IV
2013

BILLET D'ÉTAT

WEDNESDAY 27th FEBRUARY 2013

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2. Policy Council - Guernsey Legal Aid Service - Legal Aid Funding of Mental Health Review Tribunals and Public Law Children Cases, p. 307

[a](including appended Projet de Loi)

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BILLET D'ÉTAT

TO
THE MEMBERS OF THE STATES
OF THE ISLAND OF GUERNSEY

I hereby give notice pursuant to Rule (1)(4) of the Rules of Procedure of the States of Deliberation that the items contained in this Billet d'État which have been submitted for debate will be considered at the Meeting of the States of Deliberation already convened for **WEDNESDAY,** the **27th February, 2013**.

R. J. COLLAS
Bailiff and Presiding Officer

The Royal Court House
Guernsey
8th February 2013

ENVIRONMENT DEPARTMENT

THE LAND PLANNING AND DEVELOPMENT (LOCAL PLANNING BRIEFS) (GUERNSEY) LAW, 2013 - REINSTATEMENT OF OUTLINE PLANNING BRIEFS FOR LE BOUET AND GLATEGNY MURAS

The Chief Minister
Policy Council
Sir Charles Frossard House
La Charroterie
St Peter Port

29th January 2013

Dear Sir,

Executive Summary

1.1 This report recommends that the States revive, for a period of 3 years subject to further extension by resolution of the States, the Outline Planning Briefs ("OPBs") for Le Bouet Mixed Use Redevelopment Area ("Bouet MURA") and the Glategny Esplanade Mixed Use Redevelopment Area ("Glategny Esplanade MURA"). The Environment Department is making this recommendation as it has received legal advice from the Law Officers' Chambers that these OPBs have expired by operation of the planning legislation.

1.2 As a result of the expiry of the OPBs there is a resultant policy vacuum in that a number of key policies in the Urban Area Plan cross-refer, in relation to the development of Mixed Use Redevelopment Areas, to detailed policy in the OPBs so that it is difficult to apply the policies as intended without reference to detailed policy in the OPBs.

1.3 This policy vacuum is delaying the determination of a current major planning application before the Environment Department relating to part of the Admiral Park site which lies within Le Bouet MURA.

1.4 The Department is recommending the enacting of a projet, on an urgent basis, as the best way of reviving the intended policy on a legally sound basis without causing undue delay to the determination of the current, and other possible future, planning applications.

1.5 At the same time it is proposed to take the opportunity to clarify in the Projet, for all OPBs (now deemed Local Planning Briefs) that where Development Plans are amended or replaced to remove all references in plan policies to a deemed Local Planning Brief that the Brief expires from the date of the adoption of such a replacement plan or amendments.

Background

2.1 The States approved OPBs for the Bouet and Glategny Esplanade MURAs in 1998 and 1999 respectively following public planning inquiries relating to the briefs (Billet d'État No. XVIII of 1998 p. 943 and Billet d'État No. VII of

1999, p. 209). The OPBs contained site specific guidance to achieve a co-ordinated approach to development on the whole of the relevant MURA. Most of the Bouet and Glategny Esplanade MURAs have now been redeveloped having regard to the policy in the relevant OPB. However, one significant site remains at Admiral Park in respect of which a planning application is before the States of Guernsey Environment Department for major mixed use office, retail, residential and leisure development. The Urban Area Plan cross-refers to the policy contained in the OPBs for the MURAs in a number of key policies. The original intention stated in the current revision of the Urban Area Plan was for the Briefs to remain valid during the life of the Urban Area Plan.

2.2 The Land Planning and Development (Guernsey) Law, 2005 (section 7(2), Part II of Schedule 1) and the Land Planning and Development (Plans) Ordinance, 2007 (section 19) contain transitional provision deeming listed OPBs, to be Local Planning Briefs under the new Law. Local Planning Briefs are statutory development plans, the examination and adoption of which is subject to a full inquiry process, relating to a particular locality; they carry forward the function of OPBs but on a statutory basis. Under section 12(1) of the 2005 Law there is a duty on the States by Ordinance to "make such provision as they consider appropriate in connection with the. ..duration and revision of... Local Planning Briefs". Such provision was made in sections 13 and 14 of the Land Planning and Development (Plans) Ordinance, 2007. Section 13 specifies that a Local Planning Brief has effect **for 10 years from its date of adoption by the States** subject to extension of that period at any time by resolution of the States in which case it shall have effect until the date specified in that resolution. Section 14 requires that a Local Planning Brief must be reviewed at least once every 10 years.

2.3 The original policy intention, as reflected in the wording of the Urban Area Plan, was for the OPBs to continue in effect during the life of the Urban Area Plan where cross-referenced in any plan policy. The 2005 Law and the 2007 Plans Ordinance came into force in April, 2009. An unintended consequence of the delayed coming into force of the legislation was that the Bouet and Glategny Esplanade OPBs (now deemed Local Planning Briefs) expired, as advised by the Law Officers' Chambers, on the coming into force of the Plans Ordinance as they were adopted by the States in 1998 and 1999 and had not been extended by resolution of the States or reviewed in the meantime. The advice from the Law Officers' Chambers is that they cannot be extended by resolution of the States after expiry as this would be a revival rather than the extension anticipated by section 13 of the 2007 Plans Ordinance.

The Admiral Park Planning Application

3.1 At the Environment Department Open Planning meeting on 13th November, 2012, the Environment Department withdrew the current planning application for mixed use development at Admiral Park from determination at that meeting so as to give further consideration to the legal advice received from the Law Officers' Chambers to the effect that the OPB for the Bouet MURA had expired.

3.2 The matter was considered further by the Environment Board at its meeting on 11th December, 2012, when the Board formally resolved that the OPB had

expired and that it would invite the applicant to submit a revised Planning Statement, in the interest of fairness, to accompany the application. It further resolved it would then proceed to determination of the application having regard to a common sense construction of the policies in the Urban Area Plan but not the expired OPB. A Planning Statement is the document which the developer submits justifying why development proposals should be approved having regard to relevant planning policy.

3.3. The applicant and the main objector in relation to the application were informed of these decisions and a notice placed on the website so that the position was clear to the public.

3.4 Following subsequent discussions with the applicant concerning the detailed application of Urban Area Plan policies without the OPB, a query was raised as to whether those policies required a Development Brief for the site. Advice was also taken from the Law Officers' Chambers and it was concluded that a Development Brief would in these circumstances be required under Policy DBE2 and Annex 1 to the Urban Area Plan. Policy DBE2 requires Development Briefs for sites of more than 0.5 ha or for developments of greater than 20 dwellings or 2000 sq m. Annex 1 confirms that these are **not** required where a site is covered by an OPB.

3.5 On 29th January 2013 the Environment Department Board resolved to recommend to the States the preparation of legislation to be enacted as soon as possible to reinstate the OPB for the Bouet and Glategny Esplanade MURAs. This was on the basis of advice from planning officers that it would take some considerable time to prepare and finalise a Development Brief for adoption by the Environment Department. This is because the usual procedures for adoption of new Development Briefs would be followed under which Development Briefs are advertised and the public given the opportunity to comment.

3.6 Planning officers also advised that, as a result, the most expedient route to allow the determination of the current application for Admiral Park would be by means of enacting legislation as soon as possible. This is because this route has the benefit of legal certainty and, as a result, a lower risk of litigation of any decision. It was recognised that legislation would cause delay but that this was less significant than previously envisaged as preparation of a Development Brief would also cause significant delay. Reinstating the Outline Planning Brief would also provide the best means of ensuring that the Urban Area Plan policies were readily construed as originally intended by the States when the Plan was adopted as they are written assuming an OPB will be in place for the MURA whereas the current situation is unanticipated by the Urban Area Plan and, therefore, makes construction of the UAP policies without the OPB difficult. It was also decided to reinstate the Glategny Esplanade OPB even though there is no current relevant planning application before the Department as one could in theory be submitted even though redevelopment of that MURA is mostly complete.

