



Legal Aid Review Panel

Legal Aid Review

Witness: The Law Society of Jersey

Thursday, 4th 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:

Advocate J. Kelleher, President, The Law Society of Jersey

Mr. N. Benbow, Chief Executive Officer, The Law Society of Jersey

Advocate R. Colley, Secretary, The Law Society of Jersey

Advocate D. Cadin, Bâtonnier

[14:02]

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

Welcome to the Legal Aid Review Panel with the Law Society of Jersey. I hope you have had an opportunity to read the regulations, which are underneath there. Obviously, we have no press today and unfortunately there will be no phones or filming by the public, I am sorry to inform you, Sir. We just have some introductions to start. We will go around the table. I am Steve Ahier, chair of the Legal Aid Review Panel.

Deputy R.J. Ward of St. Helier:

Deputy Rob Ward, I am on the panel.

Deputy D. Johnson of St. Mary:

David Johnson, member of the panel, Deputy of St. Mary.

Bâtonnier:

David Cadin, Bâtonnier.

Secretary, The Law Society of Jersey:

Rose Colley. I am secretary of the Law Society.

Chief Executive Officer, The Law Society of Jersey:

Neville Benbow, chief executive of the Law Society.

President, The Law Society of Jersey:

John Kelleher. I am the president of the Law Society.'

Deputy S.M. Ahier:

Thank you very much. If we could start. Could you briefly summarise your thoughts on the proposed changes that are held in the Draft Access to Justice Law?

Chief Executive Officer, The Law Society of Jersey:

Clearly, the Draft Access to Justice Law is an enabling law to provide framework for the future of legal aid in Jersey, which has hitherto been discharged; the legal aid has been discharged in Jersey by the legal profession in its entirety. It brings legal aid on to a statutory footing for the first time and creates a partnership between the States of Jersey or the Government of Jersey and the legal profession. It is a building block, a very welcome building block, because it moves matters forward. The legal profession has been looking for reform of legal aid for probably 2 decades on the basis that Jersey is unique and it is the only jurisdiction in the world where legal aid is provided exclusively by the legal profession at its cost rather than by Government, which is the position in every other jurisdiction. It is a matter that needed to be addressed. The obligations on the Government of Jersey have been fulfilled, the human rights obligations have been fulfilled by the legal profession since legal aid started. It is now really the time to move things forward. So we welcome the new law and we look forward to a positive implementation of that law but with a sustainable legal aid scheme, and that involves change and a review of all their eligibility for legal aid, which will come about through the guidelines, which are in integral part of the law.

Deputy S.M. Ahier:

Could you just explain the difference in funding between civil and criminal law as proposed?

Chief Executive Officer, The Law Society of Jersey:

Civil legal aid will continue to be paid for by the legal profession. There are no changes to that. In relation to criminal legal aid, which, as I said a moment ago, is part of the human rights obligations of the Government of Jersey. That and other public law legal aid, and when I talk about public law I talk about mental health representation and public children law matters will be funded on a fixed-fee basis by the Government. However, it is important to recognise that the extent of that funding is limited and it is also pertinent to say that the cost is largely already within the court and criminal costs budget and it is that budget that will be reallocated for the most part in meeting the proposed fixed-fee cost arrangements for lawyers for representing individuals. So from a cost perspective it is relatively cost neutral other than the costs associated with the duty lawyer scheme for the Magistrates' Court and for the duty lawyer scheme for Police Headquarters and Customs where it is a fundamental right to have access to legal representation at a time of need, irrespective of an individual's means. The only other additional costs that will come to the Government is in relation to funding of the legal aid office. That is to be centralised under the control of the Law Society as a role handed down by the Judicial Greffe, with overall supervision from the Judicial Greffe. So the additional funding is around about £400,000, as we understand it, with everything else being found from within existing budgets.

Deputy S.M. Ahier:

Sorry, the £400,000, that is the allocation to the legal aid office?

Chief Executive Officer, The Law Society of Jersey:

No, the cost of the legal aid office is between £220,000 and £230,000 per annum, which is an additional £150,000 on top of the ... there is a degree of funding that is already provided by the Judicial Greffe, and that is the cost of being able to manage that office.

Deputy S.M. Ahier:

Yes, there was already £150,000 allocated from last year's budget, as I understand it.

Chief Executive Officer, The Law Society of Jersey:

No, £71,000 was paid by the Judicial Greffe ... is in the annual budget of the Judicial Greffe for its contribution towards some software provision and a contribution towards staff costs in its existing format. The agreement for an additional £150,000 is an annual allocation on top of the £71,000. So it's £150,000 to £160,000 I think is what the Chief Minister agreed to fund.

Deputy S.M. Ahier:

So the overall funding you have already mentioned will mostly come from recycling of funds?

Chief Executive Officer, The Law Society of Jersey:

Indeed.

Deputy S.M. Ahier:

How much do you envisage the total cost above the recycling may be? I know it is a difficult one.

Chief Executive Officer, The Law Society of Jersey:

A difficult one. As I said, I think the indication across the piece is in the region of £400,000.

Deputy S.M. Ahier:

Thank you. Does the proposed scheme successfully maintain and represent the theory of legal aid?

President, The Law Society of Jersey:

What is the "theory of legal aid"?

Deputy S.M. Ahier:

The current theory of legal aid that we have that obviously when lawyers take their oath and they ...

Secretary, The Law Society of Jersey:

You mean in terms of the undefended orphans, widows?

Deputy S.M. Ahier:

Exactly, yes.

Secretary, The Law Society of Jersey:

I think society has moved on since then, has it not? Therefore, though that is still part of the oath it is clearly not the case that the current scheme only deals with those people. Clearly, for years and years, the profession in the Island has undertaken legal aid for people not within those categories and therefore I am not quite sure what you mean by the theory because we have already moved on. So, yes, we still have the oath.

Deputy S.M. Ahier:

Will that be changing?

Chief Executive Officer, The Law Society of Jersey:

The oath has been in place since at least 1771 and it is not anticipated that will change but I think the key thing here is the revised legal aid scheme will provide an effective and sustainable legal aid scheme, which maintains the safety net of legal representation to the most vulnerable members of our community, who might otherwise be deprived of justice.

Deputy R.J. Ward:

Are you saying that what you have been doing in the last, however long, 10, 20 years ...

Secretary, The Law Society of Jersey:

More than that.

Deputy R.J. Ward:

More than that. Has been providing legal aid for those who really could be providing it for themselves on the Tour de Role?

Bâtonnier:

Yes.

Secretary, The Law Society of Jersey:

Yes.

Bâtonnier:

We have gone far beyond widows, poor people and orphans. It is quite interesting, I think. If you ask about the theory of legal aid, the theory of legal aid very much depends on where you sit in the criminal justice system. If you sit as a judge in the criminal justice system the theory of legal aid is everyone who cannot afford a lawyer should be represented free of charge so that you have no litigants in person from the court system. If you are a taxpayer, why should you be paying for someone who is importing drugs into Jersey who has no connection with Jersey at all? So your perception is legal aid is for someone else to deal with. If you are a lawyer at the heart of this, you are sort of torn between we have got a pro bono obligation, we have taken an oath but there are boundaries. If you are the States looking at this holistically, if you started with a blank piece of paper, you would not end up with this scheme. You would not say that income support is going to have the following limits and if you go over £17,000 we are not going to assist you to put bread on your table. But we will assist you to double that limit to engage in litigation." That is madness. It would not work like that. So part of the theory of legal aid is we have a system, that systems needs to change and it needs to change so it works for all members of society. All of those who have an interest in it. Now we have taken a role, we have had an access to justice review, and what you have got in front of you in terms of the draft legislation is effectively that debate played out over a number of years with the sort of waxing and waning of people putting their theories forward, looking at it, having a discussion around it. In terms of where we have come out, it is broadly all right. It looks at something that meets financial criteria, looks at eligibility in terms of what do we think is right that the people are represented by. What subjects should they have assistance for? It carves out other things.

Deputy R.J. Ward:

Is that the distinction between criminal and civil law that you have made in terms of, i.e. criminal law perhaps ...

[14:15]

Bâtonnier:

No, I think it is more fundamental than that. We have seen society change. One of the interesting things, you may have seen the Bailiff's letter to you talking about look at the rise in litigants in person we are seeing in court. That is quite interesting.

The Deputy of St. Mary:

We had the Bailiff before us yesterday.

Bâtonnier:

So rise in litigants in person. What has changed since 2010 when the legal aid guidelines came in? Absolutely nothing. So why are they seeing more litigants in person? Not because legal aid has changed. It is because litigants are sitting there saying: "Well, actually, I can have a legal aid certificate. It sends me off to a lawyer. I cannot choose, at a price I have no say about. I could do it myself." They are choosing to do it themselves. So there is a societal change and we need our scheme to reflect that. That applies to lawyers, it applies to courts and so on. Everyone needs to change to move forward with this.

Deputy S.M. Ahier:

It could also be that the eligibility rates have not been raised in line with inflation. Would that have had an effect as well over the last 8 or 9 years? In fact, it is from the 2005 scheme, is it not? I do not believe it has raised since the 2010 laws with the revised scheme, so we are talking nearly 15 years.

