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Review no ____?

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Our ref: Legal Aid

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Dear Deputy Ahier

Draft Access to Justice (Jersey) Law 201-

Thank you for your letter of 14th September confirming an extended timetable for me to respond to your letter of 31st August.

Since I first wrote to you, I have given further thought to the nature of this reply, and in the interests of transparency and open government, I have reached the conclusion that it would be appropriate for my response to be made public.

I am aware that your Panel has written to different members of the judiciary in respect of this review. There is a well-established rule that members of the judiciary do not involve themselves in political matters, and in the circumstances it seems to me to be better that the views of the judiciary generally should be provided through the Bailiff as Chief Justice.

I would like to make it plain that I consider it right that you have consulted the judiciary about this proposed legislation, and right that the Court Service responds through me. This is because access to justice is a fundamental part of the responsibility of the Bailiff as Chief Justice of this Island. Not only am I entitled to comment on proposals which might affect the delivery of justice, but it is in my view my duty to do so.

I should add that the Jersey Law Society wrote to me on 22nd May 2017 to ask for my views on the Scheme then proposed. I did not feel able to comment at that time because there were proceedings relevant to the issue actually before the Court. Those proceedings have since been withdrawn and I do not think the same constraint now exists.

There is an important distinction between what ought to be provided by way of legal aid in order to ensure that justice is done, and who provides the relevant services or the financing for them. In large measure, the latter is for political consideration. The former – what funding or services are necessary? – is a structural one on which the Court Service certainly has a view.

It is essential that members of our community have access to the courts of this Island. In criminal cases of course, the state ensures that they do have access to justice because, through the prosecution service, defendants are brought to court whether they like it or not. In civil cases, however, the focus is in a different place; and here it is essential that members of the community have access to the courts to provide them with a remedy when they have claims against others, because without a remedy they would be more likely to take the law into their own hands.

In the last few years, we have seen in court a great increase in the number of litigants in person in civil cases. I mean no disrespect to those litigants, who devote a great deal of time to presenting their cases in what is for them foreign territory, but it is not desirable in the interests of justice for several reasons:-

(i) Although this is a generalisation and there are individual exceptions, litigants in person do not generally focus on the essential issues in the case in the same way as lawyers have been trained to do. As a result, they are inclined to raise points which are not legally relevant, although they are often emotionally important to the litigant. This very much increases both the time taken in court and the expense of the process. In addition, where a client who is legally represented faces a litigant in person, it is almost certainly the case that the costs which the represented client will have to bear are greatly increased.

(ii) Despite the best efforts of the Court, the litigant in person is less likely to receive good justice. Courts inevitably focus on what is put before them, and if the litigant in person omits to mention important points which might go in his favour, there is a real risk from time to time that the court will not find those points for itself. Conversely, if the court has identified the relevant point which the litigant in person has failed to make and subsequently takes that point up with the lawyer for the represented client, that client is likely to feel that the process is not fair because the judge is against him – whereas in fact all the judge is trying to do is to explore areas which, had the litigant in person been legally represented, the lawyer would have raised on that person's behalf.

(iii) Furthermore, the court is unlikely to have such an accurate estimate of the amount of time which would be required to deal with proceedings in which there is one or perhaps more than one litigant representing himself. This has an impact on the timetabling of cases in the Royal Court and is likely to cause delay. Furthermore, writing a judgment where there is a litigant representing himself is likely to prove more difficult than in other cases. So there is a real risk of delay in the publication of judgments as well.

The courts do try to ease the way for litigants in person as far as they can. Initiatives are taking place elsewhere with a view to improving processes for all litigants, including litigants in person, but at the end of the day it still remains true for the reasons given that we should if possible structure our system so that litigants are able to get professional assistance in presenting their cases. That always used to be the position but it has increasingly been eroded over recent years. Litigants in person used to be a rarity but the progressive reduction in the availability of legal aid has had a marked impact already.

