

**THE STATES OF DELIBERATION**  
**of the**  
**ISLAND OF GUERNSEY**

**THE SCRUTINY OF STATES AND PUBLIC BODIES (GUERNSEY) ORDINANCE, 2020**

The States are asked to decide:-

Whether they are of the opinion to approve the draft Ordinance entitled "The Scrutiny of States and Public Bodies (Guernsey) Ordinance, 2020", and to direct that the same shall have effect as an Ordinance of the States.

This proposition has 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.

**EXPLANATORY MEMORANDUM**

This Ordinance empowers the States Scrutiny Management Committee (the "SMC") to apply to the Royal Court for an Order requiring a person to appear before and produce documents to that committee or a scrutiny panel appointed by it, and provides for privilege, confidentiality and immunity in respect of evidence given to the SMC or a scrutiny panel.

Section 1 requires the SMC to ask a person to produce documents or appear before it to give evidence before applying to the Court for an Order requiring that person to do so, and to accommodate certain requests if made by that person in response to such a request. It goes on to provide the grounds for an application to the Court by the SMC if a person refuses to comply with a request made by it, and to make further provision in respect of such applications. Section 2 makes provision in relation to Orders made pursuant to an application under section 1, including provision as to the service of such Orders.

Section 3 amends Article 20E of the Reform (Guernsey) Law, 1948, and provides that a person appearing before the SMC or a scrutiny panel ("a witness") may refuse to answer a question on the grounds of a privilege conferred by that Article. Section 4 provides grounds on which a witness may challenge a question put to him or her by the SMC or a scrutiny panel, and for such a challenge to be considered in closed session. Section 5 confers a right on a witness to request the SMC or scrutiny panel to go into closed session for part of his or her evidence on specified grounds. Section 6 confers immunity from proceedings on witnesses and excludes answers given by witnesses from use in other proceedings, but allows the person chairing the meeting to withdraw that immunity and/or exclusion from further questions, having given a warning to that effect, if the chairperson is of opinion that the witness may be abusing

such protection. The section does not preclude the institution of criminal proceedings under section 8.

Sections 7 to 9 create criminal offences. Section 7 makes it an offence without reasonable excuse to disobey a Court Order requiring a person to produce documents to the SMC, or to appear before the SMC or a scrutiny panel, or to refuse to comply with a requirement to be examined before or answer any lawful and relevant question put by the SMC or scrutiny panel. It makes clear that exercising a right conferred under sections 3 to 5 – for example, to challenge a question under section 4 – is a reasonable excuse for these purposes. Section 8 creates an offence (in standard terms) of making false statements and producing false or misleading information and documents, and section 9 makes it an offence to interfere with witnesses appearing before or producing documents to the SMC or a scrutiny panel. Sections 10, 11 and 12 deal with interpretation, citation and commencement.

# **The Scrutiny of States and Public Bodies (Guernsey)**

## **Ordinance, 2020**

### ARRANGEMENT OF SECTIONS

#### *Formal requirements to give evidence and produce documents*

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2. Imposition of formal requirement by the Ordinary Court.

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4. Challenge to question put by the SMC or a scrutiny panel.
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12. Commencement.

# **The Scrutiny of States and Public Bodies (Guernsey)**

## **Ordinance, 2020**

**THE STATES**, in pursuance of their Resolutions of the 18<sup>th</sup> February, 2016<sup>a</sup>, and in exercise of the powers conferred on them by sections 20H and 20I of the Reform (Guernsey) Law, 1948 as amended<sup>b</sup>, and all other powers enabling them in that behalf, hereby order:-

*Formal requirements to give evidence and produce documents*

### **Requests and applications for orders to appear, produce documents, or both.**

1. (1) Before applying for an Order imposing a formal requirement under section 2 that a person –

- (a) produce documents to the SMC, or
- (b) appear before the SMC or a scrutiny panel to give evidence, or to give evidence and produce documents,

the SMC must request the person so to produce documents, appear to give evidence, or appear to give evidence and produce documents (as the case may be).

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<sup>a</sup> Article II of Billet d'État No. IV of 2016.

