

# STATES OF JERSEY



## DRAFT ACCESS TO JUSTICE (JERSEY) LAW 201-

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Lodged au Greffe on 25th February 2019  
by the Chief Minister

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STATES GREFFE





Jersey

## **DRAFT ACCESS TO JUSTICE (JERSEY) LAW 201-**

### **European Convention on Human Rights**

In accordance with the provisions of Article 16 of the Human Rights (Jersey) Law 2000, the Chief Minister has made the following statement –

In the view of the Chief Minister, the provisions of the Draft Access to Justice (Jersey) Law 201- are compatible with the Convention Rights.

Signed: **Senator J.A.N. Le Fondré**

*Chief Minister*

Dated: 9th January 2019

# REPORT

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## 1. Summary

The Draft Access to Justice (Jersey) Law 201- (“the draft Law”) would improve access to justice by establishing, for the first time, a legislative basis for legal aid in Jersey. The draft Law would make the Judicial Greffier responsible for the administration of the Legal Aid Scheme (“the Scheme”). A new Legal Aid Guidelines Committee would be established to assist and advise the Chief Minister in making the Legal Aid Guidelines (“the Guidelines”). The draft Law sets out the matters that the Guidelines must and may provide for.

The Judicial Greffier would be able to entrust any part of the administration of the Scheme to the Law Society of Jersey (“the Law Society”) or others as deemed appropriate. The Scheme would be subject to the Comptroller and Auditor General, and would also be subject to Freedom of Information legislation. The Judicial Greffier would be required to prepare an annual report in respect of the Scheme, which the Chief Minister must then present to the States Assembly.

The draft Law would also clarify that an advocate or solicitor can enter into conditional fee agreements (often referred to as ‘no win, no fee’ agreements), provided that such agreements do not include a success fee. In addition, the draft Law amends existing legislation so as to ensure that the practice of the Courts in relation to costs in criminal and extradition cases would be aligned with any new Scheme. The draft Law would come into force following a decision by the Assembly regarding an Appointed Day Act.

Whilst the Guidelines for any revised Scheme cannot be established until this draft Law has been decided upon and has come into force, there has been extensive discussion with the Law Society and others, including a public consultation, regarding a revised Scheme.

## 2. Background

A summary is provided below of recent events which have led to the lodging of this draft Law. Whilst the legal aid scheme in Jersey has been the subject of a number of previous reviews, court cases and legal opinions, the summary below seeks only to capture more recent events.

### 2.1 Existing legal aid scheme in Jersey

The basis for the existing legal aid scheme in Jersey is a professional obligation on locally qualified lawyers to carry out this task on behalf of “widows, the poverty stricken, orphans and undefended persons”. The obligation derives from an Oath and is defined by guidelines determined by the Law Society. The Law Society is a statutory body, and the Guidelines are a Code of Conduct obligation, enforceable by way of the Law Society’s statutory Disciplinary Committee.

All Jersey lawyers of less than 15 years’ call who are in private practice are required to participate in the legal aid scheme. (For the avoidance of doubt, advocates and solicitors employed within the Law Officers’ Department or Judicial Greffe are exempted from participation in the legal aid scheme.) The existing 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. The scheme is currently 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. In addition, the Acting Bâtonnier's office is responsible for maintaining a rota system for providing legal advice to individuals detained at Police Headquarters or Customs and Immigration, and to individuals at the Magistrate's Court, Youth Court and Citizen's Advice Jersey. Each rota allows the participating lawyer to obtain 'credits', which allows them to 'miss' a certificate in return for the work undertaken on one of the rotas. During 2017, there were a total of 950 legal aid certificates issued, of which 537 related to criminal matters, 293 to family law matters, and 120 to other civil matters (such as personal injury and housing issues).

Unlike elsewhere in the British Isles, the current legal aid system is not publicly funded, although there is a legal aid vote administered by the Judicial Greffe in order to fund the more onerous cases. In addition, some aspects of public law are already fully publicly funded, such as public law children's cases. Other than through the Oath, there is currently no dedicated legislation which governs the scheme.

A factual description of the current Jersey legal aid system was prepared and published on [www.gov.je](http://www.gov.je) in June 2014 as part of the Review of Access to Justice in Jersey (see below).

## 2.2 Guernsey and the Isle of Man

The current legal aid scheme in Guernsey was put in place following a complaint to the European Court of Human Rights in 1995, which resulted in the development of a statutory legal aid scheme, introduced through the *Legal Aid (Bailiwick of Guernsey) Law, 2003*. The costs of the scheme are met largely by the States of Guernsey, with expenditure on legal aid payments amounting to around £2 million in 2016 (with criminal legal aid payments costing £812,000 and civil legal aid payments costing £1,173,000). Legal aid is a policy responsibility of the Committee for Employment and Social Security. The Guernsey Legal Aid Service is separately constituted, but related to the Royal Court of Guernsey. Expenditure on legal aid administration in 2015 was £390,000.

Legal aid in the Isle of Man has a statutory basis through the *Legal Aid Act 1986*. The financial budgets for legal aid are provided by the Social Security Division of the Treasury. The Isle of Man legal aid schemes cost £2.7 million in 2016/17. The schemes are administered through the legal aid section of the Isle of Man Courts of Justice.

## 2.3 Review of Access to Justice in Jersey

### 2.3.1 *Establishing the review*

A proposal lodged by the Chief Minister to undertake a review of access to justice in Jersey ([P.158/2013](#)) was decided upon unanimously by the States Assembly in January 2014. An Advisory Panel was established, chaired by the then Senator P.F. Routier, M.B.E., and comprising Senator L.J. Farnham, former Connétable J. Gallichan of St. Mary and Deputies M. Tadier and J.H. Young of St. Brelade.

Under Ministerial Decision number [MD-C-2015-0009](#) the membership subsequently appointed comprised Connétable D.W. Mezbourian of St. Lawrence, Deputy J.A. Hilton of St. Helier and Deputy M. Tadier of St. Brelade. The Panel is supported by an Expert Group, chaired by the Chief Officer for Community and Constitutional Affairs, and consisting of representatives from the Law Officers' Department, Judicial Greffe, Law Society of Jersey, Bâtonnier, Jersey Chamber of Commerce, Citizen's Advice Jersey, and Jersey Consumer Council.

### 2.3.2 *Call for evidence*

A call for evidence was issued in May 2014 for members of the Public and the legal profession to provide comments on any aspect of access to justice. The evidence provided was summarised in the first *Access to Justice Review: Interim Report* ([R.107/2014](#)), which noted that whilst legal aid is only one component of access to justice, the existing system of legal aid featured in many of the comments received. In particular, the evidence submitted highlighted the disadvantages of using a “Tour de Role” system to assign lawyers to legal aid cases, and the barriers to entry faced by new law firms as a result of the legal aid obligation. A number of respondents suggested that it was a responsibility of the government to ensure access to justice, and that the obligation to provide legal aid rests more properly with the state. There was also a suggestion that the administration of the legal aid system should be undertaken by the Government in order to ensure that decisions are made only in the public interest. The majority opinion was that the system needed to be modernised, working in partnership with the Law Society.

### 2.3.3 *Law Society review of the legal aid scheme*

The Advisory Panel considered that the legal aid scheme merited a careful review in order to ensure that it remained fit for purpose. The Panel therefore welcomed plans by the Law Society to undertake a comprehensive review of the legal aid scheme, in consultation with its members, as noted in the *Access to Justice Review: Second Interim Report* ([R.89/2015](#)). The Law Society commenced a comprehensive review of the legal aid scheme in July 2015, and the Advisory Panel held Public Hearings regarding the review in 2015 and 2016, as noted in the *Access to Justice Review: Third Interim Report* ([R.85/2016](#)). The Law Society was expected to reach its conclusions by the end of October 2016.

### 2.4 Initial proposals made by the Law Society

The Law Society wrote to Senator Routier on 4th October 2016 to advise that the review had been completed, and members had resolved on 26th September 2016 to implement a revised legal aid scheme from 1st January 2017. The revised scheme gave rise to a number of concerns, as it appeared to represent a reduction in the legal aid provision available to Islanders. As a result, H.M. Attorney General, as *Partie Publique*, made representations to the Royal Court in November 2016 in order to achieve a stay on the implementation of this revised scheme, with the Chief Minister as an interested party to these proceedings. The Chief Minister and Senator Routier subsequently attended an Extraordinary General Meeting of the Law Society on 8th December 2016, at which members agreed to pause the implementation of the revised scheme in order to enter into discussions with the government. The Court proceedings have now been set aside, given that satisfactory progress has been made through discussions involving all parties to develop a new legal aid scheme.

### 2.5 Development of a revised scheme

It was agreed that discussions would take place within the framework established for the Access to Justice Review. As a result, there have been many meetings of the Advisory Panel and the Expert Group over the last 12 months, which have considered various aspects of the scheme in detail. Officers from the Social Security Department have joined the later meetings in order to bring their expertise to specific matters which affect their clients.

These discussions were entered into on the basis of developing a scheme for Jersey which was comparable with the schemes in place in Guernsey and the Isle of Man, in order to ensure that Islanders were being treated equitably.

### 2.5.1 *Public Consultation*

The Law Society also undertook a public consultation regarding a revised legal aid scheme during May and June 2017, which was conducted with the assistance of the Jersey Consumer Council and Citizen's Advice Jersey. This public consultation was supplemented by targeted consultation with the Courts, the Advisory Panel and others. Public Hearings were held by the Advisory Panel to take evidence from both the Law Society and from consumer bodies. This consultation informed the development of a revised scheme.

### 2.5.2 *Law Society*

A revised scheme was subsequently considered by an Extraordinary General Meeting of the Law Society on 12th September 2017, at which it is understood that members agreed with the revised scheme; and also authorised the Law Society Committee to agree further minor changes to the scheme, to agree the format and content of the subsequent guidelines and to support the development of legislation to underpin the legal aid scheme.

### 2.5.3 *Further revised scheme*

Subsequent discussions conducted through the Expert Group and Advisory Panel resulted in a further revised scheme, which was felt to provide a broadly satisfactory basis on which to proceed (details of the draft further revised scheme were included as Appendix 2 to the Report in [P.50/2018](#)), as well as being comparable with schemes in Guernsey and the Isle of Man. The Council of Ministers considered this further revised scheme in October 2017, and it was agreed that this should continue to be progressed, with the scheme put on a statutory basis and other required legislative changes advanced.

## **3. Lodging of P.50/2018 and subsequent developments**

Accordingly, the previous Chief Minister lodged [P.50/2018](#) in February 2018. Due to the significant number of Propositions which were listed for debate at the March and April States Sittings, it was not possible for the draft Law to be debated prior to the General Election in May. Following the election of a new Chief Minister in June, the *Projet* was again deferred to allow time for the Chief Minister to be briefed on the proposals. P.50/2018 was withdrawn under Standing Order 34(2).

Prior to re-lodging, the Chief Minister requested that the draft Law be considered by the Council of Ministers. Scrutiny also commenced a review of the draft Law, and the proposed revised Scheme, on 30th August 2018. This review was commenced in anticipation of the draft Law being re-lodged in due course.

At a meeting with Policy and Law Officers, the Scrutiny Panel informally mentioned some possible amendments to the draft Law. These were considered by the Chief Minister. The proposals from Scrutiny that were accepted are –

#### Article 6

- The addition of 2 States Members, nominated by the States, to the membership of the Legal Aid Guidelines Advisory Committee.
- Increasing the quorum for meetings of the Committee from 5 to 7 members, and a requirement for reports of the Committee to be signed by not less than 7 members (from the previous requirement of reports to be signed by 5 members).

## Article 7

- Introducing a procedure for the Minister to lay the Legal Aid Guidelines, or any revisions to the Guidelines, before the States for at least a 4 week period before they can be made and published. As part of this process, a States Member will be able to lodge a Proposition during this 4 week period requesting that the initial Guidelines, or any amendments, are annulled.

Other amendments to P.50/2018 include a requirement under Article 6(9) for the Advisory Committee to provide a report to the Chief Minister no later than 6 months after its establishment; confirmation that interim reports submitted under Article 15(3) will be presented to the States; and revisions to Article 17 to widen the power of the Assembly to amend the Law by Regulations.

Other typographical, linguistic and minor amendments have also been made that are not considered to have any significant impact on the provisions of what is being proposed, and are therefore not referred to in detail.