Bâtonnier:

It could be a reflection of rates having not changed but what we seem to see ... sitting as Bâtonnier, what I see is that people who do not fall within the legal aid scheme will often appeal and say: "Look, I have been refused legal aid" and my response to them is: "Look, I have a discretion but I have to exercise that in exceptional circumstances. Why do you not go and see if you can get representation by a smaller law firm who may be a bit more flexible in terms of the charges they are going to levy, maybe a bit more flexible in terms of when they want payment." Now out of all of the people that have come to me on appeal that I have sent away saying: "You are outside the scheme, go and see

if you can find some representation in the market”, none have returned. That seems to me to say there is a market out there, a commercial market that is allowing people to get representation and then there is a choice. Either people are deciding to pay for it or they are deciding to do it themselves. But that is their choice.

The Deputy of St. Mary:

Can I lift the défaut on the Constable of St. Peter, Richard Vibert? Can I make a more general point which is, as Neville said, at the outset you referred to the framework? Essentially that is what this panel is doing but it will be remiss of us not to look at what is in the guidelines. So our primary review is on the law and the guidelines will be a question for the Guidelines Committee but we feel we are going to have to look at various things and comment on it, if only to flag the points that need to be ... so the States are aware of it when they take it further. That is really what I am saying.

Connétable R. Vibert of St. Peter:

You do get people who fall outside the scheme and, I do not really hold with this, but the reason they fall outside the scheme is because they are a householder. The issue there is if you are the householder, and perhaps you are not even paying a mortgage, but you have not got a particularly high income nevertheless you are probably not entitled to free legal aid. I have seen that where people represent themselves when I was a Centenier on the basis that they were a householder. To be honest, I do not think they should get legal aid. I tend to agree with you on that. They are in a position that probably somewhere along the line they could finance some form of legal aid but they prefer not to.

Chief Executive Officer, The Law Society of Jersey:

I think it is important to say that there is within the existing and proposed future guidelines an equity allowance of £100,000 so if a household has income as proposed under £35,000, that has capital of £15,000 but excluding £100,000 of equity in a property in Jersey they will still be eligible for legal aid. That obviously means that someone who has equity, their legal representation is paid for by the lawyer or in some cases, as proposed, under criminal representation, a contribution made by the Government.

President, The Law Society of Jersey:

We get to see people who apply for legal aid but we also get to see the judgments where people have represented themselves. I understand where the Bailiff is saying he is seeing more litigants in person, what the Bailiff does not know though is why they are being a litigant in person. In our experience, it is not because they cannot afford a lawyer. It is either because they have come through the system, our legal aid system, and they have been told that ... we have quite a good robust system with second chances for review where it has been scrutinised and the opinion given

by 2 independent lawyers is they do not have a case. Then those people then go on to represent themselves or others who just simply do not want to pay legal fees. I have got one at the moment, this person could afford to pay, they do not want to pay legal fees. They just want to do it themselves. You can do it yourself with a bit of internet law and the court will bend over backwards to assist you. So I do not think it is a situation that the legal aid scheme is failing anybody and therefore there are more litigants in person. That is not the case at all. That is people choosing to do that or we have told them, in 2 separate pieces of advice, they do not have a case.

Deputy S.M. Ahier:

But are they not delaying the process because that takes a great deal more time, litigants in person?

President, The Law Society of Jersey:

But everybody is entitled to do that. It is your right, is it not? If you are a defendant or you wish to be a plaintiff because you have a right to go to court in such form as you choose to; represented or not.

Bâtonnier:

That then comes down to a question of value for the States. If you had an unlimited chequebook you can ensure that everybody is represented at any court, any tribunal in the Island and you can pay for that. You would have as swift justice as you could possibly desire. But is that the right use of public money? It is a decision for you. But one might say there are alternatives to that. What we are trying to do is work out where that barrier is.

Chief Executive Officer, The Law Society of Jersey:

I think it also needs to be noted that we are not suggesting that civil legal aid is paid for by Government, as it is in other jurisdictions. We are still maintaining a very significant contribution under the proposed terms of the new scheme. We are continuing to subsidise criminal representation and pay entirely for civil representation.

Deputy S.M. Ahier:

But there are some slight changes to eligibility.

Chief Executive Officer, The Law Society of Jersey:

There are, but those changes reflect the key changes. As a good example, minor criminal matters are not proposed to be included. At the moment, it is based on a fine level of £500 so, for instance, having increased the tariff on mobile phone offences above £500 as the available fine, a fine that is available to the Magistrate, then someone who is financially eligible for legal aid would get a legal aid certificate for a mobile phone offence that comes before the Magistrates' Court. Now, under any

construction, we do not think that is an appropriate use of a lawyer's funds or going forward of public funds. Yes, there are some changes. We believe the financial changes we have proposed are fair because, bear in mind, it is lawyers who are paying these costs. It costs the profession currently in excess of £7 million a year to fund legal aid. We undertook a survey of firms and established that over 45,000 hours of free and reduced costs legal aid was provided by lawyers in the space of one year. That was the equivalent of 42 lawyers working for nothing each year. Or 14 per cent of every lawyers' time. That is significant.

Deputy S.M. Ahier:

Would it be possible to supply the panel with the information regarding the £7 million a year that you believe that it costs to support the legal aid so that we can have guidelines to take to the House so that they can be fully informed?

Chief Executive Officer, The Law Society of Jersey:

That is based on the 45,000-hour level and it is the actual and opportunity costs.

Deputy S.M. Ahier:

If you could so that we can address the Assembly and keep them fully informed of what the situation is.

Deputy R.J. Ward:

There are a number of things that came from that, which are ... the first one has now gone, it will come back to me. But you say an estimate of £7 million a year for legal aid so with this scheme, given that there is not £7 million of funding from the States, knowing that you will continue with the civil law assistance, how much less will this cost be to you with this legal aid scheme? Or will it be, as you are suggesting, there will be less people actually taking legal advice and using lawyers, which would lower that cost as well?

Chief Executive Officer, The Law Society of Jersey:

It is difficult to say because on the basis of the mix of legal aid that is undertaken, we have seen historically, for example, that 55 per cent of all legal aid certificates are in criminal matters. But this year, as a good example, the criminal legal aid matters have, as a percentage, reduced in the first quarter. We do not know the reasons. But the family matters, which will continue to be paid for by the profession in its entirety, have increased exponentially. In the first quarter of this year they represented 49 per cent of all legal aid certificates issued, which is a considerable turnaround.

Deputy R.J. Ward:

So there would still be considerable cost to lawyers but if that cost is halved, for example, which it may be if roughly half is criminal law, then that cost of £3.5 million would need to be passed on to the public purse to maintain criminal law the way it is.

Chief Executive Officer, The Law Society of Jersey:

No, because of the fixed fee ...

Secretary, The Law Society of Jersey:

We deliberately agreed on the expert panel the fixed fee and there was lots of debate about what the fixed fee should be. At the end of the day, it was agreed that these were the figures that were acceptable, both to the public purse and to the profession. But it still means in virtually all criminal cases there will be a small cost that the law firm will still bear because it is swings and roundabouts really. There are going to be a number of cases which far exceed the fixed fee. Some may be slightly less than the fixed fee. But overall, I think the estimate is that there will still be some cost to the profession on the criminal side and obviously on the civil side there are some changes, as you rightly pointed out, that are being proposed in terms of both eligibility and what comes within the legal aid scheme. So I think it would be wrong of us to say that on the civil side the cost will also not reduce slightly. But I think the reduction will be quite slight. I do a lot of legal aid work and most cases that I deal with, which are all family cases, are virtually all people who will continue to qualify. There are very few people, in my experience, on an income of between £35,000 to £45,000 for a family case who actually do choose to have legal aid. Lots of people already opt to choose their lawyer because they want to go to an expert, not just be allocated anybody. Many law firms, as we do, make arrangements whereby they pay by instalments over a long period, they pay at the end. I think the real effect on the civil side will not be as huge as maybe ...

Deputy R.J. Ward:

I am just trying to get a handle on the cost to the public purse here because obviously that is something we are going to be asked about, or the Assembly will be very concerned with, because the £400,000 across the piece, as you mentioned, does not seem to match the £7 million even though you are keeping a considerable amount of that. I recognise that because of the civil law part but if the criminal law part is half of that, even if it was only one-third that was passed on to the public purse for some reason, because the costs would come down because of the fixed fees, it is still significantly more than the £400,000 we are looking at.

[14:30]

Chief Executive Officer, The Law Society of Jersey:

That is £400,000 of new money. That is new money because there is a considerable amount of the funding in the criminal which is from the Court of Criminal Costs budget, from existing.

Deputy R.J. Ward:

That is the recycling?

Chief Executive Officer, The Law Society of Jersey:

That is the recycling and they have that considerable budget which covers complex matters, it covers other public law matters such as children cases, and the calculations they have done is on the fees that we have talked about and effectively agreed in principle. It works without additional costing.

Deputy R.J. Ward:

Just one final thing. With the fixed fees that will bring the cost down so the money is already there and can pay for the other changes, that is the proposition?

Secretary, The Law Society of Jersey:

Yes.

