

STATES OF JERSEY



Jersey

DRAFT STATES OF JERSEY (AMENDMENT No. 9) LAW 202-

Lodged au Greffe on 22nd January 2021
by the Privileges and Procedures Committee

STATES GREFFE



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European Convention on Human Rights

In accordance with the provisions of Article 16 of the Human Rights (Jersey) Law 2000, the Privileges and Procedures Committee has made the following statement –

In the view of the Privileges and Procedures Committee, the provisions of the Draft States of Jersey (Amendment No. 9) Law 202- are compatible with the Convention Rights.

Signed: **Deputy R. Labey of St. Helier**
Chair, Privileges and Procedures Committee

Dated: 19th January 2021

REPORT

Background

‘Parliamentary privilege’ is a term which refers to the rules which uphold the special constitutional status of parliamentary bodies, reflecting their democratic accountability to the electorate. At the most basic level the key privileges are freedom of speech for parliamentarians and other people who contribute to parliamentary proceedings and a legislature’s freedom to set its own internal rules and procedures. Without effective rules on parliamentary privilege, legislatures and their Members risk facing legal challenges because of the things they publish, say and do in the course of their parliamentary work.

In 2016, the then Chairmen’s Committee raised questions with the Privileges and Procedures Committee (“PPC”) about the adequacy of the legislation on the protections provided to witnesses giving evidence to scrutiny panels. The Greffier also raised concerns about the coherence of the legislation on privilege. PPC commissioned Sir Malcolm Jack, a former Clerk of the UK House of Commons, to undertake a review of parliamentary privilege in Jersey, which reported in summer 2017 ([R.109/2017](#)). His terms of reference were to –

- review Jersey legislation and case law relating to parliamentary privilege;
- prepare an options paper on codifying parliamentary privilege in a single draft Law, drawing on experience in other jurisdictions;
- visit the Island in order to discuss the options paper with key stakeholders, including the Committee; and
- finalise advice to the Committee, including drafting instructions for the new Law.

In compiling his report, Sir Malcolm met the then Bailiff, Attorney General and Chief Minister and they were all invited to provide comments on his recommendations, if they so wished. PPC subsequently agreed law drafting instructions, resulting in the draft Law and explanatory notes accompanying this report.

Provisions in the draft Law

The draft Law takes the form of amendments to the existing primary legislation on parliamentary privilege, contained in the [States of Jersey Law 2005](#).

Articles 2 and 3 of the draft Law are particularly significant. Article 3 inserts a new Article 34 into the States of Jersey Law, which provides for a clearer and more comprehensive definition of ‘Assembly privilege’ than exists at the moment. Crucially, the privilege relates to people “undertaking States proceedings”, which could include staff and members of the public contributing to the work of scrutiny and review panels. Article 2 defines “States proceedings”, drawing on comparable Australian legislation. At present, privilege is defined only in relation to the people and bodies who benefit from it, rather than to the function (“undertaking States proceedings”) those people and bodies are performing, which creates loopholes and ambiguities, particularly in relation to scrutiny and review panels. For example, the Attorney General recently drew attention to problems affecting review panels in an answer to the Assembly ([WQ.365/2019](#)). Articles 9 to 11 make consequential amendments to existing legislation as a result of the clearer and more comprehensive definitions set out in this draft Law.

Inserted Article 34 provides a clear basis for when Assembly proceedings can and cannot be used in court. In respect of citing proceedings, the current position in Jersey, established in case law, broadly follows the decision of the House of Lords in *Pepper v. Hart (1993)* whereby the long-standing court practice which prevented the admission of parliamentary debates in the interpretation of statute, was set aside. However, in that judgement, limits were placed upon the circumstances in which parliamentary matter could be admitted so as not to involve a breach of Article IX of the UK Bill of Rights 1688. PPC wishes to place this matter on a statutory footing.

Article 4 deals with members' correspondence with the public, again drawing on Australian legislation. This does not automatically attract the protection of parliamentary privilege, because such correspondence does not necessarily relate to a States proceeding, such as a debate or a scrutiny review. However, this Article provides for correspondence with the public to be protected from legal proceedings "unless it is shown to be made with malice" if "the communication is made by an elected member ... acting in his or her capacity as an elected member". This is an important protection for members' work as constituency or parish representatives.

Existing Article 35 of the States of Jersey Law states that –

A copy of any minutes of the States or of any committee or panel established under standing orders signed by the Greffier of the States or as otherwise provided by standing orders, shall be received in evidence [in Court] without further proof.

Article 5 updates this provision to say that any document which falls within the definition of "States proceeding" can be authenticated by means of the Greffier's signature.

