

THE STATES OF DELIBERATION
of the
ISLAND OF GUERNSEY

COMMITTEE *FOR* EMPLOYMENT & SOCIAL SECURITY

THE GUERNSEY LEGAL AID SERVICE – APPROVAL OF THE LEGAL AID (GUERNSEY AND
ALDERNEY) (SCHEMES AND MISCELLANEOUS PROVISIONS) ORDINANCE, 2018

The States are asked to decide:

Whether, after consideration of the Policy Letter entitled ‘The Guernsey Legal Aid Service – Approval of the Legal Aid (Guernsey and Alderney) (Schemes and Miscellaneous Provisions) Ordinance, 2018’, dated 8th October 2018, they are of the opinion:

1. To note the contents, and
2. To approve the draft Ordinance entitled ‘The Legal Aid (Guernsey and Alderney) (Schemes and Miscellaneous Provisions) Ordinance, 2018’ and to direct that the same shall have effect as an Ordinance of the States.

The above Propositions have been submitted to Her Majesty’s Procureur for advice on any legal or constitutional implications in accordance with Rule 4(1) of the Rules of Procedure of the States of Deliberation and their Committees.

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The Presiding Officer
States of Guernsey
Royal Court House
St Peter Port

8th October 2018

Dear Sir

1. Executive Summary

- 1.1. The Legal Aid (Bailiwick of Guernsey) Law, 2003 ¹(‘the Law’) has been in force since 2005.
- 1.2. The Law provides for the creation and operational aspects of a Legal Aid Scheme to be given effect by Ordinance of the States. In 2001 (Billet d’État XVII of 2001) and 2005 (Billet d’État VI of 2005) there were a number of Resolutions of the States that described the elements of the scheme that should appear in legislation, including a Resolution directing the preparation of legislation. To date, however, the Guernsey Legal Aid Scheme has largely operated on an extra-statutory basis known as the ‘Interim Scheme’.
- 1.3. The Interim scheme for both civil and criminal legal aid has been working satisfactorily but the Committee considers it preferable to codify the scheme under an Ordinance, as was the intention of the States.
- 1.4. In view of the passage of time between the Resolutions of the States and the bringing forward of a draft Ordinance, the Committee considers it appropriate for the Ordinance to be accompanied by a Policy Letter in order to inform the current Assembly of the background to the legislation.

¹ <http://www.guernseylegalresources.gg/CHttpHandler.ashx?id=71961&p=0>

- 1.5. The States will be asked to approve the Legal Aid (Bailiwick of Guernsey) (Schemes and Miscellaneous Provisions) Ordinance, 2018, which is attached to this Policy Letter at Appendix 1.

2. Background

- 2.1. On 25th July 2001, the States resolved that a comprehensive system for the provision of civil and criminal legal aid be established in Guernsey to satisfy the Island's obligations under the European Convention on Human Rights and the International Covenant on Civil and Political Rights.
- 2.2. The Guernsey Legal Aid Service ('GLAS') was established on 1st September 2001, on a wholly non-statutory basis, and at first offering assistance in criminal matters only. The Service was broadly modelled on the voluntary scheme that was already in operation.
- 2.3. The extra-statutory civil scheme commenced later, on 1st January 2002. As there had been no previous voluntary scheme in place, it was recognised from the outset that it would take some time to develop this new and potentially complex service. There was a need to establish and refine procedures, set up an office, negotiate arrangements with the Guernsey Bar and, in particular, to take account of constantly evolving legislation which would have an impact on the service and its scope. Accordingly, it was decided to initially operate the schemes for civil and criminal legal aid on an extra-statutory basis, pending the development and review of the schemes and the subsequent drafting and States' approval of an Ordinance.
- 2.4. The Legal Aid (Bailiwick of Guernsey) Law, 2003, came into force on 28th September 2005. However, Part III and Sections 18 and 19 of the Law were excluded from commencement and have not been brought into effect.
- 2.5. The following areas are covered by Part III:
- Creation of a Legal Aid Fund: It was originally envisaged that such a fund would be separately constituted and vest in the Legal Aid Administrator with all the administration and overhead cost that this would necessarily entail. It was, however, subsequently decided that no such separate fund needed to be created. This would save costs and no dis-benefit was identified.
 - Grants and loans to Administrator: It was originally envisaged that the States would vote for the financing of the operation of the Administrator's office. However, Paragraph 2 of the First Schedule of the Law already requires the responsible Committee to provide such personnel, accommodation, equipment, support services and facilities

as the Administrator reasonably requires for the proper and effectual discharge of her functions.

- Investment of surplus funds
- Exemption from income tax
- Accounts and audit.

- 2.6. As the 'responsible Committee', being the Committee *for* Employment & Social Security, already has the legislative authority to finance the operation of the Legal Aid Administrator's office and other operating costs, it is envisaged that the Committee shall continue to bring annual proposals to the States for the provision of such resources through its annual budget submission. In addition, paragraph 27 of the draft Ordinance states that provided that the Legal Aid Administrator complied with the policies and procedures of the States governing the maintenance and production of annual accounts, the Administrator's obligations in this regard under the Law are deemed to be discharged.
- 2.7. Section 18, 'Power to establish a Legal Aid Board' provides the power to establish a Board by Ordinance. To the extent that a Legal Aid Board would have exercised some kind of strategic oversight or guidance role, then in the absence of establishing this as a formally constituted body, it may be necessary for the Committee to plan from time to time to commission an independent review of legal aid.
- 2.8. H. M. Comptroller has advised that it is preferable to retain the sections of the Law as above, rather than repeal them, although there is no intention to bring them into force in the foreseeable future.
- 2.9. Section 19, 'Power to enable authorised lawyer to represent legally assisted person' is not yet in force. However, it may be required either if a Public Defender model were to be implemented for criminal legal aid, if a lawyer other than an advocate were to provide legal assistance, or if the Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law, 2003, were to be amended, as it currently provides that only advocates can give advice to detainees at the Police station or Border Agency.

