

# JERSEY LAW COMMISSION



TOPIC REPORT

## **IMPROVING ADMINISTRATIVE REDRESS IN JERSEY**

The Jersey Law Commission is an independent body appointed by the States Assembly to identify and examine aspects of Jersey law with a view to their development and reform. This includes in particular: the elimination of anomalies; the repeal of obsolete and unnecessary enactments; the reductions of the number of separate enactments; and generally, the simplification and modernisation of the law.

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## GLOSSARY OF TERMS

Accountability	A constitutional principle requiring that a person (for example, a Minister) exercising power over others routinely explain and justify conduct and decisions (“explanatory accountability”) and be held responsible for errors and failings.
Administrative decisions	Determinations about individuals taken by Ministers, Connétables, civil servants and other holders of public office exercising legal powers conferred on them by law.
Administrative redress	Any process that a person may be able to use to challenge an administrative decision, for example, making a complaint, appealing to a tribunal, making an application for judicial review to the Royal Court, or using ADR.
Administrative justice	An umbrella term describing the whole system from making administrative decisions to administrative redress, and the values unpinning the system (for example, fairness).
Administrative Justice (Jersey) Law	The name we give to the piece of legislation we envisage being used to turn many of our recommendations into law.
Alternative dispute resolution (ADR)	Techniques that may be used to help parties resolve a dispute without a formal hearing by a tribunal, Royal Court, or the States of Jersey Complaints Panel.
(Right of) appeal	A person has a right of appeal, when a law permits a person to start legal proceedings within a specified time to challenge the correctness of an administrative decision by going to a tribunal or to the Royal Court. Where a tribunal hears an appeal, there is normally a further right of appeal (a “second appeal”) to the Royal Court.
Appointments process	The criteria and procedures used to select office-holders to serve as members of the States of Jersey Complaints Panel, tribunals, courts and other positions of authority.
Bailiff	The head of the judiciary in Jersey and the principal judge of the Royal Court. The Bailiff also has a “dual role” as the presiding officer of the States Assembly, though since 2000 there have been recommendations that this should cease.
Chief Minister	The head of the Government of Jersey appointed under Article 19 of the States of Jersey Law 2005. The Chief Minister has specific ministerial responsibility for justice policy and providing resources to the justice system, including responsibility for safeguarding human rights and for strengthening democracy (P92/2013).
(Jersey) Citizens’ Advice Bureau	A charity providing independent, confidential and impartial advice service in Jersey. Core funding is provided by the Government of Jersey. In 2016, over 11,000 clients made

	contact with CAB. The largest single issue about which clients sought advice in 2016 was Income Support.
Clothier report	The report, published in 2000, by the Review Panel on the Machinery of Government in Jersey, chaired by Sir Cecil Clothier QC. This made far-reaching recommendations, including the introduction of ministerial government. Some recommendations have not been implemented, including ending the dual rôle of the Bailiff and the creation of a public services Ombudsman.
Complaint	An “expression of dissatisfaction” by a person, which requires a response from a public body.
(States of Jersey) Complaints Panel	Originally established by the States Assembly in 1979, the Panel appointed by the States Assembly enquires into complaints made by people about Ministers’ decisions. It conducts hearings and makes non-binding recommendations to Ministers.
Connétable (or Constable)	Each of the Island’s 12 Parishes is headed by a Connétable, an elected public office with responsibility for some types of administrative decision-making. The 12 Connétables are by virtue of their office members of the States Assembly.
Constitutional principles	Guiding values in Jersey’s unwritten constitution, including accountability, the Rule of Law, and judicial independence.
Customary law	A source of obligations and rights in Jersey law flowing from the Island’s legal heritage as part of the Duchy of Normandy until 1204.
European Convention on Human Rights (ECHR)	An international law protecting human rights, in force since 1958, that applies across 48 countries in Europe. The ECHR was made part of Island law by the Human Rights (Jersey) Law 2000.
Government of Jersey	The term “Government of Jersey” was first used in legislation approved by the States Assembly in 2012 and was adopted by the Council of Ministers in July 2014 to refer to all-Island executive government.
Grievances	A non-technical umbrella term for complaints and legal disagreements.
Human rights	Fundamental liberties or entitlements benefiting everybody, which are protected by Island and international law, including for example the right to a fair trial and freedom of expression. Many human rights have legal protection under the European Convention of Human Rights and the Human Rights (Jersey) Law 2000.
Human Rights (Jersey) Law 2000	A Law passed by the States Assembly to incorporate rights contained in the European Convention of Human Rights into

	Island law. It is closely modelled on the UK's Human Rights Act 1998.
Income Support	Launched in 2008, Income Support is a non-contributory, means tested welfare benefit for low income households in Jersey funded from general tax revenues. From 1 October 2017, the weekly rate is £94.85 to cover adult personal costs; a person may be eligible for additional components related to accommodation, medical and disability needs, and child care. In 2016, support of £72m was provided to 5,951 households. Income Support replaced benefits previously paid by various Departments and the Parish Welfare system.
Internal complaints process	The procedure that a public body has for dealing with complaints.
Judicial and Legal Services Commission	In July 2017, the Department for Community and Constitutional Affairs published a consultation report proposing the creation of a body called the Judicial and Legal Services Commission; its functions include appointing judges.
Judicial independence	The constitutional principle that judges (sitting in tribunals and courts) should operate – and be seen to operate – at arms' length from the Government and parliament (States Assembly).
Judicial Greffe	Headed by the Judicial Greffier, this public body provides administrative support for the running of courts and tribunals in the Island.
Jurats	The 12 members of the Royal Court who are judges of fact in trials; the Bailiff, Deputy Bailiff or other legally-qualified presiding judge of the Royal Court is the judge on questions of law. Jurats are appointed by an electoral college and hold office until retirement at 72. Jurats hear applications for judicial review and administrative appeals to the Royal Court.
Judicial review	The procedure in the Royal Court of Jersey by which a person can question the legality of an administrative decision (Royal Court Rules, Part 16). The grounds on which review can be sought include "illegality", "irrationality", and "procedural impropriety". Judicial review cannot normally be used if there is a right of appeal against an administrative decision.
Judgment	The written reasons given by a tribunal or court at the conclusion of a hearing explaining the outcome and reasons for it.
Jurisdiction	A legal term used to describe the remit of a tribunal or court to hear different kinds of cases.
Mediation	A form of ADR in which the mediator (a neutral third party) helps parties in a dispute to reach an acceptable outcome. Mediation normally takes place in private.

Ministers/ ministerial government	Since 2006, Jersey has had a system of Ministerial government. Ministers are elected members of the States Assembly on whom legal powers are conferred to develop policy and carry out public administration (supported by civil servants).
Ombudsman	A public office-holder independent of government who has power to investigate people's complaints and make recommendations to government about rectifying injustices caused by maladministration.
Parish	Jersey is divided into 12 Parishes, which have ancient boundaries. A Parish is headed by a Connétable and decisions are also made by the Assemblée Paroissiale (Parish Assembly).
Projet de loi	A proposal for a new Law, typically made by a Minister, which is debated by the States Assembly before receiving Royal Assent and being registered in the Royal Court.
Public bodies (or public authorities)	The different office-holders and organisations authorised by Laws to make administrative decisions.
Public administration	A general description for the whole system of making administrative decisions.
Rule of Law	A constitutional principle requiring people exercising power to do so in accordance with legal rules (for example, those set out in a Law passed by the States Assembly) and broader legal principles recognised in Jersey's unwritten constitution.
Rights of audience	The legal rules about who is permitted to represent a person appearing in a tribunal or court.
Royal Court of Jersey	The Island's principal court, operating under the Royal Court (Jersey) Law 1948 and the Royal Court Rules 2004.
Scrutiny panel	A committee of the States Assembly responsible for inquiring into an area of Government administration, policy, or legislation established under the Standing Orders of the States, Order 135.
Social Security and Health Insurance	A compulsory insurance scheme funded by employer and employee contributions and general tax revenues. The scheme provides old age pensions, maternity allowances, death grants, subsidies for GP consultation fees, and medical prescriptions. The introduction of "insular insurance" in 1950 was politically controversial.
States Employment Board	The SEB is the employer of all public employees in Jersey. It is chaired by the Chief Minister, two other Ministers or Assistant Members and two further members of the States Assembly who are not Ministers.

States Greffe	The Greffier of the States, Deputy Greffier and Assistant Greffiers provide advice and support to members of the States Assembly.
States of Jersey (or States Assembly)	The official name for the States Assembly, the Island's parliament. Its elected members consist of 8 Senators, 12 Connétables and 29 Deputies. Ministers are held to account through questions, debates and the work of scrutiny panels.
Tribunal (administrative appeals tribunal).	A judicial body established by a Law to hear appeals against administrative decisions.
Tribunal members	The people appointed to serve on a tribunal. Typically, cases are heard by three members. Members may be legally qualified, expert (e.g. medical practitioners), or lay people.
Tribunal Service	A section of the Judicial Greffe currently responsible for supporting the work of some administrative appeals tribunals (and the Jersey Employment and Discrimination Tribunal).
User perspective	The guiding principle that in designing and operating public services and administrative redress systems, public bodies should prioritise the interests and needs of citizens (rather than administrative convenience or tradition). The system should be as user friendly as possible.

## SUMMARY OF REPORT

In this report, the Jersey Law Commission makes a series of recommendations (see **Annex A: List of Recommendations**) designed to modernise how individuals and businesses aggrieved by administrative decisions can question whether a public body's decision is correctly made and lawful. The recommendations will now be considered by the Government of Jersey and the States Assembly.

**Chapter 1** provides an outline of the project. We say that Jersey's administrative justice system should become less complicated and more focused on the needs of people using the procedures. It is important that institutions and processes operate a satisfactory legal and constitutional footings. There should be better coordination of the different parts of the system and data should be collected to measure how well it is working.

**Chapter 2 focuses on overarching issues** in Jersey's administrative justice system. We recommend that the Chief Minister should issue guidance to public bodies about internal procedures for handling complaints fairly and effectively. The Chief Minister should also make an annual report to the States Assembly providing an overview how the system is performing, which should be scrutinised. The largest category of internal complaints is those relating to health and social services, which calls for further study. We recommend that there should be a general right to "good administration" in Jersey law, including a right to request reasons for decisions.

**Chapter 3 considers administrative appeals tribunals.** We recommend that eight existing tribunals should be merged into a single new tribunal, to be called the Jersey Administrative Appeals Tribunal (JAAT). Five rights of appeal that currently go to Ministers should instead go to JAAT. More than 50 rights of appeal to the Royal Court, most of which are rarely if ever used, should instead go to JAAT. As in the current administrative appeal tribunals, the members should include legally-qualified, expert and lay members. They should be appointed by the Judicial and Legal Services Commission (recently proposed by the Department for Community and Constitutional Affairs) and should no longer be appointed on fixed-terms. An annual report on the work of JAAT should be published. JAAT should be run by the Judicial Greffe. A set of user-friendly procedures should be made, bearing in mind that most appellants will be individuals with no legal training. There is, however, a category of case where there is a risk – because of the vulnerability of the appellant or the complexity of the case – that a fair trial will not take place if the appellant does not have access to an affordable lawyer; we say that these appellants should be provided with legal advice and representation from public funds.

**Chapter 4 looks at rights of appeal to Ministers.** In most situations, it is not appropriate for a politician to be carrying out appellate functions. We recommend that five out of six of these rights of appeal should be amended so that they are heard by JAAT rather than a Minister.

**Chapter 5 examines the operation of the States of Jersey Complaints Panel.** We conclude that the Complaints Panel should be replaced by an Ombudsman. If, contrary to our principal recommendation, the Complaints Panel is retained we outline a range of reforms that would be needed to help it function more effectively.

**Chapter 6 calls on the Government of Jersey to make an "in principle" decision to support next steps in the creation of a Jersey Public Services Ombudsman (JPSO).** It would have a remit to investigate alleged maladministration by public bodies and to work with public bodies to ensure the continuous improvement in the quality of public administration. Further detailed work would be needed to develop options for the detailed institutional design of JPSO.

**Chapter 7 surveys the work of the Royal Court of Jersey** as part of the Island's administrative justice system. We recommend that many current rights of administrative appeal to the Royal Court should instead go to JAAT, but the Royal Court should retain power to hear administrative appeals that are likely to involve important general questions of law.

**Chapter 8 considers the scope for alternative dispute resolution (ADR)** in relation to administrative grievances. We identify a need for further research to develop proposals for the use of mediation and other forms of ADR.



# CHAPTER 1

## ABOUT THE ADMINISTRATIVE REDRESS PROJECT

### About this report

- 1.1** This chapter outlines the scope of the Jersey Law Commission's project on administrative redress. It explains the terms "administrative decisions" and "administrative redress" and provides an overview of the problems and proposed solutions addressed in this report.
- 1.2** The report sets out recommendations for improving the law about what happens in Jersey when an individual, business or organisation is aggrieved about an administrative decision made by a public body. **Annex A: Recommendations** lists the recommendations, which are explained in more detail in each chapter. Recommendations within each chapter are shown as highlighted boxes, starting with the chapter number followed by the number of the recommendation, for example:

**Recommendation 1.1: This is an example of a recommendation**

**Annex B: Alternative recommendations relating to the States of Jersey Complaints Panel** contains different proposals should our main proposal to replace the Complaints Panel with an Ombudsman not be accepted. **Annex C** lists provisional proposals we put forward in our April 2016 consultation paper that are not being taken forward.<sup>1</sup>

- 1.3** In line with the Jersey Law Commission's general terms of reference, the recommendations seek in particular to achieve "the elimination of anomalies; the repeal of obsolete and unnecessary enactments; the reductions of the number of separate enactments; and generally, the simplification and modernisation of the law". We have also had regard to principles relevant to reform of administrative justice systems, which are discussed further in **Annex D: Research statement**. Of particular importance is the need for grievance redress processes to be designed around the needs of potential users of the system (rather than being based on tradition or administrative convenience). Another essential consideration is that procedures and institutions must operate on satisfactory legal and constitutional footings.
- 1.4** The recommendations are made to the Chief Minister and will now be considered by the Government of Jersey and the States Assembly.

### Administrative decisions

- 1.5** An "administrative decision" is a determination by a public body that has legal effects on a particular individual, business or organisation. In the typical scenario, there is (1) a law either passed by the States Assembly or in a few situations found in Jersey customary law, which (2) empowers a public authority, such as a Minister or Connétable, to (3) make a decision about a person's rights.
- 1.6** This process affects many aspects of personal and business life.
- Administrative decisions may be about money such as assessment of income tax, liability for Parish rates, payment of old-age pensions, deciding whether a person is eligible for Income Support and other welfare benefits, decisions about grants and bursaries for students in higher education.

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<sup>1</sup> Jersey Law Commission, *Consultation Paper: Improving Administrative Redress in Jersey*, No.1/2016/CP (St Helier, Jersey, 2016).



- The provision of public services involves administrative decision-making, such as decisions made by professional staff in the General Hospital, about access to mental health services, support from social workers, access to schools, allocation of social housing.
- Administrative decisions may be about the regulation of work, business and professional activity (including financial services), controls on imports and exports, regulation of the right to work, health and safety, the running of ports and the airport, and controls over ownership, use and trade in legal but potentially dangerous items (fireworks, explosives, firearms).
- The Island's infrastructure and environment is controlled by administrative decision-making across a wide variety of areas, including maintenance and closure of highways, licensing of taxi-cabs, and planning permission.

**1.7** The public bodies in Jersey that have powers and duties conferred on can be placed into five main categories.

- Many Laws confer decision-making powers on a **Minister** (all of whom are elected members of the States Assembly). The Government of Jersey is organised as departments led by Ministers: the Chief Minister's Department; Education; Health and Social Services; Housing; Social Security; Treasury and Resources; Economic Development, Sport and Tourism; External Relations; Community and Constitutional Affairs (formerly Home Affairs); Environment; and Infrastructure (formerly Transport and Technical Services). Ministers will in many situations be advised by **civil servants**, though the power or duty is conferred directly on the Minister.
- Laws may directly empower **non-elected office-holders** to make administrative decisions. These include, for example: the Comptroller of Taxes; the Chief Officer, Deputy Chief Officer and police officers of the States of Jersey Police; the Chief Officer of Education; the Superintendent Registrar of births deaths and marriages; the Registrar of Companies; and "determining officers" who make decisions relating to social security.
- Each of the 12 **Parish administrations** has a variety of powers in their area exercised by the Connétable, the Parish Assembly, the Rates Assessment Committee or the Roads Committee. These powers include, for example: in relation to roads – closures and naming of streets; compulsory purchase; issuing permits for Sunday trading, regulation of pawnbrokers and sale of fireworks; granting firearms certificates; registration of premises for marriages and civil partnerships; dog licences; driving licences; and making orders in respect of various kinds of nuisances on private property affecting public health.
- "**Arm's length**" **public bodies** operate independently from Ministers. These include bodies carrying out regulatory functions, such as the Jersey Financial Services Commission and the Jersey Competition Regulatory Authority. Some functions previously exercised by Government of Jersey departments have been transferred to corporate entities wholly owned by the States of Jersey, operating at arm's length from Ministers: JT Ltd (Jersey Telecom Group Ltd, a telecommunications business); Jersey Post Ltd (the mail service); Ports of Jersey Ltd (running harbours and the airport since 2015); and Andium Homes Ltd (in July 2014 the housing stock and responsibilities of the Housing Department were transferred to Andium). Some functions of the corporate entities are commercial rather than administrative.
- Several "**non-ministerial bodies**" are recognised by the Public Finances (Jersey) Law 2005: the Bailiff's Chambers; Office of the Lieutenant Governor; Office of the Dean of Jersey; Viscount's Department; Judicial Greffe; Law Officers Department; Comptroller and Auditor General; Data Protection Registrar; Probation Department; Official Analyst; States Assembly. Other "minor entities" include the Government of Jersey London Office and the Jersey Legal Information Board.

## The changing face of administrative decision-making in Jersey

**1.8** Within living memory, there has been a transformation in administrative decision-making in Jersey. Several trends can be identified, which provide a practical context for thinking about future development. In outline:

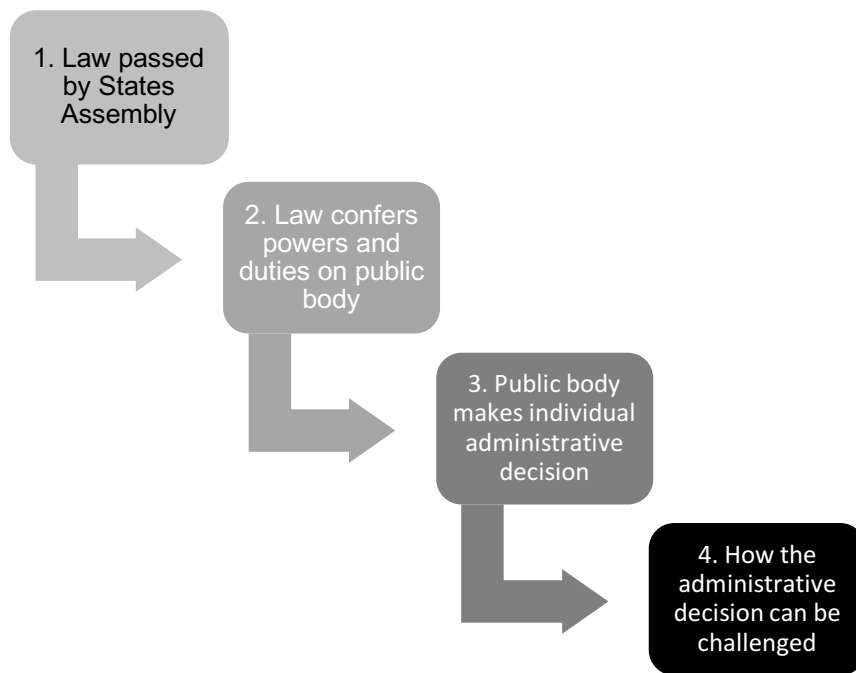
- 5.1** The quantity of administrative decision-making has increased significantly. There are more people living in the Island than ever before (the population has risen from around 57,000 in 1951 to over 104,200 in 2017), more public services are provided than in the past, and the day-to-day activities of individuals and business are more highly regulated.
- 5.2** There has been some transfer of responsibility for public functions (and therefore administrative decision-making) from Parish level to whole-Island government. This is especially evident in relation to provision of welfare support, with the introduction of “insular insurance” in the 1950s and Income Support in 2008.
- 5.3** There has been a transfer of responsibility for some public functions from the Government of Jersey to arms’ length bodies (see para 1.7 above).
- 5.4** Broad discretionary powers of public authorities (in the country Parishes, often based on the Connétables’ personal knowledge of individuals and their families) have been replaced by detailed rules governing entitlement to welfare and other public services, by civil servants with no prior knowledge of individuals and their families.
- 5.5** At whole-Island level, there was a change from committee-based government to ministerial government under the States of Jersey Law 2005, following recommendations in the Clothier report.

## Administrative redress

**1.9** In the large majority of cases, administrative decisions are taken on the basis of correct facts, in accordance with the law, and using fair procedures. In a minority of cases, however, experience suggests that the individual, business or organisation affected by the decision will be dissatisfied. A grievance or sense of grievance may arise for a variety of different reasons, for example the public authority may have (or be thought by the aggrieved person to have):

- made a legal error in interpreting or applying relevant legal rules and standards applicable to the decision
- misunderstood the facts
- made a judgement based on professional expertise or a policy preference that is disputed by the individual
- failed to make the decision in a procedurally fair manner.

**1.10** This report is about how disputes about administrative decision-making are dealt with. The term “administrative redress” describes the various ways in which this happens or should happen – a fourth step in the chain of public administration:



- 1.11** There is a variety of ways in which a person can challenge an administrative decision that is thought to be wrong.
- 1.12** In Chapter 2, we look at **internal complaints procedures** within public bodies in Jersey. We conclude that there should be more sharing of good practice and that coordination is needed to make sure this happens.
- 1.13** Chapter 3 is concerned with **administrative appeals tribunals**. In Jersey, these have developed piecemeal over many years. Work by the Judicial Greffe is helping to create a more coordinated and streamlined approach across some of the tribunals but this has not been underpinned by changes in the Laws governing tribunals. Our recommendations include amalgamating existing tribunals into a single new tribunal (the Jersey Administrative Appeals Tribunal) and creating user-friendly procedural rules. We also find that there are some cases where a fair trial may not occur because appellants seeking to challenge an administrative decision do not have access to affordable legal advice and representation. Tribunals fall outside the current legal aid scheme in Jersey. We recommend that where necessary, a judicial order should be made to provide legal assistance paid for by public funds.
- 1.14** We found six rights of appeals against administrative decisions in Jersey law that must be made to Ministers. **It is generally not appropriate for Ministers, as elected politicians, to hear administrative appeals** and we accordingly recommend in Chapter 4 that five of these appeals move to the new Jersey Administrative Appeal Tribunal.
- 1.15** In Chapter 5, we examine the role of the **States of Jersey Complaints Panel** (a body unique to the Island). During the consultation phase of this project, the Complaints Panel and the Privileges and Procedure Committee (PPC) of the States Assembly argued strongly against our provisional recommendations that the Complaints Panel should be replaced by an ombudsman. We have considered the views of all consultees (the majority of whom supported our provisional proposal) and concluded that the Complaints Panel should be replaced. If, however, our

recommendation is not accepted, we provide a series of recommendations for improving the effectiveness of the Complaints Panel.<sup>2</sup>

- 1.16 In Chapter 6, we outline our recommendations for a **Jersey Public Services Ombudsman**, who would become responsible for investigating complaints about maladministration and who would have a role coordinating continuous improvements in administrative redress and the quality of administrative decision-making.
- 1.17 In Chapter 7, we consider the Royal Court's contribution as part of the administrative redress system. In relation to appeals, in our view the Royal Court's function should be to hear cases that involve complex issues of fact or law, leaving more straightforward appeals to be determined by the new Jersey Administrative Appeal Tribunal (JAAT). We therefore recommend that more than 50 laws that currently create rights of appeal to the Royal Court should be amended to give JAAT the responsibility for determining these appeals. This will help make the appeals process more user-friendly and accessible, especially to people who do not have legal advice or representation.
- 1.18 In Chapter 8 we look at the role of Alternative Dispute Resolution (ADR) processes. We recommend an expansion of the Community Mediation scheme to provide mediation in administrative disputes – but only where this is suitable for the type of case and the parties agree.

## Other reform initiatives linked to administrative redress

- 1.19 Our project to analyse and develop proposals for improving administrative redress is one of a number of relatively uncoordinated reform initiatives from different bodies in Jersey which have considered questions of access to justice.
- 1.20 In December 2000, a Review Panel on the Machinery of Government, chaired by Sir Cecil Clothier QC, made a range of recommendations for modernising Jersey's system of government. This included replacing the States of Jersey Complaints Panel with an Ombudsman. On this issue, our report makes similar conclusions and recommendations as the Clothier panel did 17 years ago (see Chapter 5 below).
- 1.21 In December 2013, the States Assembly approved a proposition by the Chief Minister to establish a Review of Access to Justice in Jersey.<sup>3</sup> The main panel consists of a Minister, a Connétable, and two other elected States Members. The focus of the Review is to examine Jersey's legal aid system and "make proposals for developing further an efficient and effective legal system, which would improve access to justice and the resolution of complaints, whilst delivering value for money in the use of public funds". Three interim reports have been made.<sup>4</sup> The Law Society of Jersey (the professional body for Jersey-qualified advocates and solicitors) has undertaken a review of its rules of legal aid, under which members of the profession provide legal advice and representation at no fee or fees at less than normal commercial rates; we understand a new scheme will come into force in 2018. Our Recommendation 3.5 calls for public funding for legal advice and representation in the proposed Jersey Administrative Appeals Tribunal, where it is necessary to ensure a fair trial. In Chapter 8, we review provision for alternative dispute resolution in administrative redress and make the case for further research.
- 1.22 During 2014-15, the Royal Court Rules Review Group developed proposals for amendments to the Royal Court Rules, including the introduction of an "overriding objective" based on the

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<sup>2</sup> See **Annex B: List of alternative recommendations on the future of the States of Jersey Complaints Panel**.

<sup>3</sup> States of Jersey, *Access to Justice in Jersey: Review*, P.158/2013.

<sup>4</sup> See [www.gov.je/CrimeJustice/AccessToJusticeReview/Pages/index.aspx](http://www.gov.je/CrimeJustice/AccessToJusticeReview/Pages/index.aspx)

overriding objective contained in the Civil Procedure Rules in force in England and Wales.<sup>5</sup> Our recommendation 3.18 proposes that the proposed Jersey Administrative Appeals Tribunal should have a modern set of user-friendly procedural rules, including an overriding objective.

- 1.23** Under the States of Jersey Strategic Plan 2015-18, the Government of Jersey is undertaking a programme of public sector reform, involving a variety of projects.<sup>6</sup> The driving principles are “start with the customer, provide the right services, have digital provision in mind, be collaborative across the States, and design to anticipate of the needs of tomorrow, not just today”.<sup>7</sup> Our Recommendation 2.1 (that the Chief Minister issues guidance on internal complaint handling) should back this work.
- 1.24** In July 2017, the Department for Community and Constitutional Affairs published a consultation paper proposing the creation of a Judicial and Legal Services Commission (JLSC).<sup>8</sup> In developing our proposals for the Jersey Administrative Appeals Tribunal, we have assumed that the JLSC will be established.
- 1.25** In July 2017, the *Report of the Independent Jersey Care Inquiry 2017*, chaired by Frances Oldham QC was presented to the States Assembly.<sup>9</sup> The inquiry’s remit was to “establish what went wrong in Jersey’s child care system over many decades”. Among its findings were “a worrying history of both inappropriate and ineffectual state intervention and state indifference”, that “child care legislation in Jersey had failed to keep pace with developments in social care and children’s rights in the developed world” and that there was “failure to tackle a silo mentality among public-sector agencies”. The inquiry’s recommendations included: the appointment of a Commissioner for Children, consideration of how fear and lack of trust associated with “The Jersey Way” can be countered in a lasting way,<sup>10</sup> and that the complaints system be reviewed with a view to ensuring that it is easily accessed and that clear responses are always made to complainants within set timescales. The Government of Jersey’s responsibilities for children’s services (the focus of the Oldham inquiry) is a subset of the broader field of administrative redress. Our recommendations aim to contribute to the wider project of building trust and confidence in processes for complaining about public administration.

## Pervasive issues across the system

- 1.26** As well as leading to recommendations for the development of the different types of administrative redress mechanisms in Jersey, our research has revealed some pervasive issues, which are considered at various points in the report.
- 1.27** Looking across the current administrative justice system in Jersey, our assessment is that it is often **not user friendly**. Institutions and procedures have not been designed primarily with the needs of ordinary people in mind and we found numerous ways in which the day-to-day

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<sup>5</sup> Royal Court Rules Review Group, *Access to Justice: Final Consultation Paper issued by the Royal Court Rules Review Group*, 5 October 2015.

<sup>6</sup> States of Jersey, *Strategic Plan 2015-18* (available online at <https://www.gov.je/SiteCollectionDocuments/Government%20and%20administration/R%20States%20of%20Jersey%20Strategic%20Plan%202015-18%2020150430%20VP.pdf>).

<sup>7</sup> Government of Jersey website, “About public sector reform” (available online at <https://www.gov.je/Government/PublicSectorReform/Pages/AboutPublicSectorReform.aspx>).

<sup>8</sup> Department for Community and Constitutional Affairs, *Consultation Paper: Judicial Independence and the Establishment of a Judicial and Legal Services Commission* (July 2017).

<sup>9</sup> States of Jersey, R.59/2017.

<sup>10</sup> The report stated, “At its best, the ‘Jersey Way’ is said to refer to the maintenance of proud and ancient traditions and the preservation of the island’s way of life. At its worst, the ‘Jersey Way’ is said to involve the protection of powerful interests and resistance to change, even when change is patently needed”.



operation of systems does not help aggrieved people. A contributing factor to this state of affairs is that the current administrative justice system is **unnecessarily complicated**. We identify numerous ways in which the Law could be simplified. We also note that Jersey's administrative redress system has **developed piecemeal over many years**.

- 1.28** A consequence of complexity and piecemeal development is that the **administrative redress system is uncoordinated**. An antidote is to **create opportunities for strategic leadership** to help coordinate the system better to ensure that it is fit for purpose. Several of our recommendations seek to do this. We envisage the Chief Minister (supported by civil servants) providing leadership over how internal complaints are handled across all public bodies (Recommendation 2.1) and in carrying out an annual review of administrative justice (Recommendation 2.2). If and when a Jersey Public Services Ombudsman is created, these functions could move to him or her.<sup>11</sup> Within the new Jersey Administrative Appeal Tribunal, we recommend the creation of a part-time salaried judicial post of Chairman, who would have responsibilities for running the tribunal in addition to hearing appeals (Recommendation 3.7); an early call on the Chairman's time (supported from staff in the Judicial Greffe) would be to take the lead in developing a set of user-friendly appeal procedures, drawing on best practice from other jurisdictions adapted to Jersey's circumstances.
- 1.29** There is currently a **lack of publicly available data about administrative redress in Jersey**, which hinders evidence-led policy making, transparency and accountability. We therefore make proposals for better data collection, evaluation, reporting, and scrutiny. These include an annual report by the Chief Minister on administrative justice (Recommendation 2.2) and an annual report by the Chairman of the Jersey Administrative Appeals Tribunal (Recommendation 3.11).
- 1.30** Our proposals aim to **assist the States Assembly to have an overview of the administrative justice system**, better able to decide if, when and how further scrutiny work is needed where problems arise (Recommendations 2.1, 2.2, 2.3, 2.4, 2.5, 3.11). Historically, the States Assembly has concerned itself mainly with seeking to right wrongs suffered by particular individuals; a more strategic approach to scrutiny would ensure that States Members do not lose sight of the wood for the trees.
- 1.31** **For an island with a population in excess of 100,000, fewer people than might be expected choose to use the current administrative redress system**. In Chapter 5, we note that the States of Jersey Complaints Panel receives a very small number of complaints a year whereas comparable grievance-handling bodies in Gibraltar, Cayman Islands, and Bermuda receive hundreds a year. In Chapter 7, we see that many rights of appeal to the Royal Court against administrative decisions have never or only rarely been used. There are three hypotheses that could explain this situation.
- The quality of public administration in Jersey is exceptionally high, so that very few administrative decisions give rise to a sense of grievance.
  - People are unaware of their rights to complain or question administrative decisions.
  - People are aware that they can complain and question but choose not to because there are barriers to using the system (for example, cost, they see it as too intimidating, or a feeling that "nothing will change").

We have not been able within the scope of this project to test these hypotheses, but we can speculate that factors b and c are at least sometimes present. We suggest ways in which these factors should be addressed. Recent experience in Jersey indicates that changes to administrative redress procedures may lead to significant increases in the number of aggrieved people using the system: in 2015, the right of appeal to the Royal Court in appeals

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<sup>11</sup> See Chapter 6.

relating to planning permission was replaced by a system of inspectors, leading to the number of appeals more than doubling in its first year of operation.

## What was excluded from this project

- 1.32 Some aspects of the administrative decision-making and redress were excluded from our project.
- 1.33 A new planning appeals system was established by the Planning and Building (Amendment No. 6) (Jersey) Law 2014, creating a new right of appeal to the Minister advised by planning inspectors in place of a right of appeal to the Royal Court. As previously noted, there was a significant increase in the number of appeal under the new system. The new arrangements should be allowed to bed down before a review is carried out.
- 1.34 The operation of the Jersey Employment and Discrimination Tribunal (JEDT) is also beyond the scope of this review (though we make some references to its practices in relation to our proposals for a single new administrative appeals tribunal that would sit alongside the JEDT). Employment disputes do not usually arise as a result of purely administrative decision-making but from a contractual relationship.
- 1.35 The Jersey Police Complaints Authority's remit is to oversee, monitor and supervise the investigation, by the Professional Standards Department of the States of Jersey Police, of certain complaints made by members of the Public against States of Jersey Police and Honorary Police officers. It does not itself carry out investigations or make determinations and for this reason falls outside this scope of the project.
- 1.36 The largest category of formal complaints against the Government of Jersey is those made to the Department of Health and Social Services. We have been unable to look in detail at this category of grievances within this project but return to this in Chapter 2 (see Recommendation 2.4 calling for a more detailed study).

## How much will the reforms cost?

- 1.37 As a law reform agency, we must be mindful of the cost of the reforms we recommend. Although we lack the resources needed to quantify the costs (and savings), we have sought to identify the main costs (and savings) headings for each recommendation in **Annex A: List of Recommendations**. Ultimately, questions of affordability and priorities in public spending will be questions for politicians in the Government of Jersey and States Assembly.

## How much did this report cost?

- 1.38 We estimate that the cost of undertaking the research for this project, carrying out the consultation process, and preparing this final report to be approximately £15,000. Breaking this down: around £10,000 was paid by the Department for Community and Constitutional Affairs under a research contract with the University of Essex, to enable Andrew Le Sueur (the Topic Commissioner) to be released from teaching and administrative duties at the University to carry out research interviews in Jersey during 2015-16. The balance of the cost is attributed to research assistance, travel and the consultation exercise.

## Criticism of institutions and processes not individuals

- 1.39 Throughout this report, we set out findings that are often critical of existing institutions, procedures and practices and make recommendations for reforms. Our report is not intended to be direct criticism of the people who currently run the system – Ministers and other holders

of public office, civil servants, members of administrative tribunals and the States of Jersey Complaints Panel. Our focus is on getting the structures and procedures right in order to create a better quality administrative justice system for the people of Jersey.

## Thanks and acknowledgements

- 1.40** More than 30 individuals agreed to be interviewed during the research phase of this project (see **Annex D: Research statement**); we are grateful for their input and thank them for being generous with their time. We also record our disappointment that three elected States Members declined to be interviewed – two without explanation and one citing lack of time.
- 1.41** Various organisations were helpful in providing information (but we again record regret that two public bodies ignored or failed to act on our requests for help). We are particularly grateful to staff and board members of the Channel Islands Financial Ombudsman, who provided invaluable insight into their organisation's work.<sup>12</sup> We also thank colleagues involved in the UK Administrative Justice Institute (UKAJI), which provides invaluable resources and sharing of ideas between academics, lawyers, judges, complaints-handlers and advisers and others involved in administrative justice systems.
- 1.42** Lori-Ann Foley provided efficient research assistance during an early phase of the project.
- 1.43** Twelve people attended a consultation event on 21 June 2016, including members of the public, two States Members (one a Minister), civil servants, and representatives of the Jersey Law Society.

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<sup>12</sup> CIFO is the joint operation of two statutory ombudsman roles, established in law by the Financial Services Ombudsman (Jersey) Law 2014 and the Financial Services Ombudsman (Bailiwick of Guernsey) Law 2014. The primary role of CIFO is to resolve complaints about financial services provided in/or from the Channel Islands of Jersey, Guernsey, Alderney and Sark (source: [www.ci-fo.org](http://www.ci-fo.org)).



## CHAPTER 2

# OVERARCHING ISSUES IN ADMINISTRATIVE JUSTICE

- 2.1** This chapter examines several overarching issues and make recommendations relating to the whole administrative justice system in Jersey.

### Proposed duty to issue guidance to public bodies about fair and effective handling of internal complaints

**Recommendation 2.1: Create a legal duty on the Chief Minister to issue guidance to public bodies about fair and effective handling of complaints**

#### *The value of internal complaint handling*

- 2.2** The starting point for a person aggrieved by an administrative decision will often be to ask the decision-making public body to check or reconsider its decision. Indeed, in some situations a Law requires this to happen (for example, in the Social Security Department there is a mandatory procedure for asking a second determining officer to review the decision of a colleague).<sup>13</sup>
- 2.3** Good internal complaints procedures help aggrieved people and the organisation complained about. As a UK parliamentary committee has noted, “There are clear economic arguments for resolving complaints as quickly as possible. The earlier complaints are resolved, the cheaper it is for everyone”.<sup>14</sup> Well-run organisations also now recognise the value of complaints as a positive influence in continuous quality improvement, seeking to learn lessons from each complaint for the future (whether or not the complaint is upheld).<sup>15</sup>

#### *The quantity of internal complaints in Jersey*

- 2.4** Data disclosed in the States Assembly *Hansard* in November 2015, in response to a question to a Minister from a backbench States Member, show the number of “formal complaints” received by the Government of Jersey and resolved internally within departments (see Table below).<sup>16</sup> The largest category of formal complaints is recorded in relation to health and social services. The Department comments “HSSD has hundreds of thousands of interactions with islanders each year and the number of complaints represents a very small fraction of those interactions. The department is always seeking to improve its services and to learn from the occasions when it could have done better”. The next largest categories of formal complaints

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<sup>13</sup> Social Security (Determination of Claims and Questions) (Jersey) Order 1974.

<sup>14</sup> House of Commons Public Administration Select Committee, *When Citizens Complain*, 5th Report of 2007-08, HC 409 (March 2008) para 10.

<sup>15</sup> See for example: House of Commons Public Accounts Committee, *Department for Work and Pensions: Handling Customer Complaints*, 13th Report of 2008-09, HC 312 (March 2009); Centre for Public Scrutiny and Local Government Ombudsman, *Aiming for the best: using lessons from complaints to improve public services* (July 2011); National Audit Office, *Feeding back? Learning from complaints handling in health and social care* (a Report by the Comptroller and Auditor General, Session 2007-08, HC 853, October 2008); Richard Simmons and Carol Brennan, *Grumbles, Gripes and Grievances: the role of complaints in transforming public services* (Nesta, April 2013).

<sup>16</sup> Extrapolated from an answer to a written question from Deputy M.R. Higgins to the Chief Minister, States of Jersey Official Report (*Hansard*), 17 November 2015, 2.1.

relate to police and social security. In relation to other departments, the data appears to reveal a picture of very low numbers of formal complaints that need to be resolved internally. In a number of respects, these data do not paint a complete picture, an issue we discuss below.

Department	Formal complaints during period 2010-15	Average number of complaints per year
<b>Health and Social Services Department</b>	1,260	252
<b>Home Affairs: Police</b>	215	43
<b>Social Security Department</b>	171	approximately 34
<b>Environment Department</b>	71	approximately 14
<b>Home Affairs: Customs &amp; Immigration</b>	64	approximately 13
<b>Education Department</b>	36	approximately 7
<b>Treasury and Resources Department</b>	9	approximately 2
<b>Transport and Technical Services</b>	5	1
<b>Home Affairs: Fire</b>	6	approximately 1
<b>Human Resources</b>	2	fewer than 1
<b>Economic Development Department</b>	1	fewer than 1
<b>Home Affairs: Prison</b>	2	fewer than 1
<b>Chief Minister's Department</b>	Not recorded	

### *The quality of internal complaint handling in Jersey*

- 2.5** In 2016, we carried out a small-scale desk-based study of the websites of a sample of Jersey public bodies to understand what, if any, information they contained about how to make a complaint.<sup>17</sup> Based on this evidence, we concluded that the quality of information about internal complaints procedures in Jersey is variable. For example: the most detailed published complaints procedure we identified was for Health and Social Services, which scores highly in relation to clarity. At the other end of the spectrum, some public bodies have no complaints procedures published online.
- 2.6** Other bodies fall between these points. For example, the Social Security Department has information online (and in leaflet format) called “If you think the decision is wrong”, which explains appeals to a tribunal and to the Royal Court. It does not mention that some matters may appropriately be taken to the States of Jersey Complaints Panel. It is also rather vague in the information it provides about sources of advice, referring to “Advice centres such as Citizens Advice can give you help and support” (why not provide a telephone number and address?).
- 2.7** In response to our consultation report, the Tribunal Service (part of the Judicial Greffe) told us: “Currently procedures and processes regarding administrative decisions made by the administrative arm of our government are not accessible (sometimes even to staff members in other areas), or procedures are passed down from one member of staff to another, without being written down, which gives little room for improvement and consultation with users of the service – all this will create challenges if and when a tribunal is to review a decision. This of course varies between departments, but must be something which is borne in mind”.

<sup>17</sup> We acknowledge that in relation to some types of administrative decision-making, for example in relation to older people who are less likely to have easy access to the internet, information on a website may not be the most appropriate method of publishing.

- 2.8** The quality of internal complaints systems can be assessed against the following criteria:<sup>18</sup>
- a. Accessibility.** Does the public body have an accessible internal complaints procedure (for example, published online or available in leaflet format)?
  - b. Clarity.** Is the procedure designed and written in a way that can be understood by users?
  - c. Independence.** Does the procedure allow for the matter to be looked at by an officer who has not previously been involved in the matter? Does the officer taking a “second look” at the matter do so through a fresh consideration of the merits (or is the officer confined to checking for technical mistakes in the original decision)?
  - d. Outcomes.** What proportion of complaints are upheld? How satisfied are complainants with the process of complaining? If the aggrieved person is unsuccessful, does the public body clearly signpost what the person can do next (for example appeal to a tribunal or make a complaint to the States of Jersey Complaints Panel)?
- 2.9** In July 2017, the *Report of the Independent Jersey Care Inquiry* chaired by Frances Oldham recommended that:
- “An effective complaints system is one key element in the structures that are necessary to ensure that looked after children are safe, and, to that end, we recommend that the current complaints system is replaced with one that is easily accessed and in which children and young people have confidence. The outcomes of complaints should be reported regularly to the relevant Minister, who, in turn, should present an annual report to the States”.<sup>19</sup>
- 2.10** This approach should not be limited to children’s services but should apply across all public bodies. Everyone in Jersey should have confidence that a fair and effective complaints system exists whenever a decision is made by a public body.

#### *Our proposal on complaint handling guidance*

- 2.11** During the consultation phase of this project, everybody who expressed a view agreed with our initial proposal that “All public bodies should set out their internal procedures for dealing with grievances in an accessible, clear and comprehensive manner”. In subsequent work, we have developed our proposal to ensure that it can be effectively implemented.
- 2.12** We considered who should develop, publish and keep under review the proposed guidance to all public bodies. There are three main candidates.
- a.** The States of Jersey Complaints Panel could have this function, alongside its role of responding to individual complaints that are not resolved internally. In Chapter 5, we recommend that the Complaints Panel is replaced by an ombudsman. If our recommendation is not accepted, we make alternative proposals for reforming the Complaints Panel. It would be possible, as part of these changes, for the duty to issue guidance to be placed on the Complaints Panel. We are not, however, confident that the Complaints Panel would have the capacity to carry out this function within its current resources.
  - b.** The Jersey Public Services Ombudsman, which in Chapter 6 we propose is created, could have this function. The advantage is that an ombudsman would be perceived as having greater independence than the Chief Minister and will bring expertise to the Island about managing complaints systems and promoting good standards of complaints handling. The

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<sup>18</sup> A similar template was developed and used in M Anderson, A McIlroy and M McAleer, *Mapping the Administrative Justice Landscape in Northern Ireland* (2014).

<sup>19</sup> Recommendation 2 (p 57).

disadvantage is that it is likely to be many months before the JPSO is operational and able to start this work.

- c. We therefore conclude that the responsibility should be placed on a Minister. We propose that this should be the Chief Minister to ensure that there is a sufficient overview of all other departments and other public bodies. If, in due course, the JPSO is established the function could be transferred from the Chief Minister.

**2.13** In our revised recommendation, there would be three steps:

- a. The Administrative Justice (Jersey) Law<sup>20</sup> should place a legal duty on a body (the Chief Minister) to develop guidance on good complaint handling.
- b. The Chief Minister should develop the guidance. We envisage this process should be open, with opportunities for sharing of good practice between public bodies in Jersey as well as lesson-learning from other systems.<sup>21</sup> Although the guidance will be non-statutory (it will not be “law”) to ensure that it can be kept under reviewed and easily updated, we expect that the States Assembly would want to scrutinise the guidance before a final version is published.
- c. The Chief Minister should ensure that the guidance is followed, including through appropriate training. Issues about non-compliance with the guidance should be included in the proposed Chief Minister’s annual report on administrative justice (see Recommendation 2.2) and if individuals were adversely affected by non-compliance, they could complain to the States of Jersey Complaints Panel (if retained) or the Jersey Public Services Ombudsman (if created).

## Proposed duty to make an annual report on administrative justice

**Recommendation 2.2: Create a legal duty on the Chief Minister to present an annual report to the States Assembly on administrative justice across the Government of Jersey and other public bodies.**

### *Consultation responses*

- 2.14** During the consultation phase of this project, there was moderate agreement with our initial proposal for an annual administrative justice report by the Chief Minister to the States Assembly.
- 2.15** One response acknowledged the general value of annual reports as a good basis for accountability, but was unconvinced that the cost of producing the proposed annual report could be justified. We are alive to cost implications of implementing the proposals made in this report and in **Annex A: List of recommendations** we seek to identify the heads of cost and the benefits flowing from each recommendation. In relation to this particular proposal, the Chief Minister could consider a “sunset clause” in the Administrative Justice (Jersey) Law, under which the duty to make an annual report would lapse unless renewed by the States Assembly. This would encourage a debate about the real costs and benefits of fulfilling the duty. If a sunset clause is included, we recommend that it should be 5 years.

