



Cayman Islands

**SPECIAL REPORT OF
THE AUDITOR GENERAL**

ON THE

REVIEW OF THE LEGAL AID PROGRAM

**Office of the Auditor General
Cayman Islands
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REVIEW OF THE LEGAL AID PROGRAM
TABLE OF CONTENTS

Executive summary 1

Background and description of the Legal Aid Program..... 3

About the audit..... 5

 Objectives..... 5

 Criteria..... 5

 Approach..... 6

 Clearance 6

Audit Findings 7

 Legal aid costs are relatively stable 7

 Legal aid legislation requires additional guidelines for implementation 9

 Applications are processed with appropriate controls in place 11

 Information for legal aid applicants could be improved 12

 Appeal process needs strengthening..... 12

 System for allocating legal aid cases not working properly 13

 Better management of legal aid costs needed 15

 Legal Aid Program has not been sufficiently funded..... 18

 Legislative Assembly has not been provided with good information 19

Conclusion..... 21

REVIEW OF THE LEGAL AID PROGRAM

Executive summary

1.01 I conducted a value-for-money audit of the Legal Aid Program (“the Program”) as a result of concerns raised about its management by the Chief Justice. My audit focused on the current Program operated by the Judicial Administration of the Cayman Islands Government, and did not consider the various options for how the program may be delivered.

1.02 The Program costs approximately \$2.0 million a year to operate. Of the amount spent, about \$1.8 million is used for attorneys fees and external costs associated with meeting the requirements of the *Legal Aid Law*. The remaining amount is spent on program administration. We found that these expenditures have been relatively stable over the last five years after per diem fees paid to participating attorneys were increased six years ago; resulting in an approximate 35% increase.

1.03 I concluded that the Program is managed in accordance with the *Legal Aid Law* by the Judicial Administration, though it does not have sufficient guidance in place for processing legal aid applications and payments on a fair and consistent basis. I also found the process for assigning attorneys to cases was not working as it was designed. I believe my recommendations would provide for more transparency in the application process and ensure fairness when assigning cases to attorneys.

1.04 Administration costs for the Program are relatively small; less than \$150,000 annually.

1.05 The Judicial Administration uses manual record keeping to record incoming applications. The application administration process would benefit from being automated to provide better information for management. Through automation, management would also have better information on the progress and status of individual legal aid cases.

1.06 When approving applications, there is no information captured relating to the estimated costs of the legal aid cases. More importantly, such basic information as the cost of individual cases and the breakdown between civil and criminal costs is not tracked, monitored or reported. As a result, management does not have sufficient information to effectively manage the Program. For example, management cannot determine if it is in compliance with its spending limits during the year nor can it effectively forecast future expenditures. Furthermore, the Program has been managed on a cash basis of accounting in contravention of the *Public Management and Finance Law (2005)* that requires management to use the accrual basis of accounting. This has resulted in management and the Legislative Assembly having inadequate financial information to do their jobs.



1.07 I found an absence of useful performance information, including appropriate and measurable outputs, for use by the Legislative Assembly to review the Program results. Without this information, it is not possible to determine the effectiveness of the Program and make the changes necessary to its management on a timely basis or to examine options on how the Program could be delivered more efficiently. The only information being provided to the Legislative Assembly on a regular basis is the total expenditures on a cash basis of accounting.

1.08 I also found shortcomings with the process for funding the Program. Initial budgets over the last five years have consistently not provided sufficient funding for the Program to be delivered in accordance with the Law. Moreover, as part of overall government spending estimates, these initial budgets for the Program have been misleading to the Legislative Assembly even though these are statutory payments that can be easily forecasted from past experience. Approximately \$1.0 million was missing from initial budgets in recent years and approximately \$1.5 million from the most recent 2009/10 budget. The lack of sufficient funding has resulted in legal spending limits being exceeded and attorneys' invoices being paid over six months late.

1.09 This audit began in early December 2009 and concluded its fieldwork in late January 2010. My audit team received excellent co-operation from the officials in the Judicial Administration and from the Chief Justice resulting in our ability to conduct and report this audit in this relatively short timeframe. I would like to thank them for the time and effort they took to do this.

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March 16, 2010



Background and description of the Legal Aid Program

2.01 Why we conducted this audit In November 2009, the Chief Justice of the Cayman Islands, the Hon. Anthony Smellie, wrote the Office of the Auditor General regarding concerns he had with information being used by the Legislative Assembly that seemed to indicate the Legal Aid Program (“the Program”) was being mismanaged. He was concerned that the information about the Program was inaccurate and misleading for decision makers. From his understanding, the information being used was not produced by the Judicial Administration.

2.02 In the letter, he suggested that an audit by the Office of the Auditor General would provide the Government the kind of independent assessment needed to evaluate the various options for program delivery. He also believed that more accurate information about the current program and how well the Program was being managed would benefit the Legislative Assembly.

2.03 We met with the Chief Justice on December 2, 2009 to discuss his concerns. After understanding the benefits an audit could have for the Members of the Legislative Assembly as they contemplated options for how it might be managed, we agreed to do it as a priority.

