



**TYNWALD COURT
OFFICIAL REPORT**

**RECORTYS OIKOIL
QUAIYL TINVAAL**

PROCEEDINGS

DAALTYN

(HANSARD)

**SELECT COMMITTEE OF TYNWALD
ON LEGAL AID IN FAMILY MATTERS
(PETITION FOR REDRESS OF GRIEVANCE)**

**BING ER-LHEH TINVAAL MYCHIONE
COONEY LEIGHOIL Y CHOYRT AYS
COOISHYN Y LUGHT-THIE
(AGHIN SON KIARTAGHEY ACCAN)**

Douglas, Monday, 8th March 2010

*All published Official Reports can be found on the Tynwald website
www.tynwald.org.im*

Official Papers/Hansards/Please select a year:

*Reports, maps and other documents referred to in the course of debates may be consulted
upon application to the Tynwald Library or the Clerk of Tynwald's Office.*

**PP112/10
TLA, No. 2**

*Published by the Office of the Clerk of Tynwald, Legislative Buildings,
Finch Road, Douglas, Isle of Man, IM1 3PW. © Court of Tynwald, 2010*

Members Present:

Chairman: Hon. W E Teare, MHK
Mr T M Crookall, MHK
Mr W M Malarkey, MHK

Clerk:

Mr J King, Deputy Clerk of Tynwald

BUSINESS TRANSACTED

	Page
Procedural	69
Evidence of Mr S Cregeen, Chief Registrar	69
<i>Ms Ingram was called at 10.12 a.m.</i>	
Evidence of Ms P Ingram, Family Court Welfare Service	77
<i>Mr McKenzie was called at 10.41 a.m.</i>	
Evidence of Mr J McKenzie, Isle of Man Children's Centre	84

The Committee sat in private at 11.24 a.m.

Select Committee of Tynwald
on Legal Aid in Family Matters
(Petition for Redress of Grievance)

*The Committee sat in public at 9.32 a.m.
in the Millennium Room,
Legislative Buildings, Douglas*

[MR TEARE *in the Chair*]

Procedural

The Chairman (Mr Teare): Good morning everybody. First of all, could I welcome you to the sitting of the Select Committee of Tynwald on Legal Aid in Family Matters (Petition for Redress of Grievance). The Committee was established by Tynwald on 21st October last. The motion establishing the Committee was, and I quote:

5

‘That a Select Committee of three members be appointed with powers to take written and oral evidence pursuant to sections 3 and 4 of the Tynwald Proceedings Act 1876, as amended, to consider the Petition for Redress of Grievance of Stephen Broad presented at St John’s on 6th July 2009 with regard to the impact on the Administration of Justice of awarding Civil Legal Aid to one side only in family cases in the Isle of Man and to report with recommendations.’

10

We heard oral evidence on 12th January 2010 and a transcript of that session has now been published in the Early Publications area of the Tynwald website. I should explain that, at the time of the last hearing, the Committee was originally known as the Select Committee on the Petition for Redress of Stephen Broad. Since the last oral hearing, however, the name of the Committee has been changed. The new name gives a better description of the remit of the Committee, which is not so much to look at any individual case but to investigate the system as a whole.

15

Now, this morning, I am joined with my colleagues on the Committee. To my left is Mr Tim Crookall, MHK. To my right, Mr Bill Malarkey, MHK. To my further right is Mr Jonathan King, the Clerk to the Committee. I am Eddie Teare, the Chairman of the Committee and our *Hansard* clerk this morning is Mr Clive Alford. He will be taking recordings of the proceedings and they will be published in due course.

20

Could I ask those of you who have got mobile phones, to switch them off, please. Even if they are on vibrate, they do interfere with our recording equipment.

25

Today we have three witnesses: Mr Stephen Cregeen, Chief Registrar; Mrs Pat Ingram, the Family Court Welfare Service; and Mr John McKenzie, Isle of Man Children’s Centre.

So, starting this morning with Mr Cregeen, I would like to welcome Mr Cregeen to the meeting and thank him for giving up his time to give evidence.

EVIDENCE OF MR S CREGEEN

Q298. The Chairman: Mr Cregeen, for the record, could you please state your name and the office which you hold?

30

Mr Cregeen: My name is Stephen Cregeen. I am the Chief Registrar in the General Registry.

Q299. The Chairman: Starting this morning, Mr Cregeen, how do you see your role, as the Chief Accounting Officer? I understand you are the Chief Accounting Officer for the Registry.

35

Mr Cregeen: Yes. The General Registry covers a range of functions and, as the Chief Officer, I am responsible for the overseeing of all of those functions, including the financial elements of it.

40 That includes the Courts Division administration, tribunals, the Legal Aid administration. It does not include responsibility for the Legal Aid certifying officer, who is an independent position, which is appointed by or through the Chief Secretary's Office. There is a divide between the certifying officer role and Legal Aid administration.

45 **Q300. The Chairman:** Right. So, can I just clarify one issue here that comes to mind? I understand that the role of the Chief Accounting Officer is to ensure the taxpayer gets value for money, from the money expended by the Department or the Division. How do you ensure that?

50 **Mr Cregeen:** By having the staff and the procedures in place to review expenditure, so that they can then be monitored and identified if there are areas that need to be reviewed. We look at the resource implications on establishing that.

55 **Q301. The Chairman:** You say that you monitor and that you compare; do you compare various firms of advocates with other firms of advocates who are dealing with similar cases, to make sure that the costs do not get out of line?

60 **Mr Cregeen:** We monitor the overall budget and the expenditure in relation to a particular year. I am aware that information has been provided to the Committee in relation to breakdown of how Legal Aid costs are done. One of the things we are looking at now, because changes to the Legal Aid Regulations came into force in 2008 and those are starting to come through now, and one of the things that I am now looking at is what the impact of those changes are, where the focus needs to be, because, to a certain extent, what we are seeing in the current financial year is a higher level of costs in relation to the Green Form Scheme, the Legal Advice and Assistance Scheme. There seems to be a reduction in the costs that are showing at the moment – and it is not the year end, so we cannot say exactly – in relation to full Legal Aid Certificate costs, but, hopefully, once we get through the end of this financial year, we will be able to do a clearer comparison as to what impact the changes that came in in August 2008 have had.

65 **Q302. The Chairman:** Right. Would you just like to give us some details of those changes, please?

70 **Mr Cregeen:** Basically, in 2008, the eligibility rules were changed for Legal Aid, in that anyone who is on Family Income Supplement (FIS) is automatically eligible for Legal Aid. The financial means test now, that is used for people who are not on automatic qualifying benefits, is the same as the FIS test. So, we would take into account what the income is, what mortgage interest payments they have, how many dependants that they have living with them, and then there is a calculation to establish whether or not they are eligible for free Legal Aid, contributory Legal Aid or no Legal Aid.

75 As part of that, there is a calculator available on the Registry's website which allows individuals to put their own figures in, in advance, to identify whether or not they may be entitled to Legal Aid and it will give them the information as to whether they would be entitled to free Legal Aid or be eligible, subject to a contribution.

80 The other aspect that came in in 2008 was the changes to the rates for the Green Form Scheme, where there were hourly rates increased in line with the rates that apply for normal Legal Aid. That is probably one of the reasons why the costs for the Green Form Scheme have increased this year, because, previously, in the Green Form Scheme, I think the hourly rate was around £47 an hour. Now it is in line with the standard Legal Aid, which is £115 and, I think, £135 for a senior advocate.

85 **Q303. The Chairman:** Do you think that an advocate has the potential conflict, whereby a person who is looking for Legal Aid, who wants Legal Aid, goes and sees that advocate and the advocate, who is going to be paid by Legal Aid, makes the initial decision under the Green Form Scheme?

90 **Mr Cregeen:** The Green Form Scheme is basically for advice and assistance –

95 **Q304. The Chairman:** No, can I have a yes or no, please?

Mr Cregeen: I think it is hard to say yes or no to. I think there may be an advocate who may do that, but I think, in the whole, they would look at it and do it in a proper manner, because

100 otherwise there would be risks there for them that they could be liable to a complaint against them,
being referred to the Law Society, being referred to the Advocates' Disciplinary Tribunal.

Q305. The Chairman: Right. Well, let us wind on, but in a way go back to the original value
for money question. It has been put to us that there is a person who is being legally aided and there
is a dispute over a matrimonial asset – say, for example, a house – there are no steps taken to
105 reclaim the Legal Aid expended funds from the successful litigant who would have benefited from
the sale of that matrimonial asset.

Mr Cregeen: That is the position at the moment. One of the areas that was identified is for the
introduction of a statutory charge, which will require primary legislation.
110

Q306. The Chairman: So, what has happened about introducing that primary legislation?

Mr Cregeen: Initially, there was an initial drafting note produced and submitted to Attorney
General's Chambers in, I think, August 2008. That was returned, basically saying that they needed
115 far more information than had been provided and it had been the intention that the officers
involved would go on a course in order to produce the proper, adequate, drafting instructions. That
course has not happened for various reasons, so I have taken the decision that an in-house team are
now developing far more comprehensive drafting instructions, in all the aspects that would be
needed to be made in the Legal Aid (Amendment) Bill. They are being worked on at the moment.
120

That will then go to the Legal Aid Committee to ensure that they are satisfied with what
officers are doing and then will be submitted to the Attorney General's Chambers, in order for
them to draft the Bill.

Q307. The Chairman: Would it be rather harsh of me to comment that there does not appear
125 to be a great deal of urgency?

