The Law Reform Commission

A REVIEW OF THE LEGAL AID SYSTEM IN THE CAYMAN ISLANDS

FINAL REPORT NO. 4

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FINAL REPORT

1. INTRODUCTION

1.1 The primary purpose of a legal aid system is to provide the services of an attorney-at-law to a person who is unable to afford one. A paramount function of a modern society is to develop a legal system, which promotes justice on the basis of equal opportunity for all its citizens. Government must therefore put in place the appropriate mechanisms, which will facilitate provision of legal aid to those who have been charged with certain offences or who desire to bring or defend a legal action but are unable to access justice due to economic constraints.

1.2 While the Constitution does not mandate a publicly funded legal aid system the Islands have for the past 32 years acted in accordance with the norms of the international community by providing such funding in both civil and criminal matters. Section 3 of the Legal Aid Law (1999 Revision) provides that persons charged with certain offences or who desire to take or defend legal proceedings in the Grand Court and who do not have the means to instruct an attorney shall be granted either free or subsidised legal aid for the proceedings and in any appeal.

1.3 As the population has increased and new crimes have been added to the statute book, the cost of prosecuting and defending cases has escalated. In 2004 the Attorney-General, in response to complaints about the rising cost of legal aid in the Islands, directed the Legislative Drafting Department to review the existing legislation and to prepare any necessary reform legislation. In September 2005 the matter was referred to the Law Reform Commission for more in-depth research and consultation. A discussion draft paper[1] and Legal Aid Bill was prepared by the Director of the Commission and submitted to the Commission on 3rd November 2005. The Bill was first addressed by the Commission on 3rd February, 2006.

[1] Appendix C

1.4 Since that time the topic of the reform of legal aid system in the Islands has become a growing subject of debate, in the Legislative Assembly, in the press and in the society at large. Concerns were raised in the Legislative Assembly in May 2007 regarding the perceived high costs of legal aid in the Islands. The legislators were also concerned that too many legal aid cases were being conducted by foreign attorneys. As a result the Attorney General requested that the Commission give priority to this matter, study the issues and prepare a report.

1.5 The Commission conducted a substantive review of the legal aid system in the Cayman Islands between October 2005 and February 2008. It also investigated how other countries provide legal aid. A range of issues was considered by the Commission as being critical to the determination of whether the legal aid system was functioning with efficiency. These are:

- whether the legal aid system may be reformed simply by improving the investigative and assessment process relating to the grant of legal aid;
- whether the system should be administered by a court-based legal aid administrator and other support staff;
- whether it would be more cost effective to establish other means by which legal aid could be provided such as by-
  - (a) a legal aid clinic;
  - (b) a Public Defenders Office;
  - (c) a mixture of clinic, public defender and the private bar;
- whether the recovery system, where certain persons who are granted legal aid are liable to pay the legal aid fund back, should be improved;
- whether legal aid fees are too high and should be capped; and
- whether pro bono work should be mandatory in order to give the public access to more legal services.

1.6 The recommendations for reform contained in this report are the culmination of in-depth legal research and deliberations as well as extensive consultation with critical stakeholders. The stakeholders who responded were the Honourable Chief Justice Smellie,[2] the Cayman Islands Criminal Defence Bar Association

[2] Memorandum to the Commission dated 15th February, 2008

(CDBA),[3] the Cayman Islands Law Society (CILS)[4] and Dr. John Epp[5]. The report of the Commission was also informed by the examination of several legal aid models originating from other common law jurisdictions.

[3] Letters to the Commission dated 14th January, 2008 and 15th February, 2008
[4] Letter to the Commission dated 18th February 2008
[5] In his personal capacity as author of several articles on legal aid; Submission of the Office of Complaints Commissioner on Questions Posed by the Law Reform Commission on the Legal Aid System on the Cayman Islands, 5th February, 2008

EXECUTIVE SUMMARY

2. Based on responses received from stakeholders and its research on the legal aid systems in other jurisdictions the Commission concludes as follows-

- **ACCESS TO JUSTICE**- The access to legal aid is an integral aspect of the administration of justice in the Cayman Islands and consequently the delivery of appropriate and cost effective legal aid in both the criminal and civil areas is essential. The existence of a modern and transparent system of legal aid not only provides access to justice for those in need it also enhances the image of the Cayman Islands as a sophisticated, democratic and stable jurisdiction.

- **COSTS**- The concerns expressed by the legislative and executive arms of government focus mainly on excessive costs and the fact that too many of the services are being provided by foreign counsel. While the Commission agrees that the containment of excessive legal aid costs is in the public interest the Commission considers that the present system of provision of legal aid services by the private bar in general offers good value for money. It should also be noted that every year the amount of public money spent on prosecuting criminal cases exceeds the amount spent on legal aid. The budget for the prosecution and support unit of the Cayman Islands Legal Portfolio has been examined and our research shows that the budget agreed for prosecution in 2008/9 is $3,164,031 while the legal aid budget for the same period is $937,000. In 2007/8 the budget for prosecution was $2,136,000 while the legal aid budget was $1,850,000. It should further be noted that the legal aid budget consists of costs related to both civil and criminal legal aid.

- **EFFICIENCY**- The Commission is of the view that a more transparent and efficient administration of legal aid, while not necessarily resulting in reduced costs, could serve to more readily demonstrate that legal aid funds are being appropriately spent thereby satisfying the objective of accountability inherent in the legislators concerns.

- **APPOINTMENT OF LEGAL AID ADMINISTRATOR**- The Commission considered whether an independent Legal Aid Commission would be the best model to administer legal aid in the Islands and it concluded that this may add to the costs of legal aid. The Commission's suggestion is that the current court-administered model of legal aid be maintained but that efficiency be improved by the appointment of a specially designated Legal Aid Administrator, with adequate support staff and resources, to undertake the task of administering legal aid. The Administrator should be part of the judicial administration for accountability purposes but would be solely responsible for deciding on the grant of legal aid subject to an appeal by applicants to the Grand Court.

- **AMEND THE LEGAL AID RULES**- The Commission is of the view that the general nature of the wording of the eligibility criteria in the Legal Aid Rules, 1997 ("the Rules") allow for a wide exercise of discretion in what is taken into account in determining the assignment of legal aid. The Rules neither define nor provide a method of calculating the "disposable capital" or "disposable income" of an applicant. The Commission finds these provisions imprecise and believes that greater clarity could be established by the provision of additional details on these concepts and how they are to be determined in practice. The Commission recommends the incorporation of more detailed provisions similar to those contained in, for example, the legislation of Bermuda.

- **CONTRIBUTIONS REQUIRED**- Further, the Commission recommends the revision of the Legal Aid Law and Rules to make it clear that contributions may be required of persons above a certain specified income, that the Government may require a charge on property as a condition of legal aid in certain circumstances and that such contributions will be recoverable and enforceable by the Attorney-General in a court of competent jurisdiction.

- **PUBLIC DEFENDER-** The Commission considered a public defenders scheme and has determined that such a scheme would involve significant expense, going beyond just the salaries of the lawyers, to include secretaries

and paralegals expenses which the private practitioners must assume as part of their own costs of doing business. The current legal aid system, the judicare model, provides a high calibre of service and is far less expensive ultimately than a public defender's scheme.

- **LEGAL AID CLINIC**- A legal aid clinic would not be appropriate to provide defence in criminal cases but could assist in civil cases and the cost of civil legal aid could be reduced by the introduction of at least one legal clinic modelled along those which are operated by the Hugh Wooding and the Norman Manley Law Schools located in Trinidad and Tobago and Jamaica respectively. We were advised that there are plans under consideration for the establishment of a legal aid clinic connected to the Cayman Islands Law School.

- **COSTS IN OTHER JURISDICTIONS**- It is very difficult to compare costs in the Islands with costs in other jurisdictions as it will be necessary to compare not only the type of cases dealt with but also the number of cases within any particular period and how the services are delivered. Overly simplified comparative calculations may be unhelpful or, worse, misleading. It is not useful to use other overseas territories as comparators as most of them do not have a tradition of providing a structured legal aid scheme (with the exception of Bermuda). The Commission nevertheless did examine the cost of legal aid in Bermuda, Barbados, Gibraltar as well as other jurisdictions and is not persuaded at this time that the costs of legal aid for standard cases in the Islands are unduly high. The local rates are lower than in Bermuda and the cost per person is only marginally higher.

- **TENDER PROCESS AND FIXED FEES**- Notwithstanding the fact that the Commission is of the view that local legal aid costs are not excessive, the Commission believes that costs can be better contained by capping the costs of long and complex cases. This could be effected by implementing a tendering process and selecting specially qualified attorneys to undertake such cases. The cases would be managed through individual case contracts based on case plans and estimates agreed to by the Legal Aid Administrator after

consultation with the attorneys. The alternative would be to impose fixed fees for such cases and provide that there is a right to request a review of a decision for remuneration only in extraordinary or exceptional circumstances. The Commission also believes that fixed fees could be implemented for duty counsel at police stations.

- **ELIGIBILITY**- The Chief Justice and the CDBA have recommended changing the eligibility for criminal legal aid by widening the types of criminal offences to which legal aid applies. The CDBA was of the opinion that legal aid should be extended to cover all cases- subject to means testing- in which a defendant faces a risk of losing his liberty. The Chief Justice has also recommended that grants should be allowed for all offences which carry more than six months' imprisonment. The Commission is of the view that the ambit of the suggested changes is too wide. The Government needs an approach that strikes a balance between the provision of legal aid in criminal cases generally with the need to ensure that those who face serious sentences have legal representation. Most jurisdictions apply limits to the offences legal aid can cover. This is done sometimes by specifying the types of offences but the modern trend is towards merits tests. The Commission had in a prior paper[6] recommended that the scheduled offences should be widened to include the offences set out in Appendix A of this report.[7] Alternatively, a merits test similar to that adopted in the United Kingdom could be used. This test takes into account the following considerations in criminal cases-

    (a) whether the individual would, if any matter arising in the proceedings is decided against him or her, be likely to lose his or her liberty or livelihood or suffer serious damage to his or her reputation;
    (b) whether the determination of any matter arising in the proceedings may involve consideration of a substantial question of law;
    (c) whether the individual may be unable to understand the proceedings or to state his or her own case;

[6] 28th March 2006; Appendix C
[7] See also Bermuda Legal Aid Act 1980

(d) whether the proceedings may involve the tracing, interviewing or expert cross examination of witnesses on behalf of the individual; and

(e) whether it is in the interests of another person that the individual be represented.

- **TAXATION OF COSTS**- The Commission is of the opinion that in order to ensure that lawyers are being appropriately paid (i.e. not being overpaid or underpaid) for their services that the courts should have staff dedicated solely to the taxing of legal aid costs. The provisions regulating taxation of bills of costs under the Legal Aid Rules are adequate to ensure that bills of costs are taxed in accordance with accepted standards and no amendment thereof is necessary.

- **PRO BONO**- While pro bono work does assist a jurisdiction in ensuring that those who are unable to afford legal representation have a wider access to legal services, the Commission does not believe that the Islands should seek to reduce legal aid costs by making pro bono work mandatory. The Commission however strongly urges that pro bono work should be more actively promoted by the associations representing lawyers. All of the responders to the consultation agreed that mandatory pro bono work was not the solution to legal aid problems.

3. ADMINISTRATION OF LEGAL AID

3.1 In his 2002 paper entitled "Legal Aid: Models of Organisation" Roger Smith[8] sets out key questions which should be answered by policy makers when evaluating any legal aid model for their jurisdiction. Some of these questions are-

(a) what mandatory duties does the jurisdiction accept in relation to public funded legal services under the 1950 European Convention on Human Rights?
(b) what discretionary services does the jurisdiction wish to provide?
(c) what criminal services does the jurisdiction wish to provide? In particular, what services does the jurisdiction wish to provide prior to a suspect being charged and during interrogation by the police?
(d) in relation to civil cases, how much of family, private, public and poverty law claims does the jurisdiction wish to cover?
(e) how do publicly funded services interrelate with other forms of funding services or different ways of resolving a dispute?
(f) should legal services extend beyond representation to advice?
(g) does the jurisdiction accept a need to provide information and public legal education?
(h) does the jurisdiction wish to incorporate funding for public interest litigation and casework? If so, how?
(i) what test of means is envisaged for criminal cases?
(j) what test of means and merit is envisaged for civil cases?
(k) who will administer the tests of means and merit? Will the providers do this or should there be some form of third party certification?
(l) how are criminal services to be delivered? Does the jurisdiction favour private practitioners, salaried practitioners, some form of 'public defender organisation' or some combination of delivery? What are the advantages and disadvantages of each system?[9]

[8] Director, Justice, UK 2002
[9] Page 1 of the paper which was written for a conference of the European Forum on Access to Justice held in Budapest on 5-7 December 2002

3.2 Legal Aid is regulated in the Islands by the Legal Aid Law (1999 Revision) which was first enacted in 1975 and the Legal Aid Rules, 1997 and they address most of the questions raised above.

