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The Legal Aid Schemes are established under The Legal Aid (Bailiwick of Guernsey) Law, 2003, The Legal Aid (Guernsey and Alderney) (Schemes and Miscellaneous Provisions) Ordinance, 2018 and the Legal Aid (Guernsey and Alderney) Rules, 2019.

Guernsey Legal Aid Service (“GLAS”) is the name of the service that administers the Legal Aid Schemes. GLAS is run by the Legal Aid Administrator who is an independent statutory official appointed by the States of Guernsey.

CIRCULAR 2 – THE CIVIL LEGAL AID SCHEME: SCOPE AND LEGAL MERITS

This Circular specifies the eligibility criteria, scope, legal merits test and the conditions that apply in relation to applications for legal aid in civil and family proceedings under the Civil Legal Aid Scheme.

1. Definitions

In this Circular the following definitions apply:

“the Administrator” means the person who has been appointed by the States of Guernsey to the Office of the Legal Aid Administrator in accordance with the Legal Aid (Bailiwick of Guernsey) Law, 2003.

“Advocate” means an Advocate of the Royal Court of Guernsey.

“the Alderney Firms” means those specific firms currently contracted under separate arrangements with the Legal Aid Administrator for the provision of legally aided services in Alderney.

“applicant” or “assisted person” means a person that is applying, who has applied for, or who has been granted legal advice and assistance and representation under the Civil Legal Aid Scheme by way of a legal aid certificate issued by the Administrator.

“certificate” means a legal aid certificate that has been issued by the Legal Aid Administrator to an applicant in connection with proceedings under the Civil Legal Aid Scheme.

“civil matters” means civil and family matters.

“contribution” means the percentage of legal costs and disbursements that an applicant has been assessed to pay towards their legal proceedings under the Civil Legal Aid Scheme.

“CYCT” means the Child, Youth and Community Tribunal as established under the Children (Guernsey and Alderney) Law, 2008.

“discharged” means when a legal aid certificate has been cancelled from a specific date. This happens automatically when the work under a legal aid certificate has concluded. A certificate can also be discharged when an assisted person becomes financially ineligible or fails to cooperate with their Advocate or the Administrator.

“financial means test” means the application of financial eligibility criteria as specified.

“GLAS” (Guernsey Legal Aid Service) means the Office of the Legal Aid Administrator and /or any member of staff.

“Green Form Scheme “or “Green Form” means advice and assistance provided to the applicant under the Legal Aid, Advice and Assistance Scheme.

“Guernsey firms” are all Guernsey Advocates’ firms that opt in to provide legal services under the Schemes.

“legal aid” means legal advice, assistance and representation provided under the Civil Legal Aid Scheme by way of a certificate issued by the Administrator.

“legal merits test “or “merits test” comprises both probable cause and reasonableness. Both aspects must be met to satisfy the legal merits test.

“liquidated damages “means cases where the sum in issue is fixed or ascertained.

“unliquidated damages” means cases where the level of damages in issue is to be determined by the proceedings.

“MHRT” means the Mental Health Review Tribunal as established under the Mental Health (Bailiwick of Guernsey) Law, 2010.

“the Ordinance” means The Legal Aid (Guernsey and Alderney) (Schemes and Miscellaneous Provisions) Ordinance, 2018.

“private law proceedings “are those in which the parties to the proceedings are private individuals.

“public law proceedings “are those in which one party to the proceedings is a public body such as the States of Guernsey.

“required documentation” means all the documentation required by the Administrator to undertake an assessment of each applicant to ascertain their eligibility for legal aid.

revoked” or “revocation” means when a legal aid certificate is not only cancelled from a specific date but is also deemed never to have existed.

If a certificate is revoked, the assisted person becomes liable for the costs of all the work undertaken by the Advocate under the Scheme and the Administrator will seek from the assisted person full reimbursement of all costs incurred under the certificate

and any associated green forms.

“the Scheme” means the Civil Legal Aid Scheme as established under The Legal Aid (Guernsey and Alderney) (Schemes and Miscellaneous Provisions) Ordinance, 2018.

“specified” means rules specified by the Committee *for* Employment and Social Security.

“suspended” means that the Administrator may temporarily suspend a certificate pending receipt of financial or other information from either the applicant or the Advocate. During a period of suspension, no fees or disbursements may be incurred by the Advocate under the Schemes.

PART I GENERAL PRINCIPLES

2. Purpose

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.¹

3. Alderney Arrangements

3.1 There are special arrangements under the Scheme in respect of applicants who are Alderney residents.

3.2 Only the Alderney firms will be remunerated by the Administrator for:

- (a) Any Green Form that falls within the scope of the Legal Aid, Advice and Assistance (Green Form) Scheme, other than in relation to matters before the Matrimonial Causes Division (“MCD”) of the Royal Court. See paragraph 3.3, and
- (b) Civil cases before the Court of Alderney that fall within the scope of the Civil Legal Aid Scheme.

3.3 Any Guernsey firm may be remunerated under the Scheme to advise, assist and represent an applicant who usually resides in Alderney in proceedings before the Guernsey Royal Court, MCD.

4. Limitations and Extent

4.1 Advice, Assistance or representation under the Scheme is not available to legal proceedings before a court outside Guernsey or Alderney, or any matter where the relevant governing or applicable law, is a law other than the law of Guernsey or Alderney, and the matter is a matter that is not justiciable before a court in Guernsey or

¹¹The Legal Aid (Guernsey and Alderney) (Schemes and Miscellaneous Provisions) Ordinance, 2018. S.5

Alderney.

- 4.2 Legal Aid is only available to individuals: not companies, charities or groups of people.
- 4.3 Legal Aid will only be available in respect of individuals who have instructed an Advocate and funding, including any disbursements, will not be provided direct to individuals or paid out on their behalf where they are acting as a litigant in person. A litigant in person means an individual who is a party to legal proceedings and who exercises their right to conduct legal proceedings on their own behalf, without the assistance of or representation by an Advocate.
- 4.4 If a type of case is not specified within this Circular, it is deemed to be excluded from the scope of the Scheme, subject to any discretion the Administrator may have or if it is a case that the Administrator considers to be exceptional.
- 4.5 The Administrator may grant a certificate in respect of part only of the proceedings in respect of which legal aid has been applied for. The certificate will detail the limitations and conditions of the grant of legal aid.
- 4.6 Representation at tribunals will not ordinarily be within scope for Legal Aid, other than:
- (a) in respect of proceedings in the CYCT in exceptional circumstances, or
 - (b) in respect of proceedings in the MHRT.
- 4.7 Legal Aid may be refused if an applicant has not fully utilised all alternative methods of resolving the dispute such as any complaints procedure, mediation, ombudsman and so on; turning to the public purse for assistance should be seen as a last resort and only if all other methods of resolving a legal dispute have been exhausted.
- 4.8 Legal aid will not be available where an applicant has available to them:
- (a) other rights and facilities making it unnecessary for them to obtain legal aid, or
 - (b) a reasonable expectation of receiving financial or other help from a body of which they are a member.
- 4.9 Legal Aid will not be granted to enable an applicant to obtain advice, assistance and representation or a second opinion from an Advocate on a matter which is already covered under a certificate with a different Advocate.
- 4.10 Legal Aid will only be available for court proceedings or tribunal proceedings that fall within the scope of the Civil Legal Aid Scheme, where an application in a court or tribunal has already been issued by the applicant or his opponent or where the reason for applying for legal aid is to make an application to a court or tribunal.

