



Legal Aid Review Panel

Legal Aid Review

Witness: The Chief Minister

Friday, 5th April 2019

Panel:

Deputy S.M. Ahier of St. Helier (Chairman)

Deputy R.J. Ward of St. Helier

Deputy D. Johnson of St. Mary

Witnesses:

Senator J.A.N. Le Fondré, The Chief Minister

Mr. D. Le Marquand, Policy Principal

Mr. D. Dixon, Legal Adviser

[14:03]

Deputy S.M. Ahier of St. Helier (Chairman):

If we could start off with introductions, I am Deputy Steve Ahier, chair of the Legal Aid Panel.

Deputy R.J. Ward of St. Helier:

Deputy Robert Ward, on the panel.

Deputy D Johnson of St. Mary:

David Johnson, Deputy of St. Mary, panel member.

The Chief Minister:

Senator John Le Fondré, Chief Minister.

Legal Adviser:

Dennis Dixon, law officer.

Policy Principal:

David Le Marquand, policy principal.

Deputy S.M. Ahier:

Thank you very much. Chief Minister, could you briefly summarise your thoughts on the changes being made to legal aid as set out in the Draft Access to Justice Law and how you believe they will affect Islanders?

The Chief Minister:

I think the crucial thing at this point is to split it between the law and the scheme. I am sure this will probably come out during the course of the hearing. I have been focused very much on the law, which I summarise as an enabling law. It basically puts things on to ... will eventually put a scheme on to a statutory basis and probably widens up the stakeholders who influence the creation of that scheme. It also introduces the role, obviously my approval of it, and the ability of the States Assembly to have an oversight of matters as well. I think that puts it on to a far fairer basis, perhaps more transparent basis, than perhaps has previously been the case. From that point of view, that should give comfort to Islanders but I am not going to go into the scheme per se because obviously the scheme has yet to be produced.

Deputy S.M. Ahier:

But the 2005-2010 scheme will be carried forward until such time after the 6 months, that is the Advisory Committee?

The Chief Minister:

You are absolutely right. The present processes will remain as they are for 6 months, and that was done in agreement with the Law Society, and that is why we have put it into the law. Then the committee that produces any new scheme has to report within 6 months of it being appointed.

Deputy S.M. Ahier:

Do you believe that the 6 months is sufficient time?

The Chief Minister:

We believe so. I mean the issue is going to be ... because I think as you are probably aware, there was this issue around what happens if the stakeholders cannot agree or where do we end up. At one point we did kind of examine some form of backstop position essentially where I had an ability to say: "Right, that is going to be the statutory basis for the time being", it would have been the

present rules. There was a bit of a push-back from the Law Society on that approach. In the end, we concluded that perhaps the reasonable approach might be the one that we have adopted, which is put a time period of 6 months in but put the fact that the committee has to report by that time. It is obviously a matter for what that committee says as to how that scheme changes.

Deputy S.M. Ahier:

So there is no availability for an extension of that period and is that purely down to the Law Society insistence?

The Chief Minister:

The 6 months was essentially agreed in discussions with the Law Society. If you take the view that it should be a longer period, I am sure that would be something you could bring an amendment to. I am sure that would be something we would be very open to but obviously it is written into the law at 6 months.

The Deputy of St. Mary:

Just to echo the Chief Minister's opening remarks, between the law per se and the guidelines. I think we accept that the response from this panel is commenting on the law but given that the guidelines are incorporated or a draft guide is incorporated in the law, we do feel compelled to comment on various aspects mentioned in the guidelines and that will come out. But you are absolutely right, Chief Minister, the law is what we are concentrating on.

The Chief Minister:

Yes, incorporated into the report not into the law.

The Deputy of St. Mary:

Yes, our accounts are incorporated into our report, yes.

The Chief Minister:

I meant the guidelines in there are incorporated into the report but not incorporated into the law.

The Deputy of St. Mary:

Sorry, you are absolutely right, yes.

Policy Principal:

Just a quick comment on the 6-month provision; there is nothing preventing the Guidelines Committee from ... they can report whenever they wish so they could report after 3 months and then after that 6 months they can then report at any time of their choosing. So the 6-month report ... I

think the hope is the 6-month report is: "We have reached this recommendation to the Chief Minister" but it could be, for example: "We have agreed A, B, C, D and E but we just need another month because we have a couple of sticking points here to agree a couple of other points." Then they will be free to report again in a month's time afterwards, by way of example. It is not you have to report in 6 months and there is no time afterwards.

Deputy R.J. Ward:

There is a point, I understand the distinction between the law and the guidelines - we are calling them guideline scheme - but we have stuck on one word. But they are inextricably linked in some way. Some comments were made to us earlier that when the criminal bar is set up, which is what effectively will happen, if the law happens, to separate criminal and civil law so that criminal law becomes our responsibility, there is a point there, to be quite frank, there will be no turning back to the Tour de Role because it would effectively be dismantled through the larger companies who will no longer provide criminal lawyers for it. It will be reliant upon the setting up of that part of the law. So the guidelines that determine that are quite linked to it.

The Chief Minister:

I think I will hand over to Denis on that point obviously from the legal side.

Legal Adviser:

If I could just say, it is very clear in the law that you can reverse.

Deputy R.J. Ward:

It is clear in the law, but there were some questions earlier as to whether that would be possible?

Legal Adviser:

If it was happening it would then be a matter for those big firms or those which lacked any criminal capacity themselves to be able to meet the obligations that would be placed on them by the Tour de Role being revived. There will be many ways in which they could do that, including bringing in people, a legal aid department at short notice, including paying smaller firms in order to cover their obligations, which is what they often do at the moment, or fronting up and doing it themselves. The obligation would be on them to do it. Obviously, if there was to be a reversal it would be easier to do with a month or 2 of notice but if there was no criminal bar, for example, then that option would have to be used because there would be nothing else.

Deputy R.J. Ward:

It was just some question of the sustainability of it because there seemed to be a 3-year commitment but whether it would be financially viable to do it in the way that it is set up in terms of succession

planning for those who are involved, whether they would remain involved. At the moment there are 48 lawyers we believe who are committed to it. It is just a concern for us obviously looking into the future because this will have to go into the future in some considerable time.