- While the Constitution[10] does not mandate a publicly funded legal aid system, the Islands have for the past 32 years acted in accordance with the internationally recognised standards by providing such funding in both civil and criminal matters.
- Section 3 of the Law provides that where it appears to any court before whom there appears any person charged with a scheduled offence or who desires to take or defend legal proceedings in the Grand Court, that such person has not the means to instruct a legal practitioner to advise or represent him in any relevant proceedings, the court shall grant to such person a certificate entitling him to free legal aid or subsidised legal aid, for the preparation of his case and generally throughout such proceedings and in any appeal. Scheduled offences are offences set out in the Schedule to the Law and these offences include murder, arson, criminal libel, assault causing grievous bodily harm, forgery manslaughter and rape.
- The Court is responsible for the administration of legal aid including the evaluation of the means of an applicant. Where the court is not satisfied that a person is of insufficient means it directs a probation officer to make inquiry as to the means of an applicant and to make a report on oath to the Court in chambers on that person's means.
- The effect of the grant of a certificate is that the person to whom the certificate is granted shall have assigned to him the services of one or, subject to the approval of the Court, more legal practitioners.
- The practitioners who provide legal aid services are from the private Bar. The Clerk of the Court keeps a roster of attorneys-at-law who have intimated to him their readiness to accept briefs under the Law and are approved by the Chief Justice as suitable persons to hold such briefs. The Clerk of the Court offers briefs in rotation to those practitioners who appear upon the roster.

[10] Cayman Islands (Constitution) 1972/1101 as amended

- In both criminal cases and civil cases a means test is carried out on the applicant. The court takes into account the amount of the applicant's disposable capital; his disposable income; his ability to obtain employment and the likely cost of the proceedings. In civil cases the court also takes into account the nature and complexity of the proceedings or the intended proceedings. Further, a certificate may only be granted in civil cases if the Court is satisfied that the applicant appears to have a reasonable prospect of succeeding on the merits of the case.[11]

- The Rules do not provide a formula to assist in determining financial eligibility and the court therefore has a wide discretion in granting legal aid. In criminal cases an assisted person who is convicted of a scheduled offence may be ordered to pay a contribution towards the cost of his representation. In civil cases in certain specified circumstances where an assisted person succeeds in obtaining money or an interest in land or other property the court may order an assisted person to pay a contribution towards the cost of his representation.

3.3 Why therefore are there complaints by the legislative and executive branches of the government that the system is not working properly, that there is excessive expenditure and lack of transparency? The concerns expressed by the legislative and executive branches of government have focussed mainly on excessive costs and the fact that too many of the services are being provided by foreign counsel. While the Commission agrees that the containment of excessive legal aid costs is in the public interest the Commission considers that the present system of provision of legal aid by the private bar in general, offers good value for money. The Commission is however also of the view that a more transparent and efficient administration of legal aid, while not necessarily resulting in reduced costs could serve to demonstrate that legal aid funds are being appropriately spent thereby satisfying the objective of accountability inherent in the legislators' concerns.

3.4 The Chief Justice in responding[12] to the charge that the high cost of providing legal aid may be due to poor administration argues that it is a misplaced premise if discussions are commenced by suggesting, without further analysis, that the

[11] Rule 12 (1)
[12] Memorandum supra

cost of legal aid is too high. While he agrees that there are areas in which the system can benefit from reforms, he suggests that we run the risk of negatively impacting the current system of legal aid if added bureaucracy is introduced and substantive adjustments made to its operations solely on the basis of high costs. He believes that the present system offers good value for money and a high calibre of service.

3.5 The Chief Justice has explained that when it comes to cases involving the defence of a person's liberty in serious criminal cases, the existing legal aid process has been satisfying its mandate by ensuring that a vast majority of all those who apply for legal assistance are able to benefit.

3.6 The CDBA was also of the opinion that criticisms of the current system were unjustified. According to the Association-

> "We firmly believe that the continuous criticism of the legal aid system is unjustified and in many cases the product of misinformation and misunderstanding. Such criticism generally rears its head at budget time or following the collapse or failure of a high profile prosecution, especially in the rare cases where overseas counsel is employed at public expense. We would submit that attempts to apportion blame to the administration of the fund and/or the small number of practitioners willing to accept work at such modest rates is illogical and unfair. The legal aid fund is woefully under-funded and undervalued. It is testament to the dedication and professionalism of the court, its staff and legal aid practitioners that the criminal justice system continues to function as efficiently as it does. Allegations of 'wasted' public funds are wrongly directed at the legal aid fund and defence practitioners. If the Legal Department initiates a prosecution, the knock on effect is that legal aid will have to be awarded to those who are the subject of that prosecution (provided the means and merits criteria are met). If the prosecution fails to prove its case, and the defendants are properly acquitted, it cannot be said that defence practitioners or the legal aid budget are to blame.".[13]

[13] Letter of 14th January 2008

3.7 Although the Law provides for all applicants to be means tested and for probation officers to assist in providing information on the means of applicants the court confirms that many applicants are not means tested and that probation officers are not routinely utilised for this purpose. The legal aid office of the courts does not have the man-power to carry out such tests as it consists of one staff member only. [14]

3.8 The question that arises is, can most of the legal aid issues be solved by employing more staff and requiring strict adherence to a routine system of means testing or should the system be revamped and the administration of legal aid be carried out instead by a new Commission or some such body with adequate resources?

3.9 Similar challenges in its provision of legal aid faced the Canadian Province of Ontario in the 1990's, which led to a review of the system in 1996. In his paper entitled "The Reshaping of Legal Aid" Professor John D. McCamus [15] noted that the costs of legal aid had escalated dramatically and reached a crisis in the mid 1990s. As a result, services were drastically curtailed. At its height the Plan issued 230,000 certificates per year. Because of cuts to services the number fell to 80,000. The result was that thousands of Ontarians with serious needs for legal aid services were denied access to service with resulting negative consequences for them personally and for the administration of justice generally. For example, in some family law courts as many as 85% of litigants may have appeared without representation.[16]

3.10 The mandate of the Review, ordered by the Ontario Government, was to propose solutions regarding the design of a legal aid system that could manage its affairs in such a manner as to comply with a fixed budget and at the same time meet the legal needs of low income Ontarians in an effective and efficient way.

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[14] The Chief Justice however explains the lack of means testing by pointing out that the reason why most criminal applicants were not means tested was because "more than 90 per cent of all defendants in criminal cases qualify for legal aid since many come from poor backgrounds or have been in prison before and could not hold a job."

[15] Osgood Hall Law School, York University, Toronto; he led the review of 1996.

[16] See Report

3.11 A report ("the McCamus" Report[17]) was submitted in 1997 and the Ontario Government, pursuant to the recommendations therein, enacted the *Legal Aid Services Act, 1998* (the Act) which established Legal Aid Ontario (LAO) as an independent agency responsible for the administration of the legal aid system.

3.12 The McCamus Report provided principles for the restructuring of legal aid. Those principles included the following -

- the rationale of a legal aid system rests on the premise that a democratic society, committed to the rule of law, has an obligation to provide access to the law across its legal system;
- the system should be designed in light of an understanding of the existing needs for service;
- the system ought to provide high quality services;
- the system should place far less importance on "the negative liberty standard" and should move to a priority setting system that would take into account a much broader range of factors;
- the increasing emphasis placed by the state on cost effectiveness and accountability imposes demands on the capacity of the system to provide effective management and transparency;
- the system ought to be more experimental and innovative in its use of delivery models while being sensitive to particular communities, client groups, and areas of law;
- the system should play an important role in monitoring the effectiveness of the larger system and in proposing reform;
- the system must be structured in such a way as to institutionalise its independence from government;
- the system's governance structure must attract public credibility and legitimacy;
- there is a compelling case for stable multi-year funding by the government.

[17] "Blueprint for Publicly Funded Legal Services" 1997

3.13 The principles that a legal system should be transparent, managed effectively, independent and credible are of particular note. In this regard, the Chief Justice argues[18] that the successes of the legal aid system have been attributable overtime to the proper administration arising for the most part out of the direct involvement of the Judges and magistrates at no additional cost. The view is that the involvement of the judiciary has minimised the occurrence of waste, inefficiency and lack of transparency and this in turn has contributed towards the delivery of legal aid at a cost that was at tolerable levels when compared to similar models elsewhere[19].

3.14 The Commission examined how legal aid is administered in a wide variety of Commonwealth jurisdictions and we have noted that with few exceptions legal aid is administered by a commission, committee or similar body. Some of these bodies are independent of the government but most of them have some link with the executive. We have noted however that the court rarely plays a role in administering legal aid in the jurisdictions examined[20].

3.15 In Bermuda for example, a legal aid committee is responsible for the administration of legal aid. A staff of public servants, including a Senior Legal Aid Counsel and Legal Aid Counsel, supports the committee. The Senior Legal

[18] Memorandum, supra.

[19] The Chief Justice identifies several areas that contribute to the efficiency of the system. These include: (i) The application process involves an assessment by a judge or magistrate and this leads to minimal delays between the time of applications and grants of legal aid; (ii) Extensive investigation and assessment does not play an integral role in the process since in the vast majority of cases the financial position of an applicant is readily ascertainable; (iii) Judges impose their own strictures in determining the ambit of legal aid grants in both civil and criminal cases; (iv) Appeals from conviction do not automatically attract legal aid. A form of "merits test" is imposed and an extension in legal aid will only be granted if the grounds are justifiable; (v) Strictures are imposed against the wasteful tendency of some defendants to switch from lawyer to lawyer without justification; (vi) Efforts have been made to cut costs by placing focus on the defence of the liberty of the subject thereby minimising grants for civil cases; (vii) Judges encourage negotiation between the parties before deciding whether to grant legal aid; (viii) The Court will itself seek the view of expert opinion to determine whether there is merit in the applicant's case; (ix) The Courts attempt to negotiate with defence counsel on a reasonable cap on expert witness fees

[20] Courts administer legal aid in Gibraltar, Turks and Caicos and Montserrat

Aid Counsel is responsible for the administration of the Legal Aid Office. A Commission is responsible for legal aid in Jamaica, Barbados and the UK. In the British Virgin Islands which does not have a statutory legal aid scheme legal aid is administered by a five member legal aid board which falls under the Ministry of Health and Welfare.

3.16 In his paper Roger Smith[21] notes that most governments have found it useful to establish an intermediate body closely linked but formally independent of government to administer legal aid. According to him "the advantage of such an arrangement is that it helps to preserve the independence of decision-making in individual cases and distances the government from political attack in cases that are controversial."

3.17 Both the Chief Justice and the CDBA agree that the administration of the legal aid system could be improved and would benefit from the establishment of the office of a qualified legal aid administrator. Their recommendation is for the administrator to fall under the supervision of the Court since it is felt that the successes and cost efficiencies would continue if the judiciary maintains an overarching supervisory role.

3.18 The Chief Justice argues that a legal aid commission would introduce additional costs and delays to the system resulting in the reduction of legal aid grants. A contrary view is adopted by Dr. Epp who favours the establishment of an independent Legal Aid Commission. According to Dr. Epp, the establishment of an independent Legal Aid Commission had much to recommend it because of its independence and because a broader section of the community would be involved in making strategic decisions about the overall aims and purposes of legal aid within the Cayman Islands. Dr. Epp proposed a model similar to that in operation in Barbados or Jamaica. He noted that since members of the Board would not be paid for their services the Board should not be a burden on the overall legal aid budget.

[21] Ante note 8

Recommendation

3.19 The Commission believes that legal aid could be more effectively administered by a legal aid commission or a board supported by adequate staff. It is acknowledged however that in the Cayman Islands there may be problems providing the human resources necessary to establish independent bodies to administer legal aid. We therefore support the recommendation for the appointment of a legal aid administrator (who should be a senior attorney) and the allocation of adequate support staff and resources to undertake the task of administering legal aid. Such an administrator would be part of the judicial administration, supervised by the Chief Justice, but would be the person solely responsible for deciding on legal aid certificates subject to an appeal by applicants to the Grand Court. The duties of the administrator would also include the preparation of the roster of attorneys and establishing guidelines, procedures and requirements pursuant to which legal and other services may be made available under the Law.

4. CRITERIA FOR THE GRANT OF LEGAL AID

4.1 One of the issues highlighted in the call for legal aid reform in the Islands is the lack of clarity as to the eligibility requirements for legal aid. There is a concern that this situation may have resulted in some undeserving recipients of legal aid.

