

Submission by Barbara Corbett of Hanson Renouf

Response to Access to Justice Review Barbara Corbett, Hanson Renouf

Potential model for legal aid

The legal aid burden on Jersey qualified lawyers is taking its toll and many people think there should be change. Different models have been suggested to replace the current system.

My suggestion is a little different and stems from my background in advising in England. After my law degree and with a house full of small children I became a volunteer CAB advisor as a way of putting something back into the system and to keep my legal knowledge up to date, to an extent. I went on to become a trainer for the National Association of CABx only stopping when I started my LPC. Before my LPC I did a Masters degree in Welfare Law which included Legal Aid (and Child Law and Mental Health Law). In 1993, when the English legal aid changes were just beginning (the beginning of the end as it turned out) I wrote an essay entitled "A Model for a Publicly Funded Legal System".

Citizens Advice Bureau

The basis of the model was using the CAB as the gateway to legal services. One thing which is key with CAB advising is that the presenting problem is not always the real problem. Lawyers encounter the same issues. Clients think they know what they want, they think they need to go to law, but often there is a less expensive way forward. Not every unhappy spouse needs a divorce, not every annoying neighbour needs to be the subject of an injunction and a boundary dispute may be more effectively dealt with by taking a bottle of wine next door and having a chat about it. But someone needs to be skilled enough to work out when it is worth instructing a lawyer and when a pragmatic approach is better or a more formal non court intervention such as mediation.

This is where the CAB could help. Unlike lawyers, the CAB is popular with States members and the public alike. It is held in high regard, rightly so. It is not difficult to raise funds for such a worthy cause which provides free, confidential and impartial advice to anyone, nothing is too big or too small for the CAB advisors to hear about and they are able to signpost people to specialist agencies. Not only that, the CAB keeps very good statistics, and has a strong social policy remit, identifying and addressing problems which come to light through its work. This information is passed on to government and is a way of bringing about changes in legislation. The CAB in Jersey is particularly committed to community involvement and is looking at ways to develop partnerships with States bodies and other organisations.

Gateway

If the gateway to legal aid (however funded) was through the CAB, any legal matter which could be dealt with in a more practical way could be diverted, clients with disputes could be diverted to mediation (both community and family) thus reducing the numbers of legal aid cases from the start. Then, when a problem has been identified as a legal one requiring action, it could be passed on to an in-house CAB lawyer (or a team if funding would allow) ensuring Chinese walls where necessary.

In-house lawyers

The in-house lawyers (Jersey qualified) would be able to deal with a large proportion of cases, giving general advice, assistance with Petty Debts claims, straightforward family law applications such as divorce and agreed orders for maintenance and again, signposting and referring to mediation where appropriate. The in-house team could also deal with the more minor criminal matters, bail applications etc and then refer on more serious matters. By being in-house, there should be little delay in getting to see a lawyer and although it may seem like a client is being passed through several people, if done efficiently it is still likely to be quicker than the current system. At the in-house lawyer stage, means and merits testing could apply. This could in itself be an income stream for the service, yet still be cost effective for clients. This next level of advisor would need to have or be taught the skills to deal with general matters but most importantly would need to be able to identify when a matter needed specialist legal knowledge and experience such as serious criminal cases, public law children cases and matters involving complex consumer or personal injury issues.

Specialist lawyers

The cases referred on at this stage would then be given to lawyers with experience and expertise in the relevant area. As there would be far fewer cases reaching this level, it would be reasonable for there to be public funding for the work, again, following a means and (usually) merits test. It may be that some of the funding is from the law firms themselves, in recognition of the lifting of the burden legal aid otherwise imposes. It may be that funding is from the States and, although the level of fees paid is likely to be lower than general private fees, nevertheless some practitioners may choose to specialise in certain traditionally lower paid areas of legal work and work with lower overheads. This could be with legal aid departments in larger firms or specific legal aid firms or legal aid chambers run on a commercial basis. Alternatively the suggestions made by others for a public defender's office, or legal aid firm could be a way of providing specialist services from lawyers paid a salary. This could be cost effective from the States point of view and little different from the Law Officers' Department, although sufficient safeguards would need to be in place to deal with conflicts, no doubt via separate teams. Such a service may well

end up being a recognised part of the career path for ambitious advocates, enabling them to gain courtroom experience on their way to partnership in private firms at a later stage. Other models, as suggested by Sir Philip Bailhache, include payments to lawyers after a certain number of hours of *pro bono* work has been completed, and that may be a less radical way of dealing with the matters which require lengthy legal proceedings. The speech of Sir Philip at the 2007 Assise d'Heritage is attached with this response.

