



Legal Aid Review Panel

Legal Aid Review

Witness: The Bailiff of Jersey

Wednesday, 3rd April 2019

Panel:

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

Deputy R.J. Ward of St. Helier

Deputy D. Johnson of St. Mary

Witness:

The Bailiff of Jersey

[16:33]

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

Welcome to the Legal Aid Review Panel public hearing with the Bailiff. Thank you very much for coming here today to see us.

The Bailiff of Jersey:

You are welcome.

Deputy S.M. Ahier:

If I could just mention to the members of the press, you have 5 minutes in which to take photographs and if we could ensure that everyone has their phones off. Just before we start, Sir William, if you have just read the Scrutiny Panel comments there.

The Bailiff of Jersey:

I will try and bear that in mind.

Deputy S.M. Ahier:

Thanks very much. We will just have quick introductions. My name is Deputy Steve Ahier, I am chairing the Legal Aid Review Panel.

Deputy R.J. Ward of St. Helier:

Deputy Robert Ward. I am on the panel.

Deputy D. Johnson of St. Mary:

Panel member, David Johnson, Deputy of St. Mary.

The Bailiff of Jersey:

William Bailhache, Bailiff.

Deputy S.M. Ahier:

Thank you, Sir. Right, Sir William, could you briefly summarise your thoughts on the changes being made to legal aid in the Draft Access to Justice and Law?

The Bailiff of Jersey:

I do not really have much to add in that sense to my letter of 21st September, which was related to a previous draft of the law, but it has not changed enormously in this draft, as you will be aware. There have been some small changes.

Deputy R.J. Ward:

In your letter you argue in favour of the principle of legal aid and the duty of lawyers to provide it in exchange for the privilege of acting in law on the Island. Does the duty of lawyers extend to only practicing, or should they also aid in funding it, in your opinion?

The Bailiff of Jersey:

Where do I say that?

Deputy R.J. Ward:

I was just looking for it myself, but it is ...

The Bailiff of Jersey:

I only say that because your summary of what I said is not quite what I remember saying.

Deputy R.J. Ward:

Unfortunately I do not have my highlighted version which is where the question came from.

The Bailiff of Jersey:

What I would like to say is that, as I said in the letter, it is certainly true that as a matter of history lawyers have been willing to make contributions on legal aid and they have given an enormous service to the Island in doing that. I would not want anything I say today to derogate from that in any way at all. They have given real service to the community.

The Deputy of St. Mary:

If it helps, I think on page 3 of your letter under the subheading of "Structure" your opening sentence confirms what you have just said.

Deputy R.J. Ward:

Yes, that is where it came from. Do the proposed guidelines appended to the draft law maintain the principle of legal aid, or does it in any way ... could they undermine it?

The Bailiff of Jersey:

Again, what I set out in my letter, starting at paragraph 6 and I think continuing more or less to the end, sets out my view of the proposed guidelines. I think they restrict the access to legal aid and, therefore, speaking for myself I think it is going to have the outcome that there will be more people driven back to be litigants in person and that is not a good thing. I should like to emphasise - and I say it in the letter - there is a distinction between what needs to be provided by way of legal aid in order to ensure that justice is done, and who pays for it. That is an important distinction.

The Deputy of St. Mary:

If it has not been said before, can we thank you for your comprehensive letter setting out your views, and a lot of what you say relates to the guidelines rather than the law and we do appreciate that; particularly your last comment about who pays. Just for the moment concentrating on the law itself because that is what is the subject of the proposition; do you have any major concerns as to why the new legal aid office is being established and its mode of operation?

The Bailiff of Jersey:

No, not really. I think it is important that the court retains the ability to call for the appointment of a lawyer to represent somebody if necessary. I do not think that has been removed. Normally members of the profession are very good about helping the court out if there is a particular problem that arises immediately where a lawyer is needed, and if there happens to be one in court and you say: "Mr So-and-so, Ms So-and-so, would you be prepared to help?" lawyers are, generally speaking, very willing to take on that task. But occasionally there will be cases where a person is defending himself or herself and something comes up where it is clear they ought to have legal

advice, and in those circumstances I would like to think the court can arrange it. I think we can but it does not jump off the page, I do not think. I think it would be part of the continuing obligation of advocates to help the court, which is one of the oaths that they take when they are admitted, and it is important that that continues. I think I would take the view that if those very rare occasions come up which are outside the legal aid scheme which is here, it will not inhibit the court from saying to an advocate: "Will you please assist?"

The Deputy of St. Mary:

A lot of the detail does relate to legal aid guidelines which will be established by the committee in due course. Now, the composition of that committee consists of various persons and again ...

The Bailiff of Jersey:

Article 6.

The Deputy of St. Mary:

Article 6, yes. The present constitution as it is now set out takes account of some recommendations this panel made, which added the 2 States Members. Are you happy with the format or could it be classed as a shade unwieldy?

The Bailiff of Jersey:

Well if this is what you wanted I should not describe it as unwieldy perhaps. The balance is slightly altered. Previously it was essentially 3 lawyer representatives, 3 court representatives and 3 States representatives; so that was 2 persons nominated by the Minister, and I was lumping the Attorney General in with the Minister for those purposes. So 3 from the States side, 3 from the lawyers side, 3 from the court side, and I personally thought that was a good balance; but it is a matter for the States.

The Deputy of St. Mary:

It perhaps comes down to who are the persons nominated by the Chief Minister and even yourself. In your case though, you have the power to nominate 2 persons; from what sort of category do you anticipate they will be coming from?

The Bailiff of Jersey:

The 2 people I am intending to nominate ...

The Deputy of St. Mary:

I was not saying individuals but just ...

