

THE STATES OF DELIBERATION
of the
ISLAND OF GUERNSEY

POLICY & RESOURCES COMMITTEE

THE HUMAN RIGHTS (BAILIWICK OF GUERNSEY) LAW, 2000
– AMENDMENT OF LEGISLATION

The States are asked to decide:-

Whether, after consideration of the Policy Letter entitled “ The Human Rights (Bailiwick of Guernsey) Law- amendment of legislation” dated 4th August, 2021, they are of the opinion:-

1. to agree to amend section 9(2) of the Human Rights (Bailiwick of Guernsey) Law, 2000, to enable a court to award compensation to a person in respect of a judicial act done in good faith, in the circumstances set out in paragraph 2.5 of that Policy Letter.
2. to direct the preparation of such legislation as may be necessary to give effect to the above decision.

The above Propositions have been submitted to Her Majesty's Procureur for advice on any legal or constitutional implications in accordance with Rule 4(1) of the Rules of Procedure of the States of Deliberation and their Committees.

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The Presiding Officer
States of Guernsey
Royal Court House
St Peter Port
Guernsey

4th August, 2021

Dear Sir

1 Executive Summary

- 1.1 In the 2016 judgment in the case of *Hammerton v UK*¹, the European Court of Human Rights found that the UK, as the State party to the case, had breached certain rights of the applicant, Mr Hammerton, under the European Convention of Human Rights² (the Convention). The breach related to a statutory bar in the Human Rights Act 1998³ (the UK legislation) which prevented damages being awarded in the circumstances of a judicial act done in good faith, except to compensate a person in respect of any deprivation of liberty. The UK, under the terms of the Convention and as a Member of the Council of Europe, is obliged to implement judgments in cases to which it is party. Accordingly, the UK Government has now amended the Human Rights Act 1998 to address the lack of domestic remedy available.
- 1.2 The Convention was extended and given effect in the Bailiwick with the enactment of the Human Rights (Bailiwick of Guernsey) Law 2000⁴ (the Bailiwick legislation). The Bailiwick legislation largely mirrors the UK legislation and, in a similar way, includes a statutory bar against the provision of damages being awarded in the circumstances arising in the Hammerton case.

¹ *Hammerton v The United Kingdom* 6287/10- Judgment of the European Court of Human Rights

² [European Convention on Human Rights](#) (also known as The Convention for the Protection of Human Rights and Fundamental Freedoms)

³ [The Human Rights Act 1998](#)

⁴ [The Human Rights \(Bailiwick of Guernsey\) Law, 2000](#)

- 1.3 Constitutionally, due to the Bailiwick's historic relationship with the Crown, the UK has responsibility for the Bailiwick's international relations and for ensuring that it meets human rights obligations and compliance with the Convention. In practice, it is for the Bailiwick to make legislation and policies to fulfil its international obligations. The UK Government has invited the Bailiwick authorities to consider amending its domestic human rights legislation in a similar way to the UK to ensure compliance. The UK Government would wish to see the alignment of the Bailiwick's position with the UK's to ensure that the UK and Bailiwick continue to meet their international obligations.
- 1.4 The Policy & Resources Committee recommends that the required legislative changes should be made to fulfil these obligations for Guernsey.
- 1.5 As the legislation applies Bailiwick-wide, consultation has taken place with Alderney and Sark. The relevant committees in those islands agree that the legislative changes should be made and that this Policy Letter will be used for consideration and decision making by the three Bailiwick parliaments.
- 1.6 If approved by the three Bailiwick parliaments, a Projet de Loi will be required to introduce the legislative changes.