2.04 In early December 2009, the Government announced the formation of a Legal Aid Review Committee to examine and report on a number of issues related to the delivery of legal aid services. The Committee was chaired by Cheryl Neblett, the Director responsible for the Law Reform Commission. The Committee’s terms of reference required it “to carry out a complete audit of the present legal aid scheme as is now administered by the Judicial Administration”.

2.05 We met with the Committee on December 16, 2009 to discuss our audit plan. We agreed that our audit of the Program could be used by the Committee to satisfy its terms of reference and that we would share our findings with the Committee as they convened in the early part of 2010. On February 2, 2010, the audit manager in charge briefed the Committee on the audit’s main findings.

2.06 How the legal aid program operates The Legal Aid Program is governed by the *Legal Aid Law (1999 Revision)* and is managed under the jurisdiction of the Judicial Administration of the Cayman Islands. The Court Administrator, who is also the Chief Officer of the Judicial Administration, is responsible for the management and delivery of the Legal Aid Program.



2.07 On a day to day basis, the Program is administered by a single legal aid officer within the Judicial Administration. This individual reports administratively to the Senior Deputy Clerk, who has no direct responsibility for managing the Legal Aid Program. Her duties include explaining the program to prospective users, the receipt and logging of applications, managing the approval process, assigning attorneys to cases, managing any backlog of applications, and maintaining a filing system. Over the past two years, the Chief Justice, in order to ensure greater consistency in the decision making process has been mainly responsible for reviewing the application forms and approving those that meet the criteria specified in the legislation. The other judges and magistrates have also decided on various applications and are expected to continue doing so until the policies of reform are settled. The Clerk of Court is responsible for the review and approval of invoices from participating attorneys.

2.08 The application includes an affidavit of means which is required to be completed by the applicant. Applicants must swear to this affidavit and give full details of their means. This enables the Chief Justice, judge or magistrate to decide whether they qualify for legal aid. Legal aid applications can be for both criminal and civil actions. In the case of criminal actions, there is a list of “scheduled offences” in the Law that entitles the applicant to legal aid if they meet the means test. For civil cases, to qualify there must be a very clear and important action where the Chief Justice is satisfied that a litigant will not be able to get justice without legal aid. Normally divorce cases are not funded except in circumstances where the welfare of a child is at risk or there is a threat to the personal safety of the litigant.

2.09 The process used to record the information for the administration of applications and ongoing case management is done manually. This precludes obtaining financial information and performance data from Justice Administration records. Since 2004, the Judicial Administration has been recording applications both in a manual log and, later in the process, in an excel spreadsheet. We were informed that Judicial Administration has a plan for the development of additional case management tools including the capture of more financial information, but that this project has not yet started due to the uncertainty about the Judicial Administration’s future role in the delivery of the Program.

2.10 Attorneys who are listed on an approved roster are, to the extent practicable, assigned by the legal aid officer in the sequence they appear on the roster to ensure equity in the process. Once the case is complete, the attorney invoices the Judicial Administration and the Clerk of Court reviews and approves each invoice for reasonableness before they are sent for payment.



About the audit

Objectives:

3.01 The objectives of the audit were:

- To determine whether legal aid funding is properly distributed to those who are entitled to receiving it; and
- To determine whether program results for the legal aid program are fairly reported

3.02 The focus of the work was on how efficiently and effectively the current process is managed. The audit did not assess alternative program delivery schemes nor did it look at economy of the current program expenditures (i.e. the costs of hiring lawyers to provide legal aid services). They were not part of the scope of the audit. However, we reviewed and assessed the costs associated with administering the program.

3.03 The audit was limited to the review of the requirements under the current legislation and associated regulations.

Criteria:

3.04 The criteria that were agreed to by Judicial Administration and discussed with the Legal Aid Review Committee for this audit were:

1. Eligibility requirements are clearly documented and communicated to prospective users of the legal aid system.
2. Eligibility requirements are applied consistently for all applications for legal aid.
3. The process for assignment of legal aid resources to individual cases is fair and consistently applied.
4. Controls are in place to ensure that payments to legal aid resources are made in accordance with the existing rules and that contributions by applicants are properly processed.
5. Legal aid payments are timely, accurate and being made in accordance with the rules.
6. Reporting of results fairly reflects the activities of the legal aid program.

Approach:

3.05 Our audit relied on information from several sources including:

- Interviews of individuals involved in the various processes of the Legal Aid Program
- Review of documents, legislation, previous studies, operational manuals
- Documentation of key processes in the current Legal Aid Program
- Review of sample legal aid files for compliance with the process
- Review of sample legal aid payments
- Review of program data and information produced by the Legal Aid Program

Clearance:

3.06 The clearance of this report, including receipt of comments and responses from the Judicial Administration to the recommendations, was carried out within the expected timeframes. The co-operation of the officials in Judicial Administration contributed greatly to the timely conduct and reporting of this audit report.