Article 6 is a straightforward updating of the existing law, to replace references to "printing" with references to "publishing", to ensure that online publication is covered in relation to the existing offence of printing false documents.

Article 47 of the States of Jersey Law, which is drawn from the previous 1966 States of Jersey Law, states –

A person who blackmails or attempts to blackmail or who offers any threat, assault, obstruction or molestation or attempt to compel by force or menace any member of the States, member of a committee of inquiry established under standing orders or officer of the States in order to influence him or her in his or her conduct as such member or officer, or for, or in respect of the promotion of or of opposition to any matter, proposition, question, bill, petition or other thing submitted or intended to be submitted to the States, the Council of Ministers, the Chief Minister, any other Minister, an Assistant Minister or any committee or panel established under standing orders, or who is a party to such an offence, shall be guilty of an offence and liable to imprisonment for a term of 5 years and a fine.

The wording of this Article is out of date and Article 7 provides a shorter, clearer and more comprehensive definition of the offence, summarised by the term 'contempt' which is used in Commonwealth parliamentary bodies to refer to a deliberate flouting of privilege.

In most (if not all) Commonwealth jurisdictions, the legislature's Standing Orders are not part of the statute book and are published by the legislature as and when they see fit. In Jersey, Article 48 of the States of Jersey Law provides a legal basis for the making of Standing Orders (which is unnecessary) and sets out areas where Standing Orders are required. This is problematic as the Assembly sometimes chooses to lift specific Standing Orders. The legal effect of some Standing Orders having a statutory

footing while others do not is also questionable. The revised Article 48 confirms a crucial element of Assembly privilege – matters arising under Standing Orders do not fall within the jurisdiction of the courts. The Assembly's constitutional position rests on this provision and although this interpretation of the relationship between the Assembly and the courts has been upheld in case law, PPC considers that for the sake of clarity it should be stated unequivocally in primary legislation.

Conclusion

The present position with parliamentary privilege in Jersey is unsatisfactory. Our legislation is out of date and lacks clarity. There is little case law on the subject, although the most significant case, *Syvret v Bailhache and Hamon 1998*, helpfully finds that the basic principles of parliamentary privilege must apply to the States Assembly in order to protect its position as the Island's legislature. However, codification of the principles of parliamentary privilege in modern form is far preferable to relying on a mixture of statute and case law which leads to a lack of clarity about the relationship between the Assembly, its Members and the courts and risks confusion and uncertain outcomes when cases come before the court.

Financial and manpower implications

There are no financial or manpower implications for the States arising from the adoption of this draft Law.

Human Rights

The notes on the human rights aspects of the draft Law in the **Appendix** have been prepared by the Law Officers' Department and are included for the information of States Members. They are not, and should not be taken as, legal advice.

APPENDIX TO REPORT**Human Rights Notes on the
Draft States of Jersey (Amendment No. 9) Law 202-**

These Notes have been prepared in respect of the Draft States of Jersey (Amendment No. 9) Law 202- (the “**draft Law**”) by the Law Officers’ Department. They summarise the principal human rights issues arising from the contents of the draft Law and explain why, in the Law Officers’ opinion, the draft Law is compatible with the European Convention on Human Rights (“**ECHR**”).

These notes are included for the information of States Members. They are not, and should not be taken as, legal advice.

The draft Law, if enacted, would amend the States of Jersey Law 2005 (the “2005 Law”) to make provision for States proceedings to be subject to parliamentary privilege and for connected purposes.

Among other provisions, Article 2 would insert a new definition of “States’ proceedings” into the 2005 Law, encompassing words spoken or written and acts done in the course of, or for the purposes of or necessarily incidental to, transacting the business of the States. Article 3 (substituting a new Article 34) would make provision for the privilege of States proceedings, stating that no civil or criminal proceedings may be instituted against any person for anything that constitutes States’ proceedings. The overall effect of these provisions is to give immunity from civil and criminal proceedings for anything done for the purposes of States proceedings.

From a human rights perspective, the draft Law principally engages the right to a fair trial (Article 6 ECHR) in this regard. Article 6(1) ECHR provides for the right of access to court, stating, *inter alia*, that in the determination of civil rights and obligations, everyone is entitled to a fair and public hearing.

The European Court on Human Rights (“**ECtHR**”) has long recognised that parliamentary privilege is well established across signatory states as an important constitutional principle and has treated freedom of speech in parliament as a legitimate limitation to the right to access to justice. Moreover, the Venice Commission, the Council of Europe’s advisory body on constitutional matters, has observed that the ECHR does not, in strict terms, regulate parliamentary immunity, and in general sets few restrictions on the application of such rules at the national level.

