1984), proceedings will be drafted pursuant to the Green Form Scheme, however, given the level of the current court fees, it will be very rare when a court fee is paid pursuant to the Green Form Scheme. Therefore most cases started by an individual eligible for legal aid, will be commenced under a full legal aid certificate in any case. The difficulty comes when proceedings are then served on an individual eligible for legal aid. Again they will be given initial advice pursuant to the Green Form Scheme, and providing there is sufficient time prior to any hearing being held, a full legal aid certificate will be applied for. The Green Form will continue to cover work (up to the maximum number of hours) pending the issue of a legal aid certificate. If, however, legal advice is only sought a day or two before a hearing (which happens quite often) the advocate can give advice pursuant to the Green Form but cannot enter an appearance before the court. The advice that would, in such circumstances, usually be given would be for the individual to appear alone and ask for an adjournment in order to obtain legal advice. Such an appearance therefore can waste court time and resources. If an advocate was instructed and on the record, they could apply to the court for an adjournment in order to fully advise

(which application would be subject to a court application fee of between £45 and £215 depending on the procedure and agreement of the other side). Whilst the outcome i.e. the adjournment would be the same, the court would have advance notice and could allocate the time to another case, thus not wasting court resources.

If the Green Form Scheme covered the preliminary or directions hearing, the advocate could appear and timetable the matter toward a final hearing, which timetable could take into account the usual (or current) processing time of a legal aid application. Such an approach would be a far better use of public resources as the cost would be less and no time would be wasted. Further, the other party's case would not be delayed, and therefore access to justice would be maintained both in reality and as a matter of perception. However, in order for advocates to be prepared to take such an approach, the current processing times for legal aid applications would need to be improved as would response times from the LACO. It must be made clear at this point, the IOMLS is not criticising the LACO, it is clear that she has a very difficult job and a limited amount of time in which to do the same. The role of LACO should, in our opinion, be, at a very minimum, one full time position where the LACO is ensured to have sufficient time to dedicate to her primary role.

The LAC has proposed the introduction of a Civil Court Duty Advocate Scheme as an alternative to the Green Form Scheme. It is respectfully suggested that this cannot and will not work in practice.

The Criminal Court Duty Advocate Scheme works primarily because every single Defendant has to make an initial appearance before the summary court before their case can proceed. The first appearance of a Defendant takes the same course and follows the same procedure, regardless of the offence. The Defendant will be asked to enter a plea to the charge, which response can be no plea, guilty or not guilty. Depending on the position of the Defendant the process will follow a defined route with a finite number of options being available to the Defendant. A bail application would usually be made, or in simple cases, a plea in mitigation presented prior to sentencing. Criminal offences are codified as are the defences available. If an adjournment is sought by a Defendant or the case cannot be dealt with in one or two appearances before the summary court, due to it being more complex, an

application for legal aid can be presented to the summary court there and then by the advocate, who can then advise and run the case (if granted). A Defendant is only supposed to use the Criminal Duty Advocate on one occasion and thereafter is supposed to arrange their own representation.

Civil cases, however, are completely different. There are innumerable types of claim that can be brought before the civil court with many different types of defences being available. A significant number of civil claims commenced never actually register any appearance before the court as they are resolved via correspondence and/or meetings. Once a civil case is commenced the Rules of the High Court of Justice 2009 ("HCR") kick in and must be complied with. If any steps are missed then applications have to be made or potentially cases can be struck out. If a step is missed by an advocate, the client would potentially have a claim in negligence (by virtue of a loss of chance claim) against the advocate. Most civil cases are paper heavy and evidence based. Different types of civil claims have different time limits (i.e. personal injury is 3 years, breach of contract is 6 years, breach of trust is 21 years).

A claim is started by the filing of a claim that must be served by the Coroner (unless an advocate has confirmed they are authorised to accept service). After service of a claim form a Defendant has a period of 14 days in which to either file an acknowledgement of service stating whether or not they defend the claim or to make an admission or file a defence. If an acknowledgement of service is filed indicating an intention to defend, the Defendant has a period of 28 days (from service of the claim) to file a defence with the court and to serve the same on the Claimant. Thereafter the Claimant has 14 days within which to file a reply. If a defence is not filed in time, the Claimant can make an application for judgment in default to be entered. Whilst a default judgment can be set aside, it requires an application to the court, together with reasons as to why the defence was not filed in time. After pleadings have closed a disclosure process must be gone through. That process requires both parties to produce every single piece of potentially relevant evidence to their advocate, in order that the advocate can consider whether it is relevant to the proceedings (regardless of whether it assists the client or not), whether it is discloseable under the HCR, and if so produce the disclosure list and thereafter produce the same for inspection. The advocate also considers the disclosure list

from the other side when that is received and considers whether there are any other documents or evidence that have not been listed but would be likely to exist or have existed at the material time. If full disclosure has not been made or appears not to have been made then the advocate would write to the other side requesting the same, failing production or explanation in relation to the existence of such items, the advocate may then make an application to the court for specific disclosure. An advocate appearing as a Civil Court Duty Advocate would not necessarily have the experience or expertise of the particular subject matter before them and may not recognise missing documents from the disclosure list. In any event, it is likely that, by the time the matter is before the court, it would be too late and if it was not, the advocate would require significant time to read into the matter. Further, in many civil cases expert evidence is required. This could not be obtained by a Civil Court Duty Advocate. Witness statements need to be obtained and drafted. Again, a Civil Court Duty Advocate could not undertake this exercise. When, how and in what amount an offer should be made is a tactical decision to be taken at the right time of proceedings. An offer made pursuant to Part 7 of the HCR has significant consequences and has to be employed correctly. Trial decisions are also largely tactical in civil claims. Damages schedules, skeleton arguments etc all have to be drafted and can take many hours of preparation. Even the most basic of civil claims can take in excess of 12 months to conclude and each requires many formal and informal steps to be taken. In order to manage and conduct a case professionally and competently there should be consistency and continuity of advocate and legal advice. It would be wholly negligent to conduct a civil claim on a piecemeal basis with a different advocate undertaking different steps and stages. By the time the claim is before the court, a vast amount of irreparable damage to a claim or a defence could already have been done. The court would likely be backed up with all number of applications to amend and seeking relief from sanctions, all of which come at the cost in terms of application fees (anywhere between £45 and £215 per application), wasted court time and resources. Cases would likely take far longer to progress and access to justice would not be maintained.

An advocate may specialise in personal injury claims but would not be capable of advising on a breach of trust matter. A Civil Court Duty Advocate is likely to be exposed to many different causes of action, with varying level of claim value, with not necessarily having the expertise or experience to deal with such a claim. It

would be a breach of the Advocates' Professional Conduct Rules for an advocate to advise in such circumstances. There are few advocates who cover the full spectrum of civil court claims on a daily basis and who would have the required experience and expertise to act. Those few advocates who would be capable of doing so will likely say they could not competently advise within the constrained remit of a Court Duty Advocate Scheme.

The Law Society could not, on any level, condone such an approach and would not support such an approach to litigation. We cannot see that the judiciary would condone such an approach either. We do not believe that advocates would be prepared to sign up to such a Scheme given the potential professional exposure and cost to them. It would be interesting to hear the views of the court and judiciary in relation to this proposal as well as the advocates' insurers.

Presumably, therefore, the LAC was considering the use of the Civil Court Duty Advocate for initial directions appointments only. Again, unfortunately this is not likely to work in practice. Taking into account the manner in which a Civil claim progresses prior to the first hearing before the court (which is not automatic and must be applied for in any event) by the point of a directions hearing, many decisions have to be made and undertaken. A full legal aid certificate would have long been applied for by that point (unless circumstances had changed). The directions for trial would need to be handled by the advocate managing the claim, as they will need to be factored into diaries, experts' and witness availability must be known, and preliminary issues will need to be factored into the timetable, site visits arranged etc. Therefore, it is respectfully suggested that the proposal of a Civil Court Duty Advocate Scheme does not appear to have any real functionality. We cannot see how it would go to increasing or further ensuring access to justice and it would, in all likelihood significantly increase costs to the public purse (both in legal aid and court resource terms).

If, however, the LAC were intent on further exploring this system, we would suggest that the following information is obtained and produced for further consideration:

1. How would the Scheme work and at what stage would it become available?
2. How would the case continue to be conducted following the first appearance?

3. How would the Scheme be delivered – at what cost, on what days, for how many hours, how many advocates would be required?
4. How would the advocate be insured and otherwise be protected?
5. What is the judiciary's view of the proposal?
6. How would legal advice prior to court appearances be delivered and managed?

It is also respectfully submitted that the LAC will be required to evidence that there are issues with the current Green Form Scheme and how the proposed Civil Court Duty Advocate Scheme would provide better access to justice on a more cost effective basis. Civil advocates who currently offer advice under the Green Form Scheme are unaware of access or other difficulties to legal advice under such Scheme and how the proposal would improve matters.

If the Green Form Scheme was replaced by a Civil Court Duty Advocate Scheme, how would members of the public receive legal advice and assistance in relation to matters not before a court? For example, if financially eligible for Green Form, an individual can seek legal advice for the preparation of a Will, advice on a tenancy agreement and enforcement thereunder, whether their consumer rights have been violated, employment issues to name but a few. A lot of the work undertaken under the Green Form Scheme presently has no court claim running, yet such advice is fundamental to the most vulnerable members of our society who require such advice in order to protect them, without which legal advice and assistance they may very well be taken advantage of to their detriment. Further, in many cases, advice and action taken under the Green Form Scheme is capable of preventing protracted and expensive court proceedings being issued.

The remaining two suggestions under this proposal are further considered as part of the Legal Advice Centre submission.

Telephone advice service for Duty Advocate Police Station work

LAC Background

Under the Police Powers and Procedures Act 1998 S.61(1) "*A person arrested and held in custody in a Police Station or other premises shall be entitled, if he so requests, to consult an Advocate privately at any time*".

Under PPPA 1998 S.42(1)(a) the Custody Sergeant has a duty to ensure “*That all persons in Police detention at any station are treated in accordance with this Act and any Code of Practice issued under it and relating to the treatment of persons in Police detention*”.

Police Powers and Procedures Codes Order 1998, Code C, para 6.1 states “*subject to the provisions in annex (B) all people in Police detention must be informed that they may at any time consult and communicate privately, whether in person, in writing or by telephone with an Advocate*”.

Under para 6.12 “*In Codes of Practice issued under the Police Powers and Procedures Act 1998 ‘advocate’ means an advocate who holds a current advocates’ commission or a temporary advocate’s licence under Sections 15 and 17 of the Advocates Act 1995. If an advocate sends a non-accredited or probationary representative to provide advice on his behalf, then that person shall not be admitted to the Police Station for this purpose*”.

Under Code C para 6 D “*The advocate’s only role in the Police Station is to protect and advance the legal rights of his clients*”.

The LAC wishes to consider the following possible changes:

Adoption of a more robust, possibly mandatory telephone service for clients in Police Custody with the objective of minimising delay, reducing expense.

Law Society Response to the above possible changes:

The LAC has not produced any evidence thus far that links an increase in cost to the Police Station Duty Advocate Scheme to the actual attendance of an advocate at the Police Station. Telephone advice has not been used routinely previously and therefore it is unknown as to why the LAC considers that the increased cost is due to advocates attending at the Police Station and not due to other factors. Further, no consideration has been given as to how such a scheme would operate and how advocates would be paid for the same. Invariably, if a suspect is to be interviewed

the advocate would have to attend in any event, and it can be seen that, in fact, the routine use of telephone advice may very well go to increase the cost of service delivery.

The LAC is once again reminded of the changes implemented at the instigation of the Isle of Man Law Society in an effort to ensure the Police Station had 24 hour cover and costs were reduced.

European Court Of Human Rights

Article 6 European Convention on Human Rights states:-

Right to a Fair Trial

1. *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*
2. *Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*
3. *Everyone charged with a criminal offence has the following minimum rights:*
 - (a) *to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*
 - (b) *to have adequate time and the facilities for the preparation of his defence;*
 - (c) *to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal*

assistance, to be given it free when the interests of justice so require;

- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.*

In Ambrose v Harris (Procurator Fiscal, Oban); H.M. Advocate v M; H.M. Advocate v G [2011] 1 W.L.R. 2435, SC, it was held that the right to a fair trial under Article 6 requires that a suspect has access to legal advice *prior to/during* questioning by Police in interview at the Police Station (Appendix 5) Salduz v Turkey (2009) 49 E.H.R.R. 19, cited.

Where Telephone Advice Is Appropriate

The circumstances in which telephone advice to a suspect at a Police Station is appropriate are very limited and include the following:-

- a) Whether to consent to provide breath/blood samples for alcohol analysis.
- b) Advice to persons arrested for non-payment of fines following execution of a Warrant of Arrest.
- c) Advice to persons arrested for breach of Court Bail conditions.
- d) Advice to suspect post charge such as in relation to Police bail/first Court appearance.
- e) Advice to suspect in respect of very minor offences where no Police interview will take place such as offences of drunk and disorderly.

Telephone Advice In England

The Legal Aid Agency funds the Defence Solicitor Call Centre (DSCC) and also the Criminal Defence Service Direct (CDS Direct) (Appendix 6).

Under such schemes Police Stations in England, following a request for legal advice by detained suspects, contact in the first instance the DSCC.

The DSCC will then refer to the matter to CDS Direct or a duty solicitor or the suspect's own solicitor.

The CDS Direct only deals with less serious matters such as non-imprisonable offences and issues such as consent to provide specimens for alcohol analysis (Appendix 7).

More serious offences are routed by the DSCC to either the duty solicitor or the suspect's own solicitor.

Such telephone advice system has been criticised for causing delay, possible noncompliance with the European Convention on Human Rights, adding layers of bureaucracy and providing an inferior service by using non advocates such as paralegals (See report by Lee Bridges and Ed Cape of the Centre for Crime and Justice Studies at King's College London Appendix 8).

Why An Expansion Of Telephone Advice Is Not Appropriate In The Isle Of Man

Where a person is to be interviewed by the Police and requests legal advice, it is essential that the advocate attends the Police Station in person for the following reasons:-

- i. The first thing the advocate will need to do upon arrival at the Police Station is to look at the suspect's custody record in order to ascertain matters such as whether there were lawful grounds for arrest, whether continued detention is lawful, whether welfare issues during detention are compliant with PPPA and Codes of Practice and whether the suspect has been seen by the Force Medical Examiner/Psychiatrist/Mental Health Team member. These are matters which cannot be dealt with remotely over the telephone.

- ii. The Advocate will also enquire of the Custody Sergeant whether the suspect has any relevant mental health issues and if there are any relevant issues request access to the FME's medical form 'Green Medical Form'. If the Custody Sergeant indicates that there are no medical or mental health issues and that the suspect has not been seen by the FME and is deemed to be fit to be interviewed and detained, the advocate may be content to proceed on that basis. However, if the suspect has been seen by the FME, the advocate should request access to the Green Medical Form but this is usually refused by the Custody Sergeant. At this point the advocate may wish to meet with the suspect and ask for a Form of Authority to be signed requesting the release of the relevant medical information. This is also usually refused by the Custody Sergeant. Again, the advocate has to be present in person for this to occur and it has to be shown that the advocate has endeavoured to obtain the relevant medical information.
- iii. A written disclosure document is then usually given to the advocate by the investigating Police Officer. This is generally a short one or two page document summarising the evidence against the suspect. Sometimes whole witness statements are disclosed and further oral disclosure given to the advocate.
- iv. Following disclosure the advocate will meet with the suspect and discuss the Police disclosure. The advocate will take a proof of evidence from the client and provide legal advice on how to proceed i.e. no comment, written statement or answer questions. The advocate will require the proof of evidence and advice note to be signed by the suspect. This helps ensure there is no misunderstanding as to what the client has said to the advocate or indeed what the professional advice was.
- v. There may be occasions where the Custody Sergeant/FME has indicated that the client is fit to be interviewed, but the advocate,

after meeting with the client face to face, judges otherwise and requests a further assessment.