Audit Findings

Legal aid costs have been relatively stable

4.01 Program expenditures: Our audit of the Legal Aid Program only extended to its activities over the last two years. However, to put that activity in context, we requested expenditure data for the last five years. We did not audit these amounts as part of this review. The amounts up to 2007/08 were reviewed as part of our audit of the financial statements of the Judicial Administration.

Table 1: Legal Aid Program expenditures for last 4 ½ years

Year	(\$000)		
	Program Expenditures	Contributions by Legal Aid Clients	Net Program Expenditure
2005/06	1,543	27	1,516
2006/07	2,067	61	2,006
2007/08	1,877	112	1,765
2008/09	1,931	82	1,849
2009/10 (to 31/12)	712	Not available	712

4.02 We used financial information provided by the Judicial Administration. It is based on cash expenditures only and does not reflect the amount invoiced by attorneys or the amounts incurred by attorneys for cases in progress.

4.03 We requested a breakdown of the Program expenditures between criminal and civil cases. We were informed that the accounting system does not break down the expenditures in this fashion and that the records maintained by the Judicial Administration do not have this information available. While we were not provided with a breakdown of the costs, we were provided with a breakdown of the number of cases in Table 2.

4.04 To conduct our analysis of the Program expenditures, we also requested a breakdown by individual cases, both criminal and civil. We were informed that this information is not captured, nor managed, and that compiling it would take a tremendous effort on the part of Judicial Administration officials.

4.05 We obtained information about the number of applications processed and applications approved by the Program.



Table 2: Application data for the last 4 ½ years

Year	Criminal		Civil	
	Applications Made	Applications Granted	Applications Made	Applications Granted
2005/06	156	146	119	61
2006/07	237	213	222	140
2007/08	177	160	217	113
2008/09	173	133	223	92
2009/10 (to 31/12)	172	136	151	53

4.06 We noted, from the information provided, that the expenditures for the last five years have been relatively stable while the activity fluctuated. This is especially true for criminal cases. However, there is a limit to the number of court cases that can be handled by the courts which explains the “smoothing out” effect on the expenditures. While costs have remained stable, there have been a number of “upward pressures” on the costs of operating the Legal Aid Program. Some of these are discussed below.

4.07 In 2006, the Chief Justice directed that two Grand Court criminal trials per week were required to deal with a backlog of indictments that existed at that time. This impacted the expenditures for 2006/07 as can be seen in Table 1. The Clerk of Court informed us that the efficiency of trying the cases in the courts improved as cases were moved through the “system” more quickly. This improved the timing of trials and ensured that defendants were being tried within a reasonable period.

4.08 The rate paid to lawyers for performing legal aid services was last increased in 2003 to \$135 per hour from \$100 per hour. The rate of pay applies to all attorneys regardless of their experience or the nature of work they are asked to perform. For example, a Queen’s Counsel gets the same rate of pay as a lawyer who has been just called to the bar. While the rates of pay to lawyers have remained stable, we were informed by Judicial Administration that the cases being tried in recent years are getting more complex. As part of the audit, we were provided with information that supports this notion. For example, there is evidence that more recent criminal trials require more expert testimony. We believe that the increased complexity has created upward pressure on the expenditures of the Program.

4.09 The Law Reform Commission conducted a review of the Legal Aid Program of the Cayman Islands and reported its results to the Legislative Assembly in July 2008. The Commission conducted what it called “a substantive review” of the legal system in the Cayman Islands between October 2005 and February 2008. It looked at how legal aid programs are delivered in other jurisdictions and compared the Program in the Cayman Islands to those provided elsewhere. The report, published in July 2008, concluded that the “the present system of provision of legal aid services by the private bar in general offers good value-for-money”. Based on our review of the Law



Reform Commission report and corroborative information we have reviewed as part of this audit, it would appear that this conclusion is both reasonable and plausible.

4.10 Recommendation: To effectively analyze and manage the Legal Aid Program expenditures, the Judicial Administration should track how much is expended for criminal and civil cases as well as the cost of individual cases.

Judicial Administration response: *Agree. Additional resources must be allocated to create a tracking system. The Judicial Administration is attempting to automate its record-keeping system with its limited resources and within the confines of the government's global restraint initiative.*

4.11 Administrative expenditures: The cost of administering the Program consists mainly of the salary and benefits of one full-time employee and the assignment of overhead costs associated with accommodation and office operating costs. The costs reported by Judicial Administration are outlined in Table 3 below.

Table 3: Administration costs of the Legal Aid Program

	Administration Costs
2005/06	\$107,000
2006/07	\$118,000
2007/08	\$132,000
2008/09	\$145,000
2009/10	\$139,000

Legal aid legislation requires additional guidelines for implementation

4.12 The Legal Aid Program is governed by the *Legal Aid Law (1999 Revision)* (the "Law"). The Law is effectively two pages long and provides the general framework for the operation of a Legal Aid Program in the Cayman Islands. It defines, in general terms, who is eligible to receive subsidized legal aid, the nature of the application process, how the applications should be approved, how fees should be determined, the general nature of penalties for applicants who misrepresent information, and the general framework by which lawyers should get reimbursed for their services.

