

## Access to Justice Review

### Factual Description of the Jersey Legal Aid System

June 2014

#### The Jersey Legal Aid System

- 1 Jersey's legal aid system is similar in many respects to those which were historically found in civil law jurisdictions on the continent of Europe. It does not owe anything to statutory provisions for legal aid in the common law jurisdictions, such as England.
- 2 The legal aid scheme has grown out of the obligations placed on Jersey advocates and ecrivains to give legal assistance to certain people. Although that obligation long predates the Code of Laws for the Island of Jersey, approved by Order in Council in 1771, it is set out in the advocates' oath, the relevant section reading as follows: -
- 3 "Vous vous contenterez de gages et salaires raisvonnables, et assisterez aux Veuves, Pauvres, Orphelins, et Personnes indefendues".

#### **Translation**

*You will content yourself with wages and salaries in a reasonable amount and will assist widows, paupers, orphans, and undefended persons.*

- 4 The current legal aid scheme now extends well beyond the provision of legal assistance to widows, poor people, orphans and the undefended.
- 5 All Jersey advocates and ecrivains (hereinafter collectively referred to as lawyers) of less than 15 years call participate in the legal aid scheme and are required to carry out legal aid work as directed by the Bâtonnier. The legal aid scheme is administered in accordance with the "Tour de Role" which is a list of participating lawyers to whom legal aid work is allocated in rotation. There are certain defined situations in the Legal Aid Guidelines where a lawyer may fall to be exempted or suspended from the Tour de Role.
- 6 The administration of the legal aid system (as set out below) is the responsibility of the Bâtonnier, on behalf of the legal profession. In practice, the Bâtonnier nominates

an Acting Bâtonnier whose responsibility is to administer the legal aid scheme. The Acting Bâtonnier operates an office, generally known as the legal aid office, on a day-to-day basis (office hours are Monday – Friday 8.30 to 5.00, closed weekends and bank holidays). The Acting Bâtonnier maintains a website, [www.legalaid.je](http://www.legalaid.je) which has relevant information, notes for guidance and application forms. Application forms for legal aid are widely available across the Island.

- 7 The Acting Bâtonnier receives all written applications for legal aid, and where necessary, contacts the applicants for further information in order to make a decision on eligibility for legal aid. The decision as to whether an applicant is entitled to legal aid is based on the financial means of the applicant's household and the merits of the case (see below). If legal aid is granted the Acting Bâtonnier issues a legal aid certificate to the next un-conflicted lawyer on the Tour de Role.
  
- 8 Legal aid is available in Jersey for a range of matters although in certain categories, legal aid is not available, such as cases for defamation, straight forward debt related matters, curatorships, creation or administration of a tutelle, certain limited specified criminal offences, tribunal hearings, claims before the Motor Insurers Bureau and Criminal Injuries Compensation Board and non contentious matters including deed polls, adoptions, wills or probate. The financial thresholds to be eligible for legal aid in Jersey were most recently reviewed in 2014. The current applicable thresholds are £15,000 capital (after allowing for £150,000 equity in the home per household); and if not exceeded, then combined gross income of £45,000. However, legal aid may still be granted notwithstanding that the applicant exceeds either of the financial limits, if in the discretion of the Acting Bâtonnier, it is in the interests of justice do so. Further the Legal Aid Guidelines now allow for legal aid certificates to be granted notwithstanding that an applicant may exceed the financial thresholds however in such circumstances, the lawyer is entitled to charge private client rates, but they are responsible for taking into account the potential hardship that such invoices could cause. The current Legal Aid Guidelines also provide for a legal aid certificate to be granted where an applicant can afford a lawyer but is unable to secure the representation of a firm privately. In such circumstances, the lawyer may charge private client rates as the legal aid certificate is used as no more than an introduction of the applicant to a lawyer, who is then obliged to take on the case.