Legal Adviser:

They set up the Public Law Children's Panel and the Public Law Children's Scheme some years ago and the way in which they did that originally did not work terribly well because essentially it was done by bidding and it incentivised under-bidding and it often pushed some of the better lawyers out of the process. When that dynamic was spotted this scheme was revised. Although the ultimate weapon for putting things back on an even keel is to avert to the Tour de Role, what should happen is that if there are problems with the working of the current scheme, such that the good lawyers are drifting off and are ceasing to have a sufficient critical mass of criminal lawyers to run legal aid then that should be seen and the scheme revised as it goes along, just as has happened with the Public Law Children's. There are many things a well-run legal aid scheme would hopefully do before you get to the ultimate crisis point.

Deputy S.M. Ahier:

If I could move on to Article 4(4) in the administration of the legal aid scheme where it says under the leeway guide: "The Judicial Greffier may, in exceptional circumstances, provide legal aid to any person where the interests of justice requires it." Now it has been brought to our attention that perhaps the Magistrate should be able to have the same power to appoint legal aid since she is on the spot and would the Chief Minister consider that as a possibility to be added into the draft law?

The Chief Minister:

I would like to go away and think about it. I am just wondering if there are any good reasons for why that should not be the case, if that makes sense.

Deputy S.M. Ahier:

It is our understanding that in past cases that there has been a provision for the Magistrate to do that, in exceptional circumstances, but it is not incorporated within the law.

Deputy R.J. Ward:

Like a flexibility that is built in.

The Chief Minister:

I get that point.

Legal Adviser:

I think what happens at the moment is that the courts will have a word with the bar in order to organise legal aid. The issue is a difficult issue. For example, in England and Wales, what they legislated for is absolute exclusivity of their legal aid scheme, so there was no provision whatsoever for the courts to try and supplement the scheme by exceptional appointment, making decisions themselves if someone should have legal aid or appointing an amicus who is really a representative of the lawyer concerned. So the difficulty that can arise is that if the courts have a general power to appoint legal aid you end up creating a parallel scheme with issues of resources at stake. There would be difficulties in just giving an open invitation to the courts to create a legal aid system of wherever they think it is just.

[14:15]

Once you produce like a 20, 30, 40, 50-page document giving legal aid, which will include a sort of human rights backstop on legal aid, and then to add another, and the courts when they really think it is right, that does raise issues which need to be thought through.

The Chief Minister:

Perhaps in terms of these circumstances that have been identified to you, what is being envisaged? I do take the point ...

Deputy S.M. Ahier:

There was a situation where somebody was possibly ... they decided to be a litigant in person and it turns out that they are not mentally capable or have some disability in some sense, and therefore the Magistrate realises this and she would have the opportunity to appoint a lawyer for them.

The Deputy of St. Mary:

It would be for the benefit of the court as well in a sense that no court time is being wasted.

The Chief Minister:

I understand that bit. I think that is something I want to go away and think because I do take the point that if you have 2 people making a decision you could end up with confusion. Do you want a mechanism to allow ... I do not know, presumably the court could defer matters and send it back to the Judicial Greffe because if you are saying you have got a litigant in person, that litigant in person has made that decision, have they not?

Deputy R.J. Ward:

I think the concern was ...

The Chief Minister:

So in a way you want a sub-routine essentially that takes you back into the Judicial Greffe process and the legal aid scheme as a whole. That is the consideration, is it not?

Legal Adviser:

If someone has not made an application for legal aid, let us say because they think they are the greatest litigant in person in the world, and there are people who have that sort of view, then you could envisage cases where maybe a trial could be stopped so that they are persuaded to go back but in the end, it is the individual's right to represent themselves if they choose to. In the case of someone who lacks the capacity to make the choice then there are other aspects of the legal system that are meant to protect people who lack capacity so that they will have somebody who is representing them generally. The question of capacity to represent yourself is something which should be internalised into the scheme so that if someone needs representation because, for example, they may have mental capacity but they do not have a physical capacity to talk properly, this would be impossible. These are things which have to be dealt with under the human rights aspect.

Deputy S.M. Ahier:

I think we are referring to people in a grey area. We are going to come to it later, but I will just touch on it. Because this scale of earnings to receive legal aid are low subsequently you may have somebody ... the idea was somebody who lives at home with their parents still but deciding they want to defend themselves, I think the scenario was, but it is clear that they cannot but would not qualify for legal aid but there would be some discretion with the Magistrate at the moment to say: "Actually, you do need somebody with you", particularly in simple cases, i.e. would become a court case which is much longer, which is unnecessary, that discretion goes with this system because it is entirely exclusive and it is not discretion. That is the message we got from the Law Society really, I believe.

Legal Adviser:

If I may say, Article 17(2)(a) means that there are regulations to allow for appeals in respect of legal aid decisions. A perfectly rational way of having an appeal in a legal aid position would be for it to be to the court that is dealing with the case itself. Regulations could provide so that if you have a Magistrates' Court case where somebody does not get legal aid, that the appeal is to the Magistrate. But again, the appeal would be applying the guidelines. So if your feeling is that the guidelines ought to deal with cases where individuals may be ...

Deputy S.M. Ahier:

Vulnerable adults.

Legal Adviser:

Deal with vulnerable adults but I think the guidelines would deal with people who are in those cases when completed. Those are things that need to go into the guidelines.

Deputy S.M. Ahier:

And made aware until they appear before the Magistrate.

Legal Adviser:

But if it is somebody who is of sound mind, of sufficient resources not to qualify for legal aid, but chooses unwisely to represent themselves then ...

Deputy S.M. Ahier:

Through incapacity.

Legal Adviser:

Well, if it is capacity ...

The Chief Minister:

Of his own capacity then not so much.

Legal Adviser:

... it is a different case. If they are incapacitated there is a social services, there is a mental health aspect to it, which needs to be dealt with. It probably needs to be dealt with separately from legal aid because there should be somebody making those decisions for them. But if they are of sound mind, if they are not somebody who needs representing in their general affairs and they choose not to have a lawyer even though they are with sufficient resources to pay for one, according to the rules of the scheme, then it is difficult to see on what basis the Magistrate could intervene to force a lawyer on them. Or perhaps the point is the Magistrate should be able to say: "Well, you are insisting on representing yourself because you refuse to pay. I think you should have a lawyer therefore you should have legal aid" would potentially drive a coach and horses through the scheme. It is a difficult issue.