- vi. Some cases also involve CCTV evidence and the advocate will be required to view such footage prior to interview.
- vii. Some suspects such as juveniles or those with mental health issues, will require the attendance of an appropriate adult and the advocate will need to liaise with the appropriate adult in respect of the suspect's welfare and ensure that the appropriate adult is suitable e.g. is not a witness to the matter for which the suspect is under arrest.
- viii. As stated above, the advocate's role is to protect and advance his client's legal rights whilst in custody. This means that the advocate's role does not finish on the giving of legal advice prior to interview. The advocate must be proactive during an interview itself, stepping in e.g. where questioning is repetitive or oppressive, where questioning is about matters for which the suspect is not under arrest or where officers mis-state the suspect's account or express their own opinions.
- ix. In addition, a further written disclosure may be given during or immediately after an initial interview. Such disclosure will then need to be discussed by advocate and client.
- x. The suspect can also be further arrested, during Police interview, for additional offences and those matters will need to be discussed with the advocate in private.
- xi. "Special Warnings" under PPA 1998 Section 72 and 73 and Code C para 10.5A, 10.5B and 10.5C are sometimes given in interview and client may request further advice in relation to such issues. A Special Warning is given for example where a suspect is asked to account for a particular mark or substance on his person/clothing

or his presence in a particular place. Failure to give an account may lead to proper inferences being drawn.

The above list of circumstances is by no means exhaustive but gives examples of why the advocate's attendance in person at the Police Station is essential, if the suspect is to be interviewed and has requested legal advice. Attendance is vital to ensure proper and comprehensive representation of the suspect and is vital to protect the advocate from claims of professional negligence.

Importance Of Legal Advice At Police Station

What a suspect says or does not say during Police interview can have significant consequences during any subsequent court proceedings.

The advocate's role at the Police Station and the professional advice given is therefore critical.

Essentially, the suspect has three options in Police interview:-

i. No Comment

The caution given at the start of a Police interview is *"you do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence"*.

This means that the suspect has an absolute legal right not to say anything during Police interview. However, if the suspect does not mention something during Police interview but subsequently relies on that fact or explanation in court, the court may draw its own conclusions as to why the suspect did not mention that matter during Police interview. The court may draw the conclusion that the suspect has made up his defence after interview.

Sometimes an advocate will advise to proceed on a no comment basis (without submitting a written statement). This might be where no evidence has been disclosed linking the suspect to the alleged crime or where the suspect does not remember anything about the alleged incident due to intoxication. If the suspect were to make a confession, but then the Police be unable to obtain any corroborating evidence, the confession may be enough to secure a conviction against the suspect. A no comment interview would have prevented this from happening. To give another example, a suspect is arrested for allegedly selling drugs in a nightclub and then states in Police interview that he thought the pills that he was selling were Ecstasy tablets. If the drugs are forensically tested and found to be perfectly legal e.g. dog worming tablets, the suspect is very likely to be charged with attempting to supply controlled drugs. Again, a no comment interview may not have resulted in any charge.

On the other hand, if the evidence against the suspect is very strong, (e.g. CCTV from a shop in relation to a theft allegation or possession of a small amount of class B drugs found on the suspect's person) and in relation to a relatively minor offence and also subject to the suspect not having any previous convictions, the Police will consider offering a caution as per the Constabulary's cautioning policy. However to be offered a caution the suspect will need to admit the offence. In those circumstances proceeding on a no comment basis may not be the most appropriate advice.

ii. Written Statement

Sometimes an advocate will advise a suspect to submit a written statement then proceed on a no comment basis. The merit in submitting a written statement is that it can avoid the inferences being drawn as per the second part of the caution and PPPA 1998 S.70. The suspect may recall some aspects of the incident but not others. He may have been intoxicated at the time of the alleged

offence. He may lack confidence to speak during Police interview. The advocate will advise on whether a written statement is appropriate and ensure that the statement is suitable. The statement must be sufficiently comprehensive but can leave out matters which might embarrass the suspect or cause difficulties.

iii. Answering Questions

If the suspect has a full explanation and denial of any wrongdoing it may be appropriate to advise him not to submit a written statement but simply answer all questions during Police interview. The advocate will bear in mind that a jury will not only consider what was said but how it was said.

Where there is a full denial of any wrongdoing e.g. the suspect acted in self-defence or an alleged rape victim was sober and consenting, proceeding on a no comment basis may impact on client's subsequent defence in court proceedings as per PPA 1998 Section 70 - failure to mention any facts subsequently relied upon at court may lead to proper inferences being drawn.

The advocate's skill is in advising the suspect at the Police Station on how to proceed during interview. Get it wrong and the suspect's case can be seriously jeopardised. Get it right and the suspect may not even be charged but if he is charged the foundations for a proper defence at trial will have been laid.

Quite simply, where a suspect is to be interviewed, it is impossible to give proper advice and representation to that suspect via the telephone.

Use Of Non-Advocates

As stated above, PPPA 1998 S.6(1) states "*A person arrested and held in custody in a Police Station or other premises shall be entitled, if he so requests, to consult an advocate privately at any time*".

Code of Practice Code C at para 6.12 states that *“‘advocate’ means an advocate who holds a current advocate’s commission or a temporary advocate’s licence under S.15 and 17 of the Advocate’s Act 1995. If an advocate sends a non-accredited or probationary representative to provide advice on his behalf, then that person shall not be admitted to the Police Station for this purpose”*.

Clearly, any use of non-advocates to provide advice to suspects at the Police Station would require a change in Manx Legislation and Codes of Practice.

As stated above, telephone advice is being provided by CDS Direct in England, sometimes using non-advocates such as paralegals.

In addition, non-advocates such as accredited Police Station Representatives/Clerks, are sometimes used to actually attend Police Stations to represent clients. In both cases (telephone advice and attendance) it is submitted that this is not in the best interests of suspects.

In order for an advocate to be able to participate in the Police Station Duty Advocate Scheme they must undergo certain training at least every two years, to ensure that they remain up to date and current. A non-advocate does not have the basic foundations an advocate has, which foundations are built on six years of training before qualification. The LAC has not provided any information as to how non-advocates would be qualified, trained, assessed, insured, supervised or otherwise managed.

For the reasons as set out above, a suspect should be provided with the best possible legal advice. Would it be acceptable for a hip replacement to be carried out by a nurse rather than a surgeon? Or would it be acceptable for A level maths to be taught by a teaching assistant? Similarly, advice to a suspect at the Police Station should be given by a fully qualified advocate sufficiently experienced to give proper legal advice.

Human Rights

As stated at para B above, the Right to a fair trial requires a suspect having access to a legal advice prior to and during questioning by the Police in interview at a Police Station, as per Ambrose. Clearly, to give legal advice during Police interview requires the legal representative to be present at the Police Station.

The PPPA 1998 and Codes of Practice in the Isle of Man require such legal advice to be given only by Manx Qualified Advocates.

A suspect, who requests such legal advice and is refused, will have his guaranteed Article 6 Right to a fair trial violated. Article 6 is not a qualified right but is absolute.

Evidence obtained in such circumstances would be *inadmissible*.

In addition, the suspect may bring proceedings in an appropriate court seeking compensation as the victim of an unlawful act.

Access to legal advice prior to and during questioning by the Police at a Police Station is therefore necessary to safeguard a suspect's human rights.

Potential Areas Of Financial Savings

Changes to Police Station Duty Advocate funding introduced in 2015, proposed by the IOMLS included ending the practice of "rounding up" to the next hour e.g. a call out from 8.00 pm to 11.25 pm is now billed as 3 hours 25 minutes, rather than 4 hours as previously. This should result in savings to the legal aid budget.

Current Police Station Duty Advocate rates:

- i. Senior Advocate Call Out - £135.00 per hour.
- ii. Junior Advocate Call Out - £115.00 per hour.
- iii. Out of hours On Call fee - £135 per 12 hour session.
- iv. Senior out of hours On Call fee - £34.44 per 12 hour session.
- v. Daytime (office hours) On Call – Nil per 12 hour session.

As with criminal legal aid court work, a senior advocate receives £135.00 per hour for Police Station work. The same senior advocate will also be undertaking private client work e.g. family, litigation for say £300.00 per hour. The current legal aid rate therefore represents good value to the taxpayer.

One aspect where savings could be made is in relation to Police procedures.

Regrettably, it is often the case that the Police request the attendance of an advocate at the Police Station before the suspect is ready to be interviewed.

The advocate should only be requested to attend once disclosure is ready to be given to the advocate, the relevant investigating officers are present at the Police station and, if relevant, the suspect has been examined by the FME and an appropriate adult is also present.

Too often the advocate is requested to attend the Police Station only to discover that the relevant investigating officers are out on another job or the suspect has not yet been seen by the FME or disclosure is not yet ready. This sort of delay causes unnecessary waiting time and therefore cost.

Further delay can be caused between interviews as officers indicate to the advocate that advice has been sought from the Attorney General's Chambers in respect of whether to charge the suspect or in relation to areas to be covered in a further interview.

It is therefore submitted that the Police should be much more conscious of the cost to the public purse incurred by such delay.

In respect of suspects who have been bailed without charge after interview, to return to the Police Station at a later date, costs can be needlessly incurred by a failure of the Police to notify the advocate as to what will happen on the bail return date. The suspect's advocate will endeavour to find out if the suspect is to be charged or re-interviewed but often the officer in the case or other officer who has taken over the case fails to respond to requests for information. The advocate then attends the Police Station with client on the bail return date only

to be informed that a decision has not been made on how to proceed and client is simply re-bailed. Such attendance by the advocate involves a needless waste of legal aid funds. If, however, the suspect is charged it is necessary for the advocate to be present in order to make representations on behalf of the suspect, which could be vital when the matter proceeds to trial. Therefore, the option of the advocate simply not attending is not an available option.

Police operational procedures therefore require an appreciation of the costs to the taxpayer of delay and poor communication.

Conclusion

Advocate telephone advice must be viewed within the present Statutory and Common Law framework.

The role of advocate telephone advice is very limited.

Where a suspect is to be interviewed and has asked for legal advice, telephone advice is wholly inappropriate.

The advocate's role at the Police Station is to "*protect and advance*" his client's legal rights, which requires the Advocate to be present and proactive during Police interview.

An expansion of advocate telephone advice may violate a suspect's guaranteed Article 6 Human Right to a fair trial, by denying the suspect access to legal advice **during** questioning in interview by the Police at the Police station and in turn rendering evidence inadmissible and potentially giving rise to a suspect's right to seek a remedy in court.

The telephone advice system operated by the DSCC and CDS Direct in England has been heavily criticised for delay, bureaucracy and poor advice from non-solicitors.

Suspects at the Police Station are often stressed and vulnerable and require the best possible advice from fully qualified and experienced advocates.

The use of non-advocates to provide legal advice to suspects at the Police Station would require a change of Legislation and Codes of Practice in the Isle of Man.

The advice given by an advocate to a suspect as to how to approach the Police interview can have a critical bearing as to how the case proceeds.

Financial savings can be made through improved Police procedures which reduce delay.

Fundamental rights and freedoms must be respected, cherished and protected and the advocate plays a central role in the proper administration of justice in the Isle of Man.

An expansion of advocate telephone advice to suspects at the Police Station represents a serious risk to the safeguarding and protection of hard won civil liberties.

The IOMLS understands that the Police do not consider that an expansion of the telephone advice presently given is beneficial either and further do not support the same.

Introduction of a fixed price or time regime

LAC Background

The cost of criminal legal aid cases is dependent on the amount of work carried out under the certificate and an assessment of the bill on completion of the case.

An advocate must produce a detailed itemised bill for payment before funds are paid over. If there is insufficient evidence on the file to support the claim the advocate will not be paid. If the costs officer believes the amount of time claimed by the

advocate for any given task is unreasonable, the same will be reduced by the costs officer or removed altogether.

Each and every case is different for a number of reasons. A client may have physical or mental health issues, may have a low IQ or be learning disabled, may be particularly vulnerable for other reasons. The facts for each offence are different. There may be a number of witnesses to be approached, a number of items to be viewed, documents to be reviewed and discussions to be had. No two cases are identical and therefore the cost of legal advice will vary from one case to the next. The current system takes account of this fact as the advocate is paid for the actual work undertaken.

The LAC wishes to consider the following possible changes:

The LAC has been asked to consider a proposal that a standard set of fees be agreed with the IOMLS in respect of certain criminal legal aid matters.

Law Society Response to the above possible changes:

The LAC, of course, in formulating its recommendations and changes to the legal aid system would benefit from views as to why advocates' firms do or do not undertake legally aided work on the Island and a survey should be carried out, in order that this data can be obtained and analysed. In particular it should address what the views of advocates are on fixed fees and the impact upon which fixed fees would have on their practices and their ability to continue offering a legal aid service to members of the public. It would also be useful if practitioners would be able to comment on the effects of the hourly rate being reduced and whether they feel that they would be able to continue as legal aid service providers. Any problems with the current time regime process should be raised by practitioners together with any suggestions to improve the process. The LAC should outline the perceived problems with the way in which advocates are currently remunerated for legal aid work and which necessitate a change to a fixed fee system. Also the LAC needs to put forward a more detailed proposal, in respect of which the IOMLS will need to consider and respond to, which sets out the proposed fees, the nature of the cases/work the fees would apply to,

what system would apply if a greater amount of work was required and how advocates would get paid in respect thereof.

Previous submissions to the LSC by the IOMLS 2002 and LSC Report 2003

The IOMLS on 15 May 2002 submitted a very detailed document which can be found at Appendix 9. This usefully sets out the Isle of Man Law Society's views back in 2002, and recommendations. This document needs to be considered by the LAC to fully understand the development of legal aid on the Island and to appreciate why the recommendations were made by the LSC in May 2003 (Appendix 10). See also the Report by Council of Ministers 10 May 2007 sitting of Tynwald together with the full Report of the Legal Services Commission at Appendix 1. In 2003, at page 62, paragraphs 1.6 and 1.7 the overriding objective of the Commission was set out.

Paragraph 1.6 *"although in one sense our terms of reference are narrower than those of both the Clothier and **Calcutt** Commissions, we regard the topic we've been asked to consider is of paramount importance. Essentially this Commission has been concerned with access to justice. That has been our overriding objective. We are persuaded that a system of law, however well fashioned can only command the respect of those affected by it, if it's seen to be accessible to all. To achieve this a publicly funded system of legal aid and assistance is a necessary pre-condition for the doing of justice between citizens, otherwise justice becomes an elusive goal available only to those who can afford to pay and denied to the rest, among whom may be the most deserving. This is not to say that every perspective litigant is entitled to a blank cheque to pursue or defend a hopeless grievance. Public resources are not infinite and those who foot the bill for such services are entitled to expect value for money. This must mean there must be some control over eligibility to legal aid civil disputes, although we see no reason why this should be elaborately cumbersome. We make recommendations to simplify proceedings in chapter 4, paragraphs 6 to 14."*

Paragraph 1.7 *"In the field of criminal law different considerations apply. Any system of criminal justice entails the coercive power of the state and may result in loss of liberty. For these reasons the European Convention for the Protection of Human Rights and Fundamental Freedoms (which is now in the prospect of*

incorporation into Manx law) (makes it obligatory (that there is) free legal assistance for those without sufficient means). We address and make recommendations on this matter in chapter for at paragraph 18.”

The 2003 report by the Commission deals with at page 63 the impressions that the Committee gained. It is imperative that the LAC gives consideration to paragraphs 1.11 through to 1.14.

“1.11 From our first meeting we were conscious of the enormous change which has taken place in the Isle of Man over the last half-century. From being primarily an agrarian and tourist driven low-wage economy, the blossoming of financial services has transformed employment opportunities and the standard of living of many, but not all, its inhabitants. This has been mirrored in the expansion of the legal profession. In 1966 there were 25 practising Manx advocates; now there are 125. In 1966 there were no registered legal practitioners; they came into being by the Legal Practitioners Act 1986 when 5 were registered; now there are 71. This increase is largely due to the financial services industry and the recommendations of the Clothier Report. Most of the new lawyers specialise in privately funded commercial law. Few regard legal aid as a mainstay of the practice and some do no legal aid work at all.

