



**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 AYNS
COOISHYN Y LUGHT-THIE
(AGHIN SON KIARTAGHEY ACCAN)**

Douglas, Thursday, 12th August 2010

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**PP120/10
TLA, No. 4**

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Members Present:

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

Apologies:
Mr T M Crookall, MHK

Clerk:
Mr J King, Deputy Clerk of Tynwald

BUSINESS TRANSACTED

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The Committee adjourned at 3.35 p.m.

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

*The Committee sat in public at 2.30 p.m.
in the Millennium Room,
Legislative Buildings, Douglas*

[MR TEARE *in the Chair*]

Procedural

The Chairman (Mr Teare): Good afternoon, everybody, and may I first of all welcome you to this sitting of the Select Committee of Tynwald on Legal Aid in Family Matters (Petition for Redress of Grievance).

5 The Committee was established by Tynwald on 21st October 2009. Our original remit was to investigate the Petition of Mr Stephen Broad, which had been presented on Tynwald Day in 2009. Our Report on this was debated by Tynwald on 13th July. Our recommendations were accepted by Tynwald, but we were given another job to do. This was to investigate the Petition of Mr Paul Smith.

10 The motion establishing the Committee was, I quote:

15 ‘... and further, that the Select Committee, which was appointed with powers to take written and oral evidence pursuant to sections 3 and 4 of the Tynwald Proceedings Act 1876 as amended, should continue with the same powers and with the same Hon. Members serving on it as at the time when it reported, and that it be instructed to take further evidence on the matters raised in the Petition for Redress of Mr Paul Smith as set out in the Third Report of the Standing Orders Committee for the Session 2009-10, and to report to the Court by December 2010.’

20 I am Eddie Teare, Chairman of the Committee. My colleague is Mr Bill Malarkey MHK, who is also a member of the Committee. The third member, Mr Crookall, is not available and is not able to with us today and sends his apologies. This is Mr Jonathan King, the Clerk to the Committee; and Mr Clive Alford, who is the *Hansard* reporter. Could I ask you, please, to switch off mobile phones. It quite often happens that it goes off in the middle of a meeting.

Today, we have one witness, Mrs Wendy Montgomerie. She appeared before us in January 2010 as part of our initial investigation. Could I welcome you back.

25 **Mrs Montgomerie:** Thank you.

WRITTEN EVIDENCE OF MRS W MONTGOMERIE

Comments for Select Committee

30 In view of the fact that the Select Committee has been extended to cover the question of a cheap procedure to deal with the complaint of an unassisted person against my decision to grant or amend a Legal Aid Certificate, I do not think that it is appropriate for me to comment as to the method of the procedure.

I do not wish the situation to occur where an unassisted person considers that the process is flawed because I made a suggestion which was accepted and they interpret the position as having been manipulated in my favour.

However, I intend to make certain observations as to the implications of any complaints process.

35 The present situation

The applicant or assisted person has a right of appeal if I refuse to grant or amend a Certificate.

A non-assisted party has no such right.

Under the Legal Aid Regulations I owe no duty to an unassisted person. The unassisted party has no right to know the reason for the issue of a Certificate.

40 It is only by way of goodwill that the present complaints procedure is in place.

The present complaints procedure

45 Upon receipt of a complaint from an unassisted party to proceedings, I write to them asking them to choose from two options:- (1) that I send a copy of their letter to the assisted person and the Nominated Advocate for comment or (2) that I paraphrase their letter and send them a copy so that they can consent to me sending it to the assisted person and the Nominated Advocate for comment.

I also indicate that if I do not hear from them within 14 days from the date of my letter, I shall assume that they no longer wish to pursue the matter.

50 Depending on the option chosen, I then send correspondence to the Nominated Advocate seeking their comments and those of their client.

Upon receipt of a response I consider the matter and inform the unassisted person of my decision. Sometimes my initial decision remains the same, in some cases I have amended or discharged Certificates.

This procedure is also followed in Guernsey.

55 Sometimes a complainant provides me with more information than I previously had. Sometimes the complainant appears more interested in attempting to ensure that the assisted person loses the support of Legal Aid.

Drawbacks of the system.

60 If the complaint concerns financial eligibility, and the assisted person is in receipt of an automatically qualifying benefit, then this office does not assess the assisted person's finances and it is better for the unassisted person to address their comments directly to the Department of Social Security.

If the assisted person is not in receipt of an automatically qualifying benefit, then this office does undertake financial assessments and we can review assessments.

65 If the complaint concerns the legal merits tests, I cannot give my full reasons to the unassisted party for my decision as to the future of the Certificate because of section 14 of the Legal Aid Act 1986 which precludes me from disclosing details of an assisted person's case without their consent plus that of the Nominated Advocate if they supplied me with information or documentation.

Factors to be considered when discussing the establishment of a complaints system

70 (1) The person who considers the complaint must have legal knowledge. My decisions are based in law and therefore a non-legally trained person cannot decide whether or not my decision is correct.

75 (2) The forum hearing the complaint must have powers to deal with vexatious complaints or such complaints that are driven by spite. The ability to award costs against the unassisted person if their complaint was not successful would be essential.

This does not mean that the forum has to award costs but it is a deterrent against vexatious complainants who abuse the process.

80 (3) The position in respect of section 14 would also have to be factored into the process.

The secrecy set out in section 14 of the Manx statute is mirrored in legislation of adjacent islands.

When the Freedom of Information Acts were introduced into England and Wales and Northern Ireland, a survey was undertaken of all legislation containing secrecy clauses to decide when information could be made available. This was referred to as a "sunset clause".

85 In respect of Legal Aid legislation the sunset clause is set at 100 years. This shows how seriously the question of secrecy is considered to be.

The reasoning behind section 14 is due to legal privilege.

Legal privilege means that certain information and documentation passing between a lawyer and the client cannot be revealed to third parties.

90 Under the Legal Aid Regulations I can ask the Nominated Advocate for any document or information which I consider to be necessary in order to reach my decision and the Advocate cannot claim privilege against it being given to me.

This means that I may be privy to highly sensitive information or to information which legal privilege would prevent from being given to the unassisted party.

95 In order to prevent that information being passed on to third parties, section 14 prevents me from disclosing details without the consent of the assisted party and their Advocate if they supplied me with any information.

If I were to supply information without the section 14 consents, an unscrupulous unassisted party could gain an advantage which could be used against the assisted person.

If I were to breach section 14 and proceedings were instituted against me I could be fined, imprisoned or both.

When the Legal Aid Act was passed in 1986 statutory secrecy was regarded as a serious matter.

100 As I have already observed, because I cannot reveal information to the unassisted party, my explanation as to my decision over the Certificate can be frustrating to them.

Here are two examples to show the way section 14 works:-

105 1. A, an unassisted person claims that B, an assisted person, should not have the benefit of a Legal Aid Certificate because A is unemployed and the application is a waste of money. I make enquiries and I am informed by B's Nominated

Advocate that A is claiming that they are unemployed but the Advocate sends me a copy of a report of a private investigator showing that A is in employment.

I then inform A that the Certificate will continue. However, although my decision is based on the contents of the report, I cannot tell A that.

110

2. C, an unassisted party, claims that the assisted party D, has no case and should not have a Certificate. I make enquiries and D's Advocate provides me with a copy of Counsel's Opinion which indicates that D has a strong case and quotes precedents in support. I revert to C and indicate that the Certificate will stay in place, but I cannot disclose the Opinion upon which I have based my decision.

115

Statutory secrecy is a blanket secrecy and I cannot pick and choose which pieces of information I can reveal. I cannot reveal any information without consent.

