

Submission by Professor Andrew Le Sueur

Comments regarding Access to Justice in Jersey

This is an optional form, which you can use in order to submit written comments to the Access to Justice Review, should you choose to do so.

Your comments should address matters contained within the Terms of Reference of the Review, which can be found on the States Assembly website from the link below.

[Read the Access to Justice in Jersey: Review document](#)

It should concentrate on issues where you have an interest, experience or expertise and provide factual information of which you would like the review to be aware.

1. About you and/or the organisation which you represent

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Date of this submission	22 May 2014

2. A brief introduction about you or your organisation

About me: I am Professor of Constitutional Justice at the University of Essex, where my research specialises in constitutional and administrative law and the legal systems of very small territories. Questions of access to justice, broadly defined, touch on all these areas of law. Prior to joining the University of Essex, I was director of studies at the Institute of Law, Jersey, 2009-2013.

About my organisations: the School of Law and Centre for Human Rights at the University of Essex is a leading centre for research in public law and human rights. Colleagues have expertise in empirical legal research (how law and legal procedures are used in practice and what impacts they have on individuals and public bodies) as well as the principles underpinning the law. I am also a member of the Law Commission in Jersey. These comments are, however, made in a personal capacity and do

not necessarily reflect the views of either the University of Essex or the Jersey Law Commission.

3. Your comments regarding Access to Justice in Jersey

The Access to Justice Review panel will want to note that the Law Commission has recently agreed to carry out a review of the provision of administrative justice in Jersey. I will be leading that project. Insofar as there is overlap between the work of the Access to Justice Review and the Law Commission's project, I would welcome opportunities to share information and coordinate research.

Background

Administrative justice is about resolving grievances against public bodies. People's grievances generally fall into three (sometimes overlapping) categories: (i) challenges to the legality of decisions,

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(ii) challenges to the merits of decisions, and (iii) complaints about non-decisional failings such as delay, rudeness, insensitivity, etc – broadly known as “maladministration”.

Public bodies in Jersey include ministers (and officials making decisions in ministers' names), parishes (eg connétables, Rate Assessment Committees) and a variety of other bodies carrying out executive and regulatory governmental functions (eg Jersey Financial Services Commission).

Various judicial and non-judicial redress mechanisms have developed in uncoordinated ways over a period of many years. There has never been a comprehensive and systematic review of administrative justice in Jersey.

The scope of the review will be to seek, first, to consider each of the main redress mechanisms:

- a) the role of the Royal Court in hearing (i) appeals against decisions of public bodies and (ii) applications for judicial review,
- b) the various “tribunals”, “panels” and similar adjudicatory bodies established under numerous different Laws,
- c) and the States of Jersey Complaints Panel established under the Administrative Decisions (Review)(Jersey) Law 1982 (as amended).

Second, and equally importantly, the review will consider the whole administrative justice “landscape” to consider whether grievances are directed to appropriate mechanisms on a principled basis and whether there is a need for new mechanisms or approaches. This will include examining what use is or could be made of alternative dispute resolution (including eg mediation and early neutral evaluation techniques). Another overarching question will be whether the redress mechanisms conform to the standards demanded by Convention rights – in particular, the need for “civil rights and obligations” to be adjudicated on by judicial bodies that are “independent and impartial” (European Convention on Human Rights article 6(1), incorporated into Jersey law by the Human Rights (Jersey) Law 2000).

The redress mechanisms operating in Jersey have, to greater and lesser extents, been modelled on those operating in England and Wales. It will therefore be appropriate for the project to have regard to developments that have taken place in the United Kingdom and whether lessons might be learnt from there – though bearing in mind the differences in scale of public administration in the two jurisdictions and the tradition of honorary service in Jersey (where some of those responsible for considering appeals and complaints do so on an unpaid basis). Developments in the UK include, for example, the judicial review procedures operating in the Administrative Court (part of the Queen's Bench Division of the High Court of England and Wales) that have been significantly modernised since they acted as a template for the creation of a judicial review procedure in Jersey in 2000.

Another point of reference from the UK would be the major review of the tribunal system carried out by Sir Andrew Leggatt in 2000, leading to substantial reforms in the Tribunals, Courts and Enforcement Act 2007 which replaced a myriad of over 70 different tribunals with just two (the First-tier Tribunal and the Upper Tribunal).