1.12 This, we believe, is unsatisfactory. It means that although life on the Island has grown more complex over the years making legal disputes more likely, the availability of the sufficient diverse cohort of lawyers to deal with such disputes has fallen behind improvements in other areas. It is now significantly more difficult to be represented by a lawyer appropriate in experience and ability in simple disputes or straight forward criminal matters than it was 50 years ago. There are certainly more lawyers working on the Island but most of them earn their living in areas not encountered by the bulk of the population. This imbalance must be put right if the Island's to make contribution to the element of European civilisation for which geography and history alike have so well equipped it.

1.13 To this end we bring forward a number of recommendations designed to strike a fair balance between the just claims of the public to be properly represented in legal matters and the expectations of the practitioner to be adequately remunerated

for his efforts. Throughout our task we have striven to be guided by the twin loadstars of simplicity and transparency.

1.14 On the whole projects work best when they are simple to understand and implement; they are most likely to achieve acceptance when they are fair and seen to be fair. In a small island we see no need for an elaborate bureaucracy to regulate the day to day operation of a legal aid system. When calls from public monies are involved there has to be scrutiny but we see no need for stultifying minute perusal of bill of costs which inevitably lead to the delay in payment so does satisfaction on the part of the lawyer. This inevitably breeds reluctance to take on further similarly funded work. The core of our recommendations is uniform basis of remuneration. This should be at the same hourly rate across the board. The preparation, travelling, waiting and court appearance irrespective of the level of court involved, except in the more senior practitioners (who are likely to be involved in more difficult work) should be paid at the higher level. At a stroke this will achieve simplicity and transparency and will, we believe, together with our proposals for prompt payments set out in chapter 4, paragraphs 24 to 27 encourage sufficient members of the legal profession to undertake legal aid work to ensure an adequate pool of appropriately experienced lawyers with proven ability to make an access to justice a reality for all the people on the Island."

As can be seen from the Access to Justice Civil Legal Aid and Legal Costs panel of advocates at Appendix 11, a number of advocates are prepared to undertake legal work thanks to the changes in remuneration which took place after the Commission. It should, however, be pointed out that some advocates appearing on the list are no longer practising in the Isle of Man and/or undertaking legal aid work. The Commission in May 2003 have pointed out at paragraph 4.22 *"For reasons set out in chapter 3 we are firmly of the view that the present level of remuneration for legal aid work is insufficient to attract enough lawyers of experience and ability to deliver the high quality service that the people of the Isle of Man deserve. In the furtherance of our overriding objective of access to justice we can see no alternative to a substantive increase in hourly rates. Minimum necessary to achieve access to justice, in our view, is £125.00 per hour for an advocate under ten years' admission, £150.00 per hour for more senior members of the profession. This should be reviewed annually at the same time as a review of the financial eligibility criteria."*

Current hourly rates for advocates on the Isle of Man – junior advocates £115.00 per hour and £135.00 per hour for senior advocates for all those that undertake legal aid work. This is substantially less than the work which takes place in the private sector where advocates are paid between £250.00 and £450.00 plus per hour.

Proposed Changes

“The Committee have been asked to consider a proposal that a standard set of fees be agreed with the Isle of Man Law Society in respect of certain criminal legal aid matters”.

It is incumbent on the LAC to put forward detailed and full proposals for the IOMLS to consider with its members in order to obtain their views in relation to a standard set of fees being put forward for certain criminal legal aid matters. At present the IOMLS simply does not have sufficient information from which to obtain informed views from its members, as the LAC have not yet considered how such a system may be operated. IOMLS members however, at this stage, are absolutely against the introduction of fixed fees across either criminal or civil legal aid as it is considered that such a system will not ensure access to justice as advocates will be restricted in how they are able to conduct cases with their clients, which will not ensure access to justice and many advocates will simply stop undertaking legal aid work. The introduction of fixed fees in England has been extremely problematic and the IOMLS will not support such a system being introduced in the Isle of Man, as it is not deemed to be in the interests of the most vulnerable members of our society in ensuring access to justice is maintained, and further is not in the best interests of maintaining an independent Bar.

It would perhaps be useful to address the following issues in relation to fixed fees. Firstly, the magistrates' court, what does the LAC think advocates should be paid for a guilty plea as a fixed fee. Clearly the difficulty could be that a guilty plea could occur on the first occasion and only one appearance is required as no reports are required on the particular case. However, if reports are required there can be two or three appearances. One also has to consider if, a Newton hearing is required to be carried out before a sentencing exercise, and how this should be dealt with by way

of fixed fee. Whether it needs to be an additional fixed fee for any Newton hearing and how can that be determined as a Newton hearing could be reasonably simple or very complicated? What other problems are envisaged?

It would also be useful for the LAC to set out as to what they feel fixed fees should be for a not guilty plea and on a one, two, three or four or more day trial. This fee would have to include all court appearances, including the trial preparation, bail appearances etc, and pre-trial review. Finally, for magistrates' matters we would have to consider the costing for appealing against sentence and conviction. What fee should be payable there?

There is little point putting forward fixed fees which advocates feel would result in their practice running at a loss and which ultimately would lead to members walking away from doing this type of work. The current hourly rates are so low that fewer advocates are prepared to undertake legal aid work, and those that do cannot make any profit from undertaking legal aid work. The LAC has not put forward any firm proposals and therefore no meaningful consultation can actually take place at this stage.

Court Of General Gaol Delivery Fixed Fee Table

There are a number of factors which will no doubt cause practitioners concern. No two cases are the same and therefore a fixed fee may well exceed the costs on a time taken basis in one case but grossly undercompensate advocates for their time in another case. Further, advocates may not be prepared to work on a fixed fee basis if, for example, they spend several hours waiting at court for their matter to be called, for which they are not getting paid. If, however, they were paid on an hourly basis (as currently) they would be paid for this time. If they gave up legal aid work, they could use this time working on private matters on hourly rates between £250.00 and £450.00 per hour. The advocate has absolutely no control over the court timetable and is expected to arrive at a fixed time. They cannot ask the court to deal with their case more urgently as they do not get paid for waiting.

The LAC have already indicated that the summary of their proposals for change that the success of time limit or fixed fees is dependent on all parties co-operating and

particularly in criminal matters, making full disclosures where appropriate. The parameters for fixed price categories of cases would need to be clearly delineated. Members of the IOMLS who are criminal practitioners will then need to consider the proposals and collate their views in relation to this issue. In an adversarial system parties do not always agree. The whole point of the adversarial system, is that there are checks and balances between parties. Further, the LAC have no control over others within the process and it would be grossly unfair on criminal Defendants if their ability to be properly and fully represented was limited, which would be possibly non-human rights compliant. Systems such as that proposed could lead to allegations of abuse by the Police and Prosecutors if there was not full and early cooperation, notwithstanding the reason for the same. It is vital that the system is fair and seen to be fair. Any system that limits the ability of a defendant and potentially produces an advantage to the Police and/or Prosecution will never be fair or seen to be fair.

Further Issues To Be Considered

“Areas where fixed fees could apply have yet to be identified and discussed.”

The LAC have indicated the need to carry out a comprehensive review of costs and fees incurred in like for like comparisons with other jurisdictions where appropriate. Attached at Appendix 12 is a copy of Lord Carter's Review of Legal Aid Procurement. It is a very complicated structure which deals with the graduated fee scheme, Police Station, pricing schedule, guilty pleas and cracked trials in first third and cracked trials beyond the first third. At Appendix 13 is a copy of the Legal Aid Remuneration Regulations 2013. Practices would not be able to survive financially on the rates system operated in the UK. Furthermore the system is extremely complicated. In the UK there is a greater volume of cases and the business model is completely different and even then, speaking to practitioners in England and Wales, their view is that the system doesn't work and they are no longer able to afford to undertake criminal work solely and manage all of their operating costs, whilst doing a proper job for the client. We are a fused profession with fewer cases but with higher operating costs, which must not be forgotten. The Isle of Man is internationally acclaimed for its justice system, which reputation could be seriously harmed by the introduction of a fixed fee system where access to justice could be severely limited.

Whilst the Isle of Man enjoys reduced tax there are certain fixed cost issues which still have to be addressed via the business model, firstly staffing costs, secondly rent, thirdly professional indemnity and general running costs of an office. All of these will have to be factored in before individuals, such as a sole practitioner, Partner, Director for example, can draw a salary. The real issue which will raise its head is the disparity in costs of professional indemnity for Solicitors/Barristers in the UK and the rates paid in the Isle of Man by advocates, in respect of which advocates have no choice or control. Attached at Appendix 14 is the visitor decision of Deemster Doyle of 21 May 2014, in relation to Appleby's grievance over the IOMLS refusal for them to opt out of the master insurance policy. Attached at Appendix 15 is a copy of the Legal Services Board research section which outlines the position on charging structures in the UK up to 2011 in terms of the statistics and range of hourly rates charged by solicitors. It is important the LAC is aware of these figures and understands how our business model works.

There are of course everyday problems that legal aid practitioners currently face. An example of this is that legal aid disbursements are actually paid by practitioners and then practitioners are reimbursed a month or so later, i.e. court filing fees for legal aid matters. In the past, before the system changed, once a practitioner received a certificate the filing fees were not charged by the court. Court filing fees have increased substantially and of course this is now a cost which is borne by legal aid practitioners and passed on to legal aid for recovery. This will of course have an effect on cash flow for any business, especially when one considers the high rates for filing fees. At present the legal aid administration is so short staffed that processing the recovery of these payments is significantly delayed and in fact, there have been few, if any, payments in November 2016 made to practitioners. These cash flow difficulties will only be compounded if fixed fees are introduced and legal aid practitioners actually end up being remunerated at a much lower level than currently. The end result will be advocates refusing to undertake legal aid work which will result in the most vulnerable members of our society not receiving representation they are entitled to.

Legal Aid In Other Jurisdictions

The position into the complicated system of legal aid in the UK is addressed by way of reference to the Carter Report and also to the Criminal Legal Aid Remuneration Regulations 2013. Other jurisdictions can also be used to provide assistance and guidance. A leaflet is attached from the Guernsey Legal Aid at Appendix 16. At Appendix 17 is enclosed a Law Society of Scotland Discussion Paper for Legal Assistance in Scotland Fit for the 21st Century. Finally, attached at Appendix 18 is Legal Aid Frequently Asked Questions about the Bailiwick of Jersey and Legal Aid Guidelines for the Position in Jersey.

The position in relation to the system of legal aid operating in the UK now can be seen in the Carter Report and also to the Criminal Legal Aid Remuneration Regulations. This system is extremely complicated and has not been followed by jurisdictions such as Guernsey. It appears to be aimed at a larger market where large numbers of firms will tender to be legal aid service providers. The system is very difficult to follow at first blush.

The position in Guernsey is very similar to the Isle of Man. They operate an hourly rate system for legal aid service providers undertaking legal aid work. As part of the research notes Hayley Cooper, who is head of the Guernsey Legal Aid Service was contacted. Miss Cooper was kind enough to assist the IOMLS and share the publicly available information and documentation in relation to the Guernsey legal aid service ("GLAS") for the purpose of the Isle of Man review relating to legal aid. Usefully, Miss Cooper provided the following brief summary:

"Our legal aid system remains on an interim basis despite the Legal Aid (Bailiwick of Guernsey) Law, 2003 having been brought (mainly) into force in 2005. We await the finalisation of our secondary legislation by way of ordinance.

The interim scheme provides access to free or reduced legal cost advice in criminal and civil cases for individual members of the public who could not otherwise afford an advocate. The interim scheme is well established and covers both civil and criminal cases. It operates in three main areas and is only available for legal assistance within the Bailiwick of Guernsey in relation to the application of Bailiwick law.

There are three forms of legal funding:

- (i) "Detention Form" – these are used to provide advice, assistance from an advocate to persons who are detained in Police or other lawful custody or a volunteer. All such advice and assistance is provided free of charge to the detainee.*
- (ii) "Green Form" – these are issued for civil or criminal preliminary advice and assistance from an advocate. Applications are, if appropriate, means tested by the advocate. Green Forms provide initially 2 hours advice and assistance that can usually be extended for a maximum of up to a further 2 hours.*
- (iii) "Full Certificate" – These are issued for civil and criminal cases or certain tribunals. Applications are, if appropriate, means tested by GLAS (based on household income, allowable expenses) and merits tested by the advocate. There are different merit tests for civil and criminal cases. There are no limits on hours on criminal matters but civil certificates are usually time limited and are extendable.*

There is also a duty advocate present at most sittings of the Magistrates and Juvenile Courts in Guernsey. A duty advocate also attends the scheduled monthly sittings for the Police Court in Alderney. This duty advocate can provide advice, assistance and representation free of charge at the time of the Court sitting to a defendant who is otherwise unrepresented.

Legal aid funding for criminal and civil cases are provided on the basis of means and merit tests. In most Court applications for specified public law or children cases legal aid funding is provided on a "no means, no merits test" basis, ie, it is provided automatically no matter what the financial circumstance of the applicant are or the merits of the case, due to Human Rights requirements. No means, no merits is also generally applied in mental health receiver tribunal cases. All civil appeals, whether public or private law are subject to the usual legal aid means and merits test. Legal aid in criminal appeals is granted by the relevant Court.

Contributions

Some recipients of legal aid may have to make a contribution to the costs of their case – this depends on the outcome of the means test. This is based on percentage of the total costs and disbursements on a sliding scale. In criminal cases, GLAS

collect the contribution for the assisted person at the conclusion of the case and the contribution may be repaid at a very low rate over several years.

In civil cases, the advocate bills GLAS for the balance of the invoice once the client's contribution has been deducted. This means that the advocate has to collect the contribution for the client.

Recovery of Costs

If an assisted person recovers, preserves or has their entitlement to any asset confirms with the use of their legal aid certificate and any connected Green Form, the GLAS requires the reimbursement of all costs and disbursements. This is most common in personal injury/medical negligence cases or in cases dividing up properties/assets following divorces. There can also be costs awarded or agreed in favour of the assisted person, which must be paid to GLAS to allow for the reimbursement of all public funds or any paid or owing to the assisted persons advocate.

Taxation

Advocates' fees in relation to Detention Forms, Green Forms and Full Certificates are checked to ensure they are reasonable and then are approved by GLAS. This is called taxation.

"Delivery"

A contract model whereby the Guernsey Private Bar provide legal aid has been resolved as the option that the States of Guernsey should implement.

Rates

Advocates charge by way of 6 minute units. Advocates charge £167.00 per hour. Accredited and non-admitted lawyers eg, Solicitors, Barristers at £83.50 per hour and Paralegals at £55.70 per hour. The hourly rate was set in 2004 and remains static with no RPI increase. Guernsey also has fixed fees for divorce and judicial separation by consent and mental health tribunal reviews. Only advocates of the Royal Court of Guernsey have rights of audience. Attached, to be by way of assistance, are the following documents:

- 1. Circular 2016 – 1- Assessment of Financial Means of Applications for Legal Aid, the Guernsey Legal Aid Service.*

2. *Circular 4, 2006 – Assessment Criteria – The approach of Assessment Costs in Civil Matters for Guernsey Legal Aid Service.*
3. *Guide D and JS For Judicial Separation by Consent, Legal Aid and Children Law 2008, the Criminal Justice Law, the Children's Law, Circular 2010 – 4 Amended 1 January 2011.*
4. *Legal Aid frequently asked questions about Legal Aid in the Bailiwick of Guernsey document.*
5. *Civil info shoot 2011.*

Budget

Legal aid has a formula led budget for the Advocates' fees and disbursements. In addition we have a set administration budget. The budget for 2016 which is available online in Billet D'Etat XIX 2015 records:

"Legal Aid translated expenditure

Civil Legal Aid – £1,696,000

Criminal Legal Aid - £884,000"

At Appendix 18 can be found documentation concerning in relation to the Bailiwick of Jersey. This outlines the legal aid guidelines in that jurisdiction in detail.

It would be useful to obtain further details from the Jersey Law Society as an extensive review is taking place at the moment. Once that review has been completed it would be appropriate for the LAC to review and consider the report in order to ascertain what, if any, lessons can be learned.

Conclusions

In order to assist the LAC in reviewing the current system and potential changes to the same a useful port of call might be to instruct an independent party to review the system; an example of such a party could be Mr Malcolm Bishop QC, (Appendix 19 see reference to 30 Park Place) who headed up the enquiry into the Legal Services Commission 2002. He, of course, would have a detailed background knowledge in this case and, of course, would be well aware of all the developments in the UK. Another idea might be to also engage the services and views of Mr Peter Wood, an advocate who has now retired and also sat on the initial commission.

