

**THE HUMAN RIGHTS (BAILIWICK OF GUERNSEY) LAW 2000**

**CORE GUIDANCE FOR PUBLIC AUTHORITIES IN THE  
BAILIWICK OF GUERNSEY**

**Last updated September 2010**

# **The Human Rights (Bailiwick of Guernsey) Law, 2000**

## **Core guidance for public authorities in the Bailiwick of Guernsey**

### **CONTENTS**

#### **Section**

<b>1. Introduction</b>	3
<b>2. What the Law Does</b>	4
<b>3. The Convention Rights</b>	5
The Articles	5
Interpreting the Convention	8
<b>4. Key Concepts</b>	9
Public authorities	9
The formulation of rights	11
Proportionality	11
Victim	12
Margin of appreciation	12
<b>5. What the Law Means in Practice</b>	14
Compatibility of legislation	14
Compatibility by public authorities	15
What areas of my work should I consider?	15
• Right to a fair trial	17
• Freedom from torture and inhuman or degrading treatment	17
• Right to respect for private and family life	18
• Freedom of expression	19
• Freedom of thought, conscience and religion	19
• Enjoyment of possessions	20
• Freedom from discrimination in the enjoyment of Convention rights	21

<b>6. Questions and Answers</b>	23
Implementation	23
Using the Law	24
ECHR protocols and other international instruments	25
<b>7. Where to Get Advice</b>	26
Publications	27
Websites	27
<b>Annex A:</b> An outline of the Human Rights (Bailiwick of Guernsey) Law	28
<b>Annex B:</b> Convention rights in full and some relevant Bailiwick case law	30
<b>Annex C:</b> Checklist - How to tell if you are interfering with a Convention right	40
<b>Annex D:</b> Hybrid bodies	44
<b>Annex E:</b> Glossary of terms	47

If you think you may need advice on a specific issue relating to human rights please refer to page 26. If you want to know where to find more information on human rights please see the resources and websites referred to on page 27.

## **1. INTRODUCTION**

1.

The Human Rights Law is one of the most significant pieces of constitutional legislation enacted in the Bailiwick of Guernsey.

2.

It is intended to encourage a modern civic society where the rights and responsibilities of our citizens are clearly recognised and properly balanced.

3.

Its effect is to allow people to claim their rights under the European Convention on Human Rights in the Bailiwick's courts and tribunals, instead of having to go to the European Court in Strasbourg as was previously required. The Law underpins this by requiring all public authorities in the Bailiwick to act compatibly with the Convention rights.

4.

This places responsibilities on all of us who work in public authorities, which include Bailiwick government departments and committees, Parish administrations, the courts, the police and other bodies carrying out functions that the Islands' governments would otherwise have to undertake.

5.

This guide introduces you to the Human Rights Law and the European Convention on Human Rights. It cannot provide a comprehensive guide to all aspects of your work. The aim is simply to explain in basic terms how the Law works, offer some examples and help you to think about how and why it affects what you do. This guidance is not, and cannot be, a substitute for seeking legal advice. However, it is intended to give sufficient guidance to enable warning bells to ring so that you can take legal advice at the right time. Annex B includes brief details of relevant Bailiwick case law by way of illustration of issues which have been considered before the domestic courts. There may be other relevant Bailiwick case law and in many cases will be relevant Strasbourg case law to which regard must be made and also case law from other jurisdictions such as the U.K. which may be persuasive.

6.

A lot of preparatory work was needed to ensure that existing legislation and procedures were compliant with Convention Rights. For this reason, although the Law was registered in 2001, it was not brought into force until 1<sup>st</sup> September, 2006

## 2. WHAT THE LAW DOES

7.

The broad aim in introducing the Law was to help create a society in which people's rights and responsibilities are properly balanced and where an awareness of the Convention rights permeates our government and legal systems at all levels.

8.

The Human Rights Law incorporates provisions from the European Convention on Human Rights into Bailiwick law.

9.

Under the Human Rights Law, the Convention rights are enforceable in the Bailiwick courts. Previously, people had to take a case to the European Court in Strasbourg, and even then only when domestic remedies had been exhausted. The process was costly and could take several years before the case was finally decided.

10.

