# REPORT OF THE SELECT COMMITTEE OF

# TYNWALD

# ON THE

# PETITION FOR REDRESS OF GRIEVANCE

# OF

# DONALD WHITTAKER

# REPORT OF THE SELECT COMMITTEE OF TYNWALD ON THE PETITION FOR REDRESS OF GRIEVANCE OF DONALD WHITTAKER

At the sitting of Tynwald Court on 23rd October 2008 it was resolved -

> *"That Tynwald appoints a Committee of three Members with powers to take written and oral evidence pursuant to sections 3 and 4 of the Tynwald Proceedings Act 1876, as amended, to investigate and report with recommendations on the Prayer of the Petitioner in the Petition for Redress of Grievance of Donald Whittaker presented on Tynwald Hill on 7th July 2008."*


The Hon S C Rodan SHK (Garff)
(Chairman)

Mr D A Callister MLC

Hon D C Cretney MHK (Douglas South)


The powers, privileges and immunities relating to the work of a committee of Tynwald are those conferred by sections 3 and 4 of the Tynwald Proceedings Act 1876, sections 1 to 4 of the Privileges of Tynwald (Publications) Act 1973 and sections 2 to 4 of the Tynwald Proceedings Act 1984.


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*All correspondence with regard to this Report should be addressed to the Clerk of Tynwald, Legislative Buildings, Finch Road, Douglas IM1 3PW.*

**IN TYNWALD**
**7th July 2008**

**To the Honourable Members of Tynwald Court**

**The Humble Petition of Donald Whittaker**
**Of 66 Beech Grove**
**Silverburn Estate**
**Ballasalla, Malew**

**Sheweth that**

Many individuals are aggrieved that there are no safeguards within the Planning process to prevent a "Developer" or other interested party, with recourse to generous funds, from carrying an issue beyond the financial capacity of challenge by other parties.

Any individual is able to pursue their democratic point of view throughout the Planning process without fear of any cost penalty, except for the loss of ones own time or any legal cost voluntarily engaged.
Having thereafter been justified by a favourable decision at the Planning Appeal, it should not then be possible for such individual to be subsequently excluded as a consequence of new legal proceedings before the High Court which brings the certainty of engaging insupportable costs even when confident of success. This derives from a situation under which only approximately a third of the extremely high, but almost certainly necessary, legal costs are generally recoverable - even when the case is won.

Any system which ensures major cost penalties being imposed on those justly proved right in the High Court, must be flawed. Nor does it seem balanced that there should even be a risk of this when proper planning procedures have already been followed successfully.

**Wherefore your petitioner seeks that**

Tynwald urgently appoint a "Select Committee" to consider, investigate and report to Tynwald with recommendations in regard to establishing a system which creates a level playing field over Petitions of Doleance and which furthermore protects the position of the ordinary objector against the weight of the wealthy.

Donald G. M. Whittaker

Donald Whittaker

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# 1. INTRODUCTION

1.1 Mr Donald Whittaker presented his Petition for Redress of Grievance at Tynwald Hill on 7th July 2008. A copy of the Petition for Redress of Grievance is at the front of this Report.

1.2 The Petition for Redress of Grievance was picked up by Mr Graham Cregeen MHK and debated by Tynwald on 23rd October 2008. During the debate Mr Cregeen's motion was amended and the resolution ultimately agreed to was as follows:

> *That Tynwald appoints a Committee of three Members with powers to take written and oral evidence pursuant to sections 3 and 4 of the Tynwald Proceedings Act 1876, as amended, to investigate and report with recommendations on the Prayer of the Petitioner in the Petition for Redress of Grievance of Donald Whittaker presented on Tynwald Hill on 7th July 2008.*

The "Prayer" referred to in the motion reads as follows:

> *"your petitioner seeks that Tynwald urgently appoint a 'Select Committee' to consider, investigate and report to Tynwald with recommendations in regard to establishing a system which creates a level playing field over Petitions of Doleance and which furthermore protects the position of the ordinary objector against the weight of the wealthy."*

1.3 The Members elected to the Committee by Tynwald were the Hon Stephen C Rodan SHK, Hon David Cretney MHK and Mr David Callister MLC.

## PROCEDURE ADOPTED BY THE COMMITTEE

1.4 At the first meeting of the Committee, the Hon S C Rodan was elected chairman. The Committee held seven meetings.

1.5 At the beginning of the investigation we invited Mr Whittaker to make a further written submission and Members of Tynwald and the public to submit any views or concerns which they believed we should take into account. Two Members of Tynwald (Mr Karran and Mr Quirk) and one member of the public availed themselves of this opportunity. During the course of the investigation we also obtained written evidence from:

- His Honour the First Deemster;
- HM Attorney General's Chambers;
- the Chief Secretary's Office;
- the Department of Local Government and the Environment;
- the General Registry;
- the Legal Aid Committee; [1]
- the Legal Aid Certifying Officer;
- the Isle of Man Law Society;
- the office of the UK Parliamentary and Health Service Ombudsman;
- the Ballasalla and District Residents' Association;
- Laurence Keenan Advocates and Solicitors.

[1] This Committee was established under the Legal Aid Act 1986 to consider legal aid policy and if appropriate recommend and put forward changes. Its members are the First Deemster (as chairman), the Attorney General, the President of the Law Society and the Chairman of the Magistrates Association.

We offered the Treasury the opportunity to make a written submission but none was received.

1.6 We invited Mr Whittaker to give oral evidence. He did so on on 9th February 2009. He asked the Committee's leave to bring with him Mr Robert Pilling, Chairman of Malew Commissioners, and Mr David Allsebrook, honorary Treasurer of the Ballasalla and District Residents' Association. The Committee accepted these additional witnesses and heard from all three at the same sitting.

1.7 We invited Mr Seth Caine to give oral evidence on behalf of the Isle of Man Law Society. He did so on 2nd March 2009.

1.8 We invited HM Attorney General to give oral evidence. He advised that the most appropriate persons to give evidence on his behalf would be the Government Advocate, Mr Stephen Harding, and Legal Officer (Civil Litigation) Mr Oliver Helfrich. We accepted this advice and took evidence from these two officers on 2nd March 2009.

1.9 Full transcripts of the oral evidence sessions are available on the Tynwald website. We have made as much of the written evidence received as possible available to Members of Tynwald and the public by placing a copy for reference in the Tynwald Library. The available papers are listed in Appendix 1.

## REMIT OF THE COMMITTEE: THE PETITION OF DOLEANCE SYSTEM, NOT THE PLANNING SYSTEM AND NOT THE SPECIFIC CASE

1.10 As mentioned above, the motion establishing the Committee was amended during the debate on 23rd October 2008. The amendment was moved by the Lord Bishop and its effect was to insert into the resolution the reference to the "Prayer of the Petitioner". This was done to reflect concern in Tynwald that the Select Committee should not be drawn too far into consideration of the planning system as

a whole, and to emphasise that it must restrict its investigation to the particular grievance identified by Mr Whittaker in his Prayer. However, it was also recognised during the debate that, as the grievance arose out of a planning issue, the Committee would not be able to avoid consideration of the planning process altogether. We have borne this dilemma in mind throughout our investigation. We have endeavoured as far as possible to concentrate on the issue of "a level playing field for Petitions of Doleance" which would apply to all Petitions of Doleance and not just to those which arise in relation to planning.

1.11 Like many Petitions for Redress of Grievance, Mr Whittaker's arose out of his experience in a particular case. The Standing Orders of Tynwald Court relating to Petitions for Redress of Grievance provide (among other things) that every such Petition must relate to a matter of public interest; and that it must not relate to any specific case which could be or has been adjudicated upon by the High Court or any tribunal or arbitration, or any formal officially recognised complaints procedure, unless the petition shows that in the particular circumstances it is not reasonable to expect the petitioner to resort, or to have resorted, to such remedy. We therefore reminded Mr Whittaker at the outset of his oral evidence that, while we could look at particular cases if they illustrated general points of wider application, we could not take a view on any particular case. We have concentrated, rather, on Mr Whittaker's proposals for how the overall system might be improved.

# 2. DESCRIPTION OF THE EXISTING SYSTEM

## PETITIONS OF DOLEANCE: SCOPE AND COST

2.1 We took the view that it would be important to establish at the outset what precisely a Petition of Doleance is, and what consequences it can have. We received a letter on this from His Honour the First Deemster and a comprehensive submission from the Isle of Man Law Society, both of which are available in the Tynwald Library. The key points for the purposes of our investigation are:

- a Petition of Doleance is the procedure used in the Isle of Man for challenging administrative action and has an important constitutional role in supervising the exercise of powers by the executive. It is the Manx equivalent of judicial review in England;

- a Petition of Doleance will succeed if it is shown that a public authority has acted unfairly, irrationally, in a manner incompatible with the European Convention on Human Rights, or in a manner which is for some other reason unlawful such as in a manner beyond its powers;

- the court will not substitute its own view for that of the original decision maker. Rather, the best a successful applicant can hope for is that a decision be quashed and remitted back to the original decision-maker to be considered afresh in the light of the court's judgment.

2.2 We consider that the opportunity to challenge the actions of a public authority by way of Petition of Doleance is an important constitutional safeguard. We would comment that, while the safeguard is important from the point of view of the private citizen including the private citizen of limited means, it is equally important from the point of view of wealthier individuals and of bodies corporate, including for example property developers. It is the role of the public authorities to

exercise their responsibilities in a manner which is fair to all. The same must also apply to the system of judicial oversight of those public authorities.

2.3 We asked the First Deemster for data on the numbers of Petitions of Doleance in recent years brought and withdrawn. He explained that the reason for withdrawal may or may not be disclosed to the court: unless a party informs the court as to the reasons for the withdrawal, then the court would not know the reasons. Nevertheless he provided the following figures (subsequently updated by the Courts Division):

| **Year** | **Number of petitions of doleance** | **Number withdrawn, with comments** |
|---|---|---|
| 2004 | 3 | 1 |
| 2005 | 5 | 2 |
| 2006 | 2 | 1 on agreed terms |
| 2007 | 11 | 3 withdrawn and a fourth by agreement |
| 2008 | 11 | 2 |
| 2009 (up to 31st Oct) | 4 | 2 withdrawn, 1 discontinued, 1 ongoing |

2.4 We found it difficult to ascertain the typical costs of a Petition of Doleance. No witness was able to come up with a figure, and all agreed that it would depend on the length and complexity of the particular case. Given the increase in the numbers of cases, we believe it would desirable if information could be collected on the overall costs of these cases taking into account judicial and court time, legal representation on all sides, and the time spent by the relevant public authorities in preparing their response.

