

# STATES OF JERSEY



## LAW OFFICERS' DEPARTMENT AND MEMBERS OF THE LAW SOCIETY OF JERSEY: REVISED DISCIPLINARY PROCESS (P.152/2013) – COMMENTS

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Presented to the States on 3rd February 2014  
by H.M. Attorney General

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STATES GREFFE

## COMMENTS

### 1. Introduction

These comments are presented to the States further to the Proposition P.152/2013 of Deputy R.G. Le Hérisier of St. Saviour (“the Proposition”), lodged on 12th November 2013 entitled “*Law Officers’ Department and members of the Law Society of Jersey: revised disciplinary process.*”

The Proposition replaces P.109/2013, which was lodged by the Deputy on 10th September 2013, but withdrawn on 19th November 2013.

Comments regarding P.109/2013 were presented to the States on 21st October 2013 by H.M. Attorney General (P.109/2013 Com.) (attached as **Appendix 1**).

The Proposition is in 3 parts –

“(a) *to request the Chief Minister to bring forward within 6 months proposals for revised procedures to deal with any complaints made against lawyers working in the Law Officers’ Department (other than H.M. Attorney General and H.M. Solicitor General) to ensure that they conform with “best practice”;*”.

In P.109/2013, the Deputy had called for lawyers working in the Law Officers’ Department (“**LOD**”) to be subject to a complaints procedure which was “*to mirror those set out in the Law Society of Jersey Law 2005*” in relation to complaints made against advocates and solicitors working in the private sector.

P.109/2013 Com. addressed that proposal and it is unnecessary to rehearse those points again here.

A Code of Conduct for all LOD lawyers was issued in June 2013 and can be found on the LOD website (this was also provided to States Members with the comments on P.109/2013). The disciplinary process that underpins the Code is attached as **Appendix 2**.

The Attorney General would be pleased to review with the Chief Minister the current complaints and disciplinary procedure for LOD lawyers to see if it can be improved, given that all are already subject to the Civil Service Code and some, but not all, of them are Advocates and Solicitors of the Royal Court.

“(b) *to request the Chief Minister to consult with the Law Society of Jersey and other interested parties to develop a revised Complaints and Disciplinary procedure for members of the Law Society that conforms with “best practice” and to present a report with recommendations to the States within 6 months;*”.

It is understood that the Legislation Advisory Panel is already in process of carrying out a review of the complaints and disciplinary procedure for members of the Law Society as contained in the 2005 Law (and subordinate legislation).

“(c) *to request the Chief Minister to consult with the Crown on the desirability and feasibility of establishing a revised Complaints and Disciplinary process for H.M. Attorney General and H.M. Solicitor General and to report to the States with recommendations within 6 months on the outcome of this consultation.*”.

This was set out in a slightly varied form in paragraph (b) of P.109/2013.

Ultimately, the discipline of the Law Officers is a matter for Her Majesty. The Attorney has not, however, changed his position from that set out in P.109/2013 Com.; and in the interests of clarity and certainty, does not object to discussions with the Crown with a view to clarifying the process over complaints made against the insular Law Officers.

### **General**

Attached hereto as **Appendix 3** is a summary note on disciplinary systems in a number of other jurisdictions.

**STATES OF JERSEY**



**LAW OFFICERS' DEPARTMENT:  
REVISED DISCIPLINARY PROCESS  
(P.109/2013) – COMMENTS**

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Presented to the States on 21st October 2013  
by H.M. Attorney General

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STATES GREFFE

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## COMMENTS

### 1. Introduction

The purpose of these comments is to provide information to Members in light of the Proposition (P.109/2013) of Deputy R.G. Le Hérisssier of St. Saviour (“the Proposition”) lodged on 10th September 2013, entitled “*Law Officers’ Department: revised disciplinary process*”.

The comments will deal with –

- (a) The statutory position under The Law Society of Jersey Law 2005 (“the 2005 Law”);
- (b) Lawyers in the Law Officers’ Department (“LOD”) and the current disciplinary environment;
- (c) The position of the Law Officers;
- (d) The rôle of the Attorney General in discipline of members of the legal profession.

### 2. The 2005 Law

The 2005 Law was adopted by the States on 2nd November 2004, received Royal Assent on 9th February 2005 and was registered by the Royal Court on 4th March 2005. The Appointed Day Act was then made on 6th December 2006, and the 2005 Law, save for Article 3(2) and (3), entered into force on 1st January 2007.

Article 3(2) and (3) came into force on 1st April 2007. Article 3(2) provides that no person shall practise law as an advocate or solicitor<sup>1</sup> unless he or she is an ordinary member of the Law Society of Jersey (“LSJ”); and Article 3(3) makes it an offence to contravene this requirement.

Article 3 in its original form applied to LOD advocates and solicitors and might, on one analysis of the wording, also have applied to the Law Officers themselves. However, a proposition was lodged (P.96/2006), and adopted by the States, to amend the 2005 Law before it came into force, by adding a new Article 3(4) which came into force, along with paragraphs (2) and (3) of Article 3, on 1st April 2007.

Article 3(4) provides that the Attorney General, Solicitor General and advocates or solicitors practicing law at the LOD are not required to be members of the LSJ.

The purpose of this amendment was clear to States Members at the time. Hansard (see **Appendix 1**) records that the then Senator Stuart Syvret voted against the amendment, having stated –

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<sup>1</sup> Any reference to “advocate” or “solicitor” in these comments is a reference to an advocate or solicitor of the Royal Court of Jersey.

*“It seems to me to exclude Jersey Advocates simply because they happen to be Crown Officers from the disciplinary structures and processes of the Law Society is wholly undesirable, given the absence of an alternative framework. Of course it is absolutely fair enough and it makes commonsense that they should not be required to pay themselves the annual subscription fees for the Jersey Law Society, nor indeed carry that kind of private sector professional indemnity insurance that is a requirement. Amending the Law to exclude them from those requirements, or perhaps for the State in some way to pay it for them, would be entirely acceptable but I am afraid removing the Law Officers, referred to by this Law, from the disciplinary structures and the general codes and so on that are required by the Jersey Law Society I regard as wholly unacceptable.”<sup>2</sup>*

The then Solicitor General, Stéphanie Nicolle, Q.C., answered the above statement as follows –

*“...The disciplinary controls, such as they are, at the moment which can be either a complaint to the Bâtonnier or a complaint to the Law Society – are generally a complaint by a client about the lawyer who has advised him and those are the most frequent complaints. Our clients are the States and their departments and if the States or any department are unhappy with the service given by the Attorney General, the Solicitor General, or any member of the department, the States can pursue that through the Chief Minister, through Human Resources or through whatever level is appropriate so that there is not the same need for the client to have a right of recourse to the Law Society. The second point is this; the Attorney General has a number of customary law and indeed statutory functions which increasingly include the inquiry into both locally, and assisting other jurisdictions, quite serious organised crime – frauds, drug trafficking and various other kinds of organised crime. Members will probably have seen in the paper the challenges which are frequently made by persons who are under investigation, here and in other jurisdictions, who have tried to challenge at every step the Attorney General when he has been seeking to assist in investigations into organised crime and into fraud. I am not disclosing anything confidential; there have recently been well-publicised and long drawn-out proceedings in relation to assistance that the Attorney General has been giving to the authorities in Brazil who have been inquiring into some very serious alleged corruption and fraud offences. At every stage the lawyers acting for the persons under investigation have sought to impede the assistance that has been given. It would be a God-send, and one of the easiest ways in the world to handicap the Attorney General in this kind of thing, by making spurious complaints to the Law Society. The Law Society would then call upon the Attorney General or whichever lawyer was dealing with this to give a full account of what they were doing and it really would be extremely seriously detrimental to the work of the Attorney General in assisting other jurisdictions and indeed in work in this jurisdiction in the policing of quite serious crimes.”<sup>3</sup>*

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<sup>2</sup> Paragraph 10.2: Hansard 26th September 2006 (Appendix 1).

<sup>3</sup> Paragraph 10.3: see 2 *ibid*.

In voting for the amendment, the intention of the States Assembly was plain: to remove the Law Officers and LOD advocates and solicitors from the ambit of the 2005 Law, as regards membership of the LSJ and the disciplinary jurisdiction of the LSJ.

The amendment was also supported by the then president of the LSJ, who wrote to the Attorney General of the day confirming that position.

### **3. Lawyers in the LOD and the current disciplinary environment**

The Proposition asks in (a) that the States agree that the Chief Minister bring forward proposals, within 12 months, “*which align the disciplinary process of the Law Officers’ Department with those that currently apply to private sector lawyers.*”

There is no explanation or justification offered for this proposal, and it requires the Chief Minister to bring forward proposals without any analysis of or inquiry into the current disciplinary environment or the need for change.

#### Reasons provided in 2006 for removing LOD advocates and solicitors from the 2005 Law

P.96/2006 set out the reasons for removing the LOD Jersey lawyers from the ambit of the 2005 Law –

- such lawyers are salaried public employees with less freedom of action than those in private practice to participate in the LSJ’s affairs;
- the need for insurance cover to be taken out for the protection of clients does not arise for such lawyers; and
- advocates and solicitors working within the LOD carry out their duties on behalf of the Attorney General and Solicitor General.

The first two reasons are not relevant to the Proposition, because it is primarily focused on the discipline aspect of the 2005 Law and its non-application to LOD advocates and solicitors. What the reasons as a whole illustrate, however, is that the position of LOD lawyers is very different from lawyers in private practice.

#### Carrying out duties on behalf of the Law Officers

LOD lawyers carrying out their duties on behalf of the Law Officers. The Attorney General<sup>4</sup> is appointed by the Crown by Letters Patent. As the Carswell Review highlighted, this method of appointment “*is a guarantee of [the Crown Officers’] independence and freedom from political pressure.*”<sup>5</sup>

This independence is also preserved by the [Departments of the Judiciary and Legislature \(Jersey\) Law 1965](#), which provides that a person employed in the LOD could only have their employment terminated with the agreement of the Attorney General. This independence is vital and ensures that those who advise government or operate the prosecution service cannot be made subject to improper pressure whether

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<sup>4</sup> Any reference to the Attorney General includes a reference to the Solicitor General.

<sup>5</sup> Paragraph 7.1: Review of the Roles of the Crown Officers (2010).

by States members, persons under investigation or prosecution, or by members of the public.

The Attorney General's rôle is multi-faceted, but includes –

- Legal adviser to the Crown on matters of Jersey law;
- Legal adviser to the States Assembly, Ministers and their Departments, Committees and Panels;
- *Partie Publique*;
- Prosecuting authority;
- Legal adviser in certain areas to Parochial Authorities;
- Central Authority for inter-jurisdictional assistance; and
- Titular Head of the Honorary Police and responsible for Honorary Police discipline.

The rôle of *Partie Publique* is potentially wide, and includes representing the Public interest before Courts and also participating in the disciplinary processes for the legal profession.

In discharging these functions the need for independence, both for the Attorney General and, by extension, those advocates and solicitors operating within the LOD, is firmly established. The above functions often involve advice and decisions which are sensitive and at times controversial; such as advising the States or Ministers whether a particular course of action or draft legislation is lawful or not; deciding whether or not to prosecute a suspected criminal; assisting other jurisdictions in criminal matters; holding a disciplinary enquiry into a complaint made by a member of the public against the honorary police; and deciding to begin an investigation under, for example, the Investigation of Fraud (Jersey) Law 1991 or, indeed, to refer a lawyer to the Royal Court for some disciplinary offence. It would be detrimental to the independent discharge of those functions were the Attorney General and his department to be subject to improper pressure from any source. This includes the possibility that a potential or actual defendant, States member, honorary officer or a member of the public might use – might exploit – for his own interest – the existence of a complaints system for the purpose of defeating the proper exercise of the Attorney's powers.

