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# STATES OF JERSEY



## JERSEY LAW COMMISSION: ANNUAL REPORT 2019

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Presented to the States on 13th July 2020  
by the Chief Minister

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STATES GREFFE

## FOREWARD

### By Chairman of the Legislation Advisory Panel

One of the roles of the Legislation Advisory Panel (“LAP”) is to receive from the Jersey Law Commission (“Commission”) its proposals as to topics it might review with a view to possible reform of the branch of law involved. LAP has therefore been fully aware of the work being carried out by the Commission and I am pleased to welcome its 2019 Annual Report setting out so comprehensively its activities throughout the year.

This year, the Report contains an additional section under the heading of “The year in perspective” where, amongst other matters, reference is made to the relationship of the Commission with government. This is an aspect which has perhaps not had the attention it deserved in previous years and I am pleased to confirm that the Commission and LAP have made significant progress in agreeing the terms of a Memorandum of Understanding (“MoU”) setting out their respective obligations. I thank the Commission for their co-operation in this respect and share the Commission’s view that the clarity afforded by the MoU (and the more formal establishment of our respective roles) will prove to be of benefit to the Commission and Government alike in the modern age.

Elsewhere, and under the heading of ACTIVITIES in Part 11, the Report distinguishes between “Completed Projects with ongoing involvement of the Commission”, “Current Projects” and “Future Projects”. In relation to the first category, reference is there made to the Commission’s report on the question of a Jersey Public Services Ombudsman; this was in fact taken forward by LAP in the form of a public consultation followed by its own report on the feedback but further progress has been delayed by the Covid emergency. As to the related question of the Commission’s earlier report on Administrative Redress generally, it is accepted that its main recommendations have not as yet been implemented, LAP’s ability to take matters forward being dependent on appropriate resources being made available.

The Report’s opening words are that “2019 has been a good year for the Jersey Law Commission overall, characterised by developments in several fields”. That statement is borne out by the contents of the Report and, again, I congratulate the Chairman of the Commission and his fellow Commissioners on their work throughout the year. The items under “Current Projects” and “Future Projects” (irrespective of any further topics that might be introduced) indicate that similar opening lines might not be inappropriate for the 2020 Annual Report and LAP looks forward to working with the Commission to that end.

Deputy D. Johnson of St. Mary  
Chairman, Legislation Advisory Panel

# JERSEY LAW COMMISSION



**Annual Report  
2019**

# ANNUAL REPORT

## The Jersey Law Commission

The Jersey Law Commission was set up by a Proposition laid before the States of Jersey and approved by the Assembly of the States of Jersey on 30 July 1996. It was established to carry out research and conduct consultations with a view to:

- identifying:
  - anomalies in Jersey legislation; and
  - obsolete or redundant legislation; and
- making recommendations to simplify and modernise the law of Jersey.

A more detailed statement of the purposes for which the Jersey Law Commission was established is set out in Appendix A to this Report.

2019 is the 23rd year during which the Jersey Law Commission has been carrying out its functions.

The Commissioners during 2019 were:

Mr Clive Chaplin, Solicitor (Chairman)  
Mr Malcolm Le Boutillier, Solicitor (completed term of office on 17 January, 2019)  
Mr Jonathan Walker, Solicitor  
Advocate Barbara Corbett  
Professor Claire de Than  
Dr Elina Steinerte, appointed July 2019  
Advocate Mark Dunlop, appointed July 2019  
Mr Timothy Hart, Solicitor, appointed July 2019

The Secretary is: Cairistiona Annan

The address of the Jersey Law Commission is:

c/o Corbett Le Quesne,  
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St Helier,  
Jersey JE2 4ST

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## **The Jersey Law Commission**

### **Annual Report 2019**

#### **Foreword**

*To the Chief Minister of the States of Jersey*

I have the honour to present to you, on behalf of the Jersey Law Commission, pursuant to the Proposition to establish the Jersey Law Commission approved by the States of Jersey on 30 July 1996, our Annual Report covering the activities of the Jersey Law Commission in the calendar year 2019.

**Signed for on behalf of the Jersey Law Commission**

Signed:

**Clive Chaplin, Chairman**

**29 May, 2020**

## PART I – 2019 OVERVIEW

### The year in perspective

2019 has been a good year for the Jersey Law Commission overall, characterised by developments in several fields. The year has seen us responding in a number of ways to the progress being made by the government with plans to improve administrative redress and the creation of an ombudsman service, on which the Jersey Law Commission published a major report in 2018. More detail on this is provided in Part II – **ACTIVITIES** of this Annual Report. Our work has advanced on surrogacy and related topics, also reported on in more detail in Part II below and a variety of themes are developing in the criminal law sphere.

Three new Commissioners have been appointed, each for a five-year term. They bring a broad range of expertise to the Jersey Law Commission: two are local practitioners and the third an academic and human rights lawyer with extensive experience in international human rights law including as an expert member of the UN Working Group on Arbitrary Detention. Human rights law is an area that the Jersey Law Commission considers to be an important theme underlying all that it does.

Progress has been made in clarifying the relationship of the Jersey Law Commission with government. In times when resources are constrained and with a reformed government machine, it is important that clear lines of communication are established. This is particularly so in connection with procedures for approving topics for the Jersey Law Commission to review and projects that it undertakes and approving the costs involved in undertaking those reviews and producing reports. Clearer and more regular contact between the Jersey Law Commission and the Government should also avoid any duplication of work and, where the work of the Jersey Law Commission complements government initiatives, to ensure that timetables are coordinated. In this context we hope that a written memorandum of understanding may be in place before the end of 2020, providing a practical way forward, whilst ensuring the independence of the Jersey Law Commission.

