# STATES OF JERSEY

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# DRAFT STATES OF JERSEY (AMENDMENT No. 2) LAW 200-

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**Lodged au Greffe on 24th May 2005**
**by the Privileges and Procedures Committee**

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**STATES GREFFE**

Jersey

# DRAFT STATES OF JERSEY (AMENDMENT No. 2)LAW 200-

**European Convention on Human Rights**

The President of 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. 2) Law 200- are compatible with the Convention Rights.

(Signed) **Deputy R.G. Le Hérissier of St. Saviour**

## REPORT

The purpose of this amendment is to repeal Article 51 of the States of Jersey Law 2005.

On 16th November 2004 the States adopted the Draft States of Jersey Law 200-, as amended. One amendment, proposed by Senator S. Syvret and concerning the right of Members to receive a fair trial and hearing, was incorporated into the Law as Article 51. Comprehensive legal advice received from H.M. Attorney General is included as an Appendix to this report. On the basis of this advice the Committee considers that, in the interests of preserving the independence of the legislature, the Assembly should repeal the aforementioned Article.

Notwithstanding the foregoing, the Committee wishes to inform Members that it will, in the revised Standing Orders, bring forward proposals to permit some form of independent involvement in the investigation of complaints against members. It will also bring forward proposals in the revised Standing Orders with the aim of ensuring that a States Member can no longer be suspended from the Assembly for an indefinite period.

**Financial and manpower statement**

No additional financial or manpower requirements arise from this amendment.

**European Convention on Human Rights**

Article 16 of the Human Rights (Jersey) Law 2000 will, when brought into force by Act of the States, require the Committee in charge of a Projet de Loi to make a statement about the compatibility of the provisions of the Projet with the Convention rights (as defined by Article 1 of the Law). Although the Human Rights (Jersey) Law 2000 is not yet in force, on 23rd May 2005 the Privileges and Procedures Committee made the following statement before Second Reading of this projet in the States Assembly –

In the view of the Privileges and Procedures Committee the provisions of the Draft States of Jersey (Amendment No. 2) Law 200- are compatible with the Convention Rights.

**APPENDIX**

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**Our Ref:** WJB/SB PPCLEGA-002

13th April, 2005.

Deputy R. Le Hérissier,
President,
Privileges and Procedures Committee,
Morier House,
St. Helier,
Jersey. JE1 1DD.

Dear President,

1. Thank you for your letter dated 25th February, 2005 in which you advise me that the Privileges and Procedures Committee have been discussing the progress made on the new Standing Orders and also on the Code of Conduct. You have asked for my advice on the implications of Article 51 of the States of Jersey Law 2005 ("the 2005 Law"). I regret this advice is rather long. I have gone into considerable detail because I recognise the need to pay the greatest respect to the democratic process.

Executive Summary

2. My primary advice is that Article 51 of the 2005 Law should be repealed and that the Committee should take the appropriate Projet to the States. I agree that in the unusual circumstances of this case a copy of this letter may be annexed to the Committee's report if that would be helpful, or, if the report is referred to me in draft for consideration, the substance of this letter may be repeated. I reserve the right to publish the entire advice because my first duty in connection with the approval of legislation is to the Assembly.

a) Article 51 is inappropriate in constitutional terms because:
   i) the Assembly has by its provision surrendered the control of its disciplinary processes to an outside body;
   ii) there is as a result the risk of that body interfering with the democratic process;
   iii) whatever the outside body might be, there is an unacceptable risk of conflict between the legislature and the judiciary.

b) If, contrary to this advice, Article 51 is to stand, however inappropriate the result, then:
   i) Amendment to the 2005 Law is necessary for the purpose of conferring power on an independent and impartial tribunal to apply sanctions against a States member.
   ii) Amendment to Article 33 of the 2005 Law would be desirable to clarify the jurisdiction of the Court in relation to its power of control over inferior tribunals.
   iii) A significant budget would seem to be appropriate.

