

Submission by David Cadin (Bâtonnier)

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Access to Justice Review
Chief Minister's Department
Cyril Le Marquand House
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By Email to a2jr@gov.je

Dear Sir

I write further to the recent Invitation to Comment, published on behalf of the Chief Minister, to address in my capacity as Bâtonnier, the two specific areas of the review, namely:

- Access to Justice; and
- Resolution of disputes and issues regarding legal services.

You have requested submissions of no more than 3,000 words and I have endeavoured to comply. As I hope is apparent, these are important issues and I would welcome the opportunity to make more detailed submissions as the Review progresses.

A Word of Caution

I appreciate that the Review is intended to consider Access to Justice and will no doubt make recommendations in relation thereto.

However, we in Jersey have, and have had for a relatively long period, a Justice system that not only works, but works well for the public of the Island without many of the problems or miscarriages which have afflicted other jurisdictions.

That Justice system has also encouraged and facilitated the growth of the legal profession which makes a significant contribution to the Island in terms of employment and taxes (and the extent of that contribution will be the subject of a report from KPMG in due course).

That is not the end of the matter. I also think that the profession as a whole attracts business and money to the island. Although there are no figures currently available, I think that the provision of legal advice and the supply of legal services is a significant export from the island and brings in revenues and business that we would not otherwise receive. Those flows of business and money in turn support other businesses and other sectors in our economy.

In my view, before any changes are recommended or indeed, implemented, significant care needs to be taken to ensure that there are no actual or potential unintended consequences which could have a detrimental impact far beyond any perceived problem which they were intended to fix.

This is particularly so in circumstances where:

- the question of whether a problem exists in respect of Access to Justice, and if it does, the magnitude of any such problem is far from clear; nor can you rely solely upon the evidence provided in response to this Review given that those members of the public who respond are likely to have a subjective rather than an objective perspective;
- there has been no consideration as to what a justice system for Jersey would comprise were it to be designed from scratch. In my view, were such an exercise to be carried out, it could be done with the key objective of ensuring that simple legal issues touching the lives of ordinary members of the public could be resolved between the citizens themselves rather than by recourse to a lawyer;
- the delicately-balanced eco-system that provides Access to Justice (and has provided Access to Justice for many years) is based in large measure on the goodwill of the public and profession; in all likelihood, Access to Justice in future is also going to require such goodwill; goodwill cannot be taken for granted – it needs to be nurtured and respected - yet recent developments such as the removal of exclusive rights of audience for Jersey lawyers before States' Committees of Enquiry without even having the courtesy to notify or to consult the Law Society merely serve to undermine it);
- lawyers make a significant economic contribution to the island economy as a whole;
- changes to the environmental, regulatory, or fiscal regime for lawyers might not only undermine Access to Justice but have consequences that extend far beyond lawyers and the legal sector and could have a profound impact on the island, its constitutional position and its economy.
- other jurisdictions (such as the UK) have made changes to their Access to Justice regimes (possibly with the benefit of governmental reviews, expert reports, Green Papers, White Papers and repeated discussion) yet notwithstanding that they have and have applied far greater resources than Jersey might utilise, the adverse consequences have been significant (see for example, the article in The Times on 15 May 2014 which noted that "*Most divorcing couples are now going to court without lawyers, creating delays and even outbreaks of courtroom violence, judges have said*").

Access to Justice

Background

Although a beguilingly simple phrase, any consideration of "*Access to Justice*" must involve a definition of what "*Justice*" is; yet there is no such definition in the Invitation to Comment.

In my view:

- *"Justice"*:
 - is the determination and vindication of rights (in relation to criminal and civil law issues) through a fair and independent tribunal by means of established and open procedures.
 - does not include alternate dispute resolution (which is only engaged when access to justice is impeded by for example, cost, complexity, or delay).
- *"Access to Justice"*:
 - refers to the ability of the public to engage in the machinery of Justice.
 - is the product of several, inter-related, matters including:
 - the nature and accessibility of the laws applicable in the island;
 - the public's level of legal awareness and education (i.e. as to what constitutes a legal issue, the nature of that legal issue, how to research that issue and/or advance that issue with or without a lawyer, methods of resolution);
 - the machinery established by the States for delivering Justice in the island;
 - whether that machinery can be accessed without a lawyer; and
 - in the event that the services of a lawyer be required, the availability of lawyers to assist.
 - is probably assessed by the ability of the public to resolve a legal issue within a proportionate timescale and at a proportionate cost;
 - is not simply a discussion about legal aid.