Deputy R.J. Ward:

We understand. It was just a concern in that situation somebody would continue and perhaps not receive a fair trial because they simply cannot represent themselves. The costs are not small and the example given to us was a one-day case, which cost £30,000 in the end as the outcome.

Subsequently, if you are earning £35,001 then you will not receive a penny in legal aid. We are talking enormous figures. Just an example, I think.

The Chief Minister:

There are 2 or 3 issues coming in there, I think. So a couple of them I will try and address and one I will need to go away and think about. If there is incapacity, i.e. they are not of sound mind, shall we say, then from what Denis has been saying, that is covered. You have to be careful about having a dual system or something coming along. I get that point so again that is where ... it seems to me, this bit I do not know, it is whether you could put some provision in the scheme to cover it, but also just picking up on the thresholds in terms of the income side, do not forget that ... sorry, that is the present draft of the scheme that has been put forward by the Law Society, in essence. So that is where I would very much assume, and expect, that the committee, which is established under this law, which to me is a huge improvement, would then consider that and I would hope that they would consider any public representations they received. Do not forget, at the end of it, it has to go to consultation anyway. So at this stage, while those numbers are written down, they are not written in stone and it is very much for ... to be honest, I think, if I understand it, you are going to be looking at the scheme in detail as the next phase of work. Or at least I hope you are. I think it is at that point those issues come through because it is the detail of the scheme, not the detail of the present law. That is the way I picture it. The issue you raise on the basis of somebody of sound mind with means but potentially has made a wrong decision, shall we say. We have got 2 issues there. One is, that is their right versus can - and I do not know this bit - they be given some friendly advice which suggests that you might want to go and rethink the approach you are taking.

The Deputy of St. Mary:

Just to wind it up, the idea came from the Magistrate and felt it would be useful if she had that power or ability to ... not force someone but seriously persuade someone to take legal advice it might help the defendant and proceedings generally.

The Chief Minister:

But if it is the case of that person that decided not to, then does that mean there needs to be provision somewhere that you can then go away and apply or however it works, or is it you need to go away and get a lawyer in which case, depending where that income threshold falls, you need to pay for it. I think we need to give a bit of consideration around that side. Sorry, that is the first time it has been raised with me.

Deputy R.J. Ward:

We had an interesting point made by the Magistrate this morning, it is certainly something we look at the thresholds when you have the Magistrate who deals with it day in, day out, and sees these

real situations it becomes very obvious. Also, remember that these ... just while it is on my mind, these thresholds apply to civil and criminal law so both to the ... to put it simply, what the States would be paying for and what will continue to be paid for in the Tour de Role. It has been decreased from what exists now for civil law significantly.

The Chief Minister:

Or it is proposed.

Deputy R.J. Ward:

Proposed, yes.

The Chief Minister:

I think that is where we know there are some issues. There are a whole range of issues.

Deputy R.J. Ward:

To get full legal aid you have got to be under £15,000 a year for a household. Now that is very, very low.

The Chief Minister:

I think that is again, I keep going back to the point, that is where I would expect quite a lot of work to be taking place on those issues and that is one of the problems we had when initially this was lodged. That is why I chose effectively to split it because at least this gives us then the ability to put it on a statutory basis, which I think is important. But also then to have that kind of ... we can then focus on the scheme and we can have that because there are a whole range of areas that I think we do need to have a look at.

Deputy S.M. Ahier:

Since obviously the first draft - obviously this is a new draft - do you believe that the changes that have been made to the draft law are adequate? Because there have been some changes; do you think they are adequate?

The Chief Minister:

I think so. I am as reasonably comfortable as I can be, if that makes sense, as a non-lawyer. Obviously, that is where we get the advice on it. The fact that, and obviously you have had a bit of input in terms of we would increase the membership of the committee and things like that, I am pretty comfortable with that. I think it gives a fairly rounded approach to hopefully them getting some focus on the scheme when that comes through. So from the principles of the law, yes, until I get told otherwise by yourselves that there is some glaring omission.

Deputy S.M. Ahier:

Just while we are on the Advisory Committee, could you just clarify 6(3)(b): "The most senior officer of the Magistrates' Court or a person nominated by that officer." Who is the senior officer of the Magistrates' Court? Is that the Magistrate or is that the Court Greffier? Who is that?

Policy Principal:

It would be the Magistrates' Court Greffier.

The Chief Minister:

I was going to say it is definitely not the Magistrate.

Deputy S.M. Ahier:

It is the Court Greffier?

The Chief Minister:

Yes.

The Deputy of St. Mary:

We had the benefit of the Magistrate this morning and she raised a metaphorical eyebrow then and it may be that ought to be ... the Magistrate Greffier is the person she was thinking will be the person.

Policy Principal:

Yes.

The Deputy of St. Mary:

As we are back on the law, can we concentrate on the committee? As you say, Chief Minister, it has been changed slightly to get a better balance. There are bodies out there who think the balance is not quite as balanced as it might be, but there we are. As the 2 persons nominated by the Bailiff, he identified at a public hearing who he had in mind. Also 2 persons nominated by the Minister, that is yourself. Can we ask in general terms, without identifying any individuals, the sort of ... are you thinking in terms of individuals or representatives of societies, or what, as your representatives on the committee?

The Chief Minister:

We have been having some discussions around it so I think it is trying to find individuals with appropriate experience that might come through. So it is not going to be necessarily ... well, it depends, it is not necessarily going to be the legal equivalent of the representative from the I.o.D.

(Institute of Directors), for the sake of argument. I think it is trying to find people who will give a balance, ideally will have had some experience of this but are also renowned as well for having a reasonably independent mind, if that makes sense. So, in other words, would understand the position or have the ability to understand the position and will be of a suitably independent mind to contribute fully to the discussions, which will be of a technical nature at the end of the day, and that will be taking less. So there were 2 individuals we had in mind. I think one we may have to change our view on that, so I do not want to name anybody today.

The Deputy of St. Mary:

No, it was not to name, I just ...

The Chief Minister:

Because of the way the law is structured.

The Deputy of St. Mary:

For some reason, you might be thinking of a representative of the Consumers' Association or bodies like that who could put in a point of view from the consumer.