5. Issue date of certificate

Legal aid is not available to any applicant until the Administrator is satisfied that; the applicant meets the specified financial eligibility test and that the proposed case satisfies the specified legal merits test. The date upon which the Administrator is satisfied on all of these elements is recorded as the "issue date" on the certificate. Work undertaken before the issue date of legal aid will not be remunerated under the Scheme.

6. Conditions of a certificate

The Administrator may require an applicant to comply with such conditions as are considered expedient to enable the Administrator to be satisfied from time to time that:

- (a) the applicant continues to be financially eligible for legal aid, and
- (b) it is in the interests of justice for him to continue to receive legal aid.

7. Reporting requirements

7.1 It shall be the duty of an applicant and an Advocate acting on behalf of an applicant where the facts are within the Advocate's knowledge, immediately to inform the Administrator of:

- (a) any change in that applicant's circumstances, financial or otherwise,
- (b) any change in the circumstances, financial or otherwise, so far as known to that applicant of any other person with whom that applicant is jointly concerned, or who has the same interest in, the matter, or
- (c) any circumstance, financial or otherwise, which may affect the Administrator's determination that the applicant has probable cause or that it is reasonable in the particular circumstances of the case that that person should receive, or continue to receive, legal aid.

7.2 Where an Advocate acting for an applicant has reason to believe that that applicant has not complied with the duty under paragraph 7.1 above, the Advocate shall forthwith draw this matter to the attention of the Administrator.

7.3. No Advocate shall be precluded, by reason of any privilege arising out of the relationship between the Advocate and the applicant from informing the Administrator of, or drawing her attention to, any matter specified in paragraphs 7.1 and 7.2 above.

7.4 The Administrator from time to time may directly request from the applicant or an Advocate acting for the applicant information relating to any change in circumstances, financial or otherwise.

7.5 No Advocate shall be precluded, by reason of any privilege arising out of the relationship between the Advocate and the applicant from informing the Administrator of or drawing her attention to, any matter specified in paragraph 7.4 above.

7.6 If an applicant fails to provide information requested by the Administrator, within any time period specified, the Administrator may suspend, revoke or discharge the certificate. Where a certificate is revoked, the Administrator may recover from the applicant all costs and disbursements paid or to be paid to their advocate.

8. Contributions

8.1 If any applicant in civil proceedings is assessed to be on a contribution to their legal costs and disbursements, all contributions are collected and retained by the instructed Advocate as the case proceeds. The balance due to the Advocate will be paid by the Administrator once the case has concluded and taxation of the Advocate's costs has taken place.

8.2 Any contribution assessed to be payable by the applicant in quasi civil /criminal proceedings will be collected by the Administrator as specified at paragraph 22.2(c).

9. Recovery and preservation of property/ assets

If an applicant recovers, preserves or has their entitlement to any property/ asset confirmed with the use of their certificate and/or any related Green Forms, the Administrator requires the reimbursement of all costs and disbursements incurred under the Schemes.

10. Costs

If a Court awards costs against an applicant, the Administrator will not accept liability to pay those costs.

**PART II
ELIGIBILITY FOR LEGAL AID**

11. Requirement for Financial Means and Legal Merits Tests

11.1 The Scheme is means tested and the Administrator requires the production of such documents, accounts or information ("required documentation") from all applicants for legal aid under the provisions of the Scheme as may be required for the purposes of properly assessing or reassessing any application for legal aid and to defer determination until any such requirement is satisfied.

11.2 Where a reassessment results in any amendment to the terms of a certificate, any amendments, whether in respect of financial eligibility or meeting the legal merits test, shall be applied to the certificate from the date upon which the Administrator determines the reassessment.

11.3 Before legal aid can be granted, every legal aid application, save as specified at paragraphs 12.3-12.11 must meet the following two tests:

- (a) The financial means test -to determine whether the applicant's resources are such that, according to the specified financial criteria, the applicant cannot

afford to pay for legal assistance, and

- (b) The legal merits test -to determine whether there is probable cause and whether it is reasonable in all the circumstances for an applicant’s legal assistance to be funded publicly.

- 11.4 The financial means test as specified is applicable to all applications for legal advice, assistance and representation provided under the Scheme, save as specified at paragraphs 12.3-12.11.
- 11.5 This Circular specifies the legal merits test which is applicable to all applications for legal advice, assistance and representation provided under the Scheme, save as specified at paragraphs 12.3-12.11.
- 11.6 Both tests are assessed and determined by the Administrator following receipt of all required documentation.

12. The three means and merits tests specified under the Scheme:

The “standard means and merits” test

- 12.1 The “standard means and merits “test is the method used to assess whether the applicant’s resources are such , that according to specified financial criteria, the applicant cannot afford to pay for legal assistance and that the legal merits test, as specified, must also be met. Most applications for a full certificate in civil proceedings will be subject to the standard means test and the legal merits test.
- 12.2 An applicant must meet both elements of the standard means test and the legal merits test to be eligible for legal aid.

The “no means, no merits” test

- 12.3 A “no means, no merits” application under the Scheme is one in which there is no requirement for an applicant to meet the financial eligibility criteria as specified nor the reasonableness test as specified.
- 12.4 Probable cause must be met in all “no means, no merits” applications.
- 12.5 This test is applied solely in respect of certain public law children cases in the court of first instance.
- 12.6 Legal Aid will automatically be granted upon the commencement of relevant proceedings under the Children (Guernsey and Alderney) Law, 2008 (“The Children Law”) without any requirement to take into consideration the applicant’s income, savings or property (i.e. means) or for the Advocate to provide the Administrator with an assessment of the reasonableness of the case.

The “MHRT no means, no merits” test

- 12.7 This test is applied only in applications for legal aid for advice, assistance and representation at a Mental Health Review Tribunal (“MHRT”).
- 12.8 Publicly funded legal representation at MHRTs will be provided under the Scheme generally on a “no means, no merits” test basis whilst reserving the right for the Administrator to exceptionally apply a “means test” to an application where reasonable and in conformity with Human Rights obligations.
- 12.9 Exceptional circumstances will be as determined by the Administrator.
- 12.10 In applications for cases before the MHRT, there is no requirement for an applicant to meet the reasonableness test as specified.
- 12.11 Probable cause must be met in all “MHRT no means, no merits” applications.

13. Discretion exercisable by the Administrator

In applications to which the *standard means and merits* test is applicable, the Administrator has limited discretion with regard to financial eligibility. The Administrator may exercise discretion in respect of financial eligibility under this Scheme only where:

- (a) an applicant is a party in a private family law case, involving domestic abuse and children and where a finding of fact hearing has been ordered by the relevant court, or
- (b) an applicant has been advised by their Advocate to seek the protection of a domestic violence injunction and has dependent children residing with them.

