

JERSEY LAW COMMISSION



CONSULTATION PAPER

IMPROVING ADMINISTRATIVE REDRESS IN JERSEY

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SUMMARY

This is a consultation report asking for views about the Jersey Law Commission's interim recommendations for improving how grievances about administrative decisions are handled. The closing date for responses is 29 July 2016 (see Part 1).

We suggest that the Chief Minister's Office should coordinate work across the Government of Jersey, Parishes, and other public bodies to improve the quality and consistency of **internal complaints** procedures (discussed in Part 1).

We propose a **major restructuring of tribunals** in Jersey, merging most of the existing tribunals into a new judicial body to be called the Jersey Administrative Appeals Tribunal (JAAT). Most rights of appeal to Ministers and many rights of appeal that currently lie to the Royal Court should be transferred to JAAT. See Part 2.

Ministers should not generally have responsibility for hearing appeals against decisions taken by other public bodies; we make interim recommendations about transferring review and appeal powers away from Ministers. See Part 3.

Our interim view is that the **States of Jersey Complaints Panel** has outlived its usefulness and should be abolished. If the Panel is to be retained, it requires far reaching reforms to its structures and processes. See Part 4.

We are inclined to favour the introduction of a **public services ombudsman** but we recognise that further detailed research work is required before a final assessment of the costs and benefits can be made. See Part 5.

Where **appeals to the Royal Court** are retained, the time limits and grounds of appeal should be amended to remove anomalies. See Part 6.

We suggest ways in which **alternative dispute resolution** (ADR) could be used for administrative grievances. See Part 7.

1. INTRODUCTION

1.1. How to respond to this consultation

This consultation paper examines the law, practice and institutions relating to administrative redress in Jersey. It is published as part of the Jersey Law Commission's work in developing and assessing a package of recommendations to the Chief Minister. It contains 'interim' recommendations (these may alter in the light of responses), 'provisional' findings (which may change on the basis of further evidence) and consultation questions.

We are keen to hear from a wide range of people, including individuals with experience of using tribunals and the States of Jersey Complaints Panel, members of those organisations, members of the Royal Court, members of the States Assembly, Ministers, officials who make administrative decisions, charities and other organisations whose role involves helping people with grievances. We also welcome comments from experts outside the island.

You do not have to respond to all the interim recommendations and consultation questions. There is a consultation response form at the end of this report (but we are also happy to receive comments by email or letter).

The consultation period runs from 29 April 2016 to 29 July 2016. Please send responses in writing

- **by email to: jerseylawcommission@gmail.com or**
- **by post to: Administrative Redress Consultation, Jersey Law Commission, c/o Institute of Law, Law House, 1 Seale Street, St Helier, Jersey JE2 3QG.**

When responding, please include your name and (if relevant) any organisation on whose behalf you are responding. In the Topic Report, which will set out our final findings and recommendations to the Chief Minister, we may

- summarise views expressed during the consultation
- list the names of people and organisations who respond to this consultation paper.

If you do not want your views to be summarised or your name listed at the end of the Topic Report, please say so in your response.

After we publish our Topic Report, it will be for the Government of Jersey and the States Assembly to decide whether to accept the recommendations and, if so, how to implement them.

1.2. Administrative decision-making

From cradle to grave, individuals, organisations and businesses are subject to administrative decisions taken by public bodies in Jersey. These include: welfare benefits and pensions; health, including mental health; education, including special education needs provision and discretionary grants; housing and the right to work; regulation of fireworks, explosives and firearms; licensing of various business activities, including financial services; regulation of certain professions; control of imports and exports; health and safety at work; discipline at the Prison; taxation; highways; and planning.

In Jersey, administrative decisions are taken by different types of public authorities.

- Many Laws confer decision-making powers on a Minister (all of whom are elected members of the States Assembly). The Government of Jersey¹ is organised as 12 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; Home Affairs; Environment; and Infrastructure (formally Transport and Technical Services).
- Laws may directly empower non-elected officials 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 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 vast majority of administrative decisions made are fair, reasonable and in accordance with the law. Occasionally, however, something goes wrong and a person feels aggrieved.

1.3. Internal complaints procedures

A good system of government must provide ways of looking into grievances against public bodies and, when things have gone wrong, ensuring that they are put right. Of course, people who complain are not always right. A small minority of complainants become aggressive or obsessive in pursuit of grievances. But it is fair to work from the assumption that a person who expresses dissatisfaction with an administrative decision or provision of a public service should have their concerns investigated and addressed.

The starting point for an aggrieved person should normally be to ask the decision-making organisation to check or reconsider its decision. Indeed, in some situations a Law requires this to happen (for

¹ We adopt the new terminology of 'Government of Jersey' to refer to island-wide governing functions based around the 12 ministerial departments. We refer to the island's legislature as the 'States Assembly'. Previously, the term 'States of Jersey' was used interchangeably for both government and legislature, a legacy of the system of government by committee that existed until 2005.

example, in the Social Security Department there is a mandatory procedure for asking a second determining officer to review the decision of a colleague).² This consultation paper is not primarily concerned with internal complaints procedures (its focus is on external redress through tribunals, the States of Jersey Complaints Panel, the Royal Court, etc). Internal complaints procedures are however an important part of the overall administrative redress system. 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’.³

Complaints, if they are systematically recorded, can also be used as a tool by managers to focus on areas of an organisation that need attention to improve the quality of public administration and service provision.

The quality of internal complaints systems can be assessed against the following criteria:⁴

- **Accessibility.** Does the public body have an accessible internal complaints procedure (for example, published online or available in leaflet format)?
- **Clarity.** Is the procedure designed and written in a way that can be understood by users?
- **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)?
- **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)?

In the time and resources available for this project, only a small sample of Jersey public bodies could be reviewed by desk-based research looking at their websites. **Based on this evidence, we conclude that the quality of internal complaints procedures in Jersey is very variable.** For example:

- The most detailed published complaints procedure we identified was for Health and Social Services, which scores highly in relation to clarity. (This is the area of public service where by far the largest number of complaints are recorded annually; we discuss the implications of this finding below).
- At the other end of the spectrum, some public bodies have no complaints procedures published online.
- 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 See e.g Social Security (Determination of Claims and Questions) (Jersey) Order 1974.

³ House of Commons Public Administration Select Committee, *When Citizens Complain*, 5th Report of 2007-08, HC 409 (March 2008) para 10.

⁴ A similar template was developed and used in M Anderson, A McIlroy and M McAleer, *Mapping the Administrative Justice Landscape in Northern Ireland* (2014).

Data published in November 2015 show the number of ‘formal complaints’ received by the Government of Jersey and resolved internally within departments (see Table 1.A).⁵ The largest category of formal complaints is recorded in relation to health and social services. The Department comments ‘HSSD has hundreds of thousands of interaction 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 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. At 1.5 below, we comment further on these data, which in a number of respects do not paint a complete picture.

Table 1.A Formal complaints to Government of Jersey departments 2010-2015

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

INTERIM RECOMMENDATION. All public bodies should set out their internal procedures for dealing with grievances in an accessible, clear and comprehensive manner.

INTERIM RECOMMENDATION. There is a need for further work across the Government of Jersey and other public bodies to improve the quality and consistency of internal complaints procedures in terms of accessibility, clarity, independence and outcomes. In systems that have a public services ombudsman, one of the ombudsman’s functions is to develop and ensure implementation of good principles of complaint handling by government bodies. In the absence of such an ombudsman in Jersey, the Chief Minister’s Department should lead this work.

1.4. External redress

If a grievance cannot be resolved internally, it is important that there are accessible and effective external forms of redress. In Jersey these have grown up over time in an uncoordinated way. This consultation paper examines: tribunals (Part 2); appeals to and reviews by Ministers (Part 3); the States of Jersey Complaints Panel (Part 4); a proposal for a public services ombudsman (Part 5); the role of the Royal Court (Part 6); and alternative dispute resolution (Part 7). This section provides an overview of our findings and interim recommendations in relation to each.

⁵ 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.

1.4.1. Tribunals

From some decisions there is a right of appeal to a tribunal (see Part 2). Tribunals are judicial bodies, usually chaired by a legally qualified member sitting with two other ‘wing members’. Wing members generally either have professional expertise relevant to the subject-matter of the appeal (such as medical practitioners) or are lay people, or a combination. The busiest tribunals in Jersey are those dealing with tax, social security, and mental health. Usually the aggrieved person or the public body, if dissatisfied by the tribunal’s decision, has a right of further appeal to the Royal Court on a point of law. Our findings in this report are that there is considerable scope for rationalising and simplifying the tribunal system to make it more accessible, efficient and independent.

Our main interim recommendation in Part 2 is that most of the nine separate tribunals should be amalgamated into a single tribunal known as the Jersey Administrative Appeals Tribunal (JAAT), managed and funded through the Judicial Greffe. We also provisionally recommend that many rights of appeal under various Laws that currently go to the Royal Court should be transferred to JAAT. In addition, there are types of decision from which there is currently no right of appeal either to a tribunal or to the Royal Court: we provisionally recommend that new rights of appeal to JAAT are created.

1.4.2. Appeals to Ministers

Several Laws stipulate that an aggrieved person’s redress against an administrative decision is an appeal to or review by a Minister (see Part 3). Our starting point is that external reviews and appeals should normally be carried out by a judicial body (such as a tribunal or the Royal Court), or by an independent body such as the States of Jersey Complaints Panel or an ombudsman, rather than a politician. The role of a politician in making formal decisions about redressing grievances is justifiable only if there is some general public interest at stake. Our main interim recommendation in Part 3 is that most appeals to or reviews by Ministers should be replaced with a right of appeal to JAAT.

1.4.3. States of Jersey Complaints Panel

A further type of administrative redress is the States of Jersey Complaints Panel (see Part 4). When originally set up in 1979, the Panel consisted of elected States members. Since 1995, the States Assembly has appointed people from outside the States. Over the years, members of the Complaints Panel have worked hard, without remuneration, to help aggrieved people.

Our interim assessment is that the Complaints Panel should be abolished and replaced by a public services ombudsman. We reach this provisional view because there seem to be too many major structural defects in the design of the Complaints Panel for it to be saved through further reforms; moreover, our research suggests that there is a crisis of confidence in relation to the Complaints Panel.

Should it be decided to retain the Complaints Panel, we set out a series of alternative interim recommendations for its reform. Some of the proposed changes are far-reaching. We are, however, unconvinced at this stage that an evolutionary approach can turn the Complaints Panel into an efficient and effective part of Jersey’s administrative redress system.

1.4.4. A public services ombudsman for Jersey

In many other countries, a further type of administrative redress is offered by an ombudsman (see Part 5). Ombudsmen use investigatory methods (through meetings, phone calls and emails) to consider complaints and make recommendations about how things should be put right. Ombudsmen also have a positive role in promoting standards of good administration and complaint handling by public bodies.

In December 2000, the Clothier committee recommended that Jersey should set up an ombudsman (perhaps in conjunction with Guernsey).⁶ The States of Jersey rejected this idea in 2004.

Our main interim recommendation in Part 5 is that the Government of Jersey and the States Assembly should reconsider the question of a public services ombudsman. We call for a detailed study to be carried out into the costs and benefits of introducing an ombudsman scheme.

1.4.5. The Royal Court

The Royal Court potentially has an important role in the administrative justice system, in particular ensuring that the rule of law is adhered to in administrative decision-making. In Part 6, we examine statutory appeals to the Royal Court directly from administrative decisions, ‘second appeals’ where the Royal Court considers challenges to decisions of a tribunal, and applications for judicial review. Very few appeals or judicial reviews are heard in a typical year.

Many different Laws create a right of appeal against the public body directly to the Royal Court. Many of these appeals have never been used or used only occasionally. Our main interim recommendation (linked to the analysis in Part 2) is that most of these appeals should go instead to JAAT. Where a route to appeal is retained to the Royal Court, we provisionally recommend that the time limits for lodging an appeal should be standardised.

If a Law does not create a right of appeal to a tribunal or the Royal Court, an aggrieved person may make an application for judicial review to the Royal Court. This is a procedure for examining whether the administrative decision is lawful. Very few, if any, applications for judicial review are made in an average year. We suggest that there may be scope for modernising the procedures for making a judicial review application. We provisionally recommend in Part 6 that the Royal Court Rules Review Group consider carrying out this review, seeking out lessons from the modernisations that have taken place in relation to judicial review procedures in England and Wales and Scotland in recent years.

1.4.6. Alternative Dispute Resolution

Alternative dispute resolution (ADR methods, such as mediation, can be used in disputes about administrative decisions (see Part 7). We consider what scope there is for JAAT, the States of Jersey Complaints Panel (if it is retained), the public sector ombudsman (if it is created) and the Royal Court to use or encourage the use of ADR. Our starting point is to recognise that some administrative disputes are unsuited to ADR, for example because a point of law must be determined or the public body has little or no discretion to change the outcome of its decision. We do however make a series of interim recommendations in Part 7 about how ADR might be used across the administrative redress system.

1.5. A need for better data about administrative redress

Publication of the statistics on ‘formal complaints’ used to compile Table 1.A 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.

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

⁶ States of Jersey, *Report of the Review Panel on the Machinery of Government in Jersey* (2000) ch 9. The Clothier Committee made far-reaching recommendations, including the introduction of ministerial government.

expressions of dissatisfaction as complaints'.⁷ **We recommend that in future this definition should be used.**

Second, 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.

Third, the published statistics 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 to which functions previously carried out by Ministers have been transferred (notably Andium Homes Ltd, which manages States of Jersey social housing).⁸

Fourth, statistics on administrative redress are not published as a coherent package. Those on formal complaints used in Table 1.A 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.

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 Table 1.A 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.

INTERIM RECOMMENDATION. A legal duty should be placed on the Chief Minister to make an annual written report to the States Assembly on administrative redress setting out data, analysis and any proposals to develop and improve the system. Data should include informal and formal complaints, appeals to tribunals, the States of Jersey Complaints Panel, use of statutory appeals and applications for judicial review to the Royal Court and other requests for administrative redress.

INTERIM RECOMMENDATION. The States Assembly Privileges and Procedures Committee (PPC) or a States Assembly Scrutiny Panel should assume responsibility for scrutinising and considering the Chief Minister's annual report on administrative justice.

⁷ House of Commons Public Administration Select Committee, *When Citizens Complain*, 5th Report of 2007-08, HC 409 (March 2008) para 17.

⁸ See 1.2 above.

1.6. What does a good administrative redress system look like?

In order to assess what improvements could be made to Jersey's administrative redress system, clarity is needed about the characteristics of a good system. We suggest that in assessing the current system and our interim recommendations, regard should be had to the following broad principles.⁹

1.6.1. Presumption in favour of express redress procedure

Whenever a Minister or other public authority is conferred with decision-making power affecting people under a Law adopted by the States Assembly, this should normally be accompanied by an appropriate and effective procedure and remedies, set out expressly in law, as to how an aggrieved person may challenge the correctness of a decision (for example, an appeal to a tribunal or the Royal Court). If a *project de loi* fails to provide this, the Minister introducing the legislation should justify the omission.

1.6.2. Constitutional principles

The design and operation of the administrative redress system should respect basic constitutional principles. These include **the rule of law** and **Convention rights** under the Human Rights (Jersey) Law 2000. Public bodies are legal entities exercising powers conferred by law in the public interest; the question whether there has been a breach of the law should always ultimately be decided by a judicial body (a court or tribunal) with judges of appropriate seniority.

A further constitutional principle is the **independence and impartiality** of judicial bodies, including tribunals. This is reflected in Article 6 of the European Convention on Human Rights (ECHR), incorporated into Jersey law by the Human Rights (Jersey) Law 2000. Our findings are that there are several respects in which the 'structural' independence of tribunals in Jersey could be enhanced.¹⁰

ECHR Article 6 also embodies the concept of **equality of arms**: in adversarial procedures, this requires that each party be given a reasonable opportunity to present their case under conditions that do not place them at a substantial disadvantage against their opponent. One area of concern is that there is no general provision for people appealing to a tribunal to receive legal aid for advice and representation even when a complicated point of law is involved and the public body is represented by a lawyer.¹¹

1.6.3. The simplicity principle

The administrative redress system should be as simple as possible. The complexity of the system in Jersey is at least as bad as it is in the United Kingdom where 'there are multiple types and channels of redress, each of which is run by a different body or section, according to different rules and definitions and using different procedures'.¹² It can be difficult for people to navigate through the redress system. The distinction between a complaint and appeal may not be clear. It can be difficult to know which route is the most appropriate. Time limits for raising grievances vary widely across the system.

