

STATES OF JERSEY



DRAFT COMMISSIONER FOR CHILDREN AND YOUNG PEOPLE (JERSEY) LAW 201- (P.18/2019): AMENDMENT (P.18/2019 Amd.) – AMENDMENT

**Lodged au Greffe on 30th April 2019
by the Minister for Children and Housing**

STATES GREFFE

**1 PAGE 43, ARTICLE 8 (Provision of information to Commissioner)
(as substituted by P.18/2019 Amd., page 2) –**

In the text of Article 8, as substituted by Amendment P.18/2019 Amd. –

- (a) in paragraph (1), for “A relevant authority” substitute “Subject to the following provisions of this Article, a relevant authority”;
- (b) for paragraphs (3) to (5) substitute –
 - “(3) A relevant authority that is not a public authority need not supply to the Commissioner, under paragraph (1), any information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.
 - (4) Subject to paragraph (5), a relevant authority need not supply to the Commissioner under paragraph (1), any information that is, or relates to, advice by the Attorney General or the Solicitor General where the Attorney General has determined that in all the circumstances of the case, the public interest in supplying the information is outweighed by the public interest in not doing so.
 - (5) Despite determining that the public interest in supplying the information referred to in paragraph (4) is outweighed by the public interest in not doing so, the Attorney General may supply the information requested to the Commissioner, after first consulting the relevant authority concerned.
 - (6) A relevant authority may, despite not receiving any request from the Commissioner to supply information for the purposes of the discharge of his or her functions under any of Articles 4 and 5, supply any such information it holds to the Commissioner provided that –
 - (a) it is lawfully able to do so; or
 - (b) in the case of information referred to in paragraph (4), the Attorney General has determined that it is in the public interest to supply it.
 - (7) Nothing in this Article is intended to limit the operation of the Freedom of Information Law or to prevent the Commissioner from making a request for information under that Law.
 - (8) Information supplied by a relevant authority under paragraph (1) must be supplied in such manner and within such period as the Commissioner may reasonably specify.
 - (9) The States may, by Regulations, amend this Article for the purpose of making further provision about the supply of information to the Commissioner.”.

2 PAGE 48, ARTICLE 12 (Formal investigations: witnesses and documents) –

In Article 12(7) for “Article 8(3) or (6)” substitute “Article 8(2), (3) or (4)”.

MINISTER FOR CHILDREN AND HOUSING

REPORT

Introduction

Members will be aware that the Chairmen's Committee has lodged *au Greffe* [P.18/2019 Amd.](#) – the 'Draft Commissioner for Children and Young People (Jersey) Law 201- (P.18/2019): amendment' (the "Scrutiny Amendment"). The Scrutiny Amendment has been lodged further to a review of the 'Draft Commissioner for Children and Young People (Jersey) Law 201-' (the "draft Law") by the Care of Children in Jersey Review Panel (the "Panel"). I am very grateful to the Panel for its review of the draft Law and welcome the Scrutiny Amendment. The Scrutiny Amendment clarifies the extent of the Commissioner for Children and Young People's (the "Commissioner") information-gathering powers, which is intended to be very wide.

I have lodged this amendment to the Scrutiny Amendment for 2 reasons. Firstly, because the Scrutiny Amendment would, if adopted, result in the draft Law being considered incompatible with the European Convention on Human Rights ("ECHR"). The draft Law in its current form enables the Commissioner to seek information from State connected entities, private entities and charities. This is appropriate and consistent with the Commissioner's functions. However, the Scrutiny Amendment would enable the Commissioner to require private entities to disclose confidential legal advice, despite that advice being subject to legal professional privilege. That privilege is intended to protect the confidentiality of lawyer-client communications and is protected by Article 8 ECHR. The Scrutiny Amendment, in not enabling a private entity to refuse to supply legal advice to the Commissioner based on legal professional privilege grounds, would be incompatible with the ECHR. The absolute necessity for the draft Law to be ECHR compatible should be evident to all Members.

The second reason is that the Scrutiny Amendment does not recognise Law Officers' advice privilege. The Scrutiny Amendment would enable the Commissioner to require public entities to supply legal advice it had received from the Law Officers, despite that advice being the subject of Law Officers' advice privilege. In doing so, the Scrutiny Amendment may undermine the indisputable constitutional convention of Law Officers' advice privilege. The preservation of, and respect for, the convention is fundamental to good governance within the Government of Jersey, which, in turn, is essential for the delivery of effective services to the children and young people of this Island.