If you set up a complaints process section 14 would have to be amended otherwise the end result will be no different from now. If you do change the law and remove lawyer/client confidentiality - which would be unprecedented - assisted persons would undoubtedly be unwilling to provide me with the information I require to reach my decisions.

120

Further, if you were to take away an assisted person's right to confidentiality you would also need to remove a non-assisted person's right.

125

(4) If a proposed complaints forum were to decide that my decision was wrong and my decision is reversed, that would not be the end of the matter. An assisted person has the right to appeal against a decision not to grant or amend a Certificate to the Legal Aid Committee.

130

I have no objection to the information I have provided being published.

Wendy Montgomerie,
Legal Aid Certifying Officer

ORAL EVIDENCE OF MRS W MONTGOMERIE

Q540. The Chairman: I would just like to start off really by asking you to give us a brief overview on the complaints procedure, because that is the kernel of Mr Smith's prayer in the Petition.

135

There are two possible complainants. There is the person who has applied for Legal Aid and who has been declined, and then there is the person on the other side, who feels that the allocation of Legal Aid should be challenged and it should not be justified. So really, if we could just take each one in turn, and if you just give us a quick explanation and then we will go through that and follow up with your comments as well. Thank you.

140

Mrs Montgomerie: If perhaps we deal with the assisted person first - that is the person who has the Legal Aid Certificate or has applied for a Legal Aid Certificate. Under the regulations, if I refuse to either grant a certificate or to amend an existing certificate, then the applicant or the already legally-aided person has the right of appeal. I will send a letter to them indicating that I have refused to either grant the certificate or to amend it, and I set out why I have done so, so they have my reasons for my refusal.

145

The letter also informs them of their right to appeal and I give them details of the person to whom that appeal should be addressed, together with the address to which they should send the form. There is no actual appeal notice. A simple letter will suffice and I also put that in the letter. I send a copy of that letter to the nominated applicant if the certificate is in place and I am refusing to amend. If it is a refusal to issue, I still send a copy to the applicant who submitted the application.

150

Q541. The Chairman: Can I just interrupt you there. For clarity, you said that, in effect, the first stage is a review. You are asked to undertake a review and you would send back your reasons for not having granted the Legal Aid Certificate. Then you said they can make a further appeal, but to whom is that appeal made?

155

160

Mrs Montgomerie: To the Legal Aid Committee.

Q542. The Chairman: Who comprises the Legal Aid Committee?

165 *Mrs Montgomerie:* The First Deemster, the Attorney General, the President of the Isle of Man Law Society and the Chairperson of the Isle of Man Magistrates' Association.

The Chairman: Thank you.

170 *Mrs Montgomerie:* At the moment, the appeal will go to the Legal Aid Committee. However, perhaps if I mention that there is a proposal before Tynwald to amend the Legal Aid Act... At the moment, the Legal Aid Committee deals with both appeals from my decisions and policy issues. The idea is to sublet that function so the Legal Aid Committee, as I have indicated there, will deal purely with policy issues and a new Legal Aid Appeal Tribunal will be set up under the auspices of the Tribunal Act.

175

Q543. The Chairman: So what are the tentative proposals for the composition of this new committee?

180 *Mrs Montgomerie:* That I do not know. That would be for someone else to deal with under the Tribunals Act. I do not know who that will be.

Q544. The Chairman: Sorry, I thought you said that there was legislation going to be placed, or had been placed before Tynwald.

185

Mrs Montgomerie: It is part of the amendments to the Legal Aid Act. I am not sure whether they have actually gone to Tynwald yet or they were supposed to be going to Tynwald, following the Legal Aid Services Commission of 2005 – or 2002, sorry. They had actually taken five years to report and reported in 2007. It was proposed there that there should be a separation, and basically what will happen is the Legal Aid Committee in its present form will purely be for policy decisions and policy matters, and then there will be a new body set up as an appeals tribunal, but that will be under the auspices of the Tribunals Act, so that they will deal with it, they will run it and they will have to advertise for members of the tribunal.

190

195 **Q545. The Chairman:** Did they ask for your input? As the Legal Aid Officer, I would have hoped that you would have had substantial expertise and experience that you could have brought to bear to it, advise about?

200 *Mrs Montgomerie:* I have not yet. All I would comment is that in any tribunal dealing with my decisions... I am a lawyer and my decisions are based in law, so therefore one of the members of the tribunal should have legal expertise or legal training because if you are deciding on my decision, then you must have some training. I am actually making my decision as a lawyer, so therefore somebody should have a legal training, but that is the only real comment that I have. I do not really have any comments about how it is comprised, how it is run. That should be left for the tribunals.

205

Q546. The Chairman: I am starting to get mixed messages here, because at the beginning we were given the impression that it was virtually done and dusted, but now you are really saying to us, in another way, there is quite a lot of work still to be done.

210 *Mrs Montgomerie:* What is done and dusted, sorry?

The Chairman: Sorry, the splitting of the appeals process between policy and specific cases.

215 *Mrs Montgomerie:* It has not yet come about. That is what is proposed.

220 **Q547. The Chairman:** No, but... Sorry, if I could just revert back to the first part of your evidence, as I understood it – and I apologise if I have misunderstood you – you did come across as having said it is done, it is virtually before Tynwald now. I would have thought that the documents would have been there, but then you are just coming to us now and saying, 'Well, actually, I haven't really been involved a great deal so far. They haven't spoken to me, they haven't got my opinion.'

Mrs Montgomerie: I am only involved with the amendment to the Legal Aid Act. I am not going to be involved in the Tribunals Act. It is not appropriate for me to become involved in how a

225 new tribunal is to be run, (**The Chairman:** No.) especially when they will be considering *my*
decisions. It would be highly improper for me to be involved in that.

Q548. The Chairman: No, but I did say earlier that they would, I am sure, have welcomed
230 your experience, because –

Mrs Montgomerie: Well, maybe they would have, but nobody has asked me as yet about that.
The only involvement I have had is amending the Legal Aid Act, so that the present Legal Aid
Committee will only consider policy matters and there will be a new Legal Aid Appeals Tribunal.

235 **Q549. The Chairman:** To cut to the chase then, this is quite some way off?

Mrs Montgomerie: I would have thought so, but I do not know. I am afraid I am not privy to
the timelines. I do not know about that.

240 At the moment, the situation is that if an assisted person wants to appeal against my decision to
either refuse or to amend or issue a certificate, they can apply and appeal to the Legal Aid
Committee with the four members I have given you.

Q550. Mr Malarkey: So, in your view on where we are going with this new tribunal, this is
245 only for those for applications for Legal Aid, not the unassisted people who appeal.

Mrs Montgomerie: No, we have not dealt with that. I assumed we were dealing with that.

Q551. Mr Malarkey: I am suddenly hearing about a new tribunal that is going to suddenly
250 appear –

Mrs Montgomerie: No, that is purely for the assisted people.

Q552. Mr Malarkey: Is it your understanding that if this new tribunal comes forward...
255 Would they then be able to deal with those unassisted people who objected to Legal Aid being – ?

Mrs Montgomerie: As far as I am aware, not at the moment. What would need to be done is a
change in the regulations.

260 **Q553. The Chairman:** If we could just carry on then on the theme, let's just concentrate on
the current position. The case is reviewed by your good self. This is in respect of an assisted
person. It then goes on to be reviewed – or appealed, to be more precise – to the Legal Aid
Committee. What happens after that?

265 **Mrs Montgomerie:** The papers are sent to the Secretary of the Committee and he then sends
them to the members of the Legal Aid Committee. They will set out a structured timetable, such as
whether the appellant should file a skeleton argument. Then I file an argument in reply to that and
then the matter is set down for hearing. It need not be a hearing; it can be done on paper, but that is
very rare these days. Most of the time, there will be an actual oral hearing.