3. The Interim Scheme

- 3.1. The Interim Scheme provides access to free or reduced cost legal advice, assistance and representation in criminal and civil cases for individual members of the public who could otherwise not afford the services of an advocate. Legal aid is only available in legal proceedings before a court within the Bailiwick, or appeal proceedings which were dealt with initially before a Bailiwick court.

- 3.2. The Guernsey Legal Aid Service financially assesses all relevant applicants for full legal aid and considers the legal merits of each application. It issues a certificate with conditions and limitations as appropriate, reviews the progress of legal aid certificates, reviews and pays interim accounts, assesses the reasonableness of advocates' fees claimed, and pays final accounts. The Service pursues the reimbursement of costs and assessed contributions to costs from assisted persons where appropriate.
- 3.3. The Service also provides information, advice and documentation concerning the provision of legal aid in the Bailiwick to the general public, advocates' firms and other agencies/interested parties.
- 3.4. The Interim Scheme operates in three main areas comprising:
- the Duty Advocate Scheme, which provides free legal advice 24 hours a day to any person who is detained or who voluntarily attends at the police station or offices of the Border Agency;
 - 'Green Form' Assistance, which usually provides up to two hours of advice and assistance on a means-tested basis and which can also include the preparation of a case or a legal document and limited representation at court;
 - Full Legal Aid, covering more prolonged or complex civil or criminal court cases. This is generally subject to both means and merits testing.
- 3.5. Legal aid services are currently delivered in Guernsey and Sark by way of an 'opt-in' system, whereby any qualified Guernsey advocate is able to take on legal aid matters. Other non-admitted lawyers (barristers and solicitors) and paralegals may also be accredited, subject to the Legal Aid Administrator being generally satisfied that they have the necessary qualifications and experience in relation to the work to be undertaken. The work is undertaken at agreed rates, which are subject to taxation (audit) of costs incurred. There are also fixed fee arrangements in some limited areas of work.
- 3.6. Special arrangements are in place to deliver legal aid services to Alderney.
- 3.7. Other models for the delivery of legal aid have previously been considered and rejected for the legal aid system as per the States report in 2007², and the current model and schemes have continued to be used and developed to date.

²Billet d'État XX of 2007, Article VII

- 3.8. Since May 2016, responsibility for legal aid has fallen within the mandate of the Committee *for* Employment & Social Security, having transferred from the Policy Council.

4. The Ordinance

- 4.1. The draft Ordinance is appended at Appendix 1 and is prepared in accordance with the powers under sections 4(j) and (k), 14, 15, 16, 17 and 30 of the Law. The Ordinance is required in order to bring the existing extra-statutory legal aid scheme onto a statutory basis.
- 4.2. The Ordinance largely maintains the status quo of the existing extra-statutory schemes for civil and criminal legal aid and establishes the statutory schemes on substantially the same basis as the interim arrangements.
- 4.3. Part I of the Ordinance enables the Legal Aid Administrator to terminate the obligations of the States under any current contracts that they have entered into for the purpose of providing legal assistance. If the Administrator terminates any such contract, she will "stand in the shoes" of the States and have the same obligations to which the States were subject and may exercise the same rights as were exercisable by the States. This part also establishes the four Legal Aid Schemes: the Transitional Scheme, the Legal Aid Advice and Assistance Scheme, the Civil Legal Aid Scheme and the Criminal Legal Aid Scheme.
- 4.4. Part II sets out the purposes of each Legal Aid Scheme. The Transitional Legal Aid Scheme enables existing recipients of legal assistance under the extra-statutory schemes to continue to receive that assistance. This part also limits the extent of advice, assistance and representation available under the Schemes only to matters arising in Guernsey and Alderney.
- 4.5. Part III of the Ordinance provides for various financial matters.
- 4.6. Part IV of the Ordinance provides for the establishment of the independent Office of the Legal Aid Commissioner ('the Commissioner') which will be a new statutory office. The Commissioner will review decisions of the Legal Aid Administrator, other than decisions relating to the financial ineligibility of an applicant or the level of contributions that an assisted person is assessed to have to make towards his or her legal aid. The establishment of the Office of Legal Aid Commissioner is to meet the requirement within the Law for an appeals process. If the Ordinance is approved, the Committee will select a candidate to nominate to the States for appointment as Commissioner.
- 4.7. It is considered that the appointment of a single Commissioner is the most cost effective and efficient way of providing a review process and the functions and processes to be implemented will largely reflect the appeals

processes already in operation under the Interim Scheme. It is intended that the Commissioner will be remunerated at an agreed daily rate, as and when required. It is not intended to have a retainer payment.