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<sup>20</sup> This is the Law we envisage should be made to implement the recommendations in this report.

<sup>21</sup> For example: the Scottish Public Services Ombudsman has set up a unit known as the Complaints Standards Authority (CSA), which is “leading the development and implementation of simplified, standardised complaints handling procedures (CHPs) across the Scottish public sector” ([www.spsso.org.uk/complaints-standards-authority-csa](http://www.spsso.org.uk/complaints-standards-authority-csa)); Northern Ireland Ombudsman, *Rights, Responsibilities and Redress: a Framework for Effective Complaints Handling*; (UK) Parliamentary and Health Service Ombudsman, *Principles of Good Complaint Handling* (2009); Local Government Ombudsman, *Guidance on Running a Complaints System*.

- 2.16** During consultation, we were told that “the reality is that in a small island the shortfall in service and the shortcomings of the complaint system are likely to become well known soon”. We do not share the confidence that this will always be the case. The findings and recommendations of the *Report of the Independent Jersey Care Inquiry 2017* chaired by Frances Oldham highlight the risks that flow from an approach such as this.
- 2.17** A member of the public liked the idea of an annual report but thought it was inappropriate for the report to be made by the Chief Minister and should be produced by an external body. We do not agree. In relation to this recommendation it is important that the maker of the report is accountable to the States Assembly. The Chief Minister is well placed to be questioned by States members on the content of his report, and to be answerable to a scrutiny panel or other committee (see Recommendation 2.3).

*What would go into the annual report on administrative justice?*

- 2.18** Our recommendation does not seek to prescribe in detail what should be contained in the annual report but we envisage that it might contain the following elements.
- 2.19** Information about how the Chief Minister has implemented his duty to provide guidance on complaints handling (Recommendation 2.1). This might describe training and other continuing professional development opportunities for staff within public bodies with responsibility for decision-making and complaints handling.
- 2.20** The report should contain analysis and evaluation of data on complaints received and their outcomes.<sup>22</sup> Publication of the statistics on “formal complaints” used to compile the Table in paragraph 2.4 above is a welcome step in developing a more systematic understanding of administrative redress in Jersey, but in some respects the picture revealed is unclear or incomplete.
- a.** First, the term “complaint” is not defined and the distinction between “informal” and “formal” complaints is imprecise. In the United Kingdom, the lack of a commonly held definition of complaint has also been a problem. In 2008, the House of Commons Public Administration Select Committee recommended “that *all* government organisations use the widest possible definition of ‘complaint’ – that of ‘any expression of dissatisfaction that needs a response, however communicated’ – and treat all such expressions of dissatisfaction as complaints”.<sup>23</sup> We recommend that in future this definition should be used.
  - b.** Clearer statistics are needed to show the relationship between “complaints” and “appeals”. There will be cases where an aggrieved person has exercised a right of appeal to a tribunal or the Royal Court: these may or may not have started as a “complaint”. For example, the 71 complaints against the Environment Department is expressly stated to *exclude* appeals made under the Planning and Building (Jersey) Law 2002 (to the Royal Court or under the new system introduced in February 2015). The data show nine complaints against Treasury and Resources in the period 2010-15 (an average of 2 a year) but it is unclear how this figure relates to appeals taken to the Commissioners of Appeal for Taxes.
  - c.** The statistics in the Table above present an incomplete picture of public administration in Jersey because it is limited to decisions by Government of Jersey departments. Administrative decision-making takes place in a variety of other bodies, including Parishes, non-ministerial bodies carrying out public functions, and States-owned corporate entities

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<sup>22</sup> We are aware of the Government of Jersey’s open data initiative (see <https://opendata.gov.je/about>). Data sets should be published there.

<sup>23</sup> House of Commons Public Administration Select Committee, *When Citizens Complain*, 5th Report of 2007-08, HC 409 (March 2008) para 17.



to which functions previously carried out by Ministers have been transferred (notably Andium Homes Ltd, which manages States of Jersey social housing).

- d. Statistics on administrative redress are not published as a coherent package. Those on formal complaints used in the Table above were published only as a result of a written question in the States Assembly. The States of Jersey Complaints Panel includes some basic statistics in its annual reports to the States Assembly. The *Jersey Court Service Annual Reports* published by the Judicial Greffe and Viscount's Department contain some very basic data on the tribunals administered by the Judicial Greffe (but not on other tribunals) but contain no data on statutory appeals or applications for judicial review in the Royal Court.

- 2.21 The absence of reliable and systematic data is our view hampering the development of a strategic and evidence-based approach to the **design** and **operation** of Jersey's administrative redress system. For example, in relation to system **design**, when in 2004 the States Assembly Privileges and Procedures Committee (PPC) examined the case for the creation of a public service ombudsman, one of their main reasons for rejecting the idea was that there would be an insufficient number of complaints. PPC appears not to have had regard to the level of complaints about health and social services matters or to have considered what role an ombudsman could have in relation to them. In relation to the **operation** of the redress system, better data could act as a driver for the continual improvement of public administration. For example, the detailed data used in the Table above shows a notable spike in formal complaints about education in 2015 (20 compared to five or fewer in previous years), a trend that should prompt further inquiry.
- 2.22 The Chief Minister's annual report on administrative justice would also provide a vehicle for explaining the Government of Jersey's responses to the States of Jersey Complaints Panel's reports on individual cases and to the Complaint Panel's own annual report (or, in future, those of the Jersey Public Services Ombudsman).
- 2.23 The general purpose of the annual reporting duty is that it will provide incentives for both the Government of Jersey and the States Assembly to maintain an overview of where problems are arising across the whole administrative redress system, make strategic decisions about how best to scrutinise those problems, and to recognise and value where improvements are made and maintained. Ultimately, individuals, business and organisations using public services in Jersey will benefit from more effective coordination and improvements in the operation of the administrative justice system.

## Proposal that the States Assembly should scrutinise the annual report on administrative justice

**Recommendation 2.3: The States Assembly should scrutinise the Chief Minister's annual report on administrative justice.**

- 2.24 Few people responded specifically to our initial proposal. One person with experience of the States Assembly agreed, saying "Privileges and Procedures Committee (PPC) is a better body to do this. Scrutiny Panels are not organised to follow a regular timetable of work and therefore I feel an annual review might not happen".
- 2.25 It would not be constitutionally appropriate for the Administrative Justice (Jersey) Law to impose a legal duty on the States Assembly to carry out scrutiny of the Chief Minister's annual report on administrative justice. Nor do we seek to prescribe by whom, or how, the scrutiny should be organised. This should be a matter for the States Assembly to determine.
- 2.26 We recommend that the Scrutiny Chairmen's Committee considers how best to provide the necessary level of scrutiny. It should be open to individual members of the States Assembly to

ask oral or written questions to the Chief Minister, though more detailed scrutiny and effective accountability is likely to be secured through the investigatory work of a scrutiny panel or committee.

**2.27** Consideration should also be given to achieving a joined-up approach to scrutiny of all annual reports relating to administrative justice system. These include:

- a. the Chief Minister's annual report on the administrative justice system (this recommendation)
- b. the proposed annual report by the Chairman of the Jersey Administrative Appeals Tribunal (Recommendation 3.11)
- c. aspects of the Jersey Court Service annual report prepared by the Judicial Greffe & Viscount's Department, to focus on data about the use of applications for judicial review and administrative appeals to the Royal Court
- d. the annual report of the States of Jersey Complaints Panel (or the Jersey Public Services Ombudsman if it is established).

**2.28** The opportunity for the States Assembly to engage on an annual basis with the Chief Minister's report on administrative justice is designed to provide a basis for members of the States Assembly to adopt a more systematic and strategic approach to accountability over the administrative justice system. The States Assembly has in the past tended to focus attention on individual cases<sup>24</sup> rather than using data and scrutiny of reports to see an overview of the administrative system as a whole.

## **Future sector-specific reviews, starting with health and social services**

**Recommendation 2.4: The Chief Minister and Minister for Health & Social Services should commission a study of complaints handling relating to health and social services decision-making and services, with a remit to make recommendations**

**2.29** As we noted in Chapter 1, we were unable within our resources and the time available to carry out a review of the sector that appears to generate the largest number of complaints – health and social services.

**2.30** The Department of Health and Social Services' grievance procedures are published online.<sup>25</sup> It involves, first, 'local resolution' during which the grievance is investigated and considered by the Health and Social Services Patient and Client Liaison Officer and if necessary the Chief Nurse, the Medical Officer of Health and an Assistant Minister of Health and Social Services. If needs be, second, the grievance may be escalated to 'external review', which is conducted by the Guernsey Health and Social Services Department. If the aggrieved person remains dissatisfied, the outcome of the external review may be challenged by an application for judicial review in the Royal Court (though this can consider only the legality of the decision, not the merits of the outcome).

**2.31** We recommend that a review is carried out to check that current arrangements for handling complaints in this area are satisfactory. The experiences of people should be central to the review alongside expert analysis of how the system measures against comparable complaints systems elsewhere. Examples of good practice should be shared across the whole public

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<sup>24</sup> See for example: States of Jersey P.130/2013 and BBC News, "Jersey man given compensation after fireworks failure", 23 November 2013; and Jersey Evening Post, "No compensation for skip hire couple", 3 April 2009.

<sup>25</sup> See [www.gov.je/Government/Comments/Pages/HSSFeedback.aspx](http://www.gov.je/Government/Comments/Pages/HSSFeedback.aspx).

administration system as part of the Chief Minister's work in developing guidance on complaint handling (see Recommendation 2.1).

## Proposal for a legal right to good administration

### Recommendation 2.5: Create a "right to good administration", based on models developed in some other jurisdictions

**2.32** The final overarching recommendation we make in the chapter is that the States Assembly should enact a right to good administration. This could be achieved by including an appropriately worded Article in the Administrative Justice (Jersey) Law, which we envisage would be passed to implement our other proposals. We propose that the right be drafted as follows:

#### Right to good administration

(1) All decisions and acts of Listed Public Bodies must be lawful, rational, proportionate, procedurally fair, and taken within a reasonable time.

(2) Every person whose interests have been affected by such a decision or act has the right to request and be given written reasons for that decision or act.

"Listed Public Bodies" means the list of public authorities, which will appear in a Schedule to the Administrative Justice (Jersey) Law, showing which public authorities fall within the ambit of the new Law.

**2.33** In recent years, several territories and countries have adopted or considered adopting a right to "good" or "lawful" administration, including the Cayman Islands and the Turks and Caicos Islands (both British Overseas Territories), Northern Ireland, South Africa (a Commonwealth member) apparently inspired by the 1990 Constitution of Namibia. When the European Union adopted a Charter of Rights in 2009, it also included a right to good administration in relation to citizen's dealings with EU institutions. During debates in the United Kingdom about a British Bill of Rights in 2008, the Joint Committee on Human Rights, recommended that a right to administrative justice is "a strong candidate for inclusion in a UK Bill of Rights".<sup>26</sup>

**2.34** Our proposed right would not have "constitutional status": Jersey does not have a codified written constitution (unlike the Cayman Islands and Turks and Caicos Islands). The right would therefore be part of a normal Law.

**2.35** The rights to good or lawful administration have been drafted in various ways: see table below. Our proposal adopts elements from several.

- a. The main text is taken from that used for new constitutions recently adopted in the Cayman Islands and Turks and Caicos Islands. In the second part of the Article, we have removed the word "adversely" in front of "affected".
- b. We have added "taken within a reasonable time", adopted from the Northern Ireland proposal, to make the right more complete.
- c. We prefer the right be called "good" rather than "lawful" administration. There is a risk that the label "lawful" will be perceived as creating a narrow right of concern only in court proceedings (such as an application for judicial review to the Royal Court). We envisage that the right would be used as a point of reference in training decision-makers, designing changes to administrative decision-making systems, and by bodies whose function is to

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<sup>26</sup> House of Lords, House of Commons, Joint Committee on Human Rights, *A Bill of Rights for the United Kingdom?* 29th Report of 2007-08, HL Paper 165-I, HC 150-I, para 128. The UK Government later abandoned the British Bill of Rights project.



consider grievances (the States of Jersey Complaints Panel if retained or the Jersey Public Service Ombudsman if created).

**Table showing different formulations of rights to good or lawful administration:**

Territory	How the right to good or lawful administration is formulated
<p>Cayman Islands</p> <p><b>Cayman Islands Constitution Order 2009, SI 2009/1379, Schedule 2, Part 1, “Bill of rights, freedoms and responsibilities”, Article 19</b></p>	<p><b>Lawful administrative action</b></p> <p>(1) All decisions and acts of public officials must be lawful, rational, proportionate and procedurally fair.</p> <p>(2) Every person whose interests have been adversely affected by such a decision or act has the right to request and be given written reasons for that decision or act.</p>
<p>Turks and Caicos Islands</p> <p><b>The Turks and Caicos Islands Constitution Order 2011, SI 2011 No. 1681, Schedule 2, Part 1, “Fundamental rights and freedoms of the individual”, Article 19</b></p>	<p><b>Lawful administrative action</b></p> <p>(1) All decisions and acts of the Government and of persons acting on its behalf must be lawful, rational, proportionate and procedurally fair.</p> <p>(2) Every person whose interests have been adversely affected by such a decision or act has the right to request and be given written reasons for that decision or act.</p>
<p>In Northern Ireland, proposals have been made by the Northern Ireland Human Rights Commission for “the right to civil and administrative justice” as a right supplementing those contained in the European Convention on Human Rights.</p> <p><b>Northern Ireland Human Rights Commission, A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland (10 December 2008) p 44</b></p>	<p>1. Everyone has the right of access to any information held by public authorities, in accordance with laws governing the exercise of this right.</p> <p>2. Everyone has the right to administrative action that is lawful, procedurally fair, rational, proportionate and taken within a reasonable time.</p> <p>3. Public authorities must give reasons for their decisions and, where feasible, provide appropriate mechanisms for internal review or appeal of their decisions.</p>
<p>South Africa</p> <p><b>Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), Article 33</b></p>	<p><b>Just administrative action</b></p> <p>(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.</p> <p>(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.</p> <p>(3) National legislation must be enacted to give effect to these rights, and must –</p> <p>(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;</p> <p>(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and</p> <p>(c) promote an efficient administration.</p>
<p>Namibia</p> <p><b>Constitution of the Republic of Namibia 1990 (as amended), Article 18</b></p>	<p><b>Administrative Justice</b></p> <p>Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law</p>

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and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.

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European Union

**Charter of Fundamental Rights of the European Union (2012/C 326/02), Title V, Citizens' Rights, Article 41**

**Right to good administration**

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.
2. This right includes:
  - (a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
  - (b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
  - (c) the obligation of the administration to give reasons for its decisions.
3. Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.
4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

**2.36** The idea of a right to good or lawful administration has not been met with universal approval among academic experts. Two Cambridge professors argued, in relation to including such a right in the proposed British Bill of Rights, that this “should be approached with considerable caution”.<sup>27</sup> They argue that a right to lawful administration would in effect merely repeat rights that are already to be found in the common law (judge-made law) in England and Wales. Their assessment is that a “blandly expressed right to good administration in a bill of rights would be unlikely to do much damage, and its omission from a catalogue of rights might create a misleading impression as to its fundamental importance. But any attempt to lay down the principles of good administration in detail, or to define with precision the reach of the right, might well add needless layers of complexity and uncertainty while making little by way of a positive contribution”.

**2.37** The body of judge-made law in Jersey called “the grounds of judicial review” is very closely modelled on the case law that has been developed by the courts in England and Wales. It is therefore true to say that Jersey law already includes requirements that public bodies’ decisions are “lawful”, “rational” and “procedurally fair”. In several respects, however, the proposed right would help clarify the law.

- a.** Our proposed formulation would provide clarification that administrative decisions must also be “proportionate”, meaning that a person could argue in the Royal Court or the proposed Jersey Administrative Appeals Tribunal, or States of Jersey Complaints Panel (if retained) or Jersey Public Services Ombudsman (if created), that a decision-maker manifestly failed to strike a “fair balance” between competing considerations or between means and ends. In the law of England and Wales there has been a long running debate in the courts as to whether “proportionality” exists in judge-made law. In Jersey, the

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<sup>27</sup> Mark Elliott and Christopher Forsyth, *A right to administrative justice?* (October 11, 2012). University of Cambridge Faculty of Law Research Paper, Available at SSRN: <https://ssrn.com/abstract=2160221>.

proposed right to good administration would confirm that public bodies are subject to this constraint.

- b.** The inclusion as part of the proposed right of a requirement of decisions taken “within a reasonable time” would also clarify that there is a corresponding legal duty on public bodies to exercise their powers and carry out their duties in a timely manner.
- c.** The proposed right includes a right to be given reasons for an administrative decision. The English common law, on which Jersey judge-made law is based, lacks clarity on when public bodies are required to give reasons for their decisions.<sup>28</sup> The proposed right will put this beyond doubt in Jersey. A right to have reasons is important for several reasons. It is respectful of the individual affected by the decision to be provided with an explanation and justification. Having to give reasons can also be a positive discipline on decision-makers to ensure they have satisfied themselves that the decision is correct. A statement of reasons may also bring out in the open flaws in the decision, facilitating an appeal by the person affected to a tribunal or court or a complaint to the States of Jersey Complaints Panel (or the proposed Jersey Public Services Ombudsman).

**2.38** The proposed right would, in our view, be symbolic of a commitment by the Government of Jersey (which would propose the right in the *projet de loi*) and the States Assembly (which would pass the Law) to upholding administrative justice in the Island. The proposed right should become a point of reference for Ministers and civil servants and other public authorities.

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<sup>28</sup> See Andrew Le Sueur, “Legal Duties to Give Reasons” (1999) 52 *Current Legal Problems* 150; H Woolf, J Jowell, A Le Sueur et al, *De Smith’s Judicial Review* (7th edn, 2013).

## CHAPTER 3

# MODERNISING JERSEY'S TRIBUNAL SYSTEM

### The aims of the modernisation proposals

- 3.1** Many of the recommendations in this Chapter are concerned with technical aspects of institutional design and procedures. The ultimate aim, however, is to improve the experience of using tribunals for the members of the public who need to question the correctness of decisions made by public bodies. The package of reforms is designed to
- simplify Jersey's tribunal system by amalgamating eight separate administrative appeal tribunals into a single new tribunal called the Jersey Administrative Appeals Tribunal (JAAT)
  - make the procedures for bringing appeals more straightforward, with a codified set of user-friendly rules that will be easier to find, be more comprehensive, and to keep updated than current arrangements
  - improve compliance with constitutional principles and human rights laws by enhancing judicial independence and making the work of tribunals more transparent and accessible.
- 3.2** The great majority of responses to our interim proposals for JAAT agreed with them. Where consultees raised significant objections, these are considered in relation to the recommendations below.

### What is a tribunal?

- 3.3** Tribunals are judicial bodies, usually consisting of a panel of three members. Some working methods of tribunals are broadly similar to courts: they adjudicate on questions of fact and law using an oral procedure. Tribunal judgments are legally binding on the parties, not mere recommendations. There is, however, often a right of appeal on a point of law to a more senior court (in Jersey, the Royal Court) if either party is dissatisfied by the tribunal's decision.
- 3.4** In other ways, tribunals may have features that differentiate them from courts. Tribunals normally focus on a particular and sometimes quite narrow area of law and public administration (such as social security or mental health); this enables members of the tribunal to develop expertise in the law and the subject matter that a generalist court may not have.
- 3.5** Tribunal members come from a variety of backgrounds. The chair of the panel may be legally qualified (contributing an understanding of procedures, interpretation of laws and the general legal framework); the other members may "expert members" with professional expertise (for example, medical qualifications) or be "lay" members.
- 3.6** Tribunal proceedings are intended to be less formal than some courts: hearings may take place in less intimidating surroundings, the tribunal members wear normal business attire rather than robes, and the rules of procedure and evidence are more flexible.
- 3.7** In tribunals, the parties are normally not represented by lawyers. The aggrieved person will do his or her best to present the case, perhaps with the assistance of a friend or colleague. The public body's case may be presented by an officer from the public body whose decision is being appealed against. Partly because of this, tribunals members may therefore use an inquisitorial approach, asking the parties questions directly in order to understand the case rather than relying on submissions of the parties' legal representatives.
- 3.8** Tribunal members may serve on a part-time basis, sitting on panels as and when the case load requires.

## Mapping the existing administrative appeals tribunals in Jersey

**3.9** Over several decades in Jersey, a number of tribunals have been created under various Laws to hear appeals against administrative decisions.<sup>29</sup> There is no official list of tribunals in Jersey law but according to our analysis there are eight bodies that carry out judicial functions in adjudicating in appeals against decisions of public bodies. (As we note below, there are also some bodies called “tribunals” that have different functions).

Name of tribunal	Case load
Commissioners of Appeal for Taxes	Average hearings a year: approximately 23 (92 appeals heard 2012-15) <sup>30</sup>
Social Security Tribunal	Average hearings a year: approximately 4 (2013: 4, 2014: 4; 2015 to July: 3) <sup>31</sup>
Social Security Medical Appeal Tribunal	Average hearings a year: approximately 11 (2013: 9, 2014: 4, 2015 to July: 2) <sup>32</sup>
Income Support Medical Appeal Tribunal	Average hearings a year: approximately 3 (2013: 6, 2014: 3, 2015 to July: 1) <sup>33</sup>
Mental Health Review Tribunal	During 2014 there were 32 applications, 9 of which went to full hearings <sup>34</sup>
Health and Safety Appeal Tribunal	Average hearings a year: fewer than 1 'In the last 3 years [to May 2015], the Appeal Tribunal has met on one occasion to hear an appeal from an asbestos licence-holder whose approval to carry out work in Jersey, pursuant to Regulation 5 of the Health and Safety at Work (Asbestos – Licensing) (Jersey) Regulations 2008, was withdrawn' <sup>35</sup>
Data Protection Tribunal	No information available
Rate Appeal Board	The RAB sits infrequently; the States were told in 2009 that it had convened only twice in recent years

<sup>29</sup> As noted in Chapter 1, the work of the Jersey Employment and Discrimination Tribunal (JEDT) falls outside the scope of this report as its main work relates to contractual disputes between employers (mostly in the private sector) and employees rather than disputes about administrative decisions taken by public bodies. We envisage that JEDT would continue and work alongside JAAT, administered jointly by staff of the Judicial Greffe.

<sup>30</sup> Source: correspondence from Advocate Adam Clarke, Clerk to the Commissioners of Appeal for Taxes.

<sup>31</sup> Source: Freedom of Information request  
[www.gov.je/Government/Pages/StatesReports.aspx?ReportID=1596](http://www.gov.je/Government/Pages/StatesReports.aspx?ReportID=1596)

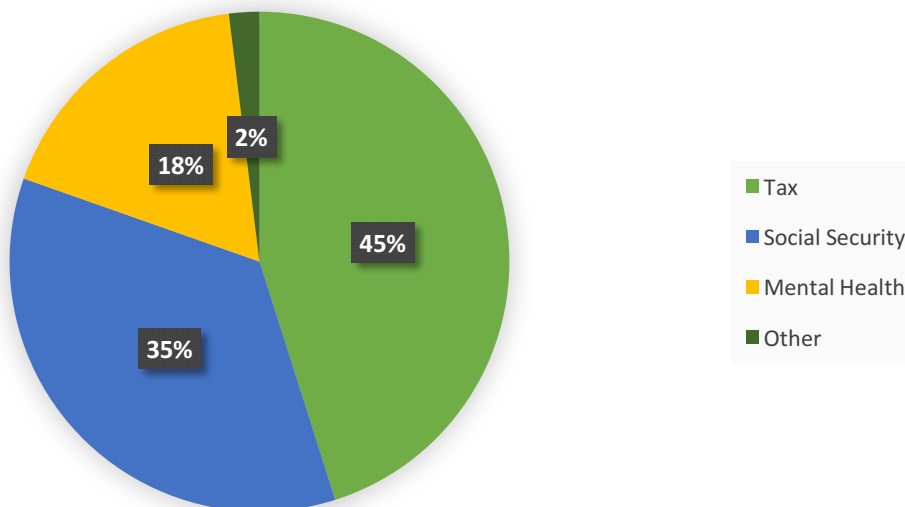
<sup>32</sup> Source: Freedom of Information request  
[www.gov.je/Government/Pages/StatesReports.aspx?ReportID=1596](http://www.gov.je/Government/Pages/StatesReports.aspx?ReportID=1596)

<sup>33</sup> Source: Freedom of Information request  
[www.gov.je/Government/Pages/StatesReports.aspx?ReportID=1596](http://www.gov.je/Government/Pages/StatesReports.aspx?ReportID=1596)

<sup>34</sup> Judicial Greffe & Viscount's Department, *Jersey Court Service Annual Report 2014* (April 2015) p 12.

<sup>35</sup> States of Jersey, P.54/2015.

**Subject matter of tribunal appeals: approximate proportions**



### *Commissioners of Appeal for Taxes*

- 3.10** The Commissioners of Appeal for Taxes (CAT) is a body established by the Income Tax (Jersey) Law 1961, which provides that up to 12 Commissioners are appointed by the States Assembly on the recommendation of the Minister for Treasury and Resources. Members must “be chosen from residents in the Island experienced in financial matters, who are not actively interested in any trade, business or profession carried out in the Island which is of such a nature as would cause their appointment to be objected to by competitors in similar trades, businesses or professions carried on in Jersey”.
- 3.11** CAT has jurisdiction over assessments of income tax and Goods and Services Tax (GST). CAT deals with two main types of case. “Delay hearings” are concerned with situations where the appellant taxpayer has failed to provide sufficient information for the Income Tax Department to establish the correct tax liability; the role of the CAT is to order information to be provided. “Contentious hearings” are cases where the appellant tax payer does not accept the assessment for tax. Either party may appeal to the Royal Court against a determination of CAT. Hearings are listed in batches and heard on average three times a year.
- 3.12** There is no requirement for CAT to have a legally-qualified member. Instead, under the 1961 Law, “The Minister may appoint a clerk to the Commissioners of Appeal, and shall fix his or her salary and determine the conditions of his or her appointment”. Since 2008, the clerk has been Advocate Adam Clarke.
- 3.13** In an unusual arrangement for an official body, CAT hearings take place on the premises of the clerk’s law firm (currently, Le Gallais and Luce). Hearings are in private and judgments are not published. Little information about CAT is available online and we were unsuccessful in our attempts to obtain information from the Taxes Office helpdesk at Cyril Le Marquand House (the Government of Jersey HQ).

### *Social security tribunals*

- 3.14** Three different tribunals hear appeals relating to social security and income support.
- 3.15** The **Social Security Tribunal** (SST) was set up in 1974. Under current law, SST determines appeals against decisions of the Department for Social Security relating to most aspects of Income Support, the Christmas bonus, TV licence benefit, cold weather bonus, food costs



bonus and under the Health Insurance (Jersey) Law 1967. The appointments process is for the Minister for Social Security to nominate prospective members to the States Assembly. SST sits as three members to hear appeals: a legally qualified chair and two lay members. The lay members are drawn from a panel of 12. The rationale given for the composition of SST is that it “consists of a legal Chair, to ensure correct interpretation of legislation, and two lay members to provide a representative public view”.<sup>36</sup>

- 3.16** The **Social Security Medical Appeal Tribunal (SSMAT)**, also established in 1974, hears appeals regarding the award of Long-Term Incapacity Allowance following assessments regarding loss of faculty made by a Medical Board. Until March 2015, appeals were heard by three medically qualified members. Since then, SSMAT hearings consist of three members: a legally qualified chair and two medically qualified members (selected from a panel of eight). The appointments process is for the Minister for Social Security to nominate prospective members to the States Assembly.
- 3.17** The **Income Support Medical Appeal Tribunal (ISMAT)** hears appeals on the award of the Impairment Component under the Income Support system and any other decisions made on medical grounds and appeals regarding care requirements for Home Carer’s Allowance and the care assessments for Long-Term Care. ISMAT panels are formed of three members: a legally qualified chair and two medically qualified members.
- 3.18** Under the relevant Laws until 2010, the Minister was responsible for providing administrative support for the three tribunals (“The Minister shall appoint a Registrar of Appeals and one or more deputy Registrars of Appeals from among the officers in any administration of the States for which the Minister is assigned responsibility who shall perform such duties in connection with appeals under the law as the Minister may direct subject to the provisions of this order”). In recent years until 2010, an individual – a retired police officer – provided administrative support for the work of the three tribunals. When that individual retired, a ministerial decision was made to transfer responsibility for supporting the tribunals to the Judicial Greffe and the legislation was amended accordingly.<sup>37</sup> The motivating consideration for this change was a recognition within the Government of Jersey that it was necessary to “maintain the required independence of the appeals process from the Social Security Department”.
- 3.19** Staff of the Judicial Greffe supporting the tribunals are branded as “Tribunal Service: A Department of the Jersey Court Service”, though these terms are not formally recognised in law.
- 3.20** The Tribunal Service and hearings were until mid-2017 based in premises known as Trinity House, Bath Street, St Helier (above a branch of Ann Summers). The Tribunal Service is now based and hearings take place at 1st Floor, International House, 41 The Parade (above Burger King).
- 3.21** In December 2015, the States Assembly appointed the same person (Advocate Sarah Fitz) to be chairman of each of the three tribunals; she is also chairman of the Mental Health Review Tribunal. The Minister for Social Security explained in a Proposition to the States Assembly, “In consultation with the Judicial Greffe, who are responsible for the convening and administration of the Tribunals, the role of Chairman was developed across all 3 Tribunals to ensure consistency of process and decision-making, and to support the further development of the Tribunals Service. The same principle is being applied, as appropriate, to Deputy

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<sup>36</sup> For example States of Jersey P.145/2014.

<sup>37</sup> Ministerial Decision, “Social Security (Determination of claims and questions) (Jersey) Order 1974: Amendment”, 11 June 2010.

Chairmen and Panel members, ensuring a stronger pool available for each Tribunal”.<sup>38</sup> All members of the tribunals are paid per sitting.

### *Mental Health Review Tribunal*

- 3.22** When we published our consultation report in April 2016, the Mental Health Review Tribunal (MHRT) operated under the Mental Health (Jersey) Law 1969; this continues to be the case but the States Assembly has passed the Mental Health (Jersey) Law 2016, which is not yet in force. Reform of the Island’s mental health legislation was necessary to make law and practice compliant with the European Convention on Human Rights.
- 3.23** MHRT’s role is to adjudicate on appeals against decisions that a patient is compulsorily detained or treated. MHRT must direct that the patient be discharged unless it is satisfied that there is good reason to continue to detain the patient. Mind Jersey (the mental health charity) employs an “Independent Mental Health Advocate”, who offers assistance free of charge to appellants. Legal representation is available under a recently implemented special legal aid scheme under which Jersey advocates on a specialist panel offer services on a fixed fee basis (paid for by public funds). Appeals are heard at St Saviour’s Hospital.
- 3.24** Members of MHRT are appointed by the Bailiff, which means there is no public record of who is appointed in Propositions to the States Assembly (as there are for most other tribunals, where appointees are nominated by Ministers). Advocate Sarah Fitz is the current chairman. All members of MHRT are paid per sitting.
- 3.25** MHRT sits as a panel of three: a legally-qualified chairman, a medical member, and a lay member (“qualified by virtue of his or her experience in administration or application of mental health legislation, or his or her knowledge of social services, or of such other qualification as the Bailiff considers suitable”). The Judicial Greffe provides administrative support for the work of MHRT.

### *Health and Safety Appeal Tribunal*

- 3.26** The Health and Safety Appeal Tribunal (HSAT), which rarely sits, hears appeals made against administrative sanctions (‘notices’) served under the Health and Safety at Work (Jersey) Law 1989 and against decisions taken by the Minister in respect of licence provisions.
- 3.27** The tribunal members are: a chairman and deputy chairman (who must be advocates or solicitors of not less than 7 years’ standing) and two lay members appointed by States Assembly. All members of the tribunal are unremunerated.
- 3.28** The legislation provides that “The Tribunal may appoint a secretary and such other officers as it thinks fit”. In practice, the Judicial Greffe provides administrative support for the work of HSAT.

### *Data Protection Tribunal*

- 3.29** The remit of the Data Protection Tribunal (DPT) is to adjudicate on appeals by people aggrieved by decisions of the Data Protection/Information Commissioner for Jersey under the Data Protection (Jersey) Law 2005. DPT consists of a legally qualified president and four other members, appointed by the States Assembly for terms of six years on the recommendation “of the Minister and on the basis that they evenly represent the interests of data subjects and of

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<sup>38</sup> States of Jersey P.11/2016 (re-issue).



data controllers". The DPT is required to publish its determinations.<sup>39</sup> Members of the tribunal are remunerated. We have been unable to locate information on the DPT's caseload.

### *Rate Appeal Board*

- 3.30** The Rate Appeal Board (RAB), operating under the Rates (Jersey) Law 2005, hears appeals from decisions of Assessment Committees (each of the 12 Parishes has one). It is a successor body to the Parish Rate Appeal Board established under Article 41 of the Parish Rate (Administration) (Jersey) Law 2003.
- 3.31** It consists of between five and nine members appointed by the States Assembly on the recommendation of the Minister for Treasury and Resources; a panel of at least three members sits to hear appeals.
- 3.32** In 2011, the States were told that RAB meets "infrequently"<sup>40</sup> and in 2009 that "they have only met twice in recent years".<sup>41</sup> We have been unable to establish who is responsible for providing administrative support for the work of RAB.

### **Other appellate bodies**

- 3.33** During our mapping exercise, we identified further bodies with appellate functions related to administrative decision-making but which fall outside the definition of an administrative appeal tribunal.

### *Discretionary education grants panel*

- 3.34** The Appeals panel on discretionary education grants operates under the Education (Discretionary Grants-General)(Jersey) Order 2008. Its role is to hear appeals against decisions relating to higher education grants to students. Because of its composition, it is best understood as part of the internal complaints system of the Department of Education rather than an independent tribunal exercising judicial powers. It consists of: (i) the Director of Education or a nominated officer; (ii) the Minister or a nominated person; and (iii) a person, nominated by the Minister, 'who is independent of the administrations of the States for which the Minister has been assigned responsibility'. Overall, the membership clearly lacks judicial independence and contains no requirement for legal expertise (despite the fact that appeals may involve the interpretation and application of legislation).

### *Investigatory Powers Tribunal*

- 3.35** The role of the Investigatory Powers Tribunal (IPT) is to adjudicate on issues arising under the Regulation of Investigatory Powers (Jersey) Law 2005, which provides a legal framework under which public authorities in Jersey may use investigatory powers, including interception of communications and covert surveillance. The IPT comprises an ordinary member of the Jersey Court of Appeal and two Jurats, appointed by the Superior Number of the Royal Court. The seniority of its judges, the sensitivity of the cases that it may be called on to hear, and the special procedures it needs to adopt in order to preserve secrecy, mark it out as different from other tribunals. It is, in reality, a senior level court.

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<sup>39</sup> Data Protection (Appeals) (Jersey) Regulations 2006, Article 18(5).

<sup>40</sup> States of Jersey Official Report (Hansard), 12 July 2011.

<sup>41</sup> States of Jersey Official Report (Hansard), 10 December 2010.

### *Appeals against Prison discipline decisions*

- 3.36** Until recently, the Prison Board of Visitors (PBV) consisting of Jurats (the judges of fact in the Royal Court) exercised supervisory functions over conditions in HMP La Moye and made an annual report to the States Assembly. A panel appointed by the chairman of the Prison Board of Visitors heard appeals against findings of guilt relating to a breach of prison discipline. The composition of the Prison Board of Visitors was controversial for several years,<sup>42</sup> as it was doubtful that PBV met international human rights standards of independence because the Jurats had been involved (as members of the Royal Court) in decisions to sentence people to imprisonment.<sup>43</sup>
- 3.37** New arrangements came into force in September 2017 following amendments to the Prison (Jersey) Rules 2007 by the Prison (Amendment No. 2) (Jersey) Rules 2017. Under the new rule 94, a prisoner has 14 days to appeal against a finding of guilt for breach of prison discipline.
- If finding of guilt was made by the Governor, the appeal is to Minister for Home Affairs.
  - If the finding of guilt was made by a prison officer appointed by the Governor, the appeal is to a “disciplinary appeals panel” constituted under directions by the Minister. The panel must consist of three members of staff of the prison selected by the Governor from a list of role holders (for example, “the prison chaplain”, “the head of learning and skills”, and “the education manager”). The disciplinary appeals panel makes recommendations to the Governor after hearing the appeal, which the Governor must follow. If the prisoner is aggrieved by the outcome of the appeal to the disciplinary appeals panel, he or she may make a second appeal to the Governor. If the Governor concludes that the disciplinary appeals panel was correct, must refer to appeal to the Minister if requested by the prisoner to do so.
- 3.38** The disciplinary appeals panel is clearly not independent from the original decision-maker, so is not a judicial tribunal. It is best understood as a form of internal complaints handling. We return to consider the new arrangements, which we regard as unsatisfactory, in Chapter 4.

### **Bodies called ‘tribunals’ that are not appellate bodies**

- 3.39** Three bodies called ‘tribunals’ do not hear administrative appeals.
- 3.40** A Minister may in cases where it is alleged that conduct by an approved medical practitioner has been prejudicial to the Health Insurance Fund refer the matter to the Health Services Disciplinary Tribunal (HSDT) established under Articles 1, 27 and Schedule 2 to the Health Insurance (Jersey) Law 1967. The Tribunal makes recommendations to the Minister. The practitioner may appeal to the Royal Court against the Minister’s decision. In 2011, the States Assembly were told that tribunal has sat only twice in 40 years. The HSDT is part of the initial decision-making process rather an appeal.
- 3.41** Under the Misuse of Drugs (Jersey) Law 1978, the Minister may ask the Bailiff to constitute a panel of the Misuse of Drugs Tribunal (MDT) to inquire into and advise the Minister on situations where it thought that a medical practitioner is prescribing, administering or supplying or authorizing the administration and supply of, any controlled drug in an irresponsible manner. The MDT is part of the initial decision-making process rather an appeal.

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<sup>42</sup> States of Jersey Education and Home Affairs Scrutiny Panel, *Prison Board of Visitors*, S.R.9/2015.

<sup>43</sup> [www.gov.je/News/2015/pages/PrisonBoardVisitors.aspx](http://www.gov.je/News/2015/pages/PrisonBoardVisitors.aspx).

- 3.42** A Marine Accident Tribunal appointed under Article 167 of the Shipping (Jersey) Law 2002 Art 167, which investigates accidents. It is part of the initial decision-making process rather than an appeal.
- 3.43** For clarity and to aid public understanding of the law, we recommend to the Law Draftsmen that the term “tribunal” in Jersey legislation should in future be reserved for judicial bodies adjudicating on appeals and should not be used for bodies exercising executive or advisory functions.

### **Unmet need: missing rights of appeal to a tribunal?**

- 3.44** The mapping exercise has identified for the first time the tribunals “landscape” in Jersey. During the consultation period, we asked consultees whether there were any gaps in the landscape: situations where it would be useful to have a right of appeal to a tribunal but where none currently exists. We did not receive any suggestions.
- 3.45** Our own suggestion is decision-making relating to children’s special educational needs (SEN). Under Article 31 of the Education (Jersey) Law 1999, parents have a right to request and assessment of their children’s SEN. If a child is assessed to have SEN, the Minister must ensure that provision is made to meet the needs. There is a right “to appeal against any part of the results of the assessment” to the Minister within 15 days after the parent is notified of the results of the assessment. Article 31(4) provides:
- “The Minister may by written direction delegate the power to receive and determine any appeal ... to the Chief Officer or to a panel of persons appointed by the Minister for the purpose, subject to the conditions, exceptions or qualifications that the Minister may specify in the direction.”
- 3.46** During 2015, the States Assembly Education and Home Affairs Scrutiny Panel conducted an inquiry into SEN.<sup>44</sup> Key finding 5.19 was that ‘The legislation and policies relating to SEN in Jersey provide a suitable framework for the provision of a high quality service’ but recommended that ‘The Minister ... must improve lines of communication with parents of SEN children’. The Panel’s report did not, however, deal specifically with any issues relating to appeals. Our assessment is that the current system of appeals to a Minister fails to provide a sufficiently independent form of redress. We return to this issue in Chapter 4.

### **Lesson learning from other jurisdictions**

- 3.47** In England and Wales, more than 70 separate tribunals were established during the 20th century as alternatives to legal proceedings in courts. Initially, tribunals had close ties with the government departments against whose decisions they heard appeals: for example, tribunal members were appointed by Ministers. By the 1950s, however, there was a realisation that tribunals should operate, and be seen to operate, independently of government departments.
- 3.48** Further major reforms were introduced for tribunals in England and Wales, and some that operate at a pan-UK level, by the Tribunals, Courts and Enforcement Act 2007. For the first time, it was made clear that all members of tribunals (whether legally qualified or not) are members of the judiciary. The 2007 reforms made significant structural changes. Over 70 separate tribunals set up under different Acts of Parliament were amalgamated into a single tribunal called the First-tier Tribunal, from which there is a right of appeal to the Upper Tribunal. The post of Senior President of Tribunals was created (occupied by a senior judge), to provide strategic leadership to the new tribunal system. The administrative support arrangements for

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<sup>44</sup> States of Jersey Education and Home Affairs Scrutiny Panel, *Special Education Needs*, Presented to the States on 14 July 2015, S.R.3/2015.

tribunals were also modernised, with responsibilities transferred from individual tribunals or government departments to Her Majesty's Courts and Tribunals Service.<sup>45</sup>

- 3.49** The Tribunals (Scotland) Act 2014, enacted by the Scottish Parliament, introduced broadly comparable reforms to the tribunal system in Scotland. This included creating a judicial leadership role of Senior President of Scottish Tribunals.<sup>46</sup>
- 3.50** Structural reforms to tribunals in Northern Ireland have also been implemented and continue to be discussed. Five previously separate tribunals on social security and child support have been amalgamated into a single tribunal. In 2009, the Northern Ireland Executive agreed that the Northern Ireland Courts and Tribunals Service should assume administrative responsibilities for all tribunals on a phased basis. Proposals have been made to create the Northern Ireland Amalgamated Tribunal (NIAT), which would take the process of amalgamation further.<sup>47</sup>
- 3.51** More recently, reforms to tribunals in Wales will be implemented during 2018 under the Wales Act 2017.<sup>48</sup>
- 3.52** A preference for replacing a proliferation of specialist tribunals with a 'super tribunal' can also be seen in Australia, at both Commonwealth and State levels. Our view is that useful lessons can be learnt for Jersey from other jurisdictions, with necessary adaptations to the special circumstances of a small jurisdiction – including Jersey's constitutional framework and the smaller scale on which its justice systems operate.

## How much will the tribunal reforms cost?

- 3.53** The majority of consultation responses expressed support for the package of reforms to tribunals that we proposed in April 2016. One response disagreed and was critical of the interim proposals, saying "what is proposed amounts to a Rolls Royce service, and if it were to be adopted, pressure would be brought to bear on the delivery of other services which have at least equal and probably more importance for the community".
- 3.54** It is not our intention to propose a grandiose and unjustifiably expensive package of reforms. The final assessment of the costs and benefits of making changes is a political decision for the Government of Jersey and the States of Jersey. As a law reform agency, our role can include

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<sup>45</sup> For background, see Sir Andrew Leggatt, *Report of the Review of Tribunals: Tribunals for Users – One System, One Service* (2001); Michael Adler, "Tribunal Reform: Proportionate Dispute Resolution and the Pursuit of Administrative Justice" (2006) 69 *Modern Law Review* 958; Genevra Richardson and Hazel Genn, "Tribunals in Transition: Resolution or Adjudication" [2007] *Public Law* 116; Andrew Le Sueur, "Administrative Justice and the Resolution of Disputes", ch 11 in J Jowell and D Oliver (eds), *The Changing Constitution* (7th edn, Oxford University Press 2011).

<sup>46</sup> For background, see Scottish Government, "Scottish Tribunals Landscape" [www.gov.scot/Topics/Justice/policies/civil-courts/tribunal-system/Tribunals](http://www.gov.scot/Topics/Justice/policies/civil-courts/tribunal-system/Tribunals); Tom Mullen and Chris Gill, "Scottish Tribunals: Smith Commission Proposes Major Transfer of Jurisdiction to Scotland" [www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/5228/Tom-Mullen-and-Chris-Gill-Scottish-Tribunals-Smith-Commission-Proposes-Major-Transfer-of-Jurisdiction-to-Scotland.aspx](http://www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/5228/Tom-Mullen-and-Chris-Gill-Scottish-Tribunals-Smith-Commission-Proposes-Major-Transfer-of-Jurisdiction-to-Scotland.aspx) (2015).

<sup>47</sup> For background, see Gráinne McKeever and Brian Thompson, *Redressing Users' Disadvantage: Proposals for Tribunal Reform in Northern Ireland* (Law Centre NI, 2010) and Brian Thompson, *Structural Tribunal Reform in Northern Ireland* (Law Centre NI, 2011); Marie Anderson et al, *Mapping the Administrative Justice Landscape in Northern Ireland: report on research undertaken on the Administrative Justice System in Northern Ireland* (Northern Ireland Ombudsman's Office, 2014).

<sup>48</sup> For background, see Huw Pritchard, "Tribunal reform in Wales under the Wales Act 2017", UKAJI Blog, July 2017, <https://ukaji.org/2017/07/20/tribunal-reform-in-wales-under-the-wales-act-2017/>.

identifying the different “heads” of costs and savings (but we lack the resources to be able to quantify these).

**3.55** One head is **one-off set-up costs** (such as drafting and scrutinising the Administrative Justice (Jersey) Law. It will normally be necessary to spend money in order to save money in the longer run or provide a better service.

**3.56** Another head of costs/savings is the **ongoing operational costs** of running the proposed new system, it is helpful to identify three categories of changes – (i) those likely to create opportunities for saving operational costs, (ii) changes that are likely to be cost neutral, either because there is no significant cost or new costs are cancelled out by anticipated savings, and (iii) change that is likely to lead to increased cost.

**3.57** A further head is any **non-financial benefits** that may flow from the proposed reforms. In relation to tribunals, these may include: improving public confidence and trust in the system; meeting international human rights standards on fair trials; and enhancing the judicial independence of tribunal members.

**3.58** In discussing costs and benefits, it is useful to identify the **impact on different bodies and individuals** of the costs and benefits. In relation to tribunal reform, these are (i) to the Judicial Greffe, the public body responsible for running courts and tribunals, paid for by public funds allocated by the Chief Minister, (ii) users of the tribunal system, who comprise the individuals challenging administrative decisions and the public bodies (e.g. Department for Health and Social Services) that must respond appeals, and (iii) others, including for example advice services such as the Jersey Citizen’s Advice Bureau which allocate resources in supporting people to use the tribunal system.