Both aspects of the amendment to the Scrutiny Amendment have been discussed at length with the Commissioner. With the Commissioner's consent, I am able to advise Members that the Commissioner considers the proposed amendment to the Scrutiny Amendment to be a pragmatic way forward in balancing the scope of the Commissioner's powers with the need to ensure ECHR compatibility and to preserve Law Officers' advice privilege in appropriate circumstances, the purpose and importance of which the Commissioner has acknowledged and does not dispute.

The Scrutiny Amendment

The Scrutiny Amendment would, if adopted, substantially revise Article 8 of the draft Law. Article 8 of the draft Law would provide the Commissioner with a power to require '*relevant authorities*' to provide information to the Commissioner, further to a reasonable request for that information being made, for the purposes of the

Commissioner's functions under the draft Law. The Commissioner's primary function is the promotion and protection of the rights of children and young people¹, among other general functions². It is important to note that the definition of 'relevant authorities' in Article 1(1) of the draft Law includes not only public entities (e.g. Ministers and departments) but also private entities, including charities.

The version of the draft Law lodged *au Greffe* on 12th February 2019 ([P.18/2019](#)) contained a form of the Article 8 information power which would have been subject to a number of qualifications, based on the concepts of qualified exempt and absolute exempt information set out in the [Freedom of Information \(Jersey\) Law 2011](#). The Panel has reviewed Article 8 of the draft Law and, in doing so, invited submissions on the provision from a number of sources. The thrust of those submissions, and the reported findings of the Panel, is that the version of Article 8 of the draft Law as lodged would significantly limit the information-gathering power of the Commissioner and, therefore, undermine the performance of the Commissioner's statutory functions.

The Scrutiny Amendment is intended to remedy this problem by proposing a version of Article 8 which would substantially revise the original provision to remove the offending qualifications on the Commissioner's information-gathering power. Under the version of Article 8 proposed in the Scrutiny Amendment, a relevant authority must supply the Commissioner with any information if the request for information is reasonable and that authority is able to 'lawfully' disclose the information. In other words, if a relevant authority receives a reasonable request for information and has a discretion to provide or withhold the information, the relevant authority must disclose it.

Having considered the Panel's report to the Scrutiny Amendment, I support the Panel's reasoning for bringing the Scrutiny Amendment, as I expect most Members will. Accordingly, I welcome a proposal to remove the majority of the qualifications on the Commissioner's information-gathering power which appear in P.18/2019 which may, otherwise, have had the effect of limiting the Commissioner's powers and frustrating the pursuit of the Commissioner's statutory functions.

The amendment to the Scrutiny Amendment

For the reasons summarised at the beginning of this Report, I am proposing an amendment to the Scrutiny Amendment (the "Proposed Amendment to the Scrutiny Amendment") because of concerns about the scope and effect of the proposed Article 8 power in the Scrutiny Amendment. Those concerns are explained in detail further below, but centre around the preservation of legal advice privilege.

Members may recognise and understand, in the case of both legal professional privilege and Law Officers' advice privilege, the underlying importance of preserving such privilege. The purpose of the privilege is to encourage full disclosure on the part of the person seeking advice, and to preserve the confidentiality of communications between legal adviser and the recipient of advice. The purpose of legal advice privilege is not to protect legal advisers; it is to protect the rights or interests of those to whom legal advice is provided. In the case of private entities, the privilege is essential for the guarantee of the Article 8 ECHR right; in the case of public entities, it enables the provision of frank legal advice which is essential to good decision-making; and, in the case of advice

¹ Article 4 of the draft Law.

² See Article 5 of the draft Law.

provided to Government, it facilitates, and is essential to, good governance. Ultimately, though, the preservation of legal advice privilege is needed to protect the interests of children and young people affected by such advice. Those children and young people are dependent on receiving services from private and public entities; and those services are, where necessary, delivered on the basis of entities having received unqualified, candid and effective legal advice.