We believe that it should be easier to achieve simplicity in a small system, such as Jersey, than in a larger system. Creating a single official point of contact for impartial information on where to make a complaint or seek redress about government decisions could be one way of promoting simplicity. In the

⁹ This draws partly on research findings and recommendations in Varda Bondy and Andrew Le Sueur, *Designing redress; a study about grievances against public bodies* (London, Public Law Project, 2012) and Administrative Justice and Tribunals Council, *Principles for Administrative Justice* (London, AJTC, 2010).

¹⁰ See Part 2.

¹¹ See Part 2.

¹² P Dunleavy et al, 'Joining up citizen redress in UK central government' ch 17 in M Adler (ed), *Administrative Justice in Context* (Oxford, Hart Publishing, 2010).

United Kingdom, this was suggested by the National Audit Office in 2005¹³ but rejected by the UK Government because they did not want to ‘create another central point in addition to the Ombudsman because we think that most of these things should be sorted out by the organisation doing them’.¹⁴ There is no public services ombudsman in Jersey to perform this role.

1.6.4. Principles of transparency and accountability

The administrative redress system should operate as transparently as possible. Under ECHR Article 6, judicial and other bodies determining ‘civil obligations’ must do so in public hearings – unless there are clear reasons for favouring privacy (such as when a hearing involves children or vulnerable adults). Our findings are that respect for the transparency principle is variable across Jersey’s administrative redress system. The Royal Court scores highly in this regard: its hearings are open to the public and written decisions are clearly presented on the Jersey Legal Information Board website (www.jerseylaw.je). The Complaints Panel’s hearings are similarly in public (indeed, they often generate interest from the news media) but the Panel’s past decisions are not easily accessible online.¹⁵

Tribunals perform quite poorly in relation to the transparency principle. Some do not sit in public (though in some situations this is justified). During research interviews, we heard that those that do sit in public provide inadequate public notice of when a hearing is to be held and that some tribunal panels agreed too readily to exclude the public at the request of appellants. The written judgments of tribunals are not publicly accessible. There is, however, a strong body of opinion in the island that greater publicity would deter people bringing appeals. We discuss these difficult issues in Part 2.

Linked to transparency is the principle of accountability for the operation of the administrative redress system. There is a public interest in knowing about matters such as how many complaints and appeals are made each year, how many are successful, how much money is spent on the system and how efficient and effective it is. Accountability requires clear leadership and a reporting mechanism. The Royal Court and the Complaints Panel score reasonably well against these measures; again, the tribunals do not. As we provisionally recommend above, there should be an annual report by the Chief Minister¹⁶ on administrative justice followed by review by the States Assembly (through the Privileges and Procedures Committee or a Scrutiny Panel).

1.6.5. The proportionality principle

An administrative redress system costs money: tax payers’ money in running it, the decision-maker’s time in responding to grievances, and aggrieved people have to spend time preparing their case and sometimes pay for legal advice and representation. These costs should be kept to the minimum possible consistent with the other principles. Any review of an administrative redress system should seek out cost savings and ways to maximise value for money. Grievances also have costs other than financial ones: for most individuals, pursuing a complaint is likely to be stressful.

For all these reasons, if a grievance arises it should be nipped in the bud as speedily, informally and cheaply as possible. Sometimes, however, where an important administrative decision impacts profoundly on a person or raises complex issues, a more elaborate and costly procedure (such an appeal to the Royal Court) may be necessary.

¹³ Comptroller and Auditor General, *Citizen Redress: What citizens can do if things go wrong with public services*, HC 2, Session 2004-2005 (9 March 2005).

¹⁴ House of Commons Public Administration Select Committee, *When Citizens Complain*, 5th Report of Session 2007-08, HC 409 (March 2008) para 37.

¹⁵ See Part 4.

¹⁶ ‘Within the executive branch of government, the Chief Minister is responsible for justice policy and resources’: see P.92/2013.

1.6.6. Good fit principle

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.

In Part 6, we consider the role of the Royal Court. In some contexts, where appeals are likely to turn on factual rather than legal disputes and where appellants are likely to be individuals with limited financial resources or small businesses, our interim recommendation is that an appeal route to the proposed JAAT (or to the proposed public services ombudsman) would be more proportionate. In Part 7, we consider how greater use of alternative dispute resolution (ADR) techniques, such as mediation, may provide the most proportionate responses in some situations.

1.6.7. The ‘right first time’ goal

As well as dealing with individual grievances, redress mechanisms should contribute to improvements in the quality of public services.

Ministers, civil servants, and others working in public bodies may fail to make decisions correctly and lawfully due to a range of different factors. These include the law being too complicated, vague or rigid or the decision-maker using an unsatisfactory procedure. Evaluation of the law underpinning the making of initial administrative decisions is beyond the scope of our current inquiry but it is notable that during the research interviews for this project,¹⁷ several people were critical of how social security and income support legislation had developed: they told us that a generation ago, the law gave officers sufficient flexibility to enable them to apply common sense and compassion in difficult cases whereas now officers had to work within a straightjacket of rules that were sometimes too rigid and led to grievances arising.

Where a decision is not made right first time and a grievance is taken to a tribunal, court or other redress mechanism, the public body should seek to learn lessons for the future.

1.6.8. The user perspective principle

Across the United Kingdom over the past decade, there has been increasing emphasis on ‘user perspectives’ and ‘customer focus’ in administrative justice. In a democracy, government exists to provide public services to citizens. Redress for grievances about administrative decisions is a public service and should be designed around people’s needs (not administrative convenience). Administrative redress should be as ‘user friendly’ as possible.

A practical way in which user perspectives can be incorporated when systems are being redesigned is to consider the ‘user journey’ through the processes. This involves thinking about how different elements of the process fit together: from how an administrative decision is communicated; what information people are given about how what to do if they are aggrieved; how people obtain independent help and advice about the problem; how they are ‘signposted’ to the right part of the redress system, etc.

¹⁷ On research methods see 1.9 below.

Our findings suggest that across the administrative redress system in Jersey there is not a strong culture and commitment to focusing on users' perspectives. For example, there have been no systematic attempts to find out what appellants using the tribunal system, or complainants using the States of Jersey Complaints Panel, think and feel about the process – or why people decide not to pursue an appeal or complaint.

Within the time and resources available for the Jersey Law Commission's project, we were relatively unsuccessful in contacting 'users' to speak to us. Through word of mouth, we identified three people with experience of either the social security tribunal, education appeals or the States of Jersey Complaints Panel but only one was willing to be interviewed. We did, however, interview several people with first-hand experience of advising aggrieved people.

A further challenge in adopting a user perspective is that in respect of many of Jersey's redress mechanisms there are either very few or no users. There are various possible explanations for this.

- There may be very few or no grievances that require to be redressed. This could be because the quality of public administration is exceptionally high or because no or very few decisions are actually made under a particular Law (which is possible in a small island).
- When grievances do arise people are unaware about what they can do about them (for example, exercise a right of appeal or use the States of Jersey Complaints Panel).
- People may be aware of how their grievances could be addressed but are reluctant to use redress mechanisms because of concerns about the stress, cost, time involved or publicity that may flow from doing so.
- It may be a mix of the above.

For the purposes of this consultation report, we have tried to have regard to the following factors, that

- people should have access to affordable, timely and independent advice about their grievance
- procedures for using redress mechanisms should be clear and easily understandable by non-lawyers
- time limits for making complaints and appeals should be clear and reasonable.

1.7. 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.¹⁸ Other interviewees suggested that too much personal information had to be made public during the process of

¹⁸ See Part 2.

taking a case to the Complaints Panel.¹⁹ 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.²⁰

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.

1.8. Scope of the project

This project is a broad one, reviewing administrative redress in relation to many different types of government decision. We have, however, decided to exclude the following areas from its scope.

- 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. We note that there has been a significant increase in the number of appeal under the new system. The new arrangements need to be allowed to bed down before a meaningful review can be carried out.
- Grievances relating to employment with the Government of Jersey and other public bodies have been excluded on the basis that disputes in this area do not usually arise as a result of purely administrative decision-making but from a contractual relationship. The operation of the Jersey Employment and Discrimination Tribunal is also beyond the scope of this review (though we make some references to its practices in relation to the proposed JAAT).
- 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.
- As noted above, the largest category of formal complaints against the Government of Jersey are made to the Department of Health and Social Services (see Box 1.A). The department's grievance procedures are published online.²¹ It involves, first, 'local resolution' during with 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 the outcome). The handling of grievances about health and social services decision-making is clearly of great importance. We have not had the time or resources to research this redress

¹⁹ See Part 4.

²⁰ See Part 2.

²¹ www.gov.je/Government/Comments/Pages/HSSFeedback.aspx.

system in detail but in Part 5 we raise the question whether health and social services complaints could be part of a public services ombudsman's remit.

1.9. Note on research methods

The project has been led by (and the Consultation Paper written by) Andrew Le Sueur, a member of the Jersey Law Commission and Professor of Constitutional Justice at the University of Essex. This section explains the research methods used to develop the interim recommendations.

This project sets out to 'map' the administrative redress landscape in Jersey to identify what bodies and processes are involved in delivering administrative justice. Similar exercises have recently been carried out in England,²² Wales,²³ Scotland²⁴ and Northern Ireland.²⁵ This mapping exercise is a necessary prelude to thinking systematically and strategically about how administrative redress system can be improved. This consultation paper makes a contribution to the map across the British Islands.

Analysis of Jersey legislation was carried 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). We are grateful to Miss Lori-Ann Foley for research 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.

Twenty-four research interviews were carried out during 2015. 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. We are grateful to all interviewees, who were generous with their time and provide valuable insights into the operation of Jersey's administrative redress system from a variety of perspectives. We note with disappointment that three States Members (two Deputies and a Connétable) declined invitations to be interviewed.

Professor Le Sueur observed a hearing of an appeal by a social security tribunal in October 2015 and attended a meeting of the Jersey Human Rights Group.

A desk based review of publicly available information was conducted. Where information or data was not in the public domain we corresponded with relevant organisations. We are grateful for the cooperation we received (but note that two public bodies did not respond to our requests).

We plan to convene a seminar during the consultation period to discuss issues raised in this paper and other issues stakeholders want to raise. The date and venue will be advertised on the Jersey Law Commission website.

²² Administrative Justice and Tribunals Council, *The Developing Administrative Justice Landscape* (2009).

²³ S Nason, *Understanding Administrative Justice in Wales* (2015).

²⁴ Scottish Tribunals and Administrative Justice Advisory Committee (STAJAC), *Mapping Administrative Justice and Tribunals in Scotland* (2015).

²⁵ M Anderson, A McIlroy and M McAleer, *Mapping the Administrative Justice Landscape in Northern Ireland* (2014).

1.10. An expert advisory body?

This consultation report reveals that a considerable amount of change is needed to Jersey's administrative justice and redress system. Expertise on administrative justice is thin on the ground in Jersey. We suggest that it would be beneficial for a small standing committee of academics and practitioners, from within the island and beyond, to be formed to provide independent and expert guidance to the Chief Minister's Department, the Judicial Greffe, the proposed President of the Jersey Administrative Appeals Tribunal and others with responsibility for leading and running the different element of the system.

We note that in England, the Administrative Justice Forum advises the Ministry of Justice on oversight of administrative justice and tribunals;²⁶ similar bodies have also advised the Scottish Government and Welsh Government. If there is interest in creating a similar body for Jersey, we will carry out further work to identify terms of reference, costs and benefits as part of our ongoing work on this project. We envisage that members of the forum would be unremunerated.

INTERIM RECOMMENDATION. The Chief Minister's Department should establish a standing committee of experts – the Jersey Administrative Justice Forum – to advise on the development of the administrative redress system

²⁶ <https://www.gov.uk/government/groups/administrative-justice-advisory-group>

2. TRIBUNALS

2.1. What is a tribunal?

Tribunals are judicial bodies, usually consisting of a panel of three members. Some working methods of tribunals are broadly similar 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.

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.
- Tribunal members come from a variety of backgrounds. The chair of the panel is normally legally qualified (contributing an understanding of procedures, interpretation of laws and the general legal framework); the other members may have professional expertise (for example medical qualifications) or be lay members.
- 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.
- In tribunals, the parties are often 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 will often 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.
- Tribunal members typically serve on a part-time basis, sitting on panels as and when the case load requires.

2.2. Tribunals in Jersey

Over several decades in Jersey, a number of tribunals have been created under various Laws. There is no official list of tribunals in Jersey law but according to our analysis there are nine bodies that carry out judicial functions in hearing appeals against decisions of public bodies. Box 2.A provides an overview of the tribunals.

Box 2.A Overview of Jersey tribunals

Name of tribunal	Case load
Commissioners of Appeal for Taxes	Average hearings a year: approximately 23 (92 appeals heard 2012-15) ²⁷
Social Security Tribunal	Average hearings a year: approximately 4 (2013: 4, 2014: 4; 2015 to July: 3) ²⁸

²⁷ Source: correspondence from Advocate Adam Clarke, Clerk to the Commissioners of Appeal of Taxes.

²⁸ Source: Freedom of Information request www.gov.je/Government/Pages/StatesReports.aspx?ReportID=1596

Social Security Medical Appeal Tribunal	Average hearings a year: approximately 11 (2013: 9, 2014: 4, 2015 to July: 2) ²⁹
Income Support Medical Appeal Tribunal	Average hearings a year: approximately 3 (2013: 6, 2014: 3, 2015 to July: 1) ³⁰
Mental Health Review Tribunal	During 2014 there were 32 applications, 9 of which went to full hearings ³¹
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’ ³²
Data Protection Tribunal	No information available
Rate Appeal Boards	The RAB sits infrequently; the States were told in 2009 that it had convened only twice in recent years
Panel appointed by the chairman of the Prison Board of Visitors to hear appeals against findings of guilt relating to a breach of prison discipline	No information available

2.2.1. The current tribunals outlined

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 on the recommendation of the Minister for Treasury and Resources; there are currently five Commissioners. CAT has jurisdiction over assessments of income tax and and Goods and Services Tax (GST). Hearings are on average held three times a year and take place at the offices of the law firm Le Gallais and Luce (a partner of which is the clerk to the Commissioners). CAT deal 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.

Three different tribunals hear appeals relating to social security and income support. The **Social Security Tribunal (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 **Social Security Medical Appeal Tribunal (SSMAT)** hears appeals regarding the award of Long-Term Incapacity Allowance following assessments regarding loss of faculty made by a Medical Board. 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. SST sits as a panel of three: a legally qualified chair and two lay members. SSMAT and ISMAT also sit as a panel of three: a legally qualified chair, a medically qualified member and a lay member. In December 2015, the States Assembly appointed the same person (Advocate Sarah Fitz) to

²⁹ Source: Freedom of Information request www.gov.je/Government/Pages/StatesReports.aspx?ReportID=1596

³⁰ Source: Freedom of Information request www.gov.je/Government/Pages/StatesReports.aspx?ReportID=1596

³¹ Judicial Greffe & Viscount’s Department, Jersey Court Service Annual Report 2014 (April 2015) p 12.

³² www.statesassembly.gov.je/AssemblyPropositions/2015/P.54-2015.pdf

be chairman of each of the tribunals. The Judicial Greffe provides administrative support for the work of the three tribunals. Appeals are heard in the tribunal suite at Trinity House, Bath Street, St Helier. All members of the tribunals are paid per sitting.

The **Mental Health Review Tribunal (MHRT)** currently operates under the Mental Health (Jersey) Law 1969; a draft of new legislation is currently under consideration.³³ The MHRT's role is to adjudicate on appeals against decisions that a patient is compulsorily detained or treated. The 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. Appeals are heard at St Saviour's Hospital. The MHRT sits as a panel of three. Advocate Sarah Fitz is the chairman. All members of the MHRT are paid per sitting. The Judicial Greffe provides administrative support for the work of the MHRT.

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. 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 the States of Jersey. All members of the tribunal are unremunerated. The Judicial Greffe provides administrative support for the work of the HSAT.

The **Data Protection Tribunal's** remit is to adjudicate on appeals by people aggrieved by decisions of the Data Protection Commissioner under the Data Protection (Jersey) Law 2005. The DPT consists of a legally qualified president and four other members, appointed by the States of Jersey 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 data controllers'. The DPT is required to publish its determinations.³⁴ Members of the tribunal are remunerated. We have been unable to locate information on the DPT's caseload.

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 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. In 2011, the States were told that the RAB meets 'infrequently'³⁵ and in 2009 that 'they have only met twice in recent years'.³⁶ It is unclear to us who is responsible for administering the RAB.