2.5 The Isle of Man Law Society commented in their submission (at paragraph 9.2) that:

> *"Because the petition of doleance is a simple, speedy remedy, which is unencumbered by legal formality, it is considerably cheaper to bring a petition of doleance than, for example, an application for judicial review in England and Wales".*

2.6 There appears to be no clear financial evidence one way or the other. We are satisfied, however, that the Manx system as it stands is simpler than the English equivalent. For example, there is no requirement for the petitioner to seek the leave of the court to apply for an order (see paragraphs 5.48 to 5.52 below). The proposition that the Manx system is cheaper is therefore plausible.

## PETITIONS OF DOLEANCE: TIME LIMITS

2.7 When we asked Members of Tynwald for views on the subject matter of Mr Whittaker's petition, one Member drew our attention to the case of Mrs Sara Hackman. In a submission to us dated 29th January 2009 Mrs Hackman set out the circumstances of her experience of the Petition of Doleance system. The submission is available in full in the Tynwald Library along with the other evidence collected by the Committee.

2.8 To summarise: following a planning appeal hearing on 17th April 2007, a decision was made on 13th July 2007 in relation to a planning matter which affected Mrs Hackman. Mrs Hackman wished to challenge the decision by way of a Petition of Doleance. She engaged legal advice on 2nd August and appears to have followed the advice given. Her Petition of Doleance was eventually issued on 13th December 2007.

2.9 In March 2008 Mrs Hackman's case was struck out by the court. In her judgment Acting Deemster Sullivan gave detailed consideration to the issue of time limits for Petitions of Doleance but concluded that "however much sympathy one might have for a Petitioner in Mrs Hackman's position, in my judgment there has been undue delay in all the circumstances".

2.10 On 20th November 2008, as part of his judgment in another case (*Arragon Properties Ltd*), Deemster Kerruish commented:

> *"[15] Whilst there is no specific period within which a Petition of Doleance must be filed, it is well-established that one of the essential features of such proceedings is the commencement and prosecution of the same without delay, see* Re Kerruish *(1961-71) MLR 374,* Re Kewley *(1990-92) MLR 286, and* In re Malew Parish Commissioners and Corlett. *In Petition of Doleance proceedings, in particular relevant to planning matters, there is potential for considerable prejudice to third parties if a litigant is dilatory in commencing and prosecuting such proceedings. Whilst I readily accept each case ought to be considered on its merits, I now take the view that a delay of three months in issuing Petition of Doleance proceedings exposes such proceedings to being struck out on the grounds of delay."*

2.11 When we asked Mr Seth Caine, representing the Isle of Man Law Society whether there were any time limits for bringing a Petition of Doleance, he said on 2nd March 2009:

> *"There is no formal time limit, but the courts say that it has to be brought promptly. If you exceed six weeks, then you are going to really struggle. It may be that the court would say six weeks is too long. In recent cases, I have seen doleance petitions thrown out where they were brought after five months and the court said that is far too long. It is a simple, speedy process."* (page 21, column 1)

2.12 The specific issue of time limits is not within the remit of the current investigation. We accept that in principle cases need to be brought in a timely fashion. We would comment that the time limits, such as they are, need to be made clear and that it is essential that anyone wishing to bring Petition of Doleance proceedings in a particular case seek specific legal advice on this point.

## THE "WEIGHT OF THE WEALTHY" AND ACCESS TO JUSTICE

2.13 Access to justice is a challenge in any jurisdiction and has been for centuries. Effective legal representation can make the difference between winning and losing one's case – and always has done.

2.14 Applying this to the present time and place, the Government Advocate put it this way:

> *"Access to justice is usually assisted by being able to fund litigation or, alternatively, by having access to Legal Aid, and accordingly it is probably easier for a person with the availability of funding to have access to the courts."* (page 23, column 2)

2.15 Mr Caine of the Isle of Man Law Society made a similar admission when the point was put to him:

> *"**The Clerk:** if there is a case with A on one side and B on the other – A is rich and B is poor – A can get further?*
>
> ***Mr Caine:** I think that is putting it too starkly, but that is the position with regard to litigation generally."* (page 22, column 2)

2.16 In summary, it is a reality of the justice system that a party can be disadvantaged by having insufficient access to legal advice – or to put it another way, the other party can gain an advantage by paying more for lawyers. This is not a new problem. In response, two particular means of redressing the balance have evolved. The first is the costs regime operated by the courts. The second is the system of Legal Aid.

## DESCRIPTION OF THE COSTS REGIME

2.17 The costs regime was explained to us by Seth Caine as follows:

> *"We now have, in my opinion, a very effective costs recovery procedure. The court has an absolute discretion in relation to costs, but Order 48 states that costs are normally awarded in favour of the winning party unless there are good reasons not to.*

*In my experience, in the last few years, adverse costs, if your client obtains an adverse costs order against another party, you should recover 70 to 80 per cent of your costs. If costs are awarded on the standard basis. The courts have a very good costs assessor. It is done mainly by Paul Coppell, the Deputy Chief Registrar. He is very good; he is very efficient; he is very quick. The court also has the power to order costs on an indemnity basis which is a slightly higher level. In those cases you would expect to recover costs of 80 to 90 per cent of your expended costs.*

*So, an advocate who has obtained a costs order on behalf of his client will prepare what is usually called a draft assessed bill, setting out all the work he has done; all the time he has incurred; all the costs. He will submit that to the costs assessor at the General Registry who will go through it and allow a figure. There is a quite a good system in that the costs of the assessment are ten per cent of the amount allowed. The usual costs order made by the court is that costs will be paid in a sum to be assessed in default of agreement.*

*So, an advocate would normally have their costs assessed in house, come to a figure, write to the other side and say, 'these are our costs.' If they agree, they are paid. If they are not, they go to assessment. If that figure or greater is achieved on assessment, then the other party pays the ten per cent. If that figure is not achieved on assessment, the assessor allows a lower figure and you pay the ten per cent. So there is, in my submission, quite an effective costs mechanism now in place in the Island and there has been for the last few years."* (page 16, column 1)

2.18 Mr Caine referred in the above quotation to costs on an "indemnity basis". The difference between the assessment of costs on the "standard basis" and on an "indemnity basis" was clarified by Mr Harding and Mr Helfrich as follows:

***"Mr Helfrich:*** *My understanding, really, is that, in terms of indemnity costs there, you are looking at the costs across the board, which would include costs that do not necessarily move a litigation forward. A standard basis is all the costs incurred in directly moving the litigation forward. So that would be, for example, pleadings, communications with the other side, whereas obviously the costs incurred in reporting back to your client, in terms of what has happened, does not necessarily push the litigation forward. So on an indemnity basis you will be entitled to recover*

*those costs, as well as the costs of pushing forward.*

***The Chairman:*** *So the residents' association would be able to recover the early costs pre court of consulting with lawyers.*

***Mr Harding:*** *I have the actual definition here, which is Rule 12.2 of Order 43A. It says:*

> *'On an assessment on the indemnity basis, all costs shall be allowed except insofar as they are of an unreasonable amount or have been unreasonably incurred and any doubts which the Chief Registrar may have as to whether the costs were unreasonably incurred or were reasonable in amount shall be resolved in favour of the receiving party and in these Rules the term "indemnity basis" in relation to the assessment of costs shall be construed accordingly.'*

*So that is what indemnity costs are, as opposed to standard costs, which are:*

> *'On an assessment of costs on the standard basis, there shall be allowed a reasonable amount in respect of all costs reasonably incurred and any doubts which the Chief Registrar may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the paying party.'*

*So you will see that the onus of proof in fact changes from one party to another. So basically the indemnity cost is more wide-ranging, in effect.*

***Mr Helfrich:*** *Mr Chairman, if I can, I suspect that your concern there is perhaps that the cost advising the client in relation to the merits.*

***The Chairman:*** *Yes.*

***Mr Helfrich:*** *That would be picked up on a standard basis. That is the ongoing litigation, so that would not fall outside a standard basis. So you would, in the normal course of events, on a set up standard basis, able to recover the cost of*

*advising your client in relation to the litigation."* (page 27, column 2 to page 28, column 1)

## DESCRIPTION OF THE LEGAL AID SYSTEM

2.19 Legal Aid is provided under the Legal Aid Act 1986. The long title of the Act sets out the purpose of the system as follows: "to make provision for legal advice or assistance to persons of small means". The General Registry pages of the Isle of Man Government website puts it like this: "The Scheme is there to allow access to representation in court for those whose means would not otherwise permit them to employ counsel."

2.20 We received written evidence on the system of legal aid from the Legal Aid Certifying Officer. We also looked back at the Council of Ministers' report "Legal Aid Services: Legal Services Commission" (GR16/07) which was approved by Tynwald on 15th May 2007. For the purposes of this investigation the key points are:

- Legal Aid is available to a person who wishes to bring Petition of Doleance proceedings or who is a respondent or other noticed party to such proceedings;

- Legal Aid is only available to individuals, not organisations;

- any application for Legal Aid is subject to a means test and a merits test.

2.21 The means test for Legal Aid is based on the Family Income Support system. Each application is based on the facts of the financial situation of the applicant, but:

i. a person who is in receipt of Family Income Support, Income Support, Disability Working Allowance or Job Seekers Allowance (income based) automatically passes the financial merits test;

ii. a person whose means would render them eligible for Family Income Supplement would pass the financial means test;

iii. a person whose means are less than £4,000 per year over the eligibility criteria for Family Income Supplement would qualify for Legal Aid on a contributory basis.

2.22 This system came into operation on 1st August 2008 following Tynwald's approval in May 2007 of the Council of Ministers' response to the Legal Services Commission report of 2003. The value of the new thresholds in 2008 ranged from £12,250 (for a single person in rented accommodation with no children) to £27,041 (for a married couple with two children paying £5,200 per year mortgage costs and £5,200 per year child care costs). These represented an increase on the thresholds which previously applied.

2.23 The merits test is as follows:

i. are there reasonable grounds for taking, defending or being party to proceedings? Reasonable grounds may be said to exist if a case has reasonable prospects in law and a feepaying client of modest means would be advised to take proceedings privately; and

ii. is it reasonable for Legal Aid to fund the proceedings if they are unlikely to be cost effective – i.e. does any benefit achieved justify the cost?

2.24 Expenditure on Legal Aid has been increasing. The following figures are drawn from the Light Blue Books for the last three years:

| | |
|---|---|
| 2008/09 | £3,045,956 |
| 2007/08 | £2,453,734 |
| 2006/07 | £1,373,710 |

Individual cases can have a large impact on the figures. The General Registry have explained that the "actual expenditure" for 2007/2008 was significantly higher than the estimate because of the impact of a large complex legal case which cost a total of £1.7m, a large proportion of which was expended during financial year 2007/2008.

# 3. MR WHITTAKER'S EXPERIENCE OF THE SYSTEM

3.1 Mr Whittaker's Petition for Redress of Grievance arose out of his experience with the legal system in a particular case. As noted above, we looked at this not in order to take a view on the case itself but in order to consider any implications for the system as a whole.