### **The Human Rights Law:**

- makes it unlawful for a public authority to act incompatibly with the Convention rights and allows for a case to be brought in a Bailiwick court or tribunal against the authority if it does so. However, a public authority will not have acted unlawfully under the Law if as the result of a provision of primary legislation it could not have acted differently.
- requires all legislation to be interpreted and given effect as far as possible compatibly with the Convention rights. Where it is not possible to do so, a court may
  - quash or disapply subordinate legislation, or
  - if available, give a declaration of incompatibility for primary legislation, thereby signalling the need to amend the legislation to bring it into line with the Convention rights.
- requires Bailiwick courts and tribunals to take account of Strasbourg case-law (i.e. the case-law of the Court and the Commission in Strasbourg, and the Committee of Ministers). They are also bound to develop the common law compatibly with the Convention rights.

11.

The practical implications of this are discussed in section 5 of this guidance "What the Law means in practice".

### 3. THE CONVENTION RIGHTS

12.

The European Convention on Human Rights is a treaty of the Council of Europe, which was adopted in 1950, ratified by the United Kingdom in 1951 and extended to the Bailiwick in 1953. It was designed to give binding effect to the guarantee of various rights and freedoms in the United Nations Declaration on Human Rights, adopted in December 1948.

13.

An immediate aim of the Convention was to protect Europe against totalitarianism and a repeat of the atrocities of the Second World War. However, its general purpose has been described as being to protect human rights and fundamental freedoms and to maintain and promote the ideals and values of a democratic society. It therefore has a strong, continuing relevance. The Convention rights are given a broad interpretation rather than a strict, legalistic one, so as to ensure that they are practical and effective within a changing society.

14.

This section offers a brief outline of the Convention rights, which are incorporated into Bailiwick law. It is intended to help you start thinking about what the Convention rights are and how they might be relevant to your work. You will need legal advice to determine how the Convention rights may apply to your particular situation. The full text of the Convention rights, as set out in the relevant Articles of the ECHR, is given in Annex B to this guidance. This Annex also notes some relevant Bailiwick case law on the particular convention rights since the Law came into force.

15.

**The Convention guarantees the following rights and freedoms:**

#### **Article 2: The right to life**

- Public authorities, such as the police, a prison or a hospital, must not cause the death of any person. Public authorities also have a positive obligation to protect life in some situations- for example, this may be relevant in relation to hospital patients or where there is otherwise a threat to someone's life. The Convention defines a limited number of circumstances where it is not a contravention of this Article for a public authority to take someone's life, where the force used is no more than absolutely necessary, such as when defending a person from an attack, to effect a lawful arrest or when quelling a riot. It has been established in Strasbourg case law that Article 2 does not include a right to take your own life.

#### **Article 3: The right to freedom from torture and inhuman or degrading treatment or punishment**

- Torture is the most serious kind of ill-treatment. Inhuman or degrading treatment is less severe than torture and may include certain physical assaults, inhuman detention conditions or corporal punishment. The ill-treatment relates to both mental and physical suffering. Whether ill-treatment qualifies as torture or inhuman treatment will depend on factors including its duration, severity and the vulnerability of the victim. Article 3 is discussed in more detail in section 5 "What the Law means in practice".

#### **Article 4: The right to freedom from slavery, servitude and forced or compulsory labour**

- Slavery means that a person is owned by someone else, just as if they were a piece of property. Someone in servitude is not actually owned by another person, though they may have to live on that person's property and be unable to leave. Certain kinds of labour, such as work that could ordinarily be expected to be carried out as part of a prison sentence, are excluded from this Article.

#### **Article 5: The right to liberty and security of person (subject to a derogation applicable to terrorism)**

- People have the right not to be arrested or detained, except where the detention is authorised by law. This Article does not just apply to police arrests, but covers all aspects of detention, including for medical or psychiatric reasons. The Article defines the six circumstances under which it is acceptable for someone to be detained, including after conviction by a criminal court or where there is reasonable suspicion that someone has committed a crime.