Finally, the Jersey Law Commission has been raising its profile, not only through more frequent communication on social media, but also by involving ourselves in international initiatives, such as those relevant to smaller jurisdictions and an environmental crimes conference held in Jersey in November 2019. Three Commissioners attended, in London, the joint annual conference of the Law Commission of England & Wales, the Scottish Law Commission, the Irish Law Reform Commission and the Jersey Law Commission.

This year, 2020, when this Report of our activities in 2019 is being made, the Jersey Law Commission has not been unaffected by the Covid-19 pandemic. Although we continue to meet, via Zoom, discussions with government have stalled as government departments and the Chief Minister's Office rightly concentrate on safeguarding Jersey's population. The pandemic also calls for the attention of the Jersey Law Commission: in particular, we are concerned that appropriate procedures are followed in relation to enacting emergency legislation introduced to combat the pandemic and that that legislation is and remains a strictly necessary and proportionate response to the emerging situation. Respect for the rule of law must remain intact at all times.

## **Commissioners**

Mr Malcolm Le Boutillier completed a term of nine years as a Jersey Law Commissioner on 17 January, 2019 and he has retired with our thanks. Following the completion of Mr Le Boutillier's term of office we have been pleased to add to the strength of the Jersey Law Commission with the appointment of three additional Commissioners: Dr Elina Steinerte; Advocate Mark Dunlop; and Mr Timothy Hart. Each of the newly appointed Commissioners was appointed in July 2019. A brief biography of each of the new Commissioners, as well as for the continuing Commissioners, is set out on the [Jersey Law Commission's website](#).

## **Premises**

The Tribunal Service in Jersey has provided facilities to the Jersey Law Commission to meet at International House in The Parade, St Helier. The Commissioners express their thanks to the Tribunal Service for this provision.

## **Support**

Ms Cairistiona Annan is Secretary to the Jersey Law Commission.

## **Communications and Media**

The website for the Jersey Law Commission sets out information about all of the Jersey Law Commission's current and past projects and [publications](#). The Commission also makes use of social media (Twitter: [@JsylawComm](#)) to publicise its activities including consultations and progress on projects and to comment on matters relevant to its activities. Tweets have covered the publication by the Jersey Law Commission of documents relating to its work and a range of subjects in which the Jersey Law Commission is interested. These have included:

- administrative justice in Jersey and elsewhere and responses by the Government in Jersey to challenges in this field;
- human rights implications of questions relating to access to justice;
- many aspects of family law and the rights of children;
- criminal law reform;
- the law relating to surrogacy and parenthood;
- reform of the law of contract in Jersey;
- the review of Legal Aid provision in Jersey;
- environmental law

and much more.

## **Consultations, Topic Reports and Projects**

The issues considered by the Jersey Law Commission during 2019 and projects undertaken by it are described in Part II - **ACTIVITIES**.

## PART II – ACTIVITIES

### Topic Reports and other issues considered by and projects undertaken by the Jersey Law Commission during 2019

A list of publications by the Jersey Law Commission from the date of its establishment in 1996 until and including the year of this Annual Report is set out in Appendix C

#### Completed Projects with ongoing involvement of the Jersey Law Commission

##### Improving Administrative Redress in Jersey

In October 2017, the Jersey Law Commission published its Topic Report, [Improving Administrative Redress in Jersey](#). This ambitious project led by former Commissioner Professor Andrew Le Sueur, looked across the whole administrative justice landscape in Jersey, including internal complaint handling by public bodies, Jersey’s tribunal system, the States of Jersey Complaints Panel, the role of the Royal Court through administrative appeals and applications for judicial review, and the use of alternative dispute resolution.

Although this annual report, strictly speaking, covers the activities of the Jersey Law Commission only for the period January to December 2019, to understand its work on this topic during that period and as it continues, it is necessary to look across a wider timeframe.

It was noted in the Jersey Law Commission’s [Annual Report 2018](#) that, on 2 January 2018, the then Chief Minister had presented a report to the States Assembly. The Chief Minister’s report stated that:

“The Chief Minister, Senator Ian Gorst and Chair of the Legislation Advisory Panel, Senator Sir Philip Bailhache have welcomed the publication of the Topic Report by the Jersey Law Commission. It is an important and substantial piece of work which aims to contribute to the wider project of building trust and confidence in the processes for complaining about public administration” (para 6, [Jersey Law Commission Report Improving Administrative Redress in Jersey: Initial Response](#)).

The Chief Minister’s response to the Jersey Law Commission’s Topic Report recognised that:

“reviewing and, if agreed, delivering and implementing the recommendations made in the Topic Report will be a significant piece of work”

and involve several different stakeholders (para 12). The Chief Minister requested that the Legislation Advisory Panel, in its advisory role to the Chief Minister, should consider the Jersey Law Commission’s recommendations.

The Government of Jersey’s initial response to the Jersey Law Commission’s Topic Report on [Improving Administrative Redress in Jersey](#) was folded into a broader package of work responding to the findings and recommendations of the Independent Jersey Care Inquiry (IJCI) – in particular the IJCI’s Recommendation 7: The Jersey Way. A project timetable was set out for

“scoping exercise and planning” in respect of projects including “administrative redress and the administrative justice system by September 2018”.

The Jersey Law Commission is concerned to know the Government’s plans in respect of the wide range of recommendations in our [October 2017 Topic Report](#), especially in relation to internal complaints and reform of the tribunal system. While progress on establishing a scheme for a Public Services Ombudsman is underway (see below under the heading **A Public Services Ombudsman for Jersey**), nearly three years after publication of our October 2017 report on improving administrative redress it remains unclear which aspects of that report the Government accepts and rejects.