In Jersey, the Prison Board of Visitors consists of Jurats (the judges of fact in the Royal Court). As well as exercising supervisory functions over conditions in HMP La Moye and making an annual report to the States of Jersey, the **Panel appointed by the chairman of the Prison Board of Visitors** hears appeals against findings of guilt relating to a breach of prison discipline. The composition of the Prison Board of Visitors has been controversial for several years.³⁷ In November 2015, the Minister for Home Affairs announcing that her department would bring forward a proposition during 2016 to establish an independent Prison Board of Visitors in order to comply with international human rights standards.³⁸ The change in the overall composition of the Prison Board of Visitors will have implications for Board's adjudicatory functions.

³³

www.gov.je/SiteCollectionDocuments/Government%20and%20administration/LD%20Draft%20New%20Mental%20Health%20Law%20LJ%2020150702.pdf (July 2015).

³⁴ Data Protection (Appeals) (Jersey) Regulations 2006, Article 18(5).

³⁵ States of Jersey Official Report (Hansard), 12 July 2011.

³⁶ States of Jersey Official Report (Hansard), 10 December 2010.

³⁷ States of Jersey Education and Home Affairs Scrutiny Panel, *Prison Board of Visitors*, S.R.9/2015.

³⁸ www.gov.je/News/2015/pages/PrisonBoardVisitors.aspx.

2.2.2. Other appellate bodies

During our mapping exercise, we identified three further bodies with appellate functions.

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).

The **Disciplinary Panel of the Law Society of Jersey** is a statutory body created by the Law Society of Jersey Law 2005. Members of the Panel are appointed for terms of five years. Lay members are appointed by the States Assembly on the recommendation of the Jersey Appointments Commission; legal members are elected by the Law Society at a general meeting. Committees of three – a lawyer and two lay members – hear appeals in private. The remit of the Panel is to adjudicate on complaints about lawyers referred by the President of the Law Society.

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.

2.2.3. Bodies called ‘tribunals’ that are not appellate bodies

Three bodies called ‘tribunals’ do not hear administrative appeals.

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.³⁹ The HSDT is part of the initial decision-making process rather an appeal.

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.

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.

INTERIM RECOMMENDATION. The term ‘tribunal’ in Jersey legislation should be reserved for judicial bodies adjudicating on appeals and should not be used for bodies exercising advisory functions.

³⁹ States of Jersey Official Report (Hansard), 12 July 2011.

2.2.4. Unmet need: missing rights of appeal to a tribunal

The mapping exercise has identified for the first time the tribunals ‘landscape’ in Jersey. During the consultation period, we are continuing research to find 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 seek suggestions.

One area we have provisionally identified 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.

During 2015, the States Assembly Education and Home Affairs Scrutiny Panel conducted an inquiry into SEN.⁴⁰ 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 interim view 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 Part 3.

CONSULTATION QUESTION. Are there areas of administrative decision-making not currently served by an appeal to a tribunal for which there should be a right of appeal to JAAT?

2.3. Lesson learning from other jurisdictions

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.

Further major reforms were introduced in the United Kingdom 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 tribunals were also modernised, with responsibilities transferred from individual tribunals or government departments to Her Majesty’s Courts and Tribunals Service.

⁴⁰ States of Jersey Education and Home Affairs Scrutiny Panel, *Special Education Needs*, Presented to the States on 14 July 2015, S.R.3/2015.

The Tribunals (Scotland) Act 2014, enacted by the Scottish Parliament, introduced broadly similar reforms to the tribunal system in Scotland. This included creating a judicial leadership role of Senior President of Scottish Tribunals.

Structural reforms to tribunals in Northern Ireland have also been implemented and continue to be discussed.⁴¹ Five previously separate tribunals on social security and child support have been amalgamated into a single tribunal. Proposals have been made to create the Northern Ireland Amalgamated Tribunal (NIAT), which would take the process of amalgamation further.

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 interim view is that useful lessons can be learnt for Jersey from other jurisdictions, with necessary adaptations to the special circumstances of a small jurisdiction.

In the following paragraphs we set out a findings critical of existing practices and make interim recommendations for reforms. Our focus is on getting the structures right. The criticisms and proposals are not directed at individual tribunal members who provide valuable service to the island in delivering administrative justice.

2.4. Proposal to create a Jersey Administrative Appeals Tribunal (JAAT)

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, we were told that three separate social security tribunals were needed because there are three separate types of benefit. 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.

There are, however, considerable disadvantages to having nine separate tribunals.

- The administrative redress system becomes unnecessarily complicated.
- Providing administrative support to nine 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 difficult to recruit members to serve on a tribunal that is expected to sit infrequently.
- There is little evidence of sharing of good practice across the different tribunals.
- Provision of training for members across the fragmented tribunals is more difficult to deliver than if there was a single tribunal.

The experience in the United Kingdom, 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.

The creation of JAAT would build on administrative changes that have taken place in recent years across Jersey’s tribunals. As discussed below, the administration of several tribunals has been

⁴¹ See B Thompson, *Structural Tribunal Reforms in Northern Ireland* (Law Centre NI, 2011).

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).

INTERIM RECOMMENDATION. A new tribunal, the Jersey Administrative Appeals Tribunal (JAAT), should be created to hear appeals against administrative decisions made under a variety of Laws.

2.4.1. Transfer of jurisdictions

Our interim view is that the jurisdiction of the following tribunals should be merged into JAAT:

- 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.

INTERIM RECOMMENDATION. The jurisdictions of eight existing tribunals should be transferred to JAAT.

As discussed in Part 3 below, our provisional view is that several appeals which currently lie to Ministers should be transferred to JAAT:

- permission to use venues for civil marriages and partnerships
- decisions of the Agent of Impôt relating to duties
- assessments and provision of special educational needs
- issue or renewal of ‘trade licences’ under the Motor Vehicle Registration (Jersey) Law 1993.

INTERIM RECOMMENDATION. Four rights of appeal that currently lie to Ministers should be transferred to JAAT (see Part 3 for more detailed discussion).

As discussed in Part 6 below, our provisional view is that rights of appeal to the Royal Court under 54 Laws should be transferred to JAAT.

INTERIM RECOMMENDATION. Rights of appeal to the Royal Court under 54 Laws should be transferred to JAAT (see Part 6 for more detailed discussion).

We envisage that the following tribunals would retain their separate identity and accordingly we make no provisional recommendations for change:

- Disciplinary Panel of the Law Society. Although this is a statutory body, with some members appointed by the States of Jersey, its functions relate to professional standards regulation rather than to administrative redress.
- The Investigatory Powers Tribunal is in reality a senior-level court rather than a tribunal and its special characteristics (outlined above) make it inappropriate to be part of JAAT.

As noted above, the Minister for Home Affairs is currently preparing proposals to reconstitute the Prison Board of Visitors with independent lay people rather than Jurats. The adjudicatory function of hearing appeals against findings of guilt relating to a breach of prison discipline should, in our provisional view, be transferred to JAAT.

INTERIM RECOMMENDATION. Appeals by prisoners against adjudications should be transferred to JAAT.

2.4.2. Transitional arrangements

It would not, in our provisional view, be necessary for the transfers of jurisdiction outlined above to take place all at once; a phased amalgamation would be possible if that was thought necessary. This was the experience in the United Kingdom: while many tribunal jurisdictions were transferred to the First-Tier Tribunal and Upper Tribunal when they launched, other tribunals merged later.

Members serving on the current tribunals would be appointed to JAAT for the balance of their term of office, on the same terms and conditions as their original appointment, to ensure continuity. As members' original terms of office come to an end, they would be eligible for appointment to JAAT. This arrangement would have the practical benefit of creating staggered dates for future appointments.

2.4.3. Preserving expertise in a tribunal with broad jurisdiction

As we note above, one of the advantages of tribunals is that members have, or develop, expertise in the subject-matter of appeals. It may be thought that a possible drawback of creating JAAT is that having a single tribunal might be seen to diminish the expertise of members. On the other hand, greater flexibility in the deployment of members will enable JAAT to work more efficiently; for example, there will be a larger pool of members from which to select a panel to hear an appeal. It also needs to be borne in mind that some tribunals in Jersey sit so infrequently that members do not have opportunity to develop expertise under the current set-up.

We believe that the benefits of specialisation can be preserved within a framework that permits greater flexibility in the deployment of tribunal members. There are two main ways in which flexibility and expertise can be combined.

Option 1: in England, the First-tier Tribunal has been organised into several different 'chambers'. Within JAAT, it would be possible to create for example a 'social security chamber', 'mental health chamber', 'tax chamber' and so on, with tribunal members assigned to serve in one or more chamber. A 'general chamber' would deal with areas of decision-making in respect of which there are few appeals. It is not clear to us that the relatively low volume of appeals justifies such a structure.

Option 2: the expertise of tribunal members could be developed and preserved by 'ticketing' some members to sit mainly in some types of appeals (e.g. social security or mental health), though retaining some flexibility so that members could sit on other types of appeals if necessary. Most lay members would be ticketed to sit across different types of appeal. This is our preferred option. The President of JAAT (see below) and officers of the Judicial Greffe would be responsible for matching members' expertise with the needs of a particular appeal.

CONSULTATION QUESTION. We seek opinions on how the benefits of specialism of tribunal members can best be balanced with the desirability of more flexible deployment.

2.5. Proposal for a President of JAAT

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, and part-time nature of the work. The absence of a clearly identified leadership role has

hampered the sharing of good practice, development of strategy, the provision of training, and 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. If, as we provisionally recommend, JAAT is created it will be important for there to be a judicial figure with leadership responsibilities. We envisage that this judicial and leadership role would be permanent, part-time and salaried. The President of JAAT would, in addition to sitting on appeals, have strategic responsibilities for

- ensuring that JAAT is attuned to the needs of users by ensuring that proceedings before JAAT are accessible and fair, and appeals are handled quickly and effectively
- leading on the appointment process for other legal, professional and lay tribunal members
- ensuring the views of tribunal members are represented to the Bailiff, the Judicial Greffe, the Government of Jersey and the States Assembly on matters affecting the operation of JAAT
- ensuring that the training needs of tribunal members are met
- from time to time responding to proposals for legislative change that may have an impact on the operation of JAAT
- working closely with the Judicial Greffe on questions of deployment of tribunal members
- contributing to the annual report on administrative justice that we propose the Chief Minister makes to the States Assembly (on the operation of JAAT)
- ensuring that the operation of JAAT is kept informed by research and good practice in relation to tribunals in the United Kingdom and other systems.
- The President of JAAT would also sit on the proposed Jersey Administrative Justice Tribunal (discussed in Part 1).

INTERIM RECOMMENDATION. A post of President of JAAT should be created to provide leadership.

2.6. Appointment of tribunal members

More than 30 people serve as members of tribunals in Jersey. Some are legally qualified; some have expertise in other professions (such as medicine); some are lay people.

A variety of different arrangements currently exist for appointing members to serve on the existing tribunals.

- Model 1: appointment by the States Assembly on the recommendation of the Minister against whose department appeals are made, with a requirement that the Minister consults the Jersey Appointments Commission. Used for: Social Security Tribunal; Social Security Medical Appeal Tribunal; Medical Appeal Tribunal.
- Model 2: appointment by the States Assembly on the recommendation of a Minister. Used for: Rate Appeals Board.
- Model 3: appointment by the States Assembly with no further elaboration. Used for: Health and Safety Tribunal; Data Protection Tribunal.
- Model 4: appointment by the Minister without the need for States Assembly approval or involvement of the Jersey Appointments Commission. Used for: Commissioners of Appeal for Taxes; Appeals panel on discretionary education grants.
- Model 5: appointment by the Bailiff. Used for: Mental Health Review Tribunal.

In assessing which model is best, a paramount consideration is that tribunal members exercise judicial functions. It is therefore important that the appointments process enhances confidence in the independence and impartiality of members (for the general public, for persons involved in appeals and, equally importantly, for members themselves).

In relation to **Ministers**, we regard it as wholly inappropriate for a Minister whose department will be the respondent in appeals to be involved in appointing tribunal members. Our preference is for Ministers to cease to have any role in the appointments process.

INTERIM RECOMMENDATION. Ministers should cease to have any role in appointing tribunal members.

In relation to the **States Assembly**, it effectively rubber stamps decisions that have been made beforehand by the Minister: it is a formality. The States Assembly's involvement may be thought to provide political legitimacy to the appointments process. There is, however, a potential risk of politicisation of appointments if States members were to take a more active and critical interest and seek, for example, to veto the appointment of a candidate nominated for a tribunal role who had been selected following a fair and open appointments process.

INTERIM RECOMMENDATION. The States Assembly should cease to have a role in the appointments process for tribunal members.

As **the Bailiff**'s role is primarily a judicial one, there are not the same concerns as there are about the involvement of members of the Government of Jersey (Ministers) or the States Assembly. Giving an appointment role to the Bailiff would complement his existing responsibilities for appointing the Magistrate, Assistant Magistrate, Relief Magistrates and Royal Court Commissioners. We are also attracted by the idea of Jurats having a role in the appointments process.

INTERIM RECOMMENDATION. We propose that:

(1) The President of JAAT should be appointed by a panel consisting of the Bailiff, the senior Jurat and a lay member nominated by the States of Jersey Appointments Commission (the independent body that oversees the recruitment of States' employees and appointees to States supported or related bodies).

(2) Other tribunal members (legally qualified, professional and lay) should be appointed by a panel consisting of the President of JAAT, a Jurat and a lay member nominated by the States of Jersey Appointments Commission.

We refer to these as 'the JAAT appointment panels'.

All posts should be filled on merit and following open competition.

We understand that the Chief Minister's Office is working on proposals for a Judicial Services Commission. If in due course such a Commission has responsibility for making appointments to judicial posts, appointments to tribunals could fall within its remit.

2.7. Eligibility conditions for appointment: nationality and residence

None of the current Laws relating to appointments to the existing tribunals place any restrictions on nationality. The creation of JAAT will require a new legislative framework and it may be thought desirable to have clarity on this subject. One point of reference is that Jurats are required to be British

subjects.⁴² In the United Kingdom, judicial appointments are open only to citizens (including those holding dual nationality) of the United Kingdom, the Republic of Ireland or a Commonwealth country. To ensure that tribunal members are reflective of Jersey's community, it may on the other hand be thought desirable for a wider range of nationals (including those of Portugal and Poland, the island's largest national minority groups) to be eligible to serve.

A further (or alternative) eligibility criterion could be residence in the island. On balance, our provisional view is that people seeking appointment to JAAT should be resident in Jersey for at least 5 years. This might be thought to help ensure that members are sufficiently familiar with the island and known within the local community. We recognise, however, that there is no residency requirement for some other figures in the justice system – notably, planning inspectors (in the new planning appeals system introduced in 2015) and judges of the Jersey Court of Appeal.

CONSULTATION QUESTION. Should there be any nationality criteria to be met by applicants seeking appointment as members of JAAT?

CONSULTATION QUESTION. Should applicants seeking appointment as members of JAAT have been resident in Jersey for at least 5 years?

2.8. Eligibility conditions for appointment as a legal member of JAAT

The Laws creating the current tribunals are inconsistent in their requirements as to whether a legal member is required and, if so, how 'legal member' is defined (see Box 2.B).

Box 2.B Requirements for legal members in existing tribunals

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'
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	No legal member required
Rate Appeal Boards	No legal member required
Disciplinary Panel of the Law Society of Jersey	Members appointed by the Law Society must be a practitioner of at least 10 years' standing
Panel appointed by the chairman of the Prison Board of Visitors to hear appeals against findings of guilt relating to a breach of prison discipline	All members are Jurats, who are judges but not necessarily legally qualified

⁴² Royal Court (Jersey) Law 1948 Article 2.

As tribunals are judicial bodies, it is in our view highly desirable that a legal member chairs every hearing. An academic or professional background in the law brings expertise in procedures, conduct of a courtroom and ability to interpret and apply legal rules and principles to the facts of a case.

INTERIM RECOMMENDATION. The presiding member in all hearings of appeals by JAAT should be a legal member (the President of JAAT or an ordinary legal member).

If JAAT is established, it will be necessary for there to be a standard eligibility condition for appointment as a legal member. We do not see a need to restrict eligibility to Jersey advocates and solicitors. The legal frameworks for administrative decision-making are broadly similar to those in the United Kingdom. Moreover, outside the tribunal system, Commissioners of the Royal Court and the Magistrate are not required to be Jersey-qualified lawyers. One option would be to make appointments on the basis of the same jurisdictions as apply to Commissioners under the Royal Court (Jersey) Law 1948 Article 10: a professional legal qualification from Jersey, England and Wales, Scotland, Northern Ireland, Guernsey or the Isle of Man. Alternatively, the range of jurisdictions could be defined more broadly.