Deputy R.J. Ward:

Okay, that is great.

The Deputy of St. Mary:

I am going to go in more detail about these fees at this stage. Two points for me. You mentioned clients choosing their own lawyer rather than getting legal aid. Presumably you would argue, would you not, that if there is, given the criminal bar being set up, there will be experts in most of the fields in any case and that will improve the service.

Secretary, The Law Society of Jersey:

On the criminal side, clients will have the ideal choice. They will be able to choose their lawyer under what is proposed and obviously the States will pay the fixed fee. But on the civil side, so for example if you want a divorce but you qualify for legal aid, you cannot choose your lawyer and that will continue.

The Deputy of St. Mary:

On one of Neville's points, he referred to the fact that 49 per cent of the work was now family. I am aware, and I do not want to go into it now in detail, but the definition of family law has perhaps been reduced under the guidelines.

Chief Executive Officer, The Law Society of Jersey:

Under the guidelines, probably the only change of any significance is the exclusion from legal representation for couples without dependent children because we felt it was ...

Secretary, The Law Society of Jersey:

We looked at other jurisdictions as well.

Chief Executive Officer, The Law Society of Jersey:

Absolutely, in other jurisdictions and the only criteria where a couple without dependent children may be eligible is where there is proven abuse or violence.

Deputy S.M. Ahier:

I think we will come back to that later.

President, The Law Society of Jersey:

It might assist you to think of this. That one often thinks if you are not a lawyer, that lawyers do everything. We all work in litigation but during our careers you could in Jersey be a generalist in litigation but even in litigation you cannot be now. You are more and more specialised. So let us just think of the criminal side. What has happened in the last 20 years that the prosecution in Jersey have got more and more specialised qualified prosecutors? You would have seen this as a Centenier. Our bar responds to that so there are a few people now who specialise in criminal law and under this new scheme you will have people who have chosen to do criminal law. We already have seen a good take up. We will offer training for them to try and make a fairer playing field or level playing field so that when you meet these professional prosecutors you have got lawyers who are specialised in criminal law, who can do that job. Not just someone who is in a small practice who unfortunately has just received a criminal legal aid certificate, notwithstanding that their bread and butter is conveyancing. That is quite a helpful aspect to it. A difficulty in the civil side is that again you could be a small practitioner practising in conveyancing, you get a family legal aid certificate yet that is not your area of speciality. You will do what you can but you do not know all the tricks of the trade. That is a difficulty in the system

The Deputy of St. Mary:

I do appreciate that, essentially I was ...

The Connétable of St. Peter:

Or you have to pay someone to take it.

President, The Law Society of Jersey:

Absolutely.

The Connétable of St. Peter:

There are one or 2 people who will see these days but it is costly if you are a particularly small firm and you have to pay someone to take on taxes ...

Chief Executive Officer, The Law Society of Jersey:

Constable Vibert makes a very important point. If you have not got the expertise, individual lawyers are personally liable if they give them wrong advice. Sometimes they say: "We are a commercial firm. We are a corporate firm. We will pay someone else to do this work. It comes at a very considerable cost."

The Connétable of St. Peter:

There was a case some years ago where a lawyer set up in practice and unfortunately, through a series of circumstances, had just started out and was pretty much bankrupted by a series of events that occurred because he could not go out and pay somebody to do the cases.

Chief Executive Officer, The Law Society of Jersey:

Absolutely and that was a very ... it was a very new ...

The Connétable of St. Peter:

I know who it, yes.

Chief Executive Officer, The Law Society of Jersey:

That was very difficult circumstances. Someone who wanted, who had great entrepreneurial spirit to set up on their own. Legal aid is a barrier to competition. That is an issue and it also stops firms from getting more people qualified as Jersey lawyers because as soon as they qualify as a Jersey lawyer, for the first 15 years of their post-qualification they are required to provide services to the people of Jersey. No other profession does that in the world.

Deputy R.J. Ward:

I think you have sort of touched on this anyway but I was going to ask about in your letter on page 4 you say: "The current legal aid system is unsustainable" and I think you have given some examples from the questions that we have had already. Do you want to just expand on that a little as to why it is considered as unsustainable? I will take on board the things you have just said.

Chief Executive Officer, The Law Society of Jersey:

It is, as we have talked about, a very considerable cost on the profession. It is an extra tax on ... if you take the gross value added of the legal profession in the last States of Jersey statistics of £200 million, if the cost is around £7 million, just do that as an example, that is a 3.5 per cent tax just across the board.

Bâtonnier:

In a way, it is a tax you are imposing on Jersey lawyers. You are not imposing them on my competition. So the local accountants who are all doing the same sort of regulatory work ...

The Deputy of St. Mary:

I raised the point before.

Bâtonnier:

... they are not taxed to the same effect. Nor do the U.K. (United Kingdom) law firms that are competing in this space who are trying to come in, get into offshore work, they do not suffer the same tax either. So we are putting ourselves at a disadvantage, which is not right, from a legal perspective.

Deputy R.J. Ward:

One of the themes behind the change to the law is financial. The main theme is financial.

Secretary, The Law Society of Jersey:

Not main, it is one of.

Bâtonnier:

It is one of. Sustainability from the profession's perspective is an important aspect. You can go to the other end of the spectrum, what about the clients. If you require legal aid and you are told: "Here is a certificate. You have no choice as to who it is addressed to. You have no choice and no say in how much that certificate is going to cost you because it is a matter for the law firm as to what it bills you." Quite often you will see in a divorce one party goes to one law firm, and their price is X, another party goes to a different law firm, both on legal aid, their price is completely different.

Deputy R.J. Ward:

The solution is the fixed fee to that, is it not?

Bâtonnier:

The solution to that is to standardise so that you go through the Judicial Greffier who will be operating the legal aid office and there will be a fixed range of contributions, depending on means. So you

start to standardise and you start to treat individual litigants more fairly. The idea behind the scheme is effectively that, to try to treat everybody fairly. So then everyone has an interest in this scheme; taxpayers through to users, through to lawyers, and try to distribute that burden more fairly across everyone.

Chief Executive Officer, The Law Society of Jersey:

I think the point the president made a few moments ago in terms of specialisms is particularly ... we are seeing far more growth in the specialist firms. There are now 47 firms in Jersey of which 18 are sole practitioners but within that you have lots of specialisms and it is creating an uneven environment, when we have the growth in areas of law that there is an expectation that people can get the legal support for because when the oath came out and you will assist people there was not a huge amount of work that was ...

The Deputy of St. Mary:

Or many lawyers either.

Chief Executive Officer, The Law Society of Jersey:

Absolutely, until 1904 there were 6 lawyers in Jersey. But the needs are much, much greater. You also have to bear in mind a huge amount of the work undertaken in Jersey is for the benefit of Jersey internationally and it is undertaken by Jersey lawyers because it is arguably the best legal jurisdiction - well we think it is the best legal jurisdiction in the world - and you have a lot of people who are practising Jersey law, they qualify in Jersey and they bring huge amounts of money into the Island for the benefit of the economy, yet those lawyer are still obliged to support the local population.

President, The Law Society of Jersey:

To give you a very tangible example, because these smaller firms, the new start-ups where you ... because often you have qualified in England before you come here. You have just qualified in Jersey and a year or 2 after qualified you have left the firm you worked for and you have started up on your own. You have got 13, 14, 15 years to go on legal aid. If you are a sole practitioner or there is only 2 of you and you do not particularly practise that area of law, supposing you are doing some sort of corporate law ... you talk unsustainability, it is a very onerous burden on you that you have to do this. You either have to do it yourself or you have to pay another law firm to do it for you. That really does contribute to the unsustainability.

The Connétable of St. Peter:

I have had discussions with a number of people and I think perhaps, let us go back perhaps even further than 10 years ago, employing another lawyer then might have been affordable but now the lawyers you would pay are specialists themselves and have chosen to do that. Of course, they

cannot charge rates that do not cover their own costs. The cost of employing another lawyer has gone up considerably. As you say, if you are a small firm it is quite a big burden, which 20 years ago you might have been able to manage it but now ...

Bâtonnier:

I will give you a real tangible example. My firm is one of the larger firms. We are in a number of different jurisdictions. We do not do legal aid. So when I say we do not do legal aid, we get a family certificate, all our lawyers are on the Tour de Role, if a family certificate comes in my firm has an arrangement with 2 other firms in the Island that we pay for out of our own pocket. If we get a criminal certificate, we have an arrangement with a criminal firm. We pay for that and we pay a retainer. Not per certificate, we pay an annual retainer to keep that firm occupied. That is not our mainstream of work. Our mainstream of work is international financial work.

The Deputy of St. Mary:

You would argue you are being responsible to the defendant by taking that action. It would be irresponsible to take it off. I understand that.

Bâtonnier:

We are not tooled up to do it. We do not have the lawyers to do it. We do not have the infrastructure. We used to but we decided it is a better service to go elsewhere. You come back to, why should we be paying for that, for the drug dealer who comes in, who has got no connection with Jersey and is stopped at the port? Why should my firm be paying for that? If society thinks they should be represented, society should be paying for it.