In very broad terms, I can summarise my view by saying that, if the draft Law is passed and if the Legal Aid Guidelines which are issued in due course under Article 7 of the draft Law reflect the scheme attached at Appendix 2 of the Report accompanying the draft Law, the outcome will be a significant deterioration in the provision of legal aid and consequent prejudice to those who can ill afford it and to the administration of justice in the Island. Far from improving access to justice, the consequences are likely to be reduced access to justice.

There is clearly an expectation that the Guidelines will be issued in accordance with the draft Scheme attached at Appendix 2 of the Report. It is described as a scheme which "*is felt to provide a broadly satisfactory basis on which to proceed*". I think that, when considering the draft Law, States Members should be aware that a possible, perhaps even a likely outcome, if the Law is passed, is that the Guidelines will be issued in the form of the draft, thus reflecting the Scheme. That is why in this letter I concentrate on the defects, as I see them, in the Scheme as reflected in the draft Guidelines.

(i) Structure

1. For over a century, legal aid has been provided by the legal profession at their cost. This is in keeping with the long tradition of honorary service in the Island and lawyers have been content that, in exchange for the privilege of being able to practice law in the Island, they were expected to act essentially for free to those who could not afford to instruct a lawyer privately. The scheme for providing legal aid has changed over the years and the increasing number of lawyers has reduced the actual burden on them individually. In recent times, as set out in the Report, the States have reimbursed lawyers for public law children's cases, (i.e. where the government wishes to intervene to protect children), and for exceptionally long cases where it was felt unfair that the burden should fall upon a particular lawyer. The States has also reimbursed disbursements (i.e. actual outgoings) incurred by lawyers acting on legal aid.

2. The administration of legal aid has gradually become more formalised. For many years, in practice it was very much a matter of discretion. Most of the time, legal aid was granted to applicants. There was no upper financial limit beyond which legal aid was refused, but the better off the applicant, the greater the contribution which the lawyer could demand. This system had the advantage that everyone had access to a lawyer and there was therefore no obvious gap in the ability of those just above a legal aid cut-off point to bring legal proceedings. However the matter has been formalised over the years and, until the attempt of the Law Society in January 2017 to effect a reduction in legal aid provision (see para 2.4 of the Report), the position was governed by the Guidelines of 30th September 2005 (as amended on 7th June 2010) issued by the Law Society. I shall refer to these as the "*2010 Guidelines*". It is my understanding that these are still currently in force pending enactment of the draft Law and the Guidelines.

3. What is proposed now is that the States should fund criminal work (which makes up a very substantial proportion of legal aid) on a similar basis to the currently funded public law children's work but that lawyers will continue to fund civil/family work. Responsibility for administering the legal aid scheme will be taken over by the Judicial Greffier but with power to delegate to the Law Society.

4. It is entirely a matter for the States as to whether they wish to apply some of the taxpayers' resources to paying lawyers for work on legal aid rather than leaving the legal profession to fund matters as before. That is not a matter for judges to comment upon.

5. Assuming that the general objective and structure envisaged in the draft Law is approved, we have only these comments on the drafting of the draft Law:-

   (i) The constitution of the Legal Aid Guidelines Advisory Committee is particularly important and is sensitive. Of course ultimately the Minister makes the Guidelines under Article 7 of the Law, but he does so with the advice and assistance of the Legal Aid Guidelines Advisory Committee. It means that the Committee must be representative of the different interests which are involved in the drawing up of the Guidelines. As presently drafted, there are three representatives from the court (the most senior officer of the Magistrate's Court, and two persons nominated by the Bailiff), three lawyer representatives (the Bâtonnier, the President of the Law Society and the Chief Executive of the Law Society) and three representing the States (two persons nominated by the Minister and the Attorney General). It seems to me that that current composition rightly acknowledges the different interests involved and it would be very important to keep that balance. I note that if anything should go wrong in practice in the future, it is open to the States by Regulation to amend the members of the Advisory Committee, and that seems to me to be an appropriate protection which would avoid any particular delay in changing the system if it needed changing.