An unscrupulous person could make vexatious claims to the LSJ so as to hinder the work of the LOD because that person's interests run contrary to the example decisions taken above. It could be used to undermine advice and decisions in criminal cases and to undermine advice given to public bodies. This was one of the reasons that the then Solicitor General put forward in 2006; and the current Solicitor General emphasized the continuing validity of this point in the States on 2nd July 2013 when he said: *“there is concern that employees of the Law Officers' Department are particularly vulnerable and susceptible to malicious complaints by, in particular, defendants who wish to use the complaint to gain some sort of advantage in criminal proceedings. That concern remains today, and advocates remain at risk of malicious complaint.”*<sup>6</sup>

The Attorney General receives notification of all complaints made to the LSJ made against private practitioners, and the majority of such complaints against private practitioners are by clients. LOD lawyers do not have 'clients' in the conventional sense. Unlike lawyers in private practice, the duties discharged by advocates and

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<sup>6</sup> Paragraph 3.1.1: Hansard 2nd July 2013.



solicitors working within the LOD do not involve interaction with members of the public to the same extent as they do for those working within the private sphere. In the areas of advice, the client is invariably the Crown, the States, a Minister/Department, or another body exercising a public function, and any issues over the conduct of the LOD employee, should they ever arise, may be dealt with internally, by the Attorney General or, if necessary, by the States Employment Board. In civil litigation, the client will again be one of the above. In criminal matters there is no 'client', but the Attorney is representing the public interest in which, of course, there is co-operation with other public bodies such as the States of Jersey Police or Customs and Immigration, and with foreign authorities. In terms, therefore, of a complaint against LOD advocates and solicitors, there is no need for them to be covered by the 2005 Law, given that such advocates will rarely deal with members of the public and will never represent a client member of the public nor be entrusted with such a person's money. As the then Solicitor General noted during the debate on P.96/2006: "*there is not the same need for the client to have a right of recourse to the [LSJ].*"<sup>7</sup>

The "*clients*" of the LOD have recourse to the Attorney General either privately, in the Council of Ministers, or in the Assembly in appropriate cases. No private practitioner is subject to similar recourse.

#### Ways in which an LOD advocate or solicitor may be disciplined

LOD advocates and solicitors are already subject to supervision and appropriate disciplinary procedures. Save for reference to the LOD Code of Conduct mentioned below (which was not then published) these and the provisions of Article 3 of the 2005 Law were set out in brief in a written answer that the Attorney General gave to Deputy Le Hérissier on 1st March 2011 (ref. 1240/5(6062)) (see **Appendix 2**), and it is not therefore entirely clear to the Attorney General why the Deputy sees the earlier question of Deputy M.R. Higgins of St. Helier as the springboard for the Proposition.

#### *Inherent Jurisdiction of the Royal Court*

Article 32 of the 2005 Law expressly preserves the inherent jurisdiction of the Royal Court to discipline advocates and solicitors. It is therefore open to the Attorney General to bring a representation to the Royal Court to discipline any advocate or solicitor. In the previous 18 months, the Attorney has brought two representations to the Royal Court to discipline advocates without any involvement of the LSJ. This power would only normally be exercised in circumstances where it is unnecessary to involve the LSJ because the Disciplinary Committee's powers of sanction are not sufficient to meet the seriousness of the offence, or because there has been a criminal conviction (as there was in both representations recently brought).

If a member of the LOD, or indeed any practitioner, has acted in a manner that requires reference to the Royal Court, then it is open for the Attorney to seize the Court of the matter. Clearly, in the case of an employee of the LOD, it would usually be appropriate to seek independent advice on the decision to refer and, if a reference were brought, it might be appropriate to appoint an advocate from outside the LOD to act. This is similar to the process recommended by the Carswell Review<sup>8</sup>, when the Attorney General is considering a prosecution against a States Department having

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<sup>7</sup> See 3 *ibid.*

<sup>8</sup> Paragraph 6.6: see 5 *ibid.*

previously advised the Department on the course of action which has led to a breach of law.

In the past, States Committees, members and Ministers have been prosecuted by the Attorney General for breaching the law, and in 2012 the Magistrate-Designate, a former LOD employee (although from before the current Attorney's time) was prosecuted for serious offences.

#### *Civil Service Code of Conduct*

Advocates and solicitors within the LOD are employees of the States Employment Board and are therefore subject to the Civil Service Code of Conduct. The Proposition asserts that this Code is "*not tailored for lawyers.*" It is not clear what this comment is directed at, because there is no ostensible need for the Civil Service Code to be specifically tailored for each individual department or profession. The Civil Service Code of Conduct is widely framed to ensure the standards expected of those within the civil service are kept high; and the Proposition does not offer any examples of lawyer misconduct which might not be caught by the Civil Service Code of Conduct. It is limited in its application to lawyers in the LOD only to the extent that no LOD employee can be dismissed without the consent of the Attorney General.

#### *Law Officers' Department Code of Conduct*

There is, moreover, an internal Code of Conduct for all "lawyers" within the LOD. This is significant because it is wider than the LSJ Code of Conduct in that it applies not only to Jersey advocates and solicitors, but also to those who have obtained a legal professional qualification in Jersey or elsewhere (for example solicitors or barristers from England and Wales), and is more closely tailored to what would be relevant to LOD lawyers. The Proposition mentions that "*Details were not provided, but it did not appear that this Code was a substitute for the disciplinary processes of the [2005 Law].*" The LOD Code of Conduct is in fact published on the LOD website and was published both at the time that the Solicitor General answered Deputy Higgins' question in the Assembly and at the time of the lodging of the Proposition (see **Appendix 3**).

Although the process for dealing with a complaint made against lawyers in the LOD is not published, it would follow standard civil service disciplinary protocols. In addition, the Senior Management Team of the LOD has minuted the Attorney General's decision that in all serious complaints (that is, complaints in which the Attorney might consider referring the matter to the Royal Court), the matter should first be referred to external counsel for advice.

The Attorney General is pleased to confirm that he will publish details of the procedure that would apply to complaints made against LOD lawyers.

#### Conclusion

Advocates and solicitors in the LOD are therefore subject to supervision and disciplinary process, both internally and by the Royal Court. There is no evidence to suggest that the combination of the nature of the work done by the LOD, disciplinary supervision by the Royal Court, the Civil Service Code of Conduct and the LOD Code of Conduct does not provide an adequate disciplinary framework in relation to LOD advocates and solicitors and lawyers in general. The Proposition offers no justification

for reversing the States' decision in 2006 that it was not appropriate for such lawyers to fall within the scope of the 2005 Law. To do so would be not only be unnecessary but potentially a substantial hostage to fortune. Accordingly it would, in the Attorney's view, be a risk not worth taking.

#### **4. The position of the Law Officers**

The Proposition proposes in (b) that the Chief Minister –

*“... consult with the Crown on the desirability and feasibility of establishing a revised disciplinary process for H.M. Attorney General and H.M. Solicitor General and to report to the States on the outcome of this consultation.”*

No evidence of any difficulty with the existing arrangements, or justification for this proposal, is offered in the Proposition.

The points made above relating to independence and freedom from improper pressure apply with even greater force to the Law Officers themselves.

The Law Officers are accountable to the States Assembly in some circumstances and this, and the Law Officers' accountability generally, was the subject of a written answer to a question by Deputy Higgins on 29th January 2013 (ref. 1240/5(73980)) (see **Appendix 4**). See also the Attorney General's answer about the process for complaints made against the Law Officers on 19th February 2013 (ref. 1240/5(7428)) (**Appendix 5**).

As stated above, the Law Officers are appointed by the Crown. These appointments are by Letters Patent during good behaviour and until the age of 70. If a person had a complaint against either Law Officer, then such a complaint, if it were not able to be resolved with the Attorney General, would have to be made to the Crown, *via* the Crown's representative in the Island, *i.e.* His Excellency the Lieutenant-Governor.

Exactly how such a complaint would progress from there is not laid down in statute, but would be a matter for the Crown, in consultation with the insular authorities, acting on the advice of its Ministers in the United Kingdom. The Attorney General understands that in the past the responsible UK department has made inquiry into any such complaint and if appropriate appointed a senior person from outside the island to investigate it.

However, in the interests of clarity and certainty, the Attorney General does not object in any way to discussions with the Crown over complaints made against the Law Officers as suggested in the proposition.

Ultimately, of course, it would be open to the Crown to withdraw the Letters Patent (as in the case of the then Deputy Bailiff in 1992).

As the then Bailiff put it in 2006 (during the debate on the Amendment to the 2005 Law):<sup>9</sup> *“There is no question that the Attorney General and Solicitor General are unaccountable.”*

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<sup>9</sup> Paragraph 10.7: see 2 *ibid.*

## **5. Rôle of H.M. Attorney General in disciplinary procedures**

The Proposition mentions this but it is not clear in what context it is being referred to, as it follows immediately the paragraph regarding the discipline of the Law Officers.

On the assumption that this refers to the Attorney's statutory rôle under the 2005 Law regarding the referral of complaints against advocates and solicitors to the Royal Court, the Legislation Advisory Panel are currently undertaking a review of the 2005 Law including the role of the Attorney General in this respect.

## STATES OF JERSEY

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## **10. Draft The Law Society of Jersey (Amendment) Law 200- (P.96/2006)**

### **The Bailiff:**

We come now to Projet 96 – the Draft The Law Society of Jersey (Amendment) Law 200- in the name of the Chief Minister. I ask the Greffier to read the citation of the draft.

### **The Greffier of the States:**

Draft The Law Society of Jersey (Amendment) Law 200-, a Law to amend the Law Society of Jersey Law 2005. The States, subject to the sanction of Her Most Excellent Majesty in Council, have adopted the following Law.

#### **10.1 Senator T.A. Le Sueur:**

Hopefully this matter may be a little bit less controversial than the last one. This is a fairly simple adjustment which really deals with the anomaly of the members of the Law Society who happen to be Crown Officers or working in the Law Officers Department. The rules and regulations of members of the Law Society working in private practice are not really appropriate to those working in the Law Officers Department and this Law really puts that right by making certain conditions for those people in that category. That is the substance of the amendments and I propose the preamble.

### **The Bailiff:**

Are the principles seconded? [**Seconded**] Does any Member wish to speak on the principles of the draft?

#### **10.2 Senator S. Syvret:**

I have some concerns about this and unless I receive a convincing explanation I will be forced to vote against it. It seems to me to exclude Jersey Advocates simply because they happen to be Crown Officers from the disciplinary structures and processes of the Law Society is wholly undesirable, given the absence of an alternative framework. Of course it is absolutely fair enough and it makes common-sense that they should not be required to pay themselves the annual subscription fees for the Jersey Law Society, nor indeed carry that kind of private sector professional indemnity insurance that is a requirement. Amending the Law to exclude them from those requirements, or perhaps for the State in some way to pay it for them, would be entirely acceptable but I am afraid removing the Law Officers, referred to by this Law, from the disciplinary structures and the general codes and so on that are required by the Jersey Law Society I regard as wholly unacceptable. I think the argument that they are Crown appointees is, I have to say, a very old fashioned argument and not really a particularly robust or convincing argument to put forward in the 21st century. I do believe that nobody should be above the Law and we regulate the practises of Advocates in Jersey through the Jersey Law Society Law and it seems to me that all Advocates practicing in Jersey, and that includes the Crown Officers, should also be subject to the same disciplinary and professional requirements laid down by the Society. Indeed the Society is

empowered to have those requirements at Law. So, Sir, unless I receive a particularly convincing explanation I am going to vote against that particular provision and I urge other Members to do the same. In the 21st century we should not be exempting Crown Officers and Advocates working in the Crown Offices Department from the disciplinary structures required by the Jersey Law Society Law.