3.2 The case concerned a proposed residential development at Ballasalla, the Crossag Farm development. On 22nd December 2006 an agreement was concluded between a developer and the Department of Local Government and the Environment for the development of land at Crossag Farm. On the same day, the Department submitted a planning application in respect of that development. Upon receipt of the application, the Council of Ministers appointed an inspector to consider the application and to report to the Council of Ministers with his recommendations. The inspector held a public inquiry on 11th and 12th July and 16th and 17th October 2007. Mr Whittaker and other residents participated in the inquiry and were legally represented at it.

3.3 The inspector produced his report on 30th November 2007 recommending refusal of permission on the ground that "the proposed development of this site is premature pending the preparation of an Area Plan which would include commitments to the provision of primary education and road proposals for Ballasalla". On 11th January 2008 the Council of Ministers issued a letter accepting the inspector's recommendations and refusing planning permission.

3.4 At this point, Mr Whittaker believed that he and his neighbours had "won". They had objected to the proposals, and planning permission had been refused. However, the developer then initiated Petition of Doleance proceedings against the Council of Ministers on the grounds that the refusal had been arrived at by an unfair procedure.

3.5 The Petition of Doleance was filed on 22nd February 2008. On 17th March 2008, initial case management directions were given in the presence of:

- counsel for the petitioners (i.e. for the developer);
- counsel for the Council of Ministers;
- counsel for the Department of Local Government and the Environment; and
- representatives of Malew Parish Commissioners.

At this stage, additional potential parties were "ordered to be served". They were identified from those parties who had been involved in the planning process and included a number of individuals. The proceedings were adjourned to 11th April to allow time for the additional potential parties to "receive notice".

3.6 The residents now found themselves in a position where a case they thought they had won had been re-opened by the other side. They saw this as a direct consequence of the other side being able to continue paying for legal advice.

3.7 The residents wished to continue to participate and sought legal advice. They do not appear to have been fully advised about the Legal Aid system. During his oral evidence Mr Whittaker asked us the following question about Legal Aid: "Is it available to individuals, because I was not aware it was." (page 7, column 1)

3.8 The residents were advised, however, about the costs regime. The advice they received was that even if they won and benefited from a costs order made by the court, they could end up having to pay a high percentage of their own legal bill. Mr Whittaker submitted to us an extract from a lawyer's letter which stated:

> *"even if you are successful the question of payment of costs and the amount is at the discretion of the Court. At this point in time, pursuant to the Advocates (Prescribed Fees) Regulations 2002, even if costs are awarded, the recovery rate will not normally exceed £77.00 per hour (in respect of an advocate who is of less than 5 years*

*standing) or in any other case £94.00 per hour. Please compare these to the fees in the Schedule."*

3.9 Mr Whittaker told us that the "fees in the Schedule" were between £265 and £335 per hour. On the basis of these figures he calculated that he might stand to recover less than a third of his costs.

3.10 It was at this point that Mr Whittaker's Petition for Redress of Grievance was drafted. In it he argued that there was not a level playing field for Petitions of Doleance, and that the position of the ordinary objector was not protected against the weight of the wealthy. He incorporated into his Petition for Redress of Grievance the results of the calculation above, writing that "only approximately a third of the extremely high, but almost certainly necessary, legal costs are generally recoverable – even when the case is won".

3.11 We offer further comment on the specific advice the residents received as to costs under the heading "percentage of costs recoverable" below.

# 4. RESPONSE OF REPRESENTATIVES OF THE LEGAL PROFESSION TO MR WHITTAKER'S GRIEVANCE

4.1 We put the elements of Mr Whittaker's case to representatives of the Isle of Man Law Society and the Attorney General's Chambers. These witnesses had experience of Petition of Doleance as legal representatives of individuals and the Government respectively. We found that, although they approached the question from different perspectives, there was much agreement between them. There was, however, a wide gap between the legal representatives' perception on the one hand and Mr Whittaker's on the other. Whereas to Mr Whittaker the case appeared to be a flagrant injustice, to the representatives of the legal profession it illustrated the system working as it should.

## OVERALL COMMENTS

4.2 We asked Mr Caine whether Mr Whittaker's petition for redress of grievance had real substance, he said:

> *"With respect to Mr Whittaker, no I do not and I do say that with respect to him. I think if one looks, for example, at the J. G. Kelly Petition, if we talk… I do not know whether Mr Whittaker was one of the independent third parties, but the independent third parties in that were represented by Lawrence Keenan Advocates. That is a matter of public record.*
>
> *The main defence in that case – I acted in that case and acted for the Department of Local Government – was put forward by the Council of Ministers. My role, really, was just to mop up anything that had not been covered by the counsel for the Council of Ministers, so we were not hugely involved in the case. The third parties also addressed the court, really, in relation to issues that had not been covered by the Council of Ministers.*

*I do not know what their costs were, but they should not have been huge, given the work done by the advocate for CoMin. They have got a costs order against J. G. Kelly and, if they get those assessed, they should be able to enforce those and there is a good procedure, now, under Order 48a of the Manx Rules of Court."* (page 18, column 1)

4.3 We asked Mr Harding for his reaction to Mr Whittaker's claim that the system of doleance currently favours those with deep pockets. He said:

*"I do not agree with Mr Whittaker's statement. I do not think that the use of the word 'favours' is particularly appropriate, as it seems to suggest an element of bias. However, what one can say is that access to justice is usually assisted by being able to fund litigation or, alternatively, to have access to Legal Aid, and accordingly it is probably easier for a person with the availability of funding to have access to the courts.*

*However, what is important to remember in this particular context is we are dealing with planning decisions here and it is important to remember that these decisions are policy laden and there is... I would submit that, where a considerable sector of the public is affected and is concerned, then there is an important role for local authorities to be involved, basically to look after the interests of hopefully a large section of the community in that area.*

*Obviously, one has to look at the type of matter that one is dealing with, or the context, because there could be matters where a local residents' association is concerned about matters which affect an area as a whole, or the matter where one is purely concerned with very, very personal interests, and one has to really be very, very careful that one is not confusing the two. That is one of the reasons why I say that there is an important role for local authorities to be involved. One could see that it would be very possible for individuals within a residents' association to approach the local authority and say, 'Look, we are very concerned about this. We should be concerned en masse because of the effect that this may very well have upon our area. And, by the way, we are more than happy to provide witness statements and any assistance we can give to you in relation to your role as statutory consultee in the planning process.'*

*So I would say that, no, I do not agree with Mr Whittaker's statement, and I would say that it is important to recognise the importance of the local authorities in these matters."* (page 23, column 2 to page 24, column 1)

## THE ROLE OF LOCAL AUTHORITIES

4.4 In discussion, Mr Harding acknowledged that there could be circumstances where a residents' association was in conflict with its local authority. However, he suggested that in general the status of a local authority would be respected by the courts, and that one of the first things he would do as a member of a residents' association might be to seek to engage the support of the local authority.

## THE DISTINCTION BETWEEN RESPONDENTS AND NOTICED PARTIES

4.5 The lawyers commented that the Petition of Doleance which motivated Mr Whittaker's Petition for Redress of Grievance was primarily between the developer and the Council of Ministers. The residents' association and the local authority were not the respondent, they were noticed parties. Mr Caine thought this aspect of the case should reduce the financial risk to Mr Whittaker. He explained this in the following exchange:

***"The Chairman:*** *... So, any third party who did this – I am not looking at this particular case – but a residents' association which is obliged, because of the actions of other parties, to engage in a legal process such as a Petition of Doleance in order to safeguard the interest of their members or the public interest, they incur legal costs on a forward basis with legal fees and paying up front to lawyers.*

*This is a process… they may well feel obliged to go down this particular path as a noticed party or as an interested party. Outcome is not guaranteed. What would happen if, at the end of the day, the case went against them and the subject of the*

*petitioning party, the party that took the action, was successful? The costs would be awarded against the respondents in that case. Where would that leave this association?*

***Mr Caine:*** *Well, in a Petition of Doleance, if the petitioner won, then they would seek a costs order. You cannot get your costs twice. So, they would be seeking to recover their costs, usually from the local government or the Government Department or the Minister, who is usually indemnified. Any remaining costs would be against a third party or a residents' association. So, the bulk of the costs, I anticipate, would be paid by the respondent, being the Government Department or the local authority and the remaining costs, which I would hope would not be substantial, would be paid by the residents' association.*

*Usually, at the very start of a case, the Deemster will give directions and he will say, in order to control costs, the bulk of the argument will be put forward by the respondent. Interested parties can attend; they can keep a watching brief; they can instruct an advocate, but he will not be allowed to duplicate the arguments, to say everything twice. That works back in relation to the costs. They will say, 'well, 90 per cent of the work that we incurred should be paid by the Department or the local authority, with the balance being paid by the interested parties.'"* (page 16, column 2)

## THE POSSIBILITY OF AN INDIVIDUAL ELIGIBLE FOR LEGAL AID RUNNING THE CASE

4.6 Mr Caine confirmed that if there had been even one resident of small enough means prepared to come forward, he or she could potentially have applied for Legal Aid and participated in the case as an individual:

*"**Mr Caine:** It may be that one of them* [i.e. one of the residents] *would be entitled to Legal Aid and he would apply for Legal Aid, which can only be granted to individuals.*

***The Chairman:*** *Yes, and he would run it.*

***Mr Caine:*** *The advocate advising would have to certify to the Legal Aid officer that there was a good prospect."* (page 18, column 1)

## PERCENTAGE OF COSTS RECOVERABLE

4.7 Mr Caine disputed Mr Whittaker's specific claim that the residents stood to recover only a third of their costs even if they won. Mr Caine said:

> *"I noticed that in the Petition of Grievance itself, of Mr Whittaker, he stated that only a third of costs are recovered. I disagree with that. In 2001, Order 48 of the Rules of Court was amended. We now have, in my opinion, a very effective costs recovery procedure. The court has an absolute discretion in relation to costs, but Order 48 states that costs are normally awarded in favour of the winning party unless there are good reasons not to."* (page 15, column 2 to page 16, column 1)

4.8 Mr Whittaker's analysis of the costs he might recover (one third) being so dramatically different from the description of the system given by the representatives of the legal profession (70 to 90 per cent), we examined more closely the advice on which Mr Whittaker based his calculation. As noted above, Mr Whittaker had submitted to us an extract from a lawyer's letter which stated:

> *"even if you are successful the question of payment of costs and the amount is at the discretion of the Court. At this point in time, pursuant to the Advocates (Prescribed Fees) Regulations 2002, even if costs are awarded, the recovery rate will not normally exceed £77.00 per hour (in respect of an advocate who is of less than 5 years standing) or in any other case £94.00 per hour. Please compare these to the fees in the Schedule."*

Mr Whittaker had told us that the "fees in the Schedule" were between £265 and £335 per hour. On the basis of these figures he had calculated that he might stand to recover less than a third of his costs.

