

Submission by Jonathan Speck, President The Law Society of Jersey



The Law Society of Jersey

Access to Justice Review
Chief Minister's Department
Cyril Le Marquand House
St Helier
Jersey
JE4 8QT

20 June 2014

Dear Sir

SUBMISSION BY THE LAW SOCIETY OF JERSEY

The Law Society of Jersey is pleased to have the opportunity to respond formally to the States' Access to Justice Review.

Notwithstanding the breadth of the scope of the Review, the focus of this submission is on Legal Aid, on the basis that the Law Society of Jersey considers Legal Aid to be the most significant aspect of the legal system that requires reform, while arguably having the most material impact on access to justice.

1. Background: the evolution of Legal Aid in Jersey

Jersey's Legal Aid system is similar in many respects to those which historically were to be found in civil law jurisdictions on the continent of Europe, with "poor man's laws" waiving court fees for the poor and providing for the appointment of legal representation for impecunious individuals, with the expectation, in the 19th Century, that lawyers would act for such individuals on a *pro bono* basis. It does not appear to owe anything to the common law jurisdictions' provisions for Legal Aid and any correspondence between the Jersey system of Legal Aid and that in England and Wales is coincidental.

The current Legal Aid system in Jersey is based upon the obligation of Advocates to give legal assistance to certain classes of litigants. Although that obligation long pre-dates the Code of Laws for the Island of Jersey approved by Order in Council in 1771, it is set out in that Code in the Advocates' oath, the relevant section reading as follows: -

"Vous vous contenterez de gages et salaires raisonnables, et assisterez aux Veuves, Pauvres, Orphelins, et Personnes indefendues".

"You will content yourself with reasonable wages and salaries and will assist widows, the poor, orphans, and undefended persons."

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It is relevant to note that, while Advocates had been required to take oaths of office since at least the 14th century, and that the oaths prior to 1771 made reference to the wages and salaries being in specified amounts, they did not include the words about assisting widows, paupers, orphans and undefended persons.

The general, and accepted, obligation “to assist the poor” effectively became formalised into the Legal Aid system that persists today when the profession determined, by unanimous resolution, on 20 August 1904, that the obligation would be discharged by Advocates of less than 15 years’ standing on a “Tour de Rôle” (‘according to one’s turn’) basis. The obligation remains in force and has been acted upon for over a century. Advocates (and now Solicitors of the Royal Court) of less than 15 years’ standing are therefore, in general, obliged to represent a person under the Legal Aid scheme.

Taking account of exemptions and suspensions from the Tour de Rôle (e.g. lawyers working in the Law Officers’ Department), the burden of Legal Aid is currently shared amongst 182 Advocates and Solicitors (out of the 324 members of the Law Society). In addition to discharging around 1,300 Legal Aid Certificates annually, those on the Tour de Rôle support a 365-days a year out of hours duty advocate service for the Police and Customs, the provision of duty advocates for every session at the Magistrates’ Court and Youth Court and a weekly Citizens Advice Bureau legal advice surgery.

As a consequence of these additional commitments, for which legal aid ‘credits’ are earned, each advocate or solicitor on the Tour de Rôle receives around 10 legal aid certificates every year. Little or no remuneration may be received (depending on the individual client’s financial circumstances) in relation to certificates issued. More complex matters may, bearing in mind the absence of any cap on hours, involve upwards of 100 hours of work. It is estimated that, on average, each legal aid certificate takes 20 hours to complete. On this basis, a lawyer on the Tour de Rôle, with 10 certificates per annum, will accumulate 200 hours of free or heavily subsidised work – or 12.5% of their working hours – on legal aid.

The allocation of certificates is undertaken strictly on a rota basis. In some cases, lawyers who specialise in particular areas of law pay to outsource any certificates which relate to areas in which they lack experience or expertise (with some predominantly small firms outsourcing all of their legal

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aid work, albeit at a considerable cost), while the issue (but not the cost) is mitigated in some of the larger firms, consequent upon their maintaining legal aid departments specifically to discharge the liability associated with their firm. However, for many small firms (including sole traders), the cost of outsourcing some or all of their legal aid work is prohibitive, resulting in such firms having to undertake the work themselves, even where the certificate relates to an area in which they lack experience. This could bring with it the risk of prejudice to the client in relation to the time taken to deal with a matter and may even impact the quality of the advice provided.