Background

3. Article 51 of the 2005 Law is in these terms:

*"Right to a fair trial and hearing.*

*1(1) Any member or person subject to any disciplinary action in respect of this Law or standing orders*

*shall have the right to a fair trial or hearing as defined in Article 6 of the European Convention on Human Rights.*

*(2) Paragraph (1) shall not prevent the person presiding at a meeting of the States from exercising such authority as may be prescribed and necessary for the immediate restoration of good order during the meeting."*

4. This Article was inserted on an amendment proposed by Senator Syvret and adopted by 21 votes to 19 The report which accompanied the proposed amendment was in this respect in very short form. It was in these terms:

> *"This amendment should be uncontroversial, after all the draft Law does claim to be human rights compliant. This amendment ensures a fair hearing in the event of disciplinary action, whilst retaining the right of the Chair to enforce order and discipline when necessary for immediate purposes during a meeting of the Assembly."*

This report shows a misunderstanding about the application of the European Convention on Human Rights. This Convention was not intended to apply, and does not apply, to the internal proceedings of the legislature of a country which is party to the Convention. The report also displays a lack of understanding about the constitutional position of a legislature, and far from being uncontroversial, the Article is highly questionable in terms of its constitutional implications in so far as the Article applies to States members.

5. The report discloses that there would be minimal additional cost or manpower requirements in the amendments proposed. That is not so. The cost implications are potentially significant as will be apparent from this letter.

6. The debate on the States of Jersey Law was a relatively long debate, although the importance of the legislation undoubtedly would have justified more time being spent if necessary. This amendment unfortunately received less attention from members than it deserved.

Fundamental Principles

7. There are fundamental principles that courts are not able to strike down what Parliament enacts as primary legislation, because that is the expression of the will of the electorate; nor are they able to interfere in the internal proceedings of a Parliament; nor will the legislature become involved in the proceedings of the courts. For these reasons, the Human Rights (Jersey) Law 2000 does not empower the Court to strike down primary legislation, notwithstanding that it may be in breach of the European Convention on Human Rights. The limit on the court's power is to declare that the legislation is incompatible with the Convention. This is consistent with the doctrine of U.K. constitutional law, which is no less applicable to the States of Jersey, of the supremacy of Parliament.

8. Some of these principles are embodied in the case of Syvret v. Bailhache and Hamon 1998 JLR 128. The facts of that case were that the Plaintiff, Senator Syvret, allegedly implied during a States debate that a fellow Senator had acted with improper motives in bringing forward some proposed legislation then under discussion. The Bailiff, the First Defendant, asked the Plaintiff to substantiate his remarks or to withdraw them. The Plaintiff's response did not, according to the Defendants, substantiate the remarks and he was told that at the next sitting he would have to withdraw them. At that sitting the Second Defendant, the Deputy Bailiff, who was presiding, summarised the matter and on the Plaintiff's failure to withdraw the comments held that his conduct had been grossly disorderly and accordingly suspended him from sitting for the remainder of the session, pursuant to Standing Order 30(3).

When the Plaintiff continued to refuse to withdraw his comments but instead sought to repeat the response which he had made, the First Defendant put the matter to the States, refusing to allow a debate or the Senator to continue, in reliance upon his prerogative powers at common law rather than under the Standing Orders of the States. The States voted by 36 votes to 3 for a further suspension of the Plaintiff. It is to be assumed that, in so voting, States members at that time considered that the Defendants' decision that the Plaintiff's response did not in fact substantiate the remarks was to be accepted. When the Plaintiff was readmitted and again refused to

withdraw the remarks, his suspension was lifted but the States passed a motion of censure. In his action in Court, the Plaintiff applied to quash the Defendants' and the States' decisions, alleging that the decisions were inter alia ultra vires and made in bad faith. These allegations could not be tested. The Court, acting through its Commissioner, a leading U.K. administrative and constitutional lawyer, Mr. Michael Beloff, Q.C., held that the States as a legislative assembly possessed such privileges as were reasonably necessary for its proper functioning, including the power to regulate its own internal proceedings the exercise of which could not be questioned by the court. The Commissioner said:

> "*In my judgment, if I am satisfied that matters complained of do relate to the regulation of the internal proceedings of the States, I cannot interfere with them and must decline jurisdiction. Existence of a privilege, the nature of which may vary between legislative assemblies, may be for the courts. Exercise of an acknowledged privilege manifestly is not. I remind myself that "it behoves the courts to be ever sensitive to the paramount need to refrain from trespassing upon the province of Parliament"."* (R v. HM Treasury ex parte Smedley 1985 per Lord Donaldson, MR).

