

# STATES OF JERSEY



## DRAFT COMMISSIONER FOR STANDARDS (JERSEY) LAW 201-

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Lodged au Greffe on 23rd August 2016  
by the Privileges and Procedures Committee

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STATES GREFFE





Jersey

## **DRAFT COMMISSIONER FOR STANDARDS (JERSEY) LAW 201-**

### **European Convention on Human Rights**

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

In the view of the Chairman of the Privileges and Procedures Committee, the provisions of the Draft Commissioner for Standards (Jersey) Law 201- are compatible with the Convention Rights.

Signed: **Connétable L. Norman of St. Clement**

*Chairman, Privileges and Procedures Committee*

Dated: 18th August 2016

## REPORT

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### Background

This draft Law will give effect to the ‘in principle’ decision of the States, taken on 19th November 2013, that a new position of Commissioner for Standards should be established in Jersey, principally to undertake initial investigations into allegations that a States Member has breached the Code of Conduct for Elected Members.

The report accompanying the ‘in principle’ proposition ([P.107/2013](#)) set out the reasons why PPC considered that this new post would be beneficial –

*“The Committee considers that one of the most significant problems with the current procedures for investigating alleged breaches of the Code of Conduct is that PPC is involved throughout the entire process. This means that the Committee must initially consider whether there are grounds to investigate a complaint and, if it thinks that there are, it must then investigate the matter itself and make adjudication at the end of the process. If a complaint is upheld, the Committee also needs to decide what sanction to recommend when making the adjudication.*

*It can, in practice, be difficult for PPC to deal with the different phases of an investigation separately. For example, in making an initial decision on whether there are grounds to accept a complaint and begin an investigation, it is almost impossible for the Committee not to stray into the actual investigation and adjudication stages, and this is clearly unsatisfactory. In addition, as indicated in the Consultation Document,<sup>1</sup> political considerations can interfere in the Committee’s deliberations as it is clearly difficult, in practice, for any group of politicians to set aside all political allegiances and views when considering a complaint about a political colleague. There are often criticisms as a result that the process is unfair and not impartial.*

*PPC believes that the evidence from other jurisdictions, as summarised in the Consultation Document, shows that a post of independent Commissioner for Standards works extremely well in other parliaments. A Commissioner is able to undertake the initial investigation into a complaint in an entirely objective and impartial way. He or she can interview the various parties as required, can call for documents and other evidence, and can then make a recommendation on whether or not he or she considers that the Code has been breached. In some cases, an informal resolution of a complaint is possible if the Commissioner is able to agree with the member concerned that a complaint can be resolved by an apology or through some other action.*

*It is important to stress that the Commissioners in other jurisdictions do not make the final decision in relation to a complaint. In order to ensure that the important principle of internal self-regulation of parliaments is respected, the Commissioners simply report their findings and recommendations to the relevant parliamentary committee responsible for standards. This committee then makes the formal decision on the case and decides whether to recommend any sanction if a complaint is upheld. PPC was nevertheless reassured to note that it is almost unheard of in other jurisdictions for the committees to do anything other than ratify the Commissioner’s recommendations. Once the Commissioner has undertaken a thorough and objective investigation it would, in practice, be very difficult for a*

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<sup>1</sup> [R.34/2012](#)

*parliamentary committee to attempt to ‘second-guess’ the outcome of the Commissioner’s work. As a result the system provides, in practice, a robust independent system of investigation into complaints against elected members without affecting the important principle of internal self-regulation by elected members to avoid any interference in the process by the courts.”*

The first version of this draft Law<sup>2</sup> was debated in the States on 1st December 2015. A number of questions were raised, including –

- Would the Commissioner be able to adjudicate on breaches of the Ministerial Code as well as on breaches of the Code of Conduct for Elected Members and, if not, why was a distinction being made?
- Was the post really necessary, and could the cost of a new post be justified at a time when savings were being made across the public sector?
- Should the remit of the Commissioner extend to the conduct of the unelected members?
- Were the penalties introduced by the draft Law set at the right level?

In view of these matters, the Assembly moved to the next item of business without reaching a decision on whether or not to adopt the draft Law, which was later withdrawn. PPC has now considered the questions which were raised in the December debate and the Law Draftsman’s Office has prepared a revised version of the draft Law, which PPC requests the Assembly to adopt.

#### **Scope of the Commissioner’s remit**

Most of the questions raised with the original version of the draft Law concerned the scope of the Commissioner’s remit. PPC wrote to the Chief Minister to ask for his views on enabling the Commissioner to consider complaints relating to breaches of the Code of Conduct and Practice for Ministers and Assistant Ministers<sup>3</sup> in addition to those relating to the Code of Conduct for Elected Members. He replied as follows –

*“When the Council of Ministers considered this as part of the updating of the Code of Conduct and Practice for Ministers and Assistant Ministers (the “ministerial code”) the consensus was that it would be helpful if the Commissioner could investigate matters arising under the ministerial code. However, such matters are invariably complex, and the debate on the 1<sup>st</sup> December 2015 was instructive in many ways in highlighting these complexities.*

*Some of the functions discharged by elected members in their capacity as members of our Assembly, and as members of the executive, or for that matter, as members of scrutiny, are distinct and should remain so, but similar principles underpin each area.*

*In particular, I noted your [the Chairman’s] opening comments in the debate. You were clear that the establishment of a Commissioner to investigate conduct nevertheless reserves for the Privileges and Procedures Committee (PPC) the judgement as to whether a breach has taken place under the code of conduct for elected members (“the elected members’ code”). The same principle applies to the ministerial code, which enables the Chief Minister to commission an investigation, but reserves for the Chief Minister the decision as to whether the code has been breached. So long as this principle is*

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<sup>2</sup> [P.120/2015](#)

<sup>3</sup> [R.11/2015](#)

*maintained, I am content with a change that formally enables the Chief Minister to ask the proposed Commissioner for Standards to undertake an investigation. However, that investigation should be at the instigation of the Chief Minister, and should only relate to personal conduct, not political conduct.*