The Bailiff of Jersey:

Well I do not mind telling you. The 2 people I intend to nominate are the Master - that is Mr. Thompson - and Peter Harris who is the Assistant Magistrate. I had contemplated one of the family registrars. The reason for choosing the Master is simply that he has been well involved in the consideration of the new law and of the guidelines, and he has consulted on the guidelines as they stand at the moment as well as being a former senior partner in Ogier; so he was a natural choice in that respect, one of the major law firms. The reason for a family registrar would be that the bulk of legal aid is either criminal and starts in the Magistrate's Court, hence the Assistant Magistrate, and the family registrar doing family work which is the other big court on legal aid work.

The Deputy of St. Mary:

I am not challenging those in any way but I am just trying to sort out the balance, therefore, this committee will have on it the Attorney General, also the most senior officer of the Magistrate's Court, your 2 persons serving; is it over-weighted with lawyers, if one can have such a thing?

The Bailiff of Jersey:

Well I cannot think that you can have such a thing really. Well, I do not think so; of course lawyers are involved, the people I am appointing are going to be lawyers, but they are not coming at it as lawyers, they are coming at it as people involved in the court. So their function is to bring the court perspective of difficulties which arise. That is why I would nominate them, they are representing the court. I appreciate that the Guidelines Committee I think is supposed to consult the Bailiff and the Magistrate under paragraph 7 ...

The Deputy of St. Mary:

Going on to that, paragraph 7, yes.

The Bailiff of Jersey:

... so we get consulted anyway. But it is not ideal to be consulted and make all your points at the end; sometimes you need to be down on the ground - the court needs to be - in the development of the guidelines and that is what I hope the Assistant Magistrate and the Master will be able to do.

The Deputy of St. Mary:

Can you answer that question, which was whether you are doubly represented almost but you think not, no?

The Bailiff of Jersey:

No, I think not, because I do not expect to be asked things all the way along the line by the Guidelines Committee, but I do expect the court to be represented by the Guidelines Committee and then, as Chief Justice, the Bailiff to be given a final opportunity to comment.

The Deputy of St. Mary:

Okay, thank you for that. The final point on paragraph 6, or 7 really, the amount of power vested in the Chief Minister effectively, he is the one who is going to be presenting guidelines, et cetera, are you happy that the safeguards regarding the fact that he will be only publishing what has been recommended by the Guidelines Committee ... you do not believe he has too much power in that sense? You believe there are enough sanctions against him for ...

[16:45]

The Bailiff of Jersey:

Well, somebody has got to make a decision so you cannot have a structure where nobody makes a decision. The Chief Minister is given the ...

The Deputy of St. Mary:

So he is able to revoke legal aid; what else can he do ...

The Bailiff of Jersey:

Well I was just checking to see whether or not he publishes the recommendations of the committee.

The Deputy of St. Mary:

I think he does.

The Bailiff of Jersey:

On the face of it, if the recommendations of the Guidelines Advisory Committee are published of course he has a discretion as to whether or not he is going to approve those recommendations or not. If he does not approve them then one would think that he will have to give some reason for not approving them and publish the reason for not approving them. In other words, publish the reason why he has got his own proposals. He is acting executively and he is subject to judicial review so there is a sanction by the lawyers, and indeed by members of the public, if they think that he is capriciously departing from the Guidelines Advisory Committee's advice. I would have thought that that is the protection that you are looking for.

The Deputy of St. Mary:

Yes, I think the panel thought it was, I just wanted to get your confirmation too. Yes, he is obliged under 7(4) at the top of page 47.

The Bailiff of Jersey:

Well, no, that is a requirement that he publish the Minister's proposals, and it is not a requirement that he publish the Advisory Committee's guidelines. That is what I was looking for. It may be that that would be an appropriate amendment to bring, so that paragraph (4), publish the Minister's proposals and, if different, the proposals of the Legal Aid Guidelines Advisory Committee and seek representations from the public. The important thing is that these things are transparent; that is the important thing.

The Deputy of St. Mary:

I appreciate that; we are just concerned that you should be content with that.

Deputy S.M. Ahier:

Just one question about the length of time, the Advisory Committee will have to report back to the Minister no later than 6 months after it is established. Do you think this is feasible or do you think there might need to be an extension?

The Bailiff of Jersey:

Yes, can you just remind, where is that?

Deputy S.M. Ahier:

Sorry, that is 6(9) yes. Because I know there is a lot of pressure from the Law Society that the guidelines should be approved within that timeframe.

The Bailiff of Jersey:

Well I want to come to that in a minute if I may. I think 6 months is enough.

Deputy S.M. Ahier:

So you do not foresee an extension?

The Bailiff of Jersey:

Well there does not seem to be any provision for extension.

Deputy S.M. Ahier:

No, indeed, that is why I was asking.

The Bailiff of Jersey:

But there is no sanction if it does not do it. Can I just pick up that other point? That is that from reading between the lines it seems as though the Law Society considers that this should be an easy job for the Guidelines Advisory Committee because they will just endorse the guidelines as proposed. I personally do not take that view, I think there is a lot to be discussed on those guidelines and it is important that nobody goes ahead on the assumption that the guidelines as proposed by the Law Society will be the final version of the guidelines. It is really important that the law is not passed on the assumption that that is the way it is going to operate because, as you will be clear from my letter I have some concerns about the guidelines.

The Deputy of St. Mary:

I think it is worth saying that we were initially concerned with the law itself, and I think I am interpreting the views of the panel correctly that when we do our report we will be perhaps just flagging certain areas about the guidelines, and certainly I think we adopt your stance that we are in no way endorsing the guidelines. That is fair to say?

Deputy S.M. Ahier:

Absolutely.