14. Administrator’s obligation to give reasons

If the Administrator refuses legal aid, or exercises discretion to grant it at or to waive a contribution, then the Administrator shall provide reasons.

15. Administrator’s reconsideration of decisions relating to the financial eligibility of an applicant

There is no statutory right of appeal against a financial determination by the Administrator. However an applicant may request the Administrator to reconsider the Administrator’s financial determination that the applicant does not qualify financially or no longer qualifies financially for legal aid under the Scheme.

16. Administrator’s review of decisions other than relating to the financial eligibility of the applicant.

An applicant may require the Administrator to review a decision that the applicant does not qualify or no longer qualifies for legal aid under the Scheme.²

² The Legal Aid (Guernsey and Alderney) (Schemes and Miscellaneous Provisions) Ordinance, 2018 S19

17. Legal Aid Commissioner’s review of decisions of the Administrator

If an applicant is not satisfied with the outcome of the review of a decision by the Administrator, other than in relation to a financial determination, the applicant may apply to the Legal Aid Commissioner for a review of the Administrator’s decision.³

18. Appeal from Legal Aid Commissioner’s Review

An appeal from a decision of the Commissioner lies to the Royal Court on a question of law.⁴

19. Judicial Review of a decision of the Administrator

Any application by a person for legal aid to commence proceedings to judicially review a decision of the Administrator will be subject to the *standard means* test and the civil legal merits test. In such circumstances, the assessment of the legal merits of the application for a legal aid certificate to judicially review a decision of the Administrator will be considered by a party independent of the Administrator.

PART III

LEGAL MERITS TEST: PROBABLE CAUSE AND REASONABLENESS

20. General Guidelines

20.1 Every application for Legal Aid, other than “*no means, no merit*” or “*MHRT no means, no merits*” cases, will be subject to an assessment by the Administrator on the *standard means and legal merits* test basis.

20.2 The standard financial means test is as specified.

20.3 The legal merits test is as specified in this Circular and comprises two parts:

- (a) Probable cause, and
- (b) Reasonableness.

20.4 Both parts must be satisfied in order to meet the legal merits test.

21. Probable Cause

To establish probable cause:

- (a) The applicant must show that there is a sound legal basis for the proposed legal action he wishes to take, and
- (b) The Administrator will expect to be given information to establish jurisdiction and right, title and interest to raise proceedings, and

³ The Legal Aid (Guernsey and Alderney) (Schemes and Miscellaneous Provisions) Ordinance, 2018 S20

⁴ The Legal Aid (Guernsey and Alderney) (Schemes and Miscellaneous Provisions) Ordinance, 2018 S20(6)

- (c) The Administrator will need specific information for certain types of cases.

22. Reasonableness

- 22.1 The reasonableness test provides the Administrator with a very wide discretion in relation to legal merits.
- 22.2 In order to offer Civil Legal Aid, the Administrator must be satisfied that it is reasonable in the particular circumstances of the case that the applicant should receive legal aid.
- 22.3 It is impossible to give an exhaustive list of circumstances in which questions of reasonableness may apply. The Administrator has identified certain situations where it may not be reasonable to grant legal aid and in addition, has provided information on certain factors that may be taken into account in deciding whether or not it is reasonable to grant legal aid.
- 22.4 See the Schedule for examples of some factors to be taken into account in assessing whether an application is reasonable.

PART IV SCOPE OF THE CIVIL LEGAL AID SCHEME

The following types of proceedings are specified as being within the scope of the Scheme:

23. Public Law Cases

- 23.1 Public Law Children cases are assessed on a “no means, no merit” test basis and are referred to as “no means, no merit children cases”.
- (a) Legal aid for no means, no merit children cases will be available to the following persons, provided there is a need for representation within the proceedings:
- (i) the child or children, who are the subject of the court proceedings,
 - (ii) their mother,
 - (iii) their father,
 - (iv) any person with parental responsibility who ordinarily has day to day care of the child or children,
 - (v) any other person that the court gives leave to be joined as a party to the proceedings, provided that the interests and position of this person are not identical to those of any other party already receiving legal aid. If this person’s interests are identical to those of another legally aided party, legal aid will not be made available for their separate representation.

- (b) Legal aid will be extended until the determination of the case in the court of first instance on a *no means, no merits* test basis.
- (c) Probable cause must be established in all applications for legal aid in respect of all no means, no merit children cases.
- (d) The following public law children case proceedings arising under the Children (Guernsey and Alderney) Law, 2008, are within the scope of the Scheme and are assessed for legal aid on the *no means, no merits* test basis:
 - (i) Community Parenting Order (“CPO”) – Section 48,
 - (ii) Interim Community Parenting Order (“ICPO”) – Section 53,
 - (iii) Special Contact Order (“SCO”) – Section 50,
 - (iv) Emergency Child Protection Order (“ECPO”) – Section 55,
 - (v) Exclusion Order – Section 59, including interim orders,
 - (vi) Secure Accommodation Order – Section 69, including interim orders.
- (e) Applications to discharge any of the public law orders at 23.1(d) will be on a *no means, no merits* test basis for those persons who were parties to the proceedings in which the order was originally made.
- (f) Applications for leave to be joined as a party or for party status in relation to all public law cases relating to children are subject to the *standard means and merits* test.

23.2 The following public law proceedings relating to children will also be considered for legal aid on a no means, no *merits* test basis, provided probable cause is met:

- (a) Defending adoption proceedings following the making of a Community Parenting Order,
- (b) Child abduction matters.

23.3 The following types of public law proceedings relating to children will be considered for legal aid on the *standard means and merits* test basis:

The Child Youth and Community Tribunal (“CYCT”)

- (a) Legal aid will not generally be available for legal representation in the CYCT unless there are truly exceptional circumstances that mean that the person cannot effectively participate in a CYCT hearing without legal representation. For legal aid to be granted:

- (i) The CYCT must confirm that they consider that legal representation of the applicant is necessary, and
 - (ii) The Administrator must determine, independently of any decision reached by the CYCT regarding the necessity for legal representation, that there are truly exceptional circumstances in respect of the applicant or the case.
- (b) Referrals to the Juvenile Court from the Children’s Convenor.

23.4 Other Public Law Proceedings

Mental Health Review Tribunals (“MHRT”)

- (a) Legal Representation at MHRTs is provided under the Scheme generally under the *no means, no merits* test basis; whilst reserving the right of the Administrator to exceptionally apply a “*means test*” to an application, where reasonable and in conformity with Human Rights obligations.
- (b) Legal aid will be available to a patient to appeal to the MHRT against a compulsory detention order made under the Mental Health (Bailiwick of Guernsey) Law, 2010, generally on the MHRT *no means, no merits* test as above.
- (c) Probable cause must be established in all applications:
 - (i) Where a person’s liberty is involved, including immigration and asylum hearings,
 - (ii) Where a person has died whilst in lawful detention or in the care of a public body, including:
 - (a) Police
 - (b) Customs
 - (c) Prison
 - (d) Mental health unit
 - (e) Children’s unit
 - (iii) Judicial Review

24. Appeals in Public Law proceedings

All appeals arising from any public law proceedings (whether against an interim or final order) will be subject to the *standard means and civil merits* test.