4.2 The eligibility requirements for criminal legal aid are clearly set out in the Law. Persons charged with the scheduled offences who do not have the means to pay for representation are entitled to legal aid.

4.3 In order to determine the means of a person the Law provides that the court should take into account the amount of the applicant's disposable capital; his disposable income; his ability to obtain employment and the likely cost of the proceedings.

4.4 Notwithstanding the fact that the law expressly provides the types of offences to which legal aid are applicable, the Chief Justice notes that the court has over the years construed the Law as implicitly also permitting grants for non-scheduled offences, such as other offences of dishonesty and drug trafficking, provided the lack of means is clearly demonstrated. According to the Chief Justice, this

construction by the court is allowed by section 3 of the Law which although it mandates assistance for scheduled offences does not preclude assistance for non-scheduled offences. By this construction, the courts have avoided putting many persons at risk of loss of liberty in such cases without them having the benefit of representation. The Chief Justice has recommended that the Law be amended to provide that grants should be allowed for all offences which carry more than six months' imprisonment.

4.5 Like the court, the CDBA is not satisfied with the ambit of the scheduled offences and has recommended that the list of offences for which legal aid may be granted should be expanded. The Association was of the opinion that legal aid should be extended to cover all cases- subject to means testing- in which a defendant faces a risk of losing his liberty regardless of the length of the custodial term. They have also suggested that legal aid should cover the attendance of competent counsel at the police station prior to charge.

4.6 The Commission does not agree that the offences should be widened to the extent recommended by either the CDBA or by the Chief Justice. For example many marine offences carry a term of imprisonment but most people are usually fined. Most jurisdictions apply limits to the offences legal aid can cover.[22] This is done either by specifying the types of offences but the modern trend is towards merits tests. The Commission had in a prior paper[23] recommended that the Scheduled offences should be widened to include the offences set out in Appendix A of this report.[24] Alternatively, a merits test similar to that adopted in the United Kingdom could be used. This test takes into account the following considerations in criminal cases-

(a) whether the individual would, if any matter arising in the proceedings is decided against him or her, be likely to lose his or

[22] The Canadian Supreme Court in May 2007 in B.C. (A.G.) v Christie held that the right to access to the courts is not absolute and that the power of legislatures to pass laws in relation to the administration of justice in a province under the constitution implies the power of the province to impose at least some conditions on how and when people have a right to access to the courts

[23] See Appendix C

[24] See also Bermuda Legal Aid Act 1980

her liberty or livelihood or suffer serious damage to his or her reputation;

(b) whether the determination of any matter arising in the proceedings may involve consideration of a substantial question of law;

(c) whether the individual may be unable to understand the proceedings or to state his or her own case;

(d) whether the proceedings may involve the tracing, interviewing or expert cross examination of witnesses on behalf of the individual; and

(e) whether it is in the interests of another person that the individual be represented.

4.7 A third option in deciding to whom criminal legal aid should be granted is set out in the approach taken by the Victoria Legal Aid in Australia which applies a "reasonable prospects of acquittal" test to some types of criminal proceedings. It is noted that this approach tries to find a balance between ensuring that legal aid is not continually used by people in criminal cases where there is no basis for a defence, with the need to ensure that those who face serious sentences have legal representation. The disadvantages of this approach include-

- it increases the complexity of administration significantly;
- it may increase the number of self representing litigants;
- the agency may be perceived as having a conflict of interest between the need for fiscal responsibility and objective legal advice.[25]

4.8 The Chief Justice states that in the Islands a "merits" test is not applied to the initial grant of legal aid in criminal cases since the presumption of innocence requires that a person charged with a criminal offence should be allowed to defend himself and so must be afforded representation by the state if he does not have the means.

4.9 In civil cases the court takes into account the nature and complexity of the proceedings or the intended proceedings. Further, a certificate may only be

[25] "Eligibility for Legal Aid Discussion Document", Ministry of Justice New Zealand 2002; see post

granted in civil cases if the court is satisfied that the applicant appears to have a reasonable prospect of succeeding on the merits of the case.[26] It has been contended locally that it is fundamentally wrong as a matter of principle that a premature conclusion on the merits of the case should be reached by the court itself before any substantive hearing has been heard. The research of the Commission shows however that many jurisdictions do use a merit test in determining civil legal aid and agrees with the use of such a test. The Commission is of the view that the use of merit tests in both criminal and civil matters is invaluable in determining eligibility and preventing abuse of the legal aid system and recommends the revision of the Law and rules to provide for this.

4.10 The Commission also believes that the Law should be reviewed to incorporate a rational and comprehensive means test by an independent assessor. While there is a means test under the Rules they do not define nor provide a method of calculating the disposable capital or disposable income of an applicant. Unlike Cayman most jurisdictions examined go into great detail as to how tests are to be administered.

4.11 For example, in Ontario,[27] the staff of LAO carries out a financial test on an applicant, his spouse, common-law partner or same-sex partner and any dependant children. The financial test has two parts: the asset test and the income test. The Legal Aid staff first determines if the applicant has enough money/assets available to pay an attorney lawyer without LAO's help. Then they look at the applicant's monthly income and expenses to determine if there may be any money left over that could be used to pay for legal fees.

4.12 In conducting the asset test LAO looks at all assets such as cash, bank accounts, stocks, bonds, etc. and also includes anything that an applicant can sell or easily convert into cash. Depending on the situation of the applicant he may be expected to use some of his assets to help pay for legal fees. Other assets include houses and property. Normally, if an applicant owns a house or property, he is expected

[26] Rule 12 (1)
[27] See www.legalaid.on.ca/en/

to borrow against it to pay for legal fees. If the applicant cannot borrow against it, LAO will ask him to agree to sign a lien against the property.

4.13 The applicant must provide proof of his assets. In conducting the income test LAO asks the applicant to give information on all sources of income including those of the dependant children, the spouse, common-law spouse or same-sex partner. Income includes worker's compensation, employment income, employment insurance, pensions, social assistance, commissions, self-employed earnings, child tax benefits, rental income, etc. To determine net income LAO deducts any payroll deductions, day care costs and child support payments from gross income. If an applicant is on social assistance, he is usually eligible for legal aid, depending on available assets. A person may be eligible for legal aid without a detailed test if net income is as follows-

	Monthly	**or**	**Yearly**
family size = 1	$ 601		$ 7,212
family size = 2	$1,075		$12,900
family size = 3	$1,137		$13,644
family size = 4	$1,281		$15,372
family size = 5+	$1,281		$15,372

4.14 If the applicant's income is more than these amounts he needs to complete a more detailed test. An applicant may qualify for free legal aid but may be asked to help pay for some of the legal fees or may be refused legal aid. An applicant must prove his sources of income to LAO through pay slips, social assistance, pension income and financial statements if he is self-employed.

4.15 LAO allows a set amount of money for monthly expenses based on the size of the applicant's family and type of shelter. Included in expenses are items such as rent or mortgage, food, clothing, transportation, telephone, and personal expenses.

LAO does not include rent or mortgage payments or other expenses that are over their set allowances. Other expenses may be considered if they are needed for health or well-being. Rent receipts, utility bills and debt payments are accepted as proof of expenses.

4.16 After the financial test is completed, LAO calculates how much money is available to pay for a lawyer. If the applicant has income and/or assets left over equal to the cost of hiring a private lawyer his application for legal aid will be refused. If an applicant is asked to contribute some money to his legal fees or if his application is refused and the applicant does not agree with the decision he may appeal the decision to the area committee which administers the legal aid services in the area in which he resides.

4.17 In Bermuda it is provided in section 10 of the Legal Aid Act 1980 that a legal aid certificate may be granted to an applicant by the Committee if his disposable income is less than $18,000 a year. An applicant shall be refused a certificate if he has a disposable capital of $20,000 or more. The Third Schedule of the Act provides the method of calculating disposable income and disposable capital as follows-

> "2 (1) A person's disposable income is the aggregate annual gross income of the household of which he is a member, less-
>
> (a) $2,000 for that person's spouse;
>
> (b) money actually paid annually by that person (whether or not under a court order) for the support of a person under twenty-one years of age who is not a member of that household;
>
> (c) $2,000 for each member of that household (whether or not under twenty-one years of age) who the Committee is satisfied is not financially independent; and
>
> (d) rent or mortgage interest not exceeding $9,600 actually paid annually in respect of the premises where that household lives.

(2) In sub-paragraph (1), the words "annual" and "annually" refer to the period of twelve calendar months immediately preceding the date of the application for legal aid or, if in the Committee's opinion to take that period would on account of special circumstances distort the true current financial position of the applicant for legal aid, such other period of twelve calendar months as the Committee considers it just and proper to take instead.

3 A person's disposable capital is the value of all the property that he owns, less the value of any of the following if owned by him, that is to say-

(a) wearing apparel;

(b) occupational tools;

(c) household furniture and effects;

(d) any owner-occupied single unit dwelling with an annual rental value, not exceeding $24,000 as assessed under the Land Valuation and Tax Act, 1967.". [28]

4.18 The Commission finds the provisions of the Cayman Islands' Rules imprecise in this area in that they allow for a wide exercise of discretion with implications for lack of consistency and transparency. For example rule 8 provides, inter alia, as follows-

"8. (1) In determining in accordance with Section 3 of the Law whether the applicant who has been charged with a scheduled offence has the means to instruct an attorney to advise and represent him, the Court shall have regard to-

(a) the amount of the applicant's disposable capital;
(b) the amount of the applicant's disposable income;
(c) the applicant's ability to obtain employment; and
(d) the likely cost of the proceedings.

[28] See also New Zealand Legal Services Regulations, 2006

(2) In determining the amount of an applicant's disposable capital the value of his sole or main residence shall be disregarded.

4.19 The Rules disregard a sole or main residence in the calculating disposable capital but what else do they take into account? How is disposable income calculated?

Recommendations

4.20 The Commission recommends the incorporation of more detailed and precise eligibility criteria similar to those contained in the legislation of Bermuda, Canada or New Zealand. The Commission also recommends the following-

- the assessment of eligibility by a qualified assessor and not by the court;
- that realistic limits should be set in order to ensure that those on relatively low incomes are not disqualified from receiving legal aid;[29]
- the use of merit tests in civil matters; and
- the use of merits test in criminal cases or a widening of the scheduled offences as set out in Appendix A.[30]

5. RECOVERY OF LEGAL AID CONTRIBUTIONS

5.1 One of the justifiable criticisms of the current system is that notwithstanding the fact that some persons are required to contribute towards their assistance, that moneys are rarely recovered and that this has contributed to the high costs of legal aid. Rule 8(5) of the Legal Aid Rules provides that an assisted person who is convicted of a scheduled offence may be ordered to pay a contribution towards the cost of his representation and such contribution shall constitute a debt payable to the Government. Rule 12(6) provides, in relation to civil matters, that if, upon conclusion of the proceeding, the assisted person succeeds in obtaining-

(a) an order for ancillary relief pursuant to Section 21 of the Matrimonial Causes Law 1976 which includes an order for the transfer of any

[29] See letters from the CDBA and Dr. Epp

[30] Both approaches could be used- a list of offences which will automatically attract legal aid where there is a lack of means and other offences to which a merits and means test will apply

property, the variation of any settlement or the payment of periodical payments or a lump sum; or

(b) a declaration under Section 16 of the Married Women's Property Law Cap. 94 as to the beneficial ownership of any property; or

(c) a money judgement; or

(d) an order for the recovery of any land or other property,

the Court may order the assisted person to pay a contribution or an additional contribution towards the cost of his representation and such contribution shall constitute a debt payable to the Government.

5.2 The words "shall constitute a debt payable to the Government" are words regularly used in legislation in the Islands to empower the Government to recover funds from any person and it is not considered necessary to provide any further details as to how such debt will be recovered. In accordance with local procedures if the debt is $20,000 or less it can be recovered by the Crown in summary court, and if the debt is higher it can be recovered in the Grand Court. However two things may perhaps have contributed to the failure to recover- there are no guidelines, as in some other jurisdictions, as to the amounts which should be repaid and there is only one member of staff of the legal aid office who administers the scheme. The Chief Justice has stated that the readily ascertainable lack of means on the part of most defendants is the reason why the judges and magistrates have not developed a general practice of requiring contributions or liens or other attachment of assets in criminal cases but states that contributions are recovered in civil cases.[31] The Court Administrator has confirmed that the system for the recovery of contributions is not vigorously enforced.

[31] The Chief Justice has indicated in his Memorandum *supra* that in civil cases, contributions are routinely required. In matters of divorce, after a petition has been filed for a restraint or exclusion order, the applicant is required to make arrangements with his attorney for funding the rest of the proceedings over time or to make monthly payments of contribution into the Fund to help offset their costs. Successful legal aid litigants are also required to recover their costs from defendants for repayment to the Fund. These strictures of contribution are not however applied to criminal cases since often times the accused is of limited means

5.3 The Commission believes that an effective way of ensuring that persons contribute to their legal aid assistance is by imposing a charge on their property as is done in some jurisdictions.