Chief Executive Officer, The Law Society of Jersey:

One very quick interesting point is that I know there is one practitioner who recently finished on the Tour de Role, he finished his 15 years, and he calculated that he had paid out to ... and all his legal aid work was done by another firm, and he had paid £1 million over a period of 15 years. That is a considerable cost of doing business and is a restraint of trade.

The Deputy of St. Mary:

I am aware of that. I said earlier on I think our main focus is to comment on the law itself, leaving guidelines to others. Going back to the law, the question I have refers to the authority vested in the Chief Minister but whether it is him or not, are you broadly content with Article 7, which says: "A Minister shall, with the advice and assistance of the Guidelines Committee, present ..." I mean it has to be a States Member.

Bâtonnier:

Absolutely. Because the States will own the scheme. You are paying for it.

The Deputy of St. Mary:

Moving on, you are not concerned that the Chief Minister and also the Justice Minister, of course, you do not believe he has got too much power vested in himself? You are relatively relaxed about that, are you?

Bâtonnier:

If he makes a decision and it is the wrong decision it is going to be susceptible to judicial review.

[14:45]

So there are challenges around this. I think someone has to make a decision.

The Deputy of St. Mary:

I am not suggesting you should be challenging it.

President, The Law Society of Jersey:

We do accept that that is correct, that you would have to have ultimate responsibility. Because, in effect, we are giving over control of the legal aid scheme to Government because Government is going to be funding it.

The Deputy of St. Mary:

Yes, before the Government was not involved but they are involved and I suggest might become increasingly involved with the way things go with that. At the risk of carrying the wrath of my colleagues here, the composition of the Guidelines Committee, recalling an earlier presentation by yourselves, and we did put in representations, has now got 2 States Members on as well. The rationale for that is that if the States are paying, and may in due course be having to pay more, we should be represented. Are you comfortable with the present composition as outlined in the Article?

Chief Executive Officer, The Law Society of Jersey:

We understand the rationale of adding States Members to the Guidelines Committee. However, we do have a concern bringing the membership of that group up to 12 has the potential to make it rather an unwieldy group. However, if that is the proper constitution of it and the key thing is, it has now had a target of 6 months to complete its work following the approval of the law, that goes some way to allay our fears, that it is not ... we do not have something that is going to be, shall we say, kicked into the long grass during which time we are continuing with an existing scheme.

President, The Law Society of Jersey:

To answer your question: we accept all stakeholders have got to have an interest in the guideline, as long as we get a fair representation because, obviously, we are the ones bearing the particular burden because under the law we are having put on to us a legal obligation to provide legal aid according to the scheme. So we want to have a fair say. As long as that is reflected in the representation that is fine.

Deputy S.M. Ahier:

Do you think that the 6-month period is a suitable amount of time?

Chief Executive Officer, The Law Society of Jersey:

It should be enough because the proposed scheme ... the scheme as presented and included within the draft law, represents the outputs of both the Law Society and the expert panel and the consultations that we had with all key stakeholders. There was a lot of compromise from the legal profession in coming up with those guidelines. Provided that we start from those guidelines, that is the starting point, rather than a desire, which I hoped there would not be, to start with a clean sheet of paper, we have a reasonable and fair set of proposals and provided that is taken as a starting point, 6 months is wholly achievable to come up with a settled and agreed form.

Secretary, The Law Society of Jersey:

It should be, yes. There should be the starting point but it depends how many changes are going to be proposed obviously. If lots and lots of changes are proposed, then we are into quite difficult waters generally, I think.

Chief Executive Officer, The Law Society of Jersey:

Yes, it should be capable but, as Rose says, it is down to if there is a fundamental disagreement on criteria ...

Secretary, The Law Society of Jersey:

Or areas of law within the scheme or ...

Chief Executive Officer, The Law Society of Jersey:

Or areas of law, then it could take longer and ...

The Deputy of St. Mary:

Yes, on that point, I say it is not the purpose of this panel but just looking at the composition, the Bailiff yesterday volunteered who his 2 nominees might be and the public record; one would be the Master and I think the other would be the Senior Assistant Magistrate. The Bailiff has outlined some

of his reservations already. Do you have concerns that with the legal input of power for assisting others that they will be ...

Secretary, The Law Society of Jersey:

Personally, I probably would. Looking at the list, and it is not really something that we properly ever discussed but it seems to me ... I agree absolutely there should be representation by the public, there should be representation by States Members, clearly, because the Law Society is still keeping a huge amount of the burden; clearly they need to be represented. But if you add up the other people, it is one, 2, 3, 4.

The Deputy of St. Mary:

Yes, if you mean the Attorney General, Magistrates' Court and ... yes.

Secretary, The Law Society of Jersey:

Who are the ...

The Deputy of St. Mary:

Four out of 12.

Chief Executive Officer, The Law Society of Jersey:

I do recall that it was not when we were going through looking at this, at expert panel level, it was not expected that the person nominated by the Bailiff would be members of the judiciary.

The Deputy of St. Mary:

Okay.

Chief Executive Officer, The Law Society of Jersey:

I am perhaps a little surprised at that because I think it ...

Secretary, The Law Society of Jersey:

I do not think we envisaged that there would be necessarily 4 either. Those 4 are more than the members of the public, they are more than the States Members; they are more than the Law Society and are they stakeholders in the same way? I am not sure they are.

President, The Law Society of Jersey:

The Attorney General's office is not, is it? It is hard to see what their role is in this. They play no role in legal aid.

Deputy R.J. Ward:

Sorry, is that the main objection then, if it is an objection, that they simply do not have a role with legal aid?

President, The Law Society of Jersey:

Essentially, we would like to ensure that the actual stakeholders each have a fair representation on the panel. The way this is shaping up is the Law Officers' Department and the judiciary are getting double members; they do not need that and it is suffice for me ... you could suffice with the 2 members represented by the judiciary. Because I accept they do see what is going on there, the very day-to-day experience of people being legally represented. The Attorney General has no role to play in this.

Bâtonnier:

I think it is interesting, one of the points that is made, as far as changes to the legal aid law, is the idea that costs are not going to be recoverable in criminal prosecutions, that somehow this is something being brought in as a gift to the Law Society.

Secretary, The Law Society of Jersey:

Which it is not.

Bâtonnier:

This is the Attorney General's perception and his idea and it is something he wants to push them through but he is using the legal aid guidelines and the legal aid law ...

Secretary, The Law Society of Jersey:

To do it.

Bâtonnier:

If that is what is happening it would seem odd that he is then part of a Guidelines Committee going forward because this just provides a cloak to bring in other changes that people ... everything is brought in and it will be ... well, it is the legal aid law. It is not, it has got nothing to do with legal aid but it is just a convenient device to get it through. I think we have got to be alive to that in terms of the guidance power.

The Deputy of St. Mary:

It is a point, obviously our prime function is to comment on the law and to hear your reservations on that, if you have any, and express some of ...

Secretary, The Law Society of Jersey:

I think that is a reservation, absolutely.

Bâtonnier:

Yes, we accept that the States are paying for this and if the States pay for it you have got to have control over it. We might have a say on it but so have all the other people who have got an interest, a legitimate interest in this; lawyers clearly do, the court clearly does.

Secretary, The Law Society of Jersey:

The public do.

Bâtonnier:

Yes, but beyond that you have got to have experience of unwieldy groups and the more members you put on the less likely you are to reach a decision.

The Deputy of St. Mary:

Sorry, I do not really want to extend this unnecessarily but Article 6 at paragraph 7 writes: "The Legal Aid Guidelines Committee shall, before in advising the Assistant Minister, consult the Bailiff and Magistrate." I am not going to say they got double representation, did ...

Secretary, The Law Society of Jersey:

I think that probably does. I think we raised this before.

Chief Executive Officer, The Law Society of Jersey:

We raised this issue with the Chief Minister in that we were concerned that the Bailiff and the Magistrate were having, as we have described it, a second bite at the cherry, having already contributed to the work. It gave us a sense of unease that what had been agreed by the Guidelines Committee was then capable of being adjusted further prior to the matter going before the Chief Minister.

Secretary, The Law Society of Jersey:

That cannot be right.

The Deputy of St. Mary:

Sorry, forgive me, I am an English solicitor by profession or was one.

Secretary, The Law Society of Jersey:

Yes, I mean it cannot be right but they have the say after the Guidelines Committee.

The Deputy of St. Mary:

Wearing a lawyer's hat in a way but is it the case that ... we raised this with the Bailiff yesterday and he said: "The difference between being a member of the actual committee and consulting afterwards." But ...

President, The Law Society of Jersey:

Yes, quite, that is the point, which is why does he need both? The idea of representation ...

The Deputy of St. Mary:

I do not want to put words in your mouth: are you, effectively, saying that it is superfluous for them to be consulted?

President, The Law Society of Jersey:

It is unfair.

Secretary, The Law Society of Jersey:

Yes, and if they are on the committee.

Chief Executive Officer, The Law Society of Jersey:

It is manifest unfairness because that second opportunity, if they do not like what is coming out ...

Bâtonnier:

You can look at what we have got here.

Secretary, The Law Society of Jersey:

That is what has happened already.

Bâtonnier:

We have got a very detailed letter from the Bailiff that has come out and we have the Access to Justice Review. The Access ...