The foremost case of the ECtHR on the issue of parliamentary immunity as an impediment to the right of access to court is *A v. the United Kingdom*. The principal question with which the Court was confronted with in this case was whether or not a lack of access to legal recourse constituted a breach of Article 6(1) ECHR or whether the necessity, in the public interest, of a scheme of parliamentary immunity constituted a justification for the limitation of the right of access to court.

The ECtHR stated that the right of access to a court is not absolute, but may be subject to limitations. In this respect, the ECtHR stated that States enjoy a certain margin of appreciation, although the final decision as to the observance of the ECHR’s requirements rests with the ECtHR. In determining the lawfulness of limitations on the right of access to court, the question was whether the limitations restricted or reduced the access left to the individual in such a way or to such an extent that the very essence

of the right is impaired. Furthermore, a limitation would not be compatible with Article 6(1) ECHR if it did not pursue a legitimate aim and if there was no reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

In *A v. the United Kingdom*, the ECtHR found that the national rules on parliamentary immunity were proportionate to the legitimate aims of protecting free speech in Parliament. In assessing the proportionality of the national rules, the ECtHR took account of the fact that immunity only attached to statements made in the course of parliamentary debates and that as a result they were designed to protect the interests of Parliament as a whole, as opposed to those of individual parliamentarians. It concluded that parliamentary immunity “cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6(1)”.

The draft Law, in making provision for the immunity from civil and criminal proceedings of things written, said or done as part of the parliamentary business of the States, in the provisions noted earlier, would, applying the decision in *A v. the United Kingdom*, in principle, be considered compatible with Article 6(1) ECHR. The purpose of the draft Law is to further codify provision for parliamentary free speech, and that purpose has been recognised as a legitimate aim by the ECtHR.

Further, the draft Law limits the application of immunity to only parliamentary aspects of States proceedings (as per the definition in new Article 1(1A)), something which is further underlined by the effect of new Article 1(1B) which provides that ‘States proceedings’ does not include anything done by the States or any committee or panel when exercising any executive or administrative powers conferred by or under any other enactment. The effect of the provisions ensures that protection from immunity is for matters associated with the conduct of the States Assembly, committees and panels, rather than individual members. It does not, for example, include provision which would confer general immunity from prosecution for elected Members, nor would it prevent a person from bringing a legal challenge to an executive or administrative act of the States. In an assessment of the proportionality of the measures in the draft Law, the express confinement of immunity in this way contributes to the assessment that the draft Law does not unduly interfere with Article 6(1) ECHR. Added to this is recognition of the margin of appreciation that would be permitted to the States in enacting legislation of this nature.

No other provisions of the ECHR are considered to be materially engaged by the draft Law.

EXPLANATORY NOTE

This Law would make provision for States' proceedings to be subject to parliamentary privilege.

Article 1 defines "principal Law" as meaning the States of Jersey Law 2005.

Article 2 amends Article 1 of the principal Law to introduce a new definition "States' proceedings", meaning all words spoken or written and acts done in the course of, or for the purposes of or necessarily incidental to, transacting the business of the States or any committee or panel established under standing orders, but not when exercising any executive or administrative powers conferred by or under any enactment other than the principal Law.

Article 3 substitutes Article 34 of the principal law to extend the immunity from legal proceedings to any person for anything that constitutes States' proceedings (paragraph (1)). Paragraph (2) further provides that in civil or criminal proceedings no evidence is to be received, questions asked, or statements, submissions or comments made concerning anything forming part of States' proceedings by way of, or for the purpose of, challenging or relying on the truth, motive, intention or good faith of anything forming part of States' proceedings, or otherwise challenging or establishing the credibility, motive, intention or good faith of any person or drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those States' proceedings.

However, paragraph (3) provides that the above provisions do not limit the use of any States' proceedings in civil or criminal proceedings if no issue is raised as to whether anything that constitutes States' proceedings is untrue, misleading or otherwise inspired by improper motives and does not give rise to any issue of legal liability on the part of any person.

Article 4 inserts a new Article 34A into the principal Law to make correspondence and other communications between an elected member of the States and a member of the public subject to qualified privilege in defamation proceedings.

Article 5 substitutes Article 35 of the principal Law so that a record of States' proceedings admissible in evidence in any court proceedings may be received in evidence as a true record of those proceedings without further proof if certified by the Greffier of the States.

Article 6 amends Article 37 of the principal Law (offence of printing false documents) so that the offence applies to the publishing of false documents.

