



Legal Aid Review Panel

Legal Aid Review

Witness: Magistrate Bridget Shaw

Friday, 5th April 2019

Panel:

Deputy S.M. Ahier of St. Helier (Chairman)

Deputy R.J. Ward of St. Helier

Deputy D. Johnson of St. Mary

Connétable R. Vibert of St. Peter

Witnesses:

Mrs. B. Shaw, Magistrate

[10:30]

Deputy S.M. Ahier of St. Helier (Chairman):

I would like to thank you, Mrs. Shaw, for attending this hearing today. If you could just have a brief look at the regulations in front of you there and obviously please try to ensure that your phone is turned off or muted for the duration.

Magistrate:

Yes. Thank you.

Deputy S.M. Ahier:

Thanks very much. So, Mrs. Shaw, could you briefly summarise your thoughts on the changes
[Interruption] I am sorry, beg your pardon. You are absolutely right. We will just introduce ourselves first. My name is Steve Ahier, I am Chairman of the Legal Aid Scrutiny Panel.

Connétable R. Vibert of St. Peter:

Richard Vibert, Constable of St. Peter.

Deputy D. Johnson of St. Mary:

David Johnson, Deputy of St. Mary

Deputy R.J. Ward of St. Helier:

I am Robert Ward, Deputy of St. Helier District 2.

Scrutiny Officer:

Simon Spottiswoode, Scrutiny Officer.

Male Speaker:

10:31:30 (inaudible), Scrutiny Officer.

Deputy S.M. Ahier:

Thank you. So I will start to commence again. Could you briefly summarise your thoughts on the changes being made to legal aid through the Draft Access to Justice (Jersey) Law and how you believe they will affect Islanders.

Magistrate:

In my position as a magistrate I think I am in a position to make a comment on how it will affect people in the court, so people likely to come before the courts. It really is not for me to make political statements and I am very aware that it is for the legislature to decide what goes into the law. I think it is proper for me to give a view from the Magistrate's Court really as to how we perceive the proposals might affect the people who come before us. There is the law and there are the guidelines and it is really the guidelines that I think it is right for the magistrate to focus on. How the Government decides to fund legal aid is really a matter for the Government but just touching on that for the moment on the general scheme that is proposed. What concerns me about the scheme is that lawyers will no longer be subject to the Tour de Role in criminal cases and it will be a voluntary scheme. In an Island where you have a limited number of lawyers and there is lucrative commercial work available I think the scheme needs to ensure that there will be sufficient lawyers of sufficient calibre prepared to do the work and I think you will need to be very much aware of that as you go forward. When there were proposals last year a number of firms took decisions as to whether they would continue to do legal aid work and a number of the bigger firms have already pulled out of legal aid work and they have subcontracted their work to other firms. In doing so those other often smaller firms ... at the moment they have got a regular source of income because they know that Ogier, for example, do not want to do in-house criminal work, placing it out to another firm. They know that Ogier will continue to pay them. Under the new scheme there will be no money from Ogier because

Ogier have no obligation to take part in the scheme. So it will be down to individual firms. Often it seems that the smaller firms are the ones who will undertake the work. There was a proposal ... it is still a proposal for this scheme that there be certified lawyers, as it were, some sort of training scheme so that they can undergo a qualification and be certified legal aid lawyers as it were. I thought it was interesting who put their names forward for that. Some of the most eminent criminal lawyers did not. Now, that is something I think you should think about. Who is going to sign up for this work? If it is not compulsory who is going to sign up for it? The more experienced criminal practitioners, some of the very good criminal practitioners, were not signing up for this so they would not be available for legally aided work for defendants. So they may still be prepared to do some criminal work but that would be for privately paying clients and for the L.O.D. (Law Officers' Department), the Crown Advocate. So I think there needs to be some thought given as to where lawyers are going to come from, where criminal lawyers are going to come from. There are some who have signed for it who are good criminal lawyers but in among the scheme as well is an option for people to choose their own lawyer. Now, if there are a handful of very good lawyers and there are some more junior lawyers then how does someone choose a lawyer and do they always go for the more experienced lawyer, how do the junior lawyers get that experience? There has been in the past ... I think when the bigger firms were doing the law there were some senior people within those firms who would help tutor the more junior ones. That is going to no longer be the case in many firms I would have thought so we need to think in terms of how are the younger lawyers, the up and coming ones, (a) going to get the work, and (b) going to get the mentoring and the supervision and long-term is it going to be worth their while to do it? I am not making any comments on the scheme as proposed but these are things that need to be thought about particularly when there is lucrative commercial work available which will always pay more than criminal work. There is no question of that. We do see some relatively inexperienced lawyers sometimes asked to take on very serious cases and when you are within a larger firm with perhaps more experienced people in that firm perhaps some mentoring goes on in those firms but will that mentoring still be there if what emerges is a series of smaller firms with not necessarily the most experienced people necessarily to help bring on the younger lawyers. That is one of my concerns about it. The other issue is when you look at the scheme as proposed is the financial level at which legal aid is to be made available. It will, as I read it, cover everyone who is on income support. I am very pleased to see a change from an earlier draft I saw and this new draft does include everyone who appears in the Youth Court. I am very pleased to see that because I was concerned about that previously. When you are looking at household income it may be the parents do not want to pay and I do think that is a very good development in this project. I also think it is vital that the Duty Advocate Scheme remains and that it remains well funded. The duty advocate in a Magistrate's Court, as I am sure Mr. Vibert is well aware, is absolutely vital. There are so many people who come into court, even people who have some wherewithal and they may be in a sort of job where they are never going to receive legal aid but they do need some legal advice. The Duty Advocate Scheme as we have at the moment I think