5.4 Our research shows that for example, in order to recover monies in New Zealand the Legal Services Agency may seek a charge against property of the aided person as security for the contribution. Where the Agency seeks authority to impose a charge, agreement to the charge is a condition of the grant.

5.5 In South Australia although people who own real estate can obtain legal aid, they may be asked to repay the Commission. It is a condition of legal aid that if the aided person, or his financially associated person, has an interest in any real estate, a statutory charge will be taken over the real estate for the value of the legal aid. The charge ensures that the Commission will be repaid by people receiving legal aid who own or are purchasing real estate but cannot repay legal aid immediately. Normally, the Commission will not force the sale of the property and the statutory charge will be held as security until the property is sold, transferred, re-financed or borrowed against. No interest is payable on the charge, but there is an administration fee of $300 which is added to the amount secured by the charge. This covers the cost of taking, administering and removing the charge. However, the amount owed will be reduced by $300 if it is paid back early.

5.6 In Bermuda the Legal Aid Act 1980 provides that an assisted person with a disposable income of more than $10,000 a year and a disposable capital of more than $10,000 may be required to contribute towards his legal costs. The Act also provides that any capital money recovered by an assisted person in, or as result of, any relevant proceedings in excess of $10,000 and any property actually so recovered to a value exceeding that amount shall stand charged in the favour of the Government with the full amount paid in respect of the certificate less the amount of any contribution paid by him in respect of that certificate. The Act expressly provides that the charge so created may be enforced by the Attorney-General in any court of competent jurisdiction.

5.7 While the option of requiring liens or other attachment of assets is not a practice of the court, according to the Chief Justice,[32] he is not opposed to introducing a system of attachment to recover legal aid expenses.

5.8 The Commission and the Chief Justice are of the view that the system for recovery of legal aid contributions would benefit from greater enforcement. To this end, the Chief Justice points to measures which have recently been put in place to correct this situation[33]. The new guidelines for recovery provide that attorneys acting under legal aid certificates are to assist in recovery of costs by-

(a) applying for costs where appropriate;
(b) safeguarding the interests of the legal aid fund on inter partes taxations where a costs order is made in favour of an assisted person;
(c) reporting the results of all civil proceedings so that the Court might seek contributions from assisted persons;
(d) reporting any material improvement in the financial means of an assisted person so that the Court might vary or revoke a certificate; and
(e) reporting an unreasonable refusal to accept an offer of settlement.[34]

5.9 It is noteworthy that the CDBA are of the opinion that the system of collection of contributions for criminal legal aid works well in the Islands. According to the Association-

> "In criminal legal aid cases the present contribution enforcement system seems to work relatively well. If a legal aid client is required to make a monthly contribution and he fails to make his monthly contribution the Clerk of the Court (who is also the taxing master for all legal aid matters)

[32] The rationale being that the defendants are either unable to contribute or have no property of significance for attachment purposes
[33] According to the Chief Justice, files which are already delinquent going back three years are sent to Debt Recovery, if demands for payment are not met
[34] See Dr. Epp's letter also on this point

writes to the attorney or firm and advises the firm that the legal aid board will no longer pay for any legal services until such time as the defendant is up to speed with his contributions. The onus then passes to the respective attorney or firm to police the contribution system on behalf of the legal aid board. No firm, at least no firm that expects to be paid, will continue working for a client who is in arrears. A firm will then require that receipts for payment are produced before continuing to act. Such a policing and collection system for contribution works pragmatically and well between the Clerk of Court and the providers of the legal services.".[35]

Recommendations

5.10 The Commission is not persuaded that the policing of the collection of contributions by the private bar is the best approach and the Commission recommends revising the Law and Rules to make it clear that contributions may be required of persons above a certain specified income as a condition of a grant. The Commission also recommends that a charge on property should be a condition of legal aid in certain circumstances. For example in cases where any land is recovered in legal aid proceedings the Director should be able to direct that such land shall stand charged in favour of the Government until the assisted person repays any contribution which he has agreed to repay.

6. LEGAL AID DELIVERY MODELS

6.1 There are two basic legal aid delivery models- judicare and salaried lawyers. By the judicare model legal aid services are provided by private practitioners who are paid on a case by case basis, usually at hourly or fixed rates. The salaried schemes consist of public defenders offices, with duty counsel who are directly employed by the legal aid scheme. There is also the community legal clinic which may be an independent statutory corporation providing services through paid staff.

6.2 The legal aid delivery model in the Islands is the judicare model with practitioners from the private bar providing legal aid services. As indicated previously the

[35] Page 5 of letter of 14th January, 2008

Clerk of the Court maintains a roster of attorneys-at-law who have indicated their readiness to accept briefs under the Law and are approved by the Chief Justice as suitable persons to hold such briefs.

6.3 Members of the Legislative Assembly in May 2007 expressed concerns in relation to the conditions for the appointment of multiple counsel and of Queen Counsel in legal cases and the circumstances in which the assignment of foreign counsel is justified. They were concerned that legal aid funds were being spent on the services of overseas counsel rather than Caymanian lawyers.

6.4 The Chief Justice responded to these concerns by noting[36] firstly, that there is a severe shortage of legal aid lawyers in the Islands and that only 10 or 12 lawyers routinely carry out legal aid work. He also noted that in serious complex cases where the Crown is represented, often by more than one highly skilled and experienced prosecutor, it follows for the same reasons, that accused persons should be afforded representation by counsel of comparable competence and experience. According to the Chief Justice, this is a principle which is known in human rights law as "equality of arms". However, in an effort to ensure that frivolous requests for a leader Queen's Counsel are not made, the Chief Justice has indicated that a screening process is introduced which requires that an application be made in writing to the Judge stating why the applicant wishes to be led. The Chief Justice argues that the costs attached to recruiting a leader Queen's Counsel from overseas are not excessive within the current scheme. Modest economy air fares are allowed and it is the practise that Queen's Counsel accept their briefs at the same standard hourly rates of CI$135 as the local juniors, perhaps to their economic disadvantage and basic standard of accommodation.[37]

6.5 The CDBA in its submission to the Commission noted that a small proportion of the total legal aid budget is being spent on the provision of overseas counsel in criminal cases. The Association opined that overseas counsel is only used in serious and complex matters and stated that it is only fair and reasonable that from an equality of arms perspective a defendant should have representation of a comparable standard to the Crown.

[36] Statement sent to the media, 4 June 2007
[37] See also para 7.11

6.6 In considering this matter the Commission examined whether the type of legal aid delivery model in the Islands should be reformed in order to ensure that there is a continuous affordable supply of local legal aid attorneys. One of the alternatives considered by the Commission was a salaried scheme in the form of a public defenders office.

6.7 Literature considered by the Commission shows that over the years there has been considerable debate comparing salaried systems with judicare systems in countries such as Canada, Australia, and the United Kingdom. The Department of Constitutional Affairs in the United Kingdom in 1997 published a report which considered the international experience of different legal aid delivery systems to explore which model offers the best "value for money" in handling mass case work.[38] The systems in Canada, Australia and the USA were examined and the findings of the report were as follows-

- "When costs data are available, they usually show that salaried services are cheaper on a cost-per-case basis. This is particularly true in criminal defence, where the Canadians have carried out some reasonably sophisticated studies (Brantingham 1981,[39] Sloan 1987[40]).
- In Canada, in the criminal field, those jurisdictions that use salaried services tend to have lower costs-per-case overall than those using judicare systems.[41] The same is not true in the USA, where some very cheap schemes in the South and Midwest use assigned counsel. However, there are several quality concerns about very low-cost judicare schemes.
- The reason salaried lawyers are cheaper is that they tend to spend less time per case (Brantingham 1981, Sloan 1987, Domberger and Sherr 1981). An Australian report found little difference in what it costs to employ a lawyer in private practice and what it costs to employ a lawyer in a staff office. The Burnaby study also found that salaried lawyers and judicare lawyers

[38] "Legal Aid Delivery Systems Which Offer The Best Value For Money In Mass Casework? A summary of international experience"- Tamara Goriely, 1997

[39] The Burnaby evaluation (Brantingham 1981)- an evaluation of an experimental public defender project established in the outskirts of Vancouver

[40] Sloan R. (1987): "Legal aid in Manitoba: evaluation report"; Department of Justice Ottawa

[41] private practitioners – employed on a case by case basis and often known by the US phrase 'judicare';

were receiving around the same costs per hour-though in some circumstances judicare lawyers were able to charge the same time to two or more different cases (Brantingham 1981).

- The reasons why salaried lawyers spend less time per case are more problematic. There are a number of possible explanations-

  (a) staff offices may select easier cases-which probably accounts for some of the observed cost differences. However, it is unlikely to be the whole story. The Burnaby study assigned cases randomly while the Manitoba studies controlled for case-type. Nor does it explain why Canadian schemes with staffed offices have lower costs per case than those with judicare schemes;

  (b) staff lawyers may be more specialist. As the Burnaby study found, a public defender office offers young lawyers a very quick way of becoming specialists in their field, and they soon become highly skilled at handling routine criminal defence. However, the same may be true in some specialist private firms. Furthermore, in complex and unusual cases which staff lawyers handle infrequently, there may be greater expertise in private practice. To put it simply, staff lawyers may be better at guilty pleas on burglary charges: private practice may be better in murder cases;

  (c) staff offices may enjoy economies of scale. As Justice (1987) puts it, 'backup services are better'. Good public defender schemes can employ investigators and some have research departments to keep abreast of scientific, technical and legal issues. They can maintain good contacts with expert witnesses. By having offices close to court and by handling many cases in the same court each day, they can cut down on travelling and waiting time;

  (d) salaried lawyers and judicare lawyers have different incentives. Staff lawyers generally wish to get through their caseload and get home at the end of the day, while judicare lawyers whose fees depend on the hours expended on each case may have incentives to carry out more work. The Canadian experience suggests that the staff lawyers are more likely to enter guilty pleas and that they do so earlier than

private lawyers. They negotiate more with prosecutors and carry out less 'hand-holding' with clients. They also provide more continuous representation, passing clients to fewer members of staff."

6.8 The report also considered the question whether staff lawyers who spend less time on the case are providing the same quality of service to the client. The report indicated that the answer may vary according to the area of work. It states-

"(a) For criminal cases, some tentative evidence from Canada suggests that a cheaper service does not necessarily mean a worse service. The Burnaby and Manitoba studies found that staff clients were convicted no more often and were less likely to receive a prison sentence. Client satisfaction was much the same.

(b) This finding, however, does not necessarily hold for other jurisdictions. Where judicare lawyers are already supplying a minimal service (as in some US Southern and Midwestern states), it is likely that a lawyer who spends less time will be providing services of poor quality. Where lawyers are already putting heavy pressure on their clients to plead guilty, any further pressure could result in innocent people entering guilty pleas. Staff lawyers can only be expected to make efficiency gains when there is already inefficiency in the system - where, for example, constant changes in lawyer lead to repetitive preparation, or where guilty pleas are entered too late, or where lawyers make applications which have little prospect of success.

(c) For social welfare law, there is some (very limited) evidence to suggest that salaried lawyers are able to secure similar outcomes even though they spend less time per case (Québec Commission 1981; Domberger and Sherr 1981).

(d) For family law, no evidence is available about the respective quality of staff and judicare systems.".

6.9 In the United Kingdom where the provision of services is dominated by private attorneys, the Legal Services Commission in 2001 added to its services a Public Defender Service (PDS) in England and Wales with the opening of public defender offices (PDOs) in Liverpool, Middlesbrough and Swansea, with further offices opened in Birmingham in July 2001, in Cheltenham in April 2002 and in

Pontypridd in September 2002. A further two were opened in Chester and Darlington in 2003. This was the first salaried criminal defence service in England and Wales. A separate Scottish Public Defender Solicitors' Office (PDSO) had previously been established in 1998 in Edinburgh. The scheme however does not appear to have been a success. In the final evaluation of the pilot scheme it was concluded that the cost of the service was around twice as much to operate per hour as opposed to paying private firms under the current legal aid scheme.

6.10 The Chief Justice stated that a public defenders scheme would involve considerable expense, going beyond just the salaries of the lawyers, to include secretaries and paralegal expenses which according to the Chief Justice, the private practitioners must assume as part of their own costs of doing business. In a previous preliminary paper the Commission had assessed the minimum costs of a public defender's office to be a little more than $400,000.[42] Such costs took into account administrative expenses.

6.11 Dr. Epp in his submission supported the introduction of such a scheme while the CDBA was of the view that legal aid services are most efficiently provided by the private sector. The Association felt that privatization as opposed to nationalization generally results in expensive administrative costs being absorbed by the private sector.