Mr Cregeen: I think there is urgency there, now. I am keen to get this progressed through. I
am, because, it is something which, looking at it... I have only been in post a short time, but I am
130 keen, with the Legal Services Commission having identified areas where changes are needed in
legislation, on getting those changes implemented.

Q308. The Chairman: How do you or what steps would you expect to see in place to satisfy
yourselves that a case would comply with the merits test?

Mr Cregeen: I think that is where there is the separation between the two roles: that the merits
test is undertaken, the assessment of that is undertaken by the certifying officer who is legally
qualified; the officers who are in my section for Legal Aid are civil servants who deal with the
financial means test. So, that is where there is a separation. We deal with sending out the letters in
135 relation to getting the evidence on the financial means test and then establishing whether or not a
person is eligible or not.
140

Q309. The Chairman: During this exercise, it seems that, from evidence we have heard, the
focus appears to be on the two litigants. That is the prime focus, as opposed to the children of the
union. Is that a fair assessment?
145

Mr Cregeen: I would hope not.

Q310. The Chairman: It is not the message that we seem to be receiving here.
So, to move on, then, would you be in favour of arbitration and mediation?
150

Mr Cregeen: I think there is a place for mediation. There are cases where mediation is very
successful, where if it is done at the right time, it will have benefit.

There will always be some cases where mediation will never work and may actually exacerbate
the situation between the parties. I think, also, you have got to have the right mediator and suitably
155 qualified in the particular areas.

Q311. The Chairman: Who is responsible for the preparation of these various brochures that
are available to potential litigants?

160 **Mr Cregeen:** I think those ones were done within the Courts Division of the General Registry.

Q312. The Chairman: For the benefit of *Hansard*, I have got in front of me a copy of the leaflet CHI01. The reason I ask is that there does not appear to be any mention in there of mediation or arbitration. (**Mr Cregeen:** Right.) But that is outwith your remit.

165 **Mr Cregeen:** Well, I think, it is something that, with the forms that are on the website, the courts website was developed and went live, I think it was August/September last year, and it is a work in progress in trying to get forms onto the website, getting information onto the website and, I think, to a certain extent, there are areas which we have identified need further work on them, to provide more information and make that information more accessible on the website.

170 One of the things that we have identified was that, where there were the forms, there was not a clear reference to where the guidance notes were. We have made that small change in relation to the website recently. But, again, it is a case of trying to get resources to work through it all, but we can look at what would be appropriate wording in relation to mediation on the guidance notes.

175 **Q313. The Chairman:** Well, certainly from the research that we have undertaken, it would appear that you had to look pretty hard before mediation pops up.

180 **Mr Cregeen:** Yes. We will look at that.

Q314. The Chairman: If you thought an advocate – excuse the colloquialism – was playing the system, in effect, what steps could you take or would you take, more importantly?

185 **Mr Cregeen:** When the advocate's bill is assessed, at the end of the matter, the assessing officer will go through bill, will look at the documentation and will identify whether all of the work has been appropriate or not. The assessing officer has the authority to make deductions to that bill, and if the bill that is assessed is reduced by more than 50 per cent, there is now provision, since last year, for the matter to be referred to the Advocates' Disciplinary Tribunal.

190 **Q315. The Chairman:** Have you ever had cause to do that?

195 **Mr Cregeen:** I am not aware of any so far, but that is a fairly new power. That power was in place, I understand, up until about 2000. It then went out of the regulations and it came back in again, I think, it was with the High Court Rules in September.

Q316. Mr Crookall: Sorry, can I just clarify? So, an advocate's bill, does that come in at the end of the case? (**Mr Cregeen:** Yes.) It does. It does not come in part way through the case for interim payments at all?

200 **Mr Cregeen:** If there are requests for interim payments, that would then be assessed then.

Q317. Mr Crookall: Right. So, if that is done, then you will have a hard job at the end of it to say, 'Well, actually, we think you have been paid too much here.'

205 **Mr Cregeen:** Well, no. Those items will be deducted off, if it is felt that there are items included in the bill that should not have been there. They will be deducted from the bill, and that has happened. The extent has not been to the 50-per-cent level.

210 **Q318. The Chairman:** If you know or if your assessing officer feels what is reasonable for a particular case, is that not an argument for having a set tariff? So, in other words, if it is a custody dispute, Legal Aid says, 'The fee for that is so much', and that would then put pressure on the advocates to resolve it quickly, rather than just keep carrying on and carrying on, whilst the metre is clicking away?

215 **Mr Cregeen:** I think there may well be a range in which certain works could be done. To set down hard and fast figures could risk a situation where, if a person was not legally aided... or where a person was legally aided and another party had significant resources available to them, if they knew that the legally aided person could only run up to a cost up to a certain figure, then it could be stretched out in order that the legally aided person would lose their representation. So, I think there has to be a balance and dealt with on a case by case basis.

220

Q319. The Chairman: Well, is that not the case now but the other way round. The legally aided funded person is perceived as having an unlimited resource behind them?

225 **Mr Cregeen:** I think that is where the certifying officer, by limiting the certificate to various stages, should be able to identify whether or not the work is appropriate. Now, whether there are steps that can be taken to undertake interim assessments that, when certificates are extended, it is identified as to what the total costs have been to a particular date, that may be an option.

230 **Q320. The Chairman:** It seems to me that there is an awful lot of weight sitting on the shoulders of the certifying officer. (**Mr Cregeen:** Yes.) What checks are there on that certifying officer? What checks and balances?

Whilst you are thinking about that, without those, how are you able to discharge your duties as the Chief Accounting Officer?

235 **Mr Cregeen:** The certifying officer, I suppose, is overseen by the Legal Aid Committee. It is a very tough role that the certifying officer has, in determining whether or not a certificate should be extended or granted in the first place. We have to rely on the professionalism of the individual and then assess the bill at the end of the case.

240 **The Chairman:** Mr Malarkey.

Q321. Mr Malarkey: Yes, thank you. A couple of issues: Legal Aid, generally, you can break it down to criminal offences and matrimonial, basically. Would you say they are the two?

245 **Mr Cregeen:** There is criminal on the one side, and on the civil side, you have got family and non-family.

Q322. Mr Malarkey: Yes, okay. So, when you apply for Legal Aid, there is no difference in the system. It runs exactly the same, whether it is Legal Aid for a criminal offence or for matrimonial or family?

250 **Mr Cregeen:** Criminal Legal Aid is dealt with by the courts, but the courts will determine whether or not a person is granted Legal Aid. With Civil Legal Aid, whether it is family or non-family, the applications come in and then there is a process for dealing with the financial –

255 **Q323. Mr Malarkey:** If they fit the system, it is automatic?

260 **Mr Cregeen:** If they are, say, for example, if they are entitled to Family Income Supplement, they have passed the financial means test. They still have to pass the merits test. If they are not eligible for FIS, the financial means test is in line with the FIS test, so we ask for similar information.

265 **Q324. Mr Malarkey:** What I am getting at here is it is easier to get it for family matters than it is for criminal matters, because the court decides in criminal matters; it is an automatic system for family matters. If you are on FIS, you get it.

270 **Mr Cregeen:** But, if you were on FIS, in criminal, you would automatically get it. It is who does the assessment, because the advocate would prepare the papers for a person before the court. Sometimes, in relation to the criminal matters, it has to be done on the morning that they appear in court. So, it is a far quicker –

Q325. Mr Malarkey: So the court will decide, so at least there is a third party involved, not just the lawyers within –

275 I will move along from that, if I can. You said, you were thinking of introducing a statutory charge. Do you want to expand on that? The big issue we have that has come to light is that one side is getting Legal Aid, then getting half the household, or half the estate, and not paying anything back. Now, when you say a statutory charge, are you saying that there will only be a proportion of the Legal Aid they will have to pay back or would it be all the Legal Aid they would have to pay back, because they have got half of the estate?

280

Mr Cregeen: I think it would be... The detail still has to be worked on, but, potentially, it would be recovering all the costs that have been incurred from the Legal Aid.

285 **Q326. Mr Malarkey:** All the costs?

Mr Cregeen: Yes. That would be one of the options and that is what, to a certain extent, in the initial drafting instructions, the detail was not there and what we are having to work on now is actually getting the precise details and examining what happens in other jurisdictions to establish which is the best way forward and how do you then ensure that, actually, you do get... If there is a
290 statutory charge in place, how do you then ensure that you get those funds back economically?

Q327. Mr Malarkey: And the final point: I keep going back to audit and how you say whether the solicitors are working to the system. At the last sitting, we had a couple of people sitting in the chair you are sitting in, where they talked about doing their own mediation: husband and wife,
295 round a table, where they had actually come up with a decision and this was how they were going to go down the road. Both parties had gone back to their own solicitors and said, 'This is what we have agreed with' and on two of the occasions, the ones with Legal Aid then turned round and said, 'Oh, that is no good. We can get you more than that. We will carry on going down the road.' All of a sudden the mediation that they had done has fallen apart, because one person is on Legal
300 Aid. What are your thoughts on that, within the audit of value for money?

Mr Cregeen: I think, in assessing the bill, we would have to make sure that the work was valid and taking into account what has happened with the issue of the certificate. The advocates, I suppose – and not being one, I cannot say it – would say that they are there to act in the interests of
305 their client and act reasonably.

Q328. Mr Malarkey: But, if the client was going to be paying the legal fees himself –

Mr Cregeen: I think that is where, to a certain extent, in relation to the merits test, there is a lot of weight on that as to whether or not... Is a matter justified; how far does it go? I think that is where we need to look at how that assessment is undertaken.