Reinstatement of OPBs

4.1 It is proposed that the OPBs for the Bouet and Glategny Esplanade should be reinstated as soon as possible by projet to provide a detailed policy framework for the remaining development at the MURAs as intended in the Urban Area Plan. The reinstatement would be for 3 years from the date the projet comes into force subject to further extension within this period by resolution of the States. It is anticipated that by 2015 the revised Urban Area Plan should be in place following completion of the current Development Plan review which will include a public inquiry process. This review will include review of the policies of the Urban Area Plan which cross refer to the OPBs. Three years should give some allowance for unforeseen delays to the Plan Review.

4.2 It is intended that the revival of the OPBs would be made so as not to affect the outcome of the current Development Plan review i.e. if as a result of the current review it is decided to remove all references in the Urban Area Plan policies to the revived OPBs then those OPBs would expire when those Urban Area Plan revisions/amendments are adopted. It is also proposed that the opportunity is taken to clarify that this is the position for all former OPBs (now deemed Local Planning Briefs) which were adopted before the Land Planning and Development (Guernsey) Law, 2005 came into force e.g. the 2006 Belgrave Vinery Outline Planning Brief.

4.3. The Law Officers' Chambers have recommended that such an extension is by projet, as they consider there is considerable doubt as to whether the Ordinance making powers under the Land Planning and Development (Guernsey) Law, 2005 can be used to reinstate an expired OPB which is not anticipated by the scheme of the legislation in the 2005 Law and the Land Planning and Development (Plans) Ordinance, 2007.

4.4 An alternative to a projet would be the preparation of a new Local Planning Brief for the two MURAs. However, this would have to be subject to a full planning inquiry process and it is felt that awaiting the outcome of such a process would result in unacceptable delay to resolving the policy lacuna in particular in view of the pending planning application for Admiral Park.

4.5 The further option of preparing a Development Brief for the Admiral Park application site only was also rejected for the reasons set out in paragraph 3.6. Also, such a Brief would apply only to that application site and not cover any different site within the two MURAs covered by any future planning application.

Urgency

5. The Environment Department considers that it is desirable in view of the current policy vacuum, resulting uncertainty as to the interpretation of key Urban Area Plan policies relating to the Bouet and Glategny Esplanade MURAs and the resulting delay to the determination of the current major planning application at Admiral Park that the proposed legislation should be enacted as soon as possible. For these reasons the Department has sought the approval of the Policy Council and the Presiding Officer for the late publication of this Report and the approval of the Presiding Officer for the

draft Projet de Loi to appear in the same Billet d'État. The Department is grateful to the Policy Council and the Presiding Officer for their consent in this regard. The Legislation Select Committee has considered the legislation at its meeting on 29th January 2013 and has approved the draft legislation as attached in Appendix 1 of this Report.

Costs/Resources

6. As the proposed Projet would just be to reinstate the Bouet and Glategny Esplanade OPBs there will be no implications for cost and resources other than those involved in the drafting and processing of the Law.

Principles of Good Governance

7. The Department believes it has complied with the six core principles of good governance in preparing this report.

Consultation

8.1 The Law Officers' Chambers have been consulted in relation to the preparation of these proposals and support the legislation proposed.

8.2 The applicant and main objector in relation to the Admiral Park planning application have been advised of the proposals and a notice has been placed on the States website. It has been made clear that such proposals are subject to approval by the States.

Recommendations

The Environment Department recommends the States to:

1. Agree the proposals to reinstate Le Bouet and Glategny Esplanade Outline Planning Briefs/deemed Local Planning Briefs for 3 years, with effect from the coming into force date of the proposed projet reinstating the OPBs, subject to the States being able to further extend them by further resolution within this period and the expiry of the Outline Planning Briefs as a result of the current Urban Area Plan review;

2. Agree the proposals to clarify that if a Development Plan is revised or amended to remove all references in plan policies to an Outline Planning Brief, which is a deemed Local Planning Brief, that the Brief in question shall expire on the adoption of the revised or amended Development Plan, and

3. Approve the Projet de Loi entitled the Land Planning and Development (Local Planning Briefs) (Guernsey) Law, 2013.

Yours faithfully

Deputy R Domaille
Minister Environment Department

Deputy A J Spruce, Deputy Minister

Deputy B J E Paint Deputy B L Brehaut Deputy Y Burford

PROJET DE LOI

ENTITLED

The Land Planning and Development (Local Planning Briefs) (Guernsey) Law, 2013

THE STATES, in pursuance of their Resolution of the 27th February, 2013[a], have approved the following provisions which, subject to the Sanction of Her Most Excellent Majesty in Council, shall have force of law in the Islands of Guernsey, Herm and Jethou.

Revival of Bouet and Glategny Esplanade deemed Local Planning Briefs.

1. (1) Notwithstanding sections 13 and 14 of the Land Planning and Development (Plans) Ordinance, 2007 ("**Plans Ordinance**")[b], the deemed Local Planning Briefs specified in subsection (2) shall have effect for the period set out in subsection (3) as if they had not expired or been subject to review under those sections 13 and 14.

(2) The deemed Local Planning Briefs referred to in subsection (1) are the Outline Planning Briefs for -

(a) Le Bouet Mixed Use Redevelopment Area[c], and

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[a] Article I of Billet d'État No. IV of 2013.

[b] Recueil d'Ordonnances Tome XXXII, p. 257 as amended by Tome XXXIII, p. 171.

[c] As adopted by resolution of the States of Guernsey (see Billet d'État No. XVIII of 1998).

(b) Glategny Esplanade Mixed Use Redevelopment Area[d],

which are deemed to be Local Planning Briefs in accordance with section 7(2) of the Principal Law.

(3) Subject to section 2, the period referred to in subsection (1) is 3 years beginning on the day this Law comes into force, unless the States resolve within that 3 year period to further extend a deemed Local Planning Brief in which case the deemed Brief in question shall have effect until the date specified in that resolution.

(4) During the 3 year period specified in subsection (3), despite section 14 of the Plans Ordinance, the deemed Local Planning Briefs referred to in subsection (1) need not be reviewed but if a brief is further extended by resolution of the States under subsection (3) that brief must be reviewed, in accordance with section 14 of the Plans Ordinance, as soon as reasonably possible after the date of the States resolution in question.

Deemed Local Planning Briefs.

2. Notwithstanding section 13 of the Plans Ordinance or section 1 of this Law, where a Development Plan is replaced or amended under the Principal Law so as to omit all references in the policies in the Development Plan to an outline planning brief which is a deemed Local Planning Brief by virtue of -

(a) section 7(2) of the Principal Law, or

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[d] As adopted by resolution of the States of Guernsey (see Billet d'État No. VII of 1999, p. 209).

(b) section 19 of the Plans Ordinance,

that Local Planning Brief shall cease to have effect from the date of the adoption by the States of the replacement Development Plan or the amendments, as the case may be.

Interpretation.

3. (1) In this Law, unless the context otherwise requires -

"**enactment**" means any Law, Ordinance or subordinate legislation,

"**Plans Ordinance**" means the Land Planning and Development (Plans) Ordinance, 2007,

"**Principal Law**" means the Land Planning and Development (Guernsey) Law, 2005[e],

"**subordinate legislation**" means any regulation, rule, order, rule of court, resolution, scheme, byelaw or other instrument made under any enactment and having legislative effect,

and other expressions, unless the context otherwise requires, have the same meaning as in the Principal Law.

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[e] Order in Council No. XVI of 2005. Section 7(2) and other relevant parts of the 2005 Law were amended by section 18 of the Land Planning and Development (Plans) Ordinance, 2007 (Recueil d'Ordonnances Tome XXXII, p. 257). There are other amendments not relevant to this Law.

(2) Any reference in this Law to an enactment is a reference thereto as from time to time amended, re-enacted (with or without modification), extended or applied.

Citation.

4. This Law may be cited as the Land Planning and Development (Local Planning Briefs) (Guernsey) Law, 2013.

(NB The Policy Council has no comment on the proposals.)

(NB The Treasury and Resources Department has no comment on the proposals)

The States are asked to decide:-

I.- Whether, after consideration of the Report dated 29th January, 2013, of the Environment Department, they are of the opinion:-

1. To agree to reinstate Le Bouet and Glategny Esplanade Outline Planning Briefs/deemed Local Planning Briefs for 3 years, with effect from the coming into force date of the proposed projet reinstating the OPBs, subject to the States being able to further extend them by further resolution within this period and the expiry of the Outline Planning Briefs expiring as a result of the current Urban Area Plan review.