Significantly, there is no legislation which requires the legal profession in Jersey to provide the island's legal aid system, the obligation for such provision resting upon the state, as is the case in the other Crown Dependencies, England, Wales, Scotland and Northern Ireland, and in developed Commonwealth and EU jurisdictions, in line with Articles 6.1. and 6.3 (c) of the European Convention on Human Rights.

Back in 1904, in very different times, the profession took upon itself a voluntary obligation to assist those who were in genuine need at a time when the welfare state, as it is named today, simply did not exist.

The burden on the profession of this voluntary scheme has increased exponentially in the intervening century and it is difficult, in those circumstances, to justify the continuation of the scheme on its current footing. It would, for example, be open to the profession to set aside the 1904 resolution and revoke Article 3 of the Law Society Code of Conduct which requires members to discharge their legal aid obligation effectively, should it choose to do so.

Nevertheless, we do consider that the legal profession remains willing to continue to assist truly disadvantaged members of society with free or reduced fee legal representation in appropriate cases. However, the nature and extent of the legal aid scheme that has evolved over time by far exceeds the *pro bono* or corporate and social responsibility contribution that any profession might be expected to support or which, we suggest, was anticipated in 1904 when the current system came into being.

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Whilst the Law Society represents all of the Jersey lawyers in private practice, its members are very diverse in terms of their practices. There are, accordingly, very diverse views as to the extent of the legal aid obligation that should be accepted. For example, some are prepared to accept the obligation as the price of doing business in the market. However, there are also those who feel that the burden is no longer fair or reasonable and that the scheme as it currently operates is no longer sustainable. Whilst there may not, at present, be a consensus wholly to dispense with the obligation to provide legal aid, there is a groundswell of opinion amongst the profession that the whole system needs to be streamlined and modernised to make it – and the financial burden – more proportionate and fair to all stakeholders, with benefits seen by lawyers and the public alike. The profession is supportive of improving access to justice, but any changes must not be to the detriment of the profession that has shouldered the burden of legal aid for over a century.

2. The financial impact of Legal Aid on the profession

In considering the rationale for change, it is appropriate to consider the cost to the profession of providing legal aid. A report in 2005 estimated that the direct cost to firms of providing legal aid as being between £4m to £6m per annum. While the number of legal aid certificates issued has reduced over the past decade, a combination of an increase in legislation and a sharp increase in the complexity of matters which are subject to legal aid, has resulted in the amount of time taken to discharge each certificate increasing. Although research is currently being undertaken, in conjunction with KPMG, which will provide detailed analysis of the cost to the profession of legal aid, it is estimated that each legal aid certificate costs law firms between £4-5,000 (in actual and/or opportunity costs). As a consequence, it is estimated that the current cost of legal aid to the profession is of the order of between £5m to £7m per annum.

It is, though, important to recognise that this cost falls almost entirely on approximately 100 equity owners of the law firms which employ lawyers who are required to discharge legal aid for the first 15 years post qualification. As such, the burden of funding the entire legal aid scheme for Jersey is being met by 0.1% of the Island's population. While it could be argued that the majority of the burden falls on those at the heart of the larger law firms, it needs to be recognised that 18 of the 44 law firms in Jersey are sole traders and 32 employ five or fewer advocates or solicitors. This serves to demonstrate that while the burden may technically be less in the small firms, the impact on

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capacity and financial resources is proportionately greater. Only six firms employ more than ten Advocates and Solicitors.

In relation to financial support from the States, this is available only in a very limited number of cases. Under the provisions of the Costs in Criminal Cases (Jersey) Law 1961, the costs of a defendant for whom a lawyer has been appointed under the Legal Aid scheme are paid from public funds where the defendant is acquitted (albeit at well below private client rates). Payment is also made from public funds (on a similar basis) for a legally-aided defendant in connection with an appeal from the Magistrate's Court to the Royal Court and an appeal from the Royal Court to the Court of Appeal under the Magistrate's Court (Miscellaneous Provisions) (Jersey) Law 1949 and 1961 Law respectively, irrespective of the outcome of the appeal.