25. Private Law Family Proceedings

25.1 Provided that both the standard means and merits tests are met, legal aid may be available in connection with the following private law family proceedings.

25.2 Proceedings in the Ordinary Division of the Royal Court, the Domestic Proceedings Court (“DPMC”) and the Court of Alderney, including:

- (a) Affiliation and/or maintenance applications which are brought at the request of the States of Guernsey Committee *for* Employment & Social Security (“ESS”),
- (b) Affiliation and/or maintenance applications which are not brought at the request of ESS but only where there are good reasons why the applicant cannot represent themselves in the DPMC,

“Good reasons” will be determined by the Administrator taking into account all of the circumstances of the case and the applicant,

- (c) Maintenance applications- but only where maintenance for any dependent child/children is being applied for, either on its own or in addition to an application for maintenance for the parent of that child or children,
- (d) Domestic violence injunctions – Legal aid may be available for ex-parte and inter-partes applications even if there are no dependent children involved but it will not ordinarily extend to cover the discharge/revocation of an injunction by consent,
- (e) The civil “prosecution” and defence of a breach or breaches of a domestic violence injunction,
- (f) Applications concerning children, including applications for leave and party status under the following sections of the Children (Guernsey and Alderney) Law 2008:
 - (i) Section 14 (order of appointment of guardian),
 - (ii) Section 17 (orders for residence, contact, specific issue, prohibited steps and parental responsibility), and
 - (iii) Section 74(2)(b) (order for leave to take a child out of the jurisdiction).
- (g) Guardianship of adults who are lacking mental capacity

25.3 The above private law proceedings, for which legal aid may be available, may include applications for interim and final orders and applications for variation of court orders, provided that the *standard means and merits* tests continue to be met throughout the proceedings.

Royal Court – Matrimonial Causes Division

25.4 Provided both the standard means and legal merits tests are met, legal aid may be available in connection with the following private law matrimonial and family proceedings:

- (a) Uncontested divorce and judicial separation by consent cases on a fixed fee basis. Cover for contested divorce and enforced separation may be available in exceptional cases,
- (b) Ancillary relief concerning financial matters may be covered but only where there are dependent children who are relevant to the case unless there are exceptional circumstances as determined by the Administrator,
- (c) Legal Aid may be available for proceedings in connection with:
 - (i) Maintenance for children,
 - (ii) Maintenance for the parent but only when maintenance for the child/children is also being sought,
 - (iii) Lump sums,
 - (iv) Transfer of property orders,
 - (v) Applications concerning children, including applications for leave and party status, brought under the following sections of the Children (Guernsey and Alderney) Law 2008:
 - (a) Section 14 – order of appointment of guardian,
 - (b) Section 17 – orders for residence, contact, specific issue, prohibited steps and parental responsibility, and
 - (c) Section 74(2)(b) – order for leave to take a child out of the jurisdiction.
- (d) Legal aid will not normally be available to adoptive parents in connection with private adoptions by consent, including inter-jurisdictional or step parental adoptions,
- (e) The above private law proceedings for which legal aid may be available may include applications for interim and final orders and applications for variation of court orders provided the *standard means and merits* tests continue to be met throughout the proceedings.

26. Separate representation of the child in private law proceedings.

26.1 Legal Aid will be considered when the separate representation of a child or children has been ordered by the Court. The separate representation will usually occur through the Family Proceedings Advisor (“FPA”) instructing an Advocate on behalf of the child.

26.2 In cases where the opinion of the child and the FPA diverge, it may be necessary for the FPA to obtain their own legal advice at the expense of the Family Proceedings Advisory Service. The funding of legal advice, assistance and representation for the FPA

separately from the child does not fall within the Scheme.

27. **Other civil matters**

General principles

- 27.1 There will be a general presumption against granting legal aid in other civil matters not specified above unless there are exceptional circumstances, for example where equality of arms (that there be a fair balance between the opportunities afforded the parties involved in litigation) provided an overriding reason, or where there is an issue of overriding public importance and subject to the *standard means and merits* tests being met.
- 27.2 In considering whether a case is exceptional when determining whether legal aid should be granted, the Administrator shall have regard to judgments of the European Court of Human Rights including *Airey v Ireland* and *Steel and Morris v the United Kingdom*. “Exceptional cases” will be determined by the Administrator, who will take into account all the circumstances of the case.
- 27.3 The following civil matters may attract legal aid funding under the Scheme, provided the standard means and merits tests are met:
- (a) Non-family mediation
 - (b) Housing cases: Legal Aid may be available where the applicant’s rights to reside in Guernsey are involved; are the subject of court proceedings, and provided the *standard means and merits* tests are met. Such housing cases may include:
 - (i) Eviction from the applicant’s home. Where there is no reasonable defence to the eviction proceedings, legal aid may be limited to applying for a stay of eviction only,
 - (ii) Appeals in respect of a refusal of a housing certificate/permit,
 - (iii) Saisie proceedings relating to the home that the applicant lives in.
 - (c) Quasi-civil/criminal proceedings, as below:
 - (i) A number of matters come before the Court that fall into a quasi-civil/criminal category. Such cases include:-confiscation of property allegedly obtained through criminal activity, deportation, confiscation of goods found on premises when the owner cannot account for them. These will be dealt with through the Civil Legal Aid Scheme where the Administrator has a better opportunity of recovering outlay from property preserved or recovered.
 - (ii) The standard means and civil legal merits tests apply.

- (iii) In any case that is assessed by the Administrator to fall within quasi-civil/criminal proceedings, any contribution to be paid by the applicant will be treated as a contribution payable under the Criminal Legal Aid Scheme and will be collected by the Administrator at the conclusion of the case.
 - (iv) In any proceedings where property is restrained or forfeited by order of the court, if the law under which the proceedings have been brought allows the applicant to apply to the court for the release of funds to meet legal costs, the Administrator may limit any grant of legal aid in the first instance to permit the applicant to apply to the court for the release of funds to meet the applicant's legal costs.
- (d) Guardianship proceedings in respect of an adult incapable of managing their own affairs. The standard means and civil merits tests apply. In such an application, the resources to be assessed are those of the person for whom Guardianship is sought.

28. Appeals in private law family, matrimonial and civil matters

The *standard means* test and the legal merits tests must both be met in relation to all appeals to a court in private law family, matrimonial and civil matters. Appeals to tribunals will not ordinarily be within scope of the Scheme.

29. Judicial Committee of the Privy Council – (“JCPC”)

- 29.1 Appeals from the Guernsey Court of Appeal (Civil Division), are heard by The Judicial Committee of the Privy Council.
- 29.2 There is no statutory basis in Guernsey for the granting of legal aid for such appeals. However, if the applicant is financially eligible under the terms of the Scheme and the legal merits test is met, the Administrator may none the less grant legal aid subject to such limitations, terms and conditions as determined by the Administrator.
- 29.3 Any grant of legal aid is likely to be limited, in the first instance, to obtaining preliminary advice from specialist counsel (JCPC).

