

STATES OF JERSEY



ACCESS TO JUSTICE (JERSEY) LAW 2019 (APPOINTED DAY) ACT 202-

(P.63/2021): COMMENTS

Presented to the States on 15th July 2021
by the Legal Aid Review Panel
Earliest date for debate: 20th July 2021

STATES GREFFE

COMMENTS

1. The Chief Minister lodged the [Access to Justice \(Jersey\) Law 2019 \(Appointed Day\) Act 202- \[P.63/2021\]](#) on 8th June 2021. This follows the adoption of the [Access to Justice \(Jersey\) Law 2019](#) (the Law) through debate of the [Draft Access to Justice \(Jersey\) Law \[P.23/2019\]](#), held on 1st May 2019.
2. The Legal Aid Review Panel (the Panel), established in August 2018, was tasked with providing scrutiny of the changes to the way individuals are supported through the Legal Aid system in Jersey. The Panel undertook a full review of P.23/2019, lodging a report [\[S.R.8/2019\]](#) detailing its findings and recommendations.
3. The Panel has continued to keep a watching brief on the progress of the Legal Aid Scheme, and met with the Law Society on 14th April 2021, and wrote to the Chief Minister on [25th February 2020](#), [28th January](#) and [16th April 2021](#).
4. The Panel is pleased to that P.63/2021 has been lodged, however, this has been somewhat delayed and there remains concern about whether a new Legal Aid Scheme will be implemented in a timely manner. The Panel is keen to seek the assurance of the Chief Minister that the necessary elements to progress the Legal Aid Guidelines, including a period of public consultation, do not delay the finalisation and implementation of the scheme. The Panel has also highlighted here additional areas where publication and/or clarification is required from the Chief Minister.

Timelines

5. The Law was adopted by the States Assembly on 1st May 2019. This followed a delay in debate, which was postponed from February 2018 due to the change in Chief Minister in June of that year and to allow time for the current Chief Minister to be briefed on the Law.
6. The Panel was informed by the Chief Minister in March 2020 that he expected to receive the Shadow Legal Aid Guidelines Advisory Committee's (the Shadow Committee) initial report and recommendation "soon". This was prior to the onset of the COVID-19 Pandemic.¹
7. The Shadow Committee's recommendations were formally presented to the Chief Minister's Office in November 2020. Again, the timing was such that it is understood that the Chief Minister's ability to review and be briefed on the recommendations was impacted by the second infection wave of the pandemic. The Chief Minister indicated in February 2021 that he would be receiving briefings on the topic in March of that year and that the lodging of the Appointed Day Act could be expected shortly after this with the intention that the proposed guidelines be laid before the States Assembly by September 2021.²
8. In April 2021 the Panel was informed by the Chief Minister of his intention to lay the proposed scheme before the States Assembly by the end of October. This date was on the proviso that the Appointed Day Act be lodged by early

¹ [Letter – Chief Minister to Legal Aid Review Panel – 6 March 2020](#)

² [Letter – Chief Minister to Legal Aid Review Panel – 4 February 2021](#)

June 2021 and the Chief Minister would be seeking formal representation from the public under Article 7 of the Law.³

9. The Panel has corresponded with the Chief Executive Officer of the Jersey Law Society, as a member of the Shadow Committee, who has reported that the Shadow Committee had met on a regular basis in late 2019 and early 2020, reaching agreement on the basis of a scheme to be placed before the Chief Minister prior to the Island going into lockdown at the end of March 2020. This has been confirmed within the report of P.63/2021. It is understood by the Panel that the expectation of both the Shadow Committee and Jersey's legal profession is that the public consultation will be completed in sufficient time to allow finalised guidelines to be implemented by the end of 2021 at the latest.
10. Adoption of P.63/2021 will allow the Legal Aid Guidelines Advisory Committee to be formally established and mark the start of a maximum six-month period culminating in a report to the Chief Minister to assist in finalising the Legal Aid Guidelines. It is anticipated that the time needed to produce this will be minimal (and certainly shorter than the allowable six months) due to the collaborative work already carried out by the Shadow Committee.
11. There are regulations that the Chief Minister will still need to lodge, in line with Article 6 of the Costs in Criminal Cases (Jersey) Law 1961. P.63/2021 indicates that these will be lodged prior to a proposed Scheme being laid before the States and will contribute towards meeting the cost of the scheme. P.63/2021 also states that this work is ongoing and the Panel would seek the Chief Minister's reassurance that this work has now been completed and will not cause further delay.
12. **The Panel is of the opinion that the Chief Minister must finalise the Legal Aid Guidelines with all due haste. Representation from the public should be sought without delay following the forwarding of the recommended guidelines by the Legal Aid Guidelines Advisory Committee, to allow for their finalisation and implementation before the end of 2021.**
13. The Panel would urge the Chief Minister to produce and publish a timeline for future progress which outlines the steps to implementation to ensure that the deadline of the end of 2021 is met. It would be helpful for this timeline to include the duration of the public consultation period and the four-week period (detailed in Article 7 of the Law⁴) allowing States members to lodge a Proposition or request that the initial Guidelines are annulled.