**3.59** Applying these considerations to the proposal for JAAT:

One-off set-up costs	<ul style="list-style-type: none"> <li>• Drafting the Administrative Justice (Jersey) Law to implement changes – cost to Government of Jersey</li> <li>• Scrutiny of <i>projet de loi</i> on Administrative (Jersey) Law – cost to States Assembly</li> <li>• Work on producing the first draft of the JAAT Rules; some efficiency savings should be gained from having tribunal rules in one place</li> </ul>
Ongoing operational costs	<ul style="list-style-type: none"> <li>• Set-up costs of Judicial Greffe in starting to support the work of JAAT</li> <li>• Ongoing costs of Judicial Greffe in supporting work of JAAT</li> <li>• Part-time salary of Chairman of JAAT (but some of this cost would replace daily fees paid to a senior lawyer member of the current tribunal system)</li> <li>• Cost of preparing Chairman of JAAT’s annual report (cost to Judicial Greffe)</li> <li>• Occasional payments from the public purse for legal advice and representations for appellants who would not otherwise have a fair hearing</li> <li>• Arrangement for publishing JAAT judgments or summaries of significant cases</li> </ul>
Ongoing savings	<ul style="list-style-type: none"> <li>• Day-to-day efficiency savings to the public funds (the Judicial Greffe and departments) from running one tribunal rather than 9 separate ones</li> <li>• Streamlined process for appointing members (savings to the States Assembly or Judicial and Legal Services Commission)</li> </ul>
Other benefits	<ul style="list-style-type: none"> <li>• Improved judicial independence</li> <li>• Improved adherence to Article 6 of the European Convention on Human Rights in relation to open hearings</li> </ul>



## Creating a single administrative tribunal

**Recommendation 3.1: Create a new tribunal (the Jersey Administrative Appeals Tribunal) with a broad jurisdiction to hear appeals against administrative decisions.**

- 3.60** The approach adopted in Jersey has been to create separate tribunals under different Laws relating to different types of administrative decision-making. For example, during the research interviews,<sup>49</sup> we were told that three separate social security tribunals were needed because there are three separate types of benefit operating under different Laws. Another reason for having separate tribunals, some interviewees suggested, was to enable members to develop expertise in the subject matter and law relating to particular types of appeals.
- 3.61** There are, however, considerable disadvantages to having several separate tribunals.
- The administrative redress system becomes unnecessarily complicated.
  - Providing administrative support to eight separate tribunals is less efficient and effective than supporting the work of one tribunal.
  - There are unnecessary differences between tribunals in relation to appointment of members, terms of service, and procedures.
  - The absence of a tribunal with general jurisdiction across different Laws acts as a disincentive to creating tribunal appeals (because setting up a new tribunal is a cumbersome process). Laws therefore create appeals to the Royal Court – but this is disproportionate for straightforward appeals about facts or straightforward questions of law.
  - It can be difficult to recruit members to serve on a tribunal that is expected to sit infrequently.
  - There was limited evidence of sharing of good practice across the different tribunals (though this may be changing following the appointment of the same Chairman across several tribunals).
  - Provision of training for members across the fragmented tribunals is more difficult to deliver than if there was a single tribunal.
- 3.62** The experience in England & Wales, Scotland, Northern Ireland and Australia is that there is no need to have a separate tribunal for each type of administrative decision taken under different laws. Appeals can be directed to a single tribunal with broad jurisdiction.
- 3.63** The creation of JAAT would build on administrative changes that have taken place in recent years across Jersey's tribunals. As outlined above, the administration of several tribunals has been transferred from States departments to the Judicial Greffe. Moreover, since November 2015, the same person has held the posts as legal chairman of the three social security tribunals and the Mental Health Review Tribunal (Advocate Sarah Fitz).
- 3.64** JAAT should have administrative support services provided by the Judicial Greffe. For presentational or administrative reasons, the staff of the Judicial Greffe who currently provide administrative support to some of the existing tribunals are designated as the "Tribunal Service". We do not see any legal necessity for the Administrative Justice (Jersey) Law to create a free-standing Tribunal Service separate from the other functions of the Judicial Greffe; indeed, to do so would run counter to the models for integrated courts and tribunals services that have been established in England and Wales, Scotland and Northern Ireland over the past decade.

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<sup>49</sup> See **Annex D: Research statement** for further information on our research methods.

- 3.65** A consequence of our recommendation is that the work of the Commissioners of Appeal for Taxes would no longer be supported by an advocate in private practice (appointed as “clerk” to CAT), with CAT conducting hearings from the clerk’s law firm’s premises.<sup>50</sup> In response to our consultation report, a member of CAT told us that it would be unsatisfactory for CAT to be supported by Judicial Greffe staff (“perhaps from a pool and therefore probably not dedicated to us”) and he expressed fear that new arrangements would be a “dumbing down” if panels of CAT no longer had the presence of an advocate as clerk (whose advice in contentious cases is described as invaluable). The Tribunal Service of the Judicial Greffe took a different view, describing the private sector support for CAT as “not best practice, nor does it meet the needs of a modern tribunal service”. We agree.
- 3.66** JAAT will be a “judicial tribunal” for the purposes of Article 11 of the Departments of the Judiciary and the Legislature (Jersey) Law 1965. This provides:
- “(1) The Judicial Greffier, the Deputy Judicial Greffier or a Greffier Substitute shall attend at all sittings of the courts and judicial tribunals to record the acts and decisions of those courts and tribunals, to take down where necessary the depositions of witnesses and generally to carry out all the duties of clerk.
- (2) All acts and decisions so recorded shall be authenticated by the signature or initials of the Judicial Greffier, the Deputy Judicial Greffier or the Greffier Substitute, as the case may be, and shall be entered in the appropriate register.”
- 3.67** The work of JAAT must be adequately resourced. The Department for Community and Constitutional Affairs’ July 2017 policy paper *Judicial Independence and the Establishment of a Legal Services Commission*, proposed a new Law to provide that “In accordance with his responsibility for justice policy and resources, the Chief Minister must have regard to ... The need for the judiciary to have the support necessary to enable them to exercise their functions” (para 22). This should apply to JAAT as it does to other courts and tribunals. We do not consider there to be a need to state this expressly in the Administrative Justice (Jersey) Law (the name we have given to the Law that we envisage being used to implement our recommendations).

## Transferring jurisdiction from eight existing tribunals to JAAT

### Recommendation 3.2: Transfer jurisdiction of eight existing tribunals to JAAT

- 3.68** The jurisdiction of the following eight tribunals should be transferred to JAAT and the tribunals should cease to exist once the new arrangements are in place:
- Commissioners of Appeal for Taxes
  - Social Security Tribunal
  - Social Security Medical Appeal Tribunal
  - Income Support Medical Appeal Tribunal
  - Mental Health Review Tribunal
  - Health and Safety Appeal Tribunal
  - Data Protection Tribunal
  - Rate Appeal Boards

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<sup>50</sup> Since 2008, the Clerk has been Advocate Adam Clarke of Le Gallais and Luce.



- 3.69** The legislation under which these tribunals operate would be amended by the proposed Administrative Justice (Jersey) Law to change the name of the tribunal and make consequential amendments.
- 3.70** Legal, expert and lay members of the current tribunals would become members of JAAT on the day of transfer, subject to any transitional arrangements thought desirable to achieve a smooth transition.

## Transferring appeal hearing powers to JAAT from Ministers

**Recommendation: this is considered in more detail in Recommendations 4.1, 4.2, 4.3, 4.4 and 4.5**

- 3.71** In Chapter 4, we recommend that five rights of appeals that currently lie to Ministers should instead be made to JAAT. The main rationale for the change is that it is not constitutionally or legally appropriate for an elected political figure to exercise *appeal* functions determining an individual's rights and obligations. The Administrative Justice (Jersey) Law would amend the relevant legislation to change the name of the appeal body.

## Appeals relating to discipline under the Prison (Jersey) Rules 2007

**Recommendation: this is considered in more detail in Recommendation 4.5**

- 3.72** As explained above, the arrangements for hearing appeals from prisoners about disciplinary findings has changed during the course of our project. This was part of a broader set of reforms to Prison Visitors, who in the past were Jurats of the Royal Court.
- 3.73** Under the revisions to rule 94 of the Prison (Jersey) Rules 2007, which came into force in September 2017, a "disciplinary appeals panel" of members of staff of the Prison is convened by the Governor to hear appeals. This panel is best understood as a form of internal complaint handling (see Chapter 2) rather than a tribunal. We would expect the Governor to have regard to the guidance on handling internal complaints that we propose should be published by the Chief Minister (Recommendation 2.1).
- 3.74** Appeals to the Minister of Community and Constitutional Affairs from determinations of a disciplinary appeals panel, or from determinations of the Governor, are not in accordance with the principles we set out in Chapter 4 and we therefore recommend that JAAT (rather than the Minister) should hear appeals: see Recommendation 4.5.

## Transferring appeal hearing powers to JAAT from the Royal Court

**Recommendation: this is considered in more detail in Recommendation 7.1**

- 3.75** In Chapter 7, we recommend that over 50 rights of appeal that currently lie to the Royal Court should instead be made to JAAT. The main rationale for this proposed change is that people (individuals and small businesses) considering appealing against an administrative decision will find JAAT more accessible than the Royal Court.
- 3.76** The Administrative Justice (Jersey) Law would amend the relevant legislation that currently creates rights of appeal against administrative decisions directly to the Royal Court. In most Laws, this would involve only substituting the words "Jersey Administrative Appeals Tribunal" for "Royal Court", though in some Laws further consequential amendments may be needed.

## Creating the judicial post of Chairman of JAAT

### Recommendation 3.3: Create a new judicial post of Chairman of the Jersey Administrative Appeal Tribunal

- 3.77** In our interim proposals, we recommended creation of the post of “President of the Jersey Administrative Appeals Tribunal”.
- 3.78** Recommendation 3.4 is in substance the same. Although there are grounds for preferring the title “President”,<sup>51</sup> the term “Chairman” indicates better that the office is the counter-part to that of the Chairman of the Employment and Discrimination Tribunal, which will run in parallel to the proposed JAAT.
- 3.79** During the research interviews, it became clear that there has been no strong sense of leadership across the existing tribunals. This is unsurprising, given the fragmented structure, the relatively low volume of appeals, the part-time nature of the work, and remuneration of legal members being based on daily fees to hear particular cases allocated to them. During the consultation phase, all respondents who supported the proposal to create JAAT welcomed the idea of a senior legal member of JAAT designated as President.
- 3.80** The absence of a clearly identified leadership role has in our assessment had an adverse effect on the quality of tribunal justice in Jersey. It has hampered the sharing of good practice between tribunal jurisdictions, prevented the development of strategy, hindered the provision of training for tribunal members, and limited the accountability for the operation of the tribunal system. For example, it remains unclear who has responsibility for ensuring that all tribunals have clear and appropriate published procedures.
- 3.81** JAAT should have a judicial figure with leadership responsibilities. We envisage that this judicial and leadership role would be permanent, part-time and salaried. The Chairman of JAAT would, in addition to sitting on appeals, have strategic responsibilities for
- leading work, as a member of the JAAT Rules Committee, in preparing and keeping up to date the set of user-friendly procedures for making appeals
  - contributing to decisions about appointment of legal, professional and lay members of JAAT through identifying JAAT’s needs and serving on the proposed Judicial and Legal Services Commission<sup>52</sup>
  - ensuring that the Bailiff is aware of the views of tribunal members on matters affecting the operation of JAAT, to enable the Bailiff to fulfil his “representative” role as head of the judiciary in Jersey<sup>53</sup>
  - from time to time responding to plans for legislative change that may have an impact on the operation of JAAT, for example as a consultee on proposals for new rights of administrative appeal contained in *projets de loi*
  - working closely with the Judicial Greffier to ensure that the training needs of tribunal members are met
  - working closely with the Judicial Greffe on questions of deployment of tribunal members

<sup>51</sup> The senior judge of the Data Protection Tribunal is described as “a president” in the Data Protection (Jersey) Law 2005.

<sup>52</sup> See Department for Community and Constitutional Affairs, *Consultation Paper: Judicial Independence and the Establishment of a Judicial and Legal Services Commission* (July 2017) para 28 ff.

<sup>53</sup> See Department for Community and Constitutional Affairs, *Consultation Paper: Judicial Independence and the Establishment of a Judicial and Legal Services Commission* (July 2017) para 26-27.

- making an annual report to the States Assembly on the operation of JAAT
- ensuring that the operation of JAAT is kept informed by research and learning from good practice in tribunals in the United Kingdom and other systems.

**3.82** We recommend that the Chairman of JAAT should be appointed on a permanent, part-time salaried basis. A permanent appointment – rather than a fixed-term of for example 4 years – is important for enhancing the judicial independence of this post for the reasons discussed below. Appointment on a salary, rather than on a daily fee-paid basis, will ensure that the officeholder has sufficient time to devote to the leadership aspects of the role beyond sitting on panels to hear particular appeals. We envisage that the Chairman will preside in a substantial number of appeals. (If the Chairman was not salaried, daily fees would need to be paid for this work).

## Creating the judicial post of Deputy Chairman of JAAT

### **Recommendation 3.4: Create a new judicial post of Deputy Chairman of the Jersey Administrative Appeal Tribunal**

**3.83** We propose that one of the legal members of JAAT should be appointed to a post of Deputy Chairman of the Jersey Administrative Appeal Tribunal. This does not need to be a salaried post as the substantial part of the office-holders time will be focused on hearing appeals, for which a daily fee-paid arrangement is satisfactory. The Deputy Chairman will deputise for the Chairman of JAAT when required.

## Members of JAAT to be included in the legal definition of “the judiciary of Jersey”

### **Recommendation 3.5: All members of JAAT – the Chairman, Deputy Chairman, legal members, expert members, and lay members – should fall within the definition of “the judiciary of Jersey” in the proposed legislation to create a Judicial and Legal Services Commission**

**3.84** In the consultation paper published by the Department for Community and Constitutional Affairs in July 2017, the Government of Jersey proposes to enact a legal definition of “the judiciary of Jersey”.<sup>54</sup> The practical purpose of this is to demarcate who benefits from the “guarantee of judicial independence” and which posts will be appointed by the proposed Judicial and Legal Services Commission.

**3.85** The consultation paper expressly leaves open the position of “other persons who also exercise judicial functions in the tribunals of Jersey”. We recommend that all members of JAAT should be recognised as part of the “judiciary of Jersey”. It would be undesirable to draw a distinction between legally qualified members of JAAT (the Chairman, Deputy Chairman and other legal members) and the expert members and lay members. All members of JAAT are equally responsible for adjudicating and should therefore have the same status for the purposes of appointments and protection.

<sup>54</sup> See Department for Community and Constitutional Affairs, *Consultation Paper: Judicial Independence and the Establishment of a Judicial and Legal Services Commission* (July 2017) para 6.

## Members of JAAT appointed by the proposed Judicial and Legal Services Commission

### Recommendation 3.6: Members of JAAT should be appointed by the proposed Judicial and Legal Services

- 3.86** In our consultation paper published in April 2016, we made detailed proposals about the arrangements for appointing members of JAAT.<sup>55</sup> These have been overtaken by the proposals made in July 2017 by the Department of Community and Constitutional Affairs for the creation of a Judicial and Legal Services Commission, chaired by the Bailiff, that will have the function of appointing the Island's judiciary.
- 3.87** We support the principle of a judicial appointments commission. If one is established in Jersey, we recommend that all appointments to JAAT should be made by this body.

## Diversity across the members of JAAT

### Recommendation 3.7: The Judicial and Legal Services Commission proposed by the Department for Community and Constitutional Affairs should have legal duty to “have regard to the need to encourage diversity in the range of persons available for selection for appointments” to JAAT.

- 3.88** One of the features that distinguishes most tribunals from many courts is that their membership includes lay people. The rationale for having lay people as judges on matters relating to administrative decision-making is that they “provide a representative public view” (to use the words often used in Propositions to the States Assembly for appointments of members of Jersey's current tribunals. The reason for valuing diversity rests on the understanding that a diverse judicial body is better at carrying out its functions than one that is drawn from a narrow spectrum of society. For example, where a panel of three members has the task of finding facts, or applying or developing the law, the decision will be enriched if the panel is able to draw on different life experiences and perspectives.
- 3.89** We investigated the diversity of the lay membership of Jersey's current tribunals. We examined Propositions for tribunal appointments lodged at the Greffe in the 6½ year period from January 2011 to May 2017 (when the last appointments were made). Appointments were made to the Income Support Medical Appeal Tribunal, the Commissioners of Appeal for Taxes, the Rate Appeal Board, the Social Security Tribunal, the Health and Safety Tribunal, and the Income Support Medical Appeal Tribunal. No appointments to the Data Protection Tribunal appear to have been made in this period and we are unable to ascertain who the current members are.<sup>56</sup> There is no record of membership of the Mental Health Review Tribunal in the official record of the States of Jersey, as members are appointed by the Bailiff.
- 3.90** During the sample period, 38 individuals were appointed or reappointed to membership of a tribunal (see the Table at the end of this Chapter for details). Eight of the individuals are female (21%). Fifteen are former or current employees of the States of Jersey (40%). Seventeen are described as retired or semi-retired in the Propositions (45%). The proportion of retired people may be affected by the requirement, in relation to the Commissioners of Appeal for Taxes, that

<sup>55</sup> Jersey Law Commission, *Consultation Paper: Improving Administrative Redress in Jersey* Consultation Paper No.1/2016/CP Chapter 2.

<sup>56</sup> The last appointments for which a Proposition is available on the States Assembly website is dated 2006. Under the Data Protection (Jersey) Law 2005, members hold office for 6 years.

members must not be “actively interested in any trade, business or profession carried out in the Island”.<sup>57</sup>

- 3.91** During the research interviews, several interviewees referred to the stereotype that lay tribunal members in Jersey are retired men, mostly with a background in working for the States. Our data confirms that this is a broadly accurate impression. We make absolutely no criticism of the individuals concerned. The concern about lack of diversity is that current practices are leading to a profile of lay membership of the tribunals that is not representative of Jersey society in terms of gender, age and employment background. This risks undermining the stated aim of having lay tribunal members (to provide “a representative public view”).
- 3.92** In England and Wales, when the Judicial Appointments Commission (JAC) was established by the Constitutional Reform Act 2005, one of the aims was to address the long-standing problem that the judiciary lacked diversity. There were too few women and the number of judges from black, Asian and minority ethnic backgrounds was also disproportionately small. The judicial appointments bodies in Northern Ireland and in Scotland also have legal duties in relation to diversity.
- 3.93** As the Jersey Law Commission, we express no official view about the decision of the Department for Community and Constitutional Affairs to entirely exclude provisions relating to diversity from its package of reforms.<sup>58</sup> We do, however, recommend that in relation to appointments to JAAT the new Judicial and Legal Services Commission should have a diversity duty.
- 3.94** We suggest that this diversity duty should be modelled on the one that applies to JAC in England and Wales: a duty “to have regard to the need to encourage diversity in the range of persons available for selection for appointments”.<sup>59</sup> We envisage that the Jersey Judicial and Legal Services Commission would fulfil its diversity duty through, for example, outreach and awareness events. Selection of candidates should be solely on merit and good character.<sup>60</sup>

## Defining professional eligibility criteria for Chairman and Deputy Chairman

**Recommendation 3.8: The professional eligibility criterion for appointment as Chairman and Deputy Chairman of JAAT should be 7 years relevant legal experience.**

- 3.95** The judicial posts of Chairman and Deputy Chairman of JAAT will be new ones. As explained above, the Chairman’s role will involve leadership functions as well as hearing appeals. Both posts should be occupied by people with significant prior legal experience, to ensure that they have sufficient professional standing to command respect. We therefore propose that there should be an eligibility criterion related to a minimum number of years of relevant legal experience.

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<sup>57</sup> Income Tax (Jersey) Law 1961 Article 10.

<sup>58</sup> As set out in Department for Community and Constitutional Affairs, *Consultation Paper: Judicial Independence and the Establishment of a Judicial and Legal Services Commission* (July 2017).

<sup>59</sup> UK Constitutional Reform Act 2005 section 64 (“Encouragement of diversity”).

<sup>60</sup> We note that this is an aspect of a much broader issue of diversity in public appointments and membership of public bodies in the Island. It will be for the Chief Minister to take steps to put in place an “effective island diversity strategy ... essential in addressing the challenges of an increasingly diverse community”, as recommended by the *Report of the Independent Jersey Care Inquiry* in July 2017.

- 3.96** In our April 2016 consultation paper, we suggested that the legal professional criterion for the Chairman of JAAT should be 10 years of relevant law-related work experience. The consultation paper published in July 2017 by the Department for Community and Constitutional Affairs proposes that “The Master of the Royal Court, Family Court Registrars, and the Chairmen and Deputy Chairman of the Jersey Employment and Discrimination Tribunal shall have 7 years legal practice in Jersey (including as a Law Officer) or the Commonwealth”.<sup>61</sup>
- 3.97** In light of the Department for Community and Constitutional Affairs’ general proposals on judicial appointments, we consider our initial proposal of 10 years sets the bar too high and risks missing out on candidates well placed to carry out the duties of Chairman and Deputy Chairman.
- 3.98** We therefore recommend that the eligibility criterion for the posts of Chairman and Deputy Chairman should be 7 years. We would prefer the criterion to be framed as “years relevant legal experience” rather than “years legal practice”. The term “practice” connotes private practice in a law firm, which is presumably why the Department for Community and Constitutional Affairs adds the qualification “including as a Law Officer”. It is possible to foresee good applicants for these posts coming from a variety of other legal professional backgrounds, including for example as in-house counsel, law draftsmen, or legal academics.
- 3.99** This criterion could be contained either in the proposed Administrative Justice (Jersey) Law or in Regulations made under that proposed Law. Alternatively (and in our view preferably), the criterion could be included in the proposed legislation to establish a Judicial and Legal Services Commission. This is because Jersey law will be simpler if all criteria relating to judicial appointments are contained in one Law.

## Defining professional eligibility criteria for legal members of JAAT

**Recommendation 3.9: The professional eligibility criterion for appointment as a “legal member” of JAAT should be 5 years relevant legal experience.**

- 3.100** The proposed ordinary “Legal members” of JAAT will preside at panel hearings if the Chairman or Deputy Chairman do not do so. Further work will be needed to identify how many Legal members should be appointed, having regard to
- the number of hearings in which the Chairman and Deputy Chairman can be expected to sit
  - the anticipated case load of JAAT
  - our recommendation (see below) that there should be a presumption in the JAAT Rules that every panel is presided over by a Legal member.
- 3.101** The current Laws defining who may be a legal member of Jersey’s existing tribunals specify a variety of different arrangements.

Name of tribunal	Requirements for legal members
Commissioners of Appeal for Taxes	No legal member required
Social Security Tribunal	Chairman and deputy chairmen must be ‘persons holding a qualification in law’
Social Security Medical Appeal Tribunal	Chairman and deputy chairmen must be ‘persons holding a qualification in law’

<sup>61</sup> See Department for Community and Constitutional Affairs, *Consultation Paper: Judicial Independence and the Establishment of a Judicial and Legal Services Commission* (July 2017) para 68.



Income Support Medical Appeal Tribunal	Chairman and deputy chairmen must be ‘persons holding a qualification in law’
Mental Health Review Tribunal	Chairman and Vice-chairman must be an advocate or solicitor of the Royal Court of not less than 5 years standing
Health and Safety Appeal Tribunal	Chairman and Deputy Chairman must be an advocate or solicitor of the Royal Court of not less than 7 years standing
Data Protection Tribunal	“The president of the Tribunal shall be an advocate or solicitor of at least 7 years’ standing”. The Data Protection Commissioner has proposed removing “the requirement for the President of the Data Protection Tribunal to be of seven years standing as an advocate or solicitor should provide greater latitude in the context of any future appointment process”. <sup>62</sup>
Rate Appeal Boards	No legal member required

**3.102** We recommend that for ordinary Legal members of JAAT, the eligibility criterion should be 5 years relevant legal experience.

## Proposal on duration of judicial appointments to JAAT

**Recommendation 3.10: Appointment as a judge to JAAT should be on a permanent basis. Open-ended terms of office should be able to be brought to an end by resignation, reaching a mandatory retirement age of 72 years, or removal from office on the same basis as other judges.**

**3.103** The length of a judicial appointment is of great significance because the “tenure of judges is one of the most important areas in which legal frameworks can support the judiciary in upholding the rule of law”.<sup>63</sup>

**3.104** The Laws that currently establish Jersey’s tribunals define the length of service for members in different ways.

<b>Name of existing tribunal</b>	<b>Term of office</b>
Commissioners of Appeal for Taxes	“The Commissioners of Appeal shall hold office for such period as the States may determine on their appointment”: Income Tax (Jersey) Law 1961, Article 10. Current practice is to appoint for a 5-year term, renewable for a further 3-year term.
Social Security Tribunal	“A member of the Tribunal shall hold office for such period as is specified in his or her appointment and after expiry of such period is eligible for re-appointment for such period as is specified in his or her new appointment”: Social Security (Determination of Claims and Questions) (Jersey) Order 1974, Article 8.

<sup>62</sup> Office of the Data Protection Commissioner, Proposed Amendments to the Data Protection (Jersey) Law 2005, <http://www.statesassembly.gov.je/scrutinyreviewresearches/2010/s-24166-31881-232010.pdf>

<sup>63</sup> J van Zyl Smit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: a Compendium and Analysis of Best Practice (Report of Research Undertaken by the Bingham Centre for the Rule of Law* (British Institute of International and Comparative Law, 2015) para 2.1.1.



Social Security Medical Appeal Tribunal	"A member of the Tribunal shall hold office for such period as is specified in his or her appointment and after expiry of such period is eligible for re-appointment for such period as is specified in his or her new appointment": Social Security (Determination of Disablement Questions) (Jersey) Order 1974, Article 6.
Income Support Medical Appeal Tribunal	"A member of the Tribunal shall hold office for such period as is specified in his or her appointment and after expiry of such period is eligible for re-appointment for such period as is specified in his or her new appointment": Income Support (General Provisions) (Jersey) Order 2008, Article 15
Mental Health Review Tribunal	Appointment by Bailiff, which ceases "at midnight on 31st December in the fifth year following the year of appointment": Mental Health (Jersey) Law 2016, Article 48.
Health and Safety Appeal Tribunal	"A member of the Tribunal shall vacate the member's office at the expiry of 3 years from the date of the member's appointment but shall be eligible for re-appointment": Health and Safety at Work (Appeal Tribunal) (Jersey) Regulations 1989, Regulation 4
Data Protection Tribunal	"A member of the Tribunal may hold office for such term not exceeding 6 years as the States determine at the time of the person's appointment": Data Protection (Jersey) Law 2005, Schedule 5 para 9.
Rate Appeal Board	"A member of the Rate Appeal Board holds office for such period, not exceeding 5 years, as the States determine on the member's appointment"; "A member of the Rate Appeal Board is eligible for re-appointment": Rates (Jersey) Law 2005, Article 44.

**3.105** In our consultation report, we made the provisional recommendation that members of JAAT should have permanent appointments brought to an end by (i) mandatory retirement at 72 years, (ii) resignation, or (iii) removal from office. There were mixed responses among the small number of people who responded to this particular question: two people agreed (a lay member of a tribunal and a member of the public, who said this would provide consistency) and two people disagreed, one commenting that "fixed terms appointments are useful to ensure 'new blood' and a fresh approach".

**3.106** Guidance published by the Jersey Appointments Commission (JAC)<sup>64</sup> provides that "States appointees and members of independent bodies should not normally be appointed for terms in excess of nine years. The period of nine years includes any term of office and periods of office in a shadow position. The terms of office for Officers of the Crown and other judicial appointments *are subject to the normal judicial terms of office*" (our emphasis).<sup>65</sup> As there are no normal, or standard, terms of judicial office in relation to administrative appeal tribunals in Jersey it might be thought that this guidance is not conclusive. Ministers have, however,

<sup>64</sup> This is an independent advisory body that oversees the recruitment of States' employees and appointees to States supported or related bodies. Note that this is distinct from the Judicial and Legal Services Commission proposed in a July 2017 consultation paper by the Department for Community and Constitutional Affairs, which will have a remit relating to the appointment judges and Law Offices.

<sup>65</sup> Jersey Appointments Commission, *Guidelines for the recruitment of Senior States Employees, appointees and members of independent bodies* (May 2016) para 10.

consulted JAC in relation to tribunal appointments, as evidenced (for example) by States of Jersey P.145/2014 on the reappointment of three lay members to the Social Security Tribunal. The Proposition states:

“The Social Security (Determination of Claims and Questions) (Jersey) Order 1974 provides that members of the Tribunal may be re-appointed for a further term of office. The appointment of Tribunal members is in accordance with the Jersey Appointments Commission’s Code for Quangos and Tribunals. Re-appointment of members is accepted, providing it does not exceed a total of 10 years. Following consultation with the Appointments Commission, it is proposed that the following members, who have completed a 5 year term to date, are re-appointed for a further 5 years to begin from the date of States approval.”

- 3.107** Although there may be practical benefits of fixed-term judicial appointments, and such arrangements do exist in some countries, we consider that the better arrangement is to have permanent appointments. The *Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence*, adopted by the Commonwealth as a statement of best practice, provides: “Judicial appointments should normally be permanent; whilst in some jurisdictions, contract appointments may be inevitable, such appointments should be subject to appropriate security of tenure”.<sup>66</sup>
- 3.108** The definition of terms of office is an important way of enhancing judicial independence and impartiality. Relatively short terms of office, subject to reappointment, are widely regarded as less than ideal as this opens up the risk that judges will effectively be removed from office because of the content their judgments. The perceived risk is heightened when Ministers and other politicians (the States Assembly) are involved in the appointment and reappointment processes. Nobody has suggested that this risk has ever materialised in relation to tribunals in Jersey. Nonetheless, in reforming the appointments process, the risk should be eliminated or reduced to ensure that Jersey meets international standards on judicial independence.
- 3.109** We recognise that this is a significant change from the current law and practice of relatively short fixed-term appointments, some of which are renewable. That practice has arisen because tribunal appointments are viewed as being akin to appointments to other public bodies; but they are not – tribunal members exercise judicial rather than executive or advisory functions and accordingly special constitutional considerations apply to them.
- 3.110** We therefore recommend that all members of JAAT – the Chairman, Deputy Chairman, ordinary legal members, expert members, and lay members – should have permanent appointments. There should be no fixed end-date at the time of appointment.
- 3.111** A tribunal member should be able to resign from office. There is precedent in Jersey law for having an express provision about resignation: a member of the Data Protection Tribunal “may resign from that office by giving at least one month’s notice in writing to the Minister”.<sup>67</sup>
- 3.112** In our consultation report, we suggested that there should be a mandatory retirement age of 72 years for members of JAAT. All but one of the responses supported this proposal; the response that expressed a different view referred to age discrimination and said that a member’s ability to contribute to the work of the tribunal was more important than age.
- 3.113** In the current tribunals, only one has a mandatory retirement age: a member of the Mental Health Tribunal ceases to be a member “at midnight on 31st December immediately following the member’s 72nd birthday”.<sup>68</sup> In selecting an age of retirement, we had regard to other judicial posts. The mandatory retirement age of the Bailiff of Jersey is 70 years and for Jurats it is 72

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<sup>66</sup> Guideline II.1.

<sup>67</sup> Data Protection (Jersey) Law 2005 Article 9.

<sup>68</sup> Mental Health (Jersey) Law 2016 Article 48.

years. The standard age of retirement for holders of judicial office in the United Kingdom is 70 years. In legal systems across the Commonwealth, retirement ages range from 60 to 75.

- 3.114** In preferring 72 years, we are mindful that a part-time tribunal role may be difficult for people to combine with the pressures of work; a significant number of current tribunal members are retired. There should be a reasonable amount of time between retirement from work and retirement from tribunal membership, to enable members to have sufficient time in the role.
- 3.115** In line with the proposed general retirement age for judges proposed by the Department of Community and Constitutional Affairs in its July 2017 consultation paper, we recommend that appointments to JAAC should end when a member reaches 72 years of age.<sup>69</sup> The rule on retirement should be framed to permit a member to continue to hear and determine any appeal that is started before the member's 72nd birthday.
- 3.116** We recommend that members of JAAT should be subject to the general provisions on discipline and removal from judicial office proposed in the July 2017 consultation paper by the Department for Community and Constitutional Affairs.<sup>70</sup>

## Chairman of JAAT's annual report

**Recommendation 3.11: The Chairman of JAAT should have a legal duty to prepare an annual report on the operation of the Tribunal and submit it to the Chief Minister. The Chief Minister should have a legal duty to present the report to the States Assembly.**

- 3.117** As part of the arrangements to make the operation of Jersey's administrative justice system transparent and accountable, we recommend that the Chairman of JAAT should have a legal duty to make an annual report. The Chairman, assisted by staff of the Judicial Greffe, should set out data on number of appeals made, time taken to hear the appeals (or dispose of them without a hearing), the success rate of appeals, and highlight significant judgments. The report should be considered by the Chief Minister (in exercise of his specific ministerial functions relating to justice policy) and by the States Assembly.
- 3.118** In a response to our consultation report, the Tribunal Service (part of the States Greffe) told us that annual reporting is a good idea in principle but "investment in data collection and administrative support will be needed to ensure this can happen. A database ... which can capture all data from all tribunal areas and provide data which can be interrogated" would be needed. In relation to the Jersey Employment and Discrimination Tribunal, "currently reporting takes up a large amount of time due not having received investment in electronic filing systems, so all data is manually collected and not centrally stored. This results in a large amount of work at the end of the year to collect data and there is limited scope to scrutinise new information without going back to each original case file".
- 3.119** There should be practical coordination of the proposed Chairman of JAAT's report, with that of the proposed report on administrative justice by the Chief Minister (see Recommendation 2.2), the *Jersey Court Service Annual Report* made by the Judicial Greffe and Viscount's Department's, and annual report of the States of Jersey Complaints Panel. Read together, these annual reports should provide a basis for a joined-up approach to administrative decision-making.

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<sup>69</sup> See Department for Community and Constitutional Affairs, *Consultation Paper: Judicial Independence and the Establishment of a Judicial and Legal Services Commission* (July 2017) para 119.

<sup>70</sup> See Department for Community and Constitutional Affairs, *Consultation Paper: Judicial Independence and the Establishment of a Judicial and Legal Services Commission* (July 2017).

## Training for members of JAAT

**Recommendation 3.12: The Chairman of JAAT and the Judicial Greffe should have a legal duty to make arrangements for the training of all JAAT members**

- 3.120** During the research interviews, we heard different accounts of the quantity and quality of training provided to tribunal members. Recent developments in training for members of the Mental Health Review Tribunal were described as having a transformative effect, deepening understanding of the relevant legislation and human rights considerations that need to be brought to bear in this category of appeal. Some members (including legal members) involved in the work of other tribunals were critical of the lack of training provided to help them carry out their judicial functions. Overall, nobody appears to have leadership responsibility for providing training. Continuing professional development is a feature of all mature professions and the tribunal judiciary should be no exception.
- 3.121** We recommend that ultimate responsibility for ensuring appropriate training should rest with the Chairman of JAAT and the Judicial Greffier. The legal duty should be contained in the proposed Administrative Justice (Jersey) Law.

## Making procedural rules for JAAT

**Recommendation 3.13: Create a legal duty on the Superior Number of the Royal Court, with the advice and assistance of a Rules Committee, to make JAAT Rules to regulate how appeals are made and determined.**

- 3.122** As a new judicial tribunal, JAAT will require a set of procedural rules to govern how appeals are made and determined. We recommend that the appropriate body to formally adopt these JAAT Rules is the Superior Number of the Royal Court (the Bailiff or Deputy Bailiff and five or more Jurats). A Rules Committee, including the Chairman of JAAT, should be responsible for preparing the JAAT Rules and keeping them under review. The JAAT Rules Committee should consult on a draft version of the Rules.
- 3.123** We note that procedural rules for some of the existing tribunals are made by Ministers, as are the procedures for the Jersey Employment and Discrimination Tribunal.<sup>71</sup> We do not consider it appropriate for Ministers to make rules for a judicial body that will adjudicate on legal challenges to administrative decisions made by or in the name of Ministers. The Superior Number of the Royal Court is responsible for adopting procedural rules for the Petty Debts Court and would be well suited to adopt the JAAT Rules.
- 3.124** The current procedural rules for the existing administrative appeals tribunals in Jersey are found in various pieces of primary and secondary legislation and guidance published on Government of Jersey and Judicial Greffe web pages. These will be replaced by the JAAT Rules.

Existing tribunal	Procedural rules
Commissioners of Appeal for Taxes	Income Tax (Jersey) Law 1961 does not create any power to make procedural rules. Some basic information is available on the Government of Jersey website. <sup>72</sup> If appeals to the Commissioners is

<sup>71</sup> Employment and Discrimination Tribunal (Procedure) (Jersey) Order 2016.

<sup>72</sup> Government of Jersey website, "How to appeal a notice issued by the taxes office" [www.gov.je/TaxesMoney/IncomeTax/Technical/Guidelines/Pages/HowToAppeal.aspx](http://www.gov.je/TaxesMoney/IncomeTax/Technical/Guidelines/Pages/HowToAppeal.aspx)

	intended to be independent of the Government of Jersey, it is questionable whether the appeal procedures should be determined and published by the Government.
Social Security Tribunal	Social Security (Determination of Claims and Questions) (Jersey) Order 1974, Articles 9-14.
Social Security Medical Appeal Tribunal	Social Security (Determination of Disablement Questions) (Jersey) Order 1974, Article 8 states “The procedure for appeals to a Tribunal shall be in accordance with the procedure set out in Article 16 of the Income Support (General Provisions) (Jersey) Order 2008 for the Medical Appeal Tribunal constituted under Article 15 of that Order, as if the appeal was in respect of any matter determined in accordance with that Order”.
Income Support Medical Appeal Tribunal	Income Support (General Provisions) (Jersey) Order 2008, Articles 15-16.
Mental Health Review Tribunal	Mental Health (Jersey) Law 2016, Schedule.
Health and Safety Appeal Tribunal	Health and Safety at Work (Jersey) Law 1989 and Health and Safety at Work (Appeal Tribunal) (Jersey) Regulations 1989 make provision for a tribunal but do not contain any procedural rules. The Tribunal Service website provides some basic information – an address and appeal form. <sup>73</sup>
Data Protection Tribunal	Data Protection (Jersey) Law 2005, Schedule 6 and Data Protection (Appeals) (Jersey) Regulations 2006.
Rate Appeal Board	Rates (Jersey) Law 2005, Article 45.

## The content and style of the JAAT Rules

### Recommendation 3.14

**The JAAT Rules should be designed and written with appellants’ needs in mind and expressed in a user-friendly style.**

**The JAAT Rules should include provision for determining the composition of panels to hear different types of appeals; this should include provision that the Chairman of JAAT, the Deputy Chairman or another legally qualified member should preside over any panel.**

**The JAAT Rules should include an “overriding objective” of enabling JAAT to deal with cases fairly and justly.**

**The JAAT Rules should include power for the Chairman of JAAT to regulate the publication of judgments and other documents relating to appeals.**

**The JAAT Rules should state that a party may appoint a legally qualified or lay representative.**

**3.125** In Recommendation 3.14, we draw together a number of considerations that the JAAT Rules Committee should have regard to in developing the JAAT Rules.

<sup>73</sup> Tribunal Service, “Health and Safety” [www.jerseyemploymenttribunal.org/tribunals/health-safety/](http://www.jerseyemploymenttribunal.org/tribunals/health-safety/)

### *Make the JAAT Rules as user-friendly as possible*

- 3.126** The JAAT Rules should be designed with the needs of appellants in mind. The vast majority of appellants will bring appeals without the benefit of legal advice or representation. This means that the JAAT Rules should be as simple as possible and expressed in straightforward language. Flow diagrams and other visual aids should be used to replace or supplement text where this will help appellants understand the process. Forms should be similarly designed with the needs of appellants paramount.

### *JAAT Rules should contain provisions about composition of panels*

- 3.127** The JAAT Rules should set out the rules that govern how three-member panels will be selected for different categories of appeal. The following table shows how, if at all, the composition of a JAAT panel would differ from the current arrangements.

<b>Existing tribunal, whose jurisdiction would be transferred to JAAT</b>	<b>Composition of JAAT panel to hear appeal</b>
Commissioners of Appeal for Tax	The panel would change from <ul style="list-style-type: none"><li>• three lay members advised by a legally-qualified clerk (an advocate in private practice) to</li><li>• a legally-qualified chairman and two lay members.</li></ul>
Social Security Tribunal	No change. The JAAT panel would consist of a legally qualified chairman and two lay members.
Social Security Medical Appeal Tribunal	No change. The JAAT panel would consist of a legally qualified chairman and two medical members.
Income Support Medical Appeal Tribunal	No change. The JAAT panel would consist of a legally qualified chairman and two medical members.
Mental Health Review Tribunal	No change. The JAAT panel would consist of a legally qualified chairman, a medical member, and a lay member.
Health and Safety Appeal Tribunal	Probably no change. The legislation does not expressly specify the composition of panels; presumably it is either the legally-qualified chairman/deputy chairman sitting with the two lay members.
Data Protection Tribunal	No change required. The legislation requires a panel consisting of a legally qualified chairman and two lay members <i>or</i> a legally-qualified chairman, another legal member and a lay member. <sup>74</sup>
Rate Appeal Board	Change. The legislation permits an appeal panel to consist of between 3 and 9 members (drawn from the 5-9 overall membership). There is no requirement for the panel to be chaired by a legally-qualified member.

### *Panels should be chaired by a Legal member*

- 3.128** We recommend that the JAAT Rules should state that presiding member of panels should normally be a legal member (the Chairman, Deputy Chairman or an ordinary legal member). JAAT will be a judicial body and is more likely to follow legal principles of fair procedures if controlled by somebody with a background in the law. Almost all responses to our consultation report agreed with our interim recommendation on this point. One response disagreed in relation to the Commissions of Appeal for Tax: a currently serving member of CAT told us that “Our present system works well with three lay members sitting at each hearing and a legally

<sup>74</sup> Data Protection (Jersey) Law 2005, Schedule 6.



qualified person present in the role of Clerk to the Commissioners ... Laymen of merit and good character should be appropriate, as at present". This is, in our view, a sub-optimal arrangement. There is a risk that by reason of being advised by a lawyer who is remunerated by a Minister, CAT loses the structural independence required of a judicial body. In saying this, we make no criticism of the current or former clerks. The need for a panel to have immediate access to legal knowledge on questions of substance and procedure is better fulfilled by a rule that panels contain a legal member rather than a panel of lay persons advised by a non-member who is a lawyer.

### *JAAT Rules should contain an overriding objective*

**3.129** In our April 2016 consultation report, we noted that the Royal Court Rules Review Group had recently recommended the adoption of an "overriding objective" in the Royal Court Rules. We said that, similarly, the JAAT Rules should have an overriding objective. All the responses to our consultation that favoured creating JAAT also agreed that there should be an overriding objective.

**3.130** Overriding objectives have been included in new procedural rules introduced in England and Wales for civil, family and criminal cases as part of a move to have clearer management of the progress of litigation by judges. The overriding objectives are a point of reference for the judge, any lawyers representing parties, and the parties themselves setting out guidelines that are used in interpreting and applying procedural rules. The overriding objectives are particularly helpful in situations where a judge must exercise discretion and undertake a balancing exercise, for example deciding whether to grant an adjournment.

**3.131** We recommend that the JAAT Rules Committee takes as its starting point the "overriding objective and parties' obligation to cooperate with the Tribunal", used in England and Wales in for the First-tier Tribunal:

2.—(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must—

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally.



### *JAAT Rules should contain provisions about open justice*

**3.132** During the research leading to our consultation report, we investigated practices in relation to public access to hearings and the publication of judgments in the current tribunals in Jersey. Open justice is an important constitutional principle and an aspect of the right to a fair trial. The right to a public hearing and public judgment is not only for the parties in the case; there is a wider public interest in open justice. In assessing how practise in Jersey should develop, regard must be had to the requirements of ECHR Article 6 (part of the law of Jersey under the Human Rights (Jersey) Law 2000), which sets out minimum standards for judicial proceedings relating to ‘civil rights and obligations’. This states, with emphasis added:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and **public hearing** within a reasonable time by an independent and impartial tribunal established by law. **Judgment shall be pronounced publicly** but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

### *JAAT rules on public hearings*

**3.133** During the research interviews and consultations, the issue of public hearings proved controversial with strongly held views in both directions.

**3.134** Speaking in favour of more open justice, one interviewee told us that information about when and where social security tribunal hearings were scheduled to take place is not readily accessible. Though case listings did appear online, confusingly they were on the Jersey Employment and Discrimination Tribunal website. Another issue raised in the interviews was that chairmen of panels are too ready to accede to requests from appellants for the hearing to take place in private (though other interviewees said this was not their experience). In response to our consultation report, Citizens Advice Jersey and the Jersey Consumer Council supported greater openness.

**3.135** There was, however, also concern in the other direction: that steps to make tribunal hearings more open to the public (and publication of judgments: see below) would have an adverse effect on potential appellants. Some interviewees suggested that information about family and relationship matters, financial circumstances and medical conditions are particularly sensitive in a small community such as Jersey. There is a general perception that greater openness would act a deterrent to people bringing appeals.

**3.136** During the consultation phase of this project, three responses from experienced tribunal members also cautioned against tribunal hearing being open to the public.

- A former legal member of a social security tribunal stated: “In my experience, applicants are often very stressed by the hearing and the presence of members of the public increases their anxiety. The application may involve details of their finances and health issues and may involve medical information about children. Complaints about hearings being in private are made more commonly by interested members of the public. The right to a public hearing is, I understand, for the benefit of the applicant and if that is going to cause them distress, it is reasonable to exclude members of the public”. (We do not agree that this is a correct understanding of the legal and constitutional reasons for open justice).
- A member of the Commissioners of Appeal for Taxes told us: “Open justice. Yes, I believe in this but just how would it affect the hearing when under the wing of the JAAT? I cannot see that the general public would be interested in attending our open hearings but there are always on or two who have nothing better to do and will be there. Contentious cases should not be open to the public as of right and I have in mind the quite recent Doctors

appeal where much highly personal and indeed commercially confidential information was presented to us. It would be wrong for such a case to be heard at an open meeting, in my opinion". (We disagree: the legal and constitutional right to open justice does not depend on whether members of the public, or journalists, are interested in attending hearings or the identity of people who do want to attend. Commercial sensitivity is not, generally speaking, an acceptable legal justification for excluding the public).

- A lay member of a tribunal said: "Applicants should be offered a choice of whether or not they want a private/public hearing. Many are extremely nervous at hearings". "From my long experience of these matters, the most satisfactory tribunal hearing is those where the applicants have felt comfortable and confident in the presence of the tribunal so as to free you are free we answer questions or raise points in their own words. It should be for the applicant to decide whether or not they want members of the public when their personal details are discussed and the tribunal should whenever possible agree to the request as your reference to ECHR our article 6 refers. There have been some Social Security tribunals where members of the public have been present and taken notes, no doubt for 'blogging' to others. Because these members of the public are seated behind the applicant, I have sometimes wondered whether the applicant has been aware of such activity. Therefore, in my opinion, the best interests of the applicant should always take priority." (We disagree: open justice is not dependent on the choice of appellants but is a fundamental legal and constitutional right to the benefit of everybody).