- 4.8. Part V of the Ordinance relates to General Provisions.
- 4.9. Once the Ordinance is implemented, in accordance with S21 of the Ordinance, the Legal Aid Administrator will have the power to issue guidance concerning the administration of the Scheme. However, the Committee's regulations or rules will take precedence over the Legal Aid Administrator's guidance where there is any conflict in relation to:
- Eligibility of an individual;
 - Scope of advice, assistance or representation that may be available to an individual;
 - Rates of remuneration; or
 - Rates of contribution.
- 4.10. The Committee will be able to develop the rules and regulations for the statutory schemes regarding these matters going forward. It is proposed that rules or regulations specified by the Committee will set out the detail of the legal aid schemes' scope, the financial criteria, eligibility and format for Guernsey and Alderney.
- 4.11. Section 22 of the Ordinance provides the statutory basis for the disclosure of any documentation or information to the Administrator for the purposes of carrying out her functions under the Law.
- 4.12. By the decision of this Committee made on 28th November 2017, the Ordinance will apply to Guernsey and Alderney but will not extend to Sark at this current time. This is due to the current joint review of the financial relationship between Guernsey and Sark and which will also include consideration of the provision of legal aid services in respect of Sark. The Policy and Performance Committee of the Chief Pleas of Sark has been advised of the Committee's decision. As a result, no further consultation of Sark regarding this draft Ordinance is required by the legislation.
- 4.13. It has been proposed that Sark may require tailored rules or regulations regarding these matters in the future, to reflect its individual set up and requirements. Pending such statutory schemes being brought into effect, the current interim legal aid schemes will continue to operate in Sark.
- 4.14. If the Ordinance is approved by the States, it will require a regulation to be made by the Committee to bring the Ordinance into effect.

- 4.15. Finally, it will be noted that the Ordinance creates a number of powers for the Committee to specify by rules various matters of detail for the purpose of the Schemes established under the Ordinance. These include eligibility criteria, the types of legal proceedings for which legal aid will be available, the conditions that will apply to funding for recipients of legal aid, and the rates of remuneration, contributions and other detailed provisions of the Schemes. The Committee takes the view that the delegation of such matters to the Committee is appropriate and necessary for the efficient operation and provision of a legal aid system and is consistent with the policy approved by the States when they first considered and approved the establishment of such a system in 2001. Members should note that under section 31 of the 2003 Law, rules made under an Ordinance must be laid before a meeting of the States and that once laid, a power to annul arises.

5. Financial impact

- 5.1. The Committee considers that transferring the extra-statutory legal aid schemes that are currently in existence into the statutory schemes as detailed in the Ordinance will not have any impact on formula-led expenditure. This is because the status quo of the way in which the current Interim Scheme is being administered and delivered will be maintained.
- 5.2. There may, however, be additional resources required within the Legal Aid office due to the work necessary to put the legal aid schemes onto a full statutory footing. This is not of sufficient substance, at this stage, to include in a budget provision. There may also be additional administration expenditure should the Commissioner, as provided for by the Ordinance, be required to review decisions of the Administrator. A budget provision of £5,000 has been included in the 2019 budget submission for the Guernsey Legal Aid Service in respect of the services of the Commissioner.

6. Consultation

- 6.1. Through the drafting of this Policy Letter, the Committee has consulted with the Policy and Finance Committee of the States of Alderney, in accordance with S30 (4) of the Legal Aid Law. The Policy and Finance Committee have resolved to approve the draft Ordinance.
- 6.2. Following the Committee's decision on 28th November 2017 (see para. 4.13), as the Ordinance does not extend to Sark at this time, no further consultation with Sark regarding the Ordinance is required by the legislation.
- 6.3. As a matter of courtesy the Guernsey Bar has also been consulted.

7. Conclusion

- 7.1. Although the Legal Aid Service has functioned well under the interim, extra-statutory arrangements, it is preferable to put the scheme under a legal framework as provided for in the enabling Law. This was intended to be done following Resolutions of the States in 2001 and 2005, but for various reasons has not been possible until now.
- 7.2. The Committee is satisfied that the attached draft Ordinance will put the Guernsey Legal aid Service on a statutory footing in accordance with the Law. The establishment, through the Ordinance, of the Office of the Commissioner will give a person who is aggrieved by a decision of the Legal Aid Administrator, other than a decision concerning financial eligibility, with recourse to an independent review of the decision.
- 7.3. Subject to approval of the draft Ordinance by the States, it will come into force by a subsequent regulation made by the Committee.

8. Compliance with Rule 4 of the Rules of Procedure

- 8.1. In accordance with Rule 4(4) of the Rules of Procedure of the States of Deliberation and their Committees, it is confirmed that the propositions have the unanimous support of the Committee.
- 8.2. In accordance with Rule 4(5), the propositions relate to the Committee's responsibilities under The Legal Aid (Bailiwick of Guernsey) Law, 2003. Approval of the draft Ordinance will align with States' commitments to promote inclusion, equality of opportunity, to maintain a mature international identity and to meet international standards.

Yours faithfully

M K Le Clerc
President

S L Langlois
Vice-President

M J Fallaize
J A B Gollop
E A Yerby

M J Brown
Non-States Member

A R Le Lièvre
Non-States Member

**The Legal Aid
(Guernsey and Alderney) (Schemes and Miscellaneous
Provisions) Ordinance, 2018**

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The Legal Aid (Guernsey and Alderney) (Schemes and Miscellaneous Provisions) Ordinance, 2018

THE STATES, in pursuance of their Resolutions of the 25th July 2001³ and 26th May, 2005⁴ and in exercise of the powers conferred on them by sections 4(j) and (k), 14, 15, 16, 17 and 30 of the Legal Aid (Bailiwick of Guernsey) Law, 2003⁵, and all other powers enabling them in that behalf, hereby order:-

PART I

TERMINATION OF OBLIGATIONS OF STATES AND ESTABLISHMENT OF THE SCHEMES

Termination of obligations of the States under relevant contracts.