Proposed changes as outlined

14. Although there have been some changes to the proposed guidelines, which the Panel has been privately briefed on by the Shadow Committee, the foundations remain similar to those outlined in the appendix of P.23/2019. The Panel will be carrying out scrutiny of the guidelines once finalised and will provide comment to the Assembly in due course.

³ [Letter – Chief Minister to Legal Aid Review Panel – 23 April 2021](#)

⁴ [\[P.23/2019\] Page 8](#)

15. These changes can briefly be outlined to include:
- a) Introduction of eligibility criteria through topic of law, split between Public and Private law
 - b) Introduction of eligibility criteria through financial background based on updated calculation of income and capital
 - c) Personal contributions to be made on a sliding scale
 - d) Fees for type of legal rates and actions
 - e) Establishment of a Legal Aid Office under the oversight of the Judicial Greffier
 - f) A publicly funded fixed fee Duty Solicitor and Duty Advocate service would operate within the office to support those taken into custody or appearing before the Courts
16. The Panel would highlight that in its understanding of the draft guidelines, sufficient allowance has now been included to allow discretion of the Judicial Greffier or the Magistrate to grant legal aid where the circumstances require it. This had been an area of concern highlighted by the Panel in S.R.8/2019.⁵
17. The Panel is broadly accepting of the draft guidelines that it has been briefed on to date. As stated, it would expect that the recommended guidelines will be passed to the Chief Minister and published in quick succession should the Assembly adopt P.63/2021.

Future changes to the Legal Aid Scheme

18. Elements of Article 7 were included in the Law following the Panel's request that procedures be in place for the Chief Minister to lay the Legal Aid guidelines, before the Assembly for at least 4-weeks before they were enacted.⁶ Under Article 7 (11) and (12) of the Law the Chief Minister will hold power to revoke or revise the Legal Aid Guidelines following adoption of P.63/2021, this is subject to the same 4-week period. This will allow any States Member the opportunity to lodge a Proposition to annul the initial guidelines or any future revisions.
19. Upon implementation of P.63/2021 the Chief Minister will be accountable to the Assembly and to the Public for the Island's Legal Aid Guidelines with the Judicial Greffier being accountable to the Assembly for the use of public resources and the administration of the Scheme.⁷ The Chief Minister must accept accountability for the allocation of public resources in this respect and, having sought clarification of financial implications of the proposed scheme, this should not cause further delay to the finalisation of the guidelines or their implementation.⁸
20. The Chief Minister, in the debate of P.23/2019, indicated that he did not wish the States to debate the specific details of the guidelines once created:
- "In terms of responding to Deputy Morel, it is not my intention, at this stage, to change the process. Essentially, I think, it is the fact that we have a public*

⁵ [\[S.R.8/2019\]](#)

⁶ [\[S.R.8/2019\]](#)

⁷ [\[S.R.8/2019\]](#)

⁸ [Letter – Chief Minister to Legal Aid Review Panel – 23 April 2021](#)

*consultation process in there before the scheme is produced. I would, therefore, hope that would extend to States Members to have input at that stage and to the Scrutiny process. The question is whether it then becomes open to States Members to amend individual bits, without having the technical offset on that. I think, if it was of sufficient concern, the fact that this Assembly can annul, as I said, I think will very much focus the minds, if a question is raised and it is of substance, by a Member, as part of that consultation process. I am open to, if that process does not work, then any future Chief Minister, or myself, may amend that. The analogy I would use is, this is a very complicated area and it is a highly technical one. If we look at things like the Island Plan which, notionally, is slightly less technical in terms of legal nuances, shall we say, that has a very defined process before it can come back to the Assembly and, yes, Members can change it, but there is a very rigid structure around that. This is even more complicated. That is the concern. Now, is that too complicated for States Members, or not? That is a different view and I would not want to even think that in my mind, but it is very much a case of do you want, effectively, a committee of 49 designing the legal guidelines, or do you want to keep it focused and say: "Right, this Assembly has the final override of saying yes or no" but bearing in mind there are public consultation steps in that process. So, that is an approach. Members may, or may not, go with that, but that is the issue."*⁹

21. The Panel accepts the principle that the finalised guidelines, or individual changes to guidelines, need not be subject to full debate in the Assembly, however there is a need to update Scrutiny and the wider Assembly of any changes to the Legal Aid Guidelines. The Panel would suggest that early briefing and working openly with Scrutiny and the Assembly will reduce the risk that any changes are annulled. The Panel advises the Chief Minister to clarify his position on the inclusion of Scrutiny and States Members in any revisions to the Legal Aid Scheme in the future. The Panel further suggests that clarification on how a States Member may influence any changes to the Legal Aid Scheme in the future be clarified.