There is also a so-called "Legal Aid Vote" fund administered by the Deputy Judicial Greffier, which is distinct from the Legal Aid system as above described. Neither the Bâtonnier nor the Acting Bâtonnier has any control over the fund, although they may make representations to the Deputy Judicial Greffier about matters to do with allocations from the fund if they deem it appropriate to do so. The funds can be utilised by the Deputy Judicial Greffier either to pay for disbursements which are required to be paid in a case, e.g. expert witness fees, or contribute to the services of an Advocate to a client who is awarded Legal Aid.

Although the administration of the fund is discretionary, there are no published guidelines about the exercise of such discretion. Recourse to the fund is arguably intended in cases where the extent of the demands on the Advocate's time and the paucity of the client's ability to make a contribution will cause the Advocate or his employers to incur a disproportionate and unfair financial burden in carrying out the instructions of the client. However, in practice, funds (other than disbursements referenced above) and costs paid under statutory provisions (e.g. under the Costs in proceedings), are only paid out in certain classes of proceedings, notably in respect of long running criminal matters, criminal appeals, cases involving children and those in relation to public interest matters.

The basis for consideration appears to be in respect of proceedings which are likely to last longer than three weeks, with payment on agreed cases only made after 60 hours of *pro bono* work has already been absorbed by the Advocate concerned and on a fixed rate basis or at 5/6ths of the

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“Factor A” (or ‘break-even’) rate. Unfortunately, there is neither transparency nor consistency of approach and, consequently, financial support varies considerably.

The issue here is that financial support through the Legal Aid Vote is provided in a limited number of cases, in particular circumstances, yet numerous legally aided cases exceed the 60 hour threshold without the potential for financial assistance.

3. The case for reform: current issues

The scope of the Legal Aid scheme, as it operates today, bears no resemblance to what would have been intended by the oath which, in its current form, dates back to 1771. Despite acceptance by the profession of an obligation to provide free or subsidised legal representation to those in genuine need, in appropriate cases, it was never intended to apply to the extraordinary range of legal issues which arise in Jersey in the 21st Century. The current system is substantially unrestricted and uncapped, at the expense of the legal profession.

Particularly over the past decade, fuelled by a plethora of new legislation, including that relating to Human Rights, together with a sharp increase in crime levels (over the period as a whole), a surge in family issues (including divorce, residence and contact cases), public law children’s matters and a more litigious society, the range and complexity of issues for which legal aid applications are made – and granted – has grown dramatically. As such, the profession is dealing with an increasingly complex workload, often requiring specialist skills and experience and for which, in many cases, they receive little or no remuneration.

Comparable jurisdictions have witnessed a similar increase in demand for legal services, principally on a legally-aided basis, although given that legal aid is state-funded in these jurisdictions, there is no direct correlation in respect of the financial impact on the legal profession.

Whilst the (Jersey) legal profession has the option to restrict the areas of law for which legal aid is available, in line with the approach taken by the UK Government, it is reluctant to do so given the adverse impact that this will have on the availability of access to justice and in the absence of alternative measures such as contingency fees and conditional fee arrangements (which are not currently permitted by law in Jersey).

In terms of the primary issues with the current system, these can be summarised as follows:

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- **Cost of Legal Aid / Financial sustainability for law firms.**

The impact on law firms, particularly small firms and sole practitioners, associated with meeting their legal aid obligation, is significant. Some (small) firms report financial difficulties arising from discharging legal aid certificates in complex matters which may take over 100 hours to complete, often over short periods of time. The current rota-based system allocates cases in order, rather than based on speciality, which may create issues for firms (notably the smaller firms who do not have the resources to allocate certificates to a specialist legal aid team). In some cases, firms have to outsource certificates that they either do not have the expertise or capacity to fulfil, the cost of which they have to bear, at commercial rates, and for which there is no current or future income.

While noting that it is the equity partners of Jersey's firms who effectively bear the cost of legal aid, 18 out of the 44 firms are sole traders, of whom 10 continue to have a legal aid liability (the remaining 8 having completed in excess of 15 years post qualification), and whose profitability is impacted adversely by virtue of their legal aid obligation. In the absence of the conveyancing 'scale fee', which was abolished in 2005, and which, it can be argued, provided a buffer or subsidy for the costs of providing legal aid, it is inevitable that the requirement to undertake legal aid impacts on the hourly rates charged by lawyers, with private clients effectively paying more to mitigate the impact of servicing un-remunerative or loss-making legal aid clients.