Potential Changes in Family Law to Improve Access to Justice

This part of my response relates simply to some aspects of access to justice in respect of family law. It is by no means exhaustive, but it is hoped that it will be of some use.

Divorce Process

Problems

The current divorce legislation is quite antiquated, although it has been amended in recent times, the last major changes being brought about in 2005. The fault based grounds for divorce continue to cause difficulty for some couples. Although there has not been a defended divorce in Jersey for many years, the requirement to have to blame the other party for the breakdown of the marriage if they have not been separated for at least a year frequently sets matters off on an adversarial track which affects the progress of the case in respect of children and finances and makes matters more difficult than they need be. There may not be any defended divorces these days but there are often notices of intention to defend and answers filed, increasing costs needlessly.

Reconciliation

Although separation is available as a ground for divorce (one year with consent of the other party or two years without), there is no provision for reconciliation in the statute. This has led to a situation where a couple, who were not living together at all, but who went to England for a few days to sort out the division of their assets there and stayed with friends, together, had to start their period of separation again. The English legislation expressly provides for the possibility of reconciliation, by allowing the separation to be interrupted for periods of time not exceeding six months, to encourage parties to make their marriages work.

The 3 Year Bar

The current bar against divorce during the first 3 years of marriage is unhelpful for couples whose marriages have broken down but who cannot move on with their lives. This increases costs because the only way to extricate themselves and deal with finances formally is by judicial separation. They then have to go through a divorce as well, after 3 years. There is no 3 year bar in Guernsey or Scotland and the bar in England is only for one year. In an age where people cohabit before marriage, the need for this restriction, which was originally in the legislation to encourage people to “work at” their marriages has passed.

Financial Claims

When there are financial claims, at the preliminary directions hearing a timetable is set for the exchange of affidavits of means, questionnaires on those affidavits, replies to questionnaires and frequently also schedules of deficiencies and responses to schedules of deficiencies. There is no judicial control over what questions can be asked, and the directions direct that questions should be answered, no matter how unreasonable, disproportionate or irrelevant the questions may be. This can lead to very large legal costs as, for example, all bank account entries of more than £200 are described and explained. In many cases such information does not take the case on any further but lawyers’ time is taken gathering and interpreting it. More judicial control is necessary in respect of disclosure and proportionality should be the watchword.

Solutions

A move to a system of no fault divorce, with no 3 year bar and potentially divorce by consent even without a lengthy period of separation before any court application would assist many clients. Such a move would mean there would be no more need for judicial separation. Such an arrangement would also allow parties time to reconsider and attempt reconciliation without having to worry that if the reconciliation didn’t work they would have to start a period of separation all over again. This may encourage more reconciliation. Also, if proceedings could be started at an early stage, financial and other matters could be dealt with during any period of separation rather than either waiting, or alternatively bringing a fault based divorce. This would make the process simpler and easier for parties to manage themselves without the assistance of lawyers.

In respect of financial claims, rather than making blanket directions regarding questionnaires at the beginning of a case, when it is not clear if there will be any difficulties with disclosure or not, any questionnaire should be approved by the judge (this could be by way of email rather than a hearing). This happens in England and since its introduction there, the length of questionnaires has reduced significantly.

It would also help for there to be more promotion of mediation and other non court routes to settlement, but that said, the Registrars and JFCAS are very supportive of mediation. This will probably filter through into more focussed and less acrimonious cases going forward.

20th June 2014

Bailiff's speech at Assise d'Héritage

13th September 2007

Your Excellency,

Even if your presence this morning is technically required, it is nonetheless an honour for us that you and your lady are attending this important occasion at the opening of the new legal year. The appearance of the Governor on behalf of the Bishops, Abbots and Abbesses goes back at least to the confiscation of the alien priories by Henry V in 1413, and your predecessors have attended the Assise D'Héritage for many centuries. There was a hiccup in 1899 when the Court adopted a rather controversial Act after the death in post of the Lieutenant Governor of the day, and declared that, because the fiefs of the Bishops and Abbots had long since been confiscated by the Crown, there was no need for the Governor to answer for these ecclesiastical figures. In 1901, the newly appointed Lieutenant Governor refused to attend the Assise, stating in effect that if he was not to answer for the Bishops and Abbots, then there was no need for him to be present. Within a month the Court had revoked the offending Act. History does not record the rationale for this judicial *volte face*, but it may be that it had something to do with a longstanding tradition recorded in the chapter on the Assise d'Héritage in Falle's 18th century work "Caesarea" in the following terms –

"[Then] the Governor, or in his absence the Receiver, causeth an ample Dinner to be prepared in the King's name, where besides the justices, those freeholders before spoken of have a right to be present, and therefore they are said in ancient Records to eat with their King. *Edere cum Rege, Ter in anno* a Custom older, doubtless, than the Conquest."