On 22 February 2019, Chairman Clive Chaplin, Commissioners Claire de Than and Jonathan Walker, with former Commissioner Andrew Le Sueur, met members of the Legislation Advisory Panel (now chaired by Deputy David Johnson of St Mary). The Commissioners and Professor Le Sueur were pleased to answer questions about the Jersey Law Commission’s work on administrative redress. The main focus of the meeting was on proposals that the Jersey Law Commission had developed over two reports to replace the States of Jersey Complaints Panel with a Public Sector Ombudsman (discussed further below).

### *Internal Complaints*

In relation to internal complaints handling, the Jersey Law Commission understands that the Government of Jersey has introduced new systems. Answering a question in the States Assembly on 5 February 2020, the Chief Minister said:

The Government is committed to improving its service to customers and this includes the way it gathers, handles, and manages complaints, compliments and comments about the many services it delivers. A new Government-wide customer feedback policy was developed last year and came into effect on 30 September [2019] and we are encouraging customers to share their feedback about government services, good and bad to ensure we learn and improve. Our new approach to feedback is part of the Government’s overall commitment to putting customers at the heart of its services. ([WQ.78/2020](#))

In our [2017 Topic Report](#), we were concerned about the quality of internal complaints handling across a range of public bodies (not just the Government of Jersey). We recommended a legal duty on the Chief Minister to issue guidance to public bodies about fair and effective handling of complaints (Recommendation 2.1). This recommendation has been superseded by the decision to establish a scheme for a Public Services Ombudsman, which we expect to have an influential role in standard-setting for internal complaints systems.

We also recommended that legislation should create a ‘right to good administration’, based on models developed in some other jurisdictions (Recommendation 2.5). It is unclear whether the Government accepts or rejects this.

### *Tribunals*

Our 2017 Topic Report, [Improving Administrative Redress in Jersey](#), looked in detail at the composition and operation of administrative appeals tribunals in Jersey. We made 16 specific

recommendations, with the overarching recommendation that the confusing array of tribunals should be amalgamated into a single tribunal – the Jersey Administrative Appeal Tribunal (JAAT).

The proposed JAAT would consolidate the following current tribunals into a single body: Commissioners for Appeal for Taxes; Social Security Tribunal; Social Security Medical Tribunal; Income Support Medical Appeal Tribunal; Mental Health Review Tribunal; Health and Safety Appeal Tribunal; Data Protection Tribunal; and Rate Appeal Boards. A Charity Tribunal has been established under the Charities (Jersey) Law 2014 to hear appeals against decisions of the Jersey Charity Commissioner; this too could be consolidated in the JAAT.

Many rights of appeal against administrative decisions that currently have to be heard by the Royal Court should, we proposed, be heard instead by the JAAT. We set out proposals to improve processes for appointing tribunal members and making the procedures used by tribunals more transparent and user-friendly.

We call on the Government to provide a detailed response to our proposals for reforming the tribunal system in Jersey. We note that in a States Assembly Proposition on the appointment of new Commissioners of Appeal for Taxes it was stated:

It is expected that the current arrangements for hearing tax appeals will change during the terms of office of these appointees, when the Government implements the recommendations of the Jersey Law Commission's October 2017 report: 'Improving Administrative Redress in Jersey'. Amongst other conclusions, the report recommended that existing tribunals (including the Commissioners of Appeal for Taxes) be amalgamated into a new judicial body – the Jersey Administrative Appeals Tribunal. ([P.42/2019](#))

This reference in passing to the Government's acceptance of the gist of our proposals is no substitute for a comprehensive and detailed response to the recommendations we made.

Twice in recent months, the States Assembly has considered issues to do with the design of tribunals in Jersey. Unfortunately, Members did so without any reference to the detailed work of the Jersey Law Commission on this topic. These were missed opportunities for Members to use the Jersey Law Commission's work to inform their thinking.

One issue related to the Commissioners of Appeal for Taxes. In our 2017 Topic Report, [Improving Administrative Redress in Jersey](#), we were critical of several aspects of how the Commissioners of Appeal were established in law (paras 3.10-3.13). As with other recommendations, we did not seek to criticise individuals serving or supporting this tribunal – our focus was on improving the system. On 22 February 2019, the Corporate Services Scrutiny Panel scrutinized the draft Revenue Administration (Jersey) Law. Article 5 of the Law makes provision for Commissioners of Appeal, in substance re-enacting previous legislation. The Law came into force on 10 December 2019. The Scrutiny Panel seemed unaware of the Jersey Law Commission's work in this area, but they expressed some of the same concerns as we had two years earlier, saying:

Stakeholders consulted during the review expressed concern about the Commissioners of Appeals' potential lack of independence and the lack of transparency when making judgments. This is

expected to be dealt with through a second tranche of Revenue Administration Law later in the year [2019]. (Finding 5, [S.R.3/2019](#))

A second issue to arise in the States Assembly related to the appointment of three members of the Social Security Tribunal ([P.2/2020](#)). Such Propositions have in the past been approved with little if any debate. On 26 February 2020, however, Members voted in favour of a reference back to the Minister for Social Security. Some Members were concerned about the sparseness of information about the three people and some questioned the relevance of their experience. In our view, the floor of the States Assembly is not the appropriate forum for detailed debate on the qualifications, experience or profile of individual tribunal members. In the Jersey Law Commission's 2017 Topic Report, [Improving Administrative Redress in Jersey](#), we recommended that all tribunal members should be appointed by the Judicial and Legal Services Commission that was then under consideration. All tribunal members, whether they are legally qualified, expert or lay members, should be regarded as members of the judiciary. In our view, the basic constitutional principle of judicial independence is not best served when politicians or a legislative body such as the States Assembly is involved in the appointment of individual members of the judiciary. In our package of proposed reforms, we also made detailed recommendations on eligibility criteria and diversity.