We also favour widening eligibility to include people who hold an academic qualification in law (but who are not qualified legal practitioners).

CONSULTATION QUESTION. Do you agree that eligibility for appointment to JAAT as a legally qualified member should not be confined to Jersey advocates and solicitors?

Consideration needs also to be given to the number of years of relevant law-related work experience a person has since gaining their academic or professional qualification.

INTERIM RECOMMENDATION. The President of JAAT should hold an academic or professional qualification in law and have not less than 10 years' relevant law-related work experience. Other legal members of JAAT should hold an academic or professional qualification in law and have not less than 7 years' relevant law-related work experience.

We do not consider it necessary for the legislative framework to provide a comprehensive definition of 'academic or professional qualification in law' or 'relevant law-related work experience'; this should be a matter for the JAAT appointments panels to decide. We prefer the concept of 'relevant law-related work experience' to 'years standing' as it ensures that experience is real not apparent. Lawyers interested in applying to serve on JAAT should be given work shadowing opportunities.

2.9. The role of lay members

Several tribunals in Jersey include members who are neither lawyers nor professional members (e.g. medical practitioners).

2.9.1. Role and value of lay members

During the research interviews, all interviewees asked about the role of lay members considered them to be a valuable feature of the tribunal system. They are seen as bringing 'common sense' and 'broader views of the world' than could be achieved a lawyer sitting alone. Some interviewees suggested that lay membership also enhances public confidence in the tribunals.

The past and present legally qualified members of tribunals interviewed thought that the presence of lay members rarely affected the outcome of appeals: although formally all three members of a panel contribute equally to decision-making, lay members were said generally to defer to the chairman on issues of fact and always on questions of law. Disadvantages to lay membership were also referred to:

a 3-person tribunal panel costs more than a 1-person tribunal. As well as additional daily fees, finding sitting dates convenient to three members is more difficult than for a single judge, which may lead to delays. Written decisions, drafted by the legally qualified chairperson, must be circulated to the lay members whose amendments are said usually to relate to style and occasionally to factual corrections but are rarely substantial.

In the light of the broad consensus that lay members have a respected role in the tribunal system, we envisage that lay appointments will be made to JAAT. The overriding need for lay members, as for legal and professional members, of tribunals is the ability to ‘do the job well’. We therefore propose that merit and good character should be the principal criteria for appointment.

INTERIM RECOMMENDATION. It should be expressly stated in law that that principal criteria for appointment as a tribunal member are merit (that is, possessing the necessary skills to adjudicate impartially on questions of facts and law) and good character.

2.9.2. Appeals by unsuccessful applicants

It is foreseeable that occasionally an applicant for a legal, professional or lay post may be aggrieved by a rejection from a JAAT appointments panel. Feedback should be made available to unsuccessful applicants. In line with the general principle that legislation conferring decision-making power on public bodies should provide for a right of appeal, we take the view that such an appeal should lie from JAAT appointments panels. The Royal Court is, in our provisional view, the most appropriate forum. The grounds of appeal should be that ‘the decision was unreasonable having regard to all the circumstances of the case’.

INTERIM RECOMMENDATION. A person aggrieved by a decision not to appoint him or her to JAAT should have a right of appeal to the Royal Court.

2.9.3. Diversity of lay members

Some interviewees expressed concern that lay members are drawn from too narrow a range of people. There is a perception that lay members are retired or semi-retired and that many have previously worked in the public sector in some capacity. Some interviewees thought that it was inevitable that many lay members are retired people as working people could not spare the time to sit; it was also suggested that people from professional and managerial backgrounds had the right range of skills needed to adjudicate on issues of law and fact. One interviewee thought the relatively recent more vigorous appointments process – which requires CVs and a structured interview process – deters people, such as ‘retired farmers and housewives’, who might have been appointed in years gone by and who could make a useful contribution to the work of a tribunal.

The main rationale for including lay members on tribunals is to enable tribunal decisions to be informed by people drawing on different life experiences. Diversity is therefore of great importance: a tribunal panel of three people from similar backgrounds will be less able to draw on different life experiences than a more diverse panel. To test whether the perceptions of interviewees were correct, we examined appointments of lay members to social security tribunals from 2008-14 (see Box 2.C). During this period, 11 individuals were appointed or reappointed as lay members.

- 7 were male and 4 were female.
- 7 were retired from paid employment, 2 were not in paid employment, 2 were in paid employment (both for the public sector).
- Of those who were or had been in paid employment: 6 worked in the public sector, 3 in the commercial sector.

Box 2.C: Lay appointments to social security tribunals 2008-2014

January 2011: four panel members appointed, three male, one female. One retired Chief Ambulance Officer; one retired police officer who serves on the Employment Tribunal; a person retired from the finance industry with experience as a carer; a person retired from a senior management post with Jersey Electricity Company, who sits on the Employment Tribunal.

February 2009: four panel members appointed, two male, two female. One is a retired States employee, working in management role in mental health (reappointed 2014); one retired IT expert (reappointed 2014); one retired social worker; one member with experience of the Youth Court Panel, no information about paid employment (reappointed 2014).

June 2008: three panel members appointed: two male; one female. Panel members: one male States employee with managerial role in health and social services, who sits on the Youth Court Panel; another male States employee in operational role within Ambulance Service (reappointed in 2013); one female full-time carer, with direct experience of benefits applications (reappointed in 2013).

Source: States Assembly website – propositions for appointment of members lodged au Greffe.

The perception of interviewees that lay members of tribunals are mostly retired and current or former States employees, is therefore not wholly inaccurate. They are also predominately male (though it should in this context be noted that two legal members are female).

INTERIM RECOMMENDATION. Subject to the principal criteria of merit and good character, a legal duty should be placed on the JAAT appointments panels to have regard to the desirability of lay members of tribunals, between them, being broadly reflective of Jersey society.

The Income Tax (Jersey) Law 1961 provides that Commissioners of Appeal ‘shall be chosen from residents in Jersey of experience in financial matters, who are not actively interested in any trade, business or profession, assessable to tax under Schedule D, 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’ (Article 10). If the tax jurisdiction of the Commissioners of Appeal is transferred to JAAT consideration would need to be given as to whether a special eligibility criterion would be needed along these lines. Our provisional view is that this is unnecessary: like any well-run judicial body, JAAT will be expected to have robust systems in place to ensure that there are no conflicts of interest (real or apparent) between members of a panel and the parties *in all types of appeal*.

One interviewee suggested that tribunal panels hearing social security and income support appeals should normally include one person with direct experience of living on benefits. This is an interesting idea. Two tribunals are required by law to strike a balance between different social interests. The Jersey Employment and Discrimination Tribunal is required by law to include ‘persons with knowledge or experience of or interest in trade unions or matters relating to employees generally’ and ‘persons with knowledge or experience of or interest in employers’ associations or matters relating to employers generally’. The Data Protection Tribunal ‘shall consist of a president, and 4 other members, appointed by the States on the recommendation of the Committee and on the basis that they evenly represent the interests of data subjects and of data controllers’. We would like to hear views on whether JAAT panels hearing benefits appeals should include a member with experience either as a claimant or as an adviser to claimants.

CONSULTATION QUESTION. We seek views on whether panels of JAAT hearing social security and income support appeals should include a member with experience as a benefits claimant or advising benefits claimants.

2.10. Terms of office

The Laws that currently establish Jersey's tribunals define the length of service for members in different ways (see appendices in Part 9).

- A commonly used expression is 'for such period as is specified in his or her appointment'. Members of the social security tribunal are in practice appointed for 5 year terms.
- Some Laws make no reference to length of office.
- Others specify a term of years: 3 years (Health and Safety Appeal Board); Rates Appeal Board and Disciplinary Tribunal of the Law Society (5 years); Data Protection Tribunal (6 years).
- Several (but not all) of the Laws explicitly refer to the possibility of reappointment for a subsequent term.

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 are involved in the appointment and reappointment processes. Nobody has suggested that this risk has ever materialised 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.

Our interim recommendation is that members of JAAT should be appointed on a broadly similar basis as Jurats: open-ended terms, subject to retirement at 72 years. We recognise that this is a significant change from the current practice of relatively short fixed-term appointments. 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.

There should be an expectation, articulated at the time of appointment, that members of JAAT will serve for at least five years.

INTERIM RECOMMENDATION. Legal, professional and lay members serving on the proposed JAAT should have open-ended appointments, brought to an end by resignation or on reaching a mandatory retirement age.

In selecting an age of retirement, we have had regard to other judicial posts. The mandatory retirement age of the Bailiff of Jersey is 70 years and for Jurats it is 72 years. The standard age of retirement for holders of judicial office in the United Kingdom is 70 years. In other legal systems, retirement ages range from 62 to 75.

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 develop and contribute their expertise.

INTERIM RECOMMENDATION. The mandatory retirement age for members of JAAT should be 72 years.

2.11. Removal from office

None of the current Laws establishing tribunals contain express provisions for removal of tribunal members from office for reasons of misconduct or medical incapacity. In our view, it would be prudent to have such a provision. The Royal Court would be appropriate body to make such decisions.

- In relation to removal of the President of JAAT, the application should be made jointly by the Attorney General and the longest serving legal member (apart from the President).
- In relation to removal of other members, the application should be made jointly by the President of JAAT and the Attorney General.

INTERIM RECOMMENDATION: Removal from office for JAAT members on grounds of misconduct or incapacity should be ordered by the Royal Court upon a joint application by the Attorney General and the President of JAAT (or, in relation to removal of the the President, the longest serving other legal member).

2.12. Remuneration of members

Members of tribunals in the current system work on a part-time basis and are paid a daily fee when they sit. During the research interviews, several interviewees commented on issues relating to fees. Differing fees for different types of tribunal members and across the different tribunals were described as ‘a nightmare’. Points were raised about differential fees paid between the different tribunals. It was noted that the chair and deputy chair of the Employment and Discrimination Tribunal are paid more than other tribunal members (£736 and £552 respectively). Reference was also made to the existence of different arrangements for taking into account work preparatory to a sitting, and what happens if an appeal is withdrawn after preparatory work has been done. Box 2.D sets out information about current fees, so far as we know them.

Box 2.D Remuneration of members of current tribunals

Name of tribunal	Remuneration of members
Commissioners of Appeal for Taxes	Unknown
Social Security Tribunal	Legal members: £440 Lay members: £97
Social Security Medical Appeal Tribunal	Legal members: £440 Medical members: unknown Lay members: £97
Income Support Medical Appeal Tribunal	Legal members: £440 Medical members: unknown Lay members: £97
Mental Health Review Tribunal	Information not in public domain
Health and Safety Appeal Tribunal	Unremunerated
Data Protection Tribunal	Data Protection Law 2005 states ‘A member of the Tribunal shall be paid by the Minister such remuneration and allowances as the Minister may from time to time determine.’
Rate Appeal Boards	Unknown
Panel appointed by the chairman of the Prison Board of Visitors to hear appeals against findings of guilt relating to a breach of prison discipline	All members are Jurats, who are unremunerated

Source: States of Jersey Official Report (Hansard), 19 January 2016.

If, as we provisionally propose, the JAAT is established, remuneration rates would need to be reviewed to ensure that anomalies were removed that they were adequate to attract lawyers and other professional people to apply for part-time roles on the tribunal. The proposed post of President of JAAT would require remuneration beyond fees paid for days sat to cover the post holder’s leadership functions; for this reason, we envisage a salaried (though not necessarily full-time) appointment.

INTERIM RECOMMENDATION. The post of Senior President of JAAT should be salaried, though not necessary a full-time appointment.

Lay members of most of the current tribunals are remunerated. We seek views on whether, once JAAT is established, new lay members should no longer receive a set daily fee for sitting. For some lay members, services as a tribunal member may be regarded as a form of honorary service to the island. In this context, we note that members of the States of Jersey Complaints Panel and Jurats are unremunerated; many people across the island contribute their time to the Honorary Police.⁴³ On the other hand, there is a need to widen the diversity of candidates, including younger people and women. A more flexible system in which lay members were able to claim specified expenses (including for example for the cost of child care) and loss of earnings up to a set limit could help to attract new kinds of applicants.

CONSULTATION QUESTION. Should the fixed daily sitting fee for lay members be replaced with expenses and compensation for loss of earnings (up to set limits)?

We were told during the research interviews that, in relation to some tribunals, the fees of tribunal members come from the budgets of the department against which appeals are heard. We regard this as highly undesirable. Such an arrangement risks breaching the constitutional principle of judicial independence.

INTERIM RECOMMENDATION. All fees and expenses paid to tribunal members should be from the Judicial Greffe's budget, not from the public body against whose decisions members hear appeals.

2.13. Training

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. We recommend, above, that that ultimate responsibility for ensuring appropriate training should rest with the President of JAAT.

INTERIM RECOMMENDATION. A programme of training should be provided on an ongoing basis to legal, professional and lay members of JAAT to ensure that the highest professional standards are maintained.

2.14. Resources and administrative support

The research interviews demonstrated the administration and budgetary arrangements of the existing tribunals are a complicated hotchpotch. Administrative support and funding for the work of Jersey's tribunals has evolved over a number of years.

⁴³ Indeed, members of the Jersey Law Commission are unremunerated.

Until approximately 2010, the social security tribunals were directly administered and funded by the Social Security Department. A part-time clerk, a retired police officer, assisted the tribunal and retired with the tribunal members when they were considering their decision.

The Income Tax (Jersey) Law 1961 provides that ‘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’. The post is held by the partner of a law firm, at whose offices the Commissioners meet. We make no criticism of the current or past holders of the office of clerk when we say that this structural arrangement is constitutionally undesirable. The administration of tribunals must be, and be seen to be, wholly independent of the department against whose decisions they hear appeals. It is therefore inappropriate for a Minister to appoint an administrator or legal adviser to a tribunal.

In about 2010, responsibility for supporting the three social security tribunals was transferred to the Judicial Greffe (the court service for Jersey) and a clerk no longer retires with tribunal members. The Judicial Greffe now also provides administrative support for the Employment and Discrimination Tribunal, the Mental Health Review Tribunal and the Health and Safety at Work Appeal Tribunal and the new Planning Inspectorate.

In recent years in both England and Wales, and Scotland, responsibilities for running tribunals have been transferred to single bodies responsible for courts and tribunals (HM Courts and Tribunals Service in England and Wales, and the Scottish Courts and Tribunal Service). This integrated approach to managing judicial functions is regarded as having worked well and sets out a suitable direction of travel for Jersey.

INTERIM RECOMMENDATION. The work of JAAT should be funded and administered through the Judicial Greffe.

2.15. Premises

The current tribunals sit at various venues:

- The Mental Health Review Tribunal uses a room at St Saviour’s Hospital. During the research interviews we were told that this works well. We make no recommendation for change.
- Some tribunals use newly refurbished hearings rooms at Trinity House in Bath Street, which confusingly is signposted as (only) the premises of the Employment and Discrimination Tribunal. Two registrars from the Judicial Greffe are based in Trinity House to run the day to day administration. During the research interviews we were told that the practical arrangements are satisfactory.
- The Commissioners of Appeal for tax meet in the offices of a law firm, where the clerk is a partner. We do not regard private premises to be a suitable venue for the exercise of the judicial functions.

INTERIM RECOMMENDATION. The administration of JAAT should be based at Trinity House, 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.

2.16. Procedures

Each of the current tribunals has its own set of procedures. In relation to some tribunals, interviewees described the procedures as incomplete. Procedures are found in various places: for some tribunals in a principal Law; in others in delegated legislation (Orders and Regulations). We recommend, above, that

the President of JAAT should have overarching responsibility for ensuring that procedures are fit for purpose and understandable to non-lawyers.

2.16.1. Single set of Rules

The procedures for all JAAT appeals should be set out in a coherent and accessible manner. In the same way as the Rules of the Royal Court provide a single set of rules for a variety of different types of case in the Royal Court, we envisage that the JAAT Rules would be in different Parts, which would set out (as needs be) different procedures for different types of appeal. The Rules should be written bearing in mind that most appellants will not have a legal advisor or representative.

INTERIM RECOMMENDATION. The procedures for making an appeal to JAAT should be set out in a coherent and user-friendly set of rules.

2.16.2. Overriding objectives

The Royal Court Rules Review Group has recently recommended the adoption of overriding objectives for the Royal Court Rules.⁴⁴ In similar vein, we envisage that the JAAT Rules would contain a statement of the overriding objectives applicable to all types of appeal. The statement of overriding objective used in the rules for the First-tier Tribunal in the United Kingdom provides a good model:

Overriding objective and parties' obligation to co-operate with the 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.