- **Lack of freedom of choice / Access to specialists**

The allocation of Legal Aid certificates on a rota basis means that individual clients do not have a choice of representation. The issue applies equally to lawyers, who have to represent the client allocated to them, even if the legal aid certificate relates to an area of law that the allocated lawyer is not an expert or specialist in, nor is it a part of their practice.

This situation has a potential to create risks for all parties, particularly where a client is allocated to a lawyer who is not an expert in that particular field e.g. a family matter allocated to a commercial lawyer. To preserve the integrity of the system, there is no capacity for a client or lawyer to appeal against allocation, other than where there is a clear conflict of interest.

The associated risks include the length of time taken to conclude a matter (including elongating court processes) and possibly even the quality of the advice provided may be impacted adversely by a lack of experience in, or knowledge of, a particular area of law. It is noted that there is no incentive for advocates and solicitors to specialise in the areas of law – family and criminal – for which the majority of legal aid certificates are granted.

It is suggested that the allocation of cases in this manner bears the risk of claims by individual clients that the absence of choice of legal representation represents a breach of Article 6.3 of the European Convention on Human Rights.

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- **Barrier to competition**

Notwithstanding the emergence of seven new law firms since 1 January 2013 (albeit that one of these firms has since closed), it is averred that the legal aid obligation is a barrier to competition and to the establishment of new firms. Of the new firms, only one is a 'general' practice, the other six being specialists (e.g. commercial, employment law, property law). The majority of these firms have chosen to outsource their legal aid commitment, although this has created a significant financial burden at a time when they are seeking to build revenue as a start-up business. Legal aid 'credits' can be acquired through being on the duty advocate rota for the Magistrate's Court or Police and Customs duty rota, although participation in such rotas requires individuals to have adequate experience in criminal matters which, while appropriate, acts to the detriment of specialist firms who do not always have such experience and therefore, ultimately, assume a greater proportion of 'live' certificates.

The 'lucky dip' nature of the rota was responsible for the demise of the one firm which has ceased trading, its principal having decided for financial reasons to discharge his legal aid burden personally. However, due to the complexity of matters allocated to him, he was forced to spend a disproportionate amount of his time on legal aid cases and was unable to devote sufficient time to the business to sustain it.

Further, the requirement for Jersey qualified lawyers to provide legal aid for the first 15 years post qualification, acts as a disincentive for firms to support the qualification of individuals, cognisant that, for example, English solicitors working in law firms do not have an obligation to undertake legal aid and, while they cannot acquire rights of audience in Jersey courts, they can and do make a valuable contribution to a law firm's output, although they remain under the supervision of a Jersey qualified advocate or solicitor.

- **Forced participation of lawyers**

Jersey qualified Advocates and Solicitors are required, for the first 15 years post-qualification – unless they work for certain States of Jersey departments e.g. Law Officers' Department – to undertake legal aid work, for which little or no remuneration may be received. They are required to hold professional indemnity insurance which covers their legal aid work, in addition to private client work and, in the event that they wish to outsource their legal aid certificates, they are required to do so entirely at their own cost, notwithstanding that no benefits are derived from doing so.

Whilst the intention of the Legal Aid Vote is financially to assist lawyers and parties in lengthy legal or onerous cases, the allocation of public funds to advocates is not applied consistently, and so it remains feasible that a challenge could be brought under Article 4.2 of the European Convention on Human Rights that a legal aid liability (where financial support is not forthcoming) may constitute 'forced labour'.

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It is further noted that in no other jurisdiction are lawyers required to participate in the prevailing legal aid scheme.

- **Application of Eligibility Criteria / Impact on the 'Inbetweeners' / Increase in Litigants in Person**

Eligibility for legal aid is based on available capital (which must be below £15,000 after allowing for equity of £150,000 per household) and, if not exceeded, combined gross income of £45,000. Contribution towards legal costs (based on a legal aid 'rate') is sought on a sliding scale based on household income between £15-45,000. In practice, many individuals who are eligible for legal aid do not contribute at all to their legal costs.