Secretary, The Law Society of Jersey:

He said not a word.

Bâtonnier:

Said not a word through that process but the Access to Justice Review was an ebb and a flow. It was not a lawyer saying: "This is all happening one way." We have got a lot of people pushing back.

We have got Consumer Council, we have got the Attorney General; we have got the Judicial Greffier. There is a discussion that takes place in the room; that carried on over a number of years. You give up some points, you win some points and so on. But we came out with a set of guidelines that broadly work for everyone who has contributed and been invited to contribute and then suddenly riding in over the hill on a white steady charger comes the Bailiff with all these comments that you have got to take into account. Because it is the Bailiff it is very difficult to ignore him. That cannot be right because he has not participated in the discussion. He has not seen the concessions that are being made. He has not seen the points that people have looked over, that is not one we want to fight on.

Secretary, The Law Society of Jersey:

So many compromises were made during the period of the expert panel.

Chief Executive Officer, The Law Society of Jersey:

The Bailiff was given the opportunity to comment on the proposal before ...

Secretary, The Law Society of Jersey:

He did not.

Chief Executive Officer, The Law Society of Jersey:

... they went forward and he declined to do so.

President, The Law Society of Jersey:

Which he accepts in his letter, does he not? He recognises that.

The Deputy of St. Mary:

Yes. I think all we can do is take note of that really. The final point on this, I think we did ourselves suggest that the States should have the power to look at the guidelines. What came up only yesterday, it was a fairly draconian step that the Minister may revoke remedial guidelines and probably shun this Article, subparagraph (11), is that ...

Chief Executive Officer, The Law Society of Jersey:

I think that is probably standard fare to have a revocation Article in any scheme under any circumstances ...

Secretary, The Law Society of Jersey:

Hopefully, with some consultation.

Chief Executive Officer, The Law Society of Jersey:

Absolutely.

President, The Law Society of Jersey:

It is another power he would have to exercise judicially, which the courts could intervene if he did not, so I do not think that ...

The Deputy of St. Mary:

Okay, right, do not get upset by them. Okay, I will move on then.

Deputy S.M. Ahier:

All right, move on. What are your views on replacing the Tour de Role system with a criminal law panel and what involvement will you have with this panel?

Chief Executive Officer, The Law Society of Jersey:

The panel would be constructed ... and we have the composition of the panel already. We have sought ...

Secretary, The Law Society of Jersey:

We have names, yes.

Chief Executive Officer, The Law Society of Jersey:

We have sought nominations for the panel for the training. We were proceeding with the training last autumn when it was anticipated that the scheme would be going through until it was deferred. We have deferred that training but we have a panel in the region of 48 specialist criminal law practitioners who have ...

President, The Law Society of Jersey:

It is a good take up, is it not?

Chief Executive Officer, The Law Society of Jersey:

It is a very good take up. When we were looking at whether we could operate the scheme and there was a clause within the law, and there is a clause within the law that if insufficient numbers came forward it would revert back to the Tour de Role, I calculated that we would need up to 30 across a range of 12 firms. We have 48 across 17 firms. I am quite satisfied and you would need that range of number of firms in case of conflict and multiple defendants in a matter, as often happens.

Secretary, The Law Society of Jersey:

But people will have a choice from that, say, 48.

Bâtonnier:

It is also right in that people have signed up for a 3-year period, so that this is not a case of the States bringing the scheme in and suddenly by Christmas everyone has run away.

Secretary, The Law Society of Jersey:

They have to do it.

Bâtonnier:

You have got a 3-year window to adjust, to fine tune, the scheme and see how it works.

Chief Executive Officer, The Law Society of Jersey:

The firms have signed up as well. The firm commitment is there, the individual commitment is there.

[15:00]

The key element of this is it will provide choice of representation for those who need criminal legal aid.

The Deputy of St. Mary:

That should reduce the prospect of them litigating in person, which is one of the ...

Secretary, The Law Society of Jersey:

Possibly.

President, The Law Society of Jersey:

They do not tend to litigate criminal matters in person, it is more civil.

Chief Executive Officer, The Law Society of Jersey:

The vast majority of those who apply for criminal legal aid are granted it.

The Deputy of St. Mary:

Okay.

Chief Executive Officer, The Law Society of Jersey:

That is the ...

Secretary, The Law Society of Jersey:

But I think choice is really important and I also think for the first-time criminal lawyers in the Island, particularly those who have not practised elsewhere, will get specialist training and that is really important, I think.

Chief Executive Officer, The Law Society of Jersey:

It will be a fully accredited scheme and the ...

Secretary, The Law Society of Jersey:

It will be accredited, so not necessarily all 48 will get over the hurdle.

Chief Executive Officer, The Law Society of Jersey:

Indeed and the accreditation is being undertaken by a Ministry of Justice peer reviewer, who is also undertaking the training.

The Deputy of St. Mary:

Going back to your point earlier about the type of offences which will be eligible, you have mentioned mobiles and things, I presume that is where there is a right to imprisonment, there is no question ...

Secretary, The Law Society of Jersey:

No, no question.

Chief Executive Officer, The Law Society of Jersey:

The definition is anything above level 2 on the sentencing guidelines or any matter in which a custodial sentence could be imposed.

The Deputy of St. Mary:

That is fine.

Deputy S.M. Ahier:

David, about the Tour de Role generally, obviously it is still going to be retained for civil law.

Bâtonnier:

Yes.

Deputy S.M. Ahier:

But do you envisage that changing over time? Do you think that maybe the tide of time is rising to subsume the Tour de Role?

Bâtonnier:

Obviously what you would replace it with ...

Secretary, The Law Society of Jersey:

Yes, because without any public funding for civil work ...

Deputy S.M. Ahier:

Is that what you envisage will happen going forward?

Chief Executive Officer, The Law Society of Jersey:

In the event that if the States Assembly is minded to give everybody the choice of their representation it would have to be on a funded basis. Here is a good example, firms in England and Wales, as they do in most jurisdictions, lawyers choose whether they wish to do legal aid.

Secretary, The Law Society of Jersey:

Very few do nowadays, of course.

Chief Executive Officer, The Law Society of Jersey:

It is a choice, they do not have any obligation. A lot of them do a lot of pro bono work but they are not obliged to do any. We cannot undertake a scheme, other than on the Tour de Role and with no choice, unless it is paid because that would be unfair on the lawyers.

Secretary, The Law Society of Jersey:

It would be unworkable.

Chief Executive Officer, The Law Society of Jersey:

Unworkable.

Bâtonnier:

I suppose the only thing that would happen, in the draft law there is an ability to bring in conditional fee arrangements. Some of the civil claims, if the regulations are brought in and allow conditional fee arrangements, effectively, a lawyer will try and not lift them their hourly rate or if they do not win they do not get a fee. If that were to get regulations that work, it is quite possible that some of the civil legal aid clients will come in and say: "I can either go to see a lawyer under the legal aid scheme, I may or may not have a choice about it. I may or may not have a choice about the rates or I can take my claim and I can go and find someone else who will do this on a no win, no fee basis."

Chief Executive Officer, The Law Society of Jersey:

The law is drafted in such a way that there is no protection for uplift, which acts as a disincentive from firms to taking on that type of work.

Deputy R.J. Ward:

The sequence of the argument for a move to a legal aid scheme, I understand the points about the environment and the positive nature of it. With the financial argument behind it and the unfairness of the burden on lawyers, and you have given some figures about how much has been paid out, what is to say that that argument of unfairness and financial burden on lawyers will not be extended to the ...

President, The Law Society of Jersey:

But it may be one day. We are talking about the compromise, this is our compromise.

Deputy R.J. Ward:

My question is: does this make it more likely because it is ...

Secretary, The Law Society of Jersey:

No, I do not think so.

Chief Executive Officer, The Law Society of Jersey:

We have come to the table in the spirit of partnership and the profession accepts an ongoing commitment to the people of Jersey and an ongoing burden, which they accept is in relation to civil legal aid and in fact subsidising criminal legal aid. The commitment remains there; we are committed to that safety net but it has to be on fair and reasonable terms.

Deputy R.J. Ward:

To you this is those terms.

Chief Executive Officer, The Law Society of Jersey:

This is what we consider.

Bâtonnier:

Deputy Ahier asked the question at the start: are we going to change the oath? There are no plans to change the oath to remove that section, saying lawyers are abandoning pro bono. Most of the lawyers, I think if you ask them, feel that they are rooted in an Island community and they owe something to the community. We are happy to give that but it is a question of balance.

Chief Executive Officer, The Law Society of Jersey:

In terms of the oath, undefended is covered, generally speaking, on the criminal side, poor, but it depends on if ...

Secretary, The Law Society of Jersey:

It depends on ...

Chief Executive Officer, The Law Society of Jersey:

If we said: "We will just look after the ones that are covered under the oath", I think you would see far fewer people eligible, it would be those who are truly poor. You could take, for instance, the States calculation of eligibility for income support and if you said: "Only people who are eligible for income support", which, essentially, I might argue, is the States definition of what constitutes poor, that would see a big reduction in eligibility; we are not suggesting that at all.