In my opinion, it is for the States (and the States alone) to provide a system of Justice which is accessible to the public. The extent of that provision is a matter for the States, albeit subject to minimum requirements imposed by considerations of human rights. However, the availability of funding is not (and should not be) a determinative factor.

The Current Justice System

In my view, the current Justice system in the island is the product of an *ad hoc* partnership between:

- the States (provision of Courts and judges);
- lawyers (provision of legal representation, including a legal aid scheme);
- voluntary organisations (such as the Citizen's Advice Bureau); and

- the public (whether through its collective political mandate, the Honorary and Parish system, Jury service or otherwise).

That partnership has grown up over the years and has come to represent the established norm. In my view, that partnership broadly works and provides reasonable Access to Justice for the majority of the population of the island. That is not to say that it is perfect:

- *ad hoc* arrangements cannot properly discharge an obligation of the government;
- for those involved it may not feel like much of a partnership;
- it does not manage to satisfy everyone;
- it could be improved. For example in an island where the majority of the population speak English as a first language and do not speak French, to have any relevant resources and/or texts and/or decisions of the Courts only available in French is wholly inappropriate. Moreover, where this has led to uncertainty and/or inconsistency (such as in relation to the law of contract), consideration should be given to the codification of those laws.

The Terms of Reference

The Current Legal Aid Scheme

Notwithstanding the apparent focus of the review being Access to Justice, the specific terms of reference appear to be more focussed on the narrow issue of legal aid. In my view, legal aid is but one small part of ensuring access to justice.

The current legal aid scheme is largely unfunded by the States (save for certain *ex gratia*, *ad hoc* payments made in exceptional cases). The scheme provides ready access to a lawyer for those who fall within certain financial limits at minimal cost to the public purse; it does not provide a free service nor is it intended so to do; rather it provides advice and representation at an affordable cost. In reality however, many firms will not charge legally aided clients for the work done on their behalf.

In the last 12 months, there were 1,303 applications for legal aid; 1,142 certificates were granted and 161 applications were refused.

In addition, as *Bâtonnier*, I have a discretion to grant legal certificates in such circumstances as I think fit (including in circumstances falling outside the terms of the legal aid scheme). In the almost 12 months since I was elected *Bâtonnier* (in June 2013) I have received 20 applications requesting that I invoke my discretion. Of those applications, just 9 were made following a refusal on financial criteria. Out of those 9 applications, I exercised my discretion to grant legal aid in 4 and upheld the Acting *Bâtonnier*'s decision in the other 5 cases. On each occasion that I declined to grant on financial criteria, I explained my reasoning and made suggestions as to how the problem might be resolved in terms of securing the necessary funding. I have also suggested that the applicant reapply to me in the event that the suggestions I made did not prove successful; so far, no such applicant has reverted to me.

As Bâtonnier, I think it right to note that:

- the profession accepts (as evidenced by the Oath) that as part of a community, lawyers have an obligation to assist disadvantaged members of society (although many would say that this does not require the provision of a Legal Aid Scheme of the current extent and magnitude);
- however, notwithstanding the ethos of assisting, and the willingness to assist, disadvantaged members of society, a significant part of the profession believes that the imposition of a legal aid obligation on lawyers is discriminatory and a breach of the human rights of clients, potential clients and lawyers alike;
- the profession is divided between those who think that the current burden imposed by the Legal Aid Scheme is both manageable and tolerable, and those who do not.
- the profession has (since at least 1904) been willing to provide a legal aid service to the community and continues to provide that legal aid service;
- the cost of providing that service is significant (in a report prepared by the Law Society in 2005, the direct costs of administering the scheme were noted to be £140,000 and the direct cost to the Law Firms of providing Legal Aid was assessed as being between £4m and £6m per annum);
- that cost falls almost entirely on the (say 100 or so) equity owners of those law firms which employ Jersey lawyers in the first 15 years after qualification; approximately 0.1% of the island population are providing, at their own expense, a legal aid scheme for the benefit of the island as a whole;
- the operation of the legal aid scheme has a particular impact upon small firms, sole practitioners and those wishing to set up in business (and could therefore be a barrier to competition).