I know, Sir, that you are conscious of your duty, and I accordingly welcome you most warmly.

May I also welcome your guests, Lord and Lady Ballyedmond, and my guest, the Earl of Jersey, attending an Assise d'Héritage for the first time. I also welcome Mr Jonathon Faull, the Director General of the Justice and Home Affairs directorate in the European Commission, with whom the Attorney General has many dealings, and Mrs Faull.

It was five years ago that I introduced the practice of a judicial *tour d'horizon* at the Assise d'Héritage which opens the legal year, with a response from the Attorney General and the Bâtonnier. During that first intervention, I spoke of the legal aid system, acknowledging that it was a sensitive subject upon which the profession was then deeply divided. There were those who thought that legal aid should be paid for by the State, as in most but not all other jurisdictions, and there were those who thought that the traditional *pro bono* approach was still a just contribution by the legal profession to the common good. I suspect that those divisions still exist but that a consensus may be emerging that the legal aid obligation in individual cases should be limited in some way. There is clear ECHR authority for the proposition that lawyers cannot lawfully be compelled to work *pro bono* to an unreasonable extent. There are of course many ways in which the obligation can be limited, but the most obvious is to agree that legal aid work on a particular matter should be remunerated out of public funds after a certain number of hours have been worked. I say "agree" but I have of course no authority to make any such agreement, which is a matter for the Minister

for Treasury and Resources. What I will say, however, is that any initiative by the profession seeking a compromise of this kind would have my full support. In the meantime I should like to express my appreciation to the profession for the huge amount of work that is done *pro bono* in the interests of justice.

Each member of the profession will have received from the office of the Law Society a consultation paper on the proposed establishment of an Institute of Law. Much work has been done over a lengthy period on this proposal by a number of members of the profession and law students, to all of whom I am very grateful. I hope that, with a fair wind, the Institute will be incorporated in the not too distant future, and will be offering a course on Jersey law to aspiring advocates and solicitors by October 2008. This is an exciting project which will carry with it the seeds of expansion into a fully-fledged law school offering a standard law degree, the conversion course for non-law graduates, and many related activities. Much could be gained from, for example, developing a course and a qualification for conveyancers and perhaps from a system of Continuous Professional Development which is now common practice in most other jurisdictions. CPD could logically follow on from the advocacy training courses pioneered by the Deputy Bailiff. Ultimately, or perhaps sooner than that, I hope that it will be possible for the Institute of Law to expand into the teaching of business skills at a senior level related to the financial services industry. It seems to be generally acknowledged that the Island is not producing as satisfactorily as it might the skills base for the Island's key industry. The Institute could play a leading role in bringing about change in this sphere. The development of advanced legal and business studies could make the Island an importer of youthful skills and researchers and see a halt to the drain of local talent to the UK and elsewhere. There is much to

be done, and I hope that the members of the profession will play their part in driving along these changes for the benefit of the Island.

The Court of Appeal has emphasised in a very important recent judgment on the law of voisinage the part which can be played in developing a legal system by institutional writers. Such authors usually exist only in the context of an academic institution. The development of Jersey's customary law is sometimes portrayed, wrongly in my view, as a struggle between English and Continental civilian influences. We are, whether we like it or not, a mixed jurisdiction, and the struggle is really for the soul of Jersey law. Our legal heritage is every bit as important as our architectural and cultural heritage. To seek to develop our customary law to serve the needs of the community in the twenty-first century is not at all regressive. Sometimes that may involve reforms which are painful to some, like the move to conveyancing in English rather than French which took place in November last year. No doubt there was similar anguish in England in 1362 when French ceased to be the language of pleading in the courts. We must move on. Inevitably, a small jurisdiction such as ours will draw in influences from other legal systems; sometimes they will come from English law; sometimes from French law or other civilian or mixed systems such as the Scottish. In 1861 Advocate Godfray told the Royal Commissioners that Jersey law resembled Scotch law more than English law. What is important, it seems to me, is to ensure that the law develops in a coherent and orderly way, respecting the traditional structure of our jurisprudence but yet rejecting notions and concepts which are out of tune with contemporary commerce and social organisation. Academic writers can play a significant part in that process. I very much hope therefore that

members of the profession, both collectively and individually, will throw their weight behind the establishment of a vibrant Institute of Law.

