

**DRAFT POLICE PROCEDURES AND CRIMINAL EVIDENCE (JERSEY) LAW 200- (P.89/2002): SECOND  
AMENDMENTS**

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**Lodged au Greffe on 1st October 2002  
by the Home Affairs Committee**

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**STATES OF JERSEY**

**STATES GREFFE**

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## Report

These amendments would replace the provisions of the draft Police Procedures and Criminal Evidence (Jersey) Law 200-, on access by the Police to confidential material, with new provisions which follow, more closely, the equivalent provisions of the Police and Criminal Evidence Act 1984 (“the PACE Act”), of the United Kingdom.

The effect of the amendments is, in summary, that instead of the approach adopted in the draft Law, of applying the same “access conditions” to all material classed as confidential material, separate access conditions would apply to material classed as “special procedure material”, as defined in the substituted Article 6(4)- (18), and to “excluded material” as defined in the substituted Article 6(1)- (3).

The access requirements are set out in the substituted Article 16 and the amended Schedule 2.

Special procedure material is material in the possession of a person who created or acquired it for business purposes and holds it under an express or implied obligation of confidence or under a legal restriction on its disclosure.

Excluded material is personal records created or acquired for business purposes, human tissue or fluid samples taken for medical purposes and journalistic material in documents or records, held in confidence.

To put these changes in context, the following is a brief summary of how the provisions of the draft Law, including these amendments, would apply to search for or access to evidence or material by the Police.

In effect, the draft Law will create a hierarchy of search and access methods.

All existing statutory provisions enabling the grant of a search warrant (e.g. under the Misuse of Drugs (Jersey) Law 1978) will become subject to the provisions of the draft Law. This means that warrants under those provisions will no longer be available for excluded or special procedure material or material subject to legal privilege (See Article 16(2)). They remain effective for warrants for other types of evidence or material, but subject to the general safeguards for execution of warrants in Articles 17 and 18 of the draft Law. Also, in future, warrants under existing provisions may be issued by a Jurat, instead of the Bailiff. Note that, as a safeguard, there will be power for the States, by Regulations, to except certain enactments from the effect of Article 16(2), but not in relation to legal privilege.

Article 15 of the draft Law creates a new power to obtain a search warrant, from the Bailiff or a Jurat, in connection with the investigation of any serious offence. This power does not extend to excluded, special procedure or legally privileged material.

The Police will, however, be able to get an order from the Bailiff, under Article 16 and paragraph 4 of Schedule 2, for access to excluded or special procedure material under a statutory search warrant issuing power which was in existence when the Draft Law comes into force (such as the Misuse of Drugs Law). To do so, they have to satisfy the second access requirements, in paragraph 2(2) of that Schedule. They do not have to show that they are investigating a serious offence, but only that special procedure or excluded material is suspected to be on the relevant premises and that the issue of a search warrant would have been “appropriate”.

In effect, this preserves the present position.

If investigating an offence, even a serious offence, in respect of which there is no pre-existing search warrant issuing power, the police will not be able to gain access to excluded material for the purposes of that investigation, under the draft Law, or indeed by any other means.

To obtain access to special procedure material, for such an investigation, the police can apply, under Article 16 and Schedule 2, for an Order from the Bailiff under paragraph 4 of Schedule 2. To succeed they must satisfy the Bailiff of all the matters listed in paragraph 2(1) of the Schedule, which include a public interest test.

The Bailiff’s Order, under paragraph 4 of the Schedule, to produce either excluded or special procedure material, will require the person in possession of the material to produce it to a police officer within seven days or such longer period as may be specified.

It is to be noted that the application for the Order is to be made on notice, giving the holder of the material a chance to object to the making of the Order, if he chooses.

If the person holding the material fails to produce it, as ordered, the police can apply to the Bailiff for a search warrant, under paragraph 11 of the Schedule, to enter premises and take the material. But before issuing the warrant, the Bailiff must be

satisfied as to any one of the further matters mentioned in paragraph 13.

The PACE Act provisions create a similar effect, though it is impossible to produce the same result because, prior to enactment of PACE there were in the U.K., existing statutory powers for issuing search warrants, we still do not have in Jersey, for instance, under the Theft Act 1968, Obscene Publications Act 1964, and Criminal Damage Act 1971.

On the other hand, the enactment of several of the Laws mentioned in Article 16(3) of the original Projet, which it was proposed to exclude from the effect of the original Article 16, has occurred in Jersey at a time when no equivalent of the PACE Act has been in force; it follows that, to the extent that those Laws, such as the Drug Trafficking Offences (Jersey) Law 1988, now enable a search warrant to be issued for special procedure or excluded material, it will still be possible, post PPCE, to apply for a production Order for such material, under Article 16 and Schedule 2.

The difference that these amendments will make to the Projet as originally lodged, is that access to material coming within the definition of excluded material, would have been possible, subject to the access conditions, in respect of any serious offence, irrespective of whether there was a pre-existing statutory search warrant issuing power, but, for those pre-existing powers, access to material coming within the definitions of excluded or special procedure material, would have been subject to the access conditions in Schedule 2.