Compared to other markets, the eligibility criteria are generous; by way of example, the upper income limit in England and Wales (in cases where legal aid is still available) is £32,000, above which market rates have to be paid, albeit that income levels and the cost of living are somewhat lower.

Notwithstanding the generosity of the eligibility criteria, many individuals are unable to access legal aid, yet have a need for legal representation. Given that legal aid is funded by the profession, there is little if any appetite to increase eligibility for legal aid. As a consequence, there are a significant number of 'inbetweeners' (described by some parties as 'Middle Jersey') who are not eligible for legal aid but have – or are perceived to have – insufficient cash resources to meet legal fees. It is important to note that some alternative options – which have been adopted in other markets – such as contingency fees and conditional fee arrangements – are not permitted in Jersey. While such measures may not adequately address this issue, they are nevertheless worthy of consideration to the extent that they may lead to improvements in access to justice.

A consequence of individuals being ineligible for legal aid and having insufficient cash resources to pay private client legal fees, is the surge in the number of litigants in person – individuals who represent themselves in court. This is not, of course, directly relevant to the manner in which the legal aid system ought to be run. Nevertheless, in general, cases involving litigants in person tend to take up more Court time and, in some instances, may come close to being vexatious. This is a separate area which is worthy of consideration on its own.

4. Options for change

- **No change**

Maintenance of the current scheme, in its current format, is not sustainable. While minor amendments have been made to the Legal Aid Guidelines in recent years, these have largely focused on clarifying eligibility or the interpretation of provisions. These changes, however, have not begun to address the need for wholesale reform to make legal aid fit for purpose for Jersey in the 21st century and improve access to justice.

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While it is within the gift of the Law Society (on behalf of the profession) to withdraw from the provision of legal aid should it wish to do so, the Society would prefer to participate in a fairer, more proportionate legal aid scheme, in partnership with the States of Jersey, to improve access to justice for the people of Jersey.

- **States funding**

Clearly, the most appropriate option, as a matter of law under ECHR legislation and from the legal profession's perspective, would be for the States of Jersey to provide appropriate funding for the provision of legal aid. This is, of course, the position in all other comparable jurisdictions. It is noted, however, that in most of these jurisdictions, consequent upon increased demand for legal services, the terms of the scheme have been tightened to reduce eligibility, in a proportionate manner (by type of case or means testing) and so reduce costs. Although the provision of funding by the States of Jersey may well be challenging in the current climate, it is essential on the basis that the obligation, under the European Convention of Human Rights, is that of the state and that it is inappropriate for the entire costs associated with legal aid to be borne by the profession alone.

Benefits:

- Lawyers could choose whether to participate in the scheme
- Clients would equally have a choice and would be able to access a specialist relevant to their needs
- Improvement in access to justice
- Potential reduction in litigants in person (depending on States eligibility criteria)
- Greater incentive for lawyers to specialise, improving access to justice for the public

Issues:

- Cost to the taxpayer (on agreed Legal Aid rate (potentially in line with 'Factor A' as used by the Judicial Greffe) or fixed fees by type of case or matter e.g. Magistrate Court hearing or Duty Advocate responsibility)
- Need for the States to determine eligibility for Legal Aid based on:
 - Nature of issue/area of law
 - Financial circumstances of client
- **Partial States funding**

It may be feasible, as an alternative to full States funding, for there to be partial States funding, either to cover some specific activity (e.g. criminal legal aid), for which there is a discrete ECHR provision, or to subsidise overall costs (by way of contribution in all instances where legal aid is granted and no contribution from the individual is available).

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Benefits:

- Continuation of existing scheme with benefit of partial funding
- Potential to improve eligibility for legal aid
- Reduced pressure on lawyers with ability to improve access to justice

Issues:

- Lawyers would not be able to opt out of the scheme (as hitherto)
- Unlikely to be able to accommodate choice of lawyer
- Cost to taxpayer / availability of States funding

- **Public Defenders' Office**

The development of a Public Defenders' Office, as operated in some other jurisdictions, to support criminal legal aid requirements, in line with the state ECHR obligation (Article 6.1), funded by the States of Jersey but manned by Jersey qualified lawyers. This could run alongside an appropriately funded legal aid scheme.