#### **Article 6: The right to a fair and public trial within a reasonable time**

- This is a wide ranging and highly developed right which covers all criminal and many civil cases, as well as, for example, cases heard by tribunals and some internal hearings or regulatory procedures. Article 6 accords anyone charged with a criminal offence certain rights, including the right to be presumed innocent until proven guilty and to be given adequate time and facilities to prepare their defence. The emphasis on a public trial protects litigants against the administration of justice in secret with no public scrutiny. Article 6 is discussed in more detail in section 5 "What the Law means in practice".

#### **Article 7: The right to freedom from retrospective criminal law and no punishment without law**

- A person may not be convicted of an act that was not a criminal offence at the time it was committed; nor can they face a penalty that was not in place when the act in question happened. 'Criminal' and 'penalty' may have a broader meaning than under domestic law. This Article also requires that a law imposing a criminal offence or penalty be clear enough so that a person can reasonably be able to foresee the legal consequences.

#### **Article 8: The right to respect for private and family life, home and correspondence**

- This Article is very broad and has wide-ranging implications. Public authorities may only interfere with someone's private life where they have legal authority to do so, the interference is necessary in a democratic society for one of the aims stated in the Article and is proportionate to that aim. This Article covers matters such as the disclosure of private information, monitoring of employees' phone calls and e-mail, carrying out body searches and restrictions on entering a person's home. It also touches on issues such as the right for families to live together or the right not to suffer from environmental hazard. It is important

to note that the rights and freedoms expressed in Articles 8 to 11 may be limited where this is necessary to achieve an important objective such as protecting public health or safety. The restrictions in each of these Articles vary; they are set out in full in Annex B. Article 8 is discussed in more detail in section 5 “What the Law means in practice”.

### **Article 9: The right to freedom of thought, conscience and religion**

- People have the right to hold whatever thoughts, positions of conscience or religious beliefs that they wish. Article 9 guarantees the right for everyone to manifest their religion or belief in worship, teaching, practice and observance. Article 9 points may be raised, for example, where a person’s religious or other beliefs require their, or prevent them from, carrying out a certain activity, such as wearing particular clothes or working on a Holy Day. Article 9 is discussed in more detail in section 5 “What the Law means in practice”.

### **Article 10: The right to freedom of expression**

- Freedom of expression covers such things as what we say in conversation or in speeches, publishing books, articles or leaflets, broadcasting, art, the Internet and many other areas. It applies to the media as well as individuals. The Strasbourg court has consistently emphasised the special importance of this right. Article 10 is discussed in more detail in section 5 “What the Law means in practice”.

### **Article 11: The right to freedom of assembly and association**

- This includes the right of people to demonstrate peacefully, and to join - or choose not to join - trade unions.

### **Article 12: The right to marry and found a family**

- This Article may be relevant to rules and policy concerning adoption and fostering. The Strasbourg Court has interpreted this article as providing post-operative transsexual people with the right to marry and to found a family. This reverses earlier Strasbourg case law and illustrates how interpretation of convention rights may change with changes in society.

### **Article 14: The prohibition of discrimination in the enjoyment of convention rights**

- Not all differences in treatment are discriminatory, but only those which have no objective and reasonable justification. Article 14 only applies to the rights set out in the Convention, and thus there must be another Convention right at issue to which a claim of discrimination can be attached. Article 14 is discussed in more detail in section 5 “What the Law means in practice”.

### **Article 1 of Protocol 1: The right to peaceful enjoyment of possessions and protection of property**

- Many possessions are regarded as property, not just houses or cars, but also things like shares, licences and goodwill. The right to engage in a profession can also, in some cases, be a property right. No one can be deprived of their property except where the action is

permitted by law and justifiable in the public or general interest. This Article is discussed in more detail in section 5 “What the Law means in practice”.

### **Article 2 of Protocol 1: The right to access to education (subject to a reservation about unreasonable expenditure)**

- The right of access to education must be balanced against the resources available. This right may, for example, be relevant to the punishments used by schools, such as the expulsion of disruptive pupils. It may also be relevant to children with special needs.

### **Article 3 of Protocol 1: The right to free elections**

- This Article applies to elections to the legislature, which must be free and fair and held at reasonable intervals. It may be relevant to issues of participation and access, such as ensuring that mechanisms for postal voting in general elections meet the needs of disabled or ill people.