Monsieur le Procureur, la parole est à vous.

the charity for
your community



The Jersey Citizens Advice Bureau

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Date: 30 January, 2014

Dear Advocate Hanson,

Re. Revision of Legal Aid Guidelines

Further to our discussions about how the Citizens Advice Bureau's legal advice service could be improved and developed, I set out below my proposals for your consideration;

- The diagnostic Legal Clinics that we hold each Wednesday assist approximately 150 clients, per annum, and to extend these clinics, in terms of frequency, would make the process more expedient. We currently get booked up one month in advance, sometimes longer. Extending the Wednesday clinics by one hour would allow us to make space for an additional two clients, per week. Perhaps the inclusion of more lawyers from the public sphere would avoid increasing the burden on lawyers from the 'tour de rôle' who currently provide this service.
- The ability to offer specialist legal advice, examples being Employment Law, Property Law, Share Transfer Legislation and Family Law would make the clinics better tailored to a client's specific query.
- Access to a lawyer over the telephone (perhaps on a rota basis) to obtain 'in principle' guidance. This would alleviate some of the pressure on the legal clinics themselves and offer the client a speedier service.
- We have numerous pages on our website that are dedicated to delivering legal information to citizens, some community spirited law firms (such as yours) are good enough to cast a critical eye on these pages with a view to making corrections and updates, where necessary. In return we offer a logo that acts as a hyperlink back to the relevant firm's website, thus increasing their traffic.



The Queen's Award for Voluntary Service
by groups in the community

- I am working with JLJB to extend our legal pages and if more individual law firms could get involved, that would also be a great help in making legal information more accessible. Our website can be found at this address www.cab.org.je

To be workable, these proposals would require lawyers in the public sphere to be part of a wider legal aid/pro bono contribution. I have taken on board your comments that lawyers working for the States in its various guises would be a resource that could be useful to the Citizens Advice Bureau and I agree that this is an avenue that should be explored. We could identify, in principle, potential conflicts in advance of referring the matter for advice, in much the same way that the Pro Bono Unit in Chancery Lane, London operates.

It would not be possible to extend the scope of the Citizens Advice Bureau Legal Clinics within the bounds of the current system and therefore, additional resources would be required, in particular, specialist Lawyers who could advise on specific legal queries.

The Citizens Advice Bureau offices could continue to be utilised for meeting clients in person and our insurance would apply to all advice furnished under our banner.

I hope that this gives you an outline of how our service could be improved and I look forward to discussing this matter further.

Yours sincerely,



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The Law Society of Jersey



Attorney General
Law Officers' Department
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31st January, 2014

Dear Attorney General,

As you know, The Law Society of Jersey is considering amending the current Legal Aid Guidelines as an interim measure pending a more thorough overhaul of the system.

There are proposals to improve the duty advocate scheme by making clear what is expected of advocates and it would seem that the CAB could be developed to an even greater and more efficient resource, provided more legal expertise were made available. As the CAB is at the rock face of access to justice, this may be considered very important.

I have been in contact with the Bar Pro Bono Unit in London and discussed the involvement of CPS/Government lawyers in the Unit's work and it is apparent that in the UK, legal services (without conflicts) can be provided by lawyers in the public sphere without undue complication.

As matters stand, it is discretionary for lawyers in the LOD to be a member of The Law Society under the 2005 Law and therefore it seems to me that they cannot be compelled to perform any legal aid service by The Law Society. Jersey lawyers in the Viscount's Dept and in States Departments are in a different category, however.

The rationale for the legal aid burden in Jersey proceeds from the oath taken by all Jersey lawyers when called, although in practice exemptions have grown up, albeit somewhat ad hoc. Whatever the correct position should be, I was rather hoping that lawyers in the public sphere would be willing to volunteer to assist the CAB in its aspirations set out in the enclosed letter, and that this would have the backing of the Law Officers.

In this way, all Jersey lawyers will be providing some assistance to those less fortunate than ourselves, in one form or another, and until the system can be overhauled. Even in any new system, I anticipate that all Jersey lawyers (private

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The Law Society of Jersey



or public) will wish to provide an element of pro bono work/discounted services in a joint effort with the States, the Court and important services such as the CAB.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Timothy V.R. Hanson', written over a circular stamp or watermark.

Advocate Timothy V.R. Hanson
President

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