<sup>b</sup> Ordres en Conseil Vol. XIII, p. 288; amended by Order in Council No. II of 2007; No. XXII of 2008; and the Reform (Guernsey) (Amendment) (No. 2) Law, 2019. There are other amendments not relevant to this Law.

(2) A request under subsection (1) may be in such form as the SMC thinks fit.

(3) Where a request is made under subsection (1) for the person to appear before the SMC or a scrutiny panel, the SMC must –

- (a) accommodate any reasonable request by the person as to the date and time of the appearance, and
- (b) where it appears to the SMC appropriate to do so, having regard to the nature of the evidence or documents and the grounds set out in section 4(1), undertake to hear the evidence in closed session or receive the documents in confidence.

(4) If a person fails to comply with a request made under subsection (1), the SMC may apply to the Ordinary Court for an Order under section 2 on the grounds that -

- (a) the SMC or scrutiny panel is, or is about to be, engaged in scrutiny of the conduct, policies, use of resources, or activities in general, of one or more committees of the States of Guernsey, other public bodies or organisations in receipt of public funds, and
- (b) the person to whom the request has been made appears to the SMC to have knowledge or information which is relevant to that scrutiny, and

- (c) the SMC has complied with subsection (1) and (if applicable) subsection (3), but
  - (d) the person has refused without reasonable cause to comply with the request made under subsection (1).
- (5) An application under subsection (4) must in all cases –
  - (a) describe the conduct, policies, use of resources, or activities in general which are or are about to be scrutinised,
  - (b) specify each of the committees of the States of Guernsey, other public bodies or organisations in receipt of public funds which are or are about to become the subjects of that scrutiny, and
  - (c) subject to Rules made under section 2(6), be served on the person.
- (6) Where an application under subsection (4) is for an Order that the person be required to appear, the application must –
  - (a) indicate, in general terms, the issues on which the SMC or scrutiny panel proposes to question the person, and
  - (b) state the date and time when, and place where, the SMC requests that that person be required to appear.

(7) Where an application under subsection (4) is for an Order that the person be required to produce documents, the application must describe the documents that are the subject of the application (whether by specifying the documents, or by reference to their subject matter or any other factor) and state how they are relevant to the matter that the SMC or a scrutiny panel is investigating.

**Imposition of formal requirement by the Ordinary Court.**

2. (1) On an application being made under section 1(4), if the Ordinary Court is satisfied (on the balance of probabilities) that –

- (a) the scrutiny referred to in the application falls within the mandate of the SMC,
- (b) the person to whom the proposed Order is requested to be addressed has knowledge or information which is relevant to that scrutiny,
- (c) the SMC has complied with section 1(1) and (if applicable) section 1(3) but the person has refused without reasonable cause to comply with the request made under section 1(1), and
- (d) it is reasonable in all the circumstances for that person to be required to do so,

the court shall make an Order imposing a formal requirement on that person to –

- (i) produce documents to the SMC, or

- (ii) appear before the SMC or a scrutiny panel and give evidence, or give evidence and produce documents, as the case may be.

(2) An Order imposing a formal requirement to produce documents may require the person to whom it is addressed to produce –

- (a) all documents,
- (b) specified documents,
- (c) documents described by reference to their subject matter or any other factor,

which in the opinion of the court are relevant to the matter that the SMC or a scrutiny panel is investigating; and may include ancillary provisions concerning, for example, the preservation, security and confidentiality of such documents.

(3) If the court makes an Order under subsection (1) requiring a person to appear before the SMC or a scrutiny panel, the date on which that person is to appear must be at least five working days after the date on which the Order is served on the person.

(4) The SMC shall cause the Order imposing a formal requirement to be served on the person to whom it is addressed by delivering it to that person personally, or by leaving it at that person's business or private address with another apparently responsible person who undertakes to bring it to the attention of the person to whom it is addressed; and the person effecting service on behalf of the SMC



shall endorse the method and date of service on a copy of the Order.

(5) An Order imposing a formal requirement may only be served in the Bailiwick.

(6) For the avoidance of doubt the Royal Court may make Rules of Court governing the procedure for the making, hearing and determination of applications for Orders under this section, including rules prescribing circumstances in which such applications may be dealt with ex parte.