The Chief Minister:

Put it this way, it is in the deliberations but I have not made a decision.

The Deputy of St. Mary:

I mean it is relevant because if the other parties do not believe the balance is not in their favour that might help to know. There are 2 States Members as well ...

The Chief Minister:

That is 6(3)(h).

The Deputy of St. Mary:

I am looking at my previous version.

[14:30]

I presume you envisage that those States Members will be appointed by your good self?

The Chief Minister:

I do not think ... it will be the ... I am not entirely sure ... I have not worked through the process. I know there are some analogies for a lot of scenarios and it has just gone out of my mind.

Policy Principal:

It is 2 Members of the States nominated by the States.

The Chief Minister:

By the States?

Policy Principal:

Yes.

The Chief Minister:

I do not think it is going to be me proposing them, as far as I am aware. I think it is going to be done through the Greffe and whether that is P.P.C. (Privileges and Procedures Committee) or not, I do not think we have bottomed it out.

Policy Principal:

That is essentially a matter for the Assembly as to how the Assembly ...

The Deputy of St. Mary:

Okay, that is fine.

Policy Principal:

An option might be to follow a similar process for electing the members that you do for any members of the Policy Authority, by way of example. But that is really a matter for ...

The Chief Minister:

It is not meant to be me.

Deputy S.M. Ahier:

Do you believe there should be a representative from the Family Court among the Advisory Committee?

The Chief Minister:

We have not considered that particularly. What is the rationale?

Deputy S.M. Ahier:

It was suggested to us by the Magistrate.

The Chief Minister:

Obviously between you have got the 2 persons ... you know the identity of the 2 persons nominated by the Bailiff. I am open to consideration to understand the rationale. Again, that is the first time that has been mentioned to me.

Deputy S.M. Ahier:

It was only mentioned to us a couple of hours ago. I thought I would air her views.

Policy Principal:

I do not know if my memory serves me correctly but I think the Bailiff may have said that he considered a representative from the Family Court. But obviously ultimately did not choose one of those as his nominees.

The Chief Minister:

Just looking through because certainly the loss of the Magistrate I think is one of the individuals of the scheme - I am trying to find which bit it is in - the guidelines do go back to for formal consideration.

Policy Principal:

You consult with the Magistrate, which is in number 6(7)(a).

The Chief Minister:

Sorry, I was on the page above. Yes, 6(7)(a) is: "The Legal Aid Guidelines shall, before advising and assisting the Minister, consult the Bailiff and Magistrate."

Deputy S.M. Ahier:

Do you think they are getting a second bit of the cherry there; the Bailiff and the Magistrate?

The Chief Minister:

No, I do not think so because obviously the individuals on the committee are not directly those individuals, if that makes sense. So it is I think that final check to make sure the people are very much on the sharp end and will see it just in case there are any final observations that may come out. I think that is quite important.

Deputy R.J. Ward:

It also says "consult other persons as considered appropriate".

The Chief Minister:

Even if they are not in there you would I think automatically do it, so I think it is useful they are in there.

The Deputy of St. Mary:

Going back to States Members, are you anticipating their duties will be heavily involved with the financial qualifications for applying for legal aid or will we ask them to be put in as addition to protect the States and future demands on the States coffers, basically. We are asking: to what extent you anticipate those Members getting very involved in the benchmarks for being able to apply?

The Chief Minister:

I would hope all Members of the committee are as equally involved in the generating of the ... I keep saying "scheme", of the guidelines. In other words, the 2 Members of the States going in, which was your recommendation, which I agree with, they have to be prepared to roll up their sleeves and get involved. Now if they consider that to be a priority then that will be a focus for them. It is very much for them as members what their contribution is going to be. But it is not a sinecure, if that is the expression, it is going to require some work. It is a case obviously, it is that first set of guidelines that is going to be the time-consuming one, I suspect. Obviously, after that you are then into changes as they evolve.

The Deputy of St. Mary:

A very general question. Let us say you do accept that legal aid is a necessary part of any government services, is there a case for making the responsibility entirely the States?

The Chief Minister:

It is an interesting question because I suspect the Law Society will have one very definitive view, for example.

The Deputy of St. Mary:

I am not being a mouthpiece for the Law Society on this, I assure you.

The Chief Minister:

No, I accept that. But I accept there may be others who have different views. I think it is that balance. Jersey is a different place and that we have always had this tradition of honorary service. Obviously, part of that tradition has fallen on to members of the Law Society in terms of the provision of legal aid in its own place. It is going forward. It is obviously very appropriate to bring things into the 21st century but let us bear in mind (a) the impact on the taxpayer and (b) the traditions of the Island. I think one has to take all elements into consideration before we automatically assume that this state should be the provider of everything.

The Deputy of St. Mary:

Do you accept that the present system therefore has had its day, in a way, and that some change is necessary for modern society?

The Chief Minister:

Change is always necessary and therefore change in terms of how those guidelines work is one aspect. Does that mean it has had its day in terms of the legal profession no longer or having a different oath and things like that. That is a slightly wider discussion and I think that would be ... I think a number of people would regard it as a bit of a sad day because then it would mean that lawyers were only doing things for commercial benefit as opposed to benefit society.

The Deputy of St. Mary:

To some lawyers that is unfair because there is always going to be a pro bono element in this.

The Chief Minister:

I did not say I agreed with that. I just said that as a perspective.

The Deputy of St. Mary:

Okay. Again, one issue in the *J.E.P. (Jersey Evening Post)* this week had a medical service been withdrawn overnight on the grounds of financial resources, so what I am saying is every profession is looking to the financial side as well as civic duty, as it were.

The Chief Minister:

They absolutely do. But I do not think doctors charge themselves out at £400 an hour.

The Deputy of St. Mary:

Not all lawyers do either.

Policy Principal:

I think it is, to build on the ...

The Chief Minister:

What I am trying to say is I do not think one can compare the 2 professions necessarily.

The Deputy of St. Mary:

Some consultants might do.

Policy Principal:

Just to build on the important point the Chief Minister made about honorary service and the role that plays in the Island. Having been involved in this process almost from the beginning, I mean there has never been a sense from the Law Society that they are not willing to do their part. I think the term often used is “partnership approach” and they perceive some unfairness, which we have tried to deal with, but there has been no sense that they are looking to walk away entirely and not do their bit in terms of honorary service, which is reflected in what is in front of us at the moment. I think that is an important point.