**3.137** We could not gather sufficient information on which to make firm findings on whether practices relating to public hearings in Jersey tribunals meet the minimum requirements for open justice guaranteed by ECHR Article 6. ECHR Article 6 recognises that "where the interests of juveniles or the protection of the private life of the parties so require" hearings and judgments may be in private. Across the United Kingdom and in Jersey, this is understood to require hearings and judgments of tribunals dealing with mental health matters to be in private (unless the appellant patient requests a public hearing).

**3.138** Tax matters are not regarded as "civil rights or obligations" and so fall outside the protective scope of ECHR Article 6. There is therefore no human rights law requirement for tax appeals to be held in public. We are not, however, persuaded that there is a compelling case for exempting contentious tax matters from the general principle of open justice: JAAT should normally sit in public (and in public premises) when hearing contested tax appeals.

**3.139** We recommend that the JAAT Rules should state that all hearings must be held in public, unless the presiding member of a panel orders otherwise (having regard to the factors set out in ECHR Article 6) or the appeal falls into a category where hearings are normally held in private. The "normally private" appeals should include (a) appeals where the rights of a child are central to the case, for example special educational needs and (b) appeals involving patients under mental health legislation.

**3.140** In recommending that mental health appeals should normally be held in private, we note that arrangements differ across legal jurisdictions (for example, they are normally private in England and Wales but normally public in New South Wales, Australia). We make our recommendation having regard to the close alignment of mental health legislation between Jersey and England and Wales and considerations of life in a relatively small community.

### *JAAT Rules on public judgments*

**3.141** The European Court of Human Rights<sup>75</sup> has ultimate responsibility for interpreting the ECHR. It has interpreted the ECHR Article 6 requirement that "judgments shall be pronounced

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<sup>75</sup> The European Court of Human Rights, based in Strasbourg, has responsibility under international law for adjudicating on the European Convention on Human Rights (after a person has exhausted all rights of appeal or review within his or her national legal system). The Convention is made part of Jersey law by the Human

publicly” flexibly. “Pronounced publicly” is normally understood to mean the reading out or publication of a reasoned explanation for the decision. If there is no such public explanation, the European Court has accepted that other means of publicity are acceptable, for example where archived copies of judgments are open to inspection and selected important decisions are officially published.<sup>76</sup>

- 3.142** The Employment and Discrimination Tribunal routinely publishes its written judgments on [www.jerseylaw.je](http://www.jerseylaw.je). The Data Protection Tribunal is also required to publish its determinations. Article 18 of the Data Protection (Appeals) (Jersey) Regulations 2006 provides: “(4) The Tribunal shall publish its determination. (5) In doing so, the Tribunal shall have regard to the desirability of – (a) safeguarding the privacy of data subjects; (b) safeguarding commercially sensitive information; and (c) restricting, in the public interest, any details of the determination. (6) For the purposes of paragraph (5), the Tribunal may in publishing a determination edit the text.”
- 3.143** When we carried out the research in 2014-16, administrative appeals tribunals in Jersey did not publish judgments or make them available for public inspection. When we requested access to a decision (of a case which we had observed) we were required to give an undertaking that the judgment would not be shared.
- 3.144** Interviewees explained that current practice was typically that at the conclusion of a hearing, the chair will (after an adjournment if necessary) announce the outcome of the appeal, though not necessarily the reasons for it, and state that written reasons will be provided later. Written judgments were provided to the appellant and the department but were not published. Nor were they circulated to tribunal members beyond those sitting on the particular panel hearing the case. Two people with experience of sitting as tribunal members were critical of the fact that they saw only the judgments of the appeals in which they were directly involved: they regarded the failure to circulate judgments to all members as a missed opportunity for developing expertise and knowledge. Members of the public are not generally permitted to consult and use archived copies of written judgments.
- 3.145** While many (perhaps most) tribunal judgments turn on assessments of facts and professional judgements, from time to time points of law or points of practice are decided. Where a point of law or practice is of general importance, at present these do not enter the public domain. One interviewee (with experience sitting as a member of a tribunal) described an episode in which a tribunal panel had been critical of an approach the States department was taking to exercising a significant decision-making power. The criticisms were set out in a written judgment but have not emerged into the public domain.
- 3.146** In our consultation report, we noted that non-publication of judgments may also give States departments an advantage over individual appellants. In the tribunal hearing observed during research for our consultation paper, at one point in proceedings the lawyer from the Law Officers’ Department representing the States department referred the panel to “the consistent jurisprudence of this tribunal”. If that “jurisprudence” (meaning, in this context, previously decided cases) is not in the public domain, assertions such as that cannot be rebutted.
- 3.147** We said our provisional assessment was that practices relating to the pronouncement of judgments in Jersey’s administrative tribunals are in breach of the minimum standards for open justice. We set out options for reform:

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Rights (Jersey) Act 2000. The European Court of Human Rights is not part of the European Union; the Court of Justice of the EU, based in Luxembourg, is responsible for adjudicating on EU law.

<sup>76</sup> See *Moser v Austria*, Application no. 12643/02, 21 September 2006, <http://hudoc.echr.coe.int/eng?i=001-76956>.

- (a) publication of all judgments in full on the Jersey Legal Information Board (JLIB)'s website in the same way as Employment and Discrimination Tribunal and Royal Court judgments, unless the JAAT panel orders otherwise
- (b) publication of judgments redacted to remove sensitive personal information on the JLIB website
- (c) publication of selected judgments ("starred" or "landmark") involving a point of law or practice of general public importance on the JLIB website; the chairman of the tribunal panel in conjunction with the President of JAAT would decide which judgments fall into this category.
- (d) no judgments would be published in full but the President of JAAT would on a regular basis (for example, every six months) prepare and publish brief summaries of all cases heard.
- If options (c) or (d) are adopted, archived copies of all judgments should be open to inspection on application to the Judicial Greffe.

**3.148** We received two consultation responses specifically on the question of publishing judgments.

- A former legal member of a tribunal said in principle that judgments should be published but cautioned that "in a small community, and given the nature of the information discussed (e.g. health conditions), it would be appropriate for the decisions to be anonymised".
- Another response from a person with experience of sitting as a lay member of a tribunal said that option (c) above would be the most appropriate.

**3.149** In January 2017, the Jersey Legal Information Board started to publish social security appeal judgments online.<sup>77</sup> Between January and September 2017 ten judgments were published: seven from the Social Security Medical Appeal Tribunal,<sup>78</sup> one from the Income Support Medical Appeal Tribunal,<sup>79</sup> and two from the Social Security Tribunal.<sup>80</sup> Viewers are able to "refine by subject" to identify different subject matter – currently listing Long Term Incapacity Allowance, Short Term Incapacity Allowance, and Income Support. The appellant and any other person referred to in the judgments are anonymised by use of letters (A, B, C, etc).

**3.150** We welcome this development: it is a significant contribution to open justice in Jersey. In light of this change in practice, we recommend that the Judicial Greffier makes arrangements for JAAT judgments to be published online in anonymised format unless the Chairman of JAAT issues directions otherwise in relation to categories of case. The Chairman should have regard to the requirements of ECHR Article 6 and the constitutional principle of open justice in making such directions.

**3.151** Decisions of the Mental Health Review Tribunal should normally be published. Access to MHRT judgments, in anonymised format, will provide opportunities for advisers to learn from rulings on points of law and practice. Even if a MHRT judgment is decided on its own particular facts, anonymised publication provides an important degree of transparency.

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<sup>77</sup> See [www.jerseylaw.je/judgments/tribunal](http://www.jerseylaw.je/judgments/tribunal).

<sup>78</sup> *G v Minister for Social Security* [2017] TRS 007; *C v Minister for Social Security* [2017] TRS 003; *D v Minister for Social Security* [2017] TRS 004; *E v Minister for Social Security* [2017] TRS 005; *F v Minister for Social Security* [2017] TRS 006; *H v Minister for Social Security* [2017] TRS 008; *J v Minister for Social Security* [2017] TRS 010.

<sup>79</sup> *A v Minister for Social Security* [2017] TRS 001.

<sup>80</sup> *B v Minister for Social Security* [2017] TRS 002; *K v Minister for Social Security* [2017] TRS 011 (consequences of a woman's failure to claim old age pension within 3 months of attaining the age of 60).

## *Rights of audience*

**3.152** In our consultation report, we sought views on what regulation is needed (if any) on rights of audience to represent appellants at hearings before JAAT. We identified four options:

- limiting rights of audience to Jersey advocates and solicitors
- additionally: rights of audience to lawyers qualified in other jurisdictions working under the supervision of a Jersey advocate or solicitor.
- additionally: rights of audience to specified professionals who are not lawyers, for example accountants.
- having no limitation on rights of audience so that appellants may choose any person to present their case. In England and Wales, there are no restrictions on rights of audience before the First-tier Tribunal, except in relation to immigration cases. The absence of restriction enables the Free Representation Unit (a charity) to train and organise law students, who are not yet qualified lawyers, to represent clients in some tribunals.

**3.153** Where a public body responding to an appeal is legally represented, this is normally through the Law Officers' Department (LOD). The lawyer employed by the LOD will not necessarily be a qualified Jersey advocate or solicitor.

**3.154** During consultations, we received two responses on this point, both from people with experience of sitting as tribunal members. Both favoured having no restrictions on rights of audience and favoured permitting lay representatives to address the tribunal directly.

**3.155** The evidence we gathered suggests that there are variable practices across Jersey's tribunal system.

- One lay member of a tribunal told us in consultation: "The applicant in my last [tribunal] was represented by her brother, who did an excellent job and won her appeal".
- A former legal member of a tribunal said: "None of the applicants at the tribunal I sat on were legally represented. Some brought family members and a few were assisted by politicians. In the absence of legal aid, the applicants need to be free to ask any person to come and support them and speak in support of their appeal".
- At a social security hearing we observed, the appellant was accompanied by a non-legally qualified person who sat next to him and assisted with finding relevant documents. The supporter was, however, refused permission by the presiding member to address the tribunal directly when the appellant was struggling to respond to points made by the Social Security Department's legally qualified representative.

**3.156** We recommend that the JAAT Rules should state that a party may appoint a representative (whether legally qualified or not) to represent that party in the proceedings.

## **Legal advice and representation paid for by public funds, where necessary for a fair trial**

**Recommendation 3.15. The Chairman or Deputy Chairman of JAAT should have power to order that an appellant receives legal advice and representation paid for by public funds where this is necessary to ensure a fair hearing.**

**3.157** In Jersey, people aggrieved by administrative decisions may obtain advice from several different sources.



- In relation to social security matters, the Citizens Advice Bureau offers advice and can help to write letters and fill in forms but does not assist with representation at tribunal hearings.
- Appellants may obtain advice and assistance from lay people, such as family members and work colleagues.
- A small number of elected States Members specialise or are willing to offer advice and some attend and speak on behalf of appellants at tribunal and States of Jersey Complaints Panel hearings.
- There is a small informal network of people, identifying themselves as social justice campaigners, who offer advice and attend social security hearings to assist appellants.
- In relatively new arrangements, patients using the Mental Health Review Tribunal are eligible to receive advice and representation from a lawyer allocated to them from a panel of accredited Jersey advocates. This service is publicly funded from the Judicial Greffe's budget. When the scheme is fully implemented, the lawyers will work on a fixed fee-basis (currently they undertake the work as part of their legal aid obligation).
- Appellants who can afford to do so, may engage the services of a Jersey lawyer on normal commercial rates.

**3.158** Tribunal proceedings are excluded from the Island's main legal aid scheme, which is administered by the Jersey Law Society on behalf of the legal profession. It is not funded by the Government of Jersey. During their first 15 years of practice, advocates and solicitors (or their firms) undertake to accept legal aid cases allocated by the Acting Bâtonnier. Applicants for legal aid cannot choose their lawyer. The lawyer may charge a reasonable (but normally significantly less than commercial) fee for advice and representation under the scheme. Paragraph 1.5.12 of the current Legal Aid Guidelines provides:<sup>81</sup>

"Legal aid will not be granted for tribunal hearings or other disputes or matters which do not constitute matters which could be litigated before the Royal Court, Magistrate's Court or Petty Debts Court in Jersey. For the avoidance of doubt this includes, but is not limited to, proceedings before: (a) employment tribunals, (b) social security tribunals, (c) mediation carried out within the Petty Debts Court or, (d) disputes with the Minister for Housing concerning housing qualifications."

**3.159** Although it may be daunting to many applicants, in our view it is reasonable to expect most appellants to prepare and present their case to a tribunal (other than the Mental Health Review Tribunal) without the need for legal advice. Tribunals are designed to be more informal than courts.

**3.160** In our consultation report, we said that our interim view was that the Legal Aid Guidelines do not need to be extended to cover all tribunal hearings. We were, however, concerned that there is a category of case where the absence of legal aid creates a danger that the principle of equality of arms under ECHR Article 6 will be breached. Three interviewees with considerable experience of tribunal hearings said that social security appeals were becoming more 'legalistic' and complex. This trend was attributed partly to the increasingly complicated social security legislation and partly to the willingness of some appellants to seek to raise legal points. Advice is available from the Citizens Advice Bureau but representation at tribunal hearings is not. The type of appeal in which legal representation may be needed includes where

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<sup>81</sup> *Legal Aid Guidelines* (as amended 7 June 2010)

[www.legalaid.je/pdfs/Legal%20Aid%20Guidelines%20final%20ver-020810.pdf](http://www.legalaid.je/pdfs/Legal%20Aid%20Guidelines%20final%20ver-020810.pdf). The Jersey Law Society is consulting on reforms to the legal aid scheme and anticipate launching new arrangements in January 2018 (see [www.jerseylawsociety.je/legal-aid-jersey](http://www.jerseylawsociety.je/legal-aid-jersey)).

- the appellant is a vulnerable person (an adult who by reason of mental or physical disability, age or illness may be unable adequately to present their appeal to the tribunal)
- the appeal raises a point of law with which it would be unreasonable to expect the appellant to deal
- the appeal depends on complex facts or expert evidence with which it would be unreasonable to expect the appellant to deal
- the public body responding to the appeal will be represented by a lawyer (rather than a non-legally qualified presenting officer).

**3.161** We sought views on how provision of appropriate legal representation before the Jersey Administrative Appeals Tribunal should be organised. We suggested that the following were among the ways in which this could be achieved.

- Paragraph 1.5.12 of the Legal Aid Guidelines could be amended to enable the Acting Bâtonnier to grant legal aid under the general scheme where in the interests of justice this is necessary.
- A scheme based on the model adopted for the Mental Health Review Tribunal could be created. A panel of lawyers would undertake work on a fixed fee basis (paid for by a budget within the Judicial Greffe). If this model is used, who would make decisions about whether an appellant was eligible for assistance, and at what point would the decision be made? One possibility is that the power to order publicly funded representation would lie with the President of JAAT or another legally qualified member, but if this takes place on receipt of the appeal this may be too late in the process.

**3.162** During the consultation phase of our project, the Law Society of Jersey told us:

“The Law Society of Jersey wishes to comment on one element of the consultation, in relation to how the provision of appropriate legal representation before the Jersey Administrative Appeals Tribunal should be organised. While the rationale for the provision of legal representation at certain tribunals where particularly complex legal issues arise, the appellant is a vulnerable person or the public body is represented by a lawyer (such that an ‘equality of arms’ argument could be pursued), is understood and is, in principle, supported, it is considered inappropriate for the Legal Aid scheme to be extended for this purpose. There is no justification for a further burden being imposed on law firms in respect of Legal Aid. It is suggested that, if it is determined that legal representation in particular circumstances or for certain tribunals (e.g. Social Security appeals) is warranted and is pursued, a similar approach to that adopted for Mental Health Review Tribunals (an accredited panel of locally qualified lawyers) should be followed, with payment of the lawyers on a fixed fee basis, funded by the Judicial Greffe.”

**3.163** A lay member of a tribunal expressed a different view, favouring the extension of the Legal Aid scheme to tribunals. A member of the public suggested “external legal assistance being administered by JAAT – video links could be a possibility and facilities within the premises of the JAAT”.

**3.164** We recommend that the Chairman or Deputy Chairman of JAAT should have power to order that an appellant receives legal advice and representation paid for by public funds where this is necessary to ensure a fair hearing. Decisions about legal advice and assistance should be made at a case management meeting at as earlier a stage of the proceedings as possible. This recommendation is not intended to alter the current arrangements for legal representation before the Mental Health Review Tribunal, which we envisage would continue in relation to mental health appeals heard by JAAT.



## Creating a right of appeal from JAAT to the Royal Court

**Recommendation 3.16: There should be a right of appeal on a question of law from JAAT to the Royal Court**

**3.165** The right, if any, to challenge the decisions of the current Jersey administrative appeal tribunals by a “second appeal” to the Royal Court vary.

### Table on rights of second appeals

Name of existing tribunal	Right to a second appeal
Commissioners of Appeal for Taxes	Income Tax (Jersey) Law 1961 Article 36: “Immediately after the determination by the Commissioners of an appeal under this Law, either party, if dissatisfied with the determination, may give notice to the Commissioners of the party’s intention to appeal and the Commissioners shall immediately notify the Judicial Greffier that such notice of appeal has been given to them”. The time limit for making an appeal is 21 days.
Social Security Tribunal	Social Security (Determination of Claims and Questions) (Jersey) Order 1974, Article 14 (as amended): (1) A person aggrieved by a decision of the Tribunal may, on a point of law only, appeal to the Royal Court. (2) An appeal under paragraph (1) may be made – (a) in the first instance, only with leave of the Tribunal; or (b) in the second instance, only with leave of the Royal Court where the Tribunal has in the first instance refused leave to appeal. (3) The Tribunal shall, if it is unable to reach a decision as to whether or not to grant leave to appeal, refer the application for leave to appeal, to the Royal Court”.
Social Security Medical Appeal Tribunal	Social Security (Determination of Disablement Questions) (Jersey) Order 1974 does not contain any provisions on appeal to the Royal Court. It is not clear to us whether there is a right of appeal to the Royal Court; if not, a party could seek judicial review of the SSMAT’s decision.
Income Support Medical Appeal Tribunal	Income Support (General Provisions) (Jersey) Order 2008, Article 18: “(1) A person aggrieved by a decision of the Medical Appeal Tribunal or the Social Security Tribunal under this Part may appeal to the Royal Court on a point of law. (2) The Medical Appeal Tribunal, the Social Security Tribunal or a determining officer may refer any point of law to the Royal Court for the Court to give a ruling on the point.” No time limit for appeal is contained in the Order.
Mental Health Review Tribunal	Mental Health (Jersey) Law 2016, Article 54(1) “A person aggrieved by a decision of the Tribunal may appeal to the Court on a point of law”. (4) “No decision of the Tribunal shall be invalidated solely by reason of procedural irregularity, unless that irregularity was

	such as to prevent a party to the appeal from presenting his or her case fairly before the Tribunal.”
Health and Safety Appeal Tribunal	Health and Safety at Work (Jersey) Law 1989 does not create a right of further appeal to the Royal Court; a party could seek judicial review of the HSAT’s decision.
Data Protection Tribunal	Data Protection (Jersey) Law 2005, Schedule 6 does not create a right of further appeal to the Royal Court; a party could seek judicial review of the DTA’s decision.
Rate Appeal Board	Rates (Jersey) Law 2005 does not create a right of further appeal to the Royal Court; a party could seek judicial review of the RAB’s decision.

- 3.166** We recommend that there should be a right of further appeal from JAAT to the Royal Court. As the Island’s senior court, the Royal Court has a constitutional role in ensuring the rule of law, which should include supervisory powers over “inferior” tribunals and courts. If no right of appeal is created, the Royal Court would nonetheless have power to determine applications for judicial review (under Royal Court Rules 2004 Part 16) but this is a less satisfactory process compared to an express right of appeal.
- 3.167** In designing the right of appeal, several factors need to be considered. First, should the right of appeal be limited to “points of law” (as in the case of the current Social Security Tribunal) or should the available grounds of appeal be broader and include disagreements of findings of fact (as in the “dissatisfied with the determination” appeal from the current Commissions of Appeal for Taxes). On balance, we prefer limiting appeals to points of law. Tribunals are created to be effective in making factual and expert assessments and we are not persuaded that reopening these issues before the Bailiff or Deputy Bailiff and Jurats in the Royal Court is necessary. Should a panel of JAAT make a decision “so unreasonable that no reasonable tribunal could have made it” (*Wednesbury* unreasonableness), this would be a question of law that could be taken to the Royal Court.
- 3.168** Second, should there be any further substantive limitation on the right of appeal to the Royal Court? We note that under the Mental Health (Jersey) Law 2016, Article 54(4), “No decision of the [current Mental Health Review Tribunal] shall be invalidated solely by reason of procedural irregularity, unless that irregularity was such as to prevent a party to the appeal from presenting his or her case fairly before the Tribunal”. We do not recommend such a restriction, as it risks undermining the rule of law. A tribunal that makes a procedural irregularity acts unlawfully and a party should be entitled to have a decision affected by that illegality set aside without the Royal Court carrying out an assessment of the irregularity’s impact on the overall fairness of the tribunal appeal process.
- 3.169** Third, should there be a requirement that a party seeking to appeal from JAAT obtain “leave” (or permission) to do so from JAAT or the Royal Court? We recommend that there should be a leave requirement, as there currently is from the Social Security Tribunal. This is a useful mechanism to ensure there is an arguable ground of appeal.
- 3.170** Fourth, what should be the time limit for seeking leave to appeal? Selecting a time limit is inevitably an arbitrary exercise. The period must balance the need to have legal certainty as to whether a tribunal decision stands and a practical assessment of what is a fair and reasonable period in which to expect an appellant to make a decision about appealing (which may involve seeking legal advice). We consider that 21 days is an appropriate time frame.<sup>82</sup>

<sup>82</sup> In Recommendation 7.3, we recommend that there is a standard time limit for *starting* and administrative appeal of 28 days. This is longer than the proposed 21 days for making a *second* appeal because here the appellant is already “in the system” and can reasonably be expected to act more promptly.

## Table of lay member appointments to Tribunals, January 2011 – May 2017

This table relates to the discussion at paragraph 3.88 on diversity of lay members. Where an individual appears more than once, he or she is colour coded to make this clear.

Appointment round

(Proposition reference)

**Income Support Medical Appeal Tribunal** lay members appointed in May 2017 for a 4-year term.

P.35/2017

Male. A retired member of staff of the States of Jersey Police Force; has served 10 years as a member of the Jersey Employment and Discrimination Tribunal. (Sam Le Breton)

Male. Retired member of staff of the Ambulance service. A past President of the Jersey Civil Service Association. Also serves on the Social Security Tribunal. (John Moulin)

**Commissioners of Appeal for Taxes** appointed in March 2016 for a 5-year term

P.22/2016

Male. Semi-retired Chartered Accountant and Chartered Tax Adviser. (Jonathan Crowther)

Male. Worked for major professional services firm for 33 years and is now a consultant. (Graeme Guy)

Male. Retired after 42 years in the marine insurance market for a number of international insurance companies. (Michael Harrison)

Male. Chartered Accountant, a Chartered Certified Accountant. (Christopher McFadyen)

**Rate Appeal Board** appointed for a 3-year term in April 2016

P.41/2016

Male. Retired Law Draftsman. (Clive Borrowman)

Male. Retired structural engineer and company director (Roger Goodwin)

Female. Semi-retired from project management. Served for 9 years on the States of Jersey Complaints Panel. (Christine Vibert)

Reappointed for a further 3-year term

Male. Self-employed (Graeme Marett).

Male. Finance director in private sector; former finance director in States of Jersey and Jersey Post (Ian Ridgeway).

Male. Manages a property portfolio of 30 units (Peter Routier)

**Social Security Tribunal** lay members appointed in February 2016 for a 5-year term.

P.11/2016 (re-issue)

Male. A retired member of staff of the States of Jersey Police Force; has served 10 years as a member of the Jersey Employment and Discrimination Tribunal. (Sam Le Breton)

Male. Retired member of staff of the Ambulance service. A past President of the Jersey Civil Service Association. Also serves on the Social Security Tribunal. (John Moulin)

Male. A retired head of internal audit of the Jersey Electricity Company; has served 10 years as a member of the Jersey Employment and Discrimination Tribunal. (Alan Hall)

**Commissioners of Appeal for Taxes** reappointed April 2015 for a 3-year term

P.37/2015

Male. Has worked in a number of finance roles. (Craig Leach)

Male. Retired senior civil servant. (John Mills)

Male. Retired Director of Jersey Airport (Michael Lanyon).

**Health and Safety Tribunal** lay members appointed in May 2015 for a period of 3 years

P.54/2015

Male. A member of staff of the Probation Service. (Nigel Collier-Webb)

Male. Works as in project management within the construction industry; 18 years' experience in the Honorary Police (David Rothband)

**Social Security Tribunal** lay members appointed in August 2014 for a 5-year term

Male. Retired from IT roles in the finance industry; involved in charitable work. (Stewart Hill)

Female. A member of the Youth Court Panel; former member of a Parish welfare panel. (Judith Querée)

Male. Retired civil servant, involved in Mental Health

P.145/2014

Services. (Geoff Esnouf)

**Social Security Tribunal**  
lay members appointed in October 2013 for a 5-year term.

P.120/2013

Male. Member of staff in the Ambulance Service (David Moody)

Female. Former sales assistant who is a full-time carer (Sandra Le Monnier)

**Income Support Medical Appeal Tribunal** lay members appointed in September 2013 for a 4-year term (all reappointments).  
P.111/2013

Female. Retired senior nurse. (Barbara Bedford)

Male. Member of staff in the Ambulance Service. (David Moody).

Female. Former sales assistant who is a full-time carer (Sandra Le Monnier)

**Rate Appeal Board** appointed for a 3-year term in January 2013

P.9/2013

Male. Finance director in private sector; former finance director in States of Jersey and Jersey Post (Ian Ridgeway).

Male. Self-employed (Graeme Maret).

Male. Manages a property portfolio of 30 units (Peter Routier)

Reappointed for 3-year term

Male. Proposition does not include biographical information. (Thomas Slattery)

Male. Proposition does not include biographical information (Timothy George Cartwright)

Male. Proposition does not include biographical information (Jethro Adams).

**Health and Safety Tribunal** lay members appointed in March 2012 for a period of 3 years.

P.32/2012

Male. A member of staff of the Probation Service. (Nigel Collier-Webb)

Male. Retired member of staff of the States of Jersey Police. (John McCourt)

**Commissioners of Appeal For Income Tax** appointed in March 2012 for a 3-year term

P.25/2012

Male. Retired corporate banking manager. (Philip J. Barber)

Male. Retired accountant. (Charles R. Blampied)

Female. Retired accountant. (Jacqueline Collins)

Male. Retired from finance industry. (Peter G. Farley)

Female. Vice-Chairman of the Jersey Appointments Commission and has been a Commissioner of Appeal for Income Tax since 1995. (Elizabeth Rees)

Re-appointment:  
Male. Retired senior civil servant. (John Mills)

Re-appointment:  
Retired Director of Jersey Airport (Michael Lanyon).

**Social Security Tribunal** lay members appointed in January 2011 for a 5-year term.

P.12/2011

Male. Retired member of staff of the Ambulance service. A past President of the Jersey Civil Service Association. Also serves on the Social Security Tribunal. (John Moulin)

Male. Retired member of staff of the Ambulance service. A past President of the Jersey Civil Service Association. Also serves on the Social Security Tribunal. (Sam Le Breton)

Female. Trust administration career; volunteer at Jersey Hospice Care (Margaret Howard)

Male. A retired head of internal audit of the Jersey Electricity Company; has served 10 years as a member of the Jersey Employment and Discrimination Tribunal. (Alan Hall)

## CHAPTER 4

# ENDING APPEALS AND REVIEWS TO MINISTERS

### When is it appropriate for administrative appeals to be heard by Ministers?

- 4.1 Our research indicates that there are currently six Laws in Jersey that give a Minister power to hear appeals against an administrative decision made by another public office-holder or official. In five of these, our assessment is that this arrangement is not appropriate and should be replaced by a right of appeal to the proposed Jersey Administrative Appeals Tribunal (JAAT).<sup>83</sup>
- 4.2 Our starting point is that a Minister – a political figure in the Government of Jersey and an elected member of the States Assembly – is not generally an appropriate person to hear appeals about administrative decisions.
- 4.3 Article 6 of the European Convention on Human Rights, which sets out international human rights minimum standards about fair trials, requires disputes about “civil rights and obligations” to be heard ultimately by “an independent and impartial tribunal”. The word “tribunal” in this context also including courts as well as judicial bodies called “tribunals”. In Jersey, the proposed JAAT and the Royal Court clearly meet the relevant standards of independence and impartiality.
- 4.4 A Minister holding elected political office can never be “independent” in the sense required by ECHR Article 6: he or she lacks the attributes that make a judge independent (for example, security of tenure) and as part of the government is likely to be conflicted.
- 4.5 This is not mean that a Minister can *never* be involved in appeals about civil rights and obligations. Some countries have designed administrative redress systems in which elected politicians have a role in adjudicating on disputes. Appeals relating to the grant or refusal of planning permission is such a category in Jersey (and also in the United Kingdom). Planning decisions often involve questions of public policy. Courts interpreting and applying ECHR Article 6 have accepted that a minister, politically accountable to Parliament, may be a satisfactory appellate or review body from decisions made by planning authorities. In these circumstances, there must however be a right for the aggrieved person to make a further appeal or seek judicial review to fully independent judicial body with power to review the minister’s decision to ensure that, ultimately, there is sufficient judicial control and that the rule of law is protected.<sup>84</sup>
- 4.6 In the recommendations below, we recognise that one of the six Laws in Jersey giving a Minister power to hear an administrative appeal is similar to a planning decision and therefore acceptable (licensing of “aerodromes”). The other five laws – including one recently enacted – we can see no justification for a Minister having an appellate function and we therefore recommend that the Laws are amended to make the proposed JAAT the body to hear appeals. The amendments could be achieved by the proposed Administrative Justice (Jersey) Law, which we envisage will be used to implement many of the proposals in this report.

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<sup>83</sup> See Chapter 3 for our recommendations on creating JAAT.

<sup>84</sup> See, in England and Wales, the ‘Alconbury case’: *R v Secretary of State for the Environment, Transport and the Regions Ex parte Holdings & Barnes Plc* [2001] UKHL 23.

## **Ending the Minister's appeal role relating to administrative decisions about venues for civil marriages and civil partnerships**

**Recommendation 4.1: The Jersey Administrative Appeals Tribunal should hear appeals from property owners about Connétables' administrative decisions relating to wedding and civil partnership venues instead of the Minister for Home Affairs**

- 4.7** Under the Marriage and Civil Status (Approved Premises) (Jersey) Order 2002 and the Civil Partnership (Approved Premises) (Jersey) Order 2012, a property owner may apply to the Connétable of the relevant parish for permission to use a venue for solemnising civil marriages/partnerships. If the property owner is aggrieved by the refusal or revocation of permission, or by conditions attached to a grant of permission, "may apply to the Minister for a review of that decision". The Minister in question is the Minister for Home Affairs.
- 4.8** The subject matter does not relate to what is in the public interest or broad questions of public policy so should be determined by an independent and impartial tribunal rather than a Minister.

## **Ending the Minister's appeal role relating to administrative decisions taken by the Agent of the Impôt about duties**

**Recommendation 4.2: The Jersey Administrative Appeals Tribunal should hear appeals relating to decisions of the Agent of Impôt instead of the Minister for Treasury and Resources.**

- 4.9** The Agent of the Impôt is an ancient administrative office in Jersey. Under Article 68 of the Customs and Excise (Jersey) Law 1999, a person aggrieved by a decision of the Agent of the Impôt relating to liability to pay a duty, eligibility to relief or to receive a repayment of duty, or impositions or applications of conditions, limitations, restrictions, prohibitions or other requirements under the Law may within one month apply to the Minister "to have the decision reviewed".
- 4.10** The Minister in question is the Minister for Treasury and Resources. Under Article 69, there is a right of appeal to the Royal Court against the Minister's decision.
- 4.11** The subject matter does not relate to what is in the public interest or broad questions of public policy so disputes should be determined by an independent and impartial tribunal rather than a Minister.

## **Ending the Minister's appeal role in relation to assessment of children's special educational needs**

**Recommendation 4.3: The Jersey Administrative Appeals Tribunal should hear appeals relating to assessment of children's special education needs instead of the Minister for Education.**

- 4.12** Under Article 31 of the Education (Jersey) Law 1999, parents have a right to request and assessment of their children's special educational needs (SEN). If a child is assessed to have SEN, the Minister must ensure that provision is made to meet the needs. There is a right 'to appeal against any part of the results of the assessment' to the Minister within 15 days after the parent is notified of the results of the assessment. Article 31(4) provides



“The Minister may by written direction delegate the power to receive and determine any appeal ... to the Chief Officer or to a panel of persons appointed by the Minister for the purpose, subject to the conditions, exceptions or qualifications that the Minister may specify in the direction.”

- 4.13** The 1999 Law does not create a right of appeal to the Royal Court.
- 4.14** During 2015, the States of Jersey Education and Home Affairs Scrutiny Panel conducted an inquiry into SEN.<sup>85</sup> Key finding 5.19 was that “The legislation and policies relating to SEN in Jersey provide a suitable framework for the provision of a high quality service” but recommended that “The Minister ... must improve lines of communication with parents of SEN children”. The Panel’s report did not, however, deal specifically with any issues relating to appeals.
- 4.15** The subject matter does not relate to what is in the public interest or broad questions of public policy so disputes should be determined by an independent and impartial tribunal rather than a Minister.
- 4.16** Questions relating to SEN often raise sensitive issues: it would be appropriate for the JAAT panels hearing SEN appeals to include a tribunal member with relevant professional expertise and a lay member alongside a legally qualified chairman. In England and Wales, appeals relating to SEN lie to the First-tier Tribunal (Special Educational Needs and Disability), part of the Health, Education and Social Care Chamber. If our recommendation is accepted, further work will be needed to seek out lessons to be learnt and transferred to Jersey.

## Ending the Minister’s appeal role relating to Motor vehicle registration

**Recommendation 4.4: The Jersey Administrative Appeals Tribunal should hear appeals about decisions of the Inspector under Article 8 of the Motor Vehicle Registration (Jersey) Law 1993 instead of the Minister for Infrastructure.**

- 4.17** Under Article 8 of the Motor Vehicle Registration (Jersey) Law 1993, a person aggrieved by a refusal of an “Inspector to issue or renew a trade licence may appeal to the Minister and the Minister shall, on any such appeal, give such directions in the matter as he or she thinks just, and the Inspector shall comply with such directions”.
- 4.18** The Minister is the Minister for Infrastructure. The subject matter does not relate to what is in the public interest or broad questions of public policy so disputes should be determined by an independent and impartial tribunal rather than a Minister.

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<sup>85</sup> States of Jersey Education and Home Affairs Scrutiny Panel, *Special Education Needs*, Presented to the States on 14 July 2015, S.R.3/2015.

## Ending the Minister's appeal role relating to Prison discipline

**Recommendation 4.5: The Jersey Administrative Appeals Tribunal should hear appeals about disciplinary matters at HM Prison La Moye instead of the Minister for Home Affairs.**

- 4.19** HM Prison La Moye ("the Prison") has 200 cells and 255 prison places. In 2016, the average daily population was 140. In relation to discipline, 228 misconduct reports were submitted during 2016 for contravening Prison Rules.<sup>86</sup>
- 4.20** After several years of political debate, in early 2017 the States Assembly agreed to Government of Jersey reform proposals on the monitoring of conditions in the Prison. The Prison Board of Visitors (consisting of Jurats) was replaced by the Independent Prison Monitoring Board.<sup>87</sup> The main driver for the reforms was concern that arrangements in Jersey did not comply with the United Nations Optional Protocol to the UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), and Article 3 of the European Convention on Human Rights, which require a system for independent monitoring of prisons. Jurats were regarded as lacking the necessary character of independence for the purposes of prison monitoring because of their role in the Royal Court in sentencing prisoners.
- 4.21** The package of reforms also changed arrangements under which prisoners may appeal against disciplinary findings. Previously, appeals against adjudications by the Governor were heard by a panel of three members of the Prison Board of Visitors (i.e. Jurats). As part of the reforms, a new system for adjudicating on breaches of prison discipline was introduced by amendments to the Prison (Jersey) Rules 2007. Following amendment of Rule 94:<sup>88</sup>
- if the prisoner is appealing against a determination of an officer appointed by the Governor to inquire into the charge, the appeal is first to an internal three-person "disciplinary appeals panel" (DAP) of Prison staff;<sup>89</sup> if the prisoner is aggrieved by the decision of the DAP, the prisoner may ask the Governor to review the determination. If "the Governor considers that the decision of the disciplinary appeals panel and punishment was correct, the Governor, if requested to do so by the prisoner, must refer the appeal to the Minister".
  - if the prisoner is appealing against a determination of the Governor (instead of a DAP), there is a right of appeal to the Minister for Home Affairs.
- 4.22** The Minister's powers on appeal are: to quash any finding of guilt; remit or mitigate any punishment; substitute another less severe punishment; or refuse the appeal.
- 4.23** In our assessment, replacing the previous appeal to a panel of Jurats with an appeal to the Minister is a retrograde development in ensuring access to appropriately independent adjudication. The subject matter of prison discipline appeals does not relate to what is in the public interest or broad questions of public policy so disputes should be determined by an independent and impartial tribunal. We recommend that that judicial body should be the Jersey Administrative Appeals Tribunal.

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<sup>86</sup> See *States of Jersey Prison Service: HM Prison La Moye – Annual Report 2016* (R.36/2017), presented to the States on 18 April 2017 by the Minister for Home Affairs.

<sup>87</sup> Prison (Independent Prison Monitoring Board) (Jersey) Regulations 2017.

<sup>88</sup> Prison (Amendment No. 2) (Jersey) Rules 2017 (in force from 7 September 2017).

<sup>89</sup> Discussed in Chapter 2 above.

## **Minister's role in appeals relating to aerodrome licenses**

- 4.24** Under the Civil Aviation (Jersey) Law 2008, the Director of Civil Aviation makes decisions relating to grant, revoke and renewal of aerodrome licenses. The term “aerodrome” covers airports and helipads. Under Article 16 of the 2008 Law, an aggrieved person may appeal to the Minister within 30 days of the Director giving reasons for his decision. The Minister in question is the Chief Minister. The Article creates a further right of appeal to the Royal Court.
- 4.25** We make no recommendation for changing this redress scheme. The site and operation of an aerodrome (for example, a helipad) is likely to raise the same sort of public interest and public policy issues as a planning decision. The possibility of an appeal to the Royal Court provides sufficient judicial control over the decision-making process to satisfy ECHR Article 6.

## CHAPTER 5

# ENDING THE RÔLE OF THE STATES OF JERSEY COMPLAINTS PANEL

### What is the Complaints Panel?

- 5.1** The States of Jersey Complaints Panel is an administrative redress body unique to Jersey. It currently operates under the Administrative Decisions (Review)(Jersey) Law 1982. The 1982 Law was amended in significant ways in 1996 and 2006.
- 5.2** The remit of the Complaints Panel is to consider disputes arising from decisions taken by Ministers and civil servants in departments of the Government of Jersey. Complainants are required to use any internal complaints systems within a Government of Jersey department before approaching the Complaints Panel. Complaints are received by the office of the States Greffe (part of the States Assembly). There is no charge for using the process.
- 5.3** If the complaint falls within the Complaints Panel's jurisdiction, the Chairman may attempt to resolve the grievance informally. If this is tried but fails, or is thought not to be appropriate, a hearing, normally in public, is held in front of a "board" of three members of the Complaints Panel, at which the complainant presents his or her case, followed by a response on behalf of the Minister. The board prepares a written decision, which is made as a report to the States Assembly by the Privileges and Procedures Committee (PPC). This may uphold the complaint and make recommendations to the Minister for providing a remedy. Any recommendations are not binding on the Minister, who may reject them in whole or in part. If the Minister does this, the Complaints Panel may make another report, via PPC, to the States Assembly drawing attention to this.

### Historical development of the Complaints Panel

- 5.4** To understand the current operation of the Complaints Panel it is necessary to trace its historical development. The "States of Jersey Administrative Appeals Panel" was first established by Regulations in 1979.<sup>90</sup> It was placed on a permanent footing by the Administrative Decisions (Review)(Jersey) Law 1982. Complaints were received by the States Greffier (the senior administrative officer of the States Assembly), who had broad discretion to decide whether to refer complaints to members of the Panel.
- 5.5** During the first phase of its existence (1979-95), the Panel consisted of elected States members. At this time, the government of Jersey was conducted through committees of the States Assembly. The presidents of the States committees and other elected members who had served for three years or more were eligible to sit on the three-person boards that were convened to consider complaints against "any decision made, or any act done or omitted, relating to any matter of administration by any Committee or Department of the States or by any person acting on behalf of any such Committee or Department". The role of the Panel was therefore to provide political control over administrative decision-making.
- 5.6** A board, having inquired into the matter, had power to request the original decision-maker to reconsider the matter if satisfied that the decision  
    “(a) was contrary to law; or

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<sup>90</sup> Administrative Decisions (Review) (Jersey) Regulations 1979.

- (b) was unjust, oppressive or improperly discriminatory, or was in accordance with a provision of any enactment or practice which is or might be unjust, oppressive or improperly discriminatory; or
- (c) was based wholly or partly on a mistake of law or fact; or
- (d) could not have been made by a reasonable body of persons after proper consideration of all the facts; or
- (e) was contrary to the generally accepted principles of natural justice”.

These criteria remain in force.

- 5.7** From its inception, the Panel’s power to grant remedies has been limited to making recommendations. It has no power to compel a Minister or department to do anything.
- 5.8** In 1996, the composition of the Panel was altered significantly.<sup>91</sup> Instead of elected States members, the Panel became composed of people appointed by the States Assembly, including a chairman and “two suitably qualified deputy chairmen” and “a sufficient number of persons to constitute the Panel”.
- 5.9** In 2000, the *Report of the Review Panel on the Machinery of Government in Jersey*, chaired by Sir Cecil Clothier QC, was highly critical of the operation of the Panel, concluding “We consider these arrangements to be quite unsatisfactory”.<sup>92</sup> In particular, the Clothier Report objected to the discretion of the States Greffier not to refer complaints to the Panel, the delays in dealing with complaints, and “If a complaint reaches the Board and is upheld, there is no satisfactory sanction which can be applied to the errant administrator or committee to oblige them to make amends”.<sup>93</sup>
- 5.10** In 2002, political responsibility in the States Assembly for the administrative appeals system was transferred from the “Special Committee to Consider the Relationship Between Committees and the States” to the Privileges and Procedures Committee (PPC).<sup>94</sup>
- 5.11** Further criticism of the Panel emerged from a review carried out by PPC in 2004.<sup>95</sup> The Committee noted
 

“Various concerns and criticisms of the present system have been expressed by States members and others in recent years and these include –

the fact that the system has no ‘teeth’ and the findings of Boards can be ignored by Committees and Departments. This can lead to frustration for both complainants and members of the Panel who feel they have wasted their time;

a perception that there is no clear ‘follow-up’ procedure when the findings of Boards are not implemented;

criticism by some Committees that certain findings have not, in their opinion, been based on a full knowledge of policies and procedures of the Committee concerned;

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<sup>91</sup> Administrative Decisions (Review) (Amendment) (Jersey) Law 1995.

<sup>92</sup> States of Jersey, *Report of the Review Panel on the Machinery of Government in Jersey*, para 9.4.

<sup>93</sup> States of Jersey, *Report of the Review Panel on the Machinery of Government in Jersey*, para 9.3.

<sup>94</sup> PPC is a committee of elected States members “responsible for the procedures of the States Assembly, for members’ facilities and the code of conduct for members”. PPC acts as a conduit through which the Complaints Panel communicates with the States Assembly.

<sup>95</sup> Privileges and Procedures Committee, *Administrative Appeals System: Proposals for Improvement – Consultation Report*, Presented to the States on 4 May 2004.

a perceived lack of independence from the States because of the rôle of the Greffier of the States in deciding whether or not to refer a complaint to a Board (although the members of the Panel have made it clear that they very much value the administrative support given by the States Greffe that they would like to retain);

the fact that the system is too slow and 'formal' and does not provide a simple, quick, informal method to resolve minor complaints;

the small number of complaints each year (no more than 20 to 25) leading to a perception that some persons who are aggrieved do not bother to use the system;

a lack of firm and binding guidelines on the operation of the system.”

**5.12** The review by PPC led to amendments to the Administrative Decisions (Review) (Jersey) Law 1982 in 2006.<sup>96</sup>

- The Panel was renamed the “States of Jersey Complaints Panel”.
- A new initial procedure was created, including providing the chairman or a deputy chairman with express powers to “attempt informal resolution of the matter”.
- The power of the Greffier of the States to dismiss a complaint without reference to the chairman was replaced with power for the chairman (or a deputy chairman) to decide that a review by a board is not justified. The role of the Greffier of the States (in practice, delegated to the Deputy Greffier of the States) is limited to enquiring into the facts of the matter and presenting a dossier to the chairman of the Panel.
- The Panel was given powers to “issue rules of practice and procedure”.
- The Panel is required to make an annual report to PPC, and PPC was placed under a duty to present the report to the States Assembly.

**5.13** The chairmen of the Panel since its composition changed to non-States members have been:

- Mr (formerly Senator) Reg Jeune CBE (1997-2003), a Jersey solicitor for over 50 years who, as a States Member, had set up the special committee that led to the Administrative Decisions (Review)(Jersey) Law 1982.
- Mrs Carol Canavan (2003-12), a Jersey solicitor, served as a Complaints Panel member for 15 years, nine as chairman.
- Advocate Richard Renouf (2012-14), a Jersey advocate, who resigned as chairman when elected as a States Member in 2014.
- Mr Nigel Le Gresley (2014-15), a Jersey solicitor.
- Mr Geoffrey Crill (appointed in July 2015 on a 5-year term), a retired Jersey solicitor.

**5.14** The Panel underwent a significant renewal of leadership during 2014-15 with the appointment of a new chairman (Mr Geoffrey Crill) and two new deputy chairmen.

**5.15** At a meeting of PPC in July 2015,<sup>97</sup> “The Chairman Designate [Mr Crill] informed the Committee that the Panel would be reconstituted shortly with reappointments and new members. Once its membership had been restored, the first task of the Panel would be to review its current practices. Of particular importance was ensuring that the work of the Panel covered all intended branches of government, to include newer bodies and departments. The Chairman Designate also indicated that the Panel might seek to accelerate and improve the process governing the initial assessment of complaints. Above all, the Chairman Designate considered it crucial for the public to be aware of the work of the Panel and for

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<sup>96</sup> Administrative Decisions (Review) (Amendment No. 2) (Jersey) Law 2006.

<sup>97</sup> Privileges and Procedures Committee (13th Meeting), *Minutes*, 7 July 2015, TM/SC/194.



States Departments to view its contribution positively. Members noted that the Panel might attend upon a future meeting of the Committee in order to discuss potential enhancements to its own procedures”.