270 **Q554. The Chairman:** Say the appellant is dissatisfied with the decision made by the tribunal,
is that the end of the matter, or can it go on somewhere further?

Mrs Montgomerie: No, there is no other further right.

275 **Q555. The Chairman:** There is no other?

Mrs Montgomerie: Not under the regulations, but I should imagine that they could take a
petition of doloance in the High Court. There is nothing to stop them from doing that, but there is
280 no further right of appeal against the decision of the Legal Aid Committee.

Q556. The Chairman: Moving on to the non-assisted party, what avenues are available to
them now?

285 **Mrs Montgomerie:** Under the regulations, there are no rights of appeal for an unassisted
person.

Q557. The Chairman: Don't you think that is unfair? A subjective question, I know.

290 *Mrs Montgomery:* I am fairly neutral. Perhaps I should set out my stall. If, at the end of the day, you have heard all the evidence and you think that the unassisted person should have the right of appeal, that is not a problem. I do not have a problem with that at all: so as far as I am concerned, I am not coming with any personal grievance or any personal stance. I am totally neutral. If you look at everything and then you decide that there should be some form of appeal, then so be it. After that, then I can answer your question.

295 **Q558. The Chairman:** Just for clarity then, at the first stage, you would be asked to review your decision.

Mrs Montgomery: Is this by the unassisted person?

300 **Q559. The Chairman:** By the unassisted person (*Mrs Montgomery:* Yes.) who would then ask you to review your decision (*Mrs Montgomery:* Yes.) and of course, through section 14 of the Legal Aid Act, you are prevented from disclosing details of the case. I understand that, but then if you go back and say, 'I am not able to alter my position,' then that is the end of the matter?

305 *Mrs Montgomery:* It is, yes.

Q560. The Chairman: Right, okay.

310 During your previous evidence to us, you did make quite a statement about the Human Rights aspects of this. Don't you think that this falls foul of the Human Rights legislation?

Mrs Montgomery: There is an argument, yes, that there is. It does, yes.

315 **Q561. The Chairman:** So what have you done to address it? You are an officer of the court, so really –

Mrs Montgomery: Am I an officer of the court?

Q562. The Chairman: Sorry, I thought you were an advocate.

320 *Mrs Montgomery:* No. Well, I am a non-practising advocate.

Q563. The Chairman: But isn't an advocate an officer of the court?

325 *Mrs Montgomery:* If they are practising, yes, but I think if you are not practising, I am not too sure. It is a very woolly area, but I would not have said so.

Q564. The Chairman: Alright, okay, but you said earlier that you were involved with giving opinions to changes in the Legal Aid system. Is this an area that you have commented on?

330 *Mrs Montgomery:* No, it is not something that has come up until this has been appointed. Nobody has ever mentioned it.

335 **Q565. The Chairman:** I am bit surprised, really. From what you have said to us in previous testimony here, that you had set good store by being Human Rights compliant, and then on the other side you are saying, 'Well, this is the elephant in the room and I have completely missed it.'

Mrs Montgomery: The thing is I do not... Perhaps if you would let me know... what duties do you think I owe to the unassisted person?

340 **Q566. The Chairman:** It is not duties to the unassisted person; it is the duties to the administration of justice and ensuring that there is an avenue for people who are not able to progress their claim to have it appealed, to have it reviewed.

345 *Mrs Montgomery:* And is that within my remit?

Q567. The Chairman: I would think so.

Mrs Montgomerie: I would disagree with you, but –

350 **Q568. The Chairman:** Shall we agree to disagree?

Mrs Montgomerie: We will disagree; we will agree to disagree on that point.

355 **Q569. The Chairman:** That's okay. We have had various evidence submitted to us which would seem to indicate that once you have said to the non-assisted person, 'I cannot deal with you any more,' that is the end of the matter. Who are you accountable to?

Mrs Montgomerie: The Governor.

360 **Q570. The Chairman:** But we have got quite a few letters on file which say, in effect, that the Governor says, 'I cannot do anything about it.' So how, if you are accountable to the Governor, is the Governor – or, should I say, his PA – writing to complainants, saying, 'I cannot do anything about it, you have got to go to court.'?

365 *Mrs Montgomerie:* Well, that, I am afraid... This has never turned up. This is new law, this is a totally new area for everybody and up until now there have not been any problems. Nobody has ever raised it. Therefore, probably nobody has ever fully considered it. This is, I assume, why you are here to now fully consider it, but it has never been raised before.

370 **Q571. The Chairman:** In terms of it never being raised before, how many complaints have there been?

Mrs Montgomerie: Over the last 12 months, there have been nine complaints.

375 **Q572. The Chairman:** Nine complaints out of a portfolio of...?

Mrs Montgomerie: Oh, gosh, hundreds of applications. About 500 to 700. About 500 High Court, about 200 for summary courts, about that. So there are about, I think... I have not got the up-to-date figures, so that is purely a guesstimate.

380 **Q573. Mr Malarkey:** How many claims per year?

Mrs Montgomerie: It is about 700.

385 **Q574. Mr Malarkey:** A total of 700 claims.

Mrs Montgomerie: Yes.

390 **Q575. The Chairman:** I do not think that accords... Sorry, I am talking from memory, and I am getting old. My memory is failing, but I do recollect that when we had figures for Legal Aid expenditure, the numbers of cases were very significantly less than the figure that is being quoted now.

395 *Mrs Montgomerie:* Maybe. I have not got the physical figures in front of me as well. I did not know you were going to ask me about the figures. I could have checked, if you had made me aware of it. I could have told you.

Q576. Mr Malarkey: If I were to ask you to make a guess of the ones we are talking about, the matrimonial ones, and before that –

400 *Mrs Montgomerie:* Well, no, the thing is I cannot really. I have already given you a guess and it could be well off. I do not know.

405 **Q577. Mr Malarkey:** I will give you a guess that the figures that came forward were considerably lower than that – less than a hundred – over matrimonial, or round about that.

The Chairman: There were.

410 **Mr Malarkey:** When we added up the amount of different lawyers who had been given money over the 12-month period.

Mrs Montgomerie: That is a different point. That is not applications, is it?

Mr Malarkey: It was some applications. It was applications on its –

415 **Q578. The Chairman:** If we just digress for a second, what you are saying to us, in effect, is if Mr Malarkey is correct and there are 100 successful applications, and you say you have had 500, maybe 700 applications, you are only granting one in 20, aren't you? Sorry, 20%.

420 **Mrs Montgomerie:** No. I do not know what the figure is. That was on what I thought it was. It could be lower, I do not know, but I do not refuse many certificates.

Q579. Mr Malarkey: It would be helpful for the Committee if you could, after leaving here, present those figures to us.

425 **Mrs Montgomerie:** Yes, I will do so, but I did not know that you were going to ask that today. I did not know that was information that you were needing.

The Chairman: That is alright.

430 **Q580. Mr Malarkey:** I find, when we talk about the applicants and if they are refused they have a right of appeal, (**Mrs Montgomerie:** Yes.) it is a very heavy right of appeal. You have got your Deemster, your Attorney General, the President of the Law Society, a magistrate. Yet the non-applicant who wants it has got no right of appeal at all, except to the Governor. In the submission which you have circulated, under (1):

435 'The person who considers the complaint must have legal knowledge. My decisions are based on law and therefore a non-legally trained person cannot decide whether or not my decision is correct.'

440 Is the Governor a legally trained person? The only way to go for an appeal from you is to the Governor. In (1) you are stating that it should only be considered by somebody with legal knowledge, and yet the Governor does not have that legal knowledge. (**Mrs Montgomerie:** No.) So really the whole system is unfair?