works very well indeed and the lawyers are very willing to take part in the Duty Advocate Scheme and I do not want to lose that spirit of co-operation that we have at the moment. So if one morning of the week we find that we have a lot of new cases and a lot of people will be needing legal advice and then you get overnight custodial cases as well we will always have one duty advocate rostered for a court but we might find we need another. At the moment we can ring the Legal Aid Office and say: "Can you send down a second duty?" and they will ring around the offices and people will be very happy to come because it is a whole credit at the moment and for them it is a very good deal. So one morning in the Magistrate's Court is very well worthwhile because otherwise they might get another legal aid case. It might be a family case that will take months to deal with. So there is a very strong incentive to cover Duty Advocate Schemes and they will come out on bank holidays because we sit bank on holiday courts and under the new bail law we may have to sit more courts out of hours. They have been very willing to cover those and they get 2 credits for the bank holidays. So you can give up bank holiday Monday morning and you get 2 credits which is well worth it. I really think the Duty Advocate Scheme needs protecting and promoting. Legal aid generally may be less available on the financial criteria than before and I think we will be relying an awful lot more on the duty advocate. Now, in the Youth Court we do rely on the duty advocate a lot. We aim to have every case, as far as possible, dealt with on the first occasion because that is good for young people. It is good for their families. Effectively you get the case dealt with as soon as possible and that is usually dealt with by a duty advocate on the morning. Sometimes though there is just too much to be dealt with by a duty advocate or we have to put the case off for a social inquiry report and a duty advocate will often deal with the matter on the next occasion in the Youth Court whereas in the adult court someone would have an appointed lawyer appointed under the Legal Aid Scheme. It is better to have, in many ways, an appointed lawyer because then they have more time to look at a case, particularly where there is a complex social history for example or criminal history and you have a long social inquiry report but a number of parents do not apply for legal aid and therefore they need to rely on the Duty Advocate Scheme but it is dealt with and it is dealt with well and the duty advocates are very diligent and they do deal with it well under the Duty Advocate Scheme. So I would be keen to see that that is retained and I see that we may be relying on that more than ever. The concerns about the scheme and the financial limits in the scheme are that a lot of Jersey people really will fall outside that financial limit. It is £35,000 household income, is it not, and £20,000 capital? I do not think that is middle Jersey. I think that is lower income people and the law does talk about people who most desperately need it and, yes, I think this will cover most of those people who financially need it, the people we see before the courts, but there are a lot of people who financially could not afford the fees that a lawyer would charge. I do not know if you have looked at some of the bills that come into the Magistrate's Court after trials and it might be worth looking at some of those.

[10:45]

The Deputy of St. Mary:

Sorry, can we access those or are we able to access them? It would be useful.

Magistrate:

I am sure that you could just discuss that with the Judicial Greffier. Just for example we had one that was causing serious injury by careless driving recently. It was a trial but the trial was on the careless driving. It was not on the serious injury so a careless driving trial. The evidence took a morning and then the magistrate retired and came back with a verdict in the afternoon and the bill for that was £30,000. That is what you are talking about. Now, if you are in that position as a defendant would you like to be facing a bill for £30,000? I think an awful lot of Islanders just do not have that amount of money. Even if they have a household income of £35,000 and that is household income; that is 2 people working on not much more than minimum wage. You would have the capital as well but if someone is trying to buy a house ... I know that should be excluded but a lot of people just do not have that sort of money and they have commitments obviously. They might have 2 children, 3 children, and who knows what commitments people have. So the bills are high and it may be thought that: "Well, if a lawyer knows that all they can recover from the Crown is legal aid rates ..." and I think that is the proposal really that there will be a new cost law or an amendment to the cost law then will that drive down lawyers' bills? If it does drive down lawyers' bills can lawyers do the work for the amount of legal aid payment made available? I do not know that. I do not work in private practice.

Deputy R.J. Ward:

Perhaps you qualify for legal aid though.

Magistrate:

My understanding is if even if you were privately paying the only recovery that you would get from the State is the legal aid rate. So if it was that trial, for a one-day trial, I do not know, £1,000 or £1,500 but the bill is £30,000. It is those sort of figures for ordinary people so we are not talking about ... at one the end there are the very wealthy who can pay for what representation they want but I think there will be a lot of people who will fall outside legal aid on financial grounds.

The Deputy of St. Mary:

Therefore might not have representation at all surely.