Legal professional privilege

Legal professional privilege protects all communications between a lawyer and his or her clients from being disclosed without the permission of the client. Its purpose is to protect a person's ability to access legal advice by encouraging complete disclosure to lawyers without the fear that any disclosure of those communications may prejudice the client in the future. This purpose and importance of legal professional privilege has been consistently made clear in a variety of English cases³ and is recognised by the Royal Court⁴.

Article 8 of the ECHR (right to respect for private and family life) protects the confidentiality of all 'communications' between individuals⁵, including correspondence⁶. Article 8 ECHR has been found to afford strengthened protection to exchanges between lawyers and their clients⁷ and, indeed, the European Court of Human Rights has held that legal professional privilege is a fundamental human right⁸. The justification for the privilege is that lawyers are assigned a fundamental role in a democratic society of providing open and unqualified legal advice to their clients. Lawyers are unable to carry out this essential task if they are unable to guarantee to their clients that their exchanges will remain confidential.

Article 8 ECHR has been found to extend protection of rights to corporations as well as individuals, it being recognised that corporations are themselves afforded the protections guaranteed by certain human rights in appropriate circumstances⁹. Further, an individual's ownership of, and involvement in, a privately-run business is also recognised as an aspect of the right to private life under Article 8 ECHR¹⁰. The ability for an individual to undertake private commercial activity, for which the taking of confidential legal advice is essential, comes within the scope of Article 8 ECHR, as does the right of an individual to develop relations with others, which could include developing private activity relations with others; for example the activities of a private business which is intrinsically linked to the private life of the individual. Interference

³ See *Three Rivers District Council and Others v. Governor and Company of the Bank of England* [2004] UKHL 48; *R v. Derby Magistrates' Court, ex parte B* [1996] AC 4987.

⁴ See for example *Bene Ltd. v. VAR Hanson & Partners (Royal Ct.)*, 1997 JLR N-10.

⁵ See, for example, *Narinen v. Finland*, App No. 45027/98, Judgment of June 1, 2004 (para. 32).

⁶ *Silver v. UK* (1983) 5 EHRR 347.

⁷ *Michaud v. France*, judgment of 6 December 2012, §§ 118-119.

⁸ *Foxley v. United Kingdom* (2001) 31 EHRR 25.

⁹ Article 8 ECHR was found to apply to a company in the context of 'home' life in *Société Colas Est v. France* (2004) 39 EHRR 17.

¹⁰ See *Onwuje v. The Secretary of State for the Home Department* [2018] EWCA Civ 331, at para. 26, referencing the judgment in *Niemietz v. Germany* (1993) 16 EHRR 97, in which the European Court of Human Rights said "Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings. There appears, furthermore, to be no reason of principle why this understanding of the notion of 'private life' should be taken to exclude activities of a professional or business nature...".

by State authorities with the specially protected right of legal professional privilege in the case of private companies will, accordingly, amount to an interference with the Article 8 ECHR of their owners, but also with aspects of the Article 8 ECHR rights of the companies themselves.

The version of Article 8 proposed in the Scrutiny Amendment would enable the Commissioner to require the production of any information, including legal advice, from private entities, so long as the request was reasonable and for the purposes of the Commissioner's statutory functions. The infringement of a private person's right to rely on legal professional privilege to lawfully refuse the disclosure of that advice would compromise the lawyer-client relationship, and may have a severe 'chilling' effect on the seeking of legal advice by private entities or, more likely, the provision of legal advice to those entities. Further, an information-gathering power that disregards the special protection afforded to the lawyer-client relationship would make the power itself incompatible with Article 8 ECHR. If the Scrutiny Amendment is adopted, I understand that the Law Officers would not be able to advise the UK's Ministry of Justice that the draft Law is compatible with the ECHR, which would be fatal to the timely progression of the draft Law in receiving Royal Assent.

ECHR considerations aside, Members should note that the Panel received a submission from the Jersey Information Commissioner¹¹ (a copy of which is available on the Scrutiny website), in which reference is made to an information-gathering power provided for the British Columbian Representative for Children and Youth. This is an express reference made in legislation to privilege in the context of a broad information-gathering power to be exercised, it is assumed, for purposes comparable to the protection of the interests of children and young people. This provision explicitly exempts information subject to 'solicitor-client privilege', so would prevent the British Columbian Representative from requiring the disclosure of advice subject to that privilege. The principle that a statutory information-gathering power should not compromise legal professional privilege is not, therefore, without clear precedent in the context of the protection of the rights of children and young people. Indeed, there are numerous other examples in Jersey legislation of legal professional privilege being preserved, including in the context of the investigation of crime¹².