4.9 We ascertained first from the Tynwald Library that the Advocates (Prescribed Fees) Regulations 2002 were no longer in force, having been revoked and replaced by the Advocates (Prescribed Fees) Regulations 2005. More significantly, Mr Paul Coppell (General Registry) advised us that the amount recoverable by Mr Whittaker would not be limited to the amounts in the Advocates (Prescribed Fees) Regulations so long as there was a written fees agreement between the advocate and the client. As he put it in his letter to the Committee of 28th April 2009:

> *"It is my understanding that the purpose of these regulations was to ensure that Advocates entered into fees arrangements with clients at the outset, in order for clients to be aware of the implications of embarking upon litigation. The prescribed rates are well below market rates and are presumably intended to be punitive so as to encourage such agreements.*
>
> *In simple terms...* ***in the absence of a fees agreement between Advocate and client****... the fees set out in Regulations (The Prescribed Fees Regulations), shall apply.*
>
> *Clearly I cannot comment on the specific circumstances of the case, other than to say that if a fees agreement was in place then the assessing officer would, as referred to in the FSC v MTM case, consider what a reasonable rate for that work would be and, in the absence of such agreement would allow no more than the applicable Prescribed Fees Regulations rate."*

4.10 We therefore needed to establish whether a fees agreement had been in place. To that end we obtained the full text of the lawyer's letter from which an extract had been submitted. This letter was sent by Laurence Keenan Advocates and Solicitors to Mr Allsebrook on 9th May 2008 and was submitted to the Committee by Mr Allsebrook on 11th May 2009. It is included in full in the published written evidence accompanying this Report by permission of Mr Allsebrook: see his letter to the Committee of 20th August 2009. It is clear from Mr Keenan's letter when viewed in full that it does indeed amount to a "fees agreement between advocate and client". This is made clear on page 6 of the letter in the following words:

*"Your continuing instructions in this matter will amount to your acceptance of these terms and conditions of business. Even so, please sign, date the enclosed copy of this Letter of Engagement , and return it to us immediately. We can then be confident that you understand the basis on which we will act for you."*

4.11 As far as the policy referred to by Mr Coppell is concerned, therefore, it is clear that the advocates in this case had adopted the approach which the Advocates (Prescribed Fees) Regulations had been designed to encourage, i.e., they had set out a written fees agreement and taken steps to ensure this is understood by the client.

4.12 Why, then, had the advocates advised that any costs awarded in the event of a "win" would be limited to the "punitive" rates set out in the Regulations? We put this question to Mr Keenan and in a letter to the Committee dated 1st July 2009 he responded as follows:

*"The purpose of pointing out the Regulations at all in terms of engagement where litigation is envisaged is to try and explain the 'worst case scenario' where although there is a costs order in the client's favour, the assessing officer can replace these rates with the commercial rates charged by this firm. Although in reality this would not happen if a terms of engagement was signed agreeing to those commercial rates, the assessing officer looks to the rates charged as well as the amount of time spent.*

*"I note that various parties have given evidence* [to the Select Committee] *about recovery rates but the fact remains that there are never any assurances to give a client who is contemplating entering the litigation arena. A 100% recovery must be unusual. The client should balance the merits of the proposed involvement against the cost risks both as a successful and unsuccessful party. In the matter of a petition of doleance, the position is all the more acute as noticed parties would not necessarily be directly affected by the outcome one way or the other.*

*"In my experience, I am seeing more and more examples of Advocates charging exceedingly high fees in cases where the fees of my own firm have been as much as one third for being involved in the same proceedings. Therefore a client has to be aware that if their participation leads to a cost order against them, the costs of the other side*

*may be much higher than the costs they have already paid. It is hoped that the assessing officer will detect this but at the end of the day, the reasonableness of a work item is subjective both in terms of merit and time taken."*

4.13 To summarise: Mr Whittaker thought that the most he could recover even in the event of a win was a third, a figure based on advice from Laurence Keenan. The representatives of the legal profession (the Law Society and the Attorney General's Chambers) disputed the advice Mr Whittaker had received and said that typically in Petition of Doleance proceedings someone in Mr Whittaker's position might in the event of a win expect to recover 70 to 90 per cent. On inspection we found that Mr Keenan's advice was based on the rates in the Advocates (Prescribed Fees) Regulations. Not only did Mr Keenan's advice refer to an out-of-date version of the Regulations, but on Mr Keenan's own admission these rates would not have applied in this case, because a written fees agreement was in place.

4.14 Mr Keenan has sought to justify his approach on the grounds that it is important to provide clients with a realistic picture of what might happen should they pursue litigation, and he has cited some of the other issues which may come into play. We recognise that the process is based ultimately on an officer's assessment of "reasonable costs" and we accept that "reasonableness" is a matter of judgement. Hence it is not surprising to find that one lawyer's view of potential financial risks differs from another's. On the other hand we are not persuaded that it was appropriate for Mr Keenan to refer in these circumstances to the rates in the Advocates (Prescribed Fees) Regulations and we are still concerned by the starkness of the difference between the advice given by him to Mr Whittaker ("one third") and the view of the Law Society and the Attorney General's Chambers ("70 to 90 per cent").

4.15 We consider that any further examination of this aspect of Mr Whittaker's case would be a matter for the Law Society.

# 5. BRIDGING THE GAP: ISSUES AND RECOMMENDATIONS

5.1 Mr Whittaker has highlighted in his Petition for Redress of Grievance the issue of judicial supervision of administrative action, and in particular what arrangements can be put in place to ensure that the ordinary citizen benefits from the protection of the courts. These issues are of significance to everyone in the Isle of Man – not only to individuals and companies affected by the planning process but also, potentially, to anyone coming into contact with any branch of the Island's public administration. According to the evidence we have heard, there is a wide gap between the perception of the operators of the system – represented by the Isle of Man Law Society and the Attorney General's Chambers – and the perception of the person affected by it – represented by Mr Whittaker.

5.2 We have considerable sympathy for Mr Whittaker and other members of the public who might in the future face a similar plight. On the other hand, having examined the background to Mr Whittaker's grievance and having considered the evidence of practitioners within the system, we would comment that this system needs to cater not only for Mr Whittaker but also for the other side, i.e. his opponent in any dispute.

5.3 We do not think that the system is incapable of improvement, but neither do we think that it is flagrantly unjust. A balance needs to be struck between the need for anyone, including the wealthy, to be able to pursue their legitimate interests before an impartial judicial authority; and the need to ensure that proper compensation is made for "the weight of the wealthy" in matters where the rights and freedoms of the individual may be put at risk; while acknowledging the need to contain public spending within reasonable limits.

5.4 We have examined a number of possible changes which might have some value in bridging the gap between the individual and the justice system. These are set out in full below. As will be seen, there are some proposals which we have rejected and there are others where we make recommendations.

## AVOIDING HIGH COURT PROCEEDINGS IN THE FIRST PLACE: FOUR ALTERNATIVES TO THE HIGH COURT

5.5 We consider that where any dispute is concerned, it is in everyone's interest for the matter to be settled without going to court. We have therefore looked at four different models for settling disputes such as that which affected Mr Whittaker, to see how they might have helped him, and how they might help others in similar positions in the future.

### *Alternative 1: a "small claims"-type procedure without legal representation*

5.6 In the October 2008 debate which established the Committee, Mr Graham Cregeen MHK referred to the "Small Claims Court". He said this system "has changed the whole area regarding where people are owed money. It has brought it to the ordinary man in the street, so that they can get their money back, without having to revert to lawyers… to make sure the whole area is affordable for everybody" (23rd October 2008: 169T126). The same point was picked up on by Mr George Waft MLC (169T126).

5.7 We understand that the advantage of the Small Claims Arbitration Scheme is that individuals normally represent themselves. The guidance document published on the website of the Office of Fair Trading states: "An Advocate would not be allowed to represent you at the hearing unless the Arbitrator gives permission". The guidance also states that "the unsuccessful party in an action does not have to pay any extra costs (such as Advocate's fees) incurred by the successful party, except in rare cases where the Arbitrator decides that the conduct of the unsuccessful party has been unreasonable."

5.8 We have considered whether this model could be used for the types of cases which currently go to the High Court as Petitions of Doleance. On the face of it there is a considerable difference, insofar as Petitions of Doleance are likely to involve much more complex matters of both fact and law.

5.9 Another difference is that the purpose of Small Claims Arbitration is to get one side to pay over money which is owing to the other side. In other words, the complainant is asking the court to put right that which he says has gone wrong. In a Petition of Doleance, by contrast, the court cannot put right that which has gone wrong. As noted above, the most it can do is quash a decision and remit it back to the original decision-maker. The purpose of a Petition of Doleance is not to compensate the complainant: he may or may not end up better off as a result. The purpose is to improve the system for the future.

5.10 There is, moreover, a conceptual difficulty with applying to Petition of Doleance-type cases the notion of each party speaking for himself without legal representation. A Petition of Doleance typically arises out of a dispute between an individual on the one hand and a Government Department or other public authority on the other. The Department is likely to be a big organisation. It would have to be represented by an officer. How could one justify preventing the Department from fielding the most suitable officer, including someone with a legal qualification if available?

5.11 We think it would seldom be appropriate for the Department to field a middle-ranking or front line officer in this type of dispute. This is because, if an injustice had occurred, it is just as likely to be a result of imperfect procedures and guidance as it is to be the fault of an individual officer. The person representing the Department in the dispute needs to be of sufficient authority to offer, for example, a change in procedures as a way of settling the dispute and ensuring the same injustice does not happen again.

5.12 Mr Whittaker himself wrote in his evidence to the Committee:

> *"Having seen alternative proposals for a "Small Claims Court" while appreciating its merit, the Association realises that this would in no way adequately protect any small party such as the Association or any individual from the outrageous claims and procedures of the larger developers."*

We are not persuaded that a system of arbitration without lawyers would have been of great assistance in a case like Mr Whittaker's or in similar cases in future.

## *Alternative 2: an ombudsman scheme*

5.13 Another means of resolving disputes between individuals and public authorities without going to court would be through a parliamentary ombudsman service like that established in the UK under the Parliamentary Commissioner Act 1967.

*History of the ombudsman proposal in the Isle of Man*

5.14 The idea of an ombudsman has been under discussion in the Isle of Man for nearly 30 years. A proposal was approved by Tynwald on 22nd October 1980. The resultant private Member's Bill was introduced into the House of Keys on 3rd February 1981 but fell at Second Reading on 24th February 1981.