Deputy R.J. Ward:

Yes, and there are checks and balances with those guidelines; they can be annulled, which would take us back to square one, by States Members within 4 weeks.

The Bailiff of Jersey:

Where is that?

Deputy R.J. Ward:

It is 7(8).

The Bailiff of Jersey:

Article 7(8)

Deputy R.J. Ward:

Yes, 7(8), Members within 4 weeks after legal aid guidelines are laid before the States can lodge a proposition to request the States annul them. Not amend but annul, we checked on that. So there are 2 areas; there is the States themselves and the Minister, so there are in-built checks and balances in those guidelines. I wonder your opinion on that?

The Bailiff of Jersey:

Well I am just wondering what happens if they are annulled?

Deputy S.M. Ahier:

If they are annulled would it then refer back to the 2010 scheme guidelines?

The Deputy of St. Mary:

Whatever they are operating on at the moment, that is right, yes.

The Bailiff of Jersey:

I understand that is what you would want to happen, I am just wondering why it does happen.

Deputy S.M. Ahier:

Because it has been incorporated in there.

The Bailiff of Jersey:

I do not think they have been incorporated, have they, into the present guidelines. Perhaps they have; I may be wrong.

Deputy S.M. Ahier:

No, but it is a question of the States being able to annul them; do you think that is a sensible procedure?

The Bailiff of Jersey:

I think that is a political matter.

The Deputy of St. Mary:

Well the States already do so on representations from various people, and I think a lot of people too. That is really to protect us against the Minister, is it not?

Deputy R.J. Ward:

Also the fact that the States would be, if you like, picking up a bill so, therefore, has to be responsible for the guidelines as well.

The Bailiff of Jersey:

Well, no, they are not really picking up a bill, are they, because the way in which it works is ... perhaps I was thinking about a previous law but in essence it is the civil legal aid which the guidelines are covering because the criminal legal aid system is going to operate rather separately, is it not?

Deputy R.J. Ward:

The civil legal aid would stay as it is, I thought.

The Bailiff of Jersey:

Well that is where the guidelines come in, is it not? That is where the eligibility and the areas of law come in. They are all about civil legal aid, are they not? I am pretty sure that is right because the consequence of what is happening here is that the States are taking over responsibility for criminal legal aid by funding the Legal Aid Office and by financial arrangements around the provision of criminal legal aid. So that meets the objection that I put up to one of the earlier pieces of draft legislation, which is that we have to be Article 6 compliant because legal aid must be available in criminal cases. But this scheme really is about civil legal aid, so that is what these guidelines are about. There is provision at the very end at the guidelines about fees in criminal cases, appendix 1 deals with these in criminal cases but that is just a relatively small part of the guidelines.

Deputy R.J. Ward:

Yes, okay.

The Bailiff of Jersey:

So the question is if the States were to annul the guidelines then you do not have any guidelines for legal aid in civil cases; you need to know what would be in place.

Deputy S.M. Ahier:

So should the wording perhaps be amended?

The Deputy of St. Mary:

Or is the present system, even though it is not covered by guidelines ...

The Bailiff of Jersey:

The present system is covered by guidelines but not by any statutory basis, no.

The Deputy of St. Mary:

No, I assume that is what will happen. I think we will take note of the point and perhaps get it clarified.

The Bailiff of Jersey:

Yes. I am not sure but it would be quite a change for the States to annul the guidelines and bring in new guidelines which contain more onerous obligations on lawyers when they had not necessarily

been consulted about them. I mean, the structure of this scheme is in relation to civil legal aid, the lawyers at least are consulted about what the legal aid obligation is going to look like, and then the Minister draws up the guidelines. The idea that the States can annul what is being done is one thing, that is to say if the States do not like what the Chief Minister is doing so they say to go and do it again; but amend them I think is definitely a stage too far because the States would be doing that ... well it would be unfair to say on a whim but they would not have gone through the process of understanding what implications the amendments carry and that sort of thing. So there is a process around these guidelines which should result in a comprehensible outcome. The Minister sees the process, he sees the recommendations, he then decides what the guidelines ought to be. If he has to disclose what the recommendations were then he has to say why he has departed from those recommendations, and that is all pretty transparent. If the States think that he is taking some irrational decision then it is fine to go and annul them, although you do need to know what is going to be in place. I just do not think the States ought to amend them themselves.

Deputy S.M. Ahier:

Absolutely. In your opinion, does the draft law provide too much power to the Chief Minister? If so, do you think it should be shared with other Members of the States Assembly, delegated accordingly to a more appropriate Minister?

The Bailiff of Jersey:

Well I think myself that the likelihood of it is that the Chief Minister is going to tick the recommendations of the Legal Aid Guidelines Advisory Committee; that is the likelihood because he would have to justify why he would not do that. So for my part, I am not sure I would get too worried about the Chief Minister exercising too much power because it does not seem to me to be very likely. Furthermore, you have got 2 Members of the States nominated by the States on the Guidelines Advisory Committee at the moment, so you can be sure that there will be a voice in the Assembly if the Chief Minister decides to go against the Guidelines Advisory Committee recommendations because he has got people who know all about them, as it were, in the Assembly on his back wanting to know why he is changing them. So I would have thought that is quite a lot of protection myself, quite apart from judicial review.

Deputy S.M. Ahier:

There is also a provision for Members to bring an amendment as well within 4 weeks.

The Bailiff of Jersey:

Where is that?

Deputy R.J. Ward:

That is the annulment I think.

The Deputy of St. Mary:

That is the annulment, sorry ...

Deputy S.M. Ahier:

That is incorporated with the annulment, okay.

Deputy R.J. Ward:

There is that provision for annulment, which is what we were talking about earlier.

Deputy S.M. Ahier:

Sorry.