### **10.3 H.M. Solicitor General:**

I wonder, Sir, if I might respond to the point about the disciplinary controls of the Law Society because I understand the Senator's concern and I can understand that Members as well may be concerned and I think that they should have an explanation of our concerns. The disciplinary controls, such as they are, at the moment – which can be either a complaint to the Bâtonnier or a complaint to the Law Society – are generally a complaint by a client about the lawyer who has advised him and those are the most frequent complaints. Our clients are the States and their departments and if the States or any department are unhappy with the service given by the Attorney General, the Solicitor General, or any member of the department, the States can pursue that through the Chief Minister, through Human Resources or through whatever level is appropriate so that there is not the same need for the client to have a right of recourse to the Law Society. The second point is this; the Attorney General has a number of customary law and indeed statutory functions which increasingly include the inquiry into both locally, and assisting other jurisdictions, quite serious organised crime – frauds, drug trafficking and various other kinds of organised crime. Members will probably have seen in the paper the challenges which are frequently made by persons who are under investigation, here and in other jurisdictions, who have tried to challenge at every step the Attorney General when he has been seeking to assist in investigations into organised crime and into fraud. I am not disclosing anything confidential; there have recently been well-publicised and long drawn-out proceedings in relation to assistance that the Attorney General has been given to the authorities in Brazil who have been inquiring into some very serious alleged corruption and fraud offences. At every stage the lawyers acting for the persons under investigation have sought to impede the assistance that has been given. It would be a God-send, and one of the easiest ways in the world to handicap the Attorney General in this kind of thing, by making spurious complaints to the Law Society. The Law Society would then call upon the Attorney General or whichever lawyer was dealing with this to give a full account of what they were doing and it really would be extremely seriously detrimental to the work of the Attorney General in assisting other jurisdictions and indeed in work in this jurisdiction in the policing of quite serious crimes.

### **10.4 Deputy of St. Martin:**

I can well remember asking questions of how long it was going to take for us to obtain this Law Society Law coming to be and that must have been some years ago and I gather this piece of legislation has taken a number of years to come to fruition. What surprises me really is having come to being that we are now asked to delete something. Maybe we could have an explanation as to why that

was not taken into consideration at the time when the Law was drafted. The second question is just as a matter of interest; how much is the subscription to be a member of the Law Society?

**Deputy P.N. Troy:**

I wondered if I could ask the Solicitor General another question, as to whether this initiative is similarly enforced in other jurisdictions for their legal representatives for any jurisdiction?

**H.M. Solicitor General:**

I am afraid I cannot assist with the arrangements in other jurisdictions. It is not that I do not wish to assist, I simply do not know.

**10.5 Deputy R.G. Le Hérisier:**

I did inquire of the Attorney General when this qualification came through and in part answer to the Deputy of St. Martin, Sir, apparently this was something that was overlooked. But I must admit when the Law did go through, as it went through the Legislation Committee over many, many decades, this was never an issue and this apparently did pop-up at the last minute. The only point, Sir, I would make in reference to the Solicitor General is of course if you have a particular assiduous policeman and he or she is very effective at countering crime and, talking in the nature of their work, they are the subject of an awful lot of complaints to trip them up of course. So, I do not think lawyers in that sense are very different. The other thing I would say, Sir, it is always a feature of professionals like doctors and lawyers that they seek self-regulation because they feel they are in the best position to judge the actions of their peers because of their knowledge of the field in which they work and in a way, Sir, it seems quite strange that the Solicitor General should aver that someone like Human Resources could well be put in the position of dealing with a discipline case against lawyers, whereas it strikes me they fought through the establishment of this particular disciplinary procedure. They have fought for the right to be judged by their peers, not to be judged, for example, by a Personnel Department so there seems a bit of inconsistency there.

**Deputy K.C. Lewis:**

Just a brief question for the Solicitor General, Sir. The Law Society of Jersey, if they were given leave to work outside of the Law Society, or not be members, if there was a genuine complaint, shall we say, to whom would they be answerable?

**H.M. Solicitor General:**

Does that mean a genuine complaint from a Member of the States or States Department about the service provided by the Law Officers or a complaint from a member of the public? I think the answer is probably different depending on who the complaint comes from. If there is a States entity who has a complaint about the conduct of the Law Officers – if it is a member of the department – that can be raised with the Attorney General or the Solicitor



General. If it is a complaint of course about one of us then it would, I think, have to be taken up politically.

**10.6 Senator W. Kinnard:**

I do hesitate to rise but as one of those who trawled through this law as a previous President of Legislation I am afraid I was not present if this was discussed at the Council of Ministers. I am just a little concerned that I do not think there has been sufficient thought from 2 points; if complaints are made against the police during the conduct of a criminal case this is dealt with after the criminal case has been concluded. I do have concerns that in this day and age of transparency that I still have concerns that it is not as clear to all of us here as to whether what we are suggesting is similar or different to other jurisdictions. My understanding is that all the lawyers for instance in England and Wales are subject to the restrictions and sanctions of the Law Society. I did send a note urging that we should perhaps delay this to have more research done as to what does go on elsewhere and to consider it further and I make that request again now today. Thank you, Sir.

**The Bailiff:**

I do not wish to join in the debate at all but I hope that Members will appreciate that the Attorney General and the Solicitor General are Crown Officers and are accountable strictly to the Crown. They are of course accountable in a practical sense, as the Solicitor General has said, to whom they provide advice – that is to say States' Members and States' departments – but they are also accountable to the Crown. When a complaint – and I say this without fear of being controversial at all – is made against a Crown Officer, if it is made to the Lieutenant Governor, as the Queen's personal representative over here, it is investigated as appropriate to the complaint which is made. There is no question that the Attorney General and Solicitor General are unaccountable. Does any other Member wish to speak?

**10.7 Deputy P.V.F. Le Claire:**

I feel confident that the advice that has been given to us by the Solicitor General and also by yourself and your contribution there, Sir – although very guarded in your advice – I think is that the States can take this on board and agree with it in the knowledge that there are avenues for complaints, should we wish to make them. At the moment I am completely happy with the situation that exists between our relationships, with not only the Law Officers but also your good offices, as States' Members, who are accountable to the public, Sir. I believe quite strongly that if I have a view to take-up an issue on behalf of the public, as I do sometimes undertake to do, that I am given a fair crack of the whip in doing so and it is only my abilities or the lack of them that stop me from proceeding.

**The Bailiff:**

I call upon the Deputy Chief Minister to reply.

### **10.8 Senator T.A. Le Sueur:**

I am grateful to the Solicitor General and indeed to yourself, Sir, for dealing with some of the points that have been raised during this debate probably in a better way than I could have done. In response to Senator Syvret, I simply add that nobody in the Island is above the Law. What we are dealing with here is the best way in dealing with a complaints procedure and it may well be that the situation is slightly different between that of the Crown Officers appointed by the Crown and those practising law within the Law Officers Department who indeed would be employees of the States working under the Attorney General and Solicitor General. But to the extent, Sir, that these are employees of the States, just like any other employees of the States, complaints should be made in the proper way and in a normal complaints procedure in respect of any States' officer. As to the other comments that have been made from the Deputy of St. Martin, why was the amendment brought in so soon? I think because when one sees something is wrong one tries to put it right as soon as possible. One does not leave it in the wrong. He would like to know how much the subscription is. I am sorry, I did not come prepared with that one because I did not think the quantum of the subscription was particularly relevant to this amendment to the Law. If he is really interested I am sure we can find out for him. The question from Deputy Le Hérissier about whether self-regulation is suitable: I am not really sure what we are getting at there. In terms of complaints procedures I have said there is a formal complaints procedure in place and I will also deal with the comments of Deputy Lewis about any complaint from a member of the public. Senator Kinnard who thinks we should defer this, I think no, it is pretty straightforward. If the Senator is not happy that the Law, in its present form, is addressing the issue then the simply remedy is to vote against the principle of the Law, Sir. I maintain the principle of the law.

### **The Bailiff:**

May I ask any Member who wishes to vote on the principles of the draft, who is in the precinct, to return to his or her seat. I ask the Greffier to open the voting.

### **POUR: 34**

Senator T.A. Le Sueur  
Senator P.F. Routier  
Senator M.E. Vibert  
Senator P.F.C. Ozouf  
Senator T.J. Le Main  
Senator B.E. Shenton  
Senator F.E. Cohen  
Senator J.L. Perchard  
Connétable of St. Saviour  
Connétable of St. Mary  
Connétable of St. Peter  
Connétable of St. Clement  
Connétable of St. Lawrence

### **CONTRE: 6**

Senator S. Syvret  
Senator W. Kinnard  
Deputy of St. Martin  
Deputy C.J. Scott Warren (S)  
Deputy R.G. Le Hérissier (S)  
Deputy K.C. Lewis (S)

### **ABSTAIN: 0**

Connétable of Grouville  
Connétable of St. John  
Connétable of St. Brelade  
Connétable of St. Martin  
Deputy R.C. Duhamel (S)  
Deputy A. Breckon (S)  
Deputy J.J. Huet (H)  
Deputy G.C.L. Baudains (C)  
Deputy P.N. Troy (B)  
Deputy S.C. Ferguson (B)  
Deputy of St. Ouen  
Deputy P.J.D. Ryan (H)  
Deputy of Grouville  
Deputy J.A. Hilton (H)  
Deputy G.W.J. de Faye (H)  
Deputy P.V.F. Le Claire (H)  
Deputy D.W. Mezbourian (L)  
Deputy S.S.P.A. Power (B)  
Deputy A.J.H. Maclean (H)  
Deputy I.J. Gorst (C)  
Deputy of St. Mary

**The Bailiff:**

Corporate Affairs, no scrutiny?

**Deputy P.J.D. Ryan:**

No, thank you, Sir.

**The Bailiff:**

Articles 1 and 2 are proposed. **[Seconded]** Does any Member wish to speak on either of those articles? I put the articles. Those Members in favour of adopting them kindly show. Against? The articles are adopted and in Third Reading. **[Seconded]** Does any Member wish to speak on the Bill in the Third Reading? I put the Bill. Those Members in favour of adopting it kindly show. Those against. The Bill is adopted in the Third Reading.

**WRITTEN QUESTION TO H.M. ATTORNEY GENERAL  
BY DEPUTY R.G. LE HÉRISSIER OF ST. SAVIOUR  
ANSWER TO BE TABLED ON TUESDAY 1st MARCH 2011**

**Question**

To what extent, if any, are the provisions of Article 3 of the Law Society of Jersey Law 2005 replicated in procedures that apply to Lawyers in public service and, if there is no replication, what disciplinary provisions, if any, exist to deal with complaints from the public?