Magistrate:

Exactly. You are bound to say: "Well, in many cases people could represent themselves." I am talking about the Magistrate's Court rather than the Royal Court. The court has a duty to ensure a

fair trial but there is a limit to how much the magistrate can intervene on behalf of a defendant and saying: "You should be asking that question, have you asked that?" or: "You should not have agreed that admission." There is a limit to how far the magistrate could go but the magistrate will always deliver what the magistrate considers to be a fair trial but it is much more difficult with unrepresented defendants and the law is becoming more complex. We just have a new criminal procedure law coming through. There are defence case statements that the defendants will need to make. There are issues of disclosure and to what you are entitled to see. Some people who are trying to defend themselves with the best will in the world they just do not really get it and they would say: "Oh, I want to see that document from the Crown" and the Crown say: "No, this is not disclosable" and they feel that is unfair. The Crown might be absolutely right legally. If they have their own lawyer they can explain that. There are also a number of people who, for whatever reason, do not really represent themselves well. They might just be very angry about what is happening. They might not listen to reason. They might have learning difficulties, sometimes quite disguised learning difficulties. I had a man the other day ... he was dealt with by the duty advocate. I hesitated as to whether to give him the duty advocate, it was such a minor offence, but I asked the duty advocate to see him. When he came into the dock we tried to read the charge to him. It was a struggle just to get him to understand what was being said to him and why we were here. Then I sent him back out with the lawyer and the lawyer managed to deal with him but he would have been a very difficult person for the court to deal with him and may well have pleaded not guilty and create more trials if the people do not have legal representation and then the trials that are created are longer and more difficult to manage because a lawyer is not involved. Sorry, that was a very long address but it ...

Deputy S.M. Ahier:

Can I just quickly make a point? You were talking about that there may be insufficient number of advocates who would be willing to undertake criminal work. It was proposed to us by the Law Society yesterday that there were 48 law practitioners available. Does that assuage your concerns?

Magistrate:

It is something that you will just have to see. It is both the number of advocates and you have to have people in a number of different firms because of conflicts and how many long-term will be able to sustain the business model. As I say, the business returns are not something that I have direct knowledge of but I do see that it is a bit of a lottery really as to what work the lawyers will get and how much time they will spend on it and how many cases may be loss leaders and how many they may might a profit on. They will have to work that out themselves but I wonder how sustainable the 48 are in the long run. So you may get a number of quick guilty pleas you do not have to do huge amounts of work on and you will make a profit on that. Sometimes, even for a guilty plea, an awful lot of work goes into it. It may be weeks of work goes into it and your return for a guilty plea is still what it was. So if you get a run of those cases or those cases tend to come to this advocate whether

that is financially viable. Those are the decisions the Law Society will have to make but my concern is really that there is not the safety net there. Now, when legal aid work is compulsory there is a safety net and the law does say that if there are not sufficient lawyers we will return to the Tour de Role. I do not think the Tour de Role is going to be there. If you go back to these firms who are not specialising in criminal law because they have stopped doing it because the new scheme has come in where are your criminal lawyers? Where are people competent to take on those cases? Those departments have packed up and gone.

The Deputy of St. Mary:

I am going off-piste slightly but taking up the Chairman's point though, we had a meeting with the Law Society and they did say there was a specialist criminal bar coming into being which perhaps there was not before, does that give you any comfort? They are having specialist training et cetera as well.

Magistrate:

Yes, the training they proposed previously was a 2-day course. I do not think a 2-day course makes you a criminal specialist if you are not already dealing in criminal law. So I think people need to look at long-term, where is the training coming? Where are the people coming up for in the future? There might be 48 today. Will those business models be sustainable? That is a matter for them. It is not really a matter for you. All I am pointing out is that you do not have the safety net that was there before and I question whether it is realistic to go back to the Tour de Role having disbanded it for criminal matters.

The Deputy of St. Mary:

Just to echo your opening remark almost we appreciate that there is the law and the guidelines and you are not here to make political statements and we are here to scrutinise a law which is effectively an enabling law and the detail will come in the guidelines. It is 2 years almost since you wrote your letter ... no, just to comment ... but from what you say there has been further discussion since then and your fears on the youth side for instance have been ...

Magistrate:

Well, the youth side, yes, and the Duty Advocate Scheme. I think at one point it was so that the Duty Advocate Scheme ought to be for custody cases only and that is not how it operates at the moment and that is not what the court could cope with. I think we need a duty advocate to deal with any case. What has been taken away in this case is the magistrates do have discretion to ask the Judicial Greffier to look at awarding legal aid in particular circumstances and that still worries me that there is a provision for exceptional circumstances but they are looking at complexity of case rather than a person's ability to cope with representing themselves.

Deputy R.J. Ward:

Sorry, may I ask just a quick question here? The duty advocate, is that still part of Tour de Role?

Magistrate:

Yes, at the moment it is and in future people would have to voluntarily sign up to being on the Duty Advocate Scheme is my understanding and they would be paid.

Deputy R.J. Ward:

But that will still be part of the Tour de Role or will that be ...