Recommendations

6.12 After deliberation the Commission was persuaded that the implementation of a public defender's scheme would not be in the best interest of the Islands. The literature considered by the Commission indicates that the ideal way forward for western countries is a model that involves a mixture of judicare and salaried schemes. Most of the jurisdictions researched by the Commission use a mixed scheme of judicare, salaried staff and community clinics, with varying degrees of success and the Commission believes that Cayman could more effectively benefit from a mixed scheme of judicare and legal aid clinics.

[42] September 2005- costs have increased since that time by about $30,000

6.13 The Commission notes that community legal clinics are popular in the UK, Canada and the United States of America.[43] Services provided by legal aid clinics include matters relating to income maintenance, employment insurance, pensions, workers' compensation, welfare and family benefits' work-related issues, including employment standards, occupational health and safety; wrongful dismissal; housing problems and consumer and debt problems.[44]

6.14 The Commission is advised that there are already proposals for the establishment of a legal aid clinic to be operated by the Cayman Islands Law School, similar to the clinics at the Norman Manley and Hugh Wooding Law Schools in Jamaica and Trinidad and Tobago respectively. It appears that focus will be on training law students by allowing them to provide legal advice to and assist in the preparation of cases for persons qualified to receive legal aid. Training of the students would be done under the supervision and scrutiny of qualified attorneys. Such a clinic could deal with matters similar to those dealt with in Ontario i.e. labour matters such as wrongful dismissal, pensions, occupational health and safety; landlord and tenant problems and consumer and debt problems.

6.15 The legal aid system can also be enhanced by providing for the appointment of duty counsel for all types of criminal offences to which legal aid applies[45]. The duty counsel service would also help reduce the high costs of administering criminal justice. It does this by assisting clients to identify at the earliest possible opportunity, matters where a plea of guilty is to be entered, and then representing them on their plea of guilty.[46] Types of services duty counsel could undertake would include standing up in court and representing a person on a plea of guilty,

[43] In Ontario for example legal aid clinics were established after it became clear that the judicare system did not meet all of the needs of low-income individuals

[44] "The Critical Characteristics of Community Legal Aid Clinics in Canada", L. Abramowicz, Executive Director of the Association of Community Legal Clinics of Ontario; The McCamus Report in its support of these clinics indicated that it is widely acknowledged that community legal clinics are best suited to deliver "poverty law" services.

[45] The Drug Court Law already provides for duty counsel in drug court

[46] See for example Legal Aid Ontario

appearing for in-custody clients in bail applications, advising people of their legal options or seeking an adjournment so the client can be referred for further legal help.

7. COSTS OF LEGAL AID SERVICES

7.1 At the foundation of most of the complaints about the legal aid system is the issue of the costs of providing legal aid services. It is a complaint heard in many jurisdictions. In considering this matter the Commission sought to determine whether the costs of legal aid are higher in the Islands than in similar jurisdictions.

7.2 In an interview given by the Chief Justice to the press on 18th June 2007, it was reported that legal aid costs have increased significantly within the past 10 years. According to the report[47]-

> "[L]egal aid costs have tripled within the past ten years. In 1999, Cayman's budget for legal aid was $555, 818. This year that budget is expected to be just below $1.8 million, including supplemental spending.".

7.3 Information provided by the Chief Financial Officer of the Portfolio of Legal Affairs show that from January to June 2003 the cost of legal aid was $734,177; from June 2003 to June 2004 the cost was $821,000 and in the 12 months to June 2005 the cost was $1,500,000.

7.4 In the book "Legal Aid Provision in the British Overseas Territories and the Commonwealth Caribbean"[48] local authors indicated that in 2001 $750,000 was spent on legal aid and in 2002 the amount was $970,000.[49] According to authors, the large difference between the amounts of 2001 and 2002 was caused by the so-called "Euro Bank trial" in which approximately $335,000 was spent on the defendant's legal fees.[50] The records of the Chief Financial Officer of the

[47] "Court to review legal aid", Caymanian Compass, 18th June 2007
[48] "Legal Aid Provision in the British Overseas Territories and the Commonwealth Caribbean, 2002", John Epp, Derek O'Brien and Terence Caudeiron
[49] "Legal Aid Provision in the British Overseas Territories and the Commonwealth Caribbean, 2002", John Epp, Derek O'Brien and Terence Caudeiron
[50] Ibid; note 73 of Chapter 3

Portfolio of Legal Affairs show that up to January 2003 $2,103,187 was spent on legal aid costs and costs to the judiciary in the said case. Again, the difference between the 2003/2004 and 2004/2005 periods was caused mainly by one case the "Cash for titles" case in which more than $700,000 was spent on legal aid fees. It should be emphasised that both the "Euro bank" case and the 'Cash for titles" cases are not ordinary criminal cases- both cases were long, complex money laundering cases with multiple defendants and detailed expert testimony. The "Cash for titles" case, for example, lasted eight months. It is necessary to take this into account in evaluating the rise in legal costs.

7.6 The Chief Justice has also noted, in defence of the higher amounts spent on legal aid, that the number of criminal charges coming before the courts since 1999 has gone up by 77 per cent. It was reported that in 1999, the Cayman Islands courts saw 4,929 criminal charges, while in 2006 there were 8,729 charges.

7.7 In the Legislative Assembly in May 2007 cost comparisons were made between the Cayman Islands on the one part and Anguilla and the British Virgin Islands on the other. During the debate the Attorney-General noted that the British Virgin Islands spent US$79,000 a year on legal aid while Anguilla had no identifiable legal aid budget. The Chief Justice has stated, and the Commission agrees, that the comparison with Anguilla and the British Virgin Islands was not appropriate as neither of those countries have a structured legal aid scheme. The Bahamas also does not have a structured scheme and neither does Jersey. A better comparison would be with Barbados, Gibraltar or Bermuda (all three have varying degrees of off-shore business, money laundering laws, strict drug laws and the legal complexities which can follow). In Barbados, with a population of 270,000,[51] the budget for 2007/08 is B$2,000,000, (approx.US$1,000,500). The Director of the Commission in Barbados there has indicated however that the budget is regularly overspent and additional amounts from government are regularly applied for. In 2006 an additional B$200,000, (US$100,250) was granted as supplemental payments by the government after submissions justifying the need.[52]

[51] Encyclopaedia Britannica
[52] Information from Mr. Tony Grant, Director Legal Services Commission

7.8 The population of Gibraltar is approximately 31,000 and budget spent on legal aid in 2006/7 was £883,282.21- legal aid expenditure (criminal) was £69,497.70 and total for legal assistance (civil) was £813,784.51.

7.9 In Bermuda with a population of 65,500 it was noted that in the 2003/4 the budget for the running of the Legal Aid Office and for the remuneration of staff was $1,003,000 (BD$/US$) and was increased in 2004/5 to $1,757,000. The Legal Aid budget for the period 2006/2007 was $1,879,835 and the approved budget for the period 2007/2008 is $2,023,840.[53] The costs in Bermuda are comparable with those in the Cayman Islands while the Cayman Islands' costs far exceed the costs in Barbados.

7.10 It is not enough however to divide the costs by population it is also necessary to look at the complexity of case work in each jurisdiction. As noted earlier, two highly complex money laundering cases, "Cash for titles" and the "Eurobank" cases were responsible for the steep increases in legal aid costs from 2003 to 2005. It is very difficult to compare costs in the Islands with cost in other jurisdictions as it will be necessary to compare not only the type of cases dealt with but also the number of cases within any particular period and how the services are delivered.

7.11 The Chief Justice has indicated that the hourly rate in the Islands since 2003 is $135 per hour although the rules under which such fee is payable, the Legal Aid Rules 1997, provide that it is $100 per hour. These rates are lower than the scheduled rates in Bermuda where fees start at $200 ($160 CI) per hour and go to $280 ($224CI) per hour. In Gibraltar there is a wide range of fees for dealing with criminal cases.[54] It should be noted that while the legal aid rate in the Islands has remained the same for the last five years in the private sector the hourly rates have gone up every year. We are advised that rates for junior counsel start at $250 per hour (nearly twice the legal aid rate), for senior counsel at $575 per hour while at the level of Queen's Counsel rates are anywhere from CI$500 per hour for preparatory work and CI$5000 per day for Court appearances.

[53] Provided by the Senior Counsel of the Legal Aid Office
[54] See Legal Aid (Fees and Expenses) Rules, LN. 1981/087

7.12 The Ministry of the Attorney-General in Ontario noted that the Indigent Defenders study which was sponsored by the U.S. National Center for State courts found that "efforts to arrive at a meaningful cost comparison across courts on a cost per cost basis are fraught with difficulties, uncertainties and hazards. Continued research along these lines, in fact, is of questionable value because of a lack of relevant standards against which cost-per case can be judged. Other factors such as differing referral patterns, the client's freedom to choose counsel and the size and structure of the tariff add to the difficulty of comparing costs across jurisdictions.".

7.13 The CDBA and Dr. Epp also warned that care should be taken when attempting to compare figures. Overly simplified comparative calculations may be unhelpful or, worse, misleading. Dr. Epp noted that it not useful to use other overseas territories as comparators as most of them do not have a tradition of providing a structured legal aid scheme.

7.14 As a remedy to the perceived high costs the Commission was asked by Cabinet to give consideration to the capping of fees in each legal aid case. The Chief Justice supports the idea of a limited cap on fees and noted that the capping of legal aid grants should be allowed by the Law in appropriate cases, based on criteria to be specified in legal aid rules to be applied at the discretion of a legal aid administrator or judge. He stated that in an effort by the judges to contain costs they have been very strict in delineating the ambit of grants. He noted for example that there is no automatic extension of a grant to cover an appeal from conviction.[55]

7.15 The Law Society was of the view that introducing a cap on fees would in the long term cause society to suffer as attorneys would decline legal aid work. The CDBA

[55] According to the Chief Justice, if arguable grounds are presented, an extension will be granted effective from the date of grant but often capped by reference to the amount of work estimated by the judge to be involved in presenting the appeal. Expenditure for appeals can be capped in this way, although trials are far less amenable to that kind of treatment

stated that it was a misconception that attorneys were profiteering from the legal system and felt that indeed the rates which are being paid are too low and should be reviewed. Instead the CDBA proposed a graduated system of payment for legal aid cases based on the level of tribunal and seniority of those conducting the matter.[56]

7.16 In researching the question of the capping of fees the Commission noted the review of the legal aid system undertaken by the New Zealand Government in 2001[57] in order, inter alia to reduce administrative costs and to make the granting process more efficient. The capping of legal aid budget was considered but was rejected. Instead the Ministry considered the management of long and complex cases (which was an area of particular concern as in the Cayman Islands) by either-

- imposing fixed fees for such cases and providing that there is no right to review decision for remuneration in such cases; or
- implementing a tendering process and managing such cases through individual case contracts based on case plans developed by lawyers and negotiated with the Legal Services Agency.

7.17 The New Zealand Ministry of Justice noted that the advantages of fixed fees for complex cases was as follows-

- a reduction in the risk of budget blow out for individual cases
- clear limits for providers on what will be funded; and
- less secondary litigation around funding issues.

7.18 The disadvantages were that fixed fees could lead to a potential unwillingness for experienced practitioners to undertake complex cases if the return does not justify the effort. Dr. Epp noted that while contracting with one or more specialist firms to provide criminal legal services at a fixed price may reduce the overall legal aid budget it may do so at the cost of client choice.

[56] See Appendix B
[57] Eligibility for Legal Aid Discussion document, Ministry of Justice, December 2002

7.19 Dr. Epp's recommendation in this matter as well as that of the New Zealand Ministry of Justice was the case management approach and tendering of legal services. The Ministry of Justice noted the advantage of this approach is that a legally aided applicant is less likely to receive second rate assistance than in a fixed fee scheme and providers are less likely to refuse legal aid work. The tendering process would also give the government a stronger sense of the real cost of the work. Dr. Epp suggested that in cases similar to the "Cash for Titles" case that this would be the best approach in dealing with costs. He noted that local firms in such cases who appear on the panel of lawyers approved by the court could be invited to submit tenders for the cost of legal representation and the selection of which tender to accept, based on considerations of both cost and quality, could be undertaken by a specialist committee of an independent Legal Aid Commission.