There have also been reforms to non-judicial redress mechanisms in the UK using the overarching concepts of “proportionate dispute resolution” and “user focus”. The modernisation process in the UK has, with varying degrees of success, sought to improve access to administrative justice and assist public bodies to improve the quality of decision-making (through the concept of “right first time”).

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Considerations of cost – to aggrieved citizens, public bodies, and the cost of operating a redress mechanism – will also be examined.

Also of note is the Law Commission of England and Wales' work on administrative redress from 2004 to 2010: "The purpose of this project was to review the law in relation to redress from public bodies for substandard administrative action. Our key objective in the project was to achieve the

correct balance between fairness to aggrieved citizens and appropriate protections to public bodies and the public funds they use."¹

The arrangements in other very small systems of public administration will also be considered as points of reference. These are likely to include Guernsey, the Isle of Man and one or two of the British Overseas Territories (such as the Cayman Islands, where the new constitution enshrines a constitutional right to administrative justice).

The remainder of these comments are a brief overview (carried out at speed, so therefore not complete or necessarily entirely accurate) of the main administrative redress mechanisms operating in Jersey followed an outline the research methods that the Law Commission plans to use.

Redress of administrative grievances in the Royal Court

The Royal Court has (a) appellate jurisdiction under many different Laws and (b) residual power of judicial review of public law decisions where no right of appeal has been created.

Some appeals are on the (uniquely Jersey) ground that the decision is "unreasonable having regard to all the circumstances of the case" – a formula that has caused some degree of uncertainty in the case law of the Royal Court and Jersey Court of Appeal.² The gist of the difficulties has been over how intensively the Royal Court should scrutinise decisions. In English judicial review, the Administrative Court normally operates at a high threshold: a decision must be so unreasonable that no reasonable decision-maker could have reached it before the court will intervene to quash it. The threshold in Jersey would appear to be lower, giving the Royal Court greater scope to review the substance of the decision.

Rights of appeal in one particular context have been especially controversial. The Planning and Building (Jersey) Law 2002 introduced third party planning appeals to the Royal Court (which came into force in 2006) in addition to existing first party appeals. The annual number of third party appeals since 2007 has been between 6 and 12; for first party appeals between 3 and 11. Most appeals lodged did not proceed to trial and of those that did, most were unsuccessful. Concerns have been voiced about various features of third party appeals, including the cost of litigation. In December 2011, the Minister for Planning and Environment announced that he would introduce a new merits-based planning appeals system. A green paper was published on 15 March 2013.

As well as having an appellate function, the Royal Court hears applications for judicial review. Judicial review may be brought if a person wants to challenge the legality of a decision and no statutory appeal exists. The Royal Court Rules 1992 lacked any specific procedure for making such applications. The RCRs were amended to include provisions on judicial review proceedings in April 2000.³ The Jersey procedure was modelled closely on the arrangements in place at that time in England and Wales, but these been significantly reformed in the ensuing years.

The project will consider the following issues:

- a) whether the statute book and drafting practices for Laws adopt a principled approach to the provision of appeals from decisions of public bodies

¹ See <https://www.lawcom.gov.uk/project/administrative-redress-public-bodies-and-the-citizen/>

² For an overview, see N Langlois, “The test for appeals against decisions of administrative bodies: unreasonable or just plain wrong?” (2008) 12 Jersey and Guernsey Law Review 93-103.

³ See I Le Marquand, “The new procedures in relation to judicial review in civil proceedings” (2000) 4 Jersey Law Review.

- b) whether the “unreasonable having regard to all the circumstances of the case” formula for statutory appeals to the Royal Court is satisfactory
- c) whether the procedures for making appeals to the Royal Court are satisfactory (including eg whether there are differences in time limits between different appeals under various Laws)
- d) how, in designing legislation, decisions are made whether to create an appeal to a tribunal to the Royal Court (or to say nothing, leaving questions of lawfulness to be dealt with on an application for judicial review)
- e) whether there are any lessons for Jersey that could be learned from the reforms of judicial review procedure in England since 1999, for example in relation to the leave stage (now called “permission” in England).