5.15 In 1988 Peter Karran MHK tabled a motion at Tynwald that an ombudsman be introduced. This resulted in the appointment of a committee, which reported in November 1989. Tynwald adopted the Select Committee's recommendations. The Select Committee concluded that there was insufficient evidence to determine whether an Ombudsman could be justified and recommended two interim measures. These were firstly the introduction of a standardised complaints procedure within Government, and secondly that there be an annual report to Tynwald based on records of complaints received during the previous year. These recommendations were implemented.

5.16 On 1st February 2000, the then Chief Minister gave a commitment to look at the idea of an ombudsman afresh. This commitment was given in response to a Question tabled in the House of Keys by Mrs Brenda Cannell MHK.

5.17 On 11th December 2002, Tynwald received the Report of the Select Committee on complaints of maladministration made by Mrs A E S Pilling, and approved the Report's recommendations. Among these was a recommendation for a full review of the current implementation of the standardised complaints procedure including the training of staff in its use and of the desirability or otherwise moving to a complaints regime supervised by an independent Ombudsman.

5.18 On 14th July 2004 the resultant Council of Ministers report was debated by Tynwald. The principal recommendation of the report was that there was merit in establishing an Ombudsman scheme.

5.19 In October 2008 the Government published its Annual Report 2008. This Report included, within the proposed legislative programme a Bill to give effect to this recommendation. The Annual Report listed the Bill under the year 2007/08 and said it was "due for consultation in October 2008". We therefore sought information from the Chief Secretary's Office about this Bill.

5.20 The Chief Secretary's Office told us in a letter dated 16th January 2009 that they hoped to get the draft Bill out to consultation by early February 2009. On 24th February they said "we are looking at March rather than February". We were supplied on 8th April 2009 with a confidential copy of the draft Bill as it then stood. A consultation document incorporating the draft Bill was issued on 6th August 2009 with a request for comments by 17th September 2009.

*Powers of an ombudsman*

5.21 In examining the ombudsman proposals, one specific point we have looked at is whether an ombudsman would have powers of final and binding arbitration. In

the July 2004 Tynwald debate the then Chief Minister (Mr Corkill) indicated that this would indeed be the case. He said (on page 1730T121):

> *"The Ombudsman would make binding recommendations to remedy the case and make suggestions as to improvements in administration."*

However, in the draft Bill accompanying the August 2009 consultation paper the ombudsman is only able to make a report to Tynwald. We enquired about the position in the UK and were advised that there too, the power of the ombudsman is only to report to Parliament as opposed to making a final decision. Having taken legal advice we think that the reason for this might be that if an ombudsman could impose a binding settlement he would have to involve all interested parties. This would mean that he would need to advertise in a suitable public forum to ensure that interested parties such as Mr Whittaker could represent their views. Where legal rights are affected any remedy should be open to public inspection and accountability.

5.22 A power to report to Parliament falls short of the ability to impose a remedy but it is nevertheless a significant power. The Jurisdiction Adviser to the UK's Parliamentary and Health Service Ombudsman, Mr Anthony Gilmour, advised us on 3rd July 2009 that:

> *"Where we try to settle a complaint, we make recommendations when we need to. But often an authority will offer (or already have offered) redress, and we may invite them to do so. Often there is more than one way of putting right the effect of official error: if so, we cannot insist that redress should take a specific form...*
>
> *"Our recommendations are almost always carried out. We won't always know whether they have been fully complied with, although we do far more now than we did once to watch compliance. Also, there may sometimes be misunderstandings over such matters. Where the department or authority refuse to comply, we have power to lay a report before Parliament under section 10(3), explaining that we have found that maladministration has led to injustice which has not been, or will not be, remedied. Since 1967, there have been, I believe, only 5 such reports. The purpose of*

*such a report is to put the matter to Parliament for the case to be aired there, largely through the Select Committee of the House of Commons overseeing our work (now the Public Administration Select Committee). That and wider public pressure have usually caused the Government in the end to give way, at least in part, over the redress we have recommended in those cases."*

*Impact of an ombudsman in Mr Whittaker's case*

5.23 We have considered whether, if an ombudsman scheme been in place in the Isle of Man in 2008, the case which affected Mr Whittaker would have been capable of adjudication by the ombudsman or would have gone to a Petition of Doleance in any case. We think the chances are that it would have ended up as a Petition of Doleance in any case.

5.24 As far as we have been able to assess the proposals, it seems likely that an ombudsman as proposed in the Government's consultation document could indeed help with some disputes between individuals and public authorities where, for the moment, the only avenue available is a Petition of Doleance. In Mr Whittaker's case, from the point of view of those objectors who were joined to the Petition of Doleance as noticed parties , an ombudsman procedure might have appeared preferable, since they might not have felt so strongly compelled to engage legal representation.

5.25 However, as Mr Whittaker and his associates were neither the original complainant nor the respondent it is not clear that an ombudsman procedure could have involved them in any satisfactorily formal way. Where legal rights are affected, any remedy should be open to public inspection/accountability in order to comply with the right to a fair trial in Article 6 of the European Convention on Human Rights. Therefore it is difficult to see how the interests of Mr Whittaker or his associates could have been represented other than in court proceedings.

*Impact of an ombudsman in other cases*

5.26 It is possible that an ombudsman scheme could reduce the burden on the High Court by dealing with at least some cases which would otherwise find their way there. Mr Gilmour advised us that in England, the courts may expect people to try to settle disputes with public authorities by other means, including perhaps through an ombudsman, rather than, or before, taking judicial review proceedings. By way of authority for this advice he cited the judgment of the Court of Appeal in *Anufrijeva v Southwark LBC* [2003] EWCA Civ 1406, which said:

> *"Before giving permission to apply for judicial review, the Administrative Court judge should require the claimant to explain why it would not be more appropriate to use any available internal complaint procedure or proceed by making a claim to the PCA [Parliamentary Commissioner for Administration i.e. Parliamentary Ombudsman] or LGO [Local Government Ombudsman] at least in the first instance. The complaint procedures of the PCA and the LGO are designed to deal economically (the claimant pays no costs and does not require a lawyer) and expeditiously with claims for compensation for maladministration. (From inquiries the court has made it is apparent that the time scale of resolving complaints compares favourably with that of litigation.)"*

5.27 That said, the interaction between ombudsman and court procedures is complex and it would be difficult to quantify with any confidence the potential reduction of the burden on the courts which could be expected from the introduction of an ombudsman in the Isle of Man. For example, a court might decide not to deal with a case, on the ground that the case should be dealt with by an ombudsman. However, this decision of the court might itself be appealed to a higher court, in which case the burden on the court system as a whole is not reduced but increased. An illustration of this cited by Mr Gilmour is *K v Cornwall County Council* [2005] EWCA Civ 1815.

5.28 Here in the Isle of Man, it is clear from the Government's August 2009 consultation document that they do hope the proposed ombudsman scheme will divert some cases away from the courts. The document says at paragraph 6.2:

*"Introducing this further stage, the right to appeal to the Tynwald Commissioner, should ensure that complaints are dealt with without recourse to the other more complex formal procedures such as Tynwald Select Committees, Petition for the Redress of Grievance or Petition of Doleance to Court."*

From the advice we have received on the experience in the English courts we would comment that this is not guaranteed. Nevertheless we share the Government's hope and we make the following recommendation:

**RECOMMENDATION 1**

**That the Council of Ministers continues to progress the Tynwald Commissioner for Administration Bill.**

## *Alternative 3: creating a new form of arbitration*

5.29 We have seen under alternatives 1 and 2 above that neither a "Small Claims Court" model nor an ombudsman model would have been capable of handling in a satisfactory way the case which affected Mr Whittaker. Hence, even if an ombudsman scheme had been in place in the Isle of Man, the case would have been likely to have ended up in the High Court.

5.30 Conscious of our remit to report to Tynwald "with recommendations with regard to establishing a system which creates a level playing field over Petitions of Doleance and which furthermore protects the position of the ordinary objector against the weight of the wealthy" we gave careful consideration to whether a new form of arbitration could be devised which would have met Mr Whittaker's concerns. The following characteristics would be essential:

- an alternative to court proceedings;

- no need for lawyers;

- able to cope with cases involving a complainant, a public authority, and one or more third parties, and available by consent of all interested parties (which would require a public advertisement);

The following characteristic would be desirable:

- ability to impose final and binding arbitration (unlike the UK ombudsman scheme).

5.31 We were reluctant to dismiss out of hand the notion that something like this could be created. However, we noted that there would be considerable complexity and cost involved in setting such a system up from a standing start. We also considered that it would seem inappropriate to set up a new system as it were in a vacuum and without reference to other current developments in related areas – most notably the Government's consultation on proposed Tynwald Commissioner for Administration (i.e. ombudsman) Bill.

5.32 Experience with the Tynwald Commissioner for Administration could impact on the priority given to any future arbitration scheme in at least two significant ways. If the ombudsman scheme is successful in diverting cases away from the High Court that would strengthen the case for devoting scarce resources to the creation of a new arbitration system. If on the other hand Manx ombudsman cases prove likely to end up in the High Court anyway that case would be weaker.

5.33 If a new arbitration scheme is to be developed, experience with the Tynwald Commissioner for Administration could impact significantly on its design. If Manx experience follows English experience in that the ombudsman's recommendations are virtually always followed, then there would be a case for adding the new arbitration system to the ombudsman's role. If on the other hand the ombudsman's lack of binding powers proves in practice to be a significant weakness, then there would be a greater case for a self-standing arbitration mechanism with greater powers.

5.34 Given these points we have reluctantly concluded that, despite the wording in our remit about "establishing a system", it would be premature at this stage to undertake detailed work on an innovative arbitration scheme designed to cater specifically for cases such as Mr Whittaker's. In the interests of making a timely report to Tynwald we have decided to offer our thinking to the Court at this stage and to recommend:

**RECOMMENDATION 2**

**That in implementing the proposals in the Tynwald Commissioner for Administration Bill, the Council of Ministers should ensure that arrangements are in place to collect detailed information on the types of cases taken by the ombudsman and the extent to which the Commissioner succeeds in diverting cases from the courts.**

**RECOMMENDATION 3**

**That when the Tynwald Commissioner for Administration has been operational for three years, the Council of Ministers should review the arguments for and against the creation of an additional system of out-of-court arbitration to cater for cases involving a complainant, a public authority and one or more third parties, and report to Tynwald.**

## *Alternative 4: an extended referral-back mechanism within the planning system*

5.35 The Chief Executive of the Department of Local Government and the Environment, Mr Ken Kinrade, responded to our initial call for evidence in his letter of 5th December 2008. Mr Kinrade observed on the basis of his experience that Petitions of Doleance were increasingly being used as another means of appeal against planning decisions which would normally be considered final. Such petitions

would normally claim that the decision-maker did not follow due process or that there was some form of administrative error that prejudiced the outcome.