The amendments will not have any extra financial or manpower implications and do not affect the compatibility of the draft Law with the Convention rights.

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PAGE 29, ARTICLE 1(1) -

- (a) *omit the definition* “confidential material”;
- (b) *after the definition* “drug trafficking” *insert the following definition* -  
    “ ‘excluded material’ has the meaning assigned to it by Article 6(1);”.

PAGE 33, ARTICLE 1(1) -

- After the definition* “skin impression” *insert the following definition* -  
    “ ‘special procedure material’ has the meaning assigned to it by Article 6(4);”.

PAGES 40 TO 45, ARTICLE 6 -

*Substitute the following Article* -

“ARTICLE 6

**Meaning of ‘excluded material’ and ‘special procedure material’**

- (1) Subject to paragraphs (2) and (3), in this Law ‘excluded material’ means -
  - (a) personal records which a person has acquired or created in the course of any trade, business, profession or other occupation or for the purposes of any paid or unpaid office and which he holds in confidence;
  - (b) human tissue or tissue fluid which has been taken for the purposes of diagnosis or medical treatment and which a person holds in confidence;
  - (c) journalistic material which a person holds in confidence and which consists of documents, or of records other than documents.
- (2) A person holds material other than journalistic material in confidence for the purposes of this Article if he holds it subject -
  - (a) to an express or implied undertaking to hold it in confidence; or
  - (b) to a restriction on disclosure or an obligation of secrecy contained in any enactment, including an enactment passed after this Law.
- (3) A person holds journalistic material in confidence for the purposes of this Article if -
  - (a) he holds it subject to an undertaking, restriction or obligation described in paragraph (2); and
  - (b) it has been continuously held, by one or more persons, subject to that undertaking, restriction or obligation since it was first acquired or created for the purposes of journalism.
- (4) In this Law, ‘special procedure material’ means -
  - (a) material to which paragraph (5) applies; and
  - (b) journalistic material, other than excluded material.
- (5) Subject to paragraphs (5) to (8), this paragraph applies to material, other than items subject to legal privilege and excluded material, in the possession of a person who -

(a) acquired or created it in the course of any trade, business, profession or other occupation or for the purpose of any paid or unpaid office; and

(b) holds it subject to an express or implied undertaking to hold it in confidence, or to a restriction or obligation mentioned in paragraph (2)(b).

(6) Where material is acquired by an employee from his employer and in the course of his employment or by a company from an associated company, it is only special procedure material if it was special procedure material immediately before the acquisition.

(7) Where material is created by an employee in the course of his employment, it is only special procedure material if it would have been special procedure material had his employer created it.

(8) Where material is created by a company on behalf of an associated company, it is only special procedure material if it would have been special procedure material had the associated company created it.

(9) For the purposes of this Article, a company is to be treated as another's associated company at a given time if, at that time, or at any other time within one year previously, one of the 2 has control of the other, or both are under the control of the same person or persons.

(10) For the purposes of this Article, a person shall be taken to have control of a company if he exercises, or is able to exercise or is entitled to acquire, direct or indirect control over the company's affairs, and in particular, but without prejudice to the generality of the preceding words, if he possesses or is entitled to acquire -

(a) the greater part of the share capital or issued share capital of the company or of the voting power in the company; or

(b) that part of the issued share capital of the company which would, if the whole of the income of the company were in fact distributed among the participators, without regard to any rights which he or any other person has as a loan creditor, entitle him to receive the greater part of the amount so distributed; or

(c) those rights which would in the event of the winding-up of the company or in any other circumstances, entitle him to receive the greater part of the assets of the company which would then be available for distribution among the participators.

(11) Where 2 or more persons together satisfy any of the conditions of paragraph (10), they shall be taken to have control of the company.

(12) For the purposes of paragraph (10) a person shall be treated as entitled to acquire anything which he is entitled to acquire at a future date, or will at a future date be entitled to acquire.

(13) For the purposes of paragraphs (10) and (11), there shall be attributed to any person any rights or powers of a nominee for him, that is to say, any rights or powers which another person possesses on his behalf or may be required to exercise on his direction or behalf.

(14) For the purposes of paragraphs (10) and (11), there may also be attributed to any person all the rights and powers of any company of which he has, or he and associates of his have, control or any 2 or more of those companies, or of any associate of his or of any 2 or more associates of his, including those attributed to a company or associate under paragraph (13), but not those attributed to an associate under this paragraph, and those attributions shall be made under this paragraph which will result in the company being treated as under the control of 5 or fewer participators if it can be so treated.