   (ii) I recommend that Article 7(2)(i) of the draft Law be amended so as to make it clear that the Guidelines may limit the contribution to a specific maximum sum in addition to the ability to specify maximum periodic payments for payment and the amount of maximum periodic payments. I would like to explain why. Fixing contributions by way of a percentage of full fees is highly undesirable and is likely to lead to litigants not being prepared to take the risk. If one takes a simple civil or family case, legal fees are unlikely to be less than £20,000 and may be considerably more. On that basis, the current proposals suggest that a person with an income of £30,000 a year will be liable to contribute £10,000 (50%). It is a matter for you to assess but such a contribution seems itself to be likely to mean the litigant simply could not afford to receive legal aid. The reality is worse still - the lawyer will be unable to guarantee what the full fee will be as it will depend on the actions of the other side. Thus a legally aided litigant will be faced with an uncertain liability expressed as a percentage of whatever the lawyer's eventual fees are. Someone earning £30,000 per annum will not be able to run the risk of an open ended uncertain contribution. If he does not identify this risk at the beginning, he may start the proceedings, incurring fees, and then have to stop them; and at that point will have incurred fees for nothing and may indeed have to pay the fees of the other party if he does. The alternative may be that he will not start the proceedings at all unless he is prepared (and able) to be a litigant in person. In my view the fair course is to limit the contribution at the outset to a maximum sum and the client can then decide whether he can afford to risk that sum, knowing that if he proceeds the liability to his lawyer will not exceed it. In this context one must remember that in relation to both public and private legal aid, contributions are fixed as a percentage of the full fees chargeable, and those full fees in the case of private law legal aid will be Factor A for taxation purposes, that is to say £235 per hour for a partner, £190 per hour for qualified staff and £156 per hour for other staff such as legal executives, trainee

lawyers etc. In connection with the public law legal aid, it is the percentage of the fees listed in the third schedule of the draft Guidelines.

6. As indicated above, our main concern relates to what is proposed under the draft Guidelines and I now turn to them.

(ii) The Draft Guidelines

(a) Areas of law covered in civil/family matters

7. Under the 2010 Guidelines, all areas of law were eligible for legal aid except those specifically excluded. In our view that was the correct way of dealing with matters as it is impossible to foresee every type of case in which legal assistance may be necessary. What is proposed now is that there is to be a list of types of work for which legal aid may be granted and another list of those matters being ineligible (see pages 15 and 16 of the Report). It is not clear whether something which does not appear on either list (like judicial review) is eligible or not. The Law Society's version of the Guidelines (at paragraph 2.3.3 says that it is not. In our view, the draft Guidelines should follow the practice of the 2010 Guidelines and simply list those areas which are <u>not</u> eligible for legal aid.

8. As to the areas not eligible, the draft Guidelines increase these as compared with the 2010 Guidelines. In other words, certain matters which have previously been eligible for legal aid will no longer be eligible. Some of these are extremely important:-

   (i) '*Ancillary relief claims*' are those which concern the allocation of property and maintenance matters following divorce or separation. Hitherto, under the 2010 Guidelines, all such matters have been eligible for legal aid subject only to the financial criteria. It is now proposed that there will be no legal aid for such matters unless there are dependent children. We regard this as highly undesirable. On the breakdown of a marriage, parties are vulnerable and emotions run high. A decision on the financial aspects will determine how both parties can get on with their lives in future. It is therefore of fundamental importance to them. They need calm legal representation advising them of their rights but also preventing unrealistic claims. Cases involving litigants in person are less likely to settle (because of the lack of measured advice), and as mentioned earlier, they take far longer to hear (because litigants do not understand what they have to do and matters repeatedly have to be adjourned as a result) cause increased delays in the delivery of justice and there is less chance of getting to the right answer (because it is more difficult for the Court to ascertain the true facts without proper and skilled presentation of the facts and cross-examination where appropriate). It may be said that we are simply following the position in England by excluding legal aid for ancillary relief claims where there are no children. That may be true but our judicial contacts in England confirm that it has been disastrous over there in the same way as we have just described above. We consider the proposal to be an unfortunate and retrograde step.