*As an aside, there is also a further important distinction, which was perhaps not clearly understood in the debate, in that members of the executive can be challenged in the Courts for their decisions, and therefore we must be clear that the ministerial code does not concern the decisions that Ministers make, and is solely one of conduct. This is likely evident to PPC, but all the same, I feel we need to make this point to Members when we come to debate.”*

There is, therefore, a consensus that there should be a role for the Commissioner for Standards in relation to the ministerial code: the question is one of how significant that role should be. The Chief Minister envisages the Commissioner being on hand to undertake an investigation of an alleged breach of the code, if asked. PPC is of the view that it would be more appropriate for alleged breaches of the ministerial code to be treated in the same way as alleged breaches of the elected members’ code. In other words, the Commissioner could receive complaints of alleged breaches of the ministerial code, investigate them, and report his or her findings to PPC. This is particularly important because, under the current system, the Chief Minister has sole responsibility for deciding whether or not to entertain a complaint, to initiate an investigation, to determine the outcome and to decide on the appropriate sanction. PPC’s view is that the involvement of an apolitical, independent and impartial person at the heart of the process would strengthen public confidence in the ministerial code and the political system as a whole. This change would also ensure that there was effective parliamentary oversight of ministerial conduct, reflecting the fact that Ministers are directly appointed by, and accountable to, the Assembly.

PPC envisage the need for a concordat between the Commissioner, PPC and the Chief Minister about how allegations of infringements of the ministerial code would be dealt with in practice, particularly in relation to matters which could fall under either the ministerial or the elected members’ code. This would replace Appendix 2 of the existing ministerial code, which deals with procedure in relation to alleged breaches of the code.

The Chief Minister rightly observes that the ministerial code deals with matters of conduct rather than the substantive decisions taken by ministers. The appointment of a Commissioner for Standards and the inclusion of the ministerial code within that position’s remit does not provide a new mechanism for challenging decisions taken by Ministers, additional to existing procedures for challenge in the Assembly or in court.

PPC also considered whether the Commissioner’s remit should extend to the codes of practice for Scrutiny Panels and for the Public Accounts Committee (PAC) drawn up under Standing Orders, which are currently under review by the Chairmen’s Committee. That Committee initially expressed interest in the Commissioner’s remit encompassing the codes of practice, but its final view, following further discussion, including with the Greffier of the States, was that this would be undesirable. The codes of practice are of a fundamentally different nature from the ministerial and elected members’ codes in that they deal with the practices and procedures of the Assembly rather than the conduct of individuals. Introducing an element of independent regulation of the Assembly’s own procedures would have far-reaching implications for how the Assembly operated and would almost certainly be an unprecedented step for a Commonwealth legislature. Alleged breaches of the Scrutiny

and PAC codes of conduct would be political matters which can be dealt with by PPC or, if necessary, by the Assembly itself without the need for external investigation.

It has also been suggested that the Commissioner's remit should include the conduct of the unelected members of the Assembly (the Bailiff/Deputy Bailiff, Lieutenant-Governor, Dean, Attorney General and Solicitor General). The case for making this change has not yet been made. Furthermore, there is no current means by which this could be achieved. The elected members' code of conduct explicitly relates to elected members, for example by referring to the representation of constituents, and cannot be applied to posts which are not elected. In some cases, the unelected members are already subject to rules of conduct, for example those which apply to members of the legal profession. There would also be constitutional implications in seeking to apply a code of conduct to Crown appointees, which would require careful examination.

### **The draft Law**

This draft Law will establish the post of Commissioner to investigate breaches of the elected members' and ministerial codes. The Commissioner will be appointed by PPC but before finalising the appointment PPC will be required to give notice to the States of the proposed appointment to allow time for other members to raise any queries or concerns. The term of appointment will be for up to 5 years with possible renewal up to a maximum term of appointment of 9 years, in accordance with Appointments Commission guidelines.

Article 5 of the Law sets out the grounds on which the appointment can be revoked by the States. As the Commissioner could occasionally be producing reports that are critical of the conduct of an elected member it is important that safeguards are put in place in the Law to limit the circumstances in which States members can seek to revoke the appointment. A proposition for the revocation of the appointment must therefore be lodged either by PPC or by a group of at least 12 States members (namely the proposer and 11 other signatories). Article 5(3) specifies a number of grounds that can be relied on to justify the lodging of a proposition to revoke the appointment. In the interests of fairness the Commissioner must be given a reasonable opportunity to comment on any draft proposition to revoke his or her appointment and any comments the Commissioner has must be included in the proposition.

Article 7 states that the States must provide the Commissioner with the necessary resources to undertake his or her duties but in practice PPC does not anticipate that there will be any significant new resource implications. At present officers of the States Greffe provide independent and impartial assistance to PPC in handling any complaints made against elected members and it is anticipated that all administrative support for the Commissioner would be provided in the same way.

Article 9 sets out how the Commissioner will undertake his or her duties. The Commissioner will undertake the initial investigation into any alleged breach of the two codes and then make a report to PPC with recommendations so that the committee can make the final adjudication on the matter. In the case of complaints relating to alleged breaches of the ministerial code, the proposed Standing Order changes provide the committee with the option of presenting the report to the States without taking further action itself. It is envisaged that this option might be chosen in situations where the Chief Minister is best placed to take any steps arising from the Commissioner's report.

It is anticipated that, in practice, the Commissioner will normally only begin an investigation if a complaint from a third party is received but Article 9(1)(b) does allow the Commissioner to begin an investigation of his own volition. This provision could be used, for example, if there was clear evidence in the public domain of a

possible breach that the Commissioner was aware of but where no-one had taken the initiative to make a complaint. The restrictions on the nature of complaints that can be accepted that are currently set out in Standing Order 156(2) are replicated in Article 9(3), namely that the Commissioner cannot accept anonymous, frivolous, vexatious or unsubstantiated complaints and he or she cannot accept complaints from anyone who is not a States member about matters that happened during a States meeting. The last restriction is an important protection of the principles of parliamentary privilege to ensure that members are free to speak freely in the Chamber without being subject to any external review or challenge.