5.36 Mr Kinrade went on to say that as part of the review of the planning system which is currently underway, his Department is looking at improving the appeals mechanism by providing the Minister with the ability to refer matters back to the Appeal Inspector in certain circumstances such as where new evidence becomes available or where the Minister believes the Inspector may have failed to give sufficient weight to other evidence or policies submitted at the appeal hearing. Mr Kinrade thought the ability for the Minister to refer matters back to the Inspector could be extended to allow the Minister to correct administrative errors and order a new determination, or at least to advise the Appeal Inspector of the error and allow him to correct it.

5.37 As indicated above, we consider that our remit requires us to concentrate on Petition of Doleance procedures as distinct from the planning system. We have no desire, as a Committee, to make recommendations which cut across the review of the planning system which is already underway. Nevertheless, from the point of view of Mr Whittaker's grievance we would welcome any development in the planning system which enable new information to be taken into account, or errors to be corrected, without the need for either side to invoke Petition of Doleance proceedings with the attendant expense in terms of legal representation and, indeed, judicial and court time.

5.38 Such a development might also help address the petition for redress of grievance of Gloria Anne Rothwell which was presented on Tynwald Hill in July 2009.

## REDUCING THE OVERALL COSTS OF PROCEEDINGS: NEW CIVIL PROCEDURE RULES

5.39 The First Deemster mentioned to us in a letter dated 25th January 2009 that new civil procedure rules were at that time being prepared which would help to reduce costs. We discussed this briefly with Mr Caine of the Isle of Man Law Society and sought further detail from the First Deemster, which he provided in a letter dated 9th March 2009.

5.40 The First Deemster explained that changes were to be made to the Petition of Doleance procedure but that these were part and parcel of a major reform to the Island's High Court Civil Procedure and Practice Rules, a project which has been underway for around two years. He hoped that the new Rules would come into force on 1st September 2009. They are designed to simplify and unify procedures by:

- merging the civil divisions of the High Court;
- introducing four main procedures: small claims, summary, chancery and ordinary;
- introduce the use of claim forms in place of petitions and statements of claim;
- introduce electronic filing;
- progress in due course to a paperless system.

5.41 The First Deemster said that the new Rules had potential cost benefits. However, he also commented: "it must be appreciated that costs are, to a major extent, subjective. The hourly rate charged by advocates varies. The cost to a client of the proceedings will also be directly related to the time expended by an advocate expended on the same."

5.42 The draft Rules submitted to us include the following statements:

> *"1.2 (1) These Rules are a new procedural code with the overriding objective of enabling the High Court to deal with cases justly.*
>
> *(2) Dealing with a case justly includes, so far as is practicable–*
> *(a) ensuring that the parties are on an equal footing;*
> *(b) saving expense"*

5.43 The Rules of the High Court of Justice 2009 (SD352/09) were made by the First and Second Deemsters on 14th May 2009 and laid before Tynwald in June 2009, coming into operation on 1st September 2009. A motion to annul them was debated in Tynwald on 16th July 2009 but the motion was defeated and so the Rules duly came into effect in September 2009. The principles at 1.2(2)(a) and (b) as quoted above from the draft Rules were unchanged in the final version of the Rules as made. We welcome the new Rules and, from the perspective of our current investigation, we firmly endorse these important principles.

## A TRIBUNAL SYSTEM ON THE ENGLISH MODEL

5.44 Mr Peter Karran MHK, in his response to our initial request for submissions, commented that "other jurisdictions are trying to steer away from a court basis onto a tribunal basis". We took this to be a reference to the reforms to the English system contained in the Tribunals, Courts and Enforcement Act 2007 (of the UK Parliament). This Act created a tribunal-level court of first instance for judicial review. We thought this might make judicial review proceedings faster and cheaper and we sought evidence as to whether there might there be any advantage in an equivalent reform to the Isle of Man system of petitions of doleance.

5.45 We addressed this question in the first instance to His Honour the First Deemster. In his response dated 7th January 2009 he asked us for more information about the English reforms. We obtained this from the UK Tribunals Service and supplied it to the First Deemster.

5.46 The advice of the UK Tribunals Service was recorded in a letter from our Committee Clerk to the First Deemster dated 6th April 2007. The following is an extract from that letter:

> *"I am advised that the primary policy intention behind the 2007 Act was to change the way tribunals were organised, bringing together under one organisation (the Tribunals Service) many tribunals which previously were scattered around various Government Departments and agencies. This is expected to improve the service delivered by both the tribunal judiciary and the supporting administration.*
>
> *Sections 15 to 21 of the 2007 Act are entitled "Judicial Review" and give the Upper Tribunal power to award judicial-review-type remedies such as a mandatory order, a prohibiting order, a quashing order etc. The delivery of these functions through the Upper Tribunal should reduce the caseload before the High Court. The main purpose of the reforms, however, was not to have a major impact on the workload of the High Court but to enable judicial review cases in specialist areas commonly dealt with by tribunals (eg tax, social security, criminal injuries compensation) to be dealt with by the specialist tribunal judges. The UK government is however considering enabling transfer of asylum and immigration judicial review cases to the Upper Tribunal, which would have a significant effect on High Court workload.*
>
> *There may be some cases in which appellants dissatisfied with a decision of the Upper Tribunal may obtain leave to take their case to the High Court by way of judicial review. It is not yet known how many of these cases there will be and it is not clear whether the High Court will permit such cases to be brought. The Upper Tribunal is by statute a "superior court of record" and it may be that the High Court will decide that that means that the Upper Tribunal's decisions cannot be further reviewed, or can be reviewed only on very limited grounds. It is therefore too early to say to what extent the reform will reduce the burden on the High Court or will merely introduce an additional, intermediate layer of appeal. At this stage the Ministry of Justice is not assuming that the implementation of these sections will reduce costs overall ...*
>
> *I am advised that legal representation is indeed available before tribunals in England, and publicly funded legal aid is available for some categories of case."*

5.47 Taking this evidence into consideration we have concluded that, for the moment at least, it looks unlikely that the tribunal route would be a valuable model for reducing the overall costs of Petition of Doleance proceedings in the Isle of Man.

## INSTIGATION OF PROCEEDINGS: SCREENING OUT OF FRIVOLOUS CASES

5.48 One of Mr Whittaker's specific proposals, which he set out in his written evidence to the Committee, is that:

> *"the most obvious step in the right direction to deter large developers from using this procedure and bringing in frivolous or unsound cases against legitimate objectors, would be to impose severe penalty costs on them, thus ensuring that small parties did not have to find such large amounts to defend themselves. Revenues received from these penalties could contribute to re-imbursing the small party."*

5.49 We have considered this proposal but we do not think it represents any significant improvement on the existing costs regime as described above. The costs regime already acts as a deterrent to the bringing of frivolous cases, and it has the merit of applying equally to rich and poor. We do not think that "penalty costs" should be introduced on a means-tested basis. We think that the only way in which costs can be apportioned is by the court. We think it is right that the court should apportion the actual costs incurred by the parties. We do not see how it could be fair to impose additional "costs" (or fines, to give a more accurate description) on losing parties merely on the basis that they were deemed to be "large developers".

5.50 We do consider, though, that there could be merit in an improved system for screening out frivolous Petition of Doleance cases earlier in the process, before either side has to incur the costs of preparing their full case. In the English equivalent jurisdiction, judicial review, a person wishing to bring a case must first apply to the court for permission, or "leave". This "leave stage" does not exist in the Isle of Man. We discussed the pros and cons of introducing a leave stage with the representatives

of the Isle of Man Law Society and the Attorney General's Chambers. This was the one significant point on which the two sides did not agree. Mr Caine said:

> *"At the moment, there is no requirement to obtain leave to bring a Petition of Doleance, whereas in England you have to get leave to bring a judicial review. So, there is a kind of filtering out process. The Law Society thinks that leave is unnecessary in this jurisdiction."* (page 18, column 2)

> "[Petition of Doleance] *is a unique Manx remedy. It is a right. If you have got a complaint against a decision that has been made, then you have a right to simply bring that and have it heard. In England, you have to persuade a judge that you have got a good case, otherwise they will not allow you to go to the time and cost and court time of bringing… In England, some of the cases are absolutely huge. We are talking about runways: the third runway at Heathrow or whatever, and the costs are going to be hundreds of thousands, perhaps millions. So, they like to filter them out. In the Isle of Man, we do not have many cases that are that big."* (page 19, column 1)

Mr Harding said:

> *"In the United Kingdom, of course, there has been a filter system, a leave system, for some time. I think it was introduced in the 1970s, Order 53 of the former Rules of Court. At the present time, if a Petition of Doleance was presented and one felt that it was not really meritorious, it would be up to the person defending it to have it struck out and take a particular action to do so. I have found that the courts are pretty loath to strike actions out and it was only in really clear cases that they would.*
>
> *However, I do think that a requirement to effectively seek the leave of the court would potentially get rid of those cases which clearly have no possible chance of ever getting anywhere. There are some cases that have appeared and I have thought, I do not know why this is being allowed to go on, to be quite honest with you, and there are other people here, potentially third parties, who are being put to some cost as a result of that.*
>
> *So my own view has always been, I felt quite strongly that there should be a leave stage. When the new draft Rules of Court were originally drafted, the first draft did*

*have the leave stage included. However, I understand that following presentations by the Law Society that leave stage was removed from the Rules. I am not sure why that happened, and personally that is about the only area where I do not agree with Mr Caine. Everything else, I do agree with, so we will perhaps have to agree to disagree."* (page 26, columns 1 to 2)

5.51 From the point of view of Mr Whittaker or others who might be in a similar situation in future, it is possible that a leave stage could be something of a double-edged sword. An ordinary citizen in dispute with a wealthy individual or a well-funded organisation might be delighted in circumstances where his opponent's case failed at the leave stage. But at the same time there could be circumstances where he himself wished to bring Petition of Doleance proceedings, and he would be less pleased if his own case fell at this additional initial hurdle without getting as far as a full hearing.