**Answer**

Article 3(4) of The Law Society of Jersey Law 2005 which was a 2006 amendment to the original Law exempts the Law Officers and persons practising law as a Jersey Advocate or Solicitor in the course of their employment with the Law Officers' Department from a requirement that they must be members of the Law Society and subject to its rules and regulations. This exemption only applies to the Law Officers' Department and persons employed and practising as lawyers in other States Departments would be required to be members of the Law Society.

Article 32 of the Law specifically preserves the inherent jurisdiction of the Royal Court to exercise disciplinary control over its practitioners. This would include Jersey Advocates and Solicitors employed by the Law Officers' Department.

Some employees of the Law Officers' Department were admitted as solicitors or barristers in England and Wales or are professionally qualified by virtue of them being fellows of the Institute of Legal Executive and are not eligible, in any event, to be members of the Law Society.

The independence of officers employed in the Law Officers' Department is preserved by Departments of the Judiciary and the Legislative (Jersey) Law 1965. The consent of the Attorney General is required before a person employed by the Law Officers' Department could have his or her appointment suspended or terminated. These safeguards and legal protections are important to ensure that the work of the Law Officers' Department may be and be seen to be free from any Political or Executive interference.

All officers employed in the Law Officers' Department perform their duties for and on behalf of the Law Officers. As such, they are accountable to me for their actions. As Attorney General, I am accountable in the States and I am, from time to time, required to provide information about the work of the Law Officers' Department.

If a member of the public wished to complain that a member of my staff was guilty of professional or other misconduct, the matter should be reported to me so that I might decide how the complaint should be dealt with.

Staff employed in the Law Officers' Department are public servants and we are committed to providing a good service to the public. I expect all members of staff, whether professionally qualified or not, to maintain high professional and personal standards.

**Law Officers' Department**  
**Code of Conduct for Lawyers**

1. The general purpose of this Code is to provide the requirements for working as a lawyer in the Law Officers' Department ("the Department") and the rules and standards applicable to such lawyers which are appropriate in the interests of justice and in relation to the performance of all their duties as public officers.
2. For the purposes of this Code, the term "lawyer" means a person who has obtained a legal professional qualification in Jersey or elsewhere and is employed in the Department by the States of Jersey Employment Board.
3. It operates in addition to and not in substitution for, the Lawyer's contract of service and the terms and conditions applying to States Employees, for the time being.
4. This Code applies to all lawyers and any breach of this Code will be treated as a matter of discipline.
5. The Attorney General and Solicitor General shall have the power to waive in writing, in whole or in part, conditionally or unconditionally any of the provisions of this Code of Conduct for a particular purpose or purposes expressed in such a waiver, and to revoke such waiver conditionally or unconditionally.

Reputation

6. A lawyer must not engage in conduct whether in pursuit of his/her profession or otherwise which is:
  - (a) dishonest or otherwise discreditable;
  - (b) prejudicial to the administration of Justice;

- (c) likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute; or
  - (d) likely to compromise the independence and political neutrality of the Law Officers' Department or to bring that Department into disrepute.
- 7. A lawyer must not, without the prior express permission of the Attorney General, engage directly or indirectly in any other business, occupation or profession. Such permission will not, in any case, be given if his/her association with the same may adversely affect the reputation of the Law Officers' Department, the Jersey Bar or solicitor's profession or otherwise prejudice the lawyer's ability to attend properly to his/her duties and responsibilities.

#### Standards

- 8. A lawyer shall uphold the dignity and high ethical and technical standards of the legal profession.
- 9. A lawyer has an overriding duty to the Court to act with independence in the interests of justice; he/she must assist the Court in the administration of justice and must not deceive or knowingly or recklessly mislead the Court.
- 10. A lawyer must exercise independence of judgment and fearlessly promote and protect the best interests of the person or department whom he has been requested to advise and represent. He/she must do so without regard to his/her own interests or to any consequences to himself or any other person. However, the lawyer's duty to the Court remains paramount.
- 11. A lawyer must not:
  - (a) permit his/her absolute independence and integrity and freedom from external pressures to be compromised;

- (b) do anything (for example accept a present or pay or loan monies) in such circumstances as may lead to any inference that his/her independence may be compromised;
  - (c) compromise his/her professional standards in order to please his/her client, the Court or a third party.
  
- 12. A lawyer must not act in any matter or take any instructions which if accepted, would cause him/her to be professionally embarrassed and for this purpose a lawyer will be professionally embarrassed if:
  - (a) the instructions seek to limit the ordinary authority or discretion of a lawyer in the conduct of the proceedings or to require the lawyer to act otherwise than in accordance with the provisions of this Code;
  - (b) the matter is one in which he/she has reason to believe that he is likely to be a witness or in which whether by reason of any connection with the client or with the Court or a member of it or otherwise it will be difficult for him/her to maintain a professional independence or the administration of justice might be or appear to be prejudiced;
  - (c) the client refuses to authorise him/her to make some disclosure to the Court which his duty to the Court requires him/her to make.
  
- 13. A lawyer should report any such matter to his/her manager. A lawyer must in all his/her professional activities be courteous and act promptly, conscientiously, diligently and with reasonable competence and take all reasonable and practicable steps to avoid unnecessary expense or waste of the Court's time and to ensure that professional engagements are fulfilled.
  
- 14. A lawyer must not in relation to any other person discriminate directly or indirectly because of race, colour, ethnic or national origin, nationality, citizenship, sex, sexual orientation, marital status, disability, age, religion or belief.

### The Law Officers

15. Ultimately, lawyers provide advice for and on behalf of the Law Officers. All lawyers should accordingly follow Law Officers' instructions and/or provide advice consistent with the Law Officers' view.
16. Otherwise, a lawyer is individually and personally responsible for his/her own conduct and for his/her professional work. He/she must exercise his/her own personal judgment in all his/her professional activities.

### Drafting Documents

17. A lawyer must not draft any statement of case, witness statement, affidavit notice of appeal or other document containing:
  - (a) any contention which he/she does not consider to be properly arguable having regard to his overriding duty to assist the Court in the administration of justice. It is the lawyer, not the client, who decides what is properly arguable;
  - (b) any statement of fact or contention which is not supported by the lay client or by his/her instructions;
  - (c) any allegation of dishonesty, fraud or other improper conduct against any person (including an Advocate representing the opposing party) unless he/she has clear instructions to make such allegation and has before him/her reasonably credible material which as it stands establishes a prima facie case;
  - (d) in the case of a witness statement or affidavit any statement of fact other than the evidence which in substance according to his/her instructions the lawyer reasonably believes the witness would give if the evidence contained in the witness statement or affidavit were being given in oral examination;provided that nothing in this paragraph shall prevent a lawyer drafting a document containing specific factual statements or contentions included by the lawyer subject to confirmation of their accuracy by the lay client or witness.



### Conduct in Court

18. A lawyer when conducting proceedings in Court:

- (a) is personally responsible for the conduct and presentation of his/her case and must exercise personal judgment upon the substance and purpose of statements made and questions asked;
- (b) must not make a submission which he/she does not consider to be properly arguable, having regard to his/her overriding duty to assist the Court in the administration of justice. It is the lawyer, not the client, who decides what is properly arguable;
- (c) must not unless invited to do so by the Court or when appearing before a tribunal where it is his/her duty to do so assert a personal opinion of the facts or the law;
- (d) must ensure that the Court is informed of all relevant decisions and legislative provisions of which he/she is aware, whether the effect is favourable or unfavourable towards the contention for which he/she argues;
- (e) must bring any procedural irregularity to the attention of the Court during the hearing and not reserve such matter to be raised on appeal;
- (f) must not adduce evidence obtained otherwise than from or through the client or invent facts which will assist in advancing the lay client's case;
- (g) must not make statements or ask questions which are merely scandalous or intended or calculated only to vilify insult or annoy either a witness or some other person;
- (h) must if possible avoid the naming in open Court of third parties whose character would thereby be impugned;
- (i) must not by assertion in an oral submission or by cross examination or otherwise make any allegation of dishonesty, fraud or other improper conduct against any person (including an Advocate representing the opposing party) unless he/she has a clear basis to make such allegation and has before

him/her reasonably credible material which as it stands establishes a prima facie case;

- (j) must not by assertion in a speech impugn a witness whom he/she has had an opportunity to cross-examine unless in cross-examination he/she has given the witness a full and proper opportunity to answer the allegation;
- (k) must not suggest that a victim, witness or other person is guilty of crime, fraud or misconduct or make any defamatory aspersion on the conduct of any other person unless such allegations go to a matter in issue (including the credibility of the witness) which is material to the case and appear to him/her to be supported by reasonable grounds.

#### Contact with witnesses

19. A lawyer must not:

- (a) rehearse, practise or coach a witness in relation to his/her evidence;
- (b) encourage a witness to give evidence which is untruthful or which is not the whole truth; or
- (c) except with the consent of the Court or the representative of the opposing side, communicate directly or indirectly about a case with any witness, once that witness has begun to give evidence until the evidence of that witness has been concluded.

#### Documents

20. A lawyer should not obtain or seek to obtain a document, or knowledge of the contents of a document, belonging to another party other than by means of the normal and proper channels for obtaining such documents or such knowledge.

21. If a lawyer comes into possession of a document belonging to another party by some means other than the normal and proper channels (for example, if the document has come into his/her possession in consequence of a mistake or inadvertence by another person or if the document appears to belong to another party, or to be a copy of such a document, and to be privileged from

discovery or otherwise to be one which ought not to be in the possession of his/her client) he/she should:

- (a) where appropriate make enquiries in order to ascertain the circumstances in which the document was obtained; and
  - (b) unless satisfied that the document has been properly obtained in the ordinary course of events at once return the document unread to the person entitled to possession of it.
22. If having come into possession of such a document the lawyer reads it before he/she realises that he/she ought not to, the lawyer should immediately draw this to the attention of the lawyer's manager and should inform his opponent of his/her knowledge of the document and of the circumstances, so far as known to him/her, in which the document was obtained and of his/her intention to use it. In the event of objection to the use of such document it is for the Court to determine what use, if any, may be made of it but subject thereto the lawyer shall make such use of the document as will be in his/her client's interests.
23. If during the course of a case a lawyer becomes aware of the existence of a document which should have been but has not been disclosed on discovery he/she should advise his/her professional client to disclose it forthwith.

#### Media

24. A lawyer must not in relation to any court proceedings express a personal opinion to the press or other media or in any other public statement upon the facts or issues arising in the proceedings.
25. Personal opinion may be expressed in an academic context with the prior consent of the Attorney General or Solicitor General.

**WRITTEN QUESTION TO H.M. ATTORNEY GENERAL  
BY DEPUTY M.R. HIGGINS OF ST. HELIER  
ANSWER TO BE TABLED ON TUESDAY 29th JANUARY 2013**

**Question**

Will Her Majesty's Attorney General explain to members the various checks and balances that apply to the Law Officers and the Law Officers Department and explain how and in what way the department is accountable to the States of Jersey Assembly?

**Answer**

It is unclear from the question precisely what is intended by "accountability" and "checks and balances".

The Attorney General and Solicitor General are appointed by the Crown and hold office during good behaviour. Although the Attorney General is the senior Law Officer they are independent of each other. The Law Officers have supervision of the Criminal and Civil Functions of the department through the Director of the Criminal Division and the Director of the Civil Division. The Law Officers are sworn office holders and are bound by the terms of their oaths.

Many of the members of the Department are also lawyers who owe independent professional obligations. Other than the Law Officers, all members of the department are subject to the codes of conduct and other policies applying to all civil servants.