It has always been the aim by Manx advocates in our compact jurisdiction to provide high quality advice in the courts and the Police Stations. Access to justice has to be as equal as possible and must always be the driving force; not cost. There should not be one quality of justice for the rich and one for the poor. These very principles were discussed by Lord MacDonald QC, former Director of Public Prosecutions in the Guardian newspaper on 1 April 2014 found at Appendix 20. The press is constantly littered with articles in relation to the situation in the UK. This can be reflected in an article which appeared on 6 January 2016 in the Guardian where the headline ran "Going into legal aid work now is career suicide" (see Appendix 21). A further article appeared in April 2016 (at Appendix 22) where it was commented "Legal Aid cuts have led to surge in DIY defence says charity". Another article entitled "Legal Aid reforms could undermine fundamental principles of justice warns CPS" appeared in the Guardian on 16 July 2016 (found at Appendix 23).

At a time of uncertainty for the Isle of Man it is very easy for the Government to look at the system of legal aid as it currently stands and view it as an expense that cannot be justified. The question is, when you look at the history of legal aid as set out in this submission, if the Government is not careful it could go back to a system where advocates are not prepared to provide legal aid services in our jurisdiction.

The consequences of legal aid cuts in the UK was discussed by Lord Neuberger the most senior UK Judge. He stated (Appendix 24) in an article that appeared in the BBC on 5 March 2013 that legal aid cuts could make people feel they cannot access justice and then take the law into their own hands. Lord Neuberger told the BBC that his worry is the removal of legal aid for people to get advice about law and get representation in court will start to undermine the rule of law because people will feel that the Government is not giving them access to justice in all sorts of cases and that will either lead to a frustration and lack of confidence in the system, or lead to people taking the law into their own hands. Lord Neuberger also stated that another problem would be the increase in the number of people who represent themselves in court as they cannot afford or get legal aids for a lawyer. This will mean that court hearings will last longer and the burden on court staff and judges will increase. He stated that you may find savings that the Government thinks it is making in legal aid

will be offset in other costs at courts in judges and staff supporting litigants in person.

At the present time therefore the IOMLS cannot support any system of fixed fee working for legal aid as we deem the same will not result in the maintenance of access to justice and the entire system of fixed fees appears to be grossly unfair. It would lead to advocates not being properly compensated for their time, expertise, knowledge and liability, which we cannot support.

Case preparation by non-advocates

LAC Background

Currently the Legal Aid Act only permits work to be carried out under the direction of an advocate. The Advocates Act 1976 restricts the conduct of legal proceedings to advocates. The ultimate duty of care rests with the advocate. Advocates need to be paid to offset overheads including public indemnity insurance.

The LAC wishes to consider the following possible changes:

Proposal is to seek a mechanism for allowing an assisted person to instruct a non-advocate provided the LACO agrees the legal merits and that it will progress their case.

Law Society Response to the above possible changes:

Cases require different approaches depending on whether they are civil, family or criminal in nature. It may be the case that a single incident in the life of an individual may in fact involve a number of legal issues which cross over both the criminal justice system and the civil justice system (including family). It is not uncommon, particularly in small jurisdictions to come across an individual who is before the criminal court accused of stealing from their employer, who finds they have employment law issues, as well as criminal law issues. They may have difficulties at home and need advice and assistance in respect of contact with their children or advice on divorce, as a result of the criminal and employment issues.

The types of individuals who access legal aid are varied. Some individuals are very vulnerable and can have physical or mental health issues or learning difficulties. In fact on a number of occasions the physical or mental characteristics of an individual can make what should be a simple case in fact very complex. Some areas of law are more complex and unpredictable than others in terms of how much assistance an individual may need. There is no guidance from the Legal Aid Committee on what they consider to be preparatory work and so for completeness set out below is the areas of work which are not required to be carried out by an Advocate directly pursuant to Sections 8 and 11 of the Advocates Act 1976, and may or may not be considered preparatory in nature. However, it must be borne in mind that pursuant to Rule 19(1) of the Advocates Practice Rules 2001:

“Advocates have an overriding duty to the court to ensure, in the public interest, that the proper and efficient administration of justice is achieved; they must assist the court in justice and must not knowingly or recklessly mislead the court”.

Therefore any work undertaken by an individual who is not a qualified advocate must be checked by the advocate on record to ensure that no document or argument is advanced to the court that may be incorrect or misleading. In real every day terms what that effectively means for the advocate who is named on the legal aid certificate is that they have a responsibility to ensure all work they do, and all work they may delegate, such as photocopying is done correctly. It must be checked by them.

Preparatory Work

The LAC have not provided any guidance on what they consider to be preparatory work. The following items are illustrations of areas of “Work” that could in appropriate cases be undertaken by someone other than an advocate. However, all work must be checked by an advocate for example court bundles, and therefore it will often be more cost efficient for the advocate to in fact do the work themselves, as it will be done properly and usually more quickly. By way of example it is very easy for a person who is not qualified as an advocate to innocently and accidentally include material that should not appear within it. That may be something as innocuous as irrelevant correspondence (albeit that may amount to a breach of data

protection); it may be something more important such as privileged advice between the advocate and client. Even basic tasks must be reviewed by the advocate in charge of the case because of the Advocates Practice Rules. Further, certain preparatory work may be appropriate for senior legal assistants who have years of experience but not for a junior.

Examples

- a. Administrative tasks such as conflict checks, opening client files, photocopying documents, making client appointments, the preparation of draft bills.
- b. Preparing witness statements.
- c. Research.
- d. Preparing and reviewing disclosure, reviewing unused material.
- e. Preparing a proof of evidence.
- f. Preparing mitigation bundles.
- g. Preparing trial bundles.
- h. Instructing and finding experts.
- i. Evidence gathering such as taking photographs of a site.

Potential Individuals Who May Be Suitable To Perform Preparatory Work

The following types of individuals (other than advocates) might be considered to undertake preparatory work:

1) Individuals with no qualifications

These individuals may be suitable for routine tasks such as photocopying and the making of appointments. There are certain areas of private practice such as conveyancing where individuals with no legal qualifications may undertake tasks such as searches.

2) Secretarial or administrative staff

These individuals may be suitable to undertake conflict checks, opening client files, photocopying documents, making client appointments and the preparation of draft bills. In a small jurisdiction tasks such as conflict checks are particularly important, given how often conflicts can arise.

3) Accounts clerks and bookkeepers

These individuals may be suitable to undertake conflict checks, opening client files, photocopying documents, making client appointments and the preparation of draft bills.

4) Retired Police Officers

These individuals may be suitable to undertake the preparation of witness statements, and the tasks set out in 1, 2 and 3 above. Some more qualified and experienced officers who were in office pre 2008 also have relevant experience in conducting prosecutions in court. They are very few in number, most do not have a law degree but some do. Certainly two retired officers are employed by firms of advocates. Those particular officers were very senior in their time, and undertook the prosecutions at court, so they had many years of relevant experience. Most officers will not have that experience because all prosecutions are now undertaken by qualified advocates at the Attorney General Chambers. There are also two private firms of retired officers on the Isle of Man who advocates can and do use in appropriate cases to take witness statements and other investigations. These individuals are also likely to have sufficient experience to be able to prepare proofs of evidence and evidence gather under the instruction of an advocate. The major issue for retired officers is that clients and witnesses can be very reluctant to engage with them and there can be an element of distrust. Some officers do not have the necessary skill set to prepare a witness statement from the defence perspective. However, the material would have to be checked and/or revised by an advocate as the advocate deemed appropriate. A retired police officer is likely to be at least as costly, if not more, than a trainee advocate in terms of salary.

5) Paralegals

Those individuals who have passed a law degree, or those individuals who have sat and passed the required examinations to be a member or fellow of the National Association of Paralegals. It is fairly common place in the UK for those graduates that have passed their law degree, and generally their Bar Professional Training Course (BPTC) or Legal Practice Course (LPC) to work as paralegals for firms of solicitors or agencies such as Citizens Advice. Over the last 10 years it has become commonplace for solicitors and advocates to employ a paralegal for a period of 6 months or even longer and if thought fit, the firm would offer them a position as a

trainee solicitor/advocate. Some solicitors would say this increased time as a paralegal is as a result of the changes that have taken place to the legal aid system in England, and the inability of small to medium sized legal aid firms being unable to offer training contracts to trainee solicitors. Trainee solicitors cost more to employ than a paralegal. The type of work these types of part qualified paralegals are often employed to undertake are:

- Conflict checks
- Opening files
- Legal research
- Various searches
- Billing legal files
- Taking witness statements
- Preparation of court bundles
- Attending court where their role is to liaise between counsel and the lay client and to sit behind counsel and take a note of the proceedings.

In the UK trainee solicitors may be able to make chambers bail applications, and have a very limited right of audience. Only advocates have rights of audience in the Isle of Man. Paralegals have no rights of audience before the Manx Courts.

6) Accredited Police Station Representatives

These individuals generally specialise in criminal law and specifically police station matters, and in many cases they often do not have a background in other areas of law. There are no such representatives working in the Isle of Man as the law does not allow for the same. This is an English scheme in respect of which some advocates have had personal experience and who express the opinion would be unsuitable for the Isle of Man. The Rules for the Accreditation Process are included at Appendix 25. The view is that such representatives and schemes would be unsuitable for the Isle of Man because it would be very difficult for the representatives to gain sufficient experience to be able to satisfy the criteria for the submission of the portfolio. Police Stations in the UK are far busier and it is therefore possible for the representatives to gain the requisite experience. In addition all advocates who attend the police station have a qualification in Manx Law. The scheme specifically deals with English law and procedure, not Manx. They are subject to regulation by the Solicitors Regulation Authority. There is no similar

qualification in Manx law that representatives would be able to obtain in order to operate a similar scheme in the Isle of Man without significant Government investment.

7) Trainee Chartered Legal Executives, and fully qualified Chartered Fellows of the Institute of Legal Executives.

These individuals can qualify in any area of law, and it takes many years to become qualified. Once qualified legal executives have significant rights of audience in the UK and can become partners in a firm of solicitors. There are a number of Fellows working for Advocates in the Isle of Man. They work in areas such as family, conveyancing, probate, criminal and litigation and tend to specialise in one or two areas. Legal executives cannot become partners in advocates' firms in the Isle of Man and they are not regulated by the IOMLS. They are trained and can undertake all of the tasks set out paragraph's 1-6 above. It is not unusual in legal aid firms in the UK for a legal executive, to also be an accredited police station representative.

There is no on Island training or education for legal executives and the number is limited due to having to study on a distance learning basis, and the sheer number of years that it takes to qualify. The numbers on Island have remained fairly steady over the years and there are less than 10 practicing individuals, of which perhaps 5 are Fellows. Due to how long it takes to qualify and the number of examinations they have to sit, they are not inexpensive to employ.

8) Trainee Advocates.

These individuals can do all of the tasks set out in 1 to 5 above, but must be supervised. The stage at which the trainee advocate is at in their articles will dictate the level of task they can undertake. For example a trainee at the beginning of their articles will be unable to undertake much beyond administrative tasks without significant supervision. After a trainee has passed their exams and are approaching qualification, they will be able to undertake most, if not all, tasks in a case, albeit still subject to supervision.

Tasks such as taking a proof of evidence require knowledge, training and experience in order for it to be done correctly. Significant portions of valuable court time can be wasted because a task which appears simple has been undertaken badly. An

example of which would be paginating court bundles, much court time is saved when the parties can locate the correct statement at the correct page immediately. Worse still can be the adverse effect on a defendant or claimant if a witness statement has been taken badly and fails to address a point which will support their case.

Criminal Law and Procedure

In the most basic terms a criminal law issue can be roughly split into the following stages, but not every case follows the same set of stages. It may be the case that a person is interviewed by the police, but the police decided not to proceed with the matter. It may be that the matter proceeds to court but the Attorney General's Chambers later decided to withdraw the case.

1. Advice sought prior to attending the police station, such as those attending voluntarily.
2. Advice at the police station to those persons either attending voluntarily or under arrest.
3. Advice between one police station attendance and the next.
4. Advice post charge or summons and prior to first appearance at court.
5. Advice post first appearance where the matter is to conclude by way of a guilty plea.
6. Advice post first appearance where the matter is to proceed to a contested hearing.
7. Advice re Appeals

Family and Civil Cases

The stages these cases can follow are far too numerous to mention. A case which at first appears it may be a straight forward divorce can become difficult and protracted if a party becomes violent, with applications made for occupation orders, or non-molestation orders. A personal injury case may reveal far more serious injuries and require many different types of expert. It requires training and experience to know what work should be done at which point, and what should not. What may be a suitable task for an unqualified person in one case may be unsuitable in another case. Who is to blame if a trainee instructs the wrong type of expert? Who is to

blame when a witness statement falls far short of what is required to support a defence? An advocate is best placed to identify which tasks if any should be carried out by a non –qualified person.

General

What every area of law has in common is the obligations placed upon the advocate by the Advocates Act and the Practice Rules. The Rules and the Act protect the public. If non-qualified individuals are used to prepare cases, then potential issues such as insurance and complaints have to be carefully considered. Advocates are subject to very many duties, and can be called to account for their actions, they can be disciplined. The individuals in paragraphs 5, 6, 7 and 8 are regulated by particular bodies and subject to their rules. How are non-qualified individuals to be held to account? These are matters which have to be considered which need to be carefully considered by the LAC.

Unfortunately the LAC has not set out in any detail how non-qualified individuals may be utilised in legal proceedings and at what stage. The English courts have ground to a standstill in the wake of an increased number of McKenzie Friends appearing, with a McKenzie Friend recently being sued/convicted of fraud (Appendix 26).

Most advocates already use administrative and non-qualified staff to undertake appropriate work. There is a non-advocate rate in place to allow for this. Advocates do not charge for review of this work, notwithstanding such review is a legal requirement, thus creating a saving for legal aid.

In all types of legal cases proceeding before the courts in the Isle of Man there are a number of very important and critical steps that must be followed. If an non-qualified person was conducting a case and then handing the same over to an advocate to conduct at the court door, the advocate may find themselves in a position where certain critical things have not been attended to. This could lead to delays and therefore increased costs, or worse still, a good case being lost or thrown out. How many advocates would be prepared to work on such a basis will be limited. It is one thing for an advocate to use a non-qualified person within their

employment to undertake certain tasks, but the proposals put forward by the LAC go beyond that and, on the face of it, appear extremely dangerous.

Adoption of standard terms to be used on all legal aid certificates

LAC Background

Pilot scheme is currently being undertaken, issuing limited certificates and monitoring case progression more closely.

Certificates are being limited as to duration (in months) by which work should reasonably be carried out and allocating a maximum time (in hours) for the work itself.

Limits can be increased on request but the matter is then reviewed both as to progress and cost.

The LAC has evidence that this approach is producing positive benefits both in terms of more speedy progression of cases and reduced overall costs.

This encourages advocates and assisted persons to be more focussed on progress and working within a budget. This encourages advocates to engage positively in considering efficiencies both as to time and cost

The LAC wishes to consider the following possible changes:

The Committee considered that this procedural change did not require any amendment to regulations or legislation and has adopted the pilot scheme as normal process since 1 January 2016.

There have been recent discussions between advocates and the Certifying Officer as to the scope of the limitations applied. The Committee will review the position after the first year of operation

Law Society Response to the above possible changes:

The current pilot scheme has been described as a mechanism by which legal aid can keep a better track of its budget and have a better understanding of costs being incurred. This is fully understood and accepted. It is appreciated that legal aid has received large bills in certain cases that were not expected and which has led to a significant legal aid spend. The difficulty is, of course, that in many legal aid cases it is not appropriate or feasible to put in an interim bill and therefore the bill is not produced until the conclusion of the matter, which often runs over a number of years.

Further to the implementation of the pilot scheme, the IOMLS worked with the LACO in respect of the introduction of an extension request form (Appendix 27), to speed up the process of obtaining extensions to certificates. The form was designed specifically to ensure the LACO was receiving all relevant information required in order to make a decision in a more effective manner. Prior to the introduction of this form advocates would write a letter to the LACO requesting an extension to the legal aid certificate and would explain what had happened thus far and why the extension was required. This process could lead, in some cases, to protracted correspondence between the advocate and the LACO in order for the LACO to fully understand the position. Indications received thus far are that the introduction of the form has improved the process from both sides.