   (ii) Divorce proceedings themselves are now excluded unless there are children, whereas at present the parties may obtain legal aid to issue divorce proceedings. In our view, it is again important that parties who cannot otherwise afford to do so can obtain legal advice on whether they have grounds for divorce proceedings, how they should set about it, etc.

(iii) It appears from the eligibility criteria that where there are no dependent children, claims for ancillary relief will still be eligible in circumstances where a civil injunction has been granted and/or a criminal prosecution has been instigated on the grounds of domestic abuse or violence. In my view, one needs to consider the likely effect of such an approach, which is that litigants will be inclined to bring a claim of domestic violence in order to qualify for legal aid. This is the law of unintended consequences, but it is a real risk. My understanding is that in England and Wales where there is a similar provision, that has already been the experience of the courts.

(iv) Enforcement of maintenance orders is now excluded whereas currently it is not. So, if a wife has an order for periodical payments from her former husband upon which she depends to buy her groceries etc. and he fails to pay, legal aid will not be granted in order for her to bring proceedings to enforce those payments. That seems to us highly undesirable.

(v) Injunctions are now excluded in the family law context where there are criminal sanctions. We are not entirely sure we understand this but again, where a wife (usually) seeks a non-molestation injunction because she needs protection from a violent partner, surely that is a case where legal aid should readily be granted even if there are parallel criminal proceedings against the partner.

(vi) Other matters now to be excluded but which were previously covered include legitimacy matters and proceedings under the Separation and Maintenance Orders (Jersey) Law 1953.

(vii) In the civil field, '*debt related issues*' are now to be excluded whereas previously they were included. We would have thought that, where a person is in problem in relation to debts, this would be a time when he or she would benefit from legal advice. By definition, the person is unlikely to be able to afford a lawyer.

(viii) We note that taxation issues (including disputes with the Comptroller of Taxes) are now excluded. Again, if a person of modest means is in dispute with the Comptroller of Taxes, why should he or she be put at a disadvantage by not being able to instruct a lawyer to argue the case for him/her, especially where the Comptroller has all the resources of the States behind him?

(ix) Most significantly, because there is now a list of matters where legal aid may be granted and presumably everything else is excluded, judicial review proceedings (i.e. proceedings where a member of the public seeks to challenge a decision of government or some other public body) are excluded, whereas at present they are included. This means that government may in future avoid challenges to its actions by any person of modest means.

9. In summary, I see no good reason to narrow the areas of civil/family law where legal aid may be granted beyond the limitations in the 2010 Guidelines. The only beneficiaries of such restriction will be the legal profession. Conversely, there will be considerable prejudice to those who are eligible for legal aid on financial grounds but happen to require legal advice in an area which is now to be excluded. I would recommend that the areas of law criteria remain as set out in the 2010 Guidelines, namely that all areas are

potentially eligible for legal aid save for those specifically excluded and that the list of excluded matters should not be extended beyond those in the 2010 Guidelines. If that requires payment to the lawyers with an appropriate scheme, then that should happen. If things remain as proposed the outcome will be damaging to those seeking access to justice.

(b) Financial eligibility

10. The financial criteria have been tightened compared with the 2010 Guidelines, i.e. persons previously eligible for legal aid will no longer be so. It seems to us to be a retrograde step, particularly given that middle income earners outside even the current figures cannot realistically afford to litigate and that position is going to be made worse by restricting legal aid yet further. Thus:-

    (i) The gross household income figure under the 2010 Guidelines is £45,000 where it is now to be £35,000. There is a question as to whether, far from a reduction, the figure of £45,000 should be increased in accordance with inflation since it was originally fixed.

    (ii) Furthermore, under the 2010 Guidelines, in assessing gross household income, certain deductions were allowed e.g. £2,900 per child living in the household. No such deductions are permitted under the draft Guidelines.

    (iii) The figure for capital of £15,000 in the draft Guidelines is the same as that in the 2010 Guidelines, as is the figure of £100,000 equity in a residential property which is to be disregarded. There is therefore no immediate reduction, but neither of these figures have been increased to allow for inflation since they were introduced, I believe in 2005.