30. Matters excluded from the Scope of the Civil Legal Aid Scheme

As a general rule, legal aid will not be available for the following matters:

- (a) In relation to the sale, purchase or transfer of a property unless it is to implement a court order e.g. following ancillary relief proceedings,
- (b) In connection with leases and bonds or any litigation arising therefrom, whether in relation to commercial or domestic premises,
- (c) Any real estate dispute including: boundary issues,

- (d) Litigation arising wholly or partially from disputes concerning trusts,
- (e) Applications to the Ecclesiastical Court for a grant of probate or letters of administration,
- (f) Any case before a Tribunal, other than for a CYCT and a MHRT,
- (g) Change of name deed,
- (h) Rectification of the Register of Births,
- (i) Commercial litigation or actions arising out of a business venture (including sole proprietorship),
- (j) Services provided to an individual in relation to matters arising out of or in connection with the establishment, carrying on, termination or transfer of a business,
- (k) Inquests unless relating to deaths whilst in lawful detention or in the care of a public body (including Guernsey Police, Guernsey Border Agency, prison, mental health unit or children's unit),
- (l) Litigation where the applicant is a corporate or unincorporated body, including charities, partnerships or to individual partners of a firm to pursue/defend proceedings brought by or against the partnership,
- (m) Making a will,
- (n) Applications to the States of Guernsey Administrative Review Board,
- (o) Matters in relation to any complaint, ombudsmen or other review processes,
- (p) Private adoptions, including inter-jurisdictional or step parental adoptions,
- (q) Mediation in family cases, including in relation to financial matters,
- (r) Regulatory investigations undertaken by any regulatory agency or body in Guernsey,
- (s) Applications for legal aid made in a representative, fiduciary or official capacity and where the Administrator is of the opinion that legal aid should not be granted having regard to any source from which the applicant is or may be entitled to be indemnified in respect of the costs of proceedings concerned or any resources of the person who would be likely to benefit from a successful outcome of the proceedings for the applicant,
- (t) Any matter where an applicant has available to them: other rights and facilities making it unnecessary for them to obtain legal aid, or

- (u) a reasonable expectation of receiving financial or other help from a body of which they are a member.

31. Exceptions in other civil matters

- 31.1 Liquidated damages cases in the Magistrates court or small claims in the Court of Alderney. Liquidated damages cases with a value of less than £10,000 do not fall within the scope of the Scheme. However, the Administrator may consider granting legal aid in cases for liquidated claims below £10,000 in exceptional cases and provided the *standard means and merits* tests are met.
- 31.2 Unliquidated damages cases in the Magistrates Court or small claims in the Court of Alderney. Unliquidated damages cases in which the value is estimated by the Advocate to be less than £5,000 do not fall within the scope of the Scheme. However, the Administrator may consider granting legal aid in exceptional cases where the value is realistically estimated by the Advocate to be in excess of £5,000 and provided the *standard means and merits* tests are met.

SCHEDULE
EXAMPLES OF REASONABLENESS (See paragraph 22)

1. The nature of the proceedings appears not to be reasonable

Something about the case itself may be objectively unreasonable, even if none of the circumstances shown in the remainder of this section apply. The Administrator will determine this based on the information provided in the application.

2. The application is premature

2.1 It may not be reasonable to grant legal aid where no or insufficient attempt has been made to resolve the dispute without litigation. The Administrator must see evidence that negotiations have been attempted and failed and that the position the applicant is adopting in the negotiations is a reasonable one. The Advocate must provide detailed evidence about the negotiations undertaken for all applications for civil legal aid, whether family or non-family applications. If this evidence is not provided or the evidence is not sufficient to show that realistic attempts have been made to settle the case without recourse to litigation, the application may be refused.

2.2 If the applicant is the respondent in the court action, the Administrator will need less evidence about whether sufficient attempts have been made to settle the case without litigation although full details of attempts made to resolve matters without further court proceedings being necessary, will need to be provided including information about any responses received from the opponent and their Advocate, given that the respondent has less opportunity to negotiate a settlement once the action has been raised.

3. Judicial Review

In relation to applications for judicial review, the Administrator still expects an applicant to demonstrate that they have made an attempt to resolve the issue without litigation. Where no such attempt has been made, an explanation for this must be provided. An inadequate or unsatisfactory explanation may have a significant bearing on the issue of whether it is reasonable to make legal aid available.

4. The proceedings are frivolous or vexatious

Applications for civil legal aid for frivolous or vexatious proceedings will not be funded at public expense. There is no reason to make public funding available to prosecute such actions where it would not be reasonable to advise privately paying clients to do so. The Administrator will consider what applicants of moderate means would be prepared to undertake were they paying for the case themselves in deciding whether to grant civil legal aid. An example of this may be where someone wants the court to look into a very minor matter that has little or no direct impact on the applicant.

5. Public sensitivity

Occasionally, some element of the background to the case or the applicant may make an application sensitive to public opinion (for example, where the applicant has been convicted of a serious crime). This does not render a case vexatious or frivolous. There may be important issues to be dealt with in the case and the application will be carefully considered by the Administrator as to whether it would be reasonable to grant legal aid.

6. Where the issues involved do not appear to be in dispute and the proposed action is unnecessary

It is not reasonable to use public funds to litigate a matter where there is no active dispute between the parties. An example may be where it is intended to raise proceedings seeking a residence order and yet the residence of a child is not actually being challenged or likely to be challenged by any other party. Such applications for legal aid will be refused.

7. The order sought is not necessary

An order might be unnecessary if, for example, the existing situation between the parties is unlikely to change and a court order is not needed to prevent it changing. This again may apply where there are issues relating to the residence of a child or where contact is being exercised without any interference.

8. A reasonable offer has been made in settlement

In assessing reasonableness, the Administrator needs to consider the reasonableness of any offer that has been made. Advocates must tell us about any offers made. The Administrator also needs to be given full information about why the Advocate or the applicant does not consider the offer reasonable with reference to awards made in similar cases. In reaching a decision on whether the offer appears reasonable the Administrator may take into account factors such as:

- (a) the likelihood of a finding of contributory negligence - where this is likely, the Advocate should estimate the percentage of claim that the court is likely to find was due to contributory negligence by the applicant, referring, if possible, to previous cases,
- (b) the likely cost of the proceedings,
- (c) the prospects of recovery of both principle sum and legal expenses,
- (d) the likelihood of additional sums being clawed back e.g. by way of contribution or where recovery/preservation may occur, and
- (e) Whether the offer appears reasonable having regard to the sum the court is likely to award.

9. The order sought will not cause significant disadvantage or prejudice

- 9.1 This is most likely to arise in a defendant's application, particularly for a domestic violence injunction.
- 9.2 Where the terms of the orders sought do not prevent any lawful act, for example if the domestic violence injunction order seeks to prevent physical harm to another person, then a defence to such an order at public expense is not warranted.
- 9.3 It could also arise where the applicant is a plaintiff wishing to oppose a counterclaim. If an order will not disadvantage the applicant, it would be not normally be reasonable to use public funds to resist the order.