2 Background

- 2.1 The circumstances in the case of Hammerton v UK related to domestic child contact proceedings brought in the English courts, which resulted in Mr Hammerton's committal to prison following his breaches of an undertaking and an injunction. In 2016, the European Court of Human Rights found that Mr Hammerton's Article 6⁵ right to a fair trial under the Convention had been breached, as he had been committed to prison for a longer period than he would otherwise have been, due to a judicial act which did not allow him certain rights under Article 6. This judicial act deprived him of legal representation when deciding whether to commit him to prison. However, section 9(3) of the UK's Human Rights Act 1998 operated as a statutory bar to an award of damages, in that it did not permit Mr Hammerton to claim damages in the domestic courts in respect of a judicial act done in good faith (the principle of judicial immunity), except to compensate to the extent required by Article 5(5) of the Convention⁶ in respect of a person's deprivation of liberty.
- 2.2 Mr Hammerton then applied to the European Court of Human Rights due to the lack of domestic remedy available. The European Court of Human Rights determined that the statutory bar in Section 9(3) of the Human Rights Act 1998, which prevented a remedy being obtained as a result of a judicial act in good

⁵ [European Convention on Human Rights, Article 6](#) pages 9-10

⁶ [European Convention on Human Rights, Article 5](#) page 8

faith, was a breach of Article 13 of the Convention⁷, regarding a person's right to obtain an effective remedy.

- 2.3 The UK remains committed to the Convention. The EU-UK Trade and Cooperation Agreement⁸ agreed following the UK's withdrawal from the EU, includes provisions relating to these continuing obligations. The Council of Europe's Committee of Ministers monitors the implementation process for judgments by the European Court of Human Rights for Member States. The UK, under the terms of the Convention, as a Member State of the Council of Europe and as the State Party to Convention, is obliged to implement judgments in cases to which it is party. Accordingly, in order to implement the Hammerton judgment, the UK government decided to amend its Human Rights legislation by removing the statutory bar on the award of damages in these circumstances.
- 2.4 Following scrutiny by the Houses of Parliament's Joint Committee of Human Rights of the proposed amendment, as set out in the Joint Committee's Report in November 2018⁹, the final amendment introduced by the UK Government provided for a slightly wider scope for an award of damages to be made than originally proposed.¹⁰ The UK Government has now completed the process to amend its legislation and the amended legislation came into force in October 2020.
- 2.5 The amendment to the UK legislation makes the following changes in terms of remedies. In addition to the existing a provision for compensation under Article 5(5) of the Convention for deprivation of liberty, the amendment now enables the UK courts to award damages to compensate a person in respect of a judicial act done in good faith where:
- the judicial act is incompatible with Article 6, and
 - the breach of Article 6 causes the person to be
 - (i) detained when they would not otherwise have been, or
 - (ii) subjected to a longer period of detention than they would otherwise have been.
- 2.6 The UK Government has now invited the Bailiwick authorities to consider amending its domestic human rights legislation in a similar way. This would be amended by including a provision to amend S9(2) of the Human Rights (Bailiwick of Guernsey) Law, 2000.

⁷ [European Convention on Human Rights, Article 13](#) page 13

⁸ [Trade and Cooperation Agreement between the United Kingdom of Great Britain and Northern Ireland, of the one part, and the European Union and the European Atomic Energy Community, of the other part](#) – signed in Brussels and London 30 December 2020, full text available on gov.uk, Article 524

⁹ [Joint Committee on Human Rights Report](#) published 21 November 2018

¹⁰ [Draft Human Rights Act 1998 \(Remedial\) Order 2019](#) published 15 October 2019