445 **Mrs Montgomerie:** I think the whole system needs... Basically, these complaints have only come up within the last couple of years. The whole system has run without a complaint being levied or anything coming up.

Q581. Mr Malarkey: Does that make it right?

450 **Mrs Montgomerie:** No, it doesn't. I am not saying that it did, but I am just saying that it has not come up. Now that it has come up, then you have got to look at it and check it and see what you want to do about it, but as I say, I am neutral on this point. I have no stance to take and I do not mind if you decide that there should be some right of appeal. I do not have a problem with that. However, it has never come up before, so it is on open ground. It is new ground for both

455 **Q582. Mr Malarkey:** Are you aware of other jurisdictions elsewhere? From your submission, you said that Guernsey, for instance... London, similar. What about Jersey? You did not mention Jersey. Is that...?

460 **Mrs Montgomerie:** Jersey's system, no, is not as well... Why I spoke to Guernsey is Guernsey's system is more set up, has been going longer than Jersey's has. Jersey still does a lot of *pro bono* work and they are only just sorting out their Legal Aid system. Guernsey has been going a lot longer. That is why I contacted Guernsey.

465 **Q583. Mr Malarkey:** And Scotland? Does Scotland have the same right of appeal as we have?

470 *Mrs Montgomerie:* I do not know. I know that Scotland run a different system, whereby they have that the opponent can have sight of the certificate before it is issued, but that is different system entirely. But that again is based in regulation.

Q584. The Chairman: So you have not studied that system at all?

475 *Mrs Montgomerie:* Well, I know of it, but I have not studied it in great detail because it is going to be expensive, it is going to be altering the regulations, and my understanding was that Mr Smith had asked for a cheap and easy way of procedure.

480 **Q585. Mr Malarkey:** Sorry to interrupt you, do you think it is a cheap and easy way of procedure for the applicant who is refused, to then get involved with the Committee with the Deemster, the Attorney General, the President of the Law Society and a magistrate? That cannot be cheap for an appeal, that way? At the moment, the only appeal that Mr Smith, or anybody else would have, would be, after the Governor, a petition of dolance.

485 *Mrs Montgomerie:* Yes.

Q586. The Chairman: That led me on to something else as well, because the picture that is coming out here is you say you are accountable to the Governor, but the Governor does not appear to be able to do anything about it and just sends a letter back: 'You had better take out a petition of dolance.' So, in effect, you are not accountable to the Governor; you are accountable to the High Court.

Mrs Montgomerie: I suppose you could view it that way. The High Court could look at it and then decide whether my decision was correct. Yes, the Deemsters can decide.

495 **Q587. The Chairman:** Yes, okay, but then to institute proceedings, you need deep pockets, don't you, and long arms? Where is the equity in that? Because on one side you are saying you can appeal it, you can take it to the Deemsters informally, without incurring very significant costs. That is if you are the legally aided party. But on the other side, the non-aided party, you have to jump through a lot of hoops and incur expense, because unless you are confident and you are a litigant in person, you will incur expenses.

500 *Mrs Montgomerie:* Well, any system you are going to incur expenses, but I do not know... I can understand that you think it is unfair, and it is not fair, it is not an even playing field, so I am not arguing on that point. Basically, perhaps if we could say that I accept that, from the point of view of an unassisted person, it is an unfair system.

Q588. Mr Malarkey: Well, that is good to hear from you when we are just setting down the road today with the first public inquiry. To hear you actually saying that is actually a comfort.

510 *Mrs Montgomerie:* But, so saying, if you want to change it, there are certain safeguards that I have mentioned that you have got to be aware of by ensuring that both parties have safeguards. You cannot just go off on a tangent and go entirely overboard and let the pendulum fall in respect of the unassisted person. There have got to be safeguards on both sides.

515 **Q589. Mr Malarkey:** I feel that it is really poor on our society who have had to come to a Select Committee to sort this out, when it has obviously, in your opinion and other people's opinions, not been right for many years, and I am very confused where your position lies. This is certainly not a criticism of you – you are doing the job that you applied for – but are you a member of the Law Society?

520 *Mrs Montgomerie:* I am a non-practising member of the Law Society.

Q590. Mr Malarkey: So are you answerable to the Law Society?

525 *Mrs Montgomerie:* No.

Q591. Mr Malarkey: So why be a member of the Law Society if you are not answerable to them? You work outside the Law Society, then?

530 *Mrs Montgomerie:* Yes. Basically, I stay in because I want to. I do not have to be a member of the Law Society.

Q592. Mr Malarkey: You do not have to be?

535 *Mrs Montgomerie:* I do not have to be, but I was a member when I was a practising advocate and I have just kept it on because I keep in the news, I keep on finding out what is going on and I get the developments about the law. But other than that, I do not have any benefit of it.

540 **Q593. Mr Malarkey:** So you do not have any bosses, you do not take directions or information from anybody? Only the Governor?

Mrs Montgomerie: The First Deemster, when we do have one, I could ask him for advice, and I suppose –

545 **Q594. Mr Malarkey:** I am not asking who you ask advice from, but as to ‘the buck stops here’... Does the Chief Minister have control of you, because you are outside Government?

Mrs Montgomerie: No, I am outside Government.

550 **Q595. Mr Malarkey:** The Chief Secretary?

Mrs Montgomerie: No. I am outside Government, I am outside the legislative bodies and I am outside the judiciary.

555 **Q596. Mr Malarkey:** And you are outside the Law Society.

Mrs Montgomerie: And outside the Law Society, yes.

Q597. Mr Malarkey: So you stand alone?

560 *Mrs Montgomerie:* I stand alone, yes.

Q598. Mr Malarkey: Do you not think that is a bit of a powerful position to have when it comes to appeals, when there is no other form of appeal, again, than the Governor over your head, who is not a legal man?

565 *Mrs Montgomerie:* Well, it depends. You see, my job... I am not interested... I think perhaps if I explain there is one slight thing that people think about. I am only there to decide if an assisted person has a reasonable argument to present to court. I am not there to decide the issue. That is the court. I am not there to decide on whether the advocate has conducted the case properly. That is other bodies. I am purely there to decide, does this person who has applied for Legal Aid have a reasonable argument that should be presented to the court?

570 The way the regulations are at the moment, my duty is to the assisted person and to no other person. I am not interested in the other party. The other party who is not legally aided is not part of my remit. If you want to bring that person into my remit, then you will have to amend the Legal Aid regulations in some form or other so that either, as in Scotland, I have to contact the opposing parties and say, ‘What do you think about this?’ or ‘This is what I am going to do – what do you think?’ or however the way they do it.

580 **Q599. Mr Malarkey:** You *do* know how the Scottish system works, then?

585 *Mrs Montgomerie:* Vaguely. I do not know it perfectly and I could not answer questions that you asked me about it. I do know that is the bare bones of it, but that is all I know, are the bare bones. Or you could alter the regulations so that the unassisted person also has a right of appeal and then they are brought into the ambit, but at the moment, the way the regulations stand, I do not owe them a duty and by way of trying to assist in some way, we instituted these proceedings whereby they can write in and I get the information from the advocate and then reach a decision.

If perhaps I can tell you of those nine complaints, six of them were in respect of financial aspects of a case alone and not the legal merits test.

590 **Q600. Mr Malarkey:** I think that is quite an important factor here, because certainly from
some of the letters I have read, a lot of them are in respect of financial matters, where one minute
somebody is not entitled to Legal Aid and then gives their job up and goes forward specifically to
get Legal Aid, and then the other party wants then to give their evidence to you and really is not
595 allowed to give that evidence to you or give that evidence to any other panel to say, 'Well, excuse
me, but yes, my wife or husband had a job yesterday but today she doesn't have a job because she
wants Legal Aid. Yesterday she couldn't have it, but she jacked the job in to get Legal Aid.'