- 9 The Acting Bâtonnier and the legal aid office are also responsible for dealing with queries regarding legal aid from applicants, the profession and others. In addition, the Acting Bâtonnier's office is responsible for providing duty advocate legal advice to individuals detained at Police Headquarters or Custom and Excise, during office hours. Such legal advice is provided entirely free of charge and is provided to the individuals, irrespective of their financial position. Further, the Acting Bâtonnier is also responsible for maintaining various rotas. These are the Magistrate's Court Duty Advocate Rota ("MC Rota"), the Youth Court Duty Advocate Rota ("YC Rota"), the Citizen's Advice Bureau Rota ("CAB Rota") and the Out of Hours Duty Advocate's Rota ("Out of Hours Rota"). The lawyers provide the advice to individuals, in accordance with each individual scheme (set out below) irrespective of their financial position. Consequently it is the case that individuals, who do not qualify for legal aid, benefit from advice from these lawyers, all provided free of charge. Each rota allows the participating lawyer to obtain 'credits', which credits are stored on the database which runs the Tour de Role. A credit will be taken when that lawyer's name comes up on the Tour de Role, thereby allowing them to 'miss' a certificate in return for the work undertaken on one of the rotas.
- 10 The MC Rota is a rota of advocates who attend at the Magistrate's Court on a daily basis to assist persons who have been remanded in custody, persons attending at Court who have been charged with specific offences or where the Magistrate requests the Duty Advocate to assist.
- 11 The YC Rota is a rota of advocates who attend at the Youth Court to assist youths who require legal advice and do not yet have legal representation.
- 12 The CAB Rota is a service provided by lawyers over and above the work carried out by the volunteers at the CAB. In some cases it is thought beneficial to have advice from a lawyer. In those circumstances the person wishing to obtain legal advice is given an appointment at a Wednesday morning 'diagnostic clinic' at which the lawyer is present to give free advice.
- 13 The Out of Hours Rota is a rota of advocates who are on call and may be contacted by the Police or Customs, out of hours when the legal aid office is closed, when individuals require legal advice. In certain specified circumstances the duty advocate

will attend at Police Headquarters to meet with individuals and assist with the interview under caution.

- 14 The issuing of a certificate completes the Acting Bâtonnier's responsibility in the allocation of legal aid, and the client then deals directly with the lawyer appointed in respect of any financial contribution which is required (as set out below).
- 15 Either the client or the lawyer may refer an issue to the Acting Bâtonnier, if either of the parties seek to have the certificate revoked for any reason or if some difficulty occurs in respect of the case. The Acting Bâtonnier is responsible for ascertaining any material information and making a decision on whether to revoke the legal aid certificate or not.
- 16 The Bâtonnier has an appellate function. This is used where the applicant is dissatisfied with the Acting Bâtonnier's refusal of legal aid, with the Acting Bâtonnier's decision on revocation of certificate, or in respect of the financial contribution which the lawyers has assessed is due from the client.
- 17 Current statistics showing the number of certificates granted per month, together with the number of applications refused, are set out below. It also shows the number of refusals which are appealed to the Bâtonnier and the outcomes of those appeals.

Month/Year	Certificates		Appeals against AB's decisions	
	Issued	Refused	Decisions Upheld	Decisions Overturned
January 2013	106	12	4	1
February	103	14	3	1
March	100	8	1	1
April	106	9	0	0
May	105	16	0	0
June	94	19	2	0
July	138	19	3	1
August	103	18	4	1
September	120	11	0	5
October	127	11	2	0
November	94	14	5	3
December	84	11	2	1
January 2014	116	17	1	2
February	113	11	1	0
March	110	7	0	2
April	99	7	0	0
May	100	3	4	0
TOTAL	1818	207	32	18

- 18 There is a “legal aid vote fund” administered by the Deputy Judicial Greffier, which is distinct from the legal aid system. Neither the Bâtonnier nor the Acting Bâtonnier have any control over the allocation of such funds and that allocation is the responsibility of the Deputy Judicial Greffier. Public funds can be made available by the Deputy Judicial Greffier in respect of a client who is represented by a lawyer under the legal aid scheme and who is unable to pay for disbursements required in connection with a criminal or a civil case, e.g. expert witness fees, technical experts and specialist counsel. In civil cases such funds are usually paid on the undertaking given by the client to reimburse the fund should they succeed at trial or they make recovery of funds by some other means.
- 19 In addition to the payment of disbursements, the Deputy Judicial Greffier, in a limited number of cases, authorises payments to lawyers from the fund in “exceptional” or “unduly onerous legal aid cases”, that is where the extent of the demands on the lawyer's time and the inability of the client to make any contribution will cause the lawyer to incur a disproportionate and unfair financial burden in acting for the client. In such cases, there may be reduced hourly rates paid or ex gratia payments made.
- 20 The administration of the legal aid vote is discretionary although there are no published guidelines about how the discretion is exercised. The exercise of discretion is subject to judicial review by the Royal Court (Warren –v- Deputy Judicial Greffier [2009]JRC 108A; Welsh –v- Deputy Judicial Greffier [2009]JCA145A)
- 21 It is also possible for legally aided clients to seek the assistance of the Viscount by means of applying to him, through their lawyer, for a certificate of exemption from judicial fees. This will ensure that those clients who are unable to afford the judicial fees necessary in bringing legal proceedings are not prevented from doing so. The certificate carries with it an obligation to re-pay any such fees, if the client is successful.
- 22 Generally speaking, save for the above, the legal aid scheme is currently funded by the legal profession and the only fees they can recover will be those they can reasonably charge to the client unless:

(1) the lawyer receives payment pursuant to an award of costs by the court under the Costs In Criminal Cases (Jersey) Law 1961 following an acquittal of a client in a criminal proceedings; or

(2) the lawyer is able to recover costs from an opposing party in civil litigation either pursuant to an order by the court or as a result of the terms of settlement agreed between the parties.

23 The liability of the legally aided client to remunerate the lawyer has been made express in legal aid certificates for the past 30 years or so in that the client is required to sign an acknowledgement at the time of instructing the lawyer that the lawyer is entitled to charge for his services to an extent which is reasonable, bearing in mind the client's means. In practice, it is often not until the lawyer has carried out the instructions that it is possible to assess how much, if anything, it would be reasonable to charge. In some cases, however, where it is clear that there will be a substantial amount of time incurred in dealing with the instruction and also clear that the client has financial resources, the lawyer is able to submit interim invoices as the case progresses.

24 The legal aid application form which an applicant must complete requires them to answer questions about their earnings, assets, savings and about their household. The application form is accompanied by notes for guidance. The notes for guidance are also, currently available in French, Portuguese and Polish. The legal aid application form requires the applicant to give full details as to his financial position. The statement serves a double purpose in that it will provide sufficient information to the Acting Bâtonnier (whose role is described above) to assess eligibility for legal aid and, if legal aid is granted, the form is sent to the allocated lawyer in order that he may proceed to assess the financial contribution, if any, the client will need to make towards his fees.

25 There are three stages when assessing whether a lawyer can charge a legal aid client. Firstly, the lawyer may only charge a reduced hourly rate when acting for a legal aid client ("legal aid rates"). These are currently:

Partners	£235 per hour
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Legally Qualified Staff	£190 per hour
Other Staff	£156 per hour

- 26 Thereafter the lawyer, must apply the income bands set out in the Legal Aid Guidelines. There are income bands set out which indicate a percentage contribution to the legal aid rates which can be requested from the client, which are:

£45,000 +	100% unless directed otherwise by the Acting Batonnier
£35,000 - £45,000	50% - 75%
£25,000 - £35,000	25% - 50%
£15,000 - £25,000	15% - 25%
£0 - £15,000	0%

It should be noted that these contributions are on a sliding scale depending as to exactly where the applicant's income falls within an income bracket.

- 27 The third, and final stage, is for the lawyer to then consider whether any invoice submitted will cause financial hardship to the client or their family due to unusually high but reasonable and necessary household expenses, the level of indebtedness of the legal aid client (incurred prior to being granted legal aid or reasonably incurred thereafter), or if the quantum an account could cause financial hardship. In the event that any of the above circumstances exists, then the lawyer should consider reducing the account of level of contribution to an affordable level.
- 28 A legally aided client may request a fee adjudication from the Bâtonnier, if aggrieved by the amount of the assessment, the accounts rendered, or the overall level of the fees. The straight forward fee adjudications are dealt with by the Acting Batonnier. The more complex cases are allocated to the next lawyer on the Tour de Role by way of a legal aid certificate. In terms of fee adjudications there were 2 legal aid certificates granted for fee adjudications in 2013 and 1 in 2014 to date. Most recently

it is the case that a majority of fee complaints initially referred to the Acting Bâtonnier are generally settled between the parties once a dialogue between the client and the firm is initiated over fees.

- 29 It should be noted that any shortfall between the full legal aid rate which a lawyer can charge and any reduced assessment (applying the income bands as per para 25 above) is not recoverable by the lawyer (save insofar as may be relevant from the legal aid vote, as set out above). Likewise, there is no compensation for the lawyer working at reduced legal aid rates when in fact he could be working on a privately funded case.
- 30 In any civil case where settlement is achieved over £10,000 or in a family case where settlement is or represents the client's interest in the former matrimonial home or an increased equitable share therein over £25,000, the settlement falls into their household capital. In such cases, the lawyer may raise a fee at 100% of the legal aid rates until the client's household capital falls below the level of £10,000 or £25,000 respectively. This is subject always to the test of hardship (as set out above).

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