Magistrate:

No, they would be paid for that.

Deputy R.J. Ward:

They would be paid from a legal aid ...

Magistrate:

Yes, a department. Yes, they will be paid and they would ...

Deputy R.J. Ward:

But it is an ongoing cost, is it not?

Magistrate:

They will be coming into the new scheme. That is my understanding, yes.

The Deputy of St. Mary:

Going back to the law, as I say, we differentiate between the law and the guidelines which come later; are you broadly content about the composition of the panel? It is Article 6 in the law.

Magistrate:

Yes. The comment I would make about that is that there is not a magistrate's nominee.

The Deputy of St. Mary:

Sorry?

Magistrate:

There is not a magistrate's nominee. There is a ...

The Deputy of St. Mary:

That is senior officer of the Magistrate's Court, is that?

Magistrate:

There is no senior officer of the Magistrate's Court; well ...

The Deputy of St. Mary:

Is that bad wording then?

Magistrate:

Awful wording, yes.

The Deputy of St. Mary:

Sorry, no, we did not draft it.

Magistrate:

We do not have a senior officer of the Magistrate's Court. We do not know what that was supposed to mean. It cannot mean the magistrate because the magistrate is the person to whom the panel must refer its report, consultation, at the end. I take it that means the Magistrate's Court Greffier. Does it? I do not know.

The Deputy of St. Mary:

Following what is said further down it could be a person nominated by the magistrate. You would be happy with that, would you?

Magistrate:

There is nothing here saying a person nominated by the magistrate.

The Deputy of St. Mary:

I know. That is what I am saying ...

Magistrate:

But do you want to substitute that?

The Deputy of St. Mary:

... would that cover your concern?

Magistrate:

That is one person on the ... at the moment what is envisaged is an administrative person, the Magistrate's Court Greffier, but there is a not lawyer from the Magistrate's Court there and you do have a number of Law Society ... you have at least 2 Law Society lawyers there and I do not know who the other 2 ...

The Deputy of St. Mary:

There are 2 of them, are there not?

Magistrate:

Two lawyers and the chief executive of the Law Society.

The Deputy of St. Mary:

Chief executive and the president, yes.

Magistrate:

There is a strong Law Society voice there. I wonder how that is balancing up with ...

The Deputy of St. Mary:

Well, that is why I am raising it. The Law Society think with the Bailiff and his nominees there is a strong judicial ...

Magistrate:

The Bailiff can nominate 2 people and it does not necessarily mean there is somebody from the Magistrate's Court there other than the Magistrate's Court Greffier depending on which bailiff nominates which person.

The Deputy of St. Mary:

Yes, and he helped you ... in the public hearing the other day he said he would ... his thoughts were to nominate the master and I think the ...

Magistrate:

Yes.

The Deputy of St. Mary:

But you are saying it could change ...

Magistrate:

That could change; that is all I am saying. For the present purposes the present Bailiff's suggestions, the assistant magistrate and the master, I think, are very good choices but that does not necessarily tie in anyone who is, for example, the assistant magistrate.

The Deputy of St. Mary:

So if those 2 people were on the committee you would be happy you were covered, would you?

[11:00]

Magistrate:

Yes. Well, I do not know how big you want this committee to be.

The Deputy of St. Mary:

Well, I think you are suggesting it might be pretty cumbersome already, is it not?

Magistrate:

It could swell and swell, could it not, if you have too many people? I think to have the assistant magistrate on there and the Magistrate's Court Greffier would adequately cover the Magistrate's Court point of view and then whoever the Bailiff wants to nominate. I also do not see any representation from the Family Court and a lot of legal aid comes through the Family Court on the private side to the family registrars. I do not know if that has been thought about.

The Deputy of St. Mary:

No differential has been made, I do not think, has it? No. That would be a useful point.

Magistrate:

Because we, the Magistrate's Court, deal with criminal and civil but we do not deal with family. The way it is structured at the moment the family registrars, they act as judges, but their appointments are as assistant greffiers so they, strictly speaking, would come under the Judicial Greffier but he is chairing the panel and I imagine he would have to remain neutral. He is not someone who is fighting their corner as it were. So I would suggest you might like to think about having someone from the Family Court.

The Deputy of St. Mary:

I am just trying to see if there is a consensus because the Law Society, not surprisingly, think it is over-weighted in favour of the judiciary side according to them.

Magistrate:

Yes, your problem.

The Deputy of St. Mary:

Sorry, the other thing on that, to finish it off, under Article 6 subparagraph 7, the Legal Aid Committee must, before advising the Minister, consult the Bailiff and the magistrate so you are involved then.

Magistrate:

Yes, we are involved at that point.

The Deputy of St. Mary:

Yes, but you may well say that is not early enough.

Magistrate:

I am not going to say that.

Deputy R.J. Ward:

It is interesting the Law Society was not too sure about their involvement at that point ...

Magistrate:

Sorry?

Deputy R.J. Ward:

The Law Society were not sure about their involvement at that point I thought when we talked to them so there is a certain difference of opinion there, which is interesting.

