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23 March 2018

STATES OF JERSEY

THE JERSEY LAW COMMISSION ANNUAL REPORT FOR 2017

**Presented to the States of Jersey
by the Chief Minister**

STATES GREFFE

ANNUAL REPORT

The Jersey Law Commission

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

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

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

2017 is the 21st year during which the Jersey Law Commission has been carrying out its functions.

The Commissioners during 2017 were:

Mr Clive Chaplin, Solicitor (Chairman)

Mr Malcolm Le Boutillier, Solicitor

Professor Andrew Le Sueur, Barrister, Professor of Constitutional Justice, University of Essex

Mr Jonathan Walker, Solicitor

Advocate Barbara Corbett

Professor Claire de Than, Director of Studies, Institute of Law

The Secretary is: Cairistiona Annan

The address of the Jersey Law Commission is:

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St Helier,
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The Jersey Law Commission

Annual Report 2017

Foreword

To the Chief Minister of the States of Jersey

I have the honour to present to you, on behalf of the Jersey Law Commission, pursuant to the Proposition to establish the Jersey Law Commission approved by the States of Jersey on 30 July 1996, our Annual Report covering the activities of the Jersey Law Commission in the calendar year 2017.

Signed for on behalf of the Jersey Law Commission

Signed: ___[C.A. CHAPLIN]___
Clive Chaplin, Chairman
23 March 2018

PART I – OVERVIEW 2017

Commissioners: there have been no changes to the membership of the Jersey Law Commission during 2017. The process for recruiting additional Commissioners has been begun, however, in view of the impending retirement of a number of the current Commissioners.

Premises and Support: the Institute of Law in Jersey has enabled the Jersey Law Commission to establish a permanent base for its work within its premises in St Helier and the Commissioners express their thanks to the Institute of Law for this generous provision. Ms Cairistiona Annan, the Assistant Manager at the Institute of Law, is Secretary to the Jersey Law Commission.

Communications and Media: the website for the Jersey Law Commission¹ sets out information about all of the Jersey Law Commission's current and past projects and publications. The Commission also makes use of social media (Twitter²) to publicise consultations and progress on projects.

Consultations, Topic Reports and Projects: the issues considered by the Jersey Law Commission during 2017 and projects undertaken by it are described in PART II - ACTIVITIES.

PART II – ACTIVITIES

Topic Reports and other issues considered by and projects undertaken by the Jersey Law Commission during 2017

Completed Projects

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

Administrative Redress

The Topic Report, *Improving Administrative Redress In Jersey* (Topic Report No.1/2017.TR)³ was published on 18 October 2017. This Topic Report makes recommendations for the comprehensive modernisation of how grievances regarding administrative decisions are handled in Jersey. The report is in eight chapters.

Chapter 1 sets out an outline of the project. The Jersey Law Commission recommends that Jersey's administrative justice system should become less complicated and more focused on the needs of people using the procedures. The coordination of different parts of the existing system needs to be improved and data should be collected to measure how well it is working. It is important that institutions and processes operate on satisfactory legal and constitutional footings.

Chapter 2 describes overarching issues in Jersey's administrative justice system. The Jersey Law Commission recommends that:

¹ <https://jerseylawcommission.org>

² Twitter account: @JsylawComm

³ https://jerseylawcommission.files.wordpress.com/2016/04/jsylawcom_topicreport_adminredress_final.pdf

- (i) Guidance: the Chief Minister should issue guidance to public bodies about internal procedures for handling complaints fairly and effectively;
- (ii) Annual Report: the Chief Minister should make an annual report to the States Assembly providing an overview how the system of administrative justice is performing;
- (iii) Scrutiny: the annual report on administrative justice should be scrutinised; and
- (iv) Right: there should be a general right to “good administration” in Jersey law, including a right to request reasons for decisions.

The Jersey Law Commission has noted that the largest category of internal complaints is that relating to health and social services. This calls for further study.

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

Chapter 4 considers rights of appeal to Ministers. In most situations it is not appropriate for a politician to be carrying out appellate functions. The Jersey Law Commission recommends that, with one exception, rights of appeal should be amended so that they are heard by JAAT rather than by a Minister.

Chapter 5 examines the operation of the States of Jersey Complaints Panel. The Jersey Law Commission recommends that an Ombudsman should replace the Complaints Panel. If, contrary to this recommendation, the Complaints Panel is retained the Jersey Law Commission recommends reforms to enable the Complaints Panel to function more effectively.