Deputy R.J. Ward:

I think that leads on to the question in regards eligibility and whether funding for legal aid existing resources in courts in case ... does it put too much emphasis on litigants and not enough on other stakeholders in terms of their limits? We come from a context, just a few sentences, where it was £45,000, which will now be reduced to £35,000; that £45,000 has not moved since 2005 anyway, so there would not ...

Chief Executive Officer, The Law Society of Jersey:

Or 2010, it went up from £40,000 to £45,000.

Deputy R.J. Ward:

In 2010, so we could be ... particularly as you said that the vast number of criminal cases do get legal aid and they apply for it, can we see a shift downwards in the number of cases that will ... it seems to be inevitable because the limits have come down? I know we are talking about guidelines now ...

Bâtonnier:

We are talking about criminal cases here. You are talking about defendants who are earning between £35,000 and £45,000. I do not know if anyone has done a study of that but it strikes me, a large number of the people who come through the criminal courts are not going to be impacted by that change in limits at all.

Secretary, The Law Society of Jersey:

No, that was the example I gave in the matrimonial, in the family sphere, there are very few legal aid clients within that bracket at the moment.

Deputy R.J. Ward:

So, therefore, any increase would not be significantly more expensive because there is not that many there anyway, it just puts another safety net for those who are within those brackets perhaps. So, for example, should it be a household income that is calculated after costs of the household?

Secretary, The Law Society of Jersey:

No, absolutely ... we used to have that system under the existing guidelines and it simply did not work because people see their household costs as all sorts of things, not just their basic needs.

The Deputy of St. Mary:

It is how they define basic, I suppose, is it not.

Secretary, The Law Society of Jersey:

It is how they define them.

Bâtonnier:

Sky TV is a basic human right.

Secretary, The Law Society of Jersey:

Mobile phones are a basic human right.

Chief Executive Officer, The Law Society of Jersey:

Should lawyers pay for, for instance, someone's divorce? Is that right? That ...

Deputy R.J. Ward:

That is a question to be considered by society I suppose. I think that is what I am getting at. We are talking about criminal cases here, we are not talking about someone's divorce, we are talking about access to a criminal lawyer. If the levels are reduced we may get a section of our community, given that the median wage is about £35,000, so a vast number of people are on that wage, it seems to me that a significant proportion of our population will not be eligible. Also at that level, £25,000 and you will be paying 50 per cent of the costs anyway, so it is a sliding scale. I just ...

Secretary, The Law Society of Jersey:

So are you just looking at the criminal side?

Deputy R.J. Ward:

Well, because that is the side at the moment that we will be paying for. Let us be practical about this from our point of view.

Secretary, The Law Society of Jersey:

If you increase the eligibility then presumably you will be paying more, and this was all part of this debate in terms of cost neutrality.

Deputy R.J. Ward:

Yes, I understand that but I am asking you about ... what I suppose I am asking you is ensuring that we do have coverage, I suppose - I cannot think of the word - but coverage for people within those income streams. Let us forget where the money comes from at the moment but ...

President, The Law Society of Jersey:

So they do not fall through the gaps.

Deputy R.J. Ward:

Yes.

Chief Executive Officer, The Law Society of Jersey:

In the event that the Guidelines Committee chose to have a higher eligibility threshold ...

Secretary, The Law Society of Jersey:

For criminal.

Chief Executive Officer, The Law Society of Jersey:

... for criminal, I do not think that would represent an issue. There would still be a marginal cost on the legal profession, but it would be a matter of funding.

Secretary, The Law Society of Jersey:

There would not be a big fuss.

Deputy R.J. Ward:

So now in terms of the civil levels do you see that moving down, as lowering your costs in the long term of the Tour de Role, as it would cost you by moving that barrier down; do you not think that many, many more people looking for legal aid within their civil cases would lose out under these guidelines?

Bâtonnier:

I think the difficulty is that presupposes that you have this person who would have qualified for legal aid at £45,000, does not qualify for legal aid at £35,000, and cannot find any alternative so, therefore, loses a case. Now, we do not have any examples of that. We have a theoretical, yes, it is possible it could happen. But sitting where I sit as Bâtonnier, look at the number of people whose appeals I have disallowed because they are outside of the scope of legal aid who I have told: "Go and find a lawyer, go and try an alternative source of funding. If you cannot, come back and see me." Because then I can exercise my discretion and say: "You fell outside, you have tried all other avenues to find representation, you have not done it, I will grant the legal aid." I have not seen any return.

Deputy R.J. Ward:

That is partly why I ask the question, for exactly that, to know what the situation is. But does that flexibility remain?

Bâtonnier:

Under the new scheme there is no discretion and that was built in because it was felt inappropriate because it was felt effectively from the States perspective if you build in a discretion it will get used; the hard rules that are set down will get flexed and suddenly everyone will be eligible.

Deputy R.J. Ward:

Just to be certain so I know, because we will be questioned on this, those very few cases that would have come back to you now would not come back to you because they are not eligible and there is no discretion?

Chief Executive Officer, The Law Society of Jersey:

There is no discretion.

Deputy R.J. Ward:

So there is a small section now.

Secretary, The Law Society of Jersey:

But that is not to say that there are not some law firms that will not pick them up in a different way. So, for example my firm, when we thought this was going to go through far more easily clearly than it has, we talked about setting up a scheme whereby we would be offering lower rates to people to do certain sorts of work. We are just one firm but there would almost certainly be others. The whole idea was that we would pick up the people that would then fall outside legal aid, and it would still give them a choice of lawyer and it might well give them more control over their fees than they have under the legal aid scheme.

Bâtonnier:

The example to give there is our firm used to do criminal law. We had a criminal advocate, we had a specialist assistant doing that, we had a specialist administrator. When we started discussing this, our criminal lawyer said that she fancied very much setting up on her own so we have sponsored her, so she is now a single practitioner. If you have someone who falls outside of the legal aid scheme she is exactly the sort of person who is going to make sure that person is represented, something my firm could not contemplate because of the overheads. But a single practitioner with low overheads can deal with it.

Chief Executive Officer, The Law Society of Jersey:

There will be far more fixed fees available on such matters. Another area that is quite important in terms of what is the right thing for people, because going to court is not always the right way, and one of the advantages of the centralisation of the Legal Aid Office is to bring together opportunities for signposting of alternative solutions. So people automatically think: "I need a lawyer" whereas, for example, mediation in a family matter may be a part of the whole of the solution ...

[15:15]

Secretary, The Law Society of Jersey:

Usually part of.

Chief Executive Officer, The Law Society of Jersey:

Part of, to resolve matters. So it is a place through which people can better signpost alternative means of resolving issues facing Islanders, so we think that is positive and it also has greater transparency and clarity on eligibility through the office.

The Deputy of St. Mary:

So to pick up on Rob's point about ... I know there is a safety net for those who are between the £35,000 and £45,000 level and that is going to go. That was debated at the time that these guidelines were produced in draft?

Secretary, The Law Society of Jersey:

Yes.

Bâtonnier:

Yes, it was felt that ...

The Deputy of St. Mary:

That was a non-starter.

Bâtonnier:

Putting things candidly, it was thought if there was a discretion given to anyone and the court is faced with a litigant in person or leaning on someone to exercise their discretion, whoever is in receipt of that discretion is going to be lent on to exercise that to grant legal aid.

Secretary, The Law Society of Jersey:

I had an example yesterday of I act for the husband, the wife has been granted legal aid, and my client was paying her effectively maintenance of £7,500 per month. She has her own income of £2,000 a month. There is equity in the house of over £400,000. Under a discretionary certificate she has been given legal aid because I assume she spoke to people and persuaded people, and it is David's point ...

Bâtonnier:

It was not me.

Secretary, The Law Society of Jersey:

It was not David, but it is David's point. That cannot be right that some other law firm now has to pick up that particular certificate.

President, The Law Society of Jersey:

So you would see probably that some of the new firms setting up would in effect have schemes that would come up ...

Secretary, The Law Society of Jersey:

Yes, or even some of the existing.

President, The Law Society of Jersey:

I would have thought they probably want to pick up some of that business, and it will evolve.

Secretary, The Law Society of Jersey:

Yes, as I say, we had done quite a lot of work on it.

Deputy R.J. Ward:

That one situation is a very different situation from somebody who is on £30,001 and will not get any legal aid.

Bâtonnier:

Just on that point though, the Draft Access to Justice Law, so this is what has been drafted, has taken out Article 23 of the Magistrates' Court miscellaneous provisions and I think that was the provision that allowed the Magistrate to appoint a lawyer to represent someone appearing in front of the court. So the deliberate intention behind this is to make it very prescriptive as to who gets it and who does not get it.

Chief Executive Officer, The Law Society of Jersey:

Because at present the Magistrate does, if she deems it fit, irrespective of someone's financial circumstances: "I want them to have a lawyer."

Secretary, The Law Society of Jersey:

Often it is quite subjective.

Deputy R.J. Ward:

Are you suggesting then the guidelines might be more flexible than the law? No, you would stick straight with the law?

Chief Executive Officer, The Law Society of Jersey:

No, by way of example in terms of discretion, and I used income support, if you apply for income support ...

Secretary, The Law Society of Jersey:

You have to meet the criteria.