Deputy S.M. Ahier:

Sorry, can I just seek clarification on the most senior officer of the Magistrate's Court? Who do you determine that to be?

Magistrate:

I thought you meant by that the Magistrate's Court Greffier.

Deputy S.M. Ahier:

The Greffier?

Magistrate:

The Magistrate's Court Greffier.

Deputy S.M. Ahier:

Thank you.

Magistrate:

Because I would have thought if you meant ... you cannot mean the Magistrate because the Magistrate comes in in 7A so it must be an officer of the court. I can only think it is the Magistrate's Court Greffier. I do not know why that wording is ...

Deputy S.M. Ahier:

That is why I am thinking there might be a need for an amendment to clarify.

Magistrate:

Yes, to clarify who that is meant unless someone has got plans to change the title of the Magistrate's Court Greffier. I do not know of any.

Deputy S.M. Ahier:

Absolutely. Thank you very much.

Deputy R.J. Ward:

A lot of question 3 has already been asked but there was something that came up ... in fact all of the question 3 I think has been asked. There was something you said about the lucrative commercial work and therefore not attracting lawyers to the criminal bar. You mentioned something about with the rates for qualifying for legal aid dropping there will be more people who obviously fall out of that. It was suggested to us that ... I do not know how to word this but I think I am using the correct words ... that the market will deal with that because there will be lawyers who will offer a cheaper option.

Magistrate:

Yes, I am sure there will be a lot more market forces at work because you have taken off the control and then leave it to market forces. As I say again, it really is not for me to say how the lawyers will sort this out. They will know. But if there are movements and you have a very limited bar I do think you need some sort of safety net first of making sure you have enough lawyers and that you have enough lawyers of good experience and skills and that new lawyers are coming up and being trained. You may well have enough good lawyers to deal with it now but where are they coming from?

Deputy R.J. Ward:

It may well be leaving it to chance and it may affect the quality of representation, do you think, for a section of our community that are above the legal aid but below of the point where they ...

Magistrate:

Yes. These are just questions really. It is not something I can express a view on whether it will happen or it will not happen but I think they are questions that need to be asked once you are effectively leaving the provision of legal aid to the market rather than the structure that used to be used.

The Deputy of St. Mary:

Can I just go back to my earlier point really that the first item is the law and then in a way the baby is passed to the Guidelines Panel and a lot of the good points you raise? I think our intention is to, essentially in our review of the law, which whatever conclusion we come to, we would want to highlight these dangers which can be looked at by the Guidelines Committee. Are you reasonably happy with that approach?

Magistrate:

Yes, I think it is a matter for you, this is how you have structured the law; this is how the Government wishes to proceed. I can only say that the scheme as it is, as my understanding, is that is what has been published now and that is what would be given to the shadow guidelines committee as, this is your starting point. I do not know how much force that comes with and I suppose time limits come into it as well. You have got something. Can you improve on this or do you just start again?

Deputy R.J. Ward:

There is a part in the law where this can be revoked but your comments ... do you think that is possible if you lose the Tour de Role?

Magistrate:

That is what I wonder. I am not dictating what anyone should do or should not do. I am just warning really or raising issues for you to think about because the reality is that a number of the bigger firms have already indicated that they will not be dealing with legal aid and they have already tendered it out to other firms so they will not be continuing their legal aid departments as they have had and the smaller firms will ... some of the smaller firms ... one or 2 of the bigger firms I think are carrying on but if you expect to be able to return to the Tour de Role then a lot of those lawyers will have been made redundant. They will have gone on to other work. It is not something that can ... I would have thought ... be very easy to recreate at short notice if the new scheme does not succeed.

The Deputy of St. Mary:

Basically the guidelines have to be approved by the States ultimately. The Minister will bring them for approval so there is going to be a lot of negotiation presumably between the law being passed if

it is passed and the guidelines coming to us or are you suggesting that all negotiation has been done thus far as it were?

Magistrate:

I do not know. I have not been party to any of the negotiations. I am not part of that. I was consulted earlier on. As you say, it is 2 years since I wrote on the matter.

The Deputy of St. Mary:

But on the fact that they come down on things like it was £1 million and legal aid would not be available unless there was a minimum fine of £2,000 ... that has come down to £500 ... so I assume they have taken note of that, have they not?

Magistrate:

I think it has come down to £1,000, has it not?

The Deputy of St. Mary:

They said £500 yesterday, did they not?

Magistrate:

No, level 2.

The Deputy of St. Mary:

Level 2 they referred to, yes. You were not aware of that then?

Magistrate:

I was not aware of £500.

The Connétable of St. Peter:

I think they mentioned level 2; that was reduced £1,000.

The Deputy of St. Mary:

They mentioned level 2. Whether that is £500 or not I do not know.

Magistrate:

It is £1,000.

The Connétable of St. Peter:

I think the level was at level 2 and they seemed to think level 2 was £500. They have got that wrong; it is £1,000 because they were talking about people getting legal aid for mobile phone offences and that sort because that was within £500.

