

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 Smith⁷⁷ 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

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

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 Bermuda⁸⁷ 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 1987⁹¹).

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 systems⁹². 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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