In my opinion, notwithstanding dissenting voices, the profession probably remains willing and able to provide (*gratis*) a legal aid service, of the current magnitude, to ensure Access to Justice is maintained.

However, the extent of that willingness (and indeed, that willingness continuing) depends in part on other economic factors (in part, fee paying clients – quite probably fee paying clients from outside the island - are subsidising local clients who are unable to pay). If there were to be changes (environmental, regulatory or otherwise) impacting on the profitability of law firms, then that may have a consequential effect on Access to Justice both at the level of legal aid and more widely.

Public Confidence in Legal Aid

In my view, those who access legal aid get a good service.

That is not to say that it could not be improved. For example, the Scheme is currently predicated on the basis that all lawyers are generalists and legal aid cases are the simpler type of cases. This is no longer correct; firms and/or lawyers are becoming increasingly specialised; and legal aid cases can be as complex and difficult as any other. The current Scheme does not reflect that sea-change.

However, the Scheme could be amended to recognise specialisation by, for example:

- having separate *tour de rôles* for civil, criminal and family matters; and/or
- allowing assignment of legal aid obligations between firms.

There are human rights issues for both those accessing Legal Aid (they cannot choose their lawyer) and for the lawyers (they are required to provide a service they might otherwise not choose to provide).

In terms of eligibility, unless there is to be a Justice system which is entirely free at the point of delivery, there will always be some who fall outside the legal aid scheme. Clearly those closest to the ceiling for entitlement will experience most distress at being excluded and the issue is therefore where the threshold lies. The Law Society has recently considered this question in an EGM and decided that Legal Aid should be available for those with income of under £45,000 and/or capital under £150,000 (or £300,000 in the case of a married couple). In my view, this is not an unreasonable threshold and it is a threshold which is capable of review should empirical evidence (collated by the Acting Bâtonnier's office) indicate that it has been set too low.

As I note above, since my appointment in June 2013, there have been 9 appeals against a decision to refuse legal aid on financial grounds; 5 of those refusals were upheld by me; none of those individuals have reverted to subsequently saying that they have been unable to secure representation privately or with alternative funding. In my view, these figures tend to suggest that only a very small number of individuals were unable to secure Legal Aid when they tried to access it.

Provision of General Advice

In my view, advice is given diligently by practitioners mindful of their obligations to the client and the commercial considerations affecting their clients from time to time.

The Overall Experience of Seeking Access to Justice

Those who seek Access to Justice inevitably do so when issues have arisen (possibly not of their choosing). This will be a time of stress, anxiety and uncertainty. However the process itself of accessing Justice should not add to the anxiety.

Given the personal circumstances of those seeking Access to Justice, it is probably difficult to get objective or positive views. However a Justice system which incorporates principles of simplicity, consistency and transparency and allows early access to impartial advice will go a long way to improve the experience of those seeking to access it.

The Use of Alternative Dispute Resolution

Alternative dispute resolution "*such as mediation*" is not the provision of Access to Justice (indeed, the growth of ADR may be indicative of a failure to provide Access to Justice); it is a means by which parties

to disputes can resolve them by way of a commercial deal.

The use of mediation in Jersey is widespread and encouraged by the Courts. It should continue to be encouraged along with alternatives (evaluative mediation, early expert determination, joint experts etc).

Tribunals are not "*alternative forms of dispute resolution*"; they are bodies established by the States to resolve disputes and to do so in a judicial manner subject to rights of appeal. However, they assist Access to Justice by amongst other things:

- removing certain areas of law or issues from the (sole) remit of the Royal Court;
- providing a specialist body to determine such issues possibly more quickly, cheaply and informally than might be the case in the Royal Court, and in all probability without the necessity for lawyers to be involved.