9. The Commissioner quoted at length from the judgment of Lord Chief Justice Coleridge in the leading U.K. case on this subject, Bradlaugh v. Gosset 1884 12 QBD 271, where it was said:

> "*The history of England and the actions of the House of Commons itself shows that now and then injustice has been done by the House to individual members of it. But the remedy, if remedy it be, lies not in actions in the courts of law … but by an appeal to the constituencies whom the House of Commons represents."*

10. The Commissioner quoted also from the judgment of Lamer, CJC, in New Brunswick Broadcasting Co v. Speaker of the House of Assembly: Nova Scotia (1943) 100 DLR 4th 212:

> "*Historically the courts have been careful to respect the independence of the legislative process just as legislators have been careful to protect the independence of the judiciary … there is a clear parallel between the doctrines of independence of the judiciary and of Parliamentary privilege as the latter is the means by which the Houses of Parliament protect their independence. In Canada it is through the exercise of privileges inherent in all legislative bodies that the Houses of Assembly are able to control their own proceedings and thereby maintain the independence of the legislative process."*

11. As the Commissioner put it in Syvret v. Bailhache:

> "*It has long been accepted that in order to perform their functions, legislative bodies require certain privileges relating to the conduct of their business. It has also long been accepted that these privileges must be held absolutely and constitutionally if they are to be effective; the legislative branch of our government must enjoy a certain autonomy which even the Crown and the courts cannot touch."*

12. The Commissioner also cited a passage from Blackstone's Commentaries on the Laws of England, which work is a pillar of constitutional practice:

> "*The whole of the law and custom of Parliament has its origin in this one maxim:*
>
> "*That whatever matter arises concerning either House of Parliament, ought to be examined, discussed and adjudged in that House to which it relates and not elsewhere."."*

13. At page 151 of his judgment the Commissioner commented on the decision of the Privy Council in Prebble v. TV New Zealand Limited (1995) 1 AC 237, saying:

> "*It appears that the Privy Council considered that the laws of Parliamentary privilege applied uniformly throughout the Commonwealth."*

14. There is other material upon which the Commissioner relied in his judgment but he concluded that the reasons for what he described as "*the principle upon which the sun never sets"* of judicial abstention from reviewing the internal proceedings of the legislature are:

(a) The legislature is the key organ of democratic government. It ought, accordingly, to enjoy absolute independence from outside interference or control, the better to perform its functions and enjoy continual respect.

(b) In particular, appeals to the courts as to whether particular behaviour of a member did or did not merit particular sanction would impair the proper functioning of the Chamber by enmeshing it in legal proceedings.

(c) The judicial and legal organs of government ought to enjoy and be seen to enjoy independence of each other if they are to command confidence.

(d) Judicial abstention from interference in Parliamentary proceedings in the best guarantee of Parliamentary abstention from interference in the judicial process.

(e) A legislature can provide its own remedies for injustice effected against a member by its officer or itself.

(f) Ultimately an aggrieved member has the right to appeal to the electorate.

15. It is interesting to compare this analysis of constitutional principle with what Senator Syvret put to the States in his summing up on this particular amendment:

> "*Yes, as the Attorney General said, (he is absolutely correct), to support this amendment would involve a fair and public hearing for any member or person subject to disciplinary procedure. It would have to be administered by an independent and impartial tribunal and indeed there would be a right of appeal on that tribunal, to all of which I say "So what"? What is your problem? If the procedures involved in this particular sphere are in fact to be genuinely human rights compliant then I really don't see why there should be any objection to the amendment. And as I said in my opening speech I don't especially want to go over it all but I am talking about real world examples here and I am afraid in my experience when that episode happened, the behaviour of the majority of members of this Assembly and the Assembly as a whole was disgraceful. Absolutely disgraceful, there is no other word to describe it."* [The Senator then went on to complain about the behaviour of the Bailiff and the Deputy Bailiff at the time he was ordered out of the Chamber]. *"… now that actually happened, it's a real world experience and I don't believe that any member of this Assembly, any member regardless of who they are, whether I agree with them or not, whether they are right or wrong, should be denied the basic principles of natural justice. Of course politicians can't be reviewed as an independent and impartial tribunal because we are not independent and impartial. We are politicians and by its very nature we are political animals, we are biased, we have political agendas of one type or another and the idea that we are remotely going to ever be capable of forming even [the vestige] of an impartial tribunal to hear a disciplinary complaint against one of our fellows is of course fanciful nonsense. So I say that any person or member accused of any disciplinary offence under this Law must have and should have the right to a fair hearing by an impartial tribunal should have access without impediment to those basic rights guaranteed by the European Convention on Human Rights."*