10. The matter could be resolved in other existing proceedings

It would not be reasonable to grant legal aid for separate proceedings where a claim or dispute could be resolved within an existing action, either as it stands or by way of an amendment of the existing pleadings. It may be more appropriate for an applicant to seek an amendment to an existing grant of legal aid.

11. Undue delay in seeking a remedy

Where an applicant has failed to avail themselves of a remedy at the appropriate time, it may be not reasonable to make legal aid available at, perhaps, some considerably later date. This could arise, for example, where:

- (a) an injunction is sought many months or years after the incident complained of,
- (b) the applicant seeks to petition for judicial review in respect of a decision taken considerably earlier,
- (c) the original decision has been supplanted by a later decision,
- (d) Legal aid has already been made available to obtain the same remedy at some earlier stage.

12. The applicant is not in a position to utilise the remedy sought

If the applicant cannot utilise the remedy sought, proceedings at public expense seem somewhat pointless. For example, a spouse may demand an order transferring title in the matrimonial home, but not be in a position to meet mortgage payments, or the lender may refuse consent to the transfer from joint names on the mortgage. Whilst the remedy sought might be valid, the applicant could not utilise it.

13. Where the state of the evidence may make it is not reasonable to make legal aid available

- 13.1 While someone may be able to rely in court on uncorroborated evidence and hearsay evidence, the courts would normally expect an Advocate to lead corroborative evidence

and non-hearsay evidence if it is available.

13.2 The Administrator expects supporting evidence, if available, to be produced with the application for legal aid.

13.3 Where an applicant is asking the court to rely on hearsay evidence, the Administrator will have to be satisfied the court would be likely to accept it as evidence.

14. Applications by corporate or unincorporated bodies

14.1 Legal aid can only be granted to “a person”; it is not available to corporate bodies, such as a limited company, a plc or a company established by a charter or Act of Parliament or a Law.⁵ Legal aid is only available to “an individual”⁶, it is not available to an unincorporated body such as a firm or partnership, a club, society or association.

14.2 Legal aid is not available to partnerships or to the individual partners of a firm to pursue or defend actions brought by or against the partnership and where the effect of giving legal aid to a partner would be to give legal aid to the partnership itself.

14.3 Legal aid may be available to an individual, who may be a partner, but who has a separate or free-standing cause of action or basis of alleged liability (but not simply, or in respect of, liability as a partner for the partnership liabilities). In these circumstances, the application for legal aid should provide full details and any relevant explanation as appropriate as to how the individual’s interests are, in the circumstances of the case, separate and distinct from that of the partnership.

14.4 Sole traders are not corporate or unincorporated bodies, and may therefore apply for legal aid. There is no prohibition on sole traders seeking legal aid to pursue or defend proceedings relating to ‘business matters’ (for example, sums not paid under a contract, providing that the sum in issue falls within scope of the scheme).

15. Applications by persons with joint interest

15.1 Legal aid can only be granted to someone who is jointly concerned with, or has the same interest in, the matter as other people if the Administrator is satisfied that:

- (a) the applicant would be seriously prejudiced in their own right if legal aid were not granted, or
- (b) It would not be reasonable and proper for the other people concerned to pay the legal costs and disbursements that would be paid under legal aid if it were granted.

15.2 Where there are a number of individuals who all appear to share a broadly similar objective in an action, legal aid will not generally be made available to fund the case unless strong evidence is provided to show that an individual will suffer serious

⁵ The Legal Aid (Bailiwick of Guernsey) Law, 2003 S29

⁶ The Legal Aid (Guernsey and Alderney) (Schemes and Miscellaneous Provisions) Ordinance, 2018. S 3,4,5 and 6

prejudice. An example of “serious prejudice” would be an owner of a flat in a tenement faced with litigation over a bill for common repairs.

- 15.3 Examples of cases where an applicant will not suffer serious prejudice include closure of a school, community centre, swimming pool, or other cultural or leisure institution.
- 15.4 Where several people each have a claim for damages, say, arising out of a common calamity and each individual has their own distinct claim, this would not be joint interest. While the parties have similar interests, they are not the same.
- 15.5 Similarly, where a claim arises from a fatal accident, the claim for a child of the deceased is treated as separate and distinct from the claim of a spouse or other relative.

16. Wider public interest

- 16.1 When considering the reasonableness test, a relevant factor may be that a case demonstrates a wider public interest. A wider interest may be presented in an application for matters such as judicial review, appeals or damages claims where several cases arise out of the same incident, or where the outcome of the case may have a direct tangible benefit to the applicant and to others.
- 16.2 It may be unreasonable to make legal aid available to a person to litigate, as a private citizen, at public expense, about something that is obviously not exclusive to him or her. Examples could be fluoridation of public water supplies, noise generated by a large social or cultural event, closure of public leisure facilities.
- 16.3 If the Administrator is satisfied the case does demonstrate a wider public interest, this can, in the particular circumstances, be treated as a determining factor, even if the value of the claim is relatively modest. However, the Administrator must also consider questions such as prospects of success and cost-benefit.

17. Shadow applications

Applications may be received in the name of a child or impecunious relative in cases where other family members, who would not qualify for legal aid, have a direct and identical interest in the matter. Indeed, the other family members may be the true client in the case, providing the Advocate with instructions. It may not be reasonable to grant legal aid to them, in effect, through the device of granting it to an impecunious relative, thus allowing them to avoid paying towards the litigation.

18. Other rights and facilities

- 18.1 Legal aid will not be granted to someone who has other rights and facilities that make it unnecessary for them to obtain legal aid, or a reasonable expectation of obtaining financial or other help from a body of which they are a member. However, legal aid may be granted if the applicant has failed to enforce or get those rights, facilities or help after taking, in the Administrator’s opinion, all reasonable steps to enforce or obtain them.

18.2 Other rights or facilities may include rights to indemnity under an insurance policy (legal expenses insurance, home insurance, motor insurance) or membership of a professional association or trade union.

- (a) If an applicant is a member of a trade union or professional body that provides legal assistance to its members, the applicant must explain why they are not using its services.
- (b) If the union is refusing to assist, the Administrator needs to know why. It may have a bearing on probable cause and reasonableness.
- (c) If the applicant has not applied to their union or has decided to stop taking their advice, the Administrator needs to know why. The applicant might be able to satisfy the Administrator that they have good reasons to be dissatisfied with the past or present performance of the union-nominated Advocates.
- (d) It would not be reasonable to make legal aid available because the applicant prefers to instruct their own Advocate, rather than a union-nominated Advocate.
- (e) Advocates must ensure that they ask about all of these potential sources of funding before applying for legal aid. Where the Administrator finds that such sources of funding exist and was not told about them the Administrator will consider revoking any grant of legal aid that may have been made.

19. Matters de minimis

It would not be reasonable to grant legal aid where the amount at stake does not justify the cost of proceedings. This is obviously a variable factor, which depends on the circumstances of the individual case, including the strength of the merits of the case. Advocates should consider, in assessing the value of a claim, any likely deduction for contributory negligence. Examples of such matters will include very modest personal injuries claims which cannot be said to justify the use of public funds to pursue the claim.