## Council of Ministers

An amended version of P.50/2018 was considered by the Council of Ministers on 17th October 2018. The Council agreed, by a majority vote, that the draft Law as amended could be re-lodged by the Chief Minister. It should be noted that the current Council of Ministers has not discussed in detail the draft revised Scheme that was attached as Appendix 2 to the report within P.50/2018, and is again attached as Appendix 2 to the report within this *Projet*. It is intended that the revised Scheme be presented to the Legal Aid Guidelines Advisory Committee to assist their work in developing a report in accordance with Article 6(1) and (9).

## Scrutiny

The Scrutiny review has, to date, issued various calls for evidence on the proposed revised Scheme, with responses already having been received from Citizen's Advice Jersey, the Bâtonnier, Consumer Council, Law Society and the Judiciary. It is anticipated that the Scrutiny review of the draft Law and Scheme will continue, and a report will be provided for States Members in advance of the debate in the Assembly.

## Engagement with the Law Society

Discussions with the Law Society have been ongoing since the lodging of P.50/2018. The Chief Minister met representatives of the Law Society on 14th August 2018. The Expert Group met on 28th September 2018. Following the agreement of the Council of Ministers to re-lodge the draft Law, the Chief Minister wrote to the President of the Law Society on 19th October 2018.

A dialogue then commenced with the Law Society regarding a proposal of the Chief Minister to include a provision in the draft Law which would have allowed the legal aid scheme that is in operation today to be brought into force under the Law. This would have served as a one-off transitional provision, only to be used if necessary whilst the process to implement a revised scheme was undertaken in accordance with the Law. This proposal was raised by the Chief Minister with the Council of Ministers. The Law Society indicated in clear terms that they were not supportive of this proposal and asked that the Chief Minister reconsider. Following a further exchange of correspondence, the Chief Minister agreed not to pursue this particular proposal. The Law Society agreed that the current scheme will continue to be supported for 6 months following (and subject to) States Assembly approval of this draft Law, whilst work is undertaken to agree and implement a revised scheme under the Law.

## Process for implementing a new Scheme

In the event that the Assembly approves the draft Law, it is expected that the Legal Aid Guidelines Advisory Committee would meet in Shadow form, in advance of the Law being registered, to begin the process of recommending a revised Scheme to the Chief Minister.

### **4. Financial and manpower implications of the further revised scheme**

Whilst this draft Law does not of itself have any direct public resource or manpower implications, it would enable Guidelines to be decided upon in due course which could have resource implications. The public resource implications of the draft further revised scheme (the 'draft scheme', as attached at **Appendix 2** to this report) are, therefore, explained below.

#### 4.1 Public Law Cases

The draft scheme features a public law (i.e. mainly criminal) legal aid scheme which would be funded by the public purse on a fixed fee basis, largely by re-using existing funds from the court and case costs budget, which would be deployed in a more stable manner than the current cost fluctuations, as explained below.

##### *4.1.1 Public Law Children Cases and Mental Health Review Tribunal*

Payment is already made from public funds in relation to public law children and child abduction cases. Such payments are made to accredited lawyers on a fixed price basis. There are, therefore, no additional budgetary implications in relation to the draft scheme in this regard, which simply maintains the *status quo*. Payments under a fixed price scheme are also presently made to lawyers in relation to cases before the Mental Health Review Tribunal. There are, therefore, no additional budgetary implications in relation to the draft scheme in this regard.

##### *4.1.2 Criminal Cases*

Payment for costs in criminal cases are currently made from public funds to lawyers in respect of a defendant who is acquitted following a trial in the Magistrate's, Youth or Royal Court, or when the Crown abandons the prosecution in whole or in part. Payment is made at hourly rates, depending on the level of experience of the legal fee earner and the complexity of the case. The costs obtained from public funds are the whole costs of the defence and so can be significant. In addition, payment is currently made on an *ex gratia* basis to lawyers in a small number of complex cases which are felt to represent an unduly onerous burden to the lawyer appointed under the existing legal aid scheme.

The draft scheme proposes a fixed price approach in relation to criminal cases and so extends the scope of the existing fixed price schemes (as mentioned above). Such a fixed price scheme for criminal cases is felt to be fairer, to remove the current budget volatility and to provide improved certainty in terms of budgeting and forecasts. On the basis that the Law is amended so that the lawyers of acquitted defendants receive simply the fixed fee amount, it is anticipated that the fixed price approach contained within the draft scheme could be accommodated within existing budgets. Whilst the new scheme would, therefore, be broadly cost-neutral, there may be a need on occasion (depending on volume of cases in any one year) to utilise recurring underspends within existing heads of expenditure in the Judicial Greffe court and case costs budget (usually around £300–£400,000). Furthermore, Regulations will be proposed which would include a provision for the Court to award additional costs in cases of hardship. In addition, it should be noted that H.M. Attorney General consulted the Law Society between August and December 2016 regarding the need to limit the exposure of the office of Attorney to costs and damages when providing

international co-operation to other jurisdictions. These law amendments have been advanced through the [International Co-operation \(Protection from Liability\) \(Jersey\) Law 2018](#). An Appointed Day Act to bring the Law into force will be lodged shortly.

A new criminal law panel would be formed of specialist legal practitioners. It is understood that a number of local firms have already committed to joining this criminal law panel. Payments to lawyers who are accredited members of this panel would be administered through a new legal aid office (see below), under the day-to-day supervision of the Law Society, but ultimately accountable to the Judicial Greffier, and operating in accordance with a formal service agreement.

The establishment of a specialist panel of criminal practitioners, overseen by the Judicial Greffe, and available to support those with relative low incomes facing criminal charges, would address concerns expressed in earlier consultations regarding the use of the “Tour de Role” system for criminal matters. This specialist expertise would also extend to the Duty Lawyers and Duty Advocate schemes (see below), thus ensuring improved initial support for those arrested and brought before the Courts, again overseen by the Judicial Greffe.

#### *4.1.3 Criminal Law – ensuring sufficient lawyers*

As explained above, legal aid representation in criminal law will be on the basis of a criminal law panel rather than the present “Tour de Role” system. There has been a need to consider what would happen if insufficient lawyers come forward for the panel to carry out the necessary defence work. As a result, there is a safeguarding provision in the draft Law for the Legal Aid Guidelines to be revised, if necessary, to revert to the “Tour de Role” system.

#### *4.1.4 Exception Case funding*

Provision is also made for exception case funding. This means that funding will be given to exception cases which fall outside the ordinary Legal Aid Guidelines, but where funding is required to ensure compliance with Convention rights. A similar system exists in the English legislation, creating a human rights safety net. This might be because a fair trial would be impossible without funding, or because a lack of representation might endanger other human rights. Guidelines will be issued, learning from English precedent, which have themselves been shaped by English Court of Appeal case-law.

## 4.2 Private Law Cases

Private law legal aid (i.e. mainly family and personal injury cases) would continue to be provided by local law firms at their own expense using the existing “Tour de Role” system.

## 4.3 Legal Aid Office

A new legal aid office would be established, which would be overseen ultimately by the Judicial Greffe, along with a publicly funded fixed fee Duty Solicitor and Duty Advocate service to support those taken into custody or taken before the Courts. This would require a net growth in revenue funding for the Judicial Greffe of around £400,000 per annum, based on a review of legal aid cases in recent years. This net growth in public funding is expected to be requested from contingencies for 2018 and 2019 (depending on progress with this draft Law), and would become a revenue growth funding consideration as part of the next Medium Term Financial Plan covering 2020 onwards.

The establishment of a legal aid office, overseen by the Judicial Greffe, would improve transparency and perceived fairness in the administration of the legal aid system. The establishment of the office would also provide significant opportunities to

improve the provision of legal advice to Islanders through, for example, the provision of legal surgeries and enhanced information for litigants in person. In addition, it is expected that the office would have a valuable role in promoting more use of alternative dispute resolution. It should be noted that funding of £150,000 to £160,000 (from contingencies) for the Legal Aid Office only (not the fixed fee Duty Solicitor and Duty Advocate service) has been agreed for 2019.

#### **5. Next steps if the draft Law is adopted**

As mentioned above, if this draft Law is adopted and brought into force, then the Legal Aid Guidelines Advisory Committee would be established. The Committee would consider the draft further revised Scheme (as attached at **Appendix 2** to this report) and, having consulted appropriately, advise the Chief Minister regarding the Guidelines for a new Scheme. The Chief Minister would, for the first time, be accountable to the Assembly and the Public for the Island's Legal Aid Guidelines. The Judicial Greffier would be accountable, personally and to the Assembly, for the use of public resources and administration of the Scheme. The Scheme would, for the first time, be subject to Freedom of Information legislation.

It will be necessary to bring forward Regulations for the efficient running of the Law, addressing the matters set out in Article 17 of the draft Law. It will also be necessary to pass Regulations under the [Costs in Criminal Cases \(Jersey\) Law 1961](#) to ensure that awards of costs in criminal cases are appropriate to rates of criminal legal aid. This will avoid the “volatility” issue explained above in section 3.1.2.

#### **Human Rights**

The notes on the human rights aspects of the draft Law attached in **Appendix 1** to this report have been prepared by the Law Officers' Department and are included for the information of States Members. They are not, and should not be taken as, legal advice.

## APPENDIX 1 TO REPORT

### Human Rights Notes on the Draft Access to Justice (Jersey) Law 201-

These Notes have been prepared in respect of the Draft Access to Justice (Jersey) Law 201- (the “draft Law”) by the Law Officers’ Department. They summarise the principal human rights issues arising from the contents of the draft Law and explain why, in the Law Officers’ opinion, the draft Law is compatible with the European Convention on Human Rights (“ECHR”).

**These notes are included for the information of States Members. They are not, and should not be taken as, legal advice.**

#### 1. Relevance of Convention Rights

The requirement under the European Convention for legal assistance to be made available to individuals can arise in 3 ways:

- In respect of criminal legal aid, Article 6(3)(c):

*“Everyone charged with a criminal offence has the following minimum rights: ... (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; ...”.*
- There is a trial to determine civil rights to which Article 6 applies, and there could not be a fair trial if the litigant were to be unrepresented, see *Airey v Ireland* (1979–80) 2 EHRR 305.
- In order to secure other convention rights where the subject matter of a hearing is not strictly one of “civil rights” for the purposes of Article 6. Immigration is an example of this, as is where relatives require representation to make effective an inquest required by reason of Article 2 of the Convention (“right to life”).

It should be noted that, outside the requirements of Article 6(3)(c) for representation in criminal matters, there is no general Convention duty for a jurisdiction to have arrangements providing such free (or reduced cost) assistance. The requirement to provide such assistance so as to ensure fairness of a civil hearing (see *Airey v Ireland*) rarely applies. This is why English legislation, as we shall now see, talks in terms of “exceptional case” provision when securing Convention Rights through legal aid in non-criminal cases.

The question of how a scheme is administered does not of itself give rise to human rights questions. It is the end result in terms of access to a fair trial that is the sole concern, so only inherent or systemic unfairness in the scheme of administration can create human rights concerns, see *Holmes v The Law Society of Jersey* [2018] JRC010. No such concerns exist.

#### 2. The draft Law

The relevant parts of the scheme of the draft Law are:

- The legal aid scheme is administered in accordance with Guidelines issued by the Minister.
- Guidelines will be issued under Article 7 of the Law creating the legal aid scheme. This will deal with ordinary entitlement to legal aid.

- Article 9 of the Law provides a positive duty for the Minister when issuing Guidelines to provide for exceptional case legal aid representation in cases where (a) the Convention requires such representation, but (b) the ordinary Guidelines do not deal with it.

Article 9 mirrors section 10 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Section 10 provides for “exceptional case” provision of legal aid. The Lord Chancellor of England and Wales is required to issue guidance to the Director of Legal Aid Casework to ensure that civil cases that require legal aid for Convention Rights receive such aid.

This is of itself sufficient for the Law to be compatible.

As in England and Wales, compatibility is ultimately secured by the content of the Guidelines to be published under the statute. There have been challenges to the Lord Chancellor’s Exceptional Case Guidance on human rights grounds, although largely on the grounds of its complexity making it occasionally necessary to have legal advice in order to navigate the application system: *Howard League for Penal Reform v the Lord Chancellor* [2017] 4 WLR 92.