4.13 The Law also provides a listing of scheduled offences (criminal acts) that would permit an eligible applicant to receive legal aid.

4.14 In addition to criminal acts, the Law provides for individuals to apply for legal aid in civil cases where the individual desires to "take or defend legal proceedings in the Grand Court."



4.15 The *Legal Aid Law (1999 Revision)* revised the *Poor Persons (Legal Aid) Law (1975)* that included the *Legal Aid Rules (1997)* (“Rules”). These revisions were made by the Chief Justice with the approval of Cabinet (EXCO) in 1997. These Rules provide information around the process for the Legal Aid Program and how it is to operate. It discusses the application and approval process for both criminal and civil cases, the duties of attorneys, and the process for attorneys to be paid for their services.

4.16 We found that the Rules are still followed by the Judicial Administration and to the extent possible, documented in the Legal Aid Manual that is used by the administrators for the day-to-day delivery of the Program. The Rules, however, are now thirteen years old and require revision. The Law Reform Commission recognized the need to do this and completed a revision in 2009; however, the draft regulations they developed have not yet been approved by the Legislative Assembly.

4.17 While the Law and proposed revisions to the Rules provide good guidelines for the implementation of an effective legal aid program, we believe more guidelines are required to ensure the consistency and fairness of the program’s ongoing operations. For example, there are no guidelines for the assessment of applicants’ financial position including the amount that should be contributed by applicants for the services provided, and the amounts that should be paid for certain kinds of services from attorneys. Without clear guidelines for the assessment of applications as well as the amounts that should be paid for certain kinds of services from attorneys, we believe that it leaves more discretion to the officials who are performing the functions of operating the Program.

4.18 For civil cases, the Chief Justice exercises discretion in his assessment of the applicants’ information within the general guidelines provided in the *Legal Aid Rules*. While we expected thresholds, ranges and limits for the different attributes within the Rules the Chief Justice should consider when assessing the applications, we concluded that these were not necessary because of the procedures adopted (i.e. the Chief Justice approves all applications).

4.19 In discussions with the Chief Justice, we found out that he has developed his own practical guidelines for consideration of civil case applications in areas not covered by the Legal Aid Rules. These include, for example, whether or not in matrimonial disputes the individual or individuals affected by the case could be in danger of losing their health or safety. Other than matters such as the concerns about the welfare of children, divorce cases are not usually funded. Another example would be whether and how much the applicant should contribute to defray the cost of the service provided by the Government.

4.20 In our testing of legal aid cases discussed later in this report, we found that additional guidance would have been useful for officials, including the Chief Justice, to ensure the consistency and fairness we expected to find for the application of the Law. We were informed that such additional guidance can only come by way of legislative changes after consultation with the Judiciary.



4.21 In 2009, the Law Reform Commission drafted Legal Aid Regulations that would have provided the general guidance needed to replace the Rules that were no longer in place. The Regulations remain draft at the date of this report.

4.22 Recommendation: The draft Regulations should be reviewed, amended as necessary, and implemented to provide appropriate guidance for officials administering the Program including the determination of eligibility.

Judicial Administration response: *Agree.*

Applications are processed with appropriate controls in place

4.23 Once applications for legal aid are completed, we found that the Judicial Administration employs an appropriate framework to ensure that the applications are processed in a timely fashion and in accordance with the legislation.

4.24 The key control in the entire process as it currently exists is the review and approval by the Chief Justice of almost all legal aid applications. This control ensures a consistent and appropriate means of review of applications. While we were informed that there are sometimes minor backlogs of applications, we did not find any problems with the level of service being provided to prospective users of the program.

4.25 To determine if the operation of the Legal Aid Program was not meeting the expectations of participants, we searched for complaints at the Judicial Administration and the Complaints Commissioner. We found none.

4.26 We noted that the applications are recorded manually in a log maintained by the Legal Aid Administrator. The log could be a useful source of information regarding the performance of the program, however because it is kept manually, it cannot be easily summarized for management purposes. As well, it is difficult to determine the size of the backlog of forms to be processed and the status of the applications from this log. We found that this log, though not relied upon as a control, contained some errors.

4.27 With a more automated process, the officials in the Judicial Administration would have better information to manage the process including monitoring backlogs, understanding financial commitments and provide better information for reporting purposes. In the fall 2009, the Judicial Administration started the process of automating legal aid records.

4.28 Recommendation: The Judicial Administration should continue automating the process of recording the incoming applications and developing the necessary controls to ensure greater accuracy while considering other means to provide more useful information for program management purposes.



Judicial Administration response: *Agree. Guidance from the Legislative Assembly, through clearer and more detailed reporting requirements, would be welcomed to ensure that the Judicial Administration provides performance information that the Legislative Assembly considers useful. As well, additional resources must be allocated to create a more detailed reporting system.*

Information for legal aid applicants could be improved

4.29 We reviewed the information available to the public and potential users of the Legal Aid Program to determine if it provided the type and extent of information necessary for the Program to be utilized effectively. This is available in the Rules which could be more prominently displayed on the website.