The Deputy of St. Mary:

I think it is good to have recorded that.

The Chief Minister:

I think it is good, for the record, as it were, to pay tribute to what lawyers and the legal profession does do for the Island and in terms of the honorary services that they do provide. That should be very clear.

Deputy S.M. Ahier:

Is the funding of legal aid ultimately a duty of the public, the courts or the legal profession?

The Chief Minister:

I think ultimately it comes down to a blend. That is still really what we are trying to achieve, as a result of this.

Deputy S.M. Ahier:

But with the changes envisaged, how much do you think that the final cost will be putting criminal law on a statutory basis? Have you any concept of the figures?

The Chief Minister:

I was going to say there were some figures some time ago. I will hand over to David on that point, but it very much does depend what the ultimate scheme comes out at. That is the issue. I think as again, I would hope therefore, as we have kind of touched on, that when that committee come together to put the guidelines together that should be something that will be in their deliberations as to what that right balance is.

Deputy R.J. Ward:

When we spoke to the Law Society, just to say we have had figures from them, to deliver the Tour de Role was £7 million a year. If you take that they will keep the civil part and the criminal part will

come to the cost of the taxpayer, if you half it you are talking £3.5 million. It is really difficult for us to get our head around the figures because there is a figure of £400,000 being put aside for the legal aid office but it seems that that is considered ... that part of that is for the legal aid office and part is a contribution. So you will need to recycle the money from the limiting of how much is paid for acquitted cases. Will there be enough money there to do that?

The Deputy of St. Mary:

And have you made an allocation of funds for this year if this all goes through, and for next year?

The Chief Minister:

Bearing in mind the present ... effectively the present scheme will continue for a further chunk of this year so the impact on this year is relatively small. I will hand over to ... who wants to come in? I can see both of them are wanting to leap in. But the monetary amount, as I said, does come down to what the fundamentals of that scheme end up as. Then ultimately it touches into the other aspect, which is the 1961 law, I think it is, which is the Costs of Criminal Cases. At that point I hand over to ... who would like to go first?

Policy Principal:

I am happy to go first.

The Chief Minister:

Then Denis can follow up.

Policy Principal:

On the £400,000 additional funding, that is not exclusively for the centralised legal aid office. There is £71,000 that the Judicial Greffier already puts into the legal aid office, but to make it an enhanced centralised legal aid office it would be about an extra £200,000; the exact figure escapes my mind. The rest of that £400,000 is to publicly fund the duty lawyer and duty advocate schemes at the police station and the Magistrates' Court. That is the £400,000. It is not just for the legal aid office. The previous Judicial Greffier then did some calculations I think based on the last 5 years - I think it was from 2012 to 2017 - of the use of his court case costs budget. Based on a fixed fee criminal legal aid scheme he estimated, and he told us he used fairly conservative estimates, that you can recycle that money and that could fund a fixed fee criminal legal aid scheme. My mind has gone blank. That would fund the criminal legal aid scheme ... sorry, back on track. Provided that you capped the costs that acquitted defendants could claim at the legal aid rate. On that basis, he thought that broadly the money worked. There is another debate as to whether that is something that is desirable or not.

Deputy R.J. Ward:

There are a couple of things that come from that.

The Chief Minister:

I was going to say, there is a live discussion, shall we say, around some of that, and I think we were following that up about 3 weeks ago in my office because that takes you into some other parameters which we might want to address shortly, but do you want to comment on the overall?

Deputy R.J. Ward:

Can we just have a figure on the amount of money that is there then?

Policy Principal:

In the ...

Deputy R.J. Ward:

That would be recycled.

Policy Principal:

... court case costs budget; I have got a figure in my mind.

The Chief Minister:

I have got one in my mind as well.

Policy Principal:

Dennis, do you know what it is?

Legal Adviser:

Not off the top of my head but it is probably the same sort of figure, which is about ... it was going to end up costing about £600,000 for the Magistrates or something. But the savings were largely in the Royal Court area by introducing fixed costs as opposed to fairly open-ended costs for acquitted defendants, most of whom would be on legal aid but instead of getting paid the fixed rates there, which are designed to be roughly £165 per hour, of a fixed amount of hours that you estimate that you would work, I suppose potentially a greater amount of hours and greater fees.

Deputy R.J. Ward:

I understand the rate, I just wondered what the figure is.

Legal Adviser:

If you are worried about how it worked in relation to the £7 million, I am not entirely clear on the methodology of that. But it seems ...

Deputy R.J. Ward:

Neither were we.

Legal Adviser:

It seems to largely assume that the hours done on legal aid are hours that would have been done on fee-earner work at full commercial rates. For some people, that might very well be the case but that does seem to be an assumption. For some people, what they would earn is £165 an hour would be quite good.

Deputy R.J. Ward:

I absolutely understand that.

Legal Adviser:

And people on £500 an hour probably would not do any work.

Deputy R.J. Ward:

This is why it is so important, I think, that we have a figure on that.

[14:45]

So we know what we spend because if there is a fixed-fee system then we know what is being spent each year by the States. If that does not happen because this is, dare I use the phrase “a recurring commitment by the States” we need to know how much that recurring commitment is. We know that is a big issue for the States. So we would need to know how much that is.

The Chief Minister:

Let us put it this way. There is another discussion around this as well, which is ... I might as well raise it because I am sure you are going to raise it at some point. That is why I do not want to get too close to the details of the scheme because I think that is where it is an output of the scheme, if that make sense, which is at what point, if you are found innocent or not guilty, should you not be penalised, for want of a better expression. Obviously without going into any details, I am sure the panel members will be aware, I can think of some instances very, very recently where somebody was brought, I think, under criminal law, if I remember correctly, but in that instance the case did not proceed but they ended up carrying a legal bill. So what you do not want to do ... so the debate that is going on, and is still a live debate, is if you are found innocent/not guilty, depending which

phraseology you want to use, in my view you should not be financially penalised as a result of that. The balance of course is that if you are an incredibly wealthy individual and had brought in a team of 5 lawyers to demonstrate your innocence, is it reasonable for the taxpayer to pay for 4 of those lawyers when one of those lawyers might have done, say. The question is then: at what point does innocent until proven guilty mean ... I am sorry, does innocent and found not guilty mean that you can throw everything at it, at the cost of the taxpayer? That is the debate.