In respect of the proposed Jersey scheme it can be said:

- (a) Public Law Legal Aid (Criminal) will be available in cases where a fairly minimal seriousness threshold is reached. It will be available in all cases where the defendant is under 18. There is no merits test, except for appeals. There are no residential criteria. The principal hurdle will be the question of financial need – a restriction clearly contemplated by Article 6(2)(c) of the Convention. It is in particular noted that the requirement to pay contributions is qualified by limits on how much can be required per month to meet such contributions. It is important that such criteria are appropriate to Jersey, and this is a matter which has been considered at length by the Expert Group and by the States’ own Access to Justice Advisory Panel. There is no basis for the LOD advising that what is proposed will be contrary to the Convention.
- (b) It is proposed that the Guidelines on Exceptional Case provision to meeting Convention Rights requirements should – albeit in a simplified form – draw greatly from the current Lord Chancellor’s Guidance. That Guidance has itself been shaped by human rights challenges. There is no reason to believe that what is proposed will be contrary to the Convention. This would only be the case if it created a systemic problem leading to the denial of legal aid where required by the Convention (*see Holmes v Law Society of Jersey*, Royal Court, 16 January 2018).

### 3. Legal professional privilege

Articles 12 and 13 ensure that information provided by the applicant for legal aid remains confidential and privileged. This is an important concept for the right to a fair hearing (see *R, ex parte Morgan Grenfell v Special Commissioner*) and also the right to privacy. Information can be shared by the assisted person’s lawyer to those administering legal aid, which is necessary for the proper administration of the system and thus plainly proportionate.

### 4. Conclusion

For the above reasons, the Law Officers advise that the draft Law is compatible with Convention Rights.



## The Law Society of Jersey

### LEGAL AID SCHEME

#### Introduction

Following an extensive review, undertaken as part of the Chief Minister's Access to Justice Review, changes are to be made to the system of Legal Aid in Jersey to ensure that access to justice continues to be made available, in key areas of personal law, to the most vulnerable members of the local community.

The current scheme, which is run by the legal profession in Jersey, for the benefit of the people of Jersey, will be replaced by a statutory scheme, administered through a formal arrangement between the Law Society of Jersey and the Judicial Greffe.

The new scheme will take effect from 1 July 2018, subject to implementation of the underlying primary legislation.

#### Key Principles

- Maintenance of an effective and sustainable Legal Aid Scheme which provides a 'safety net' of legal representation to the most vulnerable members of our community who might otherwise be deprived of access to justice.
- The establishment of an effective partnership between the Government of Jersey and the Legal Profession in Jersey to ensure that solutions are provided to meet the legal needs of the most vulnerable members of the community.
- Preservation of access to justice for the people of Jersey.
- Effective discharge, by the States of Jersey, of their human rights obligations in relation to access to justice.

#### Review of Scheme

- A comprehensive review of Legal Aid has been undertaken by the Law Society of Jersey, including a public consultation undertaken with the assistance of Citizen's Advice Jersey and the Jersey Consumer Council, as part of the Chief Minister's Access to Justice Review.
- The purpose of that review was to develop a sustainable Legal Aid model that is fit for the future, and ensures access to justice for those most in need and who cannot afford the full costs of legal representation.
- Key stakeholders, including Government, the Judiciary, the Law Officers' Department and representatives from consumer groups including the Jersey Consumer Council and Citizens Advice Jersey, have been consulted during the course of the review and have been actively engaged in the development of a revised Legal Aid scheme.



## The Law Society of Jersey

### Legal Aid Scheme: Key Features

- The Legal Aid Scheme has been simplified, enabling applicants to determine quickly whether the area of law or criminal offence for which they have a legal need is eligible for assistance and whether they qualify for free or reduced cost legal representation.
- Legal aid continues to be predicated upon the general presumption that, prior to consideration of an application for legal aid, applicants must first investigate whether they have any other means of funding their legal expenses under insurance policies (legal expenses, motor or home insurance policies) or membership of a professional association or trades union.
- The Legal Aid Scheme will be administered by a Legal Aid Administrator (unconnected to a law firm), who will be under the day-to-day supervision of the Law Society, but subject to the ultimate oversight of the Judicial Greffe. Administration will be governed by an entrustment agreement between the Law Society and the Judicial Greffier. In addition to administering the scheme, the Administrator will guide unsuccessful applicants towards the range of alternative solutions that are available to enable individuals to resolve their issues or to obtain legal representation, supported by providing access to procedural guides in relation to key Court processes and proceedings. The Legal Aid Office will, additionally, administer funding payments in eligible Public Law matters.
- Other than in respect of applications in respect of Criminal proceedings, the application process will include consideration, in conjunction with the applicant, of alternative means of resolving issues that do not require legal representation, even where an individual is eligible for free or reduced cost legal aid.
- Legal Aid will be categorised as either Public Law or Private Law.
  - Public Law covers Criminal, Human Rights, Public Law Children and Mental Health matters.
  - Private Law covers Family and Civil matters.
- All Legal Aid applications (other than in respect of Youth Court, Public Children Law Proceedings and Mental Health Review Tribunal Representation) will be subject to the application of eligibility criteria:
  - Public Law (Criminal) – Financial (means test)\* and Nature of Criminal Offence
  - Public Law (Human Rights) – Financial (means test)\* and Nature/Merits of Claim
  - Private Law – Financial (means test)\*, Residency and Area of Law[\* other than where the applicant is in receipt of Income Support]
- Applications for Legal Aid in respect of Human Rights claims and matters will be assessed to determine whether the claim represents a legitimate human rights claim or entitlement, and the merits of such a claim, such as to warrant the issue of a Legal Aid certificate. Limited certificates may be issued to enable the merits of a claim to be assessed before a claim proceeds. No residency test will be applied.



## The Law Society of Jersey

- Personal contributions may be levied in respect of Public and Private Law Legal Aid Certificates, dependent upon an applicant's level of income and financial circumstances. Where personal contributions are applicable, applicants must be given the opportunity to pay these contributions monthly, in accordance with a set scale.
- No personal contributions will be levied in relation to representation in the Youth Court or in respect of Public Law Children and Mental Health matters. Personal contributions are not required in relation to public law matters where the applicant is in receipt of Income Support.
- Legal representation in Public Law matters (Criminal, Human Rights, Public Law Children and Mental Health) will be provided by accredited specialist panels. Representation will be funded, through the Judicial Greffe, on a fixed fee/tariff basis.
- Legal representation in Private Law matters (Family and Civil) will be undertaken as hitherto, on a rota basis. Representation will not be funded but will be subject to individual contributions, in accordance with means. Entitlement to free or reduced cost representation in private law matters is subject to eligibility criteria being met.
- The Duty Advocate (Magistrate's Court) and Duty Lawyer (Police Headquarters / Customs Advisory Service) Schemes will be retained, resourced by members of the Accredited Criminal Panel, on an agreed tariff/fee basis.
- Public Law Legal Aid activity will be undertaken in all cases by specialists who have been accredited under the relevant Accreditation Scheme, overseen by the Law Society of Jersey in partnership with the Judicial Greffe.
- Practitioners who are no longer required to undertake Legal Aid (having completed 15 years' post qualification service in Jersey) will be eligible to undertake Public Law work, subject to being formally accredited under the relevant scheme.
- Allocation of Public Law Legal Aid Certificates in relation to Public Law Children and Mental Health representation will continue to be on a rota basis (administered by the Legal Aid Office) from amongst panel members. Certificates in eligible Human Rights matters will, wherever possible, be allocated to a human rights specialist lawyer in line with the circumstances and needs of the individual case, but will otherwise be allocated on a rota basis. It is further intended to enable parents and principal carers in Public Law Children matters to have a choice of representation, subject to availability and absence of any conflicts, from the accredited specialist panel of lawyers.
- Applicants who are granted Public Legal Aid Certificates in relation to Criminal matters will be able to select a lawyer from a Panel of Accredited Criminal Specialists (subject to the lawyer being available to represent the applicant and not subject to a conflict). Applicants who do not wish to choose a lawyer can elect to be represented by the next lawyer on the rota of accredited specialists. The operation of the rota will ensure that no applicant will be unable to secure representation.



## The Law Society of Jersey

- Accredited practitioners will be able to opt in to the relevant Public Law Panel (Criminal, Human Rights, Public Law Children, Mental Health).
- Practitioners of less than 15 years' standing will continue to be obliged to discharge their obligation to undertake Private Law Legal Aid work; Public Law Legal Aid work will, going forward, effectively fall outside the scope of the Legal Aid obligation. Such work will, however, be discharged by specialist and accredited practitioners on a funded basis as part of a partnership approach between the legal profession and the States of Jersey.
- Appeals against decisions made by the Legal Aid Office (to refuse, limit the scope of, or withdraw legal aid certificates) will be considered by a panel chaired by the Bâtonnier, in accordance with published guidelines.
- Complaints relating to any aspect of legal aid, other than appeals against decisions made by the Legal Aid Office and professional misconduct complaints will be considered by the Law Society of Jersey in conjunction with the Bâtonnier, in accordance with published procedures. All complaints of professional misconduct will be considered by the Law Society of Jersey in accordance with the provisions of The Law Society of Jersey Law 2005.

### PUBLIC LAW

#### Eligibility Criteria

Applicants for Legal Aid must be able to satisfy two eligibility tests:

1. Nature of Public Law Matter/Criminal Offence
2. Financial (Criminal and Human Rights applications only)

Applicants for a representation in respect of an eligible criminal offence must be able to demonstrate that they meet the financial test to qualify. Financial eligibility does not apply in relation to criminal matters in the Youth Court or in relation to Public Law Children or Mental Health and Capacity representation. Applicants who are in receipt of Income Support are deemed to have met the financial eligibility test.

Legal aid is not available in respect of corporate or business activity, including matters of a criminal nature.

#### Nature of Public Law Matter/Criminal Offence

#### ELIGIBLE

##### Children Law

- All Children Law proceedings brought by the Minister under the Children Law 2005
- Child abductions including applications under the Hague Convention



## The Law Society of Jersey

### Mental Health

- Representation in appeals to the Mental Health Review Tribunal under the Mental Health and Capacity Laws

### Human Rights

- Asylum and Immigration Exceptional cases where there is a human rights entitlement to legal representation

### Criminal

- All criminal matters in the Royal Court.
- All criminal matters\* in the Magistrate's Court (other than minor offences and minor motor-related offences).
- All criminal matters in the Youth Court \*\*

\* Limited to offences for which the sentencing guidelines indicate a fine with a starting point above Level 2 on the Standard Scale of Fines (in accordance with the Criminal Justice (Standard Scale of Fines) (Jersey) Law 1993) or there is a risk of a custodial sentence on conviction. (e.g. an offence where the starting point is at or below Level 2 on the Standard Scale, currently £1000, would not be eligible under Legal Aid.) The guidelines may provide for the inclusion of offences which, despite the penalty, involve serious damage to reputation or serious consequences e.g. loss of employment.

\*\* Where it is in the best interests of the defendant, and where a matter can, in all circumstances, fairly be concluded at first appearance in the Youth Court, legal assistance will be provided by the Duty Advocate. Legal Aid Certificates will be issued in all cases where a matter cannot be concluded during a first appearance, an application for Legal Aid has been made and approved prior to such first appearance or a defendant elects to be represented.

### NOT ELIGIBLE

### Criminal

- Minor criminal offences (where current sentencing guidelines indicate a fine with a starting point no higher than Level 2 on the Standard Scale of Fines or where there is no risk of a custodial sentence)
- Minor motor-related offences (where current sentencing guidelines indicate a fine with a starting point no higher than Level 2 on the Standard Scale of Fines or where there is no risk of a custodial sentence)



## The Law Society of Jersey

### PRIVATE LAW

#### Eligibility Criteria

Applicants for Private Law Legal Aid must be able to satisfy three eligibility tests:

1. Area of Law
2. Residency
3. Financial

Applicants for legal aid in an area of law that is eligible for support must be able to demonstrate that they meet the residency and financial tests to qualify. Applicants who are in receipt of Income Support are deemed to have met the financial eligibility test.

Applications can only be accepted in relation to personal law, from individuals acting in their private capacity. Legal aid is not available in respect of corporate or business activity.