Members are invited to consider the wording of the Proposed Amendment to the Scrutiny Amendment and, specifically, the amendment set out in paragraph (a) together with the amendment set out in the first paragraph at paragraph (b), which would insert a new paragraph (3) into Article 8 of the draft Law. Those amendments would make the necessary amendments to the Scrutiny Amendment to achieve compatibility with the ECHR.

¹¹ Submission from the Information Commissioner dated 8 March 2019, Scrutiny ref: 510/4(2).

¹² Members should also note that there is a reason why the English Children's Commissioner's information-gathering power, in section 2F of the Children Act 2004 and which is referred to in the Panel's Report, is not qualified to take account of legal professional privilege. The reason is that the English Commissioner's power applies only as regards "*any person exercising functions of a public nature*", which would exclude private individuals and entities and, therefore, negates the concern about preserving legal professional privilege in the case of private persons and associated ECHR issues.

Law Officers' advice privilege

The Law Officers are the principal legal advisers to the States of Jersey, providing advice on legal matters that ensures Members of the States, departments and other entities are able to act lawfully, which is absolutely critical to good governance. It is a longstanding constitutional convention that neither the fact, nor the content, of legal advice provided by the Law Officers to the States should be disclosed without the prior consent of both the Law Officers and the intended recipient of that advice. Law Officers' privilege is an undisputable constitutional convention: it has been recognised in Jersey most recently by the Information Commissioner¹³, and is referred to in the Scrutiny and Public Accounts Committee Codes of Practice¹⁴. The existence and nature of the convention was also recently explained by the Attorney General for England and Wales, Geoffrey Cox, in a statement to the House of Commons regarding advice to the Cabinet concerning the UK's withdrawal agreement with the European Union¹⁵. The purpose of the convention has recently been usefully, and succinctly, explained by the Jersey Information Commissioner –

“The purpose of this confidentiality is to protect fully informed decision making by allowing government to seek legal advice in private, without fear of adverse inferences being drawn from either the content of the advice or the fact that it was sought. It ensures that government is neither discouraged from seeking advice in appropriate cases, nor pressurised to seek advice in inappropriate cases.”¹⁶

The version of Article 8 proposed in the Scrutiny Amendment may provide the Commissioner with a power to require the Law Officers or a Minister, States Member, or department, to disclose legal advice provided by the Law Officers, notwithstanding that the advice is subject to Law Officers' advice privilege. The question of what legal advice the Commissioner should have access to, in the exercise of this power, would be for the Commissioner to determine at the Commissioner's discretion. While the Commissioner is required to exercise that power reasonably and for the Commissioner's statutory functions, the version of Article 8 in the Scrutiny Amendment would not provide any guarantee that the convention of Law Officers' advice privilege would not be breached.

Disregarding the convention in the present context would have serious consequences for the seeking of, and provision, of legal advice between the Law Officers and government or States departments involved in providing services to children and young people. There is a real risk that government and departments would be discouraged from seeking legal advice, for fear that it would be disclosed, and that would lead to qualified or restricted disclosure in instructing the Law Officers. In turn, this would lead to the provision of limited or insufficient legal advice. It is essential that government and departments take legal advice in the discharge of their functions, and so should not be dissuaded in doing so. It is certainly not the intention that the draft Law should provide an absolute bar to the supply of Law Officers' advice; rather the draft Law should

¹³ Office of the Information Commissioner Decision Notice OIC Reference CAS-01542 *re* Parish of St. Lawrence.

¹⁴ Scrutiny and Public Accounts Committee Proceedings: Code of Practice (paragraph 100); Code of Practice for Engagement between Scrutiny Panels and the Public Accounts Committee and the Executive (paragraph 39).

¹⁵ AGO: WMS 1 – Exiting the EU: Publication of Legal Advice.

¹⁶ See paragraph 20 of the Information Commissioner's Decision Notice.

provide that: advice which is subject to Law Officers' advice privilege may be supplied to the Commissioner if the Attorney General is satisfied that the public interest in supplying the information is outweighed by the public interest in not doing so; or, in cases where that public interest test is not met, where the Attorney General is minded to supply the information to the Commissioner following consultation with the relevant authority to which the advice was provided.