Article 7 replaces Article 47 of the principal Law (which sets out the offences of blackmail, menace or compulsion) with a new offence of contempt. It is an offence to intentionally and without reasonable excuse engage in conduct that the person knows or suspects will substantially interfere with the carrying out of any function of the States, or any committee or a panel established under standing orders. The offence is punishable with an unlimited fine and imprisonment for 5 years.

Article 8 substitutes Article 48 of the principal Law to make it clear that standing orders are not legislation and to provide that the jurisdiction of the Royal Court or the Magistrate's Court does not extend to any proceedings, business or other matter arising under standing orders except as otherwise provided under that Law. The current standing orders are unaffected by the substitution.

Article 9 deletes provisions in Article 49 of the 2005 Law enabling Regulations to extend privilege to committees and panels which are unnecessary because they are now included by virtue of the wide definition of “States’ proceedings”.

Article 10 makes consequential amendments to the principal Law as a result of the changes to the status of standing orders made by *Article 8*.

Article 11 makes consequential amendments to the Regulations already made under Article 49 of the principal Law to remove provisions made in relation to the powers removed under *Article 9*.

Article 12 gives the title of this Law and provides for it to come into force 7 days after the day on which it is registered.



Jersey

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Jersey

DRAFT STATES OF JERSEY (AMENDMENT No. 9) LAW 202-

A LAW to amend further the States of Jersey Law 2005 to make provision for parliamentary privilege and connected purposes.

<i>Adopted by the States</i>	<i>[date to be inserted]</i>
<i>Sanctioned by Order of Her Majesty in Council</i>	<i>[date to be inserted]</i>
<i>Registered by the Royal Court</i>	<i>[date to be inserted]</i>
<i>Coming into force</i>	<i>[date to be inserted]</i>

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

1 Interpretation

In this Law, “principal Law” means the States of Jersey Law 2005¹.

2 Article 1 (interpretation) amended

After Article 1(1) of the principal Law there is inserted –

“(1A) In this Law “States’ proceedings” means all words spoken or written and acts done in the course of, or for the purposes of or necessarily incidental to, transacting the business of the States or any committee or panel established under standing orders including (without limiting this definition) –

- (a) the giving of evidence before the States or a committee, panel or officer authorised to receive that evidence;
- (b) the presentation or submission of a document to the States, or a committee, panel or officer authorised to receive it, once that document is accepted by the States or by that committee, panel or officer;
- (c) the preparation of a document for the purposes of transacting the business of the States, a committee or panel;
- (d) the formulation, making or publication of a document by the States, a committee or panel;

(e) any evidence, document or submission made for the purposes of carrying on any business of the States, a committee or panel.

(1B) However, “States’ proceedings” does not include anything done by the States or any such committee or panel when exercising any executive or administrative powers conferred by or under any enactment other than this Law.”.

3 Article 34 substituted

For Article 34 of the principal Law there is substituted –

“34 Privilege of States’ proceedings

- (1) No civil or criminal proceedings may be instituted against any person for anything that constitutes States’ proceedings.
- (2) In any civil or criminal proceedings no evidence may be received, questions asked, or statements, submissions or comments made, concerning any States’ proceedings by way of, or for the purpose of –
 - (a) challenging or relying on the truth, motive, intention or good faith of any part of those proceedings;
 - (b) otherwise challenging or establishing the credibility, motive, intention or good faith of any person; or
 - (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from any part of the proceedings.
- (3) However, paragraphs (1) and (2) do not limit the use of any States’ proceedings in civil or criminal proceedings if no issue is raised as to whether anything that constitutes States’ proceedings is untrue, misleading or otherwise inspired by improper motives and does not give rise to any issue of legal liability on the part of any person.”.

4 Article 34A inserted

After Article 34 of the principal Law there is inserted –

“34A Correspondence etc. between members and the public protected by qualified privilege for defamation purposes

- (1) For the purposes of the law relating to defamation, any correspondence or other communication passing between an elected member and a member of the public is privileged, unless it is shown to be made with malice.
- (2) Paragraph (1) does not apply unless the elected member concerned is acting in the capacity of an elected member.
- (3) Nothing in paragraph (1) is to be construed as limiting any privilege that may apply other than under that paragraph.”.

5 Article 35 substituted

For Article 35 of the principal Law there is substituted –

“35 States’ proceedings in evidence

If any document constituting a record of States’ proceedings is admissible in evidence in any court proceedings, that document may be received in evidence as a true record of those proceedings without further proof if it is so certified by the Greffier of the States.”.