1. (1) The Administrator may terminate the obligations of the States under any relevant contract, by notice in writing given to any person who is, together with the States, a party to any such contract.

(2) Upon termination of a relevant contract, the Administrator -

- (a) shall have the same obligations to which the States were subject, and
- (b) may exercise upon behalf of the States the same rights which were exercisable by the States,

³ Article VI of Billet d'État No. XVII of 2001.

⁴ Article IV of Billet d'État No. VI of 2005.

⁵ Ordres en Conseil Vol. XLIV (1), p. 104.

under the contract immediately prior to its termination.

(3) For the purposes of this section and section 3, a "**relevant contract**" is any contract, agreement or other form of arrangement for, or relating to, the provision of legal assistance entered into, or made, by the States -

- (a) prior to the commencement of this Ordinance, or
- (b) which the Administrator, following consultation with the Committee, determines as such.

Establishment of Legal Aid Schemes.

2. (1) There are established for the purposes described in Part II, four Schemes to be known as -

- (a) the Transitional Legal Aid Scheme,
- (b) the Legal Aid, Advice and Assistance Scheme,
- (c) the Criminal Legal Aid Scheme, and
- (d) the Civil Legal Aid Scheme.

(2) The Schemes established under subsection (1) are referred to in this Ordinance as "**the Schemes**".

PART II
PURPOSES OF THE SCHEMES

Purpose of the Transitional Legal Aid Scheme.

3. The purpose of the Transitional Legal Aid Scheme is to enable any individual beneficiary of legal assistance under a relevant contract to continue to receive that assistance in accordance with the terms and conditions of the contract.

Purpose of the Legal Aid, Advice and Assistance Scheme.

4. The purpose of the Legal Aid, Advice and Assistance Scheme (also known as the "Green Form Scheme") is to enable an individual, who satisfies specified eligibility criteria, to obtain -

- (a) advice about the application of the laws of Guernsey and Alderney to specified circumstances which have arisen in relation to -
 - (i) that individual, or
 - (ii) such other individual as may be specified, and
- (b) in specified circumstances, assistance in order to -
 - (i) settle a claim,
 - (ii) defend criminal proceedings,
 - (iii) bring or defend civil proceedings, or

- (iv) make any specified agreement or other document that has or is intended to have legal effect,

subject to specified conditions.

Purpose of the Civil Legal Aid Scheme.

5. The purpose of the Civil Legal Aid Scheme is to enable an individual, who satisfies specified eligibility criteria, to obtain advice, assistance and representation in relation to specified civil and family proceedings, subject to specified conditions.

Purpose of the Criminal Legal Aid Scheme.

6. The purpose of the Criminal Legal Aid Scheme is to enable an individual, who satisfies specified eligibility criteria, to obtain advice, assistance and representation in relation to specified criminal proceedings, subject to specified conditions.

Limitation of Schemes to Guernsey and Alderney matters.

7. Advice, assistance or representation under the Schemes is not available in relation to -

- (a) legal proceedings before a court outside Guernsey and Alderney (other than appeal proceedings relating to any matter dealt with at first instance before a court in Guernsey or Alderney), or
- (b) any matter where -

- (i) the relevant governing, or applicable, law is a law other than the law of Guernsey or Alderney, and
- (ii) the matter is not a matter that is justiciable before a court in Guernsey or Alderney.

PART III

FINANCIAL MATTERS

Remuneration payable under the Schemes.

8. (1) The rates of remuneration which shall be paid, and the persons to whom and the circumstances and conditions in, and subject to, which payments may be made in respect of -

- (a) legal or other services reasonably and necessarily rendered,
- (b) expenses reasonably and necessarily incurred, and
- (c) disbursements reasonably and necessarily made,

for the purposes of providing legal services under or in connection with the Schemes, shall be as specified.

(2) Without prejudice to the generality of the power under subsection (1), any matter specified thereunder may make provision for, or concerning the circumstances in which payments may be made on account of -

- (a) legal, or other, services reasonably and necessarily

rendered,

(b) expenses reasonably and necessarily incurred, and

(c) disbursements reasonably and necessarily made.

(3) Remuneration and other payments specified under this section shall be paid by the Committee from the general revenue account of the States.

Contributions payable under the Schemes.

9. (1) The amount of any contribution, the method of and time for payment of any contribution, the amount of interest payable in respect of any overdue contribution and the persons by whom, and circumstances in which, a contribution is payable under the Schemes, shall be as specified.

(2) Without prejudice to the generality of the power under subsection (1), any matter specified thereunder may make provision for, or concerning-

(a) the maximum and minimum contributions payable under the Schemes, and

(b) the payment of contributions by means of -

(i) periodical payments,

(ii) a capital sum, or

(iii) such other method as may be specified.

Reimbursement to Administrator of payments made under Schemes.

10. (1) A payment which has been made under any of the Schemes established under Part I -

- (a) in error,
- (b) in respect of a legally assisted person who is no longer eligible under a Scheme,
- (c) as a result of any misrepresentation made to the Administrator,
- (d) for the purpose of enabling a person to recover or preserve any property (and which has enabled the property to be recovered or preserved), or
- (e) in such other circumstances as may be specified,

shall be reimbursed, together with such interest as may be specified, to the Administrator by the persons referred to in subsection (2), who shall be jointly and severally liable.

(2) The persons for the purpose of subsection (1) are -

- (a) subject to subsection (3), the person to whom the payment has been made, and
- (b) the legally assisted person who has received advice, assistance or representation under a Scheme.

