

24 August 2020

Andy Harris
Committee and Panel Officer
Care of Children in Jersey Review Panel
States Assembly
St Helier
Jersey

Dear Mr Harris

REDRESS AND ACCOUNTABILITY SYSTEMS IN JERSEY REVIEW

I would like to make the following submission to the Panel for its review of redress and accountability systems in Jersey. I do so in my capacity as an academic expert: I have researched and written on issues related to redress and accountability of public bodies since 1988 and I am currently Professor of Constitutional Justice at the University of Essex. I am a barrister (England & Wales) and have been adviser to several UK Parliamentary committees, including the legal adviser to the House of Lords Constitution Committee. From 2014 to 2018, I was a member of the Jersey Law Commission, where I led two projects on improving the law relating to redress for grievances against public bodies. I draw on those reports in making my submission but would like to emphasise that I do so in a personal capacity as my term of office as a Law Commissioner has ended.

You have my consent to publish the submission on the Panel's webpages.

The work of the Jersey Law Commission on redress against public bodies

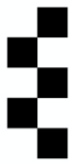
When I was appointed as a member of the Jersey Law Commission, I proposed a wide-ranging review of how in Jersey people's grievances against public bodies are handled. The project spanned five years and covered internal complaints procedures, the tribunal system, appeals to ministers, the States of Jersey Complaints Panel, the possibility of a public services ombudsman for Jersey, the role of the Royal Court (hearing administrative appeals and applications for judicial review), and opportunities to use alternative dispute resolution (ADR) such as mediation.

Based on my research, the Jersey Law Commission published a consultation paper *Improving Administrative Redress in Jersey* in April 2016 (with a public consultation running from 29 April to 29 July 2016). This was followed up with a topic report of the same title including findings and final recommendations in October 2017.

A second topic report *Designing a Public Services Ombudsman for Jersey* was published in November 2018, after a debate in the States Assembly in March 2018 approved Senator Ozouf's proposition on setting up an Ombudsman scheme, subject to further research.

All publications are on the Jersey Law Commission website.

My work with the Jersey Law Commission had two overarching aims. The first was to address the question '**In Jersey, what procedures and institutions are available to people who need to challenge the correctness of administrative decisions or the manner in which they were made?**'. The publications presented for the first time an overview of the whole administrative justice 'landscape' in the island. This mapping exercise is necessary to enable policymakers to think systematically and strategically about how the administrative redress system as a whole can be improved.



A second main aim was to evaluate the procedures and institutions in order to generate policy recommendations for improving the quality of administrative redress in the island. The October 2017 report made several dozen detailed recommendations. The November 2018 report presented a detailed blueprint for the design of a public services ombudsman suited to the needs of the island.

A 'mixed methodology' approach was adopted, to enable the island's complex and previously unresearched procedures and institutions to be understood in the round. A series of semi-structured interviews (24 individuals and 3 group interviews) were carried out. A social security tribunal hearing was observed. A detailed analysis in 2015 of Jersey legislation sought to identify rights of appeal and other avenues of redress that had been formally created in law. Desk-based research was used to collect further information. Further information about how the research was planned and carried out is in 'Annex D – Research Statement' in *Improving Administrative Redress in Jersey* (October 2017). Research for the report on designing a public services Ombudsman scheme included looking at how Ombudsman schemes operating in other jurisdictions (especially in smaller territories) were set up and operate.

Links with the work of the Independent Jersey Care Inquiry

In terms of timing, the IJCI's main period of work (April 2014 - to July 2017) coincided with the Jersey Law Commission's 'Improving administrative redress' project (January 2015 – October 2017). Neither I nor the Jersey Law Commission had any direct contact with the IJCI. With hindsight, there may have been missed opportunities for closer working. But I believe the IJCI and Jersey Law Commission projects share common goal – of improving the quality of the Island's redress mechanisms and increasing public trust and confidence in them.

The partial overlap of focus between the IJCI and Jersey Law Commission's projects was recognised by the Government of Jersey with publication of States Assembly Proposition P.108/2017 (Independent Jersey Care Inquiry Report: Implementation of Recommendations) and the Chief Minister's report R.1/2018 (Jersey Law Commission Report 'Improving Administrative Redress in Jersey: Initial Response') in January 2018. The Government, at the time led by Chief Minister Senator Ian Gorst, broadly welcomed the Jersey Law Commission's recommendations.

Internal complaint handling

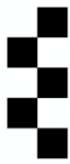
Internal complaints handling procedures are important first-line dispute resolution mechanisms – if they exist and service users have confidence in them. In the time and resources available in the Jersey Law Commission project, we were not able to look at internal complaint handling in depth.

Among the recommendations on internal complaint handling made in the Jersey Law Commission's October 2017 report were:

- 2.1 Create a legal duty on the Chief Minister to issue guidance to public bodies about fair and effective handling of complaints.
- 2.4 The Chief Minister and the Minister for Health & Social Services should commission a duty of complaints handling relating to health and social services decision-making, with a remit to make recommendations.