#### Area of Law

#### ELIGIBLE

##### Family claims and proceedings

- Ancillary relief claims where there are dependent children\*\*
- Child maintenance (including Schedule 1 claims) under Matrimonial Causes (Jersey) Law 1949 or the Children (Jersey) Law 2002
- Child maintenance claims where the applicant is on income support and has no other capital assets and no other income ++
- Divorce / Judicial Separation / Civil partnership / nullity proceedings where there are dependent children\*\*
- Residence and contact disputes, prohibited steps orders, specific issue orders and removal from the jurisdiction under the Children Law 2002 or the Matrimonial Causes (Jersey) Law 1949 (but the parties must have attended mediation except where there are reasonable grounds to suspect that mediation would not be appropriate due to domestic abuse)
- Injunctions, ex parte orders and ex-parte injunctions within the family law context where no criminal sanctions are being pursued by the police.
- Appeals in family proceedings (where a Legal Aid certificate has been granted), subject to a favourable second opinion.

\*\* Claims in relevant matters where there are no dependent children will be eligible (subject to financial and residency criteria being met) in circumstances where a civil injunction has been



## The Law Society of Jersey

granted and/or criminal prosecution has been instigated on the grounds of domestic abuse or violence.

'Dependent child' is defined as a child up to the age of 16 or in full-time education (until the end of a first degree only).

++ Such claims are outside the scope of Legal Aid and will be subject to separate arrangements being implemented with Social Security to process claims where there is a realistic prospect of success.

### Civil Claims and proceedings

- Contractual disputes
- Actions in tort
- Professional negligence claims (other than in relation to medical negligence which is dealt with separately)
- Bankruptcy/en Désastre (in relation to personal assets and where supported by the Viscount)
- Remise de bien proceedings
- Eviction proceedings
- Personal injury claims^^
- Medical negligence claims^^
- Appeals in civil proceedings (where a Legal Aid certificate has been granted), subject to a favourable second opinion.

^^ Potential personal injury and medical negligence claimants must have had their claim assessed by a member of the Law Society Personal Injury and Medical Negligence Review Panel (referred to by the Legal Aid Office). Where a negative opinion on the prospects of success of the claim is given, an individual may apply for a second opinion under Private Legal Aid, subject to financial and residency criteria being met. Claims will not be considered under Private Legal Aid until and unless the above assessment by a member of the Panel has been undertaken.

### **NOT ELIGIBLE**

#### Family

- Adoptions (other than freeing for adoption proceedings being undertaken as part of Public Law Children proceedings)
- Ancillary relief claims where there are no dependent children\*\*
- Divorce / judicial separation/ Civil partnership dissolution / nullity proceedings where there are no dependent children\*\*
- Enforcement of maintenance orders
- Injunctions within the family law context where there are criminal sanctions
- Legitimacy (Jersey) Law as amended – all claims (except where the claim is by a child)
- Pre or post nuptial agreements
- Separation Agreements (unless part of a settlement under an ancillary relief claim where there are dependent children)
- Separation and Maintenance proceedings under the 1953 law



## The Law Society of Jersey

\*\* Claims in relevant matters where there are no dependent children will be eligible (subject to financial and residency criteria being met) in circumstances where a civil injunction has been granted and/or criminal prosecution has been instigated on the grounds of domestic abuse or violence.

'Dependent child' is defined as a child up to the age of 16 or in full-time education (until the end of a first degree only).

### Civil

- All appeals save where the case involves a substantive question of law and a Jersey qualified lawyer has provided a positive opinion on the merits
- Corporate and Business matters
- Curatorships
- Conveyancing / Property / Boundary Disputes / Voisinage
- Deed polls
- Defamation / Libel / Slander
- Debt related issues
- Discrimination law (including claims at the Employment and Discrimination Tribunal)
- Employment law (including claims at the Employment and Discrimination Tribunal)
- Planning disputes
- Powers of attorney
- Probate
- Succession planning (wills)
- Taxation issues (including disputes with Comptroller of Taxes)
- Tribunal issues whatever the nature of such tribunal (Discrimination, Employment, Social Security, Housing, Motor Insurance Bureau, Criminal Injuries Compensation Board or any other type of tribunal) including any appeals<sup>^^^</sup>
- Tutelles
- Wills (the making of wills or associated activity)
- Notwithstanding the above all or any other non-contentious matters

<sup>^^^</sup> Excludes appeals to the Mental Health Review Tribunal which, under the Public Law Legal Aid Scheme, are eligible for legal representation.



## The Law Society of Jersey

### Financial

To pass the Financial Eligibility Test, applicants must (1) have capital\* with a value no greater than £15,000 and (2) gross household income<sup>^</sup> of less than £35,000. The income test will only be applied where the capital test is passed. Legal aid will not be granted where the capital and income thresholds are exceeded. Applicants who are in receipt of Income Support are deemed to have met the financial eligibility test.

(\*property, savings, investments or a financial interest in any asset, including the equity in any property, whether in Jersey or elsewhere, other than an exemption of £100,000 of equity in the applicant's principal residence in Jersey, but excluding the capital value of any pensions – see Capital below.)

(<sup>^</sup> including pensions, benefits, maintenance and income from any source, including interest, dividends and trust fund income, from any individual within the household, including cohabittees).

#### Capital

Capital includes the following:

- Cash savings including joint savings;
- The market value of the applicant's principal residence in Jersey, in excess of £100,000, after the deduction of outstanding borrowings, irrespective of whether the property is in sole or joint names;
- Other Property (whether in Jersey or elsewhere) – net value after deduction of outstanding borrowings;
- National Savings certificates, National Savings capital bonds and premium bonds;
- Stocks/shares;
- Share save schemes;
- Share Incentive plans;
- Unit Trusts;
- PEP Investments;
- Fixed term investments
- Timeshares;
- Trust assets or funds;
- Valuables including Boats, Paintings and Antiques;
- Jewellery other than engagement rings, wedding rings and eternity rings;
- Money owing to an applicant;
- Money due from an estate or trust fund;
- Money that can be borrowed against business assets.

The following are disregarded in the calculation of capital:

- Household furniture and effects (unless the contents include any single or collection of items valued at more than £10,000);
- Personal clothing/tools and equipment of trade;
- Engagement rings, wedding rings and eternity rings;
- One motor vehicle per household that is regularly used and valued less than £15,000 (any loan or HP is deducted from the value);
- Capital value of any pension.



## The Law Society of Jersey

### Gross Household Income and Capital

If the applicant is married, in a civil partnership or living with someone (“their partner”) as a couple, their partner’s income and capital assets will be included within the applicant’s gross household income and capital unless:

- (a) They live apart because the relationship is over; or
- (b) There is a conflict of interest between them which is the subject of the application for Legal Aid (e.g. separation or divorce).

Where, in such circumstances, applications for legal aid are received from either or both of the individual parties previously considered part of a household for these purposes and/or the principal residence in Jersey is the subject of, or is a factor in the dispute or proceedings for which legal aid is being sought, the individuals will each be considered as separate applicants. Each party will be assessed on their gross income and capital, in accordance with the defined limits, save that the equity allowance of £100,000 will be split equally between the two parties, irrespective of whether both parties make an application for legal aid.

### Personal Contributions

Applicants who are granted Legal Aid in Public Law (Criminal) or Private Law matters with gross household income (as defined above) of no more than £15,000 are not required to contribute towards the cost of their legal representation. Applicants with gross income above £15,000 will be required to make a contribution in accordance with published guidelines.

Personal contributions are not payable in relation to the representation of applicants in the Youth Court, at the Mental Health Review Tribunal or in respect of the representation of children, parents or principal carers in Public Law Children matters. Applicants in public law matters who are in receipt of Income Support are not required to make personal contributions.

### Fee Adjudications

- Legally aided clients may, in the event of a dispute over the level of fees charged, seek fee adjudication through the Legal Aid Office.
- Fee adjudications will ordinarily proceed where requested, subject to provision by the applicant of reasons for the dispute and any supporting evidence.

### Financial Hardship

- Where the amount outstanding by way of personal contribution is such that it could cause financial hardship to a legally aided client, then if it is appropriate in all circumstances of the case, the outstanding amount or level of monthly payments shall be reviewed and, where appropriate, reduced to an affordable level.



## The Law Society of Jersey

### Residency – Private Law Only

- Private Law Applicants must be ordinarily resident in Jersey for a period of not less than 12 months and be registered with Social Security.

[Applicants will be required to evidence that they meet the residency test].

- Discretion will be held by the Legal Aid Office to waive or reduce the residency requirement in exceptional circumstances, where it is in the interests of justice to do so.

### Personal Contributions – Public Law

Applicants who are granted Public Law Legal Aid with gross household income (as defined above) of no more than £15,000 are not required to contribute towards the cost of their legal representation. Applicants with gross household income above £15,000 (except where the applicant is in receipt of Income Support) will be required to make a contribution based on the following scale:

<u>Gross household income (as defined above)</u>	<u>Contribution Level</u>	<u>Monthly Payment</u>
Up to £15,000	NIL	NIL
£15,001 - £20,000	10%	£25
£20,001 - £25,000	25%	£50
£25,001 - £35,000	50%	£100

Legal Aid will not be granted where an applicant's gross household income exceeds £35,000.

The financial liability of an individual involved in criminal proceedings is limited to the above percentage of the fees paid to the lawyer who represents that individual. The contribution percentage and monthly payments will be assessed by the Legal Aid Office at the point of issue of a Legal Aid Certificate, based on assessment of documentary evidence in respect of an applicant's income. Applicants may choose to pay more than the stated monthly payments. Changes in a client's income and circumstances may result in a re-assessment of contributions. An individual's final liability will be confirmed at the conclusion of a criminal matter.

For example:

- Fee paid to a representing lawyer in a matter before the Magistrate's Court is £2,400
- Applicant's household income is £24,000
- Contribution level is 25%
- Applicant's liability will be £600, payable at £50 per month (for 12 months).

Where an applicant is acquitted of all charges or a prosecution is abandoned for any reason, no contribution is payable and any payments made will be refunded.



## The Law Society of Jersey

Applicants are entitled to pay off the balance of their liability at any time. Outstanding fees will be subject to full immediate payment upon receipt of capital or other funds in excess of £15,000.

All fees paid to lawyers are based on a tariff/fee scale, depending on the complexity of the matter and nature of the proceedings (e.g. the fee where a guilty plea is entered in the Magistrate's Court will be much lower than that applicable to a trial in the Royal Court).

### Personal Contributions – Private Law

Applicants who are granted Private Law Legal Aid with gross household income (as defined above) of no more than £15,000 are not required to contribute towards the cost of their legal representation. Applicants with gross household income above £15,000 will be required to make a contribution based on the following scale:

<u>Gross household income (as defined above)</u>	<u>Contribution Level</u>	<u>Monthly Payment</u>
Up to £15,000	NIL	NIL
£15,001 - £20,000	10%	£25
£20,001 - £25,000	25%	£50
£25,001 - £35,000	50%	£100

Legal Aid will not be granted where an applicant's gross household income exceeds £35,000.

An individual's contribution level will be assessed by the Legal Aid Office at the point of issue of a Legal Aid Certificate, based on assessment of documentary evidence in respect of an applicant's income. Changes in a client's income and circumstances may result in a re-assessment of contributions (which will be undertaken by the appointed law firm).

Firms will, at the outset of a matter, provide an estimate of the anticipated cost to the applicant (at the appropriate percentage rate). Monthly payments should be implemented at the commencement of a matter, at the stated level. Firms are required to accept monthly payments. Applicants may choose to pay more than the stated monthly payments. Payments will continue until the cost of legal representation, at the appropriate contribution rate, has been met.

Outstanding fees are, however, subject to full immediate payment upon receipt of capital or other funds in excess of £15,000.

In family matters, where funds and/or property is obtained through the division of assets or other financial settlement, including those arising from the sale or transfer of ownership of the former matrimonial home, a legally-aided client will be liable to meet the **full** costs of legal representation (at 100% of the Legal Aid rate). To ensure that legal aid clients in such matters are aware of their liability in this regard, clear reference shall be made in letters of engagement issued by law firms to the circumstances under which full recovery of costs, at 100% of the Legal Aid rate can be claimed by a firm. Invoices issued to the client should detail the full costs (at 100% of the Legal Aid rate) as well as the charges that apply, based on the personal contribution level determined by the Legal Aid Office.



## The Law Society of Jersey

Where costs reach 75% of the initial estimate and are expected to exceed the initial estimate, a new estimate must be provided.