(3) Subsection (2)(a) shall not apply to a person to whom a payment has been made in circumstance where subsection (1)(c) has effect, except where the person to whom the payment has been made -

(a) knew, or ought reasonably in the circumstances to have known, at the time of payment, that a misrepresentation had been made to the Administrator, and

(b) has failed to notify the Administrator that a misrepresentation has, or appears to have, been made.

(4) Any sum paid to or received, or recovered, by the Administrator under this section shall be paid into the general revenue account of the States.

Payment to Administrator of legal costs recovered by, or on behalf of, legally assisted person.

11. (1) Any sum paid to or received, or recovered, by or on behalf of, a legally assisted person under -

(a) any order for legal costs made in favour of the legally assisted person, or

(b) any agreement pursuant to which costs are payable to, or for the benefit of -

(i) the legally assisted person, or

(ii) any person acting, or who has acted, on behalf of the legally assisted person,

shall be paid to the Administrator by the legally assisted person, or by any person to whom any such sum has been paid.

(2) Subject to subsection (3), any sum payable to the Administrator under subsection (1) may be recovered by the Administrator from -

(a) the legally assisted person, or

(b) any person to whom any such sum has been paid,

as a civil debt in accordance with section 7 of the Law of 2003.

(3) The amount of any liability of any person under subsection (1) shall not exceed the amount of any payment which –

(a) has been made under any of the Schemes for the benefit of the legally assisted person concerned, and

(b) has not been paid to or received, or recovered, by the Administrator further to any other provision of or under the Law of 2003 or otherwise.

(4) Any sum paid to or received or recovered by the Administrator under this section shall be paid into the general revenue account of the States.

(5) For the avoidance of any doubt, the courts of the Bailiwick shall have jurisdiction over any dispute or claim arising in connection with any sum recoverable by the Administrator under the Law of 2003; provided that this subsection shall not prevent the Administrator from commencing proceedings in a court having

jurisdiction outside the Bailiwick -

- (a) for recovery of any such sum, or
- (b) for enforcement of a judgment obtained from any court, whether within or outside the Bailiwick.

Indemnity for costs of legally assisted person to enure for benefit of Administrator.

12. (1) The right of any legally assisted person to be indemnified against any costs or expenses incurred in connection with any proceedings shall enure for the benefit of the Administrator.

(2) Where the Administrator is entitled to the benefit of any indemnity under subsection (1), she may enforce any right to be indemnified in the same manner as the legally assisted person could enforce her right under the indemnity.

(3) The amount of any sum, which may be recovered by the Administrator under an indemnity under this section, shall not exceed the amount of any payment which –

- (a) has been made under any of the Schemes for the benefit of the legally assisted person concerned, and
 - (b) has not been paid to or received, or recovered, by the Administrator further to any other provision of or under the Law of 2003, or otherwise.
- (4) Any sum paid to or received, or recovered, by the Administrator

under this section shall be paid into the general revenue account of the States.

Costs in legal proceedings involving a legally assisted party.

13. (1) In any legal proceedings involving a legally assisted party, a court may make an order requiring such costs as the court thinks fit to be paid by any party to the proceedings to the Administrator; provided that the amount of any such costs does not exceed the amount that –

- (a) has been paid or is payable under any of the Schemes in connection with the proceedings, and
- (b) has not been paid to or received, or recovered, by the Administrator further to any other provision of or under the Law of 2003 or otherwise.

(2) Any sum paid to or received, or recovered, by the Administrator under this section shall be paid into the general revenue account of the States.

PART IV

OFFICE OF COMMISSIONER AND REVIEW OF ADMINISTRATOR'S DECISIONS

Establishment of the Office of the Commissioner.

14. (1) There is established an office to be known as the office of the Legal Aid Commissioner (referred to in this Law as "**the Office of the Commissioner**").

(2) The Office of the Commissioner is a body corporate with perpetual succession.

(3) The holder of the Office of the Commissioner shall discharge the functions of that office and is referred to in this Law as "**the Commissioner**".

(4) The function of the Commissioner shall be to review decisions taken by the Administrator in accordance with the provisions of this Ordinance.

Independence of the Office of the Commissioner.

15. (1) The Office of the Commissioner is independent of the States and of the States of Alderney and of any committee of the same.

(2) Except to the extent provided otherwise under this Ordinance or any other enactment, the Office of the Commissioner -

(a) is not subject to any rule of law relating to, and

(b) does not have any right or privilege vested in, or enjoyed by,

a committee of the States or of the States of Alderney.

Appointment.

16. (1) The States shall, on the nomination of the Committee, appoint the Commissioner.

(2) The terms and conditions of the Commissioner's appointment shall be such as may from time to time be agreed between the Committee and the Commissioner, provided that none of those terms and conditions shall be -

(a) inconsistent with any provision of this Ordinance, or

(b) construed so as to create a contract of employment or agency between -

(i) the States, or

(ii) any committee,

and the Commissioner.

Tenure of office.

17. (1) Subject to the provisions of this section, the Commissioner shall hold office for such term not exceeding five years as may be agreed between the Committee and the Commissioner at the time of appointment.

(2) The Commissioner may only be relieved from office by the Committee before the expiration of the agreed term -

(a) pursuant to a Resolution of the States requiring the Committee so to do, or

(b) on receipt of a written request made by the Commissioner.

(3) When the Commissioner ceases to hold office by reason of the expiration of the agreed term he shall be eligible for reappointment.

Confidentiality of information.