2. To agree to clarify that if a Development Plan is revised or amended to remove all references in plan policies to an Outline Planning Brief, which is a deemed Local Planning Brief, that the Brief in question shall expire on the adoption of the revised or amended Development Plan.

3. To approve the Projet de Loi entitled "The Land Planning and Development (Local Planning Briefs) (Guernsey) Law, 2013" and to authorise the Bailiff to present a most humble petition to Her Majesty in Council praying for Her Royal Sanction thereto.

POLICY COUNCIL

GUERNSEY LEGAL AID SERVICE - LEGAL AID FUNDING OF MENTAL HEALTH REVIEW TRIBUNALS AND PUBLIC LAW CHILDREN CASES

1. Executive Summary

1.1 The Mental Health (Bailiwick of Guernsey) Law, 2010 ("the 2010 Law") is expected to come into force on 8th April, 2013. The implementation of the 2010 Law should result in a more modern and appropriate treatment of people who suffer from and may be detained due to mental disorder or disability.

1.2 In terms of Legal Aid provision in Guernsey, the 2010 Law will introduce an entirely new area of legally-aided assistance, providing patients, for the first time in Guernsey with an automatic statutory right of appeal against compulsory detention and other decisions; currently, the only method to challenge detention under the Mental Treatment (Guernsey) Law, 1939 is by way of judicial review.

1.3 Such appeals will be considered by the new Mental Health Review Tribunal ("MHRT"), whose decisions may be appealed on a point of law to the Royal Court and thereafter the Court of Appeal. The practical arrangements for the MHRT will be undertaken by the Health and Social Services Department, with Policy Council staff providing administrative support for the hearings. This division of responsibility is intended to facilitate the independent operation of the MHRT.

1.4 The Children (Guernsey and Alderney) Law, 2008 ("the Children's Law") has been in force since 4th January, 2010 and was the first major piece of legislation dealing directly with the welfare of children in Guernsey in the last 40 years.

1.5 Legal Aid is currently provided for certain specific public law proceedings in court ("Specified Public Law Cases"), where one party to the proceedings is a public body such as the States of Guernsey, an example being that of a Community Parenting Order, whereby the Health and Social Services Department may bring proceedings to protect a child in danger; that child may be permanently removed from its family and may even have to leave the Bailiwick if placed for adoption. Legal Aid may also be available to provide legal representation for appeals in respect of public law cases from the Child Youth and Community Tribunal ("CYCT") or court.

This report is set out in two parts and considers the basis on which Legal Aid will be provided to applicants for:

i) representation at the MHRT, as well as any subsequent appeals to the Royal Court and the Court of Appeal, when the 2010 Law comes into force; and

ii) representation in specified public law children cases including the issue of a community parenting order, an emergency child protection order or secure accommodation order by a relevant court which may ultimately result in children being permanently removed from their family under the Children's Law.

1.6 It is important to note that Legal Aid in Guernsey is provided to applicants subject to the assessment of the applicant's financial means and the legal merits or "strength" of their case. This "*means and merit test"* is detailed further in paragraph 2.4 and 2.5 of this Report. There are, however, some public law cases which necessitate a departure from this general principle due to overriding Human Rights obligations. As an average, public law applications represented approximately 4% of all legal aid applications over the last three years.

1.7 This report therefore proposes that Legal Aid for representation:

(i) at the MHRT be provided generally on a '***no means, no merit test***' basis, whilst reserving the right for the Legal Aid Administrator to exceptionally apply a means test to an application, where this is reasonable and in conformity with Human Rights obligations;

(ii) in certain specified public law children cases be provided on a '***no means, no merit test***' basis.

1.8 The requirement to extend Legal Aid funding to these areas derives from the need to address several fundamental Human Rights issues, as highlighted below.

i) **The 2010 Law**

As with the current mental health legislation, the 2010 Law will allow for the compulsory detention of patients. Consequently, there are a number of human rights issues that potentially arise whenever an individual is detained or is liable to be detained without consent or in circumstances where an individual lacks the capacity to consent. Of particular relevance is the right to liberty and security of person set out in Article 5 of the European Convention of Human Rights ("the ECHR").

It is worth noting that one of the aims of the Mental Health and Wellbeing Strategy ("the Strategy"), which will be considered by the States of Deliberation in February 2013,[1] is to "*ensure people with mental health problems are treated with the same respect and courtesy that is offered to all, without discrimination by virtue of their mental condition*."

[1] Billet III of 2013, page 230

ii) **The Children's Law**

The Children's Law allows for the court to make a number of different types of orders including an order for the permanent removal of children from their family and in some cases from the Bailiwick. This is an especially draconian power which must be exercised judiciously by the relevant court and with the human rights of all parties borne in mind. Consequently, there are a number of human rights issues that potentially arise whenever a child is removed from the family without consent. Of particular relevance is the right to respect for an individual's family life set out in Article 8 of the ECHR.

2. Overview of Legal Aid

2.1 The current non-statutory Legal Aid Scheme ("the Scheme") has been in place since 2002 and is operated by the Guernsey Legal Aid Service ("GLAS"), led by the Legal Aid Administrator, who was appointed to this statutory post pursuant to a resolution of the States of Deliberation in December 2012[2]. The Policy Council remains responsible for all Legal Aid policies, which the Administrator implements under the direction of the Policy Council. The Policy Council intends to seek the States of Deliberation's approval to place the Scheme on a statutory footing later this year.

2.2 Legal Aid is available in both civil and criminal law cases. Civil Legal Aid covers both private law cases and public law cases**.** Legal Aid in Guernsey is almost exclusively limited to applications made by private individuals. Appeals to the MHRT under the 2010 Law will be public law cases. Some applications to the court made under the Children's Law can be categorised as public law cases.

2.3 Legal Aid funding for criminal and private law cases is provided on the basis of the applicant meeting certain eligibility criteria ("Eligibility Criteria").

The Eligibility Criteria:

2.4 The ***'means and merit test'*** requires the assessment of the applicant's financial means and the assessment of the strength of their case (i.e. the merits of the application to the relevant court).

An applicant meeting both elements of the Eligibility Criteria will be eligible to receive Legal Aid. The Legal Aid Administrator applies this Eligibility Criteria to all of the applications received for legal aid assistance in Guernsey other than Public Law children cases.

2.5 The *'**no means, no merit tests**'* does not require an applicant to meet the above Eligibility Criteria. In such cases, Legal Aid is provided automatically regardless of both the financial circumstances of the applicant and the merits of the case.

[2] Billet XXV of 2012, page 2203

This is awarded by the Legal Aid Administrator only in exceptional cases to protect the liberty and human rights of vulnerable members of society.

2.6 In most court applications for specified public law children cases Legal Aid funding is provided on a '*no means, no merit test'* basis i.e. it is provided automatically regardless of both the financial circumstances of the applicant and the merits of the case, due to Human Rights obligations, addressed elsewhere in this report. Other public law children case applications and all appeals, whether public or private law, are subject to the usual Legal Aid *means and merits tests*. The CYCT does not attract Legal Aid funding unless there are exceptional circumstances.

2.7 There are three forms of Legal Aid funding:-

i) **'Detention form'** – these are used to provide advice and assistance from an advocate to persons who are detained in police or other lawful custody. All such advice and assistance is provided free of charge to the detainee.

ii) **'Green form'** – these are issued for preliminary advice and assistance from an advocate. Applications are, if appropriate, means tested by the advocate. Green forms provide initially 2 hours advice and assistance but can be extended usually for a further 2 hours.

iii) '**Full certificate**' – these are issued for court cases. Applications are, if appropriate, means tested by GLAS (based on household income and allowable expenses) and merit tested by the advocate (based on legal opinion and cost/benefit analysis) but automatically approved if there is a real risk of a custodial sentence in criminal cases. There are no limits on hours in criminal matters but civil certificates are usually time limited but are extendable.

2.8 Advocates' fees in relation to detention forms, green forms and full certificates are checked, to ensure they are reasonable, and then approved by GLAS. This is called 'taxation'.

2.9 Some recipients of Legal Aid may have to make a contribution to the costs depending on the outcome of the means test. This is based on a percentage of the total costs and disbursements of the case on a sliding scale.