### **Article 1 of the Thirteenth Protocol 5: Abolition of the death penalty**

- This provision abolishes the death penalty.

16.

The Convention is about protecting fundamental rights and freedoms against the power of the state. This means that the rights can be relied on by any victim who claims that his or her rights have been or will be interfered with. This can be an individual, non-governmental organisation or group of individuals and in some cases also companies and other bodies (see also paragraphs 29-31) - but not governmental organisations (though they can rely on the Convention as a defence to a claim against them). The rights set out in the Convention are explained and developed in the case-law of the Strasbourg bodies (the Court, the Commission and the Committee of Ministers).

17.

The Convention contains other provisions, largely about the machinery for enforcing rights, which are not incorporated by the Human Rights Law.

### **Interpreting the Convention**

18.

The Strasbourg court has adopted a number of principles of interpretation of the Convention:

- The Strasbourg court takes an overall view of the situation and seeks to give a practical and effective interpretation to the rights.
- While rights are widely interpreted and applied to the particular facts before the court, any limitation to those rights, for example the limitations to Articles 8 to 11, are interpreted narrowly.

- The Convention is, in the words of the Strasbourg court, a “living instrument” which must be interpreted in the light of present-day conditions. Societies and values change and the Strasbourg court takes account of these changes in interpreting the Convention. In doing so, it looks to see whether there are common European standards.
- Terms or expressions in the Convention have the same meaning for all the countries bound by it. That meaning is given independently by the Strasbourg authorities. The use of an expression in the law of an individual state (such as whether a matter is considered to be criminal or civil) is not conclusive and may not be the same as the definition of that expression in the Convention.

19.

Under the Human Rights Law, these principles of interpretation must be taken into account by the Bailiwick courts and tribunals.

#### **4. KEY CONCEPTS**

20.

There are a number of concepts relating to the Human Rights Law and the European Convention on Human Rights with which you should be familiar. This section outlines some of the most important of these and gives some indication of their significance.

#### **Public authorities**

21.

The Law requires public authorities to act compatibly with the Convention rights. “Public authorities” are not defined exhaustively but the term covers three broad categories:

- obvious public authorities such as Bailiwick government departments or committees, Parish bodies and the police. Everything these bodies do is covered by the Law. The Island legislatures, though, are not public authorities.
- courts and tribunals.
- any person or organisation that carries out some functions of a public nature (“functional public bodies”). Under the Law, however, they are only considered a public authority in relation to their public functions and not in relation to wholly private matters such as acting as an employer or in a commercial capacity. This provision was added in view of the changing nature of public service provision where services may be contracted out to the private, voluntary or charitable sectors. So, for example, if a security company were contracted to police the airport, it would probably be a public authority in relation to its acts when doing so but not when offering security services to a supermarket or entering into a contract for the purchase of land. Another example is a private school in respect of its education and pupil welfare functions. However, the issue is not straightforward as the U. K. courts, in considering the similar definition in the Human Rights Act, have not just determined the question just by looking at the nature of the function but also by looking at the nature and motivation of the particular body in question in carrying out the function as discussed below. It is hard to draw general lessons from the U.K. case law on this topic other than that the determination of the public status of a particular body is specific to the particular facts.

22.

Private bodies that have some public functions are sometimes referred to as “hybrid bodies” and, as well as private companies, may include such other bodies as charities and voluntary organisations and professional associations in their regulatory capacities. The classification of organisations as public authorities or hybrid bodies is often far from straightforward and is clearly a matter of great importance for the organisations concerned. Fuller consideration of how a private or voluntary sector organisation may determine whether it is wholly or partly a public authority for the purposes of the Law is given in Annex D.

Since the U.K. Human Rights Act came into force, there has been a significant debate on whether certain bodies are functional public bodies e.g. private companies running care homes or hospitals. There is now a significant body of case law on this issue, reports by the U.K. Joint Committee on Human Rights and UK government guidance -see **The Human Rights Act 1998- the Definition of "Public Authority"**- Government response to the Joint Committee on Human Rights' Ninth Report of Session 2006-07-October 2009-issued by the Ministry of Justice and **"Guidance on contracting for Services in the light of the Human Rights Act 1998-** .available from the UK Communities and Local Government Department.