    (iv) Under the 2010 Guidelines, the Bâtonnier had a discretion to grant legal aid even where an applicant did not fall within the financial criteria. There is no such provision in the draft Guidelines although we note that, following representations, Article 4(4) of the draft Law does allow for this. We think it extremely important that the Judicial Greffier does have a discretion to provide legal aid even where it falls outside the guidelines where the interests of justice require it. It would simply preserve the existing provision under the 2010 Guidelines.

11. Even under the 2010 Guidelines (let alone under the draft Guidelines) there will be many people who fall just outside the guidelines who simply cannot afford to litigate. A household with a joint income even of £45,000 is one that usually has no spare cash, with everything being devoted to meeting regular outgoings. There is no way in which members of such a household can suddenly face the potential of a bill of many thousands of pounds in order to protect or enforce their legal rights. If this reduction in financial eligibility is implemented, there will be a real increase in the number of those unable to obtain legal advice. This is a matter for political consideration but surely one measure of the fairness of our system is to see how it treats those who are financially vulnerable.

12. More generally in relation to the reduction of eligibility for legal aid, the Report does not contain any justification for the financial changes proposed. It does not indicate for example why there has been no extension in terms of value of the exemption of £100,000 in respect of a family home as discussed above, which has been in place since 2005 and

has not been adjusted for inflation. The price for a two bedroom flat is now £258,000 as at the end of the second quarter of 2018.

13. I note also that a change which we introduced in the Royal Court Rules in June 2017 in respect of personal injury claims is not reflected in the new Scheme. Under the changes we made, an unsuccessful plaintiff will only have to pay the costs if a claim is brought in bad faith or is an abuse of process – this was introduced to prevent adverse costs orders being sought against an unsuccessful plaintiff, because there was a real fear that if they were made, plaintiffs might be deterred from bringing a claim because of the risk of losing their main asset, the family home. The Scheme as proposed by the Legal Aid Guidelines means that an unsuccessful plaintiff, while not having to pay the costs of a defendant, could still have to pay the costs of their own legal aid adviser and thus still face the risk of selling the matrimonial home. Perhaps some consideration should be given to the Legal Aid Scheme reflecting the changes to the Royal Court Rules introduced in 2017. This would be a matter for discussion in the Legal Aid Guidelines Committee and advice to the Minister and perhaps it goes to show how important it is that the Bailiff should have nominees on the Legal Aid Guidelines Committee.

14. More generally in relation to the reduction of eligibility for legal aid, the Report does not contain any justification for the financial changes which apparently will be introduced. The Panel may wish to make enquiries from the Statistics Office about the income of the legal sector, the numbers of partner advocates as opposed to employed lawyers and the likely net profit figures. I say this because if it is argued that the current legal aid scheme involves a burden on the legal sector, it seems to me that that claim should be evaluated in the light of the available statistics.

(iii) Contributions

15. The most significant difference here is that in the 2010 Guidelines, although the rules for contributions were in fairly similar terms to those set out in the draft Guidelines, there were overriding provisions (at 2.12.4.2 and 2.12.4.3) to the effect that a demand for contributions should not cause financial hardship to a client and should be reduced to an affordable level where this was the case. There was a right of appeal from the decision of the law firm concerned to the Bâtonnier, who also applied the test of not causing financial hardship.

16. There is no equivalent provision in the draft Guidelines. In our judgment, such a provision should be included and there should be a right of appeal from any determination by the legal aid administrator to the Judicial Greffier. It would enable the Greffier to provide some form of safety net where the scale of contribution would cause financial hardship.

17. I am extremely concerned at the last paragraph of the draft Guidelines at page 19 of the Report. This provides that, in family matters (e.g. financial disputes following divorce) where funds are obtained through the division of assets (including those arising from sale or transfer of ownership of the former matrimonial home) a legally aided client will be liable to meet the <u>full</u> costs of legal representation (i.e. 100% of the legal aid rate). This seems extremely harsh. On a divorce, the chances are that two homes will now be required rather than one. Accordingly, on a sale, the proceeds have to be used to provide two homes instead of just one. There is therefore in reality no spare cash. To say that in

those circumstances the lawyer should be paid full costs of legal representation is to favour the lawyer over the housing needs of the legally aided client (and any dependents).