Magistrate:

I think there is a little bit of muddled thinking on that that the starting point for sentencing is a starting point once a guilty plea is entered, that is for an early guilty plea with no previous convictions. You do not get to enter a guilty plea until you have had the legal advice sometimes so if you were going to trial your starting point ... we normally give a third discount for an early guilty plea so your starting point would then be higher if you are talking about a trial. I do understand that for some more minor cases a number of people can very adequately represent themselves but some people cannot and they are more likely to go to trial and trials are more likely to be difficult to manage and difficult to both give someone a fair trial and for them to understand that they have had a fair trial, which I think is as important as delivering a fair trial.

The Connétable of St. Peter:

So you could see the number of people representing themselves increasing as a result of this because they have fallen outside of the net?

Magistrate:

I would think so, yes.

The Connétable of St. Peter:

That would create its own issues.

Magistrate:

As I say, there is a limit to how far the court can assist. The Law Officers' Department do do a very good job in speaking to litigants in person but a lot of issues in trials are agreed outside court. A lot goes on outside court and it is much easier to do that lawyer to lawyer than from the Law Officers' Department on one side speaking to a defendant in person and you have to think of the ... they do not want to push too hard. Some evidence can be agreed, which are called admissions. Now, for lawyer to lawyer there might be some robust discussions about what should and should not be admitted. Law Officers' Department to a litigant in person they could not properly, I do not think, have the same conversations with litigants in person as they would with the lawyer without risking seeming that they are overbearing. So they have got to act very properly and they do act very properly. So I would imagine that fewer things would be admitted beforehand and therefore more evidence needs to be called, that means the trial is longer et cetera.

The Deputy of St. Mary:

Perhaps an unfair question, can you give us an indication of what proportion of defendants do self-represent at the moment?

Magistrate:

A relatively small proportion. Again, as I have said, we try to deal with as many as we can with the duty advocate and because we have a very good Duty Advocate Scheme a number of the people ... say, for example, drink diving; that is the area where you would get people who are in work, they can afford to run a car, they fall foul of drink driving laws. A lot of those cases are fairly straightforward and even though they can possibly afford their own lawyer they see the duty advocate on the day, initial advice is given on the day, it is over and done with, guilty plea and off you go. If they are either not represented or want to be represented by their own advocates then there is generally some more work for the police to do, providing much more evidence, more liaison between the police and the prosecution and the lawyer or a litigant in person but the duty advocate does mean, I think, that a lot of people who might otherwise fall outside the scope of legal aid, as it is now, are picked up on that basis. We do not want to over rely on a duty advocate because if you do then you do not get the continuity in their case and it puts a much bigger burden on the duty advocate to pick up a case that they have never seen before on the day and it is no substitute for properly appointed lawyers in suitable cases. I had one the other day with causing serious injury by careless driving again. It was a matter which I asked the duty advocate to have a look at and he said: "Well, there is just so much to go through here I do not think I could do justice to it as a duty advocate. It should be adjourned for an advocate to be appointed."

[11:15]

I thought on balance that was right that the police reports, D.V.S. (Driver and Vehicle Standards) reports, how much was it the defect in the vehicle that contributed to the accident or was it really a failure on the part of the driver? Was it really careless driving or was it really defective brakes. So the advocate was quite right that the defendant needed to see an appointed lawyer. So a duty advocate is not the answer to everything but it does do a very good job. So, as a result of that, I think we have few completely unrepresented defendants at the moment.

Deputy S.M. Ahier:

Okay, but do you think that the draft law itself will encourage a huge increase in the amount of litigants in person?

Magistrate:

I do not know because I do not look at people's finances. I cannot say how many would fall this side and who you can see is going on that side.

Deputy R.J. Ward:

Do you think the flexibility that you have with the current duty advocate system will be lost with this new system? Because it does seem to be that there is a great deal of flexibility lost with this in terms of you either qualify or you do not. There has always been a grey area where people will be needing a bit of help.

Magistrate:

Well, I do not think the duty advocate is reliant on legal aid criteria. The duty advocate has presence and it is that, perhaps, why I am so keen to keep it as it is. The duty advocate will see anyone the magistrate asks them to see. Primarily they are there for people in custody, they almost always have to see them but anyone else the magistrate asks them to see they will see and they will do so very willingly. But people do not need to qualify under the legal aid criteria to see the duty advocate.

Deputy R.J. Ward:

Are you going to see that change in ...

Magistrate:

Well, I hope it does not change and my concern is that it either stays as it is now or is enhanced, that there will always be enough advocates of sufficient expertise and quality and willingness to come to court at the drop of a hat if necessary. They are on the roster, they will come, or if we need an extra one they will come. Or sometimes, if we are just in court, a case we thought could be dealt with without a lawyer suddenly takes a more complex turn and I suddenly realise that this person does need legal advice. The duty advocate is busy and I say to the advocates in court: "Is anyone available to assist?" People very willingly assist. Now, whether they claim a credit for that or not I do not know but they are very willing to assist; even sometimes before I have asked they will say: "We have identified that so and so is in difficulty."