3 Previous States of Deliberation and Bailiwick decisions regarding the European Convention of Human Rights

- 3.1 Following the consideration by the States of Deliberation in April 2000 and the making of relevant resolutions to introduce human rights legislation for the Bailiwick¹¹, the European Convention of Human Rights was extended and given effect in the Bailiwick by way of enactment of the Human Rights (Bailiwick of Guernsey) Law, 2000. The Bailiwick legislation came into force in September 2006.¹²
- 3.2 The Bailiwick legislation largely mirrors the UK legislation. Section 9(2) of the Human Rights (Bailiwick of Guernsey) Law, 2000 follows the wording of the unamended UK legislation regarding judicial acts and, therefore, no damages nor effective remedy would be available in respect of a breach resulting from a judicial act done in good faith should a similar case to Hammerton come before the Bailiwick courts in the future.
- 3.3 The Law Officers of the Crown have advised that the Bailiwick legislation should be amended in a similar way to the UK's legislation, to remedy the current incompatibility of the legislation with the Convention. If the States recommends that the changes are introduced, a Projet de Loi would need to be prepared to amend the legislation as the amendment will introduce new provisions.
- 3.4 The UK Government wishes the Bailiwick's position to be aligned to ensure that the UK continues to meet its international obligations and in order to protect its reputation. The UK has a responsibility for the international relations of the Bailiwick, including monitoring compliance with the Convention. If the Bailiwick refused to make similar provision to the UK by not amending its legislation and a situation like Hammerton arose, with one of the Bailiwick jurisdictions found to be in contravention of the Convention, this would potentially place the UK, as a Member of the Council of Europe, in breach of its Convention obligations.

4 Engagement and Consultation

- 4.1 The Law Officers have been consulted and have provided advice, as set out in this Policy Letter.
- 4.2 The Human Rights (Bailiwick of Guernsey) Law, 2000 is a Bailiwick-wide law. Consultation has taken place with Alderney and Sark regarding the proposed amendment. Alderney and Sark's Policy & Finance Committees¹³ have confirmed

¹¹ Policy Letter "Incorporation of the European Convention for the Protection of Human Rights and Fundamental Freedoms into Bailiwick Legislation" by the States Advisory and Finance Committee, Billet d'État IX of 2000 and Resolutions of 5th April, 2000 (not available online)

¹² [The Human Rights \(Bailiwick of Guernsey\) Law 2000, \(Commencement\) Ordinance, 2006](#)

¹³ Sark P&F Committee decision 18 May 2021, Alderney P&F Committee decision 20 May 2021

their agreement to the amendment of the Bailiwick legislation. These Committees have also agreed that they are content for the same Policy Letter to be used for the three jurisdictions parliaments, at or about the same time.

- 4.3 Discussions are taking place with the Ministry of Justice, at officer level, as the UK Government Department responsible for the implementation of judgments of the European Court of Human Rights and with responsibility for managing the UK's constitutional relationship with the Bailiwick, regarding the steps being taken to amend the Bailiwick legislation.

5 Conclusion and Recommendations

- 5.1 It is recommended that the Bailiwick legislation is amended in a similar way to the UK legislation, as outlined in Section 2.5 of this Policy Letter, to provide a remedy in those defined circumstances and to ensure that the Bailiwick continues to meet its Convention obligations.

6 Compliance with Rule 4

- 6.1 Rule 4 of the Rules of Procedure of the States of Deliberation and their Committees sets out the information which must be included in, or appended to, motions laid before the States.
- 6.2 Rule 4(1)(a) - The Propositions for this Policy Letter relate to the States' objectives and policy plans for managing the States' international obligations¹⁴, by ensuring compliance with the Convention obligations.
- 6.3 Rule 4(1)(b) - The Committee's engagement and consultation with other parties is outlined in section 4, in accordance with Rule 4(1)(b).
- 6.4 Rule 4(1)(c) - The Propositions have been submitted to Her Majesty's Procureur for advice on any legal or constitutional implications.
- 6.5 Rule 4(1)(d) - There are no financial implications from these proposals and no additional resources will be required to fulfil these Propositions.
- 6.6 Rule 4(2)(a) - The Propositions relate to the purpose, policy responsibilities and duties of the Policy & Resources Committee in terms of its responsibilities for external relations and international and constitutional affairs, which includes the Island's constitutional position.
- 6.7 Rule 4(2)(b) - It is confirmed that the Propositions have the unanimous support

¹⁴ Policy & Resources Committee - [Government Work Plan 2021-2025](#) Billet d'État XV of 2021 (Stage 2 of GWP) (including pages 18-20, 40 and 41) and Resolutions of 23rd July, 2021

of the members of the Committee.

Yours faithfully

Policy & Resources Committee

P T R Ferbrache
President

H J Soulsby
Vice-President

M A J Helyar
J P Le Tocq
D J Mahoney