4.30 We found that there were no information booklets available for the public about the Program. In addition, we found that although there was information by way of guidance for applicants on the Judicial Administration’s website, that information is of limited assistance to applicants. For example, it does not mention who can apply or discuss the appeal process. Some of the information is directed to attorneys who participate in the program.

4.31 Recommendation: We recommend that the Judicial Administration develop an appropriate strategy to ensure that potential applicants are informed of the requirements to use the Legal Aid Program.

Judicial Administration response: *Agree. There is always room for improvement. The Judicial Administration is currently reviewing its website with a view to expanding the already significant and helpful content regarding legal aid services. Additional resources are required to create and distribute information booklets. There is no information regarding the appeal process because the current legislation is silent in this regard – in other words, legislative reform is required to provide for an appeal process.*

Appeal process needs strengthening

4.32 As noted in the background section of this report, the current legal aid process requires that the Chief Justice evaluate and approve all applications for legal aid. If a legal aid applicant is not satisfied that the decision was fair and consistent with their understanding of the program’s criteria, they can put in a new application to appeal the decision.

4.33 When the appeal is made, the application form and supporting information is returned to the Chief Justice for consideration; the same individual who made the decision in the first place. We expected to find an independent process for appealing



initial decisions but recognize that this is the only process afforded by the Law as it stands.

4.34 Recommendation: We recommend that there should be an independent appeal process implemented for legal aid applicants.

Judicial Administration response: *Agree. Legislative reform is required to provide for an appeal process and will require the appointment of an administrator whose decision can be appealed to a judge as the Law Reform Commission had recommended.*

System for allocating legal aid cases to attorneys not working properly

4.35 Practicing attorneys in the Cayman Islands who wish to provide services to the Legal Aid Program can request that their name be put on the “roster” maintained by the Judicial Administration. The attorney can indicate the kind of service they wish to provide – criminal or civil. To provide fairness to the way cases are allocated to the attorneys on the roster, the Judicial Administration uses a rotation system. When a case is approved for legal aid, the responsible official is to select the next attorney on the roster.

4.36 We found that the roster was out of date. Many of the attorneys on the roster no longer provided services to the Legal Aid Program. In fact, we found three separate rosters; one provided to us by the Chief Justice, one used by the Legal Aid Officer; and a third that was included in the Legal Aid Manual. After discussion with the Clerk of Court, it was agreed that these rosters would be updated as a priority. It is management’s belief that recent discussions about changes to the way the Program would be delivered contributed to the reduction of the number of attorneys on the roster.

4.37 When we discussed the use of the roster with the Legal Aid Officer responsible for assigning attorneys to cases, we found that the list was not used as it was intended. There was no evidence that the attorneys were being assigned on a rotational basis. We were told that in most cases it was very difficult to find an attorney to do the work and that it was easier to simply speak to an attorney who she knows would do the work. We were also informed that, in many cases, applicants had already indicated their choice of counsel on the application form. While this may have been faster, it did not provide the fairness that the rotational system was meant to provide. However, we found no evidence that there have been any complaints by the attorneys to date.

4.38 We reviewed the expenditures by attorney / law firm for the last couple of years and found that the majority of expenditures were limited to just a few law firms in the Cayman Islands. Our findings on payments made to attorneys / law firms in 2007/08 and 2008/09 are included in Table 4 below. We were informed by Judicial Administration that the increases in payments to the limited number of law firms is indicative of the increased criminal work they undertook while other firms refrained



from taking this kind of work. While this may be the case, the lack of implementation of the rotational policy does not provide the comfort that there is fairness and transparency to the process.

Table 4: Payments to attorneys / law firms

	2008/09		2007/08	
	Payments	%	Payments	%
SAMSON & MCGRATH	555,242.77	28.6	600,079.00	32.0
MOURANT DU FEU & JEUNE	296,625.13	15.3	122,997.93	6.6
WALKERS	163,873.13	8.4	154,565.87	8.2
JOHN FURNISS	140,674.75	7.2	124,280.52	6.6
BROOKS & BROOKS ATTORNEYS	132,800.29	6.8	122,135.45	6.5
DIAMOND LAW ASSOCIATES	72,644.85	3.7	23,437.75	1.2
CAMPBELLS	48,754.64	2.5	27,578.43	1.5
FACEY-CLARKE & ASSOCIATES	48,691.75	2.5	27,657.75	1.5
CHARLES ADAM'S, RITCHIE	46,919.01	2.4	9,974.16	.5
PRIESTLEYS ATTORNEYS-AT	41,959.73	2.2	1,296.00	.1
STUARTS ATTORNEYS-AT-LAW	39,292.39	2.0	117,850.17	6.3
PETER KYTE, QC	36,675.23	1.9	0	0
THOMAS BUXTON	36,650.76	1.9	0	0
STENNING & ASSOCIATES	27,387.25	1.4	0	0
ALASTAIR MALCOLM, Q.C.	27,135.00	1.4	0	0
APPLEBYS	19,891.99	1.0	72,109.19	3.8
BODDEN & BODDEN ATTORNEYS	19,609.44	1.0	10,207.00	.5

Source: IRIS (government accounting system)

4.39 Despite the issues we found in the allocation of cases to attorneys, we were informed that the Judicial Administration has never received any formal complaints from attorneys/firms stating that they were not getting enough legal aid work or that the Judicial Administration was improperly assigning cases. While the lack of complaints is an indicator that the allocation of attorneys is working effectively, we don't believe there is sufficient public information about the amount of work each attorney is allocated from the program for informed consideration.