## Composition of the Complaints Panel

**5.16** As of October 2017, the Complaints Panel consists of 12 members; there is no legal limit on the number of members who can be appointed by the States Assembly.<sup>98</sup>

Member	Gender	Profile <sup>99</sup>
Geoffrey Crill	Male	First appointed in 2013; appointed as Deputy Chairman in 2015; appointed as Chairman in July 2015 for a 5-year term. Retired solicitor. Educated in Jersey. See P.180/2014.
Christopher Beirnie	Male	First appointed in 2009; reappointed as a member for a further 4 years in 2015 and as Deputy Chairman. Headmaster and Chief Executive of Beaulieu Convent School since 2006. Jersey resident since 1996. See P.71.2015 and P.133/2015.
Stuart Catchpole QC	Male	First appointed in 2013; appointed as Deputy Chairman in July 2015 for a 5-year term. A senior barrister at the Bar of England and Wales, specialising in “international arbitration, construction, professional negligence, commercial litigation, energy and natural resources and insurance and re-insurance”. See P.180/2014.
Robert (Bob) Bonney	Male	First appointed in 2009; reappointed as a member for a further 4 years in 2015. Member of the States of Jersey Police Force for 28 years until retirement in 2005. See P.71.2015.
Patrick David McGrath	Male	First appointed in 2012; reappointed as a member for a further 4 years in 2015. Member of the States of Jersey Police Force for 27 years until retirement in 2002.
Graeme George Marett	Male	First appointed in 2012; reappointed as a member for a further 4 years in 2015. Retired computer consultant. Educated in Jersey.
Janice Eden	Female	First appointed in 2013; reappointed for a further 5-year term in March 2017. Qualified in counselling, she has held many voluntary roles and is the owner/manager of a card shop in St Helier. See P.8/2017.
John Moulin	Male	First appointed in 2013; reappointed for a further 5-year term in March 2017. Mr Moulin retired from the Civil Service in 2009 following nearly 29 years of service. President of the Jersey Civil Service Association between 2003 and 2009. He also serves as a member of the “Social Security Low Income Support Appeal

<sup>98</sup> Under the Draft States of Jersey (Appointments Procedures)(Jersey) Law 201-, lodged au Greffe on 13 October 2017, appointments will in future be made by the Privileges and Procedures Committee rather than the States Assembly as a whole.

<sup>99</sup> Summarised from the biographies included in Propositions to the States Assembly for the appointments of each member.

		Tribunal” [sic] and the “Medical Incapacity Appeal Tribunal” [sic]. Born in Jersey. See P.8/2017.
Susan Cuming	Female	Appointed in May 2017 for 5 years. “Retired from the civil service in 2015 after 32 years’ service, mostly working in human resources”. Since 2015, she has been a member of the Jersey Employment Discrimination Tribunal. A Jersey resident since 1983. See P.20/2017.
Gavin M Fraser	Male	Appointed in May 2017 for 5 years. “A senior finance professional and non-executive director with 40 years’ experience in investments, banking, trusts, insurance and education.” A Jersey resident since 1985. See P.20/2017.
David Greenwood	Male	Appointed in May 2017 for 5 years. “Head of International for HSBC Bank International, being responsible for the Company’s strategic customer and deposit growth objectives”. A Jersey resident since 2013. See P.20/2017.
Gwyn Llewellyn	Male	Appointed in May 2017 for 5 years. Senior Clinical Medical Officer for the States of Jersey Public Health Department 1988-2002. During his employment as a Civil Servant, he served as President of the Jersey Civil Service Association between 1997 and 2002. He was a member of the Health and Safety at Work Appeal Tribunal 2002-2008. A Jersey resident since 1976. See P.20/2017.

**5.17** The Complaints Panel considers itself to be a diverse body. Speaking to PPC in July 2015, the new chairman, Mr Crill, “assured the Committee that the Panel retained a broad membership, with volunteers from a wide range of professional and social backgrounds”.<sup>100</sup> In its response to our consultation, the Complaints Panel (referring to itself as “the SCP”) said:

“The members are voluntary, and the present membership incorporates a wide diversity of backgrounds and life experiences. The Panel is able to draw on that diversity to formulate a Board that is most appropriate to consider any given complaint. However, what is absolutely critical to the credibility of the SCP, both with the public and with the executive, is that the SCP is seen to comprise a broad cross-section of members of the community who between them have no obvious political affiliations but have sufficient experience and expertise to justify the confidence of both ‘sides’ that a Board can reach an independent, reasoned decision based only on the evidence put before them. It is that broad cross-section of the membership of the SCP that provides confidence to the public that it is not an ‘establishment’ body that is hearing their complaint, but rather a group of their peers.”

**5.18** During our research interviews, one former member of the Complaints Panel told us “Many recent appointments have been retired public sector employees who are more likely to have heard of the Panel and be familiar with government processes. They are good members but those with different backgrounds can bring valuable insights”.

**5.19** We do not share the Complaints Panel’s confidence that it can be regarded as a diverse body. Most strikingly in its current composition, there are only two women out of the 12

<sup>100</sup> Privileges and Procedures Committee (13th Meeting), *Minutes*, 7 July 2015, TM/SC/194.

members. Eight of the 12 are retired or semi-retired. To point this out is not to criticise any of the Complaints Panel's individual members but simply to question to what extent the Panel is meeting its stated aim of being a "broad cross-section".

**5.20** In Chapter 3, in relation to membership of the proposed Jersey Administrative Appeal Tribunal, we are recommending that those responsible for making appointments have regard to the need for diversity among members.<sup>101</sup> In our consultation report, we made a similar proposal in relation to the Complaints Panel, saying that there should be a legal duty on the States Assembly to have regard to the desirability of Panel members, between them, being broadly reflective of Jersey society.

**5.21** We decided to make no final recommendation about changing the law in relation to diversity in respect of the Complaints Panel (if it is retained). This is because the process of appointing members is already subject to the oversight of the Jersey Appointments Commission (though it is not directly involved in making appointments). In recent appointments processes, selection of new members has been undertaken by the Chairman and two Deputy Chairmen of the Complaints Panel. They should follow the Jersey Appointments Commission's guidelines set out in *Recruitment and Selection Guidance for Independent bodies*.<sup>102</sup>

## The Complaint Panel's caseload

**5.22** Over the past six years, the number of complaints received has varied between 8 and 17, with an average of 11 a year.<sup>103</sup> The number of public hearings held is smaller, ranging from one to four (and average of 2.3 a year).

**Table: Case load of States of Jersey Complaints Panel**

Year	New complaints received	Not proceeded with	Hearings held	Informal resolutions	Complaints upheld
2015	9	0	1	0	1
2014	13	11	1	4	0
2013	17	5	4	1	4
2012	7	4	1	1	1
2011	8	No information	4	No information	0
2010	12	No information	3	No information	No information

**5.23** The type of complaints has varied over time. The Panel's annual reports for 2010 and 2011 note that most of the complaints received related to decisions made by the Minister for Planning and Environment in relation to planning applications, and speculated that "the increase in Planning related complaints could be a result of the perceived prohibitive costs of a Royal Court or Third Party Appeal process". New, more accessible arrangements for planning appeals has resulted in planning cases to the Complaints Panel drying up.

<sup>101</sup> See Recommendation 3.7. We also noted there that this is an aspect of a much broader issue of diversity in public appointments and membership of public bodies in the Island. It will be for the Chief Minister to take steps to put in place an "effective island diversity strategy ... essential in addressing the challenges of an increasingly diverse community", as recommended by the *Report of the Independent Jersey Care Inquiry* in July 2017.

<sup>102</sup> See

[www.gov.je/Government/Departments/ChiefMinisters/ChiefMinistersSections/JerseyAppointmentsCommission/Pages/GuidelinesRecruitmentSeniorEmployeesAppointeesIndependents.aspx](http://www.gov.je/Government/Departments/ChiefMinisters/ChiefMinistersSections/JerseyAppointmentsCommission/Pages/GuidelinesRecruitmentSeniorEmployeesAppointeesIndependents.aspx)

<sup>103</sup> Source: Annual Reports and other information on the States Assembly website.

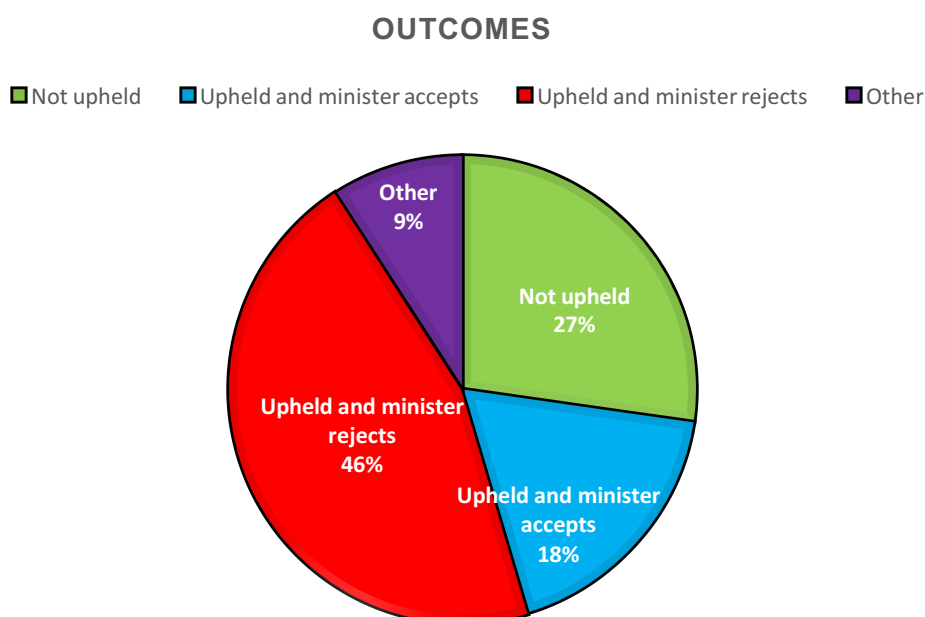
**5.24** The annual reports for 2012-2015 present a different picture of the caseload, explaining that the complaints received “related to decisions made by a wide variety of Ministers, when in previous years they had been mostly concentrated on planning matters”. The introduction of a new planning appeals system established by the Planning and Building (Amendment No. 6) (Jersey) Law 2014, which creates a new right of appeal to the Minister advised by planning inspectors in place of a right of appeal to the Royal Court, is likely to further diminish the Panel’s oversight over applications for planning permission.

## Outcomes of complaints after hearings

**5.25** To understand the operation of the Complaints Panel, we have looked in more detail at the 11 complaints that led to hearings and reports, or responses to reports, between January 2013 and October 2017. These have been identified from annual reports of the Complaints Panel and the “reports” section of the States Assembly website.<sup>104</sup>

**5.26** Of the 11 complaints, three were not upheld by the Complaints Panel (colour coded green in the Chart and Table below).

**5.27** Of the eight cases upheld, the Minister or other public body accepted the findings and recommendations in two cases (blue) and rejected the main findings and recommendations in five cases (red) and in one case rejected findings but nonetheless reconsidered the decision and made an outcome favourable to the complainant (purple). We view this high proportion of cases in which Ministers reject Complaint Panel findings and recommendations (and in some cases, are highly critical of the Complaint Panel’s approach) as creating an unstable relationship, which undermines the efficacy of the Complaints Panel.



<sup>104</sup> As noted below, there is no easy accessible systematic collection of the Complaint Panel’s reports.

## Table of complaint outcomes

1	<b>2017 complaint not upheld by Complaints Panel</b>	Mrs and Mrs A complained against a decision of the Minister of Education regarding an appeal in respect of a higher education student grant for their son. In September 2017, following a private hearing, the Complaints Panel (G. Crill, G. Marett and S. Cuming) did not uphold the complaint but made suggestions that the Education Department respond within 2 months outlining ways in which it would review aspects of its decision-making (R.108/2017).
2	<b>2017 complaint upheld by Complaints Panel</b>  <b>Findings rejected by States Employment Board</b>	Mrs X, a lab technician in Jersey schools for many years, complained about the way in which her request for ill-health retirement was handled. In May 2017, following a private hearing the Complaints Panel (C. Beirnie, R. Bonney and J. Moulin) upheld Mrs X's complaint, finding that "Mrs X received insufficient guidance and support from the Employer, who had a responsibility to provide an appropriate level of care". The decision was found to be "unjust, oppressive or improperly discriminatory, or was in accordance with a provision of any enactment or practice which is or might be unjust, oppressive or improperly discriminatory", "could not have been made by a reasonable body of persons after proper consideration of all the facts"; and "was contrary to the generally accepted principles of natural justice". The Complaints Panel recommended that the States Employment Board (SEB) reconsider its decision (R.53/2017). In its formal response in July 2017, the SEB substantially rejected the Complaint Board's findings (R.53/2017 Res.). In a further report, the Chairman of the Complaints Panel stated, "I am disappointed with the response provided by the States Employment Board, which I find to be poorly balanced, highly selective, and which ignores the context of the events surrounding the decision" (R.53/2017 Res.Res.(re-issue)).
3	<b>2016 complaint upheld Complaints Panel.</b>  <b>Findings rejected by SEB.</b>	Mr Alwity complained about the withdrawal of an offer of employment to the position of consultant ophthalmologist. Following a 2-day public hearing, the Complaints Panel (G. Crill, S. Catchpole and J. Eden) issued a 159-page report concluding that the complaint was well-founded. It concluded by saying, "We agree that this case is a paradigm example of introspective and poor decision-making by a small group of senior public officials. While we are only concerned with the procedure that was adopted rather than the substantive merits of the decision itself, the only conclusion that one can reach is that the process was manifestly unfair, was based on incorrect information and advice, took account of irrelevant considerations and failed to take account of all of the relevant ones (precisely because the process was not designed to ensure that relevant information was confirmed and considered impartially by an independent body). It follows that we also agree that the description ... of the procedure (or lack of it) that was followed in the present case as 'appallingly shabby' is apt" (R.75/2016). On 7 July 2016,

		<p>the Minister issued a press release saying, "... I am concerned that the terms of reference [of the Complaints Panel's board] have vastly expanded without the opportunity for officers to provide the appropriate evidence for the new areas under review. Regrettably, staff have had their integrity and their honesty called into question in a public document, without any opportunity to put forward the facts of the case as they were at the time".<sup>105</sup> In his formal response, the Minister said "The SEB considers that the Complaints Board did not conduct the hearing in accordance with its own directions and that it strayed into areas that it had specifically and repeatedly told the SEB and the Complainant that it would not deal with such as the reasonableness of the decision to withdraw Mr Alwitary's contract of employment" (R.75/2016 Res.). In December 2016, the Chairman of the Complaints Panel made a further 18-page report, describing SEB's formal response as "deeply unsatisfactory", saying the Panel was "concerned and confused by SEB's response" (R.75/2016 Res.).</p>
4	2016 complaint not upheld by Complaints Panel	<p>Unite the Union complained about a decision of the Minister for Infrastructure about actions under the Connex bus contract. Following a public hearing, the Complaints Panel (C. Beirnie, G. Marett and J. Eden) made a report concluding that the Minister had correctly interpreted his duties and accordingly did not uphold the complaint (R.31/2016).</p>
5	2015 complaint upheld by Complaints Panel. Minister accepts some recommendations	<p>Mr Sullivan and Mr Sullivan, commercial fishermen, complained against the Minister for Economic Development regarding enforcement of a contract to use facilities at Bouley Bay. Following a public hearing, the Complaints Panel (G Crill, C. Beirne, and J. Moulin) made a report in February 2014 upholding the complaint and made a series of recommendations (R.24/2015). In his response, the Minister said he accepted and acted upon some recommendations (R.40/2015).</p>
6	2014 complaint not upheld by Complaints Panel	<p>Mr Manning made a complaint against the Minister for Treasury and Resources regarding overcharging on a loan made to him by the States of Jersey in 1999. Following a hearing, the Complaints Panel (Advocate R. Renouf, D. McGrath and C. Boscq-Scott) issued a report in April 2014 that did not uphold the complaint. It did however recommend that the Minister give consideration in future circumstances to address any perceptions that loan agreements are unclear or ambiguous (R.67/2014).</p>

<sup>105</sup> Government of Jersey website, "Health Minister responds to Complaints Board report", [www.gov.je/news/2016/pages/ministerrespondstocomplaintsboardreport.aspx](http://www.gov.je/news/2016/pages/ministerrespondstocomplaintsboardreport.aspx). The SEB issued a similar statement [www.gov.je/news/2016/pages/sebstatement.aspx](http://www.gov.je/news/2016/pages/sebstatement.aspx).



7	<p><b>2014 complaint upheld by Complaints Panel.</b></p> <p><b>Findings rejected by Minister.</b></p>	<p>Mr Manning made a complaint against the Minister for Planning and Environment relating to an enforcement notice. Following a public hearing, the Complaints Panel (C. Vibert, J. Mills and G. Crill) found that service of the enforcement note was contrary to law and the department's subsequent handling of the case was contrary to natural justice, and requested the Minister to reconsider the matter (R.144/2013). The Minister's response was published in December 2013 (R.154/2013), saying that he did not accept that it was correct to say that service of the enforcement notice was ultra vires. On 11 February 2014, PPC published correspondence from the Deputy Chairman of the Complaints Panel, saying that it is "disappointing for the [Complaints Panel] to have its findings insufficiently considered or implemented" (R.15/2014).</p>
8	<p><b>2013 complaint upheld by Complaints Panel</b></p> <p><b>Minister took positive action in response to findings and recommendations</b></p>	<p>Mr Berry complained about the decision to dismiss him from his post as Deputy Chief Officer of the States of Jersey Police on grounds of ill-health. Following a public hearing, the Complaints Panel (Advocate R. Renouf, F. Dearie and S. Catchpole) upheld the complaint holding that the new Deputy Chief Officer did not have legal power to dismiss Mr Berry and relevant policy was not rationally applied (R.157/2013). In his response, the Minister for Home Affairs expressed concern about the lack of clear definition of the Complaint Panel's jurisdiction but accepted the finding that there was a lack of legal powers. The Minister noted that it was unfortunate that Mr Berry had not immediately challenged his dismissal by an application for judicial review to the Royal Court (R.13/2014).</p>
9	<p><b>2013 complaint upheld by Complaints Panel</b></p> <p><b>Minister rejects findings and recommendations</b></p>	<p>Mr Bisson complained against a decision of the Minister for Transport and Technical Services about a decision of the Driver and Vehicle Standards section of the Transport and Technical Services Department to place restrictions on the public service vehicle licence issued to a business known as "Pet Cab". Following a public hearing, the Complaints Panel (C. Vibert, C. Beirne and G. Marett) upheld the complaint, stating in its June 2013 report that the decision to issue the licence with a condition was unreasonable (R.67/2013). In his response, the Minister "highlighted a number of concerns ... in relation to the proceedings and findings" of the Panel, rejected the recommendation and said that it was "unclear what condition would be acceptable" to the Complaints Panel. The Minister proposed an alternative solution (R.93/2013).</p>
10	<p><b>2013 complaint upheld by the Complaints Panel</b></p> <p><b>Minister rejects findings and recommendations</b></p>	<p>Mr Bellas complained against the Minister for Social Security regarding the handling of an application for Income Support in relation to whether a sum of money paid by a former employer should be regarded as income or capital. Following a public hearing, the Complaints Panel (Advocate R. Renouf, C. Beirne and D McGrath) upheld the complaint in</p>

**11 2012 complaint upheld by the Complaints Panel**  
**Minister rejects findings and recommendations (but retakes decision to the benefit of the complainant)**

November 2013 (R.142/2013). The Minister rejected the findings and recommendations (R.156/2013).

Mr and Mrs B complained against a decision of the Minister for Education, Sport and Culture to transfer their son to School A rather than their preferred choice of School B. Following a private hearing, the Complaints Panel (Advocate R. Renouf, F. Dearie and R. Bonney) upheld the complaint (R.102/2012). In his response, the Minister rejected several of the Complaints Panel's findings and recommendations (R.108/2012) but did agree to transfer the child to School B.

*Ministers often do not accept findings and recommendations of the Complaints Panel*

**5.28** As we explored above, it is evident that Ministers reject a significant proportion of the adverse findings and recommendations of the Complaints Panel. The reasons for rejecting findings and recommendations in summary are as follows.

- Case 2 (see Table above): the Minister saw “no merit in carrying out a further” report; he rejected a finding that that a decision was unreasonable when the Complaints Panel had accepted that the decision was appropriate given the information available at the time; and rejected the conclusion that the decision was contrary to principles of natural justice (R.53/2017 Res.).
- Case 3: “The SEB considers that the Complaints Board did not conduct the hearing in accordance with its own directions and that it strayed into areas that it had specifically and repeatedly told the SEB and the Complainant that it would not deal with such as the reasonableness of the decision to withdraw Mr Alwitary’s contract of employment” (R.75/2016 Res.).
- Case 7: the Minister said that the Complaints Panel “reached different conclusions to the Royal Court as regards the legitimacy of the temporary storage of telegraph poles”; the Minister “cannot accept that it is correct” to say, as the Panel did, “that the service of the [enforcement notice] was ultra vires” (R.154/2013).
- Case 9: in his response, the Minister “highlighted a number of concerns ... in relation to the proceedings and findings” of the Panel, rejected the recommendation and said that it was “unclear what condition would be acceptable” to the Complaints Panel (R.93/2013).
- Case 10: the Minister noted that the complainant had a right of appeal to the Social Security Tribunal, which was withdrawn; the department’s decision was just and would not be changed; and the claim had been assessed correctly (R.156/2013).
- Case 11: the Minister’s response opened by saying “I wish to place it on record that there are several points on which I disagree with the summary and findings of the Complaints Board”; among the points the Minister made, was that the Complaints Panel had reached a different interpretation of the law relating to parental choice of schools from that of the Law Officers’ Department; and he rejected Complaint Panel’s findings of fact; and was critical of how the Panel had described an aspect of the case “in such emotive terms”.

It is not appropriate for the Jersey Law Commission to “re-litigate” the complaints process to assess whether the Complaints Panel or the Minister is correct. Our point is that the high level of disagreement between Ministers and the Complaints Panel does not provide a sound basis for the relationship of mutual respect that must exist in a system where the Panel’s findings and recommendations are not binding orders.

## **Our principal recommendation: The Complaints Panel should be replaced by an ombudsman**

### **Recommendation 5.1: The States of Jersey Complaints Panel should be replaced by a Jersey Public Services Ombudsman.**

- 5.29** Our overarching finding is that, notwithstanding previous attempts at reforms, several serious problems persist with the remit of the Complaints Panel, the framework within which it operates, the procedures it uses, and its track record in providing effective redress to people in Jersey. Our criticisms are not directed at the individuals (past and present) who contribute their time without remuneration to serve on the Complaints Panel. As with the other elements of administrative redress in Jersey, our focus is on getting the system right.
- 5.30** We have considered two general ways forward: to abolish the Complaints Panel and replace it with a public sector ombudsman; or to adopt an evolutionary approach and introduce a range of further reforms to make the Complaints Panel more coherent and effective (noting that substantial changes have already been made in 1996 and 2006).
- 5.31** Our principal recommendation is that the Complaints Panel should be replaced by a Jersey Public Services Ombudsman (which we discuss in Chapter 6). Closure of the Complaints Panel would be achieved by repeal of the Administrative Decisions (Review)(Jersey) Law 1982. Our principal recommendation is based on the following considerations.
- The volume of complaints received by the Complaints Panel is very low, suggesting that people are unaware of the Complaints Panel or are aware of it but do not want to use it. In Chapter 6, we look at ombudsman schemes in small jurisdictions: these attract 100-200+ complaints a year, compared to the Complaints Panel's average of 11 complaints a year (of which, fewer than 3 a year are on average fully adjudicated). The low caseload also results in Panel members having insufficient opportunity to develop their skills as they are involved in hearings only occasionally.
  - There is a range of significant problems with how the Complaints Panel's remit is defined and how it operates; we discuss these below and provide some alternative recommendations on how these could be addressed. We are not, however, confident that these recommendations will provide a satisfactory solution.
  - There is an opportunity cost to keeping the Complaints Panel. While the Complaints Panel is retained, there will not be a public services ombudsman in Jersey. As we discuss in Chapter 6, we believe that an ombudsman could have a transformational influence on the Island's administrative justice system which the Complaints Panel cannot aspire to have.
  - There is, on our analysis, a worrying pattern in the relationship between Ministers and the Complaints Panel. A situation in which the majority of the Complaints Panel's findings and recommendations are rejected by Ministers does not provide a stable and effective basis for the relationship between the Complaints Panel and the Government of Jersey.

## **Why we are making alternative recommendations**

- 5.32** During the consultation phase of this project, we received strongly expressed responses from the Complaints Panel and from the States Assembly's Privileges and Procedures Committee (PPC) arguing against our interim recommendation to abolish the Complaints Panel to replace it with an ombudsman.

- 5.33** The Complaints Panel described our April 2016 consultation report as containing “unsubstantiated generalisations”, “sweeping allegations ... without any evidence or apparent justification”, and said that it “cannot avoid the feeling that [the consultation report] has been written from the conclusion (that there should be a remunerated public services ombudsman with power to make binding orders) backwards, rather than looking at the structure of the complaints process, and then seeing how it may be improved”. We did not and do not recommend that the proposed public services ombudsman should have powers to “make binding orders”. We do not accept the criticisms made by the Complaints Panel of our approach to developing our interim recommendations. On the contrary, we have drawn evidence-based conclusions for improving administrative redress based on analysis of relevant laws and practice.
- 5.34** On 16 August 2016, the Chairman of the Jersey Law Commission (Mr Clive Chaplin) and the Topic Commissioner (Professor Andrew Le Sueur) attended a closed meeting of PPC, at their invitation. We subsequently received a detailed 5-page letter dated 17 August 2016 from Connétable Len Norman, the Chairman of PPC, rejecting our research findings (set out in our consultation report) that “an atmosphere of mutual distrust has arisen between the Panel and the government”, that the “Panel makes little or no tangible contribution to improving the quality of public administration”, that “The Panel has outlived its usefulness”, and that the Panel “offers poor value for money”. We stand by our assessments.
- 5.35** In 2000, the Clothier report (discussed above) concluded that the Complaints Panel was “quite unsatisfactory” and that change was patently needed in the form of an ombudsman. Our fresh review of the law and evidence 16 years later leads us to the same conclusion.
- 5.36** In light of responses from the Complaints Panel and PPC, we anticipate that there will be political opposition to our recommendation to end the role of the Complaints Panel. We have therefore developed a series of alternative recommendations for reform of the Complaints Panel: these are discussed in this Chapter and summarised in **Annex B: List of Alternative Recommendations on the Future of the States of Jersey Complaints Panel**. Although these proposals would, in our assessment, improve the operation of the Complaints Panel we do not have sufficient confidence in them to recommend them as providing a long-term solution to the various problems with the Complaints Panel.

## Alternative recommendation on training for Complaints Panel members

**Alternative recommendation 5.2: The Greffier of the States should have a legal duty to provide a programme of training to members of the Complaints Panel.**

- 5.37** In our April 2016 consultation report, we made the interim recommendation that all members of the Complaints Panel should receive good quality training on all aspects of the Panel’s work, including informal resolution. There was strong agreement with this proposal. The Complaints Panel told us that it “wholeheartedly supports” this proposal, noting that “while it is a priority that the members of the [Complaints Panel] are drawn from a wide Island community and have broad life experience, they will only retain credibility if they clearly demonstrate that they are fulfilling their duties properly and appropriately, and this necessitates maintaining a level of ongoing training”.<sup>106</sup> A former member of the Complaints Panel said that training was “very important, particularly if the Panel is to be enhanced”, adding “I believe this would be welcomed by Panel members”.

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<sup>106</sup> Selected responses to consultation are published on the Jersey Law Commission website.

- 5.38** During the research interviews, we were told no training in mediation and other alternative dispute resolution methods is provided to members of the Complaints Panel, though some Panel members have experience of ADR through their past or present employments.
- 5.39** To ensure that training is provided and properly resourced, we consider that it is necessary to create a legal obligation to do so. We propose that the most appropriate public office holder to have this legal duty is the Greffier of the States. It would be appropriate for the Complaint Panel's annual report to provide an account of the training that has been provided.

## Alternative recommendation on publicity about the Complaints Panel

**Alternative recommendation 5.3: The States Assembly should invest resources in developing a website, other publicity material and a programme of activities to publicise the work of the Complaints Panel.**

- 5.40** In our consultation report, we proposed that the Panel should have its own website, which should be developed into a resource for complainants and their advisers. There was broad support for this proposal. The Complaints Panel told us that it agreed "wholeheartedly that the findings of the Board should be properly publicised. It further agrees that the [Complaints Panel] should have its own website, which it considers would be the appropriate place for reports to be published, with links to the site from the JLIB and gov.je websites". A former member of the Complaints Panel commented on better publicity that "This has been spoken about for years!".
- 5.41** Earlier in this Chapter, we hypothesised that one reason why the Complaints Panel receives few complaints compared to ombudsman systems in some other small jurisdictions is because of low levels of public awareness of the existence and function of the Complaints Panel. To bring about higher levels of public awareness of and confidence in the work of the Complaints Panel, better online information is a necessary but not sufficient action. As we note in Chapter 6, some ombudsmen have used a range of activities to raise public awareness. In Jersey, the Complaints Panel could have a stall in King Street, have a programme of talks to local groups, and use social media. Public bodies also have a responsibility to ensure that users of their services are aware that the Complaints Panel may be able to assist them should they have a grievance that the public body is not able to resolve.

## Alternative recommendation on widening the scope of the Complaints Panel's jurisdiction

**Alternative recommendation 5.4: The scope of the Complaints Panel's jurisdiction should be broadened to include a wider range of public bodies.**

- 5.42** Article 2 of the Administrative Decisions (Review) (Jersey) Law 1982 states
- "Where any person (referred to in this Law as the 'complainant') is aggrieved by any decision made, or any act done or omitted, relating to any matter of administration by **any Minister or Department of the States or by any person acting on behalf of any such Minister or Department**, the person may apply to the Greffier to have the matter reviewed by a Board."
- 5.43** The Complaints Panel's remit is therefore not comprehensive; it covers only some areas of public administration in the Island. It does not cover the following areas of administrative decision-making public bodies:
- administrative decisions taken by Parishes



- arm's length bodies such as the Jersey Financial Services Commission and the Jersey Competition Regulation Authority
- decisions previously made within States departments that have in recent years been transferred to corporate entities wholly owned by the States of Jersey, operating at arm's length from Ministers: JT Ltd (Jersey Telecom Group Ltd, a telecommunications business); Jersey Post Ltd (the mail service); Ports of Jersey Ltd (running the harbour and airport since 2015); and Andium Homes Ltd (in July 2014 the States of Jersey's housing stock and responsibilities of the States of Jersey Housing Department were transferred to Andium)
- decisions made by non-ministerial bodies, which include: the Overseas Aid Commission; the Bailiff's Chambers; the Judicial Greffe; the Viscount's Department; the Office Analyst; the Office of the Lieutenant Governor; the office of the Dean of Jersey; the Data Protection Commission; Probation; and the Comptroller and Auditor General
- decisions made by "minor entities", which include the Government of Jersey London Office and the Jersey Legal Information Board.

**5.44** During the research interviews, a former member of the Complaints Panel expressed disagreement with this idea, taking the view that only Ministers should be subject to review by the Panel as there would be nothing that the States Assembly could do with a report relating to corporate entity or Parish. The value of the Complaints Panel's work in relation to such bodies is that they would seek to provide a good quality complaints handling service external to the body complained about. Recommendations would be made to the incorporated entity, Parish etc and the Complaints Panel would report in their annual reports on the responses received. The Complaints Panel would have no sanction for non-compliance except the pressure of political and public opinion; this is no different from the position in relation to Ministers.

**5.45** In our consultation report, we proposed that the Complaint Panel's remit should be extended to cover a wider range of public bodies. One response disagreed (without giving a reason); all other responses supported the proposal (though it was suggested to us that the work of the Viscount should not fall under the oversight of the Complaints Panel or an ombudsman).

**5.46** The Complaints Panel supported widening its jurisdiction, saying that "its remit should extend to any corporate entity to which public administration is devolved, be that Andium Homes, Ports of Jersey, Property Holdings, Jersey Post or whoever. When considering such devolution, the States Assembly should have serious and fundamental regard to the manner and extent to which the rights of redress of ordinary members of the public might be protected. The same comments apply to all States-funded bodies – be they quangos or independent entities – whose prime function is to deliver States policy or manage public funds."

**5.47** A former member of the Complaints Panel referred to "Parishes, States owned incorporated bodies, Charities Commission" as bodies that should fall within its remit.

**5.48** If the Complaints Panel is retained, we recommend that the Panel's remit should be widened to cover a broader range of public authorities than it currently does. The guiding principle should be that any office-holder or organisation performing functions of a public nature should fall within the remit of the Complaints Panel. For clarity and certainty, these public bodies should be listed or defined in the amended Law governing the Complaints Panel.<sup>107</sup>

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<sup>107</sup> A point of reference for developing a wider definition could be the Freedom of Information (Jersey) Law 2011, in which Article 1 provides a definition of "public authority".



## Alternative recommendation on reformulating the grounds of review

**Alternative recommendation 5.5: The grounds of review used by the Complaints Panel should be reformulated.**

**5.49** Article 2 of the Administrative Decisions (Review) (Jersey) Law 1982 (as currently in force) states

“Where any person (referred to in this Law as the ‘complainant’) is **aggrieved by any decision made, or any act done or omitted, relating to any matter of administration** by any Minister or Department of the States or by any person acting on behalf of any such Minister or Department, the person may apply to the Greffier to have the matter reviewed by a Board.”

**5.50** The definition of the Complaint Panel’s jurisdiction and the grounds of review have remained substantially unaltered since the 1979. The grounds on which a three-person board should decide whether to uphold a complaint are set out in Article 9(2) of the 1982 Law:

“Where a Board after making enquiry as aforesaid is of opinion that the decision, act or omission which was the subject matter of the complaint –

(a) was contrary to law;

(b) was unjust, oppressive or improperly discriminatory, or was in accordance with a provision of any enactment or practice which is or might be unjust, oppressive or improperly discriminatory;

(c) was based wholly or partly on a mistake of law or fact;

(d) could not have been made by a reasonable body of persons after proper consideration of all the facts; or

(e) was contrary to the generally accepted principles of natural justice,

the Board, in reporting its findings thereon to the Minister, Department or person concerned, shall request that Minister, Department or person to reconsider the matter.”

**5.51** In our consultation report, we identified what we considered to be significant problems with this legal framework and how it has been interpreted by the Complaints Panel.

### Questions of law

**5.52** The grounds of review set out in Article 9 of the 1982 Law have a strong focus on legal questions, referring to: “contrary to law”; “based wholly or partly on a mistake of law”; “could not have been made by a reasonable body of persons” (a test that alludes to the legal principle of *Wednesbury* unreasonableness,<sup>108</sup> a ground for challenging the legality of a decision in an application for judicial review to the Royal Court); and “was contrary to the generally accepted principles of natural justice” (alluding to the case law developed by courts since the 17th century on procedural fairness in decision-making).<sup>109</sup>

**5.53** It is surprising that the grounds on which the Complaints Panel reviews decisions are based so closely on legal questions, given the initial composition of the Panel (elected States

<sup>108</sup> See H Woolf, J Jowell, A Le Sueur et al, *de Smith’s Judicial Review*, 7th edn (Sweet and Maxwell, London, 2013).

<sup>109</sup> See H Woolf, J Jowell, A Le Sueur et al, *de Smith’s Judicial Review*, 7th edn (Sweet and Maxwell, London, 2013).

members)<sup>110</sup> and the current composition of the Panel (predominantly non-legally qualified members).

**5.54** There is evidence to suggest that, over the years, the Complaints Panel has struggled to understand its proper role in relation to legal questions. For example:

- On 9 March 2010, the chairman of PPC answered a written question from the Deputy of St Martin, raising an issue that the Deputy had first raised on 30 June 2009, about the Complaints Panel's role when a complaint raises a point about human rights (which is a legal issue).<sup>111</sup> The question was prompted by perceptions that a board had been reluctant to address an issue related to a Convention right at a hearing. The chairman of PPC said: "It would be inappropriate for the Complaints Board to operate as a kind of Human Rights Tribunal, as this is not the reason why it was established by Law in 1982. However, if Human Rights issues arise while reviewing a complaint about a specific decision, a Board will look into them, and if appropriate, seek legal advice". (We comment: if the source of advice is the Law Officer's Department, grounds for a perception of lack of independence or impartiality in the Complaints Panel may be created if the Complaints Panel is receiving legal advice from the same source as the Minister whose decision is being challenged).
- The Deputy Greffier of the States, who acts as the executive officer for the Complaints Panel, told a meeting of PPC on 6 March 2014 that "It was within the Board's remit to be concerned with matters of law in accordance with Article 9(2) of the Administrative Decisions (Review) (Jersey) Law 1982".<sup>112</sup>
- In its annual report for 2014, the Complaints Panel provides information on progress dealing with a complaint relating to a decision of the Minister for Transport and Technical Services (now the Minister for Infrastructure) in respect of an undertaking given by the Public Services Committee to a trade union. It notes that the then chairman (Mr Le Gresley) "was of the very firm opinion that asking the Complaints Panel to look into legal matters fell beyond its remit, and that the correct course of action should really be a judicial review". A board of the Complaints Panel, consisting of three non-legally qualified members, heard the complaint and reported to the States Assembly in April 2016, concluding that "that the Minister had correctly interpreted his duties".<sup>113</sup>

**5.55** We are confident that Article 9 of the 1982 Law requires the Complaints Panel to deal with complaints based on errors of law or which depend on a board reaching a conclusion on a question of law. This includes questions of law under the Human Rights (Jersey) Law 2000.

**5.56** In response to consultation, one former member of the Complaints Panel agreed with our interim proposal: "Even if the Chair is a lawyer, a Board is not constituted as a legal forum and it is inappropriate for it to make findings on questions of law". Another response said "In my view, either the existing statutory appeals or judicial review are best suited to deal with questions of law".

**5.57** The Complaints Panel disagreed, telling us: "On the question of whether the SCP should deal with questions of law, the SCP considers that it should retain this power. If questions of law were to be excluded, it is envisaged that there could be significant arguments over whether or not complaints involved a question of law, not least because most administrative decisions derive from statutory powers. The SCP would therefore be deciding as a question

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<sup>110</sup> Though the first chairman of the Panel was Senator Reg Jeune, a Jersey lawyer.

<sup>111</sup> States of Jersey, 240/5(5175).

<sup>112</sup> States of Jersey, AG/SC/080.

<sup>113</sup> States of Jersey, *States of Jersey Complaints Board: Findings – Complaint Against a Decision of the Minister for Infrastructure Regarding the Minister's Actions Under Clause 18.3 of the Connex Bus Contract*, Presented to the States on 1st April 2016 by the Privileges and Procedures Committee, R.31/2016.

of law whether or not something was a question of law and thus within its remit. It is acknowledged that important questions of law could arise during its deliberations, and in such circumstances, it should be possible for the SCP to refer such matters as it felt were of such importance or beyond its capabilities to determine to the Royal Court for determination. In practice, however, the SCP is of the view that in such circumstances the complainant would have already chosen to follow a judicial route for the resolution of the dispute, rather than the process laid down under the Law”.

- 5.58** In our consultation report, we said that the composition of the Complaints Panel is not well suited to determining questions of law. This remains our view for three reasons.
- 5.59** First, the Complaints Panel is institutionally ill-equipped to determine questions of law. There is no express requirement that the Chairman of the Complaints Panel is legally qualified (though in practice all Chairmen have been). Equally significantly, there is no requirement that a board convened to hold a public hearing shall always include a legally qualified member. Complaints involving points of interpretation have been heard by entirely non-lawyer boards.<sup>114</sup> The suggestion that a board will be able to seek legal advice if necessary does not commend itself as a practical work-around: this is likely to delay proceedings and runs the risk of a board deferring to the views of legal adviser rather than reaching a conclusion of its own (as a court or tribunal would do).
- 5.60** Second, there are reasons to doubt that a public hearing involving a point of law will be fair to a complainant. In such cases, the Minister will invariably be legally represented but there is no provision for legal aid for a complainant who cannot afford to fund his or her own legal representation. There is a risk of inequality of arms.
- 5.61** Third, it is undermining of the constitutional principle of the rule of law for questions of law to be determined by a body whose remedy is limited to making recommendations. In recent years, the majority of recommendations have been rejected by Ministers. Ministers should not be able to choose whether or not to accept rulings on questions of law.

### *Maladministration*

- 5.62** During the research interviews, several interviewees described the Panel’s role in relation to “maladministration”. Indeed, in its reports for 2013 and 2014, the Panel “acknowledged that the majority of complaints received were considered not to relate to matters of maladministration and therefore had not justified a hearing being convened”. The States Assembly Hansard also provides several examples of States Members referring to the Complaints Panel and maladministration. Our finding is that there is widespread confusion in Jersey over the meaning of maladministration and its application to the Panel’s role.
- 5.63** The concept of “maladministration” seems to have come to Jersey via contact with the public sector ombudsmen in the United Kingdom.<sup>115</sup> The principal remit of ombudsmen is to investigate complaints from a member of the public who “claims to have sustained injustice in consequence of maladministration in connection with action taken by or on behalf of” of a public body.<sup>116</sup> In the UK legislation, maladministration is not expressly defined. It is, however, understood to cover “bias, neglect, inattention, delay, incompetence, ineptitude,

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<sup>114</sup> For example, Connex complaint (see previous note).

<sup>115</sup> See [www.statesassembly.gov.je/AssemblyReports/2002/17021-24410.pdf#search=maladministration](http://www.statesassembly.gov.je/AssemblyReports/2002/17021-24410.pdf#search=maladministration).

<sup>116</sup> There are currently three main public sector ombudsman operating in England and Wales. The Parliamentary Commission for Administration covers central government departments and the Health Service Ombudsman covers NHS complaints. Both institutions in practice operate as a single entity, often referred to as ‘the PHSO’. The Local Government Ombudsman covers local authorities. There are current proposals to create a single public sector ombudsman: see Cabinet Office, *A Public Sector Ombudsman: a consultation* (2015) and the Draft Public Services Ombudsman Bill (Cm 9374, December 2016).

perversity, turpitude, arbitrariness and so on”.<sup>117</sup> Maladministration also includes: “rudeness (though that is a matter of degree); unwillingness to treat the complainant as a person with rights; refusal to answer reasonable questions; neglecting to inform a complainant on request of his or her rights or entitlements; knowingly giving advice which is misleading or inadequate; ignoring valid advice or overruling considerations which would produce an uncomfortable result for the overruler; offering no redress or manifestly disproportionate redress; showing bias, whether because of colour, sex, or any other grounds; omission to notify those who thereby lose a right of appeal; refusal to inform adequately of the right to appeal; faulty procedures; failure by management to monitor compliance with adequate procedures; cavalier disregard of guidance which is intended to be followed in the interest of equitable treatment of those who use a service; partiality; and failure to mitigate the effects of rigid adherence to the letter of the law where that produces manifestly inequitable treatment”.<sup>118</sup>

**5.64** The Administrative Decisions (Review) (Jersey) Law 1982 does not use the word “maladministration” to define the Complaint Panel’s remit and the grounds of review in Article 9(2) do not constitute a statement of the concept of maladministration. In our consultation report, we said that if the Complaints Panel is to be retained its focus on maladministration should be clarified and made explicit.

**5.65** Except for the Complaints Panel, responses to consultation broadly supported this proposal. The Complaints Panel told us: “Is interesting to note that UK legislation does not expressly define “maladministration”, yet the Paper recommends that (were it to be retained) the SCP’s grounds of review of complaint should be expressly defined in terms of maladministration. We do not see that this clarifies the grounds available to the SCP under the Law as at present. On the contrary, we consider the grounds set out in Article 9(2) of the Law to be clear and unambiguous, yet broad enough to encompass any behaviour which might fall under the description of “maladministration”.

**5.66** Ombudsman schemes around the world, including across the United Kingdom, have produced valuable guidance – for public bodies and for members of the public – on the meaning of maladministration. Our view remains that that there would be considerable advantage in redefining the grounds of review in Article 9(2) of the 1982 Law. Using the concept of maladministration would emphasise that the Complaint Panel is not a body whose main function is to adjudicate on questions of law and could help explain to people in Jersey that the Complaints Panel provides an “ombudsman-style” dispute resolution service.

## Alternative recommendation on avoiding duplication of remedies

**Alternative recommendation 5.6: The Complaints Panel should not accept complaints where the aggrieved person has or had a right of appeal to JAAT or another tribunal, a right of appeal to the Royal Court, or it would be reasonable for the person to challenge the lawfulness of the administrative decision by making an application for judicial review to the Royal Court.**

**5.67** The Administrative Decisions (Review) (Jersey) Law 1982 does not expressly state what the Complaints Panel will do if an alternative remedy, such as an appeal to a tribunal or the

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<sup>117</sup> These factors are called “the Crossman catalogue” as they are words used by Anthony Crossman MP, the minister in charge of the bill creating the first ombudsman in the UK.

<sup>118</sup> Quoted in the UK Parliamentary Ombudsman’s 1993 *Annual Report* and endorsed by Treasury Ministers in November 1994 in evidence to the House of Commons Public Administration Select Committee.

Royal Court, is potentially available to the aggrieved person. The Complaints Panel appears to have no consistent practice on what to do in such circumstances.

- 5.68** For example: in 2013, the Complaints Panel held a public hearing and made adverse findings against the Minister for Transport and Technical Services in respect of conditions imposed on a PSV licence for a “pet taxi”. One of the reasons given by the Minister for rejecting the Complaints Panel’s report is that the complainant had a right of appeal to the Royal Court against the imposition of conditions, which the complainant did not use.
- 5.69** By contrast, as noted above, the Complaints Panel in its 2014 annual report provided information on progress dealing with a complaint relating to a decision of Minister for Transport and Technical Services in respect of an undertaking given by the Public Services Committee to a trade union. It notes that the then chairman (Mr Le Gresley) “was of the very firm opinion that asking the Complaints Panel to look into legal matters fell beyond its remit, and that the correct course of action should really be a judicial review” application to the Royal Court.<sup>119</sup>
- 5.70** It is important that across the administrative redress system there are good “fits” between the type of grievances a person needs to pursue and the institution and process that handles it. We therefore recommend that the Complaints Panel should not accept complaints where a person has (or had) a right of appeal to a tribunal or court on the specific issue in question.