The Law Officers' Department carries out a number of different functions and different considerations apply to the various functions.

Neither the Law Officers nor the department are accountable to the States Assembly for prosecution decisions or prosecutorial matters which are and must remain independent of political considerations and pressure.

Similarly, the Law Officers' Department is not accountable to the States Assembly for operational matters as it must maintain its ability to give impartial and independent advice.

Subject to such exceptions the Law Officers' Department is accountable to the States Assembly through the Attorney General or Solicitor General who are members of the Assembly.

Financially the Law Officers' Department is accountable to the Chief Minister's Department and Treasury and thereby ultimately to the States Assembly for matters of financial management.

Some decisions of the Law Officers may be challenged before the courts. In the exercise of their functions, the Law Officers are public authorities under the Human Rights Jersey Law and must therefore act compatibly with the Convention rights of others, whenever such rights are engaged by the exercise of those functions.

Should the States Assembly fundamentally lose confidence in a Law Officer then the Assembly could adopt a motion of no confidence in that officer. Although the motion would not be legally binding, the Crown and the officer concerned would inevitably pay regard to the views expressed by the elected representatives of the Island.

**WRITTEN QUESTION TO H.M. ATTORNEY GENERAL  
BY DEPUTY M.R. HIGGINS OF ST. HELIER  
ANSWER TO BE TABLED ON TUESDAY 19th FEBRUARY 2013**

**Question**

- (a) Will H.M. Attorney General set out clearly each of the steps that need to be taken by anyone wishing to make a complaint (including misconduct) against the actions of any of the following office holders, explaining in detail each step and each level, until the matter reaches the persons or bodies ultimately responsible for determining such matters:
- (i) Legally qualified members of the Law Officers Department;
  - (ii) Solicitor General;
  - (iii) Attorney General;
  - (iv) Deputy Bailiff;
  - (v) Bailiff;
  - (vi) Jurats;
  - (vii) Magistrates?
- (b) To whom are the office holders (i) to (vii) listed above accountable for appraisal purposes?

**Answer**

- (a) The question is not clear as to what is meant by “complaint”, particularly in respect of the office holders who are listed at (iv) to (vii) whose functions require them to act as judges in the Jersey courts. It is important to distinguish between two types of complaint in relation to a judge.

In so far as the complaint relates to matters occurring in the course of legal proceedings (for example, a complaint that the judge’s decision is wrong or that he or she has behaved unfairly or should not have sat because he or she had a conflict of interest) then the appropriate remedy is for the aggrieved party to use the judicial process and appeal or apply for *doléance* (an alternative method of review) where available.

Where the complaint alleges misconduct other than in the course of legal proceedings, then the appropriate course in respect of a complaint made against a Jurat or a Magistrate is to lodge that complaint with the Bailiff. The Bailiff can then decide if the complaint requires investigation. If it does, he will seek to replicate the procedures applied in England and Wales as far as possible and, where appropriate, will appoint an independent person to investigate the matter.

The process thereafter in respect of a Jurat is set out in the Royal Court (Jersey) Law 1948. The Bailiff can convene the Superior Number at the conclusion of any investigation so that the Royal Court can consider whether

or not to petition the Privy Council seeking the removal of the Jurat (if no resignation is forthcoming) by Order in Council.

A Magistrate may only be dismissed by Order in Council. Should the independent investigation merit such a course of action, the Bailiff would make a recommendation accordingly.

The Bailiff and Deputy Bailiff are appointed by Her Majesty and may only be dismissed by Her Majesty.

If a complaint of misconduct outside court proceedings concerns the Bailiff or the Deputy Bailiff then the complaint should be lodged with the Lieutenant Governor as Her Majesty's personal representative. If he decides that the complaint requires investigation, he may appoint an independent person to investigate in the same manner as described above. Should the result of the investigation merit such a course of action, a recommendation can then be made to Her Majesty.

The Attorney General and the Solicitor General are appointed by Her Majesty and may only be dismissed by Her Majesty. The procedure for a complaint against either of them would be analogous to that in respect of the Bailiff and Deputy Bailiff.

The Law Officers' Department has its own internal disciplinary procedures and any complaint about a legally qualified member of staff should be made to the Attorney General in the first instance.

The procedures described above are designed to provide for effective investigation when merited but at the same time preserve the independence of the office holders as the independence of the judiciary and the prosecuting authorities is vital to the maintenance of the rule of law.

- (b) The management at the Law Officers' Department conducts appraisals of legally qualified members of staff. The Law Officers and members of the Judiciary are not the subject of appraisals. The members of the Judiciary receive training on a regular basis. The Court's judgments are subject to public scrutiny and litigants are able to exercise any rights of appeal.

## APPENDIX 2

### Law Officers' Department Disciplinary Procedure

#### Interpretation

1. The following definitions shall have effect for the purposes of this procedure.
  - (a) “*A serious breach of the Code*” shall be a breach of the Code which is considered sufficiently serious that, in the case of an Advocate or Solicitor, it requires a reference to the Royal Court.
  - (b) “*Advocate or Solicitor*” shall mean an Advocate or Solicitor of the Royal Court of Jersey.
  - (c) “*Attorney General*” shall unless the context requires otherwise include reference to the Solicitor General.
  - (d) “*a/the Director*” shall mean either the Director of the Civil Division or the Director of the Criminal Division.
  - (e) “*the Code*” shall mean the Code of Conduct of the Law Officers’ Department (July 2013).
  - (f) “*CS Disciplinary Procedure*” shall mean the Civil Service Disciplinary Policy and Procedure (October 2009).
  - (g) “*the Department*” shall mean the Law Officers’ Department.
2. Save as otherwise specified, the terms used in this procedure have the same meaning that they have in the Code.
3. Words importing the masculine gender shall include females.

#### General Principles

4. This document sets out the procedure for the investigation of a complaint against or conduct by a lawyer working in the Law Officers’ Department, and the manner in which such complaints or conduct may be dealt with.
5. This procedure operates in conjunction with the CS Disciplinary Procedure and nothing in this procedure derogates from the rights of a lawyer under the CS Disciplinary Procedure. The Attorney General may vary or depart from the approach set out in this procedure in any given case, if the interests of justice require him to do so, subject to the CS Disciplinary Procedure not being departed from.
6. Nothing in this document qualifies or touches upon the powers and duties of the Attorney General to bring before the Royal Court, as he sees fit, any issues relating to an Advocate or Solicitor.



7. At each stage of the process the Director or the Attorney General, as the case may be, must consider
  - (a) whether the complaint or conduct is such that the lawyer is able to remain in post pending the outcome of any investigation or disciplinary hearing; and
  - (b) whether the complaint requires a reference to the Attorney General in order that the Attorney General may consider exercising his powers and duties to bring a matter concerning an Advocate or Solicitor before the Royal Court.
8. Nothing in this procedure shall prevent the Attorney General from notifying a legal professional body, in a jurisdiction other than Jersey, of conduct by a lawyer who is regulated by such a legal professional body.
9. The Attorney General may at any stage seek external independent advice on the matters contained within this procedure, the substance and procedure in dealing with a complaint or conduct and the Attorney General's duties in law.
10. A note of the outcome of any complaint should be placed on the lawyer's file, subject to the CS Disciplinary Procedure.

#### Application

11. This procedure shall apply where:
  - (a) the Attorney General receives a complaint in writing about a lawyer working in the Department; or
  - (b) the Attorney General becomes aware of conduct by a lawyer working in the Department which may constitute a breach of the Code.

#### Threshold Determinations

12. The Attorney General shall dismiss a complaint received under Paragraph 11(a) if:
  - (a) it does not adequately particularise the matter complained of or is not in writing;
  - (b) he considers it to be vexatious, malicious, frivolous or trivial;
  - (c) it does not even if true amount to a breach of the Code;
  - (d) it is without substance;
  - (e) it is untrue, mistaken or misconceived
  - (f) it raises a matter already dealt with and does not raise any material new consideration that would change the manner in which the matter had been disposed of; or

- (g) for any other reason it does not relate to misconduct by the lawyer.
- 13. A complaint shall not be dismissed under 12(a) unless the complainant has been afforded an opportunity to provide adequate details of the complaint or an opportunity to put the complaint in writing. A complainant must provide further details as requested or put the complaint in writing within 21 calendar days of any such request by the Attorney General.
- 14. The Attorney General may dismiss a complaint if received more than 6 months after the last of the events giving rise to the complaint, and should do so unless the Attorney General is satisfied that exceptional circumstances exist which justify the making of the complaint outside that period.
- 15. If the Attorney General dismisses a complaint under Paragraphs 12 or 14, he shall inform the complainant in writing, and provide reasons. If the lawyer is aware of the complaint, he shall also be informed of the dismissal and reasons.

#### Informal Resolution of Minor Complaints

- 16. If the Attorney General does not dismiss a complaint that has been made to him under Paragraph 11(a) or conduct has come to his attention under Paragraph 11(b), the Attorney General shall refer the matter to the Director of the Division in which the lawyer is employed. That Director may then determine how to proceed.
- 17. The Director may decide to resolve the complaint or deal with the misconduct informally if the complaint or misconduct is minor. If the matter is not minor the Director shall cause an investigation in accordance with Paragraphs 20–23.
- 18. Informal resolution may include, but is not limited to, the following:
  - (a) inviting the lawyer to apologise in writing to a complainant;
  - (b) holding an informal meeting to resolve the issues; and/or
  - (c) establishing an agreed course of action with the lawyer including setting objectives, identifying timescales for improvement, and the provision of additional training.
- 19. If the Director is considering dealing with a complaint or potential misconduct informally, he shall:
  - (a) seek the views of the complainant and the lawyer concerned about the matter;
  - (b) give the lawyer concerned the opportunity to respond to the complaint, orally or in writing; and
  - (c) take such other steps as may appear to the Director to be appropriate.

### Investigation

20. If the Attorney General does not dismiss a complaint, or a complaint or potential misconduct has not been dealt with informally by the Director, the Director shall cause a thorough investigation into the matter.
21. An investigation shall take into account at least a statement from the lawyer and any information from a complainant. The lawyer may be interviewed and shall have the right to be accompanied at such interview by a legal representative, a workplace colleague or a trade union representative.
22. A written complaint shall be taken as the statement of any complainant for the purposes of the investigation and if necessary the complainant may be invited to a separate interview.
23. The investigation will normally commence within 7 calendar days of the Attorney General deciding not to dismiss a complaint or the Director deciding that informal resolution is not possible or appropriate, as the case may be. The investigation will normally be completed within 21 calendar days of the decision not to dismiss a complaint or the decision that informal resolution is not possible or appropriate.
24. Following the completion of the investigation, the Director may:
  - (a) refer the matter back to the Attorney General with a recommendation that the matter be dismissed under Paragraph 12;
  - (b) seek an informal resolution in accordance with Paragraphs 17 to 18; or
  - (c) cause a disciplinary hearing to be held if he considers, based on an investigation report or otherwise, that there is a *prima facie* case against the lawyer of a breach of the Code which cannot be dealt with informally.

### Disciplinary Hearing

25. A disciplinary hearing shall be chaired by a Director (hereinafter “**the Chairman**”).
26. The Chairman shall not be the Director to whom the complaint was referred by the Attorney General under Paragraph 16. The Chairman may appoint any other persons as he considers necessary to assist in conducting the disciplinary hearing.
27. If the Attorney General considers a Director unable to present the case against the lawyer or chair the disciplinary panel, as the case may be, he shall appoint a suitably qualified person to otherwise fulfil either rôle.
28. The lawyer shall be notified of the hearing by the Chairman in accordance with the CS Disciplinary Procedure. If there is a complaint, the complainant shall, unless inappropriate, be called as a witness and notified of the date, time

venue and hearing and the identity of the Chairman of the disciplinary hearing.

