

CONFORMED COPY
28 May 2019

JERSEY LAW COMMISSION



**Annual Report
2018**

ANNUAL REPORT

The Jersey Law Commission

The Jersey Law Commission was set up pursuant to 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.

2018 is the 22nd year during which the Jersey Law Commission has been carrying out its functions.

The Commissioners during 2018 were:

Mr Clive Chaplin, Solicitor (Chairman)

Mr Malcolm Le Boutillier, Solicitor

Professor Andrew Le Sueur, Barrister, Professor of Constitutional Justice, University of Essex
(completed term of office in October 2018)

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:

c/o Corbett Le Quesne
1a West's Centre,
St Helier,
Jersey
JE2 4ST

Contents of this Annual Report

Foreword by the Chairman

PART I	OVERVIEW 2018
PART II	ACTIVITIES
	Topic Reports and other issues considered by and projects undertaken by the Jersey Law Commission during 2018
PART III	COST
	The cost of the Jersey Law Commission
PART IV	IMPACT
	Responses to the work of the Jersey Law Commission
APPENDIX A	ROLE
	The role of the Jersey Law Commission
APPENDIX B	METHOD
	The working method of the Jersey Law Commission
APPENDIX C	PUBLICATIONS
	Topic Reports and other issues reported on by the Jersey Law Commission

CONFORMED COPY
28 May 2018

The Jersey Law Commission

Annual Report 2018

Foreword

To the Chief Minister of the Government 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 2018.

Signed for on behalf of the Jersey Law Commission

Signed: C.A.CHAPLIN
Clive Chaplin, Chairman
28 May 2019

PART I – OVERVIEW 2018

Commissioners: Professor Andrew Le Sueur completed his five-year term of office in October 2018. The process for recruiting additional Commissioners is under way to maintain the strength of the Jersey Law Commission following the departure of Professor Le Sueur and in view of the impending conclusion of the terms of office of a number of other current Commissioners.

Premises: with the departure of the Institute of Law in Jersey from its premises in St Helier during 2018, the Jersey Law Commission has established a place to meet in the premises of the Tribunal Service in St Helier. The Commissioners express their thanks to the Institute of Law for the provision of facilities at Law House and to the Tribunal Service for providing facilities at International House in The Parade, St Helier.

Support: 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, progress on projects and matters of interest relevant to the work of the Jersey Law Commission.

Consultations, Topic Reports and Projects: the issues considered by the Jersey Law Commission during 2018 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 2018

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

A Public Services Ombudsman

In our report *Improving Administrative Redress in Jersey* (Topic Report No.1/2017/TR)³, published in October 2017, the Jersey Law Commission recommended that further research be carried out with a view to establishing a public services ombudsman in Jersey responsible for resolving grievances about administrative decisions (in place of the current States of Jersey Complaints Panel). On 22 March 2018, the States Assembly voted in favour of a Proposition lodged by Senator Philip Ozouf that “that the recommendations from the Clothier Report on the Machinery of Government in Jersey and the Jersey Law Commission that ‘An Ombudsman should be appointed to hear and determine complaints of maladministration’ should be progressed as a matter of priority”, subject to findings of research.

¹ <https://jerseylawcommission.org>

² Twitter account: @JsylawComm

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

A team associated with the UK Administrative Justice Institute (UKAJI), based at the University of Essex, worked with the Jersey Law Commission to conduct that research during 2018. The University of Essex provided funding of almost £15,000 to support this project, via the Economic and Social Research Council's Impact Acceleration Account (IAA) scheme. IAAs enable research organisations in the United Kingdom to develop knowledge exchange with users of research. The Jersey Law Commission thanks the University of Essex and the ESRC for facilitating this research. We are grateful for their work to Professor Andrew Le Sueur, Margaret Doyle and Varda Bondy and to the individuals who and organisations that provided input into the research.

The final report, *Designing a Public Services Ombudsman for Jersey* (Topic Report No.1/2018/TR)⁴, was published in November 2018. The overarching questions it addressed were: What could and should a public services Ombudsman scheme for Jersey look like? Drawing on knowledge of Jersey and academic research the report examined international benchmarks for good design of ombudsman organisations, other design principles, the design and operation of 13 Ombudsman schemes in small jurisdictions and developments in Ombudsman organisations across the United Kingdom.

We understand that the Government of Jersey plans to carry out a consultation on proposals for a public services ombudsman.

Current Projects

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 grounds for appeals against criminal convictions should be reformed. For the purposes of the review the Jersey Law Commission published a Consultation Scoping Paper, *Criminal Appeals Against Conviction* (Consultation Paper No.2/2016/CP)⁵, in July 2016 that asked a series of 'scoping' questions.