20. Applicant convicted of a criminal offence arising from subject matter of application

20.1 If civil litigation arises because of a criminal offence of which an applicant has been convicted, it would not be reasonable to grant legal aid to oppose the merits of the action. Where for example a claim for damages is made arising from an incident which led to the conviction of the applicant a defence on the merits would not be likely to be reasonable even if the applicant wanted to deny certain aspects of the case.

20.2 However, it would not necessarily be unreasonable to oppose the claim on quantum, depending on the whole circumstances of the case. Advocates may also need to consider the prospects of success, where substantial questions may arise bearing upon the reliability and credibility of evidence.

21. Insufficient interest

All applicants must show they have a right, title and interest to be a party to the proceedings. Even where such an interest is demonstrated, the amount of interest the applicant has may not justify the use of public funds. As a general proposition, litigation, that would have little or no material benefit to the applicant or is brought simply to satisfy vague demands for justice or principle, would not be reasonable.

22. Prospects of success

- 22.1 An important factor in deciding whether it is reasonable to grant civil legal aid is the issue of prospects of success. Advocates must address the prospects in all applications and give the Administrator enough detail about the case and its background to allow her to examine this issue carefully.
- 22.2 In addition Advocates are required to assess the prospects of success and provide reasons for reaching this conclusion.
- 22.3 Experience shows that forms almost invariably suggest there are “excellent” or “good” prospects of success. While the Administrator will take into account the Advocate’s comments on the prospects, all the circumstances will be considered to decide whether it is reasonable to grant legal aid.
- 22.4 Advocates must send us information to satisfy the Administrator that, if the case is determined at proof or other final hearing, the client is likely to get an outcome that has some practical benefit for them.
- 22.5 Advocates must provide information on the prospects of success in the Form 1LM Civil, Form 1LM Family or Form 1LM Children as appropriate.
- 22.6 The forms asks whether prospects are “excellent”, “good”, “fair”, or “poor”.
- 22.7 Advocates must also give their view on prospects on a scale of 1-10 with 1 being minimal or no prospects of success and 10 being an almost guarantee of success. Comparing this numerical assessment against the four categories for prospects would mean that the Administrator will view cases ranked:
- (a) between 1 and 3 as having poor prospects, which means it is probable they will be unsuccessful,
 - (b) between 4 and 6 as having fair prospects, which means there is a strong possibility they will be unsuccessful,
 - (c) as 7 and 8 as having good prospects, which means there is a strong probability they will be successful, and
 - (d) as 9 and 10 as having excellent prospects, which is almost a guarantee of success.

22.8 Advocates will need to support this assessment with reference to the information provided to the Administrator who will use this to help to consider the application.

22.9 In applications for civil legal aid in non-family cases where the assessment of prospects of success are given on the Form 1LM Civil (Non-family) as “fair” or “poor” (between 1 and 6), Advocates must provide detailed information on any other significant factors that would warrant granting civil legal aid despite this. Failure to do this may lead to the application being refused.

22.10 In applications for civil legal aid in family cases where the assessment of prospects of success are given on the Form 1LM Family or Form 1LM Children as “fair” or “poor” (between 1 and 6), Advocates must also show there is some purpose in the applicant continuing with the proceedings despite this.

22.11 Prospects of success must be completed on every Form 1LM involving civil proceedings even if it is a case which does not relate to pecuniary matters e.g. relating to children or injunctive relief. This includes Public Law Children matters in the court of first instance, even though these may be on a “*No means No merit*” test basis.

22.12 There may be some classes of case where less emphasis would be placed on the prospects of success, but a greater emphasis placed on other factors. In looking at prospects of success, the Administrator is not looking at a guaranteed successful outcome, but rather, all things being equal, a reasonable prospect of success.

22.13 In assessing the prospects of success, the Administrator will also consider the following:

- (a) volenti and contributory negligence,
- (b) evidential difficulties arising from the fading memories of witnesses,
- (c) unsuccessful litigation of a similar nature in The Bailiwick or elsewhere in the UK,
- (d) evidential discrepancies,
- (e) unsupportive opinions of the applicant’s own legal advisers.

23. Prospect of recovery do not justify the use of public funds

23.1 The Administrator will give careful consideration to the prospects of recovery in any case.

23.2 If the client is unlikely to recover the principal sum and expenses, it would not be reasonable to use public money obtaining an unenforceable decree.

23.3 The Advocate’s opinion on the Form 1LM must indicate prospects of recovery having regard to all the circumstances. Experience indicates that Advocates tend to suggest there are “excellent” or “good” prospects of recovery. The Advocate should consider,

inter alia, whether the opponent/defendant:

- (a) is insured,
- (b) has substantial capital assets or income to satisfy a judgment or order and costs,
- (c) is en désastre, insolvent or subject to Saisie proceedings,
- (d) is not indemnified by the insurer for the particular risk or claim,
- (e) is no longer resident in the Bailiwick with no employer or capital in the Bailiwick,
- (f) has unreachable assets (for example, individual placing property behind the corporate veil) or is in receipt of legal aid.

23.4 The Administrator will note the Advocate’s comments about the prospects of recovery but will consider all of the circumstances and reach a view on whether it is reasonable to grant legal aid.

23.5 Advocates must provide information on the prospects of recovery in the Forms 1LM Civil or 1LM Family. The forms ask whether prospects are “excellent”, “good”, “fair”, or “poor.”

23.6 Advocates must also give their view on prospects on a scale of 1-10, with 1 being minimal or no prospects of recovery and 10 being an almost guarantee of a full recovery of principal sum, and expenses being made. Comparing this numerical assessment against the four categories for prospects would mean that cases ranked:

- (a) between 1 and 3 will be viewed as having poor prospects, which means it is probable that a full recovery will not be made,
- (b) between 4 and 6 will have fair prospects, which means there is a strong possibility a full recovery will not be made,
- (c) as 7 and 8 have good prospects, which means there is a strong probability that a full recovery will be made, and
- (d) as 9 and 10 have excellent prospects, which means there is almost a guarantee that a full recovery will be made.

23.7 Advocates must support this assessment with reference to the circumstances of the opponent and their ability to meet any awards that may be made.

23.8 Where an Advocate assesses the prospect of recovery as being either “fair” or “poor” (between 1 and 6), they must provide detailed information about why it is considered reasonable to grant civil legal aid. Failure to do this may lead to the application being

refused. If an order is not likely to help an applicant it would not be reasonable to spend public funds on a court action.

23.9 Information on the prospects of recovery should include the prospects of recovering expenses in addition to any damages or capital sum that may be awarded.

23.10 Expenses should be sought in all non-family cases where the legally aided party is successful.

23.11 The Advocate should also consider applying for Advocates' costs and/or Court/Greffe costs in all family cases, where appropriate.

24. Cost benefit analysis

24.1 The Administrator will always examine the Advocate's assessment of the likely costs of any case and balance these against the benefit an applicant will get from proceedings. Advocates must provide details of the potential costs of cases including those where proceedings are likely to be defended. This includes the cost of any fees, including fees for counsel together with any likely disbursements to be incurred.