Deputy R.J. Ward:

The other question that came up was: do you feel that as Chief Justice you were adequately consulted during the development of the draft law, in the context of development of the law?

The Bailiff of Jersey:

This draft, as I said, more or less repeats what was in the previous draft and there was consultation from time to time. It is like asking somebody whether they think they are paid enough money, of course they will say they are not. Of course I could have done with more consultation but there was some consultation. I will add that I think in justice matters it is very important that the Chief Justice is consulted, and it is one of the quirks of our system in Jersey that sometimes, perhaps a little defensively, Ministers are inclined not to come and consult the Bailiff because they do not think they ought to. But I think that is a shame because the Bailiff as Chief Justice has got absolutely a part to play in the development of justice legislation.

[17:00]

The Deputy of St. Mary:

I think previous questions have all dealt with the law itself, the territory of the guidelines themselves, and I am not sure how much more you want to say on that. You do note in your letter that a household with a joint income even of £45,000 is one that usually has no spare cash left, everything being devoted to meet greater outgoings. So given that this will be £10,000 above the new threshold, what are your views on the proposed income threshold and do you maintain that it should perhaps be raised?

The Bailiff of Jersey:

I do think that it is important that people have access to legal advice before they get committed to litigation in court, and there is a real risk if they do not have access to legal advice that they will commence proceedings and find themselves later on losing them because they never had the right advice to formulate the claim in the right way or because they just did not have the basis for a claim, and then face a very large bill of costs. So it is quite important that people are able to get access to legal advice. The more wealthy a person is then, on the whole, the more experience he or she will have had of lawyers, and probably will know how to go about instructing a lawyer and probably will be more familiar in that sense with what happens in courts. So it is really important that there is protection for those on lower incomes to have access to some legal advice before they launch civil proceedings, and that is usually where the problem comes because they feel a sense of grievance at what has happened to them and think that there must be a claim which they can bring in court, and sometimes there is and sometimes there is not. They need to have advice. So for my part I would make the financial eligibility as generous as possible. The other side of that argument of course is that lawyers need to be willing to do the work and there is a tension in reaching the right balance, and I think that is where the Guidelines Advisory Committee need to its work.

The Deputy of St. Mary:

Going back to your general theme I think it is, that certainly a criminal defendant should surely have representation and do you leave open the possibility of if there is a gap between what the Law Society require and what you consider is reasonable, maybe the States should have involvement; or you do not discard that possibility?

The Bailiff of Jersey:

In civil cases as well?

The Deputy of St. Mary:

Yes.

The Bailiff of Jersey:

Yes, well sorry your question was a bit ...

The Deputy of St. Mary:

Well it was on criminal particularly, yes.

The Bailiff of Jersey:

Well on criminal, depending on the nature of the charge, there is an obligation on the state to make sure legal aid is available, but it comes under Article 6 in the European Convention. If it is a parking

offence, which is a quasi-criminal offence, you do not need to have legal representation. But certainly if anything which threatens the liberty of the subject or is going to result in a significant fine, you would expect the state to make sure that the defendant has access to a lawyer to defend him, her or it. That either is in the shape of a system we have at the moment where there is a Tour de Role and the lawyers are obliged to do it or a replacement system, which is what you have got with this draft law. In civil cases the obligation, under Article 6, is not as wide and there is more scope for argument about it. But I certainly think that it is important that if it is obvious that there is going to be hardship because people are finding themselves on the wrong end of orders for costs in cases because they did not have access to advice at the right time, then I think the States should consider what they are going to do about that problem because it is vulnerable people getting themselves into trouble and making mistakes.

The Deputy of St. Mary:

Again, to echo a recurring theme in your letter, just that apart from the intervention of state, it is that those who cannot afford might be persuaded to represent themselves personally in a court and you see that might ...

The Bailiff of Jersey:

That does happen at the moment sometimes because you might find that ... we had one case where this was precisely the position, the defendant realised that although he had been given legal aid the lawyer was likely to charge him a fee because his income was in excess of the minimum income support figures. Also, I think that the scheme allowed for the partner's income to be taken into account as well, and he chose not to have a lawyer and represent himself instead. He was charged with a grave and criminal assault; I was very worried about that. He was convicted before the Magistrate and I have to say absolutely all credit to the Magistrate, she fell over backwards to explain the legal points that could be taken on his behalf and he, of course, took them but he did not know how to articulate them. When they were decided against him and then she convicted, one was left with quite an uneasy feeling about the case and that is a case that is reported in the law reports. There is no doubt that legal aid in criminal cases, it needs to be available on a basis which does not leave defendants worried that they may face large sums in costs from their lawyers.

Deputy S.M. Ahier:

We note that many lawyers who provide legal aid do not receive significant payment for their work, which has been a major point of contention for Jersey lawyers involved in legal aid. Should legal aid practitioners receive more for their work and, if so, how much more?

The Bailiff of Jersey:

I am all in favour of a fair day's work for a fair day's pay and the question of, what is a fair day's work and how much is a fair day's pay is one, in this context, for politicians and not for me.

Deputy S.M. Ahier:

Do you believe the proposal to introduce conditional fee agreements undermine the principle of legal aid?

The Bailiff of Jersey:

Conditional fee agreements are one of the ways forward that has been adopted in the United Kingdom. You understand how they work; they are, essentially, agreements by which there is a supplementary fee - success fee if you like - if the litigant is successful at the end of the day. It is not really consistent with the oath, which the advocates take, in my view, but we have not had that case argued in court and so that is just a preliminary view, which I express in the absence of argument being put to me. But I cannot say that I much like the conditional fee. I think it is liable to encourage people to litigate when perhaps they should not. I think it is perhaps capable of being an encouragement to lawyers to continue arguing when the client would be prepared to settle. We have certainly had that in the Laker litigation years ago where the thing that held up, ultimately, the settlement of the Laker Airways litigation was the claim of the American lawyers that they were entitled to a percentage of the fees of the losses which Laker Airways had allegedly sustained. I think one has got to be awfully careful with these things. I am, myself, not a huge fan of conditional fees but I know the lawyers like them and they are taken in other agreements in other countries.