Summary of Constitutional Implications

16. As I indicated to you in my e-mail on 16th November, 2004, shortly after this amendment was passed, it is no understatement to say that I was astonished at the adoption of this amendment, and that members appeared to have voluntarily surrendered privileges which legislatures have jealously protected in every mature Parliamentary jurisdiction for years. I also said that I thought that the involvement of the Royal Court in political matters was something enormously to be deprecated. I now regret that I did not go in to more detail at the time of the debate than actually I did, although in the context that the Privileges and Procedures Committee had indicated in advance that it intended resolutely to oppose the amendment, I thought I had given sufficient advice in highlighting the particular difficulties without being over critical. I have to say that I also assumed that members were aware of their constitutional privileges.

17. Indeed these were referred to in the report accompanying the Projet on the Code of Conduct for elected members of the States (P.32/2003) which was adopted by 34 votes to 10 on 29th April, 2003. At paragraph 2.6 of the report, the Committee set out its position in this way:

> *"It is, of course, hoped and anticipated that breaches will be extremely rare but the Committee believes that it is important that any alleged breaches of the Code are considered by elected members rather than by a person or body outside the States appointed for this purpose. Once the Code has been approved by the States and put in place, members of the States will be bound by its provisions and it therefore seems entirely appropriate that any member who is alleged to have breached the Code is investigated by his or her peers. The Committee believes that, although some may be concerned that members are effectively regulating themselves, it is a necessary feature of a sovereign body such as the States Assembly that it should remain responsible for the conduct of its own members to preserve its Parliamentary privilege."*

18. I have set out the background in some detail to assist the Privileges and Procedures Committee should it decide to bring a proposition back to the States to repeal Article 51 of the 2005 Law. The proposition would be based upon a recognition that a mistake had been made in constitutional terms, and also upon the recognition that there were serious reservations as to how the proposals now reflected in Article 51 can be appropriately achieved and if they cannot, then serious doubt as to whether any disciplinary action will be workable in practice.

19. Before leaving the subject of constitutional propriety, I also draw your attention to Article 47(1) of the 2005 Law which is in these terms:

> *"The States shall make Standing Orders to give effect to this Law and to regulate their proceedings and business and the conduct of elected members."*

20. There does not seem to be any doubt that it was contemplated that the States would by its Standing Orders make provision to regulate the conduct of elected members. Implicit in that is that the States would be doing the regulating themselves. Had it been intended that a separate tribunal would be established to deal with the conduct of elected members, one would have expected express provision to be found in Article 47, just as that Article contains requirements for the establishment of the Privileges and Procedures Committee, the Public Accounts Committee and for two or more Scrutiny Panels. It would have been necessary to provide a framework for what such a tribunal could so.

Article 6 of the Convention

21. The European Court of Human Rights has analysed Article 6 as containing three distinct elements– access to a court; guarantees as to the jurisdiction of the court; and guarantees as to the conduct of court proceedings. As said above, it was never intended to apply to the internal proceedings of a legislature.

22. This Article was intended to make provision for those facing civil or criminal process in which their Convention rights would be determined. As I advised the States at the time the amendment was debated, Article 6 of the Convention requires, among other things, a fair and public hearing by an independent and impartial tribunal. In my view there is no doubt that States members could not provide an independent and impartial tribunal when dealing with a matter of discipline of a States member. I can expand on this if necessary, but there is both a subjective impartiality problem, because the conduct complained of may well have occurred in the face of the Assembly and therefore would affect all members, and, in addition, a potential objective impartiality problem where one does not assert that actual bias might be present, but there might be a perceived or objective lack of impartiality. The European Court of Human Rights has for example found breaches of Article 6.1 where some members of the Tribunal had close links with the administration, or the defendants, where the complainants or victims of the offence participated in the proceedings, and where the distinctions between the court and the prosecution become blurred.