Members are also invited to consider the wording of the Proposed Amendment to the Scrutiny Amendment and, specifically, the amendment set out in paragraph (a) together with the amendment set out in the second and third paragraphs at paragraph (b), which would insert new paragraphs (4) and (5) into Article 8 of the draft Law. These amendments to the Scrutiny Amendment would provide that a relevant authority (in this case a public authority) need not supply information to the Commissioner if the information is subject to Law Officers' advice privilege, where the Attorney General has determined that in all the circumstances of the case, the public interest in supplying the information is outweighed by the public interest in not doing so. The Attorney General may, however, despite determining that there is no public interest in supplying the information to the Commissioner, supply that information to the Commissioner, having first consulted with the relevant authority to which the advice is provided.

The fourth paragraph at paragraph (b) of the Proposed Amendment to the Scrutiny Amendment, which would insert a new paragraph (6) into Article 8 of the draft Law, would clarify that relevant authorities may provide information to the Commissioner, where the Commissioner has not made a request for that information, where the supply of that information would be lawful and, in the case of privileged Law Officers' advice, the Attorney General has determined that it is in the public interest to supply it. A provision to the effect of paragraph (6) was proposed in the Scrutiny Amendment; the amendment here is just to reflect the proper circumstances in which relevant authorities can willingly supply information to the Commissioner.

Members are also invited to note the fifth provision at paragraph (b) of the Proposed Amendment to the Scrutiny Amendment, which would insert a new paragraph (7) in Article 8 of the draft Law. This provision would make it clear that nothing in Article 8 of the draft Law would limit or prevent the Commissioner from making a request for Law Officers' advice under the [Freedom of Information \(Jersey\) Law 2011](#).

The sixth and seventh paragraphs at paragraph (b) of the Proposed Amendment to the Scrutiny Amendment, which would insert new paragraphs (8) and (9) into Article 8 of the draft Law, are replicated from the Scrutiny Amendment. They have not been amended, but are just restated for ease in preparing the amendment.

Finally, Members are invited to note paragraph 2, headed "**PAGE 48, ARTICLE 12 (Formal investigations: witnesses and documents)** –" of the Proposed Amendment to the Scrutiny Amendment. The amendment proposed here would address a cross-reference to Article 8 of the draft Law which appears at Article 12(7) of the draft Law. Article 12 of the draft Law deals with the provision of documents in an investigation by the Commissioner, and enables the redaction from documents of information which a relevant authority is not required to supply under Article 8 of the draft Law. The amendment proposed here is simply to update the cross-referencing between the paragraph numbers in Article 12 and Article 8, to reflect the changes to the numbering made by the Proposed Amendment to the Scrutiny Amendment, if adopted.

Disclosures of advice in the public interest

As noted in the section above, where the Attorney General determines that the public interest requires the supply of otherwise privileged legal advice to the Commissioner, that advice will be supplied to the Commissioner. The Attorney General, the Commissioner, the Chief Minister, on behalf of the Government, and I as Minister for Children and Housing, are wholly committed to the promotion and protection of the rights of children and young people. We are committed also to working together in fulfilling this important and ongoing objective.

For these reasons, a Protocol has been signed by those just mentioned, setting out how the Commissioner can raise with the Attorney General questions around the determination of the public interest in the disclosure, or not, of Law Officers' advice. The Protocol will shortly be published as an addendum to the Proposed Amendment to the Scrutiny Amendment and, as Members will recognise from the Protocol, it makes provision for the determination of public interest questions and disclosure of legal advice by the Attorney General on an expedited basis. All signatories to the Protocol have a shared interest in the improvement of the provision of services to children and young people in Jersey, and the success of the Commissioner's office.

Conclusion

It is imperative that any amendment to the draft Law is compatible with the ECHR, and also that the correct balance is struck between providing the Commissioner with adequate information-gathering powers and recognising the fundamental importance to good governance of maintaining Law Officers' privilege. The Proposed Amendment to the Scrutiny Amendment will address and resolve these issues and, for that reason, I would urge Members to vote for the Proposed Amendment to the Scrutiny Amendment.

Financial and manpower implications

There are no additional financial or manpower implications for the States arising from the adoption of the Proposed Amendment to the Scrutiny Amendment.