The percentage levels relate to the applicable Legal Aid rate. For example, if the applicable Legal Aid rate is £190 per hour, and the applicant has gross income of £23,000, the applicable contribution will be £47.50 per hour.

Examples of payments:

- Estimate of fees in a matter (at 100% of the Legal Aid rate) is £10,000
- Applicant has gross household income of £29,000 and so is assessed as being a 50% contributor
- Total liability of applicant is therefore £5,000
- Monthly payments of £100 per month are required from the commencement of a matter, which will be payable for 50 months. Higher monthly payments may be made voluntarily to reduce the payment period.

### Legal Aid Rates

The applicable rates for work undertaken under Legal Aid (which mirror the Factor 'A' Rates set down by the Royal Court from time to time and which reflect the 'breakeven point' for lawyers) are currently as follows:

<u>Fee earner</u>	<u>Hourly rate</u>
Partner	£235
Qualified staff (Advocates, Barristers, Jersey and English Solicitors)	£190
Other staff (Legal Executives, Paralegals and Trainee Lawyers)	£156

Fee estimates will be based on the amount of time likely to be spent on the matter, by each fee earner, at the above rates, which represent 100% of the 'Legal Aid rate'.

The financial liability of the applicant will be the appropriate percentage of this amount, based on assessment of gross household income, subject to the recovery provisions in relation to family matters, where assets and/or financial settlement are obtained, and in respect of which the applicant is liable to meet fees at 100% of the Legal Aid rate.



### Conditions and Limitations

- Initial or limited certificates may be issued to enable a lawyer to consider whether a claim has sufficient merit.
- All certificates are capable of withdrawal in the event of:
  - Change in financial circumstances
  - Provision of incorrect or misleading information at time of application (or at any time thereafter)
  - Failure to meet conditions of approval of certificate
  - Failure to co-operate with, or respond to, lawyer
  - Failure or refusal to complete due diligence or client take-on procedures
  - Refusal to accept advice provided by lawyer
  - Inappropriate behaviour or conduct on the part of the applicant/client
  - A negative opinion is provided in relation to the prospects of success
  - The advice to a privately funded litigant of moderate means would not be to pursue or defend the claim.
- The pursuit by a legally aided client of frivolous or vexatious claims within the context of family proceedings may additionally result in the withdrawal of entitlement to Legal Aid.
- In exceptional circumstances, the Bâtonnier may appoint a lawyer to an individual who is unable to find a lawyer to represent them in Private Law matters (subject to the provision of supporting documentary evidence). Where such a 'Discretionary' appointments are made, in all circumstances, the applicant will be liable for 100% of the prevailing commercial rate that applies in relation to the appointed lawyer. There is no entitlement to compulsory adjudication of fees in relation to discretionary appointments.
- Individuals granted legal aid may be required to contribute towards the cost of their legal representation, on a sliding scale, depending on their level of income (see 'Personal Contributions').



## The Law Society of Jersey

### Legal Aid Credits

- Legal Aid Credits may be allocated by the Legal Aid Office in respect of the following activities:
  - Attendance at Citizens Advice Jersey Legal Clinic (one credit per 2 x 1.5 hour session)
  - Legal representation of, or the provision of advice to, the Law Society of Jersey or the Legal Aid Office or the provision of legal services in any exceptional matters outside the scope of Legal Aid (credit allocation to be determined on a case by case basis by the Committee of the Law Society)
- Existing credits earned by practitioners may be applied against Private Law Legal Aid certificates. Credits are fully transferrable and do not have an expiry date.

### Legal Aid Office

- The Legal Aid Scheme will be administered by a Legal Aid Administrator (unconnected to a law firm), who will be under the day-to-day supervision of the Law Society, but subject to the ultimate oversight of the Judicial Greffier. Administration will be governed by an entrustment agreement between the Law Society and the Judicial Greffier. In addition to administering the scheme, the Administrator will guide unsuccessful applicants towards the range of alternative solutions that are available to enable individuals to resolve their issues or to obtain legal representation, supported by providing access to procedural guides in relation to key Court processes and proceedings. The Legal Aid Office will, additionally, administer funding payments in eligible matters.
- Appeals against decisions made by the Legal Aid Office (to refuse, limit the scope of, or withdraw legal aid certificates) will be considered by a panel chaired by the Bâtonnier, in accordance with published guidelines.
- Complaints relating to any aspect of legal aid, other than appeals against decisions made by the Legal Aid Office and professional misconduct complaints will be considered by the Law Society of Jersey in conjunction with the Bâtonnier, in accordance with published procedures. All complaints of professional misconduct will be considered by the Law Society of Jersey in accordance with the provisions of The Law Society of Jersey Law 2005.



## The Law Society of Jersey

### Responsibilities

- Administration of applications for Public Law and Private Law Legal Aid
- Review of applications (with client meeting where appropriate)
- Decision on application
  - Approval: Issue of certificate (including lawyer details\*, terms and conditions and contribution level)
  - Notification to lawyer of appointment (nature of appointment/issue covered, terms and contribution level)
  - Decline:
    - Notification to applicant of refusal to grant certificate (and reason for refusal)
    - Details of process for appealing against decision
    - Details of alternative solutions for client (depending on nature of issue):
      - ✓ Free legal clinics run by firms (covering family, personal injury, etc.)
      - ✓ Personal Injury Clinic (through Jersey Citizens Advice)
      - ✓ Citizens Advice Jersey Legal Clinic
      - ✓ Details of law firms specialising in key law areas: Personal Injury, Family, Criminal (who are prepared to provide initial assessment of claim/issue). A panel of lawyers in relation to personal injury/medical negligence claims (potentially on a 'no win no fee' basis will be available).
      - ✓ Community Mediation (via Citizens Advice Jersey) / Family Mediation Jersey / JACS (Employment issues) / Citizens Advice Jersey
      - ✓ Use of Legal Expenses Cover provided through Union Membership, Motor Insurance, Household Insurance (Insurers will direct applicant to law firm for assessment of claim)
    - Provision of Litigant in Person Guides and other procedural guides in relation to all types of proceedings in Jersey.

(\* in relation to Criminal certificates, details of accredited lawyers will be provided to enable the applicant to make a choice of representation, unless the applicant wishes to be represented by the next lawyer on the rota of accredited specialists).

The Legal Aid Office will be supported by an interactive website which will assist applicants, particularly in providing an initial assessment of eligibility for Legal Aid and, for ineligible applicants, provide effective signposting to the alternative solutions available.



## The Law Society of Jersey

### Application Process

- A clear and transparent applications process will be implemented in relation to Private Law Legal Aid, supported by the operation of a Legal Aid Clinic, at which, in conjunction with applicants, consideration will be given to:
  - Alternative sources of funding of legal services e.g. insurance policies, union membership, obviating the need for legal aid;
  - Alternative sources of dispute or issue resolution e.g. Petty Debts Court, Community or Family Mediation;
  - Procedural guidance (e.g. re Divorce process) where legal representation is not needed or appropriate.
  - Criteria Based Assessment of Eligibility
    - Financial
    - Residency
    - Area of Law
- Confirmation of eligibility and issue of certificate or signposting of alternative sources of legal representation or assistance and/or provision of procedural guidance as appropriate.
- A separate applications process will be implemented in relation to Public Law Legal Aid, providing for prompt allocation of representation in Public Law Children and Mental Health matters (where no qualifying criteria applies). Attendance of applicants at a Legal Aid Clinic is not required.
- Eligibility for Criminal Legal Aid will generally be considered based on assessment of a bespoke application form, detailing financial circumstances (except for Youth Court matters) and the nature of criminal offence. Attendance at a Legal Aid Clinic will not generally be required, other than in specific cases where evidence of eligibility needs to be explored.
- Confirmation of eligibility and issue of certificate or signposting of alternative sources of legal representation or assistance and/or provision of procedural guidance as appropriate.
- Details of accredited practitioners provided to successful applicants to enable them to choose their lawyer (subject to availability and absence of conflicts). Where an applicant does not wish to choose their lawyer, allocation of made on a rota basis (subject to availability and absence of conflicts).



## The Law Society of Jersey

### Funding administration

The Legal Aid Office will be responsible (on behalf of the Judicial Greffe) for the approval and administration of funding payments for the following activities:

- Public Law Children proceedings
- Mental Health Review Tribunal appeals
- Criminal proceedings (in the Youth Court, the Magistrate's Court (in eligible cases) and the Royal Court).

All the above payments will be on a fixed fee or tariff basis.

### Administration of Duty Lawyer and Duty Advocate Schemes

The Legal Aid Office will administer the rota for the Duty Advocate and Duty Lawyer schemes and the funding payments associated with this activity.

The Duty Advocate (Citizens Advice) is a separate scheme. Credits will be allocated on an agreed basis for the provision of assistance at the Citizens Advice Clinic. Credits can be utilised against the allocation of Private Law Legal Aid Certificates.

### Benefits of Centralisation

The benefits of centralisation include:

- Independent interpretation of Legal Aid Guidelines
- Improved accountability, ensuring fairness to applicants
- Consistency of approach
- Reduction in conflicts of interest
- Effective signposting of alternative solutions where applicant or area of law ineligible for Legal Aid
- Gateway for provision of procedural advice (e.g. Litigant in Person Guide, Family Law Procedures)
- Effective administration of funding arrangements for Children Law Proceedings, Mental Health representation and Criminal Proceedings
- Administration of Duty Lawyer and Duty Advocate schedules
- Single point of contact for legal assistance and information
- Improvement in public confidence



Public Legal Aid – Application of Fixed Fees in Criminal Matters

Duty Lawyer Scheme

1. PHQ / Customs and all similar interviews (under caution):

(a)	A flat fee to be paid for each day (9am – 5pm) that the duty lawyer is on call. If the duty advocate is required to attend, this allowance to be subsumed within the visit flat fee but not otherwise.	Flat fee £50
(b)	During normal business hours, i.e. 9am - 5pm, a fixed fee is paid for each visit where attendance is required.	Flat fee £200
(c)	A flat fee to be paid for each evening (5pm – 11pm) that the duty lawyer is on call. If the duty advocate is required to attend, this allowance to be subsumed within the visit flat fee but not otherwise.	Flat fee £50
(d)	Outside normal office hours, a fixed fee paid for each visit where attendance is required.	Flat fee £400
(e)	A flat fee to be paid for each weekend day (7am – 11pm) that the duty lawyer is on call. If the duty advocate is required to attend, this allowance to be subsumed within the visit flat fee but not otherwise.	Flat fee £100
(f)	At weekends (Saturday and Sunday), a fixed fee paid for each visit where attendance is required.	Flat fee £400

Duty Advocate Scheme

2. Magistrate's Court and Youth Court Work

(a)	Duty Advocate (irrespective of time spent) per duty	Flat fee £400
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Magistrate's Court or Youth Court Representation

(a)	Flat fee (irrespective of time spent)	£1200
(b)	Uplift where a matter proceeds to trial in Magistrate's or Youth Court	£1200

Where a matter is, or is likely to be committed to the Royal Court (irrespective of plea) a fee of £1200 will be payable in recognition of the work undertaken at the Magistrate's Court. The above fee scale will not apply in such cases.

Where an individual has commenced personal contributions and is acquitted of all charges or a prosecution is, for any reason, abandoned, any costs paid will be refunded.

In the event that a defendant is acquitted, there shall be no entitlement to additional costs. Where a defendant is privately represented and is acquitted or a prosecution is abandoned, cost recovery is limited to the level of the standard fee payable under a Public Law Criminal Legal Aid Certificate.



## The Law Society of Jersey

### Appeals against Magistrate's Court or Youth Court decisions to the Royal Court

(a)	Appeal on point of law (case stated)	£1000
(b)	Appeal against conviction only	£1000
(c)	Appeal against conviction and sentence	£1500
(d)	Appeal against sentence only	£750

Where an appeal is abandoned prior to a hearing, in respect of any basis of appeal, a flat fee of £500 will apply.

### 3. Royal Court cases

#### Guilty Pleas

(a)	Receive and discuss committal bundle with defendant and attend indictment hearing	3 hours	£500
(b)	Prepare for sentencing hearing (including deportation and/or confiscation hearings)	4 hours	£660
(c)	Attend sentencing hearing	2 hours	£330
(d)	Advice on appeal against sentence	1 hour	£165
	Total	10 hours	£1655

All Royal Court matters will have been referred by the Magistrate's Court. The applicable 'committal' fee of £1200 will apply in addition to these fees.