INTERIM RECOMMENDATION. The JAAT rules should contain an overriding objective.

⁴⁴ *Access to Justice*, Final Consultation Paper Issued by the Royal Court Rules Review Group (5 October 2015).

2.16.3. Transfers between JAAT and the Royal Court

As discussed in Part 6 below, we provisionally recommend that the JAAT Rules enable cases to be transferred from JAAT to the Royal Court and vice versa. This would provide flexibility in the management of an appeal. Adapting Article 2 of the Petty Debts Court (Miscellaneous Provisions) (Jersey) Law 2000 on the transfer of actions between the Petty Debts Court and the Royal Court we envisage a provision along the following lines:

(1) At any stage in any proceedings commenced in the Jersey Administrative Appeals Tribunal, the Tribunal may, either of its own motion or on the application of any party to the proceedings, order the transfer of the whole or any part of the proceedings to the Royal Court on such terms as to costs or otherwise as it thinks proper, if it considers that –

- (a) an important or complex question of law or a complex question of fact is likely to arise;
- (b) a remedy needs to be granted that is not within the jurisdiction of the Tribunal; or
- (c) it is otherwise in the public interest to do so.

(2) At any stage in any proceedings commenced in the Royal Court, the Court may, either of its own motion or on the application of any party to the proceedings, order the transfer of the whole or any part of the proceedings to the Jersey Administrative Appeals Tribunal on such terms as to costs or otherwise as it thinks proper, if it considers that the action is or is likely to be within the jurisdiction of the Jersey Administrative Appeals Tribunal.

INTERIM RECOMMENDATION. The JAAT Rules should enable orders to be made transferring appeals from JAAT to the Royal Court and vice versa.

2.16.4. ADR in relation to JAAT proceedings

In Part 7, we consider the scope for using alternative dispute resolution (ADR) techniques, such as early neutral evaluation and mediation, in relation to JAAT proceedings. We envisage that the JAAT Rules will contain provision for use of ADR. 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.

INTERIM RECOMMENDATION. The JAAT Rules should enable appeals to be resolved without a hearing where this is appropriate and in the interests of justice.

2.17. Open justice: hearings and delivery of judgments

Open justice is an important constitutional principle and an aspect of the right to a fair trial. 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.

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.

2.17.1. Public hearings

During the research interviews, the issue of public hearings was raised by several interviewees in relation to the social security tribunals. One interviewee told us that information about when and where hearings are scheduled to take place is not readily accessible. Though case listings do now appear online, confusingly they are 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).

There was also widespread 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.

We do not have 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).

Tax matters these 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 requirement for tax appeals to be held in public. We are not, however, persuaded that there is a compelling case for exempting tax matters from the general principle of open justice: JAAT should normally sit in public when hearing tax appeals.

Our interim recommendation is that the procedural rules for the JAAT should expressly state that hearings shall take place in public unless the chairman of the panel orders otherwise. An exception to this general rule should be appeals relating to mental or physical health of an individual (to protect private life).

INTERIM RECOMMENDATION. Except for mental health appeals, all JAAT hearings should be in public unless the chairman of the panel orders otherwise (if compatible with ECHR Article 6).

2.17.2. Public judgments

The European Court of Human Rights, based in Strasbourg, has ultimate responsibility for interpreting the ECHR. It has interpreted the ECHR Article 6 requirement that ‘judgments shall be pronounced 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.⁴⁵

The Employment and Discrimination Tribunal (which is beyond the scope of this consultation paper) routinely publishes its written judgments on www.jerseylaw.je.

⁴⁵ See *Moser v Austria*, Application no. 12643/02, 21 September 2006, <http://hudoc.echr.coe.int/eng?i=001-76956>.

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.

Other tribunals do not publish judgments or make them available for public inspection.

Interviewees explained that current practice is 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 are provided to the appellant and the department but are not published. Nor are 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.

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.

Non-publication of judgments may also give States departments an advantage over individual appellants. In the tribunal hearing observed during research for this 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.

CONSULTATION QUESTION. Our provisional assessment is that practices relating to the pronouncement of judgments in Jersey's administrative tribunals are in breach of the minimum standards for open justice. We seek views on which of the following options for reform would be preferable to bring current practices into conformity with human rights requirements.

The options for reform are:

- (a) publication of all judgments in full on the Jersey Legal Information Board (JLIB)'s website (like 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. **This is our preferred option.**
- (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.

2.18. Rights of audience

We seek views on what regulation is needed (if any) on rights of audience to represent appellants at hearings before JAAT. Options include:

- (a) limiting rights of audience to Jersey advocates and solicitors
- (b) additionally: rights of audience to lawyers qualified in other jurisdictions working under the supervision of a Jersey advocate or solicitor.
- (c) additionally: rights of audience to specified professionals who are not lawyers, for example accountants.
- (d) 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.

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.

CONSULTATION QUESTION. We seek views on what regulation is needed, if any, on rights of audience to represent appellants at JAAT hearings.

2.19. Legal aid

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.
- A handful 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 members of the public who offer advice and attend social security hearings as a 'McKenzie friend' to assist appellants (but not speak directly to the tribunal panel).
- 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.

Tribunal and States of Jersey Complaints Panel proceedings are excluded from the main legal aid scheme, which is administered by the Jersey Law Society on behalf of the legal profession. It is not funded by the States. During their first 15 years of practice, advocates (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 Legal Aid Guidelines provides:⁴⁶

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.

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. Our interim view is that the Legal Aid Guidelines do not need to be extended to cover all tribunal hearings.

We are, 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

- (a) 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)
- (b) the appeal raises a point of law with which it would be unreasonable to expect the appellant to deal
- (c) the appeal depends on complex facts or expert evidence with which it would be unreasonable to expect the appellant to deal
- (d) the public body responding to the appeal will be represented by a lawyer (rather than a non-legally qualified presenting officer).

CONSULTATION QUESTION. We seek views on how provision of appropriate legal representation before the Jersey Administrative Appeals Tribunal should be organised.

The following are 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, e.g. having regard to the factors (a) to (d) above.
- 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.

For the avoidance of doubt, our interim recommendation is not intended to alter the current arrangements for legal representation before the Mental Health Review Tribunal.

⁴⁶ <http://www.legalaid.je/pdfs/Legal%20Aid%20Guidelines%20final%20ver-020810.pdf>

3. APPEALS AND REVIEWS DETERMINED BY MINISTERS

3.1. What are appeals determined by Ministers?

This Part is concerned with situations in which a Law expressly provides administrative redress in the form of an appeal to or review by a Minister.

Our starting point is that a Minister (a political figure in the government) is not generally an appropriate person to formally resolve grievances about administrative decisions. The international standards guaranteed by ECHR Article 6 require disputes about ‘civil rights and obligations’ to be made by ‘an independent and impartial tribunal’ (the word ‘tribunal’ in this context also including courts as well as judicial bodies called ‘tribunals’). A minister holding elected political office can never be ‘independent’ (he or she is part of the government) in the same way as a judge.

Where the initial decision involves broad questions of public policy, it has however been recognised that ministers may have a legitimate role in determining grievances. An example of such a situation is planning. Here, the courts have accepted that a minister, politically accountable to Parliament, may be a satisfactory appellate or review body from decisions taken by other public bodies (local authorities in the United Kingdom). In these circumstances, there must nevertheless 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.⁴⁷

3.2. The current law in Jersey

There are currently five Laws in Jersey where Ministers are expressly given powers to review or hear appeals relating to administrative grievances.

3.2.1. Venues for civil marriages and civil partnerships

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. 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.

INTERIM RECOMMENDATION. Appeals from Connétables relating to civil marriage and partnership venues should be made to JAAT, not the Minister for Home Affairs.

3.2.2. Civil aviation: aerodrome licenses

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.

⁴⁷ See, in England and Wales, the ‘Alconbury case’: *R. v Secretary of State for the Environment, Transport and the Regions Ex p. Holdings & Barnes Plc* [2001] UKHL 23.

Under Article 16, 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.

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.

CONSULTATION QUESTION. Do you agree that the Chief Minister should continue to have a role in reviewing decisions under the Civil Aviation (Jersey) Law 2008?

3.2.3. Decisions of the Agent of the Impôt relating to duties

The Agent of the Impôt is an ancient administrative office. Under Article 68 of the Customs and Excise (Jersey) Law 1999, a person aggrieved by 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’. 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. 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.

INTERIM RECOMMENDATION. Appeals from the Agent of Impôt relating to duties should be made to JAAT, not the Minister for Treasury and Resources.

3.2.4. Children’s special educational needs

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.

The 1999 does not create a right of appeal to the Royal Court.

During 2015, the States of Jersey Education and Home Affairs Scrutiny Panel conducted an inquiry into SEN.⁴⁸ 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.

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.

⁴⁸ States of Jersey Education and Home Affairs Scrutiny Panel, *Special Education Needs*, Presented to the States on 14 July 2015, S.R.3/2015.

INTERIM RECOMMENDATION. Appeals relating to SEN assessments and provision should be made to JAAT, not the Minister for Education or any officer or panel appointed by the Minister.

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 interim recommendation is accepted, further work will be needed to seek out lessons to be learnt and transferred to Jersey.

3.2.5. Motor vehicle registration

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’.

INTERIM RECOMMENDATION. Appeals from the Inspector under Article 8 of the Motor Vehicle Registration (Jersey) Law 1993 should be made to JAAT, not the Minister.

4. STATES OF JERSEY COMPLAINTS PANEL

4.1. What is the Complaints Panel?

The States of Jersey Complaints Panel was established in 1979, when it was called ‘the States of Jersey Administrative Appeals Panel’. It operates under the Administrative Decisions (Review)(Jersey) Law 1982. The 1982 Law has been amended in significant ways over the years.

The Complaints Panel is a type of administrative redress institution unique to Jersey. It is a body of ten people appointed by the States Assembly, drawn from different walks of life. Members are unremunerated. Since its inception the Panel has been chaired by Jersey-qualified lawyers, though the 1982 Law does not expressly require this.

The remit of the Complaints Panel is to consider disputes arising from decisions taken by Ministers and by civil servants in departments of the Government of Jersey. Complainants are required to use any internal complaints systems within a States department before approaching the Complaints Panel. Complaints are received by the office of the States Greffe. The number has varied between eight and 16 in recent years.

The chairman (or one of the deputy chairman) reviews complaints: many are rejected as not appropriate for the Complaints Panel to consider. The chairman may attempt to resolve a dispute informally. If this fails, or if informal resolution is inappropriate, members of the Panel, sitting as a 3-person ‘board’, adjudicate on the complaint at a public hearing. A formal report is prepared, which may request that the Minister ‘reconsider the matter’. In recent years, Ministers have rejected four out of five requests to reconsider.

4.2. Overview of findings and interim recommendations

Our overarching interim finding is that, notwithstanding reforms made in 2006, several significant problems persist with the remit of the Complaints Panel, the framework within which it operates, the procedures it uses and its track record in delivering effective redress. 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.

In developing our recommendations, we have considered two broad ways forward.

The bold approach would be to abolish the Complaints Panel and replace it with a public sector ombudsman service. Our interim recommendation is that this would be the best option and in Part 5 we discuss the possible benefits of creating a public sector ombudsman. An evolutionary approach has already been tried (with significant reforms introduced in 1996 and 2006) but this has not, on our assessment, led to an effective redress mechanism.

The evolutionary approach would be to introduce a range of reforms to make the remit of the Complaints Panel more coherent and effective. If this approach is adopted, a package of reforms could include the following.

- The point of entry for complaints should move from the States of Jersey Greffe (the office primarily responsible for running the States Assembly) to the Judicial Greffe (which provides administrative support for courts and tribunals).
- The reach of the Complaints Panel’s jurisdiction should be extended beyond decisions taken by Ministers and civil servants. Administrative decisions taken by Parishes should be included.

Consideration should also be given to the Panel having a role in relation disputes with Andium Homes Ltd and some functions of Ports of Jersey Ltd (corporate entities, wholly owned by the States of Jersey, to which some ministerial functions have been transferred). The purpose of this reform would be to provide a more comprehensive redress scheme.

- The grounds of review used by the Complaints Panel should be reformulated in terms of ‘maladministration’. The 1982 Law should be amended to make clearer that the Complaints Panel’s remit relates to *how* a decision was made rather than the substantive merits of the decision or its legality.
- The Complaints Panel should not generally look at cases where the complainant can or could have used an alternative form of redress, such as an appeal to a tribunal or proceedings in the Royal Court. The 1982 Law should be amended to make this clear and the Complaints Panel should adopt a more consistent practice.
- Informal resolution of disputes should become a more prominent part of the Complaint Panel’s methods of work. Although the 1982 Law now makes provision for informal dispute resolution, it is not clear that the Complaints Panel regards this as a priority or that it has capacity to help achieve resolution in this way.
- Public hearings should no longer be held. This would be a major change in the Complaints Panel’s work. Our assessment is that public hearings, which in recent years have become increasingly formal and legalistic, are not good procedures for dealing with issues of maladministration.
- All Complaints Panel members should receive training.

CONSULTATION QUESTION. We seek views on whether an evolutionary approach to reform of the Complaints Panel is desirable or whether it should be abolished and replaced with a public services ombudsman. Our provisional view is that that latter course is preferable.

4.3. Development of the Complaints Panel

To understand the current operation of the Complaints Panel it is necessary to trace its historical development. The ‘States of Jersey Administrative Appeals Panel’ (as it was originally called) was first established by Regulations in 1979.⁴⁹ 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.

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 of Jersey. The presidents of the 27 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.

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

⁴⁹ 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).

From its inception, the Panel's remedy has been limited to making recommendations. It has no power to compel a Minister or department to do anything.

In 1996, the composition of the Panel was altered significantly.⁵⁰ 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'.

In 2000, the *Report of the Review Panel on the Machinery of Government in Jersey*, chaired by Sir Cecil Clothier, was highly critical of the operation of the Panel, concluding 'We consider these arrangements to be quite unsatisfactory'.⁵¹ 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'.⁵²

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).⁵³

Further criticism of the Panel emerged from a review carried out by PPC in 2004.⁵⁴ 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;
- 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

⁵⁰ Administrative Decisions (Review) (Amendment) (Jersey) Law 1995.

⁵¹ States of Jersey, *Report of the Review Panel on the Machinery of Government in Jersey*, para 9.4.

⁵² States of Jersey, *Report of the Review Panel on the Machinery of Government in Jersey*, para 9.3.

⁵³ 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 assembly of the States of Jersey.

⁵⁴ Privileges and Procedures Committee, *Administrative Appeals System: Proposals for Improvement – Consultation Report*, Presented to the States on 4 May 2004.

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.

The review by PPC led to amendments to the Administrative Decisions (Review) (Jersey) Law 1982 in 2006.⁵⁵

- 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.

The chairmen of the Panel have been: Mr R.R. Jeune (1996-unknown date); Mrs C.E. Canavan (unknown date-2012); Advocate R.J. Renouf (2012-2014);⁵⁶ Mr N. Le Gresley (2014-2015); and Mr G.G. Crill (appointed in July 2015 on a 5-year term). 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 chairman.

At a meeting of PPC in July 2015:⁵⁷

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 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.

⁵⁵ Administrative Decisions (Review) (Amendment No. 2) (Jersey) Law 2006.

⁵⁶ Advocate Renouf resigned a year before the end of his 3-year term as chairman upon his election to the States Assembly as Deputy of St Ouen.

⁵⁷ Privileges and Procedures Committee (13th Meeting), *Minutes*, 7 July 2015, TM/SC/194.

4.4. Composition and appointments to the Complaints Panel

As of October 2015, the Complaints Panel consists of 10 members (see Box 4.A). Speaking to PPC in July 2015, the new chairman ‘assured the Committee that the Panel retained a broad membership, with volunteers from a wide range of professional and social backgrounds’.⁵⁸ We welcome this commitment to diversity. Where decisions are taken by multi-member panels, those decisions are likely to be better informed than if taken by a panel of people drawn from a narrow spectrum of society.

Box 4.A: membership of the Complaints Panel as of October 2015
A retired Jersey solicitor, serving as chairman (male)
A senior member of the English Bar who lives in Jersey, serving as a deputy chairman (male),
A headmaster of a secondary school, serving as a deputy chairman (male)
A retired police officer, with senior investigative experience (male)
A retired police officer (male)
A computer consultant (male)
A retired principal of a further education college (male)
A retired civil servant who also serves as a member of two tribunals (male)
A shopkeeper with counselling experience who serves in many voluntary roles (female)
A manager in the hospitality industry (female).