Article 9(1)(d) allows the Commissioner to give advice on matters relating to the conduct of members and ministers and to suggest amendments to the codes if he or she believes these are appropriate.

Article 11 explains how the Commissioner will have to prepare a statement of the way in which he or she will undertake the role. As explained in P.107/2013 PPC does not consider it would be appropriate for the legislation to be over-prescriptive in requiring the Commissioner to undertake his or her duties in a particular way but it will be important for members and others to be aware of the procedures and, for that reason, the procedures drawn up by the Commissioner will be presented to the States by PPC. In a similar way the Commissioner’s annual report will, under the provisions of Article 12, be presented to the States by PPC.

Part 4 of the draft Law sets out the powers of the Commissioner and the offences that a person may commit for failure to co-operate with the Commissioner. If the Commissioner is to be able to undertake his or her work effectively it will be important that powers exist to require people to appear and to produce relevant documents. The human rights notes on this draft Law, Articles 14, 15 and 16, explain the offences and penalties that apply if a person fails to co-operate.

If the draft Law is adopted there will need to be consequential changes made to Standing Orders to reflect the new functions of the Commissioner and to take away from PPC the current requirement for the Committee to undertake investigations. The Committee’s role in future will be limited to adjudicating on the conclusions made by the Commissioner. For members’ information, the draft amendments to Standing Orders that will be required have been circulated separately, and these will be lodged and debated once the Law, if adopted by the States, has received Royal Assent.

**Financial and manpower implications**

PPC does not consider that it would be reasonable or appropriate to expect this important work to be undertaken on a purely honorary basis, and considers that a daily honorarium should therefore be payable.

Since the debate in December 2015, research has been undertaken into the payment rate of the Standards Commissioners in the UK and Wales, as well as into the rates paid to comparable office-holders in Jersey. This information, which is set out below, is compatible with the original estimate provided of a daily rate of £300 to £400.

Jurisdiction	Position	Rate
UK	Standards Commissioner	£517 <sup>4</sup>
Wales	Standards Commissioner	£51 <sup>5</sup>

<sup>4</sup> Rate per day.

<sup>5</sup> Rate per hour plus an additional monthly fixed retainer premium of £434.



In Jersey, there are other Commissioners, Shadow Board members and Tribunal members appointed, who work for the benefit of the people in Jersey. Details of their remuneration rates have been included below.

<b>Jersey office-holders</b>	<b>Position</b>	<b>Daily Rate</b>
Data Protection Commissioner's Office	Data Protection Commissioner	£334 <sup>6</sup>
Appointments Commission	Appointments Commissioner Chairman	£1,000
	Appointments Commissioner	£333 <sup>7</sup>
Jersey Employment and Discrimination Tribunal	Chairman	£736
	Deputy Chairman	£552
	Lay Member	£97
Social Security Tribunal	Chairman/Deputy Chairman	£440
	Medical practitioner	£440
	Lay Member	£102
Social Security Medical Appeal Tribunal	Chairman/Deputy Chairman	£440
	Medical practitioner	£440
	Lay Member	£102
Income Support Medical Appeal Tribunal	Chairman/Deputy Chairman	£440
	Medical practitioner	£440
	Lay Member	£102
Board of Skills Jersey	Chairman	£750
	Members	£500
Board of Ports of Jersey	Chairman	£1,000
	Member	£625

The number of complaints which the Commissioner will deal with is likely to be relatively small and, unless there were to be a sudden increase, the total annual cost should not exceed some £8,000 to £10,000. PPC is willing to find this sum within the existing States Assembly budget. As indicated above the Commissioner would be provided with administrative support through the States Greffe, which currently deals with the administration of complaints for PPC.

### **Human Rights**

The notes on the human rights aspects of the draft Law in **Appendix 2** to this report 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.

<sup>6</sup> Basic pay only daily rate. The Data Protection Commissioner currently receives £87,202 in Basic Pay plus a non-pensionable allowance of £15,000 in recognition of Pan Island responsibilities.

<sup>7</sup> The States of Jersey currently employs three Appointments Commissioners on a flat rate of £5,000 per annum. Each Appointment Commissioner works 0.0576 FTE.



Jersey

## DRAFT AMENDMENT (No. XX) OF THE STANDING ORDERS OF THE STATES OF JERSEY

### REPORT

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#### Explanatory Note

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These amendments to the Standing Orders of the States of Jersey are in consequence of the establishment of the office of Commissioner for Standards under the Commissioner for Standards (Jersey) Law 201-.

*Amendment 1* is an interpretation provision.

*Amendment 2* defines “Commissioner for Standards” with reference to the Commissioner for Standards (Jersey) Law 201-.

*Amendment 3* amends standing order 156 to provide that any person can complain to the Commissioner for Standards (“Commissioner”) that there has been a breach of the code of conduct for elected members of the States or breach of the code of conduct and practice for Ministers and Assistant Ministers. The code of conduct for elected members of the States is set out in Schedule 3 to the Standing Orders. The code of conduct and practice for Ministers and Assistant Ministers is referred to in Article 18(3A) of the States of Jersey Law 2005. This amendment replaces the existing provision that allows a person to make a complaint relating to the code of conduct for elected members of the States to the Privileges and Procedures Committee (“PPC”). The existing provisions in standing order 156 setting out the circumstances in which a complaint must be refused are removed as equivalent provisions relating to complaints to the Commissioner are now in Article 9 of the Commissioner for Standards (Jersey) Law 201-. Those circumstances are where the complaint is by a non-States member about conduct of a States member during a States meeting, is anonymous or is considered to be frivolous, vexatious or unsubstantiated.

*Amendment 4* revokes standing order 157 which sets out the procedures for investigation of a complaint by the PPC.