7.20 In the United Kingdom complex, expensive cases ("Very High Cost Cases") are managed by the Complex Crime Unit of the Legal Services Commission. Very High Cost Cases include cases which are expected to last 20 weeks or more or exceed specified amounts[58]. Pursuant to the recommendations of Lord Carter[59] the Legal Services Commission in 2007 ran a tender for bids by firms to undertake such types of cases. The Legal Services Commission assessed the experience and the pay rates tendered by firms and barristers and chose qualified firms and barristers to be part of a panel. Members of such panel are then assigned the high profile cases. Cases are monitored by the Complex Crime Unit in order to ensure that estimates of time and costs under individual contracts are met. Fees are paid in accordance with the terms of the individual contract and at rates in the Criminal Defence Service (Funding) Order of 2007.[60]

[58] Criminal Defence Service (Funding Order) 2007
[59] Legal Aid: A market-based approach to reform
[60] See also Big Case Management under Legal Aid Ontario; Tendering for legal aid for aborigines in Australia

Recommendations

7.21 The Commission recommends that a tendering process be used for expensive cases (to be defined by the legal aid administrator) and that they be managed through individual case contracts based on case plans and estimates agreed to by the Legal Aid Administrator after consultation with the attorneys. The alternative would be to impose fixed fees for such cases and provide that there is a right to request a review of a decision for remuneration only in extraordinary or exceptional circumstances. The Commission also believes that fixed fees could be implemented for duty counsel cases at police station but sees no need for any other change in the payment of fees in the Cayman Islands as it is not convinced that the costs of legal aid in standard cases in the Islands are unduly high. In our earlier comparisons the rates are lower in the Islands than in Bermuda and the cost per person is only marginally higher than Bermuda. It should also be noted that the budget for the prosecution and support unit of the Legal Portfolio in the Islands has also been compared and the budget for prosecution is considerably larger than the budget for legal aid- the budget for the prosecution and support unit of the Cayman Islands Legal Portfolio in 2008/9 is $3,164,031 while the legal aid budget for the same period is $937,000. In 2007/8 the budget for prosecution was $2,136,000 while the legal aid budget was $1,850,000. It should further be noted that the legal aid budget consists of costs related to both civil and criminal legal aid.

7.22 The Commission is of the opinion that in order to ensure that lawyers are being appropriately paid (not being overpaid or underpaid) for their services that the courts should have staff dedicated only to the taxing of legal aid accounts. The provisions regulating taxation of bills of costs under the Legal Aid Rules are adequate to ensure that bills of costs are taxed in accordance with accepted standards and no amendment thereof is necessary but they could be more effective if enough staff is assigned to assess and investigate bills of costs presented to the court.

8. PRO BONO WORK

8.1 In a letter to the Law Reform Commission[61] the Attorney-General asked the Commission to explore with the CILS, the Bar Association and CDBA the designating of persons from the associations to do pro bono legal work as a contribution to the Society. The Commission however strongly urges the associations representing lawyers to actively promote the idea of pro bono work amongst the legal profession.

8.2 The Commission is advised that quite a few of the larger firms[62] in the Cayman Islands carry out a lot of pro bono work in the Islands but the Commission has not obtained any statistics as to the percentage of lawyers who do provide such work or on the hours of work carried out.[63]

8.3 Compulsory pro bono is an integral part of the legal aid services in Jersey. In Jersey there is no statutory legal aid although there is a legal aid scheme. The Law Society of Jersey states that "a key point to note which differentiates the Jersey Legal Aid Scheme from that of many jurisdictions is that, with few exceptions, no public money is spent on legal aid. The obligation is that of the Advocate and frequently results in the Advocate receiving no remuneration for work carried out". The source of the obligation to give legal assistance is the oath of office of an Advocate.[64] In August 2004 at a meeting of the Bar a resolution was passed stating that Advocates of less than 15 years standing would fulfil this oath.[65]

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[61] 1st February, 2008

[62] The CDBA indicates that members of the association who practice criminal law already undertake considerable amounts of pro-bono work, largely unrecognised

[63] The best known pro bono program is that set up by Walkers in 1998, the Legal Befrienders

[64] Advocates are bound by their oath to represent "veuves, pauvres, orphelins, et personnes indefendues".

[65] The Law Society feels that in light of a case Van der Mussele v Belgium (6 EHRR) an advocate cannot declare that his rights are being infringed by the oath

8.4 Pro bono work is also an integral part of legal practice in the United States, Canada and the United Kingdom. The Civil Justice Quarterly[66] 2006 noted that in the United States there are estimated to be over 600 pro bono programmes and 15,000 attorneys are registered to participate in pro bono activities promoted and funded by the Legal Services Corporation. In many of the American states examined for this research paper the rules governing the bar in those states expressly provide for pro bono services. An example of pro bono requirements is seen in Florida in the rules regulating the Florida Bar where it is it is provided in rule 4-6.1 as follows-

> " (a) Professional Responsibility. Each member of The Florida Bar in good standing, as part of that member's professional responsibility, should (1) render pro bono legal services to the poor and (2) participate, to the extent possible, in other pro bono service activities that directly relate to the legal needs of the poor. This professional responsibility does not apply to members of the judiciary or their staffs or to government lawyers who are prohibited from performing legal services by constitutional, statutory, rule, or regulatory prohibitions. Neither does this professional responsibility apply to those members of the bar who are retired, inactive, or suspended, or who have been placed on the inactive list for incapacity not related to discipline.
>
> (b) Discharge of the Professional Responsibility to Provide Pro Bono Legal Service to the Poor. The professional responsibility to provide pro bono legal services as established under this rule is aspirational rather than mandatory in nature. The failure to fulfill one's professional responsibility under this rule will not subject a lawyer to discipline. The professional responsibility to provide pro bono legal service to the poor may be discharged by:
>
> (1) annually providing at least 20 hours of pro bono legal service to the poor; or

[66] Vol. 25 January 2006 "What's Wrong with Legal Aid" Lessons from Outside the UK. John Flood, Avis Whyte

(2) making an annual contribution of at least $350 to a legal aid organization.

(c) Collective Discharge of the Professional Responsibility to Provide Pro Bono Legal Service to the Poor. Each member of the bar should strive to individually satisfy the member's professional responsibility to provide pro bono legal service to the poor. Collective satisfaction of this professional responsibility is permitted by law firms only under a collective satisfaction plan that has been filed previously with the circuit pro bono committee and only when providing pro bono legal service to the poor:

(1) in a major case or matter involving a substantial expenditure of time and resources; or
(2) through a full-time community or public service staff; or
(3) in any other manner that has been approved by the circuit pro bono committee in the circuit in which the firm practices.

(d) Reporting Requirement. Each member of the bar shall annually report whether the member has satisfied the member's professional responsibility to provide pro bono legal services to the poor. Each member shall report this information through a simplified reporting form that is made a part of the member's annual membership fees statement. The form will contain the following categories from which each member will be allowed to choose in reporting whether the member has provided pro bono legal services to the poor:

(1) I have personally provided _____ hours of pro bono legal services;
(2) I have provided pro bono legal services collectively by: (indicate type of case and manner in which service was provided);
(3) I have contributed $_____ to: (indicate organization to which funds were provided);

(4) I have provided legal services to the poor in the following special manner: (indicate manner in which services were provided); or
(5) I have been unable to provide pro bono legal services to the poor this year; or
(6) I am deferred from the provision of pro bono legal services to the poor because I am: (indicate whether lawyer is: a member of the judiciary or judicial staff; a government lawyer prohibited by statute, rule, or regulation from providing services; retired, or inactive).

The failure to report this information shall constitute a disciplinary offence under these rules.

(e) Credit Toward Professional Responsibility in Future Years. In the event that more than 20 hours of pro bono legal service to the poor are provided and reported in any 1 year, the hours in excess of 20 hours may be carried forward and reported as such for up to 2 succeeding years for the purpose of determining whether a lawyer has fulfilled the professional responsibility to provide pro bono legal service to the poor in those succeeding years.
(f) Out-of-State Members of the Bar. Out-of-state members of the bar may fulfill their professional responsibility in the states in which they practice or reside.".[67]

8.5 It has been posited that apart from complementing a legal aid scheme by providing legal representation to those who cannot get funding but cannot afford to pay their bills, pro bono work allows attorneys, especially junior ones, to develop their legal skills and it enhances leadership, project management and client relationships.[68] Pro bono work breaks the insularity of many elements of corporate practice and fosters a cross-fertilisation of knowledge, skills and client

[67] See also e.g., rules in Kansas; Missouri; New York
[68] "Why lawyers should take on pro bono work". Linda Singer, Legal Times August 11 2006

contact. According to one firm,[69] the value is such that consideration of pro bono work is included within staff appraisal as a way of seeking to inculcate a culture.[70]

8.6 Notwithstanding the importance placed on pro bono in the UK, Canada and the USA pro bono work is not compulsory. None of the stakeholders with whom the Commission consulted supported the call for mandatory pro bono. Dr. Epp noted moral and practical objections to a mandatory pro bono scheme[71]. The moral objections cited by him were-

- "compulsory charity" is a contradiction in terms;
- requiring lawyers to undertake pro bono work would undermine its moral significance and compromise the altruistic commitment of lawyers taking part in the scheme;
- compulsory pro bono discourages lawyers from providing assistance over and above the prescribed minimum limit, so that both the quantity and quality of legal services would suffer and the experience would lose its meaning;
- compulsory pro bono unlike voluntary pro bono work would not serve the purpose of enhancing the volunteer lawyer's individual reputation or the legal professions public image.

8.7 The CDBA opined that the encouragement of and advent of more pro bono work by local attorneys through the CILS or the Caymanian Bar Association is something which will not reduce significantly, or more likely at all, the spending of legal aid funds in criminal cases. According to them-

> " Almost all of the provision of legal services by our members which is funded by legal aid is for the purposes of attending court and work ancillary to the court process. Recent figures at the opening of the Grand Court indicate that there are now approximately 475 attorneys in private practice in the Cayman Islands. Of this amount there are probably fewer

[69] Allen & Overy, U.K.
[70] "Pro Bono Legal Services in England and Wales", Roger Smith, November 2002
[71] 4 February 2008

than 20 who have the appropriate and necessary experience to advise and represent defendants in the criminal courts. Of that 20 there are probably fewer than 10 who appear daily in the criminal courts. Most attorneys in this jurisdiction are qualified and have experience in the provision of legal services in offshore finance, funds, and complex financial repackaging structures. It is inconceivable that they would be able to provide *pro bono* representation in a criminal case."

8.8 The CDBA however recommends that as an incentive to participate in the legal aid system, the Government should consider waiving certain fees for attorneys who undertake a minimum of 200 hours of legal aid work per year.

Recommendations

8.9 The Commission agrees with the objections above and does not recommend making pro bono work mandatory because, in the words of Pro Bono Law Ontario "to do so would devalue the spirit and proud tradition of volunteerism that already motivates many members of the legal profession.". It has been argued that politics of pro bono can create difficulties as lawyers' attitude will alter when pro bono becomes part of a political platform for the subsiding the deficits of legal aid.[72]

8.10 The value of pro bono work should be promoted more by the professional associations, by the firms and by the Law School. For example the Law Society in the United Kingdom in March 2007, in supporting and promoting pro bono activity, approved a business plan for the Representation and Legal Policy Directorate which included a proposal to appoint a new post holder to coordinate and enhance the Law Society's activities in pro bono promotion. The Society is also considering a plan to provide funding for the establishment of a new post in LawWorks[73] to liaise with law schools; to provide advice and assistance on pro bono projects; to develop training and promotional material, work with law

[72] The Chief Justice shares similar sentiments and believes that the call to mandate pro-bono work is ill advised. According to him, ultimately, the provision of legal representation for indigent persons, against whom the State has brought criminal charges, is a fundamental obligation of the State

[73] LawWorks was established as the Solicitors Pro Bono Group in 1997

societies and law firms to provide pro bono opportunities, support and supervision.[74]

8.11 Legal aid is an issue of social justice and therefore a matter for society as a whole and not singularly the profession. The Government has a social responsibility to provide access to justice. Therefore, all attached costs should be borne by the society as a whole rather than identifying the legal profession as the sole responsible body.

9. CONTRIBUTION BY LAW FIRMS/ LEGAL ASSOCIATIONS TO LEGAL AID FUND

9.1 In the letter to the Commission of 1st February, 2008 the Attorney-General also raised the question of the legal associations and the law firms contributing funds to the legal aid pool. The CILS responded by stating that the question of the provision of adequate access to justice is part of the social responsibility of the Government and is a cost to be borne by society in general and not by the legal profession. The Society further stated that it would view such a move as being effectively an imposition of a tax on the legal profession and which due to its arbitrary nature would appear contrary to the fundamental principles of the current legal system.

9.2 The CDBA noted that it comprised 12 members and that it intended to introduce annual subscriptions of CI$30 per person to cover our running costs and would not therefore be financially able to make any contribution to the legal aid pool. The Association also stated that law firms undertaking legally aided work already bear the burden of employing attorneys who are paid fees for legal aid work which are approximately 35-40% of the fees they could charge private clients.