Chief Executive Officer, The Law Society of Jersey:

... you have to meet the criteria and if you do not meet the criteria, and I think you can go to a tribunal to raise that issue, but otherwise the Minister does not have the power to override that. That is exactly the same, particularly when you are imposing an obligation on lawyers in respect of civil legal aid to do work. If that work is outside the criteria that does ... I have a sense of unease about that.

Bâtonnier:

Whenever you make changes you run the risk of an unmet need. Having worked on this for a number of years we think we have drawn the balance and we have drawn the line where it should be. If it were to turn out that the line is in the wrong place it is going to be moved. The Guidelines Committee will look at this and flex it.

Deputy R.J. Ward:

That is why I asked the question and I think it is really important to ask those questions from the States Members side as well because what will be seen are the figures and those figures will be looked at, and I think that is a very useful discussion that you talk about how some of those gaps may be met.

Secretary, The Law Society of Jersey:

Will be met.

The Deputy of St. Mary:

Going back to our agenda, some of the questions we outlined have been dealt with in other ways but just to return to this in a way, in your own submission, and I have got it here, you say: "The provision of public funding where legal assistance is required in public law matters, such as penal matters, et cetera, in line with the Government's human rights obligations, et cetera, the proposals are, however, largely cost neutral, with reallocation of other courts and costs funding." Am I being unfair to say that this is in part finance driven rather than not human rights driven but having regard to ...

Chief Executive Officer, The Law Society of Jersey:

The human rights thing is pretty important.

President, The Law Society of Jersey:

Your point is a fair one. It is because it has become too onerous on the profession, but underlying that is the matter of law which it is the States ...

The Deputy of St. Mary:

I am just echoing what people have told to us and we have to play back again. That is really it, clarifying that, yes.

Bâtonnier:

But I think when you say it is the finances; it is more than just a question of pounds, shillings and pence. It gets to a point where the law firms will not do it. So that is what you are buffing up against is, absent change, there is a real chance that someone is going to challenge this, and if they challenge it then you run the risk that you do not have any control over it, someone else imposes something on you, and in the meantime you do not have a scheme at all.

Secretary, The Law Society of Jersey:

It has happened in Guernsey.

The Deputy of St. Mary:

Okay, that is fine.

Deputy R.J. Ward:

Could that happen with the fixed fees, sorry? Could that happen with the fixed fees that basically law companies just simply will not take up the work because of fixed fees?

Chief Executive Officer, The Law Society of Jersey:

Well, as David said, we have ...

Deputy R.J. Ward:

It is not a loaded question, it is a genuine question.

Chief Executive Officer, The Law Society of Jersey:

We have 48 individuals across 17 firms who have signed up ...

Secretary, The Law Society of Jersey:

Who know what the fixed fees are.

Chief Executive Officer, The Law Society of Jersey:

... and they are signed up for a 3-year period. They know what the fixed fees are and if anybody chose not to do that work there are plenty of people who are prepared to do it.

President, The Law Society of Jersey:

It is a fair question. We cannot control all of that, we represent them but ...

Deputy R.J. Ward:

I ask it purely because it is one of the questions that I am going to be asked, to be quite frank. Sorry, I jumped in again, sorry.

Deputy S.M. Ahier:

It was only because we were talking about human rights. What obligations do you believe the legal profession has regarding the maintenance and funding of legal aid, and could you specify the human rights concerns that you have raised in your letter?

President, The Law Society of Jersey:

As a matter of law, our only obligation is to discharge our oath, so we are not even obliged to administer the legal aid scheme. What happened historically was that from the beginning of the 20th century, because of the increase in population and the increase of the States role in people's lives, people had more demand of legal services and those who could not afford it got lawyers. So the Law Society in its early days got together and decided to administer it as a scheme, so it does that voluntarily. It has evolved, it gets some States funding now, but it goes no further than our obligation under the oath. So that answers the question about what our actual obligation is in law, and we could be very strict and say, well, leave it to the court to decide whether you are an orphan or a widow, we are not doing anything more. We obviously have not done that. In terms of the human rights provision that is the only straightforward position. Jersey has signed up to the European Convention on Human Rights, and it is a breach of Jersey as a state, it is a breach of its obligations under that convention not to provide a legal aid scheme to its citizens. It is very simple. So to put it bluntly, if lawyers decided that they were going to not do anything beyond their oath the obligation would fall on the State to come up with a scheme pretty quick.

Chief Executive Officer, The Law Society of Jersey:

As we said in reference earlier, in Guernsey there was a ... it was taking the United Kingdom to the European Court of Human Rights on the basis of their responsibility for Guernsey.

President, The Law Society of Jersey:

That is how it would work, that is right.

Chief Executive Officer, The Law Society of Jersey:

That is what would happen and I do not think there is a desire for the U.K. Government to be taken, in relation to Jersey, to the European Court to be told to put a scheme in place for covering criminal and civil, which is what happened in Guernsey, and where it is entirely paid for by Government.

Deputy R.J. Ward:

So to some extent we have got no choice.

Secretary, The Law Society of Jersey:

No.

Bâtonnier:

You ask about the human rights aspect, there is another aspect which is that as a taxpayer I have a human right to be treated equally, equally with all the accountants and everyone else, every other taxpayer ...

Secretary, The Law Society of Jersey:

Estate agents.

Bâtonnier:

Estate agent, every other taxpayer in the Island. Now, you may put limits around ...

Deputy R.J. Ward:

Where is that stated? I think that is a genuine human rights, it is a view.

Bâtonnier:

But we should all be treated fairly.

Chief Executive Officer, The Law Society of Jersey:

It does have to be recognised that we are entering into this in the spirit of partnership. We are not going to say: "No, we are not going to do anything." Which we feel we could rightly do so, unless it is paid for. So we think that we are maintaining our contribution to the economy and our commitment to the people of Jersey by carrying on as we have proposed.

Deputy S.M. Ahier:

What are your views on the guidelines of divorce proceedings for legal aid unless there are children? Because there is obviously some concern that with the amount of tax that people pay it is all represented in one party, not both parties of the couple, and would there be a possibility that one party claims abuse by the other party to, therefore, claim legal aid?

Deputy R.J. Ward:

Because domestic abuse is included, would it be a driver?

Chief Executive Officer, The Law Society of Jersey:

It is not a matter of a domestic abuse just being cited; there has to be a credible assessment of what that risk is, whether it be injunction ...

President, The Law Society of Jersey:

Yes, but that is not a question for divorce, it is a separate issue. Domestic abuse typically is getting an injunction, usually for the wife to remove the husband from the house. That is typically how we deal with domestic abuse. It is not a divorce issue.

Deputy S.M. Ahier:

But if the other party of the couple could not claim legal aid but they could claim it if they had been abused, would they not be liable to claim that they had been abused to get legal aid?

Secretary, The Law Society of Jersey:

Well this has been the debate in England as well because in England when legal aid was removed from virtually all family cases, the only exception in England, apart from public law children cases, is in relation to where there has been domestic abuse. In those cases legal aid is still available for family law generally. What happened in England was that there was a lot of concern that people were potentially ... I put it no higher than slightly exaggerating the level of domestic abuse, in order to get legal aid. But obviously the other side of that is that you also need to have some safety net because domestic abuse is not just physical abuse, it can be for example as still happens, one party, husband or wife, often the husband, absolutely controlling all the money. So that is abuse and in those situations the husband could afford the person that he considers to be the best family lawyer, the wife would have to represent herself unless there was some sort of safety net in that sort of example. It is a really difficult area, I agree, but I think what is forgotten with divorce proceedings where there are no children is, if you look at the divorce list lots of couples already represent themselves. You do not, for a divorce, need to go to court and many of the law firms in the Island do a fixed fee on divorce, which is around £950 if you are the petitioner, £500 if you are the respondent is the norm.

President, The Law Society of Jersey:

You do not have to prove fault. It is consensual divorce or eventually for partners and consent ...

Deputy R.J. Ward:

There are some proposals for changing divorce law as well, which may assist.

Secretary, The Law Society of Jersey:

In any event.

The Deputy of St. Mary:

Sorry, you referred to what happens in England; are these - on the matter really offside - is that bordering on what happens in England?

Secretary, The Law Society of Jersey:

Yes. Well, our proposed guidelines are much wider than what happens in England because in England now, even with children, unless there is domestic abuse, you do not get legal aid in a family case.

The Deputy of St. Mary:

Okay, thanks.

Deputy R.J. Ward:

We do not want to head down the U.K. line.

Chief Executive Officer, The Law Society of Jersey:

No. I was going to say, the scheme overall is much wider than is available in England and still is supported by the profession.

The Deputy of St. Mary:

Yes. Sorry, very quickly. I see that in 2017 a total of 950 legal aid certificates were issued. Have you got a comparable figure for last year?

Chief Executive Officer, The Law Society of Jersey:

Last year it did reduce, it was 777. The numbers vary.

Secretary, The Law Society of Jersey:

They fluctuate each year.

Chief Executive Officer, The Law Society of Jersey:

It does fluctuate. It is on a trend to be higher this year, particularly in family matters. So, it is always difficult to say but one thing worthy of saying is that every case is individual and the complexities we are seeing are increasing because the areas of law that are coming forward are getting more complex, and Constable Vibert will know that from his work in our criminal courts.