*Amendment 5* substitutes the existing standing order 158 so as to make provision for the action the PPC must take following a report to it by the Commissioner under the Commissioner for Standards (Jersey) Law 201- of the Commissioner’s investigation that there has been a breach of one of the codes referred to above. Under Article 9 of that Law, the report must include the Commissioner’s conclusions and the action, if any, recommended by the Commissioner. Such conclusions and recommendations are

not binding on the PPC. The amendment to standing order 158 requires the PPC to review the Commissioner's report where the report concerns the code of conduct for elected members and give the person whose action is investigated the right to address the PPC accompanied, if the person wishes, by someone of his or her choice. The PPC must, on the basis of the information before it, form its own opinion as to whether the relevant code has been breached and what action, if any, it thinks should be taken. The PPC must inform the persons concerned of its opinion with reasons and any action it thinks should be taken and, if it wishes, may report on such matters to the States. Where the Commissioner's report concerns the code of conduct and practice for Ministers and Assistant Ministers, the PPC has a choice: it can review the report and take the same steps as it would take where the report concerns the code of conduct for elected members or it can simply make the report available to the States.

*Amendment 6* sets out the title of these Amendments to Standing Orders and provides that they will come into force on the same date that the Commissioner for Standards (Jersey) Law 201- comes into force.



**DRAFT AMENDMENT (No. XX) OF THE  
STANDING ORDERS OF THE STATES OF JERSEY**

**Arrangement**

**Amendment**

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Jersey

## DRAFT AMENDMENT (No. XX) OF THE STANDING ORDERS OF THE STATES OF JERSEY

*Made* [date to be inserted]  
*Coming into force* [date to be inserted]

THE STATES, in pursuance of Article 48 of the States of Jersey Law 2005, have made the following amendments to the Standing Orders of the States of Jersey –

### 1 Interpretation

In these Amendments, a reference to a standing order by number is a reference to the standing order of that number in the Standing Orders of the States of Jersey.

### 2 Standing order 1 amended

In standing order 1(1) after the definition “cohabitee” there shall be inserted the following definition –

“ ‘Commissioner for Standards’ has the same meaning as in the Commissioner for Standards (Jersey) Law 201-;”.

### 3 Standing order 156 substituted

For standing order 156 there shall be substituted the following standing order –

#### “156 Complaints to the Commissioner for Standards

Any person may complain to the Commissioner for Standards that an elected member has breached the code of conduct in Schedule 3 or that a Minister or Assistant Minister has breached the code of conduct and code of practice referred to in Article 18(3A) of the Law.”.

### 4 Standing order 157 revoked

Standing order 157 shall be revoked.

**5 Standing order 158 substituted**

For standing order 158 there shall be substituted the following standing order –

**“Outcome of investigation by the Commissioner for Standards**

- (1) When the Commissioner for Standards has reported the outcome of an investigation to the PPC under Article 9(1)(c) of the Commissioner for Standards (Jersey) Law 201- in relation to the code of conduct for elected members of the States set out in Schedule 3, the PPC –
  - (a) shall review the Commissioner’s report;
  - (b) shall give the elected member whose act has been investigated the right to address the PPC, accompanied, if the elected member wishes, by a person of his or her choice;
  - (c) shall form an opinion, on the basis of the information before it, as to whether or not the elected member has breached the code of conduct and what action, if any, should be taken;
  - (d) shall inform the elected member of its opinion with reasons and what action, if any, it thinks should be taken; and
  - (e) may report its opinion and reasons, and any action it thinks should be taken, or which has been taken, to the States.
- (2) When the Commissioner for Standards has reported the outcome of an investigation to the States under Article 9(1)(c) of the Commissioner for Standards (Jersey) Law 201- in relation to the code of conduct and code of practice for Ministers and Assistant Ministers referred to in Article 18(3A) of the Law, the PPC shall –
  - (a) follow the procedure set out in sub-paragraphs (a) to (e) of paragraph (1) in relation to that report; or
  - (b) make the report of the Commissioner for Standards available to the States.
- (3) The report by the PPC (whether or not made under paragraph (2)(a)) referred to in paragraph (1)(e) may be presented to the States in writing or made orally by the chairman of the PPC in a statement.”

**6 Citation and commencement**

These Amendments may be cited as Amendment (No. XX) of the Standing Orders of the States of Jersey and shall come into force on the same date as the Commissioner for Standards (Jersey) Law 201- comes into force.

**Human Rights Notes on the  
Draft Commissioner for Standards (Jersey) Law 201-**

These Notes have been prepared in respect of the Draft Commissioner for Standards (Jersey) Law 201- (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 will establish the office of Commissioner for Standards for the purpose of investigating breaches of the code of conduct for elected members of the States of Jersey and breaches of the code of conduct for elected members of the States (the “**Codes**”) and for the purpose of other matters in connection with the Codes.

Article 6(2) ECHR – The presumption of innocence

Article 6(2) ECHR provides that “everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.” Article 6(2) ECHR is engaged by Article 14(3) of the draft Law which provides for a defence to the offence of failing to appear before the Commissioner, failing to answer questions or failing to provide information to the Commissioner. The defence to that offence is based around a reverse burden of proof, i.e. that it is for the person charged to show that there was a reasonable excuse for the failure or refusal.

Article 6(2) ECHR does not prohibit statutory provisions which transfer the burden of proof to the accused to establish the defence, provided the overall burden of establishing guilt remains with the prosecution. In the case of Article 14(3), the legal burden of proof properly falls on the accused because all information relevant to the defence would be known to him or her and not to the prosecutor. Balanced against the need to maintain and encourage the proper conduct of States Members and Ministers and the level of the penalty under Article 14(2) of the draft Law, (a level 4 fine), Article 14(3) is compatible with the ECHR.

Article 8 ECHR – The right to respect for private life

Powers to require production of records and information

Article 8(1) ECHR is engaged by the power of the Commissioner, in the exercise of his or her functions, to summon a person to produce a specified record (Article 13(1)(a)) or to require a person who has access to a record to provide the information contained in it to the Commissioner (Article 13(1)(c)). The functions of the Commissioner are investigative in nature and focus on the standards of conduct of States Members and Ministers (see Article 9(1)). Those standards (as set out in the Codes), amongst other things, focus on the personal conduct of States Members and Ministers and conflicts between public office and private life.