Costs of the Scheme

22. Funding of £400,000 per annum is allocated to the Legal Aid Office in the Government Plan 2021-24.¹⁰ However, the anticipated financial implications of the Legal Aid Guidelines have not yet been finalised.
23. As mentioned, the Chief Minister is anticipating lodging Regulations under Article 6 of the Costs in Criminal Cases (Jersey) Law 1961 to contribute towards meeting the cost of the publicly funded Criminal Legal Aid Scheme.
24. The Panel notes that under Article 5 of the Law, once enacted, the States is required to ensure that the Judicial Greffier is provided with sufficient resources for the purpose of meeting payments under the Legal Aid Scheme.
25. The Panel has some concern that costs previously identified, and budgeted for, will not meet the financial needs of the Legal Aid Scheme. The Chief Minister

⁹ [Hansard, 1.2.4, 1st May 2019](#)

¹⁰ [Government Plan 2021-24, page 201](#)

must identify these urgently in order to include them within the Government Plan 2022-25.

Legal Aid Guidelines Advisory Committee

26. As identified the Legal Aid Guidelines Advisory Committee has been meeting in shadow form since 2019. The membership of the committee once established by P.63/2021 will consist of:

- the Attorney General or a person nominated by the Attorney General;
- the most senior officer of the Magistrate’s Court, or a person nominated by that senior officer;
- the Bâtonnier or a person nominated by the Bâtonnier;
- the President of the Law Society or a person nominated by the President;
- the Chief Executive Officer of the Law Society or a person nominated by the Chief Executive Officer;
- two persons nominated by the Bailiff;
- two other persons nominated by the Chief Minister who are residents of Jersey and who are not members of the States; and
- two members of the States, nominated by the States.

27. Inclusion of two members of the States, nominated by the States, was included in the Law following recommendation of the Panel. A quorum of not less than seven members was also included in the establishment terms on the basis of Panel recommendations.

28. The Panel expects that the Chief Minister will outline his nominations of members to the Assembly upon adoption of P.63/2021. The Chief Minister should also clarify the position of membership during 2022 following the election of a new States Assembly, for example will members hold their position if re-elected and will any new Chief Minister be in the position to nominate new members.

29. The Panel would also request that the Chief Minister outline how the Legal Aid Guidelines Advisory Committee, in his opinion, will operate following publication of the Legal Aid Guidelines. For example, what frequency of meetings is anticipated and does he expect to receive recommendations on potential revisions and changes moving forward.

The Bâtonnier and Tour de Rôle

30. The Panel remains unclear on the future role of the Bâtonnier. This should be clarified. The postholder will have the right to membership of the Legal Aid Guidelines Advisory Committee, however the role of administrating the Legal Aid Scheme will be the responsibility of the Judicial Greffier under the Legal Aid Office.¹¹ The Panel notes that the Bâtonnier will hold authority in consideration of appeals made against decisions of the Legal Aid Office, as well

¹¹ [\[S.R.8/2019\]](#)

as of complaints made in respect to an aspect of Legal Aid, although it is unclear on the position of the Bâtonnier beyond this.

31. Practitioners of less than 15 years standing will continue to be obliged to undertake their obligation to undertake private Law Legal Aid work but it is still envisaged that the Tour de Rôle will be removed in favour of allocation of accredited practitioners enabling successful applicants to choose their lawyer for Criminal Legal Aid.

Panel Conclusion

32. The Panel recommends that the [Access to Justice \(Jersey\) Law 2019 \(Appointed Day\) Act 202-](#) proposition should be adopted by the States Assembly and that an updated Legal Aid Scheme should be implemented by the Chief Minister by the 1st January 2022.
33. However, the Panel highlights a number of points that should be actioned by the Chief Minister:
 - a) Publish differences in the proposed Legal Aid Guidelines compared to the current scheme in use;
 - b) Clarify the future role of the Bâtonnier in relation to Legal Aid;
 - c) Clarify what ability there will be to change the Legal Aid Scheme, by whom, and what reporting or scrutiny of this would be required;
 - d) Identify and publish the total cost of funding the scheme;
 - e) Publish the membership of the Legal Aid Guidelines Advisory Committee upon its formal establishment and clarify its future operation; and,
 - f) Outline the timeline for the public consultation and the implementation of the updated guidelines.