5.52 On balance we consider that if an action fails at the leave stage, whatever the circumstances of the parties, it is fairer to all concerned. Provided that actions are struck out early only for very clear reasons, then everyone benefits, even the disappointed party, who will avoid incurring extra expense. (We have been advised by the Clerk of Tynwald that in the UK, leave to appeal to the House of Lords was introduced to stop bullying by rich litigants of poor ones, by way of pursuing "all the way" appeals which were without a realistic prospect of success but which nevertheless had to be contested.) We recommend:

**RECOMMENDATION 4**

**That the Deemsters consider introducing a "leave stage" in Petition of Doleance proceedings, bearing in mind any implications for the ordinary citizen in dispute with a public authority, wealthy individual or well-funded organisation.**

## NOTICED PARTIES IN PETITIONS OF DOLEANCE: ADVICE TO THE PUBLIC ON WHAT THIS MEANS

5.53 We were struck by the following statement in Mr Whittaker's written evidence:

> *"The developer saw fit to institute a petition of doleance against the Government, but he did so in such a manner that he cited the Association as being liable for the fact that his application was unsuccessful. Thus the Association, although not being a defendant of the petition, found itself having to legally defend itself unjustly against a petitioner who had considerably more finances behind him than the Association did."*

5.54 Mr Whittaker clearly believed that his Association (the Ballasalla and District Residents' Association) was being asked to "defend itself" without adequate funding being available – wherein lay the injustice. Looked at from the point of view of the lawyers, however, the Association was not a "defendant" at all. The case was between the developer and the Council of Ministers. The Association (and Malew Commissioners) were "only" noticed parties, who did not have to participate at all and if they did participate, would not have much to contribute. Mr Caine commented:

> *"If we look at the decision in the case of the Petition of Doleance brought by J. G. Kelly Ltd in relation to the proposed Crossag Farm development – which I know BADRA was involved in and Malew Parish Commissioners – the petitioner lost that case. The respondent to that case was the Council of Ministers who were represented by Mr Helfrich and they won.*
>
> *So, the large burden of costs would be borne by the Council of Ministers because they did the bulk of the work in defending the Petition. Then Malew Parish Commissioners and the independent third parties, as they were called, raised points that had not been dealt with by the Council of Ministers."* (page 16, column 1)

5.55 We have sympathy with Mr Whittaker's perspective. When he and his neighbours were invited to be joined as noticed parties they would naturally have

assumed it was in their interests to participate fully, and that this would mean incurring steep legal costs. We do not wish to comment in too much detail on the particular case. But there is a general lesson that, even in a case where a noticed party could have minimal impact on the outcome and minimal work to do in order to participate, he would not know this without in the first place paying for some initial legal advice. We would assume that if there was truly no point in getting involved, his lawyer would tell him this – but even that advice would come at a price.

5.56 We consulted the First Deemster about the way in which contact is made with potential noticed parties and whether any guidance is offered to them by the courts administration at that stage. He responded in a letter dated 13th May 2009, from which the following is an extract:

> *"When a person, or entity is joined either as a defendant or third party presently in the case of petitions as a respondent or noticed party, 'the invitation' will be the service of proceedings upon such person. It is considered that the proceedings in themselves are readily comprehensible as to what is the subject of the proceedings, and the claim or relief sought by the issuing party.*
>
> *"Petition of doleance proceedings are brought before the court for active case management usually within one to two weeks of commencement. It is standard practice either at the initial case management directions or at the first case management directions hearing at which a litigant in person appears for the court to explain in general terms the procedure which the proceedings will take leading to trial, including, but not limited to when such litigant in person will be served by one or more of the parties with pleadings and evidence, when such litigant in person should file his, her or its pleadings and evidence, the consequences of failure to do so, and generally the procedural steps leading to trial...*
>
> *"Also, whilst court administration will and do provide objective advice, but not legal advice, to a recipient of proceedings as to what initial steps are required to be taken by such recipient, the initial advice must always be for such recipient to take legal advice...*

*"[In the context of the new High Court Rules, the] Courts Administration of the General Registry is in course of producing guidance notes for a claimant, and other parties, which guidance notes will be issued with the proceedings. The Committee will appreciate that by their very nature such guidance notes will be general, and that the best guidance that can be given is for anyone, who desires to issue, or is the recipient of proceedings, to take legal advice. The provision of guidance to any party to litigation is a delicate and difficult matter."*

5.57 We acknowledge the force of the argument that the best guidance that can be given is to take legal advice. Nevertheless we welcome the initiative to produce new guidance in the context of the new High Court Rules and we encourage the Deemsters and the General Registry to make this guidance as clear as possible.

## RESIDENTS' ASSOCIATIONS AND LOCAL AUTHORITIES: PROMOTING CO-OPERATION

5.58 Another very striking feature of Mr Whittaker's case was the extent of agreement which appeared to exist between the Ballasalla and District Residents' Association and Malew Commissioners. The two groups, one voluntary and one statutory, appeared to have exactly the same objections both to the proposed development and to the Petition of Doleance procedure. The voluntary organisation (through Mr Whittaker) is complaining about lack of funding. The statutory organisation, apparently, is not.

5.59 Mr Allsebrook explained in a letter dated 10th February 2009 that there were three distinct "settlements" within Malew: Ballasalla, Derbyhaven and St Marks. All three had residents' associations, and Mr Allsebrook said the associations in Derbyhaven and St Marks were better supported than the Ballasalla and District Residents' Association.

5.60 We naturally recognise the right of individuals to form groups representing shared interests of any kind, including residents' associations for different neighbourhoods within a local authority area. It is certainly conceivable that a group

of residents in one neighbourhood might feel that their interests were not adequately represented by the particular Commissioners in office at a particular time. Part of their recourse to this situation is through the ballot box. But in the mean time it is entirely proper for residents to form their own groups in order, for example, to participate in the planning process.

5.61 Where public money is concerned it is always necessary to avoid duplication. We would not therefore be comfortable, for example, with recommending an increase in of any kind of public funding to an organisation such as a residents' association where the organisation was fulfilling exactly the same role as the local authority. We do not know if such duplication constitutes a significant risk to public funds at present. We nevertheless note that the "interests of the objector" would be served by a well-functioning local authority system, and that to that extent this issue falls within our remit. We would welcome greater co-operation where necessary between residents' associations and local authorities, who have a statutory role in planning matters.

## POTENTIAL SOURCES OF FUNDING: THREE OPTIONS

### *Option 1: insurance*

5.62 In circumstances where a small voluntary organisation such as a residents' association does end up in court in connection with Petition of Doleance proceedings, it will face some legal costs. We inquired of representatives of the insurance industry whether any cover would be available to assist such organisations with such costs.

5.63 Mr David Vick, Chief Executive of the Insurance and Pensions Authority, wrote to us on 26th February 2009: "I think that it is likely that there could be significant restrictions on the availability of insurance cover in such circumstances." He also referred us to two leading Island insurance firms for advice based on their practical experience. An expert in one of these firms advised as follows:

*"Using the English Judicial Review as a benchmark, I've further researched various ATE* [After The Event] *Legal Expenses product wordings available via the internet, including one provided by DAS Legal Expenses whom previously I've used a fair bit. Apart from the requirement for a high potential success rate – 60% in one instance – a commonality between the products was an exclusion in respect of Judicial Reviews, and would therefore expect any product tailored for Manx legislation to exclude PoD's (not sure there is a market here either since the Legal Aid arrangement still exists – ATE cover only really surfaced after LA was withdrawn in England & Wales and the 'no win, no fee' culture took off).*

*My gut instinct at the outset was a "no" to* [the Committee's] *question, but my research has bolstered this and would suggest it looks highly unlikely a commercial or charitable entity would be able to offset their legal costs in bringing together a PoD via the purchase of a Legal Expenses policy, whether it be an annual cover or a single ATE product."*

5.64 We have concluded that this does not appear to be a fruitful avenue of inquiry.

## *Option 2: Legal Aid for organisations*

5.65 Another possibility we considered was whether it would be desirable to amend Legal Aid provision to make it available to a small voluntary organisation such as a residents' association: to a group of "persons of small means" rather than just to an individual. It would already be possible for a member of such an organisation to apply for Legal Aid as an individual and thereby to pursue a case which might benefit both himself and his neighbours (see paragraph 4.6 above). We wanted to look, however, at whether there could be an explicit option for an organisation (incorporated or otherwise) to apply for Legal Aid in its own right.

5.66 At present, Legal Aid is only available to individuals. This is set out in Regulation 7(6) of the Legal Aid (General) Regulations 1997 as amended. The Isle of

Man is no different in this respect to the neighbouring jurisdictions of England and Wales, Scotland, Northern Ireland and the Republic of Ireland.

5.67 If Legal Aid were to be extended to organisations this would require amendments to primary and secondary legislation. It would be necessary to consider how to assess the financial situation of the organisation: not only its accounts, if it had them, but what other sources of funding it might be able to access. Such a scheme would have potential to generate enormous bureaucracy.

5.68 The central policy question, however, is: should public funding be made available to an organisation when the members of the organisation might include individuals who would not otherwise be eligible for Legal Aid? For example, suppose two neighbours on moderate or high incomes were in dispute with a third neighbour, also on a similar income. The two neighbours who agreed with one another could form an "association" with the aim of taking the other neighbour to court. They might decide to put £10 per year into the association. The association would be "of small means" but to grant it public funding to pursue its objectives through the courts would be absurd.

5.69 We have concluded that the policy priority underpinning existing is the right one, namely that scarce public funding should be spent on those individuals who are in greatest personal need, leaving associations and organisations to raise funds in other ways. In his letter to us of 22nd May 2009 the First Deemster indicated that the Legal Aid Committee supports this conclusion.

## *Option 3: adjusted Legal Aid thresholds*

5.70 If Legal Aid is to remain dedicated to individuals, are the thresholds too low? The Chief Minister commented in the debate establishing the Committee (162T126) that:

> *"There are people who can get support under our system of Legal Aid, which is the most lucrative one in the British Isles. Then you have got people in the middle who, if*

*you go to court and a lot of money is spent, in fact will exhaust considerably their financial savings…"*

5.71 We recognise that Legal Aid is only available to people whose income is below certain thresholds, and that there are a lot of people "in the middle" who are not eligible for Legal Aid but who are not so well off as to be able to pursue cases through the courts without worrying about the costs. We imagine that Mr Whittaker and most of his neighbours may be in this position. We also note, however, that Mr Whittaker did not specifically suggest an increase in Legal Aid as a possible way forward either in his Petition for Redress of Grievance or in his initial written evidence to the Committee.

5.72 We note that the existing Legal Aid thresholds were put in place following the Council of Ministers' response in May 2007 to the report of the Legal Aid Commission of May 2003. The Legal Aid Commission had been appointed in January 2002. We recognise that the issue of Legal Aid eligibility goes much wider than the issue of Petitions of Doleance and we understand that the majority of Legal Aid is spent not on matters of public administration but on criminal and family law matters. We do not consider that it would be appropriate to introduce a different means test for Petitions of Doleance, but at the same time we think it is beyond our remit to consider possible changes which would affect the whole Legal Aid system. We therefore make the following recommendation:

**RECOMMENDATION 5**

**That when the Legal Aid system is next reviewed, consideration should be given to Petitions of Doleance along with other types of case.**

5.73 In his letter to us of 22nd May 2009 the First Deemster indicated that the Legal Aid Committee was supportive of periodic review of the availability of legal aid, and matters relevant thereto, including the criteria applied to merit, and financial resources. He commented that any review of legal aid, whether general, or specific, requires to be undertaken in the context of the availability of legal aid as a whole.