<http://www.communities.gov.uk/publications/localgovernment/guidancecontracting>

The problem has been circumvented in the U.K. for certain residential care functions, by amendment to U.K. health and social care legislation, to ensure that certain publically arranged residential care home functions are subject to the Human Rights Act as if they were functions of a public nature. There is no similar provision in the Bailiwick.

23.

In some cases it will be difficult to know if a body is a public authority. You will need to take legal advice to clarify this. However, some key considerations in deciding whether a body is a public authority include:

- whether the body performs or operates in the public domain as an integral part of a statutory system which performs public law duties whether the duty performed is of public significance
- whether the rights or obligations of individuals may be affected in the performance of the duty
- whether an individual may be deprived of some legitimate expectation in performance of the duty
- whether the body is non-statutory but is established under the authority of a Bailiwick government or a Parish authority
- whether the body is supported by statutory powers and penalties and public funding
- whether the body performs functions that a Bailiwick government or a parish would otherwise perform
- whether the body is under a duty to act judicially in exercising what amounts to public powers.
- the proximity of the relationship between the private body and the delegating "core" public authority

- whether the body is democratically accountable

### **The formulation of Rights**

24.

The Convention rights are formulated in three broad ways, often referred to as the hierarchy of rights: some are absolute, some are limited and some are qualified.

25.

**Absolute** rights include the right to protection from torture, inhuman and degrading treatment and punishment (Article 3), the prohibition on slavery and enforced labour (Article 4), and the prohibition of discrimination in the enjoyment of convention rights (Article 14). These rights cannot be interfered with by a public authority.

26.

Other rights, such as the right to liberty (Article 5), are **limited** under explicit and finite circumstances, defined in the Convention itself, which provide exceptions to the general right.

27.

**Qualified** rights include the right to respect for private and family life (Article 8), the right to freedom of expression (Article 10), religion (Article 9) assembly and association (Article 11), the right to the peaceful enjoyment of property (Protocol 1, Article 1) and to some extent the right to education (Protocol 1, Article 2). Although these rights are qualified, interference with them is permissible only if what is done:

- has its basis in law
- is necessary in a democratic society, which means it must:
  - fulfil a pressing social need
  - pursue a legitimate aim
  - be proportionate to the aims being pursued
- is related to the permissible aim set out in the relevant Article, for example
  - the prevention of crime, or
  - the protection of public order or health.

### **Proportionality**

28.

This is a crucial concept. Any interference with a Convention right must be proportionate to the intended objective. This means that even if a particular policy or action that interferes with a Convention right is aimed at pursuing a legitimate aim (for example the prevention of crime) this will not justify the interference if the means used to achieve the aim are excessive in the circumstances. Any interference with a Convention right should be carefully designed to meet the

objective in question and must not be arbitrary or unfair. You must not use a sledgehammer to crack a nut. Even taking all these considerations into account, in a particular case an interference may still not be justified because the impact on the individual or group is too severe. For example, the European Court of Human Rights took this view in 2000 when it ruled that an outright ban on homosexual people serving in the British Army was not compatible with convention rights.

### **Victim**

29.

Only a person considered a victim can bring proceedings against a public authority under the Law. A victim is someone who is directly affected by the act in question. Victims can include companies as well as individuals and may also be relatives of the victim where a complaint is made about his death. A victim may also be a person who is at risk of being directly affected by a measure.

30.

An organisation or interest group or trade union cannot bring a case unless it is itself a victim. However, there is nothing to stop it providing legal or other assistance to a victim.

31.

Governmental organisations cannot be victims.

### **Margin of appreciation**

32.

In relation to some Convention rights (particularly those requiring a balance to be struck between competing considerations) the Strasbourg court allows a “margin of appreciation” to the domestic authorities, meaning that it is reluctant to substitute its own views of the merits of the case for those of the national authorities. It would not be appropriate for our courts to apply that as it has been applied in Strasbourg, but they may develop a similar concept and be more ready to examine the merits of a decision, policy or law and the reasons for its adoption. In some cases the court may conclude that there are insufficient reasons to support the decision, policy or law. However, in others it may be willing to accept the opinion of expert decision makers, such as the Islands’ executives or parliaments and their understanding of the facts and the policy.