The creation of the JAAT would also avoid the problem reported to States Members in [P.82/2019](#), which noted that the vacancy for the chairman of the Health and Safety Appeal Tribunal 'has been advertised in the Jersey Evening Post on several occasions over the past 2 years, none of which generated any applications'. In [P.82/2019](#), the States appointed Advocate Sarah Fitz to the role, alongside her chairmanship of three other tribunals. The JAAT, with a legally qualified and permanent (part-time) Chairman and Deputy Chairman able to sit on a wide range of cases, would avoid time consuming and expensive attempts to identify and appoint chairs for several different tribunals and contribute to the development and use of a consistent set of rules by which complaints or allegations of maladministration could be decided.

### **A Public Services Ombudsman for Jersey**

A specific strand of the work in recent years of the Jersey Law Commission on administrative redress concerned the creation of a scheme for a Public Services Ombudsman. The work, led by Professor Andrew Le Sueur, on developing a detailed model for a Public Services Ombudsman has had significant impact during the period 2018-2020. Again, to understand our work on this topic it is necessary to look across a wider timeframe than this Annual Report otherwise covers.

The Jersey Law Commission's 2017 Topic Report, [Improving Administrative Redress in Jersey](#), reviewed the effectiveness of the States of Jersey Complaints Panel. The overarching finding was that, despite previous attempts at reforms, several serious problems persisted with the remit of the Panel, the framework within which it operates, the procedures it uses, and the high proportion of cases where Ministers rejected its findings and recommendations (para 5.29). The Jersey Law Commission made clear that the criticisms were not (and are not) directed at the individuals (past and present) who contribute their time without remuneration to service on the Panel.

The Jersey Law Commission therefore recommended in 2017 that the Complaints Panel should be replaced by a Public Services Ombudsman. Alternatively, a range of detailed proposals to

improve the operation of the Complaints Panel were set out in the 2017 Topic Report if the Government of Jersey and the States Assembly decided to keep the Panel.

In March 2018, shortly before the general election, the States Assembly voted in favour of a Proposition ([P.32/2018](#)) brought by Senator Philip Ozouf, agreeing in principle to establish an Ombudsman scheme, subject to further research. The Jersey Law Commission were commissioned by the Government to carry out that research, which we did through a project led by Professor Le Sueur with colleagues from the University of Essex and the UK Administrative Justice Institute (UKAJI). The research was part-funded by a grant to the research team from the Economic and Social Research Council Impact Acceleration Account.

The Jersey Law Commission published a 238-page Topic Report [Designing a Public Services Ombudsman for Jersey](#) in November 2018, which provided comprehensive analysis and policy options for the Government of Jersey and the States Assembly.

Six months later, in an Oral Question on 21 May 2019, Deputy S.M. Ahier of St Helier asked:

Will the Chief Minister update the Assembly on the development of a Public Services Ombudsman to deal with complaints of maladministration by Government departments? ([Oral Question, 126/2019](#))

Explaining what would be included in a consultation document the chairman of the Legislation Advisory Panel, Deputy David Johnson of St Mary, told the States Assembly that the consultation document:

mirrors, very much, the recommendation by the Law Commission to establish a Public Ombudsman in substitution for the Complaints Panel ([Para 4.5.5](#))

The Government of Jersey ran a [public consultation](#) exercise from July to October 2019 seeking views on proposals for the establishment of an independent public services ombudsman set out in a [consultation document](#). While much in the document reflected proposals made by the Jersey Law Commission, it also contained an alternative model that would in effect have maintained a role for the Complaints Panel, assisted by caseworkers, and renaming this an “Ombudsman scheme”. In its [submission to the consultation](#), the Jersey Law Commission argued that this alternative model would not meet minimum international standards for public service ombudsman schemes.

In November 2019, the Care of Children in Jersey Review Panel (a States Assembly scrutiny panel) was critical of the lack of speed on the part of Government, reporting that:

it is concerning that clear actions (such as the appointment of a public services ombudsman or addressing complaints systems) do not appear to have been brought forward at pace. (Care of Children in Jersey Review Panel, Response to the Care Inquiry: Update Report November 2019) ([S.R.12/2019](#))

In December 2019, the Jersey Law Commission was pleased to see publication by the outgoing Comptroller and Auditor General, Karen McConnell, of a wide-ranging report welcoming the research by the Jersey Law Commission and stating:

In my view, establishment of a Public Services Ombudsman, with wide powers, reflecting modern legislation in other jurisdictions, sends an important message about transparent, accountable services that embrace feedback and a commitment to improve ([Governance – A Thinkpiece](#) paras 9.5-9.6, 18 December 2019)

The Jersey Law Commission's Topic Report, [Designing a Public Services Ombudsman for Jersey](#), in November 2018 had indeed identified and analysed models for public services ombudsman schemes in smaller and some larger jurisdictions to provide reference points for policymakers in Jersey.

In January 2020 the outcome of the public consultation became clear. The Legislation Advisory Panel published a report entitled [Jersey Public Services Ombudsman: Consultation on Feedback](#) that included its "provisional policy responses".

The Jersey Law Commission welcomes the Legislation Advisory Panel's provisional policy position that the Government of Jersey should proceed with legislative drafting for a Public Services Ombudsman scheme and that, pending decisions made by the States Assembly, the scheme be established in 2021.

In almost all respects, the Legislation Advisory Panel's provisional policy responses align with the recommendations made by the Jersey Law Commission in its Topic Report, [Designing a Public Services Ombudsman for Jersey](#). In particular:

- The Ombudsman should
  - have power to receive complaints about a broad range of public bodies (not just Ministers)
  - have power to investigate complaints, normally in private but in exceptional cases by way of a public hearing
  - be free to all
  - have a remit to investigate "maladministration" and "service failure"
- Some categories of case should be excluded from the Ombudsman's jurisdiction
- There should be time limits for taking cases to the Ombudsman.