# 6. SUMMARY AND CONCLUSIONS

6.1 Mr Whittaker and the Ballasalla and District Residents' Association (BADRA) objected to a proposed development in Ballasalla. Their objections were upheld by the planning inspector. To BADRA's dismay, the developer then pursued the case by way of a Petition of Doleance against the consequent decision of the Council of Ministers. The members of BADRA were invited to participate in the case as noticed parties. They decided to do so and they instructed lawyers to represent them in the case.

6.1 BADRA received advice from their advocate that, even if they were successful in the Petition of Doleance, the most they could hope to receive from their opponents was a third of their own costs. They thought this was unfair, because it appeared to them that the developer had been able to "buy" an advantage in the case by dint of having greater capacity to pay for lawyers. Mr Whittaker accordingly presented his Petition on Tynwald Hill with the following Prayer:

> *"your petitioner seeks that Tynwald urgently appoint a 'Select Committee' to consider, investigate and report to Tynwald with recommendations in regard to establishing a system which creates a level playing field over Petitions of Doleance and which furthermore protects the position of the ordinary objector against the weight of the wealthy."*

6.3 We took evidence from representatives of the legal profession, including oral evidence from the Law Society and the Attorney General's Chambers. They explained to us the system of Petitions of Doleance, the system of awarding costs to winning parties (the "costs regime") and the Legal Aid system. Their perception was that the system was not unfair, and that a well-funded party in these circumstances could not "buy" a significant advantage over a party of more modest means. In particular they said that under the costs regime a winning party could generally expect to receive around 70 to 90 per cent of his costs from the losing party.

6.4 We examined the reasons for the discrepancy between the proportion of his costs Mr Whittaker expected to receive in the event of a win – a third – and the proportion advised by the Law Society and the Attorney General's Chambers – 70 to 90 per cent. We discovered that on this critical point, which lay at the heart of Mr Whittaker's Petition for Redress of Grievance, the advice Mr Whittaker had received from his advocate was flawed. We have commented that any further examination of this aspect of the case would be a matter for the Law Society.

6.5 This discovery that Mr Whittaker had received flawed advice on such a critical point went a considerable way towards closing the gap between the lawyers' description of the system and Mr Whittaker's experience of it. Nevertheless, we have also considered a range of other possible changes which have, or might have had, value in ensuring a "level playing field over Petitions of Doleance" and in "protecting the position of the ordinary objector against the weight of the wealthy".

6.6 We have identified two changes which we believe would help for different reasons. First, in terms of a "level playing field over Petitions of Doleance", we consider that the introduction of a "leave stage" in Petition of Doleance proceedings would help. Such a stage would make it possible to screen out "frivolous" cases, which might include cases where the wealthy were throwing their "weight" around. The introduction of a "leave stage" is the subject of Recommendation 4.

6.7 Second, in terms of "protecting the position of the ordinary objector" we think it would be desirable for more cases to be resolved out of court. In that context we would highlight the importance of the Government's proposals for a Tynwald Commissioner for Administration, or ombudsman. It cannot be guaranteed that the introduction of the ombudsman will reduce the numbers of Petitions of Doleance cases. However, An ombudsman could help resolve some complaints by individuals against public authorities without the need to go to court. The need to move forward with the ombudsman proposal is the subject of our Recommendation 1.

6.8 The ombudsman as currently designed would not have helped in the case which affected Mr Whittaker. To resolve cases such as his out of court would need a new and different form of arbitration which does not yet exist. We have concluded

that, because of the potential overlap with the ombudsman proposals, it would be premature at this stage to pursue detailed work on a new form of arbitration. Instead we believe that this should be looked at once the ombudsman scheme is up and running. This is the subject of Recommendations 2 and 3.

6.9 In the course of our investigation we have identified a number of other developments, or potential developments, which could be of some benefit in reducing the chances of a situation like Mr Whittaker's arising again. These are:

- the review of the planning system;
- the new High Court Rules;
- new advice to the public being produced by the courts administration;
- co-operation between local authorities and residents' associations; and
- the possibility of a review of legal aid thresholds (this being the subject of Recommendation 5).

6.10 We considered but rejected the following possibilities:

- a tribunal system for Petitions of Doleance on the model of that introduced by recent English legislation;
- the possibility that organisations such as BADRA might be able to take out insurance against possible legal costs of the kind they encountered in this case; and
- the possibility of extending Legal Aid to organisations as opposed to individuals.

6.11 To conclude, we would acknowledge that our recommendations are not such as to establish a completely new system which would cater for circumstances exactly

like those experienced by Mr Whittaker. Our considered view is that a completely new system may not be needed, but that until the ombudsman scheme is in place it is too early to come to a final conclusion either for or against the establishment of such a system. In the mean time we consider that we have fulfilled the remit laid down for us by Tynwald Court because:

- we have established that the "playing field over Petitions of Doleance" is already considerably more "level" that Mr Whittaker had been led to believe;

- our recommendation on a "leave stage" for Petition of Doleance (Recommendation 4) could lead to a significant improvement – from the point of view of the individual or organisations of modest means – in the existing system for handling legal challenges against public authorities. This is because it could reduce the risk of private individuals or small voluntary organisations being drawn into "frivolous" cases;

- our first recommendation in relation to the proposed ombudsman scheme (Recommendation 1) re-affirms the need to progress that long-running initiative, which could assist in certain cases similar to Mr Whittaker's (though not in his case itself);

- our second and third recommendations in relation to the proposed ombudsman scheme (Recommendations 2 and 3) establish a clear link between the ombudsman initiative and the particular experience of Mr Whittaker, and ensure that the opportunity will be taken to look at this again once the ombudsman scheme is up and running;

- our recommendation in relation to Legal Aid (Recommendation 5) ensures that Petitions of Doleance will not be overlooked the next time the thresholds are reviewed.

# 7. RECOMMENDATIONS

7.1 The following are our recommendations, brought together here for ease of reference.

**RECOMMENDATION 1**

**That the Council of Ministers continues to progress the Tynwald Commissioner for Administration Bill.**

(paragraph 5.28)

**RECOMMENDATION 2**

**That in implementing the proposals in the Tynwald Commissioner for Administration Bill, the Council of Ministers should ensure that arrangements are in place to collect detailed information on the types of cases taken by the ombudsman and the extent to which the Commissioner succeeds in diverting cases from the courts.**

(paragraph 5.34)

**RECOMMENDATION 3**

**That when the Tynwald Commissioner for Administration has been operational for three years, the Council of Ministers should review the arguments for and against the creation of an additional system of out-of-court arbitration to cater for cases involving a complainant, a public authority and one or more third parties, and report to Tynwald.**

(paragraph 5.34)

**RECOMMENDATION 4**

**That the Deemsters consider introducing a "leave stage" in Petition of Doleance proceedings, bearing in mind any implications for the ordinary**

**citizen in dispute with a public authority, wealthy individual or large and well-funded organisation.**

(paragraph 5.52)

**RECOMMENDATION 5**

**That when the Legal Aid system is next reviewed, consideration should be given to Petitions of Doleance along with other types of case.**

(paragraph 5.72)

S C Rodan (Chairman)
D A Callister
D C Cretney

# APPENDIX 1

# INDEX OF WRITTEN EVIDENCE

# AVAILABLE IN THE TYNWALD LIBRARY

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| 28 Oct 08 | Committee Clerk | Mr Donald Whittaker | Request for written submission |
| 28 Oct 08 | Committee Clerk | IoM Law Society | Request for statement |
| 28 Oct 08 | Committee Clerk | Chief Executive, DoLGE | Request for statement |
| 28 Oct 08 | Committee Clerk | All Members of Tynwald | Invitation to provide comments, concerns or views |
| 3 Nov 08 | Mr David Quirk MHK | Committee Clerk | First submission |
| 7 Nov 08 | Mrs Wendy Megson | Committee Clerk | Request for information |
| 10 Nov 08 | Mr Peter Karran MHK | Committee Clerk | First submission |
| 12 Nov 08 | Legal Aid Certifying Officer | Committee Clerk | Submission |
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| 1 Dec 08 | Mrs Wendy Megson | Committee Clerk | Comments |
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| 22 Dec 08 | Committee Clerk | Director of Public Services, General Registry | Follow-up questions |
| 22 Dec 08 | Committee Clerk | Director of Policy, Chief Secretary's Office | Request for note on ombudsman schemes |
| 22 Dec 08 | Committee Clerk | Sara Hackman | Request for submission |
| 7 Jan 09 | First Deemster | Committee Clerk | Response to question about tribunals |

| Date | From | To | Notes |
|---|---|---|---|
| 16 Jan 09 | Director of Policy, Chief Secretary's Office | Committee Clerk | Response about ombudsman schemes |
| 29 Jan 09 | Ms Sara Hackman | Committee Clerk | Submission |
| 10 Feb 09 | Mr David Allsebrook | Committee Clerk | Letter about settlements within Malew |
| 23 Feb 09 | Committee Clerk | Director of Policy, Chief Secretary's Office | Request for update on ombudsman Bill |
| 23 Feb 09 | Committee Clerk | First Deemster | Request for further information about new civil procedure rules |
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| 27 Apr 09 | Committee Clerk | Mr Donald Whittaker | Request for information about legal advice and representation |
| 27 Apr 09 | Committee Clerk | First Deemster | Request for information about advice given to the public |
| 28 Apr 09 | Committee Clerk | Chairman of Legal Aid Committee | Consultation on provisional conclusion and potential recommendation |
| 28 Apr 09 | Director of Public Services, General Registry | Committee Clerk | Advice about Advocates (Prescribed Fees) Regulations |

| Date | From | To | Notes |
|---|---|---|---|
| 4 May 09 | Mr Donald Whittaker | Committee Clerk | Holding response about legal advice and representation |
| 11 May 09 | Mr David Allsebrook | Committee Clerk | Response about legal advice and representation, including letter dated 9 May 08 from Laurence Keenan in full |
| 13 May 09 | First Deemster | Committee Clerk | Information about advice given to the public |
| 14 May 09 | Committee Clerk | Laurence Keenan | Questions |
| 22 May 09 | Chairman of Legal Aid Committee | Committee Clerk | Response to consultation |
| 22 June 09 | Committee Clerk | Office of the UK Parliamentary and Health Service Ombudsman | Questions |
| 1 July 09 | Laurence Keenan | Committee Clerk | Response |
| 3 July 09 | Office of the UK Parliamentary and Health Service Ombudsman | Committee Clerk | Response |
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| 13 Aug 09 | Committee Clerk | Mr David Allsebrook | Request for permission to publish legal advice |
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| 11 Nov 09 | Courts Division | Committee Clerk | Updated Petition of Doleance figures |

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