[15:30]

Deputy R.J. Ward:

You know the 42 days of lawyers' time that you talked about being used for legal aid certificates?

Chief Executive Officer, The Law Society of Jersey:

No, it is 42 lawyers' time, i.e. full time.

Deputy R.J. Ward:

Time, okay. If they did not do that work would there be enough work for them to be working anyway?

President, The Law Society of Jersey:

Based on my schedules, yes.

Deputy R.J. Ward:

Because you are assuming they are making money out of the time so there must be people missing out.

Secretary, The Law Society of Jersey:

I do not think you are going to see lawyers unemployed, on the streets.

Deputy R.J. Ward:

We would not want to see that, would we?

Deputy S.M. Ahier:

In our hearing yesterday with the Bailiff, a concern was raised regarding the changes to cost recovery from acquittal cases. In your view, how should successful litigants be able to recover these costs?

President, The Law Society of Jersey:

They should be able to recover their costs from the state. That should be fundamental and that is the Law Officers' Department under the Attorney General pressing for that not to be the case.

Secretary, The Law Society of Jersey:

That is the Attorney General point that David made earlier. That change has not come from us.

President, The Law Society of Jersey:

No, not at all.

Chief Executive Officer, The Law Society of Jersey:

It is not associated with legal aid.

Secretary, The Law Society of Jersey:

The lawyer members are not happy with it.

Chief Executive Officer, The Law Society of Jersey:

The only association is financial and it is that the Attorney General is proposing to ...

Secretary, The Law Society of Jersey:

Reallocate the money.

Chief Executive Officer, The Law Society of Jersey:

... say when someone is acquitted, a privately-funded defendant, a privately instructing defendant who is acquitted, the limit of their recovery would be what would have been the fee under legal aid.

Deputy R.J. Ward:

That is essentially for recycling the money to pay for it though, is it not?

Secretary, The Law Society of Jersey:

It is recycling the money. One, it is recycling the money, and (2), as the Attorney General made this point at the expert panel, he wants to go along the line of, again, what happens in England. That is what happens in England now.

Chief Executive Officer, The Law Society of Jersey:

That was intended before the legal aid debate came forward.

Deputy R.J. Ward:

Sorry, just a final question. If that did not happen the money would not be there to recycle so there would need to be another pot of money from the public purse to pay for that?

Secretary, The Law Society of Jersey:

Yes.

President, The Law Society of Jersey:

If I were a States Member, I would be asking myself this question: is it right, therefore, to penalise people who, under the judicial system, have been found to be innocent of the charges which they were charged with and, in some cases, perhaps wrongly prosecuted, should they be punished for the fact that the States are having to pick it up? It is an obligation in law to provide legal aid.

Deputy R.J. Ward:

Theoretically with the criminal bar that you are developing, which will be very skilled, there will be no need to pay for a more expensive lawyer.

President, The Law Society of Jersey:

No but you will not be able to recover that money.

Bâtonnier:

No. This is for privately-funded litigants. So someone who falls outside the legal aid scheme, you know, £100,000 a year cannot afford legal aid or is not eligible for legal aid, goes in ...

Secretary, The Law Society of Jersey:

There are some.

Bâtonnier:

... spends £50,000 defending themselves and are acquitted; they will not get their £50,000 back they will only get legal aid £5,000 back.

Deputy S.M. Ahier:

Is that not the case at the moment?

Secretary, The Law Society of Jersey:

No.

Deputy S.M. Ahier:

I would like to question that because I have had submissions from people in my Parish who have said that this is the case at the moment.

Chief Executive Officer, The Law Society of Jersey:

The recovery is generally subject to taxation now.

Bâtonnier:

Perhaps if I could just intervene and we walk through what happens. So someone is acquitted at the end of the trial. The law firm will have charged an hourly rate. Usually that hourly rate covers their profit costs, it is a choice so there will be a difference between a top division firm and a smaller firm and rates will vary. But what the court says is that okay, we are going to give a relatively standard rate, so it is called factor A plus factor B. Factor B is your uplift charge, how complex the case is and so on. Now, what the court will allow is: "Okay, we will allow for that price, that hourly rate throughout the case." But to get there you have to go through a taxation process. So what will happen at the end of a criminal case is the acquitted defendant will say: "Well, how much did that cost?" The law firm will say: "It cost you this." You put in your bill to the Attorney General's Chambers. The Attorney General's Chambers will come back offering you a penny out of the poor box and there is usually some negotiation around that. If you do not accept the number that is offered by the Attorney General's Chambers you then go into this taxation process with the Judicial Greffier who will run his finger down the bill and say: "Well, you do not need 2 lawyers to do that, that telephone call should not have taken quite so long." At the end of that process he will come out

with a figure and that is the figure that the Attorney General's Chamber will pay to the successful defendant. So when your parishioner says: "Well, hang on a minute I did not get the full amount of my costs." That may be because they negotiated a lower figure with the Attorney General's Chambers or, alternatively, they went through a taxation process and at the end of that the court says: "No, we think this is a fair price on that."

Secretary, The Law Society of Jersey:

There is a gap.

The Deputy of St. Mary:

What about the differential between the tax costs element and the amount the lawyer wants to charge, will the lawyer seek to charge that difference?

Bâtonnier:

Yes.

Secretary, The Law Society of Jersey:

Yes, very often.

President, The Law Society of Jersey:

Perhaps the best way is to think of this. Think of your parishioner who comes to you who lost a court case. He is only going to pay a percentage of the other side's costs because of that system because the court is trying to impose a fair system across the board. So the fact that your parishioner lost and the person who took him to court had engaged a very expensive lawyer; that system is in place to make sure your parishioner who has lost does not pay too much.

Secretary, The Law Society of Jersey:

So it works both ways.

Deputy S.M. Ahier:

Right, do we have any more questions before we come to the end of our time?

The Deputy of St. Mary:

On this one item, as I understand it, the system proposed is that the lawyer who has successfully defended the alleged criminal will, under the new system ... well, the defender will only get the fixed fee as per the legal aid scheme.

Secretary, The Law Society of Jersey:

It is going to be a huge gap.

Chief Executive Officer, The Law Society of Jersey:

If the privately defended individual is convicted, he will be liable to the lawyer for the full costs of the representation at that lawyer's private client rate. If he is acquitted his recovery will be limited to the relevant fixed fee that is payable under legal aid. That is the only association with legal aid that is against a fee scale.

Bâtonnier:

From the States perspective, the interesting thing would be to look at the acquittal rates for the Law Officers' Department because that is where the proof of this is as to whether or not, you know, are there too many acquittals? If there are more acquittals than there are convictions there are some questions to be asked. It is that statistic that will inform how this impacts.

Chief Executive Officer, The Law Society of Jersey:

Because this process reduces the risk to the Attorney General of effecting a prosecution. If it is a marginal case ...

Secretary, The Law Society of Jersey:

Then they will prosecute.

Chief Executive Officer, The Law Society of Jersey:

... he will do it and he knows, if it is under legal aid, under the new scheme it will cost a small amount and if he loses and is privately paying, that is the limit of what he is going to pay. So, it could lead to some ... not that I would suggest that that would be the case but it could lead to questions over the appropriateness of all prosecutions.

Deputy R.J. Ward:

Can I just ask, sorry, it has just occurred to me?

Deputy S.M. Ahier:

No, that is fine.

Deputy R.J. Ward:

This might be an unanswerable but what percentage of lawyers would be charging above the rate suggested for legal aid then? I mean is that figure that you have come up with a median figure or is it a ...

Chief Executive Officer, The Law Society of Jersey:

The figure on criminal legal aid is much lower. Reference was made earlier to factor A. Factor A for a partner in a firm, which has not changed for a good number of years, is £235 an hour and factor A represents the break-even costs. That is all costs associated with running a ...

Secretary, The Law Society of Jersey:

No profit.

Chief Executive Officer, The Law Society of Jersey:

... firm so that is at no profit. The figures for criminal legal aid for work in the Royal Court are positioned at £165 an hour so it is below the break-even point. For Magistrates' Court work it is around about £100 to £120 per hour. So, again, that is below the (Factor A) rate and that is why it is smaller firms, who arguably have lower overheads, who have expressed a willingness to do that work. It is not a huge profit earner and there are a number of them who believe that by doing so it is still a ...

Secretary, The Law Society of Jersey:

But it was all part of the compromise that we reached when this was all discussed.

Deputy R.J. Ward:

Those overheads are the cost of staff and ...

Chief Executive Officer, The Law Society of Jersey:

The cost of staff and the cost of insurance which is very expensive because lawyers, whether they are doing the work on legal aid and they are getting no money, they still have to be insured for the risk of the work that they are undertaking. Legal overheads are exceptionally high.

Deputy S.M. Ahier:

Well, thank you. I would like to thank you all for coming here today. I will call the hearing to a close. Thanks very much.

President, The Law Society of Jersey:

If you have anything else you have forgotten or missed, please write to us and we will be happy to assist you.

Deputy S.M. Ahier:

Thank you.

[15:41]