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

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

Chapter 8 considers the scope for alternative dispute resolution in relation to administrative grievances. The Jersey Law Commission has identified a need for further research to develop proposals for the use of mediation and other forms of alternative dispute resolution.

The Topic Report also identifies systematically the costs, benefits and risks associated with each of the recommendations made in it.

This Topic Report has prompted responses and comment from a wide range of interested persons, including the Government of Jersey, as described below in PART IV - IMPACT. The Jersey Law Commission is grateful to the Chief Minister and Council of Ministers for their prompt response to its recommendations in this Topic Report and looks forward to assisting the Legislation Advisory Panel in its work on the issue of administrative redress during 2018.

Current Projects

Law of Contract

In December 2002, the Jersey Law Commission published a consultation paper, *The Jersey Law of Contract*⁴, identifying the problems of Jersey contract law and reviewing the pros and cons of three general solutions: codification; incorporation of English contract law by legislation; and a suggestion that the Jersey courts could be more consistent and true to the origins of Jersey contract law.

In February 2004, the Jersey Law Commission recommended in *The Law of Contract* (Topic Report No.10)⁵ that a statutory framework be adopted for the Jersey law of contract incorporating, where necessary, those aspects of existing Jersey law that are peculiar to Jersey, distinct from English law and that are found to be worthy of retention.

In October 2015, the Jersey Law Commission was made aware that the Institute of Law in conjunction with the Government of Jersey was seeking to examine the current and future position of the Jersey law of contract and to examine in particular what opportunities a re-statement of the Jersey law of contract could present for Jersey.

The Jersey Law Commission is holding a watching brief on this work and is prepared to comment on any proposals put forward by the Government of Jersey. The Jersey Law Commission saw no further proposals in respect of this project during 2017 but it continues to be prepared to comment on proposals as they are made.

Criminal Appeals

The Jersey Law Commission is reviewing the law relating to appeals against criminal convictions in Jersey with a view to making recommendations as to whether and how the

⁴ <https://jerseylawcommission.files.wordpress.com/2015/06/2002-jersey-law-of-contract.pdf>

⁵ <https://jerseylawcommission.files.wordpress.com/2015/06/2004-topic-report-on-the-law-of-contract.pdf>

grounds for appeals against criminal convictions should be reformed. A Consultation Scoping Paper, *Criminal Appeals Against Conviction*⁶, was published in July 2016 asking a series of ‘scoping’ questions.

The Jersey Law Commission submitted reform proposals reflecting the responses received to the Consultation Scoping Paper, *Criminal Appeals Against Conviction*, to the Department for Community and Constitutional Affairs so that the reform proposals could be considered by the States of Jersey. None of the responses received to the consultation favoured preserving the existing law in relation to appeals against criminal convictions. Respondents to the consultation identified two factors in particular that created risks of miscarriages of justice:

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

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

The Department for Community and Constitutional Affairs noted the reform proposals in the *Response to the Criminal Procedure Consultation*⁷ and it is hoped that the proposed reforms will be taken forward in 2018.

Criminal Code

Work began in 2017 on the Criminal Code project, with the first publication expected in 2018. The publication, to be made available on the website of the Jersey Legal Information Board⁸, will be a brief and accessible document stating the customary and common law offences under Jersey’s criminal law, their scope and elements, and applicable defences, and containing worked examples so that members of the public will have, for the first time, a clear explanation of each of these offences. The next stage will be a full Criminal Code.

Assisted Reproduction and Surrogacy

There is currently no law in Jersey relating to the processes and procedures for assisted reproduction and surrogacy. Medical involvement in the processes and procedures is generally covered by English law because the medical practitioners in Jersey are subject to regulation from professional bodies that are based in England. The legal status of children born through

⁶ https://jerseylawcommission.files.wordpress.com/2016/07/jsylawcom_criminalappeals_cp2_2016.pdf

⁷ <https://www.gov.je/government/consultations/pages/criminalprocedure.aspx>

⁸ <https://www.jerseylaw.je/Pages/default.aspx>

assisted reproduction techniques or surrogacy also needs clarifying. This is a specialist area of law. Topic practitioners have been identified and instructed to complete a consultation paper. The topic practitioners are Deirdre Fottrell QC and Tom Wilson, both barristers at 1, Garden Court, the specialist children's law set of chambers. The consultation paper is expected to be published in 2018.