#### Not Guilty Pleas

(a)	Receive and discuss committal bundle with defendant and attend indictment hearing	6 hours	£1000
(b)	Take detailed instructions from defendant as to his defence and consider all issues involved in conducting case including gathering of evidence and the appointment of any experts.	10 hours	£1650
(c)	General preparation of defence case for plea and directions hearing	3 hours	£500
(d)	Attendance at plea and directions hearing	2 hours	£330
(e)	Further preparation for trial (e.g. statements/bundles etc.) (2 days preparation to be allowed for every 1 day of trial in any event)	14 hours	£2350
(f)	Attendance at trial (per day)	7 hours	£1175
(g)	Preparing for sentencing hearing (including deportation and/or confiscation hearings) and attending thereon. Any divergence from the above to be dealt with as for guilty pleas above	6 hours	£1000
(h)	If the defendant is convicted, providing an opinion on the merits of an appeal	1 hour	£165
	Total	49 hours	£8170



## The Law Society of Jersey

The above bands take no account of bail applications or the occasional need for a Newton hearing. It is proposed that these be subject to the following fixed fees:-

Bail application (taking instructions and attending hearing)	2 hours	£330
Newton hearing (taking instructions and attending)	6 hours	£1000

In the event that a defendant is acquitted, there shall be no entitlement to additional costs. Where a defendant is privately represented and is acquitted or a prosecution is abandoned, cost recovery is limited to the level of the standard fee payable under a Public Law Criminal Legal Aid Certificate.

Claims on the Legal Aid Vote for disbursements remain unchanged.

#### 4. Criminal Appeal cases (Sentence only) (Superior Number and Court of Appeal)

(a)	Considering grounds for appeal and discussing same with client. Preparing and filing notice of appeal	3 hours	£500
(b)	Preparing appeal contentions and filing same together with necessary bundles	8 hours	£1340
(c)	Preparation for appeal hearing	6 hours	£1000
(d)	Attendance at appeal hearing	3 hours	£500
	Total	20 hours	£3340

An appeal against conviction and sentence is almost always much more demanding than one just against sentence and for the sake of simplicity it is suggested that the tariff for such appeals should be double for that for sentence only so £6,680 based on 40 hours or such lesser time as actually is spent.

## Explanatory Note

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This Law makes provision for improving access to justice by establishing a legal aid scheme.

*Article 1* sets out definitions for certain terms used in the Law.

*Article 2* imposes a duty on advocates and solicitors of the Royal Court to provide legal aid to a person in accordance with this Law, without prejudice to the generality of their respective oaths of office.

*Article 2* also provides that a failure by an advocate or a solicitor to discharge the duty specified in their respective oaths of office would be professional misconduct and a complaint against an advocate or solicitor alleging professional misconduct on grounds of failure to discharge that duty must be made and determined under Part 3 of The Law Society of Jersey Law 2005.

*Article 3* makes provision for the establishment of a scheme (the “Legal Aid Scheme” as defined in *Article 1*) for the provision of assistance in Jersey in a case where an individual is in need of legal services (as defined in *Article 1*).

*Article 4* makes provision for the Judicial Greffier to be responsible for the administration of the Legal Aid Scheme. The Judicial Greffier has the power to entrust any part of the administration of the Legal Aid Scheme to the Law Society or to such other person as the Judicial Greffier deems appropriate except for the responsibility for meeting payments under the Legal Aid Scheme and the requirements imposed on the Judicial Greffier under *Article 16*. For the purposes of Article 3(b) of the Freedom of Information (Jersey) Law 2011, information in respect of the administration of the Legal Aid Scheme held by a person to whom an entrustment is made under paragraph (2), would be information that is held on behalf of the Judicial Greffier. The administration of the Legal Aid Scheme must be carried out in accordance with the Legal Aid Guidelines (as defined in *Article 1*), except that, notwithstanding any provision to contrary in this Law or the Regulations or an Order made under this Law or the Legal Aid Guidelines, the Judicial Greffier may, in exceptional circumstances, provide legal aid to any person where the interests of justice requires it.

*Article 5* makes provision for the States to ensure that the Judicial Greffier is provided with sufficient resources for the purpose of meeting payments under the Legal Aid Scheme. Where a function is entrusted to the Law Society under *Article 4(2)*, the Law Society would, to the extent of those functions, be a States aided independent body for the purposes of Article 14 of the Comptroller and Auditor General (Jersey) Law 2014.

By *Article 6*, a committee to be known as the Legal Aid Guidelines Advisory Committee is established for the purpose of advising and assisting the Minister in making the Legal Aid Guidelines. The Committee is composed of the members specified in *Article 6* and is chaired by the Judicial Greffier who is a member. The other members, except those nominated by the Bailiff Chief Minister or the States, may nominate a person in their stead, subject to prior consultation with the Judicial Greffier. The Committee is quorate with 7 members. Before advising and assisting the Minister in making the Legal Aid Guidelines, the Committee must consult the Bailiff and Magistrate and such other persons it considers appropriate, and meet (unless a meeting would be inexpedient). No later than 6 months after its establishment, the Committee must make its first report to the Minister for the purpose of advising and assisting him or her in making the Legal Aid Guidelines.

*Article 7* gives the Minister the power, with the advice and assistance of the Legal Aid Guidelines Advisory Committee, to make guidelines (the “Legal Aid Guidelines”) for the purposes of providing for the administration of the Legal Aid Scheme, including providing for the manner in which legal aid shall be provided in Jersey; for the responsibility for meeting the reasonable costs of legal representation in matters under the Legal Aid Scheme; for the financial cost to individuals who are provided with legal aid; and information regarding the Legal Aid Scheme to applicants for legal aid and to advocates and solicitors who provide legal services under the Legal Aid Scheme.

*Article 7* also sets out the matters that the Legal Aid Guidelines may provide for, including, specifying the types of cases that may be eligible or not be eligible for legal aid; providing for different types of cases to be dealt with in accordance with different systems of legal aid; specifying the factors that may be relevant to providing legal aid and establishing financial eligibility criteria by reference to income and capital, including that of the applicant’s household.

By *Article 8* the Legal Aid Guidelines may provide for the transfer of different types of cases between the different systems of legal aid referred to in *Article 7(2)(b)*. Provision is made so that the Legal Aid Guidelines may, in particular, provide for the transfer of cases in respect of legal services referred to in *Article 7(2)(b)(ii)* if there are insufficient advocates or solicitors to support the system of legal aid under which those legal services are provided.

*Article 9* requires that the Legal Aid Guidelines must make provision for legal aid to be provided in exceptional circumstances which shall include cases in respect of which compliance with the Human Rights (Jersey) Law 2000 or any other enactment, obligations arising under Article 2 of the European Union (Jersey) Law 1973 or obligations arising under international obligations, requires that such legal aid be provided.

By *Article 10*, where funding for legal aid is by way of public funds, the Judicial Greffier has the power to determine, in accordance with the Legal Aid Guidelines, that such funding should be subject to contributions by the individual to whom legal aid is provided. An individual provided with legal aid is not allowed to raise any issue of law or fact as regards the duty to pay contributions if it concerns an issue that could have been raised under appeal rights given by Regulations made under *Article 18*. Contributions recoverable from an individual provided with legal aid would be recoverable as a civil debt by the Treasurer of the States.

By *Article 11*, an advocate or solicitor may enter into a conditional fee agreement with any other person. The Minister is given the power by Order to make provision in respect of conditional fee agreements. The Order may prescribe the conditions applicable to a conditional fee agreement, but a conditional fee agreement must not provide for a success fee. A conditional fee agreement is an agreement with a person providing legal services which provides for his or her fees and expenses, or any part of them, to be payable only in specified circumstances. A conditional fee agreement provides for a success fee if it provides for the amount of any fees to which it applies to be increased, in specified circumstances, above the amount which would be payable if it were not payable only in specified circumstances.

*Article 12* restricts the disclosure of information by any person in connection with the person’s functions or any other person’s functions under this Law.

*Article 13* makes provision for information provided by an applicant to any person for the purposes of determining entitlement to legal aid to be treated as if it had been

provided in a client and lawyer relationship for the purpose of determining whether legal professional privilege applies.

*Article 14* protects from liability any person who carries out a function (including any person who assists in carrying out a function under this Law or carries out a function under an entrustment pursuant to *Article 4(2)*) other than a person carrying out a professional obligation in a client and lawyer relationship. Such a person would not be liable in damages, for consequential loss, or for costs in legal proceedings, in respect of any act done in the discharge or purported discharge of that person's functions under, or authorized by or under, this Law unless it is shown that the act was done in bad faith. The protection from liability would not apply so as to prevent an award of damages made in respect of an act on the ground that the act was unlawful as a result of *Article 7(1)* of the Human Rights (Jersey) Law 2000. The Minister has the power by Order to exclude any type of damages, costs or consequential loss from the application of *Article 14*.

*Article 15* makes provision for an annual report in respect of the Legal Aid Scheme to be prepared by the Judicial Greffier and to be provided to the Minister who must present it to the States as soon as is reasonably practicable (and in any case, no later than 4 months) after the end of the financial year to which the report relates. An interim report or a report on specific matters arising in respect of the Legal Aid Scheme may also be provided at the Minister's request or on the Judicial Greffier's own motion.

*Article 16* provides for the power to make Rules of Court under the Royal Court (Jersey) Law 1948 to include a power to make Rules for the purposes of this Law.

*Article 17* gives the States the power by Regulations to make such other provision as the States think fit for the purpose of carrying this Law into effect.

*Article 18* gives the Minister the power by Order to prescribe any matter which is to be prescribed under this Law. An Order may make different provision for different cases and contain such incidental, supplemental and transitional provisions as appear to the Minister to be necessary or expedient. The Minister must consult the Judicial Greffier and the Law Society before making any Orders.

*Article 19* amends the Costs in Criminal Cases (Jersey) Law 1961 to insert a reference to costs being paid by the defendant in *Article 6* of that Law.

*Article 20* amends the Extradition (Jersey) Law 2004 to provide for Regulations made under *Article 6* of the Costs in Criminal Cases (Jersey) Law 1961 to apply (in addition to *Article 2* of that Law) in respect of an extradition hearing and to provide for *Article 3* of that Law and Regulations made under *Article 6* of that Law to apply to costs on any appeal to the Royal Court against an order for extradition.

*Article 21* amends the Magistrate's Court (Miscellaneous Provisions) (Jersey) Law 1949 to make provision for costs to be awarded subject to such rates or scales of payment of any costs payable out of public funds or by the defendant as are provided for by Regulations made under *Article 6* of the Costs in Criminal Cases (Jersey) Law 1961.

*Article 22* amends the Police Procedures and Criminal Evidence (Jersey) Law 2003 to provide for an order as to costs under *Article 106(4)(c)* of that Law to be subject to such rates or scales of payment of any costs payable out of public funds or by the defendant as are provided for by Regulations made under *Article 6* of the Costs in Criminal Cases (Jersey) Law 1961.

*Article 23* provides the title of this Law and provides for it to come into force on such day or days as the States may by Act appoint and for different dates to be appointed for different provisions and different purposes of this Law.



Jersey

## DRAFT ACCESS TO JUSTICE (JERSEY) LAW 201-

### Arrangement

#### Article

1	Interpretation .....	41
2	Duty to provide legal aid.....	41
3	Establishment of the Legal Aid Scheme .....	42
4	Administration of the Legal Aid Scheme.....	42
5	Resources .....	43
6	Establishment of Legal Aid Guidelines Advisory Committee .....	43
7	Legal Aid Guidelines .....	44
8	Transfer of cases.....	47
9	Exceptional circumstances .....	48
10	Contributions .....	48
11	Conditional fee agreement .....	48
12	Restriction on disclosure of information .....	49
13	Legal professional privilege .....	49
14	Protection from liability for damages, costs and loss.....	49
15	Annual report and other reports .....	50
16	Rules of Court .....	50
17	Regulations.....	51
18	Orders .....	51
19	Costs in Criminal Cases (Jersey) Law 1961 amended .....	51
20	Extradition (Jersey) Law 2004 amended.....	51
21	Magistrate's Court (Miscellaneous Provisions) (Jersey) Law 1949 amended .....	52
22	Police Procedures and Criminal Evidence (Jersey) Law 2003 amended .....	53
23	Citation and commencement .....	53





Jersey

## **DRAFT ACCESS TO JUSTICE (JERSEY) LAW 201-**

**A LAW** to make provision for improving access to justice by establishing a legal aid scheme, and for connected purposes.