3. PART I: The Mental Health Review Tribunal

3.1 Overview

3.1.1 In November 2002, the States of Deliberation resolved to modernise the Mental Treatment (Guernsey) Law, 1939, in order to bring this legislation in line with best practice elsewhere and promote compliance with the ECHR.

3.1.2 These proposals resulted in the preparation of the 2010 Law which included the creation of a MHRT to allow patients who have been made subject to an order under the 2010 Law, for example which authorises their detention in an approved establishment (such as an assessment or treatment order) or which allows them to reside in the community but subject to certain conditions (specified in a community treatment order), to apply for a review of that order.

3.1.3 In November 2010, the Council of Europe's Committee for the Prevention of Torture ("the CPT") published a report into the treatment of persons detained in Guernsey. The report followed a visit to the Island by the Committee in March 2010 as part of a regular scrutiny process covering all 47 members of the Council of Europe. This visit followed the United Kingdom's ratification of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment in 1988 which was subsequently extended to the Bailiwick of Guernsey and came into force on 1 March 1995.

3.1.4 The report stated:-

'*A person who is involuntarily placed in a psychiatric establishment by a non-judicial authority must have the right to bring proceedings by which the lawfulness of his detention shall be decided speedily by a court. In Guernsey, involuntary psychiatric placement – which is not decided by a court – may be reviewed by the Royal Court via an order for the examination of a patient by two medical practitioners certifying that the patient may be safely discharged. However, it is not clear whether the patient himself or herself may prompt such a review. Further, for such an examination to be ordered, the person applying for it must first satisfy the Court that it is proper to grant such an order. The CPT recommends that a fully-fledged right of appeal against compulsory admission orders be introduced, without waiting for the new mental health law to be adopted.*'

3.1.5 Since the publication of that report, the Health and Social Services Department has continued to work towards the introduction of such a right of appeal whilst also seeking to implement the 2010 Law, together with the introduction of the Strategy.

3.2 Background to the provision of Legal Aid in respect of Mental Health Review Tribunals

3.2.1 The 2010 Law will introduce an entirely new area of Legal Aid as, under the current Mental Treatment (Guernsey) Law, 1939, there is no statutory right of appeal against compulsory detention. Only judicial review proceedings are available to challenge the making of an order. Legal Aid may be made available for judicial review of a patient's detention, subject to the usual means and merits tests. The new Law will allow patients to appeal decisions, including orders for detention for assessment or treatment to MHRT (and ultimately on points of law

to the Royal Court and the Court of Appeal), where legal representation should be made available to them.

3.2.2. The Table below sets out how the Policy Council and the Legal Aid Administrator expects that a patient will access Legal Aid under the 2010 Law in respect of the MHRT:

Example of how Legal Aid may assist a patient, “Mr A”, under the new 2010 Law. "Legal representative" means an Advocate, barrister, solicitor or other person approved by the Royal Court to represent patients before the Mental Health Review Tribunal, and this representative may be funded privately or through the Guernsey Legal Aid Service.	
PATIENT’S EXPERIENCE	**LEGAL AID PROVISION**
Serious concern is raised over Mr A's mental health due to the nature of his conduct on successive days. It is thought that he might need treatment for a mental disorder.	No Legal Aid assistance at this stage.
A doctor and a social worker visit Mr A to complete an initial mental health assessment.	No Legal Aid assistance at this stage.
The doctor states that Mr A is suffering from a mental disorder which requires his admission and detention for at least a short period in the Castel Hospital (“the Hospital”) for assessment (and, if necessary, treatment), and that he ought to be detained for his own health or safety, or with a view to protecting other people from harm.	No Legal Aid assistance at this stage.
The social worker accepts the doctor's medical recommendation and decides that an application to a Law Officer for an assessment order should be made.	No Legal Aid assistance at this stage.
The social worker makes the application to the Law Officer, who examines it in order to confirm that the legal grounds for the order are satisfied.	No Legal Aid assistance at this stage.
The Law Officer makes an assessment order, which gives authority to the social worker to take Mr A to the Hospital for assessment.	No Legal Aid assistance at this stage.

Mr A does not agree that he should be detained at the Hospital for assessment so he wishes to make an application to the Tribunal to be discharged. This application must be made within 14 days of his admission and detention.	Mr A (or a friend or relative) contacts a legal representative who attends the Hospital to meet Mr A and take basic information from him. The legal representative also helps Mr A fill in the relevant form to apply to the Tribunal and the Legal Aid form (if Legal Aid is to be claimed). The legal representative requests and views Mr A's medical records, and gathers evidence (including expert evidence where it is required) to be presented to the Tribunal.
The Tribunal (comprising one legal member, one consultant psychiatrist member and one member with experience of health and social care matters) arranges a hearing to decide Mr A's application. This hearing must take place within 10 days of Mr A's application being made.	A legal representative provided under the Legal Aid Scheme may be of assistance at this stage.
Medical staff prepare reports in relation to Mr A, which are sent both to the Tribunal and to Mr A. The consultant psychiatrist member meets with Mr A before the Tribunal to assess his mental state.	The legal representative attends the Hospital again to ask questions of Mr A based on the reports, medical records and other evidence, either before or on the day of the hearing.
At the hearing, medical staff gives evidence why Mr A should not be discharged; Mr A's legal representative can ask them questions. Mr A can give reasons why the medical staff's view is incorrect. The Tribunal can ask questions based on the reports, the consultant psychiatrist's view, the evidence given by the medical staff and any reasons given by Mr A. Mr A's legal representative can put forward arguments based on the evidence before the Tribunal.	The legal representative may ask questions and put arguments based on the evidence before the Tribunal.

The Tribunal decides that Mr A should not be discharged on this occasion and he is detained for 28 days. If Mr A wishes to appeal, he speaks to his legal representative to find out if there is an error of law which he can appeal or his legal representative may advise him that an error of law has been made. A notice of appeal will then be prepared and the relevant documentation (including a skeleton argument) will be submitted before the appeal takes place before the Royal Court.	If Mr A's legal representative advises that the Tribunal has made an error of law, the legal representative helps Mr A fill in the notice of appeal to the Royal Court and the Legal Aid form (if Legal Aid is to be claimed). A full means test takes place and the legal representative must certify that the merits test is met. The legal representative prepares and submits the relevant documentation and, if an Advocate, represents Mr A at his appeal.
After assessing Mr A, if 2 doctors at the Hospital recommend that he is detained for treatment, the social worker can then make an application to a Law Officer for a treatment order. If this order was granted, Mr A could be detained for up to 6 months (and when renewed, for periods of 6 and then 12 months). In due course, Mr A may apply to the Tribunal for this order to be discharged.	Mr A's legal representative may then represent him in the same manner as before.

3.2.3 In November 2002, the States of Deliberation considered a policy letter from the former Board of Health entitled 'New Mental Health Legislation'[3] ("the Board of Health Report"). Paragraph 97[4] of that report stated:

'*The applicant will be entitled to legal representation at Review Tribunal hearings. Where the applicant is without sufficient funds it is proposed that the States would meet the cost of representation,* ***subject to a means test***[5]*. This could be dealt with through the local Legal Aid scheme, subject to legislative and budgetary provision being made.*'

3.2.4 At that time the States of Deliberation resolved '*To approve that new Mental Health legislation be enacted for the Bailiwick on the lines set out in the report*'. No further explanation or justification was given in the Board of Health Report for the basis of the "means test" referred to, nor did the States' Resolution particularise this. The provision of Legal Aid is not included in the 2010 Law.

[3] Billet XXIII, November 2002, page 1950
[4] Billet XXIII, November 2002, page 1963
[5] Emphasis added in bold

3.2.5 As explained in , paragraph 2.1 above, the Policy Council remains responsible for all Legal Aid policies, which the Administrator implements under the direction of the Policy Council. It is the Policy Council's and the Legal Aid Administrator's view that mental health legislation has evolved significantly as a result of the Board of Health Report and since the States of Deliberation originally considered this important issue back in 2002. The processes, practices and procedures of the Legal Aid Scheme have also evolved since that date. It is important and timely for the States of Deliberation to consider endorsing a modification of the general policy to provide Legal Aid on a "no means and no merit" basis, with some exceptions under the 2010 Law, not least as a consequence of the commencement of Human Rights legislation in 2006.