But, I think, to a certain extent, there is a separation between the certifying officer and the Legal Aid administration, quite deliberately, so that I cannot influence the certifying officer as to whether or not a certificate can be issued or not.
315

Q329. The Chairman: You said that you were looking at other jurisdictions. Are you not in danger, with respect, of trying to reinvent the wheel? From the research that I have undertaken – I had a look at the Northern Ireland one and the Scottish one, the Channel Islands, Jersey and Guernsey – they seem to have a common theme which we do not have, which is, in effect, getting
320 litigants to accept some financial responsibility, even though they are legally aided. Is that not just a quick way of doing it? What is coming out from your evidence, and it might be that I am reading it the wrong way, is there does seem to be a lack of urgency in bringing these proposals forward.

Mr Cregeen: I would say that there is not a lack of urgency. I am keen to try and progress this as quickly as we can and get it moving, because the sooner it is in, the better the opportunity is of recovering more funds that are being spent out and, also, to ensure that it is reasonable as to what is paid out.
325

Q330. The Chairman: One of the things that we have not focused on, and it is vitally important from my point of view, is the effect on the children of very protracted litigation. Does this ever feature in your considerations?
330

Mr Cregeen: That would be in relation to the court and to the certifying officer. They are the ones that will have that at the forefront. We are administering it at the end of the process.
335 However, what we are able to do is look at a bill and say, 'Well, this has been protracted. Maybe this should not have happened.' But that is only a small financial penalty that may be imposed onto the advocate. It does not resolve the issue beforehand and, really, it is for the advocate, for the courts, for the certifying officer, to ensure that it is moving as quickly as possible, but that it is being progressed on having all the information in front of the parties, so that the right decision is
340 made.

345 **Q331. Mr Malarkey:** I think we were talking about this with Mrs Montgomerie, as from August last year, mediation was a recommendation coming through from Legal Aid. Do you ever take that into consideration at all? Do you look for mediation or the attempt for mediation anywhere, when you are paying these bills? Do you actually go through and say, 'Well, they did try mediation' or 'They did not try mediation' – or do you just rule that to one side? Although we were told by Mrs Montgomerie that mediation was now a recommendation, it does not seem to be showing itself.

350 **Mr Cregeen:** I think, in relation to the limitation on the certificate, it talks about negotiating a settlement and whether that has been achieved or not achieved, so when they are setting the bill they would look to see that, but once the certifying officer has extended the certificate for the next stage we would then look to see... 'Okay, it has gone through that stage. What is the next stage?' and identify what were the costs and were they reasonable at each level.

355 **Q332. Mr Malarkey:** So you do not have to get to the Green Form stage and they have to come back to take things further, which is the next level, for more money? Do you not say, 'Excuse me, mediation, has it been tried before we go spending loads more money on this case?'

360 **Mr Cregeen:** That is within the merits test; that is not within the financial means test. What happens with the financial means test is that an individual... if they are not on an automatic qualifying benefit, the office will write to them and get the information to establish whether or not they meet the financial means test. If they have met the financial means test, that does not mean that they are automatically granted a Legal Aid certificate. That is down to the certifying officer being satisfied that the merits test has been met.

365 **Q333. The Chairman:** The merits test is just looked at at one moment in time, at the beginning. What steps are taken to ensure that the merits test is still complied with as the case evolves?

370 **Mr Cregeen:** My understanding is that the cases are reviewed at each stage that the request for a certificate extension is submitted, and also, if that does not come in the meantime, I think it is at least every six months that they are considered, as is the financial means test. They will review the financial means of an individual, if they are not on a qualifying benefit, again on a six-monthly basis.

375 **Q334. Mr Malarkey:** So that means that, after the Green Form stage, and it has got to the next level and you have done a means test, it is going to be another six months down the line before you check whether that is still applying, so that person could have gone out after that stage and got a job, for instance, and get income.

380 **Mr Cregeen:** If that information is brought to us in advance, or at a certain stage, then we would look at it then, but it certainly happens at the six-months stage if nothing is brought to us.

385 **Q335. Mr Malarkey:** Would you go to claim the money back, if that was the circumstance?

390 **Mr Cregeen:** If there was information there, that would then be looked at as to whether or not the certificate should be discharged. There is a requirement on the individual, which they sign when they are granted Legal Aid, that they are required to inform the Legal Aid Office of any changes in their circumstances. It is the same as with any benefits. If a person is on benefit, if their circumstances change, they are required to inform the DHSS that their circumstances have changed, and it is the same in relation to Legal Aid.

395 **Q336. Mr Malarkey:** With benefits, if they do that and they do not do it, they get prosecuted. What happens with Legal Aid? Do they just get away with it?

Mr Cregeen: If the certificate is discharged and that is put back to a previous date, they could then be liable for those costs.

400 **Q337. Mr Malarkey:** But it would not be a criminal...?

Mr Cregeen: I would need to check on that one.

405 **Q338. The Chairman:** One item which we have had contradictory evidence on is, where people are partially funded by Legal Aid, who actually recoups the contribution? Is it the lawyer, or is it the Legal Aid?

Mr Cregeen: The Green Form Scheme, the money is paid to the advocate. For a Legal Aid certificate, it comes into the General Registry, and therefore into Treasury.

410 **Q339. The Chairman:** And that money is vigorously pursued, is it?

Mr Cregeen: Yes.

415 **Q340. Mr Crookall:** Chairman, just one final thing. Does the General Registry believe that we get value for money out of the Legal Aid system? I say the General Registry as a whole because I know you have only been there a short time.

420 *Mr Cregeen:* I think value for money is a difficult one when it comes to dealing with legal matters, justice and that, because at the end of the day it is establishing justice and an appropriate position in relation to an individual. We try and ensure that, in relation to Legal Aid, we get the best value for money we can out of it with the resources we have, and that is why, when bills are assessed, items will be deducted from them if it is felt that they are not reasonable in relation to the process.

425 If there were additional resources, yes, you could do even more, and I think one of the areas which I am wanting us to look at, once we get through this financial year, is the evidence in relation to the Advice and Assistance Scheme, because there we are seeing additional costs, as I think I mentioned earlier, and therefore my feeling is that we are probably going to have to put more resources into assessing the Green Form Scheme than happened in the past, because the actual cost of the Green Form in the past was relatively low. Those costs are now increasing, so
430 therefore it, I think to my mind, justifies additional assessment.

Q341. Mr Crookall: Is it not the case that Legal Aid is basically seen as an open cheque book?

435 *Mr Cregeen:* I do not think so, because there is the merits test and the assessment by the certifying officer throughout the matter of the case. Subsequently, the assessing officer looks at the bill and identifies whether it is appropriate or not, or whether there should be deductions. In view of the hourly rates available under Legal Aid, compared to what the hourly rates are for non Legal Aid work, there is also a difference there. So, to a certain extent, we do seek to get the best value,
440 but we also try to ensure that we actually have advocates who are available to do Legal Aid work for those who do not have any means to take their own cases.

Q342. The Chairman: Regularly through your testimony this morning you have stressed the merits test and that is the key, and how for Legal Aid would it pass the merits test. I have to say
445 some of the evidence that we have had from a previous oral hearing is... It is difficult, from the evidence that has been adduced to us, that the circumstances would actually fit the merits test, so how are you and your colleagues going to ensure in the future that the merits test is respected?

450 *Mr Cregeen:* I think one of the changes that we are looking at in relation to the merits test is making it quite specific in the primary legislation as to the two elements of the test, so there will be a far greater legal basis for that merits test. The difficulty then is making that judgement call – is it reasonable, or would it be unreasonable to withhold the issue of a certificate in a particular case – and that is a decision that will then have to be made by the certifying officer at that
455 particular time.

The Chairman: I think really the inference underlying that is very valid. The legislation is only one tool in the box, but it is only as good as the enforcement and the steps taken to enforce. We have got a merits test in place now, but I have to say I am doubtful that it is being vigorously
460 enforced.

Q343. Mr Malarkey: You might not know the answer to this. We are almost at the end of the financial year now, so have we any approximate idea what Legal Aid has cost us up to the middle

of March for this year? I am looking at the figures for past years and they seem to be climbing quite astonishingly, to be honest.

465

Mr Cregeen: I think last year the cost for 2008-09, in total for all of Legal Aid, was about £3 million –

470

Mr Malarkey: That is right, £3,045,000.

Mr Cregeen: – of which I think almost £2½ million was Criminal Legal Aid. The figure at the end of February was about £2.4 million.

475

Q344. Mr Malarkey: So we might not be climbing. From 2006-07, it has gone up from £1.3 million, then it has gone up to £2½ million, and then it has gone up to £3 million. It seems to be, up to now, rising at a staggering rate over the last three years.

480

Mr Cregeen: There were increases in the hourly rates which followed on from the Legal Services Commission Report, and because of the way those rates are introduced, it takes a while for them to feed through into the actual expenditure showing within our financial figures, so when the Legal Services Commission's recommendations were considered, it was agreed that, once a number of the changes had been implemented, including the hourly rates etc, there would be a further review of the whole system and the costs etc once they had settled down, which will probably be the middle of next year, once we have got two financial years' figures of the changes that have been brought in. As you will be aware, the increase in hourly rates for Legal Aid, which were due to be introduced from 1st April, have actually been deferred this year, so it is the rates that were put in place last year that will continue through this financial year.

485

490

The Chairman: I think we are just about coming to the end now. Could I ask my colleagues if they have any further questions?