33.

Factors that might influence the court are:

- the nature of the Convention right and the activity involved. Certain rights are absolute and a State cannot legislate so as to reduce or qualify the right, whilst other rights specifically refer to the possibility of limitations on the right being imposed. Also, some rights are of particular importance since they relate to the fundamentals of a democratic society (freedom of expression, right to a fair hearing) and the courts will require in such cases very convincing reasons and evidence to be put forward to support a decision, policy or law that restricts such a right.
- the nature of the restriction on the right. Strasbourg is more likely to defer to the state in cases where the decision, law or policy requires a consideration of social, economic or political matters or relates to national security. This is based on the assumption that national

governments are in a better position to judge the requirements of their society and to balance competing needs.

- In some cases, for example a challenge under Article 2 or 3 to the distribution of scarce resources within the health service, the courts will have to think very carefully about whether to intervene. However in other cases, such as those involving the right to a fair trial, the court may feel well placed to assess more thoroughly whether or not a violation has taken place.

34.

The Bailiwick courts are required by the Human Rights Law to take into account the Strasbourg jurisprudence on the Convention rights. Also, the Convention is a living instrument whose interpretation changes over time to reflect social attitudes. This means that the outcome of Strasbourg cases in which the Bailiwick or UK government departments have been involved in the past is not an infallible guide to what may happen under the Human Rights Law.

## **5. WHAT THE LAW MEANS IN PRACTICE**

35.

The Human Rights Law is about respecting and fostering the Convention rights in everything a public authority does. It provides a new basis for the protection of fundamental rights of every citizen.

36.

The Law does this in two ways: it places everyone under a duty to interpret all legislation compatibly with the Convention rights, and requires you, as a public authority, to act in accordance with the Convention rights.

37.

What does this mean in practice?

### **Compatibility of legislation**

38.

The Law requires that all legislation - Laws, UK Acts applied to the Bailiwick, Ordinances, orders, rules, regulations - so far as is possible, be read and given effect in a way that is compatible with the Convention rights.

39.

This is a very strong provision and you must make every effort to interpret legislation in accordance with the Convention rights. Where there are two possible interpretations of a provision - one that is compatible with the Convention rights and one that is not - the one that is compatible must be adopted. The fact that a court may have interpreted a law in a certain way before the Law came into force on 1<sup>st</sup> September, 2006 does not mean that it will now interpret the provision in that same way; nor can that earlier interpretation be relied upon by a public authority.

40.

If a piece of primary legislation (defined in section 17(1) of the Human Rights Law) cannot be interpreted compatibly with the Convention rights, it will remain in force. The courts will not be able to overrule it. That would be to undermine the sovereignty of the Bailiwick parliaments. However, certain courts (defined in section 4(5) of the Law) can make a declaration of incompatibility, which will create considerable pressure to find a way of amending the legislation so that it is compatible with the Convention rights.

41.

The courts may however quash subordinate legislation, such as some ordinances and all orders, regulations and rules, that is not compatible with the Convention rights, unless the provision has to say what it does because of a provision of primary legislation.

## **Compatibility by public authorities**

42.

All public authorities have a positive obligation to ensure that respect for human rights is at the core of their day to day work, although it is emphasised that some organisations or persons are only considered public authorities in relation to the public functions that they undertake (see paragraph 21-23 and annex D). This means that a public authority should act in a compliant manner, rather than simply seeking to avoid acting non-compliantly. The Human Rights Law underpins this by making it unlawful for a public authority to act (or fail to act) in a way that is incompatible with a Convention right. This covers all aspects of the public authority's activities including:

- Drafting rules and regulations
- Decision making
- Policy implementation
- Interaction with members of the public

and, depending upon the type of public authority (paragraph 21):

- Internal staff and personnel issues
- Administrative procedures.

43.

Respect for Convention rights must be a central factor in everything you and your organisation do as a public authority. If your organisation's existing procedures are not compatible, it will need to implement new policies and procedures that are consistent with the Convention rights. You should consider how the relevant parts of the Law apply to all aspects of your work, and be able to show that you have done so. You should be able to justify your decisions in the context of the Convention rights, and show that you have considered the Convention rights and dealt with any issues arising out of such a consideration.