The Deputy of St. Mary:

That is one of your basic points at the moment that the present system, there is a civic duty embodied in all that and you are frightened or more frightened that that might go.

Magistrate:

Well, I am not saying it will not be there but I wish it to remain and I think it is very important that it remains.

Deputy R.J. Ward:

Will the division between civil and criminal law affect that? Because the civil duty will still be there with the civil law but with criminal law it is a legal duty because of the Legal Aid Scheme set up for criminal law; so the duty advocate with a flat fee. You should, if necessary, have 2 different duty advocates one for criminal law and one for civil law.

Magistrate:

No, we do not have a duty advocate in the civil court.

Deputy R.J. Ward:

Civil. Right, okay, that makes sense.

Magistrate:

So there is separate courtroom separate day.

Deputy R.J. Ward:

Yes, okay, now that does make sense. I am just trying to get the distinction between the 2. Yes, thank you.

The Deputy of St. Mary:

Despite it being in the one Magistrate's Court? Sorry, there is meant to be changing, I am digressing, in another forum, civil division and criminal law division.

Magistrate:

At the moment we are the Magistrate's Court and we are the Petty Debts Court and the magistrate is the judge of the Petty Debts Court; that is the situation. The Petty Debts covers debts, personal injury, evictions, some matrimonial; very wide ranging.

The Deputy of St. Mary:

You have just reminded me, out there somewhere is a proposal to change the name of the Petty Debts Court.

Magistrate:

I think when its jurisdiction went up to £30,000 it is no longer so 'Petty'.

Deputy S.M. Ahier:

You mentioned that the vast majority of cases, both in the Magistrate Court and the Royal Court are presently legally aided. What sort of percentage are legally aided?

Magistrate:

That might be something you would have to ask the Judicial Greffier or the Legal Aid Office. I am not told, when somebody appears before me, they have an advocate. I do not know whether they are being paid privately or under the Legal Aid Scheme. But I would say a good proportion; a healthy majority.

Deputy S.M. Ahier:

Are there concerns about the vulnerable adults that you were talking about previously? Obviously do you believe these groups are being properly considered under the construction of these proposals especially the vulnerable people who may be living with family or even living in sheltered accommodation?

Magistrate:

Well, I think the difference now is that it is clear that anyone who is in receipt of income support would be treated as eligible. It may vary in households as to whether anyone claims income support or whether you would have to widen the definition. If it is income support it may be somebody on long-term incapacity allowance who might be in need and I am not sure that income support itself covers everything. I would imagine that most adult vulnerable people who are living in a household, perhaps with elderly relatives, and they maybe would not qualify on their own financially. If they are in receipt of some sort of benefits, and I would imagine that most adults who are so dependent that they have to live with their parents may well be on benefits but they might not be. You find people with learning difficulties who are holding down a job, whether they would still apply for legal aid because they do not have the assets or because they are not, I do not know, in a home or something, I do not know. What is not there is the sort of safety net for somebody who has maybe a personality disorder, maybe learning difficulties of some sort. So, even though the case in question may be fairly simple and they fall below the criteria for seriousness of offence or they may also fall under the ... they may have a job and they may have certain assets, they are not necessarily capable of representing themselves. If there were the safety net that said, for example, that the exceptional cases do not relate necessarily to the complexity of the case, it can also extend to the personal circumstances or characteristics of the defendant, or just at the discretion of the magistrate because the last thing you want to do is humiliate people and say: "We do not think you are competent." But when people are getting themselves into a real fix about a case and they really are not understanding some very basic points if, at that point, the magistrate could say: "We really think you need some representation here beyond that which a duty advocate can give." If there were a discretion for the magistrate to refer the matter to legal aid and say: "I am asking for this person to be granted legal aid because without that I do not think this person can receive a fair trial" I think that would be an

important safeguard that could perhaps be worked into the law. But, again, it is a matter for you but we do see that Mr. Vibert has come across people in that situation.

The Connétable of St. Peter:

I certainly have and I share your concerns there. I think we should ask that that discretion is written into the law because it is often at the point the person comes in front of the magistrate that you realise that they do need legal aid and, in some cases, they have not fully understood the implications of the charges. They may have dropped out of the legal aid system but for some very good reason may not be able to afford a lawyer.

Magistrate:

Either they cannot afford a lawyer, and I have given you some examples of what we get, or they can be really not capable of properly representing themselves.

The Connétable of St. Peter:

We have seen people in that state sadly, yes.

Magistrate:

Yes, many times. People can just be so, sometimes, very obstinate. They might be able to keep down a job and even run their own business but they cannot see this point that is obvious to the court and it is obvious to the prosecution, that they really do need a lawyer to represent their interests and to explain to them, as well as perhaps avoid a trial or to help them through a trial which they would not be able to manage very well on their own.

The Deputy of St. Mary:

We take note of all your concerns and some of them are repeated in your letter. Sorry I keep on returning to the idea of the difference between the law and the guidelines. Now, are you content that, within the guidelines, the comments you have made will be translated into action, either through the consultation process or at the time they are presented to you before you go back to the Minister?

