

# STATES OF JERSEY



## DRAFT INTERNATIONAL CO- OPERATION (PROTECTION FROM LIABILITY) (JERSEY) LAW 201-

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Lodged au Greffe on 27th February 2018  
by the Chief Minister

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STATES GREFFE





Jersey

**DRAFT INTERNATIONAL CO-OPERATION  
(PROTECTION FROM LIABILITY) (JERSEY)  
LAW 201-**

**European Convention on Human Rights**

In accordance with the provisions of Article 16 of the Human Rights (Jersey) Law 2000, the Chief Minister has made the following statement –

In the view of the Chief Minister, the provisions of the Draft International Co-operation (Protection from Liability) (Jersey) Law 201- are compatible with the Convention Rights.

Signed: **Senator I.J. Gorst**

*Chief Minister*

Dated: 23rd February 2018

# REPORT

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## 1. Summary

The Draft International Co-operation (Protection from Liability) (Jersey) Law 201- (“the draft Law”) would protect public authorities in Jersey against claims for costs, damages or consequential losses when acting in matters of international assistance. This assistance could include obtaining evidence or information, obtaining assets, conducting investigations, conducting searches or providing assistance in any legal proceedings. Such assistance would usually be provided by H.M. Attorney General and certain other public office holders and bodies in Jersey.

This would ensure that, in cases where public authorities in Jersey act at the request of other jurisdictions under international arrangements, those authorities would not face adverse costs orders for acting in good faith. Where a person (usually the object of the investigation) has any complaint as to the reasonableness of the investigation, then such complaints can be addressed to the home jurisdiction of the investigators.

The draft Law would also provide protection in respect of claims for damages. It is common to have provisions protecting regulatory bodies from claims for damages, save in cases of bad faith or human rights issues. The draft Law addresses some outstanding areas where this issue has not been dealt with already through existing legislation.

## 2. Background

Compliance with international standards and providing assistance to other jurisdictions are crucial for Jersey’s position as an international finance centre and reputation as a co-operative jurisdiction. The provision of such assistance to other jurisdictions should not be constrained by considerations regarding the risk to public funds in Jersey arising from claims for costs, damages or consequential losses.

### *Limiting costs*

There are a number of relevant examples of limits on the recovery of costs which already exist in Jersey legislation. For example, the International Criminal Court (Jersey) Law 2014, provides for the Attorney General to act on requests for assistance by the International Criminal Court, but also provides that no orders for costs will be made in such proceedings. Similarly, the Criminal Justice (International Co-operation) (Jersey) Law 2001 provides that the Attorney General may respond to requests for advice in respect of criminal proceedings from other territories, but also provides that no order for costs can be made in respect of proceedings before the Court or the Viscount.

Whilst these existing provisions are helpful, much of Jersey’s mutual legal assistance takes place, for example, under the Investigation of Fraud (Jersey) Law 1991, which does not include any provisions limiting costs in mutual assistance cases. Similarly, an important mutual assistance provision is contained within the Proceeds of Crime (Enforcement of Confiscation Orders) (Jersey) Regulations 2008, but no provision is made to restrict costs. This draft Law would, therefore, ensure that authorities in Jersey would not face adverse costs orders for acting in good faith when assisting other jurisdictions.

### *Limiting damages*

There are a number of relevant examples of Laws which already have provisions to limit liability for damages in matters of international co-operation. For example, the International Criminal Court (Jersey) Law 2014 provides protection from claims of

any loss of damage to both receivers and officers involved in the seizure of assets except in cases of negligence. Similar protections are provided for the Viscount in the Proceeds of Crime (Jersey) Law 1999, the Proceeds of Crime (Enforcement of Confiscation Orders) (Jersey) Regulations 2008 and the Civil Asset Recovery (International Co-operation) (Jersey) Law 2007.

The Financial Services (Jersey) Law 1998 provides a general immunity to damages except for acts and omissions done in bad faith. A similar provision is included within the Taxation (Implementation) (Jersey) Law 2004, but only in respect of tax officers.

This draft Law would ensure that authorities in Jersey would not face claims for damages or consequential losses when acting in good faith to assist other jurisdictions. This protection from liability would not, however, apply in respect of claims for damages under the Human Rights (Jersey) Law 2000.

One result is that in certain cases it will be necessary for a claimant to prove bad faith on the part of the public body as opposed to negligence. This means that there would need to be something more like carelessness. This is in line with the approach taken in respect of many recent statutes, such as the Comptroller and Auditor General (Jersey) Law 2014.

The draft Law would be brought into force in Jersey by means of an Appointed Day Act.

### **3. Collective responsibility under Standing Order 21(3A)**

The Council of Ministers has a single policy position on this proposition, and as such, all Ministers, and the Assistant Ministers to the Chief Minister, are bound by the principle of collective responsibility to support the proposition, as outlined in the Code of Conduct and Practice for Ministers and Assistant Ministers ([R.11/2015](#) refers).

### **4. Financial and manpower implications**

This draft Law would protect the public purse from claims for costs, damages or consequential losses when acting in good faith in matters of international assistance and cooperation.