18. (1) The Commissioner shall not disclose or cause or permit the disclosure of any document or information which relates to the business or affairs of

any person and which is acquired by the Commissioner in the course of performing the functions of the Office of Commissioner, except -

- (a) with the consent of the person to whom the document or information relates and (if different) the person from whom it was acquired, or
- (b) to the extent that the disclosure is necessary -
 - (i) to enable the Commissioner to perform those functions,
 - (ii) for the purposes of the investigation, prevention or detection of crime or with a view to the instigation of, or otherwise for the purposes of, any criminal proceedings, or
 - (iii) to comply with an order of a court.

(2) A person who, without reasonable excuse, discloses or causes or permits the disclosure of any document or information in contravention of subsection (1) is guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding three months, or to a fine not exceeding level 5 on the uniform scale, or to both.

Administrator's review of decisions.

19. (1) A person aggrieved by a decision of the Administrator -
- (a) to refuse an application for legal assistance under any of the Schemes (other than a decision to refuse an application for a reason relating to an applicant's failure to meet specified financial criteria),
 - (b) to grant an application for legal assistance subject to any condition or limitation (other than a condition relating to the payment of any contribution),
 - (c) to vary any condition or limitation to which any grant of entitlement to legal assistance is subject (other than a decision to vary a condition relating to the payment of any contribution),
 - (d) to revoke a grant of entitlement to legal assistance (other than a decision to revoke a grant for a reason relating to an applicant's failure to meet specified financial criteria),
or
 - (e) of such other type as may be specified,

may require the Administrator to review the decision.

- (2) A review under this section must be instituted -
- (a) either -

- (i) within a period of 14 days immediately following the date of the notice of the Administrator's decision, or
 - (ii) within such longer period as the Administrator may allow, where the Administrator is satisfied that -
 - (A) it was not reasonably practicable for the review to be instituted within that period of 14 days, and
 - (B) it is fair in all the circumstances, and
- (b) by written notice served on the Administrator stating the grounds and material facts on which the person making the review relies.
- (3) Following a review under this section the Administrator shall-
 - (a) set the decision aside and substitute the decision with another decision, or
 - (b) confirm the decision, in whole or in part.

Commissioner's review of decisions of Administrator under section 19(3).

20. (1) A person aggrieved by a decision of the Administrator under section 19(3) may apply to the Commissioner to review the decision.

(2) The grounds of an application to review under this section are that -

- (a) the decision was ultra vires or there was some other error of law,
- (b) the decision was unreasonable,
- (c) the decision was made in bad faith,
- (d) there was a lack of proportionality, or
- (e) there was a material error as to the facts or as to the procedure.

(3) An application to review under this section shall be instituted-

- (a) either -
 - (i) within a period of 28 days immediately following the date of the notice of the Administrator's decision, or
 - (ii) within such longer period as the Commissioner may allow, where the Commissioner is satisfied that -
 - (A) it was not reasonably practicable for the application to be instituted within that

period of 28 days, and

(B) it is fair in all the circumstances, and

(b) by written notice served on the Administrator stating the grounds and material facts on which the person making the application relies.

(4) Following a review under this section the Commissioner may-

(a) set the decision of the Administrator aside and, if the Commissioner considers it appropriate to do so, remit the matter to the Administrator with such directions as the Commissioner thinks fit, or

(b) confirm the decision, in whole or in part.

(5) On a review under this section against or relating to a decision described in section 19(1)(b) or (c) the Commissioner may, upon the application of the applicant, and on such terms as the Commissioner thinks just, suspend or modify the operation of the condition or limitation in question, or the variation thereof, pending the determination of the review.

(6) An appeal from a decision of the Commissioner made under this Ordinance shall lie to the Royal Court on a question of law.

PART V
GENERAL PROVISIONS

Power to issue guidance.

21. (1) Subject to subsection (2), the Administrator may from time to time issue guidance concerning the administration of a Scheme.

(2) Where guidance under subsection (1) relating to -

- (a) the eligibility of an individual,
- (b) the scope of the advice, assistance or representation that may be available to an individual,
- (c) rates of remuneration, or
- (d) rates of contributions,

under a Scheme, conflicts with regulations or rules of the Committee relating to any of those matters, the regulations or rules, as the case may be, shall have precedence.

(3) Guidance under subsection (1) -

- (a) may provide for the circumstances in and conditions subject to which payments under, or in connection with, a Scheme may be made, and

- (b) may include provisions establishing such reasonable system of assessment and taxation of claims for payment as the Administrator may determine.

(4) Failure to comply with guidance issued by the Administrator shall entitle the Administrator to take such reasonable steps as she thinks fit including, without limitation -

- (a) making a decision of a type referred to in section 19(1),
- (b) refusing to make payment of any sum of money claimed under a Scheme, and
- (c) making payment of part only of any sum of money claimed under a Scheme.

Disclosure of documents and information to Administrator.

22. (1) This section applies where the Administrator gives written notice that she requires to have sight of, or access to, any document or information specified in the notice for the purposes of carrying out her functions under the Law of 2003.

(2) Where this section applies -

- (a) any prohibition or restriction on the disclosure of any document or information,
- (b) any duty of confidentiality, and

- (c) any obligation not to disclose any document or information,

is not infringed or breached by a relevant person, where the disclosure is made in accordance with a requirement under a notice given under subsection (1).

