

3.5 Deputy T.M. Pitman of the Chief Minister regarding the use of the Data Protection (Jersey) Law 2005 to prosecute former Senator S. Syvret:

Will the Chief Minister clarify why the Data Protection Commissioner was able to utilise the Data Protection (Jersey) Law 2005 to prosecute former Senator S. Syvret as a data controller and why no similar actions have yet been brought against others who run hate sites such as forums and blogs under the same provisions and in doing so would he clarify precisely which Article of the Law was utilised?

Senator I.J. Gorst (The Chief Minister):

A data controller is a person who determines the purpose for which and the manner in which any personal data is processed. In the case of the former Senator the court judged that the Data Protection Law did apply to the way personal data acquired in his capacity as data controller was published. Each complaint to the Data Protection Commissioner's office is assessed on its own merits. A regulatory offence is dealt with by the Data Protection Commissioner's office. In the case of a criminal offence a file is submitted to H.M. Attorney General for consideration. If the Data Protection Commissioner does not comply with the law when bringing a case the court will dismiss the case. The Articles of the Data Protection (Jersey) Law 2005 used in the prosecution in question were Articles 21 and 55.

3.5.1 Deputy T.M. Pitman:

The manner in which the Data Protection Law has been interpreted, I would argue manipulated, in truth means that everyone who owns an iPhone, tablet or laptop could be classed as a data controller. So, what I would like the Minister to answer me is this: the former Senator was in fact no more a data controller than the individual who runs the Haut de la Garenne murder files hate site on which emails stolen from Deputy Martin by Deputy Power appeared and on a current site run by the same convicted criminal. Could the Minister please clarify why that person who is clearly a data controller has not been prosecuted, given that there have been complaints made to the authorities?

The Deputy Bailiff:

Deputy Trevor Pitman, it was, in my view, quite unnecessary to add the gratuitous attack on Deputy Power in the course of that question. I would ask you to withdraw the offending words, which will then be withdrawn from Hansard.

Deputy T.M. Pitman:

No, I certainly will not withdraw it, Sir, because I am just stating the truth, which I believe the Chair is fully aware of.

Deputy M.R. Higgins:

Sir, can I just ask a question, if I may, on this particular issue. It is a fact that Deputy Power was dealt with by this House with for basically taking documents that were not his and sending them out. Surely it is a matter of record that that took place.

The Deputy Bailiff:

With that I am not taking issue. What I am taking issue with was the gratuitous attack on a Member which is irrelevant to the question which was being put. That is the issue I was inviting Deputy Trevor Pitman to address and withdraw.

Deputy T.M. Pitman:

It is not gratuitous. The Deputy has admitted it. Deputy Martin, who was the victim, can clarify. I find the foot-stomping very worrying. I am stating a simple fact. There is nothing gratuitous, it is just fact.

The Deputy Bailiff:

Deputy Pitman, would you please explain why the reference to Deputy Power is relevant to the question which you were putting, which as I understood it was a question as to whether everyone who held an iPhone or an iPad was a data controller? I cannot for the moment see the relevance of the reference to Deputy Power.

Deputy T.M. Pitman:

With due respect, I think it is very relevant, because I am highlighting a very obviously and very worrying inconsistency within the law. We have clear breaches arising from the perfect example of data which was stolen. That has been acknowledged. It has gone on to a site where complaints have been made. Clearly that site, the person behind it is a data protection controller, yet no prosecution. So, I think it is entirely relevant. I maintain that, Sir. I am stating a simple fact.

The Deputy Bailiff:

Very well. Ultimately I think this is probably a matter for Members if they think it appropriate later on. Chief Minister.

Senator I.J. Gorst:

Sorry, Sir, I could not hear what your ruling was.

The Deputy Bailiff:

Sorry. The ruling is that your question will stand. I think it is a matter for Members to take further with the Privileges and Procedures Committee if they wish.