*Scrutiny hearings before the SMC and scrutiny panels*

**Privilege.**

3. (1) In Article 20E of the Reform (Guernsey) Law, 1948 -

(a) for paragraph (a), substitute -

"(a) the Scrutiny Management Committee or any standing or ad hoc panel appointed pursuant to the powers and duties of that Committee to carry out particular aspects of its mandate, or to scrutinise particular matters within its mandate, on that Committee's behalf," and

(b) at the end of the words insert ", including privilege against self-incrimination and legal professional privilege".

(2) A person appearing before the SMC or a scrutiny panel may at

any time refuse to answer a question on the ground of a privilege conferred by that Article.

**Challenge to question put by the SMC or a scrutiny panel.**

4. (1) A person appearing before the SMC or a scrutiny panel may challenge a question put by the SMC or scrutiny panel on the ground that –

- (a) the question is not relevant to, or necessary for the consideration of, the matter that the SMC or scrutiny panel is investigating,
- (b) the question concerns matters which are currently, or are shortly to be, under consideration by a court,
- (c) if the person is a Member of the States of Deliberation or a civil servant, giving the evidence or producing the documents would contravene the Code of Conduct binding upon that person as such, or
- (d) the prejudice to the person, the States of Guernsey or any third party that would ensue if he or she answered the question so far outweighs the usefulness of the answer to the SMC or scrutiny panel that it would be unreasonable to require the person to answer.

(2) The SMC or scrutiny panel shall consider any such challenge in closed session and thereafter (in public session if evidence is being taken in public session) shall -

- (a) direct that the question be answered, or that the question need not be answered, and
- (b) inform the person of the reasons for that direction.

**Confidentiality.**

5. (1) A person appearing before the SMC or a scrutiny panel may at any time request that the SMC or panel -

- (a) go into closed session to hear all or any part of the oral evidence which the person has been requested or required to give, or when examining any document which the person has been requested or required to produce, or
- (b) undertake not to publish, or to publish only in redacted form, all or any part of the oral evidence which the person has been requested or required to give, or any document which the witness has been requested or required to produce, or
- (c) both,

and may insist that the SMC or scrutiny panel go into closed session whilst the person makes, and whilst the SMC or scrutiny panel rules on, that request.

(2) The grounds for making a request under subsection (1) are that further disclosure of the evidence or information would or may -

- (a) risk serious damage to the public interest,
- (b) constitute a contempt of court in respect of matters which are currently, or are shortly to be, under consideration by a court,
- (c) endanger any significant public or private commercial interest,
- (d) if the person is a Member of the States of Deliberation or civil servant, contravene the Code of Conduct binding upon that person as such,
- (e) prejudice the person, the States of Guernsey, or any third party, to such extent as to so far outweigh the value of publication that it would be unreasonable to require the person to answer questions or produce documents without acceding to the confidentiality request.

(3) For the avoidance of doubt, if the SMC or scrutiny panel rules against a request under subsection (1) made by a person who has been required to give evidence, the person may nevertheless thereafter challenge a question under section 4 (unless a challenge to that question has already been made under that section).

**Immunity of person appearing before, or producing documents to, the SMC or a scrutiny panel.**

6. (1) Subject to the succeeding provisions of this section -

- (a) no civil proceedings or criminal proceedings may be instituted against any person in respect of any words spoken or written by that person in the course of giving evidence, or contained in any document produced by that person and accepted by the SMC or a scrutiny panel in the course of a scrutiny investigation, and
- (b) an answer given by a person to a question put to that person, an oral or written statement made by a person, or a document produced by a person, in the course of the person's appearance before the SMC or a scrutiny panel shall not be admissible in evidence against the person in any other civil proceedings or criminal proceedings.

(2) Subsection (1) does not preclude the institution of criminal proceedings under section 8 (false or misleading evidence).

(3) If it appears to the person chairing a meeting of the SMC or a scrutiny panel ("**the chairperson**") at which evidence is being taken that a person is or may be abusing the immunity or exclusion provided for in subsection (1), the chairperson shall warn that person ("**the witness**") that he or she may withdraw those rights if the witness continues in his or her abuse of the immunity or exclusion; and that warning must be recorded in the minutes of the meeting.

