

STATES OF JERSEY



REVIEW INTO THE PROPOSED AMENDMENTS TO THE DATA PROTECTION (JERSEY) LAW 2005 (S.R.6/2010): RESPONSE OF THE MINISTER FOR TREASURY AND RESOURCES

**Presented to the States on 8th June 2010
by the Minister for Treasury and Resources**

STATES GREFFE

REVIEW INTO THE PROPOSED AMENDMENTS TO THE DATA PROTECTION (JERSEY) LAW 2005 (S.R.6/2010): RESPONSE OF THE MINISTER FOR TREASURY AND RESOURCES

Ministerial Response: S.R.6/2010
 Ministerial Response required by 31st May 2010

Review title: Review into the Proposed Amendments to the Data Protection (Jersey) Law 2005 (“the 2005 Law”)

Scrutiny Panel: Corporate Services

Introduction

The Minister is pleased to have the opportunity to respond to the findings of the Corporate Services Scrutiny Panel.

Findings

	Findings	Comments
1	The wording of proposed amendment one causes concern to the Sub-Panel in its current context.	It is noted that the independent legal opinion did not identify any material legal concerns in this regard, stating that such a change would (in conjunction with other provisions) “enhance the data protection regime in Jersey. It is, therefore, adding to human rights protection, which is welcomed, not limiting it”. In the light of this, the appropriateness of the proposal is considered to be a matter of policy. The Minister and Commissioner welcome the Sub-Panel’s views.
2	The Sub-Panel acknowledges that a person can appeal against an information notice however, is concerned that not everyone is aware of data protection. If the Commissioner has an increased power in its current format to issue anyone with a notice, the public need to be aware that there is an appeal process.	Noted. Whilst the rights of appeal are always carefully explained to the recipient of an information notice in any event (in accordance with Article 43 of the 2005 Law), both the Minister and the Commissioner are mindful of the need to raise and maintain public awareness in all areas of data protection (subject to resource constraints).

3	<p>The Sub-Panel is concerned that costs would become apparent in Jersey, although on a lesser scale, and these concerns are enhanced further after learning that the Commissioner's Office consists of a very small team, particularly with the possibility of extending her remit.</p>	<p>Noted. It is the view of the Minister and the Commissioner that it is unlikely that the measure would have significant resource implications. There is a cogent argument that in a small jurisdiction it is the use (and not the existence) of statutory powers which is likely to have resource implications. It is understood that this power has been used very sparingly where it is available. The proposals are designed to improve the efficiency and resource allocation. Whilst details have been provided regarding resource implications, further work can be considered to extrapolate the number of times such a power might be likely to be used.</p>
4	<p>The Sub-Panel acknowledges Guernsey's decision in adopting an amendment which increases the Commissioner's information notice power because it has been focussed in one particular area – <i>The European Communities (implementation of Council Directive on Privacy and Electronic Communications) (Guernsey) Ordinance</i>.</p>	<p>Noted. The Minister and the Commissioner will be pleased to consider further whether this is an appropriate route to pursue, in the context of resource constraints.</p>
5	<p>The Sub-Panel acknowledges that the UK Act applies the seven years required experience and accepts that by removing it from the Data Protection (Jersey) Law 2005, could affect confidence levels in the Tribunal.</p>	<p>Noted.</p>
6	<p>The Sub-Panel is interested to note that there appears to be a discrepancy between Articles 60 and 55. A person may be liable to 2 years' imprisonment under Article 55, but a person may also be liable to 5 years' imprisonment under Article 60. Article 55 relates directly to an information notice whilst Article 60 may also potentially relate to an information notice.</p>	<p>Noted.</p> <p>The proposed amendment to Article 55 (up to 2 years' imprisonment and an unlimited fine) is consistent with the direction of policy in the UK.</p> <p>Article 60 (up to 5 years' imprisonment and an unlimited fine) is consistent with numerous other "false information" provisions within local legislation, e.g. –</p> <ul style="list-style-type: none"> ● Article 28(5) of the Financial Services (Jersey) Law 1998, ● Article 55(2) of the Competition (Jersey) Law 2005,

		<ul style="list-style-type: none"> • Article 54(5) of the Telecommunications (Jersey) Law 2002, • Article 38(3) of the Insurance Business (Jersey) Law 1996, • Article 71(3) of the Postal Services (Jersey) Law 2004 and • Article 89(3) of the Goods and Services Tax (Jersey) Law 2007. <p>A further review of penalties will be undertaken prior to any amendment being lodged.</p>
7	In comparison to the UK, the Sub-Panel has found that a “reasonable belief” Public interest test has not been added to the Data Protection (Jersey) Law 2005 under Article 55, to protect journalistic activity.	Noted. The Minister and the Commissioner will be pleased to consider further whether this is an appropriate route to pursue.
8	Evidence suggests that increasing the penalty to 2 years’ imprisonment for unlawful obtaining would act as a deterrent. It was also noted that penalties of imprisonment are incorporated into other Jersey legislation for Data Protection breaches.	Noted.
9	The Sub-Panel found a potential loophole regarding the amendment to include equipment found on premises, rather than ‘other material’ and Article 61 of the Data Protection (Jersey) Law 2005 which refers to any documents and other material.	The Minister and Commissioner are not satisfied that there is a potential loophole. There is no present intention to forfeit, destroy or erase equipment. There may be a need to forfeit, destroy or erase documents/ material.
10	The Sub-Panel noted the inequity between Health and Social Services and other businesses for subject access requests. It was also noted that Jersey should follow the EU Data Protection Directive 95/46EC which states that data should be supplied without excessive expense. During the transitional period when the fee was a maximum of £50 the Health Department used their discretion, on what seemed to the Sub-Panel, a fair basis.	Noted. The Minister is minded to accept a generic cap of £50 in relation to all subject access requests in line with the Directive.