However, there still remains a delay in response from the legal aid office. This delay is understood to be as a result of the workload of the LACO and the limited time in which she has allocated to the performance of this role, it not being allocated to all of her time in the office, and her reduced working hours. The IOMLS does not seek to criticise the LACO directly, the difficult and time constrained working is acknowledged and is certainly something the LAC need to address as a priority.

Further, the alleged changes implemented to ensure emergency legal aid certificates are being issued in the absence of the LACO are not working. It is reported to the IOMLS that emergency certificates are rarely issued in the absence of the LACO with advocates being advised they must wait. Advocates therefore end up not getting paid for a lot of urgent work being undertaken by them, as the work is a genuine emergency but no certificate can be obtained to cover the same. Again, this needs to be addressed.

The LACO currently considers the advocate's request for an extension to the legal aid certificate. The advocate sets out the steps they require to take and how long they require to do so. Invariably, the LACO reduces the time requested and states that the advocate should revert if further time is necessary. The advocate will have given due consideration to the time needed in the first instance, based on the circumstances of the case, the work likely involved and any issues that may arise. An advocate does not bill for the number of hours allocated, but for the time the work actually took. The current approach of allocating less time than the advocate requests therefore only seeks to curtail the job the advocate can do, increase time and costs being spent on form filling and bureaucracy and delays the case in progressing. It is to be remembered that, notwithstanding the LACO granting time to the advocate for undertaking work, the bill remains subject to scrutiny from the costs officer, who will look at the actual work done in order to ascertain as to whether the same was reasonable and the time spent too was reasonable. The costs officer will reduce the bill accordingly if he considers that an unreasonable amount of work has been undertaken, notwithstanding the hours allocated pursuant to the certificate. Therefore, it is respectfully submitted that the current approach is not required and only serves to increase the cost to legal aid.

The IOMLS recommends an agreed set of standard terms for legal aid certificates be produced and implemented. It is becoming increasingly noticeable that advocates are requesting permission to undertake certain work and they receive an extended certificate from the LACO, following which the work is undertaken. The advocate reads the certificate in light of the request made and any subsequent communications had with the LACO. However, when the bill is being assessed by the costs officer, he does not have the benefit of that knowledge and he writes off properly billed time as he does not consider it is covered by the wording of the certificate. This then leads to the bill being appealed (in respect of which an advocate cannot charge for their time) and the LACO considering the matter. This then takes the LACO time to review the file and her decisions, which time is diverted away from issuing certificates in ongoing cases. Alternatively, advocates simply write off the time resulting in a further loss to their practice.

If there was an agreed set of standard terms this problem could be avoided. It is noted that the LACO and the Deputy LACO use different terms, which again causes confusion. The IOMLS are prepared to work with the LACO in the production of the standard terms, by case type. Such standard terms could then be transposed over onto the extension form and the advocate can use a simple tick box mechanism to identify which wording should apply to the certificate, or if none are appropriate in the particular case, suggest the wording to be used. This would cut down on time at both ends and would ensure consistency of approach. It would also assist the costs officer when he comes to assess the bill as he would be able to see instantly what work was covered by the extension.

It is, however, submitted that certificates should give advocates a greater amount of control as presently the pilot scheme is micro management to the point where case progression is being hampered and additional costs are being incurred across the whole justice system. Legal aid certificates are being issued with restrictions on the number of hours and the time with which to undertake the work, some certificates expiring within one month of issue. In this situation, further correspondence with legal aid is required requesting extensions, leading to delays and frustration for the clients, who may be in protracted and time critical disputes. Extension requests are not being received back in time for directions hearings and therefore advocates have to attend court (without getting paid to do so) to advise that no funding is in place and an adjournment is required. In most cases an adjournment will be granted, however the courts are making it abundantly clear that a lack of funding should not prevent case progression and advocates are being directed to undertake work regardless of the lack of funding. Administrative adjournments cannot be obtained as the court will issue a fee for such a request, which fee must be paid by the advocate and would not be recoverable from legal aid in the circumstances. Therefore valuable court time is wasted and other litigants are prevented from having their cases allocated in a more timely manner. Further, if a directions Order has been issued but an extension has not yet been granted, directions to file or undertake tasks cannot be complied with, without the advocate undertaking the work for free. Again, this wastes time and increases costs as Orders must be varied and hearings disposed of due to delays in complying with directions Orders. A failure to comply with an Order is in fact contempt of court and an advocate exposes their client to such if an Order is not complied with on time. To obtain a variation to the

Order, before a breach, an application is required to the court, which necessitates the court fee being incurred and paid by the advocate, which would not be recovered from legal aid. Therefore, advocates are being placed in very difficult positions as a result of the tight limitations on certificates and the delays in the issuance of extensions. An advocate owes a duty to their client and could be sued or disciplined for failing to comply with a directions Order. Further, an advocate owes an overriding duty to the court and must at all times operate in a manner such to further the overriding objective. Advocates are leaving themselves open to criticism by the court if they fail to undertake tasks due to a lack of funding.

The LAC states that advocates should be required to provide periodic updates on matters. The system of limited certificates already implements this. In any event, periodic updates have always been a part of the legal aid system and advocates are already required to provide the same, as a matter of practice.

The overall principle of managing certificates is understood and accepted by the IOMLS, however the current method of delivery is flawed. The IOMLS is prepared to work with the LACO in order to improve the current system so to ensure the same is delivered in a more cost effective manner and ensure that delays are not occurring in case progression. With some tweaking, this method of control could be improved and would improve the overall delivery of legal aid. If, legal aid modernised its IT facilities to allow for online access and updates, this aspect could be vastly improved with significant costs savings in the long term.

Ensure that the courts, advocates, prosecution and police collaborate to demonstrate effective use of publicly funded resources and accountability to tax payers

LAC Background

Police, prosecutors and courts do not appear to be aware of the impact of their decisions on the legal aid allocation. This leaves the possibility that opportunities to develop alternative strategies and procedures which might allow for improvement in process and corresponding cost effectiveness in delivering access to justice are overlooked.

There is a practical need to evidence Isle of Man Government "Value for Money" Guidelines and provide a level of accountability to tax payers.

The LAC wishes to consider the following possible changes:

Proposed consultative forum including the LAC, police, prosecutions and judiciary on the costs implications of processes and procedures and to identify opportunities for streamlining and reducing the cost of cases being processed through the courts.

Legal Aid Committee to engage with the existing Court User Groups.

Law Society Response to the above possible changes:

The IOMLS has already set up regular legal aid user group meetings in order that advocates and the LACO can come together and discuss practical day to day issues and improvements that can be made to the system as currently operated.

The IOMLS has further recommended to the LAC that a key stakeholders meeting be organised in order to ensure this legal aid review is structured in such a way that improvements can actually be made with all involved in the process being on board. The system cannot be improved without all key stakeholders signing up to the same.

The suggestion that the court should issue directions to dovetail with the legal aid certificate restrictions is, with all due respect, looking at the matter the wrong way. The judge in any particular case is best placed to ascertain what directions should be issued in order to ensure a case is progressed in accordance with legal requirements. In certain cases additional directions will be required to take account of the facts and law involved, in other cases certain directions can be disposed of. Cases must progress in a fixed and prescribed manner and it is entirely inappropriate for either the court or legal aid to seek to restrict the time available to a litigant and his advocate to undertake the necessary work. The judiciary must remain impartial and justice must be open. It is respectfully submitted that the legal aid certificates should be issued to dovetail with the directions issued by the court, to which end see above suggestions and proposals. The advocate should advise the LACO how much time they require to comply with the directions, which advice is based on the

knowledge of the case, the opponent, the law, the facts and the work to be completed.

Review/modify/remove certain financial means test limits

LAC Background

Means tested financial resource and income limits apply to all cases except Duty Advocate Schemes, Hague Convention International Child Abduction and Custody cases and Mental Health Review Tribunals. A case can be made that the child and parents/grandparents should also be exempted.

Following the recognition in the English courts that it can take an excessive amount of time to deal with public care proceedings, often to the detriment of the child, the courts in England introduced a pilot scheme which laid down time limits and a similar pilot scheme was introduced in the Isle of Man by the Child Court User Group approximately 12 months ago.

The Child Court User Group has approached the LAC to request the introduction of universal legal aid for parents in child care cases, the objective being to provide a level playing field particularly where one party is legally aided and the other is not.

The LAC wishes to consider the following possible changes:

Waive the proposed charges to the financial means test in view of the serious nature of the proceedings, making the legal means test as given, in order to effect a reduction in procedural time and hence costs.

Law Society Response to the above possible changes:

In theory the LAC proposals in this regard are positive and are likely to receive support from the IOMLS.

Whilst these changes are being reviewed, the IOMLS consider that of more importance are changes to ensure that learning disabled parents can have funding for next friends to be appointed. It has recently come to the attention of the IOMLS

that, notwithstanding next friends have been funded by legal aid for many years, there is no provision for this to be done. Next friends are currently being treated as experts and under disbursement provisions, but this has the ability to hamper the progress of the proceedings and must be addressed.

Further, legal aid has recently had to fund a significant disbursement cost in transcribing documents in a child care case. Whilst an application has been made to the court to seek that the Department contribute to these costs, it is considered that there should be legislative provision laid down as to the responsibility for such costs. The IOMLS consider that such costs should be paid by the Department, which would then focus the Department's mind as to how these proceedings are in fact being conducted. At present public law cases are not being presented in a cost effective manner by the Department and the manner of presentation is increasing the cost to legal aid, which we consider is unnecessary. Again, this needs to be addressed with key stakeholders and is not something the LAC is capable of resolving without outside support.

Consideration to any new system of handling public law cases (noting the LAC considers an inquisitorial system should be used as opposed to the current adversarial system) will need to be extensively researched and considered before any decisions can be made. Further, data will be required as to how many public law cases proceed through the courts each year and how many of those already benefit from legal aid funding, in order that the cost of this proposal can be fully considered and understood. However, putting all litigants in the same position in these difficult cases is a positive step and will ensure access to justice for all. It is anticipated that there is scope (if not already happening) for vulnerable people to be just outside of the legal aid financial limit who are simply not capable of dealing with these proceedings on their own and who cannot afford to pay privately for representation. Whilst the court will go a long way to ensuring a fair hearing for a litigant in person, such often leads to cases taking longer and other advocates having to undertake additional work, which will have an impact on the cost to legal aid in any event.

Review procedure for timely submission of bills and interim payments

LAC Background

The current separation of the costs officers and certifying officer in different Government Departments could be seen as highly inefficient with duplication of manpower and potential for delay and misfiling.

The LAC has held discussions with the IOMLS and established the merit of the Costs Officer and the functions of assessing the claims to come together in one Government Department as soon as possible.

The LAC wishes to consider the following possible changes:

Committee proposes to introduce guidelines requiring the legal aid administration team to turn around the majority of straightforward claims in a timely manner.

Committee is also considering amending current regulations to reduce or disallow in whole or part any claims submitted more than a specified time after the case is concluded.

Law Society Response to the above possible changes:

The need for legal aid to understand, manage and control its budget is understood and accepted. This is the rationale provided for the time and scope limited legal aid certificates, which the IOMLS accept.

However, time limits on the submission of legal aid bills is something that needs to be considered far more carefully. Firstly, if legal aid are going to start requesting that advocates provide regular costs updates that will lead to delays in cases and further costs being incurred, which will ultimately increase the cost of legal aid provision. It is submitted that, given the introduction of time and scope limited certificates the same is not required. Legal aid should be able to adequately manage and control its budget based on these changes.

The LAC has suggested that the time limit they are proposing is 3 or 6 months. That is, for some practices, not realistic. Once a case has concluded there may be appeals or other work to be completed before the file can be prepared and

submitted for billing. Access to the files will be required for that work to be undertaken. That work can take well in excess of the proposed time limits.

The preparation of a legal aid bill is not as simple as the preparation of a private bill. Most advocates, but not all, will operate a time recording system via legal case management software. Unfortunately, bills automatically prepared via this software cannot be used for the submission of legal aid bills. Legal aid bills must be produced manually, which takes considerable time and effort, as they must be produced within a certain form. The vast majority of legal aid advocates cannot afford to pay a dedicated accounts person to sit and prepare legal aid bills, which means either the advocate, their secretary or junior staff must prepare the bills. That has to be completed as well as undertaking all other work, which will be subject to tight deadlines. Often, as the production of legal aid bills is not time constrained so tightly, the bills will be put to the back of the queue of work to be completed.

The LAC has not advised from which point that time frame will begin to run. A legal aid certificate can be discharged for a number of reasons, which have nothing to do with the conclusion of the matter. For example, there could be a significant case underway and the client's financial circumstances change which results in a discharge of his legal aid certificate as he is no longer financially eligible. The case however is ongoing and the advocate will be focussed on the matters in hand. When the case concludes (perhaps 3 years later) the advocate will then prepare and submit their bill to legal aid for the duration of the certificate. They cannot prepare and submit the bill sooner, as there may be the ability to recover costs from the other side or they are simply too busy focussing on the work required. Further, in order for the bill to be assessed the advocate will have to provide their files to the costs officer in order that he can assess the bill. The files cannot be handed over when the case is ongoing. If the time limit runs from the discharge certificate then the advocate would be unfairly penalised for concluding the case and trying to recover costs, resulting in a potential saving for legal aid, which is not acceptable to the IOMLS.

The Limitation Act 1984 provides a statutory time limit of 6 years to issue a claim based on a simple contract. The relationship between advocate and legal aid is a simple contract. Therefore, if an advocate produced a bill to legal aid for payment 7

years following the conclusion of a matter, legal aid would be well entitled to refuse to make a payment to the advocate on the grounds of delay. The advocate would be prevented from succeeding in a claim to recover their fees, unless the contract had been varied and time period extended, as they would be time barred and legal aid would have a limitation defence available to them.

Whilst it is accepted that producing a bill many years after a case has concluded causes all number of administrative headaches for legal aid, caution must be exercised in how this situation is managed. Guidance and best practice should be set out within the handbook and advocates should be encouraged to submit bills as soon as reasonably practicable, however, penalties should not be arbitrarily imposed against advocates for a delay in submitting bills.

The LACO has recently clarified the position with regard to interim bills and advocates should be encouraged to submit interim bills, in appropriate cases. Not all cases are, however, suitable for interim billing. For example in many civil cases costs can be awarded in favour of legally aided parties. Those costs, provided that they have not already been claimed against the legal aid fund, can be recovered at the advocates' private rate (as agreed with the client in the letter of engagement) and no call will be made against the legal aid fund. Advocates therefore do not, as a matter of routine, submit interim bills in such cases nor would it be appropriate to do so. Section 5 of the Legal Aid Act 1986 was specifically amended in 2008 to allow for this recovery.

Further, the legal aid office must ensure that bills are assessed and paid more quickly. Advocates report that there can be delays in excess of 1 year for the assessment and payment of bills and these delays do not apply to bills submitted by advocates years after files have been concluded. The LAC cannot propose to penalise advocates yet allow a system of significant delay in payment to continue.

Since changes to the manner in which legal aid disbursements are recovered by advocates, advocates have been fronting the cost of legal aid provision to their own cash flow detriment. There was no consultation with advocates about this introduction and it has had a significant impact on many legal aid advocates. It can still take months to recover disbursement outlay, which has a significant negative

impact on the cash flow of advocates, which is grossly unfair. Advocates can be penalised in interest if they do not discharge the disbursement in the prescribed timeframe, yet legal aid repayment is not subject to any similar penalty. Treasury has on a number of occasions suffered from technical problems in relation to making payments (as recently as last week) which results in advocates receiving no payments. This again has a considerable impact on advocates' firms. It should be recognised by the LAC that the majority of firms that undertake legal aid work are small firms or sole practitioners. Therefore they do not have the same leeway as large practices when there is a delay in receiving payments, as such delays are far more likely to hit them hard.