The Jersey Law Commission supports the Legislation Advisory Panel's provisional policy position that healthcare will initially be excluded from the Ombudsman scheme and is pleased to see acceptance of its recommendation that the legislation setting up the Ombudsman should set out a timeframe for inclusion of healthcare decision-making. In time, this is likely to be the largest area of the Ombudsman's work.

The detailed analysis by the Jersey Law Commission of how a new Ombudsman scheme would interact with other 'watchdog' bodies has also helped define the Legislation Advisory Panel's provisional policy position on joint working and information sharing with organisations including the Care Commission, Children's Commissioner, and Comptroller & Auditor General.

In one respect, however, the Legislation Advisory Panel's provisional policy position differs from the model recommended by the Jersey Law Commission. In its report, [Designing a Public Services Ombudsman for Jersey](#), the Jersey Law Commission said:

In the opinion of the Jersey Law Commission, the pattern of frequent rejection of States of Jersey Complaints Panel decision reports would, if carried over to the new Ombudsman scheme, call into question the value of creating an ombudsman. ([Para 9.14](#))

The Jersey Law Commission reviewed in detail the arguments for and against binding or enforceable outcomes from public services ombudsman schemes. It was noted that the majority of schemes around the world gave the Ombudsman powers only to make recommendations to the public body complained about – but also noted that, by way of example, for people in Northern Ireland, there is a court-based enforcement procedure if a government body decides not to follow a decision of the Northern Ireland Public Services Ombudsman. The Jersey Law Commission saw merit in a similar process in Jersey, stating:

The Jersey Law Commission's preferred option is that Ombudsman findings should be binding and if a Minister or other public body fails to follow a recommendation aimed at providing redress for injustice in the individual case, the aggrieved person should be able to go to court to enforce that recommendation ([Para 9.17.3](#))

The Legislation Advisory Panel's Jersey Public Services Ombudsman Consultation Feedback Report records that responses to the surveys and correspondence reflected differences of opinion. The 'provisional policy position' of the Legislation Advisory Panel in the light of that is:

Whilst [it is] recognised that some consultation respondents were in favour of binding decisions there are nevertheless very legitimate concerns about unelected officials being able to overturn the decisions of a Minister. Therefore, it is envisaged that neither the [Ombudsman's] findings nor recommendations will be binding. This is in accordance with ombudsman schemes in other jurisdictions. ([Jersey Public Services Ombudsman Consultation Feedback Report](#), page 20)

The Jersey Law Commission accepts that the Legislation Advisory Panel may not take forward its recommendation for binding Ombudsman findings (what happened) and recommendations (what should be done to right an injustice) but it will be important that Ministers and other public bodies respect and implement reports of the Jersey Public Service Ombudsman. The unfortunate experience of islanders in the current system, who too often have had their grievances upheld by the Complaints Panel but subsequently rejected by Ministers, should not be allowed to continue.

The Jersey Law Commission is not persuaded that there are "very legitimate concerns" about unelected officials being able to overturn a Minister's decision, as there must have been a finding of an injustice or a wrong committed by a government department in the first place.

The headline development is therefore that Ministers have agreed that work should proceed on the establishment of a Jersey Public Services Ombudsman broadly along the lines proposed by the Jersey Law Commission in its November 2018 report, [Designing A Public Services Ombudsman](#). Ministers have informed the States Assembly that:

law drafting will commence in early 2020 with a view to establishing the Office of the Ombudsman in early 2021, subject to the decisions of the States Assembly. The Government Plan includes provision for funding of the Ombudsman from 2021 onward. Policy development and law drafting

capacity has been allocated in 2020 to progress a draft law (States of Jersey, *Government Plan 2020-2023: Further Information on Additional Revenue Expenditure and Capital and Major Projects Expenditure* ([2019/R.91](#)), page 31, and States of Jersey, *Scrutiny Review of the Government Plan: 2020-2023 (S.R.13/2019) – Care of Children in Jersey Review Panel Findings – Joint response of the Ministers for Children and Housing and Home Affairs* ([2019/S.R.13 Res.\(7\)](#)), page 10)

The Government Plan 2020-2023, referring to the work of the Jersey Law Commission, echoed its findings and recommendations that an Ombudsman scheme was needed

- To drive public service improvement
- For reputational reasons, saying “it is proposed that the Jersey Public Services Ombudsman will meet international best practice standards for transparency, accountability and fair treatment of complaints”
- To drive trust and confidence
- Because the current Complaints Panel service is not satisfactory, noting that “Board processes fall significantly short of good practice standards (e.g. complainant must make their ‘case’ as opposed to the Board pro-actively investigating)”. ([Government Plan 2020-2023](#), page 31)

## **Current Projects**

### **Parentage, Donor Conception and Surrogacy**

During 2019 a substantial piece of work was completed on behalf of the Law Commission by Marisa Allman, barrister at 36 Family Chambers in London. Initially the remit had been to consider the law relating to surrogacy in Jersey, or rather the complete lack of any such law. It became clear, however, that the issues that needed addressing were much wider than simply the law relating to surrogacy.

The law in Jersey relating to parentage generally is significantly behind that of many other nations in the world. This is of particular concern because the Government of Jersey has been keen to promote civil partnerships and more recently same sex marriage and has legislated accordingly. Despite such legislation confirming the right of same sex couples to marry and found a family, the law has not, in fact, achieved the equality it appeared to set out to do. There is, for example, no provision in Jersey to register the parents of a child as being anything other than one female mother and one male father. Further, although heterosexual couples both gain parental responsibility for a child born to them, same sex couples do not. This, together with the significant progress that has been made in respect of assisted reproduction generally, which the law has not kept pace with, has resulted in significant anomalies.