(iv) Other matters

(a) Fees of acquitted defendants

18. Where a person is prosecuted for a criminal offence and is then acquitted or the prosecution against him abandoned, the Court will normally order that he be awarded his legal costs against the prosecution. This does not reimburse him in full for his legal costs but it will cover most of them.

19. It is apparent from the Report (paragraph 3.1.2 on page 7), the Scheme (pages 13 and 14) and the draft Guidelines (last paragraph of the Third Schedule) that in future, any award of costs in favour of an acquitted defendant will be limited to the new fixed rates for lawyers acting on criminal legal aid and this will be so whether the defendant is legally aided or not. It is apparent from the Report that this is being done in order to save money on costs so as to be able to pay for the provision of legal aid in criminal matters.

20. This is perfectly reasonable in relation to defendants on legal aid. The lawyer in such cases will only have been paid at the fixed legal aid rate and accordingly those are the only fees which the prosecution should have to pay for.

21. However, it will operate extremely unfairly in the case of an acquitted defendant who is not on legal aid. He will have been billed by his lawyers at their normal rate and an award of costs at the criminal legal aid rate will be but a small percentage of the costs he has actually incurred. The fact that this may be done in other jurisdictions does not make it right. There may be a perception that such defendants are wealthy and can afford it. That may be so in the odd case but in our experience the vast majority of defendants who are not on legal aid come from what is frequently described as middle Jersey. Their income will be fully committed to ordinary household expenditure, yet they are faced with the prospect of imprisonment and therefore wish to instruct a lawyer. They often have to fund this by taking out a loan secured on their property, raid any savings or simply incurring a large debt to their lawyer. In circumstances where they have been found not guilty – indeed the prosecution may even have abandoned the matter before it gets to trial – it seems wrong in principle that they should be left to pick up the vast majority of the expenses they have incurred.

22. It may be said that there is no reason why the State should undertake to pay lawyers at a particular rate simply because the defendant has reached that agreement. That misconstrues completely the approach to the award of costs by a court. The purpose of a costs order in our jurisdiction is to recognise that the successful party has been put to expense as a result of litigation brought by an unsuccessful party. That is a principle of general application, and has effect with regard to the prosecution just as much as it does to any other unsuccessful party. Other jurisdictions do things differently – as in America where it is rare to obtain a costs order which has a very significant impact on the delivery of justice both in criminal and civil cases.

23. In effect, the proposal put forward asks acquitted (accordingly in law, innocent) non-legally aided defendants to pay for the fact that lawyers on legal aid in criminal matters will now be paid. It is not clear why such innocent defendants as a group should be

penalised in this way. If it is felt right to pay lawyers for legally aided defence work, any associated costs should be paid for by the state, not by a particular class of individuals who are not on legal aid.

(b) The indemnity principle

24. A successful litigant in a civil case is frequently awarded costs against the unsuccessful litigant. This means that, depending upon the amount which is allowed when the bill of costs is submitted to the Greffier for assessment, the unsuccessful party has to pay that amount to the successful party. A situation arose in Flynn v Reid [2012] 2 JLR 226 where the Court of Appeal had to consider the extent to which costs should be recoverable by the lawyer who was acting on legal aid – should this be only the costs which the lawyer was going to charge his or her client, or should the costs be calculated at the full rate which the lawyer would have charged had the client been a fee paying client not on legal aid. There is well established authority in the United Kingdom that one does not calculate the amount of recoverable costs in such a way as to breach what is called "*the indemnity principle*" – in other words, the costs order is made to compensate the client for what or she has had to pay his or her lawyer and is not made to give a bonus to the lawyer. In Flynn v Reid, the Court of Appeal, although not referred to this long line of authority, concluded in relation to the then current legal aid scheme that the indemnity principle ought not to apply. I imagine the court reached that conclusion by having regard to the legal aid scheme as it then existed as a whole. In my view, if one is changing the legal aid scheme, one should take the opportunity to re-state the indemnity principle so that the unsuccessful party who has to pay costs to a legally aided opponent should not pay more costs than the opponent is himself or herself required to pay his or her lawyer. Whether that restatement of the indemnity principle can be made in an amendment to the draft Law, or though the relevant Guidelines, is perhaps a matter which requires further consideration.