If the Complaints Panel is retained (contrary to our preferred interim recommendation), we recommend that the Administrative Decisions (Review) (Jersey) Law 1982 should be amended to include a duty in relation to diversity. This mirrors a similar recommendation made in relation to the Jersey Administrative Appeals Tribunal.⁵⁹ The duty could be defined as: ‘The States Assembly shall have regard to the desirability of Panel members, between them, being broadly reflective of Jersey society’.

CONSULTATION QUESTION. <i>If, contrary to our interim view, the Complaints Panel is retained:</i> should the States Assembly have a legal obligation to ‘have regard to the desirability of Panel members, between them, being broadly reflective of Jersey society’?

We make no specific interim recommendations about the size of the Complaints Panel but would welcome views about the apparent problem that some members rarely have opportunities to participate meaningfully in the Panel’s work. During the research interviews, some interviewees with experience of serving on the Complaints Panel suggested that there was insufficient work for the number of members on the Panel. We were told that most of the work is carried out by the chairmen and deputy chairmen (with the assistance of the Deputy Greffier of the States), with other members called on only when a hearing was held. Some members, we were told, sit very infrequently. This state of affairs hampers members developing experience and expertise in their roles.

4.5. Caseload of the Complaints Panel

Over the past five years, the number of complaints received has varied between 8 and 16 (see Box 4.B). The number of public hearings held is smaller, ranging from one to four. It is difficult to assess whether this level of complaints is satisfactory. It would be undesirable if potential complainants with good cause to complain did not do so because they are unaware of the existence of the Complaints Panel or where aware of it but were deterred from bringing a complaint.

⁵⁸ Privileges and Procedures Committee (13th Meeting), *Minutes*, 7 July 2015, TM/SC/194.

⁵⁹ See Part 2.

Box 4.B: Case load of States of Jersey Complaints Panel

Year	New complaints received	Not proceeded with*	Hearings held	Informal resolutions	Complaints upheld
2015 (to November)	9	n/a	1	n/a	1
2014	13	11	1	4	0
2013	17	5	4	1	4
2012	7	4	1	1	1
2011	8	n/a	4	n/a	0
2010	12	n/a	3	n/a	n/a

Source: Answer to Written Question from Deputy M.R. Higgins to the Chief Minister regarding complaints received by States Departments, States of Jersey Official Report (*Hansard*), 17 November 2015.

* Request for Hearing refused/ withdrawn/ matter not pursued

n/a Information not given

The type of complaints has also 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'. The annual reports for 2012, 2013 and 2014 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.

4.6. Scope of the Complaints Panel's jurisdiction

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.

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 public bodies listed in Box 4.C. Some of the bodies listed in Box 4.C may rarely, if ever, make administrative decisions affecting individuals directly; many of them, however, do make such decisions.

Box 4.C Administrative decisions that do not currently fall within the remit of the Complaints Panel

- (a) administrative decisions taken by Parishes
- (b) arm's length bodies such as the Jersey Financial Services Commission and the Jersey Competition Regulation Authority
- (c) 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 housing stock and responsibilities of the States of Jersey Housing Department were transferred to Andium)

- (d) decisions made by non-ministerial bodies, which include: the Overseas Aid Commission; the Bailiffs' 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
- (e) decisions made by 'minor entities', which include the Government of Jersey London Office and the Jersey Legal Information Board.

If the Complaints Panel is retained, we see merit in the Panel's remit being widened to cover a broader range of public authorities than it does currently. The guiding principle should be that any body performing functions of a public nature should fall within the remit of the Complaints Panel. For clarity and certainty, these bodies should be listed in the amended Law governing the Complaints Panel.

During the research interviews, one interviewee with experience of serving on 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.

CONSULTATION QUESTION. *If, contrary to our interim view, the Complaints Panel is retained: should the Complaint Panel's remit be extended beyond decisions of Ministers and Government of Jersey departments? If so, which public bodies should people be able to complain about to the Panel?*

4.7. Defining the grounds of review

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.

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.

This definition of the Complaint Panel's jurisdiction and the grounds of review have remained substantially unaltered since the 1979. Our provisional findings are that there are significant problems with this legal framework and how they have been interpreted by the Complaint Panel.

4.7.1. Maladministration

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 Panel and maladministration. **Our finding is that there is widespread confusion over the meaning of maladministration and its application to the Panel's role.**

The concept of 'maladministration' seems to have come to Jersey via contact with the public sector ombudsmen in the United Kingdom.⁶⁰ 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.⁶¹ In the UK legislation, maladministration is not expressly defined. It is, however, understood to cover 'bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude, arbitrariness and so on'.⁶² 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'.⁶³

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. If the Complaints Panel is to be retained its focus on maladministration should be clarified and made explicit.

INTERIM RECOMMENDATION. *If, contrary to our interim view, the Complaints Panel is retained, we recommend that the grounds of review should be expressly defined in terms of maladministration.*

⁶⁰ <http://www.statesassembly.gov.je/AssemblyReports/2002/17021-24410.pdf#search=maladministration>

⁶¹ 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) www.gov.uk/government/uploads/system/uploads/attachment_data/file/417111/Ombudsman_Service_Consultation.pdf

⁶² These factors are often referred to as '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.

⁶³ 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.

4.7.2. Questions of law

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,⁶⁴ 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).⁶⁵

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 members)⁶⁶ and the current composition of the Panel (predominantly non-legally qualified members).

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 PCC 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).⁶⁷ 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 PCC 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’.
- 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’.⁶⁸
- 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’.⁶⁹

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. **We do not, however, consider**

⁶⁴ See H Woolf, J Jowell, A Le Sueur et al, *de Smith’s Judicial Review*, 7th edn (Sweet and Maxwell, London, 2013).

⁶⁵ See H Woolf, J Jowell, A Le Sueur et al, *de Smith’s Judicial Review*, 7th edn (Sweet and Maxwell, London, 2013).

⁶⁶ Though the first chairman of the Panel was Senator Reg Jeune, a lawyer.

⁶⁷ 240/5(5175).

⁶⁸ AG/SC/080.

⁶⁹ 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.

that the composition of the Complaints Panel is well suited to determining questions of law for three reasons.

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.⁷⁰ 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).

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.

Thirdly, 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 has been rejected by Ministers. Ministers should not be able to choose whether or not to accept rulings on questions of law.

For these reasons, we are unconvinced that the Complaints Panel should deal with questions of law. The grounds of review should be amended to avoid reference to legal issues as a ground of complaint. Where an aggrieved person's challenge is based on a legal question, the more appropriate avenue for redress is either an appeal to the proposed Jersey Administrative Appeals Tribunal or the Royal Court (if the underlying legislation creates a right of appeal) or an application for judicial review by the Royal Court (if the underlying legislation does not create a right of appeal).

INTERIM RECOMMENDATION. *If, contrary to our preferred view, the Complaints Panel is retained, it should not seek to deal with questions of law. Defining the Complaint Panel's role as being in relation to maladministration, rather than the current grounds of review set out in Article 9 of the 1982 Law, would help achieve this.*

4.7.3. Complaints to the Panel where there is an alternative remedy

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 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. 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.⁷¹
- 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

⁷⁰ For example, Connex complaint (see previous note) and *States of Jersey Complaints Board: Findings – Complaint against a Decision of the Minister for Social Security and the Department for Social Security Regarding The Handling Of An Application For Income Support R.142/2013* (relating to issue of whether a lump sum payment should be treated as income).

⁷¹ R.67/2013.

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.⁷²

INTERIM RECOMMENDATION. *If, contrary to our preferred view, the Complaints Panel is retained,* the Complaints Panel should not consider complaints where the complainant has (or had) a right of appeal to JAAT or the Royal Court, or could reasonably have made an application for judicial review to the Royal Court.

4.8. Starting the complaints process

The Deputy Greffier of the States has responsibility for dealing with inquiries about complaints to the Panel and is the Panel’s executive officer. We were told that on average she spends at least a day a week dealing with Panel work.

During the research interviews for this project, we gathered information about the operation of the complaints process. We were told that a large majority of complainants first contact the Office of States Greffier by telephone. Sometimes complainants are upset and sensitive handling of the phone call is needed. Many complaints fall outside the scope of the Complaints Panel and the Deputy States Greffier’s role is to ‘signpost’ them to more appropriate types of redress, for example the Employment and Discrimination Tribunal or the planning appeals procedure. At this stage, a check is also made on whether the complainant has exhausted the internal complaints procedures within the department. The Panel’s processes are also explained at this point, including the time scales (ensuring the complainant understands that speedy resolution is unlikely) and that if the complaint is upheld the Panel only has power to make recommendations to the department.

If a complainant appears to the Deputy States Greffier probably to fall within the remit of Panel, she sends a standard letter to the department asking for a brief résumé of the case. Once the facts are collated, the complaint is referred to the chairman or one of the deputy chairmen, who under Article 3 of the Administrative Decisions (Review) (Jersey) Law 1982 has three options

- to reject the complaint as not justifying review by the Panel
- if the complaint does justify review by the Panel, the chairman may ‘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’
- alternatively, the chairman may decide that the complaint should be referred to a 3-person board of Panel members for review.

When the Panel was originally set up, it was logical for the Greffier of the States (the senior clerk of the States Assembly) to be identified as the person to whom complaints should be sent. This is because between 1979 and 1995 the Panel was composed of elected States members *and* the government of the island was conducted through committees of the States Assembly. The rationale of this arrangement has disappeared now that the Panel consists of independent people *and* the introduction of ministerial government in 2006 ended the States Assembly’s direct role in public administration.

INTERIM RECOMMENDATION. *If, contrary to our preferred view, the Complaints Panel is retained,* the Greffier of the States should cease to be point of entry for complaints. The role should be assumed by the Judicial Greffe.

⁷² Discussed in the previous section.

4.9. Informal resolution

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.

The principle of proportionality in administrative redress⁷³ supports attempts to seek informal resolution of disputes.

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.

Some interviewees were doubtful about informal resolution. We were 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 complainant is not present (which could raise issues about impartiality). It was important that a board hearing a case 'comes fresh' at the issues.

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.

INTERIM RECOMMENDATION. *If, contrary to our preferred view, the Complaints Panel is retained, the power to broker informal resolution should not be restricted to the chairman and deputy chairman. It should be conferred on the Complaints Panel, enabling any member to exercise the power and for the Panel to work more flexibly.*

With a Panel consisting of ten members there would be sufficient manpower to consider encouraging some ordinary members of the Panel to specialise in informal resolution.

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.

INTERIM RECOMMENDATION. *If, contrary to our preferred view, the Complaints Panel is retained, all members should receive good quality training on all aspects of the Panel's work including informal resolution.*

⁷³ See Part 1.

4.10. Hearings

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).

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’.

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 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.

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.

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.

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.

We are 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,⁷⁴ the same considerations do not apply to complaint handlers whose focus is on maladministration.

INTERIM RECOMMENDATION. *If, contrary to our preferred view, the Complaints Panel is retained, it should cease to hold public hearings and focus on using investigatory techniques to find facts and develop its recommendations.*

4.11. Publication of reports

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

⁷⁴ See Parts 1 and 2.

Panel told us that the reports should be more succinct and directed at the errors complained about. We agree. During the research interviews, some interviewees expressed concern about how much personal information about complainants is contained in reports written after hearings, which are circulated to all elected States members and placed on the States Assembly website.

INTERIM RECOMMENDATION. *If, contrary to our preferred view, the Complaints Panel is retained, reports following hearings should be more succinct and seek to focus on the gist of the complaint.*

Much more could be done to make past reports (and annual reports) accessible along with useful information about the remit of the Complaints Panel. Currently the Panel has a single webpage on the Government of Jersey website (inaccurately headed ‘States of Jersey Complaints Board’) but this does not provide links to past reports of complaints or to annual reports.⁷⁵ The website of the States of Jersey assembly contains these reports, but they are available only by searching.⁷⁶

INTERIM RECOMMENDATION. *If, contrary to our preferred view, the Complaints Panel is retained, the Panel should have its own website, which should be used to archive past reports and annual reports and be developed into a resource for complainants and their advisers.*

4.12. Value for money

During the research interviews, most people identified the relatively low cost of running the Complaints Panel as one of its advantages. The members of the Complaints Panel receive no remuneration but there are other public costs that must be taken into account. As noted above, we were told during the research interviews that the Deputy Greffier of the States spends at least a day a week on Complaints Panel business. A considerable amount of work is undertaken by departments in preparing for and attending hearings.

In our view, any consideration of cost should also have regard to value for money. The Complaints Panel assist only a small number of complainants a year. Unlike ombudsman schemes, the Complaints Panel makes little or no tangible contribution to improving the quality of public administration generally.⁷⁷ And, as discussed above, most reports made by boards of the Complaints Panel are not accepted by Ministers.

Our interim findings are that the Complaints Panel, although its running costs are relatively low, offers poor value for money in the island’s administrative redress system.

4.13. Panel’s power to request Ministers to reconsider matters

The Panel’s remedial powers are limited to making a ‘request that the Minister, Department or person to reconsider the matter’.⁷⁸ 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 shall make a report to the States Assembly. 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.

⁷⁵ <https://www.gov.je/Government/Comments/Pages/StatesJerseyComplaintsBoard.aspx>

⁷⁶ <http://www.statesassembly.gov.je/Pages/default.aspx>

⁷⁷ See Part 5.

⁷⁸ Administrative Decisions (Review) (Jersey) Law 1982, Article 9.

In the United Kingdom, the public sector ombudsmen also have powers limited to making recommendations.⁷⁹ 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.

Of the five reports issued after hearings in recent years requesting Ministers to reconsider the matter, four resulted in Ministers refusing to do so (see Box 4.C). The Panel views with 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 various Boards' and 'is concerned that Ministers and officers seem reluctant to acknowledge that mistakes are occasionally made'.⁸⁰

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.

Our finding is that an atmosphere of mutual distrust has arisen between the Panel and government. An unsustainable situation has come about in which the work of the Panel is routinely dismissed by Ministers, leaving complainants with no remedy notwithstanding the considerable time and effort expended in preparing for a public hearing of their case.

We have reviewed the four recent complaints in which Ministers rejected the Complaints Panel's findings. In each case, we find the Minister's reasons for not accepting the reasoning and recommendations of the Complaints Panel persuasive.

Box 4.C Panel recommendations rejected by Ministers. Source: Panel annual reports

Annual report	Number of hearings	Requests to Ministers to reconsider	Response of Minister etc
2014 (presented to States July 2015)	1	0	Not applicable
2013 (presented to States April 2014)	4	4	<ul style="list-style-type: none"> R.67/2013: Minister for Transport and Technical Services rejected Panel's finding that it unreasonable conditions were imposed on a PSV licence. R.144/2013: Minister for the Environment rejected Panel's findings that department had acted outside its legal powers, and with maladministration, in relation to planning enforcement notice. Minister for Social Security rejected Panel's findings in relation to determination on whether a lump sum severance payment was income.

⁷⁹ See Part 5.

⁸⁰ 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.

			<ul style="list-style-type: none"> R.157/201: Minister for Home Affairs accepted Panel's findings on decision to terminate police officer's appointment under a 'managing attendance policy'.
2012 (presented to States May 2013)	1	1	1386.1.1.3(18): Minister for Education, Culture and Sport rejected Panel's findings that a decision on transferring a pupil to a secondary school contrary to the parent's wishes was contrary to natural justice and unreasonable.
2011 (presented to States May 2012)	4	0	Not applicable

4.14. Role of the States Assembly

During the research, we were unable to gain access to interview members of PPC. Our research on the role of PPC, and the States Assembly more broadly, in relation to the Complaints Panel is therefore based on a review of documents on the States Assembly website.

Under the Administrative Decisions (Review) (Jersey) Law 1982, PPC is the conduit through which a report on a particular case is presented to the States Assembly. This appears to be a formal process, undertaken with no consideration of the content of the report by members of PPC.

Where a Minister rejects the findings of a board of the Complaints Panel, on some occasions PPC has invited the Minister and chief officer to a meeting to discuss the matter. Such meetings take place behind closed doors but minutes are subsequently published. One meeting was prompted by concerns expressed by a deputy chairman of the Complaints Panel that the Minister had 'insufficiently considered' the Panel's findings.⁸¹ The Complaints Panel asked PPC 'to consider what action it might wish to take should Ministers continue to ignore its findings, being as this would have the potential to undermine the Panel's role'.