Deputy S.M. Ahier:

Should income thresholds and level of access be set by the States or by the legal profession or through a collaboration of both?

The Bailiff of Jersey:

Sorry, would you say that one again?

Deputy S.M. Ahier:

Income thresholds, the eligibility criteria.

The Bailiff of Jersey:

That is in the guidelines, is it not? The proposals are going to be made by the Guidelines Advisory Committee and set by the Minister, and the States will have the ability to bring annulment under this law, bring an annulment opposition if you do not like them. I think the composition of the Guidelines Committee should be such that there is a very healthy debate about what the minimum levels are going to be. The structure of it is such the lawyers are in the minority.

Deputy S.M. Ahier:

In your opinion, does the removal of the law firms to contribute to the funding of legal aid further separate them from the civic elements of judicial representation?

The Bailiff of Jersey:

I am not quite sure what you mean by “judicial representation”. Certainly for as long as we can remember lawyers have made, as I say, a big contribution to the community by legal aid. Lawyers will not be surprised to hear me say I am disappointed that they are not apparently willing to continue that because I have said so, in effect, in my letter. It is very easy to say: “I did it when I was a young lawyer and so why cannot you do it these days.” I think that that is just perhaps a feature of the way in which society has developed over the last 30 or 40 years and sometimes, as said in politics, we are where we are. If lawyers are not prepared to do that, I think some of the politicians need to take it into account. I am personally sorry about it but there you are; that seems to be where we are. I do not think they should be lambasted for it because I am not aware of any other profession that regularly produces services for the community without charge, which is what lawyers have been doing. The other thing to add is that I think without exception the legal aid lawyers who are doing the work, so I am not talking about the partners and the law firms who employ them but the legal aid lawyers who are doing the work, are very comfortable doing it. They like doing it and they do it completely willingly and wholeheartedly.

The Deputy of St. Mary:

Yes, without wishing to rake the point, I mean last night’s *J.E.P. (Jersey Evening Post)* had an article about doctors who were drawing up a particular service overnight because possibly could not afford to; do you accept that ... that is your point really, that lawyers have been, in a way, subsidising the legal aid system for a long time and they are not bailing out completely at the moment, it is a sort of compromise, is it not?

The Bailiff of Jersey:

It is a compromise.

The Deputy of St. Mary:

Yes, and the arguments put by the younger generation, I remember the days of getting green forms in England for £25, et cetera. But the young generation lawyers would say that for them to carry on doing legal aid on the present system for 15 years, I think it is, could be, depending on what comes their way, a heavy burden on their income stream in the future and do you have any element of sympathy with that argument?

The Bailiff of Jersey:

Yes, it can be. I am aware, for example, from my younger days when 2 single practitioners were in danger of getting into financial difficulty as a result of a legal aid certificate. In fact one of them did go *en désastre* and the other one was, I think, assisted by the States and a payment was made out of court and case costs to fund that particular prosecution. He was defending one of the defendants. One has to be aware that, firstly, that is a possibility and, secondly, I think perhaps some sort of mechanism as far as possible for making sure that the damage is not terminal.

The Deputy of St. Mary:

Okay. Just in case the Chief Minister is listening, I do note that practising accountants do not give tax advice for free.

The Bailiff of Jersey:

Really, maybe it is because they pay so much tax they do not feel they have to.

Deputy R.J. Ward:

In your letter, it is on page 4, section 5(ii), you describe the notion of fixed contributions by way of a percentage of fees is highly undesirable.

[17:15]

The newest draft of the law in Article 2 does make some changes to a maximum specific payment for a maximum period payment from administering the length of time which period payments are to be made.

The Bailiff of Jersey:

Sorry, it cannot be Article 2 and it is 7(2), is it not?

Deputy R.J. Ward:

Sorry, 7 part (2), sorry, (a) and (b), do you think this addresses your concern there adequately?
Sorry, 7(2) part (1), (a) and (b).

The Bailiff of Jersey:

Yes, that ensures that the guidelines can, in effect ... I thought there was some other prohibition but that ensures the guidelines can protect against the worry that I express there.

Deputy R.J. Ward:

Okay, so that is a step forward.

The Bailiff of Jersey:

Also, under (h): “Make provision for the criteria for the payment of financial contributions by persons eligible for legal aid to their advocate or solicitor.” Then, importantly, under (i): “Make provision for limiting financial contributions to a maximum specific payment for a maximum periodic payment.” It is (i), I think, which is new and which meets the objections which I set out there at 5(ii).

Deputy R.J. Ward:

Okay, yes, sorry, that was what I was referring to. Yes, okay, that answers the question.

The Deputy of St. Mary:

If I may go back to your long letter, you draw particular attention to the withdrawal of aid for ancillary relief claims. I am referring to your letter at page 5, paragraph 8.

The Bailiff of Jersey:

Yes.

The Deputy of St. Mary:

I just want to expand on that, particularly do you think this will go so far as to lock couples into a situation because of uneven representation?

The Bailiff of Jersey:

Well, 7(2) of the law allows the legal aid guidelines to provide for different types of cases to be dealt with in particular ways and legal services provided and so on. The guidelines can do what the present draft guidelines do, that is to say restrict legal aid to cases where there are dependent children but they do not have to do that and I think it is very important that they do not do that and that is the point really I am making there. It emphasises why I hope that these guidelines are not going to be taken as a blueprint for what needs to be established by the Minister, following the new Guidelines Advisory Committee.