The report deals with all these matters and suggests possible considerations for reform using international comparisons and drawing on the positive and negative experiences of different jurisdictions.

## Criminal Appeals

The Jersey Law Commission reviewed the law relating to appeals against criminal convictions in Jersey with a view to making recommendations as to whether and how the grounds for appeals against criminal convictions should be reformed. For the purposes of the review the Jersey Law Commission published a Consultation Scoping Paper, [Criminal Appeals Against Conviction](#) (Consultation Paper No.2/2016/CP), in July 2016 that asked a series of ‘scoping’ questions.

Reflecting the responses received by it to its paper, [Criminal Appeals Against Conviction](#), the Jersey Law Commission submitted [reform proposals](#) to the Department for Community and Constitutional Affairs as part of that department’s [Review Of Draft Legislation On New Criminal Procedure](#) to enable the reform proposals to be considered by the States Assembly.

None of the responses received to the consultation carried out by the Jersey Law Commission favoured preserving the existing law in relation to appeals against criminal convictions. Respondents to the consultation identified two factors in particular that created risks of miscarriages of justice:

- (i) the wording of Article 26(1) of the Court of Appeal (Jersey) Law 1961, specifically the *proviso* that even if an appellant may succeed on a point raised in the appeal, the appeal may be dismissed if the court considers that there has been no substantial miscarriage of justice; and
- (ii) judicial reluctance to overturn jury verdicts notwithstanding scientific and academic research on jury fallibility for reasons that equally apply to the decisions of jurats

Reflecting these concerns, the Jersey Law Commission has proposed replacing existing grounds of appeal with a single ground allowing the Court of Appeal to quash a conviction when it “*has a serious doubt about the verdict*”. In conjunction with this reform, guidance should be issued to explain that the legislative intention is to give a broad ground for allowing an appeal (even where there is no fresh evidence or fresh legal argument) and that there are many factors which can lead to a serious doubt about a conviction. The power to order a retrial should remain.

In its summary of the responses to the consultation it had carried out, [Response to the Criminal Procedure Consultation](#), the Department for Community and Constitutional Affairs noted the reform proposals made by the Jersey Law Commission. It is hoped that the proposed reforms will be taken forward in 2020. Jersey’s criminal appeals legislation continues to risk miscarriages of justice due to its anachronistic nature.

## Criminal Code

Work began in 2017 on the Criminal Code project, with the first publication expected in 2020. The first stage of the project comprises two brief and accessible documents stating:

- (i) the customary and common law offences under Jersey's criminal law, their scope and elements, and
- (ii) applicable defences under Jersey's criminal law.

These are to be made available on the website of the [Jersey Legal Information Board](#). Each document contains worked examples so that members of the public will have, for the first time, a clear explanation of each of these offences. In this way concerns about legal certainty and the principle of legality will be addressed. Short papers proposing amendments to some customary offences will be produced in 2020. Significant progress has been made towards a full draft Criminal Code. A great deal of interest has been shown in this project by researchers and reform bodies in other jurisdictions.

### Open Justice

A short project assessing the current approach to open justice, reporting restrictions and contempt of court in Jersey is underway. This builds on issues and opportunities previously highlighted in [response](#) by Professor de Than to the [Consultation](#) on the then Draft Criminal Procedure Law. Rapid changes in online justice in 2020 are drawing attention to previously unnoticed access, equality and reporting issues, as well as those which are well-known in all comparable jurisdictions

### Future Projects

The Jersey Law Commission has a varied and wide-ranging set of projects under consideration for future review.

### Maintenance and Champerty

A report is due to be prepared in 2020 on maintenance and champerty. These are medieval legal concepts designed to prevent, on grounds of public policy, a trade in legal claims. The effect of them, however, could call into question the increasingly popular arrangements for contingent fees and certain types of arrangements entered into by litigation funding investment companies. Some Anglo-Saxon jurisdictions have abolished the concept, so as to make a trade in litigious claims lawful, whereas others have retained it. The report will consider the current position and options for reform.

### Légitime

The Jersey Law Commission has sought feedback from the Legislation Advisory Panel as to whether there is governmental appetite for reform in respect of the field of *légitime*, the subject of a recent report by the Law Officers' Department (see [Légitime Reform: Lessons From Different Systems Of Protection From Disinheritance](#) and [Légitime Reform: Where To Go?](#)), a two-part article by Dennis Dixon in the Jersey and Guernsey Law Review). In carrying out any such work, the Jersey Law Commission would aim to complement any work being undertaken by government in this field of law reform.

## Human Rights

Planned work also includes an assessment of the impact and application of the Human Rights (Jersey) Law 2000. This is a project that the Jersey Law Commission is well qualified to undertake because two Commissioners of the Jersey Law Commission have considerable experience and numerous publications in their respective names in human rights law. It has been noted that human rights law has been argued relatively rarely in Jersey's courts, in contrast to trends in other British jurisdictions that have adopted similar laws. The project proposes to investigate the reasons for this and map the extent of the use of those provisions that have been argued with a view to considering how to make the Human Rights (Jersey) Law 2000 more effective. It will also highlight areas of law where reform may be necessary in order to bring legal principles into compliance with the European Court of Human Rights and other relevant human rights guarantees.

## Electronic Signatures

With the greater use of technology, more contracts are being concluded without the use of traditional "wet-ink" signatures and are being signed electronically. Indeed, the use of electronic signatures has been particularly helpful for signatories when faced with the travel and social distancing requirements of COVID-19. It is therefore an area of immediate and topical concern. The aim of the work would be to consider the current legal position concerning the validity of electronic signatures under Jersey law and whether there are any recommendations to be made for reform.