PPC has also considered correspondence from individuals whose complaint has been rejected by the Complaints Panel without a hearing; PPC's response has been to state that it cannot intervene in individual cases.⁸²

The PPC also periodically invites the chairman of the Complaints Panel to a meeting to discuss the operation of the Panel; again this is not open to the public but minutes are subsequently published.

The Complaints Panel appears not to have regular contact with Scrutiny Panels.

CONSULTATION QUESTION. *If, contrary to our preferred view, the Complaints Panel is retained, we seek views on how the Complaints Panel should relate to the States Assembly.*

4.15. The name of the body

Under the Administrative Decisions (Review) (Jersey) Law 1982 the name of the body is the 'Complaints Panel' currently consisting of 10 members. A 'Complaints Board' is the three-person committee that conducts a hearing into a particular complaint. The difference between 'the Panel' and

⁸¹ See e.g. PPC (24th Meeting), 6 March 2014 <http://www.statesassembly.gov.je/AssemblyMinutes/2014/2014-03-06%20PPC%20%28A%29.pdf>

⁸² See e.g. PPC (10th Meeting), 19 May 2015. <http://www.statesassembly.gov.je/AssemblyMinutes/2015/2015-05-19%20PPC%20%28A%29.pdf>

‘the Board’ is confusing. The terms are often used interchangeably and inaccurately, including on the Complaints Panel’s webpage. This does not assist with public understanding of the Panel’s role.

INTERIM RECOMMENDATION. *If, contrary to our preferred view, the Complaints Panel is retained, the confusing terminology of ‘Panel’ and ‘boards’ should be abolished. There is no need for the 1982 Law to make this distinction.*

4.16. Overarching interim conclusion

In 2004, PPC reported to the States Assembly that ‘it would seem essential that the current administrative appeals system is amended because of the perceived lack of confidence in it’.⁸³ As described above, a range of reforms was implemented in an effort to revitalise the Complaints Panel.

INTERIM RECOMMENDATION. Our overarching finding is that previous attempts at reform have not succeeded in enhancing political or public confidence in the Complaints Panel or in improving its effectiveness as an administrative redress remedy. Our interim view is that a bolder approach is now needed. It should be recognised that the Complaints Panel has outlived its usefulness and should be replaced with a public services ombudsman scheme.

⁸³ Privileges and Procedures Committee, *Administrative Appeals System: Proposals for Improvement – Consultation Report*, Presented to the States on 4 May 2004.

5. A JERSEY PUBLIC SERVICES OMBUDSMAN

5.1. What is an ombudsman?

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.

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) as a way of dealing with complaints in an independent way.

The Ombudsman Association, an international organisation of ombudsman bodies, defines the role of an ombudsman as follows:⁸⁴

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.

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. As we noted in Part 1, there is currently no institution in Jersey with this remit in relation to public administration generally.

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.

⁸⁴ <http://www.ombudsmanassociation.org/about-the-role-of-an-ombudsman.php>.

5.2. Comparison with the States of Jersey Complaints Panel

The States of Jersey Complaints Panel, examined in Part 4, 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’. In several respects, an ombudsman and the Complaints Panel are different.

Box 5.A Comparison of ombudsmen and States of Jersey Complaints Panel

Feature	Ombudsman (typically)	States of Jersey Complaints Panel
Personnel	A professional expert, leading a team of case workers	Committee with no particular professional expertise in public administration dispute handling
Criteria of review	‘Maladministration’	The list of rather legalistic criteria in Article 9(2) of the Administrative Decisions (Review)(Jersey) Law 1982 – discussed in Part 4 above.
Methods of work	Informal resolution if possible Formal investigation leading to a published report where informal resolution is not possible	Some use of informal resolution Adjudication at a formal public hearing leading to a published report where informal resolution is not used
Remedies	Power to make recommendations High level of compliance by public authorities	Power to make recommendations (request that Minister reconsiders) More often than not, rejected by Ministers
Role in promoting good standards of administration and dispute resolution within public authorities	Yes, central to role	No

5.3. Debate about a public sector ombudsman for Jersey

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.⁸⁵

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.

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

⁸⁵ *Report of the Review Panel on the Machinery of Government in Jersey* Part 9.

- 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:⁸⁶ 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’.

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.⁸⁷

5.4. Ombudsman schemes on other small jurisdictions

Ombudsman schemes operate in a number of small jurisdictions worldwide.

The Gibraltar Public Services Ombudsman was established in 1999, serving a population of 30,000. The office consists of the Ombudsman and four members of staff. In 2014, it received 113 enquiries and 205 complaints (housing matters forming the largest single category). Many cases were resolved informally. Nine cases were subject to formal investigation leading to reports. 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.

The Ombudsman for Bermuda serves a population of 65,000. It was established in 2004. In addition to the Ombudsman, the office has five members of staff. In 2014, it received 128 new complaints. It works with government departments to promote best practice in good administration and internal complaint handling.

In the Cayman Islands (population 63,000), the Office of the Complaints Commissioner was created in 2004. The office consists of a Complaints Commissioner and four members of staff. During the financial year 2013-14, the Office received 26 enquiries, 87 complaints and completed 44 full investigations.

Based on these examples of ombudsmen in jurisdictions similar in size to Jersey, we find that public services ombudsman schemes appear to be operating successfully in other small jurisdictions. Further research is, however, required before a detailed proposal for a Jersey public services ombudsman can be submitted.

⁸⁶ 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.

⁸⁷ See Part 4.

5.5. Interim recommendation

The States Assembly has in the past rejected the idea of a public services ombudsman. In our view, the time is right to revisit the question. The deficiencies of the States of Jersey Complaints Panel (discussed in Part 4) are even more apparent than in 2004. We recognise a decision to establish a public services ombudsman in Jersey would be a major investment of political and financial resources. Neither the PPC's 2004 study nor the Clothier recommendation in 2000 were, in our view, based on adequate research. In any event, there have been significant developments in the 'ombudsman world' since then – including, as we have discussed, the creation of ombudsman schemes in small jurisdictions. A next step is therefore to examine in more detail the need, feasibility, costs and benefits of setting up a Jersey public services ombudsman to replace the States of Jersey Complaints Panel.

INTERIM RECOMMENDATION. The Chief Minister's Office should commission a research study on the benefits and costs of introducing an ombudsman scheme in Jersey.

This study should:

- assess the operation and effectiveness of the ombudsman schemes established in other small jurisdictions (notably 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 health services would be included. As the data discussed in Part 1 show, it is the Health and Social Services Department that generate by far the largest number of formal complaints a year
- investigate the procedures that a Jersey public services ombudsman could use, including alternative dispute resolution (ADR) methods⁸⁸
- consider the relationship between a Jersey public services ombudsman and other redress mechanisms (including appeals to tribunals and the Royal Court)
- estimate the likely case load of a Jersey public services ombudsman
- consider what, if any scope, there would be for joint working between the new Channel Islands Financial Ombudsman (CIFO) and a public services ombudsman
- consider the political and practical feasibility of developing a public services ombudsman in conjunction with Guernsey, examining whether there are lessons for joint working from the creation of CIFO
- develop a costed model for a Jersey public services ombudsman.

⁸⁸ On ADR, see further Part 7 below.

6. THE ROYAL COURT

6.1. The Royal Court

The Royal Court of Jersey is the island's principal court, with jurisdiction over civil and criminal matters. The Bailiff and Deputy Bailiff (which 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.

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.

There is a right of appeal from decisions of the Royal Court to the Jersey Court of Appeal.

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. 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.

6.2. Role of the Royal Court in administrative redress

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.

6.2.1. Administrative appeals

First, many Laws enacted by the States Assembly create a right of appeal to the Royal Court. 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.

The thrust of our interim recommendations, discussed below, is that an appeal to the proposed Jersey Administrative Appeals Tribunal (JAAT) would in relation to many situations be a more accessible and proportionate form of redress than an appeal to the Royal Court. Appeals to the Royal Court should be restricted to types of cases in which important or complex questions of law are likely to arise. Where appeals to the Royal Court are retained, we provisionally recommend that the time limits for making an appeal should be standardised.

6.2.2. Applications for judicial review

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 ‘an application 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).

The application for judicial review procedure adopted 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. Our interim recommendation is that consideration should be given to updating the Royal Court Rules.

6.2.3. Broader roles for the Royal Court and the Bailiff

As discussed in Part 4, our interim recommendations in relation to the proposed Jersey Administrative Appeals Tribunal (JAAT) envisage that the Bailiff assumes a role in relation to the appointment of the President of JAAT. The Royal Court would have a role in hearing any appeals by unsuccessful applicants seeking appointment to the tribunal and in removing a tribunal member for misconduct or incapacity.

6.3. Appeals from administrative decisions

Our analysis of legislation in force in mid-2015 suggests that there are 40 rights of appeal from administrative decisions across a wide range of subjects. 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).

6.3.1. Why are very few rights of appeal used?

According to information from 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.

It is always difficult to analyse why people do not exercise rights of appeal. One possibility 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.

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.

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.

6.3.2. The grounds of appeal

The Laws creating rights of appeal to the Royal Court define the grounds on which appeals may be brought in different ways:

- ‘the decision was unreasonable having regard to all the circumstances of the case’
- the appellant ‘is aggrieved’ by the decision
- no indication is given of the possible grounds of appeal.

The meaning of the formula ‘the decision was unreasonable having regard to all the circumstances of the case’ has in the past been the source of uncertainty and some professional and academic comment.⁸⁹ The issue is how much judicial control over administrative decision-making this type of appeal confers on the Royal Court and the extent to which the Court is able to impose its own view of what is reasonable in the case. Detailed examination of these rather complex issues falls outside the scope of our current administrative redress project but we seek views as to whether this is a topic that the Jersey Law Commission should inquire into in the future.

CONSULTATION QUESTION. Should the Jersey Law Commission review the operation of the ground of appeal formulated as ‘the decision was unreasonable having regard to all the circumstances of the case’?

6.3.3. Proportionality principle

As discussed in Part 1, the principle of proportionality should inform the design and operation of the administrative redress system. 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.

A proportionate approach has benefits for potential appellants. For individuals and small business owners, making an appeal to JAAT is likely to be 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.

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

⁸⁹ See G Robinson, ‘Administrative Appeals: a hearing de novo?’ (1997) 1 *Jersey Law Review* 233; A Le Sueur, ‘Appeals and judicial review after the Human Rights (Jersey) Law 2000’ (2002) 6 *Jersey Law Review* 142; N Langlois, ‘the test for appeals against decisions of administrative bodies: unreasonable or just plain wrong?’ (2008) 12 *Jersey and Guernsey Law Review*. All available at www.jerseylaw.je.

fact or administrative judgement (whether an administrative decision is ‘reasonable’) JAAT would be as well placed as the Royal Court to decide the matter.

In selecting a provisional list of Laws that could be amended to change the right of appeal to JAAT, we have had regard to the following criteria:

- appellants are likely to be individuals or smaller/medium sized businesses with limited financial resources
- the ground of appeal against the administrative decision is that it is ‘unreasonable’ or, more broadly still, that the appellant ‘is aggrieved’.

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.

INTERIM RECOMMENDATION. There are 54 appeals (see Table 6.A) in respect of which JAAT would be a more proportionate body to hear the appeal than the Royal Court. We seek views on whether any of these rights of appeal should be excluded from the proposed transfer of jurisdiction to JAAT.

The Laws set out in Table 6.A are based on a snapshot of Laws in force during the first half of 2015.

Table 6.A: Appeals proposed to be transferred to JAAT

	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

6.3.4. Appeals that would be retained by the Royal Court

We provisionally recommend that the appeals listed in Table 6.B would be retained by the Royal Court.

Table 6.B: Appeals retained by 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	
18		Water Resources (Jersey) Law 2007	
19	Connetable's refusal to add or remove a person's name to the register	Public Elections (Jersey) Law 2002	Unspecified

6.3.5. Transfer of proceedings between the Royal Court and JAAT

It is possible to envisage that an appeal lodged with the JAAT may, on initial inspection, seem to warrant the attention of Royal Court, for example because a point of law of general public importance is raised by the appellant or respondent. As we discuss in Part 2, 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.

INTERIM RECOMMENDATION. The Royal Court Rules should enable orders to be made transferring appeals the Royal Court to JAAT and vice versa.

6.3.6. Time limits for appeals

The administrative appeals that currently lie to the Royal Court (some of which we provisionally recommend should go instead to JAAT) specify a various time limits for making the appeal:

- 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.

This wide variety of different dates is potentially confusing and are difficult to justify.

INTERIM RECOMMENDATION. There should be a standard time limit for making administrative appeals (unless there is an overwhelming public interest in specifying a different limit). The standard time limit should be 28 days from the appellant receiving notice of the decision appealed against.

6.4. ‘Second appeals’

The previous section concerned appeals directly from an administrative decision-making (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. According to our analysis of legislation in force in mid-2015, there were six such ‘second appeals’: see Table 6.B.

Table 6.B: second appeals to the Royal Court

First appeal body	Law	Ground of appeal	Time limit
Social Security Tribunal or Medical Appeal Tribunal	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 to the Tribunal 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 to the Court in accordance with Rules of Court
Social Security Tribunal	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 to the Tribunal 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 to the Court in accordance with Rules of Court
Social Security Tribunal constituted under Art 8 of the Social Security (Determination of Claims and Questions) (Jersey) Order 1974.	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
Social Security Tribunal	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.
Minister hearing appeal against decision of Director of Civil Aviation regarding aerodrome licences	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
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.

According to information supplied by the Judicial Greffe, none of these rights of appeal had been used in the four years to mid-2015.

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'.

INTERIM RECOMMENDATION. A 'second appeal' to the Royal Court on a question of law should exist from all final determinations of the proposed Jersey Administrative Appeals Tribunal. The right to exercise such an appeal should be subject to leave being granted either by JAAT or, if JAAT declines to grant leave to appeal, by the Royal Court. There should be a standardised time limit, which we provisionally propose should be 28 days.

6.5. Applications for judicial review

If there is no right of appeal against an administrative decision to a tribunal or to the Royal Court, an aggrieved person may make an application for judicial review to the Royal Court. In other words, even 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.

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.

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).

A small number of applications for judicial review are made each year, typically two or three. Table 6.C provides some illustrations of the types of case that come before the Royal Court by this route.

Table 6.C Recent applications for judicial review

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.

Detailed examination of the operation of the judicial review procedure falls outside the scope of this consultation report. 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.

INTERIM RECOMMENDATION. 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. ALTERNATIVE DISPUTE RESOLUTION

7.1. What is alternative dispute resolution?

Alternative dispute resolution (ADR) refers to a range of techniques that may be used for resolving disputes rather than formal adjudication by a court or tribunal. These techniques include: negotiation, arbitration, conciliation, early neutral evaluation and mediation.

The origins of 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 in many legal systems.

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 courts and tribunals, 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:⁹⁰

- 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.

7.1.1. The advantages of ADR

There is a perception that ADR is cheaper (for the parties and public funds) than determining a dispute at a formal hearing before a court or tribunal. Whether or not this is true, it needs to be borne in mind that if attempts at ADR fail, the parties to the dispute may end up in a tribunal or court hearing afterwards. A major determinant of cost is whether lawyers are involved in the ADR – for example, in some mediations one or both parties may have legal representation during the process.

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. Certainly, there are some studies that show ADR takes longer than adjudication in some contexts.⁹¹

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 timing of ADR may also be more flexible than court or tribunal hearings (for example, mediations may take place in evenings or weekends).

A further advantage of ADR, for the parties to the dispute, is that the process and outcome are normally confidential.

7.1.2. The disadvantages of ADR

As noted above, caution is needed before it can be assumed that ADR is either cheaper or quicker than adjudication by a court or tribunal.

⁹⁰ Other types of mediation include 'narrative mediation' and 'transformative mediation'.

⁹¹ See below.

Especially 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.

7.2. ADR in Jersey

In Jersey, there has been an increasing use and awareness of ADR in recent years, especially in relation to family breakdown,⁹² petty debts⁹³ and ‘community mediation’.⁹⁴

Community Mediation is a scheme set up by the Jersey Legal Information Board in 2009 and administered by Jersey Citizen’s 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.

7.3. ADR in relation to disputes about administrative decisions

In England, as in Jersey, the use of ADR techniques is less prevalent in relation to administrative decisions than in other areas (such as family, commercial and consumer disputes). In England and some other jurisdictions, there have been efforts to extend ADR into administrative disputes in recent years, so it is instructive to look at that experience to see what can be learned for Jersey.

7.3.1. ADR and tribunals

When the UK tribunal system was reformed in 2007,⁹⁵ 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.⁹⁶

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.⁹⁷ 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.