## Alternative recommendation on informal resolution by the Complaints Panel

**Alternative recommendation 5.7: All members of the Complaints Panel – not only the Chairman and Deputy Chairmen – should have power to attempt informal resolution of complaints.**

- 5.71** Since 2006, the Complaints Panel has express powers to seek to resolve complaints informally under Article 3(3) of the 1982 Law as amended:
- If the Chairman (or Deputy Chairman) decides that a review of the matter by a Board is justified, he or she may nevertheless first attempt informal resolution of the matter and in that case may use whatever means that he or she considers reasonable in the circumstances to achieve such a resolution.
- 5.72** During the research interviews, we were given several examples of successful informal resolution. In one (before States housing was transferred to Andium Homes Ltd), the Minister had refused to change arrangements for a designated children’s play area; we were told that the Complaints Panel, working with the relevant elected States members, was able to ensure that ‘common sense prevailed’. Another example given was a complaint that roads had been closed by ministerial order for a road race; the Complaints Panel got the Department for Transport and Technical Services and the event organisers to agree a better procedure for subsequent races.
- 5.73** Some interviewees were doubtful about informal resolution. We we told that typically complaints were **not** suited to informal resolution. Moreover, if the chairman was involved in attempting to achieve informal resolution and this failed, there could be concerns about the chairman’s ability to preside at the public hearing that might follow because it was possible that he or she may need to be involved in discussions with the department when the

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<sup>119</sup> Discussed in the previous section.



complainant is not present (which could raise issues about impartiality). It was important that a board hearing a case ‘comes fresh’ at the issues.

- 5.74** We were told during the research interviews that only the chairman and deputy chairmen are involved in informal resolution. Indeed, on a strict reading of Article 3(3), only they are empowered to do so. The reason for barring other Complaints Panel members from informal resolution is unclear.
- 5.75** With a Panel consisting of 12 members there would be sufficient manpower to consider encouraging some ordinary members of the Panel to engage in informal resolution.
- 5.76** During the research interviews, we were told no training in mediation and other alternative dispute resolution methods is provided to members of the Complaints Panel, though some Panel members have experience of ADR through their past or present employments. As part of the package of training envisaged in Recommendation 5.2, Panel members should be expected to develop their skills in this area.

## **Alternative recommendation on ministerial responses to Complaints Panel reports**

**Alternative recommendation 5.8: The Chief Minister should prepare a report to the States Assembly reviewing responses to the Complaints Panel’s findings and recommendations since October 2011 and making proposals for the Government of Jersey’s future working relationship with the Complaints Panel.**

- 5.77** The Panel’s remedial powers are limited to making a “request that the Minister, Department or person to reconsider the matter”.<sup>120</sup> If the Panel “considers that its findings have been insufficiently considered or implemented”, it may “present a report to that effect to the Privileges and Procedures Committee” and, in turn PPC must make a report to the States Assembly.
- 5.78** The Panel’s remedial powers differ from tribunals and courts in that the Panel’s findings are only recommendations and are not enforceable against the Minister or other public body.
- 5.79** In the United Kingdom, the public sector ombudsmen also have powers limited to making recommendations.<sup>121</sup> There are, however, important differences with the position in Jersey. First, there is a very high level of official and political acceptance of ombudsmen decisions: a failure to implement an ombudsman recommendation is exceptionally rare. In Jersey, by contrast, Ministers routinely disagree with the Panel’s findings. Secondly, in relation to the Local Government Ombudsman (LGO) a distinction is drawn between ‘findings’ of fact and ‘recommendations’ of the action needed to cure the injustice. The LGO’s findings on facts are binding on local authorities: if a local authority disagrees with a finding it must seek judicial review of the LGO’s decision and demonstrate that it was not a decision that the LGO could lawfully make on the material before it. Local authorities have more discretion to decide whether or not to accept recommendations. This distinction does not exist in Jersey.
- 5.80** As described above, the outcome in a large proportion (more than half) of complaints that go to a hearing is that the Minister rejects the Complaints Panels findings and recommendations. The Complaints Panel views this state of affairs with concern. In its 2013 report, the Panel notes that it is “troubled by the inflexible stance adopted by some Ministers, despite being presented with the considered, independent and impartial findings of the

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<sup>120</sup> Administrative Decisions (Review) (Jersey) Law 1982, Article 9.

<sup>121</sup> See Part 5.



various Boards” and “is concerned that Ministers and officers seem reluctant to acknowledge that mistakes are occasionally made”.<sup>122</sup>

- 5.81** During the research interviews, civil servants and others involved in government expressed little confidence in the operation of the Complaints Panel; the Panel’s reports are regarded as poorly written and straying outside the Panel’s jurisdiction; Panel members were regarded as amateurs who had little understanding of public administration. In contrast, some interviewees with experience serving on the Complaints Panel painted a quite different picture. One identified 2005 as a turning point, suggesting that the introduction of ministerial government to the island had given chief officers and civil servants a more prominent role in administrative decision-making and Ministers feel compelled to defend civil servants’ decisions.
- 5.82** In our consultation report, we said that our research finding was that there is an atmosphere of mutual distrust has arisen between the Complaints Panel and government. In its response, the Complaints Panel described this as a “sweeping allegation”, “made without any evidence or apparent justification” and referred to: “the fact that many complaints are not considered by the SCP to warrant further examination; the fact that the States’ departments are prepared to consider and enter into informal negotiations with the SCP; and the fact that individual Boards have frequently been commended by Minister and senior officials for their conduct of hearings (irrespective of their findings), support the unanimous view of the SCP members that they approach all complaints with an open mind, with an acknowledgement that the administration of executive responsibility is frequently difficult and that decisions are not always easily reached”.
- 5.83** Our assessment – based on views gathered during the research interviews and from the public record of ministerial responses to Complaints Panel’s reports – is that a difficult relationship exists. We therefore recommend that, if the Complaints Panel is to be retained, the Chief Minister should make an evaluation of the current relationship in a report to the States Assembly as a way of resettling the relationship in an open and transparent way. Consideration needs to be given to the reasons given by Ministers for not accepting findings and recommendations (see paragraph 5.28).

## Use of public hearings to adjudicate on complaints

- 5.84** The Complaints Panel refers a small number of complaints to a 3-person ‘board’ of Panel members to determine complaints each year (between one and four in the years 2010-14). These are normally held in public but may be held in private, for example where a child is involved or sensitive personal information will be discussed.
- 5.85** During the research interviews the centrality of public hearings was strongly defended as a ‘good fit’ for the Complaint Panel’s remit. We were told that the Complaints Panel ‘is not an arbitrator, is not an ombudsman service’. Ministers, we were told, should be compelled to justify their decisions in public. It was salutary to have a journalist from the *Jersey Evening Post* in the corner of the room when the minister did so, according to an interviewee with experience of serving on the Panel. We were told that hearings allow complainants to ‘have their “day in court” without too much expense’.
- 5.86** A variety of premises have been used for hearings, including parish halls and rooms in the States Assembly building. Site visits have also been made when a complaint relates to a planning matter. During the research interviews, we were told that some venues had poor

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<sup>122</sup> R.51/2014. The matter was reported in the news media: H Chalmers, ‘Public complaints: Ministers “ignored recommendations”’, *Jersey Evening Post*, 26 April 2014, p 4.

acoustics. Another criticism was that there was inadequate public notice in advance of hearings, which hindered members of the public concerned about the issue from attending.

**5.87** One interviewee suggested that the Complaints Panel's questioning of Ministers was superior to the 'quite amateurish' approach of States Assembly Scrutiny Panels and questioning by backbenchers and was therefore a valuable addition to political accountability in the island.

**5.88** Other interviewees reported that complainants are usually very anxious about the public hearing stage of their complaint: they ask 'will it be like a court?' and 'will I need to wear a suit?' (inquired by a complainant who did not own one). We were told that it has become routine for the Minister to be represented by a lawyer and that departments come to hearings 'mob handed' (meaning with a full legal and official team). This, one interviewee observed, has created a different atmosphere to that which typically existed in the past. An interviewee connected to the Complaints Panel said the Panel tried to avoid hearings becoming 'a court room scenario' but this was now difficult or impossible as legal representatives raised 'pedantic' and 'legalistic' points.

**5.89** The procedure adopted at hearings appears to be flexible. We were told that at some hearings elected States members asked and were permitted to address the board (and this is confirmed in reports on some complaints). One criticism of the procedure made during the research interviews is that it is unfair that civil servants who are to give evidence may sit in during the hearing, enabling them to listen to evidence given by the complainant.

**5.90** In our consultation report, we said we were unconvinced that adjudication at public hearings is the best way to resolve complaints about maladministration. We are not aware of any other complaint handling schemes that work in this way. The more normal technique is investigation, in which the facts of the case are gathered through interviews and access to official files leading to the informal resolution or formal publication of a report. While there are strong constitutional and other reasons for courts and tribunals to sit in public,<sup>123</sup> the same considerations do not apply to complaint handlers whose focus is on maladministration.

**5.91** In its response the Complaints Panel told us:

"The SCP does not agree that public hearings of complaints should be dispensed with. It is critically important that any scrutiny process by which the executive is held to account is open and transparent, not only to reassure the public that complaints are being considered exhaustively, but also because the executive knows that it will have to justify its decisions in public. We consider this to be a very valuable incentive in achieving the best possible standard of public administration.

Article 7 of the Law requires a Board to "enquire into any complaint" and allows the SCP to determine its own procedure. Other than attempts at informal resolution, it is accepted that the default procedure is to consider the complaint at a public hearing. The SCP has not enquired into any complaint through an investigatory process, but the SCP accepts that there may be cases where that would be a more appropriate method of enquiry than a public hearing. The principle disadvantages that come to mind of an investigatory process as opposed to a public hearing are first, the benefits of the process being in public are lost, and second, there is a risk that an investigation would be more drawn out than a once and for all hearing. In an investigation, the onus is on the investigator to ensure that the investigation is exhaustive, whereas with a hearing it is for the parties to submit the papers and the witnesses on which they will rely (with the Board retaining the right to call for further documents or information it may require)."

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<sup>123</sup> See Parts 1 and 2.

- 5.92** We welcome the Complaint Panel's openness to consider using investigations in future. In light of this response, we do not propose any change in the 1982 Law.

## Starting the complaints process

- 5.93** In our consultation report, we suggested that there might be benefits in moving the point of entry to the Complaints Panel from the States Greffe in the States Assembly to the Judicial Greffe (which has responsibility for supporting the work of tribunals courts). Our thinking was that this would provide a more joined-up approach for people with complaints, as it would be easier to undertake triage of grievances at the outset to ensure they were being directed to be most appropriate channel (Complaints Panel, Jersey Administrative Appeals Tribunal, Royal Court).
- 5.94** Although the proposal received some support during the consultation phase of the project, the Complaints Panel and a former member of the Complaints Panel disagreed. On reflection, we agree that it would not be practical for this change to be made. We therefore make no final recommendation on this point.

## Style of reports

- 5.95** In our consultation report we said: Reports by boards are written as a narrative of events and points raised at the hearing. They are not, in our view, consistently well written. One interviewee with experience as a member of the Complaints Panel told us that the reports should be more succinct and directed at the errors complained about. We agree.

- 5.96** In its response, the Complaints Panel told us:

"The SCP agrees that the published report of any Board finding should focus on the process of the making of the decision complained of, rather than the details of the specific decision. However, it should not be overlooked that the complaint is primarily a personal one, and the complainant can only be satisfied by the detailed findings that the complaint has been fully and properly considered. Article 9(1) of the Law requires a Board to report its findings in writing to the complainant, the Minister or department concerned, and also to present a copy of its report to the States' Privileges and Procedures Committee. The report is therefore required to be as full as is necessary to explain its conclusions. In some cases, that may require a full and detailed account of the facts surrounding the decision complained of. The SCP has in all cases made it clear to complainants that they may request details to be kept private, and each request is considered on its own merits. The SCP is of course particularly sensitive to matters relating to personal health, personal means and matters involving children.

The SCP considers that it may be appropriate that, rather than publishing a Board's findings *in extenso*, an editorial panel (drawn perhaps from JLIB or the Jersey Law Review editorial board) may extract a summary of the findings from the Board's report which would focus on the process of the making of the decision complained of, and that summary would be the extent of the publication. The full report would be archived, but available for inspection."

- 5.97** We do not understand why an editorial panel is necessary to achieve this or why the editorial committee of the *Jersey and Guernsey Law Review* is relevant. The style of reports, and any summaries, are matters within the responsibility of the Complaints Panel. If the Complaints Panel is retained, clearly this is a matter that it will want to consider. We make no recommendation because no change in the law is needed.

## CHAPTER 6

# PROPOSAL FOR A JERSEY PUBLIC SERVICES OMBUDSMAN

### What is an ombudsman?

**6.1** The term “ombudsman” originated in Sweden in the early 19th century. During the 1960s and 1970s, many countries around the world set up ombudsman schemes to deal with complaints against government. These developments were driven by concerns about the growing power of government and the relative inaccessibility of legal remedies due to cost and formality.

**6.2** Typically, the remit of an ombudsman is to investigate cases of alleged maladministration in public administration causing injustice. More recently, ombudsman schemes have been set up in the private sector (for example, banking, insurance and financial services)<sup>124</sup> as a way of dealing with complaints in an independent way.

**6.3** The Ombudsman Association, an international organisation of ombudsman bodies, defines the role of an ombudsman as follows:<sup>125</sup>

Ombudsmen offer their services free of charge, and are thus accessible to individuals who could not afford to pursue their complaints through the courts.

They are committed to achieving redress for the individual, but also, where they identify systemic failings, to seek changes in the work of the bodies in their jurisdiction, both individually and collectively.

They can generally undertake a single investigation into multiple complaints about the same topic, thus avoiding duplication and excessive cost.

They are neutral arbiters and not advocates nor “consumer champions”.

They normally ask the body concerned and the complainant to try to resolve complaints before commencing an investigation.

They usually seek to resolve disputes without resort to formal investigations where this is possible and desirable.

Where they identify injustice, they seek to put this right.

**6.4** The role of ombudsmen in “identifying systematic failings” in public administration is of particular importance. The UK public sector ombudsmen work proactively with central and local government to improve the quality of decision-making and complaint handling.

**6.5** In some countries, the ombudsman has the status of an officer of parliament. In the United Kingdom, the Parliamentary Commissioner for Administration (sometimes referred to as “the PCA” or the “Parliamentary Ombudsman”) set up in 1967 has this position. The PCA determines complaints against central government departments. Complaints cannot go directly to the PCA but must be referred by a Member of Parliament; this feature of the system has been criticised for many years. An ombudsman does not have to be an officer of parliament. In England, the Local Commission for Administration (often called “the Local Government Ombudsman”) set up in 1974, which deals with complaints against local authorities, does not have this status.

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<sup>124</sup> In 2014, the governments of Jersey and Guernsey cooperated to establish the Channel Island Financial Services Ombudsman: see [www.ci-fo.org](http://www.ci-fo.org).

<sup>125</sup> See [www.ombudsmanassociation.org/about-the-role-of-an-ombudsman.php](http://www.ombudsmanassociation.org/about-the-role-of-an-ombudsman.php).

- 6.6** In the UK, the Government has proposed reforms of the structure of the ombudsmen system, merging the PCA, Health Service Commissioner and the Local Government Ombudsman.<sup>126</sup>

## Comparison with the States of Jersey Complaints Panel

- 6.7** The States of Jersey Complaints Panel, examined in Chapter 5, is often regarded as the Jersey institution that stands in the place of an ombudsman. Indeed, the Complaints Panel has “associate membership” of the Ombudsman Association as a “complaint handler member”. But in several important respects, an ombudsman and the Complaints Panel are different.

Feature	Ombudsman (typically)	States of Jersey Complaints Panel
<b>Office holder</b>	A salaried professional expert	A group of 12 unremunerated members of the public appointed by the States Assembly
<b>Staff</b>	Case workers and support staff	All support work is carried out by the Deputy Greffier of the States
<b>Criteria of review</b>	“Maladministration”	The list of criteria in Article 9(2) of the Administrative Decisions (Review)(Jersey) Law 1982
<b>Methods of work</b>	Informal resolution if possible. Formal private investigation leading to a published report where informal resolution is not possible. Reports are anonymised.	Some use of informal resolution by the Chairman or Deputy Chairmen. Adjudication at a formal hearing leading to a published report. The hearings are normally in public and the reports are not normally anonymised.
<b>Remedies</b>	Power to make recommendations.  High level of compliance by public authorities	Power request that Minister reconsiders.  Rejected by Ministers in high proportion of cases
<b>Role in promoting good standards of administration and dispute resolution within public authorities</b>	Ombudsman actively engage with Ministers and civil servants to encourage continuous improvement in the quality of public administration.	This is not part of the remit of the Complaints Panel (though some specific recommendations in published reports may seek to make improvements in particular contexts)
<b>Public awareness activities</b>	Ombudsmen engage in a wide variety of activities to make	Little or no activity by the Complaints Panel to publicise its work to the public.

<sup>126</sup> See Cabinet Office, *A Public Service Ombudsman: a Consultation* (2015); a Draft Public Services Ombudsman Bill was published in December 2016.

	public aware of ombudsman's role.	
<b>Own-initiative powers to investigate where there is evidence of systemic problems</b>	Some ombudsmen have this power.	The Complaints Panel does not have this power.

## Debates about a public sector ombudsman for Jersey

**6.8** In 2000, one of the principal recommendations of the *Report of the Review Panel on the Machinery of Government in Jersey* (the Clothier report) was the creation of an ombudsman.<sup>127</sup>

We recommend the institution of a proper Ombudsman to hear complaints of maladministration by Government Departments. This would be a matter of little difficulty and no great expense. The Ombudsman should be an independent person and endowed with powers to order the production of papers and files and to command the attendance of witnesses. If a finding is made in favour of the citizen, and the responsible Department does not volunteer to remedy the grievance, the power of compulsion should lie in the States, to whom the Ombudsman reports and whose officer he is. The States should jealously guard the authority of the Ombudsman if they find his report acceptable.

**6.9** In May 2004, the Privileges and Procedures Committee (PPC) presented a report to the States Assembly reviewing the operation of the States of Jersey Complaints Panel (as it is now called) and assessing the case for introducing an ombudsman scheme. PPC

- accepted “that the establishment of an Ombudsman in Jersey might, in itself, be sufficient to re-establish confidence in a system of informal dispute resolution
- noted that the number of complaints made to the States of Jersey Complaints Panel “is very small at present” – implying that the case load could not justify the introduction of an ombudsman scheme
- rejected the idea that a public sector ombudsman scheme could be combined with an ombudsman for financial services:<sup>128</sup> it was thought unlikely that an ombudsman could be appointed who had sufficient expertise in both financial services and public administration; moreover, it was thought likely to cause confusion to amalgamate two different sectors
- rejected the idea that a public sector ombudsman could be shared with Guernsey, noting “this would seem to imply that the Ombudsman might not always be readily available to deal with complaints which would run contrary to the desire to provide a swift response to complaints”
- was concerned about the costs of setting up a public sector ombudsman, estimating operating costs of £300,000 a year, “which could be difficult to justify in present financial circumstances”.

<sup>127</sup> *Report of the Review Panel on the Machinery of Government in Jersey* Part 9.

<sup>128</sup> In November 2015, the Channel Islands Financial Ombudsman began work. This is a joint scheme between Jersey and Guernsey. In Jersey, the CIFO operates under the Financial Services Ombudsman (Jersey) Law 2014; there is corresponding legislation in Guernsey.



- 6.10** PPC concluded that it was “not minded to recommend that a public sector Ombudsman be established in the Island at the present time”. The States Assembly accepted PPC’s conclusions and subsequently introduced a range of reforms to the States of Jersey Complaints Panel.<sup>129</sup>
- 6.11** The “Complaints Panel vs Ombudsman” debate seems to on sincerely held opposing views about two matters.
- 6.12** The first is cost. As noted above, in 2004, PPC estimated that the annual operating budget of an ombudsman would be £300,000. We make no assessment of this figure; the cost would be related to the design of the new ombudsman service. Judgements about expenditure of public resources is ultimately for politicians. This assessment needs to be made having regard to the benefits that accrue from the investment.
- 6.13** The second concerns who should carry out the work.
- When originally set up as the States of Jersey Administrative Appeals Panel, complaints were heard by States Members: the model was of politicians reviewing fellow politicians and their civil servants.
  - In its current format, the Complaints Panel consists of local people, who are mostly not experts in public sector dispute resolution, carrying out the role of adjudicating on complaints. Jersey has a long tradition of valuing honorary service in public institutions, including in the Honorary Police.
  - If a Jersey Public Services Ombudsman was set up, the work would be carried out by professional experts – the Ombudsman him or herself (and if the case load required it, one or more case workers).

## Proposal for a Jersey Public Services Ombudsman

**Recommendation 6.1: The Government of Jersey should make an “in principle” decision to support next steps in the creation of a Jersey Public Services Ombudsman (JPSO).**

**Recommendation 6.2: The Government of Jersey should request the Jersey Law Commission to develop institutional design options for the JPSO.**

- 6.14** As we noted in Chapter 5, there continues to be opposition to the idea of replacing the States of Jersey Complaints Panel with a public services ombudsman. The Complaints Panel and States Members on PPC criticised the proposal contained in our April 2016 Consultation Report for a fresh look at the benefits and costs of creating an ombudsman scheme for the Island.
- 6.15** Against this political background, and mindful of our role as an independent law reform agency, we have sought to contribute in the ongoing debate in two ways.
- In Chapter 5, we set out a series of “alternative recommendations” for changes to the law and practices of the Complaints Panel. As we indicated, however, we are not confident that these proposals would solve the problems we identified.
  - Here in Chapter 6, we propose that a further step should be taken in developing an institutional design for a Jersey Public Services Ombudsman (JPSO). If the Government of Jersey supports further exploration of the proposal for a JPSO, the Jersey Law Commission would undertake further work to develop an outline design for the new institution and an assessment of its costs and benefits. If the Government of Jersey is

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<sup>129</sup> See Part 4.

committed to maintaining the States of Jersey Complaints Panel, and sees value in our alternative recommendations in Chapter 5, we will not carry out further work about a JPSO.

**6.16** The proposed study would:

- assess the operation and effectiveness of the ombudsman schemes established in other small jurisdictions (for example, Gibraltar, Bermuda and the Cayman Islands)
- consider recent developments in the operation and effectiveness of the various public sector ombudsman schemes across the United Kingdom (where relatively new ombudsman schemes exist in Wales, Scotland and Northern Ireland) and lessons to be learnt for Jersey
- examine what public bodies should fall within the remit of a Jersey public services ombudsman. A point of particular importance is whether complaints in relation to health services would be included.
- investigate the procedures that a Jersey public services ombudsman could use, including alternative dispute resolution (ADR) methods<sup>130</sup>
- consider the relationship between a Jersey public services ombudsman and other redress mechanisms (including appeals to tribunals and the Royal Court and the work of the Jersey Audit Office)
- estimate the likely case load of a Jersey public services ombudsman
- develop a design, or different design options, for a costed model for a Jersey public services ombudsman.

**6.17** The research would involve desk-based research, interviews (face-to-face where possible or by video conference calls where travel is uneconomic) and public consultation.

## **Ombudsman schemes on other very small jurisdictions**

**6.18** One development that has taken place since the 2004 PPC report to the States Assembly is that public service ombudsman schemes have been set-up in a number of other small jurisdictions. These will be a useful point of reference in further development of options for institutional design for a JPSO.

### *Gibraltar Public Services Ombudsman*

**6.19** The Gibraltar Public Services Ombudsman was established in 1999, serving a population of 30,000.<sup>131</sup> In 2015, its jurisdiction was extended to cover the Gibraltar Health Authority. It promotes a telephone helpline as a way of accessing its services and actively publicises its role to the public. It works proactively with government bodies to champion continuous improvement in the quality of public administration.

**6.20** The office consists of the Ombudsman and eight members of staff. In 2015, it received 164 complaints. Many cases were resolved informally. Nine cases were subject to formal investigation leading to reports. It has a website containing useful information about how to make a complaint and the work of the GPSO. It distributes copies of its annual report from a stall in Main Street and conducts surveys to test levels of public awareness and understanding of the GPSO's role.

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<sup>130</sup> On ADR, see Chapter 8.

<sup>131</sup> See information at [www.ombudsman.org.gi](http://www.ombudsman.org.gi).

### *Ombudsman for Bermuda*

- 6.21** The Ombudsman for Bermuda serves a population of 65,000. It was established in 2004. Its mission is “To investigate administrative actions of an authority for the purpose of deciding whether there is evidence of maladministration on the part of the authority” and “Pursuant to an investigation, to make recommendations to an authority concerning administrative action that formed the subject of the investigation and, generally, about ways of improving its administrative practices and procedures”.<sup>132</sup>
- 6.22** The current Ombudsman has set as her strategic aims: great public access, greater public awareness, and championing best practice. The Ombudsman and her team take an active approach to raising awareness, including education sessions in schools, organisations and for government departments. The Ombudsman has a user-friendly website and publishes an informative annual report.
- 6.23** In 2016, over 260 people contacted it and they recorded a total of 285 cases. In addition to the Ombudsman, the office has five members of staff.

### *Office of the Complaints Commissioner*

- 6.24** In the Cayman Islands (population 63,000), the Office of the Complaints Commissioner (OCC) was created in 2004. Its aim is “To investigate in a fair and independent manner complaints against government to ascertain whether injustice has been caused by improper, unreasonable, or inadequate government administrative conduct, and to ascertain the inequitable or unreasonable nature or operation of any enactment or rule of law”.<sup>133</sup> The OCC uses investigations, which are conducted in private.
- 6.25** As well as receiving complaints, the OCC has powers to carry out “own initiative” investigations into aspects of public administration where there is evidence of systematic failure. The OCC engages in public education outreach, including promoting the OCC’s work at public festivals and an “open house” for members of the public to visit the OCC’s offices.
- 6.26** During the financial year 2015-16, the Office received 26 enquiries, 133 complaints and completed 96 investigations. The office consists of an Acting Complaints Commissioner and four members of staff. We have not been able to ascertain the cost of running the OCC.

## **What a JPSO would do**

- 6.27** In developing the institutional design for a JPSO, it will be important to specify the full range of functions to be carried out.
- 6.28** Looking into individual complaints would be a core aspect of a JPSO’s work. We have already noted the stark contrast between the tiny number of complaints that reach the States of Jersey Complaints Panel and the significantly higher numbers that reach the ombudsman schemes in Gibraltar, Bermuda and the Cayman Islands (each of which has a population smaller than Jersey’s).
- 6.29** A JPSO would also have a wider role of working with public bodies to improve the quality of public administration. This is a major emphasis of many ombudsman schemes and something that the States of Jersey Complaints Panel is unable to provide in a systematic way.
- 6.30** In a written response to our Consultation Report, Dr Chris Gill (now of the University of Glasgow) drew our attention to his research on complaints handling in England, which we expect to be a

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<sup>132</sup> See information at [www.ombudsman.bm](http://www.ombudsman.bm).

<sup>133</sup> See information at [www.occ.ky](http://www.occ.ky).

point of reference in our future work on a JPSO.<sup>134</sup> Dr Gill's study investigates questions about the practical impact of the work of ombudsman, courts and tribunals have on the day-to-day work of public bodies. One of Dr Gill's policy recommendations is that ombudsmen should be "learning champions", which would have three facets:

**"Spokesperson:** working collaboratively with courts and tribunals, the ombudsman could distil and disseminate important decisions taken by other redress mechanisms. This would draw on the institution's skill in packaging messages in ways that are accessible to administrators. Rather than only drawing on its own casework, it could bring together and disseminate important, cross-cutting administrative justice principles. Drawing on its closer understanding of bureaucratic decision-makers, the ombudsman could be charged with the coherent presentation of administrative justice principles to bureaucratic audiences.

**Relationship manager:** here the ombudsman would function as a conduit for interchange between decision-makers and redress mechanisms. The ombudsman could either create professional networks or develop existing ones, which would function as spaces in which administrative justice principles could be disseminated and as fora in which shared understandings of good practice could be jointly developed. This would capitalise on the ombudsman's ability to enter into professional networks and would allow it to extend its scope as a policy actor. This would also allow the ombudsman to identify more clearly areas where the decision-makers require training or guidance.

**System fixer:** The third dimension of the ombudsman as learning agent would require new powers of own-initiative investigation, which could be harnessed to trouble-shoot problem areas within the administrative justice system. For example, the ombudsman might launch an investigation in areas where there are high levels of successful appeals, or in response to concerns raised in the annual reports of the Senior President of Tribunals. The ombudsman might also investigate where new initiatives have a significant knock on effect on the administrative justice system, such as currently in relation to mandatory reconsideration. There is also potential for the ombudsman to follow up individual cases. Particularly where important legal precedents are set, the ombudsman could have a role akin to Special Masters in the US court system (Cannon 2004). Here, judges might refer cases to the ombudsman for follow up where public interest issues appear to be at stake. Such a proactive role is quite different from the fire-fighting approach currently adopted by the [Local Government Ombudsman in England]; however, this thesis' findings suggest that the potential benefits of the ombudsman within the administrative justice system are currently underdeveloped".

**6.31** A JPSO could work closely with the proposed Chairman of the Jersey Administrative Appeals Tribunals,<sup>135</sup> the Jersey Audit Office,<sup>136</sup> and public bodies.

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<sup>134</sup> Selected responses to consultation are available on [www.jerseylawcommission.org](http://www.jerseylawcommission.org).

<sup>135</sup> See Chapter 3.

<sup>136</sup> The office of Comptroller and Auditor General (C&AG) was established in 2005 under the Comptroller and Auditor General (Jersey) Law 2014. The remit of the C&AG includes the audit of financial statements and wider consideration of public funds including internal financial control, value for money and corporate governance. As we noted in Chapter 2, there are close connections between effect complaints handling and value for money.

## CHAPTER 7

# THE ROLE OF THE ROYAL COURT IN THE ADMINISTRATIVE JUSTICE SYSTEM

### The Royal Court

- 7.1** The Royal Court of Jersey is the Island's principal court, with jurisdiction over civil and criminal matters. The Bailiff and Deputy Bailiff (who are Crown appointments) serve as permanent judges. In addition, several non-permanent judges known as Commissioners are appointed by the Bailiff to hear cases. The Bailiff, Deputy Bailiff and Commissioners are judges of law, procedure and have the power to award costs.
- 7.2** A distinctive and ancient feature of the Island's judicial system is the 12 Jurats. The role of the Jurats is to decide facts. If the Jurats are divided on the finding of facts in a case, the Bailiff (or Deputy Bailiff or Commissioner) has a casting vote. The Jurats are members of the judiciary but most are not legally qualified; they are elected by an electoral college comprising the Bailiff, existing Jurats, Connétables, elected States members, and members of the Jersey legal profession. The Jurats are unpaid and hold office until the mandatory retiring age of 72 years. When the Royal Court sits as "The Inferior Number of the Royal Court", the court consists of the Bailiff (or Deputy Bailiff or Commissioner) and two Jurats. "The Superior Number of the Royal Court" consists of the Bailiff (or Deputy Bailiff) sitting with at least five Jurats and is most commonly convened for sentencing of serious criminal offences.
- 7.3** There is a right of appeal from decisions of the Royal Court to the Jersey Court of Appeal; and onwards to the Judicial Committee of the Privy Council.
- 7.4** Jersey has been a pioneering participant in the worldwide "free access to law movement". Almost all Royal Court judgments are published online at [www.jerseylaw.je](http://www.jerseylaw.je). Some judgments – those that involve significant points of law – are selected to be 'reported' (meaning formally published in print) in the *Jersey Law Reports*. Unlike England and Wales, the Jersey legal system does not rely on a strict doctrine of precedent but the Royal Court normally follows its own previous case law.

### Role of the Royal Court in administrative redress

- 7.5** The Inferior Number of the Royal Court contributes to Jersey's administrative redress system in two main ways, both of which are important in upholding the constitutional principle of the rule of law.
- 7.6** Many Laws passed by the States Assembly **create a right of appeal to the Royal Court in relation to an administrative decision**. The procedure for making an appeal is contained in Part 15 of the Royal Court Rules 2004. Appeals may either be
- directly from the decision of the public body (for example, the Minister)
  - from the decision of a tribunal so that the Royal Court is hearing a "second appeal" relating to the administrative decision.
- 7.7** Where a person believes that an administrative decision is unlawful but the Law under which it was made contains no right of appeal to a tribunal or the Royal Court, the Royal Court has an inherent jurisdiction to hear **applications of judicial review**. The procedure for making applications for judicial review was created in 2000 and is contained in Part 16 of the Royal Court Rules. Few applications for judicial review are made each year (typically two or three).

- 7.8** The application for judicial review procedure adopted by the Royal Court in 2000 was modelled very closely on that in England and Wales. Since then, the procedure in England and Wales has been modified in several important respects.

## Appeals from administrative decisions

**Recommendation 7.1: Amend 54 Laws that provide a right of appeal from an administrative decision to the Royal Court to provide instead for the appeal to be heard by the Jersey Administrative Appeals Tribunal (JAAT).**

- 7.9** Our analysis of legislation in force in mid-2015 shows that there are rights of appeal from administrative decisions to the Royal Court across a wide range of subject matter. The majority of appeals are from decisions taken by Ministers but appeals also exist from decisions taken by
- Jersey Bank Depositors Scheme Board
  - Jersey Financial Services Commission
  - Registrar of Companies
  - Jersey Competition Regulatory Authority
  - Jersey Gambling Commission
  - consumer safety inspectors
  - Registrar of Trade Unions and Employers' Associations
  - Connétables (in relation to licensing of firearms, explosives and fireworks)
  - Harbour Master
  - Highways authorities (which are either a Minister or a Parish Roads Committee).
- 7.10** According to information supplied to us by the Judicial Greffe, the great majority of rights of appeal had not been used in the four years to mid-2015. Appeals have arisen only in relation to:
- Minister's decisions under the Customs and Excise (Jersey) Law 1999, Article 69
  - Minister's decisions under the High Hedges (Jersey) Law 2008, Articles 12-13.
- 7.11** It is difficult to research why people do not exercise rights of appeal. One hypothesis could be that Ministers and other public bodies in Jersey almost never make decisions that are legally questionable. All decisions could be made with complete legal accuracy (so that people never have grounds on which to bring an appeal). We do not know how many *potentially* appealable administrative decisions are made under each Law; the number could be very small or nil.
- 7.12** There are, however, other possible hypotheses. It is possible to speculate that from time to time unlawful decisions are made but the person subject to the decision is either unaware that this may be the case or be uninformed about the right to challenge the decision.
- 7.13** A further possibility is that a person knows about the right to appeal but is deterred from exercising that right, for example because of concerns about the cost or stress of doing so. There is some circumstantial evidence to suggest that this may be a factor. Until 2015, a third party right of appeal against planning permission lay to the Royal Court; when this right of appeal was replaced with a new system (appeals to planning inspectors), there was a notable increase in the number of appeals to 42 in 2015 compared to 11 during the last full year of appeals to the Royal Court.



## Proportionality principle

- 7.14** The principle of proportionality should inform the design and operation of the administrative redress system.<sup>137</sup> The idea that the Royal Court should be reserved for complex or particularly important cases is already part of the design of the Island's court system: the Magistrate's Court deals with criminal offences of lesser importance and the Petty Debt's Court deals with straightforward lower value contract disputes. A similar approach should in our view be adopted in relation to administrative redress. The creation of the Jersey Administrative Appeals Tribunal (JAAT) would enable this to be achieved in a more comprehensive way than currently.
- 7.15** A proportionate approach has benefits for potential appellants. For individuals and small business owners, making an appeal to JAAT is likely to be a less daunting prospect. The venue and procedures of a tribunal are less intimidating than the Royal Court, especially for a litigant bringing an appeal without legal representation. An unsuccessful appellant using JAAT will also not be at risk of having to pay the Minister's (or other public body's) legal costs.
- 7.16** A further benefit is that it would enable judicial resources to be used more efficiently. Where a dispute relates to relatively uncomplicated factors or straightforward points of law, a tribunal provides a more cost-effective forum. The resources of the Royal Court should be conserved for appeals likely to involve complicated issues of law. Where appeals are likely to involve relatively straightforward questions of fact or administrative judgement (whether an administrative decision is "reasonable") JAAT, with its legal members, would be as well placed as the Royal Court, with the Jurats, to decide the matter.
- 7.17** In our Consultation Report, we proposed that it would be more proportionate for many rights of appeal relating to administrative decisions that currently lie to the Royal Court (but are rarely if ever used) to go instead to JAAT. Most people responded in support of this proposal, including Citizens Advice Jersey and the Jersey Consumer Council.
- 7.18** One response took a different view, saying that it was not a sustainable argument to say that the Royal Court is too expensive and suggesting that if appeals to the Royal Court are thought to be too formal, that can be easily dealt with by rules. It was suggested that if a court other than the Royal Court is needed for administrative appeals, this could be the Petty Debts Court. We do not agree with this analysis. In our view, JAAT will provide a user-friendly judicial body for dealing with straightforward disagreements, building on foundations already laid by the existing administrative appeal tribunals and administrative staff in the Judicial Greffe's Tribunal Service.
- 7.19** We therefore propose that some Laws that currently create a right of appeal to the Royal Court from administrative decisions should instead specify JAAT. These are appeals where (a) appellants are likely to be individuals or smaller businesses with limited financial resources, or (b) the ground of appeal against the administrative decision is that it is "unreasonable" or, more broadly still, that the appellant "is aggrieved".
- 7.20** A power to transfer appeals from JAAT to the Royal Court, and vice versa (discussed below) would enable flexibility. There would also be a possibility of a "second" appeal on questions of law from JAAT to the Royal Court, ensuring that the Royal Court retained ultimate control over the interpretation of law.
- 7.21** The following Table lists the 52 Laws, identified in the first half of 2015, that we propose should be amended to create a right of appeal to JAAT in place of the Royal Court. It is likely that since June 2015 further Laws have created appeal rights to the Royal Court or some of the 52 may have been repealed. The table is therefore illustrative rather than definitive of our proposal.

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<sup>137</sup> See **Annex D: Research Statement**.

	Administrative decision	Law conferring right of appeal	Grounds of appeal
1	Decisions by the Minister regarding control of sales and leases of agricultural land	Agricultural Land (Control of Sales and Leases)(Jersey) Law 1974	'the decision was unreasonable having regard to all the circumstances of the case'
2	Decisions of the Board administering agricultural marketing scheme	Agricultural Marketing (Jersey) Law 1953	appellant 'is aggrieved' by the decision'
3	Decisions of Minister relating to licences to export agricultural produce	Export of Agricultural Produce (Jersey) Order 1972 Art 5	appellant 'is aggrieved' by the decision
4	Minister's licensing powers in relation to animals	Animal Welfare (Jersey) Law 2004 Art 21	Grounds of appeal are not specified in the Law. Powers of the Court are not specified.
5	Minister's licensing powers in relation to animals	Dangerous Wild Animals (Jersey) Law 1999 Art 19	Grounds of appeal are not specified in the Law. The Court may confirm, reverse or vary the decision of the Minister.
6	Minister's functions in relation to regulation of trade in endangered species	Endangered Species (CITES)(Jersey) Law 2012 Art 31	Grounds of appeal are not specified in the Law. The Court may confirm, reverse or vary the decision.
6	Minister's licensing powers	Artificial Insemination of Domestic Animals (Bovine Semen)(Jersey) Order 2008	'An aggrieved person may apply to the Royal Court for a review of a decision of the Minister ...'
7	Minister's licensing powers	Community Provisions (Bovine Embryos)(Jersey) Regulations 2010	'An applicant ... may apply to the Royal Court for a review of the decision of the Minister'
8	Consumer safety inspector's decisions about safety notices and detention of consumer goods	Consumer Safety (Jersey) Law 2006	Grounds of appeal are not specified in the Law. The Court has broad power to 'confirm, vary or revoke the notice or substitute a different type of notice'
9	Decision of a Minister following Minister's review of a decision by the Agent of the Impôts	Customs and Excise (Jersey) Law 1999 Art 69	Grounds not specified in the Law. The Court may confirm Minister's decision or order Minister to rescind or vary the decision
10	Minister's functions about imported food said to be unfit for human consumption	Imported Food (Jersey) Order 1998 Art 6	Grounds of appeal are not specified in the Law.
11	Various decisions relating to housing and work controls	Control of Housing and Work (Jersey) Law 2012 Art 41	the decision is unreasonable having regard to all the circumstances of the case.
12	Minister's decision to refuse or cancel registration relating to day care of children	Day Care of Children (Jersey) Law 2002 Art 9	the decision is unreasonable in all the circumstances of the case
13	Minister's functions relating to registration of health care practitioners	Health Care (Registration)(Jersey) Law 1995	the decision of the Minister was unreasonable having regard to all the circumstances of the case
14	Minister's decision (on recommendation of Health Services Disciplinary Tribunal) to withdraw approval of a medical practitioner in relation to the Health Insurance Fund	Health Insurance (Jersey) Law 1967 Art 27	Law does not specify grounds of appeal
15	Minister's decisions relating to trade effluent discharge certificates etc	Drainage (Jersey) Law 2005 as amended by Drainage (Amendment)(Jersey) Law 2014	Law does not specify grounds of appeal. The Court may confirm, reverse or vary the decision or requirement against which the appeal is brought.
16	Minister's decisions about registration of non-provided schools	Education (Jersey) Law 1999 Art 44	The Law does not specify grounds of appeal or the Court's powers.
17	Minister's decisions about registration of employment agencies	Employment Agencies (Registration)(Jersey) Law 1969 Art 8	the decision of the Minister was unreasonable having regard to all the circumstances of the case

18	Minister's and Connétables' functions licensing explosives including fireworks	Explosives (Jersey) Law 1979 Art 12	unreasonable having regard to all the circumstances of the case
19	Minister's decisions relating to fire certificates for premises	Fire Precautions (Jersey) Law 1977 Art 7	The appellant 'is aggrieved'
20	Minister's decision to exempt premises, stall or vehicle from food hygiene requirements	Food Hygiene (General Provisions)(Jersey) Order 1967 Art 33	decision was unreasonable having regard to all the circumstances
21	Minister's decision about ending emergency prohibition order relating to a health risk in a food business	Food Safety (Miscellaneous Provisions)(Jersey) Law 2000 Art 4	The Law does not specify grounds of appeal
22	Minister's refusal or cancellation of licence for ice-cream vehicle or stall	Food Safety (Ice-cream stalls etc)(Jersey) Order 1969 Art 4	The appellant 'is aggrieved'
23	Connétable's functions licensing firearms	Firearms (Jersey) Law 2000 Art 55	The appellant 'is aggrieved'
24	Jersey Gambling Commission functions	Gambling (Jersey) Law 2012 Art 45	unreasonable having regard to all the circumstances of the case
25	Jersey Gambling Commission functions relating to social responsibility levy	Gambling Commission (Jersey) Law 2010 Art 12	In determining an appeal the Court is not restricted to a consideration of questions of law or to any information that was before the Commission. The Court may confirm the amount of the levy appealed against, declare that no levy is payable or determine for itself what the levy should be
26	Minister and Harbour Master's functions licensing ships for hire	Habours (Inshore Safety)(Jersey) Regulations 2012 reg 6	The appellant 'is aggrieved'
27	Harbour Master's designation of facilities or services in a harbour where permit is required	Harbours (Jersey) Regulations 1962	taking the action was not reasonable in the circumstances
28	Highway authority (Minister or Roads Committee of a parish) withdraws licence to place anything below/on/above a highway	Highways (Jersey) Law 1956	The Law does not specify grounds of appeal
29	Minister's decision functions relating to neighbour disputes about high hedges	High Hedges (Jersey) Law 2008 Arts 12-13	The Law does not specify grounds of appeal
30	Minister's functions regulating public service vehicles	Motor Traffic (Jersey) Law 1935	The Law does not specify grounds of appeal
31	Minister's functions	Motor Vehicles (Construction and Use) (Jersey) Order 1998	A person aggrieved
32	Jersey Financial Services Commission regulation of not-profit organisations	Non-Profit Organizations (Jersey) Law 2008	Unreasonableness
33	Minister's registration of nursing and residential homes	Nursing and Residential Homes (Jersey) Law 1994	The Law does not specify grounds of appeal
35	Minister's functions	Lodging Houses (Registration) (Jersey) Law 1962	Unreasonableness
36	Minister's function regulating carriers	Pet Travel Scheme (Jersey) Regulations 2011	Unreasonableness
37	Minister's licensing functions	Petroleum (Jersey) Law 1984	Unreasonableness
38	Minister's function registering pharmacists and pharmacy technicians	Pharmacists and Pharmacy Technicians (Registration) (Jersey) Law 2010	The Law does not specify grounds of appeal

39	Minister's functions registering tattooists	Piercing and Tattooing (Jersey) Law 2002	A person aggrieved
40	Harbour Master's licencing of pilots functions	Pilotage (Jersey) Law 2009	A person aggrieved
41	Minister's registration functions	Places of Refreshment (Jersey) Law 1967	A person aggrieved
42	Minister's functions	Plant Health (Jersey) Law 2003	The Law does not specify grounds of appeal
43	Minister's licencing functions	Poisons (Jersey) Law 1952	A person aggrieved
44	Inspector's functions to detain good and documents	Price and Charge Indicators (Jersey) Law 2008	The Law does not specify grounds of appeal
45	Highway authority's refusal to grant to sent to break up or open a road	Public Utilities Road Works (Jersey) Law 1963	Public interest
46	Minister's decision relating to forfeiture of restricted radio equipment	Radio Equipment (Jersey) Law 1997	The Law does not specify grounds of appeal
47	Registrar of Business Names (Jersey Financial Services Commission) refusal to register undesirable or misleading business names	Registration of Business Names (Jersey) Law 1956	The Law does not specify grounds of appeal
48	Inspector of Motor Traffic's refusal to register driving instructor	Road Traffic (Jersey) Law 1956	A person aggrieved
49	Parish decision to refuse driving licence to person on grounds of physical fitness	Road Traffic (Jersey) Law 1956	A person aggrieved
50	Minister's licensing functions	Sea Fisheries (Jersey) Law 1994	A person aggrieved
51	Comité des Connétables' review of a Connetable's refusal to permit shop to open on Sundays	Shops (Regulation of Opening) (Jersey) Regulations 2011	A person aggrieved
52	Minister's licensing functions	Slaughter of Animals (Jersey) Law 1962	A person aggrieved
53	Minister's licensing functions relating to registration of premises	Tourism (Jersey) Law 1948	A person aggrieved
54	Minister's licensing functions	Waste Management (Jersey) Law 2005	A person aggrieved

## Appeals that would be retained by the Royal Court

**7.22** There are some appeals that in our view should continue to be made to the Royal Court:

	Decision maker appealed against	Law conferring right of appeal	Grounds of appeal
1	Jersey Financial Services Commission decisions	Alternative Investment Funds (Jersey) Regulations 2012	Unreasonableness
2	Jersey Financial Services Commission	Banking Business (Jersey) Law 1991	Unreasonableness
3	Jersey Financial Services Commission	Collective Investment Funds (Jersey) Law 1988	Unreasonableness
4	Jersey Financial Services Commission	Financial Services (Jersey) Law 1998	Unreasonableness
5	Jersey Financial Services Commission	Insurance Business (Jersey) Law 1996	Unreasonableness
6	Jersey Bank Depositors Compensation Board	Banking Business (Depositors Compensation) (Jersey) Regulations 2009	Unreasonableness

7	Jersey Financial Services Commission	Control of Borrowing (Jersey) Law 1947	Unreasonableness
8	Jersey Financial Services Commission / Registrar of Companies	Companies (Jersey) Law 1991	Unreasonableness
9	Registrar of Companies / Jersey Financial Services Commission	Foundations (Jersey) Law 2009	Unspecified
10	OFCOM	Communications (Jersey) Order 2003	Unreasonableness
11	Jersey Competition Regulatory Authority	Competition (Jersey) Law 2005	Not restricted to a consideration of questions of law or to any information that was before the Authority
12	Jersey Competition Regulatory Authority	Postal Services (Jersey) Law 2004	Not restricted to a consideration of questions of law or to any information that was before the Authority
13	Jersey Competition Regulatory Authority	Telecommunications (Jersey) Law 2002	Not restricted to a consideration of questions of law or to any information that was before the Authority
14	Minister	Medicines (Jersey) Law 1995	Unreasonableness
15	Jersey Milk Marketing Board	Milk Marketing Scheme (Approval) (Jersey) Act 1954	Unspecified
16	Minister	Water (Jersey) Law 1972	the Company aggrieved
17		Water Pollution (Jersey) Law 2000	Unspecified
18		Water Resources (Jersey) Law 2007	Unspecified
19	Connétable's refusal to add or remove a person's name to the register	Public Elections (Jersey) Law 2002	Unspecified

## Transfer of proceedings between the Royal Court and JAAT

**Recommendation 7.2: Amend the Royal Court Rules to enable the Royal Court to transfer the hearing of a case from the Royal Court to JAAT. See also Recommendation 3.14, which recommends that a comparable procedure for transferring a case from JAAT to the Royal Court.**

**7.23** It is possible to envisage that an appeal lodged with the JAAT may, on initial inspection, seem to warrant the attention of the Royal Court, for example because a point of law of general public importance is raised by the appellant or respondent. We envisage that the JAAT Rules and Royal Court Rules should enable the transfer of appeals, should this be thought desirable under the “overarching objective” of the rules.