Magistrate:

At this stage the report that is going to the Minister will be the Committee's report and the magistrate and the Bailiff will be consulted. Now, I do not know whether consultation is going to result in any change. I think what is important is the composition of a committee and that there is a voice on the committee, from a judicial perspective, regarding the defendants in the Magistrate's Court and the magistrate's ability to give someone a fair trial.

The Deputy of St. Mary:

Just going back to the point that if it was the ... I have made a note somewhere ... Magistrate's Greffier on the committee, you would be content with that?

Magistrate:

Yes, I think there does need to be the assistant magistrate on there.

The Deputy of St. Mary:

The assistant magistrate, yes, okay. Sorry I have got that down as a comment. Okay. From what you say, after the initial consultation, you have not been over-involved in any further discussions of detail?

Magistrate:

I know what the Bailiff said to you last October.

The Deputy of St. Mary:

More recently too, yes.

Magistrate:

I have not heard what he said more recently.

The Deputy of St. Mary:

He handed over the letter in March, was it?

The Connétable of St. Peter:

Yes.

Magistrate:

I have not seen that.

The Deputy of St. Mary:

It is his open letter.

Magistrate:

Well, I would not have thought it would differ very much from his views back in October.

The Deputy of St. Mary:

No, you are right.

Magistrate:

So I am aware of that and I would endorse what views the Bailiff has brought forward.

The Deputy of St. Mary:

So the final question I have, and reiterate you will probably say it is not for you to answer, is that I think Jersey is the only jurisdiction which does not have state-aided legal aid. I mean do you think it would solve all your problems if the States took it up?

Magistrate:

That is a political question, would you not say? Very much so.

The Deputy of St. Mary:

Yes, I knew you would not answer it.

Magistrate:

It is not for me and, I do want to emphasise, it is not for me to dictate to or comment on how the legal profession will rearrange itself. Very much that is a matter for the lawyers and a matter for the States but I would hope that there was adequate input from the Magistrate's Court into the Guidelines Committee and I could raise the issue with the family registrars as well.

The Connétable of St. Peter:

Do you have any more questions, Rob?

Deputy R.J. Ward:

I think most things have been covered. I think it was just something about the levels, and I know this is about the guidelines, but it is just such an important issue because it does make or break the law to some extent. The level of income is very low when it is Jersey and I am just concerned that it may be counterintuitive to the idea that legal aid would ensure a fair trial if there is that block in the middle, which would be left to the whims of the free market and whatever to deal with. Do we need another safety net by changing those limits or should they be on disposable salaries, for example?

[11:30]

Magistrate:

That is a matter for you. You have identified the questions that I am raising. I think one of the additional safeguards can be a discretion for the magistrate to refer the matter to legal aid and say: "This person really needs a bit of help." So that is one. It may be that you could look at the disposable income; that is another issue for the advisory committee to have a look at. Also, it is all

tied up with; well, why can you not afford a lawyer's fee? Because fees are high. Now, fees are high, in some cases ... I cannot speak for all cases ... we only see obviously the contested ones. But will that drive down costs generally because a lawyer is going to know that they can only recover so much from the State even if they win a case and the client might say: "I'm not going to pay the difference." So the lawyer will reduce perhaps the cost of their operations and say: "Well, that is what the bill is going to be. It is only going to be this much." Well, that might evolve but it is all the market pressures that I think are difficult to predict. Can lawyers operate and make an acceptable profit if they are having to charge so much less to their clients for their services? Obviously the Law Society will have their views but they are issues that are in ...

Deputy S.M. Ahier:

Does anyone have a point or any final comments? No?

Magistrate:

Just a little overall one, when I was saying about where are the next generation of good and tutored lawyers coming from. If you look at, say, the legal profession in England and Wales, for example, if you look at barristers you will get junior barristers being led by senior barristers in serious trials and that is how you learn. You also go and you learn from simply doing an awful lot of trials around the country. We do not have that volume of trials and also because of the vagaries, even of the Legal Aid Scheme at the moment, there is no guarantee that the same person is going to always get trials in the Royal Court and learn as they do but we do not have a scheme of mentoring. Whether something like that needs to be worked into the scheme may be something that the Law Society may or may not think is a good idea. But just looking at the future of the work, where are the future good lawyers coming from? Who is mentoring them? How are they getting the Royal Court experience? You could not just say: "Well, I will be mentored by the senior lawyer in my firm" because ...

The Deputy of St. Mary:

There may not be one.

Magistrate:

... they may only get one case or may never get a case and it may be some sort of cross-profession mentoring that may be necessary. I say this only because some of the big firms are dropping out. Senior people, people who may have long experience, are no longer doing the work. You can opt in or opt out. Where is that going to come from?

The Deputy of St. Mary:

I take your point.

Deputy S.M. Ahier:

Well, thank you very much. I would like to thank you, Mrs. Shaw, for attending today and I hereby call the hearing to a close. Thanks very much.

[11:34]