Reflecting the responses received by it to its Consultation Scoping Paper, *Criminal Appeals Against Conviction*, the Jersey Law Commission submitted reform proposals⁶, to the Department for Community and Constitutional Affairs as part of that department's *Review Of Draft Legislation On New Criminal Procedure*⁷ to enable the reform proposals to be considered by the Government of Jersey and the States Assembly.

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

- (i) the wording of Article 26(1) of the Court of Appeal (Jersey) Law 1961, specifically the *proviso* that even if an appellant may succeed on a point raised in the appeal, the

⁴ https://jerseylawcommission.files.wordpress.com/2018/11/jsylawcom_designingombudsman_final.pdf

⁵ https://jerseylawcommission.files.wordpress.com/2016/07/jsylawcom_criminalappeals_cp2_2016.pdf

⁶ <https://www.gov.je/SiteCollectionDocuments/Government%20and%20administration/Response%20from%20C%20De%20Than.pdf>

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

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 jurors

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

In its summary of the responses to the consultation it had carried out, *Response to the Criminal Procedure Consultation*⁸, the Department for Community and Constitutional Affairs noted the reform proposals made by the Jersey Law Commission. It is hoped that the proposed reforms will be taken forward in 2019.

Criminal Code

Work began in 2017 on the Criminal Code project, with the first publication expected in 2019. The first stage of the project, to be made available on the website of the Jersey Legal Information Board⁹, will be two brief and accessible documents stating:

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

Each document will contain worked examples so that members of the public will have, for the first time, a clear explanation of each of these offences. In this way concerns about legal certainty and the principle of legality will be addressed. Short papers proposing amendments to some customary offences will be produced in 2019. The next stage will be preparation of a full Criminal Code. Interest has been shown in this project by researchers and reform bodies in other jurisdictions.

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 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 consultation paper is expected to be published in 2019.

⁸ <https://www.gov.je/government/consultations/pages/criminalprocedure.aspx>

⁹ <https://www.jerseylaw.je/Pages/default.aspx>

Champerty and Maintenance

Champerty and maintenance are doctrines of law designed to preclude frivolous litigation and meddling in lawsuits by persons without a proper interest. In Jersey they are expressed in the following provision of the 1771 Code:

“personne ne pourra contracter pour choses ou matières en litige”

The issue is important in the context of access to justice and has become topical with the growth of third party funding for lawsuits. The Royal Court and the Court of Appeal in Jersey have both considered it and made recommendations that the issue be subject to detailed consideration and recommendation. The Jersey Law Commission is undertaking this review.

Prescription and Limitation

The Jersey Law Commission reviewed issues of Prescription and Limitation under the law of Jersey in its consultation paper, *Prescription and Limitation* (Consultation Paper No. 1/2008/CP)¹⁰, 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 may require development and reform and has commenced research with a view to updating its conclusions and to consulting further upon the topic.

Law of Contract

The law of contract in Jersey was the subject of a consultation by the Jersey Law Commission in December 2002¹¹. A topic report making recommendations for the reform of the Jersey law of contract was published in February 2004¹². Since the Jersey Law Commission made its recommendations in 2004, the Government of Jersey (in conjunction, latterly, with the Institute of Law) has been considering reform of this area of law.

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 2018 but it continues to be prepared to comment on proposals as they are made.

Future Projects

Planned work includes an assessment of the impact and application of the Human Rights (Jersey) Law 2000. Human rights law has been argued relatively rarely in Jersey's courts, in contrast to trends in other British jurisdictions that have adopted similar laws. The project will investigate the reasons for this and map the extent of the use of those provisions that have been argued with a view to considering how to make the Human Rights (Jersey) Law 2000 more effective.

¹⁰ <https://jerseylawcommission.files.wordpress.com/2015/06/2008-prescription-and-limitation.pdf>

¹¹ *The Jersey Law of Contract* (Consultation Paper No.5)

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

¹² *The Law of Contract* (Topic Report No.10)

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

PART III – COSTS

The cost of the Jersey Law Commission

The Government of Jersey makes resources available to the Jersey Law Commission through the Department for Strategic Policy, Performance and Population (formerly resources were provided through the Department for Community and Constitutional Affairs). No fixed budget is available from or agreed with the 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 relating to the Jersey Law Commission are incurred in respect of consultations it carries out and Topic Reports it issues. During the year covered by this Annual Report the total costs of running the Jersey Law Commission 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.