24.2 Where the potential benefit to the applicant equals or is less than the likely cost of pursuing the action, the application will fail the cost benefit test e.g. if the benefit to the applicant is £10,000 and the cost of an action is likely to be £12,000, there is no costs benefit. Whilst cost alone cannot justify a refusal on reasonableness, balancing the cost of litigation against the potential benefit to the client and prospects of success where heavy expenditure of public funds was likely to be needed does not prevent the Administrator from effectively viewing the cost of the litigation as the deciding factor.

24.3 The cost benefit analysis applies to any financial claim, for example, by way of damages in personal injury cases, professional negligence (including medical negligence), financial relief in matrimonial disputes and determination of the ownership of assets. If the applicant fails to fully recover judicial expenses, property recovered or preserved by the applicant may be subject to reimbursement to GLAS, potentially leading to little or no material benefit to the applicant. The Administrator needs to be able to assess any such risk at the outset and so Advocates must provide full details on the total potential costs and disbursements.

24.4 Advocates must also satisfy the Administrator about the prospects of success in any individual case as well as the likelihood of recovering costs.

24.5 If the Administrator exceptionally grants legal aid in financial cases within the Magistrates Court, particular caution must be exercised by the Advocate to ensure that the costs benefit analysis is made out and continues to be so as the case progresses.

25. Claim likely to be within the small claims limit

25.1 Assertions of a particular value of a claim must not be taken at face value. Legal aid is not available for liquidated petty debt actions (i.e. of a value of less than £10,000)

unless in the opinion of the Administrator it is an exceptional case.

25.2 Civil legal aid is also not available in unliquidated cases with a value of less than £5,000. However, the Administrator needs to consider carefully whether the value of any unliquidated claim, such as a personal injury case, is enough to make it reasonable to grant legal aid. This will include careful consideration of the cost benefit analysis test set out above. Advocates will be required to provide a realistic estimate of quantum at the outset and as the case progresses.

26. Private client reality

26.1 Legal aid does not exist to place those receiving it in any better position than privately paying clients. The Administrator will look to see whether a privately paying client of modest means would reasonably be advised to litigate in the same circumstances.

26.2 The Administrator is entitled to take into account what a private client would do on being told that part of their case was likely to involve unusually large expenditure.

26.3 Taking this into account expensive litigation in the Royal Court or Court of Appeal on issues that, while having a legal basis, are in connection with issues that have only a modest impact on the applicant, may well not be a reasonable use of public funds.

26.4 It is important to remember that the availability of legal aid does not give entitlement to resources beyond that of the privately fee-paying client of modest means.

27. Practical benefit to the applicant

In assessing whether it is reasonable to make legal aid available, the Administrator needs to consider the practical benefit an applicant will get from any proceedings. Advocates should address what significant personal interest an applicant has in a case and its outcome. If no information is provided to show a significant practical benefit to an applicant from being involved in proceedings, the application for legal aid may be refused.

28. Legal Aid for Appellate Proceedings

28.1 The onus is on the applicant to satisfy the Administrator that there is both probable cause for the appeal and that it is reasonable to grant legal aid for the appeal. Accordingly Advocates must provide a lucid explanation of the basis upon which the court decision is susceptible to appeal. The applicant must also be financially eligible on the standard means test.

Probable cause in relation to appellate proceedings

28.2 For all appeals, including against interim and final appeals, the Administrator requires:

- (a) a copy of the judgment/order appealed against, and/or
- (b) a summary of the decision and the reasons given by the court, if the appeal is against an interim order or another decision in relation to which the reasons

for the decision are not contained in an order, and

- (c) a statement of the grounds of appeal (either in the form of a draft/principal copy of the document required in the proceedings or as a separate statement otherwise providing the detail that would be required by the appellate court).

Reasonableness in relation to appellate proceedings

- 28.3 Appellate proceedings are more expensive than those at first instance and the Administrator requires detailed information about the potential cost of such proceedings.
- 28.4 The Administrator also needs the Advocate’s detailed views on the prospects for success as set out in paragraph 22 of this Schedule. The potential cost implications arising from unsuccessful appellate proceedings are a factor that the Administrator needs to take into account in assessing whether it is reasonable to make legal aid available.

29. Where more than one party is legally aided

- 29.1 Where more than one party in an action has legal aid, the Administrator needs to give careful consideration to the nature of the issues in dispute and whether it is appropriate for public funds to be made available for the proceedings. Such cases have the potential to be expensive and need to be carefully monitored to ensure that litigation is the only way of resolving matters expeditiously.
- 29.2 In family actions it is not unusual to find more than one party seeking public funding. Even if it is reasonable to grant legal aid, the Administrator needs to consider the nature of the issues in dispute and whether they can only be resolved through court proceedings. Advocates must provide detailed information on attempts made to resolve matters without resorting to court. This should show that proposals to try to settle the case without litigation have been pragmatic and were designed to achieve settlement where possible.
- 29.3 Where an application for legal aid to defend a non-family case issued by a legally aided party, is received the Administrator will revisit any existing grant of legal aid to the plaintiff in addition to considering the defendant’s application. The Administrator will use all relevant information including any documentation about the other party’s case to decide whether it is reasonable to make public funding available to more than one party in the action.
- 29.4 The Administrator will also examine the outcomes achieved in such cases to allow a constant review to be kept regarding the benefits achieved from proceedings where more than one party has legal aid.

30. Proceedings in a court outside the Bailiwick of Guernsey are more appropriate

- 30.1 This factor interacts with an examination of jurisdiction when assessing probable cause. There may be cases where both the Bailiwick and foreign courts have jurisdiction.

Factors which might be relevant in assessing which country is more appropriate include, for example:

- (a) place of accident,
- (b) place of business/residence of opponent,
- (c) location of witnesses,
- (d) whether there are existing related proceedings in the other jurisdiction,
- (e) existence of a statutory remedy in the Bailiwick although incident occurred abroad.

30.2 Legal aid is not available in relation to any legal matters occurring outside the Bailiwick of Guernsey.

31. Judicial Committee of the Privy Council (“JCPC”)

30.3 In what will invariably be expensive proceedings, the standard that is applied to the application for legal aid is relatively high.

- (a) The sum involved, after making appropriate allowances for any element of contributory negligence, or the importance of the point at issue, must justify the cost of proceedings.
- (b) An applicant who has been successful in the court at first instance but not before the Royal Court or Court of Appeal is on relatively stronger ground than one who has failed both at first instance and on appeal.
- (c) In any application for proceedings before the JCPC, the Administrator will also need to consider if the proposed appeal is devoid of merit and has no prospect of success and/or if the appeal is an abuse of process.

30.4 Any grant of legal aid is likely to be limited, in the first instance, to obtaining specialist JCPC counsel’s opinion on the merits of the applicant’s case and points of law at issue.

Dated this 4th day of April, 2022



P. J. ROFFEY

President of the Committee *for* Employment & Social Security
For and on behalf of the Committee



L. H. HAYWOOD
Legal Aid Administrator