### **5. Human Rights**

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

## APPENDIX TO REPORT

### Human Rights Notes on the Draft International Co-operation (Protection from Liability) (Jersey) Law 201-

These Notes have been prepared in respect of the Draft International Co-operation (Protection from Liability) (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 Law limits rights to claim costs and damages (including consequential loss) against public bodies.

#### **Costs**

It is clear from the cases of *Masson v The Netherlands*,<sup>1</sup> and *Ashenden v United Kingdom*,<sup>2</sup> that there is no human right to recover costs against a public body for its regulatory actions (whether in matters of crime or elsewhere). Similarly, there is no human right to employ one’s own choice of lawyers in resisting regulatory activity, and be reimbursed for their fees should they be successful, see *R (Henderson) v Secretary of State for Justice*.<sup>3</sup>

#### **Damages and consequential loss**

The question of where damages can be claimed against public bodies is not of itself a matter of human rights law under the Convention. If a contracting party decides that public bodies should not be liable in damages by reason of public policy, then Convention rights are not automatically engaged, see *Z v United Kingdom*.<sup>4</sup> In short, a provision that blocks a claim that might otherwise arise under law is not a breach of Article 6 of the Convention (i.e. “right to a fair hearing to determine civil rights”) – the right to fair hearing cannot be a means to establish the existence of substantive rights and claims.

The positive requirement of the Convention, as can be seen from *Z v United Kingdom*, is that there should be a remedy if any substantive provision of the Convention is breached. This is preserved in all cases under the draft Law by the provision that the immunity given to the public body does not affect the right to bring claims under the Human Rights (Jersey) Law 2000. Although it would probably as a matter of strict law be sufficient to simply have the “bad faith” clause without direct reference to the Human Rights (Jersey) Law, it is something that the Ministry of Justice strongly desires to put compatibility with the Convention beyond doubt.

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<sup>1</sup> (1996) 22 EHRR 491.

<sup>2</sup> (2012) 54 EHRR 13.

<sup>3</sup> [2015] EWHC 130 (Admin).

<sup>4</sup> (2002) 34 E.H.R.R. 3.

### ***Conclusion***

It follows that there are no human rights issues. The Convention leaves the question of when costs should be obtained in litigation, or where recompense should be obtained for loss and damage, as matters for national law. The question of whether liability for costs or damages will tend to restrain abuse of state power, or will instead provide an obstacle to the beneficial use of important regulatory powers, is not a matter on which the Convention has an opinion. These matters are very much a matter of judgement for the local legislature.

Only where the loss and damage gives rise to substantive human rights violations are Convention rights relevant, and the right to make such claims under the Human Rights (Jersey) Law 2000 is expressly preserved.

## Explanatory Note

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This Law makes provision for protection from liability against claims for damages, costs and consequential loss in cases where a public authority provides assistance pursuant to a request made by a relevant authority (as defined in *Article 1*) of a country or territory outside Jersey.

The term “assistance” is defined in *Article 1* to include –

- (a) assistance in respect of obtaining evidence or information, obtaining assets, conducting investigations and conducting searches; and
- (b) assistance in any legal proceedings, including proceedings to establish the lawfulness of a decision to give assistance.

The term “public authority” is defined in *Article 1* to include any person certain functions of whose are of a public nature, or a person who is or has been, or is acting or has acted as, an officer or agent of such a person, but does not include a court or tribunal or an officer of a court or tribunal.

Under *Article 2(1)*, a public authority would not be liable in damages, for consequential loss, or for costs in legal proceedings, in respect of any act done in the discharge or purported discharge of the public authority’s functions under an enactment specified in *Schedule 1* or Regulations or an Order made under such enactment which entitles the public authority to give assistance to a relevant authority of any country or territory outside Jersey unless it is shown that the act was done in bad faith.

By *Article 2(2)*, the protection from liability would not apply 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.

By *Article 2(3)*, a public authority may rely on the good faith of the relevant authority to which it gave the assistance to prove that the public authority did not act in bad faith.

Under *Article 2(4)*, the Chief Minister is given the power by Order to exclude any type of damages, costs or consequential loss in respect of assistance in any legal proceedings from the application of this Law.

*Article 3* gives the States the power by Regulations to make such other provision as the States think fit for the purposes of carrying this Law into effect and to make such consequential, incidental, supplementary or transitional provision as may appear to be necessary or expedient.

*Article 4* makes provision for amendments to certain enactments required as a consequence of this Law to be specified in the Schedule.

*Article 5* provides the title to this Law and provides for it to come into force on such day or days as the States may by Act appoint.



Jersey

**DRAFT INTERNATIONAL CO-OPERATION  
(PROTECTION FROM LIABILITY) (JERSEY)  
LAW 201-**

**Arrangement**

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**Article**

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Jersey

## **DRAFT INTERNATIONAL CO-OPERATION (PROTECTION FROM LIABILITY) (JERSEY) LAW 201-**

**A LAW** to make provision for protection from liability against claims for damages, costs and consequential loss in cases where a public authority provides assistance pursuant to a request made by a relevant authority of a country or territory outside Jersey, and for connected purposes.