4.40 In comments made recently to the Legal Aid Review Committee as a result of a public request, the Law Society of the Cayman Islands and the Cayman Islands Bar Associations did not discuss the issue of the allocation of attorneys.

4.41 As we conducted our audit, the Judicial Administration canvassed all attorneys and law firms to obtain an updated roster. We were informed that the updated roster contains only 23 attorneys willing to provide legal aid services, and seven of these are employed by Samson & McGrath. This compares to a previous roster of 54 attorneys. In their recent communications with the attorneys, Judicial Administration officials informed us that the vast majority of the attorneys refusing to be on the roster did so as a result of the uncertainty about funding and being paid for their services.



4.42 Recommendation: The Judicial Administration should maintain its list of available attorneys current and follow its own procedures for assigning them on a rotational basis subject to availability and willingness to accept legal aid cases.

Judicial Administration response: *Agree. Any failure to follow the Judicial Administration's procedures is a human resource issue, not a policy issue.*

Better management of legal aid costs needed

4.43 To manage the Legal Aid Program expenditures we expected to find systems, controls and financial information that would provide Judicial Administration officials with the means to effectively manage the costs of the program and make informed decisions with regard to value-for-money.

4.44 Improved procedures needed for ensuring the accuracy of financial information on legal aid applications: As noted previously in this report, there are few guidelines for officials to use when assessing the financial information provided by applicants to the Legal Aid Program. We were informed that because of the cost of conducting follow-up, there are virtually no verifications being performed of the information provided.

4.45 We tested a number of cases and in all those we tested, there were no reviews done of the financial information provided by the applicant. For the criminal cases we selected, we were informed that it is usually pretty clear to the officials involved that the applicant is eligible from their past criminal history and from being known to court officials. For civil cases, there are few checks performed. Although we were informed that there have been occasions when checks were made (for example, requiring bank statements or other proof of financial status), reliance is usually placed on sworn affidavits of means and the fact that it is an offence under Section 7 of the *Legal Aid Law* to misrepresent one's lack of means.

4.46 We expected to find a process in place to verify the information provided by legal aid applicants such as a random review of cases. Such a process would have minimal costs while providing some additional assurance that the information being provided by applicants is accurate and within the guidelines of the Legal Aid Program.

4.47 Recommendation: The Judicial Administration should implement, proportionate, reasonable and appropriate review procedures of the financial information provided by legal aid applicants.

Judicial Administration response: *Agree. Additional resources are required to implement review procedures.*



4.48 More information needed for control of costs: When considering a legal aid application for a civil action, the Chief Justice will, at times, put a cap on the costs for the case. Although no statistics have been kept by the Judicial Administration regarding the use of caps, we were informed and noted that the use of caps has increased over the last few years. These caps are recorded on the approved certificate and maintained in the case file for management purposes.

4.49 Our testing of case files included a review of cases where caps were implemented. While our testing found that the caps had been respected and expenditures were kept within the limits set, we could not assess the reasonableness of the caps. The opportunity to provide more guidance in these matters was mentioned earlier in this report.

4.50 In testing the case files where there was no cap on amounts to be paid, we did not find any estimate or budget of the cost of the case. We expected to find some indication of financial impact for individual case files in order to provide information for program management. For example, if a number of cases are approved by the Chief Justice and are in progress, without any kind of financial estimates, it is not possible for Judicial Administration management to know how much money has been committed or that they are managing the funds available for the Program within their approved spending limits. Without that information, we concluded that management could not provide reasonably accurate information about expenditures against approved funding from the Legislative Assembly.

4.51 While we understand the amount spent in this Program is approximately \$150,000 per month on average, we believe that it is a critical element for the managers of any government program to know how much has been committed to ensure that spending is within the limits set by the Legislative Assembly.

4.52 In addition, we believe that the use of budgets on individual cases would provide program managers with an effective means to control the costs of overall program spending. When cases that do not have caps are managed, the Judicial Administration officials would have a better means to ensure that expenditures are reasonable.

4.53 Recommendation: When approving applications for legal aid, the Judicial Administration should either apply a cap or provide a budget for what the case will cost to provide better forecasting and cost management of Program expenditures.

Judicial Administration response: *Agree. Caps are regularly imposed.*

4.54 Taxing guidelines needed: When approving payments to attorneys on individual cases, the Clerk of the Court acts as a reviewer and approver of the payments. When approving the payments, he has the case file as information to ensure that caps are respected, contribution payments are considered and the amounts charged for the case are reasonable under the circumstances. The process of



reviewing, adjusting and approving payments to attorneys is called “taxing” by the legal profession.