Personal data, such as names and addresses, is protected under Article 8(1) ECHR as part of the subject’s private life. Moreover, the right to home life under Article 8(1) ECHR covers a right to respect for correspondence and the confidentiality of private

communications. An obligation to provide personal data and the storage of personal data as part of an investigation will amount to an intrusion with the Article 8 ECHR right to private life. Accordingly, to the extent that the powers of the Commissioner under Article 13(1) require the production of personal records, such as correspondence, or other information that contains personal data, such as names and addresses, it is possible that there will be an interference with the Article 8(1) ECHR right.

Any interference with the Article 8(1) ECHR right must be justified under Article 8(2) ECHR, meaning it must be (a) in accordance with the law; (b) in pursuit of one of the legitimate aims set out in Article 8(2) ECHR; and (c) necessary in a democratic society. ‘Necessity’ requires the identification of a pressing social need and the existence of “relevant and sufficient” reasons to justify the interference at issue. A measure will only be proportionate to the legitimate aim if supported by sufficiently persuasive reasons.

The nature of interference constituted by the power to require the production of records in the draft Law would be deemed to be ‘in accordance with the law’; that power is contained in a provision which has a basis in domestic law and can be viewed as sufficiently precise and accessible, therefore being foreseeable. The purpose of the Article 13(1) powers are to ensure that the Commissioner can gain access to information that will enable a report to be prepared on a possible breach of the Codes, and, for example, the purpose of the code of conduct for elected members of the States is “to assist elected members in the discharge of their obligations to the States, their constituents and the public of Jersey”. The rationale for the Article 13(1) powers can, therefore, be linked to enabling oversight of States Members and their democratic accountability, which in turn can be said to come within the protection of morals and national security interest qualifications in Article 8(2) ECHR.

‘Necessary in a democratic society’ requires there to be a pressing social need for the interference in question. In the present case, powers to requisition information, documents and records are ‘necessary’ for ensuring that the Commissioner has access to the information required to prepare reports and deal with complaints and, in turn, for encouraging compliance with the Codes. Compliance with the Code, and regulation to encourage that compliance, can be regarded as a ‘pressing social need’. Given the legitimate aims concerned and the necessity for ensuring compliance with the Codes, the interference with the Article 8 ECHR right is proportionate, in principle. There will be a need for the Commissioner, in practice, to exercise the powers in Article 13 in a proportionate manner.

An important aspect in determining what is ‘necessary in a democratic society’ is the identification of procedural safeguards which mitigate the exercise of powers interfering with private life. Safeguards ensure that a state remains within its margin of appreciation in fixing the applicable regulatory framework. The European Court of Human Rights has enunciated a list of safeguards which provide adequate protection against abuse of the Article 8 right, one of which was the requirement for the Law to contain explicit and detailed provisions about how the powers interfering with Article 8 ECHR could be exercised.

In the draft Law, the purpose for the exercise of the Article 13(1) powers are clearly stated as being for the exercise of the functions listed in Article 9(1). Linking the requisition power to such functions should temper any frivolous or unnecessary exercise of the powers. In addition, there are a number of other safeguards against excessive operation of the powers: stating that the records may be retained or copied; a list of retained records to be provided to the person from whom they were obtained; providing for how long records may be retained; and ensuring copies of records are



provided (see Article 13(2)–(5)). Moreover, the inclusion of a provision in Article 17 of the draft Law stating that nothing in the Law requires a person to produce a record or to provide information that would otherwise be subject to legal privilege is a further procedural safeguard against excessive interference with the Article 8 ECHR right.

Right to respect for reputation

The draft Law also engages the right to reputation which has been held to fall under Article 8 ECHR. A person’s reputation, even if criticised in a public debate, forms part of his or her personal identity and psychological integrity and therefore also falls within the scope of his or her “private life”. As a result, to the extent that any investigation or the decisions of the Commissioner become widely publicised, the subject or another person affected by that investigation could argue an interference with his or her right to respect for his private life and, in particular, his right to respect for reputation.

That interference with the Article 8(1) ECHR right would be justified, however, as there is a legitimate public interest for the Public in knowing the outcome of investigations into a complaint about a States Member’s or Minister’s conduct, and the investigative and reporting powers of the Commissioner in this respect are not disproportionate to that end. Indeed, the Commissioner has the power under Article 9(4) to determine the procedure of any investigation and, if there is particular sensitivity surrounding private information in any particular case, it would be for the Commissioner to conduct the procedural aspects of the investigation accordingly in view of the Article 8 ECHR right. However, any such sensitivity would be balanced against the need for a proper investigation to be carried out.

## Explanatory Note

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This Law would establish the office of Commissioner for Standards for the purpose of investigating breaches of the code of conduct for elected members of the States of Jersey and breaches of the code of conduct and code of practice for Ministers and Assistant Ministers.

### **PART 1 – INTERPRETATION**

*Article 1* is an interpretation provision. It defines “code” to mean any of the following –

- (a) the code of conduct for elected members of the States set out in Schedule 3 to the Standing Orders of the States of Jersey;
- (b) the code of conduct and code of practice for Ministers and Assistant Ministers referred to in Article 18(3A) of the States of Jersey Law 2005.

### **PART 2 – APPOINTMENT AND ADMINISTRATION**

*Article 2* establishes the office of Commissioner for Standards (referred to in this Law as “Commissioner”).

*Article 3* provides for the Privileges and Procedures Committee (“PPC”) to appoint a person to the office of Commissioner. The PPC must give 2 weeks’ notice to the States of its intention to make such an appointment.

*Article 4* provides for the person appointed to the office of Commissioner to be appointed for an initial fixed term of up to 5 years on such terms as may be agreed with the PPC. This term may be extended so that the total period of the appointment does not exceed 10 years. A person cannot be appointed to the office more than once.