The Deputy of St. Mary:

Yes, so we heard that at the beginning and that week before the Guidelines Committee are not necessarily our first port of call but I think we will flag various points you have made as well.

The Bailiff of Jersey:

Yes, thank you.

Deputy R.J. Ward:

Is that partly as one due to the issue of perhaps somebody in a marriage who cannot get access to prove their income because of our specific tax laws and the way that we file tax under the man in the relationship and may not be able to prove that they should get legal aid? Is that what you are addressing there in terms of those sort of concerns around that area? Say if there is a domestic abusive case, for example, if the woman is reliant on the man financially and cannot prove her income being low, so to speak, to get legal aid, is that what you are referring to in terms of your concerns? If it is just having dependent children there are wider issues.

The Bailiff of Jersey:

No, that is not what I am referring to. Under 8 paragraph (i) of my letter on page 5, the first point being made there is to say under the guidelines in 2010, all matters concerning property and maintenance after divorce or separation are eligible for legal aid, subject only to financial criteria.

Deputy R.J. Ward:

Right, okay.

The Bailiff of Jersey:

But the proposal under the new guidelines was that you would only get legal aid if there are dependent children and that was the point that was being highlighted there.

Deputy R.J. Ward:

Okay, yes, that makes sense. Yes, interesting ...

Deputy S.M. Ahier:

In terms about domestic abuse, you mentioned criminal prosecutions being instigated on the grounds of domestic abuse or violence and it is possible ...

The Bailiff of Jersey:

Sorry, what are you referring to?

Deputy S.M. Ahier:

Sorry, 8(iii) in your letter and you say: "Litigants will be inclined to bring a claim of domestic violence in order to qualify for legal aid." Do you think that is a serious possibility?

The Bailiff of Jersey:

As I said, it is the law of unintended consequences and my information, which is obviously anecdotal, is that it is exactly what has happened in England and Wales. Because you do not get legal aid and you want a lawyer you make an allegation of violence in order to make sure you get a lawyer because

you are then entitled to legal aid, whereas the real argument is about property or bank accounts or whatever it is. Are you asking me, are people sometimes ...

Deputy S.M. Ahier:

No, how do we get around this problem, was my question.

The Bailiff of Jersey:

Are people sometimes devious? The answer is yes, sometimes they are. How you get around it is you do not create the problem by saying that you do not get legal advice in divorce cases, unless there are dependent children or there has been domestic abuse. If you just say you are entitled to get legal advice, subject to financial things, you are entitled to legal aid for legal advice; in divorce cases you do not get that problem.

The Deputy of St. Mary:

You remove the domestic violence as a condition then, yes.

The Bailiff of Jersey:

Sorry?

The Deputy of St. Mary:

You remove the qualification of domestic violence as a precondition.

The Bailiff of Jersey:

Yes, you would certainly say the legal aid ought to be available if there is a claim for domestic violence.

The Deputy of St. Mary:

Yes.

The Bailiff of Jersey:

Suppose it is not a divorce case, you have got 2 partners living together and one alleges the other one is violent to him or her, then you would want them to have legal aid in order to bring what we call ouster proceedings to get an order from the court to get the partner out of the home because they want to stop the violence taking place. But there needs to be a different eligibility criteria for legal aid if you are going through divorce, in which case you should not need to establish either that there are children or that there has been domestic violence. Are you clear about that?

Deputy S.M. Ahier:

Yes, I am, yes, absolutely.

The Deputy of St. Mary:

Yes. You mentioned what happened in England and Wales in that case; are there any other examples which come to mind where Wales has produced problems which we should steer away from?

The Bailiff of Jersey:

I think these guidelines have probably been borrowed in part from the English and Welsh guidelines; that is why it is there but I do not think it is a good thing.

The Deputy of St. Mary:

Sorry, while we are on the comparable jurisdictions, Guernsey is very much state-funded.

The Bailiff of Jersey:

Yes.

The Deputy of St. Mary:

Okay, we will save that for the Chief Minister, I think.

The Bailiff of Jersey:

I know that when Guernsey was criticised for not having a legal aid scheme in the early 2000s and the then Attorney General came up with a scheme and discussion with all those and he said it was going to cost £550,000 or £600,000 a year is the figure I have got in mind, and I believe it costs very much more than that.

The Deputy of St. Mary:

I think so. Yes, I think your numbers might be right, although this final one is £1 million, rather than thousands, I think, yes.

The Bailiff of Jersey:

Yes, I think it is. It is a lot of money, I think.

Deputy S.M. Ahier:

Certainly the Law Society are claiming that it is many millions that they have been losing out on.

The Bailiff of Jersey:

I am sure they are.

Deputy S.M. Ahier:

Do you think that the public are fully aware of the changes that will be taking place if this law is implemented?

The Bailiff of Jersey:

I do not know the answer to that. But it has been given publicity in the same way as other draft laws have been given publicity. How much the public follows the States Assembly website, I am not sure. But, of course, that is really the job of those proposing the laws ...

The Deputy of St. Mary:

Scrutinising them ...

The Bailiff of Jersey:

... and scrutinising them to make sure the public becomes aware of them.

Deputy S.M. Ahier:

We are doing everything we possibly can to get as many submissions as possible.

The Bailiff of Jersey:

You have not had that many.

Deputy S.M. Ahier:

No, of course, and this is our concern, that the public ...

The Bailiff of Jersey:

Yes, I am not blaming you for that but I mean it is true, is it not, you have not had that many?

Deputy S.M. Ahier:

No, and it is a problem ...