4.55 Without the guidelines discussed paragraphs 4.12 to 4.22 of this report, the current process relies heavily on the experience and qualifications of the taxing officer. In our review of payments made by the Judicial Administration, we found that the taxing officer performed a relatively thorough review of the charges for the cases selected and that he could readily justify the amounts approved. The process relies on the record keeping by the attorneys and their associated legal firms to ensure that the amounts included in the invoices are reasonable and accurate. As the process is based on self reporting by the attorneys and the quality of their time reporting and accounting systems, it is important that there be some guidelines established.

4.56 Recommendation: The Judicial Administration should develop guidelines for the taxing of attorneys’ billings to the extent that it would provide both attorneys and the taxing officer with a better framework for the amounts payable on individual cases.

Judicial Administration response: *Agree. Legislative reform is required.*

4.57 Better management needed of contributions from Legal Aid Program participants: When approving both criminal and civil cases, the Chief Justice may require that an applicant contribute a certain amount to the cost of providing the service. The amount to be provided is at the discretion of the Chief Justice. As noted earlier in this report, we believe there needs to be more specific guidelines pertaining to these instances.

4.58 To ensure the collection of the contribution amounts, the Clerk of the Court only pays the attorney fees when the contributions have been made by the participant. This control works only to the extent that contributions are required in the same time frames as the case lasts. In situations where the contributions are to be made after the case finishes (for example, when an applicant becomes employed at some date in the future), there is no system in place to follow up and ensure the contributions are paid.

4.59 When we brought this matter to the attention of Judicial Administration officials, they agreed with our finding but noted that the amounts involved are very small. Nevertheless, they agreed to implement an accounts receivable system to ensure that all amounts designated as contributions are collected.

4.60 Recommendation: The Judicial Administration should develop processes to record, manage and collect contributions from those legal aid recipients who are required to pay a certain amount towards the cost of their legal fees.

Judicial Administration response: *Agree. Additional resources are required to create a contributions management system.*



Legal Aid Program has not been sufficiently funded

4.61 As part of our audit, we reviewed the funding process for the Legal Aid Program. We expected to find an efficient process for establishing the funding needed to effectively deliver the services required by the *Legal Aid Law*.

4.62 We found that the initial funding for the last number of years to be insufficient for the Program to operate effectively and this has required Judicial Administration officials to request additional funding during the year.

4.63 For 2009/10, only \$300,000 was budgeted for the Legal Aid Program. This amount was approved in the Cayman Island budget by the Legislative Assembly in October 2009. The program had incurred expenditures greater than that amount by the time the funding was approved. At that time, invoices payable to attorneys were held back for payment until additional funding could be secured. While invoices were held back, the Legal Aid Program had effectively exceeded the legal limit by continuing to incur expenditures. The fact that the invoices were not paid does not absolve the fact that legal spending limits for the Program were exceeded by officials managing the Legal Aid Program. Judicial Administration officials chose to continue providing the services required by the *Legal Aid Law*.

4.64 We found that there were a number of invoices not paid, over \$100,000 in total. Because of the lack of record keeping for accounts payable as noted earlier in this report, we could not determine an exact amount. Some of the invoices had been waiting for payment for approximately four to six months.

4.65 At the time our audit work was being conducted, the Judicial Administration had just completed a second request for additional funding to bring the expenditure limit up to \$1,038,000. In effect, this is the third time the Judicial Administration has had to request funding for the current fiscal year. It should be noted that considerable effort is required by Judicial Administration and Legal Affairs officials to prepare individual funding requests.



4.66 In table 5 below, we have summarized the funding of the Legal Aid Program for the last five years. Every year, the program has been considerably underfunded in the initial budget.

Table 5: Funding for the Legal Aid Program for the last 5 years.

Year	Initial Budget	Supplementary Budgets	Final Budget
2005/06	1,150,000	600,000	1,750,000
2006/07	1,150,000	625,000	1,775,000
2007/08	919,000	931,000	1,850,000
2008/09	937,000	913,000	1,850,000
2009/10	300,000	738,000	N/A

4.67 Each year, the Judicial Administration conducts an exercise to determine what the budget should be for the coming year using information such as crime rates. Based on this information, the Judicial Administration has consistently determined for the last five years that the initial budgets should be approximately \$1,800,000. Based upon the results, the estimates have proven to be relatively accurate.

4.68 Beyond the additional work it takes management to prepare additional funding requests, our concern extends to the information contained in the Government’s initial budget and the propensity to understate what is effectively a legislated program. We are concerned that an understatement of approximately \$1.0 million in the budget of this program in recent years (\$1.5 million for 2009/10) may distort the projected financial position put forth by the government in their initial budget approvals.

4.69 Recommendation: The Government should appropriately fund the Legal Aid Program in its initial budget so that Judicial Administration officials can effectively manage the program within the limits of existing laws governing the financing of government programs.

Judicial Administration response: *Agree.*

Legislative Assembly has not been provided with good information

4.70 Lack of performance information: We reviewed the information provided to the Legislative Assembly that is produced by the Judicial Administration. We reviewed the information in the initial budget and program results, both financial and performance information.