⁹² Jersey Law Commission, *Divorce: Topic Report 2015*.

⁹³ [www.jerseylaw.je/mediation/reports/Small_Claims_Mediation\(JW\).aspx](http://www.jerseylaw.je/mediation/reports/Small_Claims_Mediation(JW).aspx)

⁹⁴ www.jerseylaw.je/Mediation/Community/Information.aspx

⁹⁵ See Part 2 above.

⁹⁶ Department for Constitutional Affairs, *Transforming Public Services; Complaints, Redress and Tribunals*, Cm 6243 (July 2004).

⁹⁷ 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.

Another useful point of reference is the Australian Administrative Appeals Tribunal (AAT).⁹⁸ 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.

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 new Tribunal Rules should, however, be sufficiently flexible to permit different types of ADR in different types of case so that in due course the President of JAAT can organise pilot schemes. 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.

INTERIM RECOMMENDATION. The procedural rules of the proposed Jersey Administrative Appeals Tribunal should make provision for appeals to be resolved by ADR, where the parties agree.

7.3.2. ADR related to maladministration complaints

Our principal interim recommendation (discussed in Part 4 above) is that the States of Jersey Complaints Panel should be replaced by a public service ombudsman scheme. If a public service ombudsman is established, we envisage that some complaints would be resolved using ADR techniques (often referred to as ‘informal resolution’ in this context)⁹⁹ 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 transparency¹⁰⁰ should require information about the extent and success in the use of ADR to be included in the ombudsman’s annual report.

Looking at ombudsman schemes elsewhere gives cause to think that ADR is likely to play a limited role in the work of a Jersey 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.¹⁰¹ Initially, it appeared that the ombudsmen made relatively little use of ADR in practice – though the Parliamentary and Health Service Ombudsman acknowledged that there may be cases where mediation is ‘especially appropriate in enabling the parties to explore their differences with a trained facilitator,

⁹⁸ <http://www.aat.gov.au/steps-in-a-review>

⁹⁹ 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.

¹⁰⁰ See Part 1.

¹⁰¹ Regulatory Reform (Collaboration etc between Ombudsmen Order 2007.

achieve insight and empowerment, and devise for themselves a way forward'.¹⁰² 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'.¹⁰³

As noted in Part 4, since 2006 the States of Jersey 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.

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.¹⁰⁴ 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.¹⁰⁵ In light of these problems, we provisionally recommend that the Chairman's power to 'attempt informal resolution' should be understood to include power to refer a complaint to mediation, if both parties agree.

Under this arrangement, mediation would be carried out by one of the trained mediators working under the auspices of the Community Mediation scheme. Members of the Complaints Panel would no longer have a direct role in attempting informal resolution.

CONSULTATION QUESTION. *If, contrary to our preferred view, the Complaints Panel is retained, we seek views on how the Panel's use of ADR should be developed.*

7.3.3. ADR related to the Royal Court

As discussed in Part 6, the Royal Court is part of the island's administrative redress system through its roles in hearing statutory appeals and applications for judicial review.

In relation to statutory appeals, our interim recommendation is 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.¹⁰⁶ **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.

In relation to applications for judicial review, we recommend that Royal Court Rules Review Group extend its work to review the operation of Part 16. In this view, it will be instructive to consider the experience in England and Wales relating to ADR and judicial review.

¹⁰² Ann Abraham, 'The ombudsman and "paths to justice": a just alternative or just an alternative' [2008] *Public Law* 1, 4.

¹⁰³ See <http://www.lgo.org.uk/guidance-inv/settling-complaints/mediation>.

¹⁰⁴ See Part 4.

¹⁰⁵ See Part 4.

¹⁰⁶ See Part 6.

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.¹⁰⁷ 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).

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 to be explored at the first directions hearing’.¹⁰⁸ **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.**

¹⁰⁷ *Cowl v Plymouth City Council* [2001] EWCA Civ 1935; [2002] 1 WLR 803.

¹⁰⁸ *Access to Justice*, Final Consultation Paper Issued by the Royal Court Rules Review Group (5 October 2015) p 32.

JERSEY LAW COMMISSION

IMPROVING ADMINISTRATIVE REDRESS CONSULTATION

The consultation report *Improving Administrative Redress in Jersey* and this form can be downloaded from the Jersey Law Commission website www.jerseylawcommission.org

You may use this form to let us have your views on our interim recommendations and consultation questions (or you can set your views out in an email or letter). It is not necessary to respond to all questions.

The consultation closes on 29 July 2016.

Please send responses

- by email to jerseylawcommission@gmail.com or
- by post to Administrative Redress Consultation, Jersey Law Commission, c/o Institute of Law, Law House, 1 Seale Street, St Helier, Jersey JE2 3QG

Your name:

Address:

.....

.....

Email @

I am responding on behalf of the following organisation/ law firm (if applicable)

.....

I [give] [do not give] permission (please delete as appropriate) for my name to be listed in the Topic Report as somebody who responded to the consultation.

I [give] [do not give] permission (please delete as appropriate) for my views to be summarised in the Topic Report.

Part 1 Introduction

Interim recommendation/consultation question	Agree	Disagree	Other/comments
All public bodies should set out their internal procedures for dealing with grievances in an accessible, clear and comprehensive manner.			
There is a need for further work across the Government of Jersey and other public bodies to improve the quality and consistency of internal complaints procedures in terms of accessibility, clarity, independence and outcomes. In			

systems that have a public services ombudsman, one of the ombudsman's functions is to develop and ensure implementation of good principles of complaint handling by government bodies. In the absence of such an ombudsman in Jersey, the Chief Minister's Department should lead this work.			
A legal duty should be placed on the Chief Minister to make an annual written report to the States Assembly on administrative redress setting out data, analysis and any proposals to develop and improve the system. Data should include informal and formal complaints, appeals to tribunals, the States of Jersey Complaints Panel, use of statutory appeals and applications for judicial review to the Royal Court and other requests for administrative redress.			
The States Assembly Privileges and Procedures Committee (PPC) or a States Assembly Scrutiny Panel should assume responsibility for scrutinising and considering the Chief Minister's annual report on administrative justice.			
The Chief Minister's Department should establish a standing committee of experts – the Jersey Administrative Justice Forum – to advise on the development of the administrative redress system.			

Part 2 Tribunals

Interim recommendation/consultation question	Agree	Disagree	Other/comments
The term 'tribunal' in Jersey legislation should be reserved for judicial bodies adjudicating on appeals and should not be used for bodies exercising advisory functions.			

Are there areas of administrative decision-making not currently served by an appeal to a tribunal for which there should be a right of appeal to JAAT?			
A new tribunal, the Jersey Administrative Appeals Tribunal (JAAT), should be created to hear appeals against administrative decisions made under a variety of Laws.			
The jurisdictions of eight existing tribunals should be transferred to JAAT.			
Four rights of appeal that currently lie to Ministers should be transferred to JAAT (see Part 3 for more detailed discussion).			
Rights of appeal to the Royal Court under 54 Laws should be transferred to JAAT (see Part 6 for more detailed discussion).			
Appeals against adjudications on prisoners should be transferred to JAAT.			
We seek opinions on how the benefits of specialism of tribunal members can best be balanced with the desirability of more flexible deployment.			
A post of President of JAAT should be created to provide leadership.			
Ministers should cease to have any role in appointing tribunal members.			
The States Assembly should cease to have a role in the appointments process for tribunal members.			

<p>We propose that:</p> <p>(1) The President of JAAT should be appointed by a panel consisting of the Bailiff, the senior Jurat and a lay member nominated by the States of Jersey Appointments Commission (the independent body that oversees the recruitment of States' employees and appointees to States supported or related bodies).</p> <p>(2) Other tribunal members (legally qualified, professional and lay) should be appointed by a panel consisting of the President of JAAT, a Jurat and a lay member nominated by the States of Jersey Appointments Commission.</p>			
Should there be any nationality criteria to be met by applicants seeking appointment as members of JAAT?			
Should applicants seeking appointment as members of JAAT have been resident in Jersey for at least 5 years?			
The presiding member in all hearings of appeals by JAAT should be a legal member (the President of JAAT or an ordinary legal member).			
Do you agree that eligibility for appointment to JAAT as a legally qualified member should not be confined to Jersey advocates and solicitors?			
The President of JAAT should hold an academic or professional qualification in law and have not less than 10 years' relevant law-related work experience. Other legal members of JAAT should hold an academic or professional qualification in law and have not less than 7 years' relevant law-related work experience.			

It should be expressly stated in law that that principal criteria for appointment as a tribunal member are merit (that is, possessing the necessary skills to adjudicate impartially on questions of facts and law) and good character.			
A person aggrieved by a decision not to appoint him or her to JAAT should have a right of appeal to the Royal Court.			
Subject to the principal criteria of merit and good character, a legal duty should be placed on the JAAT appointments panels to have regard to the desirability of lay members of tribunals, between them, being broadly reflective of Jersey society.			
We seek views on whether panels of JAAT hearing social security and income support appeals should include a member with experience as a benefits claimant or advising benefits claimants.			
Legal, professional and lay members serving on the proposed JAAT should have open-ended appointments, brought to an end by resignation or on reaching a mandatory retirement age.			
The mandatory retirement age for members of JAAT should be 72 years.			
Removal from office for JAAT members on grounds of misconduct or incapacity should be ordered by the Royal Court upon a joint application by the Attorney General and the President of JAAT (or, in relation to removal of the the President, the longest serving other legal member).			
The post of Senior President of JAAT should be salaried, though not necessary a full-time appointment.			

Should the fixed daily sitting fee for lay members be replaced with expenses and compensation for loss of earnings (up to set limits)?			
All fees and expenses paid to tribunal members should be from the Judicial Greffe's budget, not from the public body against whose decisions members hear appeals.			
A programme of training should be provided on an ongoing basis to legal, professional and lay members of JAAT to ensure that the highest professional standards are maintained.			
The work of JAAT should be funded and administered through the Judicial Greffe.			
The administration of JAAT should be based at Trinity House, 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.			
The procedures for making an appeal to JAAT should be set out in a coherent and user-friendly set of rules.			
The JAAT rules should contain an overriding objective.			
The JAAT Rules should enable orders to be made transferring appeals from JAAT to the Royal Court and vice versa.			
The JAAT Rules should enable appeals to be resolved without a hearing where this is appropriate and in the interests of justice.			
Except for mental health appeals, all JAAT hearings should be in			

public unless the chairman of the panel orders otherwise (if compatible with ECHR Article 6).			
Our provisional assessment is that practices relating to the pronouncement of judgments in Jersey's administrative tribunals are in breach of the minimum standards for open justice. We seek views on which of the options for reform set out in the consultation report would be preferable to bring current practices into conformity with human rights requirements.			
We seek views on what regulation is needed, if any, on rights of audience to represent appellants at JAAT hearings.			
We seek views on how provision of appropriate legal representation before the Jersey Administrative Appeals Tribunal should be organised.			

Part 3 Appeals and reviews determined by Ministers

Interim recommendation/ consultation question	Agree	Disagree	Other / comment
Appeals from Connétables relating to civil marriage and partnership venues should be made to JAAT, not the Minister for Home Affairs.			
Do you agree that the Chief Minister should continue to have a role in reviewing decisions under the Civil Aviation (Jersey) Law 2008?			
Appeals from the Agent of Impôt relating to duties should be made to JAAT, not the Minister for Treasury and Resources.			
Appeals relating to special educational needs assessments and provision should be made to JAAT, not the Minister for Education or			

any officer or panel appointed by the Minister.			
Appeals from the Inspector under Article 8 of the Motor Vehicle Registration (Jersey) Law 1993 should be made to JAAT, not the Minister.			

Part 4 States of Jersey Complaints Panel

Note: our main interim recommendation is that the Complaints Panel should be abolished. Nonetheless, we explore ways in which (if it is retained) the Complaints Panel could be reformed. We seek views on both these options.

Interim recommendation/consultation question	Agree	Disagree	Other/comment
We seek views on whether an evolutionary approach to reform of the Complaints Panel is desirable or whether it should be abolished and replaced with a public services ombudsman. Our provisional view is that that latter course is preferable.			
<i>If, contrary to our interim view, the Complaints Panel is retained:</i> should the States Assembly have a legal obligation to ‘have regard to the desirability of Panel members, between them, being broadly reflective of Jersey society’?			
<i>If, contrary to our interim view, the Complaints Panel is retained:</i> should the Complaint Panel’s remit be extended beyond decisions of Ministers and Government of Jersey departments? If so, which public bodies should people be able to complain about to the Panel?			
<i>If, contrary to our interim view, the Complaints Panel is retained,</i> we recommend that the grounds of review should be expressly defined in terms of maladministration.			
<i>If, contrary to our preferred view, the Complaints Panel is retained,</i> it			

should not seek to deal with questions of law. Defining the Complaint Panel's role as being in relation to maladministration, rather than the current grounds of review set out in Article 9 of the 1982 Law, would help achieve this.			
<i>If, contrary to our preferred view, the Complaints Panel is retained,</i> the Complaints Panel should not consider complaints where the complainant has (or had) a right of appeal to JAAT or the Royal Court, or could reasonably have made an application for judicial review to the Royal Court.			
<i>If, contrary to our preferred view, the Complaints Panel is retained,</i> the Greffier of the States should cease to be point of entry for complaints. The role should be assumed by the Judicial Greffe.			
<i>If, contrary to our preferred view, the Complaints Panel is retained,</i> the power to broker informal resolution should not be restricted to the chairman and deputy chairman. It should be conferred on the Complaints Panel, enabling any member to exercise the power and for the Panel to work more flexibly.			
<i>If, contrary to our preferred view, the Complaints Panel is retained,</i> all members should receive good quality training on all aspects of the Panel's work including informal resolution.			
<i>If, contrary to our preferred view, the Complaints Panel is retained,</i> it should cease to hold public hearings and focus on using investigatory techniques to find facts and develop its recommendations.			
<i>If, contrary to our preferred view, the Complaints Panel is retained,</i> reports following hearings should			

be more succinct and seek to focus on the gist of the complaint.			
<i>If, contrary to our preferred view, the Complaints Panel is retained, the Panel should have its own website, which should be used to archive past reports and annual reports and be developed into a resource for complainants and their advisers.</i>			
<i>If, contrary to our preferred view, the Complaints Panel is retained, we seek views on how the Complaints Panel should relate to the States Assembly.</i>			
<i>If, contrary to our preferred view, the Complaints Panel is retained, the confusing terminology of 'Panel' and 'boards' should be abolished. There is no need for the 1982 Law to make this distinction.</i>			
Our overarching finding is that previous attempts at reform have not succeeded in enhancing political or public confidence in the Complaints Panel or in improving its effectiveness as an administrative redress remedy. Our interim view is that a bolder approach is now needed. It should be recognised that the Complaints Panel has outlived its usefulness and should be replaced with a public services ombudsman scheme.			

Part 5 A Jersey Public Services Ombudsman

Interim recommendation	Agree	Disagree	Other / comments
The Chief Minister's Office should commission a research study on the benefits and costs of introducing an ombudsman scheme in Jersey.			

Part 6 The Royal Court

Interim recommendation/ consultation question	Agree	Disagree	Other / comment
Should the Jersey Law Commission review the operation of the ground of appeal formulated as ‘the decision was unreasonable having regard to all the circumstances of the case’?			
There are 54 appeals (see Table 6.A) in respect of which JAAT would be a more proportionate body to hear the appeal than the Royal Court. We seek views on whether any of these rights of appeal should be excluded from the proposed transfer of jurisdiction to JAAT.			
The Royal Court Rules should enable orders to be made transferring appeals the Royal Court to JAAT and vice versa.			
There should be a standard time limit for making administrative appeals (unless there is an overwhelming public interest in specifying a different limit). The standard time limit should be 28 days from the appellant receiving notice of the decision appealed against.			
A ‘second appeal’ to the Royal Court on a question of law should exist from all final determinations of the proposed Jersey Administrative Appeals Tribunal. The right to exercise such an appeal should be subject to leave being granted either by			

JAAT or, if JAAT declines to grant leave to appeal, by the Royal Court. There should be a standardised time limit, which we provisionally propose should be 28 days.			
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.			

Part 7 Alternative Dispute Resolution

Interim recommendation/ consultation question	Agree	Disagree	Other / comment
The procedural rules of the proposed Jersey Administrative Appeals Tribunal should make provision for appeals to be resolved by ADR where the parties agree. (Also considered in Part 2).			
If contrary to our preferred view the States of Jersey Complaints Panel is retained, we seek views on how the Panel's use of ADR should be developed. (Also considered in Part 4).			