Deputy R.J. Ward:

I was going to ask, do you think overall - it is a very difficult, I suppose - summary, this is a step forward in terms of this scheme or do you think we may be making a step backwards? We are very conscious that once you make a distinct change you will lose the Tour de Role very quickly and there is no going back, is a comment made and obviously that is our concern underlying all of this.

The Bailiff of Jersey:

It is a step forward if it secures the provision of legal aid on a proper basis for the future. If it does not work then I think you need to have the ability to restore the Tour de Role and I think that is probably still protected. I think it has been clear from the Law Society resolutions and from what has been said by the presidents of the law societies, the present one and his predecessor and the Bâtonnier, that the lawyers find the current system to be unfair. On that basis, something probably does need to be done about it. Is it a step forward? As I say, if it provides a solution which works then, yes, of course it is; that is a bit of a nonsense reply but it clearly is not a good thing that people who have been willing to make a contribution on a voluntary basis previously are feeling that they are being taken advantage of, that is not a good thing. I think some scheme needs to be found which takes advantage of the goodwill, which lawyers have shown in the past and still have, to do legal aid, that takes advantage of that and at the same time does not take advantage of them. Whether this is the right scheme or not that is just, I think, a matter for your assessment but if the state thinks it is right and if the lawyers think it is right, then I am sure that is a good start.

The Deputy of St. Mary:

In some areas it could be seen as a catalyst for improving. I am thinking now there is a criminal bar developing which perhaps was not there formally before.

The Bailiff of Jersey:

Yes, of course there has been increasingly a private criminal bar because of things like money laundering and the like, which have led to quite wealthy people finding they need advice in relation to criminal matters, so that is just the market at work. In legal aid terms, it is certainly true that we tend to see the same advocates doing criminal legal aid routinely and I guess that must be because the firms are shuffling the criminal legal aid certificates to the regular criminal advocates and so you get a more specialist bar in that respect. When I started there were 45 lawyers and several of those were not on legal aid. When I started we had a legal aid certificate once a week in the summer and once every 2 to 3 weeks in the winter. Some of them were very substantial and you had to do just about anything that was thrown your way. These days the bar is more specialist because there are 300-and-something advocates and another 100-and-something solicitors and so there is much more specialism and the legal world has changed, there is no doubt about that. Of course, there are a lot more financial services business as well.

The Deputy of St. Mary:

The honorary bit has not been totally lost.

The Bailiff of Jersey:

No.

The Deputy of St. Mary:

You said earlier on, I think, there are lawyers who like doing a certain sort of work and they perhaps could have earned more elsewhere, they will come round doing that.

The Bailiff of Jersey:

Yes, hopefully.

[17:30]

Deputy S.M. Ahier:

Any more questions? No. Right, well we would like to thank you, Sir William, for your attendance.

The Bailiff of Jersey:

Can I just add one thing in case you have missed it?

Deputy S.M. Ahier:

Of course.

The Bailiff of Jersey:

That is one of the points in my letter, which I regarded as being quite important, was this question of the fees of acquitted defendants, which I think is at page 9. The reason this is relevant is that I think that the cost ... it is a structure to enable the cost of the state picking up some of the legal aid obligations, the structures to enable that to be levelled out because defendants who are acquitted and who have their own lawyers, privately-funded defendants, are not going to get all their legal costs back again. The savings that are made from that will pay for the cost of providing lawyers in other cases; that, I think, is the structure of it. It is an important financial balance in the view of the judges and I talk for all my colleagues, this is not fair. There is no reason why you should expect a defendant who can afford his own lawyer to subsidise all those defendants who cannot afford a lawyer because that is what it amounts to. If the question is: why should the state pay a very large sum of money to lawyers who are successful defending privately-paying clients? The answer is that you control on a reasonable fee basis what they can recover. But what you do not do is to say whatever their reasonable fee basis is, you, the privately-retained lawyer, are only going to recover the same amount as the public sector lawyer is being paid. Am I explaining this properly? I am not sure that I am.

The Deputy of St. Mary:

Yes, I understand fully. I was just talking about whether there is a question on that but carry on, yes.

The Bailiff of Jersey:

Let us suppose you go to one of the senior private sector advocates doing defence criminal work and you would go to him because it is important to you because it is a sex case and you are worried that you are going to go to prison for a very long time and you want to have somebody who is at the top of his game defending you and his charges are £400 an hour, or whatever it happens to be. If you got legal aid the person who is going on the legal aid rota is being paid, I forget what it is, £200 an hour or something like that but it is in here somewhere.

The Deputy of St. Mary:

I will see what the guidelines say in that case then.

The Bailiff of Jersey:

It is in the guidelines at the back. It is on a ...

Deputy S.M. Ahier:

It is £235 per hour for a partner.

The Bailiff of Jersey:

Where is that?

Deputy S.M. Ahier:

That is on your submission, page 4.

The Bailiff of Jersey:

I am just looking at the guidelines; for not guilty pleas 10 hours is £1,650, so that is £165 an hour in total, £230 7 hours per day or £1,175, that is the same sort of rate, I think. The difference might be quite substantial as to what you can get back if you are successful and you are acquitted. At the moment if you are acquitted the state pays your reasonable costs. In the future the state will not pay your reasonable costs, will pay what the state pay to the legal aid lawyers, which is going to be fixed, having regard to some quite different considerations. Because the fees for the legal aid lawyers, they will be fixed at what the state think they can get away with; that is essentially what it will be in practice, to ensure that there will be enough lawyers prepared to do the work at that rate; that is what one would expect. When I say "get away with", I do not mean to be derogatory in any sense, it is just as long as you can provide enough lawyers who are prepared to do the work at £180 an hour, why would you pay £250 an hour? You would not, would you, because you can get enough lawyers to do it at £180? Once the state have fixed that level of hourly remuneration but the private sector, a privately-retained lawyer, would normally charge £400 an hour because he is used to doing

big money-laundering cases and that is what he can charge in the marketplace. I am not sure why it is fair for the state then to say to the acquitted defendant: "You are not going to get all your costs back because we only pay this to our public sector legal aid lawyers." That seems to me to be unfair and I say that for all my Royal Court colleagues as well, as they also have this view. That funding point is quite an important funding point.