Benefits:

- Allocation of specialist lawyers for criminal work with improved efficiency
- Automatic eligibility for legal representation for defendants
- Reduced pressure on legacy legal aid scheme

Issues:

- Cost to taxpayer / availability of States funding
- Resource identification (could be effected by secondment from firms or permanent employment of criminal lawyers)

- **Legal Aid Firms / Chambers**

Establishment of Firms/Chambers to service legal aid clients (all matters or to cover civil/family matters in the event of a Public Defenders' Office being established). Funded by States of Jersey, in partnership with firms (with potential secondment of lawyers).

Benefits:

- Allocation of specialist lawyers
- Improved access to justice

Issues:

- Cost to taxpayer / availability of States funding
- Management of conflicts

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- **Implementation of 'Green Card' system**

Provision of limited legal aid certificates (e.g. 2 hours of legal representation/advice) for minor matters or to determine need for longer/open-ended support. Means tested (on simple basis) with full eligibility check for subsequent or longer term need. Funded by States. (This system is applied in Guernsey.) This would run alongside an appropriately funded legal aid scheme.

Benefits:

- Effective provision of emergency/short-term legal aid
- Anticipate reduction in volume of longer term legal aid certificates and thus reduced reliance on legal aid scheme.

Issues:

- Administration of approvals (simple format could be applied)
- Cost to taxpayer /availability of States funding

- **Firms' Co-operative**

Development of co-operative across (predominantly) small firms to deal with legal aid certificates on a collaborative/shared resource basis.

Benefits:

- Reduced impact within small firms of legal aid liability
- Cost neutral

Issues:

- Management of conflicts
- Does not address the issue of funding

- **Imposition of Limits / Review of Eligibility Criteria (by Area of Law) on Legal Aid**

Implementation of limits on 'value' or 'eligibility' of legal aid certificates, serving to limit the time allocation under a legal aid certificate or provide a cap, above which States funding may be applied for. Areas of law to be reviewed to determine whether some activity is removed from scope of legal aid.

Benefits:

- Reduction of open-ended legal aid commitments
- Availability of funding after time/value limits reached

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Issues:

- Cost to taxpayer (re 'excess' costs)
- Contrary to principle of improving access to justice if areas of law covered is reduced
- **Other options**
 - Categorisation of cases – basic, medium, complex – different tariff or credit (and/or States contribution) with potential for allocation on fixed fee basis (paid by client where affordable, States where below threshold)
 - Creation of specialist 'boxes' within Tour de Rôle to improve choice for client and imposition on lawyer.

5. Summary

For over 240 years, Jersey's legal profession has effectively underwritten the legal aid scheme, providing free or reduced cost legal representation for those who cannot afford it, without recourse to the States of Jersey, other than on a limited and discretionary basis through the Legal Aid Vote.

Notwithstanding very significant changes in the operating environment, the legal profession has continued to provide free and subsidised legal representation, through the legal aid scheme, for the people of Jersey, notwithstanding that the responsibility formally rests with the States of Jersey.

No other profession is obliged to undertake such a public duty and while there remains a willingness amongst the profession to support the provision of legal representation for those who are truly disadvantaged, the burden should be assumed by, or at least shared with, the States of Jersey, in line with their obligations under the European Convention on Human Rights and the overarching principle, which the legal profession shares, of improving access to justice.

With the goodwill of the legal profession severely stretched, in the event that the case for full or partial States funding is not accepted, it is evident that the profession will, itself, need to act to reduce the burden. Regrettably, this will not improve access to justice. It is accepted that funding presents a political challenge, but it is simply wrong that the profession, which is pivotal to the administration of justice, is effectively subject to an additional and uncapped tax on their activities.

The Law Society of Jersey and its members are justifiably proud of their significant contribution to the Island, not least of which is the tangible and substantial contribution it makes through the provision of legal aid. We remain committed to improving access to justice and welcome the opportunity to assist in the creation of a legal aid system that is truly fit for the people of Jersey in the 21st century.

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Yours faithfully

A handwritten signature in blue ink, consisting of a large, stylized 'J' followed by a series of loops and a final flourish.

Advocate Jonathan Speck
President
The Law Society of Jersey

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