

**DRAFT LAW REFORM (DISCLOSURE AND CONDUCT
BEFORE ACTION) (JERSEY) LAW 199**

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by the Legislation Committee**



STATES OF JERSEY

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Report

The Legislation Committee has for some time been considering ways in which persons who believe that they may have a civil claim can obtain in advance of instituting civil proceedings copies of documents which may be relevant to any such claim. The existing position in Jersey is that the courts generally will not intervene to assist a person who wants to discover information in order to bring proceedings.

This problem has been addressed in the United Kingdom by section 33 of the Supreme Court Act 1981 which enables disclosure and production of documents to be ordered - including medical records - to the legal advisers, medical advisers and/or other professional advisers of any person if there is a likelihood that that person may be a party to legal proceedings in which a claim is likely to be made in respect of personal injury or death. The Civil Procedure Act 1997 has now also been enacted enabling amongst other things the extension of section 33 of the 1981 Act to all civil claims and not just claims made in respect of personal injury or death.

As indicated at the outset, in Jersey, there is no statutory provision for the pre-trial disclosure of medical (or indeed any other) records. The legal position is that, until proceedings are commenced, an applicant is not legally entitled to require production of his medical records either to himself or to his professional advisers. Once legal proceedings have commenced, disclosure can be compelled under the ordinary process of discovery of documents. Although that is the legal position, the Public Health Committee (as it then was) adopted a policy of disclosing medical records with as much facility as if the United Kingdom Act applied in Jersey, although within the same limits. This policy (which is still followed by the Health and Social Services Committee) is that disclosure is only made to professional advisers, and only if there appears to be a genuine likelihood of proceedings being instituted. Medical practitioners in the private sector are of course not bound by this policy.

The Committee has consulted extensively in connection with this proposed legislation and is convinced of the need for legislation which will help parties to adopt a sensible and co-operative approach from the earliest stages at which a potential civil claim begins to materialize. The twofold vice of the existing position is that -

1. it may keep in ignorance a person who in reality has every right to institute proceedings and recover compensation; or alternatively,
2. it may drive persons to institute civil proceedings on a speculative basis and incur legal costs in pursuit of a claim which, when the facts come to be known, is found to have no basis.

The draft Law is intended to eliminate both of these vices. The draftsman's Explanatory Note sets out the precise effect of each of the *Articles*. It is unnecessary to re-recite what is said in that Note. The goals of the legislation are -

- (a) to focus the attention of would-be litigants on the desirability of resolving disputes without litigation;
- (b) to enable them to obtain the information they reasonably need in order to enter into an appropriate settlement;
- (c) to enable them to make an appropriate offer (of a kind which can have cost consequences if litigation ensues); and
- (d) if pre-action settlement is not achieved, to lay the ground for expeditious conduct of the proceedings.

Whilst the draft Law refers specifically to claims in respect of personal injuries or death, the States would be empowered by Regulations to extend the Law to cases in which claims other than in respect of personal injuries or death might be made, or generally. This would be similar to the power conferred on the Lord Chancellor in England and Wales by section 8 of the Civil Procedure Act 1997 (referred to above).

The draft Law has the support of the Superior Number of the Royal Court. It has also been the subject of consultation with the Health and Social Services Committee, the Jersey Medical Society and the Prison Board as well as the Law Society. The Committee believes it to be an important reform of civil procedure which will be of benefit to potential parties to litigation.

Explanatory Note

The purpose of this draft Law is to promote the early and informed settlement of certain civil claims.

Article 1 is the interpretation provision.

Article 2 enables the Royal Court to order the disclosure of documents relevant to a claim in respect of personal injury or death before proceedings are commenced. An application for an order may be made by any person who would be likely to be a party to the proceedings. The Court may order the production of the documents to the applicant or to his legal, medical and other professional advisers, but must not make any order if to do so would be contrary to public interest. Unless the Court expressly directs otherwise, the person ordered to produce the documents will be awarded his costs relating to the application.

Article 3 enables the Superior Number of the Royal Court to issue practice guides as to the conduct of any claim in respect of personal injury or death before proceedings are commenced. Where proceedings are subsequently commenced before the Royal Court, the Court may, when making an order as to the procedure in the proceedings or as to costs, take into account the extent to which any party to the proceedings has acted in accordance with the practice guide.

Article 4 enables the States to make Regulations extending the descriptions of claims to which this draft Law applies.