Future Projects

Prescription and Limitation

The Jersey Law Commission reviewed issues of Prescription and Limitation under the law of Jersey in its consultation paper No 1/2008/CP, *Prescription and Limitation*⁹, issued in March 2008. There was a limited response only to that consultation. The Jersey Law Commission has concluded that this is an area of Jersey law that it may be possible to develop and reform and proposes to consult further upon it.

PART III – COSTS

The cost of the Jersey Law Commission

Resources are made available to the Jersey Law Commission by the States of Jersey through the Department for Community and Constitutional Affairs. No fixed budget is available from or agreed with the States of Jersey, but expenses likely to be incurred are agreed in advance with the Department and, once incurred, payment is made directly by the Department to the person owed. The Jersey Law Commission does not itself receive or hold any funds. Discussions are under way with the Department with a view to formalising these arrangements.

The principal costs of the Jersey Law Commission are incurred in respect of consultations it carries out and Topic Reports it issues. During the year covered by this Annual Report the principal costs have not exceeded £11,000. The total costs of the Jersey Law Commission during the year covered by this Annual Report have not exceeded £15,000.

Pursuant to arrangements with the Department for Community and Constitutional Affairs, the Secretary to the Jersey Law Commission from time to time is remunerated on an agreed hourly rate basis. The total annual cost of the Secretary's services is unlikely to exceed £1,500 in any one year.

PART IV – IMPACT

Responses to the work of the Jersey Law Commission

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

⁹ <https://jerseylawcommission.files.wordpress.com/2015/06/2008-prescription-and-limitation.pdf>

Divorce Law

The Topic Report, *Divorce Reform* (Topic Report No 1/2015/Tr)¹⁰, published in October 2015 recommended that a new Family (Jersey) Law be enacted to implement the far-reaching recommendations made in the Topic Report. In particular it was recommended that the changes that the Jersey Law Commission had identified as needing to be made to family law should be included in the equal marriage legislation. Notwithstanding the recommendation of the Jersey Law Commission, the ambit of the draft Marriage and Civil Status Law has been limited during the course of 2017 to allowing same sex couples to marry and to making some changes to the possible venues for weddings. This legislation, in its limited form, is expected to become effective in 2018. The effect of enacting the legislation in the way proposed, without including the divorce law reforms recommended by the Jersey Law Commission, is that the objective of equal marriage for all couples will not be achieved. In particular not all marriages will be treated in the same way with respect to issues of adultery and consummation. If the equal marriage legislation is enacted as proposed as at the date of this Annual Report, without addressing the recommendations made by the Jersey Law Commission in its Topic Report, *Divorce Reform*, the equal marriage legislation will be disjointed and inconsistent. It may also fail to comply with the requirements of the European Convention on Human Rights.

Law of Contract

The Jersey Law Commission's Topic Report, *The Law of Contract* (Topic Report No 10)¹¹, issued in February 2004 was a significant contribution to the debate among legal practitioners, judges and academics about the future direction of Jersey contract law. The debate has continued, including at a conference organised by the Institute of Law in October 2010.

The Topic Report made a clear recommendation for the adoption of a statutory framework for the law of contract as a way of addressing the unsatisfactory state of the law in Jersey relating to contract that it had identified. The Jersey Law Commission recommended against codification as a way of addressing the identified problems because it would be likely to take many years during which the unsatisfactory state of the law identified would continue. The Government of Jersey has preferred to explore the approach of codification rather than adoption of a statutory framework and continues to work on this. The Jersey Law Commission is observing the work on codification that is being carried on but there appears to have been no significant progress towards addressing the issues initially identified and those issues continue to cause problems. Contract law is a fundamental pillar of Jersey law, affecting consumers, businesses and the finance industry. It is concerning and unsatisfactory that this important area of reform has been unresolved for so long. If the Government of Jersey is not able to take this project forward in a timely way, it should be remitted back to the Jersey Law Commission.

Administrative Redress

The Topic Report, *Improving Administrative Redress In Jersey* (Topic Report No.1/2017.TR)¹² was covered in the news media, including by the Jersey Evening Post ("*Overhaul the tribunals system, lawyers say*", 19 October 2017 and "*States to streamline complaints procedure*", 20 December 2017) and the Bailiwick Express ("*Pale, Male, Stale ... and ignored by politicians*", 19 October 2017).