The Deputy of St. Mary:

That is ongoing?

The Chief Minister:

That is definitely ongoing because it ties into thresholds, where does that put ... let us use the somewhat nebulous phrase of “middle Jersey” and we have all got to look at the position of what would we do if we were brought to court and carry the costs.

Deputy R.J. Ward:

There is some argument that these thresholds here are not even middle Jersey and they are below middle Jersey, and that is ...

The Chief Minister:

No, but that is why I am using that as an example.

Deputy R.J. Ward:

It affects a large proportion; you are absolutely right.

The Chief Minister:

That then determines obviously what the financial impact is later on. That is what I am saying; we have to understand what the scheme is. I must admit I also raised a metaphoric eyebrow at the £7 million because that is not ... I think Denis has attributed it correctly. If that is full charge-out rate then that is not necessarily the cost that would be incurred by doing it under the measures that are being talked about. If you want something a bit more precise, I think the Judicial Greffier might be the right person, and we can get something in writing to you.

Deputy S.M. Ahier:

On the payment of costs, because in the Criminal Cases Law 1961, revised 2006. It says: “If acquitted the court order the payment of public funds to the costs of the defence.” So, are we saying that we will have to amend the 2006 revised law to incorporate this law?

The Chief Minister:

Yes.

Deputy R.J. Ward:

It will initially be legal aid loans.

Legal Adviser:

There are amendments to those provisions which we are going through, which will go to great detail as to the approach that the court should make but what is retained is Article 6 of that law, which allows for regulations to set out rate scales and conditions.

Deputy R.J. Ward:

Taxation.

Legal Adviser:

Well, for example ...

Deputy R.J. Ward:

Is that the taxation process that the director ...

Legal Adviser:

They are going to be getting rid of detailed taxation and having a summary assessment of criminal costs. But just to think of a sort of 1990s reference about what is reasonable costs. If you were in America it would always be reasonable to hire Johnnie Cochran if you were accused of a crime. The question that we are dealing with on this side of the table is if you make that choice, does it then become reasonable, if you get acquitted, for the public funds to pick up the cost of that choice, or should the public funds say: "Well, you can get a good lawyer definitely for such an amount of money even if you are not on legal aid and so people cannot be made to represent you, therefore we are not going to pay the rates of the absolute elite of the profession because you are choosing, reasonably, to have the elite plus their other supporting lawyers." That is what we are wrestling with at the moment; is the difference between what is perhaps reasonable as your choice of representative and reasonable in terms of putting the bill to the public funds.

Deputy R.J. Ward:

Yes. So to some extent there has always been a 2-tier system whether you find an expensive lawyer or not. What we are doing effectively is formalising that.

Legal Adviser:

I do not think that we are formalising it because at the moment the formal system means that if you are accused and you are on legal aid you will get a lawyer assigned to you by legal aid and if you are not on legal aid and you have got lots of money you can get the equivalent of choosing Cochran. If you are not on legal aid and in the middle then you have to do it as you can.

The Chief Minister:

Again, I am not being trite about it because it is quite a fundamental one, this one, and that is where, again, we would welcome the views that you come with because it is at what ... should it be blanket? In other words can justice be means tested effectively, or is there a tipping point when it says: "No, that is beyond being reasonable." As I said, that is a debate we are going to have to have. It is not directly relevant for the law. That is why, do you accept, I have made this split because we can get an enabling law in, we can get the statutory basis and then that means the debate around the scheme and the interaction of that scheme and, this is a fundamental part, we can then focus on that and say: "Right, that is where you are going."

Deputy R.J. Ward:

The only relevance being that it relies on the criminal bar that has been so successful to have those quality lawyers available for criminal cases for the legal aid scheme, which is set up from the law because once the law is set up for criminal aid it is put separately to start the ball rolling or something. So there is an inextricable link there.

The Chief Minister:

There is a consequence but on the other hand if we do not have a scheme on a statutory basis then I think that consequence comes anyway and you end up with ...

Deputy R.J. Ward:

We also have a human rights requirement.

The Chief Minister:

So there is a whole issue that comes through if you do not put the law in place, that then the legal aid scheme in some shape or form basically falters. So, this law then means that there will be a legal aid scheme and there is a precedence for establishing it. There is a process that gets followed and then there is a transparency bit and there is a consultation bit, which is under statute. So, I am really trying to be quite clear that that is why I have made the distinction between get the law in because these issues do have to be resolved. In my view, they do not have to be resolved today for the law, they do have to be resolved for the scheme, for the guidelines.

Deputy R.J. Ward:

Just contact.

The Chief Minister:

That is a fair comment.

Legal Adviser:

Can I just say, because you said about the human rights obligation; just to be clear, the human rights obligation is that the system should provide fair trials and representation on criminal matters is an important part of that under Article 5. There is no human rights obligation as to how that is achieved so it does not have to be done through public funding, it does not have to be done through a statutory scheme. It is necessary for the States, as a whole, to be presiding over a system where it is achieved, which is achieved at the moment. But we do have to be mindful of the human rights obligations in creating a statutory scheme, if you follow.

The Deputy of St. Mary:

Just going on to Rob's point really, and you have repeated it, that as you see it this is an enabling law but it is a conundrum in a way. That is an ongoing discussion and you see it very much as that. I think our responsibility in our report is to highlight where these conundra are, if that is a word.

The Chief Minister:

Yes, but I think hopefully I am very clear we recognise that. What I am trying to treat it as is that is the next phase of work because otherwise if it interferes on phase 1 and delays it further, shall we say, we do not know if perhaps harder consequences come out on, which then you do not have necessarily a statutory basis behind you and that kind of depends on your view.

Deputy S.M. Ahier:

While we are concentrating on the actual law in Article 7(2): "Without prejudice to the generality of paragraph (1) the legal aid guidelines may be readily applied." How do you interpret "may" in that?

The Chief Minister:

Well, basically this is outlining what the legal aid scheme may or might include, could include, but it is not prescriptive. So it is not exclusive.

Deputy S.M. Ahier:

So none of the following Articles ...

The Chief Minister:

That is the way I would interpret it.