## Time limits for first appeals

**Recommendation 7.3: There should be a standard time limit for making administrative appeals (unless there is a strong public interest in specifying a different limit in a Law). The standard time limit should be 28 days from the appellant receiving notice of the decision appealed against.**

**7.24** There are a wide variety of different time limits for exercising a right of appeal relating to an administrative decision. The following formula are used in current Jersey Laws:

- either in term or in vacation within 90 days after the notification of the decision was given

- within 2 months
- ‘no later than the day that is one month after the day on which notice was served on the person’
- within one month from the date on which notice in writing has been given to the person
- within 30 days of the day on which notification of the Minister’s decision refusing or withdrawing the certificate of exemption was sent to the person
- within 28 days after a company receives a notice of a direction
- within 21 days
- within 21 days after the appellant is served by the Minister with a written copy of the decision to which the appeal relates, or within such further time as the Royal Court may allow
- within the 15 days next following the day on which notice of the decision of the Minister or the Connétable, was given to the person
- within 14 days next following the day on which notice was served
- An importer served with an export notice may, within 7 days of such service, appeal to the Royal Court.

**7.25** This wide variety of different time limited is potentially confusing and is difficult to justify. We therefore recommend that relevant laws are amended to create a standard time limit (this could be achieved by the Administrative Justice (Jersey) Law).

**7.26** The choice of time limit is necessarily somewhat arbitrary. We propose that it should be 28 days. If there is a compelling reason (for example, the need for certainty in the context of a specific area of administrative decision-making), a case should be made for a different time limit during the reform process. JAAT or the Royal Court should have discretion to extend time where justice requires.

**7.27** In setting the default time limit for starting an appeal at 28 days, we have had regard to the time limit for making an application for judicial review. An application for judicial review is the procedure that may be used to challenge the lawfulness of an administrative decision if no right of appeal exists. The Royal Court Rules 2004 state an application for judicial review “must be made promptly and in any event not later than 3 months from the date when grounds for the application first arose” (rule 16/3). The Royal Court has discretion to extend this time or to hold that a challenge has not been made sufficiently “promptly” within the 3 months.

## **‘Second appeals’ from tribunals to the Royal Court**

**Recommendation: see Recommendation 3.16 (which proposes there should be a right of appeal from JAAT to the Royal Court on questions of law).**

**7.28** The previous section concerned appeals directly from an administrative decision-maker (such as a Minister) to the Royal Court. In addition to these, the Royal Court has a jurisdiction over “second appeals”, where the aggrieved person has already appealed to a tribunal or similar appellate body and either the aggrieved person or the public body has a right of further appeal to the Royal Court on a question of law. Second appeals to the Royal Court on questions of law are constitutionally important. They permit the Island’s principal court to determine questions of administrative legality and, if necessary, to correct errors of interpretation made during a “first appeal”.

**7.29** According to our analysis of legislation in force in mid-2015, there were six such ‘second appeals’ as shown in the following Table. Where the first appeal body will under our proposals be subsumed within JAAT, a new right of second appeal should be created to the Royal Court.



The general rule should be that there is a right of appeal on point of law from JAAT to the Royal Court.

First appeal body	Law	Ground of appeal	Time limit
<b>Social Security Tribunal or Medical Appeal Tribunal</b>	Income Support (Jersey) Law 2007 Art 9 and Income Support (General Provisions)(Jersey) Order 2008 Art 18 (as amended by Social Security, Health Insurance and Income Support (Miscellaneous Provisions)(Jersey) Order 2015)	on questions of law	Application for leave to appeal to the Court must be made <b>to the Tribunal</b> before the pend of the period of 4 weeks beginning with the date of the Tribunal's decision or order; the tribunal may vary this time limit 'if, in the circumstances of the case, the Tribunal is satisfied that it would be fair and just to do so'  If the Tribunal refuses leave, an application may be made <b>to the Court</b> in accordance with Rules of Court
<b>Social Security Tribunal</b>	Health Insurance (Jersey) Law 1967 Art 28 and Health Insurance (Determination of Claims and Questions)(Jersey) Order 2008 Art 6 (as amended by Social Security, Health Insurance and Income Support (Miscellaneous Provisions)(Jersey) Order 2015)	on a point of law only	Application for leave to appeal to the Court must be made <b>to the Tribunal</b> before the pend of the period of 4 weeks beginning with the date of the Tribunal's decision or order; the tribunal may vary this time limit 'if, in the circumstances of the case, the Tribunal is satisfied that it would be fair and just to do so'  If the Tribunal refuses leave, an application may be made <b>to the Court</b> in accordance with Rules of Court
<b>Social Security Tribunal constituted under Art 8 of the Social Security (Determination of Claims and Questions) (Jersey) Order 1974.</b>	Christmas Bonus (Jersey) Law 2011	A person aggrieved by a decision of the Tribunal on an appeal under this Law may appeal to the Royal Court on a point of law	None specified in the Law
<b>Social Security Tribunal</b>	Food Costs Bonus (Jersey) Regulations 2014 reg 14	A person aggrieved by a decision of the Tribunal, may on a point of Law only, appeal to the Royal Court.	must be made before the end of the period of 4 weeks beginning with the date of the Tribunal's written decision.
<b>Minister hearing appeal against decision of Director of Civil Aviation</b>	Civil Aviation (Jersey)(Law) 2008	No ground specified: 'Director and the appellant each has a right to appeal to the Royal Court against the Minister's decision'	None specified in the Law

regarding aerodrome licences			
Information Commissioner's determination about freedom of information rights in relation to public authorities	Freedom of Information (Jersey) Law 2011 Art 47	in all the circumstances of the case the decision was not reasonable	within 28 days of the Information Commissioner giving notice of his or her decision to the applicant.

## Applications for judicial review

**Recommendation 7.4: The Royal Court Rules Review Group should consider whether the application for judicial review procedure needs to be developed in light of changes to the procedures in England and Wales since 1999.**

- 7.30** If the States Assembly has not created a right of appeal, the Royal Court nonetheless has a residual power to control the legality of administrative decision-making. This is an important safeguard for the constitutional principle of the rule of law.
- 7.31** The Royal Court's role is to examine the legality of the administrative decision on the grounds that a decision is
- 'illegal', in the sense that the Minister or other public body did not understand or correctly apply the relevant Law when exercising their functions
  - 'procedurally improper', meaning that the correct procedures set out in relevant Laws or the judge-made principles of 'natural justice' were not followed
  - 'unreasonable', where court adjudicates on whether no reasonable public body could have made the administrative decision in question, or
  - contrary to the Human Rights (Jersey) Law 2000.
- 7.32** Part 16 of the Royal Court Rules creates a two-step procedure. First, an applicant must seek the 'leave' of the Royal Court to make an application for judicial review. A judge of the Royal Court considers the applicant's legal arguments and decides whether there is an arguable case. If the judge decides that there is an arguable case, the application is set down for a full oral hearing (usually several months later).
- 7.33** A small number of applications for judicial review are made each year, typically two or three. The following are illustrations of the types of case that come before the Royal Court by this route.
- *Banyan Retail Ltd v The Licensing Assembly* [2016] JRC 031 (Hon Michael Beloff QC, Commissioner). The applicant challenged the legality of the refusal of a 1st category licence for two restaurants. The application for judicial review was refused.
  - *Organic Kids Ltd and another v Minister for Education Sport and Culture* [2015] JRC 067 (Sir Michael Birt, Commissioner and Jurats Kerley and Liston). This was a challenge to the legality of decisions taken by the Minister not to list the applicants in the directory of nurseries approved to operate under the nursery education funding scheme. The Royal Court quashed the Minister's decisions and directed him to reconsider applications from the nurseries.
  - *Meinl Bank Aktiengesellschaft v HM Attorney General and Jersey Financial Services Commission* [2015] JRC 238 (JA Clyde-Smith, Commissioner). Several applicants commenced judicial review proceedings against decisions taken by the JFSC but withdrew

on the day scheduled for the hearing of the leave application. The Court concluded that the application was ‘fundamentally flawed and therefore hopeless’ and ordered the applicants to pay the JFSC’s legal costs.

- *Larsen and Volaw v Comptroller of Taxes and States of Jersey* [2014] JRC 232 (leave application) and [2015] JRC 244 (full hearing before Hon Michael Beloff QC, Commissioner). Various applicants unsuccessfully challenged the legality of notices issued by the Comptroller requiring provision of certain documents to foreign tax authorities under the Taxation (Exchange of Information with Third Countries) Regulations 2008.
- *Chief of States of Jersey Police v The Panel of Jurats* (Police Constable X, Interested Party) [2014] JRC 114B (Sir Christopher Pitchers, Commissioner, dismissed application); [2014] JCA 155 (application for extension of time for service of a Notice of Appeal refused). In this case the Chief of Police in disciplinary proceedings against a PC ordered that the PC be immediately dismissed from the force. The PC appealed to a Panel of Jurats, which reduced the penalty to a reduction of pay and refused to publish their reasons. The Chief of Police unsuccessfully challenged the legality of the Jurat’s decision.

**7.34** Detailed examination of the operation of the judicial review procedure falls outside the scope of this project. We are not aware of any systematic problems. That said, we note that Jersey judicial review procedure was modelled very closely on what existed in England and Wales in 1999. Since then in England and Wales, the judicial review procedure has been modified in several important respects and it may therefore be beneficial to review what lessons might be learnt for the Royal Court Rules. We draw this observation to the attention of the Royal Court Rules Review Group.

## CHAPTER 8

# USING ALTERNATIVE DISPUTE RESOLUTION

### What is alternative dispute resolution?

- 8.1** The origins of Alternative Dispute Resolution (ADR) can be traced back to the 1960s, when in some circles court-based procedures were considered too adversarial and legalistic. ADR has now moved into the mainstream and is actively promoted by governments in many legal systems.
- 8.2** Alternative dispute resolution (ADR) refers to a range of techniques that may be used for resolving disputes rather than formal adversarial adjudication by a court or tribunal or the States of Jersey. These techniques include: negotiation, arbitration, conciliation, early neutral evaluation and mediation.<sup>138</sup>
- 8.3** ADR may be a free-standing process – for example, the parties may approach a mediator to help them reach agreement about a dispute. ADR may be attached to a formal process – for example, an aggrieved person may start an appeal to a tribunal or court and the tribunal/court may refer the parties to an ADR service rather than proceeding directly to a formal adversarial hearing.

### Mediation

- 8.4** Mediation is a widely used form of ADR. In a mediation, a neutral person (the mediator) assists the parties to a dispute to reach an agreement to resolve their disagreement. The mediator helps set a structure and timetable for dialogue. The process is consensual (parties cannot be compelled to enter into mediation) and confidential (unlike tribunals, the Royal Court or the States of Jersey Complaints Panel, the outcome of the mediation is private). The precise role of the mediator may vary according to the nature of the dispute, the wishes of the parties, and the professional training of the mediator. Types of mediation include:
- facilitative mediation, where the focus is on enabling the parties to discuss their dispute, without the mediator steering the parties to a particular outcome
  - evaluative mediation, where the parties agree that the mediator may express views on the parties' positions and suggest a reasonable and fair settlement
  - rights-based mediation, where legal rights are identified at the start of the mediation process and the mediator may take a more directive role to ensure that the outcome agreed by the parties falls within relevant legal structures. This form of mediation may be the best fit in disagreements over administrative decision-making where the public body must operate within the constraints of a legal framework.
- 8.5** Whereas professionals working the legal profession are highly regulated by law (in Jersey, by the Law Society of Jersey), there is relatively little centralised regulation of people providing services as mediators. In Jersey, there is no legal requirement that a person holding themselves out as a mediator, who is not a qualified lawyer, has any training or professional body overseeing their work. There are however several self-accreditation schemes in the United

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<sup>138</sup> For background in the context of administrative redress, see for example: Northern Ireland Ombudsman/Jack Anderson, *Alternatives to Court in Northern Ireland* (Law Centre, Queen's University Belfast, 2011).

Kingdom to which some mediators in Jersey may choose to subscribe<sup>139</sup> and there are various professional training courses leading to the award of a qualification in mediation.

**8.6** There are costs associated with carrying out ADR as with all other forms of administrative redress.

- Unless the mediator or other third-party individual is acting pro bono (i.e. without charging professional fees for his or her services), the cost of professional charges need to be paid by the parties using the service or by public funds.
- Premises are needed for the mediation or other ADR activity if the parties need to be brought together in the same place (which they do in many forms of ADR). A mediation, for example, will normally require three rooms – one for each party and a neutral middle room for meetings during the process, which may last several hours. Because the mediation process should be and be seen to be independent of the public body against which the challenge is made, it may often not be appropriate to use the public body's offices.
- The parties may need to take independent legal advice about using ADR and lawyers may in some cases be involved in the mediation process.

## Advantages and disadvantages of ADR

**8.7** Formal hearings before a court, tribunal or the States of Jersey Complaints Panel are adversarial, usually leading to an outcome that one party is the “winner” and the other is the “loser”. ADR aims to achieve a more conciliatory process based around the need to solve a problem, leading to a more consensual outcome, where possible, that both sides can accept. This approach may be particularly significant where the two parties have an ongoing relationship that will continue after the dispute has been resolved.

**8.8** ADR can be helpful in providing the aggrieved person with an explanation of what happened to start the grievance and may result in an apology from the public body.

**8.9** ADR may provide a less stressful experience for individuals, for whom the prospect of presenting a case in front of a court or tribunal can seem daunting. The process of mediation may be valued by the parties as a learning experience, enabling them to gain insight into themselves, the other party and the situation that has given rise to the disagreement.<sup>140</sup>

**8.10** ADR is more flexible than a formal process leading to a hearing. There are no formal rules of procedure or evidence. The timing of ADR may be more flexible than court or tribunal hearings (for example, mediations may take place in evenings or weekends).

**8.11** But as noted above, ADR such as mediation is not cost free: there may be a professional charge by the mediator and the parties may have a need to seek legal advice. It is not possible to generalise and say that ADR is cheaper than determining a dispute at a formal hearing before a court or tribunal. The costs will vary according the context, even within the administrative justice system. There are some research findings that show that mediation can be a cost-effective route for disagreement resolution.<sup>141</sup>

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<sup>139</sup> For example, the Civil Mediation Council and the College of Mediators.

<sup>140</sup> See Timea Tallodi, “Mediation at its core: Insight into a qualitative research study on the lived experiences of parties to mediation”, UKAJI Blog, 27 July 2017 <https://ukaji.org/2017/07/27/mediation-at-its-core-insight-into-a-qualitative-research-study-on-the-lived-experiences-of-parties-to-mediation/>.

<sup>141</sup> See in relation to disputes about special education needs: Mairi Ann Cullen et al, *Review of arrangements for disagreement resolution (SEND): research report* (Department for Education, Ministry of Justice, March 2017) [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/603487/CEDAR\\_review.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/603487/CEDAR_review.pdf)

- 8.12** ADR is also often regarded as resolving disputes with less delay than court and tribunal proceedings. Such a sweeping assessment needs to be treated with caution.<sup>142</sup> If ADR such as mediation fails to enable the parties to come to an agreement, it may be necessary for the aggrieved party to continue with a more formal type of redress. There are time limits within which a person must exercise rights of appeal to tribunals and the Royal Court, to make applications for judicial review, or to complain to the States of Jersey Complaints Panel. In order to preserve the right to appeal/apply for judicial review/make a complaint, the aggrieved person may need to commence those formal processes to preserve their position, and seek permission from the tribunal/Royal Court/Complaints Panel to pause the formal process while they try ADR.
- 8.13** A further advantage of ADR, for the parties to the dispute, is that the process and outcome are normally confidential. But in the context of disputes about administrative decisions, a disadvantage of ADR is that it takes place behind closed doors: there is a public interest in challenges to administrative errors being exposed to public scrutiny.

## ADR in Jersey

- 8.14** In Jersey, there has been an increasing use and awareness of ADR in recent years, especially in relation to family breakdown, petty debts and “community mediation”.
- 8.15** Community Mediation is a scheme set up by the Jersey Legal Information Board in 2009 and administered by Jersey Citizens Advice Bureau. During the research interviews, we were told that approximately eight people a year use the service. Mediations have included consumer and neighbour disputes. Each party pays £20 to use the scheme and the dispute is referred to a person on a panel of trained and accredited mediators. Mediators, some of whom are Jersey qualified lawyers, provide their services under the scheme free of charge.

## ADR in relation to disputes about administrative decisions

**Recommendation 8.1: Further research should be carried out to develop proposals for mediation and other forms of ADR related to disagreements about administrative decision-making in the Island.**

- 8.16** In Jersey, as in England and Wales, the use of ADR techniques appears to be less prevalent in relation to administrative decisions than in other areas (such as family, commercial and consumer disputes).
- 8.17** Further research work is needed to develop detailed proposals for more use of ADR in relation to disagreements about administrative decision-making. The practical outcomes could be proposals
- for the Government of Jersey to develop a policy on when and how ADR is suitable for disagreements in this area (because unless public bodies are willing to engage with ADR, it cannot take occur)
  - for the Community Mediation scheme (sponsored by the Jersey Legal Information Board and Jersey Citizen’s Advice Bureau) to develop provision for mediation services related to administrative disputes.
- 8.18** Until this further research is completed, our recommendations seek to keep open the possibility of using ADR while our other proposals are implemented.

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<sup>142</sup> For a critique, see Varda Bondy and Linda Mulchahy, *Mediation and Judicial Review: an empirical research study* (The Nuffield Foundation/The Public Law Project 2009) p 86.



## ADR and tribunals

**8.19** When the tribunal system in England and Wales was reformed in 2007,<sup>143</sup> the government envisaged that ADR would be used by the First-tier Tribunal to help parties, where possible, to avoid a formal hearing. The overarching mission of the First-tier Tribunal was envisaged to be “dispute resolution” rather than merely hearing cases.<sup>144</sup> The reality has not lived up to this initial high hopes.

**8.20** As a pilot study, an early neutral evaluation (ENE) scheme was introduced in relation to social security cases. When ENE is used, a tribunal judge carries out a preliminary assessment of the facts, evidence and legal merits of an appeal based on the papers lodged by the parties. The scheme was not compulsory: appellants chose to opt-in and whatever the outcome of the ENE, appellants retained the right to continue to an oral hearing in front of a tribunal. An evaluation of the pilot study found that judges carrying out ENE took between 25 minutes and two hours, with an average case taking 40-45 minutes to appraise.<sup>145</sup> After the appraisal, the tribunal judge makes a telephone call to the party the judges believes is likely to lose the appeal – this could be the administrative decision-maker or the social security claimant (or the claimant’s representative). The evaluation of the pilot study reported “mixed findings concerning the operation and outputs achieved”: in the pilot, ENE did not deliver cheaper or speedier resolution.

**8.21** Another useful point of reference is the Australian Administrative Appeals Tribunal (AAT).<sup>146</sup> The AAT offers a well-developed range of ADR:

- conferences: the process of “conferencing” provides the tribunal and the parties to discuss and define the issues and dispute, identify further evidence that needs to be gathered, explore whether issues can be settled and discuss how the appeal will proceed;
- conciliation: a judge or officer of the tribunal helps the parties to develop options on how they might reach agreement. The conciliator may make suggestions about the terms of the settlement and actively encourage the parties to reach an agreement;
- mediation: a judge or officer of the tribunal (or a mediator appointed by the tribunal) helps the parties discuss the dispute but does not advise about the content of the dispute or the outcome;
- case appraisal: a judge or officer of the tribunal provides a non-binding opinion on the facts and likely outcome of the appeal. This may encourage settlement before a hearing; if the case proceeds to a hearing, the case appraisal report may be referred to by the tribunal.
- neutral evaluation: this is similar to a case appraisal but also includes evaluation of the legal issues.

**8.22** We are not convinced that using an elaborate range of ADR options is either necessary or desirable for the proposed Jersey Administrative Appeals Tribunal (JAAT) during its start-up phase. The JAAT Rules should, however, be sufficiently flexible to permit different types of ADR in different types of case so that in due course the Chairman of JAAT can organise pilot schemes (see **Recommendation 3.14**). The rules should state expressly that ADR should take place only with the agreement of the parties. Further detailed work would be needed to develop the range of ADR options.

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<sup>143</sup> See Chapter 3 above.

<sup>144</sup> Department for Constitutional Affairs, *Transforming Public Services; Complaints, Redress and Tribunals*, Cm 6243 (July 2004).

<sup>145</sup> See C Hay, K McKenna and T Buck, *Evaluation of Early Neutral Evaluation ADR in the Social Security and Child Support Tribunal*, Ministry of Justice Research Series 2/10 (January 2010) p 23.

<sup>146</sup> See [www.aat.gov.au/steps-in-a-review](http://www.aat.gov.au/steps-in-a-review).

## ADR related to the States of Jersey Complaints Panel

- 8.23** Our principal interim recommendation (discussed in Chapter 5 above) is that the States of Jersey Complaints Panel should be replaced by an ombudsman scheme. If this does not happen, we looked at ways in which the effectiveness of the Complaints Panel could be improved.
- 8.24** Since 2006, the Complaints Panel has express powers to seek to resolve complaints informally. Under Article 3(3) of the Administrative Decisions (Review)(Jersey) Law 1982 Law as amended:
- If the Chairman (or Deputy Chairman) decides that a review of the matter by a Board is justified, he or she may nevertheless first attempt informal resolution of the matter and in that case may use whatever means that he or she considers reasonable in the circumstances to achieve such a resolution.
- 8.25** During the research interviews, interviewees with experience of serving on the Complaints Panel expressed unease about the use of this power: there is a concern that if the chairman or deputy chairmen are involved in informal resolution this may bar their participation at a hearing (if the informal resolution fails) because they may no longer be regarded as impartial if they have had private meetings with civil servants.<sup>147</sup> Another issue that emerged during the research interviews is that there is no requirement for the chairman or deputy chairmen to be trained in ADR or to be accredited mediators.
- 8.26** In response to these problems, in **Alternative recommendation 5.7** we propose that all members of the Complaints Panel (not only the Chairman and Deputy Chairmen) should have power to “attempt informal resolution”. The corollary of the widening of this power is that all Complaints Panel members should undertake training in ADR. Also, the power to attempt informal resolution should include power to refer a complaint to mediation by an external third party (for example, a member of the Community Mediation panel), if both parties agree.

## ADR related to the proposed Jersey Public Services Ombudsman

- 8.27** If a public service ombudsman is established in Jersey (as we recommend in Chapter 6), we envisage that some complaints would be resolved using ADR techniques (often referred to as “informal resolution” in this context)<sup>148</sup> rather than a process of formal investigation leading to a published report. Use of ADR should be part of the detailed implementation research study that we recommend. Where ADR is used, the principle of transparency<sup>149</sup> should require information about the extent and success in the use of ADR to be included in the ombudsman’s annual report.
- 8.28** Looking at ombudsman schemes elsewhere gives cause to think that ADR is likely to play a limited role in the future work of a Jersey public services ombudsman. As we noted, in the early years of ombudsmen in the UK the work of the ombudsmen focused on carrying out a full investigation into complaints leading publication of a full report. More recently, UK ombudsmen have recognised that they needed to use a broader range working methods. Since 2007, the three main public sector ombudsmen in England have express power to “appoint and pay a mediator or other appropriate person” to assist in the conduct of an investigation.<sup>150</sup> It appears that the ombudsmen have made relatively little use of ADR in practice – though the UK Parliamentary and Health Service Ombudsman acknowledged that there may be cases where

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<sup>147</sup> See Part 4.

<sup>148</sup> See M Doyle, V Bondy, C Hirst, *The use of informal resolution approaches by ombudsmen in the UK and Ireland* (October 2014), a study funded by the Nuffield Foundation.

<sup>149</sup> See Recommendation 6.1 above.

<sup>150</sup> Regulatory Reform (Collaboration etc between Ombudsmen) Order 2007.

mediation is “especially appropriate in enabling the parties to explore their differences with a trained facilitator, achieve insight and empowerment, and devise for themselves a way forward”.<sup>151</sup> The Local Government Ombudsman reported in March 2010 that they “do not routinely offer mediation as a means to resolve complaints; although a small number of mediations are being carried out as part of a pilot scheme in operation in the Coventry office”.<sup>152</sup>

## ADR related to the Royal Court

- 8.29** As discussed in Chapter 7, the Royal Court is part of the Island’s administrative redress system through its roles in hearing statutory appeals against administrative decisions and applications for judicial review.
- 8.30** In relation to statutory appeals, we recommend that the right of appeal under many Laws should be transferred to the proposed Jersey Administrative Appeals Tribunal (JAAT); the Royal Court should remain the forum for appeals that are likely to raise more complex issues of fact or law and in all cases where JAAT determines an administrative appeal there should be a “second appeal” on point of law to the Royal Court.<sup>153</sup> We see little or no scope for the use of ADR in the context of the Royal Court’s proposed jurisdiction over administrative appeals. The primary function of the Royal Court in this context should be to interpret and apply legal principles. There is a strong public interest in this happening in open court and published judgments.
- 8.31** We recommend that Royal Court Rules Review Group extend its work to review the operation of Applications for Judicial Review Part 16 (see **Recommendation 7.5**). As part of this review, it would be possible to consider the experience in England and Wales relating to ADR and judicial review.<sup>154</sup>
- 8.32** In 2001, the Court of Appeal in England issued strong words of warning in a judgment, urging applicants and their legal advisers to use ADR methods rather than judicial review.<sup>155</sup> The *Cowl* case concerned a decision of a local authority to close residential accommodation for elderly people. Lord Woolf CJ referred to “heavy obligation” to resort to litigation only if it is really unavoidable. If litigation is necessary, the courts should deter the parties from “adopting an unnecessarily confrontational approach to the litigation”. The Administrative Court should, the court said “scrutinise extremely carefully” claims for judicial review so as to ensure that parties tried “to resolve the dispute with the minimum involvement of the court”. Ample powers existed under the Civil Procedure Rules (CPR) for the Administrative Court to hold, on its own initiative, an inter partes hearing at which both sides could explain what steps they had taken to resolve the dispute without the courts’ involvement using complaints procedures and other forms of ADR. In the years since *Cowl*, there has been little progress towards establishing a principled basis on which ADR can be used in public law disputes (some cases are not suited to ADR because they require a point of law to be determined), finding a suitable funding regime (who will pay for mediation?) or working out how ADR can take place in the short time before a claim for judicial review must be started (promptly and in any event within three months).
- 8.33** In its October 2015 report, the Royal Court Rules Review Group recommended “issue of a practice direction and amendment to the form of the summons for directions to require mediation

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<sup>151</sup> Ann Abraham, ‘The ombudsman and “paths to justice”: a just alternative or just an alternative’ [2008] *Public Law* 1, 4.

<sup>152</sup> See [www.lgo.org.uk/guidance-inv/settling-complaints/mediation](http://www.lgo.org.uk/guidance-inv/settling-complaints/mediation).

<sup>153</sup> See Chapter 7.

<sup>154</sup> See Varda Bondy and Linda Mulchahy, *Mediation and Judicial Review: an empirical research study* (The Nuffield Foundation/The Public Law Project 2009).

<sup>155</sup> *Cowl v Plymouth City Council* [2001] EWCA Civ 1935; [2002] 1 WLR 803.

to be explored at the first directions hearing”.<sup>156</sup> In principle, this approach of requiring mediation to be explored at an early stage of an application for judicial review appears to us to be appropriate.

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<sup>156</sup> *Access to Justice*, Final Consultation Paper Issued by the Royal Court Rules Review Group (5 October 2015) p 32.

## ANNEX A

### LIST OF RECOMMENDATIONS

This Annex lists the recommendations made by the Topic Report. The method of implementation of each recommendation and the potential costs, benefits and strategic risks are identified in outline. Further explanation and analysis of each of the recommendations can be found in relevant chapters of the Topic Report.

Abbreviations used:

AJL	Many of the recommendations contained in this report would need to be implemented through a new Law; we use the working title "Administrative Justice (Jersey) Law"
CM	The Chief Minister of Jersey, who is head of the Government of Jersey and the minister responsible for justice policy and resources
SPBs	Scheduled Public Bodies. We propose that the public authorities to which the AJL applies should be listed in a Schedule.

#### Chapter 1: About the project

This chapter does not contain any recommendations

#### Chapter 2: Overarching Issues in Administrative Justice in Jersey

	Recommendation	Method of implementation	Costs, benefits, risks
<b>Recommendation 2.1</b>	Create a legal duty on the CM to issue guidance to public bodies about fair and effective handling of complaints	Article in AJL creates duty  CM issues non-statutory guidance (and keeps under review); consideration to be given to the mechanisms by which the States Assembly can best scrutinise this guidance.	<p><u>Costs</u></p> <ul style="list-style-type: none"> <li>One-off cost of drafting duty in article in AJL (cost to Government of Jersey) and scrutiny of the projet de loi (cost to States Assembly)</li> <li>One-off cost of developing a first draft of the non-statutory guidance, including external advisers, and carrying out consultation (cost to Government of Jersey); the Jersey Law Commission could contribute to this work</li> <li>One-off cost of scrutinising the draft guidance by States Assembly e.g. through a Scrutiny Panel (cost to States Assembly)</li> <li>Ongoing cost of operationalising the guidance, including reviews of complaint handling process by SPBs, training for staff, and publishing information about internal complaints through websites and leaflets (cost to Government of Jersey and other SPBs)</li> </ul> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>Individual users of public services in Jersey will benefit from improved complaints handling</li> <li>The process of developing and consulting on the contents of the guidance will encourage sharing of good practice across SPBs</li> <li>Guidance will help SPBs to improve the quality of complaint handling</li> <li>Guidance will encourage greater transparency in handling of complaints by SPBs</li> </ul>

			<ul style="list-style-type: none"> <li>– Guidance will encourage a more consistent approach to handling of complaints across public services</li> <li>– Requirements in the guidance to publish information about complaint handling will improve public understanding of rights to complain</li> </ul> <p><u>Risks</u></p> <ul style="list-style-type: none"> <li>– Risk that SPBs may fail to comply with the guidance or view it as a “paper exercise”, leading to patchy improvements across the public sector</li> </ul>
<b>Recommendation 2.2</b>	Create a legal duty on the CM to present an annual report to the States Assembly on administrative redress across the Government of Jersey and other public bodies	<p>Article in AJJL creates duty</p> <p>CM prepares and presents annual report</p>	<p><u>Costs</u></p> <ul style="list-style-type: none"> <li>– One-off cost of drafting article in AJJL (cost to Government of Jersey) and scrutiny of projet de loi (cost to States Assembly)</li> <li>– Annual cost to SPBs of staff time and other resources needed to collect and report data to the CM (cost to SPBs)</li> <li>– Annual cost to CM of analysing data, preparing and publishing report (cost to Government of Jersey)</li> <li>– Annual cost of providing political scrutiny and accountability in relation to CM's report (cost to States Assembly)</li> </ul> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>– Annual report provides good quality information to support evidence-led policy-making and actions by Government</li> <li>– Annual report will enable members of the States Assembly to provide more systematic accountability over the administrative justice system</li> <li>– Ultimately, individuals, business and organisations using public services in Jersey will benefit from more effective coordination and improvements in the operation of the administrative justice system</li> </ul> <p><u>Risks</u></p> <ul style="list-style-type: none"> <li>– SPBs may fail to collect and report accurate data to the CM</li> <li>– The CM and officials may adopt an insufficiently reflective and critical approach to evaluating data, lesson learning and taking remedial action where systematic problems arise</li> <li>– States Members may not regard scrutiny of the annual report as a political priority and will fail to provide independent challenge and accountability to Government</li> </ul>
<b>Recommendation 2.3</b>	The States Assembly should scrutinise the CM's annual report on administrative justice	Scrutiny Chairmen's Committee to consider how best to provide scrutiny of the CM's annual reports (e.g. through a committee or scrutiny panel)	<p><u>Costs</u></p> <ul style="list-style-type: none"> <li>– Ongoing costs of activity in States Assembly in conducting scrutiny of CM's annual report, including Members' time, administrative support for a committee/scrutiny panel and appointment of external specialist advisers as needed (cost to States Assembly)</li> </ul> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>– Annual report will enable States Members to have an overview of where problems are arising across the whole administrative redress system and make strategic decisions about how best to scrutinise those problems</li> <li>– Annual report subject to public scrutiny will provide an incentive for SPBs to engage in continuous improvement and address systematic problems openly</li> </ul>



			<ul style="list-style-type: none"> <li>Ultimately, individuals, business and organisations using public services in Jersey will benefit from more effective coordination and improvements in the operation of the administrative justice system</li> </ul> <p><u>Risks</u></p> <ul style="list-style-type: none"> <li>States Members may not regard scrutiny of annual report as a political priority and will fail to provide independent challenge and accountability to Government</li> <li>The CM's annual report and subsequent scrutiny may yield insufficient practical improvement in the quality of public services and administrative redress</li> </ul>
<b>Recommendation 2.4</b>	CM and Minister for Health & Social Services should commission a study of complaints handling relating to health and social services decision-making and services, with a remit to make recommendations	Ministerial decision	<p><u>Costs</u></p> <p>One-off cost of a study involving desk-based research, research interviews, and review of files, which we estimate will be achievable for £15,000 (cost to Government of Jersey).</p> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>An independent review will provide basis for evidence-led policy making by the Government of Jersey in the area that produces the largest number of internal complaints</li> <li>Ultimately, individuals using health and social services in Jersey will benefit from improvements in the operation of the administrative justice system</li> </ul> <p><u>Risks</u></p> <p>The independent study may make recommendations that are not acceptable to Government of Jersey or the States Assembly</p>
<b>Recommendation 2.5</b>	Create a legal "right to good administration" based on models developed in some other jurisdictions	Article in AJJL	<p><u>Costs</u></p> <ul style="list-style-type: none"> <li>One-off cost of drafting article in AJJL (cost to Government of Jersey) and scrutiny of projet de loi (cost to States Assembly)</li> </ul> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>Existence of the right benefiting individuals will become a point of reference for the Government of Jersey, the States Assembly and the judiciary when developing and applying rules relating to administrative justice and redress</li> <li>Reputational benefit to the Island of signalling to the world Jersey's commitment to the rule of law in public administration</li> <li>Ultimately, individuals, business and organisations using public services in Jersey will benefit from a commitment by the Government of Jersey and States Assembly to respect and uphold a right to just administration</li> </ul> <p><u>Risks</u></p> <ul style="list-style-type: none"> <li>The new right may have little practical impact on improving quality of administrative justice and redress</li> </ul>

## Chapter 3: Modernising Jersey's Tribunals System

	Recommendation	Method of implementation	Costs, benefits, risks
<b>Recommendation 3.1</b>	Create a new tribunal (the Jersey Administrative Appeals Tribunal) with a broad jurisdiction to hear appeals against administrative decisions	Articles in AJJL	<p><u>Costs</u></p> <ul style="list-style-type: none"> <li>One-off cost of drafting article in AJJL (cost to Government of Jersey) and scrutiny of projet de loi (cost to States Assembly)</li> <li>Ongoing costs of running JAAT (cost to the Judicial Greffe, with resources provided by the CM); this will be off-set by savings from no longer running the tribunals that will be abolished</li> </ul> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>The creation of a single tribunal will eliminate anomalies, reduce the number of separate legislative provisions relating to tribunals, and simplify and modernise the law relating to tribunals in Jersey</li> <li>Efficiency gains and cost savings from running one tribunal rather than 8 separate tribunals</li> <li>When in future new administrative decision-making functions are created in Law by the States Assembly, it will be straightforward to have a right of appeal to JAAT (rather than having to create a new tribunal or specify a right of appeal to the Royal Court, which may be disproportionate)</li> <li>Ultimately, users of the appeal process will benefit from a better coordinated and more effective tribunal appeal system</li> </ul> <p><u>Risks</u></p> <ul style="list-style-type: none"> <li>Perception that expertise and experience of existing tribunals may diminish (but see Recommendation 3.20.a)</li> </ul>
<b>Recommendation 3.2</b>	<p>Transfer jurisdiction of the following tribunals to JAAT and abolish them:</p> <ol style="list-style-type: none"> <li>Commissioners of Appeal for Taxes</li> <li>Social Security Tribunal</li> <li>Social Security and Medical Tribunal</li> <li>Income Support Medical Appeal Tribunal</li> <li>Mental Health Review Tribunal</li> <li>Health and Safety Appeal Tribunal</li> <li>Data Protection Tribunal</li> <li>Rate Support Board</li> </ol>	<p>Articles in AJJL</p> <p>Amendments and repeals to existing Laws</p>	<p><u>Costs</u></p> <ul style="list-style-type: none"> <li>One-off cost of drafting article in AJJL (cost to Government of Jersey) and scrutiny of projet de loi (cost to States Assembly)</li> <li>Ongoing costs of running the JAAT (cost to Judicial Greffe); this will be off-set by savings from no longer running the tribunals that will be abolished</li> <li>Additional costs may arise during a transitional period if the some of the existing tribunals and JAAT operate simultaneously (cost to Judicial Greffe and some SPBs)</li> </ul> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>The creation of a single tribunal will eliminate anomalies, reduce the number of separate legislative provisions relating to tribunals, and simplify and modernise the law relating to tribunals in Jersey</li> <li>Efficiency gains and cost savings from running one tribunal rather than 8 separate tribunals</li> <li>Ultimately, users of the appeal process will benefit from a better coordinated and more effective tribunal appeal system</li> </ul> <p><u>Risks</u></p> <p>Perception that expertise and experience of existing tribunals may be lost (but see Recommendation 3.20.a)</p>

<b>Recommendation contained in Chapter 4</b>	Amend legislation to transfer rights of appeal from Ministers to JAAT	Amendments and repeals to existing Laws and Orders	Cross-refer to Recommendations 4.1, 4.2, 4.3, 4.4 and 4.5.
<b>Recommendation contained in Chapter 7</b>	Amend approximately 54 Laws to transfer right of appeal from Royal Court to JAAT.	AJL will make amendments and repeals to existing Laws	Cross-refer to Recommendation 7.1
<b>Recommendation 3.3</b>	Create new judicial post of "Chairman of the Jersey Administrative Appeal Tribunal"	Article in AJL	<p><u>Costs</u></p> <ul style="list-style-type: none"> <li>One-off cost of drafting article in AJL (cost to Government of Jersey) and scrutiny of projet de loi (cost to States Assembly)</li> <li>On-going part-time salary and on-costs for judicial post; this will be off-set by savings in daily sitting fees paid to a legally qualified tribunal member in the previous system</li> </ul> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>Post will provide judicial leadership capacity in new tribunal system</li> <li>Ultimately, users of the appeal process will benefit from a better coordinated and more effective tribunal appeals system</li> </ul> <p><u>Risks</u></p> <ul style="list-style-type: none"> <li>It may be difficult to recruit and retain suitable candidates for the role</li> </ul>
<b>Recommendation 3.4</b>	Create new judicial office of "Deputy Chairman of the Jersey Administrative Appeal Tribunal".	Article in AJL	<p><u>Costs</u></p> <ul style="list-style-type: none"> <li>One-off cost of drafting article in AJL (cost to Government of Jersey) and scrutiny of projet de loi (cost to States Assembly)</li> <li>Ongoing daily fees for this judicial post; fees are paid to a legally qualified tribunal members in the current system but additional days may be worked by the Deputy Chairman in carrying out leadership functions</li> </ul> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>Post will provide judicial leadership capacity in new tribunal system</li> <li>Designated Deputy Chairman role will enable efficient decision-making by JAAT when the Chairman is unavailable or conflicted from deciding</li> <li>Ultimately, users of the appeal process will benefit from a better coordinated and more effective tribunal appeals system</li> </ul> <p><u>Risks</u></p> <ul style="list-style-type: none"> <li>It may be difficult to recruit and retain a suitable person for the role</li> </ul>
<b>Recommendation 3.5</b>	<p>Include all members of JAAT within the definition of members of the "judiciary of Jersey", including</p> <ol style="list-style-type: none"> <li>Chairman of JAAT</li> <li>Deputy Chairman of JAAT</li> <li>Other legal members</li> <li>Expert members</li> <li>Lay members</li> </ol>	<p>Depending on the sequencing of the legislation, this would either be in the AJL or included the projet de loi implementing CM's proposals on "Judicial Independence and the Establishment of a Judicial and Legal Services Commission"</p>	<p><u>Costs</u></p> <ul style="list-style-type: none"> <li>No significant additional costs</li> </ul> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>Will ensure all members of JAAT benefit from the proposed "guarantee of judicial independence" and are subject to the responsibilities of members of the Jersey judiciary</li> <li>Will enhance the status of JAAT as an independent and impartial judicial body, to the benefit of users of tribunal appeals</li> </ul>

(published in July 2017)

<b>Recommendation 3.6</b>	Members of JAAT should be appointed by the proposed Judicial and Legal Services Commission (JLSC)	Depending on the sequencing of the legislation, this would either be in the AJJL or included in the projet de loi implementing CM's proposals on "Judicial Independence and the Establishment of a Judicial and Legal Services Commission"	<p><u>Costs</u></p> <ul style="list-style-type: none"> <li>Tribunal appointments, including lay members, are likely to be a significant part of the JLSC's annual workload (cost to the JLSC); the cost of the JLSC making the appointments will be offset by the savings from the previous appointment procedures (savings to the Government of Jersey and States Assembly).</li> </ul> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>Appointments by the JLSC will enhance the independence of the JAAT compared to existing appointments procedures, to the benefit of users of tribunal appeals</li> </ul> <p><u>Risks</u></p> <ul style="list-style-type: none"> <li>It may be difficult to recruit and retain members of JAAT</li> </ul>
<b>Recommendation 3.7</b>	The proposed JLSC should have legal duty to "have regard to the need to encourage diversity in the range of persons available for selection for appointments" to JAAT.	Depending on the sequencing of the legislation, this would either be in the AJJL or included in the projet de loi implementing CM's proposals on "Judicial Independence and the Establishment of a Judicial and Legal Services Commission"	<p><u>Costs</u></p> <ul style="list-style-type: none"> <li>JLSC would need sufficient resources to take practical steps to encourage interest in serving (especially as lay members) from individuals from diverse backgrounds (cost to JLSC)</li> </ul> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>Diverse panels of JAAT will increase and maintain public confidence in the independence and impartiality of hearings</li> <li>Panels of JAAT composed of members with diverse life experiences will make better decisions than homogenous panels, to the benefit of users of tribunal appeals</li> <li>Placing a diversity duty on the JLSC will contribute to the realisation of an "effective island diversity strategy ... essential in addressing the challenges of an increasingly diverse community" recommended by the Report of the Independent Jersey Care Inquiry 2017.</li> </ul> <p><u>Risks</u></p> <ul style="list-style-type: none"> <li>The JLSC may lack commitment to achieving diverse appointments in JAAT appointments</li> <li>It may be difficult to attract people from diverse backgrounds to apply to serve as members of JAAT</li> </ul>
<b>Recommendation 3.8</b>	The professional eligibility criterion for appointment as Chairman and Deputy Chairman of JAAT should be 7 years relevant legal experience	Article in AJJL	<p><u>Costs</u></p> <p>One-off cost of drafting article in AJJL (cost to Government of Jersey) and scrutiny of projet de loi (cost to States Assembly)</p> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>This will simplify and remove anomalies seen in the criteria for appointments to the existing tribunals</li> <li>Will ensure that the Chairman and Deputy Chairman have sufficient legal experience to carry out their functions effectively</li> <li>Criteria for senior legal membership of JAAT will be brought into in line with those of the Chairman and Deputy Chairman of the Jersey Employment and Discrimination Tribunal</li> </ul>
<b>Recommendation 3.9</b>	The professional eligibility criterion for appointment as	Article in AJJL	<u>Costs</u>

	a "legal member" of JAAT should be 5 years relevant legal experience		<p>One-off cost of drafting article in AJJL (Government of Jersey) and scrutiny of projet de loi (States Assembly)</p> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>- This will simplify and remove anomalies seen in the criteria for appointments to the existing tribunals</li> <li>- Will ensure that legally qualified members of JAAT have sufficient experience to carry out their functions effectively</li> </ul> <p><u>Risks</u></p> <ul style="list-style-type: none"> <li>- It may be difficult to recruit and retain suitable persons for the role</li> </ul>
<b>Recommendation 3.10</b>	Appointment as a judge to JAAT should be on a permanent basis. Open-ended terms of office should be able to be brought to an end by resignation, reaching a mandatory retirement age of 72 years, or removal from office on the same basis as other judges	Article in AJJL	<p><u>Costs</u></p> <ul style="list-style-type: none"> <li>- One-off cost of drafting article in AJJL (Government of Jersey) and scrutiny of projet de loi (States Assembly)</li> <li>- A move from fixed terms to open ended appointments may affect the frequency with which appointments are made by the JLSC; if it reduces, this will yield a cost saving</li> </ul> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>- Open-ended appointments will enhance the independence and impartiality of JAAT</li> </ul> <p><u>Risks</u></p> <ul style="list-style-type: none"> <li>- A move from fixed terms to open ended appointments may have an adverse impact on achieving a more diverse tribunal judiciary if the rate of renewal of membership slows</li> </ul>
<b>Recommendation 3.11</b>	<p>The Chairman of JAAT should have a legal duty to prepare an annual report on the operation of the Tribunal and submit it to the CM</p> <p>The CM should have a legal duty to present a copy of report to the States Assembly</p>	<p>Article in AJJL</p> <p>Annual Ministerial decision to present a copy of report before the States Assembly</p>	<p><u>Costs</u></p> <ul style="list-style-type: none"> <li>- One-off cost of drafting article in AJJL (cost to Government of Jersey) and scrutiny of projet de loi (cost to States Assembly)</li> <li>- Ongoing cost of time of Chairman and staff in Judicial Greffe in preparing the annual report (cost to the Judicial Greffe)</li> </ul> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>- Annual report will provide transparency about the work of JAAT</li> </ul> <p><u>Risks</u></p> <ul style="list-style-type: none"> <li>- States Members may not regard scrutiny of JAAT Chairman's annual report as a political priority, diminishing its usefulness as a means of accountability</li> <li>- The JAAT Chairman's report may attract little attention from the news media, civil society organisations or the general public, diminishing its usefulness as a means of accountability</li> </ul>
<b>Recommendation 3.12</b>	The Chairman of JAAT and the Judicial Greffe should have a legal duty to make arrangements for the training of all JAAT members	Article in AJJL	<p><u>Costs</u></p> <ul style="list-style-type: none"> <li>- One-off cost of drafting article in AJJL (Government of Jersey) and scrutiny of projet de loi (States Assembly)</li> <li>- Ongoing cost of fees for external trainers; as well as training in general aspects of tribunal work, members focusing on particular areas (e.g. mental health) will require specialist training (cost to the Judicial Greffe)</li> </ul>