From a Legal Aid and from Government's point of view and a money point of view, that is not
very helpful, is it? Surely there must be a right of the person who knows the facts to present to
you.

600

Mrs Montgomerie: Well, if I say on the financial side, these people have... The six complaints
on the finances that I have received have been from members of the public who have written in to
me. On those, one of them was, in actual fact, an anonymous letter – no name, no address – who
said that somebody should not have been on an automatically qualifying benefit, either FIS or
605 Income Support. We made enquiries of the DHSS and their application was above board and quite
correct. Therefore, I could not write back to them, because I did not know who it was, but that
person stayed.

We had two cases where people complained that somebody was on an automatic benefit, and
in actual fact, one of those, as a result of what this person told us, the Legal Aid was withdrawn.
610 The other one, somebody wrote in to say that they should not have Legal Aid, and in actual fact
we had redetermined that person 10 days earlier and had stopped the Legal Aid, so although the
person actually wrote in to say they should not have it, we had already discharged the certificate
10 days before we received the letter of complaint. Whilst we would then have followed that
through, we had already done that in any event, so it was unfortunate that the two lots had crossed,
615 but that had gone by the board.

In one other, after I had approached the advocate acting for the person who was in receipt of
Legal Aid, they have now decided not to continue it any more, so that has gone by the board as
well.

So in actual fact, out of the six that have been financially based, we have got two that are still
620 progressing, one we are still making enquiries and one we do have the information but the person,
although they gave their name, did not give any address at which to contact them, so I just have to
wait until they write in again and say, 'What's happened? Why haven't you written to me?' Then I
can contact them, but until they do that that has just got to sit there, and then I can tell them what
the situation is.

625 So out of those nine, six were purely financial matters. Out of the other three, it was a mixture
of finance and merit. Out of those, two are continuing. One has almost concluded and one has only
just started this month and the third one has been completed.

Q601. The Chairman: There was something you said there which set a hare running in my
630 mind. You said, and I apologise if I made a note of it wrongly, but you said, 'I am not there to
decide whether the advocate has conducted the case correctly.'

Mrs Montgomerie: That is correct, yes.

635 **Q602. The Chairman:** How do you square that with the application of the merits test?

Mrs Montgomerie: The merits test is whether this person has a reasonable argument to present
to the court, not how their advocate deals with it.

640 **Q603. The Chairman:** I think that is a very fine nuance, if you don't mind me saying.

Mrs Montgomerie: It is set out in a book on Legal Aid by two well-known writers, so I am
afraid I would bow to the two gentlemen who have written that book and have expertise on Legal
Aid.

645

Q604. Mr Malarkey: I find, from the last conversation we had when we discussed family
matters where Legal Aid had been given to one party by several different solicitors, where they
had gone from one to another to another, where they have said, 'Well, I won't take your case on
and I don't think you should have Legal Aid and I don't want to take the case on,' then they go to
650 another one who turns round and says, 'Yes, okay, I'll take the case on.' It is a bit of a

contradiction of what you have said on where the ruling comes from, because one lawyer's decision on whether he will take it, for whatever reason – it might be for the money or it might be because he genuinely thinks there is a case there... How can you make that final ruling? You have had maybe two or three lawyers down the line refusing to take your case, then you get another lawyer coming in and saying, 'Well, okay, I will take the case.' Do you check back whether this is the first lawyer they have been to?

Mrs Montgomerie: On the green forms, yes, that is sorted out. If they have applied for Legal Aid before, they have to say on the forms that they have applied for Legal Aid and then we look in our archive records and see whether or not they have applied for Legal Aid on the same subject.

Q605. Mr Malarkey: And if they have not applied for Legal Aid but they have applied to different solicitors or lawyers to take on the case, there is no trace of that?

Mrs Montgomerie: No, but then again, it is only once they come to me for a Legal Aid Certificate that the tests kick in. If they have been round about three or four people and people have said, 'No, go away,' I would not be involved in that.

Q606. Mr Malarkey: Okay, but the ones who have had Legal Aid... In the last tribunal, we had several cases where the one person had maybe had three different lawyers, all funded by Legal Aid, and for whatever reason they had moved from one lawyer to another lawyer. Do you not then step in and say, 'Why is this happening? Is it because one lawyer does not think you have a case and another lawyer does think you have a case?'

Mrs Montgomerie: They have no right –

Q607. Mr Malarkey: Could that be means tested?

Mrs Montgomerie: Basically, a person does not have any right to have a transfer of a certificate. That is within my discretion. So if somebody seeks to have a certificate transferred, I have to find out and get a report as to why they are getting this done. If it is that there is now a conflict and somebody has got a conflict, then obviously that does not mean that their case is no longer any good. It means that there has been a conflict with a lawyer. Sometimes people will fall out and will find out...

So if, say, somebody has fallen out with their lawyer and wants to go somewhere else, then I find out why they fell out. Was it because they were not prepared to accept the advice? If that is the case, they do not get Legal Aid, they do not get it transferred. Quite often, it is just generally that there is a personality clash. If there is a personality clash, again that is not affecting the right or wrongs of the person's case, it is just that there is a clash between them.

Q608. Mr Malarkey: I do not want to go down the past history of the last Committee. It was just that the merits testing I was trying to get to, where you are doing the merits testing and yet it could have passed through three different lawyers before it got to you.

Mrs Montgomerie: We continue doing the merits testing. Just because you get a Legal Aid Certificate, it does not mean that it carries on forever. I do check that it still passes the legal merits test and if they want amendments, I will make sure that it passes the legal merits test before I amend. So I do monitor. If you get Legal Aid in 2009, you are not still getting it in 2011 unless your case still passes the legal merits test.

Q609. Mr Malarkey: I think the point I am trying to make is that the non-assisted person on the merit test side says there is no case to answer here (*Mrs Montgomerie:* Yes.) and you have a situation where it has gone through maybe three lawyers, and then suddenly one lawyer has decided yes, there is a case to answer –

Mrs Montgomerie: Well then, if the other two had said no, there would not have been a Legal Aid Certificate, so maybe they have been privately... It could have been that they have been privately advised and then they have run out of money and come to Legal Aid. I do not know, but as far as the Legal Aid is concerned, they cannot just go from one to the other without there being a test.

Q610. Mr Malarkey: The point I am coming back to is that the non-assisted party has no right to appeal that decision. (*Mrs Montgomery:* No.) That is what I am getting back to, although the assisted one –

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Mrs Montgomery: Yes, that is what we said. If you want to change the system so that every time there is a transfer they can come into that again, that is for you to amend the regulations and to do that.

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Q611. The Chairman: In your paper... and I have to say, if you do not mind, I did not think it particularly helpful that the Committee had got these papers the day before, because it was quite late last night by the time I opened my e-mail, so I apologise that we have not had a chance to go into it in as much depth as I would have wished to do.

725

Mrs Montgomery: Well, I am sorry, but I have also been very busy and that was the first opportunity that I had to deal with it.

Q612. The Chairman: I am just putting that down. What you say is:

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‘Under the Legal Aid Regulations I can ask the Nominated Advocate for any documents or information which I consider to be necessary...’

Mrs Montgomery: Yes.

735

The Chairman: How often is that done?

Mrs Montgomery: When the first comes in, if they want a certificate, and also when they want to amend it... because what happens is, I will issue a certificate and it will be limited to certain steps. When they want to have the certificate amended so that those steps are taken away and they do a next step, I will then seek again for further information. Or if, say, a certificate has been issued to close a pleadings and they then want to go on further, then I seek the pleadings to see what has been said by both sides.