23. In order to provide an Article 6 compliant process, it would be necessary to appoint a tribunal. I do not think this tribunal can be appointed specifically to deal with individual complaints, because if that were the case there would be a substantial risk that the member could complain of the impartiality of the tribunal – he might complain that the composition of the tribunal had been selected by the States in order to ensure that he was found guilty of the disciplinary process. The likely structure would be the appointment of a number of people as

potential members of a tribunal with the appointment of a Chairman. Presumably each of those appointments would be made through the Appointments Commission. The Chairman would have the right to select panel members to sit with him on any particular hearing. The tribunal members would either have fixed non-renewable terms of office or would hold office indefinitely subject to dismissal for incapacity or bad behaviour. It is essential that the independence of the tribunal could not be attacked on the ground that tribunal members were concerned at their possible removal from office such as might objectively be seen to influence their conduct in any particular disciplinary enquiry. It is obvious, but is in the circumstances worth restating, that the tribunal will not be accountable to the States or to the Public for what it does, other than in terms of bad behaviour. If it were accountable, it would not be an independent and impartial tribunal.

24. The effect of Article 51 of the 2005 Law is to apply the civil case guarantees to disciplinary action however minor, other than action taken by the person presiding at a meeting of the States who is acting under the authorisation of Standing Orders in accordance with Article 51(2), and providing that that person acts in circumstances which make it necessary that action be taken for the immediate restoration of good order. This is an odd conclusion. Article 6 applies where a court or tribunal determines a person's civil rights. The effect of Article 51 is to have Article 6 apply notwithstanding that a person's civil rights may not be determined – for example a motion of censure or reprimand would not, on the face of it, appear to determine a member's civil rights.

25. The notion of access to a court implies, even in civil cases, a right to have legal representation or the assistance of a lawyer where the interests of justice so require. A decision on whether or not a lawyer is necessary will have to be taken by the tribunal which is given the task of dealing with the case – see Aerts v. Belgium 30th July, 1998, 61/1997/845/I051. It is likely that the majority of disciplinary cases will be straightforward and that the assistance of lawyer may not be necessary. Nonetheless, a proper construction of Article 51 would appear to be that there is imported, by reference to Article 6 of the Convention, the obligation to provide legal representation in cases where it is necessary. There is clearly scope for argument in any particular case as to whether legal aid should or should not be available. That might cause a problem.

26. There is every reason in principle why the Royal Court should not be the disciplinary tribunal in relation to the conduct of States members. In what may be highly charged circumstances, the Court would be dragged into a political problem. That confidence which must repose in the Court on the part of all well meaning members of society would be likely to be damaged, at least amongst some politicians, regardless of whether the Court upheld the complaint or did not do so.

27. There is also the difficulty that the Court would normally have some form of jurisdiction over the disciplinary tribunal by virtue of the Court's control of all inferior tribunals by way of judicial review. This carries with it all the same concerns for the relationship between the Court and the legislature to which I have adverted earlier. There is a further problem on this which I describe at paragraph 29 below.

Relationship between Articles 33 and 51

28. Article 33 of the 2005 Law is in these terms:

> "*No civil or criminal proceedings may be instituted against any member of the States –*
>
> *(a) for any word spoken before or written in a report to the States or a Committee or Panel established under Standing Orders; or*
>
> *(b) by reason of any other matter or thing brought by the member before or within the States or any such Committee or Panel by petition, proposition or otherwise."*

29. Proceedings before the Court are generally classified as civil or criminal proceedings. Disciplinary process would almost certainly therefore fall to be treated as civil proceedings, if instituted before a court. It would seem to follow from Article 33 that the Court will not have jurisdiction over any disciplinary process concerning matters falling within its terms, either in the event that it were to be the tribunal established as the

independent and impartial tribunal pursuant to Article 51, or in the event that judicial review of a separate independent and impartial tribunal was contemplated.