Summary

25. I make no apology for the length of this letter as Access to Justice is a critically important subject. Given its length, however, I now summarise the points I have made above as follows:

(i) The areas of law for which private (i.e. civil/family) legal aid may be granted will be more restricted than under the 2010 Guidelines. I recommend that the position remain as under the 2010 Guidelines i.e. all matters are eligible for legal aid (subject to financial criteria) except the listed excluded areas. The listed excluded areas should not be expanded beyond those in the 2010 Guidelines (see paras 7 – 9 above).

(ii) The draft Guidelines introduce tighter financial limits compared with the 2010 Guidelines so that less people will be eligible for legal aid. At the very least, the financial criteria in the 2010 Guidelines should be maintained. In reality, these are now considerably out of date and do not allow for inflation, with the result that fewer people are eligible for legal aid under the 2010 Guidelines now than was the case when they were introduced. The Panel may want to consider whether the capital and income financial criteria should be updated to allow for inflation since their introduction so as simply to maintain their value in real terms (paras 10 – 14).

(iii) Certain deductions should be allowed when assessing gross household income as in the 2010 Guidelines (para 10(ii)).

(iv) The Judicial Greffier should have an overriding discretion to grant legal aid where an applicant does not fall within the financial criteria, thus maintaining the position as under the 2010 Guidelines (para 10(iv)).

(v) The provisions for contributions should be subject to an overriding principle that they must not cause financial hardship, as set out in the 2010 Guidelines (paras 12 and 13).

(vi) Contributions should be assessed by way of a fixed maximum sum rather than a percentage of the fees to be incurred (paras 13 – 14).

(vii) Where a matrimonial home is sold and the proceeds are required for substitute homes, there should be no provision for the lawyer to be able to charge a full fee, thereby reducing the amount available to re-house the parties (para 17).

(viii) Non-legally aided defendants in criminal cases who are acquitted should be entitled to be paid their reasonable costs by the prosecution as at present. It is wrong in principle to require innocent non-legally aided defendants to fund the new provision of criminal legal aid (paras 18 – 22).

(ix) The indemnity principle could usefully be re-stated (para 24).

Conclusion

26. In conculsion, if the Legal Aid Guidelines are in due course issued in the form of the draft Guidelines:

(i) There will be a marked deterioration in the provision of legal aid in civil/family cases because the areas of work eligible for legal aid will be narrowed and the financial criteria will be lower. Thus less people will be eligible for legal aid on financial grounds and those that are eligible will not be able to obtain legal aid for areas which they would have previously.

(ii) Partners in law firms (and not necessarily employed lawyers) will benefit substantially. Those volunteering to undertake criminal legal aid will now be paid. Those who do not volunteer for criminal work but remain duty bound to undertake civil/family work will see an improvement in two ways:-

(a) According to para 2.1 of the Report accompanying the draft Law, in 2017 some 56% of the legal aid certificates related to criminal matters. There will therefore be a 56% reduction in legal aid matters to be dealt with by lawyers on civil/family legal aid;

(b) The percentage will in fact probably be greater, because the areas of law are being restricted and the financial criteria are being tightened, so that less matters will be eligible for civil/family legal aid.

Putting these two together there will therefore be a significant reduction in the burden on lawyers, at the expense of a deterioration in the legal aid position for the less well-off members of our community; and in doing so there will be conferred a financial benefit in particular on the partners in the major firms. That is a matter for political choice. What I am concerned with is the impact of that choice on the work of the courts and our ability to deliver justice on the same timely and effective basis as we do at present. If the choice is made to reduce the burden on lawyers, the way to achieve that is to introduce an appropriate scheme which nonetheless continues to make legal aid available, albeit at the expense of the public.

Yours sincerely

Bailiff