Recommendation

9.3 The Commission makes no recommendation in connection with this issue.

[74] The Law Society Corporate Governance Board 6 June 2007

10. CONCLUSION

10.1 The above recommendations by the Commission recognizes the genuine concerns by the legislators and some others in the society about the perceived high cost of legal aid in the Cayman Islands. The Commission also agrees that every effort should be made to contain cost is a manner consistent with the objectives and purpose of having a legal aid system in the first place. A close examination of the data available from other similar jurisdictions makes it difficult to arrive at any definitive conclusions (differences in population size, number of applicants, types of cases, inter alia) except to say that the costs in the Cayman Islands legal aid budget appear to be comparable in absolute amounts to some of our closest comparators (Bermuda and Gibraltar) and significantly more than that of some of our larger Caribbean neighbours examined (specifically Barbados).

10.2 The Cayman Islands, like all successful financial centres place a high value on access to justice and the rule of law. As noted earlier in the report, the existence of a modern, transparent system of legal aid not only provides access to justice for those in need, it also enhances the image of the jurisdiction as a sophisticated, democratic and stable jurisdiction. It is hoped that the recommendations in this report achieves the right balance between the competing interests of the various stake holders and will provide some guide for a modest reform of the system which will result in achieving a more cost effective, efficient, fair and transparent delivery of legal aid to those who need it.

Chairman: Langston R.M. Sibblies
Date: 15 July, 2008

APPENDIX A

Specified Offences

(a) Under the Penal Code (2007; Revision)

Treason

Accessory to treason

Concealment of treason

Treasonable felonies

Inciting to mutiny

Seditious offences

Unlawful assembly

Riot and other riotous offences

Corruption

Perjury

Piracy and related offences

Counterfeiting and other coinage offences

Unnatural offences

Carnal knowledge

Incest

Bigamy

Defamation

Explosive offences

Murder

Attempted murder

Threats to murder

Conspiracy to murder

Manslaughter

Rape or attempt

Assault with intent to rape

Robbery

Assault with intent to rob

Burglary

False pretences

Receiving

False accounting

Forgery

Uttering

Arson or attempt.

(b) Firearms Law (2006 Revision)

Firearm offences with intent.

(c) Misuse of Drugs Law (2000 Revision) [when prosecuted indictably]

Importing or exporting controlled drug

Producing or supplying controlled drug

Handling controlled drug.

(d) Any other offence under any other Law for which on a first conviction the offender may be liable to imprisonment for 5 years or more.

APPENDIX B

GRADUATED FEE SCHEME

The CDBA suggests the following graduated fee scheme reflecting the seniority of attorney and seriousness of the case:

Rates in CI$'s	Summary Court	Grand Court	Court of Appeal
0-6 years call	160	175	175
6-15 years call	170	185	185
15 years +	180	200	200

APPENDIX C

The Law Reform Commission

A REVIEW OF THE LEGAL AID SYSTEM IN THE CAYMAN ISLANDS

A PRELIMINARY DISCUSSION PAPER

INTRODUCTION

In September 2005 the Law Reform Commission included a review of the system of free legal aid in the Islands in its legislative programme. A discussion draft Legal Aid Bill was prepared by the Law Reform Administrator and submitted to the Commission on 3rd November 2005. The Bill was first addressed by the Commission on 3rd February, 2006.

The Commission was informed that in 2004 the Attorney-General requested a review of the system of legal aid in light of the high cost of legal aid to the Government. Information provided by the Chief Financial Officer of the Portfolio of Legal Affairs shows that from January to June 2003 the cost of legal aid was $734,177; from June 2003 to June 2004 the cost was $821,000 and in the 12 months to June 2005 the cost was $1,500,000.

Other sources show that in 2001 $750,000 was spent on legal aid and in 2002 the amount was $970,000.[75]

Dr. Epp noted in his book that the large difference between the amounts of 2001 and 2002 was caused by the so-called "Euro Bank trial" in which approximately $335,000 was spent on the defendant's legal fees.[76] The records of the Chief Financial Officer of the Portfolio of Legal Affairs show that up to January 2003 $2,103, 187 was spent on legal aid costs and costs to the judiciary in the said case.

Again, the difference between the 2003/2004 and 2004/2005 periods was caused mainly by one case the "Cash for titles" case in which more than $700,000 was spent on legal aid fees.

The Commission has also been advised that there have been complaints relating to availability of legal aid counsel. The Commission was therefore asked to propose an alternative way of dealing with legal aid or a more cost effective and efficient way of providing such aid. Currently legal aid is administered by the Courts based upon information provided in accordance with the Legal Aid Rules 1997.

The Commission in considering the legal aid system shall address the following issues-

[75] "Legal Aid Provision in the British Overseas Territories and the Commonwealth Caribbean, 2002", John Epp, Derek O'Brien and Terence Caudeiron

[76] Ibid; note 73 of Chapter 3

- whether the legal aid system may be reformed simply by improving the investigative and assessment process relating to the grant of legal aid;
- whether it would be more cost effective to establish a public defenders office where counsel would be available year round;
- whether such an office could effectively provide most of the services required under legal aid or whether there will be a need to hire specialist lawyers when required;
- if an office is proposed, whether the office should be independent of the Attorney-General's office to ensure that there is no conflict of interest;
- the need for an appeal system to deal with appeals from a person who is refused legal aid; and
- the need for a recovery system where certain persons who are granted legal aid would be liable to pay the legal aid fund back.

In his 2002 paper entitled "Legal Aid: Models of Organisation" Roger Smith[77] sets out key questions which should be answered by policy makers when evaluating any legal aid model for their jurisdiction. Some of these questions are-

(a) what mandatory duties does the jurisdiction accept in relation to public funded legal services under the European Convention on Human Rights;
(b) what discretionary services does the jurisdiction wish to provide?
(c) what criminal services does the jurisdiction wish to provide? In particular, what services does the jurisdiction wish to provide prior to a suspect being charged and during interrogation by the police?
(d) in relation to civil cases, how much of family, private, public and poverty law claims does the jurisdiction wish to cover?
(e) how do publicly funded services interrelate with other forms of funding services or different ways of resolving a dispute?
(f) should legal services extend beyond representation to advice?
(g) does the jurisdiction accept a need to provide information and public legal education?
(h) does the jurisdiction wish to incorporate funding for public interest litigation and casework? If so, how?

[77] Director, Justice, UK 2002

(i) what test of means is envisaged for criminal cases?
(j) what test of means and merit is envisaged for civil cases?
(k) who will administer the tests of means and merit? Will the providers do this or should there be some form of third party certification?
(l) how are criminal services to be delivered? Does the jurisdiction favour private practitioners, salaried practitioners, some form of 'public defender organisation' or some combination of delivery? What are the advantages and disadvantages of each system?[78]

Current legislation

Legal Aid is regulated in the Islands by the Legal Aid Law (1999 Revision) which was first enacted in 1975 and the Legal Aid Rules, 1997.

Section 3 of the Law provides that where it appears to any court before whom there appears any person charged with a scheduled offence or who desires to take or defend legal proceedings in the Grand Court, that such person has not the means to instruct a legal practitioner to advise or represent him in any relevant proceedings, the court shall grant to such person a certificate entitling him to free legal aid or subsidised legal aid, for the preparation of his case and generally throughout such proceedings and in any appeal.

Scheduled offences are offences set out in the Schedule to the Law and these offences are -

arson
assault causing grievous bodily harm
bestiality
blackmail
buggery
burglary
carnal knowledge of a girl under the age of twelve
criminal libel
forgery
infanticide
indecent assault
manslaughter
murder
rape

[78] page 1 of the paper which was written for a conference of the European Forum on Access to Justice held in Budapest on 5-7 December 2002

carnal knowledge of a girl under the age of fourteen	robbery
causing death by driving	treason,
coining offences	

Where the court is not satisfied that a person is of insufficient means it directs a probation officer to make inquiry as to the means of an applicant and to make a report on oath to the Court in chambers on that person's means.

According to section 5 of the Law, the effect of the grant of a certificate is that the person to whom the certificate is granted shall have assigned to him the services of one or, subject to the approval of the Court, more legal practitioners.

The practitioners who provide legal aid services are from the private Bar. The Clerk of the Court keeps a roster of attorneys-at-law who have intimated to him their readiness to accept briefs under the Law and are approved by the Chief Justice as suitable persons to hold such briefs. The Clerk of the Court offers such briefs in rotation to those practitioners who appear upon the roster.

Rule 6 of the Legal Aid Rules provide that before agreeing to act for any person, it shall be the duty of every attorney to consider whether such person may be eligible for legal aid and, if so, to advise him to make an application for the grant of legal aid. The Rule further provides that an attorney shall not agree to act in consideration of any fee or accept any fee from a person who appears to be eligible for legal aid unless-

(a) the attorney has first given such person written advice to the effect that he appears to be eligible for legal aid and such person has made an informed decision not to apply for legal aid; or
(b) such person has applied for legal aid and his application has been rejected.

An attorney shall not seek or accept any fee from any person (including the assisted person) in respect of the proceedings to which a certificate relates.[79]

An assisted person may only instruct the attorney-at-law named in his certificate, but that if that attorney is unable to take any step in the matter to which he has been assigned, he may request another attorney on the roster to do so on his behalf.[80] Further, an attorney

[79] Rule 6 (3)
[80] Rule 6 (6)

who agrees to act pursuant to a legal aid certificate has a duty to represent the assisted person until the matter is completed or the certificate is discharged.[81]

In accordance with rule 16, an attorney is entitled to remuneration at the rate of $100 per hour for work done on the instructions of an assisted person. Rule 16 also provides that an attorney is entitled to reimbursement in respect of the following-

(a) fixed fees and ad valorem fees;
(b) fees paid for the service of documents, provided that the amount recoverable shall not exceed that prescribed by paragraph 1 of Schedule 3 of the Grand Court Fees Rules 1995; and
(c) photocopying and printing charges, charges incurred in respect of international telephone calls and facsimile transmissions and any costs or expenses which the certificate specifically authorises him to incur, provided that such costs and expenses have been reasonably and properly incurred.[82]

Legal aid assistance does not cover appearance before the court for mention nor fees for expert witnesses, without the prior approval of the court.

Rule 17 provides for the taxation of an attorney's bill of costs by the Clerk of the Court. Rule 18 gives the attorney the right to appeal to judge where the attorney is dissatisfied with the amount allowed to him on taxation by the Clerk of the Court.

In both criminal cases and civil cases a means test is carried out on the applicant.

The court takes into account the amount of the applicant's disposable capital; his disposable income; his ability to obtain employment and the likely cost of the proceedings. In civil cases the court also takes into account the nature and complexity of the proceedings or the intended proceedings. Further, a certificate may only be granted in civil cases if the Court is satisfied that the applicant appears to have a reasonable prospect of succeeding on the merits of the case.[83]

The Rules do not provide a formula to assist in determining financial eligibility and the court therefore has a wide discretion in granting legal aid.

[81] Rule 6 (7)
[82] Rule 16 (2)
[83] Rule 12 (1)

In criminal cases an assisted person who is convicted of a scheduled offence may be ordered to pay a contribution towards the cost of his representation. In civil cases in certain specified circumstances where an assisted person succeeds in obtaining money or an interest in land or other property the court may order an assisted person to pay a contribution towards the cost of his representation.[84]

Proposed legislation

The discussion draft Bill and regulations submitted to the Commission propose a dual system where legal aid services would be provided by both a public defenders office and by private lawyers willing and able to carry out legal aid work. The main precedent used in the preparation of the draft legislation was the Legal Aid Act 1980 of Bermuda.

[84] Rules 12 (6)

Bermuda legislation

In Bermuda legal aid is regulated by the Legal Aid Act 1980, the Legal Aid (Amendment) Act 2003 and the regulations made thereunder.

In accordance with section 3 of the Act legal aid may be granted in proceedings before a court in the following cases-

- criminal trials on indictment, preliminary inquiries into charges of an indictable offence and summary trials on information charging an offence which is triable either summarily or on indictment;
- civil proceedings generally in the Supreme Court or a court of summary jurisdiction; and
- appeals in criminal and civil cases.

Legal aid may be granted to individual natural persons in the following circumstances —

- accused persons in criminal trials;
- persons who are detained at a police station, correctional institution or other similar place
- appellants (including applicants for leave to appeal) in appeals against conviction or sentence and respondents to criminal appeals by prosecutors;
- parties generally in civil proceedings;
- parties generally in civil appeals; and
- special circumstances to the Privy Council including instructing counsel in the UK.