30. There is a wider point in that it is unclear what 'proceedings' are contemplated by Article 33. If these are limited to proceedings before the Court, then the inter-relationship of Articles 33 and 51 is that the tribunal established pursuant to Article 51 would have to have power conferred on it to reach whatever conclusion it thought appropriate without review by anyone, to the extent that the disciplinary process engaged the subject matter of Article 33, unless an appeals tribunal were also created. If, on the other hand, Article 33 'proceedings' include proceedings before a tribunal other than a court, then there is a complete conflict between Article 33 and the requirements of Article 51 to the extent that any disciplinary proceedings arise from, for example, words spoken or written in a report to the States, or a Committee or Panel established by Standing Orders. It might then be the result that no disciplinary proceedings were possible at all in respect of these matters.

31. I note in passing, and by way of distinction, that the Court may have jurisdiction to determine whether a tribunal established under Article 51 had proceeded within the ambit of its jurisdiction.

32. In summary, the problem with the inter-relationship with Article 33 is that either the court will not be able to exercise jurisdiction over the tribunal, which leaves the tribunal, at least in some areas, with a wide jurisdiction to interfere with the processes of democracy, or the Court will have that jurisdiction, which is similarly undemocratic and could lead to undesirable conflict between the judiciary and the legislature.

Three or Four Stages

33. It is necessary to recognise that there may be at least three and in some cases four component parts to the disciplinary process. First of all, provision needs to be made for recording complaints and initiating the process itself. It may be appropriate to build in to the complaints part of the process a weeding or filtering system to avoid frivolous complaints being taken forward. The second component part is that appropriate provision must be made for an investigation of the facts. Sometimes these will be self-evident – for example if a States member punches another States member on the floor of the Assembly – but sometimes the conduct complained of will need to be referred to the member against whom the complaint is made for comment, and steps may need to be taken to gather evidence, where, for example, there is a complaint that there has been a breach by the member of his duty to make a declaration of interest under the relevant Standing Order. The third component part is the stage at which a finding is made as to whether there has been a breach of the appropriate standards which are required of States members. The fourth component part is the application of a sanction in relation to a breach, once the breach has been found.

34. I have drawn out this analysis because it is worth emphasizing that in my view Article 51 of the 2005 Law does not have any direct application to the first two stages. Article 6 of the European Convention on Human Rights deals with the requirements for a fair trial or hearing. This may require an examination of the conduct of an investigation but it certainly allows for the possibility of an investigation by a body which is not itself impartial. The Article 6 provisions do require, for the purposes of establishing a fair trial or hearing, that the tribunal considers properly all the material put before it in order to guarantee a fair conclusion, but the Article 6 rights do not impinge directly on the way in which the matter has been investigated. Thus for example, illegally obtained evidence may nonetheless be admitted in a criminal trial at the discretion of the trial judge.

35. By contrast, the finding stage and the sanction stage are very firmly matters which do engage in civil and criminal proceedings the Article 6 rights to a fair trial or hearing, and it appears to me that Article 51(1) of the 2005 Law needs to be construed accordingly. I raise this because I have seen reference to arrangements in the Scottish Parliament where the investigation of an alleged disciplinary matter was conducted by persons outside the Parliament, but decisions as to what should then be done were taken by those inside the Parliament. A curiosity of the Article 51 provision in the 2005 Law is that it would permit the investigation to be carried out by States members but it would not allow States members to determine the result nor to have any say in the sanction to be applied – the opposite of the arrangement described to me in relation to the Scottish Parliament. This

seemingly demonstrates how flawed Article 51 is in concept and in practice.

36. It is instructive to return to the Syvret v. Bailhache and Hamon case. There, in the absence of any provisions in Standing Orders which would allow for an investigation of an alleged breach of Standing Orders, the Bailiff used powers necessarily to be implied from custom and the 1966 States of Jersey Law and from Standing Orders. There is, however, no reason why, in the future, the Standing Orders should not make provision for an investigation of the facts or dispute by a body of persons outside the Assembly or indeed by a Privileges Committee inside the Assembly. It may be that members would feel that some concessions were being made to Senator Syvret's obvious concerns about the way he perceives he was treated at that time if in future an independent investigation of the evidence, surrounding a complaint, with or without any finding, is made by an external body. That concession can be made without any determination of whether the Senator was or was not treated unfairly, a matter on which different views appear to be held notwithstanding the resounding 36:3 vote at the time in favour of a sanction being applied to him. The important objective, in my view, is to ensure that at the formal findings and sanctions stages, the Assembly, either directly or indirectly through a Privileges Committee, retains control of its own disciplinary process. If that objective is not secured, there is a risk that at some future date the workings of the Assembly may be adversely affected; and that would be a threat to the democratic process, if that occurred.