(15) In this Article -

(a) 'associate' means, in relation to a participator and correspondingly in relation to a person other than a participator -

(i) any relative of the participator,

(ii) any person with whom the participator is in partnership,

- (iii) the trustee or trustees of any settlement in relation to which the participator is, or any relative of his, living or dead, is or was, a settlor, and
  - (iv) where the participator is interested in any shares or obligations of the company which are subject to any trust, or are part of the estate of a deceased person, the trustee or trustees of the settlement concerned or the personal representatives of the deceased and, if the participator is a company, any other company interested in those shares or obligations;
- (b) 'loan creditor', in relation to a company, means subject to paragraphs (17) and (18), a creditor in respect of any redeemable loan capital issued by the company or in respect of any debt incurred by the company -
- (i) for any money borrowed or capital assets acquired by the company,
  - (ii) for any right to receive income created in favour of the company, or
  - (iii) for consideration the value of which to the company was, at the time when the debt was incurred, substantially less than the amount of the debt including any premium on it;
- (c) a 'participator' is, in relation to any company, a person having a share or interest in the capital or income of the company and, without prejudice to the generality of the preceding words, includes -
- (i) any person who possesses, or is entitled to acquire, share capital or voting rights in the company,
  - (ii) any loan creditor of the company,
  - (iii) any person who possesses, or is entitled to acquire, a right to receive or participate in distributions of the company of any amounts payable by the company, in cash or in kind, to loan creditors by way of premium on redemption, and
  - (iv) any person who is entitled to secure that income or assets whether present or future of the company will be applied directly or indirectly for his benefit;
- (d) 'relative' means husband or wife, parent or remoter forebear, child or remoter issue, or brother or sister.

(16) References in paragraph (15)(c) to being entitled to do anything apply where a person is presently entitled to do it at a future date, or will at a future date be entitled to do it.

(17) Subject to paragraph (18), a person who is not the creditor in respect of any debt or loan capital to which paragraph (15)(b) applies but nevertheless has a beneficial interest therein shall, to the extent of that interest, be treated for the purposes of this Article as a loan creditor in respect of that debt or loan capital.

(18) A person carrying on a business of banking shall not be deemed to be a loan creditor in respect of any loan capital or debt issued or incurred by the company for money lent by him to the company in the ordinary course of that business.”.

PAGE 58, ARTICLE 15 -

*In paragraph (1)(a)(iii), for the words “or confidential material” substitute the words “excluded material or special procedure material”.*

PAGES 59 TO 60, ARTICLE 16 -

*Substitute the following Article -*

#### “ARTICLE 16

##### **Special provisions as to access**

(1) A police officer may obtain access to excluded material or special procedure material for the purposes of a criminal investigation by making an application under Schedule 2 and in accordance with that Schedule.

(2) Subject to paragraph (3), any enactment passed before this Law under which a search of premises for the purposes of a criminal investigation could be authorized by the issue of a warrant to a police officer shall cease to have effect so far as it relates to the authorization of searches -

- (a) for items subject to legal privilege;
- (b) for excluded material; or
- (c) for special procedure material consisting of documents or records other than documents.

(3) The States may by Regulations disapply paragraph (2) to an enactment so far as the enactment relates to the authorization of searches for material described in either or both of sub-paragraphs (b) and (c) of that paragraph.”.

PAGE 174, ARTICLE 107 -

*In paragraph (1)(b)(i), in the inserted Article 8A for the words “not confidential material” substitute the words “neither excluded material nor special procedure material”.*

PAGE 181, SCHEDULE 2 -

(a) *In the heading to Schedule 2, for the words “Confidential material” substitute the words “Special procedure”;*

(b) *for paragraphs 1 and 2 substitute the following paragraphs -*

“1. If, on an application made by a police officer, the Bailiff is satisfied that one or other of the sets of access conditions in paragraph 2 is fulfilled, the Bailiff may make an order under paragraph 3.

2.-(1) The first set of access conditions is fulfilled if

- (a) there are reasonable grounds for believing -
  - (i) that a serious offence has been committed,
  - (ii) that there is material which consists of special procedure material or includes special procedure material and does not also include excluded material on premises specified in the application,
  - (iii) that the material is likely to be of substantial value, whether by itself or together with other material, to the investigation in connection with which the application is made, and
  - (iv) that the material is likely to be relevant evidence;
- (b) other methods of obtaining the material have been tried without success or have not been tried because it appeared that they were bound to fail; and
- (c) it is in the public interest, having regard to the benefit likely to accrue to the investigation if the material is obtained and to the circumstances under which the person in possession of the material holds it, that the material should be produced or that access to it should be given.

(2) The second set of access conditions is fulfilled if -

- (a) there are reasonable grounds for believing that there is material which consists of or includes excluded material or special procedure material on premises specified in the application;
- (b) but for Article 16(2), a search of the premises for that material could have been authorized by the issue of a warrant to a police officer under an enactment other than this Schedule; and
- (c) the issue of such a warrant would have been appropriate.”.

PAGE 182, SCHEDULE 2 -

*In paragraph 5 for the words “paragraph 4(a)” substitute the words “paragraph 3”.*

PAGE 183, SCHEDULE 2 -

*For paragraph 11 substitute the following paragraph -*

“11. If on an application made by a police officer the Bailiff -

(a) is satisfied that either set of access conditions is fulfilled and that any of the further conditions set out in paragraph 13 is also fulfilled; or

(b) is satisfied that the second set of access conditions is fulfilled and that an order under paragraph 3 relating to the material has not been complied with,

the Bailiff may issue a warrant authorizing a police officer to enter and search the premises.”.

HOME AFFAIRS COMMITTEE