A Legal Aid Committee is responsible for the administration of legal aid in Bermuda. It consists of 5 members and must be chaired by a person who holds or has held the judicial office of a judge or magistrate. The function of the Committee is to receive and consider every application for legal aid and grant legal aid certificates accordingly.[85] The Minister responsible for legal aid, the Minister of Justice, may after consultation with the

[85] Section 4 and 5 of the Legal Aid Act 1980

Committee give general directions as to the policy to be followed by the Committee in performance of its functions.[86]

The Legal Aid Office provides legal services to members of the public who qualify for representation. It falls under the Ministry of Justice and is staffed by public servants, including a Senior Legal Aid Counsel and Legal Aid Counsel. The Senior Legal Aid Counsel is responsible for the administration of the Legal Aid office.

In a paper presented by the Attorney-General of Bermuda[87] at the conference of Attorneys General of the United Kingdom Overseas Territories in Anguilla between 15 to 17th February 2005 the Attorney- General indicated that, despite the existence of an office with salaried counsel, most of the legal aid services are provided by the private bar. The private attorneys are paid on a sliding scale. Fees range from $200 per hour (BD$/US$) for out of court work to $220 per hour in court work, to $280 per hour for appearing in the Court of Appeal or in the Privy Council.

The scheme in Bermuda also provides for duty counsel. The Law provides that as soon as a decision has been made to detain a person at a police station, correctional institution or other similar place the person in charge of the police station, correctional institution or other similar place, as the case may be, shall inform the first mentioned person that he has a right to obtain advice and representation for the purpose of any interview from a duty counsel or Legal Aid Counsel.[88] A duty counsel also appears in each session of the daily plea court.

The means test in Bermuda is very detailed and, unlike the Cayman Islands, a formula is set out to assist in determining eligibility.

An applicant is likely to be granted a legal aid certificate if his disposable income is less than $18,000 and his disposable capital is less than $20,000. A person may be asked to contribute towards legal fees.

In the paper presented by the Bermudian Attorney-General in 2005 it was noted that in the years 2003/4 the budget for the running of the Legal Aid office and for the remuneration of staff was $1,003,000 (BD$/US$) and was increased in 2004/5 to $1,

[86] Section 5A, Legal Aid (Amendment) Act, 2003
[87] Access to Justice, Legal Aid Scheme of Bermuda-
[88] Section 7 (2A)

757,000. The population of Bermuda is approximately 65,000 people or approximately 1 ½ times the population of the Cayman Islands.

The figures do not appear to cover fees paid to the private Bar for legal services.

Draft Legal Aid bill and regulations

As indicated previously the draft legislation prepared by the Law Reform Administrator is modelled on the Bermuda legislation.

The Bill provides for the establishment of a Legal Aid Commission to be responsible for the administration of legal aid. It is proposed that the Commission would comprise the following members-

(a) one member appointed by the Chief Justice on the nomination of the Caymanian Bar Association;
(b) one member appointed by the Chief Justice on the nomination of the Cayman Islands Law Society;
(c) one member appointed by the Chief Justice in his absolute discretion and such member be either-
    (i) an accountant employed by a reputable accounting firm;
    (ii) a social worker or a person with experience in social work; and
    (iii) an attorney-at-law or a person who holds or has held the office of a judge or magistrate in some part of the Commonwealth;
(d) one member selected from among the public and appointed by the Attorney-General; or
(e) the Solicitor-General ex officio or his nominee.

The powers of the Commission would include-

(a) establishing guidelines, procedures and requirements pursuant to which legal and other services may be made available under the legislation;
(b) encouraging and assisting by means of grants or otherwise, the programme of any full-time law student where the programme has objects consistent with the objects of the legislation;
(c) making public by means of advertising or otherwise the nature and extent of the legal services that are available; and

(d) establishing and conducting such programmes as the Commission considers advisable to provide services to persons to prevent legal problems arising in connection with their affairs, and generally to carry out the purposes of the legislation.

The Ministry responsible for the Commission and for legal aid services must be considered. The draft provides that the Attorney- General would have such ministerial responsibility but questions have arisen as to whether this may not be a conflict of interests as the Legal Portfolio is responsible for prosecution of offences.

Clause 9 provides for the office of the Commission which would comprise a Director of Legal Aid and Legal Aid Counsel and such other staff as would be necessary for the administration of the office.

It is proposed that if the Commission agrees with the idea of a legal aid office that it may be comprised as follows-

Staff

Director- 15 years call to the Bar
Grade E Point 1 $89, 160

Senior Legal Counsel (1)- 10 years call to the Bar
Grade F Point 1 $81, 840

Legal Counsel (2)- 5 to 7 years call to the Bar
Grade H Point 1 $64, 260

Social worker/ Legal aid assessor
Grade K Point 1 $43,956,

Clerical Officer
Grade P Point 1 $24,972

Salaries $304,188 (annual minimum)

Administrative costs

Rent- based on rent paid by the Legislative Drafting Department which consists of 4 attorneys and one clerical officer
$6000 per month ($72,000)

Utilities
$2000 per month ($24,000)

Books/ paper
$3000 per year

Costs $99, 000 (annual minimum)

The Bill also provides that services may be provided by attorneys in the private Bar. Clause 6 provides that the Commission, in consultation with the Caymanian Bar Association and the Cayman Islands Law Society, would prepare and maintain a list of attorneys-at-law who are in active private practice in the Islands, from which shall be drawn the names of all attorneys-at-law ("listed attorneys-at-law") who are able and willing to represent applicants and assisted persons.

The Bill sets out the formula for determining the means of an applicant. Clause 18 provides that a legal aid certificate may be granted to an applicant by the Commission if his disposable income is less than **$18,000** a year; but an applicant shall be refused a certificate if he has a disposable capital of **$20,000** or more. The Third Schedule to the Bill provides that a person's disposable income is the aggregate annual gross income of the household of which he is a member, less-

(a) $2,000 for that person's married spouse;
(b) money actually paid annually by that person (whether or not under a court order) for the support of a person under eighteen years of age who is not a member of that household;
(c) $2,000 for each member of that household (whether or not under eighteen years of age) who the Commission is satisfied is not financially independent; and
(d) rent or mortgage interest not exceeding $9,600 actually paid annually in respect of the premises where that household lives.

The Third Schedule also provides that a person's disposable capital is the value of all the property that he owns, less the value of any of the following if owned by him, that is to say—

(a) wearing apparel;
(b) occupational tools;
(c) his household furniture and effects; and
(d) any owner-occupied single unit dwelling with an annual rental value not exceeding $24,000.

The Bill has yet to be fully discussed but in addressing the review of legal aid the main issue is whether the high costs of legal aid in the Islands can be solved by establishing the system set out in the bill and regulations. In considering that issue the Commission should also consider what kind of scheme would provide the most efficient service to assisted persons.

Research

The Department of Constitutional Affairs in the United Kingdom in 1997 published a report which considered the international experience of different legal aid delivery systems to explore which model offers the best "value for money" in handling mass case work.[89] The systems in Canada, Australia and the USA were examined and the findings of the report were as follows-

- "When costs data are available, they usually show that salaried services are cheaper on a cost-per-case basis. This is particularly true in criminal defence, where the Canadians have carried out some reasonably sophisticated studies (Brantingham 1981,[90] Sloan 1987[91]).

[89] "Legal Aid Delivery Systems Which Offer The Best Value For Money In Mass Casework? A summary of international experience"- Tamara Goriely, 1997
[90] The Burnaby evaluation (Brantingham 1981)- an evaluation of an experimental public defender project established in the outskirts of Vancouver
[91] Sloan R. (1987):"Legal aid in Manitoba: evaluation report"; Department of Justice Ottawa

- In Canada, in the criminal field, those jurisdictions that use salaried services tend to have lower costs-per-case overall than those using judicare systems[92]. The same is not true in the USA, where some very cheap schemes in the South and Midwest use assigned counsel. However, there are several quality concerns about very low-cost judicare schemes.
- The reason salaried lawyers are cheaper is that they tend to spend less time per case (Brantingham 1981, Sloan 1987, Domberger and Sherr 1981). An Australian report found little difference in what it costs to employ a lawyer in private practice and what they cost to employ in a staff office. The Burnaby study also found that salaried lawyers and judicare lawyers were receiving around the same costs per hour - though in some circumstances judicare lawyers were able to charge the same time to two or more different cases (Brantingham 1981).
- The reasons why salaried lawyers spend less time per case are more problematic. There are a number of possible explanations-
  (a) staff offices may select easier cases - which probably accounts for some of the observed cost differences. However, it is unlikely to be the whole story. The Burnaby study assigned cases randomly while the Manitoba studies controlled for case-type. Nor does it explain why Canadian schemes with staffed offices have lower costs per case than those with judicare schemes;
  (b) staff lawyers may be more specialist. As the Burnaby study found, a public defender office offers young lawyers a very quick way of becoming specialists in their field, and they soon become highly skilled at handling routine criminal defence. However, the same may be true in some specialist private firms. Furthermore, in complex and unusual cases which staff lawyers handle infrequently, there may be greater expertise in private practice. To put it simply, staff lawyers may be better at guilty pleas on burglary charges: private practice may be better in murder cases.
  (c) staff offices may enjoy economies of scale. As Justice (1987) puts it, 'backup services are better'. Good public defender schemes can employ investigators and some have research departments to keep abreast of scientific, technical and legal issues. They can maintain good contacts with

[92] private practitioners – employed on a case by case basis and often known by the US phrase ‘judicare’;

expert witnesses. By having offices close to court and by handling many cases in the same court each day, they can cut down on travelling and waiting time.

(d) salaried lawyers and judicare lawyers have different incentives. Staff lawyers generally wish to get through their caseload and get home at the end of the day, while judicare lawyers whose fees depend on the hours expended on each case may have incentives to carry out more work. The Canadian experience suggests that the staff lawyers are more likely to enter guilty pleas and that they do so earlier than private lawyers. They negotiate more with prosecutors and carry out less 'hand-holding' with clients. They also provide more continuous representation, passing clients to fewer members of staff.

The report also considered the question whether staff lawyers who spend less time on the case are providing the same quality of service to the client. The report indicated that the answer may vary according to the area of work.

The report states-

"(a) For criminal cases, some tentative evidence from Canada suggests that a cheaper service does not necessarily mean a worse service. The Burnaby and Manitoba studies found that staff clients were convicted no more often and were less likely to receive a prison sentence. Client satisfaction was much the same.

(b) This finding, however, does not necessarily hold for other jurisdictions. Where judicare lawyers are already supplying a minimal service (as in some US Southern and Midwestern states), it is likely that a lawyer who spends less time will be providing services of poor quality. Where lawyers are already putting heavy pressure on their clients to plead guilty, any further pressure could result in innocent people entering guilty pleas. Staff lawyers can only be expected to make efficiency gains when there is already inefficiency in the system - where, for example, constant changes in lawyer lead to repetitive preparation, or where guilty pleas are entered too late, or where lawyers make applications which have little prospect of success.

(c) For social welfare law, there is some (very limited) evidence to suggest that salaried lawyers are able to secure similar outcomes even though they spend less time per case (Québec Commission 1981; Domberger and Sherr 1981).
(d) For family law, no evidence is available about the respective quality of staff and judicare systems.".

Dr. Epp in a report for the Attorney-General of England and Wales noted that the level of funding from Government was integral in determining which model of legal aid service would work in a small jurisdiction. He noted that many of the overseas territories used the judicare model. However the BVI Bar Association recommended the staff- lawyer model as the way forward for the BVI, because it offers the advantage of reasonably predictable expenditure. The model can be modified to allow some cases to be referred to private lawyers, where there is a conflict of interest or a need for greater independence.

According to Dr. Epp, "The staff model has another advantage. Lawyers are employed on the basis that they are competent to provide advice and representation in the areas of law covered by the legal aid programme. In those jurisdictions with only a small number of lawyers who are able to offer services in contentious matters but with a relatively large demand for legal aid service, the staff model is a good option. If the lawyers in private practice are general practitioners and are willing to do legal aid work, such as the two in the Falkland Islands, then the judicare model is equally effective. A mix of the two models may be appropriate, depending on local conditions.".

Roger Smith [93] noted that in considering delivery legal aid models there is one constant "Good public legal aid services equate with high levels of funding.".

Some of the research material also deals with the issue as to which government ministry should be responsible for legal aid.

There are a variety of arrangements. In England and Wales it is the Lord Chancellor's Department; in Bermuda it is the Ministry of Justice; in Ontario and Federal Canada, it is the Ministry of the Attorney-General. In the United States there is a stricter approach to the separation of powers. In some states funding comes via the judiciary. In other states funding comes through an office of public defence located within the executive.

[93] See footnote 3

Conclusion

This paper is a preliminary paper outlining the issues which must be considered by the Commissioners in reviewing the system of legal aid in the Islands. The research provided is only a synopsis of the material which has been found on the topic. More research on other overseas territories and Caribbean jurisdictions will be provided. A full report will be provided after the Commissioners have considered this paper.

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