The LAC has not produced any data to evidence the alleged problem. The IOMLS has been advised by the LAC of one file being produced 3 years after the certificate had been discharged. The IOMLS is not aware of this being a regular occurrence and therefore a significant problem. It is of course, in the interests of advocates to submit their bills in a timely manner in order that they recover money due to them.

The IOMLS therefore proposes that it continue to encourage advocates to submit their bills in a timely fashion and make full use of the interim billing process, where appropriate. The LAC should ensure a timely turnaround of assessment of bills, payments and disbursement recovery to advocates.

If the issue with bills being received after a number of years following the discharge of the legal aid certificate continues, then the IOMLS will be prepared to consider alternatives with the LAC upon production of evidence of the problem, to ensure a more timely system is introduced. Again, an online submission would likely assist, but requires extensive IT upgrades for legal aid.

Should a public defender unit (PDU) be established?

LAC Background

A Public Defender Unit (PDU) is a system in which the Government employs salaried legal representatives to represent defendants in Criminal matters.

A PDU is independent of the Prosecutions office and Courts service.

In England and Wales, the plan to establish a POU was announced in 1998 in the Labour Government's White Paper, modernising Justice:

"Evidence from other countries suggests that properly funded salaried defenders can be more cost effective and provide a better service than lawyers in private practice ... "

In Scotland the Public Defence Solicitors' Office (PDSO) started as a five year pilot scheme with its own code of conduct for defence solicitors. The Scottish model has been the basis for pilot programmes in the Netherlands, Finland and Moldova.

The LAC wishes to consider the following possible changes:

To further consider the creation of a salaried Public Defender Unit to represent defendants in criminal matters in place of the current system of criminal legal aid.

Law Society Response to the above possible changes:

A Public Defender Service (PDS) was set up in England in 2001.

Following cuts to criminal legal aid in England implemented during the Conservative/Liberal Democrat Coalition Government, the UK Government sought to expand the PDS.

In England the PDS is funded by the Legal Aid Agency and has offices in Cardiff, Cheltenham, Darlington, Pontypridd and Swansea (Appendix 28).

The PDS is a Department of the Legal Aid Agency, an executive agency of the Ministry of Justice.

PDS solicitors are in effect salaried civil servants, and are subject to the Civil Service Code.

The PDS provides free representation at the Police Station and at court for those persons eligible for legal aid.

A job advert placed by the Ministry of Justice in England in 2014 indicates a salary of between £46,000.00 and £125,000.00 for PDS solicitors.

In addition the specialist PDS Advocacy Unit was created in 2014 and works akin to a Barristers' Chambers. It is a service to legal aid solicitors looking to instruct barristers for criminal court cases. The PDS Advocacy Unit is independent from the PDS solicitors (Appendix 29).

Additional personal costs/benefits relating to the PDS include employer pension contributions, employer national insurance contributions, Law Society membership fees, clothing, training fees, books/website subscriptions.

As PDS lawyers are salaried civil servants obviously sick pay and holiday pay have to be taken into account together with redundancy pay and severance/exit payments.

Office costs will include rental of premises, electricity, heating, stationery and IT running costs.

Support staff costs will include secretarial support, administration and office management.

An entity similar to the PDS has been established in Scotland and is called the Public Defence Solicitors Office (PDSO) (Appendix 30).

It should be noted that the PDS in England the PDSO in Scotland both run alongside the criminal legal aid systems in the respective jurisdictions and have not replaced criminal legal aid in England or Scotland.

Application To Isle Of Man

Value For Money

Due to the small size of this jurisdiction it would be impractical to run both a Public Defender Unit and maintain a criminal legal aid system.

If a PDU was to be introduced in the Isle of Man as a replacement for criminal legal aid i.e. to cover CDA work, all Police Station work (Panel and Duty) and all current legal aid certificate cases, it is estimated that 12 - 15 Advocates would be required.

This would be to provide a 24/7, 365 days per year service of legal representation at the Police Station together with cover at all criminal courts and the taking on of criminal cases currently funded by criminal legal aid.

A mixture of junior and senior advocates would be required for Police Station work (to cover serious or complex cases including rape/murder).

A mixture of junior and senior advocates would be required for court work including General Gaol Trials/Staff of Government cases.

The Attorney General's Chambers currently has 8 prosecuting advocates plus a Solicitor General and the Attorney General.

The costs of employing a QC at the PDS in England has been calculated at approximately £173,000.00 p.a. inclusive of salary, employer pension contribution, employer national insurance contribution, practising certificate, clothing, personal expenses and research materials (Appendix 31).

In contrast, the cost of employing a self-employed QC to do similar work has been calculated at approximately £97,000.00 p.a (Appendix 32).

Sick pay needs to be taken into consideration. Rates of absenteeism are considerably higher in the public sector than private sector. Currently civil servants are entitled to receive 6 months at full salary whilst off sick followed by 6 months at half salary. Maternity provisions are also applicable to civil servants where they receive between 4 to 12 weeks full pay and thereafter between 4 to 6 weeks half pay, depending on length of service. In contrast, sick pay and maternity pay remains discretionary in the private sector.

Payments to staff suspended for disciplinary reasons also need to be considered. Recent examples include the current Attorney General who has been suspended on

full pay for over 3 years. The additional cost of the Acting Attorney General is presently in excess of £500,000.00 for those 3 years, according to an answer in Tynwald.

Voluntary redundancy/exit packages are also currently on offer to Isle of Man civil servants.

The office running costs in relation to rent etc for a PDU on the Isle of Man are likely to exceed £100,000.00 per annum.

Ancillary staffing costs would need to include approximately 7 secretaries/support workers together with 2 administrators and an office manager.

The following legal aid rates on the Isle of Man should be noted:-

- | | | |
|----|---------------------------------------|------------------|
| a) | junior advocates (0 – 5 years called) | £115.00 per hour |
| b) | senior advocates (5 + years called) | £135.00 per hour |

Compare this with the following charge out rates for private client work on the Isle of Man:

- | | |
|----|---|
| a) | junior advocates - £225.00 per hour |
| b) | senior advocates - £250.00/£450.00 per hour |

Given that the same senior advocate who is undertaking private client work at say £300.00 per hour is also undertaking criminal legal aid work at £135.00 per hour, it is submitted that the tax payer is receiving excellent value for money.

A PDU would cost more to run annually than the criminal legal aid system costs annually.

Public Sector Pension Crisis

The Isle of Man public sector pension crisis is currently the most serious concern in Manx politics.

The present public sector pension scheme (not to be confused with the state pension) has created a funding gap currently running at £44 million per annum i.e. £44 million is being withdrawn from Government Reserves to cover the gap created by public sector pension expenditure over public sector pension contributions.

There are currently 6,000 public sector workers on the Isle of Man.

The funding gap can only be plugged by increasing members' contributions, employers' contributions, raising general taxation or cutting government expenditure.

A Public Defender Unit on the Isle of Man would add approximately 25 (15 Advocates plus 10 support staff) members to the public sector pension scheme.

Obviously the current model of private legal practices undertaking criminal legal aid works does not involve any liability for payment of public sector pensions.

Advocates and staff working in the private sector remain responsible for the provision of their own private pension arrangements.

Interests Of Justice

Following the incorporation of the European Convention on Human Rights into Manx law, the roles of investigating crime and prosecuting crime were separated, with the Police investigating crime but not prosecuting in court and with prosecutions undertaken solely by the Attorney General's Chambers.

If a Public Defender Unit were to be created in the Isle of Man the situation would be that there would be state Police investigating crime, State prosecutors prosecuting and State defenders defending.

The Isle of Man is small jurisdiction of 86,000 people. There could certainly be a perception that a Public Defender Unit would not be truly independent and separated from the Police and prosecution but was simply another arm of the State.

There are currently 37 private legal practices in the Isle of Man carrying out a mixture of private and legal aid work. The position is similar to say a building contractor who may do some road works for the Department of Infrastructure but also undertakes work for private individuals and companies. Although such building contractor receives some public work, the company remains a private entity entirely separate from the Government.

It is submitted that in the interests of justice it is crucial that defence advocates remain separate from the State, free to criticise and hold to account the Police and the Crown and apply for costs where appropriate without fear or favour. The independence of the Manx criminal bar operates as a vital check and balance in the administration of justice.

Justice “should not only be done but also be seen to be done”.

Private Clients

The current means test for criminal legal aid on the Isle of Man is such that a person is entitled to full free legal aid if his/her income is less than £191.00 per week (after deductions such as rent, maintenance and travel costs).

Between £191.00 and £250.00 a contribution to legal aid may be ordered.

A net income in excess of £250.00 per week will almost certainly result in legal aid being refused by the Court.

This means that if a person has been refused criminal legal aid he either has to represent himself or pay privately.

The vast majority of criminal cases involved clients who are eligible for legal aid.

If a Public Defender Unit were to be established obviously the advocates most experienced in criminal law would be those working within such Public Defender Unit. This means that there would be a very limited choice of suitably skilled and experienced advocates in private practice on the Island who would be able to

represent those clients not eligible for representation by the Public Defender Unit. This would clearly not be in the best interests of justice. Further, junior advocates would not get as much experience as presently and therefore once the more experience advocates retire from practice, the Isle of Man will be left with a hole in terms of private advocates suitably experienced to represent in criminal matters.

Quality Of Representation

Criminal Defendants are often vulnerable persons with troubled backgrounds. The best representation is provided by sympathetic advocates who have a desire to help and protect such persons.

Advocates should have a passion for criminal law, willing to leave no stone unturned (e.g. tracing potential defence witnesses, requesting unused material, instructing relevant experts to provide opinions) in order to achieve the best possible outcome for clients.

The current legal aid model supports such Advocacy.

The suspicion is that salaried defence advocates in a PDU may also lack the incentive to go the extra mile, resulting in an increase in guilty pleas as the Public Defender takes the easy way out instead of fighting tooth and nail to achieve the best possible outcome. It is clear from the LAC proposals that the LAC see that a PDU has the potential for increases in early plea and conclusion as an advantage, which is a fundamental misunderstanding of the role of a defence advocate. The danger signs are already in place in that regard, in that advocates may well be encouraged to encourage defendants to plead out to a charge instead of properly and robustly defending, where a defence is available.

In addition, advocates currently undertaking criminal legal aid work in private practice are only sustained by their reputation. This would not be as critical for salaried Public Defenders, guaranteed their salaries irrespective of outcomes. Also, advocates in private practice can give more attention to a small number of criminal clients, as opposed to a single PDU seeking to service almost every defendant.

As with the provision of most services, the private sector is usually much more efficient and effective than a publicly run entity; as is reflected in the Scope and Scale of Government Report commissioned by the IOM Government with its recommendations for increased privatisation of state run entities such as the Villa Marina and Ronaldsway Airport.

The current system of prosecuting operated at the Attorney General's Chambers is such that files can be handled by several different prosecutors prior to trial. Such "pass the parcel" of defendants' cases leads to serious inefficiency and unacceptable delay. Such system creates a lack of continuity and a lack of communication. It would be most regrettable if defence representation mirrored such a state of shambles.

The present system of criminal legal aid allows the allocated advocate to build up a personal relationship of trust with the defendant. Passing clients around different advocates within a PDU would lead to a lack of continuity, duplication of work and different advocates potentially taking different views on how a case is to be handled. Clearly, clients would also no longer be able to instruct the advocate of their choice.

Criminal convictions for a defendant can involve relatively minor punishments such as fines and community service but can also involve life changing consequences such as driving bans or immediate custody with consequential loss of home, job and relationships.

In a significant number of cases where not guilty pleas have been entered, the Crown will subsequently offer a less serious alternative charge or other disposal such as caution, bind over or even no evidence at all prior to the Pre-Trial Review stage.

Even after the Pre-Trial Review stage when trial dates have been set, many cases are subsequently resolved prior to the actual trial for reasons such as the Crown's difficulty in securing witness attendance at trial or simply that a different prosecutor has reviewed the file and decided that there is insufficient evidence to secure a conviction. (see court form VECI at Appendix 33, which is being piloted by the courts during 2016 to monitor vacated trial dates)

Pressure to enter early guilty pleas may not therefore always result in the correct outcome for Defendants.

Overall, therefore the interests of Defendants would not be best served by a PDU.

Areas Of Possible Financial Savings

Savings have already been made by reducing the number of duty advocates at any one court from 2 to 1.

Legal aid rates have been frozen since 2010, despite office running costs continuing to rise every year.

The introduction of plea before venue and mode of trial for either way offences has resulted in a considerable saving on legal aid costs as cases involving guilty pleas are fast tracked to the Court of General Gaol Delivery without having to go through the committal stage.

Improved Community Policing - public policy issues such as the public finances, need to better inform Police decisions which would lead to less heavy handed policing. For example, to arrest a person for swearing in the street can eventually lead to a court appearance incurring legal aid costs if that person is represented either on Green Form or by the Duty Advocate. Quite simply, less Defendants in court means less legal aid costs.

Court waiting time can add considerably to a Defendant's legal aid bill.

The Deputy High Bailiff's Court on a Tuesday is usually the busiest court of the week with currently between 20 – 30 Defendants on the list.

Advocates sometimes have to wait 2 or 3 hours for their single case to be dealt with (due to protracted sentencing cases or contested bail applications) and it could be that the advocate has waited just for a caution to be administered or an adjournment granted.

Perhaps the court could commence by the Deputy High Bailiff asking for all relatively quick matters such as cautions/bind overs/adjournments to be dealt with first.

Alternatively, all sentencing cases could be listed for 2.30 pm on a Tuesday or even on a separate day.

Greater use could also be made of staggered court attendance times say a third of Defendants to arrive at 10.00 am, a third to arrive at 12 Noon and the final third to arrive at 2.30 pm, rather than most Defendants arriving en masse at 10.00 am.

Improved standard of prosecuting. At present, legal aid costs are often needlessly incurred due to errors/poor file management by the Crown. Examples include letters and emails simply ignored leading to repeat correspondence, requests for disclosure of unused material not dealt with leading to court appearances, decisions late on in proceedings to discontinue/change charge following file review by a different prosecutor leading to needless trial preparation costs such as obtaining defence witness statements being incurred.

A more robust and timely case review procedure is required to be adopted by the Crown.

Such failings by the Crown are reflected by the number of costs orders made against the Crown by the court.

Are costs order figures available?

Conclusion

A Public Defender Unit would not result in financial savings to the public purse. It would be more expensive than the current criminal legal aid system.

A Public Defender Unit would worsen the Isle of Man public sector pension crisis.

A Public Defender Unit would not be in the interests of justice.

A Public Defender Unit would not improve the quality of representation for Defendants.

Public funds could be saved in other ways such as by changes to the Policing ethos, court administration, as well as an improved standard of prosecuting.

The present model of criminal legal aid being awarded to advocates in private practice is the best model for delivering public justice, offering good value for money to the tax payer.

Should publicly funded legal advice centres be established?

LAC Background

Known as Law Centres in the UK they have existed since the early 1970s. For some time they have been primarily delivered through the Citizens Advice Bureaux.

Cuts in publicly funded legal advice in the UK have led to a reduction of generalist comprehensive Law Centres. The reduction in generic centres has, to some extent, now shifted responsibility to specialist voluntary organisations. Primarily, they specialise in family, consumer, housing, debt and social welfare law and where still operable, continue to offer legal advice, casework and representation to individuals and groups.

Centres could still potentially be set up in the Isle of Man - run either within or outside Government - and staffed by Trainee Advocates, paralegals and or by Advocates operating on a "pro bono" basis or by some alternative form of paid or voluntary arrangement.

Legal Advice Centres have not previously operated in the Isle of Man and would be a new concept. The potential to create them has been introduced through the current consultative exercise run by the Committee

The LAC wishes to consider the following possible changes:

Establishment and strategic location of Legal Advice Centres in order to allow the public easier access to legal advice.

Legal Advices Centres to be funded and operated by a partnership between any combination of Government, private or third sectors.

Could provide a fast track source of legal advice with the aim of preventing problems from arising in the first place - and provide early impartial advice which could avoid the need to formally engage an Advocate to act on their behalf.

This would provide a full opportunity to explore alternative means of dispute resolution (ADR) before the matter escalates and an immediate low level early intervention approach could change the nature of the Legal Aid system from its supporting an adversarial position to it encouraging problem solving and compromise.