Senator I.J. Gorst:

I am not sure the question is a question for me. The question is why is a particular site or individual or action not being prosecuted, so that does not in any way, shape or form fall, I believe, within any of my responsibilities. Prosecution decisions are made appropriately by the prosecuting authority. They are balanced and difficult decisions. It is not a question that I can answer. If the Deputy feels that a particular website warrants investigation or is in breach or committing a criminal offence with regard to what is being published on it that would fall foul of the Data Protection Law then he should approach either the Data Protection Commissioner or the police with those concerns. That seems to be the appropriate course of action.

Deputy T.M. Pitman:

I have already done both.

3.5.2 Deputy T.A. Vallois of St. Saviour:

In 2010 the Corporate Services Scrutiny Panel carried out a review on data protection amendments. In particular the European Communities Implementation of Council Directive on Privacy and Electronic Communications Ordinance that was carried out in Guernsey in 2004. A recommendation was stated as accepted by the then Minister for Treasury and Resources. I was wondering whether the Chief Minister could advise whether anything has been carried out further in this respect in terms of looking at consistency with the Data Protection Law?

Senator I.J. Gorst:

I am not aware of whether that recommendation has now been enacted, but the Data Protection Commissioner, I think, since then is now working across both jurisdictions. So, if changes are being made or have been made to Guernsey legislation I would expect that proposals, if not already made, would be coming forward in due course for Jersey legislation as well.

3.5.3 Deputy T.A. Vallois:

Supplementary? Could I ask the Chief Minister that he looks over the responses that were given to that report and report back as to what will be updated or not, because I would imagine there needs to be regulations to come forward?

Senator I.J. Gorst:

I would be pleased to do that because, as Members will perhaps now realise from the number of questions that have been raised in this Assembly on these issues and with the advent of digital technology and social media, these issues have become far more complex.

3.5.4 Deputy C.F. Labey of Grouville:

Would the Chief Minister confirm that the said Deputy lost his seat as Minister for Housing because of those same breaches and because he no longer enjoyed the trust of his colleagues and the Council of Ministers?

The Deputy Bailiff:

No. That question does not arise out of the question which has been put. Deputy Higgins?

3.5.5 Deputy M.R. Higgins:

Does the Chief Minister think it is appropriate that a person who has been convicted of hate campaigns is invited by the Data Protection Commissioner to join in what was effectively a secret action against former Senator Stuart Syvret? In other words, a person who has abused the law is invited by the Data Protection Commissioner to join in an action. Does he think that is an appropriate use of the law?

Senator I.J. Gorst:

I am not aware of the facts which the Deputy raises. Therefore, I cannot say whether it is appropriate or not.

3.5.6 Deputy M. Tadier:

Article 10 of the European Court Convention on Human Rights says that everyone has the right to freedom of expression and the right shall include freedom to hold opinions and to receive and impart information and ideas, without interference by the public authority. This is a qualified right. Will the Chief Minister explain where he thinks the balance lies between the defence of Article 10 and the ability of an individual to make a complaint and use the Data Protection Law for published comments which he or she feels are distressing, but which may nonetheless be true?

Senator I.J. Gorst:

There are other Members of this Assembly who are far more qualified to deal with the legal interpretation of where the juxtaposition between European Human Rights and the interplay with the Data Protection Law. The Data Protection Law is there to protect individuals against inappropriate use by data controllers of their personal information. It is, I believe, a

fundamental right. It is even more so in the digital age in which we live as I have just said. But, these issues are complex.

3.5.7 Deputy M. Tadier:

Does the right to ask for information on yourself to be taken down because one finds it distressing, even though one does not have to prove that it is incorrect, override the basic Article 10 right to freedom of expression?

The Deputy Bailiff:

Deputy, the Chief Minister is often expected to answer questions with his opinions on almost everything. That is the nature of the job. But that particular question is really a legal question, which also does not really arise out of the question which has been put by Deputy Trevor Pitman, which was the utilisation of the Data Protection Law to prosecute a former Senator and why similar actions have not been brought against others.