11	The Sub-Panel accepts that there may be an issue of inequality between charities being exempt from the notification fee, and small businesses.	Whilst the Minister is open-minded regarding funding options in the future, an exemption for small businesses would have a significant impact upon resources.
12	Evidence from the Public Hearings suggested that there is a low level of awareness of Data Protection.	The Minister and the Commissioner are mindful of the need to raise and maintain public awareness in all areas of data protection (subject to resource constraints). It should be noted that obligations regarding compliance sit with the Data Controller as well as the Commissioner's office having a role in raising awareness. Notwithstanding the pressure of work in respect of existing complaints files, extensive public education work has been undertaken prior to and since the commencement of the 2005 Law.

Recommendations

	Recommendations	To	Accept/ Reject	Comments	Target date of action/ completion
1	The Sub-Panel would strongly recommend that the Commissioner reconsiders the wording and format of the draft legislation for amendment one as it currently stands.	T&R	Accept	The Minister and the Commissioner will be pleased to reflect further.	Q1 2011
2	The Sub-Panel recommends that the public are made more aware of the Data Protection Tribunal, and that it is more accessible to the public if an increase in power is to be adopted.	T&R	Accept	The Commissioner will continue to seek to raise awareness, subject to resource constraints.	Q1 2011
3	The Sub-Panel suggest additional research is carried out into the manpower and financial costs of the proposed amendments, which has been conducted in the UK.	T&R	Accept	The Minister and the Commissioner will be pleased to consider the scope of work in addition to that already undertaken.	Q1 2011

4	The Sub-Panel recommends that Jersey explores the possibility of adopting a Privacy and Electronic Communication Regulation.	T&R	Accept	The Minister and the Commissioner will be pleased to consider further whether this is an appropriate route to pursue, in the context of resource constraints.	2011
5	The Sub-Panel recommends that the 7 years' required experience for the President of the Tribunal should remain however, a degree of discretion should be allowed. It also suggests that the Law should provide, in addition to discretion, that whilst the person must be a locally qualified lawyer, the 7 years' experience need not be as a locally qualified lawyer.	T&R	Accept	Noted. The Minister welcomes the Sub-Panel's proposals and will be pleased to consider further.	Q1 2011
6	The Sub-Panel recommend that penalties for all breaches are clarified before an amendment to increase the maximum penalty for offences under Article 55 is lodged.	T&R	Accept	Noted. A further review of penalties will be undertaken prior to any amendment being lodged.	Q1 2011
7	It is strongly recommended that Jersey should follow the UK precedent by adding a "reasonable belief" public interest test to Article 55 of the Law.	T&R	---	Noted. The Minister welcomes the Sub-Panel's proposals and will be pleased to reflect further.	2011
8	The Sub-Panel recommend that there should be a public awareness campaign to address changes in the Data Protection Law. This could be beneficial because it could work in favour of the deterrence factor carried with some of the amendments.	T&R	Accept	Noted. The Minister welcomes the Sub-Panel's proposals and will be pleased to reflect further.	Q1 2011

9	The Sub-Panel recommend that the word “equipment” is included in Article 61 to avoid any potential discrepancies in a Court of Law. Furthermore, it recommends that the Law should be revisited to ensure there are no other incidences of potential loopholes.	T&R	Reject	The Minister is not satisfied that there is a potential loophole. There is no present intention to forfeit, destroy or erase equipment. There may be a need to forfeit, destroy or erase documents/material.	n/a
10	The Sub-Panel suggests that the maximum fee of £50 for subject access requests should be charged across the board. It further suggests that this should remain on a discretionary basis.	T&R	Accept	The Minister is minded to propose a generic cap of £50 in relation to all subject access requests.	n/a
11	The Sub-Panel considers charities being exempt from the notification fee as acceptable, however recommends that this is reviewed in the context of small businesses.	T&R	Reject	Whilst the Minister is open-minded regarding funding options in the future, an exemption for small businesses would have a significant impact upon resources.	n/a
12	The Panel recommends that if the amendments were to be adopted, in particular amendment one, the general public and businesses need to be fully aware so that they can comply with the Law.	T&R	Accept	The Commissioner will continue to seek to raise awareness, subject to resource constraints.	Q1 2011

Conclusion

The Minister offers a qualified welcome to the findings of the Corporate Services Scrutiny Panel and is pleased to accept the majority of its recommendations and proposals.