Policy Principal:

It is not inclusive or exclusive.

The Chief Minister:

No, this is indicative so no doubt I presume the committee will look at these but it is not only this and it does not have to be this.

Legal Adviser:

Some things are effectively necessary because it would be very hard to imagine you can design a scheme without them. But some things, for example, like having something where the advocates provide it pro bono and other parts where it is paid via public funds, that sort of division is one which you would not necessarily have to have in a scheme in 10, 20, 30 years' time. So, this basically provides all the tools to put together a scheme. Whether you need a Phillips screwdriver to put together your house. It is good to have one at hand. That is essentially what this is doing. In a way, you could have, as I think is in the Matrimonial Causes Law, you could just have the "you may do it"; a general "you may do what is just provision" and then not itemise it. But once you start itemising it, which is useful because it points people to the way of how it is going to be done and, more importantly, makes it clear that you will have providers to do things, which is particularly important when you are going to be requiring lawyers to positively have obligations under the scheme. Once you start adding those particular parts in you do not have to put in everything.

Deputy R.J. Ward:

Sorry, I do not know whether to ask it now or just wait. Do you think inevitably civil law will come under our jurisdiction as well?

Legal Adviser:

Not inevitably.

Policy Principal:

I do not think it is inevitable.

The Chief Minister:

No, and I think also, I go back to one of my earlier remarks, if you have got to make it in the, what I call the blend. It is that provision between, given from where we start, which is that the legal profession has always performed this honorary thing and partially it is in recognition of the position of advocates, for example, vis-à-vis the Royal Courts and their sole ability to be in front of it. So, as I understand matters, we will make it. You know, there is a trade-off in that and I think that has

always been what that recognition is. Now, I am not going to try and predict where we are in 30 years' time or 10 years' time but there will be that balance as well then between the honorary service side and then the issue on the advocate versus justice.

Deputy S.M. Ahier:

This was not all funding. Were other methods of funding considered when we considered this draft law such as a tax on large law firms?

The Chief Minister:

It is on the counter and I will refrain from making any jokes about lawyers. But no, I think the point is that I am focusing on the law and I am focusing on is it an enabling law, and given that it is, trying to get the statutory side in place. How we fund things in the future I think is very much a matter for that discussion once we know those kinds of quantum and once we have had that debate around the fundamental issue of if you are found not guilty what the consequences are.

The Deputy of St. Mary:

On a similar theme in a way, we have a question here about the lawyers who do provide legal aid, whether or not they are the best remunerated lawyers around. Do you envisage obviously that their fees will increase and the gap between legal aid lawyers and the private sector where there are some big sums to be earned are ... I am asking: do you see there being an inevitable drive for legal aid lawyers to be paid more?

The Chief Minister:

I have to say I have not particularly considered that aspect. I do not know if that was in the deliberations before my time.

Legal Adviser:

At the moment, it depends what you mean by legal aid lawyer because if you are talking about someone who is employed by a big firm to carry out the legal aid burden on the fee earning members of that firm, then often they would be very low paid in terms of being a lawyer. If you mean those who work in private practice themselves and might have a small firm, and they take the burden off the big firms so are paid to do the work, then I suppose they charge a commercial rate to take that work off.

[15:00]

I do not know what their overall billing would be or profits will be for the year but if you are doing that sort of working and making a living out of it then that is their aim as a small practice.

The Chief Minister:

There are certainly some firms which specialise in it.

Legal Adviser:

There is a market for it and the rate, we would have to assume, is set by the market. In terms of, I suppose here you are saying well, you are paying £165 an hour effectively, that is what is estimated for the public or legal aid work, would there be pressure to increase that. To which the answer is, there would be if you are finding it hard to get people to do the job properly at that rate. It may be that in actual fact there are a lot of lawyers willing to do it, particularly young lawyers who might be able to get a good stream of work and practice in the courts when they are young. We do not know quite how this is going to work out. Suffice it to say that in the U.K. (United Kingdom) the rates are much lower and there still are sufficient lawyers to cover the work, I think, and certainly there would be more than enough lawyers to cover the work that are offering anything like the rates under this scheme.

The Deputy of St. Mary:

It does sound, at the moment, as though the large firms who have commitments and obligations under the 12-year old scheme, they pass them on to the small firm who would charge a reasonable rate. Now, under the new scheme the major law firms maybe would not have to be involved in that at all. So the guaranteed income which a small practice might have had from a bigger firm is not going to be there anymore.

Legal Adviser:

Well, what would still happen is the civil work, I imagine, would be farmed out just the same, and the criminal work, if that firm is made up of criminal practitioners, should then become accredited as criminal practitioners in the scheme, if it works anything like how it is planned, and would then be getting work directly from the legal aid scheme because they will come up as being the lawyers and their turn will come. So, it should be just a different route for the work to come to them.

The Chief Minister:

I think, again, it is also a matter, again, of we are down to the details of the guidelines and the scheme ultimately.

Deputy R.J. Ward:

I suggest ...

The Deputy of St. Mary:

I appreciate there are difficulties. On that, are you - you made an earlier remark - anticipating that the further details agreed as between the guidelines will come up for Scrutiny?

The Chief Minister:

Yes.

The Deputy of St. Mary:

You do not see this law as giving full power to the body then constituting that is what they want?

The Chief Minister:

No because 7(4), I think it is: "In preparing the new guidelines the Minister shall publish the Minister's proposals and seek representation from the public." I would have thought any Minister of sound mind, at the very least, would include the Scrutiny Panel in that consultation process. Particularly when you have then got the fact that I have got to lay under 7(7), is that correct?

Policy Principal:

Yes.

The Chief Minister:

Yes. "If the Minister makes legal aid guidelines before publishing the Minister shall lay the legal aid guidelines before the States" and essentially there is a 4-week ...

The Deputy of St. Mary:

We might be responsible.

The Chief Minister:

Exactly. So I am sure that was in your consideration at the time, which basically means that if the Chief Minister of the day, and if it is me, did that and had there been no discussions with the Scrutiny Panel I would rather suspect that it then says a Member of the States could lodge a proposition requesting the States to review it. So I think ...

The Deputy of St. Mary:

It suits the panel quite well, I think.

The Chief Minister:

I think it does, it comes to you and I suspect there will be a lot of discussion around the timeframe.