¹⁰ <https://jerseylawcommission.files.wordpress.com/2015/06/2015-topic-report-on-divorce.pdf>

¹¹ <https://jerseylawcommission.files.wordpress.com/2015/06/2004-topic-report-on-the-law-of-contract.pdf>

¹² https://jerseylawcommission.files.wordpress.com/2016/04/jsylawcom_topicreport_adminredress_final.pdf

The Council of Ministers referred to the administrative redress report in their Proposition to the States Assembly P.108/2017, lodged au Greffe on 31 October 2017, *Independent Jersey Care Inquiry Report: Implementation of Recommendations*¹³. The Department for Community and Constitutional Affairs undertook to complete a scoping exercise and planning for a project on administrative redress and the administrative justice system by September 2018.

On 8 December 2017, the Care of Children in Jersey Scrutiny Review Panel took oral evidence from the Chief Minister, the Chief Officer of the Department for Community and Constitutional Affairs and others during which reference was made to the Jersey Law Commission's administrative redress report.

On 2 January 2018, the Chief Minister presented a report to the States Assembly (R1/2018) on *Jersey Law Commission Report "Improving Administrative Redress in Jersey": Initial Response*¹⁴. The report noted "The Chief Minister, Senator Ian Gorst and Chair of the Legislation Advisory Panel, Senator Sir Philip Bailhache have welcomed the publication of the Topic Report by the Jersey Law Commission. It is an important and substantial piece of work which aims to contribute to the wider project of building trust and confidence in the processes for complaining about public administration" (para 6). The Chief Minister's response recognised that "reviewing and, if agreed, delivering and implementing the recommendations made in the Topic Report will be a significant piece of work" and involve several different stakeholders (para 12). The Chief Minister requested that the Legislation Advisory Panel, in its advisory role to the Chief Minister, should consider the Jersey Law Commission's recommendations.

Law Commissioners have also responded to States Consultations on a variety of draft Laws. Responses have included those by Professor de Than to the Consultations on Sexual Offences, Criminal Procedure and Disability Discrimination.

¹³ <http://www.statesassembly.gov.je/assemblypropositions/2017/p.108-2017.pdf>

¹⁴ <http://www.statesassembly.gov.je/assemblyreports/2018/r.1-2018.pdf>

APPENDIX A

ROLE

The role of the Jersey Law Commission

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

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

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

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

APPENDIX B

METHOD

The working method of the Jersey Law Commission

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

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

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

APPENDIX C

PUBLICATIONS

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

From its establishment in 1996 until the end of 2017 (the year covered by this Annual Report) the Commission has issued the following reports. All papers published by the Jersey Law Commission can be found on the Jersey Law Commission's website under Publications¹⁵

Consultation papers (seeking input into the reform process)

- 2016 Scoping consultation report on Criminal Appeals Against Conviction
- 2016 Improving Administrative Redress In Jersey
- 2015 Divorce Reform
- 2010 Voisinage
- 2010 Bankruptcy (Désastre) (Jersey) Law 1990 "Social Désastre"
- 2009 Topic report on Corroboration Of Evidence In Criminal Trials
- 2008 Prescription And Limitation
- 2008 The Jersey Law Of Partnership
- 2006 The Prohibition On Trusts Applying Directly To Jersey Immovable Property
- 2006 Security On Immoveable Property
- 2006 The Jersey Law Of Charities (revised)
- 2004 The Jersey Law Of Charities
- 2002 The Jersey Law Of Real Property
- 2002 The Jersey Law Of Contract
- 2002 The Law Of Tutelles
- 1999 Best Evidence Rule In Civil Proceedings
- 1998 Dégrèvement
- 1998 The Rights Of Beneficiaries To Information Regarding A Trust

Final topic reports (containing recommendations)

- 2017 Topic Report on Improving Administrative Redress in Jersey
- 2015 Topic report on Divorce Reform
- 2011 Topic report on Voisinage
- 2011 Topic report on Bankruptcy (Désastre) (Jersey) Law 1990 "Social Désastre"
- 2010 Topic report on The Jersey Law Of Partnership
- 2009 Topic report on Corroboration Of Evidence In Criminal Trials
- 2009 Topic report on The Jersey Law Of Charities

¹⁵ <https://jerseylawcommission.org/reports>

2008 Topic report on Security On Immoveable Property

2004 Topic report on The Law of Contract

2002 Topic report on The Best Evidence Rule In Civil Proceedings

2002 Topic report on The Law Of Tutelles

1999 Topic report on Dégrèvement

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

All papers published by the Jersey Law Commission can be found on the Jersey Law Commission's website under Publications¹⁶

¹⁶ <https://jerseylawcommission.org/reports>