- (3) For the purposes of this section -

- (a) a prohibition, restriction, duty and obligation means a prohibition, restriction, duty and obligation of any type and whether arising under statute or otherwise,

- (b) a notice under subsection (1) may, without limitation, specify -

- (i) individual documents and/or specific information, and/or

- (ii) classes or descriptions of document and/or information, and

- (c) a "**relevant person**" means -

- (i) an Advocate, and

- (ii) such other person or body as the Administrator shall determine.

Disclosure of documents and information to Advocate.

23. (1) This section applies where a legally assisted person has instructed an Advocate ("**Advocate A**") in relation to a matter in the place of another Advocate, who has previously been instructed by that assisted person, in relation to the same or a similar matter.

(2) Where this section applies -

(a) the Administrator may disclose to Advocate A such documents and information relating to -

(i) the legally assisted person, and

(ii) the matter or matters referred to in subsection (1),

as the Administrator thinks fit for the purposes set out in subsection (3), and

(b) section 5 (confidentiality) of the Law of 2003 shall not apply to the disclosure.

(3) The purposes are -

(a) to ensure that no unreasonable or unnecessary cost or expenditure is borne by a Scheme,

(b) to inform Advocate A of anything that may be relevant for the purposes of the efficient and fair determination or disposal of any matter, and

- (c) to ensure that the interests of justice are satisfied.

Exclusion of liability.

24. (1) Subject to subsection (3), no person within subsection (2) is to be -

- (a) liable in damages, or
- (b) where an individual, personally liable in any civil proceedings,

in respect of anything done or omitted to be done in the discharge or purported discharge of her functions, or functions delegated to her, under the Law of 2003, unless the thing was done or omitted to be done in bad faith.

- (2) The persons within this subsection are -

- (a) the Administrator,
- (b) any person -
 - (i) to whom the Administrator has, under paragraph 6 of the First Schedule to the Law of 2003, delegated the carrying out of any function, or
 - (ii) appointed as Deputy Administrator under paragraph 7 of that Schedule, and
- (c) the Commissioner.

- (3) Subsection (1) does not apply so as to prevent an award of

damages in respect of the act or omission on the ground that it was unlawful as a result of section 6(1) of the Human Rights (Bailiwick of Guernsey) Law, 2000⁶.

Interpretation.

25. (1) In this Ordinance, unless the context requires otherwise –

"**the Administrator**" means the holder of the Office of the Administrator,

"**guidance**" includes codes of practice, memoranda, circulars, notes and information sheets,

"**the Law of 2003**" means the Legal Aid (Bailiwick of Guernsey) Law, 2003,

"**person**" includes any body or authority,

"**relevant contract**": see section 1(3),

"**specified**" means specified by rules made by the Committee,

"**the Schemes**": see section 2(2),

"**States**" means the States of Guernsey,

and other words or expressions which are defined in the Law of 2003 have the same meanings as in that Law.

⁶ Ordres en Conseil Vol. XL p. 396 as amended by Order in Council No. 1 of 2005 and G.S.I. No. 27 of 2006.

(2) Any reference in this Ordinance to an enactment is a reference thereto as from time to time amended, re-enacted (with or without modification), extended or applied.

Amendment of Law of 2003.

26. (1) The Law of 2003 is amended as follows.

(2) In section 24, immediately after the words "the amount" insert "(together with interest thereon, calculated in accordance with such method as may be specified by regulations, under any Ordinance made under this Law or under the provisions of a Scheme)".

(3) Immediately after section 24, insert the following section-

"Recovery or preservation of property.

24A. For the purposes of this Part and any Ordinance, order, regulations or rules made under this Law, property which is recovered or preserved includes property -

- (a) that a court has confirmed or declared is vested in a person,
- (b) to which a court has confirmed or declared that a person is entitled, and
- (c) that has been recovered or preserved further to a settlement or agreement reached without recourse to legal proceedings."

(4) In section 29(1), insert the following definitions in the appropriate places -

""**property**" means -

- (a) *immeubles* and *meubles* of any description, wherever situated, and any share, right or interest therein, and includes tangible or intangible property and any debt or other thing in action, and
- (b) in relation to rights and interests, includes rights and interests whether vested, contingent, defeasible or future,"

""**regulations**" means regulations made by the Committee," and

""**uniform scale**" means the uniform scale of fines for the time being in force under the Uniform Scale of Fines (Bailiwick of Guernsey) Law, 1989."

(5) In section 30(2) -

- (a) for the full stop substitute a comma, and
- (b) insert the following subparagraph immediately after subparagraph (ii) -

"(iii) in the case of an Ordinance, provision –

- (A) enabling the Administrator to issue guidance concerning the administration of a Scheme, and
- (B) relating to the consequences of a failure to comply with guidance."

Accounts.

27. Provided that the Administrator complies with the policies and procedures of the States governing the maintenance and production of annual accounts, the obligations of the Administrator under paragraph 3(4) of the First Schedule to the Law of 2003 are deemed to be discharged.

Extent.

28. This Ordinance has effect in Guernsey and Alderney.

Citation.

29. This Ordinance may be cited as the Legal Aid (Guernsey and Alderney) (Schemes and Miscellaneous Provisions) Ordinance, 2018.

Commencement.

30. This Ordinance shall come into force on the day appointed by regulations.

THE LEGAL AID (GUERNSEY AND ALDERNEY) (SCHEMES AND MISCELLANEOUS PROVISIONS) ORDINANCE, 2018

The States are asked to decide:-

Whether they are of the opinion to approve the draft Ordinance entitled "The Legal Aid (Guernsey and Alderney) (Schemes and Miscellaneous Provisions) Ordinance, 2018", and to direct that the same shall have effect as an Ordinance of the States.