- Ongoing cost of daily sitting fee to be paid to fee-paid tribunal members attending training events (cost to the Judicial Greffe)

#### Benefits

- Will address unmet need expressed by current tribunal members for training opportunities
- Will improve the efficiency, fairness and quality of judgments made by JAAT by having better trained members

#### **Recommendation 3.13**

Create a legal duty on the Superior Number of the Royal Court, with the advice and assistance of a Rules Committee, to make JAAT Rules to regulate the conduct of appeals

Article in AJJL conferring rule-making power on Royal Court

Royal Court will adopt rules (and revise from time to time as needs be)

#### Costs

- One-off cost of drafting article in AJJL (cost to Government of Jersey) and scrutiny of projet de loi (cost to States Assembly)
- One-off cost of drafting the JAAT Rules and consulting on them (cost to Judicial Greffe); we envisage that a "JAAT Rules Committee" would be established, including an external adviser with experience of developing tribunal rules in another jurisdiction
- Ongoing cost of reviewing and revising JAAT Rules as needs be (cost to Judicial Greffe/Royal Court); this will be off-set by the cost savings of no longer having to revise several sets of procedural rules currently applicable to different tribunals

#### Benefits

- Some current tribunals do not have any or sufficiently detailed rules of procedure; the JAAT Rules will ensure there is procedural guidance for all administrative appeals
- Simplification of rules applicable to tribunal hearings will assist appellants (especially those without legal advice and representation) to use the appeal process
- A single set of rules will simplify the law and remove unjustified anomalies in current rules for different tribunals (though procedural differences in different types of appeal can be justified within a common framework)
- Moving responsibility for making rules from the departments against which appeals are made (Government of Jersey) to a judiciary-led body (a Rules Committee/Royal Court) will lead to better adherence to the constitutional principles of separation of powers and judicial independence.
- Ultimately, users of the appeal process will benefit from a better coordinated and more effective tribunal appeals system

#### Risks

- The JAAT Rules may be insufficiently focused on the needs of tribunal users, especially those who do not have access to legal advice and representation
- Individual appellants without legal advice and representation may find the JAAT Rules complex and confusing

#### **Recommendation 3.14 on content and style of the JAAT Rules**

The JAAT Rules should be designed and written with appellants' needs in mind and expressed in user-friendly style

Detail to be developed by Rules Committee having regard to Jersey Law Commission proposals

#### Costs

- One-off cost of providing resources to the Rules Committee to develop the rule (cost to the Judicial Greffe)

#### Benefits

- Will help accessibility of tribunal system



- Ultimately, users of the appeal process will benefit from a better coordinated and more effective tribunal appeals system

<b>Recommendation 3.14 on content and style of the JAAT Rules (continued)</b>	<p>The JAAT Rules should include provision for determining the composition of panels to hear different types of appeals;</p> <p>this should include provision that the Chairman of JAAT, the Deputy Chairman or another legally qualified member should preside over any panel</p>	Detail to be developed by Rules Committee having regard to Jersey Law Commission proposals	<p><u>Costs</u></p> <ul style="list-style-type: none"> <li>– One-off cost of providing resources to the Rules Committee to develop the rule (cost to the Judicial Greffe)</li> <li>– Ongoing cost – as an aspect of Recommendation 3.1, the overall membership of JAAT will need to be sufficient in number to provide the range of expertise from which panels may be drawn. It is possible, however, that this number will be less than the overall number of members serving the existing tribunals.</li> </ul> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>– This provision in the JAAT Rules will enable panel members to be assigned to cases in light of their expertise and training to ensure appropriate composition of panels</li> <li>– An express requirement that the presiding member of any panel is legally qualified will ensure better adherence to the constitutional principle of the rule of law</li> <li>– Ultimately, users of the appeal process will benefit from a better coordinated and more effective tribunal appeals system</li> </ul> <p><u>Risks</u></p> <ul style="list-style-type: none"> <li>– If the Rules are not sufficiently transparent, some appellants may perceive the panel hearing their appeals as “fixed”</li> </ul>
<b>Recommendation 3.14 on content and style of the JAAT Rules (continued)</b>	<p>The JAAT Rules should include an “overriding objective” of enabling JAAT to deal with cases fairly and justly</p>	Detail to be developed by Rules Committee having regard to Jersey Law Commission proposals	<p><u>Costs</u></p> <ul style="list-style-type: none"> <li>– One-off cost of providing resources to the Rules Committee to develop the rule (cost to the Judicial Greffe)</li> </ul> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>– The use of an “overriding objective” in procedural rules is well-established; in relation to the operation of the JAAT it will assist as a point of reference in the development of the JAAT Rules and in their application by panels in particular cases</li> <li>– Ultimately, users of the appeal process will benefit from a better coordinated and more effective tribunal appeals system</li> </ul>
<b>Recommendation 3.14 on content and style of the JAAT Rules (continued)</b>	<p>The JAAT Rules should include a power for appeals to be transferred between JAAT and the Royal Court and vice versa</p>	Detail to be developed by Rules Committee having regard to Jersey Law Commission proposals	<p><u>Costs</u></p> <ul style="list-style-type: none"> <li>– One-off cost of providing resources to the Rules Committee to develop the rule (cost to the Judicial Greffe)</li> </ul> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>– This will facilitate flexibility in hearing appeals, to ensure that each appeal can be heard by the most appropriate judicial body</li> <li>– Ultimately, users of the appeal process will benefit from a better coordinated and more effective tribunal appeals system</li> </ul>
<b>Recommendation 3.14 on content and style of the</b>	<p>The JAAT Rules should include power for the Chairman of JAAT to regulate the publication of</p>	Detail to be developed by Rules Committee having regard to Jersey	<p><u>Costs</u></p>

<b>JAAT Rules (continued)</b>	judgments and other documents relating to appeals	Law Commission proposals	<ul style="list-style-type: none"> <li>– One-off cost of providing resources to the Rules Committee to develop the rule (cost to the Judicial Greffe)</li> <li>– The ongoing cost will depend on the framework adopted by the Rules Committee. If this involves redacting private information from JAAC judgments or preparing summaries of cases, this will require resources in the Judicial Greffe</li> </ul>
			<p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>– More systematic publication of tribunal judgments, or summaries of judgments, will increase transparency and open justice</li> <li>– Better dissemination of judgments will improve the knowledge of all tribunal members of decisions taken by panels on which they do not sit</li> <li>– Appellants' advisers and representatives will have access to previous tribunal judgments as an aid to preparing their cases</li> <li>– A publication scheme will assist in ensuring that JAAT satisfies the requirements of Article 6 of the European Convention of Human Rights (incorporated into island law by the Human Rights (Jersey) Law 2000) on fair trials</li> <li>– Ultimately, users of the appeal process will benefit from a better coordinated and more effective tribunal appeals system</li> </ul>
<b>Recommendation 3.14 on content and style of the JAAT Rules (continued)</b>	The JAAT Rules should state that a party may appoint a legally qualified or lay representative	Detail to be developed by Rules Committee having regard to Jersey Law Commission proposals	<p><u>Costs</u></p> <ul style="list-style-type: none"> <li>– One-off cost of providing resources to the JATT Rules Committee to develop the rule (cost to the Judicial Greffe)</li> </ul> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>– Will provide clarity on the issue</li> <li>– Ultimately, users of the appeal process will benefit from a better coordinated and more effective tribunal appeals system</li> </ul>
<b>Recommendation 3.15</b>	The Chairman/Deputy Chairman of JAAT should have power to order that an appellant receives legal advice and representation paid for by public funds where this is necessary to ensure a fair hearing	Article in AJJL CM to make resources available via the Judicial Greffe	<p><u>Costs</u></p> <ul style="list-style-type: none"> <li>– One-off cost of drafting article in AJJL (cost to Government of Jersey) and scrutinising it during the legislative process (cost to States Assembly)</li> <li>– Ongoing cost in a small number of cases each year of providing legal advice and representation to an appellant by a member of the Jersey Bar paid for from public funds (cost to the Judicial Greffe)</li> </ul> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>– JAAT hearings will comply with requirements of Article 6 of the European Convention of Human Rights (incorporated into island law by the Human Rights (Jersey) Law 2000) on fair trials</li> <li>– Ultimately, users of the appeal process will benefit from a better coordinated and more effective tribunal appeals system</li> </ul>
<b>Recommendation 3.16</b>	There should be a right of appeal on a question of law from JAAT to the Royal Court	Article in AJJL	<p><u>Costs</u></p> <ul style="list-style-type: none"> <li>– One-off cost of drafting article in AJJL (cost to Government of Jersey) and scrutinising it during the legislative process (cost to States Assembly)</li> <li>– No significant additional cost is identified as such a right of appeal already exists from most of the existing tribunals</li> </ul>

#### Benefits

- Will ensure senior-level judicial supervision of the legality of decisions made by JAAT

## Chapter 4: Appeals and reviews determined by Connétables and Ministers

	Recommendation	Method of implementation	Costs, benefits, risks
<b>Recommendation 4.1</b>	JAAT should hear appeals from property owners about Connétables' administrative decisions relating to wedding and civil partnership venues instead of the Minister for Home Affairs	Amendment and Civil Status (Approved Premises)(Jersey) Order 2002 and Civil Partnership (Approved Premises)(Jersey) Order 2012	<u>Costs</u> <ul style="list-style-type: none"><li>- One-off costs of drafting amendment to Order (cost to Government of Jersey)</li><li>- Ongoing occasional costs to JAAT of hearing appeals (cost to Judicial Greffe) but off-set by saving of costs to Connétables</li></ul> <u>Benefits</u> <ul style="list-style-type: none"><li>- Appellants will have more specialist, expert and structured adjudication by JAAT than can typically be provided by Connétables</li><li>- Simplification of administrative appeals system will help people better understand their rights of appeal</li><li>- Better adherence to the constitutional principles of the rule of law and separation of powers by ensuring that disputes are adjudicated on by an independent and impartial judicial body</li></ul> <u>Risks</u> <p>None have been identified</p>
<b>Recommendation 4.2</b>	JAAT should hear appeals relating to decisions of Agent of the Impôt instead of the Minister for Treasury and Resources	Amend Article 68 of the Customs and Excise (Jersey) Law 1999  This can be done in the AJJL	<u>Costs</u> <ul style="list-style-type: none"><li>- One-off cost of drafting article in AJJL (cost to Government of Jersey) and scrutinising it during the legislative process (cost to States Assembly)</li><li>- Ongoing occasional costs to JAAT of hearing appeals (cost to Judicial Greffe) but off-set by saving of costs to Minister's department (cost savings to Government of Jersey)</li></ul> <u>Benefits</u> <ul style="list-style-type: none"><li>- Appellants will have more specialist, expert and structured adjudication by JAAT than can typically be provided by the Minister and officials</li><li>- Simplification of administrative appeals system will help people better understand their rights of appeal</li><li>- Better adherence to the constitutional principles of the rule of law and separation of powers by ensuring that disputes are adjudicated on by an independent and impartial judicial body</li></ul>
<b>Recommendation 4.3</b>	JAAT should hear appeals relating to assessment of children's special education needs instead of the Minister for Education	Amend Article 31 of the Education (Jersey) Law 1999  This can be done in the AJJL	<u>Costs</u> <ul style="list-style-type: none"><li>- One-off cost of drafting article in AJJL (cost to Government of Jersey) and scrutinising it during the legislative process (cost to States Assembly)</li><li>- Ongoing occasional costs to JAAT of hearing appeals (cost to Judicial Greffe) but off-set by saving of costs to Minister's department (cost saving to Government of Jersey)</li><li>- The current tribunal system does not deal with education matters whereas it is proposed that JAAT will; specialist training will need to be provided to</li></ul>

			<p>JAAT members available to sit on panels hearing SEN appeals (cost to Judicial Greffe)</p> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>- Appellants will have more specialist, expert and structured adjudication by JAAT than can typically be provided by the Minister and officials</li> <li>- Simplification of administrative appeals system will help people better understand their rights of appeal</li> <li>- Better adherence to the constitutional principles of the rule of law and separation of powers by ensuring that disputes are adjudicated on by an independent and impartial judicial body</li> </ul>
<b>Recommendation 4.4</b>	JAAT should hear appeals about decisions of the Inspector under the Motor Vehicle Registration (Jersey) Law 1993	<p>Amend Article 8 of the Motor Vehicle Registration (Jersey) Law 1993</p> <p>This can be done in the AJJL</p>	<p><u>Costs</u></p> <ul style="list-style-type: none"> <li>- One-off cost of drafting article in AJJL (cost to Government of Jersey) and scrutinising it during the legislative process (cost to States Assembly)</li> <li>- Ongoing occasional costs to JAAT of hearing appeals (cost to Judicial Greffe) but off-set by saving of costs to Minister's department (savings to Government of Jersey)</li> </ul> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>- Appellants will have more specialist, expert and structured adjudication by JAAT than can typically be provided by the Minister and officials</li> <li>- Simplification of administrative appeals system will help people better understand their rights of appeal</li> <li>- Better adherence to the constitutional principles of the rule of law and separation of powers by ensuring that disputes are adjudicated on by an independent and impartial judicial body</li> </ul>
<b>Recommendation 4.5</b>	JAAT should hear appeals about disciplinary matters at HM Prison La Moye instead of the Minister for Home Affairs	Amend Prison (Jersey) Rules 2007	<p><u>Costs</u></p> <ul style="list-style-type: none"> <li>- One-off cost of redrafting rule in Prison (Jersey) Rules 2007</li> <li>- Ongoing costs to JAAT of hearing appeals (cost to Judicial Greffe) but off-set by savings of costs to Minister's department (Government of Jersey)</li> </ul> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>- Better adherence to the constitutional principles of the rule of law and separation of powers by ensuring that disputes are adjudicated on by an independent and impartial judicial body</li> <li>- Appellants will have more specialist, expert and structured adjudication by JAAT than can typically be provided by the Minister and officials</li> <li>- Simplification of administrative appeals system will help people better understand their rights of appeal</li> </ul>

## Chapter 5: Ending the role of the States of Jersey Complaints Panel

	Recommendation	Method	Costs, benefits, risks
<b>Recommendation 5.1</b>	The States of Jersey Complaints Panel should be replaced by a Jersey Public Services Ombudsman	Repeal of the Administrative Decisions (Review)(Jersey) Law 1982 by article in AJJL or in separate legislation creating the Jersey	<p><u>Costs</u></p> <ul style="list-style-type: none"> <li>- One-off cost of drafting article in AJJL (cost to Government of Jersey) and scrutinising it during the legislative process (cost to States Assembly)</li> </ul>

	Public Services Ombudsman	<ul style="list-style-type: none"> <li>Recommendation 6.1 envisages replacing the States of Jersey Complaints Panel with a Jersey Public Services Ombudsman.</li> </ul> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>Replacing the States of Jersey Complaints Panel would enable the creation of a Jersey Public Services Ombudsman.</li> </ul>
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Note: Chapter 5 contains alternative recommendations for improving the Complaints Panel if our principal recommendation is rejected by the CM; these are also listed in Annex B.

## Chapter 6: Creating a Public Services Ombudsman for Jersey

	Recommendation	Method of implementation	Costs, benefits, risks
<b>Recommendation 6.1</b>	The Government of Jersey should make an "in principle" decision to support next steps in the creation of a Jersey Public Services Ombudsman (JPSO)	Ministerial decision  Creation of the JPSO would require legislation, either as part of the AJJL or in separate legislation	<p><u>Costs</u></p> <ul style="list-style-type: none"> <li>One-off cost of drafting legislation to create the JPSO (cost to Government of Jersey) and scrutinising it during the legislative process (cost to States Assembly)</li> <li>Ongoing costs of operating the office of the JPSO. This will be off-set to some extent by savings from the abolition of the States of Jersey Complaints Panel. Clearly, however, the costs of running the JPSO's office will be greater than the costs of running the States of Jersey Complaints Panel</li> </ul> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>The JPSO will provide a more accessible and effective redress service than is provided by the States of Jersey Complaints Panel</li> <li>The JPSO will contribute to systemic improvements in the quality of administrative decision-making, redress of grievances, and quality of public administration</li> <li>Creation of the PSOJ will help complete the package of recommendations made by the Clothier report in 2000</li> </ul> <p><u>Risks</u></p> <ul style="list-style-type: none"> <li>The creation of the JPSO may not lead to significantly more people using its services compared to the States of Jersey Complaints Panel</li> <li>The JPSO may encounter resistance within the Government of Jersey and other SPBs to implementing recommendations in particular cases and on broader systematic issues</li> </ul>
<b>Recommendation 6.2</b>	The Government of Jersey should request the Jersey Law Commission to develop institutional design options for the JPSO	Ministerial decision	<p><u>Costs</u></p> <p>This work could be carried out within the existing resources allocated to the Jersey Law Commission; we estimate the cost to be approximately £10,000 (cost to the Jersey Law Commission)</p> <p><u>Benefits</u></p> <p>Developing more detailed proposals will enable Ministers, officials and States Members to evaluate different options for the PSOJ, drawing on published research, analysis of the local context, and lesson learning from other ombudsman systems</p> <p><u>Risks</u></p>

The detailed proposals for a JPSO may not receive support from the Government of Jersey or the States Assembly

## Chapter 7: The role of the Royal Court in Jersey's administrative redress system

	Recommendation	Method of implementation	Costs, benefits, risks
<b>Recommendation 7.1</b>	Amend 54 Laws that currently provide a right of appeal from an administrative decision to the Royal Court to provide instead for the appeal to be heard by the JAAT	Amendment of Laws.  This can be done in the proposed AJJL	
<b>(unnumbered recommendation because no change in law proposed)</b>	Retain approximately 19 rights of appeal from administrative decision-making to the Royal Court	No action needed	No change is proposed
<b>Recommendation 7.2</b>	Amend the Royal Court Rules to enable the Royal Court to transfer the hearing of a case from the Royal Court to JAAT, and vice versa  (See also Recommendation 3.16, which proposes a counterpart of this provision in the JAAT Rules)	Amendment of the Royal Court Rules by the Superior Number of the Royal Court under powers from Article 11 of the Royal Court (Jersey) Law 1948	<p><u>Costs</u></p> <ul style="list-style-type: none"> <li>One-off costs of drafting amendment to Royal Court Rules (cost to Judicial Greffe); a similar provision will be contained in the new JAAT Rules to enable transfer from JAAT to the Royal Court</li> </ul> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>This will facilitate flexibility in hearing particular cases, to ensure that each appeal can be heard by the most appropriate judicial body</li> <li>Ultimately, users of the appeal process will benefit from a better coordinated and more effective tribunal appeals system</li> </ul>
<b>Recommendation 7.3</b>	There should be a standard time limit for making administrative appeals (unless there is a strong public interest in specifying a different limit in a law). The standard time limit should be 28 days from the appellant receiving notice of the decision appealed against.	Amendment of Laws.  This can be done in the proposed AJJL	<p><u>Costs</u></p> <ul style="list-style-type: none"> <li>One-off cost of drafting article in AJJL (cost to Government of Jersey) and scrutiny of projet de loi (cost to States Assembly)</li> </ul> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>Simplification of administrative appeals will help people better understand the system and their rights of appeal</li> <li>Reduce unfairness to individuals of unjustified differences in time limits for appealing against different administrative decisions</li> </ul>
<b>Recommendation 7.4</b>	A Royal Court Rules Review Group should consider reviewing Part 16 of the Royal Court Rules (Applications for Judicial Review in Civil Proceedings)	Decision of the Bailiff	<p><u>Costs</u></p> <ul style="list-style-type: none"> <li>One-off costs of work by the Royal Court Rules Review Group in reviewing operation of Part 16 in light of experience in Jersey and developments in other jurisdictions on which Part 16 was originally modelled (cost to the Judicial Greffe)</li> </ul>



#### Benefits

- Opportunity to identify improvements in the Part 16 procedure

## Chapter 8: Using Alternative Dispute Resolution (ADR)

	Recommendation	Method of implementation	Costs, benefits, risks
<b>Recommendation 8.1</b>	Further research should be carried out to develop proposals for mediation and other forms of ADR related to disagreements about administrative decision-making in the Island	Detail to be developed by a Rules Committee having regard to Jersey Law Commission proposals	<p><u>Costs</u></p> <ul style="list-style-type: none"><li>- One-off cost of providing resources to a Rules Committee to develop the rule (cost to the Judicial Greffe)</li></ul> <p><u>Benefits</u></p> <ul style="list-style-type: none"><li>- The rule will provide flexibility to JAAT to dispose of cases other than by a formal hearing, where this is appropriate and the parties agree</li><li>- Ultimately, users of the appeal process will benefit from a better coordinated and more effective administrative redress appeals system</li></ul>

## ANNEX B

# LIST OF ALTERNATIVE RECOMMENDATIONS RELATING TO THE STATES OF JERSEY COMPLAINTS PANEL

Annex B: LIST OF Alternative Recommendations on the future of the States of Jersey Complaints Panel (Chapter 5)

In Chapters 5 and 6, we set out our principal recommendations for improving the external complaint handling provision in Jersey. Our primary recommendation is that the States of Jersey Complaints Panel (Chapter 5) should be replaced by a Jersey Public Services Ombudsman (Chapter 6). Should our primary recommendation not be accepted by the Government of Jersey or the States Assembly, we have developed a set of alternative proposals designed to improve the functioning of the States of Jersey Complaints Panel: these are explained and analysed in Chapter 5.

ADJL	Administrative Decisions (Jersey) Law 1982
AJL	The proposed Administrative Justice (Jersey) Law, that would implement many of the proposals contained in this report
CM	Chief Minister
Panel	States of Jersey Complaints Panel
LPBs	Listed Public Bodies. We propose that the public authorities to which the AJL applies are listed in a Schedule.

	Recommendation	Method of implementation	Costs, benefits, risks
<b>Alternative recommendation 5.2</b>	The States Greffe should have a legal duty to provide a programme of training to members of the Panel	Amendment to ADJL	<p><u>Costs</u></p> <ul style="list-style-type: none"> <li>One-off cost of drafting amendment to ADJL (cost to Government of Jersey) and scrutinising it during the legislative process (cost to States Assembly)</li> <li>Ongoing resources sufficient to provide induction to new members and continuing professional development to all Panel members to address currently unmet training needs (cost to States Assembly)</li> </ul> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>Panel members will be better equipped to fulfil their role</li> <li>Ultimately, users of the complaints process (complainants and public bodies) will benefit from improved quality of complaint resolution</li> </ul>
<b>Alternative recommendation 5.3</b>	The States Greffe should invest resources in developing a website and other material to explain and publicise	Decision of the States Assembly	<p><u>Costs</u></p> <ul style="list-style-type: none"> <li>Ongoing resources sufficient to provide better information to the public about how the Panel can help with complaints about provision of public services and</li> </ul>

	how the Panel can help aggrieved people		<p>administrative decision-making (cost to States Assembly)</p> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>Members of the public will gain greater awareness of the existence and role of the Panel</li> <li>More people with complaints will use the Panel</li> </ul> <p><u>Risks</u></p> <ul style="list-style-type: none"> <li>Better public information may not lead to significantly better public awareness of the Panel</li> <li>Better public information may not generate significantly greater demand for use of the Panel as a form of redress from people with complaints</li> </ul>
<b>Alternative recommendation 5.4</b>	The remit of the Panel should be widened beyond Ministers and States of Jersey Departments to cover all SPBs	Amendment to ADJL	<p><u>Costs</u></p> <ul style="list-style-type: none"> <li>One-off cost of drafting amendment to ADJL (cost to Government of Jersey) and scrutinising it during the legislative process (cost to States Assembly)</li> <li>The States Greffe and Chairman of the Panel will need to develop and deliver induction and training to key personnel in SPBs not currently within the Panel's remit about the role of the Panel and the implications of being brought within its remit (cost to States Assembly)</li> </ul> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>Will create a better match between (a) the Panel's remit and (b) how public services are delivered and the bodies making administrative decisions</li> </ul>
<b>Alternative recommendation 5.5</b>	The grounds on which people can complain to the Panel should be reformulated	Amendment to ADJL	<p><u>Costs</u></p> <ul style="list-style-type: none"> <li>One-off cost of drafting amendment to ADJL (cost to Government of Jersey) and scrutinising it during the legislative process (cost to States Assembly)</li> </ul> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>The Panel's work will be better aligned to the techniques, skills, and membership of a Panel consisting mainly of non-legally qualified members</li> <li>Ultimately, users of the complaints process (complainants and public bodies) will benefit from improved quality of complaint resolution</li> </ul>
<b>Alternative recommendation 5.6</b>	<p>The Panel should not accept complaints where the aggrieved person has or had</p> <ol style="list-style-type: none"> <li>a right of appeal to JAAT or</li> </ol>	Amendment to ADJL	<p><u>Costs</u></p> <ul style="list-style-type: none"> <li>One-off cost of drafting amendment to ADJL (cost to Government of Jersey) and scrutinising it during the legislative process (cost to States Assembly)</li> </ul> <p><u>Benefits</u></p>

	<ol style="list-style-type: none"> <li>2. a right of appeal to the Royal Court or</li> <li>3. it would be reasonable for the person to challenge the legality of the administrative decision by making an application for judicial review to the Royal Court</li> </ol>		<ul style="list-style-type: none"> <li>- The Panel's work will be better aligned to the techniques, skills, and membership of a Panel consisting mainly of non-legally qualified members</li> <li>- Ultimately, users of the complaints process (complainants and public bodies) will benefit from improved quality of complaint resolution</li> </ul>
<b>Alternative recommendation 5.7</b>	All members of the Panel (not only the Chairman and Deputy Chairman) should have power to attempt informal resolution of complaints	Amendment to ADJL	<p><u>Costs</u></p> <ul style="list-style-type: none"> <li>- One-off cost of drafting amendment to ADJL (cost to Government of Jersey) and scrutinising it during the legislative process (cost to States Assembly)</li> <li>- Ongoing cost of training on informal resolution for all Panel members (cost to States Assembly)</li> </ul> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>- The Panel's capacity to offer informal resolution of complaints will be increased</li> <li>- The reform will improve efficiency and effectiveness of the Panel (e.g. preventing the Chairman or Deputy Chairman from presiding at a hearing after he has attempted informal resolution, which has failed, because this would create a conflict)</li> </ul> <p><u>Risks</u></p> <ul style="list-style-type: none"> <li>- Too few people may continue to use the Panel to justify a full training programme for all Panel members on informal resolution</li> </ul>
<b>Alternative recommendation 5.8</b>	The Chief Minister should prepare a report reviewing responses to Panel recommendations since October 2011 and making proposals for the Government of Jersey's future working relationship with the Panel	Ministerial decision	<p><u>Costs</u></p> <ul style="list-style-type: none"> <li>- One-off cost of Ministers', officials' and Law Officers' time in conducting the review (cost to the Government of Jersey)</li> </ul> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>- Review and report will provide greater transparency about Government of Jersey thinking about its past and future relationship with the Panel</li> <li>- Review and report will contribute to evidence-base for policy-making about the future of the Panel.</li> </ul>

## ANNEX C

### LIST OF PROPOSALS MADE IN CONSULTATION REPORT NOT IN FINAL RECOMMENDATIONS

Section of Consultation Report	Interim proposal	Reasons for not pursuing the proposal
Overarching issues		
<b>Consultation Report section 1.10</b>	The Chief Minister (CM) should establish a standing committee of experts ("the Jersey Administrative Justice Forum") to advise on the development of the administrative redress system	<ul style="list-style-type: none"> <li>Concerns expressed during consultation about the cost of running the Forum</li> <li>Our vision for the Jersey Public Services Ombudsman (JPSO) has developed to include a more extensive role across the administrative justice system, which will provide opportunities for the Government of Jersey and other SPBs to benefit from expert and external strategic advice</li> <li>An expert committee may risk marginalising States Members and the States Assembly in monitoring and developing the administrative justice system; a better model would be one in which the States Assembly (e.g. through a committee or scrutiny panel) calls in specialist advisers to support their work as required</li> </ul>
Tribunals		
<b>Consultation Report section 2.2.3</b>	The term "tribunal" in Jersey legislation should be reserved for judicial bodies adjudicating on appeals and should not be used for bodies exercising advisory or executive functions	<ul style="list-style-type: none"> <li>There is no pressing legal need to amend the titles of the three bodies that are misnamed (the Health Services Disciplinary Tribunal, the Misuse of Drugs Tribunal, and the Marine Accident Tribunal)</li> <li>In future, we do not foresee the need to create new judicial bodies adjudicating on administrative appeals as jurisdiction will be conferred on the Jersey Administrative Appeal Tribunal (JAAT)</li> </ul>
<b>Consultation Report section 2.6 2.9 2.11</b>	The Consultation Report made detailed recommendations on arrangements to reform how JAAT members should be appointed and, if needs be, disciplined and removed from office	<ul style="list-style-type: none"> <li>Since publication of the Consultation Report, the Chief Minister has published proposals to create a Judicial and Legal Services Commission (JLSC) with a function of appointing members of the judiciary in Jersey</li> <li>The law would be simpler and clearer if members of JAAT are appointed by the JLSC rather than through the bespoke arrangements proposed in our Consultation Report</li> </ul>
<b>Consultation Report section 2.12</b>	The Consultation Report made recommendations relating to remuneration of members of JAAT	<ul style="list-style-type: none"> <li>Although some consultation responses raised concerns about remuneration arrangements, we take the view that this work can be taken forward by the Judicial Greffe as an administrative action without the need for a specific recommendation from the Jersey Law Commission</li> </ul>

<b>Consultation Report section 2.15</b>	The administration of JAAT should be based at Trinity House (in Bath Street, St Helier), where hearings should also be held except for mental health appeals which should continue to be heard at St Saviour's Hospital or similar facility. New signage should be installed to make it plain that Trinity House is the home of JAAT as well as the Employment and Discrimination Tribunal	<ul style="list-style-type: none"> <li>- This is a matter of practical administration and resourcing rather than a law reform question</li> <li>- We note with approval that since publication of our Consultation Report in April 2016 better signage has been installed at street level, making it clearer that Trinity House is the home of the Tribunal Service and a number of the current administrative appeal tribunals.</li> </ul>
States of Jersey Complaints Panel		
<b>Note: the primary recommendation in the Consultation Report was that the Panel should be replaced by a Jersey Public Services Ombudsman. The following interim recommendations were made on the alternative basis that the Government of Jersey or the States Assembly did not support the proposal for an ombudsman. See Annex B for alternative recommendations that are carried forward to this Topic Report</b>		
<b>Consultation Report section 4.4</b>	The States Assembly, in appointing members of the States of Jersey Complaints Panel (the Panel) should have a legal obligation "to have regard to the desirability of Panel members, between them, being broadly reflective of Jersey society"	<ul style="list-style-type: none"> <li>- On reflection, we regard this to be an aspect of a much broader issue of diversity in public appointments and membership of public bodies</li> <li>- It will be for the Chief Minister to take steps to put in place an "effective island diversity strategy ... essential in addressing the challenges of an increasingly diverse community" recommended by the Report of the Independent Jersey Care Inquiry 2017.</li> </ul>
<b>Consultation Report section 4.8</b>	The Greffier to the States should cease to be the point of entry for complaints; the role should be assumed by the Judicial Greffe	<ul style="list-style-type: none"> <li>- In its response to consultation, the Panel stated that there would be no benefit in moving the initial point of contact for potential complainants, and administrative support for the work of the Panel, from the States Greffe to the Judicial Greffe.</li> <li>- On reflection, we accept that as part of an evolutionary approach to developing the work of the Panel, there are practical benefits to retaining the role of the States Greffe; we are mindful that the resources of the Judicial Greffe may be stretched if implementing our proposals on creation of JAAT</li> </ul>
<b>Consultation Report section 4.10</b>	The Panel should cease to hold public hearings and focus on using investigatory techniques to find facts and develop its recommendations	<ul style="list-style-type: none"> <li>- In its response to consultation, the Panel accepted that there may be cases where an investigatory approach is more appropriate than a formal public hearing and pointed out that Article 7 of the ADJL provides a broad power to "enquire into any complaint", which could include investigation.</li> <li>- We are satisfied that under the current Law there is sufficient power for the Panel to make greater use of investigatory techniques</li> </ul>



## ANNEX D

### RESEARCH STATEMENT

This Annex contains information about: the research questions that underpinned this project; the research methods; and the contribution of the study to understanding administrative justice systems.

#### Principal Investigator and author

The PI of the research project and author of this report for the Jersey Law Commission is Andrew Le Sueur. He is Professor of Constitutional Justice at the University of Essex, UK.

#### Research aims

The project had two principal aims.

The first aim was descriptive, and sought to **answer the research question “In Jersey, what procedures and institutions are available to people who need to challenge the correctness of administrative decisions?”** In answering this question, the project makes an important contribution to the growing body of literature that provides a “map” of the administrative justice “landscape” across the British Islands. The map previously extended to England,<sup>157</sup> Wales,<sup>158</sup> Scotland<sup>159</sup> and Northern Ireland.<sup>160</sup> This mapping exercise is a necessary prelude to thinking systematically and strategically about how administrative redress systems can be improved.

The second aim was **to evaluate the procedures and institutions in order to generate policy recommendations for improving the quality of administrative redress in the Island.** This aspect of the research study applied and tested the Principal Investigator’s previous research and published outputs in this area, including: A Le Sueur, “Foundations of Justice”, chap 9 in J Jowell, D Oliver, and C O’Cinneide (eds), *The Changing Constitution* (Oxford, OUP, 2015); H Woolf, J Jowell, A Le Sueur, et al, *De Smith’s Judicial Review* (7th edn, London, Sweet & Maxwell, 2013); A Le Sueur, “Parliamentary Accountability and the Judicial System”, chap 9 in N Bamforth and P Leyland (eds), *Accountability in the Contemporary Constitution* (Oxford, OUP, 2013); and V Bondy and A Le Sueur, *Designing redress: a study about grievances against public bodies* (London, The Public Law Project, 2012).

#### Research methods

A mixed methods research design was used.

1. Analysis of Jersey legislation was carried out to identify where rights of appeal in administrative decision-making had been created. This was done through the Jersey Legal Information Board database of Laws ([www.jerseylaw.je](http://www.jerseylaw.je)). We are grateful to Lori-Ann Foley for research

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<sup>157</sup> See for example Administrative Justice and Tribunals Council, *The Developing Administrative Justice Landscape* (2009).

<sup>158</sup> See for example S Nason, *Understanding Administrative Justice in Wales* (2015).

<sup>159</sup> See for example Scottish Tribunals and Administrative Justice Advisory Committee (STAJAC), *Mapping Administrative Justice and Tribunals in Scotland* (2015).

<sup>160</sup> See for example M Anderson, A McIlroy and M McAleer, *Mapping the Administrative Justice Landscape in Northern Ireland* (2014).

assistance in relation to this part of the project. The analysis is based on a snapshot of Laws in force in the first half of 2015; some amendments have been made since then which are not reflected in the analysis.

2. A series of semi-structured research interviews were carried out, starting in 2015. Interviewees were identified using a snowball approach: we started with a small core of people we wanted to interview and asked each of them to suggest further possible interviewees. We conducted 24 individual interviews and three group interviews. The people interviewed included: a social security claimant using the social security tribunals; current and former Members of the States Assembly with experience of assisting constituents with administrative grievances; people working in advice agencies with first-hand experience of assisting aggrieved people; past and present tribunal members; past and present members of the States of Jersey Complaints Board; officials responsible for running tribunals, the Royal Court and the States of Jersey Complaints Board; and officers in States Departments. The interviews were conducted on the basis of anonymity, in accordance with the ethical framework agreed with the University of Essex.
3. A hearing of an appeal by a social security tribunal in October 2015 was observed.
4. Desk-based research was conducted to collect information about the operation of all strands of the Island's administrative justice system. In relation to most aspects of the system, there was no previously published academic literature available. Our research mainly used online material (especially the Government of Jersey and States of Jersey websites); where information was not in the public domain we corresponded with relevant organisations.
5. We had regard to the political science literature on "lesson learning from abroad". Richard Rose describes this approach as follows: "Lesson-drawing is future-oriented, drawing on current experience in other countries to improve national policy. It offers an evidence-based alternative to developing new programme. It is evidence-based, since a lesson is based on programmes that have been operating for a long time elsewhere" (Richard Rose, *Ten Steps in Learning Lessons from Abroad*, ESRC 2001; see also, for example, Edward C Page, *Future Governance and the Literature on Policy Transfer and Lesson Drawing* (ESRC, 2000). Several of the recommendations made in our report are based on experiences in England, Wales, Scotland and Northern Ireland. These were chosen as points of reference because of the similarities in the structures of Jersey's administrative system with those in the United Kingdom. In developing our proposals, we have been especially sensitive to feelings about change in Jersey that is sceptical or hostile to importing carbon-copies of UK arrangements to the Island.
6. We looked at published research about the administrative justice system in the UK. As there was little or no previous empirical research into the operation of administrative justice in Jersey, we sought where appropriate practical lessons from research findings and policy-development work in the UK, mindful of the need for consider the differences in the Jersey situation. We record our thanks to the UK Administrative Justice Institute ([www.ukaji.org](http://www.ukaji.org)) for providing resources and professional links.
7. As part of the Jersey Law Commission's process for preparing this report, we published a consultation report in April 2016 (Jersey Law Commission, *Improving Administrative Redress in Jersey: Consultation Report*, Consultation Paper No.1/2016/CP). A consultation event was held at the Institute of Law, St Helier on 21 June 2016, which was attended by 12 people including two States Members, representatives of the Law Society of Jersey, staff from the Viscount's Department, the States Greffe, the Government of Jersey, the Jersey Appointments Commission, and two members of the public. During the 3-month consultation phase of the project, we received 14 written responses and engaged with 22 individuals and organisations. The Chairman and Topic Commissioner attended a meeting of the States of Jersey Privileges and Procedures Committee on 16 August 2016 to be questioned about our interim proposals on the States of Jersey Complaints Panel).

## What does a good administrative redress system look like?

In order to develop reform proposals, we needed to have a strong sense of “what good looks like”. Our starting point was work carried by Varda Bondy and Andrew Le Sueur (funded by The Nuffield Foundation), which investigated questions relating to institutional design of administrative justice systems (see V Bondy and A Le Sueur, *Designing Redress: a study about grievances against public bodies*, The Public Law Project, 2012).<sup>161</sup> This study identified nine principles of redress design, which have been tested and applied in developing recommendations for Jersey.

Three principles relate to the constitutional context: they are premised on the idea that redressing grievances is a constitutional activity – it conditions the relationship between citizens and the state.

1. *There should be a presumption in favour of all administrative decision-making schemes making an express provision in legislation for effective pathways and remedies for addressing grievances.* Establishing the Jersey Administrative Appeals Tribunal (JAAT),<sup>162</sup> will help in future design of rights of appeal. Because Jersey lacks an administrative appeals tribunal with a broad jurisdiction, policy-makers and law draftsmen typically have three options: (a) to create a new bespoke tribunal, (b) to create a right of appeal to the Royal Court, or (c) make no express provision for a right of appeal. There are disadvantages associated with all three. The existence of JAAT will enable Laws passed by the States Assembly to use this as the default appeal route in the future.
2. *The design of grievance redress mechanisms should (i) include processes for considering compatibility with principles and rights protected by the constitution and the European Convention on Human Rights and (ii) be compatible with them.* During the mapping phase of the project, several features were identified as calling for closer analysis of their compatibility with constitutional principles and/or the ECHR. In Chapter 3, we recommend a package of reforms to the tribunal system, including better arrangements for appointing members and their terms of office, arrangements for public hearings and publications of judgments, and the availability of publicly funded legal advice and representation to appellants where this is necessary to ensure a fair trial takes place. In Chapter 4, we make recommendations about: no longer creating rights of appeal to Ministers – we propose that five appeal rights, including the newly created right of appeal for prisoners to the Minister for Home Affairs – should instead be heard by an independent and impartial tribunal (JAAT).
3. *Grievance-handlers should be held to account for their work. A design of a grievance handling system should facilitate accountability by considering the methods of accountability and the “audience”. The appropriate mix of accountability mechanisms varies according to the context in which the grievance system operates.* Our recommendations propose that the Chief Minister make an annual report on administrative justice to the States Assembly (see Chapter 2) and that the Chairman of JAAT makes an annual report (see Chapter 3). We intend that these reports will encourage the States Assembly to adopt a more strategic approach to accountability over the administrative justice system. As we note, the States Assembly has in the past preferred to focus on individual cause célèbres and there is a risk that insufficient political attention is paid to systemic issues.

Two principles are about the process of design.

4. *Where a new grievance redress system is being created, or an existing one reformed, policy-making should be informed by evidence and research.* The Jersey Law Commission’s whole project was designed to bring an evidence-based and research-focus approach to reform. As we discuss in Chapter 5, our work at consultation stage was criticised as not based on evidence or rigorously researched by members of the States of Jersey Complaints Panel (a body we

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<sup>161</sup> Available on open access at <http://repository.essex.ac.uk/7416/1/SSRN-id2154195.pdf>.

<sup>162</sup> See Chapter 3.

recommend should be abolished) and by States Members on the Privileges and Procedures Committee (which has political responsibility for the Complaints Panel). We do not accept the criticisms made of our research; but the exchanges did serve to highlight the politically contentious character of the proposals and the need to develop better shared understandings of what is meant by “evidence” and “research” in policy-making contexts such as this. We have been clear about the limits of the research conducted for this project and where, accordingly further research is needed, for example: on internal complaint handling related to health and social services (Chapter 2); on design options for a Jersey Public Services Ombudsman (Chapter 6); and on developing ADR for administrative redress (Chapter 8).

5. *There should be opportunities for grass-roots innovation.* The package of recommendations is to a large extent “top down” proposals for change. We have, however, identified where possible opportunities for innovation by those who will be responsible for running different aspects of the system. We envisage that the work by the Chief Minister in developing and implementing guidance on complaints handling to all public bodies in the Island will enable the sharing of good local practice (Chapter 2). In making recommendations about the procedural rules of JAAT, we have not sought to be overly prescriptive, recognising that these should be developed by the Chairman of JAAT and the JAAT Rules Committee (Chapter 3).

Four further principles focus on the substance of the design.

6. *The design of a grievance handling system should ensure that the costs of creating, running and using a grievance redress system provide value for money and are proportionate.* In developing our proposals, we were mindful of the need to provide the Government of Jersey and the States Assembly with assistance in understanding the costs and benefits of each recommendation. As one of the smallest law reform agencies in the world (in terms of our budget and manpower), we are not in a position to be able to provide detailed costings; we have, however, attempted where possible to identify the “heads” of costs, costs savings and benefits.
7. *There should be good “fit” between the types of grievance and the redress mechanism.* A well-designed administrative redress system should ensure that grievances are channelled to the appropriate redress body. In reviewing and redesigning a redress system, regard should be had to achieving a good ‘fit’ between the type of complaints that arise and redress mechanism. For example: disagreements about everyday facts, or how the decision-maker exercised discretion, may be best resolved by a body including lay people with broad experience of life; disputes involving disagreements over professional judgements or technical matters may be best resolved by a body that includes experts in the relevant subject-matter; disputes about important points of law are best addressed by a judicial body such as the Royal Court.
8. *It should be anticipated that if a redress mechanism is created it will be used (i) by people who have complaints that are obviously without substance and (ii) by people who may have a legitimate grievance but who are seeking to raise it using the wrong mechanism. Fair, rational and effective “filters” should be put in place.* In our alternative recommendations for the States of Jersey Complaints Panel (if it is retained contrary to our principal recommendation), we propose that the Panel should not be open to people who could reasonably be expected to use a tribunal appeal, appeal to the Royal Court, or application for judicial review to the Royal Court (Chapter 5).
9. *As well as resolving individual grievances, redress mechanisms should contribute to improvements in public service by providing opportunities for public bodies to learn lessons.* We envisage that the annual report by the Chief Minister (see Chapter 2) will be one way of disseminating lesson learning across all public bodies.

## The Jersey context

In reviewing and making reform proposals for the administrative redress system in Jersey, we have been mindful of the island’s characteristics.

One obvious characteristic is the island's relatively small size. With a population of around 100,000 there are far fewer administrative decisions than in larger systems and consequently fewer grievances. Everything operates on a much smaller scale than in the United Kingdom (the country that has been most influential in shaping Jersey's approach to public administration and administrative redress). Many reforms introduced in the UK are in response to systems coming under pressure from large volumes of grievances. This should not, however, lead too quickly to the conclusion that successful reforms in larger systems are inappropriate for Jersey (though they may need adaptations).

During research interviews for this project, several people highlighted the perception that in a small island 'everybody knows everybody'. This led some interviewees to suggest, for example, that it was right that judgments of social security tribunals were unpublished: if potential appellants knew that details of their case would be available online, they would be deterred from making an appeal. Other interviewees suggested that too much personal information had to be made public during the process of taking a case to the Complaints Panel. Another factor that some interviewees referred to was the perception that a small pool of people serve as members of tribunals and the Complaints Panel.

In a small community, civil society is relatively underdeveloped. Compared to the United Kingdom, there are few active campaign groups or expert organisations interested in access to justice and administrative redress. The island appears to have few lawyers in the private sector with expertise or interest in administrative law or human rights.

A further aspect of the Jersey context is the island's population mix. Seven percent of the population were born in Portugal/Madeira and 3 per cent in Poland. In reviewing the operation of the administrative redress system, consideration needs to be given to the level of English language skills that are needed to deal with letter writing and form filling that is normally required to seek administrative redress. Adopting a user perspective, one response could be to make it easy to have initial contact with a redress institutions (tribunals, the States of Jersey Complaints Panel, the proposed public services ombudsman, the Royal Court) by telephone or in person rather than in writing.

## **List of consultees**

We have decided to depart from the normal practice of listing the names of people and organisations who responded in writing to our consultation in 2016. Several people asked not to be listed; this, taken with the ethical framework of the research interviews that required anonymity, makes it inappropriate for us to publish an incomplete list. We extend our thanks to everybody who participated in the project.