Appeals to “tribunals”, “panels” and other adjudicatory bodies

The Royal Court does not have a monopoly over adjudicating on administrative law questions. Various enactments provide for an appeal against a public body’s decision to “tribunal” or “panel” for adjudication. A person with legal qualifications must chair some; others have no such requirement.

Examples include:

- Social Security Tribunal: Social Security (Jersey) Law 1974
- Social Security Medical Appeal Tribunal
- Income Support Medical Appeal Tribunal: Social Security (Jersey) Law 1974 article 34 as amended (hearing appeals on the award of the impairment component under the Income Support Law and home carer’s allowance payable under the Social Security Law)
- Health and Safety Appeal Tribunal
- Mental Health Review Tribunal: Mental Health (Jersey) Law 1969
- Investigatory Powers Tribunal: Regulation of Investigatory Powers (Jersey) Law 2005
- Health Services Disciplinary Tribunal: Health Insurance (Jersey) Law 1967
- Health and Safety at Work Appeal Tribunal
- Data Protection Tribunal: Data Protection (Jersey) Law 2007
- Misuse of Drugs Tribunal: Misuse of Drugs Law 1978
- Marine Accident Tribunal: Shipping (Jersey) Law 2002
- Tribunal established by Police (Complaints and Discipline)(Jersey) Law 1999.
- Jersey Police Complaints Authority
- Rate Appeal Boards: Rates (Jersey) Law 2005 article 44
- Appeals panel on discretionary education grants: Educations (Discretionary Grants – General)(Jersey) Order 2008 article 24
- Data Protection Tribunal: Data Protection (Jersey) Law 2005 schedule 6
- Commissioners of Appeal: Income Tax (Jersey) Law 1961
- Disciplinary panel of the Law Society: Law Society of Jersey Law 2005 article 18
- Panel appointed by the chairman of the Prison Board of Visitors to hear appeals against finding of guilt relating to a breach of prison discipline: Prison (Jersey) Rules 2007 rule 94.

This list is incomplete; research work is needed to compile a comprehensive and more detailed one. It is not proposed that the project consider the operation of the Employment Tribunal established under the Employment (Jersey) Law 2003 or the Rent Control Tribunal as these bodies do not deal mainly with complaints against public bodies. The Canons of the Church of England in Jersey 2012 is a specialist body of law; although for some purposes the Church of England may be regarded as a public body, consideration of appeals relating to church matters should fall outside the project.

As noted earlier, the Leggatt review of tribunals in England and Wales reported in 2001,⁴ was followed by a white paper,⁵ and the Tribunals, Courts and Enforcement Act 2007 was enacted. This

⁴ A Leggatt, *Tribunals for Users – One System, One Service* (Department for Constitutional Affairs 2001)

radically simplified the plethora of tribunals (reducing 70 to two), to improve access to justice, to encourage use of ADR, and to ensure that tribunals are fully independent from the public bodies from whose decisions they hear appeals. Tribunal judges are now recognised as part of the mainstream “family” of judges in England and Wales. Administration was rationalised by the creation of HM Courts and Tribunal Service, which now provides administrative support to all judicial bodies (whether “courts” or “tribunals”) in England and Wales. A new post of Senior President of Tribunals (held by a Lord Justice of Appeal) was created to provide high-level judicial leadership to the new system. Procedures were established for better case management, so that cases starting in the First-tier Tribunal may be transferred to the Administrative Court (for example, if it is identified that an appeal raises an important point of law) and vice versa (for example, if a claim for judicial review turns mainly on factual issues or the expertise of a tribunal would be beneficial).

Using the Leggatt review and subsequent implementation work in the UK as a template, questions to be investigated in relation to Jersey’s tribunals could include the following.

- a) whether there may be advantages in creating a single general purpose tribunal (as now exists in England), arranged as needs be into chambers, rather than creating a separate tribunal each time legislation requires an appeal route to a tribunal
- b) how, in designing legislation, decisions are made whether to create an appeal to a tribunal or the Royal Court
- c) whether the arrangements for the appointment of tribunal/panel members ensure the independence and impartiality of members. A quick perusal of the Laws listed above suggests that for many tribunals the minister against whose decisions a tribunal hears appeals is responsible for nominating members, which may be highly problematic if the tribunal/panel is intended to be more than a wholly “internal” non-judicial redress mechanism.
- d) whether the procedures and rules of evidence used by the tribunals are satisfactory
- e) whether there exists satisfactory opportunities and requirements for the training of tribunal members (especially those who are not legally qualified).
- f) whether users of tribunals are able to obtain satisfactory access to legal advice and representation when needed.