3.3 **Mental Health Review Tribunal: Public Law Cases and Human Rights Considerations**

3.3.1 Such cases are likely to involve vulnerable patients whose judgement may be impaired. Referrals to the MHRT will be categorised as public law proceedings in which patients will have a statutory right to challenge the lawfulness of their compulsory detention by the public authorities under the 2010 Law.

3.3.2 The Law Officers' Chambers have advised that there are a number of human rights issues that potentially arise whenever an individual is detained or liable to be detained without consent or in circumstances where the individual lacks the capacity to consent. In particular, breaches of the fundamental right to liberty and security of person set out in Article 5 of the ECHR may be alleged (a copy of this Article is provided in Appendix A to this report).

3.3.3 Any challenge must be heard by a judicial body that is both independent and impartial and whose fairness is guaranteed by procedural safeguards. If detention is ongoing, the lawfulness of the detention must be reviewed at various intervals. Any detention must also have a clear legal basis and must remain proportionate.

3.3.4 Article 5(5) provides that everyone who has been the victim of arrest or detention in contravention of the principles of this Article shall have an enforceable right to compensation; therefore there may be cost implications for the States if those compulsorily detained under the 2010 Law do not have meaningful access to the MHRT, which includes being represented by an independent lawyer.

3.3.5 It is likely that many detained patients would not be able to appreciate that their detention may be in breach of Article 5 and it is vital that their rights are fully protected.

3.3.6 In addition, Article 6 of the ECHR enshrines the right to a fair trial and, whilst the minimum right to free legal assistance in relation to criminal offences does not extend to civil cases, best practice in protection of the rights of detained patients under the ECHR would certainly includes the provision of free Legal

Aid. This is the case given the nature of the right which is at stake, the complexity of the procedure and the emotional involvement of the patient (which is incompatible with the degree of objectivity required for advocacy in a formal setting).

3.3.7 Consequently, meaningful access to the MHRT, which includes representation by an independent lawyer, or to some other human rights compliant review of the lawfulness and reasonableness of a patient's detention must be available to those concerned.

3.3.8 It is therefore proposed that Legal Aid for the patient at any MHRT be provided on a 'no means, no merit' basis for the reasons discussed above, without any requirement to take into consideration that individual's income, savings or assets (i.e. means) or for the legal representative to provide the Legal Aid Administrator with an assessment of the strength of the case (i.e. the merits of the application to the relevant court)

3.4 Maintaining the Status Quo: Potential Issues of Applying a "*Means Test*" for Legal Aid at MHRT Proceedings

3.4.1 It is highly likely that, given the mental state of those detained under the 2010 Law, patients will not have the capacity and skill to represent themselves before the MHRT without legal assistance. Such proceedings are likely to be complex and wide-ranging, including patients challenging expert medical evidence about them.

3.4.2 It is important to consider the possible issues which may arise should the proposals contained in this report not be supported and Legal Aid be made subject to a means test as originally resolved by the States of Deliberation in 2002.

(i) By way of example, a patient who has been detained under the 2010 Law may be assessed as being ineligible for Legal Aid funding but yet may not have sufficient funds at the time to engage a lawyer on a private basis to challenge the lawfulness of their detention. It is also possible that the person does not have the mental capacity to organise and engage the services of a legal representative, or to present a meaningful case before the MHRT.

(ii) If a patient could not meaningfully take part in the proceedings, or could not arrange or afford for a legal representative to do so, that person's ability to have their detention reviewed would be compromised and there would be a serious risk that the proceedings would not be human rights compliant. This in turn could lead to a successful challenge of the lawfulness of the detention and the enforceable right of the aggrieved patient to compensation payable by the States as permitted by Art 5(5).

(iii) Under the Police Powers and Criminal Evidence Law, 2003 and the related Codes of Practice 2004[6], a person who is detained at a police station in connection with a criminal offence is automatically entitled to free legal advice and assistance under the Legal Aid scheme whilst in detention. This is to protect the Human Rights of individuals who have been detained by, amongst other things, ensuring that the lawfulness of the detention can be reviewed and assessed by an independent legal representative. This important safeguard is similar in many respects to that which will be provided by the review to be undertaken by the MHRT under the 2010 Law.

3.4.3 Although some general advice may be available from other sources such as websites or the voluntary sector e.g. MIND Guernsey, this is unlikely to be sufficient support to enable this group of vulnerable persons to resolve potentially complex legal issues affecting their liberty, without legal assistance.

3.4.4 GLAS has advised the Policy Council that there are significant difficulties and delays for all concerned in relation to obtaining properly completed financial assessment forms from applicants who have mental health issues under the current arrangements. This is understandable, given the nature of the medical conditions involved. GLAS has warned the Policy Council that this delay and difficulty would be further exacerbated should all applicants regarding MHRT have to be means tested. The financial application forms for legal aid are 19 pages in length and it may not be appropriate, reasonable, practicable or lawful to expect a mentally disordered patient to be able to complete them meaningfully. It would also be unrealistic and inappropriate to expect hospital staff to complete the form on the applicant's behalf. Not every applicant will have a family member who may be able to assist in this regard. Only a person with access to the patient in question's financial information or a legal guardian may be able to assist.

3.4.5 Mindful of the possible constraints highlighted by the Law Officers and the Legal Aid Administrator, in as far as it is not unlawful and not in breach of a person's human rights and is practicable, it is Policy Council's intention that a means test be undertaken in exceptional circumstances to be determined at the discretion of the Legal Aid Administrator.

3.4.6 GLAS undertakes an assessment of each application and has to be satisfied with the financial information provided on each individual case prior to granting Legal Aid. However, it is considered that the likely delays occasioned in obtaining adequate information from some applicants from this vulnerable group of people may lead to an impaired access to justice; there are strict time limits imposed under the Tribunal Rules, regarding for example applications to be discharged from an Assessment Order as the MHRT hearing of the case must start within 10 days after the date on which the MHRT receives the application notice. An Assessment Order permits the detention of a patient to assess the

[6] Code C 3 (a), 3.1, Code C, 3.19 and Code C, 6.1

mental disorder from which the patient might be suffering and to provide any appropriate medical treatment.

3.4.7 It should be noted that although many of the persons who are compulsorily detained are likely to be in receipt of States benefits, only Supplementary Benefit currently provides an automatic access to free Legal Aid. Consequently a person in receipt of Invalidity or Sickness Benefit could conceivably be required to make a contribution towards the legal costs of challenging their detention under the 2010 Law if they were made subject to a means test. It is debateable whether persons so detained would understand the basis upon which they were being asked to contribute towards their legal fees in order to challenge their compulsory detention or indeed whether they could properly enter into a legally binding and enforceable agreement to contribute toward their legal fees.

3.4.8 It should also be noted that since the original Board of Health Report was debated in 2002, the Human Rights Law became effective from 2006.

3.5 **Appeals to the Royal Court or the Court of Appeal from the MHRT**

3.5.1 Currently, all civil appeals currently funded by Legal Aid are subject to an assessment of both means and merits. Appeals from the MHRT to the Royal Court can only be on points of law and any appeal from the Royal Court must be with the leave of the Royal Court or Court of Appeal.

On that basis, and for consistency, it is therefore proposed that Legal Aid for all appeals from the MHRT to the Royal Court or Court of Appeal should also be on a 'means and merit test' basis. Applicants would therefore only be awarded Legal Aid to challenge the decision of the MHRT if they met the financial eligibility criteria and there was an arguable point of law.

3.5.2 To apply the *'**no means, no merit test**'* basis for appeals from the MHRT would allow Legal Aid to be provided automatically irrespective of both the financial circumstances of the applicant and the merits of bringing the appeal and is not considered appropriate by the Policy Council and GLAS.

3.5.3 The application of the means and merit test to onward appeals in Guernsey would also align with the positions of the Legal Aid authorities of England and Wales, Scotland, Northern Ireland and the Isle of Man, which is that Legal Aid regarding appeals from the relevant Mental Health Tribunal is means and merit tested.