The Deputy of St. Mary:

What about the argument, which I am sure the Law Society will raise, that the lawyer who gets the legal aid rate should be more than adequate to defend you, why are you not wasting state money by employing a Rolls Royce when a Ford Escort would do?

The Bailiff of Jersey:

I do not think the lawyers would say that that was a Ford Escort and, to be fair to the lawyers who are doing the legal aid work, they are quite experienced and they do it very well.

The Deputy of St. Mary:

I should have made that point better, that ...

The Bailiff of Jersey:

But the point that the defendant who chooses his own lawyer is concerned, the Law Society do say how important it is that you should be able to choose your own lawyer.

Deputy R.J. Ward:

Was there not an issue of multiple lawyers that they were talking about? If someone decides to employ 3 or 4 lawyers, top lawyers; that the idea that the state would limit what they would pay for.

The Bailiff of Jersey:

Can I come back to that, it is a slightly different point? The lawyers say that you should be able to choose your own lawyer, if you choose to get somebody who is not prepared to do the work for the public legal aid scheme because he can charge £150 an hour more and the market will pay it, then why should he not? That seems to me to be a reasonable approach for a defendant to take. If he takes it and he is successful, why do you say that the state should not pay the cost of doing so? In all other cases and all civil cases where a party is successful and gets an order for costs, that nobody interferes to say the amount that has to be recoverable is reduced; that is not the way it works.

The Deputy of St. Mary:

Forgive my ignorance on this, but the English system has a taxing mechanism where you go to the Registrar, does that apply here in any way?

The Bailiff of Jersey:

We do have a taxing mechanism and so there is an ability for the paying party to object to the extent of the costs which are being charged. When the court makes an order for costs it is sometimes called taxed costs or standard costs and that will be in accordance with a rate which is approved by the court annually; I think it may go up every 18 months or so and it is at a relatively low level. Everybody understands that it is not the full cost. There is also the possibility that the court will make what is called an indemnity costs order in which they will order the payment of all the costs which have been incurred at an indemnity rate. But in neither case do you necessarily get every single cost back. The difference is that if you are assessing costs on an indemnity basis all the doubts are resolved in favour of the receiving party. If you are doing it on what is called the taxed or standard basis, the doubts are resolved in favour of a paying party. We do have a Taxing Master, it is in the Greffier. One of the Assistant Judges or Greffiers operates as a Taxing Master and he goes through bills and he is working out 2 things; first of all, whether the rates which are being charged are the rates that fall within the right bracket and, secondly, whether the work that is being done is reasonably being done, so that a lawyer cannot say, when he has a costs order to his benefit: "I have done 6 hours' work here" or he can say he has done 6 hours' work but if it is reasonable to have done the work in one hour he can only get one hour back. There is that assessment basis which makes sure that people are not overcharging when they have the benefit of a costs order and that would apply to the defendant who is acquitted as well. He will not necessarily get all his fees back but the difference is that what is proposed here is that the rate at which he can charge should be reduced and that I just do not think is appropriate.

The Deputy of St. Mary:

You explained that the taxing basis ensures that there is no question of, not that he would, a lawyer sort of doing work which is not strictly necessary in the sure knowledge that he will get paid.

The Bailiff of Jersey:

Sometimes just being inefficient about it.

The Deputy of St. Mary:

Okay.

The Bailiff of Jersey:

He might be doing the very best he can but he is just being a bit inefficient or sometimes his client is being too demanding. The client insists on talking for 3 hours when you give the instruction in one; who should pay for that? Not necessarily the state and not necessarily the unsuccessful party in the civil litigation.

The Deputy of St. Mary:

Yes, that is useful, thank you.

Deputy S.M. Ahier:

A quick question about multiple lawyers.

Deputy R.J. Ward:

Yes, I cannot remember where it came from though, this notion that it may have just been a worst-case scenario, so to speak, from the state.

The Bailiff of Jersey:

There are 2 things about multiple lawyers, the first is that there will be cases, in criminal cases in particular, where you have got multiple defendants. If you have a drug importation case there could be 5 or 6 different defendants. Their interests are all slightly different and it is very important that you have got enough lawyers so that each one can be represented and that the lawyers in question are not in the same firm and, therefore, in potential conflict with each other because the client is entitled to know that his or her business is being kept entirely confidential to that lawyer. There is an issue around making sure that there are enough lawyers doing the legal aid work in criminal cases to cope with those multi-handed defendants; that is one point. If the point was a different one, which is that the privately-represented defendant is going to go and instruct 4 lawyers and then would it not be dreadful for the state to have to pay for all 4? There are 2 answers to that, the first is that when he instructs the lawyer in the first place, he would be mad to instruct 4 lawyers because he does not know if he is going to get any costs back anyway. If he can afford it he is taking on a huge expense, which he probably ought not to be thinking about doing. But, secondly, even if he did it, the question as to whether or not it was reasonable to have 4 lawyers would be one, eminently, for the taxation process, which I have just described. It just is not an issue, as far as that is concerned.

Deputy S.M. Ahier:

Thanks very much indeed, Sir William. I will now call this hearing to an end. Thanks very much.

The Bailiff of Jersey:

Thank you very much.

[17:43]