495

Q345. The Clerk: Thanks, Mr Chairman.

It has been mentioned a couple of times that you are not long in post. Can you just tell us when you took up the post?

Mr Cregeen: On 1st November.

The Clerk: Thank you.

500

The Chairman: Thank you very much, you have been very helpful.

Mr Cregeen: Thank you.

Ms Ingram was called at 10.12 a.m.

EVIDENCE OF MS P INGRAM

505

The Chairman: I would now like to call Pat Ingram please.

Welcome. I would like to thank you for attending today. If you have a mobile phone, could we please switch it off.

Ms Ingram: I did not bring one.

510

Q346. The Chairman: Thanks very much. What we would like to do is just to get some information from you. You have heard part of the previous testimony. When we talk to your good self, what we are trying to find and identify from you is the effects on the children of the relationship from what can be acrimonious and protracted disputes going on over many months, if not years.

515

I would first of all, for the record, like you to state your name and the office that you hold.

Ms Ingram: I am Patricia Ingram. I am the Director of Operations for the Probation Service and Family Court Welfare Service, and I directly manage the two court welfare officers.

520 **Q347. The Chairman:** Could you explain the role of the Family Court Welfare Service? I am afraid I am not familiar with it, and my colleagues are not either.

525 **Ms Ingram:** The Family Court Welfare Officer is a reporting officer, so under the instructions of the court they will be asked to write a report gathering information on the case, and that comes in the format of... It is similar to a care proceedings report in that it will identify the children's welfare checklist – that is the views of the child, the welfare of the child, any risk the child may be at. It also states briefly the views of the parents. I say parents because generally it is parents, but sometimes grandparents may make application to the court so we would use the term 'parties' to cover any adults who were making applications to the court. The parties have provided statements to the court expressing their view, so we would only refer to those; we would not repeat that again
530 in our report. The final part of the report would be a summing up and a recommendation to the court as to what perhaps the court should order or not order. We work on the principle that it is in the best interests of the child for there to be no order, so if parents can agree, if parties can agree on arrangements for their children and they can do that without a court order in place, then that is best for the children because the family can then live as a family would without having to be
535 restricted by a court order.

Q348. The Chairman: You said that you are conscious of the effects on children and that, in effect, families should reach their own conclusion first. What steps would you take to encourage mediation and arbitration?
540

Ms Ingram: In an ideal world, when families separate, the parents would make arrangements between themselves and the children would be able to see them reasonably making arrangements to suit them all. In that situation, the child feels secure, they are still maintained in a stable family relationship, albeit separate, in separate houses, but they feel secure and that is very positive for them. So in an ideal world we would want them to do that without any recourse to court. If they cannot do that – and we have to remember that, of course, the number of families who cannot do that are relatively small in comparison to the number of families who are breaking up – the next step would be, in preference, an ability for them to sit down with a third party and discuss that and come to agreement, again without taking the matter to court. Obviously, if they cannot do that, or
545 if they feel that one of the parties will not keep to the arrangements, then they may need a court order, which puts it on a more formal footing.
550

Q349. The Chairman: As part of your assessment, would you recommend, or your colleagues recommend, mediation?
555

Ms Ingram: We only become involved when it has already got to court, because we are instructed by the court. So an application is made to the court and then we are requested to do a report. So before it comes to us the court will probably have suggested to them that they go to mediation. What we have advised the court is that we cannot run mediation and the court welfare alongside, because they need to be open and honest in the mediation to try and reach agreement and they may discuss things in mediation which they then perhaps would not want to have shared with us because we would write that in our report. So what we ask is that the parents go to mediation, and if it is not successful it comes back to us. We then write a report advising that they have not been able to agree and then we make a recommendation on what is best for the child.
560
565

Q350. Mr Crookall: Chairman, can I just clarify then, so the Department do not offer mediation at all?

570 **Ms Ingram:** The only mediation service we have currently is the Children's Centre, although I understand the Government are making plans to provide it.

Q351. Mr Crookall: But the Department itself does not offer that service?

575 **Ms Ingram:** No. Many years ago I think the Court Welfare Service here did offer conciliation, but with only two court welfare officers we do not have the resources to do that. Having said that, when parties come to us, while we are gathering the information, obviously we are talking to the

580 parties, and on occasion, when we have felt that it may work, we have asked if the parties would
come in together and two court welfare officers will talk to both of the parties to see if we can
reach agreement. We do not call it mediation because we do not want it muddled up with true
mediation. All it is is trying to get them to agree, and if we can get them to agree whilst we are
writing the report then that obviously is in the best interests of the child, but that is not always
successful.

585 **Q352. Mr Malarkey:** Can I just clarify this now, that if it gets to the stage where they cannot
get agreement themselves, the courts will automatically recommend mediation, are you saying?
Always?

590 **Ms Ingram:** They will ask in court whether the parties have been to mediation and whether
they would consider mediation. Not all parties want mediation, or one half may and one half may
not, and so sometimes there is an adjournment while they are expected to go to mediation, but not
on all occasions do both parties turn up for mediation, or they go for one session and discover that
it... One party may say, 'I do not think this is working for me.'

595 **Q353. Mr Malarkey:** And the only people who do mediation is the Children's Centre, is that
right?

Ms Ingram: At the moment.

600 **Mr Malarkey:** At the moment.

Ms Ingram: I understand, yes.

Q354. Mr Malarkey: Any idea who pays for the mediation? Do the courts, the lawyers?

605 **Ms Ingram:** We do not get involved in the mediation, so I would not know. I think some
parties pay privately. I think the Children's Centre work on an ability-to-pay fee, but as I say, I am
not the right person to be answering that, really, because we do not... Once they go to mediation,
they are not part of our Court Welfare Service until they come back to us, if it has not successfully
resolved matters.

610 **Q355. Mr Malarkey:** And have you, from your experience of being in court, been in when
one party has actually asked for mediation and the courts have turned around and said no?

615 **Ms Ingram:** I personally have not, but I actually do not attend court; it would be the court
welfare officers. They have never come back and reported that the court have said no to mediation.
It is more likely to be that the parties may say no, because I know that the Deputy Deemster is
very encouraging of mediation.

620 **Q356. Mr Malarkey:** So basically if one side asks for it and the other one says no, the odds
are that it is not going to happen, then?

625 **Ms Ingram:** It is difficult to enforce it, because they have to voluntarily agree, and also they
have to at least have the view that they can resolve it between themselves for the mediation to be
successful.

Q357. The Chairman: Just to aid my understanding – I am not very bright, I have to say –
how long would you expect a court process to take for an application for access to children of the
relationship?

630 **Ms Ingram:** We are invited to attend a directions hearing, and that is the first time we will
come across a new case. We attend the directions hearing – that is about 10 or 15 minutes in court
– and at that point the Deemster will make a decision as to whether a court welfare report is
required. That can either be preliminary enquiries, where we would have about six weeks if it is
deemed that the matter is relatively small that they are disagreeing over, and in six weeks we may
be able to resolve that and go back with a very short report and we may assist them to agree. If it is
635 more complex, then we are asked to do a full court welfare report, and for that we ask for 12
weeks. The reason we ask for 12 weeks is we have to undertake police checks, we ask for

information from school or social services, health visitors, and that takes some time to gather that. So a court date will be set about two weeks after the 12-week date.

640 Our reports are submitted to the court and the advocates and the parties get to read them, and we then attend court. That may still only be a directions hearing, because at that point we may have agreement. The parties may have agreed to compromise and there will be arrangements in the court welfare report that the parties are saying, 'Yes, I am quite happy to go along with these arrangements,' and at that point then it may end without it ever going to a full hearing because the parties agree and an order may be put in place to support those arrangements. If the parties do not agree at that point, it can be extended for further enquiries, or it may be that an arrangement has been put in place and the court would like to see how that works – is it going to be successful before they make their final order? So at that point it could be extended, and some cases we have, and they are rare, but some cases we have for several years because we are still trying to perhaps initiate contact, or the arrangements that are put in place are not quite working as well as one would hope, and so the case has not actually reached a point where it can be closed.

655 **Q358. The Chairman:** Could you describe the effects on the children of the union during this, what you have just said is, or can be, a very protracted period?

660 **Ms Ingram:** It partly depends on the age of the child. I think people mistakenly think that younger children, who perhaps do not know what is going on, are less affected, but that is not necessarily the case because they sense the acrimony and they often observe, at handover, parents not acting in a reasonable way. Obviously, that is not a very good role model for them. They are not looking at people reasonably sorting things out.

665 Older children, from the age of five, we ask their wishes and views. Sometimes you can tell that they have been party to what should really be adult conversation where the children should not be involved, but certainly they are. They know more about the process than they should, and in some cases it is evident that they are influenced by the parents. That does not mean necessarily maliciously, but they are influenced because they have heard conversations between parents. We will often say that it is not in the best interests of the child to overhear these conversations, and they say, 'No, we always make sure that they are not here,' but children can be the other side of a door or they may hear one half of a telephone conversation, and so children can pick it up in ways that people do not realise.

670 Of course, older children, when they get to teenagers, their views we take on fully, because it would be very hard to force a 15-year-old to have contact with a parent they did not want to have contact with. You could not actually physically get them there. So their views are taken on, but having said that, as long as they are old enough to understand, we would talk it through with them so that they are making a fully formed decision, not a decision perhaps made on the influence of just one parent.

675 **Q359. The Chairman:** Do you feel that the availability of Legal Aid encourages an entrenched position?