4.71 For the budget information, beyond the problems with the projected funding required noted above, we found that the Judicial Administration only included the hours used by attorneys as an output indicator. In fact, the hours used by attorneys to conduct their service for the Program is an input, not an output. While the Judicial Administration indicated they would report the hours spent by attorneys as an indicator of performance, they do not have any systems in place to capture this information.

4.72 There is a complete absence of performance information provided to the Legislative Assembly. As noted above, the Judicial Administration does not report on their planned outputs.

4.73 We believe there are opportunities for better reporting to the Legislative Assembly on the results of the Program. For example, the number and cost per completed case by type with a trend over time would give some indication to the Legislative Assembly about how well the program is being managed.

4.74 We were informed that the Chief Justice discusses the Program in his opening address to the Grand Court and that program delivery issues are discussed. While this may be true, his report does not provide an appropriate mechanism to demonstrate the effective delivery of the Program in accordance with the plans provided to the Legislative Assembly.

4.75 Recommendation: We recommend that the Judicial Administration develop appropriate and meaningful performance indicators for reporting on the Legal Aid Program results to the Legislative Assembly.

Judicial Administration response: *Agree. Guidance from the Legislative Assembly, through clearer and more detailed reporting requirements, would be welcomed to ensure that the Judicial Administration provides performance information that the Legislative Assembly considers useful. As well, additional resources must be provided to create a more detailed reporting system.*

4.76 Financial information incorrectly reported: While our audit focused on the management of the Legal Aid Program, we noted that the expenditures are not being reported in accordance with the requirements of the *Public Management and Finance Law (2005 revision)* (PMFL). That law requires the Judicial Administration to report all expenditures on a full accrual basis.

4.77 We found that the methods used for reporting annual financial results do not provide an accurate accounting of expenditures by the Legal Aid Program. From our audit work, we believe that expenditures could be misstated by more than \$100,000 in one year which would affect the reporting of expenditures in the following year.

4.78 As noted, the Legal Aid Program has continued to record and manage its expenditures on a cash basis of accounting rather than the accrual basis demanded by



the PMFL. While the cash basis of accounting provides an accurate picture of what amounts have been paid, it does not necessarily reflect the true expenditures of the program. The basis on which the records have been maintained by the Judicial Administration allows for manipulation of financial results by simply not paying an invoice; something that the PMFL and accrual accounting was designed to prevent. This is a particular problem in this Program which has had a history of paying bills late.

4.79 The problem stems from a lack of information regarding how much work has been performed by attorneys in any fiscal year. To accurately report on the annual Program expenditures, the Judicial Administration should collect information about how much work was performed by attorneys before year-end and not yet paid. The current process only includes the amounts invoiced by attorneys in the month following the fiscal year. In many cases, the work performed by attorneys on certain cases is not billed until several months later. As well, many cases are ongoing which are not accounted for. This results in a high risk that the Program expenditures are reported in the wrong year.

4.80 We believe that collection of the information needed to provide an accurate accounting for the Legal Aid Program would not require a large amount of effort by Judicial Administration officials. Attorneys involved in ongoing cases could provide an estimate of the amount of work they have performed up to year-end. More importantly, this information is required for Judicial Administration to be in compliance with the PMFL.

4.81 Recommendation: We recommend that the Judicial Administration implement appropriate accounting processes to provide accurate reporting of legal aid expenditures in accordance with the PMFL.

Judicial Administration response: *Agree. Additional resources must be allocated to implement a financial year-end accounting report (there would be hundreds of invoices to process at year end).*

Conclusion:

5.01 The audit has two distinct objectives against which I concluded.

5.02 For the first objective, we concluded that the legal aid funding was properly distributed to those who are entitled to receiving it and administered with relatively few resources. However, the Judicial Administration could make significant improvements to ensure the consistency and fairness of the way it currently delivers the Legal Aid Program including providing more guidelines to ensure consistency on how legal aid applications are processed, attorneys are chosen and cases are managed. As well, a number of recommendations were made regarding cost management of the Program including the collection and monitoring of key financial information for better analysis and forecasting of Program expenditures.



5.03 For the second objective, we concluded that the Legal Aid Program results are not fairly reported to the Legislative Assembly. The Judicial Administration has not developed nor reported on any reasonable outputs or indicators regarding the performance of the Legal Aid Program. Furthermore, we found that the financial information reported to the Legislative Assembly is effectively being reported on a cash basis rather than an accrual basis of accounting; thus creating the risk that users of that information may be misled about the true costs of the Program in any particular year.

Judicial Administration response to conclusion: *Guidance from the Legislative Assembly, through clearer and more detailed reporting requirements, is necessary to ensure that the Judicial Administration provides performance information that the Legislative Assembly considers useful.*

The risk that users of financial information reported on a cash basis rather than an accrual basis will be misled about the true costs of the legal aid program is minimal given the consistency of legal aid expenditures at approximately \$150,000/month over the past five years.