29. The lawyer has the right to attend the disciplinary hearing and be accompanied at the disciplinary hearing by a legal representative, workplace colleague or trade union representative
30. Unless otherwise agreed, notice shall be affected by ordinary service in accordance with Rule 5/6 of the Royal Court Rules 2004.
31. In addition to the investigation report, the Chairman may also request any further documents which appear to be relevant or make any further inquiries he considers appropriate to fulfil his functions.
32. The Director who to whom the matter was referred by the Attorney General under Paragraph 16 shall present the case against the lawyer first. The lawyer or his representative and the Chairman shall have the opportunity to ask questions relating to the case against the lawyer as presented.
33. The lawyer or his representative shall present the case for the lawyer. The Director, and the Chairman, shall have the opportunity to ask questions relating to the lawyer's case as presented.
34. The Chairman may otherwise make whatever arrangements are necessary or appropriate for hearing the complainant or other witnesses or obtaining other evidence.
35. The Chairman may regulate and determine the procedure of a disciplinary hearing as he sees fit subject to this procedure and the CS Disciplinary Procedure.

#### Director decision

36. Once the case has been presented, the Chairman shall determine the facts of the matter. Such a decision shall be made on the civil standard of proof. The Chairman shall then determine if the facts amount to a breach of the Code or otherwise amount to a breach of the lawyer's terms and conditions of employment.
37. If the Chairman is not satisfied that there has been a breach of the Code or of the lawyer's terms and conditions of employment, he shall dismiss the matter.
38. If the Chairman is satisfied that there has been a breach of the Code, he may decide either that no further action is necessary or he may do one or more of the following things:
  - (a) require the lawyer to issue a written apology to the complainant;
  - (b) give advice to the lawyer as to future conduct;
  - (c) require the lawyer to undertake certain training;
  - (d) recommend that the Attorney General privately reprimand the lawyer;

- (e) determine to:
    - i. issue a verbal warning to the lawyer;
    - ii. issue a written warning to the lawyer;
    - iii. issue a final written warning to the lawyer;
    - iv. recommend that the Attorney General dismiss the lawyer;
 and/or
  - (f) recommend that the Attorney General refer the matter to the Royal Court if the lawyer is an Advocate or a Solicitor.
39. In considering an action or recommendation under Paragraph 38(e)(i)–(iii) or a recommendation under Paragraph 38(e)(iv), the Director shall take into account the CS Disciplinary Procedure.
40. A recommendation under Paragraph 38(e)(iv) may not be made in the case of a first breach of the Code unless it amounts to gross misconduct.
41. A recommendation under Paragraph 38(f) shall only be made if the breach is considered by the Director to be a serious breach of the Code.
42. The lawyer and the Director who presented the case shall be notified in writing of the Chairman’s decision within 5 calendar days of the hearing and the action, if any, which the Chairman has decided to take. If there was a complaint, the complainant shall be notified by the Director who presented the case of the outcome of the disciplinary hearing and that disciplinary action has or will be taken.

Appeal

43. A complainant shall have no right of appeal regarding any of the Chairman’s decisions.
44. If the lawyer is aggrieved by:
  - (a) the Chairman’s decision determining that the facts amount to a breach of the Code; and/or
  - (b) the action(s) taken or the recommendation(s) made by the Chairman.
 he may appeal to the Attorney General.
45. An appeal must be lodged with the Attorney General within 5 calendar days of the lawyer being notified of the Chairman’s decision(s). The Attorney General may however extend this period as he thinks fit. An appeal shall normally be held within 21 calendar days of the appeal being lodged.

46. The appeal shall be heard by either the Attorney General or Solicitor General and will generally not be heard by the same person who made a threshold determination under Paragraph 12. The lawyer may request that a member of Human Resources attend the appeal. The Attorney General shall retain discretion to appoint suitably qualified persons to assist him in hearing the appeal.
47. The appeal shall proceed, in the same manner as a disciplinary hearing and the lawyer retains the right to attend the appeal hearing and have representation as described in Paragraph 29. The appeal shall otherwise proceed in such manner as the Attorney General shall determine.
48. The Attorney General may:
  - (a) allow the appeal;
  - (b) dismiss the appeal; or
  - (c) subject to Paragraph 49, substitute some other penalty or sanction.
49. The Attorney General may not substitute some other penalty or sanction unless it was available to the Chairman under Paragraph 38 and it is less severe than that imposed by the Chairman, save that in all cases the Attorney General reserves the right to refer a matter, in the case of an Advocate or Solicitor, to the Royal Court.
50. The Attorney General, having reached his decision under Paragraph 48, shall notify the lawyer of the decision in writing within 5 calendar days.
51. The decision of the Attorney General shall be final and no further appeal shall be available under this procedure. This Paragraph shall not affect any further appeal available to a lawyer under the CS Disciplinary Procedure.

#### Reference to the Royal Court

52. In deciding whether to refer a breach of the Code to the Royal Court, the Attorney General may, other than in clear cut cases and without prejudice to the generality of Paragraph 9, seek independent advice from outside the Department on whether the breach is a serious breach of the Code, sufficient to justify reference to the Royal Court.
53. If the Attorney General concludes that a reference to the Royal Court is necessary, he will generally appoint a Crown Advocate, who is not an employee of the States Employment Board, to bring the matter to the Court's attention in the Attorney General's name.

**Discipline of Public Sector Lawyers in other Jurisdictions**

**Introduction**

1. The contents of this Note have been collated to provide States Members with information that he has requested about the discipline of public sector lawyers in other jurisdictions. It informs some parts of Proposition (P.152/2013) (“the Proposition”) lodged on 12th November 2013 entitled “Law Officers’ Department and Members of the Law Society of Jersey: revised disciplinary process.”

**Background**

2. A full background to the Law Society of Jersey Law 2005 (“**the 2005 Law**”) and the position regarding Advocates and Solicitors (Écrivains) of the Royal Court employed by the Law Officers’ Department (“LOD”) is set out in **P.109/2013 Com.**
3. It may, however, assist further by setting out briefly the general disciplinary process for Advocates and Solicitors under both the 2005 Law and customary law.
4. If a complaint is received by the Law Society of Jersey (“**LSJ**”) alleging that a practitioner (i.e. an Advocate or Solicitor who is an ordinary member of the LSJ) is guilty of professional misconduct, the President shall appoint a disciplinary committee from the membership of the disciplinary panel. The latter is comprised of persons appointed by the States. The disciplinary committee consists of 2 lay persons and one existing ordinary member of the Law Society. One of the lay persons shall be appointed as the Chairman. The President then refers the complaint to the Disciplinary Committee.
5. The President has the right to refuse to refer a complaint to a Disciplinary Committee if he or she considers that the complaint does not relate to professional misconduct or that it is vexatious, frivolous or trivial. The President must confirm this decision in writing with reasons to the complainant and the Attorney General.
6. The Attorney General retains discretion to refer a complaint to the Royal Court, notwithstanding the fact that the President has refused to refer it to a Disciplinary Committee (more information regarding a referral to the Royal Court is provided below).
7. Should a complaint be referred to a Disciplinary Committee, the Committee (which sits privately) shall give the complainant and practitioner an opportunity to be heard, to call evidence and to cross-examine witness.
8. If the Disciplinary Committee does not dismiss the complaint but is satisfied that it is proven, the Committee may –

- (a) privately reprimand or publicly rebuke the practitioner if it is satisfied that this punishment is a proper way of dealing with the misconduct; or
  - (b) refer the complaint to the Attorney General without making a finding.
- 9. The LSJ Disciplinary Committee may therefore be best described as a tribunal of first instance exercising summary judgment for less serious instances of professional misconduct. It is this process to which LOD lawyers are not subject. If professional misconduct is serious, then reference to the Royal Court will be necessary ( the Royal Court has a higher range of penalties available to it (see below)), and LOD Advocates and Solicitors are not exempt from the disciplinary jurisdiction of the Royal Court.
- 10. The decisions by the Disciplinary Committee may be subject to appeal to the Royal Court –
  - (a) by the complainant or the practitioner regarding the decision to reprimand or rebuke the practitioner; or
  - (b) by the complainant or the Attorney General regarding a dismissal of the complaint.
- 11. The practitioner, but not the Attorney General or the complainant, has an option to appeal the Royal Court’s decision to the Court of Appeal.
- 12. The procedural detail of how the LSJ progresses complaints are provided for in the Law Society of Jersey (Disciplinary Proceedings) Rules 2010 (Revised Edition [chapter 07.570.40](#)).
- 13. If the disciplinary committee refers a complaint to the Attorney General, or the President has refused to refer a complaint to a Disciplinary Committee, the Attorney General may refer the complaint to the Royal Court, at which the Attorney shall be given the opportunity to be heard, call evidence and cross-examine witnesses.
- 14. The Royal Court shall dismiss the complaint if it is not satisfied that –
  - (a) the complaint is proved; or
  - (b) it constitutes professional misconduct.
- 15. If however, the Royal Court is satisfied that the complaint is proved and that it constitutes professional misconduct, it may deal with the matter in one of the following ways as it thinks fit –
  - (a) by privately reprimanding the practitioner;
  - (b) by rebuking him or her publicly;
  - (c) by imposing a fine;



- (d) by suspending the practitioner from practice for a period not exceeding 6 months; or
  - (e) by striking off the practitioner.
16. The practitioner or the Attorney General, but not the complainant, has a right of appeal to the Court of Appeal against the decision of the Royal Court.
17. Under Article 32 of the 2005 Law, the Royal Court retains an inherent jurisdiction to discipline its officers, its officers including of course Advocates and Solicitors. A practitioner may therefore be disciplined by the Royal Court without any necessary involvement of the LSJ. The Attorney General, as *partie publique*, may bring a Representation to the Court to bring its attention to a matter of professional misconduct. References outside the 2005 Law have been made twice in the recent past, when 2 Advocates were convicted of criminal offences.

### **Other Jurisdictions**

18. The following information relates to the disciplinary processes for lawyers, including public lawyers, in –
- Guernsey (advocates)
  - The Isle of Man (advocates)
  - England and Wales (solicitors)
  - England and Wales (barristers)
  - Scotland (solicitors)
  - Scotland (advocates)
  - Ireland (solicitors); and
  - Ireland (barristers).