6 Article 37 (offence of printing false documents) amended

In Article 37 of the principal Law –

- (a) in the heading for “printing” there is substituted “publishing”;
- (b) in paragraph (1)(a) for “print” there is substituted “publish”;
- (c) in paragraph (1) for “printed” in each place it appears there is substituted “published”.

7 Article 47 substituted

For Article 47 of the principal Law there is substituted –

“47 Offence of contempt

- (1) A person who intentionally and without reasonable excuse engages in conduct (including the use of words) that the person knows or suspects will substantially interfere with the carrying out of any function of the States, or any committee or a panel established under standing orders, commits an offence and is liable to imprisonment for a term of 5 years and to a fine.
- (2) If the Privileges and Procedures Committee established under standing orders considers that an offence under this Article is likely to have been committed it may refer the matter to the Attorney General to decide whether or not to prosecute the person for the offence.”.

8 Article 48 substituted

For Article 48 of the principal Law there is substituted –

“48 Standing orders

- (1) Standing orders are not an enactment within the meaning of Article 1(1) of the Interpretation (Jersey) Law 1954².
- (2) The jurisdiction of the Royal Court or Magistrate’s Court does not extend to any proceedings, business or other matter arising under standing orders except as otherwise provided under this Law.

- (3) Nothing in this Article affects the Standing Orders of the States of Jersey made or amended under this Article before it was substituted by the States of Jersey (Amendment No. 9) Law 202-³.”.

9 Article 49 amended

In Article 49 of the principal Law –

- (a) for the heading there is substituted –

“49 Regulations about powers of committees and panels”;

- (b) sub-paragraphs (a), (e) and (f) are deleted.

10 Consequential amendments – principal Law

- (1) The principal Law is amended in accordance with this Article.
- (2) In Article 1(1) –
 - (a) the definition “prescribed” is deleted;
 - (b) in the definition “standing orders” for “made” there is substituted “prepared and adopted”.
- (3) In Articles 9(5) and 13(4) for “prescribed” there is substituted “provided for in standing orders”.
- (4) In Article 19 –
 - (a) in paragraph (1) for “in accordance with the prescribed procedures and within the prescribed period” there is substituted “in accordance with standing orders and”;
 - (b) in paragraphs (3) and (4)(a) for “within the prescribed period and in accordance with the prescribed procedures” there is substituted “in accordance with standing orders”;
 - (c) in paragraph (5) for “the prescribed procedures” there is substituted “standing orders”.
- (5) In Article 23 –
 - (a) in paragraphs (1) and (3) for “within the prescribed period” there is substituted “in accordance with standing orders”;
 - (b) in paragraph (2) for “within the prescribed period” there is substituted “in accordance with standing orders, and”;
 - (c) in paragraph (4) for “the prescribed procedures” there is substituted “standing orders”.
- (6) In Article 25A(1) and (2) for “the prescribed number of individuals” there is substituted “the limit set out in standing orders”.
- (7) In Article 51 there is deleted “or standing orders”.

11 Consequential amendments – Regulations

- (1) In the States of Jersey (Powers, Privileges and Immunities) (Scrutiny panels, PAC and PPC) (Jersey) Regulations 2006⁴ –
 - (a) for Regulation 2 there is substituted –

“2 Application to members of the States

These Regulations do not confer any power to issue a summons requiring the appearance of, or the production of documents by, a member of the States.”;

- (b) Regulations 8, 8A, 9, 10(c), 17, 18 and 19(c) are deleted;
 - (c) in Regulation 23 (citation) for “States of Jersey (Powers, Privileges and Immunities) (Scrutiny panels, PAC and PPC) (Jersey) Regulations 2006” there is substituted “States of Jersey (Powers of Scrutiny Panels, PAC and PPC) (Jersey) Regulations 2006”.
- (2) In the States of Jersey (Powers, Privileges and Immunities) (Committees of Inquiry) (Jersey) Regulations 2007⁵ –
 - (a) Regulations 8 and 9 are deleted;
 - (b) in Regulation 13 (citation) for “States of Jersey (Powers, Privileges and Immunities) (Committees of Inquiry) (Jersey) Regulations 2007” there is substituted “States of Jersey (Powers of Committees of Inquiry) (Jersey) Regulations 2007”.

12 Citation and commencement

This Law may be cited as the States of Jersey (Amendment No. 9) Law 202- and comes into force 7 days after the day on which it is registered.

ENDNOTES

Table of Endnote References

<u>1</u>	<i>chapter 16.800</i>
<u>2</u>	<i>chapter 15.360</i>
<u>3</u>	<i>P.3/2021</i>
<u>4</u>	<i>chapter 16.800.25</i>
<u>5</u>	<i>chapter 16.800.23</i>