*Article 5* sets out the circumstances and grounds on which the States may revoke the appointment of a Commissioner. A proposition for revocation with an accompanying report must be lodged either by the PPC, or by a States member and signed by at least 11 other States members, and the person concerned must have been given a reasonable opportunity in advance to consider the report and prepare a written statement in response.

*Article 6* sets out the circumstances in which a vacancy in the office of Commissioner arises. These circumstances include where the appointment expires, the States revoke an appointment under Article 5, notice of resignation is given or the person is convicted of certain offences.

*Article 7* makes provision for the States to provide the Commissioner with such support as may be reasonably required for the purpose of discharging his or her functions, for example administrative support, staff and accommodation.

*Article 8* provides that the Commissioner is not liable in damages for anything done whilst acting in the course of his or her office unless acting in bad faith or in contravention of the European Convention on Human Rights.

### **PART 3 – POWERS AND DUTIES**

*Article 9* sets out the Commissioner’s functions. The Commissioner’s main function is to investigate suspected breaches of a code (defined in *Article 1*) by States members, whether arising from complaints or otherwise, and to report to the PPC in respect of a breach of the code of conduct for elected members and code for Ministers and

Assistant Ministers. Certain complaints are not covered. These are complaints by non-States members about conduct of States members during States meetings, anonymous complaints and complaints which the Commissioner considers are frivolous, vexatious or unsubstantiated or which are about breaches alleged to have taken place more than one year before this Article comes into force. The Commissioner's conclusions and recommendations in his or her report are not binding on the PPC.

*Article 10* makes provisions about the Commissioner's independence. The Commissioner must not be directed whether or not to carry out an investigation referred to in *Article 9* and may seek legal advice from the Attorney General on any subject relating to any of his or her functions.

*Article 11* requires the Commissioner to prepare and publish a statement of how he or she proposes to exercise the Commissioner's functions and *Article 12* requires the Commissioner to prepare an annual report to the PPC and lay it before the States.

#### **PART 4 – ENFORCEMENT**

*Article 13* makes provision for the Commissioner to require persons to appear before him or her, provide information and produce any written documents.

*Article 14* makes it an offence for a person, when required to do so under *Article 13*, to fail to appear before the Commissioner, to produce a record, to give information, to state where a record is or to answer untruthfully or at all any question. A person guilty of an offence under this Article is liable to a fine of level 4 on the standard scale, that is a maximum fine of £5,000. It is a defence to show that there was a reasonable excuse for the failure or refusal.

*Article 15* makes it an offence to falsify a record such as by destroying or altering it with intent to deceive or knowingly to provide information that is false, misleading or incomplete in a material way. A person guilty of an offence under this Article is liable to a penalty of a fine up to an unlimited amount and imprisonment for a maximum term of 5 years in connection with an offence relating to records or to a fine up to an unlimited amount and imprisonment for a maximum term of 2 years for the offence of knowingly providing false, misleading or incomplete information.

*Article 16* makes it an offence to hinder or obstruct a person in exercise of his or her functions under this Law. Such a person is liable to a maximum term of imprisonment for 6 months and to a fine of level 4 on the standard scale, that is a maximum fine of £5,000.

#### **PART 5 – MISCELLANEOUS AND CLOSING**

*Article 17* makes provision so that no person is required to produce a record or to give information that would be subject to legal professional privilege.

*Article 18* gives the States power to amend by Regulations any enactment in consequence of this Law.

*Article 19* sets out the title of the Law and provides that it will come into force by an Appointed Day Act.





Jersey

## DRAFT COMMISSIONER FOR STANDARDS (JERSEY) LAW 201-

### Arrangement

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Jersey

## **DRAFT COMMISSIONER FOR STANDARDS (JERSEY) LAW 201-**

**A LAW** to establish the office of Commissioner for Standards and to make provision for connected purposes.

*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 –

### **PART 1**

#### **INTERPRETATION**

##### **1 Interpretation**

In this Law, unless the context otherwise requires –

“code” means any of the following as the case requires –

- (a) the code of conduct for elected members of the States set out in Schedule 3 to the Standing Orders of the States of Jersey<sup>1</sup>; or
- (b) the code of conduct and code of practice for Ministers and Assistant Ministers referred to in Article 18(3A) of the States of Jersey Law 2005<sup>2</sup>;

“Commissioner” means the Commissioner for Standards established under Article 2;

“independently audited States body” has the same meaning as in Article 1 of the Public Finances (Jersey) Law 2005<sup>3</sup>;

“lodge” has the same meaning as in Article 1(1) of the States of Jersey Law 2005;

“PPC” means the Privileges and Procedures Committee established under the Standing Orders of the States of Jersey;

“States’ employee” has the same meaning as in Article 2 of the Employment of States of Jersey Employees (Jersey) Law 2005<sup>4</sup>;

“States funded body” has the same meaning as in Article 1 of the Public Finances (Jersey) Law 2005.

## **PART 2**

### **APPOINTMENT AND ADMINISTRATION**

#### **2 Office of Commissioner**

There shall be an office of Commissioner for Standards.

#### **3 Appointment of Commissioner**

- (1) The PPC shall appoint a person to the office of Commissioner.
- (2) Before the PCC appoints a person to the office of Commissioner, the PPC must present to the States notice of its intention to make the appointment at least 2 weeks before the appointment is made.
- (3) A person, on being appointed to the office of Commissioner –
  - (a) shall cease to hold any employment as a States’ employee; and
  - (b) shall cease to hold any other office or employment (whether or not for remuneration) with any States funded body or independently audited States body.
- (4) A person, whilst holding the office of Commissioner, shall be disqualified from holding any employment or office described in paragraph (3).
- (5) The PPC may appoint a person to carry out the duties of the office of Commissioner while –
  - (a) the office is vacant; or
  - (b) the holder of the office is unable to perform the functions of the office.
- (6) The PPC must report an appointment under paragraph (5) to the States at the first reasonable opportunity.