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Q613. The Chairman: So you would actually seek or ask the advocates to substantiate what they were telling you with documentary evidence, then?

745

Mrs Montgomery: Yes.

Q614. The Chairman: Moving on, I think really we have addressed quite a significant number of issues here and there seems to be a commonality of opinion emerging, if I could just put it that way. With the benefit of your experience, it has come to your view now that the present system is wrong.

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Mrs Montgomery: I would not say it is wrong, but it needs updating. This system was put in in the 1970s and it was not actually significantly changed in the 1980s, and it needs to be brought into the 21st century, and I think that is what it is.

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I would not say... When it was set up, I do not think there was a problem, but life has gone on, the world has changed and the Legal Aid system has not. When I appeared in 2002 at this commission, I asked them to use the opportunity to bring Legal Aid up into the 20th century because we were still in the 19th and it has not happened, so I think this is a great opportunity for the matter to be overhauled and brought up into the 21st century.

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Q615. Mr Malarkey: But it sounds as if we have been thinking about doing this since 2002 and all we are doing is still thinking about it.

765

Mrs Montgomery: Well, the thing is there were certain... this was not one of them... about the unassisted person’s right of appeal, but there were certain things that had actually been decided by the Legal Aid Committee and then, when they heard that there was going to be a commission, they decided to leave it in abeyance rather than perhaps alter the regulations, alter everything and then the commission say, ‘No, that’s wrong,’ and you have got to do another set of alterations a couple of years later.

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775 Of course, at that time, nobody realised that it was going to take five years before the
commission gave its report. So then, after that, there were a lot of things that had to be done
urgently and they were done in 2008, 2009 and are still being done. So the most urgent matters
have now been seen to, but there are still other things that need to be done and I think this is one
that now comes into that category.

780 **Q616. Mr Malarkey:** Personally, I am quite staggered, knowing it has been talked about for
so long and so little has been done about it, and that this particular issue has never really been
addressed. I take from note (4) of your list:

'If a proposed complaint forum were to decide that my decision was wrong and my decision is reversed, that would not
be the end of the matter.'

785 An assisted person has the right to appeal against a decision not to be granted and can start the
procedure all over again.

Mrs Montgomerie: That is right.

790 **Q617. Mr Malarkey:** But the non-assisted person has no rights.

795 *Mrs Montgomerie:* Yes, but if you look at the beginning, what I said was that I made
observations as to the implications of the process first, so that is one implication. Unless you alter
the whole thing and do it properly now, this is going to be a problem that is going to come up in
the future. So that was just one thing to make you aware of, so that you are aware that that is there,
and so, when you deliberate, you do consider it as well.

Q618. Mr Malarkey: But in your own words you are saying the system is wrong.

800 *Mrs Montgomerie:* I am not saying the system is wrong.

Q619. Mr Malarkey: Simply by saying that, you are saying that –

805 *Mrs Montgomerie:* I am saying it is outdated and needs to be modernised.

Q620. Mr Malarkey: Yes, but you are saying that even if we did set up a panel for appeals
etc, they could go back to the beginning and start all the way down the line.

810 *Mrs Montgomerie:* Well, that is something you have got to see about. When you are doing the
regulations, you are going to have to make these recommendations as to what happens to the
assisted person's right of appeal. They have a right initially when I refuse. If then the unassisted
person has a right to appeal because I have issued, what happens then? You are going to have both
sides bartering. You are going to have me issuing a certificate, then the unassisted person appeals
against that. What if they are successful? Then what happens? Does the person who originally had
815 the certificate then have a right to appeal against that second decision? Where does it stop? What
happens?

820 Under the system at the moment, if you just put on a piecemeal appendage that says unassisted
people can appeal to whoever, then that is not going to work because of this right of appeal. When
you do it, you have got to do it and take this into account as well so that the two are joined
together and so that it runs on. Otherwise, you are just going to get a lot of anomalies and the
whole system is not going to work. It has got to be done properly and it has got to be done
carefully.

825 **Q621. The Chairman:** Just for the record, how long have you been the Legal Aid Certifying
Officer?

Mrs Montgomerie: Eight years. I was the deputy... I had been the deputy for 10 years and then
I became the Certifying Officer eight years ago.

830 **Q622. The Chairman:** So you have been involved with this now for 18 years. (*Mrs
Montgomerie:* No.) Sorry?

Mrs Montgomerie: No, I was 10 years ago, I was Certifying Officer –

835 **Mr Malarkey:** Oh, 10 years ago.

Mrs Montgomerie: – and then eight years ago I became Certifying Officer.

840 **Q623. The Chairman:** Okay, but you were the deputy prior to that?

Mrs Montgomerie: Yes, I was.

845 **Q624. The Chairman:** So in other words, you would have some involvement to some extent at that time?

Mrs Montgomerie: Yes.

850 **Q625. The Chairman:** I am surprised that, in view of this long involvement which you have had, very experienced, it is only now that in effect it has come to your attention that the system is not right, it is not Human Rights compliant, it should be reviewed.

855 *Mrs Montgomerie:* It is not that it is not Human Rights compliant; it is because we have had somebody at the General Registry to look at everything and to look at whether or not the regulations were Human Rights compliant, and they were. So it is not that they are in breach of Human Rights.

860 However, I do agree that an unassisted person has an argument in respect of Human Rights. Whether or not it would succeed, I do not know, but they do have a reasonable argument in it. But the Legal Aid Regulations were reviewed and were considered to be Human Rights compliant, with the exception of the Legal Aid Committee appeal, which is why that has been altered.

Q626. The Chairman: But to go back to the original thrust then, you have been aware for some time that this could be improved because it might be open to challenge –

865 *Mrs Montgomerie:* Not about this particular aspect of unassisted people, no. That has only just come up within the last, I would say, 18 months that we have had a lot of people complaining. I can think of one, maybe two, over the previous years and that is it. The fact that we have got nine, which is quite a lot compared to what we used to have, has been something over the last 18 months to 12 months, not before.

870 **Q627. Mr Malarkey:** These are more recent, the nine, then?

Mrs Montgomerie: It is a very recent – (**Mr Malarkey:** Trend.) trend.

875 **Q628. The Chairman:** I have to say I am quite surprised, but anyway.

880 *Mrs Montgomerie:* I do not see why. People are more generally... life, and people are more now prepared to argue their cases. They are more prepared to take matters further than they were, so I do not see why you are surprised that it has happened. It is obviously just another aspect of the life which we lead.

Q629. Mr Malarkey: Picking out again from your submission, the present complaints procedure, where you say you send them a copy of the letter and then you give them another option, sending to a nominated advocate for comments. You say you send the letter back:

885 ‘I also indicate that if I do not hear from them within 14 days of that date of my letter, I shall assume that they no longer wish to pursue the matter.’

Mrs Montgomerie: Yes.

890 **Mr Malarkey:** So you close the books on it at that stage, then?

Mrs Montgomerie: Well, yes, if they do not follow it up.

895 **Q630. Mr Malarkey:** Within 14 days.

Mrs Montgomerie: This is for the vexatious, because we do have one or two vexatious people who will write in and then that is it and they never write back. But the people who really are interested do write back.

900 **Q631. Mr Malarkey:** Yes, it just concerns me slightly because of the submissions we have, an awful lot of them have got several comments about the amount of time it is taking letters, if any, to be sent back from your office, and certainly well outside the 14-day period. It seems rather a rule for one and not a rule for the other here, if you do not mind me saying, because most of the letters that I have read are complaints about non-replies to comments or letters sent, letters being replied to up to a month later – certainly timescales way outside 14 days – and yet you are putting a strict 14-day timescale upon letters that you send out to them. Do you think this is, again, fair?