Article 5 enables Rules of Court to be made for the purposes of the draft Law.

Article 6 is the short title and commencement provision.

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A LAW to enable the Royal Court, before any proceedings are commenced, to order the production of documents relevant to certain claims which are likely to be the subject of proceedings in the Royal Court; to enable the Superior Number of the Royal Court to issue practice guides as to the conduct of such claims before action; and to enable the Royal Court to take into account in proceedings the extent to which a party has acted in accordance with a practice guide, sanctioned by Order of Her Majesty in Council of the

(Registered on the day of 199)

STATES OF JERSEY

The day of 199

THE STATES, subject to the sanction of Her Most Excellent Majesty in Council, have adopted the following Law -

ARTICLE 1

Interpretation

(1) In this Law -

“the Court” means the Royal Court;

“party”, in relation to any proceedings, includes any person who, pursuant to or by virtue of Rules of Court or any other

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enactment, is served with notice of, or intervenes in, those proceedings;

“personal injuries” includes any disease and any impairment of a person’s physical or mental condition;

“prescribed” means prescribed in Rules of Court;

“proceedings” means any proceedings in the Court howsoever commenced.

(2) A reference in this Law to an Article by number only and without further identification is a reference to the Article of that number in this Law.

(3) A reference in an Article or other division of this Law to a paragraph, sub-paragraph or clause by number or letter only and without further identification, is a reference to the paragraph, sub-paragraph or clause of that number or letter contained in the Article or other division in which that reference occurs.

ARTICLE 2

Power to order disclosure

(1) On the application of a person who appears to the Court to be likely to be a party to subsequent proceedings in that Court in which a claim in respect of personal injuries to a person, or in respect of a person’s death, is likely to be made, the Court shall, in such circumstances as may be prescribed, have power to order a person who appears to the Court to be likely to be a party to the proceedings and to be likely to have or to have had in his possession, custody or power any documents which are relevant to an issue arising or likely to arise out of that claim -

(a) to disclose whether those documents are in his possession, custody or power; and

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- (b) to produce such of those documents as are in his possession, custody or power to the applicant or, on such conditions as may be stated in the order -
 - (i) to the applicant's legal advisers, or
 - (ii) to the applicant's legal advisers and any medical or other professional adviser of the applicant, or
 - (iii) if the applicant has no legal adviser, to any medical or other professional adviser of the applicant.
- (2) The Court shall not make an order under paragraph (1) if it considers that compliance with the order, if made, would be likely to be injurious to the public interest.
- (3) The costs of and incidental to proceedings for an order under paragraph (1) incurred by the person against whom the order is sought shall be awarded to that person unless the Court otherwise directs.

ARTICLE 3

Practice guides as to conduct

- (1) The Superior Number of the Court may issue practice guides as to the conduct, before the commencement of proceedings, of any description of claim mentioned in paragraph (1) of Article 2.
- (2) Where proceedings are subsequently commenced before the Court in which a claim is made of a description for which a practice guide has been issued, the Court may, when deciding whether to make an order as to the procedure in the proceedings or as to costs, take into account the extent to which, before the commencement of proceedings, any party did not act in accordance with the practice guide.

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ARTICLE 4

Regulations

The States may make Regulations amending paragraph (1) of Article 2 so as to extend its provisions -

- (a) to circumstances where other claims may be made; or
- (b) generally.

ARTICLE 5

Rules of Court

(1) The power to make Rules of Court under the Royal Court (Jersey) Law 1948, as amended,¹ shall include the power to prescribe anything to be prescribed by virtue of this Law.

(2) Paragraph (1) of Article 3 of the Official Publications (Jersey) Law 1960² shall apply to Rules made pursuant to this Article as it applies to enactments mentioned in that paragraph and accordingly, as soon as may be after such Rules are made, the Judicial Greffier shall transmit a certified copy of them to the Greffier of the States.

ARTICLE 6

Short title and commencement

This Law may be cited as the Law Reform (Disclosure and Conduct before Action) (Jersey) Law 199 and shall come into force on such day as the States may by Act appoint.

¹ Tome VII, page 502, Volume 1979-1981, page 195, Volume 1984-1985, pages 175 and 178, Volume 1990-1991, page 113, Volume 1992-1993, page 461, and Volume 1996-1997, pages 147, 148 and 665.

² Tome VIII, page 884.