3.5.4 From research undertaken by GLAS, it is worth noting that the experience of the other jurisdictions consulted suggests that there will be very few appeals from the MHRT. Of particular interest is that many patients in other jurisdictions who wish to appeal the decision of the Mental Health Tribunals are in receipt of state benefits. Any applicant for Legal Aid in the Bailiwick who is in receipt of

Supplementary Benefits is "passported" to free Legal Aid; whilst recipients of other benefits are means tested.

3.6 **Funding the Mental Health Review Tribunal**

3.6.1 As highlighted in HSSD's Strategy report in Billet III, 2013[7] *"One in every four people will experience mental health difficulties during their lifetime. As many as one in 10 will have significant difficulties"*.

3.6.2 Data received from the Health and Social Services Department indicate that 33 people from Guernsey were made subject to orders under the Mental Treatment (Guernsey) Law, 1939 ("Certified") in 2012. Of that number,

(i) 10 were certified in the UK whilst receiving medical treatment;
(ii) 20 were Certified in Guernsey; and
(iii) 3 were Certified before 2012 but carried over into 2012 (i.e. they are not new certifications).

The table below shows the approximate number[8] of people Certified for mental health reasons in Guernsey from 2009 to 2012 and those receiving treatment in England:

Year	**Total Average Number of People certified**	**Number remaining In Guernsey for treatment**	**Number from Guernsey certified in England/ treated in England**
2012	33	23	10
2011	18	2	16
2010	36	24	12
2009	38	25	13
	Annual Average Number of people Certified: 31	**Annual Average Number of people Certified in Guernsey : 18**	**Annual Average Number of people from Guernsey, certified /treated in England : 12**

3.6.3 It is important to note that the 10 people Certified in the UK in 2012 will not be able to appeal to the Guernsey MHRT and are subject to the UK certification/appeal system/Legal Aid system. However, this does not preclude them from falling under the new 2010 Law and the Guernsey Legal Aid system upon their return, should they continue to be affected by their condition in the future.

[7] Page 233, Para 17
[8] Data provided by Health and Social Services Department and compiled to show approximate annual averages

3.6.4 Although the potential costs in relation to Legal Aid under the MHRT are impossible to forecast because all Legal Aid is demand-led and subject to the meeting of the eligibility criteria, the States of Deliberation, through the States Strategic Plan for 2011[9] onwards has already approved funding of £300,000 per annum ("the SSP bid") in respect of Legal Aid for cases before the MHRT, based on a typical average number of 35 detentions, plus an estimate of five appeals per year to the Royal Court or Court of Appeal. There may also be other appeals against conditions placed on Community Treatment Orders for which an allowance has also been made.

3.6.5 It is possible that significantly fewer or more eligible claims may be made in any financial year.

3.6.6 However, it is worth noting that the criteria for orders made under the 2010 Law will be stricter and may therefore lead to fewer patients being detained. Treatment in the community via Community Treatment Orders will also be available, thereby reducing the number of patients who remain detained.

3.6.7 The Policy Council has therefore made the following assumptions in relation to how the SSP bid of £300,000 will be spent annually from 2013, as tabulated below:

SSP Bid 2010 Legal Aid - Mental Health Tribunal- £300,000

RESOURCES	**ESTIMATED COSTS**
The equivalent of half a Full Time Employee (FTE) at a cost of no more than £25,000 to assist with the additional Legal Aid administration and enquiries that this new legislation will generate.	£25,000
LEGAL AID ASSISTANCE AND REPRESENTATION	
(a) Before the Tribunal Based on Fixed fees for the representation for 20 cases per annum & appeals	£237, 400
(b) Ancillary matters: (i) Green Form Advice and Assistance: estimated at 50 additional applications per year	£15,000
(ii) Legal costs and Court fees incurred under full Legal Aid certificates in respect of court proceedings.	£22,600
TOTAL	£300,000

[9] Billet XIX of 2010

3.6.8 The above estimated costs take into account the funding of other ancillary legal advice under the Scheme, such as property matters which will arise only as a direct result of the introduction of the 2010 Law. One illustrative example is that of a relative of a person being certified, who satisfies the eligibility criteria for Legal Aid and seeks advice on the 2010 Law in connection with the detention of that person or the management of any joint property or assets owned with that person. This additional call on the Legal Aid budget is attributable directly to the introduction of the 2010 Law or in relation to applications to court which may arise under the new law.

3.6.9 It is only possible to estimate the aggregate costs of the potential ancillary areas at this stage. The Policy Council and GLAS estimate that £37,600 per annum may be incurred as a result. This is calculated on the assumption that there would be 50 extra Green Form advice and assistance applications, which would cost £15,000, and approximately £22,600 of legal costs and court fees may be incurred in total under full Legal Aid certificates in respect of court proceedings.

3.6.10 In addition, the SSP bid will also allow for the provision to the GLAS for the equivalent of half a Full Time Employee (FTE) at a cost of no more than £25,000 per annum to assist with the additional Legal Aid administration and enquiries that this new legislation will generate and cannot be undertaken by the existing small number of staff at GLAS offices.

3.6.11 In this context the Policy Council is also mindful of the States' objective to achieve a real terms freeze on aggregate States Revenue expenditure. The Policy Council will therefore direct GLAS to monitor and report on these ancillary costs and liaise with the Treasury and Resources Department as necessary. The Policy Council will also be working closely with GLAS to continue to seek efficiency savings and cost reductions including in relation to this new area in order to deliver best value for money.

3.6.12 The Policy Council estimates that the sum awarded by the SSP bid of £300,000 may be sufficient to fund the additional part–time member of staff and the additional green form and legal costs and courts fees which may be incurred by the Service. This assumption derives from the assessment that the criteria for detentions under 2010 Law will be more stringent, thus resulting in fewer detentions than previously envisaged in 2009/10 and based on the number of existing patients who are sectioned in the UK and have no recourse to local services and Legal Aid in Guernsey during that period.

3.6.13 The Policy Council does not believe that this report is subject to Rule 15 (2) of the Rules of Procedure of the States of Deliberation *(which relates to a proposition which may have the effect of increasing revenue expenditure).* Whilst it is almost impossible, given that Legal Aid is demand-led, with any accuracy or certainty for the Policy Council to estimate the additional revenue expenditure which may result as highlighted in paragraphs 3.6.8 and 3.6.9 of this

report, the analysis undertaken demonstrates that it is reasonably likely that the SSP bid sum will cover the requirements for legal representation arising under this 2010 Law and therefore these proposals have no material impact on the Fiscal and Economic Policy Plan.

3.6.14 The release of this SSP bid is subject to the submission of a full business case to the Treasury and Resources Department which the Policy Council will submit following the States' consideration of the proposals contained in this report.

4. Part II: The Children (Guernsey and Alderney) Law, 2008

4.1 Overview of the Children (Guernsey and Alderney) Law, 2008

4.1.1 The Children's Law came into force on 4th January 2010 and was the first major piece of legislation affecting children in 40 years with the welfare of children being at its heart.

4.1.2 Whilst the Children's Law does not expressly differentiate between public law and private law proceedings, it encompasses both:

a) private law proceedings which include disputes between parents regarding, for example, where and with whom children are to live, and issues regarding contact.

b) public law proceedings which include those in respect of emergency child protection orders, community parenting orders, special contact orders, which are examples of state intervention in family life and usually relate to child protection issues. Some of the orders are of a long term nature and may remove a child from their family. Public law children cases concern the protection and welfare of children.

4.1.3 In addition to court proceedings, some children's matters can be dealt with by the CYCT and Children's Convenor ("the Convenor"). These were also established under the Children's Law and it was anticipated that they would replace court proceedings in most cases of child protection. The Convenor acts as the gate keeper to the CYCT. The CYCT was established in part to allow matters involving children to be dealt with without legal representation and to avoid the costs of litigation. However, it should be noted that certain public law children's proceedings, including those at 4.1.2 (b) can only be heard in court.