Mrs Montgomerie: Yes, for the vexatious. If people –

910 **Q632. Mr Malarkey:** But you do not know if they are vexatious or not.

Mrs Montgomerie: But if they write in... Other people have written in after the 14 days and I have dealt with it, so I do not strictly... If somebody wants to write in and follow it up a couple of weeks later, I still deal with it, so it is not as if I strictly use it against '14 days and if you write on the 15th day that is it, I don't follow it up'.

915 **Q633. Mr Malarkey:** But you were a lawyer, and most people writing to you are not lawyers and they probably cannot afford to get lawyers. That is why they are writing to you directly. So they have to sit down and get every bit of help and guidance and whatever they have to put this letter together. I certainly know – I am not a lawyer – when I have to do stuff within Government, I can take quite a little bit of time to get my evidence together to make sure my facts are right, because I do not want to send anything wrong, because I am not a lawyer –

920 *Mrs Montgomerie:* Well, no, what I am asking... It is the 14 days if they let me know if they are going to... if I agree. In that letter, I am saying, 'Thank you for your letter of complaint. May I send that copy of that letter direct to the advocate, or do you want me to paraphrase it? Please let me know which option you want.' That is all I am asking for, a reply in 14 days to that. Then some people come back and say, 'You can send the copy of it,' and I send it off. Other people say, 'No, please paraphrase it,' and then I paraphrase it. So it is not as if I am... It is not rocket science that I am asking them to do. I am asking for option 1 or option 2. That is all. Press button 1 or press button 2. That is all I am seeking.

925 **Q634. Mr Malarkey:** It is just that the timescale seems a bit harsh.

Mrs Montgomerie: Well, if you really... Whatever happens, it can always be extended if you feel that it is necessary to. I just put that on because I do everything for 14 days. If I ask for a reply from anybody, I say 14 days.

935 **Q635. Mr Malarkey:** It is a bit dangerous putting that down when the rest of the letters I have read are saying they have not replied within a month and some saying you have not replied whatsoever. That is the reason I have picked up the 14 days.

Mrs Montgomerie: Really? Perhaps you could let me know the names of the people to whom I have never made a response.

945 **Q636. Mr Malarkey:** We are not here, Mrs Montgomerie, to discuss individual cases, so I would not be prepared to do that.

Mrs Montgomerie: Right, fine.

950 **The Chairman:** Could I maybe ask Mr King.

Q637. The Clerk: Thanks, Mr Chairman.

955 Could I ask just a practical question, or a factual question, going back to earlier on. We were talking about the right of appeal of the assisted person or the applicant for assistance, a right of appeal to the Legal Aid Committee. Is that right of appeal enshrined in the regulations?

Mrs Montgomerie: It is, yes.

960 **Q638. The Clerk:** And is that under part 1 of the Legal Aid Act?

Mrs Montgomerie: It is under the general regulations.

965 **The Clerk:** Right, okay.

Mrs Montgomerie: Where it says... Regulation 13, I think it is, but it actually sets out the right of appeal. If you look at the general regulations, there is a section that has right of appeal and it is only in respect of the legal merits test. It is *not* in respect of the financial assessment. There is no right of appeal by the assisted person in respect of a financial assessment. However, they have now, since 2008... if Legal Aid is refused on a financial basis, they can ask me to review it.

970 **Q639. The Clerk:** Yes, thank you. You mentioned that in your written evidence last time round, so that is fine.

975 Could I ask you just to comment on the secrecy issue in section 14 of the Legal Aid Act 1986, because there has been a mood in the room on both sides of the table so far in the discussion that it would be possible to put in place a right of appeal for the opponent of the assisted person, but one of the pitfalls with making that work (*Mrs Montgomerie:* It is –) and making it satisfactory –

980 *Mrs Montgomerie:* Section 14 is going to be very, very awkward and very, very difficult and I cannot see any easy way out of it. Basically, as I have set out there, we have client-lawyer confidentiality so that the lawyer can claim professional privilege against not revealing certain documents to other parties.

985 In the Legal Aid Act, I can demand anything that I feel that I need and the lawyer cannot claim professional privilege against me. So therefore there has already been an inroad into the client confidentiality because I get the information. Then where does it stop? It has got to stop somewhere, so section 14 has put down that I cannot give out any details of the case unless I have the consent of the assisted person and if the advocate or any third party has provided information to me, the consent of that person or the advocate as well.

990 So that means that the assisted person still has the benefit of the client-lawyer confidentiality; however, I am also included in the picture.

995 This is one of the reasons why I know it is very frustrating. I am sure it is for the unassisted person. It is also very frustrating for me when I have to write back and say to them, 'This is why I have decided Legal Aid is still available.' If I could say it is because (a), (b) and (c), it would be a lot easier. I could explain it. I do not know if the other person would accept it, but at least they have got a full explanation. At the moment, I cannot do that, so all that person gets is my, 'No, I am not going to alter it and I cannot tell you why,' which I can understand is very frustrating. If it happened to me, I would feel equally bad about it.

1000 However, the thing is how do we get round that? It is a statutory bar. I cannot reveal anything. It is a blanket secrecy clause, so I cannot pick and choose if I tell certain people certain items and I withhold certain items. I cannot tell anybody anything, and that is an end to the matter.

1005 So what would have to happen is to make some sort of a system work for the unassisted person, there would have to be some alteration of section 14, which means that perhaps if... Say you have a tribunal. Say, for argument's sake, a tribunal is set up and the unassisted person can apply to that tribunal for them to review my decision as to the issue of a certificate. If I explain to the tribunal why I have reached that decision, I might have to mention and reveal information which is subject to the professional privilege. If I give that to the tribunal chairman, there would have to be an inroad into section 14 and section 14 would have to be amended by Tynwald to allow me to do that.

1010 What happens then? I give the information to the tribunal chair person and say, 'This is why I made that decision.' When that tribunal has reached a decision and is going to give its decision, what if their decision is based on some of that qualified information? What happens then? If they tell the unassisted person the reason why they have reached whatever decision they reach, they may be in breach of section 14 because they may have to tell the appellant something that is subject to professional privilege. That is the problem: where does section 14 stop and how do we

1015 get around it? I have given some thought to this and I do not know. I do not know how to get
round it.

Q640. The Clerk: Do you think, if there was a risk, from the point of view of the person
1020 applying for Legal Aid... if they knew that such a system as you have just described was in place
and there was a risk that in the context of an appeal their information could go to the other side, do
you think it would reduce the number of Legal Aid applications?

Mrs Montgomerie: Yes.

1025 **Q641. The Clerk:** Do you think it would be Human Rights compliant?

Mrs Montgomerie: No, I do not think it would, because they have a right of privacy and there
is also... one of the sacrosanct stones of most jurisdictions is that there is client privilege. It is
going to the heart of the matter and it is a very difficult question. I have given it some thought as I
1030 was writing this out and everything. I cannot see a way round it. I just cannot. There might be
some QC in London who can think of it – that is fine, but at the moment I cannot see any way of
getting round that.

Q642. The Clerk: While people are pondering it, can I just come back to the right of appeal
1035 which is enjoyed by the assisted person. Their appeal can go to the Legal Aid Committee. (*Mrs
Montgomerie:* Yes.) There is no problem with privacy of information in that case?

Mrs Montgomerie: No, because there are actual rules of court that say that privilege does not
1040 apply to members of the Legal Aid Committee, so that anything that they sit in can be seen.