*Adopted by the States* [date to be inserted]

*Sanctioned by Order of Her Majesty in Council* [date to be inserted]

*Registered by the Royal Court* [date to be inserted]

**THE STATES**, subject to the sanction of Her Most Excellent Majesty in Council, have adopted the following Law –

### **1 Interpretation**

In this Law, unless the context otherwise requires –

“applicant” means an applicant for legal aid;

“Law Society” has the meaning given by Article 1(1) of The Law Society of Jersey Law 2005<sup>1</sup>;

“Legal Aid Guidelines Advisory Committee” means the committee established under Article 6;

“Legal Aid Guidelines” means the guidelines made under Article 7(1) or any revisions to the Legal Aid Guidelines under Article 7(12);

“Legal Aid Scheme” means the scheme established under Article 3;

“legal aid” means the provision of legal services under the Legal Aid Scheme;

“legal services” includes legal advice, legal assistance and legal representation;

“Minister” means the Chief Minister;

“prescribed” means prescribed by an Order made by the Minister.

### **2 Duty to provide legal aid**

(1) Without prejudice to the generality of –

- (a) the oath of advocates of the Royal Court administered under Article 8(6)(a) of the Advocates and Solicitors (Jersey) Law 1997<sup>2</sup> and set out in the Code of 1771<sup>3</sup>; or
- (b) the oath of office of solicitors of the Royal Court administered under Article 8(6)(b) of the Advocates and Solicitors (Jersey) Law 1997<sup>4</sup> and set out in Schedule 1 to that Law,

an advocate or a solicitor is under a duty to provide legal aid to a person in accordance with this Law.

- (2) A failure by an advocate or a solicitor to provide legal aid in accordance with paragraph (1) shall be professional misconduct and a complaint against an advocate or a solicitor alleging professional misconduct on grounds of failure to discharge that duty shall be made and determined under Part 3 of The Law Society of Jersey Law 2005<sup>5</sup>.

### **3 Establishment of the Legal Aid Scheme**

There shall be established in accordance with this Law, a scheme to be known as the Legal Aid Scheme, for the provision of assistance in Jersey in a case where an individual is in need of legal services.

### **4 Administration of the Legal Aid Scheme**

- (1) The Judicial Greffier shall be responsible for the administration of the Legal Aid Scheme.
- (2) Subject to paragraph (1) and to such directions as the Judicial Greffier may from time to time determine, the Judicial Greffier may entrust any part of the administration of the Legal Aid Scheme to the Law Society or to such other person as the Judicial Greffier deems appropriate, except for –
  - (a) the responsibility for meeting payments under the Legal Aid Scheme; and
  - (b) the requirements imposed on the Judicial Greffier under Article 16.
- (3) For the purposes of Article 3(b) of the Freedom of Information (Jersey) Law 2011<sup>6</sup>, information in respect of the administration of the Legal Aid Scheme held by a person to whom an entrustment is made under paragraph (2), shall be information that is held on behalf of the Judicial Greffier.
- (4) The administration of the Legal Aid Scheme shall be carried out in accordance with the Legal Aid Guidelines except that, notwithstanding any provision to contrary in this Law or Regulations or an Order made under this Law or the Legal Aid Guidelines, the Judicial Greffier may, in exceptional circumstances, provide legal aid to any person where the interests of justice requires it.

**5 Resources**

- (1) The States shall ensure that the Judicial Greffier is provided with sufficient resources for the purpose of meeting payments under the Legal Aid Scheme.
- (2) Without prejudice to the application of the Public Finances (Jersey) Law 2005<sup>7</sup> to the Judicial Greffier's Department, where a function is entrusted to the Law Society under Article 4(2), the Law Society shall, to the extent of those functions, be a States aided independent body for the purposes of Article 14 of the Comptroller and Auditor General (Jersey) Law 2014<sup>8</sup>.

**6 Establishment of Legal Aid Guidelines Advisory Committee**

- (1) There is established a committee to be known as the Legal Aid Guidelines Advisory Committee for the purpose of advising and assisting the Minister in making the Legal Aid Guidelines.
- (2) The Legal Aid Guidelines Advisory Committee shall be chaired by the Judicial Greffier who shall be a member of the Legal Aid Guidelines Advisory Committee.
- (3) The Legal Aid Guidelines Advisory Committee shall also consist of the following members –
  - (a) the Attorney General or a person nominated by the Attorney General;
  - (b) the most senior officer of the Magistrate's Court, or a person nominated by that senior officer;
  - (c) the Bâtonnier or a person nominated by the Bâtonnier;
  - (d) the President of the Law Society or a person nominated by the President;
  - (e) the Chief Executive Officer of the Law Society or a person nominated by the Chief Executive Officer;
  - (f) two persons nominated by the Bailiff;
  - (g) two other persons nominated by the Minister who are residents of Jersey and who are not members of the States; and
  - (h) two members of the States, nominated by the States.
- (4) Before nominating a person under paragraph (3), the Judicial Greffier, must first be consulted.
- (5) A person shall be nominated under paragraph (3) for such period as may be specified by the person who has nominated him or her.
- (6) The Legal Aid Guidelines Advisory Committee may, subject to a quorum of not less than 7 members, meet for the conduct of business, adjourn and otherwise regulate its procedures as it thinks fit.
- (7) The Legal Aid Guidelines Advisory Committee shall, before advising and assisting the Minister –
  - (a) consult the Bailiff and Magistrate;

- (b) consult such other persons as it considers appropriate; and
  - (c) meet (unless it is inexpedient to do so).
- (8) The reports of the Legal Aid Guidelines Advisory Committee must be signed by not less than 7 members of the Legal Aid Guidelines Advisory Committee.
- (9) The Legal Aid Guidelines Advisory Committee must make a report to the Minister for the purpose of advising and assisting him or her under paragraph (1) no later than 6 months after its establishment under that paragraph.
- (10) The States may, by Regulations, amend the members of the Legal Aid Guidelines Advisory Committee listed in paragraph (3).

## **7 Legal Aid Guidelines**

- (1) The Minister shall, with the advice and assistance of the Legal Aid Guidelines Advisory Committee, make and publish guidelines for the purpose of providing for the administration of the Legal Aid Scheme, including providing –
- (a) for the conditions under which legal aid shall be provided in Jersey;
  - (b) for the responsibility for meeting the reasonable costs of legal services under the Legal Aid Scheme;
  - (c) for the financial cost to individuals provided with legal aid; and
  - (d) information regarding the Legal Aid Scheme to applicants and to advocates and solicitors who provide legal services under the Legal Aid Scheme.
- (2) Without prejudice to the generality of paragraph (1), the Legal Aid Guidelines may do any of the following –
- (a) subject to Article 9, specify the types of cases that may be eligible or not eligible for legal aid;
  - (b) provide for different types of cases to be dealt with in accordance with different systems of legal aid under which –
    - (i) legal services are provided by an advocate or a solicitor who is paid out of public funds for those legal services, or
    - (ii) legal services are provided by an advocate or a solicitor who is not paid out of public funds but may receive contributions from an applicant in accordance with the provisions made under sub-paragraphs (f), (g), (h) and (i);
  - (c) specify the factors that may be relevant to providing legal aid, take into account the circumstances in which it is appropriate to provide legal aid, and may, in particular, set out the extent to which the factors ought to reflect the following –
    - (i) the likely cost of providing the legal services and the benefit which may be obtained by the legal services being provided,

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- (ii) the appropriateness of applying available resources to provide the legal services, having regard to present and likely future demands for the provision of legal services,
  - (iii) the importance to an individual of the matters in relation to which the legal services would be provided,
  - (iv) the nature and seriousness of the act, circumstances or other matter in relation to which the legal services are sought,
  - (v) the availability to an individual of legal services provided and the likelihood of the individual being able to make use of such legal services,
  - (vi) if the legal services are sought by an individual in relation to a dispute, the individual's prospects of success in the dispute,
  - (vii) the conduct of an individual in connection with legal services made available or in connection with an application for such legal services,
  - (viii) the conduct of an individual in connection with any legal proceedings or other proceedings for resolving disputes about legal rights or duties,
  - (ix) the public interest, and
  - (x) an individual's residential status, length of residency, or other connection with Jersey;
- (d) set out the system for determining whether legal aid is provided, including provisions in respect of –
- (i) obtaining legal opinions, and such other advice as is required to make a determination,
  - (ii) making provision for the involvement of the Bâtonnier, the Law Society, its employees, or any of its officers in the exercise of functions under this Law, and
  - (iii) obtaining of an advocate or a solicitor, whether by a system of compulsory assignment of an advocate or a solicitor, or otherwise providing legal representation where an applicant is unable to obtain legal representation;
- (e) establish financial eligibility criteria by reference to income and capital, including that of the applicant's household;
- (f) make provision for determining whether a case falls within a class for which the advocate or solicitor must be paid by the Judicial Greffier for the provision of legal services;
- (g) make provision for determining the rates and amounts of payments for the provision of legal aid,
- (h) make provision for the criteria for the payment of financial contributions by persons eligible for legal aid to –
- (i) their advocate or solicitor, or
  - (ii) the Judicial Greffier;
- (i) make provision for limiting financial contributions under subparagraph (h) to –

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- (a) a maximum specific payment; or
  - (b) a maximum periodic payment and for limiting the length of time for which periodic payments are to be made;
  - (j) make provision in respect of procedures for billing persons provided with legal aid, and the recovery of amounts unpaid;
  - (k) make provision for legal aid to be conditional on an arbitration agreement (within the meaning given by Article 1 of the Arbitration (Jersey) Law 1998<sup>9</sup>) that disputes as to fees payable for work done shall be subject to arbitration and for the form of that arbitration;
  - (l) set out the duties of advocates and solicitors in respect of work undertaken in respect of legal aid and for the provision of legal services and other assistance in the administration of the legal aid scheme;
  - (m) provide for the establishment and maintenance of panels of advocates or solicitors, or both, to undertake particular categories of work;
  - (n) provide for the waiver of contributions to legal aid, whether payable to the advocate or solicitor or in respect of public funds provided by the States, on the grounds of hardship arising from a change in financial circumstances since the legal services were provided;
  - (o) provide for the review, revocation and revision of grants of legal aid;
  - (p) impose requirements for an applicant to provide information to the Judicial Greffier;
  - (q) impose requirements for an applicant to co-operate with the advocates or solicitors providing legal services under this Law, and impose requirements as to the conduct of the applicant in respect of claims supported by legal aid;
  - (r) impose conditions for the renewal of applications;
  - (s) impose conditions for the making of payments whether directly or by way of the advocate or solicitor assigned to the client for the purposes of meeting disbursements, such as the obtaining of records or payment of expert witnesses;
  - (t) set out conditions whereby amounts paid under the Legal Aid Scheme for the benefit of an applicant will be recoverable under Article 10(3);
  - (u) provide for any matters of procedure to be specified by a practice direction published by the Judicial Greffier.
- (3) The Legal Aid Guidelines may do any of the following –
- (a) make different provisions, both in terms of the tests for eligibility and the procedures to be followed, depending on when in the course of litigation an application is made;
  - (b) make particular provision (which may include the complete exclusion from eligibility) in respect of companies, partnerships and claims brought in respect of businesses;

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- (c) provide for such other matters as are necessary or expedient.
  - (4) In preparing the Legal Aid Guidelines, the Minister shall publish the Minister's proposals and seek representations from the public.
  - (5) The manner in which –
    - (a) the Minister's proposal for the Legal Aid Guidelines shall be published; and
    - (b) representations may be provided by members of the public, shall be prescribed.
  - (6) The Minister shall consider the representations that he or she has received in preparing the Legal Aid Guidelines.
  - (7) If the Minister makes Legal Aid Guidelines, before publishing the Legal Aid Guidelines –
    - (a) the Minister shall lay the Legal Aid Guidelines before the States;
    - (b) the Minister shall, in the Legal Aid Guidelines, specify the date that they are to take effect, being at least 4 weeks after they are laid before the States.
  - (8) A member of the States may, within 4 weeks after the Legal Aid Guidelines are laid before the States under paragraph (7), lodge a proposition requesting that the States annul them.
  - (9) The Legal Aid Guidelines shall not come into effect during any period within which a proposition requesting their annulment under paragraph (8) is outstanding.
  - (10) If the proposition requesting that the States annul the Legal Aid Guidelines under paragraph (8) –
    - (a) is approved by the States, the Legal Aid Guidelines shall be annulled and shall not come into effect; or
    - (b) is withdrawn, the Legal Aid Guidelines shall come into effect on the date specified in the Legal Aid Guidelines and shall be published in a way that makes them available to the public..
  - (11) The Minister may at any time revoke any Legal Aid Guidelines published under this Article.
  - (12) The Minister may, from time to time, revise the Legal Aid Guidelines made under this Article from and a reference to the Legal Aid Guidelines includes a reference to the revised Legal Aid Guidelines.