(4) If, having issued a warning under subsection (3), the chairperson is of the opinion that the witness is persisting in his or her abuse of the immunity or exclusion, and that its withdrawal is in the public interest, the

chairperson may withdraw it by so informing the witness, whereupon the immunity, the exclusion, or both (as the case may be), shall not apply in respect of any further evidence given to that meeting by that witness, and that withdrawal must be recorded in the minutes of the meeting.

### *Offences*

#### **Disobedience to formal requirement.**

7. (1) A person who, without reasonable excuse –
- (a) disobeys an Order of the court imposing a formal requirement to produce documents to the SMC or to appear before the SMC or a scrutiny panel, or
  - (b) having so appeared, refuses to comply with a requirement to be examined before, or to answer any lawful and relevant question put by, the SMC or scrutiny panel as the case may be,

is guilty of an offence; and for the avoidance of doubt, exercise of the rights conferred by sections 3 to 5 constitutes a reasonable excuse for the purposes of subparagraph (b).

(2) A person guilty of an offence under subsection (1) shall be liable to imprisonment for a term not exceeding six months, or to a fine not exceeding level 4 on the uniform scale, or to both.

#### **False or misleading evidence.**

8. (1) A person is guilty of an offence if he or she, when giving

evidence or producing documents in response to a request made, or an Order imposing a formal requirement, under this Ordinance -

- (a) makes a statement which he or she knows or has reasonable cause to believe to be false, deceptive or misleading in a material particular,
- (b) recklessly makes a statement, dishonestly or otherwise, which is false, deceptive or misleading in a material particular,
- (c) produces or furnishes, or causes or permits to be produced or furnished, any information or document which he or she knows or has reasonable cause to believe to be false, deceptive or misleading in a material particular, or
- (d) recklessly produces or furnishes, or recklessly causes or permits to be produced or furnished, dishonestly or otherwise, any information or document which is false, deceptive or misleading in a material particular.

(2) A person guilty of an offence under subsection (1) shall be liable to imprisonment for a term not exceeding 12 months, or to a fine not exceeding level 5 on the uniform scale, or to both.

**Interference with witnesses.**

9. (1) A person is guilty of an offence if he or she, by fraud, intimidation, force or threat, by the offer or promise of any inducement or benefit, or

by other improper means -

- (a) induces or attempts to induce another person who has been requested or formally required to appear before or produce documents to the SMC or a scrutiny panel, to refrain from doing as requested or formally required, or
- (b) influences or attempts to influence another person in respect of any evidence given before the SMC or a scrutiny panel in response to such a request or formal requirement.

(2) A person guilty of an offence under subsection (1) shall be liable to imprisonment for a term not exceeding 2 years, or to a fine not exceeding level 5 on the uniform scale, or to both.

#### *General*

#### **Interpretation.**

10. In this Ordinance -

"**civil proceedings**" includes regulatory proceedings and disciplinary proceedings,

"**closed session**" means a part (or the whole) of a meeting of the SMC or a scrutiny panel from which the public and media are excluded, and which is not to be publicly reported; and "public session" is to be construed accordingly,



**"a scrutiny investigation"** means an investigation being conducted by the SMC or by a scrutiny panel within the terms of the SMC's mandate,

**"a scrutiny panel"** means a standing or *ad hoc* panel appointed pursuant to the powers and duties of the SMC to carry out particular aspects of the SMC's mandate, or to scrutinise particular matters within the SMC's mandate, on the SMC's behalf, and

**"the SMC"** means the States Scrutiny Management Committee, or such other committee as the States may from time to time constitute with a mandate to scrutinise the conduct, policies, use of resources, and activities in general, of committees of the States of Guernsey, other public bodies and organisations in receipt of public funds.

**Citation.**

11. This Ordinance may be cited as the Scrutiny of States and Public Bodies (Guernsey) Ordinance, 2020.

**Commencement.**

12. This Ordinance shall come into force on the day appointed by regulations of the SMC, and such regulations may appoint different days for different provisions and different purposes.