#### **4 Terms and conditions of appointment**

- (1) Subject to paragraphs (2), (3) and (4), and any other provision of this Law, a person appointed to the office of Commissioner shall hold the office on such terms and conditions as are agreed between the person and the PPC.
- (2) A person shall be appointed to the office of Commissioner for a fixed term of up to 5 years.



- (3) The appointment may be extended for one or more fixed terms provided that the total length of the appointment, including the initial appointment under paragraph (2), does not exceed 9 years.
- (4) A person cannot be appointed to the office of Commissioner more than once.

## **5 Revocation of appointment**

- (1) The States may revoke the appointment of a person to the office of Commissioner –
  - (a) on a proposition lodged by the PPC; or
  - (b) on a proposition signed by at least 11 members of the States in addition to the member of the States lodging the proposition.
- (2) The States shall debate the proposition in camera.
- (3) The proposition must allege one of the following grounds for revocation, namely, that the person holding the office of Commissioner –
  - (a) has not carried out the duties of the office in a competent manner;
  - (b) is incapacitated either mentally or physically from carrying out the duties of the office;
  - (c) has neglected to carry out all or any of the duties of the office;
  - (d) has failed to comply with any term or condition of his or her appointment;
  - (e) has indulged in dishonourable conduct;
  - (f) has, without the approval of the PPC, taken leave of absence not provided for by his or her terms and conditions of appointment; or
  - (g) has been convicted of an offence and, by virtue of the conviction, has shown himself or herself not to be a fit and proper person to continue to hold office.
- (4) The report accompanying the proposition must set out details of the evidence to be relied upon to support the allegation.
- (5) The proposition cannot be lodged unless the person holding the office of Commissioner –
  - (a) has been given a copy of the report mentioned in paragraph (4); and
  - (b) has been given such reasonable opportunity as the circumstances allow to prepare a written statement in respect of the evidence mentioned in the report.
- (6) Any statement prepared in accordance with paragraph (5)(b) must accompany the proposition when it is lodged.
- (7) When the proposition has been lodged the PPC may suspend the Commissioner from office if the proposition is one to which paragraph (1)(a) refers.
- (8) If the proposition –
  - (a) is withdrawn;

- (b) is not approved by the States after debate; or
  - (c) is not debated by the States within 3 months of being lodged,
- the Commissioner must be restored to office without loss of remuneration or any other benefits.

## **6 Vacancy in office**

- (1) The office of Commissioner becomes vacant if the term of appointment of the person holding the office expires.
- (2) It also becomes vacant if the person holding the office –
  - (a) dies;
  - (b) gives the PPC written notice of resignation from the appointment;
  - (c) is nominated for election to the States;
  - (d) is appointed to any paid office or other place of profit under the Crown;
  - (e) becomes a paid officer in the service of any parish;
  - (f) is compulsorily detained or subject to guardianship under the Mental Health (Jersey) Law 1969<sup>5</sup>;
  - (g) has a curator of his or her person or property appointed;
  - (h) has an attorney appointed without whom he or she may not act in matters movable or immovable;
  - (i) becomes bankrupt or makes a composition or arrangement with his or her creditors;
  - (j) is convicted of an offence involving corruption; or
  - (k) whether in Jersey or elsewhere, is convicted of any offence and ordered to be imprisoned.
- (3) The office of Commissioner also becomes vacant if the States, acting in accordance with Article 5, revoke the appointment of the person holding the office.

## **7 Resources**

The States must ensure that the Commissioner is provided with such administrative and other support, including staff, services and accommodation, as the Commissioner may reasonably require for the purpose of discharging the functions of the Commissioner under this Law.

## **8 Limitation of civil liability**

- (1) This Article applies to –
  - (a) a person who is or has been the Commissioner; and
  - (b) a person who is or has been or is acting or has acted as, an officer or agent of the Commissioner.

- (2) A person to whom this Article applies is not liable in damages for any act done in the discharge, or purported discharge, of the functions of the Commissioner under this Law or any other enactment.
- (3) Paragraph (2) does not apply –
  - (a) if it is shown that the act was done in bad faith; or
  - (b) so as to prevent an award of damages made in respect of an act on the ground that the act was unlawful as a result of Article 7(1) of the Human Rights (Jersey) Law 2000<sup>6</sup>.

## PART 3

### POWERS AND DUTIES

#### **9 Commissioner’s functions relating to investigations, complaints and other matters concerning a code**

- (1) The functions of the Commissioner are –
  - (a) to investigate a complaint to the Commissioner that, at a relevant time, a breach of a code as in force at that time occurred;
  - (b) to initiate an investigation if the Commissioner believes that, at a relevant time, a breach of a code as in force at that time may have occurred;
  - (c) to report to the PPC on the outcome of any investigation referred to in paragraph (1)(a) or (b);
  - (d) on the Commissioner’s own initiative or, if requested by the PPC, to give advice on any matter relating to standards of conduct of elected members of the States or standards of conduct and practice of Ministers and Assistant Ministers, including proposals to change a code;
  - (e) if requested by the Chief Minister, to give advice on any matter relating to standards of conduct and practice of Ministers and Assistant Ministers, including proposals to change the code referred to in paragraph (b) of the definition “code”.
- (2) In paragraph (1)(a) and (b), “relevant time” means any time that is not earlier than the date that is 12 months before the date that this Article comes into force.
- (3) The Commissioner shall not accept any complaint which –
  - (a) is made anonymously;
  - (b) in the Commissioner’s opinion, is frivolous, vexatious or unsubstantiated; or
  - (c) is from a person who is not a member of the States regarding words spoken by, or actions of, an elected member during a meeting of the States.
- (4) On receipt of a complaint described in paragraph (1)(a), the Commissioner must decide whether there are grounds to investigate and shall either –

- 
- (a) notify the complainant that no such grounds exist; or
  - (b) undertake an investigation.
- (5) The Commissioner shall determine the procedure and timing of any investigation.
  - (6) In making a report to the PPC under paragraph (1)(c), the Commissioner shall state his or her conclusions and recommend what action, if any, should be taken.
  - (7) The Commissioner's conclusions and recommendations are not binding on the PPC.