## **8 Transfer of cases**

- (1) The Legal Aid Guidelines may provide for the transfer of different types of cases between the different systems of legal aid referred to in Article 7(2)(b).
- (2) Without prejudice to the generality of paragraph (1), the Legal Aid Guidelines may, in particular, provide for the transfer of cases in respect of legal services referred to in Article 7(2)(b)(ii) if there are insufficient

advocates or solicitors to support the system of legal aid under which those legal services are provided.

## **9 Exceptional circumstances**

The Legal Aid Guidelines must make provision for legal aid to be provided in exceptional circumstances which shall include cases in respect of which compliance with –

- (a) the Human Rights (Jersey) Law 2000<sup>10</sup> or any other enactment;
- (b) obligations arising under Article 2 of the European Union (Jersey) Law 1973<sup>11</sup>; or
- (c) obligations arising under international obligations,

makes it necessary that such legal aid be provided.

## **10 Contributions**

- (1) Where funding for legal aid is by way of public funds, the Judicial Greffier may, in accordance with the Legal Aid Guidelines, determine that such funding shall be subject to contributions by the individual provided with such legal aid.
- (2) An individual provided with legal aid shall not raise any issue of law or fact as regards the duty to pay contributions if it concerns an issue that could have been raised under appeal rights given by Regulations made under Article 18.
- (3) Contributions recoverable from an individual provided with legal aid under this Law shall be recoverable as a civil debt by the Treasurer of the States.
- (4) The determination by the Judicial Greffier of contributions, and a certificate by the Judicial Greffier of amounts payable shall be sufficient evidence of the civil debt referred to in paragraph (3).

## **11 Conditional fee agreement**

- (1) Notwithstanding any other rule of law to the contrary, an advocate or solicitor may enter into a conditional fee agreement with any person.
- (2) The Minister may by Order make provision in respect of conditional fee agreements entered into under paragraph (1).
- (3) An Order made under paragraph (2) may prescribe –
  - (a) the form of a conditional fee agreement;
  - (b) the types of cases that may be subject to a conditional fee agreement;
  - (c) the conditions applicable to a conditional fee agreement.
- (4) A conditional fee agreement entered into under paragraph (1) shall not provide for a success fee.
- (5) For the purposes of this Article –

- (a) a conditional fee agreement is an agreement with a person providing legal services which provides for his or her fees and expenses, or any part of them, to be payable only in specified circumstances; and
- (b) a conditional fee agreement provides for a success fee if it provides for the amount of any fees to which it applies to be increased in specified circumstances above the amount which would otherwise be payable.

## **12 Restriction on disclosure of information**

- (1) Information received by any person in connection with the person's functions or any other person's functions under this Law shall not be disclosed by that person except –
  - (a) to another person acting in the execution of this Law so far as may be necessary for the proper discharge of the functions of that person under this Law;
  - (b) as may be required for any purpose prescribed;
  - (c) for the purposes or in the course of any legal proceedings.
- (2) Any person who discloses information in contravention of paragraph (1) shall be guilty of an offence and liable to a fine.
- (3) It is a defence for a person charged with an offence under this Article to prove that he reasonably believed –
  - (a) that the disclosure was lawful; or
  - (b) that the information had already lawfully been made available to the public.

## **13 Legal professional privilege**

- (1) For the purpose of determining if legal professional privilege applies, any information provided by an applicant to any person for the purpose of determining entitlement to legal aid shall be treated as if it had been provided in a client and lawyer relationship.
- (2) It shall not be a breach of legal professional privilege for an applicant's advocate or solicitor to provide otherwise privileged information to a person carrying on a function under this Law.
- (3) Paragraph (2) shall apply at any time during the client and lawyer relationship and after the end of such a relationship.

## **14 Protection from liability for damages, costs and loss**

- (1) This Article applies to any person who carries out a function under this Law (including any person who assists in carrying out a function under this Law or carries out a function under an entrustment pursuant to Article 4(2)) other than a person carrying out a professional obligation in a client and lawyer relationship.

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- (2) Subject to paragraph (3), a person to whom this Article applies shall not be liable –
    - (a) in damages;
    - (b) for consequential loss; or
    - (c) for costs in legal proceedings,in respect of any act done in the discharge or purported discharge of that person's functions under, or authorized by or under, this Law unless it is shown that the act was done in bad faith.
  - (3) Paragraph (2) shall not apply so as to prevent an award of damages made in respect of an act on the ground that the act was unlawful as a result of Article 7(1) of the Human Rights (Jersey) Law 2000<sup>12</sup>.
  - (4) The Minister may by Order exclude any type of damages, costs or consequential loss from the application of this Article.

## **15 Annual report and other reports**

- (1) The Judicial Greffier shall prepare an annual report in respect of the Legal Aid Scheme and provide the report to the Minister as soon as reasonably practicable (and in any case no later than 4 months) after the end of the financial year to which the report relates.
- (2) An annual report referred to in paragraph (1), shall contain such matters as the Minister may require.
- (3) The Judicial Greffier may, on his or her own motion or at the request of the Minister, provide an interim report, or a report on specific matters arising in respect of the Legal Aid Scheme, to the Minister.
- (4) The Judicial Greffier shall use his or her best endeavours to exclude from a report referred to in paragraph (1) or (3), any matter relating to a person mentioned, or identifiable from information contained in, the report if the Judicial Greffier considers that the publication of such matter would or might seriously and prejudicially affect the person's privacy, reputation or commercial interests, unless –
  - (a) the person has consented, prior to the provision of the report, to publication of the matter in the report; or
  - (b) the Judicial Greffier considers that the importance of the public interest in the matter outweighs the effect of publication on the person's privacy, reputation or commercial interests.
- (5) The Minister shall present an annual report or interim report provided under paragraph (1) or (3) to the States as soon as is reasonably practicable.

## **16 Rules of Court**

The power to make Rules of Court under the Royal Court (Jersey) Law 1948<sup>13</sup> shall include a power to make Rules for the purposes of this Law.

**17 Regulations**

- (1) The States may by Regulations make any provision as the States think fit for the purposes of carrying this Law into effect.
- (2) Without limiting the generality of paragraph (1), Regulations made under this Law may –
  - (a) provide for appeals to a court or tribunal against decisions made pursuant to this Law;
  - (b) modify the application, in relation to an appeal under the Regulations, of a Law relating to the conduct of appeals by a body or tribunal to which an appeal under the Regulations may be made;
  - (c) provide for recovery of the amount paid or awarded for legal aid;
  - (d) provide for administrative expenses to be payable to members of a body or tribunal referred to in sub-paragraph (a) or (b);
  - (e) create offences for contravention of the Regulations and specify penalties for such offences not exceeding imprisonment for 2 years and a fine;
  - (f) amend Articles, 4, 5(2), 6, 7(4) to (11), 8, 10, 11, 12 and 15;
  - (g) make such consequential, incidental, supplementary and transitional provisions as may appear to be necessary or expedient, including provisions making amendments to any other enactment as appear to the States to be expedient –
    - (i) for the general purposes, or any particular purpose, of this Law,
    - (ii) in consequence of any provision made by or under this Law, or
    - (iii) for giving full effect to this Law or any provision of it.

**18 Orders**

- (1) The Minister may by Order prescribe any matter which is to be prescribed under this Law.
- (2) An Order made under this Law may make different provisions for different cases and contain such incidental, supplemental and transitional provisions as appear to the Minister to be necessary or expedient.
- (3) The Minister shall consult the Judicial Greffier and the Law Society before making any Order under this Law.

**19 Costs in Criminal Cases (Jersey) Law 1961 amended**

In Article 6 of the Costs in Criminal Cases (Jersey) Law 1961<sup>14</sup>, after the words “out of public funds” there shall be inserted the words “or by the defendant”.

**20 Extradition (Jersey) Law 2004 amended**

In the Extradition (Jersey) Law 2004<sup>15</sup> –

- (a) in Article 14(4) –
  - (i) after the words “Article 2 of the Costs in Criminal Cases (Jersey) Law 1961” there shall be inserted the words “and the Regulations made under Article 6 of that Law”,
  - (ii) in sub-paragraph (a), after the words “that other Law” there shall be inserted the words “and Regulations made under Article 6 of that other Law”,
  - (iii) in sub-paragraph (b), after the words “that other Law” there shall be inserted the words “and Regulations made under Article 6 of that other Law”;
- (b) for Article 50 there shall be substituted the following Article –

**“50 Costs on appeal to Royal Court**

On any appeal under this Part, Article 3 of the Costs in Criminal Cases (Jersey) Law 1961<sup>16</sup> and Regulations made under Article 6 of that Law shall apply as if the references in that Law and Regulations made under Article 6 of that Law to a conviction, or a sentence, were references to an order that the person be extradited under this Law.”;

- (c) in Schedule 2 –
  - (i) in paragraph 1(4) –
    - (A) after the words “Article 2 of the Costs in Criminal Cases (Jersey) Law 1961” there shall be inserted the words “and Regulations made under Article 6 of that Law”,
    - (B) in clause (a), after the words “that other Law” there shall be inserted the words “and Regulations made under Article 6 of that other Law”,
    - (C) in clause (b), after the words “that other Law” there shall be inserted the words “and Regulations made under Article 6 of that other Law”,
  - (ii) for paragraph 35 there shall be substituted the following paragraph –

**“35 Costs on appeal to Royal Court**

On any appeal to the Royal Court under this Schedule, Article 3 of the Costs in Criminal Cases (Jersey) Law 1961<sup>17</sup> and Regulations made under Article 6 of that Law shall apply as if the references in that Law and Regulations made under Article 6 of that Law to a conviction, or a sentence, were references to an order that the person be extradited under this Law.”.

**21 Magistrate’s Court (Miscellaneous Provisions) (Jersey) Law 1949 amended**

In the Magistrate’s Court (Miscellaneous Provisions) (Jersey) Law 1949<sup>18</sup> –

- (a) Article 23 shall be repealed;

(b) in Article 26, after paragraph (3) there shall be added the following paragraph –

“(4) Costs ordered to be paid under this Part shall be subject to such rates or scales of payment of any costs payable out of public funds or by the defendant as are provided for by Regulations made under Article 6 of the Costs in Criminal Cases (Jersey) Law 1961<sup>19</sup>.”.

## **22 Police Procedures and Criminal Evidence (Jersey) Law 2003 amended**

In Article 106 of the Police Procedures and Criminal Evidence (Jersey) Law 2003, for paragraph (4)(c) there shall be substituted the following sub-paragraph –

“(c) make an order as to costs subject to such rates or scales of payment of any costs payable out of public funds or by the defendant as are provided for by Regulations made under Article 6 of the Costs in Criminal Cases (Jersey) Law 1961<sup>20</sup>.”.

## **23 Citation and commencement**

This Law may be cited as the Access to Justice (Jersey) Law 201- and shall come into force on such day or days as the States may by Act appoint, and different dates may be appointed for different provisions and different purposes of this Law.

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- 1 *chapter 07.570*
  - 2 *chapter 07.070*
  - 3 *chapter 15.120*
  - 4 *chapter 07.070*
  - 5 *chapter 07.570*
  - 6 *chapter 16.330*
  - 7 *chapter 24.900*
  - 8 *chapter 24.140*
  - 9 *chapter 04.080*
  - 10 *chapter 15.350*
  - 11 *chapter 17.210*
  - 12 *chapter 15.350*
  - 13 *chapter 07.770*
  - 14 *chapter 08.100*
  - 15 *chapter 17.325*
  - 16 *chapter 08.100*
  - 17 *chapter 08.100*
  - 18 *chapter 07.595*
  - 19 *chapter 08.100*
  - 20 *chapter 08.100*