States of Jersey Complaints Board

A non-judicial system for hearing complaints by aggrieved citizens about States of Jersey decisions was established by the Administrative Decisions (Review)(Jersey) Law 1982, which created the “Board of Administrative Appeal” drawn from presidents of committees and other elected States members who had held office for three years or more. These arrangements were reformed by the Administrative Decisions (Review)(Amendment) (Jersey) Law 1997, with the creation of a panel of non-States Members, appointed through an independent process, to hear complaints.

In 2000, one of the principal recommendations of the Clothier Report was the creation of an ombudsman.⁶

“We **recommend** the institution of a proper Ombudsman to hear complaints of maladministration by Government Departments. This would be a matter of little difficulty and no great expense. The Ombudsman should be an independent person and endowed with powers to order the production of papers and files and to command the attendance of witnesses. If a finding is made in favour of the citizen, and the responsible Department does not volunteer to remedy the grievance, the power of compulsion should lie in the States, to

⁵ Department for Constitutional Affairs, *Transforming Public Services: Complaints, Redress and Tribunals* (Cm 6243, 2004).

⁶ States of Jersey, Report of the Review Panel on the Machinery of Government in Jersey (States of Jersey 2000) chapter 9.

whom the Ombudsman reports and whose officer he is. The States should jealously guard the authority of the Ombudsman if they find his report acceptable.”

In May 2004, the Privileges and Procedures Committee presented a report to the States Assembly rejecting this recommendation, principally on the basis that very few complaints were made each year and the cost of establishing a public sector ombudsman would be disproportionate.

In February 2006, a (new) Privileges and Procedures Committee endorsed this approach and brought forward proposals for amending the existing system, which was done by amending the 1982 Law. The Board of Administrative Appeal was renamed the “States of Jersey Complaints Board”. Provision was made for the Board to issue procedural rules and the gate-keeping function of whether to accept a complaint for full hearing moved from the States Greffier to the chairman of the Board. Under the 1982 Law, the Privileges and Procedures Committee receives reports from the Complaints Board on individual complaints (article 9) and an annual report (article 10), with the committee authorised for presentation to the States Assembly.

One question that has arisen in questions in the Assembly of the States of Jersey is whether, and if so how, panels of the Board should consider allegations that human rights have been contravened.

Among the questions that the Law Commission’s review may consider are

- a) whether the reforms made in 2006 are operating as intended and whether there is a need for further amendments to the Law, practice or procedures
- b) whether it is a desirable arrangement that reports go to the Privileges and Procedures Committee (which now appears to be a mere formality) and for individual reports to be presented to the States Assembly
- c) the review could also re-open the discussion as to whether an ombudsman would have advantages over the Complaints Board but given the States have decided against this in 2004 and 2006 it might be thought unnecessary to pursue this line of inquiry on grounds of political realism.

Research methods and schedule

The Law Commission’s plan of work is as follows.

Phase 1 (June – October 2014): desk-based research leading to publication of a background paper. This would seek to describe systematically how the current redress mechanisms are constituted, present data on how they are used, and provide an indication of points for further inquiry arising out of analysis of legislation, case law and other publicly available documents. The paper may also include a brief survey of administrative justice systems in some other small jurisdictions and provide information about reforms that have been introduced and current thinking in the United Kingdom.

Phase 2 (January – May 2015): empirical research by interviews with key participants in the administrative justice system in Jersey. The purpose will be to gather further evidence about the practical operation of redress mechanisms and ideas for reform based on the experiences of those who operate and use the systems.

Phase 3 (July – August 2015): preparation and publication of a consultation paper drawing together material gathered and issues identified in phases 1 and 2.

Phase 4 (October/November 2015): seminar to discuss consultation paper.

As a guideline, your comments should not normally exceed 3,000 words.

Once completed, this template should be emailed to A2JR@gov.je or printed and posted to Access to Justice Review, Chief Minister's Department, Cyril Le Marquand House, St. Helier, Jersey, JE4

8QT. The deadline for the submission of comments is Friday 20 June 2014.