## PART III – COST

### The cost of the Jersey Law Commission

The Government of Jersey makes resources available to the Jersey Law Commission through the Department for Strategic Policy, Performance and Population (formerly resources were provided through the Department for Community and Constitutional Affairs). No fixed budget is available from or agreed with the government, but expenses likely to be incurred are agreed in advance with the Department and, once incurred, payment is made directly by the Department to the person owed. The Jersey Law Commission does not itself receive or hold any funds. As outlined above in Part I – **2019 OVERVIEW**, discussions are under way with the Department with a view to formalising these arrangements in a memorandum of understanding

The principal costs relating to the Jersey Law Commission are incurred in respect of consultations it carries out and Topic Reports it issues. During the year covered by this Annual Report the total costs of running the Jersey Law Commission have amounted to just over £13,000.

Pursuant to arrangements with the Department for Community and Constitutional Affairs, the Secretary to the Jersey Law Commission from time to time is remunerated on an agreed hourly rate basis. The total annual cost of the Secretary's services was £1440 in 2019 and is unlikely to exceed £2,000 in 2020.

## **PART IV – IMPACT**

### **Responses to the work of the Jersey Law Commission**

During the period covered by this Annual Report, legislation has been enacted or proposed on the following matters on which the Jersey Law Commission has issued Topic Reports and made recommendations.

#### **Administrative Redress and a Public Services Ombudsman**

In relation to issues of administrative redress and the establishment of a Public Services Ombudsman scheme a description of the substantial impact of the important work of the Jersey Law Commission is set out above in PART II – **ACTIVITIES** under the heading **Completed Projects with ongoing involvement of the Jersey Law Commission**.

#### **Parentage, Donor Conception and Surrogacy**

Advocate Barbara Corbett has spoken on issues relating to parentage, donor conception and surrogacy in the media and arranged for Ms Allman to speak on the issues at the Jersey International Family Law Conference in October 2019. The challenge now is to encourage the Government of Jersey to include law reform in respect of assisted reproduction and parentage in all its forms in the near future.

The report on parentage, donor conception and surrogacy has been submitted to the Government of Jersey but no progress was made during 2019. It is hoped that in 2020 the Jersey Law Commission and the Government of Jersey will be able to work together to achieve progress in this area.

#### **Legal Aid Review**

The Jersey Law Commission commented on the Draft Access to Jersey Law 201- ([Comments on Proposition 23/2019](#)). This was not an issue upon which the Jersey Law Commission carried out its own consultation and the comments were made in response to a request from the Chairman of the Legal Aid Review Panel. The Jersey Law Commission commented, therefore, in relation to the proposed legislation by reference to and in the context of the work it had carried out on other issues. These comments covered aspects of the proposed legislation including the composition of the Legal Aid Guidelines Committee, the format of the Legal Aid Office and the proposed arrangements for conditional fees, disclosing a range of substantial concerns about the proposed legislation. The Jersey Law Commission noted that the Report by the Legal Aid Scrutiny Review Panel ([S.R.8/2019](#)) was not informed by these comments and it would be disappointing if the issues raised were not addressed in the legislation as the proposed legislation had implications in respect of provisions for good administration by States and conformity with human rights obligations

#### **Divorce Reform**

It is very disappointing that although it is now several years since the Law Commission report on divorce reform was produced, there has still been no reform of the law. During 2018 a consultation

was undertaken which concluded in February 2019. Unfortunately, no action was taken during the year and no date has been fixed for any progress to be made in this important area.

### **Criminal Law**

During 2019, work began on a number of joint research projects with other bodies conducting research about law reform. This includes a project with two UK universities on Defences in Criminal Law, funded by the British Academy. A conference will take place in 2020 once restrictions allow, and two articles have already been published as a result of the project.

### **Environmental Law**

In 2019 the Jersey Law Commission partnered with The Common Good Foundation and The Resolution Centre to run a successful conference on Environmental Crimes. An open access academic journal has been created and will be hosted on the website of the [Jersey Legal Information Board](#). The first edition comprises articles from academic and practitioner authors from many different jurisdictions, with themes relevant to Jersey. Jersey Law Commissioners act as a Review Board for submissions to the journal. A second conference will take place in October 2020.

### **Small Jurisdictions**

The Jersey Law Commission has had further international impact through work on a Small Jurisdictions Project led by Professor de Than, which has gained substantial support from a wide range of stakeholders, and through work with bodies in the Isle of Man who seek to learn from the experiences of Jersey and other small jurisdictions. These links and projects will continue in 2020 and beyond.

## APPENDIX A

### ROLE

#### **The role of the Jersey Law Commission**

The Jersey Law Commission is a body established by the States of Jersey. It works in consultation with the Legislation Advisory Panel and the Department for Community and Constitutional Affairs but the Jersey Law Commission is an independent body whose reports will be made available, in the form determined by the Jersey Law Commission, to the public.