680 **Ms Ingram:** One issue I particularly wanted to raise today was that there have been, I think, at least two, if not three, incidents where, when a request has been made to extend Legal Aid, the decision on whether that person should have their Legal Aid extended has depended on the recommendation of the court welfare officer in their report. Clearly, that is not how the process should be, because it is only a recommendation – it is actually the court that makes the order – and so if it gets to a hearing, the recommendation and the evidence of the court welfare officer is only part of it. Each party has a right to give their evidence in court and the Deemster or the High Bailiff should listen to all of that before they make the decision on what order should be made. That concerns us because it gives 'power' to the court welfare officer that they actually do not have. They do not make the final decision. So we have parties coming to us saying, 'I cannot get Legal Aid because of your recommendation and now I have got to accept an order I do not want because I now have no money to continue it in court.'

695 **Q360. The Chairman:** You have not, with respect, answered the question: does the availability of Legal Aid encourage entrenched positions to develop?

Ms Ingram: I would say that, whether someone has Legal Aid or not, some parties are entrenched and they will not follow the advice of the court welfare officer that there has to be compromise, and they may stick out for what *they* believe is in the best interests of the child. They

700 truly believe that is in the best interests of the child, but then both parties will think their view is in
the best interests of that child, and unfortunately, if they do not agree, then they are entrenched.

We know of some cases where they have paid for their representation but will still remain
entrenched and arguing over fairly trivial matters and will ultimately have extensive legal fees to
pay. Equally, someone on Legal Aid can also be entrenched in their ideas, and it does seem unfair
705 to the person who is paying fees that the for person on Legal Aid there are no consequences to
them continuing it. So I can see how that would be unfair.

For the child, the issue of Legal Aid, in a way, does not matter. All that matters to the child is,
for one reason or another, it is not being resolved, and so really it is the responsibility of the
parents to be reasonable and try and reach agreement. We do have people come back, because
even when... If, for example, an order is made and the parties go away, and one of the parties does
710 not adhere to the order, they come back for advice. We can only offer advice because once the
case is closed we cannot work with it until we are instructed by the court again. So they come back
for advice and they say, 'Well we have got a court order and they are not adhering to the court
order.' Ultimately, to get that party to adhere to the court order, they have to go back to court.
715 Clearly, if they are paying for their legal representation, that is a hindrance, they may have run out
of money by then. If they are on Legal Aid, they may be able to get Legal Aid to take that back,
but in some circumstances, if it is deemed that the person is being unreasonable, then I know Legal
Aid has been refused.

720 **Q361. The Chairman:** What about the effects on the children, the psychological effects on the
children? Are you and your colleagues seeing adverse effects on children?

Ms Ingram: Yes. There will always be an adverse effect, to some degree, on all the children,
simply by the fact that they are, if they are old enough, interviewed by what is, relatively, a
stranger – someone coming into their home, asking them questions about things that are
725 emotionally difficult for them. It intervenes in their private life. Older children, particularly, find
that difficult. They do not necessarily want to discuss what goes on in their household. They may
have split loyalties, where they know that what they say may upset one parent or the other and an
example of that is, if you interview the child with the mother, they will give one version and then
the next week, if you interview the child with the father, they will give a different version.
730 Completely at odds, and that is their struggle to try and please both parents and so that, obviously,
must put an emotional strain on them.

We get some cases where children have had work with a psychologist as a result, in a way, of
going through the court process, because they may not want contact with one of the parents and
there does seem to be any obvious reason, and so a psychologist is sometimes brought in to do
735 some work with those children.

Q362. The Chairman: Is the adverse effect truncated, shortened, if the overall process is
shortened?

740 **Ms Ingram:** Certainly. Certainly, because they are not left wondering what is going to happen
at the end and, the longer the period, the more times they are likely to be interviewed by a court
welfare officer. So, yes, if it could be shorter, it certainly would be in the interests of the child.

745 **Q363. The Chairman:** And less adversarial as well?

Ms Ingram: Yes.

750 **Q364. The Chairman:** So, in other words, what you seem to be coming forward with is that
the first step, really, should be mediation, arbitration, before it gets into a fully fledged court case?

Ms Ingram: Yes. The first step is the parents themselves agreeing on arrangements in the best
interests of their children – adults taking responsibility, as parents, for the welfare of their
children. That is the first step. But the next step, if they cannot do that, is the assistance of a third
party, to assist them in doing that.
755

Q365. The Chairman: So, then, you would support, in effect, Legal Aid now being slanted
towards mediation as the first step, rather than going to court as the first step. We have been
advised that to actually get Legal Aid for mediation, court proceedings have to be instigated.

760 *Ms Ingram:* I am afraid I could not answer that, because I would not know how that was funded.

Q366. The Chairman: No, sorry. I did not expect you to. Just the principle.

765 *Ms Ingram:* I think they should have an easy path to mediation. How that is funded, well, obviously, that is another issue, but I do not think the issue of funding should prevent people having access to a third party to help them to agree.

770 **Q367. Mr Crookall:** Have you got any other ideas which might make the whole system speedier, and a lot less damaging on the children involved?

Ms Ingram: Well, it is difficult but, in our control, we try and keep it as short as possible. Twelve weeks is the shortest we can do a report in and we ensure our reports are filed on time. So, any extension would not necessarily... unless we were asking for an extension to say, 'It is all going well, but we would like to review this. We would like to make sure that it is okay.' As part of the 12 weeks, we may have initiated contact. So, someone may have started off not having any contact and during the 12 weeks we will have started that up, so you would not necessarily wait the whole 12 weeks before, perhaps, a parent had contact.

775
780 The trouble we have is that the courts are very busy and so setting the next court date, in itself, can be difficult and we are, I think, already now setting dates for months in advance, and that makes it difficult. Without additional resources to the courts, I do not know how we would shorten that time.

785 Of course, advocates play their part in making sure that the matters are not extended unnecessarily, in assisting the parties.

Q368. The Chairman: Well, surely one way of reducing the pressure on courts is to take it outwith the courts and use mediation and arbitration first.

790 *Ms Ingram:* Yes. I have to say that, since the mediation has been in place, we have not seen a reduction in the number of cases we have coming to us. In the last year, we had 80 cases and the court welfare officers hold about 25 cases each. We have not seen a reduction in that.

795 **Q369. Mr Malarkey:** Can I just clarify that you are appointed by the courts and the welfare. If one of the parties does not agree with your report, do they have a right to ask for an independent assessment?

800 *Ms Ingram:* Well, in some cases, neither party agrees to the report, because it is a compromise and so neither of them have really got what they wanted, but the court welfare officer is simply making a recommendation in the interests of the child. So that is often why neither party will agree or one will agree more than the other.

805 When it gets to court, the parties then have the opportunity to call the court welfare officer to give evidence and, so, if there are any parts of the report that they disagree with, it is their opportunity then to ask and the court welfare officer has to give verbal evidence as to why they have recommended what they have recommended.

810 Sometimes, very occasionally, parties disagree with the court order that is made, but come back and make a complaint about the court welfare officer's report, but actually it is not the report they are complaining about; they are complaining against the order that was put in place, but they feel that the court has gone along with the recommendation of the court welfare officer and it is easier, really, to come back to complain about us. Actually, I then advise them – and they can make an official complaint – really, it is the court's order that they are unhappy with and they need to deal with that with the court.

815 **Q370. The Clerk:** Thanks, Mr Teare.
Can I ask, you said that 12 weeks was the fastest in which you could do a full report.

Ms Ingram: A full report, yes.

Q371. The Clerk: If you had twice as many officers, could you do it faster?

820 **Ms Ingram:** We would still have the difficulty in that we have to wait for the police check and we have to wait for the school to get back to us and the health visitors and we have to access the Social Services files. So, that, in itself, takes some time. We can be waiting for that.

Also, we interview the child and, depending on how able the child is to discuss the situation, that may take some time. The court welfare officer has to develop a relationship with the child. So,
825 some of those areas we could not do any quicker and even if we had more court welfare officers, that would still take that length of time.

One difficulty we have is that some of the parties, their expectations on the Court Welfare Service are unrealistic in that, for example, they think that we can force the other party to do something and we cannot. They may say, 'I want to see my child on Saturday evenings, I want
830 them overnight and I want them to go back on Sunday teatime.' We say, 'Well, we will ask the other party about that', but, actually, if they are not willing to agree that, we, as court welfare officers, cannot force them to do that. Only the court can do that with an order. So it –

Q372. The Clerk: Sorry to interrupt. Can I just ask, who decides how many? Who decides on
835 the resourcing of this service?

Ms Ingram: It comes under the Probation overall funding – the Probation Service.

Q373. The Clerk: So, it is within the Department of Home Affairs' vote?
840

Ms Ingram: Yes. As everyone knows, unfortunately, we are now having our funding reduced.

Mr Malarkey: Careful, Jonathan, that comes under my remit!

The Chairman: Any questions?
845

Q374. Mr Malarkey: Yes, the shock answer that you gave a few minutes ago was you have seen no reduction in the cases, even with the introduction of mediation but, having said that, we understand mediation is relatively new on the scene. Do we know how many mediation cases are
850 still ending up in front of the courts, basically, or is it just a sign of the times that there are more divorces going on and more...?

It is a bit of a sweeping statement to say that you have not seen any reduction, which makes us think, are we wasting our time here, if mediation is not going to work?

Ms Ingram: Well, we gather data and, actually, I spoke to this person this morning before I came about the data we gather. It is difficult to gather the data about mediation. We can only gather data on how many cases come before us and the number of cases that come before us is not
855 reducing. We have had 80 in the last year and that is certainly more than in previous years.