Q643. Mr Malarkey: So you are basically saying that only lawyers are capable of keeping
things secret and no other committee is capable of doing it?

1045 *Mrs Montgomerie:* At the moment, that is the way the law is stated.

Q644. Mr Malarkey: But what you are actually saying is if there was a tribunal sitting here
and we were not lawyers and we were privy to information to make a decision, we could not be
entrusted to keep that information to ourselves in making our decision.

1050 *Mrs Montgomerie:* The thing is, what if you base your decision on that information?

Q645. Mr Malarkey: As long as it did not go outside the room, we would make a decision
back saying that we withhold because of information we have been given.

1055 *Mrs Montgomerie:* That is fine –

Q646. Mr Malarkey: It then takes it... At the moment, I am sorry, you are sitting as God, as
being the only persons privy to all this information, and you are saying that nobody else can have
it. You are saying that a committee of maybe... I do not know... I am not saying, in our particular
1060 case, MHKs or whatever, but it could be a lawyer, a doctor and somebody else sitting here as a
panel, listening to evidence that you are putting forward why you have made the decision you have
made, and we can go along and say, 'Yes, we agree with it.'

At least those people who are complaining that they have got no right of appeal could do that
quite cheaply and know that somebody other than you has listened independently to evidence and
1065 drawn the same conclusion as you, or even a different conclusion. At the moment, they have not
got that right.

But the only obstacle you seem to be putting in the way is this section 14, the confidentiality,
which is really only implying that lawyers are the only people who can keep confidentiality, as far
as I am hearing, no other panel could do that. I think it could be done quite simply without being
1070 exploited.

Mrs Montgomerie: I am sorry, but I found that offensive.

1075 **Mr Malarkey:** I am sorry you do, but I just –

Mrs Montgomerie: How dare you assume that, just because I am a lawyer –

1080 **Q647. The Chairman:** Now, come on. I will not have that in my Committee. You are entitled to your opinions. Let's move on. Thank you.

Mrs Montgomerie: No. Can I just say... and I am not being rude. I am not saying anything. What I was saying is that that is a problem that has got to be addressed. I did not say that the tribunal could not do it. I was not casting any aspersions on the tribunal at all.

1085 **Q648. Mr Malarkey:** Okay, if you find it offensive, I apologise, but my reading of what you were saying was that lawyers were the only people who were capable of keeping this within their own circle.

1090 *Mrs Montgomerie:* Well, I am sorry if I have been rude as well.

Q649. Mr Malarkey: Let's agree to disagree, then.

1095 *Mrs Montgomerie:* Let's forget about that and yes, agree to disagree. I am not saying that at all, but there is one thing at the moment that has to be dealt with. The thing is I am not arguing, if you were the tribunal, that you could not do that, but at the moment, you cannot.

1100 **Q650. The Clerk:** May I just briefly, Mr Chairman... Would it be right to say that when we talk about the right of appeal of the assisted person, whether it is to the Legal Aid Committee or another tribunal or an ombudsman or anybody, the issue of secrecy does not really arise. My question was a technical one – as far as it is covered in the legislation – but the substantive issue does not really arise because it is all within the same appellant, it is all the same person. If you are the applicant and you apply to Mrs Montgomerie and you do not like the decision and you apply to the Legal Aid Committee, you are not drawing in information from another party. I think that is the crucial difference, because in the new proposal you talk about a right of appeal for the other side and that is where the boundaries of secrecy become –

1110 *Mrs Montgomerie:* Yes, and of course, unfortunately what happens is that you have two parties and they are both ultimately, unless they mediate or they settle, are going to go to court, and the information they get from each other, if it is privileged, should not be used, but there are problems there.

So that is why I was saying about the tribunal, because unfortunately... To be quite honest, I do not care who sits on the tribunal, but I do not think that there is any difference between me explaining to an unassisted person or somebody on a tribunal, because you still have this problem, that section 14 will preclude you from giving a full and satisfying and satisfactory...

1115 Sorry, but say, your case, you are the tribunal, and you have decided... If you say, 'Right, we have reached this decision, but we are not telling you some of the reasons because they have got to be kept inside this room,' is that going to satisfy the unassisted person?

1120 **Q651. Mr Malarkey:** I think it would.

Mrs Montgomerie: Do you?

1125 **Q652. Mr Malarkey:** Most definitely I think it would. (*Mrs Montgomerie:* Right.) Because at the moment they go from you to the Governor. There is absolutely nowhere else to go, and all they want is somebody independent, away from you, away from the Governor, to sit and listen to the evidence. They might understand it is totally confidential, but they just want somebody outside to say, 'We have listened to the evidence, the tribunal is absolutely convinced that the decision made was correct. We cannot divulge why.'

1130 I think in 99.9% of cases they would walk away thinking, 'Okay, they must know something that I don't know. End of story.' It is that not knowing. It is that one person being in that strong position and nowhere else for them to turn, and that is where the frustration, I think, is coming from.

1135 *Mrs Montgomerie:* Is that as opposed to me not telling them?

Q653. Mr Malarkey: It is not the not telling; it is the not having the chance that somebody else can look at it from a different set of eyes and say, 'Okay, it was right, it was wrong, I believe you.'

1140 **Mrs Montgomerie:** I have always been under the impression it is the fact that I cannot tell the people that has been the problem and has been why they have had problems with it, because I have just had to say, 'I agree with what I did the first time round. I cannot tell you why.'

1145 **Q654. The Chairman:** I would suspect, really, that this might take quite a few complaints off your desk, because you can say, 'I know you are not happy, but this is the next port of call' –

Mrs Montgomerie: Yes, that is fine.

1150 **Q655. The Chairman:** So then people could be satisfied that the case had been independently reviewed and then they could... even if they did not get the decision that they had hoped they would get, at least they would know it has been reviewed independently.

1155 **Mrs Montgomerie:** That is fine. As I say, I do not have any personal problem with it at all. As you say, probably you would make my life a bit easier, so it is not as if I am having a problem with it.

1160 **Q656. Mr Malarkey:** This does not just lie with you. It lies in the likes of planning. When a planning appeals officer makes a decision, the only next place to go after that is a petition of dolence and that makes people quite bitter as well. It is just not having another non-financial step to take.

1165 **Mrs Montgomerie:** I think perhaps that is something that again, if our systems are brought into the 21st century... I think that is something of the 20th century and even earlier that has not yet been reviewed and brought up to date.

Q657. Mr Malarkey: We keep talking about Human Rights and this is another step forward, as far as I can see, on Human Rights.

1170 **Mrs Montgomerie:** Yes, as I say, the regulations were considered to be Human Rights compliant, but I can see the unassisted person's part of it. They would consider that their Human Rights had not been considered.

1175 **Q658. The Chairman:** I think that is it from our side. Is there anything that you want to mention to us?

1180 **Mrs Montgomerie:** No, other than my usual plea is if you decide to change it... and as I say, if you do, I do not have a problem with that, but please do look at everything. Please follow everything through, because I am afraid, if not, then we get problems maybe 12 months down the line, and if something is thought through thoroughly and thoughtfully then that is a great help.

Q659. The Chairman: Yes. I would just say though that we do not decide to change. We make recommendations.

1185 **Mrs Montgomerie:** Yes, I know, but if your recommendations follow it through as well, then that is a great help, because there is nothing worse than having a half thing. Again, I do apologise if I was a bit sharp. I did not mean it personally, but, as I say, I am not a great... I do not consider myself to be a God or a great lawyer sitting on high.

1190 **The Chairman:** Thank you very much. We will now adjourn. The Committee is sitting again in public on 26th August, when we will be taking further evidence, but thank you very much. I adjourn the meeting for today.

The Committee adjourned at 3.35 p.m.