Law Society Response to the above possible changes:

In or around early 2007 the Young Lawyers Association undertook discussions with the Citizens Advice Bureau and OFT in relation to the setting up of a legal advice centre. Nick Black was the primary contact from the OFT.

The problems encountered in 2007 were as follows:

How would the advice centre be staffed? – only 3 advocates were prepared to attend and provide advice.

Who would be responsible for the advice given?

How would insurance be provided?

How would work and advice be supervised and monitored?

Who would be eligible for advice?

Why was a legal advice centre any better than the current Green Form Scheme and how would it widen exposure to legal advice for those that require it?

In 2007, the Government was not prepared to fund the delivery of a legal advice centre and the issues identified above were quoted as the reason for why the initiative could not progress. The IOMLS is unaware of any of the above issues having been further considered and resolved.

Currently legal advice is available from advocates practising all over the Island. There are legal offices in Douglas, Ramsey, Peel and Port Erin/Port St Mary. The offices operating outside of Douglas all provide advice pursuant to the various legal aid schemes. Therefore, members of the public have the ability to, subject to eligibility, obtain free legal advice as and when required. The IOMLS is not aware of any access difficulties to the obtaining of legal advice. Further, some firms offer free 30 minute consultations and other fee driven initiatives for privately funded individuals, to ensure that legal advice is accessible on a cost managed basis.

Legal advice centres in the UK are run as “not for profit organisations” and are well established, having initially been set up in the 1970s. They are therefore well set up and organised. The activities are targeted at those sections of the community who have the greatest need such as the unemployed or low paid, disabled people, minority ethnic communities, women and children.

The withdrawal of legal aid funding for many different types of cases in England and Wales had led to an increased need for legal advice centres which provide advice on those areas in respect of which no legal aid funding is available.

Clearly, the same restrictions do not apply in the Isle of Man and the social gap is not as large. The Isle of Man is a small community and does not face the same issues and exclusions as England and Wales.

Attached at Appendix 34 is a report produced by ICF International on 25 November 2015, in relation to Funding for Law Centres, which provides a very useful overview of the operation and funding of the same. The report highlights that legal advice centres in England and Wales are facing funding difficulties themselves and it is

quoted that the Cumbria Law Centre only has capacity to take on 1 in 4 cases presenting.

The current Green Form model in the Isle of Man provides access to legal advice to all those eligible, who will in all likelihood be the most vulnerable members of society. The benefit of the current system is that once a Client has received initial advice via Green Form, if their case cannot be resolved quickly and a full legal aid certificate is required, they will have the continuity of having the same advocate represent them. With legal advice centres, it would be unlikely that this would happen. Further, Green Form advice covers such a wide remit of legal advice that can be covered, staffing a legal advice centre with sufficient advocates to cover all aspects of legal advice is unlikely to be achieved.

The model of legal advice centre for the Isle of Man would, in all reality, to work effectively have to be a permanent centre fully staffed and manned. For the reasons as to why a Civil Court Duty Advocate Scheme wouldn't work, a part time legal advice centre would not work either. What would happen to a Client's case after they had received their initial advice? Who would have conduct – the advocate or the centre? What if further advice is required, how is that paid for? At what stage would access to legal aid be available? What about the right to choose legal representation?

Many advocates on the Isle of Man provide pro bono services in addition to legal aid and privately paid work. Those individuals requiring pro bono advice are usually those that fall between the gap of being eligible for legal aid and those who can afford representation. In some cases, such as DHSC Appeals and Employment Tribunals, advice can be provided on Green Form however advocates would usually appear at the hearing on a pro bono basis. The IOMLS operates a scheme manned by trainee advocates in respect of DHSC Appeals, which is a pro bono scheme. Notwithstanding that a trainee advocate conducts such case, and can appear before certain Tribunals such as the Employment Tribunal, the duty rests with the supervising advocate to ensure the work is completed to a professional standard and undertaken properly. The advocates' terms of business and insurance covers the work, notwithstanding the free nature of the same. The advocate and their trainee are subject to the supervision of the IOMLS and answerable to the ADT.

If legal advice centres were established, and manned by non-qualified advocates, who would be responsible for the advice given, if the same was wrong? Who would check the advice and supervise the advisors? Would there be an insurance policy in place to cover any mistakes, if so who would provide and pay for it? Would the legal advice centre be a permanently staffed operation like in the UK and if so, how would that affect the independence of the Manx Bar? Further, if a permanent operation, presumably run by Government, the same issues as to perception of bias and lack of independence would arise as discussed within the PDU proposal. If not permanent, and run on a drop in centre basis only, how would cases be followed up and conducted? How would those case be funded if Green Form is disposed of?

Is it fair for advocates' practices to fund such a centre when the same advice is currently being offered within the current business models operated across the legal profession? The Government would, in any event, still have to provide funding and resources to cover a legal advice centre. On what basis and to what degree would these be provided? It is of particular concern to the IOMLS that the current legal aid office is not being resourced adequately at present which is causing significant difficulties for all those involved in the administration of justice. If the Government cannot adequately resource the current provision, why would it be better able to resource a new legal advice centre? If this was taken as the way forward, what would prevent the Government from removing resources in the future and how then would access to justice be obtained and maintained?

The IOMLS cannot see that there is currently any difficulty to accessing legal services. The LAC has not produced any evidence to show that there is. It is therefore very difficult to envisage how legal advice centres would improve the current provision.

Should alternative dispute resolution and in particular mediation, be promoted or made mandatory?

LAC Background

Alternative dispute resolution (ADR) is the process whereby the parties to a dispute are assisted by a third party to resolve their disputes in an optimal fashion which meets as many of their needs as possible. In Arbitration, the parties agree that the decision of the Arbitrator will be accepted by the parties in dispute. In mediation an impartial third party acting as mediator helps the parties to reach their own solutions for resolving their dispute. The Committee is primarily, but not only, concerned with mediation services.

The best case mediation outcome is that proceedings (and associated costs and delays) are avoided altogether. If however, proceedings have commenced then mediation can bring the matter to a much quicker conclusion in the most cost effective manner.

The LAC wishes to consider the following possible changes:

To recommend legislative change to make Legal Aid available for ADR/Mediation prior to the instruction of Advocates.

To require the use of ADR/Mediation before the grant of Legal Aid. This recommendation does not require legislative change.

Law Society Response to the above possible changes:

Mediation is an effective way of resolving disputes without the need to go to court. It involves an independent third party - a mediator - who helps both sides come to an agreement.

Mediation is a flexible process that can be used to settle disputes in a whole range of situations.

The role of the mediator is to help parties reach a solution to their problem and to arrive at an outcome that both parties are happy to accept. Mediators avoid taking sides, making judgements or giving guidance. They are simply responsible for developing effective communications and building consensus between the parties.

The focus of a mediation meeting is to reach a common sense settlement agreeable to both parties in a case.

Mediation is a voluntary process and will only take place if both parties agree. It is a confidential process where the terms of discussion are not disclosed to any party outside the mediation hearing.

If parties are unable to reach agreement, they can still go to court. Details about what went on at the mediation will not be disclosed or used at a court hearing.

Both parties share the cost of mediation, which will depend on the value and complexity of the claim.

Therefore, it is quite clear that mediation cannot be made mandatory as the whole model of mediation is built around a willingness and cooperation to resolve matters. Sometimes parties are too entrenched to effectively mediate. On other occasions, it takes some time for parties to calm down and understand both sides of a case, before mediation becomes a viable option.

The IOMLS understands from its members that mediation (primarily) and other forms of ADR are considered at all times throughout a case and is offered and/or used whenever appropriate.

Further, Part 7 Chapter 9 of the HCR provides for mediation in civil cases. The standard directions issued by the Family court also provide for mediation in family disputes. However, mediation cannot be Ordered unless all parties agree, as that is the fundamental basis on which it is based.

In the Isle of Man in civil and commercial litigation the model of mediation adopted is that of shuttle mediation. Each party, accompanied by their advocate, will be placed in a separate room and the mediator will have his own room. The mediator will have all of the case papers (usually the pleadings, reports, witness statements and schedules of damages) in front of him as well as a mediation position statement. The mediator will then shuttle between each party in an effort to limit the issues between the parties and broker a settlement deal. In civil and commercial

mediations the day will usually start off by all parties being in the same room and the mediator will confirm the documents he has received (and that they have been read) and will confirm his role for the day. In some cases the parties will decline such an opening meeting as they do not wish to be in the same room. If the case settles successfully as a result of the mediation, it is sometimes appropriate for the parties to meet together at the end to agree and sign the mediation settlement agreement. Sometimes, it is a term of the settlement that one party apologises or something else of that nature, and the parties will be brought together for such to occur. Clearly, no court has the ability to Order an apology! Mediation is not always successful, but sometimes certain issues can be narrowed and/or agreed, which then has the net result of limiting the scope of any court proceedings, and in that regard mediation should be seen as a success. Most of the time, civil and commercial cases can be easier to resolve by way of mediation as the court will usually be looking at an amount of compensation to Order to be paid by one or other party. Therefore, these mediations are often focussed on a figure and are not quite as personal and entrenched as family cases.

Family mediation works in an altogether different way, for obvious reasons. In family cases there is usually an ongoing relationship notwithstanding the breakdown of a marriage or partnership. There may be children involved or long term financial involvement and therefore it is important for the parties to be able to discuss the future together and reach agreement in that way. That said, in some rare cases, shuttle mediation may be more appropriate. In family mediation therefore it is recommended that there be two mediators present as a matter of best practice. This protects the mediators from allegations of bias or anything else and also can assist in the parties understanding and negotiation. In family cases the parties are often entrenched in their own positions and find it extremely difficult to see things from the other person's perspective. Sometimes one party has absolutely no understanding as to how the relationship has broken down and believes that everything was going well. The benefit of having two mediators in that situation is that whilst one mediator is discussing matters, the other can observe the parties to ensure they understand what is being said and are not taking things the wrong way. Often mediators put forward the position of one party to the other party in order to ascertain the other party's view, which can be misinterpreted as the mediator taking sides. The second mediator assists in such circumstances to reiterate that it not

what is taking place. Further, parties undertaking family mediation are often in a very difficult and vulnerable emotional state and at times will need emotional support throughout the process. In cases where violence is a feature, it is not recommended for a sole mediator to conduct the mediation at all. However, it should be recognised that there are many relationships where one party dominates the other and this sometimes cannot be picked up by a sole mediator who is focussing on the job in hand. A second mediator is far more likely to pick up on this and the mediation can be conducted in such a way to ensure that one party is not being dominated or emotionally pressured into agreement. Advocates do not, as a matter of course, attend family mediation as cooperation between the parties is key for moving forward with their lives. Therefore, the mediator does not have the benefit of another professional person being in the room to assist, if required.

The IOMLS is aware that family mediators on the Island are currently very unhappy with the manner in which mediation is being delivered under the current legal aid regime. To train, qualify and maintain accreditation as a mediator takes a significant investment of time and money. The number of mediations that take place on the Island can make it difficult for mediators to get their required number of “flying hours” or maintain their accreditation. Co-mediating is one way of achieving that. The current system implemented by the LAC without proper or full consultation, has resulted in a fixed fee for mediation regardless of the issues and complexity involved. If mediators want to co-mediate they must split the fee between them (which is very low for the work involved) if they cannot obtain consent from the LACO to co-mediation.

We have very few civil and commercial mediators on the Island and members report that in most of these cases they use off Island mediators. There are a higher number of family mediators but many of these refuse to work under the current legal aid regime and therefore access to mediation is limited, which can cause delay in progressing cases.

The proposal that legal aid should not be granted until mediation has been undertaken is non-sensical. How would a party receive advice in terms of their case, what they are and are not entitled to, the mediation process and even their entitlement to legal aid, if mediation had to be undertaken at such an early stage?

How would a mediator be able to negotiate a settlement in any case without having the benefit of the papers, statements, schedules and other documents. Mediators cannot give advice to the parties and therefore, if legal advice had been restricted prior to mediation, it is respectfully submitted, mediation is likely to be far less effective than when it is used at the appropriate point in the proceedings. The appropriate point will vary on the facts of each and every case.

Presently, legal aid certificates require the parties to negotiate in any event. The LACO will enquire as to whether mediation has been considered and if it has been discounted an explanation is required. There are cases where mediation is not appropriate based on the facts of the case or the particular traits of the parties.

Where only one party is legally aided there can sometimes be great difficulty in agreeing mediation. The privately funded party will be aware of the limitation on the legal aid certificate and, sometimes, will try to use this as an advantage to bolster their position. The LAC will never have control over the manner in which privately funded parties conduct their cases.

The fixed fees introduced by the LAC in relation to mediation are, with respect, lower than certain manual servicemen charge such as plumbers and electricians. £55 per hour to conduct 10 hours of mediation, is quite frankly derisory. Mediators in the UK do not work for such low fees, nor should they when you take into account the work involved (as mediation is not a turn up on the day and figure it out system), the training, accreditation, professional indemnity and other operating costs.

The IOMLS cannot understand the LAC's proposal to make mediation available prior to any advocate involvement. Given that the context in which the mediation will be conducted i.e. in relation to a legal dispute, legal advice is absolutely vital. If parties enter into mediation without the benefit of legal advice, and later find that they have missed an entire part of their claim because they were not aware of their entitlement i.e. loss of future pension in a personal injury case, or spousal maintenance in a family case, they may well then have to make an application to the court to open up the mediation settlement or they may well seek to sue the mediator for not advising them. This would simply increase costs and claims and would leave mediators entirely exposed. How, even, would a party know about mediation?

Advocates currently ascertain the appropriate stage within proceedings for mediation to take place. That is based on experience and knowledge and is entirely driven by the facts of the case and the legal issues involved. The current system should not delay or add to the cost of running a case, if it is undertaken at the appropriate stage within the case. There is no evidence put forward by the LAC to show that the current system is not working, adds to expense and delays case progression. No statistics have been produced as to how many cases move to mediation (or other ADR) and how many of all cases settle by way of mediation (or other ADR).

It is accepted by the IOMLS that mediation and ADR is a very important part of the litigation process. Advocates are aware of the benefits of mediation and the fact that it should be considered in all cases. It is submitted that advocates use mediation and other ADR in a much wider manner than is presently understood by the LAC. However, the current system is untenable and is not such to encourage mediation. Mediation should be properly funded and advocates should be trusted to utilise the same, where appropriate, at the relevant point in the proceedings, and should not be dictated to or have their funding restricted in any way because they do not believe the time is when dictated to them is in the best interest of their client or the progress of the case. The advocates handling the cases are the experts and should be allowed to do their job unimpeded. A properly resourced mediation system would, however, be of great benefit to the Isle of Man and the LAC should focus its attention on ensuring this going forward.

Should a unified legal aid service be developed?

LAC Background

A Unified Legal Aid Service represents the amalgamation of the Criminal and Civil Legal Aid systems under one central system of administration.

A system of Unified Legal Aid works in England and Wales where it is administered by the Legal Aid Agency.

The LAC wishes to consider the following possible changes:

Ultimately, recommendations include that the administration of both Criminal and Civil Legal Aid sit together in one Government Department and that this be achieved through legislative change and as an interim step, the Chief Registrar be invited to extend delegation to effect a unified system.

As part of this interim measure, the Committee proposes that administrative responsibility for undertaking financial and legal merits tests be unified within the Legal Aid office so that both Civil and Criminal cases are assessed in the Legal Aid office.

In order to maintain immediate access to justice, the Committee proposes that Courts of Summary Jurisdiction be empowered to issue limited Legal Aid Certificates providing representation to a maximum of 6 hours work to be completed within 8 weeks. The Defence Advocate would need to agree a case management strategy with the Certifying Officer who would grant or refuse subsequent extensions, in the same way as civil matters proceed presently.

Law Society Response to the above possible changes:

The current system of criminal legal aid works extremely well as it is unhindered by bureaucracy and needless correspondence. A criminal defendant potentially has their liberty at stake and at the very least any conviction is likely to have a significant impact on their life going forward.