Q375. Mr Malarkey: But you do not know how many of them have actually been to mediation beforehand?
860

Ms Ingram: And we try to gather information on that to see, because, obviously, we want mediation to work, because we do not want the cases coming to us. The difficulty we have is that
865 when we ask people if they have been for mediation, it may be that they went for mediation some time back and this is a different issue and they do not want to go back to mediation, or it may be that they have recently been advised to go to mediation and they have chosen not to, or they have been to mediation and it has not worked. So, it is a difficult area to actually gather concrete evidence on.

Q376. Mr Malarkey: But, it is vital that we do get that type of information, because we cannot go forward, really, without it.
870

Ms Ingram: I am sure the courts could gather information on how many cases they recommend have mediation, and there is a delay while the parties go to mediation. I am sure the Mediation Service must gather information on how many they have managed to get to agree.
875

Mr Malarkey: I am sure Mr McKenzie will be able to answer some of those questions, won't he?
880

The Chairman: Thanks. Anything else, Bill?

Mr Malarkey: No, thanks.

885 **The Chairman:** Well, thank you very much. I would like to thank you for your time and your openness this morning. Thank you very much.

Mr McKenzie was called at 10.41 a.m.

EVIDENCE OF MR J MCKENZIE

Q377. The Chairman: Right if we could call Mr McKenzie, now, please.

890 Well, Mr McKenzie, thank you very much for coming back. We found your evidence on 12th January very useful and very helpful. At that time, you mentioned that there was information on mediation on the Courts Service website. Just for the record and for the benefit of anyone reading *Hansard*, I would like to mention that we followed this up with you afterwards and we were directed to the exact location of the information. It is at www.courts.im/courtprocedures/mediation.

895 Last time that you were here, we spent quite a long time discussing mediation. We have asked you to come back today because we wanted to hear more about the effects of prolonged family court disputes on children, and the effects on children are turning out to be one of our primary concerns here.

900 So, where parents are in dispute, what are the effects on the children? We have just heard now that they are in danger in going one side or the other; they are torn between both parents and it can have a psychological effect on the children.

Mr McKenzie: Yes and, again, I would just thank you for inviting me back. I have prepared some anonymised case studies that, I think, may well give some illustrations to that.

905 But, just in answer to your question, the issues around separation and divorce – and this is separate from the court proceedings – but once families separate and divorce, children are in a tension relationship and will be affected in different ways, but a very common experience, as Ms Ingram has said, is that children have torn loyalties, so that they will be torn between what they want to say and what they believe their dad wants to hear and what their mum wants to hear. It is somewhere in the middle of that, they are kind of torn between these tensions and that tension creates problems of insecurity. What we know is that children grow up best in warm, loving, stable relationships. When those relationships break down, then children are inevitably affected.

915 The degree to which children are affected is subject to a whole number of variables and one of the biggest variables is around the child's resilience. There are some children who, it has to be said, can go through very traumatic situations and can seemingly breeze through that, without it having a massive effect. Other children can go through situations which may have a minor disruption and can be massively affected by it. The main factor is about the individual resilience. So, you cannot really legislate for that, because we cannot test for resilience at birth. What we know is that children behave differently at different stages, according to the influences that they have on them.

920 What we know is that where children are put through trauma of separation or are put through situations where the adults in their life are in conflict, then it raises serious conflicts with the children. One of the effects, for example, is a very common effect, that children feel guilty because they take on a lot of the guilt that 'mum and dad have split up and it is because of me', because children are very self-centred. Lots of children find it very difficult, if you have been part of a family where relationships have been fractured, they find it then difficult to form relationships in later life, because their experience of people forming relationships is not 'normal', for want of a better term. So, there are lots of categorised effects for children where parents are split up and divorced and that is regardless of how that divorce is handled.

930 One of the mitigating factors in that is – and lots of research evidence shows – that children are much better able to cope with that, where the adults involved are able to discuss and resolve things in a sensible way without conflict. However that is managed, whether parents are going through divorce proceedings through court, but are able to maintain a level of friendliness and a level of communication, then children can survive that process.

935 Where parents are going through... and it may not be involving the family courts because we know of families who are not married who have split up and there is no kind of legal positions with them. Where they are not able to do that on a friendly basis, that is where it causes conflict. So, the key elements are how well the parents and the adults in the situation can resolve and communicate with the children.

940 The other clear factor is around where the children are kept informed of the process, to the level that they can understand because, again, as I heard Ms Ingram saying, lots of people delude themselves that children are far too young to know what is going on and 'we will deal with it'. Children are very, very sensitive, can pick up all sorts of bits of information and will pick up from moods, will pick up from snippets of conversation, which are actually more dangerous than sitting down and talking with someone.

945 So, that is a very generalised sense in which children are kind of damaged when parents split up and, unfortunately, as I think Mr Malarkey said before, as divorce rates and split-up rates between parents are increasing in society, that means we are going to have more damaged children. Our job, I think, as a society, is to try and mitigate against that damage, and to try and alleviate that damage as much as we can, and to make sure that the systems we have got in place
950 do not add to that or exacerbate that.

There is a lot of evidence to say that mediation works and, again, I think, as Ms Ingram says, it does not matter how many court orders you have got in place telling you that you have got to take your child to see your ex-wife on a Saturday afternoon, if you are not minded to do that, then it is going to be very difficult to enforce that, from the court's point of view. So, where that works is
955 where there is a voluntary agreement and that is part of the whole ethos around mediation. It is around getting that voluntary agreement between the two parties.

As I say, what I have tried to do is to look at about six families and these are families that we have dealt with through various services throughout the Children's Centre, in recent times. It is not trawling back through long history, and we do have a long history of being involved in family centres and with our contact centre. So, we do have a long history of being involved with families. But I have selected about half a dozen different families which try to illustrate some of those issues and, obviously, I have tried to keep it confidential without...

960 But the kind of effects that we have on children, I have got... Would it be useful if you had a copy of these? [*Mr McKenzie passes papers to the Committee.*]

965 There are also some other papers around the effects of mediation and some information from the National Audit Office in the UK which reported on the effectiveness of mediation. I think there should be at least three or four sets of papers there.

970 **Q378. Mr Malarkey:** Just before we carry on, could you just remind us when you started your mediation at the Children's Centre, because it has been a pilot scheme you have been running? It might be helpful for *Hansard*, if we know when you started the mediation period.

975 **Mr McKenzie:** We seconded Sue Smith, who is our Mediation Manager, to set up the project in October 2008 to establish the process. She underwent training, so we started to take cases from around December, but largely in January of last year. So, we have been running in a gradual build-up of cases from around January of last year. We had agreed to set that up on an 18-month secondment process, which comes up to April of this year.

980 **Q379. Mr Malarkey:** Thank you. Carry on.

985 **Mr McKenzie:** As I say, I have selected a number of families we have been working with, and what I have tried to do in each of those cases is to identify where we know they have been involved in the court process and where we know they have either been involved in or had Legal Aid. As you will see from some of the examples, not all of them are Legal Aid supported. Again, it is a factor but it is not the only factor that relates to that.

990 So, some of the effects: we have got Family A where one child had been involved in proceedings for over six years. This has been going on for a long time. The child has limited contact with the non-residential parent, but she is demonstrating clinging and insecure attachment behaviours. Now, we do not know why. We do not always know why children do the things that they do. Our job, as professionals, is to try and make some assumptions or to try and identify possible reasons for that. Possible reasons are that this child is exposed to the parental disputes and arguments. So, this child is seeing mum and dad arguing all the time and that causes them to be very clingy and insecure.

995 The second case that I have highlighted, where parents split up soon after birth. This has been a
conflicted separation and there is no direct communication between the parents. They do not speak
to each other. They use, frequently, the court to get different orders to change levels of contact and
where they go. The Family Court Welfare Service have been involved, as have child psychologists
and, again, as I think Ms Ingram identified, the very fact that you have got lots of different
1000 strangers coming in, involved in the child's life, can, in itself – it is done for the best intentions –
be quite traumatic. Mum is funded by Legal Aid and father is self funded, but the child is worried.
He experiences pressure from the father and there are tensions within the step-relationships,
because as relationships develop, obviously, there are step-parents coming onto the scene and
there are pressures that get exerted from various other places.

1005 I do not know if you want me to go through all of those but, generally, what I have tried to do
in that very short paper – it is very, very snapshot case studies – is to identify some of the issues
that are affecting children.

1010 I think in the final case, as well, there is an issue there around the systems not necessarily
working together. This is a family that have – It has been a fairly conflicted piece of work where
father is not resident and has been applying for contact with the children. It has been through the
Family Court Welfare and other agencies have been drafted in to try and illicit the views of the
child.

1015 One of the difficulties that Ms Ingram and her colleagues and anybody else working in this
field has is trying to determine when a child says they do want to see their mum or their dad or
they do not want to see their mum and their dad, how much of that is influenced by the parent that
they are living with and how much of that is driven by the adult agendas. That is a very difficult
process to try and cut through. One of the difficulties within that is that a mum who has a number
of children who has been struggling with a number of issues and this court case is one factor in a
number of other factors, which led that family to then get involved with Social Services to try and
provide some support. The difficulty in that case was that, because you have got this court case
1020 rumbling on, it adds an extra pressure onto a mum who is struggling already and the danger there
is that that could provide the tipping point.