### **Guernsey**

19. The Guernsey Advocates'<sup>10</sup> position is governed by the Guernsey Bar (Bailiwick of Guernsey) Law 2007 (“**the Bar Law**”), as well as the Bar Rules 2010 and the Rules of Professional Conduct 1995.
20. The 2010 Rules provide that a practising member shall observe the Code of Conduct in the conduct of his professional practice, a breach of which is professional misconduct.
21. La Chambre de Discipline is empowered under the Bar Law to hear any complaint concerning a member of the Bar in respect of professional misconduct.
22. The complaint procedure involves stages which occur prior to a complaint reaching La Chambre, and any further referral to the Royal Court. The procedure is set out fully in *Part II* of the Bar Law and may be summarised as follows –

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<sup>10</sup> Guernsey has only one legal profession : i.e. advocate; it does not have solicitors/écrivains

- (a) the President of La Chambre de Discipline and the Batônnier, on receipt of a complaint, give notice to the Advocate and decide whether the complaint should be referred to the Registrar;
- (b) if the President and Batônnier consider a complaint to be vexatious, frivolous or not one of professional misconduct, then there is no reference to the Registrar;
- (c) if either the President or Batônnier do not consider it vexatious, etc., then the complaint is referred to the Registrar;
- (d) if a complaint has been made 6 months after the conduct complained of, it will be prescribed unless exceptional circumstances justify the complainant bringing the complaint outside that period;
- (e) the Registrar makes investigations before deciding if a *prima facie* case is disclosed or not disclosed. If it is the former, it is referred to La Chambre;
- (f) the complaint is then heard by La Chambre, i.e. a 3 person Panel consisting of an Advocate<sup>11</sup>, a senior lawyer<sup>12</sup> and a lay-person;
- (g) La Chambre may dismiss the claim, or if satisfied the complaint is proved and that it constitutes professional misconduct, then it may dispose of the issue by –
  - (i) issuing a private reprimand or public rebuke,
  - (ii) imposing a fine (not exceeding £2,000),
  - (iii) ordering training, or
  - (iv) suspending the Advocate for 3 months,
 (the decision of La Chambre may be appealed to the Royal Court);
- (h) if La Chambre feels that its powers are inadequate in the circumstances, reference may be made to the Royal Court for the ‘sentencing’;
- (i) the Royal Court shall consider the most appropriate disposal and afford the respondent the opportunity to be heard and for an Advocate instructed by the Registrar to present the facts as found by La Chambre;
- (j) The Royal Court may deal with the complaint by –
  - (i) privately reprimanding or publicly rebuking the Advocate,
  - (ii) fining the Advocate (no prescribed limit),
  - (iii) ordering the Advocate to complete such training as directed,
  - (iv) suspending the Advocate (no prescribed limit), or
  - (v) disbarring the Advocate;

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<sup>11</sup> The Advocate must have been practising for at least 15 years

<sup>12</sup> The Senior Lawyer must not be an Advocate but instead a practitioner or judge from a jurisdiction in the British Islands of at least 15 years’ standing

- (k) the decision of the Royal Court may be appealed to the Court of Appeal.
- 23. The standard of proof applied by La Chambre is the criminal standard, save for proceedings in respect of breaching Proceeds of Crime Regulations. This contrasts with the position in Jersey, where the burden is the civil standard, i.e. that professional misconduct must be proved on the balance of probabilities.
- 24. La Chambre is similar to the LSJ disciplinary committee and the SRA in being a tribunal of first instance for professional misconduct for less serious matterscale, although La Chambre is distinguished by its power to suspend an Advocate for up to 3 months.
- 25. Advocates within the employ of the Law Officers of the Crown are subject to the disciplinary jurisdiction of La Chambre and the Royal Court. Any complaints against LOFC Advocates would most likely be made in the first instance to H.M. Procureur. LOFC Advocates are also, like their Jersey counterparts, bound by their Civil Service Code.

### **Isle of Man**

- 26. The discipline of Isle of Man Advocates<sup>13</sup> is governed by the Advocates Act 1976.
- 27. Under that Act, a complaint against an Advocate regarding his professional conduct is to be made in writing to the Advocates Disciplinary Tribunal (“**the ADT**”). The ADT, on hearing a complaint, may dismiss it if it is not proved to the ADT’s satisfaction, or if it is so proved, the ADT may –
  - (a) reprimand the Advocate;
  - (b) fine the Advocate (up to a maximum of £5,000);
  - (c) refer the complaint to the Governor if it considers its powers inadequate in the circumstances of the complaint.
- 28. Any person aggrieved by the ADT’s determination may require the ADT to refer the complaint to the Governor.
- 29. The Governor may hear a complaint (referred to him by the ADT either at the ADT’s insistence or at the insistence of a person aggrieved by the ADT’s determination). The Governor must hear the complaint in the presence of Deemsters (i.e. Manx judges).
- 30. The Governor may dismiss the complaint if not proved to his satisfaction, but if it is in fact proved to his satisfaction, he may order that the advocate –
  - (a) be reprimanded;
  - (b) pay a fine to the Treasury not exceeding £25,000;

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<sup>13</sup> Like Guernsey, Advocate is the only legal profession in the Isle of Man

- (c) be suspended for such specified period; or
  - (d) be struck off, i.e. the Advocate's commission is cancelled.
31. The Isle of Man Law Society does not have a role in the discipline of Advocates other than appointing 2 persons (typically Advocates) to the ADT. The ADT further consists of 2 persons appointed by the Office of Fair Trading (Isle of Man) and is chaired by an Advocate, Barrister or Solicitor of at least 10 years' standing who is appointed by the Governor, and must not be carrying on practice in the Isle or have a spouse/civil partner who is carrying on practice in the Isle. This contrasts with Jersey, where the LSJ enjoys both a representative and regulatory/disciplinary role. The ADT itself is like the LSJ, SRA and La Chambre, i.e. a first-instance tribunal for minor cases, and more serious cases require reference to the Governor. The ADT, like the SRA and La Chambre, has the power to impose a fine, but does not have the same powers of suspension as La Chambre.
32. Advocates within the A.G.'s Chambers are subject to this disciplinary regime, and are subject to both an internal Attorney General's Chambers Code and the Isle of Man Civil Service Code.

### **England and Wales (solicitors)**

33. The Law Society of England and Wales' functions are now limited to representation. The regulation and discipline of the profession has been delegated since January 2007 to the independent regulatory arm of the Society, i.e. the Solicitors Regulation Authority ("**the SRA**").<sup>14</sup>
34. The SRA's rules may be found in the SRA Handbook, which includes, *inter alia*, the SRA Principles 2011 ("**the Principles**"), the SRA Code of Conduct 2011 (in this part, "**the Code of Conduct**") and the SRA Disciplinary Procedure Rules 2010 (in this part "**the Rules**").
35. The Principles are stated to apply to all practising solicitors of England and Wales. A "solicitor" is defined in the SRA Handbook Glossary 2012 to mean a person who has been admitted as a solicitor of the Senior Courts of England and Wales and whose name is on the roll kept by the Society. "Practice" means the activities, in that capacity of, *inter alia*, a solicitor.
36. The Code of Conduct also applies to all solicitors practising as such in England and Wales –
37. The Rules also apply to all solicitors. Where a complaint is made against a solicitor, the SRA may hear the complaint and, if it is upheld, then the SRA has jurisdiction to –
- (a) issue a written rebuke on the solicitor;
  - (b) impose a fine of up to £2,000 on the solicitor; or

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<sup>14</sup> Previously known as the "Law Society Regulation Board."

- (c) make an application to the Solicitors Disciplinary Tribunal (“**the SDT**”) in respect of that solicitor.
38. The SRA acts as a first-instance tribunal for discipline and may therefore be compared in some respect to the LSJ disciplinary committee. The SRA however is a fully independent regulatory body separate from the representative Law Society. The SRA also has the ability to impose a fine, although minor, on solicitors, whereas the LSJ is limited to making a private reprimand or a public rebuke.
39. A disciplinary matter may be referred by the SRA to the SDT (a statutory body with disciplinary jurisdiction over solicitors) if –
- (a) there is a realistic prospect of an application being upheld by the SDT;
  - (b) it is in the public interest to do so; and
  - (c) the allegations are sufficiently serious that the SDT is likely to impose an order which exceeds the SRA’s jurisdiction.
40. Where the SDT upholds a complaint, the penalties which may be imposed are –
- (a) to subject the solicitor to an order revoking its recognition;
  - (b) a fine which may exceed the maximum that the SRA may impose;
  - (c) suspension;
  - (d) striking off; or
  - (e) any other order which the SRA is not empowered to make.
41. The SDT sits in a 3 person division which is comprised of 2 practising solicitors of at least 10 years’ standing, one of whom is the Chairman, and one lay-person. The sanctions which the SDT is capable of issuing, which of course the SRA of course are not, makes the SDT comparable in this context to the Royal Court – being the ultimate tribunal of disciplinary jurisdiction over practitioners.
42. Solicitors employed by the Government Legal Service or the Crown Prosecution Service are subject to the Code of Conduct and Principles, and the disciplinary jurisdiction of the SRA and SDT. Solicitors working in public departments are, however, exempt from the requirement to hold a practising certificate.

### **England and Wales (barristers)**

43. Barristers are represented in England and Wales by the General Council of the Bar and each barrister is required to belong to an Inn of Court. Regulation and discipline is, however, administered by the Bar Standards Board (“**the BSB**”).

44. The BSB set the standards of conduct by barristers through the BSB Handbook<sup>15</sup>, which contains, *inter alia*, the Code of Conduct (“in this part, **“the Code of Conduct”**), Complaints Regulations and Disciplinary Tribunal Regulations.
45. The Code of Conduct provides that a barrister must comply with the Code which (save as otherwise provided) applies to all barristers whenever called to the Bar (of England and Wales). A “barrister” is defined as an individual who has been called to the Bar by an Inn of Court and has not ceased to be a barrister.
46. Complaints are considered firstly by the Professional Conduct Committee (in this part, **“the PCC”**). The PCC shall dismiss complaints which are prescribed under the Complaints Regulations (i.e. 12 months after the conduct or 3 months after the conclusion of an internal investigation by Chambers) unless it considers that further consideration is justified in the public interest. The PCC shall also dismiss complaints which lack substance, cannot be properly or fairly investigated, are insufficiently serious to justify further action or are not apt for further consideration.
47. If the PCC have considered a complaint and have not determined to dismiss it or that no further action shall be taken, then the complaint must be investigated.
48. Following investigation, the PCC shall consider the complaint together with the results of an investigation and may conclude –
- (a) that the conduct did constitute a breach of the Handbook (i.e. “professional misconduct”) and the PCC shall dismiss the complaint;
  - (b) that the conduct did constitute a breach of the handbook on the balance of probabilities but that no further action should be taken;
  - (c) that the conduct did constitute a breach of the handbook but can be dealt with by an administrative sanction, i.e. a warning or a fine of up to £1,000;
  - (d) that the conduct may constitute a breach of the Handbook which if proved, an administrative sanction would not be appropriate and a reference to the Disciplinary Tribunal would be necessary.
49. A reference to the Disciplinary Tribunal is only to be made if there is a realistic prospect of a finding of professional misconduct being made and the regulatory objectives would be best served by pursuing disciplinary proceedings. Such reference to the Tribunal is, however, mandatory where there has been a conviction for dishonesty or deception.

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<sup>15</sup> In force from 6th January 2014

50. Where the PCC is minded to refer a matter to the Disciplinary Tribunal for determination it may, in appropriate cases and with the consent of the barrister, instead direct that the barrister be subject to the determination by consent procedure. If the barrister agrees to a Determination by consent, he or she may be subject to the following sanctions –
- (a) order to pay a fine to the BSB (the amount determined in accordance with the relevant fines policy);
  - (b) imposition of conditions on his licence or authorisation;
  - (c) reprimand by the PCC or order to attend on a nominated person to be reprimanded;
  - (d) advice by the PCC as to future conduct or order to attend on a nominated person to be given advice as to future conduct; or
  - (e) order to complete continuing professional development as the PCC directs.
51. If a complaint is referred to the Disciplinary Tribunal and a charge of professional misconduct is proved, the Tribunal may decide to –
- (a) disbar the barrister;
  - (b) suspend his practising certificate for a prescribed period;
  - (c) not renew his practising certificate;
  - (d) impose conditions on his practising certificate;
  - (e) prohibit the barrister from accepting certain instructions;
  - (f) remove or suspend authorisation to conduct litigation;
  - (g) order him to pay a fine of up to £50,000 to the BSB;
  - (h) order him to complete continuing professional development;
  - (i) order him to be reprimanded by the Treasurer of his Inn;
  - (j) order him to be reprimanded by the Tribunal;
  - (k) give him advice as to future conduct;
  - (l) order him to attend upon a nominated person to be reprimanded; or
  - (m) order him to attend upon a nominated person to be given advice as to future conduct.