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*Adopted by the States* [date to be inserted]

*Sanctioned by Order of Her Majesty in Council* [date to be inserted]

*Registered by the Royal Court* [date to be inserted]

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

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### **1 Interpretation**

In this Law –

“assistance” includes –

- (a) assistance in respect of obtaining evidence or information, obtaining assets, conducting investigations and conducting searches; and
- (b) assistance in any legal proceedings, including proceedings to establish the lawfulness of a decision to give assistance;

“damages” includes loss or damage to property;

“Minister” means the Chief Minister;

“public authority” includes –

- (a) any person certain functions of whose are functions of a public nature; and
- (b) a person who is or has been, or is acting or has acted as, an officer or agent of a person referred to in paragraph (a),

but does not include a court or tribunal or an officer of a court or tribunal;

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“relevant authority”, in relation to a country or territory outside Jersey, means an authority in that country or territory that requests assistance.

## **2 Protection from liability for damages, costs and consequential loss**

- (1) Subject to paragraphs (2) and (3) but despite any other provision in any other enactment to the contrary, a public authority shall not be liable –
- (a) in damages;
  - (b) for consequential loss; or
  - (c) for costs in legal proceedings,
- in respect of any act done in the discharge or purported discharge of the public authority’s functions under any enactment specified in Schedule 1 or Regulations or an Order made under such enactment which entitles the public authority to give assistance to a relevant authority of any country or territory outside Jersey unless it is shown that the act was done in bad faith.
- (2) Paragraph (1) shall not apply 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>1</sup>.
- (3) A public authority may rely on the good faith of the relevant authority to which it gave the assistance referred to in paragraph (1) to prove that the public authority did not act in bad faith.
- (4) The Minister may by Order exclude any type of damages, costs or consequential loss in respect of assistance in any legal proceedings from the application of this Law.

## **3 Regulations**

The States may by Regulations –

- (a) make such other provision as the States think fit for the purposes of carrying this Law into effect;
- (b) amend Schedule 1;
- (c) make such consequential, incidental, supplementary or transitional provisions as appear to the States to be necessary or expedient, including provisions making amendments to any other enactment as appear to the States to be expedient –
  - (i) for the general purposes, or any particular purpose, of this Law,
  - (ii) in consequence of any provision made by or under this Law, or
  - (iii) for giving full effect to this Law or any provision of it.

## **4 Enactments amended**

The enactments specified in the second column of the table in Schedule 2 shall be amended as specified in the third column of that table.

**5 Citation and commencement**

This Law may be cited as the International Co-operation (Protection from Liability) (Jersey) Law 201- and shall come into force on such day or days as the States may by Act appoint.

**SCHEDULE 1**

(Article 2(1))

**ENACTMENTS UNDER WHICH A PUBLIC AUTHORITY IS PROTECTED  
FROM LIABILITY**

1. Bankers' Books Evidence (Jersey) Law 1986<sup>2</sup>
2. Civil Asset Recovery (International Co-operation) (Jersey) Law 2007<sup>3</sup>
3. Competition (Jersey) Law 2005<sup>4</sup>
4. Criminal Justice (International Co-operation) (Jersey) Law 2001<sup>5</sup>
5. Financial Services (Jersey) Law 1998<sup>6</sup>
6. International Criminal Court (Jersey) Law 2014<sup>7</sup>
7. Investigation of Fraud (Jersey) Law 1991<sup>8</sup>
8. Proceeds of Crime (Jersey) Law 1999<sup>9</sup>
9. Taxation (Implementation) (Jersey) Law 2004<sup>10</sup>

**SCHEDULE 2**

(Article 4)

**ENACTMENTS AMENDED**

	<b>Name of enactment</b>	<b>Amendment</b>
1.	International Criminal Court (Jersey) Law 2014 <sup>11</sup>	In Schedule 6, in paragraphs 6(5) and 11(2), for the word “negligence” there shall be substituted the words “bad faith”.
2.	Proceeds of Crime (Jersey) Law 1999 <sup>12</sup>	In Article 23, for the word “negligence” there shall be substituted the words “bad faith”.
3.	Proceeds of Crime (Enforcement of Confiscation Orders) (Jersey) Regulations 2008 <sup>13</sup>	In Article 23 of the Proceeds of Crime (Jersey) Law 1999 <sup>14</sup> , as modified by the Proceeds of Crime (Enforcement of Confiscation Orders) (Jersey) Regulations 2008 <sup>15</sup> , as set out in the Schedule, for the word “negligence” there shall be substituted the words “bad faith”.

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- 1 *chapter 15.350*
  - 2 *chapter 08.040*
  - 3 *chapter 17.145*
  - 4 *chapter 05.070*
  - 5 *chapter 08.300*
  - 6 *chapter 13.225*
  - 7 *chapter 17.520*
  - 8 *chapter 08.640*
  - 9 *chapter 08.780*
  - 10 *chapter 17.850*
  - 11 *chapter 17.520*
  - 12 *chapter 08.780*
  - 13 *chapter 08.780.60*
  - 14 *chapter 08.780*
  - 15 *chapter 08.780.60*