This proposition has been submitted to Her Majesty's Procureur for advice on any legal or constitutional implications in accordance with Rule 4(1) of the Rules of Procedure of the States of Deliberation and their Committees.

EXPLANATORY MEMORANDUM

This Ordinance is made under the Legal Aid (Bailiwick of Guernsey) Law, 2003 ("the 2003 Law") and is intended to place the current system of legal aid on a statutory footing.

Section 1 of the Ordinance enables the Legal Aid Administrator to terminate the obligations of the States under any current contracts that they have entered into for the purpose of providing legal assistance. If the Administrator terminates any such contract he or she will "stand in the shoes" of the States and have the same obligations to which the States were subject and may exercise the same rights as were exercisable by the States. Section 2 establishes four separate Legal Aid Schemes: the Transitional Legal Aid Scheme, the Legal Aid, Advice and Assistance Scheme, the Criminal Legal Aid Scheme and the Civil Legal Aid Scheme (collectively referred to as "the Schemes").

Part II of the Law (sections 3 to 6) prescribes the purposes for which each of the Schemes is established. Section 7 limits the extent to which advice, assistance or representation is available under the Schemes effectively to Guernsey and Alderney matters.

Part III of the Law deals with financial aspects of the Schemes. Section 8 provides for remuneration payable under the Schemes and enables the States Committee *for* Employment & Social Security ("the Committee") to make rules prescribing rates of remuneration payable to providers of services under the Schemes as well as payments in respect of expenses and disbursements reasonably and necessarily incurred or made. Section 9 enables the Committee by rules to specify the amount of any contribution that a person may be obliged to make in order to receive assistance under a Scheme. Section 10 provides for the circumstances in which payments made under the Schemes must be reimbursed to the Administrator – for example where a payment is made in error or a misrepresentation has been made to the Administrator. Section 11 requires any sum recovered by or on behalf of a legally assisted person under any order or agreement for legal costs to be paid to the Administrator and paid into the

general revenue account of the States. Section 12 enables the Administrator to benefit from any indemnity for costs which a legally assisted person may have and section 13 creates a power for a court, in any proceedings involving a legally assisted person, to make an order requiring such costs as the court thinks fit to be paid by any party to the proceedings to the Administrator.

Part IV establishes the office of the Legal Aid Commissioner and confers on the Commissioner the function of reviewing decisions taken by the Administrator. Section 15 provides for the independence of the office and under section 16 the States, on the nomination of the Committee is empowered to appoint the Commissioner on such terms and conditions as may from time to time be agreed between the Committee and the Commissioner. Section 17 deals with the Commissioner's tenure of office which under that section shall be for such term not exceeding 5 years as may be agreed between the Committee and the Commissioner. Section 18 places an obligation of confidentiality upon the Commissioner in relation to documents and information relating to the business or affairs of any person and which are acquired by the Commissioner in the course of the performance of his functions. Section 19 provides for the circumstances in which the Administrator must review certain decisions relating to applications for legal assistance under any of the Schemes and which he or she has taken. Section 20 enables any person aggrieved by a decision of the Administrator under section 19 to apply to the Commissioner in order that the Commissioner may review the Administrator's decision. The section also sets out the grounds on which an application may be made, the time period within which the application must be made and the powers of the Commissioner following any review.

Part V contains a number of general provisions including creation of a power for the Administrator to issue guidance (section 21), specifying the circumstances in which disclosure of documents or information to the Administrator shall not constitute a breach of any prohibition on disclosure or duty of confidentiality (section 22), providing for the disclosure of documents and information by the Administrator to Advocates in certain circumstances (section 23), an exclusion of liability for the Administrator and his or her delegates (section 24) and interpretation of the Ordinance (section 25). Section 26 makes a number of amendments to the 2003 Law. Section 27 deals with the duties of the Administrator to comply with the policies and procedures of the States governing maintenance and production of annual accounts. Sections 28, 29 and 30 are the extent, citation and commencement provisions respectively.

THE STATES OF DELIBERATION
of the
ISLAND OF GUERNSEY

COMMITTEE *FOR* EMPLOYMENT & SOCIAL SECURITY

THE GUERNSEY LEGAL AID SERVICE – APPROVAL OF THE LEGAL AID (GUERNSEY AND
ALDERNEY) (SCHEMES AND MISCELLANEOUS PROVISIONS) ORDINANCE, 2018

The President
Policy & Resources Committee
Sir Charles Frossard House
La Charroterie
St Peter Port
GY1 1FH

8th October 2018

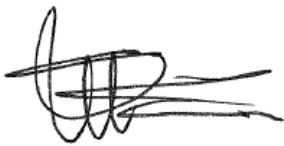
Dear Sir

Preferred date for consideration by the States of Deliberation

In accordance with Rule 4(2) of the Rules of Procedure of the States of Deliberation and their Committees, the Committee *for* Employment & Social Security requests that the Policy Letter entitled 'The Guernsey Legal Aid Service – Approval of the Legal Aid (Guernsey and Alderney) (Schemes and Miscellaneous Provisions) Ordinance, 2018' and the Ordinance which is attached to the Policy Letter, be considered at the States Meeting to be held on 28th November 2018.

It would be helpful for the Policy Letter and Ordinance to be considered at the earliest opportunity to allow for the Ordinance to come into force on 1st January 2019.

Yours faithfully



Shane Langlois
Vice President

Michelle Le Clerc
President

Matthew Fallaize, John Gollop, Emilie Yerby

Mike Brown, Andrew Le Lievre
Non-States Members