Divorce Law

The Topic Report, *Divorce Reform* (Topic Report No 1/2015/Tr)¹³, 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 was 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, became 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 has not been achieved. In particular not all marriages will be treated in the same way with respect to issues of adultery and consummation. Equal marriage legislation that does not address the recommendations made by the Jersey Law Commission in its Topic

¹³ <https://jerseylawcommission.files.wordpress.com/2015/06/2015-topic-report-on-divorce.pdf>

Report, *Divorce Reform* (Topic Report No 1/2015/Tr), will be disjointed and inconsistent. It may also fail to comply with the requirements of the European Convention on Human Rights.

A review is being undertaken into these issues and Commissioner Barbara Corbett has contributed to establishing the terms of a consultation in respect of amendments to the legislation. The matters under consultation include the Jersey Law Commission's recommendations in relation to divorce reform, the age of consent for marriage and whether or not civil partnerships should be available to couples of the opposite sex.

Law of Contract

The Jersey Law Commission's Topic Report, *The Law of Contract* (Topic Report No 10)¹⁴, 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 Jersey Law Commission's 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

During 2018, there has been official consideration of the Jersey Law Commission's two reports concerning administrative redress: *Improving Administrative Redress in Jersey* (published in October 2017) and *Designing a Public Services Ombudsman for Jersey* (published in November 2018).

On 2 January 2018, the then Chief Minister presented a report to the States Assembly (R1/2018) with the title "Jersey Law Commission Report *Improving Administrative Redress in Jersey: Initial Response*"¹⁵. 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

¹⁴ <https://jerseylawcommission.files.wordpress.com/2015/06/2004-topic-report-on-the-law-of-contract.pdf>

¹⁵ <https://statesassembly.gov.je/assemblyreports/2018/r.1-2018.pdf>

recognised that “reviewing and, if agreed, delivering and implementing the recommendations made in the Topic Report will be a significant piece of work” and involve several different stakeholders (para 12). The Chief Minister requested that the Legislation Advisory Panel, in its advisory role to the Chief Minister, should consider the Jersey Law Commission’s recommendations.

The Jersey Law Commission’s report was before States Members during a debate on 31 January 2018. This provided the States Assembly with an opportunity to consider the Jersey Law Commission’s recommendations in the context of the Independent Jersey Care Inquiry 2017 (Recommendation 7) as they relate “to the system of checks and balances and accountability by which government and public institutions are held to account, and are intended to contribute to the wider project of building trust and confidence in processes for complaining about public administration”. It was disappointing that only the then Chief Minister and one other Member expressly referred to the Jersey Law Commission’s work on administrative justice.

Creation of an Ombudsman

On 23 March 2018, the States Assembly considered the Jersey Law Commission report on *Improving Administrative Redress in Jersey* in the context of a Proposition brought by Senator Philip Ozouf for the creation of a public services Ombudsman.

As we note above, we published a report *Designing a Public Services Ombudsman for Jersey* in November 2018, which sets out options for a new Ombudsman service. In a message to States Members, the Chairman of the Legislation Advisory Panel, Deputy David Johnson said that he welcomed the report and extended thanks to the Commission and Professor Le Sueur for the substantial and comprehensive research undertaken, stating “It is a valuable piece of work which will contribute to the wider project of building trust and confidence in the administrative processes of government by providing opportunities for both challenge and redress”. The report is currently being considered by the Legislation Advisory Panel.

Legal Aid

The Legal Aid Review Panel requested comments from the Jersey Law Commission on the Draft Access to Justice Law 201- in the form lodged au Greffe on 27 February 2018. A preliminary review was carried out and the Jersey Law Commission anticipates carrying out a further review when the proposition is re-lodged.

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.

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 2018 (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 Publications¹⁶

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)

- 2018 Topic Report on Designing A Public Services Ombudsman for Jersey
- 2017 Topic Report on Improving Administrative Redress in Jersey
- 2015 Topic report on Divorce Reform
- 2011 Topic report on Voisinage
- 2011 Topic report on Bankruptcy (Désastre) (Jersey) Law 1990 "Social Désastre"
- 2010 Topic report on The Jersey Law Of Partnership
- 2009 Topic report on Corroboration Of Evidence In Criminal Trials

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

CONFORMED COPY
28 May 2018

2009 Topic report on The Jersey Law Of Charities

2008 Topic report on Security On Immoveable Property

2004 Topic report on The Law of Contract

2002 Topic report on The Best Evidence Rule In Civil Proceedings

2002 Topic report on The Law Of Tutelles

1999 Topic report on Dégrèvement

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

All papers published by the Jersey Law Commission can be found on the Jersey Law Commission's website under Publications¹⁷

¹⁷ <https://jerseylawcommission.org/reports>