Potential Sanctions

37. The sanctions for a breach of the Code of Conduct conceivably cover in my view these areas:

(i) A private reprimand.

(ii) A public reprimand.

(iii) Docking of pay.

(iv) Dismissal from a post (as Minister, member of Scrutiny Panel, and so on).

(v) Suspension from the Assembly.

(vi) Expulsion from the Assembly.

38. It is to be noted that expulsion is in some respects a far more democratic penalty than suspension, particularly if suspension is for a lengthy period. The result of expulsion ought to be that an election is called, which allows the electorate to exact its own sanction if voters were to refuse to return the expelled member who had stood again. Expulsion also meets the objection that the electorate are disenfranchised by the imposition of the sanction of a lengthy suspension. The concept that an unelected tribunal however should have the power to determine disciplinary sanctions does not sit easily with the democratic process.

39. In my view, the Assembly is entitled to make rules to protect itself, and to enforce those rules. If the electorate disapproves of the way in which the rules are enforced, then the result will be a change in the membership of the Assembly at the next election time. As was said by Lord Chief Justice Coleridge in Bradlaugh v. Gosset in the extract to which I referred earlier, injustice may be done by the Assembly to individual members from time to time, but the remedy lies in an appeal to the constituencies who are represented in the Assembly.

Authority of the Presiding Officer

40. It may be suggested that Article 51(2) provides a sufficient safeguard for maintaining order, in that i appears to confer upon the presiding officer of the meeting power to exercise authority for the immediate restoration of good order.

41. In my view Article 51(2) is a difficult provision to construe. It appears to mean that Standing Orders mus specify what the presiding officer may do in the way of measures to restore order for the immediate situation. This presumably would include ordering a member to leave the Chamber, at least for a short period, and if the member refuses, ordering his or her removal by the Viscount. It might also include suspending the member for the duration of a particular debate; it seems to me to be more questionable as to whether it would enable the presiding

officer to suspend a member for a whole day. The powers which could be conferred by Standing Orders might extend to a power to order a member to withdraw an offensive remark or to apologise for such remarks but it is to be noted that the power could only be exercised where it was necessary for the immediate restoration of good order.

42. It is certainly not going to be easy to prepare Standing Orders for this purpose, and it could be very difficult to apply them. There is certainly a danger of the presiding officer becoming involved in an argument with the States over whether or not the action taken is necessary within the meaning of the Article, or is in fact authorised by the Standing Orders in question. There is a danger of the Court being asked to determine whether the presiding officer had acted ultra vires in exercising the authority which he or she did. This, of itself, could give rise to substantial argument because there is sometimes a fine line between the Court determining the existence or extent of a privilege, which it can, and determining whether the privilege was rightly exercised, which it cannot.

43. What is clear is that Standing Orders cannot make provision for the exercise of authority by the presiding officer other than for the purposes of the immediate restoration of good order during the meeting. It follows that there must be a lack of good order before the presiding officer can take action. There may be doubt as to what *"good order"* means for this purpose. It would not seem to be open to the presiding officer to take action to prevent anticipated disorder.

44. In the circumstances I advise firmly that a proposition be taken back to the States for the repeal of Article 51.

Yours sincerely,

Attorney General

## Explanatory Note

This draft Law would repeal Article 51 of the States of Jersey Law 2005.

Jersey

# DRAFT STATES OF JERSEY (AMENDMENT No. 2)LAW 200-

**A LAW** to amend further the States of Jersey Law 2005.

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*Adopted by the States* *[date to be inserted]*
*Sanctioned by Order of Her Majesty in Council* *[date to be inserted]*
*Registered by the Royal Court* *[date to be inserted]*

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

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**1 Article 51 of States of Jersey Law 2005 repealed**

Article 51 of the States of Jersey Law 2005[1] is repealed.

**2 Citation and commencement**

This Law may be cited as the States of Jersey (Amendment No. 2) Law 200- and shall come into force 7 days after it is registered.

[1] *Volume 2005, page 371.*