It is not clear to me whether these specific recommendations have been accepted or rejected by the Government. It will be highly desirable for the proposed new Public Services Ombudsman scheme to have a remit over the quality of internal complaints handling. In Chapter 4 of the November 2018 report *Designing a Public Services Ombudsman for Jersey*, the Jersey Law Commission said in section 4.2:

- Ombudsman schemes can be designed to have oversight role in relation to internal complaints systems, to ensure that people have opportunities to access to good quality internal complaints handling.



- 'We therefore modify our 2017 recommendation [about the Chief Minister's role] and recommend that the Ombudsman have a legal duty to issue guidance to public bodies about fair and effective handling of complaints'.

Tribunals

Where a person disagrees with a decision made about them, an appeal to an independent tribunal can be an appropriate avenue of redress.

In *Improving Administrative Redress in Jersey* (2017), the Jersey Law Commission explained that 'Over several decades in Jersey, a number of tribunals have been created under various Laws to hear appeals against administrative decisions' (para 3.9). Research found that there were eight bodies carrying out judicial functions in this context: Commissioners of Appeal for Taxes; Social Security Tribunal; Social Security Medical Appeal Tribunal; Income Support Medical Appeal Tribunal; Mental Health Review Tribunal; Health and Safety Appeal Tribunal; Data Protection Tribunal; and Rate Appeal Board. Since the 2017 report, at least one further tribunal has come into operation (Charity Tribunal).

Chapter 3 of the 2017 report contains a comprehensive range of recommendations for the reform of the Jersey tribunal system. Key points include:

- The system should be rationalised by the creation of a single new tribunal (the Jersey Administrative Appeals Tribunal) which would replace the existing hotchpotch of separate tribunals (recommendation 3.1).
- In the process for appointing tribunal members, the appointing body should be under a legal duty to 'have regard to the need to encourage diversity in the range of persons available for selection for appointments' (recommendation 3.7).
- Accountability for the operation of the tribunal should be through an annual report by the Chairman to the Chief Minister, who should present the report to the States Assembly (recommendation 3.11).
- Tribunal members should be appropriately trained (recommendation 3.12).
- The new tribunal should have procedural rules, designed and written with appellants' needs in mind and expressed in a user-friendly style (recommendations 3.13 and 3.14).
- Publicly funded legal advice and representation should be available to appellants where this is necessary to ensure that the hearing is fair (recommendation 3.15).

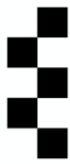
The report also recommended that a large number of rights of appeal that under currently law go directly to the Royal Court (though are rarely if ever actually used by people) should instead go to the more user-friendly new tribunal.

Ministers as decision-makers on appeals

Chapter 4 of the 2017 report found that there were several Laws that give a Minister responsibility for adjudicating on complaints or disagreements with:

- a Connétable's decision on wedding and civil partnership venues
- decisions taken by the Agent of Impôt
- Assessment of special education needs
- Inspector's decisions under the Motor Vehicle Registration (Jersey) Law 1993
- Disciplinary matters at HM Prison La Moye.

The Jersey Law Commission recommended that these 'appeals' to Ministers should instead go to the new tribunal. Generally speaking, a Minister – a political figure in the Government of Jersey and an elected Member of



the States Assembly – is not an appropriate person to hear appeals about administrative decisions. It is not clear to me whether the Government of Jersey has accepted these recommendations.

States of Jersey Complaints Panel and a Public Services Ombudsman scheme

One of the most controversial aspects of the Jersey Law Commission's project related to findings and recommendations made about the States of Jersey Complaints Panel and proposals to replace it with a Public Services Ombudsman. This is considered in chapters 5 and 6 of *Improving Administrative Redress in Jersey* (October 2017) and in the whole of the report *Designing a Public Services Ombudsman for Jersey* (November 2018).

As the Panel will be aware, the outcome has been acceptance by the States Assembly and the Government of Jersey that a Public Services Ombudsman scheme will be established. In my view, this has the capacity to improve the quality of administrative decision-making and access to justice when a person feels a decision has not been correctly or properly made.

The role of the Royal Court in the Administrative Justice system

The Royal Court can have a role in three technically distinct ways in addressing a person's grievance against a public body:

- A specific Law creates a direct right of appeal against an administrative decision
- A specific Law creates 'second' appeal, where a person has gone first to a tribunal but remains dissatisfied or the public body want to appeal against the ruling
- On an application for judicial review, where the Royal Court adjudicates on the legality, procedural impropriety and unreasonableness of a public body's decision or action.

One of the key findings and recommendations of the Jersey Law Commission in *Improving Administrative Redress in Jersey* (2017), chapter 7 was that rights of appeal in 54 Laws should be transferred to the new tribunal (recommendation 7.1). This would be more proportionate and user-friendly.

Alternative dispute resolution

Chapter 8 of *Improving Administrative Redress in Jersey* (2017) examined opportunities for using alternative dispute resolution (ADR) in disputes between individuals and public bodies. The single recommendation was 'Further research should be carried out to develop proposals for mediation and other forms of ADR related to disagreements about administrative decision-making in Jersey'.

Final comments

I hope the panel find this brief overview of the Jersey Law Commission's work in this area over five years helpful. I would be pleased to give oral evidence to the panel or to provide further written evidence if required.

Yours sincerely

Andrew Le Sueur