52. The composition of the Tribunal will either be –
- (a) a 5 person Panel comprising a judge as Chairman, and 4 members, including at least one lay-person and at least one barrister of at least 7 years' standing; or
  - (b) a 3 person Panel comprising a judge or Q.C. as Chairman, one lay person and one lay-barrister of at least 7 years' standing.

A 3 person Panel cannot disbar a barrister or suspend for a period in excess of 12 months and, if it considers that the case before it merits such a punishment, then the Panel shall refer the case to a 5 person Panel for sentencing.<sup>16</sup>

53. It is worth noting that, under the Disciplinary Regulations, the Disciplinary Tribunal applies the criminal standard (i.e. “beyond reasonable doubt”) of proof when adjudicating upon charges of professional misconduct. As mentioned above, the burden for Jersey professional misconduct cases is the civil standard.
54. Decisions of the Disciplinary Tribunal made before 7th January 2014 are capable of being appealed to the Visitors to the Inns of Court, and the Visitors may dismiss or allow an appeal, confirm or vary the Tribunal’s decision or order a re-hearing. For decisions after 7th January 2014, appeals are made to the High Court in accordance with the Civil Procedure Rules 1998.
55. Barristers employed by the Government Legal Service or Crown Prosecution Service are subject to the BSB’s disciplinary jurisdiction.

### **Scotland (solicitors)**

56. Complaints against Scottish solicitors are made in the first instance to the Scottish Legal Complaints Commission, which processes service type complaints, and acts as a gateway for conduct complaints. Service type complaints will generally not be relevant for public sector lawyers, as they are mostly concerned with negligence complaints by clients of private sector lawyers. Conduct complaints may however be relevant, and the Commission sifts through conduct complaints and dismisses any claims which are, *inter alia*, vexatious, frivolous or totally without merit. Furthermore, there is a prescription period of 12 months for complaints unless there are extraordinary circumstances which justify the complaint to otherwise be heard.
57. Conduct complaints which make it through the above filtering stage are passed onto the Law Society of Scotland to process and investigate. The Law Society carries out an investigation through a Complaints Investigator, and serious cases are remitted to the Scottish Solicitors Disciplinary Tribunal (“**the SSDT**”).
58. The SSDT is a statutory body, established by the Solicitors (Scotland) Act 1980, responsible for the discipline of Scottish solicitors. It is constituted by at least 4 members, including at least one lay-member. Solicitor Members must

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<sup>16</sup> Advocate and solicitor disciplinary hearings are customarily heard by the Superior Number (i.e. not less than 5 Jurats)



exceed the lay members, but by no more than a ratio of 3 to 1. A complaint may be made to the SSDT by the Law Society Council regarding a solicitor, and certain others (Lord Advocate, Advocate General, any judge, etc.) may report to the SSDT where it appears a solicitor may have been guilty of professional misconduct.

59. If a solicitor is found guilty by the SSDT of professional misconduct, the Tribunal may impose a penalty such as –
  - (a) ordering the solicitor to be struck off the roll;
  - (b) suspension;
  - (c) a fine not exceeding £10,000;
  - (d) censure; or
  - (e) revocation of rights of audience or recognition.
60. Any person aggrieved by the SSDT's decision may appeal to the Court of Session and the Court may impose the same penalties as the SDT, but there is no prescribed limit on the fine which may be ordered by the Court.
61. The Law Society of Scotland have confirmed that it was rare for conduct complaints regarding Crown Office solicitors conducting prosecutions to be made, and usually such complaints have been last resort actions by aggrieved opponents and have been rejected as ineligible for investigation. There is also a Civil Service Code which applies to all civil servants in Scotland, including solicitors (and Advocates).

#### **Scotland (Advocates)**

62. The Code of Conduct applies to all Advocates admitted in the Court of Session. The Faculty of Advocates is responsible for the admission, rules of professional conduct and discipline of Advocates, but in practice the majority of these powers are delegated to the Dean of the Faculty.
63. The discipline of Advocates is governed by the Faculty of Advocates Disciplinary Rules, which apply in respect of complaints regarding the conduct of an identified member of Faculty.
64. Disciplinary proceedings may be initiated by a complaint being made to the Dean, the Dean initiating disciplinary proceedings, or the Scottish Legal Complaints Commission remitting a complaint to the Faculty. The Commission filters out vexatious complaints and handles service complaints, or refers conduct complaints to the Faculty in the same manner as with solicitor complaints as described above.
65. The Dean, on receiving a complaint, shall afford the respondent an opportunity to respond to the complaints and may make further enquiries, and at any stage the Dean may refer a complaint to the Complaints Committee for determination and disposal.

66. Whether the facts are disputed are not, the Complaints Committee may –
- (a) deem no further action to be appropriate;
  - (b) make further enquiries;
  - (c) dismiss the complaint where it considers it to be unjustified, unreasonable or vexatious;
  - (d) uphold the complaint in whole or in part and impose one or more penalties;
  - (e) remit the complaint to the Disciplinary Tribunal for the imposition of a more stringent penalty; or
  - (f) remit the complaint to the Tribunal for determination and disposal.
67. If the facts are disputed, in addition to the powers above, the Committee may also refer the complaint to the Investigating Committee.
68. The penalties which the Complaints Committee may impose on Advocates include –
- (a) a fine not exceeding £7,500;
  - (b) a compensation order not exceeding £5,000; or
  - (c) suspension up to one year.
69. The Disciplinary Tribunal is constituted by a Chairman who is a retired senior judge, as well as 2 counsel and 3 lay-persons. The Tribunal may impose any of the penalties the Complaints Committee can, and in addition it also has jurisdiction to order –
- (a) a fine not exceeding £15,000;
  - (b) suspension from practice or suspension from Faculty membership for up to 5 years; or
  - (c) expulsion from membership of the Faculty (“striking off”).
70. The Code of Conduct and Disciplinary Rules expressly apply to Advocates working as Crown Counsel or in public office.

### **Ireland (solicitors)**

71. Irish Solicitors are governed by the Solicitors Act of 1954 (as amended by Solicitors Acts of 1960, 1994, 2002 and the Civil Law (Miscellaneous Provisions) Act 2008).
72. The Law Society has powers under the 1954 Act (as amended) to investigate complaints and make determinations. The Society is empowered to impose sanctions for inadequate services or for charging excessive fees.

73. The 1960 Act (as amended by the 1994 Act) provides for the Disciplinary Tribunal which is composed of 2 practising Irish solicitors of at least 10 years' standing, one of which shall be appointed Chairman, and one lay-person.
74. If a solicitor is found, following an inquiry, to have committed professional misconduct, the Tribunal may by order do one or more of the following things –
- (a) advise and admonish or censure the solicitor;
  - (b) direct the payment of a sum, not exceeding £5,000, to be paid by the solicitor to the Compensation Fund;
  - (c) direct the payment of a sum, not exceeding £5,000, to be paid by the solicitor to any aggrieved party; or
  - (d) direct that the solicitor be liable for costs of the Law Society or any person appearing before the Tribunal.
75. The solicitor, the Law Society or the complainant may appeal to the High Court and the High Court may –
- (a) rescind or vary the order;
  - (b) confirm the Tribunal's order; or
  - (c) impose a more stringent penalty on the solicitor (only in circumstances where the Society or the complainant has appealed).
76. Should the Tribunal report to the High Court, or an appeal be made to the High Court by the Society or the complainant, the Court may do one or more of the following things –
- (a) strike the name of the solicitor off the roll;
  - (b) suspend the solicitor for a specified period;
  - (c) prohibit the solicitor from practising as a sole practitioner or partner for a period;
  - (d) restrict the solicitor practising in a particular area of work for a period;
  - (e) censure the solicitor, or censure and fine the solicitor;
  - (f) make an order as to costs; or
  - (g) direct the solicitor to make restitution to any aggrieved party.
77. The High Court may also make orders furnishing information regarding the solicitor's financial information. The High Court also has the power to remit a case to the Disciplinary Tribunal for further evidence and report.

78. A solicitor is exempt from the requirement to take out a practising certificate if he or she is in the full time service of the State.

**Ireland (barristers)**

79. The Constitution of the General Council of the Bar of Ireland provides that all members of the Bar shall be subject to the Code of Conduct and to the decisions of the Tribunal, Appeals Board and Benchers. Furthermore, the Code of Conduct for the Bar of Ireland (in this part, “**the Code**”) provides in its preamble that “*the Code... applies to all Barristers whether called to the Bar before or since this day.*” A “barrister” is defined in the Code as a person “*who is a subscribing member of the Law Library and is engaged (subject to the provisions hereof) in full time practice at the Bar.*”.
80. The Disciplinary Code for the Bar of Ireland provides for the Barristers Professional Conduct Tribunal which is constituted by a quorum of 3 drawn from a pool of 4 practising barristers and 5 non-lawyers (there must be at least one barrister but a majority of non-lawyers). The Disciplinary Code also provides for the Appeals Board to which the Tribunal’s decisions may be appealed.
81. The Tribunal (or the Appeals Board), should it uphold a complaint and find a barrister guilty of conduct breaching the Code or constituting a breach of proper professional standards, may impose one or a combination of the following sanctions –
- (a) take no action other than record the complaint;
  - (b) advise the barrister as to future conduct;
  - (c) require the barrister to attend on a nominated person to be given advice as to future conduct;
  - (d) require the barrister to complete a professional development course at his or her expense, and to the satisfaction of the Tribunal;
  - (e) require the Bar Council to remove the barrister from the List of Pupil Masters;
  - (f) admonish the barrister;
  - (g) impose a fine;
  - (h) require the payment of fees/foregoing of fees by the barrister; or
  - (i) suspend the barrister from the Law Library.
82. The Tribunal or Appeals Board may also require the Bar Council to prefer and present a complaint to the Disciplinary Committee of the Benchers of the Honourable Society of King’s Inns.

83. The Disciplinary Committee's Rules set out the procedure for complaints presented to the Disciplinary Committee of the Benchers, which is constituted by 3 judicial benchers.
84. The Disciplinary Committee Rules set out that the Committee has the following powers of sanction should a complaint be upheld –
- (a) admonish or censure the barrister;
  - (b) require the payment of fees/foregoing of fees by the barrister;
  - (c) impose a fine;
  - (d) order an apology;
  - (e) order professional development;
  - (f) advise the barrister as to future conduct;
  - (g) order the barrister to attend on a nominated person to be given advice as to future conduct; or
  - (h) recommend the Bar Council to remove the barrister from the List of Pupil Masters.
85. The Committee may also report to the Benchers that the barrister should be suspended or disbarred, and the barrister has further opportunity to be heard by the Benchers, the quorum of Benchers being not less than 12, and a 2/3rds majority being required for decisions. An order for suspension or disbarment shall be of no effect unless confirmed by the Benchers.

Timothy Le Cocq, Q.C.  
H.M. Attorney General  
30th January 2014