4.1.4 Legal Aid for specified public law children cases is currently provided under the existing non-statutory Scheme.

4.2 **Legal Aid in respect of Specified Public Law Children's cases – *the "Means and Merit Test"***

4.2.1 A policy letter of the former Advisory and Finance Committee entitled 'Legal Aid Scheme'[10] stated the overarching principle that *means and merit testing* should be applied to all aspects of Legal Aid, whilst noting that "the Committee recognises that in some exceptional circumstances which fall outside these criteria it may be necessary to grant legal aid for representation in order to ensure that there is "equality of arms".[11] The practice and reality of administering Legal Aid in order to meet Human Rights obligations has meant that in practice, this area has had to be operated on a "no means no merits" basis since 2004. Based on GLAS' experience administering this aspect of Legal Aid over the last 8 years, the Policy Council is now seeking confirmation that Legal Aid in respect of specified public law children cases should continue to be provided on a '**no means, no merit test**' basis for the reasons set out in this report.

4.2.2 This means that Legal Aid would be automatically granted upon the commencement of relevant proceedings under the Children's Law **without any requirement to take into consideration that individual's income, savings or assets (i.e. means) or for the legal representative to provide the Legal Aid Administrator with an assessment of the strength of the case (i.e. the merits of the application to the relevant court).**

4.3 **The Children's Law: Public Law Children Cases and Human Rights Considerations**

4.3.1 In Guernsey, under the Legal Aid funding model for specified public law children cases, Legal Aid is awarded to defined parties (including children and their natural parents), under a Scheme on a 'no means, no merit test' basis. It is considered that the rights of these parties to be able to challenge the decisions of a local authority and be legally represented must override any requirement for means or merit testing. The rationale for this approach is that the removal by the public authorities of a child from his or her family is both a draconian measure and a serious interference with both the child's and the parents' right to private and family life under Article 8 of the ECHR (a copy of this article is provided in Appendix B to this report).

4.3.2 It should be noted that many of the ECHR cases which raise claims of a violation of the right to family life in connection with the taking of children into public care also raise violations of the right to fair proceedings under Article 6(1) of the ECHR. Article 6(1) also imports the idea of "equality of arms" i.e. that each party should have an equal opportunity to present his case with neither party having a substantial advantage over the other (a copy of this article is provided in Appendix C to this report).

[10] Billet XVII of 25th July 2001, paragraphs 36 to 38, page 1145
[11] Billet XVII of 25th July 2001, paragraphs 37, page 1145

4.4 Maintaining the Status Quo: Potential Issues of Applying *"a Means and Merit Test"* to Public Law Children Cases

4.4.1 Legal Aid in some cases is currently provided on a 'no means, no merits test' basis. There is a risk that Human Rights legislation will be breached should the proposals contained in this report not be accepted and Legal Aid is made subject to a means and merit test. An example is that of applicants who are assessed as being ineligible for Legal Aid funding but have insufficient funds to engage a lawyer on a private basis to challenge the lawfulness of their children's removal. Under this scenario, it is probable that where the applicant is a parent, child, or other specified interested party, the right for respect for family life may be violated. The absence of Legal Aid may also compromise an applicant's right to a fair trial, equality of arms and access to justice.

4.4.2 Many of the potential applicants are vulnerable members of society and thus likely to be unable to adequately and effectively represent themselves properly. Such persons benefit from having the expertise of legal representation in what can often be complex and emotional cases regarding the welfare of children. They may also have to challenge expert evidence about them and/or their children produced by the State which would be difficult for them to undertake effectively without legal representation.

4.4.3 Experience evidences that the overwhelming majority of public law children cases in Guernsey involve families who are in receipt of Supplementary Benefit and as such would be eligible for Legal Aid irrespective of a means test.

4.4.4 It should be noted that paragraph 3.4.7 in Part I above applies equally to public law children cases. Furthermore, given that the power to remove a child from a family is so draconian in nature (with potential and consequential human rights issues) it would be exceptionally rare for the Legal Aid Administrator to consider that an application to challenge such a power had no merit. In such circumstances the Policy Council recommends that the status quo is maintained and that funding should be continued on a 'no means, no merit test' basis.

4.5 Appeals relating to Public Law Children Cases

4.5.1 Currently all appeals from the Tribunal or court of first determination are funded on the usual "means and merit" test basis and it is proposed that this should continue.

4.6 Funding relating to Public Law Children Cases

4.6.1 There will be no increase in the costs incurred through the continued funding on a "no means, no merit" basis for specified public law children cases as such cases are already being funded, other than increases (or decreases) due to the variable numbers and nature of these types of case from year to year.

4.6.2 It should be noted that even if public law children cases were means tested, evidence suggests that the vast majority of applicants involved in such cases would be in receipt of Supplementary Benefits and therefore would be automatically 'passported' for free Legal Aid anyway.

4.6.3 In particular, a review of public law Legal Aid certificates from January 2011 to November 2012, using the limited information necessarily provided in these 'no means, no merit' applications, showed that of the 42 applications, 41 would have been financially eligible for Legal Aid had a means test been applied. This included 13 which were for the benefit of children (who had no income) and 28 where the applicants were in receipt of Supplementary Benefit, in prison, or in receipt of low income. Only one applicant out of the 42 of applicants during this period, would have been financially ineligible for Legal Aid had a means test been applied. It is suggested that those parents and children involved in public law proceedings concerning children predominantly come from the lower socio-economic stratum of society.

5. How Other Jurisdictions Deal with these Issues e.g. England and Wales

5.1 Mental Health Review Tribunal

5.1.1 In England and Wales, Legal Aid for representation at the First-Tier Tribunal (Mental Health) and the Mental Health Tribunal of Wales is usually available on a 'no means, no merit test' basis. That is, all Legal Aid provided to a patient whose case is or will be subject to proceedings before the Tribunal will not be subject to a means assessment. It is possible, in exceptional circumstances, to refuse to grant Legal Aid to a patient if it would be unreasonable in the particular circumstances of the case to do so. However, it is understood that most cases where the patient is detained would meet the 'reasonableness test'. The usual expectation is therefore that every patient is represented and at public expense.

5.1.2 Appeals from decisions of the First Tier Tribunal (Mental Health) are to the Upper Tribunal, Administrative Appeals Chamber and application must be made to the First-Tier Tribunal Judge for permission to appeal. Legal Aid for such appeals is considered on a 'means and merit test' basis.

5.1.3 It should be noted that a recent consultation and ensuing response by the United Kingdom Government regarding proposed major changes to the system of civil Legal Aid in England and Wales (in an attempt to reduce costs by £350 million a year by 2015) has concluded that the 'status quo' should be retained on mental health related Legal Aid, based on the principle that Legal Aid should continue to be available in cases 'where life or liberty is at stake'. As a result, mental health Legal Aid is one of the very few areas of Legal Aid that will remain unaffected and fully funded under the proposed reforms other than the 10% reduction in civil fees across all Legal Aid.

5.1.4 Further information on Legal Aid arrangements for mental health tribunals in other jurisdictions is provided in Appendix D to this report. It is evident from this information that the majority of British and Irish jurisdictions consider it appropriate that applications to mental health tribunals concerning patients who have been involuntarily detained under the relevant mental health laws, should be provided with legal representation free of charge.

5.2 Public Law Children Cases

5.2.1 In England and Wales, although the situation is not directly comparable, because of the nature of proceedings under s.31 (for a care or supervision order), s.43 (a child assessment order), s.44 (an emergency protection order) and s.45 (extension to discharge of an emergency protection order) of the Children Act 1989, Legal Aid for representation in public law children cases is currently granted on a 'no means, no merit test' basis. This means that children and parents who are party to the proceedings are currently granted funding without reference to means, prospects of success or reasonableness. If another party wishes to be joined as a party to the proceedings, they will be means tested but not merits tested. Legal Aid for appeals is funded on a 'means and merit test' basis and this practice is mirrored in Guernsey.

5.2.2 Funding for public law children cases has remained within the scope of the scheme for civil Legal Aid under the United Kingdom Government consultation referred to in paragraph 5.1.3. The Legal Aid Administrator is advised that there will be no change to the means and merits criteria in relation to specified public law children care proceedings. Other public law proceedings e.g. adoption will remain means and merit tested.

6. Conclusion

6.1 Mental Health Review Tribunal

6.1.1 Although the Board of Health Report initially indicated that Legal Aid for representation to the MHRT would be provided on a 'means and no merit test' basis, after careful consideration it has been concluded that it should instead be provided on a 'no means, no merit test' basis, subject to exceptional circumstances which point to the necessity for an applicant to be subject to a means test (see paragraph 3.4.5 above).