Criminal legal aid is granted by the summary court, usually at the first appearance. The advocate is then trusted to run the case, in conjunction with the defendant, in the most appropriate manner. There is no interference in the advocates' defence strategy, which is a matter for the advocate and his client alone. The only involvement of the legal aid office is in relation to disbursements to be incurred, which is already impeding the ability of an advocate to fully explore and run a defence. Further, it is clear that the impact of a conviction is not understood by the LAC, which is evident from their request for the IOMLS to consider proportionality in criminal cases. The LACO often seeks to reduce the limit of disbursements being incurred, which can often be required as a result of the failure of the Police to properly investigate the matter. Members have reported issues in this regard to the

IOMLS. Further, members report that delays in obtaining approval for disbursements is leading to delays in cases being progressed and a waste of costs and court time.

The current legal aid administration is significantly under resourced and is struggling to manage the administration of civil and family legal aid. Beyond doubt it cannot cope with taking over responsibility for the criminal legal aid system.

Whilst the IOMLS fully appreciates and understands the administrative benefits of having all legal aid physically dealt with under one roof, which would cut down in processing times, the likelihood of papers being lost and delays in respect of payments, the IOMLS cannot support any measures that would lead to criminal legal aid being administered in the same manner as civil legal aid.

In a civil case parties are invariably arguing over money, not their liberty. It is therefore appropriate for an advocate to explain to the LACO the rationale of the steps being taken in any case and justifying such expenditure. The test applied under the legislation is whether a person of reasonable means properly advised would incur the cost or take the step requested. Civil advocates justify their extensions on this basis and have to convince the LACO of the reasonableness of such request.

If such approach was to apply in criminal cases there would be a theoretical limit on the ability of a defendant to defend himself properly and therefore this is likely to breach Article 6 of the Human Rights Act. A defendant should not in any way be impeded or have their access to justice delayed.

In the circumstances therefore, whilst it is accepted that it may well be more helpful to have all of the administration and papers under one roof, there should be absolutely no move away from the summary court issuing criminal legal aid on an open certificate. There is presently no delay by the summary court in issuing legal aid certificates. The advocates' bill remains subject to full assessment at the end of the case and the costs officer will reduce the bill if he considers that the advocate has acted unreasonably or has undertaken unnecessary work. That is the measuring stick to ensure advocates are not wasteful of public resources. If an advocates' bill is reduced by 50% or more the costs office must report the advocate to the ADT

immediately. The IOMLS is not aware of this ever occurring. Further, the LACO can, if an advocates' conduct is wholly inappropriate, seek to remove them from the legal aid panel. The IOMLS is not aware of any advocates being removed from the panel as a result of their conduct.

Further, it is believed that there should be some independence between the LACO and costs officer, to ensure that there is no undue influence or perception of bias between the two. The fact that the costs officer is currently part of the court and not legal aid administration gives this separation and independence of systems.

Review of the Current Legal Aid Rates

This is not an aspect considered at all by the LAC proposals and is a very important feature from 2007 that has been wholly ignored. The IOMLAS therefore makes submissions as to the current legal aid rates and why the same are wholly deficient.

This formal submission is made by the IOMLS in relation to the rates of remuneration currently paid under the various elements of the legal aid scheme. The IOMLS formally requests an increase in the rates paid under legal aid.

Since April 2009, legal aid has been remunerated at the following rates:

- (i) £115 per hour for an advocate of less than 5 years standing (a "junior" advocate)
- (ii) £135 per hour for an advocate of 5 or more years standing (a "senior" advocate)

The history of Legal Aid remuneration in the Isle of Man over recent years is one of which the Isle of Man Government should be truly ashamed. Goodwill offered by advocates undertaking legal aid work has been abused by the Government, who have buried their heads in the sand, who have ignored the concerns of the IOMLS, and who have become indifferent to the fundamental principles of justice for all.

The history of such Government's indifference to the principles of justice for all is lamentable:

In January 2002 the Council of Ministers appointed the LSC to consider various aspects of the legal aid system, including the fee structures for those providing legal services.

In May 2003 the LSC submitted its report to the Council of Ministers. It is understood that the LSC recommended that legal aid rates ought to be set at a rate of £150 per hour.

The publication of the report was delayed, further consultations took place, and further consideration of the report was given by the Council of Ministers in February 2004, July 2005, April 2006 and February 2007.

In January 2006 a meeting took place between the IOMLS and the Chief Secretary's Office, at which it was indicated that the recommended rate of £150 per hour was accepted as being appropriate. It was stated that an immediate increase had not been budgeted for, and that accordingly the intention was to phase this rate in this over a period of 3 years

In May 2007 the Council of Ministers produced its own report, detailing the LSC's report, its own conclusions, and its intentions.

On 1 May 2008 the Criminal Legal Aid Order 2008 (which applied to all types of legal aid across the board) came into force. In the intervening period legal aid rates had not been reviewed since 1 December 2005.

The 2008 Order provided for the phased introduction as agreed by the Council of Ministers, so that legal aid rates were set for the following 3 years, as follows:

- (a) 1 May 2008 to 31 March 2009
 - Junior Advocates - £100 per hour
 - Senior Advocates - £120 per hour
- (b) 1 April 2009 to 31 March 2010
 - Junior Advocates - £115 per hour
 - Senior Advocates - £135 per hour
- (c) 1 April 2010 until further Order

Junior Advocates - £125 per hour

Senior Advocates - £150 per hour

The May 2007 report of the Council of Ministers indicated that thereafter the rates should be reviewed annually by Treasury.

In April 2010 the Criminal Legal Aid Order 2010 came into force. This revoked the 2008 Order and froze the legal aid rates at £115 per hour for junior advocates and £135 per hour for senior advocates.

Legal aid rates have now remained at this frozen level for the past 6 ½ years.

Furthermore, backdoor methods of cutting legal aid rates have also been introduced:

(i) Legal aid had always been based on the standard system of using units of 6 minutes for a standard letter written or received. Such standard unit charging system applies to private work both in the Isle of Man and elsewhere in similar jurisdictions such as England and Wales. The LAC (when making its recommendation), and the Government (when eventually setting the rates) had worked on the basis of this method of calculation. The HCR introduced a provision that (in relation to awards of costs against an unsuccessful litigant) the paying party would only have to pay for a unit of 3 minutes for a standard letter received. This was quickly adopted by the legal aid office, so that an advocate undertaking work on legal aid would only be paid for 3 minutes for a standard letter received. This operated, at the stroke of a pen, as a pay cut for legal aid advocates in the region of 10% (thereby instantly “rewinding” the pay of legal aid advocates effectively to the levels paid in 2008). Legal aid rates had been set on the basis that 6 minutes would be allowed for letters received.

(ii) The Police Station Duty Advocate Scheme had always operated on being paid on a “per hour or part of an hour” basis. When the Police Station Duty Advocate Scheme was established, this basis was agreed as a way of recompensing the advocates for the fact that the majority of Police Station Duty Advocate work was carried out during unsociable hours. Legal aid rates make no allowance for “overtime”, or working unsociable hours, unlike civil servants who are adequately

compensated for unsociable hours or weekend working. The Police Station Duty Advocate Scheme operates to provide an on-call advocate from 7pm until 7am each night, and all day on Saturdays, Sundays and all public holidays.

The payment for a “part hour” provided a small acknowledgement to the fact of the extremely unsociable hours worked under this scheme. It in no way truly compensated for the unsociable hours worked. Nevertheless, this has now been removed altogether, so that these extremely unsociable hours are paid at the basic legal aid rate for actual time spent.

The recognition (in the form enhanced hourly rates) given to public sector employees for working unsociable hours does not, it seems, apply to advocates.

(iii) Many legal firms employ lawyers qualified in other jurisdictions. Furthermore, many Isle of Man advocates start their careers firstly by qualifying in other jurisdictions. It was previously the case that work was paid for at the hourly rate of the advocate dealing with the matter. This applied to all work undertaken on the matter, even if that were delegated within a firm to be carried out by someone else. This was on the basis that the advocate still had to organise and supervise the work. Such supervision time is not separately charged for by the advocate. Often this work would be undertaken by a lawyer qualified in another jurisdiction. Again, the legal aid rates previously set were set on the understanding that this was the case.

The introduction of a new (and reduced) rate for any time spent by a non-Isle of Man qualified lawyer (at £85 per hour), again at a stroke of the pen, further reduced the pay of legal aid advocates. This is applied even where work is undertaken by a lawyer qualified in another jurisdiction.

The unfair situation where the senior rate applies only after 5 years call as a Manx advocate (even where the advocate may already be an experienced lawyer from another jurisdiction before then requalifying as a Manx advocate) has additionally never been addressed.

(iv) Erosion by inflation, created by the practice of leaving legal aid rates frozen, whilst the cost of providing those services increases, means that advocates are no better off now than in 2008.

Ignoring entirely the above cuts to Legal Aid, since 1 April 2009 (the last increase in legal Aid rates) the CPI has risen from 104 (end March 2009) to 122.1 (end October 2016) – an increase in the Cost of Prices Index of 17.4%. The legal aid rates since 1 April 2009 have therefore been eroded by inflation of 17.4%, with no review for 6 ½ years.

The buying power of £115 (junior advocate) today is the equivalent of just £97.95 in 2009 (junior advocate rate £115 per hour x 104/122.1). For a senior advocate, £135 today has the equivalent buying power of just £114.99 in 2009 (senior advocate rate £135 per hour x 104/122.1).

The situation is, however, even worse than simply 17.4% erosion through inflation. The increase in 2009 had been entirely offset by the reduction in fees brought about almost simultaneously by the HCR (above). The reality is that legal aid remuneration has in practice remained the same since 2008. Inflation since May 2008 has been 19.47% (CPI end April 2008 102.2, CPI end October 2016 122.1).

The actions, and failures, of Government over the past 13 years, since the LSC report, are a scandal. Many advocates (and in particular many senior advocates) are no longer prepared to undertake legal aid work at all. Many of those still prepared to undertake legal aid limit the amount they will take on.

The Goodwill, provided by advocates over so many years, has equally been eroded.

The attitude of the LAC appears to be that “advocates do legal aid work not for remuneration but for the public good - pro bono”. If such impression as to the LAC’s attitude is correct, then the LAC has fatally misunderstood the sentiments of the profession. Advocates undertaking legal aid work expect to receive reasonable remuneration – not “top dollar” – just reasonable pay.

The LSC recommended, in 2003, £125 per hour for junior advocates and £150 per hour for senior advocates. Ignoring entirely the 10% cut in remuneration brought about by the HCR, inflation since 2003 has been 52.35% (RPI October 2003 110.4, RPI October 2016). Those rates today (increased by inflation alone, and ignoring entirely the 10% cut brought about by the HCR) would be £190 and £228 per hour respectively.

At a minimum, the rates of remuneration ought to be increased by either:

- (i) a 30% increase in the rates (such an increase would merely redress (a) the effective 10% cut which was implemented by the HCR, and (b) the erosion by inflation since 2008); or
- (ii) the standard time allowed for a standard letter received should be reinstated to 6 minutes and an increase of 17.4% in the rates.

The above would merely reinstate legal aid remuneration back to the level (in real terms) of 2009.

Advocates are not seeking an increase in rates in order to increase their profits and to ensure they can afford an expensive lifestyle. If legal aid advocates were financially driven they would, in actual fact, practice commercial law where there is a lot of money to be made. To assist the LAC understanding at Appendix 35 there is a basic breakdown of the fundamental operating costs of a legal practice. These are the costs required simply to open the doors and are based on a small legal aid practice. The costs do not account for the advocate principal receiving any remuneration at all. Many of these costs cannot be further reduced and are all essential to the operation of a practice.

The failures of Government properly to fund the legal aid system are rapidly leading to a two-tier system of justice - those who can afford to pay privately, and those who cannot. For those who cannot, they face the risk of rough justice, or no justice at all. And those who qualify for legal aid are often those who need assistance the most.

Increasingly litigants are representing themselves. This adds to court time and Court costs, as litigants who have no real understanding of the (increasingly complicated) system attempt to navigate it. Where the opposing party is legally aided, it additionally adds to the legal aid bill of the opposing party, whose advocate has to undertake more (poorly paid) work to try to keep matters on track. There is now a trend from the judiciary to Order the legally aided party to undertake certain tasks that the litigant in person would ordinarily be responsible for (such as collating bundles, legal arguments etc), which cost is either picked up by the legal aid budget, or if the LACO refuses to allow the funding, the advocate must produce at their own cost. The court has made it abundantly clear that an advocate has an overriding duty to the court and must comply with court Orders regardless of whether they have funding in place or not. See Creer v DHA Judgment of Deemster Doyle 29 July 2016 (Appendix 36).

The current trend of increasing bureaucracy, micro-management of legal aid matters, and reduction of remuneration, seems designed to remove the right to legal aid representation from the poorest members of society. Ultimately it is access to justice that will suffer, with the poorest and most vulnerable members of our society paying the penalty.

IOMLS RECOMMENDATIONS FOR MOVING FORWARD

The IOMLS remains concerned about the speed at which our the current review is being undertaken and therefore would like to respectfully suggest that we take a step back at this stage and consider adopting a similar approach to Jersey. Clearly Jersey, like the Isle of Man, is a small jurisdiction with its own financial constraints. The Isle of Man cannot be and should not be compared to much larger jurisdictions such as England and Wales and Scotland. Our economy, lifestyles, financial make up and professional workings are different and in some cases unique. This significant difference cannot be ignored and what works in other jurisdictions may not work in this jurisdiction. However, given the similarities between the Islands we firmly believe that the Jersey model of approach is a good one to follow, notwithstanding that the solutions may be different.

Neither the LAC nor the IOMLS can improve legal aid alone and a number of other stakeholders need to be involved in the consultation, solution identification and implementation of any changes, that can improve the current system. At no point can or should the review be focussed purely on cost savings. The LAC has identified itself that one of our strengths in the current delivery of legal aid is that the same is good value for money and we are more cost effective than our neighbouring jurisdictions. The IOMLS will not endorse such an approach. Access to justice for the most vulnerable members of Isle of Man society must at all times be the overriding factor and drive for change. Whilst it is accepted that such must be delivered in a cost effective manner, and the IOMLS will continue to work with the LAC to ensure that it is, simple cuts to services will not be tolerated by our members, as to tolerate the same will result in less fortunate and vulnerable members of Isle of Man society being left to fend for themselves and that is not what we have signed up for.

Therefore, what we would like to suggest, in the first instance, is a meeting of key stakeholders in order to ascertain how to conduct the review effectively. We would suggest that those stakeholders should be as follows:

Isle of Man Law Society
Treasury
Legal Aid Certifying Officer
Courts of Justice
Judiciary
Dept of Home Affairs
Attorney General's Chambers
Police
Court Welfare Officers
Probation

Thereafter a proper framework with working groups can be established and a timetable designed to move forward. The work already undertaken will not be lost and can form part of the work going forward. The LAC has already admitted that it has no resources or budget for reviewing the proposals in a detailed fashion. Therefore, working groups of key stakeholders should spread the workload and cost

of the review. Further, it is pointless looking for solutions and improvements without fully understanding how the same will impact upon others involved in the justice system and whether such proposals are even capable of being implemented. It is already clear from the proposals put forward by the LAC that there is a fundamental lack of understanding of how the justice system works, which is understandable given the lack of involvement of the LAC in the justice system of the Isle of Man.

One of our primary concerns is that advocates and the legal aid office are not the only people who really need to be on board if we are to effect real change that ensures access to justice remains. We need all key stakeholders to be a part of this and to sign up to a more effective working system, whether that be tweaking and improving what we already have or designing a completely new look legal aid system. This is a work stream that the Criminal Justice Board have been looking at for a number of years, but from legal aid's perspective, this review should and must go across all legal aid services not simply criminal.

Of the areas identified by the LAC as being weaknesses to our current system, the stand out factor is a lack of education and understanding of the current system, which has led to criticism and complaint. Perhaps, in the first instance, the LAC needs to better educate our MHKs and MLCs as well as senior civil servants as to why our current system is in fact a better one than that offered by neighbouring jurisdictions. The IOMLS is more than happy to assist with a programme of education and understanding and consider that having key stakeholders on board will make such education far more effective.

The IOMLS is committed to working with the LAC with regard to this review but not at the cost of access to justice. We truly hope that the LAC is committed to working with us to ensure access to justice is maintained in the long term.

November 2016

IOMLS Legal Aid Committee

Jane Gray, Terence McDonald and Vicki Unsworth