1025 Our concerns within that family were that those court proceedings and the pressure that the
father was exerting to see contact with the children – which, incidentally, mother was not
particularly disagreeing with, but she was saying that the children do not want to see their dad –
that was creating pressures and we felt that was actually putting pressure onto that family, where
that family which was existing at the moment and supporting could break down, and those other
children could have ended up in care.

1030 That has not happened, but that is a serious risk and one of the issues, then, is the difficulty of
two bits of the system, as in the child support system and the juvenile care system, not necessarily
communicating with the family court system and that is a worry, I think, that that may not be the
only case where that is an issue.

But, I do not know if that, hopefully, gives you a bit of a snapshot of some of the areas in
which children are affected.

1035 **Q380. The Chairman:** That is helpful. Certainly, mediation has got some very strong points,
but how can the problems be addressed if the parents are unwilling to submit to mediation in the
first place?

1040 **Mr McKenzie:** I think mediation has to be a voluntary process because – and our experience
from running the mediation is that, and some of the experience from the way it has been
implemented across – there are some parents who will use it simply as a tick box exercise. If the
insistence is that you go to mediation and if you do not go to mediation then you cannot get Legal
Aid or you cannot get access into the court, there will be some parents who always provide lip
service to that – ‘I have come along; I have given it a try. It did not work.’ One of the reasons it
1045 did not work is that you are coming in with the view that it is not going to work – ‘I do not
particularly want to make it work.’

1050 I think the skill of the mediators are around trying to make that happen, but you cannot do that
in every instance. I think in the paper that Neil Robinson has submitted, identifying some of the
key facets of mediation, one of the facets is the voluntaryism, that people come into that process
on a voluntary basis. But, what you can do, with a systemic approach, is that you can apply certain
pressures onto parents to get them through the door and there will be some parents... and I divide
it into three categories, really. There are some parents who will embrace mediation, will come
along, will take part, will try and make it work. For some of those, it will work, for some of those,

1055 despite their best efforts, it will not work. Nothing in this life, mediation included, comes with guarantees.

There will be some parents who come in, maybe reluctantly, one party more reluctant than the other but, by getting them through into mediation, we can start to make advances and we can start to win hearts and minds and souls.

1060 There are some parents who will come into mediation and they have got no intention of making it work and, for those parents, it is going to be very difficult, but then I would suggest for those parents, it is very difficult for anything to work, really.

1065 The process, I think, is around reducing barriers to parents being able to sit down and talk. I think, as I said last time, the unique experience of the Isle of Man mediation is that it has been applied to cases where there has been lots of conflict already in the court and it has been protracted but mediation can still, at that point, make some differences.

Q381. The Chairman: So, you said, just then, that mediation has to be on a voluntary basis, but there might be certain levers which might encourage people to move towards mediation. Would you consider one of those levers as being a first step before you get Legal Aid? So, the first part of the process would be automatic mediation, acknowledging that some people will never submit to it in a genuine and open manner, but at least give the opportunity?

1075 **Mr McKenzie:** I think, certainly, anything which... and the reason that we would welcome the information on the courts website is that courts are saying, 'We want people to go to mediation before you come here.' I think having that systemic view of directing people to try mediation before they come through the courts, before they get to the Legal Aid system, I think would be a positive step. I suppose rather than using the thing of trying to force people into it which you cannot do, I think if you look at it in terms of reducing the barriers to mediation, so that people can increasingly get access to that mediation, it is probably the way forward. But certainly, if there are steps that can be applied which encourage families and adults to come to try mediation before they do anything else, I think that is going to be helpful.

Q382. The Chairman: Do you think that the influence of Legal Aid on one party or another encourages a lack of will on the legally aided funded party to compromise and settle?

1085 **Mr McKenzie:** I think it is very difficult to draw distinctions. There are examples I think we have had where Legal Aid is helpful for parents. There are examples where it is not helpful that parents are able to fund it themselves. There are examples where Legal Aid has not been helpful, because people are doing it. So I do not think Legal Aid of itself is necessarily a key kind of factor.

1090 I think the key factor is how much we can use, how much we can encourage parents to get together and undertake that mediation process. Sometimes I think the Legal Aid system may well mitigate against that, the fact that, I think as you mentioned before, you cannot get Legal Aid unless you are involved in proceedings, which means it encourages people to get involved in the court process before going to mediation. We have been very clear at the Children's Centre that we do not want to necessarily get tied into a position of funding so that – and I think Ms Ingram has mentioned it before – really how it is funded should be separate to the process, in one sense, because what we believe is that it should be open and it should be available to families, regardless of whether or not they can pay for it or not.

1100 The realities of that are that some families are able to pay for it, some families are not and our position from the outset within mediation is that our concern is around trying to help the children that are involved and whether that is two multi-millionaire businessmen, who are able to fund the total process out of their own pockets, or two families on benefits who do not have any kind of access to that kind of funds, the children are the same. The children will suffer because the parents are not communicating, so our desire is to be able to offer that service to everybody.

1105 How you make that fair and how you make that accessible to people is a challenge for us all, I think, in that process.

Q383. The Chairman: Is there an argument to say that where Legal Aid is involved, the fees per case should be capped?

Mr McKenzie: In what way do you mean?

The Chairman: To encourage people to negotiate.

1115 **Mr McKenzie:** In what way do you mean the fees be 'kept'?

The Chairman: Sorry, capped.

1120 **Mr McKenzie:** Oh, capped.

The Chairman: So in other words there is a set tariff for a certain type of proceedings.

1125 **Mr McKenzie:** I think there are merits in that, because it does highlight that actually there is a limit to what you can do. In practice, how you administer that, because families and situations are complicated and they move out and there will always be... and our experience has been that there are a number of families who, wherever you set the guidelines in terms of what the thresholds are for being eligible for Legal Aid, what the thresholds are in terms of the number of court appearances that you can have for Legal Aid, there are always families that fall right through your guidelines, either because they do not earn enough to be able to pay for advocates but they earn too much to be able to qualify for Legal Aid... There will be families to whom you say, whatever the limit is, it is six court appearances that you need to resolve this dispute, and actually there will be families where that seventh court appearance or seventh piece of funding will be the crucial one.

1135 So wherever you set the limits, there will always be families that you need to legislate for some of the exceptions. But I think there are principles you can put into place which are... Again, some of that from the Children Act, around, if we are involved in proceedings, then there should be minimal delay for children.

1140 I think the crucial thing is, and the difference between this and civil or corporate proceedings, that there is a time limit. There is a clock running, as soon as parents start splitting up or start arguing, there is a clock ticking for children and the sooner you can get that resolved, the better. Families, courts, companies can go on almost *ad infinitum* really, until the money runs out, and it is not going to make any difference to a certain extent; but children are growing up all of the time and a six months' delay in a two-year-old's life is a matter amount of time. The longer we delay getting parents to agree and getting some measure of stability in children's lives, the longer the court process takes, the more damage and the more unsettled children become, because they are living in a situation... As I say I have related my evidence, previously, to the analogy between the court system with the care proceedings. The longer it takes us as adults and as a society to make long-lasting resolutions for these children's future, the more damaged the children are, because they are living in an insecure environment. They do not know what is happening to them, they do not know where their security lies. Because we cannot identify children at birth who are going to be resilient to that, we have to try and protect all children.

1155 **Q384. Mr Malarkey:** On a very similar line to a question that has already been asked you by the Chair, going back to the different types of cases you deal with in mediation: you mentioned the millionaires that could be at loggerheads and they have got plenty of money to throw at various solicitors and what have you. Then you have got Mr and Mrs Average: neither of them will get Legal Aid, probably the family home is at risk here and there is a divorce going on. Then you get Mr and Mrs Not Quite Average, where one side is keeping the house and the other side is on Legal Aid, so one is funding it themselves. Do you actually see any pattern on...?

1160 Well, we know that the millionaires do not worry about the money, they could throw it and fight forever. Then you have got Mr and Mrs Average in the middle where they are both paying what little money they have got to try and resolve it, or you go down to the next level where you have somebody paying for it themselves and somebody getting Legal Aid.

1165 I think what I am trying to fit in, are they all the same or do you get more... where there is money involved, they do not care, they are not co-operating, or people who are both paying co-operate better?

1170 **Mr McKenzie:** I do not think there is any... I think the key thing is the relationships between the adults involved and we have not been able to see any kind of outright pattern, in terms of the finance driving that. There are families – I have detailed one in there – who are in massive amounts of debt, as a result of this, but it does not necessarily stop them wanting to come... It does not necessarily make them more likely to come to a conclusion.

1175 We have families where one side is legally aided and our perception would be they are the ones who are driving the process and are less likely to come to a solution because, in that instance, you have got somebody who is saying, 'I know it's going to hurt you because it's costing you

every time and I'm okay'. So I think that is a factor in some cases. But equally we have got the other side where, 'I am paying for this and your Legal Aid's going to run out at some point and it doesn't matter really to me.'

1180 So I think you see all colours, I do not think there are necessarily strong patterns that we have seen from the pattern of funding that we have got.

1185 **Q385. Mr Malarkey:** I will go back to something I said earlier on, before you arrived, where we took evidence last time and we had two different people sitting in the chair, saying that they had sat round a table with their opposites and they had come up with a solution, and that included the kids, the finances and everything. Then the one on Legal Aid had gone back to their own lawyer and said, 'I've got a solution, I'm going down this road', and the lawyer has said, 'No, no, we can do better than that for you, we'll carry on.' Do you get incidents like this?