[10:15]

Deputy M. Tadier:

Sir, may I rephrase? The reason I ask is that both the Data Protection Law and human rights legislation falls under the Chief Minister, I believe. Therefore it is his area to answer questions on this and its application of those 2 laws. The issue here is about getting the balance of those 2 laws. If the Data Protection Law seems to be being used to ... it has opened the door to be used indiscriminately. So just because an individual does not like what has been written about him or herself does that pose a political issue in the Chief Minister also enforcing human rights, which are also an issue for all individuals in our society?

Senator I.J. Gorst:

I cannot and do not wish to be drawn on the complexities of where human rights relate to data protection. However, I am quite willing to ask for legal advice on that matter if that is what particular Members would require. Equally those Members can ask themselves as well.

3.5.8 Deputy R.G. Le Hérissier of St. Saviour:

Would the Chief Minister not acknowledge, given the issues raised in the question, that now may be the time for an independent inquiry to be held into the workings of the law, given some of its apparent perversion of anomalous consequences?

Senator I.J. Gorst:

I have said on many occasions in this Assembly when answering questions on this particular issue, if Members of this Assembly feel that the law is not working in the way that it was intended when it was introduced or feel that the other place in this building when interpreting and making decisions in the courts on this law then this Assembly has a responsibility to bring forward amendments and discuss it in this Assembly. That is the right and proper process. We do not need to have an independent review of it. If we do not think it is working, bring forward amendments to it. That is what our job is.

3.5.9 Deputy J.A. Martin of St. Helier:

The question asked about the 2005 law and prosecuting a former Senator, he was prosecuted after he was a Senator, so I will call him Mr. Syvret. Is the Chief Minister certain that the law at the moment is not in favour of sitting States Members above former States Members and ordinary Members of the public? Is he absolutely sure that law is carried out equally for everybody?

Senator I.J. Gorst:

I have no reason to suspect anything other than that the Data Protection Commissioner is acting in an appropriate manner. The particular issue that seems to be on some Members' minds with regard to an existing States Members, I answered that question in October of this year. It was quite straightforward. That breach was a regulatory breach of the data protection principles which is covered in Schedule 1 Part 1 of the Law. The particular breach that this question relates to was a criminal breach and it refers to those Articles in the law which carry a criminal sanction. At the end of the day the court agreed with the Data Protection Commissioner in that regard.

3.5.10 Deputy T.M. Pitman:

These are my last questions in the States for now. I would hope that I might get an answer. It is quite simple. The Data Protection Commissioner uses the term to justify non-prosecution of others if they are, in her words, kitchen table bloggers. So, could the Chief Minister enlighten me as to what is the difference between a kitchen table blogger and a data controller? I am happy if he refers to H.M. Solicitor General, because I know it might be a bit complex.

The Deputy Bailiff:

Frankly I do not understand how the Chief Minister can be expected to explain an expression which has been used, you say, by the Data Protection Commissioner.

Deputy T.M. Pitman:

It goes to the fundamental part of the law. As I was trying to highlight before, these inconsistencies mean we cannot say that someone who is not employed by a magazine, a newspaper, for example, is a data controller, but someone else who is also not employed by anyone is a kitchen table blogger. I am just trying to understand, as many of the public are, why Senator Syvret could be prosecuted and others cannot. I think it is relevant, with due respect.

The Deputy Bailiff:

I understood the last question. Could you answer that, Chief Minister?

Senator I.J. Gorst:

I have answered the question with regard to the prosecution that the question alludes to. With regard to the term "kitchen table blogger" it is not a term that I am familiar with. I am not party to the correspondence where the Deputy says that the Data Protection Commissioner has used it. I would have thought the simplest follow-up would have been to ask indeed the Data Protection Commissioner what was meant by that term.

Deputy T.M. Pitman:

I have already done that.