There are a number of tribunals in Jersey (the most notable being the Employment Tribunal). Consideration should be given to increasing the number of tribunals where appropriate or necessary.

Whilst I am not aware of any specific unmet demands for the creation of new tribunals, one area which might merit consideration could be in the area of public law children issues (in effect, mirroring the Guernsey Child Youth and Community Tribunal). Many of the longer cases in the Royal Court involve public law children issues; these cases tie up Courts and Judges; were there to be an alternative route, it might significantly reduce demand on the resources of the Royal Court (thereby reducing delay) and the stress on those involved.

In addition, consideration should be given to changing the jurisdictional limits of the tribunals and indeed, the Petty Debts Court and Magistrate's Court, and providing expedited procedural rules for certain disputes in the Royal Court.

The Availability of a High-Quality Legal Profession

This we have. I can do no better than to quote Michael Beloff QC on his retirement as a Jersey Court of Appeal Judge (reported in the Jersey Evening Post, 9 April 2014):

"On the whole, the Jersey advocates can compete with the best. If you compare their experience to that of those on the mainland, I think you have to mature more quickly as an advocate here. In Jersey they probably deal with more complex cases earlier on than advocates in England."

We must however ensure that we continue to support and to maintain the profession and to protect it (where appropriate).

As with all professions, there will be complaints. The Law Society has a means to addressing complaints relating to breaches of the Code of Conduct through a disciplinary process and both the Attorney General and the Bâtonnier have independent roles in relation thereto. No doubt to the extent that necessary changes to the disciplinary regime are identified, they could and should be implemented.

The Law Society can also deal with fee disputes between clients and lawyers through an established procedure.

In relation to service-level complaints, law firms are required to have procedures for resolving them. However, the Law Society can only intervene if the service-level complaint amounts to a breach of the Code of Conduct.

Affordability

In real terms, this is probably directed at those that are above the ceiling for eligibility to legal aid. In my view:

- there is always likely to be a ceiling on eligibility;
- in which case, there will always be someone who is ineligible;
- that person will feel dissatisfied;
- whether an individual can afford Access to Justice is in part an objective assessment but may also depend on subjective issues (for example, the magnitude of the dispute and/or the importance of the dispute to them);
- litigation funding is available for large disputes;
- Access to Justice for individuals who fall above the legal aid ceiling and who feel unable to access justice could be improved by for example:
 - conditional fee arrangements. These are currently not permitted; were they to be permitted, those outside the legal aid scheme might be in a position to obtain representation more readily (in effect resolving a cash-flow issue);
 - contingency fee or damages-based agreements;
 - encouraging members of the public to procure affordable legal expenses insurance and when opportunity presents (for example through household or motor insurance policies);
 - increasing the legal aid ceiling (so as to allow a greater number of people access to a lawyer) but in return, increasing the ability of lawyers to charge legal aid clients (in effect providing a legal aid safety net but otherwise stimulating the market as has occurred in relation to certain family legal aid certificates).

However, absent a detailed impact assessment it is impossible to determine whether these, or indeed any of the other options which could no doubt be explored, will make a tangible difference without having any detrimental unintended consequences.

In my view, the profession is unlikely to be willing to pay for such an impact assessment. The profession is however likely to be willing to develop the scheme by design and empirical testing.

Competition

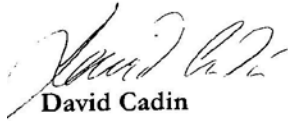
There are a large number of law firms ranging from sole practitioners though to multi-jurisdictional firms. Not only are these firms competing against one another but they are also competing against other professionals (such as accountants, debt recovery agents) in the island but also against lawyers and other professionals from outside (increasingly UK law firms are purporting to advise on Jersey law).

However, whilst the market is competitive, there may be areas where it is not so competitive (for example, low profit work falling just outside of the legal aid scheme).

Resolution of disputes regarding Legal Services

This issue has been addressed above.

Yours faithfully



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