1190 **Mr McKenzie:** I think there are. I think there may well be instances where... I mean it is difficult for us, in the sense that there are times, I think, within the mediations where they will come to an agreement and then one party goes away and thinks. It is actually very difficult, from our point of view, to know when somebody has had a rethink and goes back on an agreement, what the influences are. It may well be that they have gone and done exactly as you have said, they have consulted with their lawyer. It may well be that they have gone and spoken to their friends or
1195 their grandmother or their sister or whatever and they have said, 'You can't let him get him get away with that' and they have persuaded and it has broken down.

It may well be that somebody is... and I believe our mediation is very good, but you cannot get away from the issue where one party may well be intimidated in that process, by 'I am meeting up with my ex-husband'. It does not matter how good the mediator is, I am actually going to be much
1200 more compliant face to face, than I will be once I have gone away.

So I do not think we can draw – we are not necessarily in a position to be able to draw – on that experience, to say that it is either advocates or family or people's own kind of thoughts about rethinking that. But certainly we would get a number of instances – not a vast number – where, having reached that conclusion, somebody then goes back and changes their mind. The process of
1205 mediation is to come to an agreement and then our mediators will only sign off a memorandum of agreement that has been agreed by both parties, and then that is the end of the mediation process, because we are then saying, 'This is what you have agreed to'. If you then decide – one party decides – not to stay to that, you can always come back to mediation or you can take it into court or wherever. But it is giving them the basis of that agreement which then gives them the base line
1210 to work from.

Q386. Mr Crookall: Chairman, just a couple of things now. You just mentioned briefly before, last time you were here actually, about the funding issues. How is that looking now, because you were quite concerned as from 1st April.

1215

Mr McKenzie: We are still concerned, we still do not have any kind of direct funding from 1st April. We have been in touch with the Department of Home Affairs who were undertaking the Mediation Working Group, and coming forward with recommendations around mediation, but we have not had any response from the Department of Home Affairs around whether or not there is
1220 any public funding for mediation.

Our concern, as a charity, is that we set this up because there was not any funding for mediation. Nobody was running the service and we believed we could do something. The idea was to set something up as a pump priming service and to be able to do that, with the hope that somebody would then be able to come forward.

1225

As a charity, we are going to have to look at whether or not we can continue to fund that or whether or not somebody else is able to come forward with some of the funding for that.

Q387. Mr Crookall: Also, the amount of cases you have done over the last year, just bearing in mind what Ms Ingram said about the numbers that they see have not gone down, so – ?

1230

Mr McKenzie: I did supply some statistics. I think we have dealt with about 95 children. We have a process and I think it is important to understand the process. We have three levels really, if you like. We have enquiries, so we will monitor where people come in for enquiries. Not every enquiry will then go forward. People may well ask us about mediation and then not do anything
1235 about it, all they have done is ask us about it, so we have a number of enquiries. Not all of those enquiries go to what we call an 'intake meeting' and the first process is that we will undertake an

intake meeting with one or other of the, ideally with both parties to it, but certainly with one of them.

1240 So not every enquiry will go to an intake. Not every intake will then result in a mediation because either we will meet up with them and they are not particularly minded towards it or it is not feasible or whatever. So then we will have a number of mediations. I think, in the last year, we have had about 51 mediation cases. Nine of those were, at the time I produced the statistics, were still open so we had completed 42 different sessions of mediation. Out of that, 13 were Legal Aid funded; 24 were self-funded; and there was a number of 14 that we did not apply any kind of charges, and partly that was during the period that our mediation manager was training. We did not feel that it was ethical to charge people for mediation while we were not fully up and running, so there is a period there.

1250 Out of the 13 that are legally aided, we have only had funding from about three and partly that was to do with some of our systems not being in place to be able to claim Legal Aid through that, because there are different models for trying to claim Legal Aid, either as a disbursement through the advocate or directly for mediation and that has not been very clear. We have had to work with the Legal Aid department and Mrs Montgomerie on that, over the past year, because we have been setting up a system and it has not been able to do that.

1255 I do not know if that helps.

Mr Crookall: Yes, thank you.

1260 **Q388. The Clerk:** Would you expect, as mediation takes off, the numbers of cases coming to the Family Court Welfare Service to fall?

Mr McKenzie: Not necessarily. I would hope that the number of cases going through the courts may well reduce and, ultimately, that may well make a reduction in the number of cases going through the Family Court Welfare.

1265 However, that is the key factor. It is really the factor in terms of how many cases will not go through court and, as I say, certainly as we have set up, there has been a mixed economy, if you like, with our mediation. Some of the cases that we have dealt with will not have got to court, so they will not be involved in court. Some of them will go to court despite... or the mediation will form part of what is happening within the court process; and some of them, as I have said before, because there was not mediation around, we have had an unusual situation on the Island, which is unusual to the mediations in the UK, where cases already involved and sometimes conflicted in the court have been referred back for mediation. So those are cases where Family Court Welfare will have already been involved, the courts have been involved and it has come back to mediation.

1275 So it does not surprise me that there has not necessarily been a reduction in the Family Court Welfare and, again, I think because we are looking at the periods of time involved in this, it is one of those delays. You are not going to see big changes in the number of cases going through court for a number of years until you have set the process up. It is not something that happens overnight particularly.

1280 But I think, if everything works well, you should see a reduction in the number of cases going through court, ultimately.

Q389. The Chairman: As another positive step though, would you expect the mediation process to shorten the overall court process, so that the effects on children could be limited?

1285 *Mr McKenzie:* Hopefully, as I think I said last time, if mediation does nothing else but identify those areas that parents agree and disagree on, one of the problems that delays the court is that you start from scratch, really, in terms of trying to find areas that people are agreed on, where there is not a dispute, areas where there is a dispute. Hopefully, mediation will give a base line to that, so if you have gone through mediation and both parties should be able to come into that with a notion that, 'We agree on 80 per cent of it; it's just these things that need to be resolved by the court', so there should be a hope that that should reduce the delay.

1290 However, as I say, human nature is human nature and there will be always families that... As I have said, there are families that we deal with who almost insist going and getting the resolution of the court, because that is the only thing that they see as the way forward. You will not completely get rid of that. As I have said before, mediation is not the answer to everything, but I think it can significantly improve it.

Q390. Mr Malarkey: Have you actually approached Legal Aid for funding?

1300 **Mr McKenzie:** We have been involved in discussions with Legal Aid, but we have not... At the moment, until the Mediation Group comes back, there is not a mechanism, necessarily, to say which arm of Government is responsible for funding mediation. I think originally, for example, in the Children's and Young Persons Services Plan, mediation fell under the remit of Social Services and the DHSS. So there is not necessarily a clear view, in terms of who should fund it.

1305 Equally, there are different models of funding a mediation service, which I think need to be looked at – whether or not that is core funding to establish the process, with some top up where cases are funded on Legal Aid, as and when they come through, or whether that is a grant to someone like the Children's Centre to establish the core bit, and then it is generally funded through on a case by case basis.

1310 The difficulty is around having a sustainable system that is in operation that is just funded on a case by case basis, because you cannot have the infrastructure that is available, if it is purely dependent on cases. I think there is some information put forward by Neil Robinson, who is our professional consultant from the UK and Chair of the Family Mediation Service and a lawyer in the UK, which outlines some of the difficulties and problems within different funding mechanisms.

1315 So we are quite happy to have a debate with anybody who will come up with ideas with which we can fund it, on a mixed economy even, in terms of where if some top-up funding needs to be brought in through voluntary income, that is entirely feasible.

1320 **Q391. Mr Malarkey:** I got the impression from the e-mail you circulated, this is limited. Is it likely to stop on 1st April?

Mr McKenzie: The position that we are in is that our trustees took a step of faith and said that the charity would fund the mediation service for 18 months. Eighteen months is up in April, and the charity will have to take a long hard look at whether or not we can afford to run that.

1325 Also, it is around sustainability, because we believe that there is no point in setting up a service that we can only run for two years and then stopping it and nothing else happening. That is almost worse than not doing anything really. It is setting up expectations where families are coming and running... So we would need to know that what we are doing is sustainable and ultimately, in the long-term, there has to be some measure of Government funding into that, as some means to make it sustainable. Not vast amounts of money and in terms of the costs, the cost benefits to it, it is a very worthwhile service and it can pay for itself, almost, in the savings in costs to the court in a very short period of time.

1330 The difficulty that we have got is that we have got no indication one way or the other. I think if someone from Government were saying, 'We might be able to fund this but not next week, but there is a timetable for that', then the trustees would be minded to perhaps continue funding. The difficulty is that if we get no response, in terms that there is nothing on the horizon in terms of being able to fund it, I think the trustees would have to look long and hard at our commitments and finances that we have as a charity, to be able to fund that.

1340 Equally, I think if Government was saying, 'There isn't any Government funding and never is going to be any Government funding to this' then the charity may well take the view that, 'Well that's something that we'll have to raise the funds for.' So, we do not want to stop, and I think that is both from a practitioner and an organisational point of view, and also from a trustee's point of view. We do not want to stop doing that, but we do really need some kind of indication and dialogue from either the DHA or from the courts to say where potential funding is coming from.

1345 **The Chairman:** Well, thanks very much. You have helped to address a few issues, some of the outstanding issues from your last testimony. Thank you for your very fulsome comments, they have been greatly appreciated and very helpful.

1350 **Mr McKenzie:** Thanks for the opportunity.

The Chairman: So with that we will draw the formal proceedings to a close and the Committee will now sit in private, but thank you very much. Thank you everybody for coming today.

The Committee sat in private at 11.24 a.m.