6.1.2 The main reason for this is, as the 2010 Law will allow the compulsory detention of patients, this deprivation of liberty potentially has serious human rights considerations particularly in regard to Article 5 of the ECHR.

6.1.3 Appeals to the Royal Court or Court of Appeal would be subject to the usual GLAS 'means and merit' criteria in line with all other civil appeals currently funded by GLAS. Funding is already available under the States Strategic Plan subject to final approval from the Treasury and Resources Department.

6.2 **Public Law Children Cases**

6.2.1 Given that the power to remove a child from a family is draconian in nature and is potentially a fundamental interference with the right to family life (with potential and consequential human rights issues as set out in Article 8 of the ECHR), it is recommended that the status quo be maintained and that funding for specified public law children cases in the court of first instance should be continued on a 'no means, no merit test' basis.

6.2.2 It is also recommended that appeals from the decision of the court of first instance should continue to be on a "means and merit test" basis in line with all other civil appeals.

7. Law Officer's advice

7.1 Advice of the Law Officers' Chambers has been obtained in relation to the subject matter of this Report, in particular on Human Rights considerations which is central to the provision of Legal Aid in Guernsey.

8. Good Governance

8.1 This States report complies with all the core Principles of Good Governance in accordance with Resolution VI of Billet d'État IV, 2011. Core Principle 1 ("*focusing on the organisation's purpose and on outcomes for citizens and service user")* is demonstrated through the existing Social Policy Plan, which can be found in the States Strategic Plan 2011-2016[12], which includes:-

'*An inclusive and caring society which supports communities, families and individuals*'[13]. The proposals in this report would support individuals suffering from mental illness.

'*Greater equality, social inclusion and social justice'*[14]. The proposals in this report would remove financial barriers to social inclusion and social justice to individuals suffering from mental illness.

'A healthy society with safeguards for vulnerable people'[15]. The proposals in this report help to safeguard vulnerable individuals suffering from mental illness.

[12] Billet XVI of 2011 page 1879
[13] Billet XVI of 2011 page 1953
[14] Billet XVI of 2011 page 1954
[15] Billet XVI of 2011 page 1954

10. Recommendations

10.1 The Policy Council recommends the States to agree that:

i) legal representation at Mental Health Review Tribunal hearings is to be provided under the Legal Aid Scheme generally on a *'no means, no merits test'* basis; whilst reserving the right for the Legal Aid Administrator to exceptionally apply a *'means test'* to an application, where reasonable and in conformity with Human Rights obligations;

ii) legal representation for appeals from a Mental Health Review Tribunal to the Royal Court or Court of Appeal is to be provided on a *'means and merit test' basis;*

iii) Legal Aid funding of specified public law children cases in the court of first instance continue to be provided on a *'no means, no merit test'* basis in line with the Guernsey Legal Aid Service pre-existing interim scheme;

iv) legal representation for appeals in respect of public law children cases from the Child Youth and Community Tribunal or relevant Court to the Juvenile Court, Royal Court or Court of Appeal is to continue to be provided on a *'means and merit test'* basis.

Deputy Peter A Harwood
Chief Minister

28th January 2013

Deputy J P Le Tocq
Deputy Chief Minister

Deputy G A St Pier
Deputy R Domaille
Deputy D B Jones
Deputy R W Sillars
Deputy P A Luxon
Deputy A H Langlois
Deputy K A Stewart
Deputy M H Dorey
Deputy M G O'Hara

Appendix A

European Convention on Human Rights

ARTICLE 5

Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

   (a) the lawful detention of a person after conviction by a competent court;
   (b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
   (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
   (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
   (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
   (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

Appendix B

European Convention on Human Rights

ARTICLE 8

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Appendix C

European Convention on Human Rights

ARTICLE 6 (1)

Right to a fair Trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Appendix D

Legal Aid for Representation at Mental Health Tribunals - Other Jurisdictions

Scotland - Scottish Legal Aid Board (SLAB)

ABWOR (Assistance by Way of Representation) provides Legal Aid for advice, assistance and representation before a Mental Health Tribunal and is not means tested. It is understood such work falls within the scope of the SLAB scheme and therefore the merits test is essentially met. ABWOR is not a full Legal Aid certificate.

Appeals - Appeals against the decision of the Mental Health Tribunal are to the Sheriff Principal and are subject to SLAB's usual means and merit criteria. Legal Aid is provided by way of a full certificate.

Northern Ireland - Northern Ireland Legal Services Commission (NILSC)

Advice, assistance and representation at a mental health tribunal are provided under the Green Form and ABWOR schemes i.e. not a full Legal Aid certificate. Since 28th January 2011, no means test has been applied in such cases. There is an applicable merits test but it is understood that the merits test is generally met where the applicant is detained under the relevant mental health legislation.

Appeals - The only method of appealing a decision of the Mental Health Tribunal is by way of Judicial Review, which is subject to the usual means and merits test of the NILSC.

Ireland

If an individual is an involuntary patient, and wishes to appeal to the Mental Health Tribunal, a lawyer is appointed for the individual by the Mental Health Commission and this is free of charge to the patient. However, if the patient personally engages a lawyer rather than having one appointed, then the patient will have to pay for their services.

Appeals - Appeals from the Mental Health Tribunal are to the Circuit Court and then on a point of law to the High Court. For an appeal the legal opinion of the previously assigned legal representative is required to confirm whether or not legal representation should be provided by the Mental Health Commission i.e. free of charge.

Isle of Man

Legal Aid is available for Mental Health Tribunals but subject to the relevant ‘means and merit tests’.

Appeals - Appeals from the Mental Health Tribunal are heard by an appeals tribunal and again are subject to the relevant means and merits test.

It should be noted that applicants who are in receipt of various Isle of Man state benefits will be "passported" to free Legal Aid. It is understood that most patients are in receipt of a benefit that passports them to free Legal Aid.

Jersey

Legal Aid in Jersey is provided by the legal profession by way of a rota, in circumstances where a person cannot afford a lawyer or is unable to obtain the services of a lawyer.

The Legal Aid Scheme is mostly funded by the legal profession and the lawyer is entitled to charge the client a “reasonable” fee in accordance with the Legal Aid guidelines. This scheme is therefore means and merits tested but the Bâtonnier has an overriding discretion to provide Legal Aid where an individual is financially ineligible under the guidelines and when it would be in the interests of justice to do so.

It is, however, understood that free Legal Aid will be available to a detained patient for representation by an advocate before the Jersey Mental Health Tribunal.

Appeals - It is understood that there is no specific provision for appeals from the Mental Health Tribunal.

(NB The Treasury and Resources Department supports this States Report including the provision of legal aid for Mental Health Tribunals on a 'no means and no merit' basis with some exceptions rather than on the 'means test' basis approved in November 2002. In respect of the funding implications, the vast majority of which are classified as formula-led, the Department accepts that the number of claimants is outside the control of the Guernsey Legal Aid Service (GLAS) and that expenditure could be somewhat volatile in nature and could exceed £300,000 in any individual year. The assurance that the Policy Council will be working closely with GLAS to continue to seek efficiency savings and costs reductions on the Legal Aid budget including in relation to this new area in order to deliver best value for money is welcomed.)

The States are asked to decide:-

II**.-** Whether, after consideration of the Report dated 28th January, 2013, of the Policy Council, they are of the opinion:

1. To agree that legal representation at Mental Health Review Tribunal hearings be provided under the Legal Aid Scheme generally on a '*no means, no merits test'* basis; whilst reserving the right for the Legal Aid Administrator to exceptionally apply a *'means test'* to an application, where reasonable and in conformity with Human Rights obligations.

2. To agree that legal representation for appeals from a Mental Health Review Tribunal to the Royal Court or Court of Appeal be provided on a *'means and merit test'* basis.

3. To agree that Legal Aid funding of specified public law children cases in the court of first instance continue to be provided on a *'no means, no merit test'* basis in line with the Guernsey Legal Aid Service pre-existing interim scheme.

4. To agree that legal representation for appeals in respect of public law children cases from the Child Youth and Community Tribunal or relevant Court to the Juvenile Court, Royal Court or Court of Appeal is to continue to be provided on a *'means and merit test'* basis.