The Deputy of St. Mary:

I think one of our concerns might well have been that we want to make sure everything was flagged now.

The Chief Minister:

So for the record, yes, I would expect it would be coming to you once we have got them into a relatively final form, hopefully involving in the early stages, that is very much down to how we discuss matters, to go through it.

Deputy S.M. Ahier:

But also on Article 7(11): “The Minister may, at any time, revoke any legal aid guidelines published under this Article.”

The Chief Minister:

Yes.

Deputy S.M. Ahier:

Does that give the Minister slightly too much power?

The Chief Minister:

I think the point is that then the idea is it goes down to a default, which you then revert back to the previous version, as I understand matters.

Deputy R.J. Ward:

Sorry, there was something came up on what you were saying; would you also publish your reasoning for that?

The Chief Minister:

Yes, I think you would have to.

Deputy R.J. Ward:

Would that need to be in the law or would that just be an expectation?

The Chief Minister:

Oh, I see.

Deputy R.J. Ward:

That was just a question we wondered about whether it should be in the law.

The Chief Minister:

I would have no objections to putting that into the law. The comment I was going to say, but bearing in mind our timing, not less in terms of timing of amendments, I was wondering - and Dennis would probably be the one - there has obviously got to be an order produced that is around the publishing of guidelines. I do not know if that order could cover process for revoking and could then make a reference in there. Or alternatively you get an assurance that yes, I certainly think it would be very logical that I would be publishing any decisions to revoke something.

Policy Principal:

Yes, I think the intention at the time of 7(11) was that if the Minister, in this case the Chief Minister, lays some guidelines before the States and it becomes very clear that the States are not happy with the guidelines currently, that is not a desirable position but hopefully the work beforehand means you do not get there. But if you do, what is the point of wasting everybody's time in having a proposition to revoke, waiting 6 weeks for that proposition when it is clear the States are going to turn them down and it just gives the Chief Minister an opportunity to say: "Right, okay, these are withdrawn. We will deal with these concerns that have been raised." That was the policy intention behind that.

Legal Adviser:

I think it is still a provision that comes from trying to analyse every detail in a process and you add something in to deal with a particular issue and then you start thinking about, but what about this issue that flows from it comes up in a later meeting. Perhaps it might have been better to have left it to common sense beforehand. There has obviously somehow been ... if somebody publishes something that they can withdraw it. But if that can be done more felicitously then we will be happy.

Deputy S.M. Ahier:

The time is running out. Do you think the public understanding of the changes that are intended to be made under the Draft Access to Justice Law ... what efforts have you undertaken to explain this to the general public?

The Chief Minister:

I have not to date. Obviously, I go back to the point, I think the fundamental changes are going to be at the guidelines territory and I think at that point, in terms of the consultation side, that will have to go through quite a careful process. In terms of this, there has not been huge amounts of consultation in my time but I do not know what was done previously.

Policy Principal:

Previously when the Access to Justice review experts ...

The Chief Minister:

Sorry, I should have said public consultation because obviously there have been exchanges with the Law Society and other stakeholders.

Policy Principal:

The scheme that is included in the draft law, the work to develop that scheme and get to that scheme, is through the expert group. At the time when the group came up with this scheme, there was a public consultation undertaken jointly by the Law Society, the Citizen's Advice Jersey and the Consumer Council and they worked quite hard to promote consultation, to get responses, to get people interested. They had, I think, it was 17 responses.

Deputy R.J. Ward:

Yes, I was going to say we remember that at that time there were not many responses.

Policy Principal:

It was low and so that is what took place in terms of public consultation on this. Obviously, the draft law is public. I cannot say that the Government has done anything particularly to promote the existence of the draft law, it is in the public domain. I know that you are doing your review now, we were always conscious that you were going to do your review and a public consultation. I hope I am not speaking out of turn, you have had some responses to your consultation but it is challenging, and I suppose it is challenging because people probably do not think that they will need legal aid really. You would not plan to get yourself into a position where you would require it. So it is tough. But that is what happen.

The Chief Minister:

Most people would not necessarily consider themselves affected by this until something happens.

Deputy R.J. Ward:

Sorry, one tiny thing about the accreditation scheme for the criminal bar. There was some suggestion that training needs to be looked at carefully and it could be as little as 2 days of training.

The Chief Minister:

I cannot speak for that.

Deputy R.J. Ward:

But I wonder whether that is something to look at in the future in order to have a check and balance on the quality of that, seeing as it is going to be so essential that that works for the scheme to work.

Policy Principal:

No problem at all. My understanding is that the accreditation is going to be undertaken externally, I think.

Deputy R.J. Ward:

Yes, that was mentioned.

Policy Principal:

I think somebody from the Ministry of Justice is going to do the accreditation but it is worth looking into.

Deputy R.J. Ward:

We may have expressed some of that. Fair enough.

Legal Adviser:

Is it not more about finding out whether somebody is already good rather than teaching them how to be good?

Deputy R.J. Ward:

I think it is more about the ongoing support mentoring. If the main criminal lawyers are not going to be involved who is going to mentor?

The Deputy of St. Mary:

Yes, so newly qualified advocates, if they need some mentoring maybe to ... but that is probably for the Law Society to sort out.

Deputy S.M. Ahier:

Are there any other comments you would like to make, Chief Minister?

The Chief Minister:

No. I think if I can say 2 things. One is sort of just to emphasise the point it is very much regarded as an enabling law and that is why I have made that split between the law, getting things on to a statutory basis, getting a greater transparency and then dealing with the issues that arise out of the scheme as a separate phase essentially because I think that is important. I think that is when we are going to get down to some quite fundamental discussions, which we are going to have to have. I welcome early feedback on that because I think that is going to be very critically important. The other one is just purely I do not have to ... I think this is my last time for interview at least before the

debate. It is just to thank you for your approach on this because I think it has been highly constructive. I will await the outcome of the report mind you, but thank you because we knew it was a hugely technical area and it is really worthwhile people going through it carefully just to watch out for the consequences. I hope we have accommodated you on the changes that have gone through the earlier drafts and if that is the way we can continue to work that would be great. Thank you.

Deputy S.M. Ahier:

Thank you for your appearance today, Chief Minister. I'll call the meeting to a close. Thank you very much.

[15:12]