The role of the Jersey Law Commission is defined in its terms of reference, which are set out as follows in the Proposition of the States of Jersey by which the Jersey Law Commission was established:

*It shall be the duty of the Commission to identify aspects of Jersey law which it considers should be examined with a view to their development and reform, including in particular the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law, and to those ends:*

- (a) to receive and consider any proposals for the reform of the law which may be made or referred to them;*
- (b) to prepare and submit to the Legislation Advisory Panel from time to time programmes for the examination of different branches of the law with a view to reform; and*
- (c) to undertake, pursuant to any such recommendations approved by the Legislation Advisory Panel, the examination of particular branches of the law, such consultation thereon as the Commission shall think fit, and the formulation by means of draft bills or otherwise of proposals for such reform.*

## **APPENDIX B**

### **METHOD**

#### **The working method of the Jersey Law Commission**

Upon accepting a topic for review the Jersey Law Commission appoints one of its members to act as the Topic Commissioner to conduct and co-ordinate all of the Jersey Law Commission's work on that topic. On his or her recommendation the Jersey Law Commission seeks expert support from lawyers practising in the field or academics learned in the subject as Topic Practitioner to assist him or her generally and to ensure that the work of the Jersey Law Commission remains relevant to the issues actually arising in relation to the topic. The Topic Commissioner is not paid in respect of the work undertaken for the Jersey Law Commission unless also acting as Topic Practitioner. The Jersey Law Commission typically agree a fee with the Topic Practitioner who then recovers that fee direct from the States of Jersey. Requisite legal research may be carried out by others: either by professional researchers under contract or by experts willing to give their time as a public service.

The procedure for the review of each topic will commonly fall into the following steps:

- 1 finding out whether there is a problem, and if there is, defining exactly what it is;
- 2 researching and summarising the existing law relevant to the topic;
- 3 suggesting how the relevant law might be changed to solve the problem;
- 4 preparing and publishing a consultation document based on items 1, 2 and 3;
- 5 receiving and discussing representations made in response to the consultation document;
- 6 preparing and publishing a final report.

## **APPENDIX C**

### **Topic reports and other issues reported on by the Jersey Law Commission**

From its establishment in 1996 until the end of 2019 (the year covered by this Annual Report) the Commission has issued the following reports. All papers published by the Jersey Law Commission can be found on the Jersey Law Commission's website under [Publications](#)

Consultation papers (seeking input into the reform process)

2016 Consultation (Phase 1) on Criminal Appeals Against Conviction

2016 Improving Administrative Redress In Jersey

2015 Divorce Reform

2010 Voisinage

2010 Bankruptcy (Désastre) (Jersey) Law 1990 "Social Désastre"

2009 Topic report on Corroboration Of Evidence In Criminal Trials

2008 Prescription And Limitation

2008 The Jersey Law Of Partnership

2006 The Prohibition On Trusts Applying Directly To Jersey Immovable Property

2006 Security On Immoveable Property

2006 The Jersey Law Of Charities (revised)

2004 The Jersey Law Of Charities

2002 The Jersey Law Of Real Property

2002 The Jersey Law Of Contract

2002 The Law Of Tutelles

1999 Best Evidence Rule In Civil Proceedings

1998 Dégrèvement

1998 The Rights Of Beneficiaries To Information Regarding A Trust

Final topic reports (containing recommendations)

2018 Topic Report on Designing A Public Services Ombudsman For Jersey

2017 Topic Report on Improving Administrative Redress in Jersey

2015 Topic report on Divorce Reform

2011 Topic report on Voisinage

2011 Topic report on Bankruptcy (Désastre) (Jersey) Law 1990 “Social Désastre”

2010 Topic report on The Jersey Law Of Partnership

2009 Topic report on Corroboration Of Evidence In Criminal Trials

2009 Topic report on The Jersey Law Of Charities

2008 Topic report on Security On Immoveable Property

2004 Topic report on The Law of Contract

2002 Topic report on The Best Evidence Rule In Civil Proceedings

2002 Topic report on The Law Of Tutelles

1999 Topic report on Dégrèvement

1998 Topic report on The Rights Of Beneficiaries To Information Regarding A Trust

#### Other publications

2019 Comments on the Draft Access to Justice (Jersey) Law 201- (Proposition 23-2019)

2019 Proposal for a review of the law in Jersey relating to prescription and limitation

2019 Response to a consultation by the Government of Jersey on establishing a Jersey Public Services Ombudsman

2019 The Appointment and Removal of the Head of Government of the Kiribati Republic, a report by the Jersey Law Commission and others for Daphne Caine MHK

2019 Comments on proposals for reform of the Jersey law of contract

2019 Comments on proposals for reform of the Jersey law of contract

#### Contributions by Commissioners to academic journals and other publications during 2019 include:

de Than and Elvin, ‘Private prosecution: a useful constitutional safeguard or a potentially dangerous historical anomaly?’, *Criminal Law Review*, August 2019.

de Than, ‘sexual offences against adults with a mental disorder and their implications for social work practice’, *Community Care Inform*, 2019.

de Than and Elvin, ‘Does English law need a general endangerment offence?’ Reed and Bohlander (eds), *Fault*, Routledge

de Than and Elvin, 'Homicide and the vulnerable subject of criminal law', Reed and Bohlander (eds), *Homicide*, Routledge, 2019

Professor de Than also made regular media appearances as an expert, including Radio 4, Radio 5 and BBC News, an interview by Kathy Lette, and contributions to a range of documentaries. She writes a monthly newspaper column on legal issues, and is a regular conference speaker. Her Keynote speeches in 2019 included:

September, SLS Conference, Preston: paper on whether English law needs a general endangerment offence.

August, briefed the government of a large state on the reform of fraud, corruption and bribery law and associated criminal procedures and agencies.

July, paper on mental capacity and human rights, Choice Support conference

May, LSA Conference Washington, paper on the human right to have fun: sex, sexuality and regulation; and keynote, Data Science Institute, Law Reform and Artificial Intelligence.

April, briefed Tynwald on constitutional reform, media appearances, debate panellist on constitutional law issues, and conference paper at University College Isle of Man.

March, Keynote at Centre for Small States conference, IALS: 'When tiny jurisdictions roar'.

February, workshop on mental capacity law at Annual MCA conference, Dorset

January, briefed Tynwald (Isle of Man) on constitutional issues in small states; and conference paper on law reform at University College Isle of Man.

All papers published by the Jersey Law Commission can be found on the Jersey Law Commission's website under [Publications](#)