## **10 Independence**

- (1) The Commissioner must not be directed on how any function of the office of Commissioner is to be carried out, including, in particular, whether or not to undertake an investigation referred to in Article 9(1)(a) or (b).
- (2) The Commissioner may seek legal advice from the Attorney General on any subject relevant to the functions of the office of the Commissioner and the Attorney General may provide that advice.

## **11 Statement of manner in which functions are to be discharged**

- (1) The Commissioner shall make and publish a statement of the manner in which he or she proposes to discharge his or her functions under this Law and any other enactment.
- (2) The Commissioner shall keep under review and revise, as needed, the statement made and published under paragraph (1).
- (3) The Commissioner must, at the same time a statement or revision is made, provide a copy of the statement or revision, as the case may be, to the PPC.
- (4) The PPC must, as soon as reasonably practicable, lay the statement, and any revision of it, before the States.

## **12 Duty to prepare annual report**

- (1) The Commissioner must, each year –
  - (a) make a report in respect of the activities of the office of Commissioner for the previous year; and
  - (b) at the same time as the report is made provide a copy of it to the PPC.
- (2) The PPC must, as soon as reasonably practicable, lay the report before the States.

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**PART 4****POWERS AND ENFORCEMENT****13 Power to summons people to appear and to provide records**

- (1) The Commissioner may, in the exercise of his or her functions, do all or any of the following –
  - (a) summons a person to appear before the Commissioner or to produce a specified record, or to do both;
  - (b) require a person to answer questions;
  - (c) require a person who has access to a record to provide the information contained in it to the Commissioner in a legible and comprehensible form.
- (2) The power under paragraph (1)(a) to require a record to be produced includes a power –
  - (a) if the record is produced, to retain the record or to take copies of it or extracts from the information it contains; and
  - (b) if the record is not produced, to require the person to whom the requirement was directed to state, to the best of his or her knowledge and belief, where it is.
- (3) If records are retained, a list of the records must be supplied to the person from whom they were obtained.
- (4) A record retained under paragraph (2)(a) –
  - (a) may be retained for one year; but
  - (b) if within that year proceedings to which the record is relevant are commenced against any person, may be retained until the conclusion of those proceedings.
- (5) If –
  - (a) the Commissioner has retained a record under paragraph (2)(a); and
  - (b) a person reasonably requires the record for his or her business,the Commissioner must provide the person with a copy of it as soon as reasonably practicable.
- (6) In this Part “record” means any written document or information, whether or not in electronic form.

**14 Offence: failure to appear, to answer questions or to provide information**

- (1) A person shall be guilty of an offence if, when summonsed or required to do so by the Commissioner acting in accordance with Article 13, the person fails or refuses –
  - (a) to appear before the Commissioner;
  - (b) to produce a specified record;

- (c) to answer truthfully or at all any question;
  - (d) to provide information contained in a record in a legible and comprehensible form; or
  - (e) to state, to the best of his or her knowledge and belief, where a record is.
- (2) A person guilty of an offence under paragraph (1) shall be liable to a fine of level 4 on the standard scale.
- (3) It shall be a defence for a person charged with an offence under paragraph (1) for the person to show that there was a reasonable excuse for the failure or refusal.

### **15 Offence: providing false record or information**

- (1) A person shall be guilty of an offence if, when required to produce a record under this Law or knowing that a record may be required to be produced under this Law, the person, with intent to deceive –
- (a) destroys the record or in any other way renders it unintelligible or useless, or difficult or impossible to retrieve; or
  - (b) alters it in any way to make the information it contains false or misleading in a material way.
- (2) A person shall be guilty of an offence if, when required to provide information under this Law, the person knowingly provides information that is false, misleading or incomplete in a material way.
- (3) A person guilty of an offence under paragraph (1) shall be liable to imprisonment for a term of 5 years and to a fine.
- (4) A person guilty of an offence under paragraph (2) shall be liable to imprisonment for a term of 2 years and to a fine.

### **16 Offence: obstruction**

- (1) A person shall be guilty of an offence if he or she hinders or obstructs a person in the exercise by that person of a function under this Law.
- (2) A person guilty of an offence under paragraph (1) shall be liable to imprisonment for a term of 6 months and to a fine of level 4 on the standard scale.

## **PART 5**

### **MISCELLANEOUS AND CLOSING**

### **17 Privilege, protection and self-incrimination**

- (1) Nothing in this Law requires a person to produce a record or to provide information that the person would, in an action in the Royal Court, be entitled to refuse to produce or provide on the grounds of legal professional privilege.

- (2) However, a lawyer must disclose the name and address of a client if required to do so by a person acting in accordance with this Law.
- (3) Where a person provides, in compliance with a request made in accordance with this Law, a record or other information in respect of another person the provision of that record or information shall not be regarded as a breach of any duty owed by the first person to the second person or to any other person.
- (4) An answer given by a person to a question put to the person in exercise of a power conferred by this Law may be used in evidence against the person.
- (5) However, in criminal proceedings in which the person is charged with an offence, other than an offence under Article 15 –
  - (a) no evidence relating to the answer may be adduced; and
  - (b) no question relating to it may be asked,by or on behalf of the prosecution, unless evidence relating to it is adduced, or a question relating to it is asked, in the proceedings by or on behalf of that person.

## **18 Amendment of other enactments**

- (1) The States may, by Regulations, amend any enactment in consequence of any provision of this enactment.
- (2) Regulations under paragraph (1) may contain such provision as appears to the States to be necessary, incidental or supplemental for the purpose of those Regulations.

## **19 Commencement**

This Law may be cited as the Commissioner for Standards (Jersey) Law 201- and shall come into force on such day or days as the States may by Act appoint.

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- <sup>1</sup> *chapter 16.800.15*
  - <sup>2</sup> *chapter 16.800*
  - <sup>3</sup> *chapter 24.900*
  - <sup>4</sup> *chapter 16.325*
  - <sup>5</sup> *chapter 20.650*
  - <sup>6</sup> *chapter 15.350*