44.

You also need to think about how, and the extent to which, any legislation underpinning your policies and procedures could help your organisation do more in dealing positively and supportively with Human Rights issues. There may be matters here to discuss with the senior manager of your organisation and which subsequently it may be appropriate to raise with the relevant Bailiwick government committee or department.

## **What Areas of My Work Should I Consider?**

45.

The Convention has a wide reach and is relevant in many areas of work. Some examples are given below to illustrate how this works.

**Does my work involve making decisions concerning a person's private rights or lay down procedures for the determination of cases?**

46.

If so, Article 6 may be relevant. Article 6 guarantees a right to a fair trial in the determination of

- a person's civil rights and obligations, or
- any criminal charge.

The distinction between civil and criminal cases is not always clear cut as an offence may be classified as civil under Bailiwick Law but its nature and the seriousness of the possible punishment may be such that make it virtually the same as a criminal case; there are now a significant number of U.K cases on this issue. It is an important distinction as because the rights under Article 6 are more extensive for cases classified as criminal.

47.

Civil rights and obligations are rights and obligations that exist under private law, although they may arise in a public law context where a public authority is involved with or has affected private rights.

48.

The concept of civil rights and obligations is an autonomous one, and therefore the definition in the Convention is not necessarily the same as that in Bailiwick law. It has been held to include:

- contracts
- a licence to provide a public service (e.g. a public transport operator)
- rights connected with land, planning decisions and certain social security benefits which are based on an insurance model.

49.

The concept does not include, for example, certain tax obligations, which according to the case law of the Strasbourg court are matters of public law.

50.

Decisions of public authorities are also covered where they affect private rights - for example, a decision to grant a licence to carry on a business activity or a decision in relation to disciplinary proceedings.

51.

Under the Convention, anyone who is having his civil rights or obligations determined (for example by planning enforcement procedures) or is facing any criminal charge is entitled to:

- **the right of access to a court or tribunal.** The whole process needs to be considered. If the original decision is taken by an administrative body whose procedures do not satisfy Article 6, the requirement may nevertheless be met if that decision can be reviewed by a court or tribunal that does satisfy Article 6. Consequently, the review may need to be in the form of an appeal on both facts and law. What is required depends upon the nature of the case. If the conditions of Article 6 are met by the original decision, it is not necessary to provide for an appeal. The right of access to a court or tribunal is not absolute. However, restrictions on it must not impair the essence of the right and they must be for a legitimate purpose and proportionate. The system must not be set up in such a way so as in practice to prevent access - for example, by creating inadequate time-limits, or not providing for the giving of notice of decisions - and it will in some cases require the right to legal aid or legal representation.
- **the right to a fair hearing.** There should be a reasonable opportunity to present a case and, in certain cases, to examine witnesses. There should be equality of arms i.e. one party should not be placed at a procedural disadvantage compared with the other. In criminal proceedings, there is a right to the assistance of an interpreter, if needed.
- **the right to a public hearing.** It is possible to have a system that allows an oral hearing to be dispensed with in certain cases. It is also possible to exclude the public from the hearing (though not from the judgement) where this can be justified on one of the grounds set out in Article 6, such as the protection of national security or public order.
- **the right to a hearing within a reasonable time.** A breach may arise if the public authority fails to organise its system so as to avoid delays, for example, by providing inadequate staff and resources to hear cases within a reasonable time.
- **the right to an independent and impartial tribunal.** Judges and tribunal members must be free from outside pressures, and should be independent of the executive and of the parties. The court or tribunal must not be biased. One element in securing this right is through the procedures and rules on the appointment and terms of office of judges and members of tribunals.

### **Does my work affect a person's physical or mental well-being?**

52.

Article 2 means that public authorities must not cause the death of any person. Public authorities also have a positive obligation to protect life in some situations. The Convention defines a limited number of circumstances where it is not a contravention of this Article for a public authority to take someone's life.

53.

Article 3 prohibits torture and inhuman or degrading treatment or punishment. This provision aims to protect an individual from physical and mental ill-treatment. Whether or not an act constitutes inhuman or degrading treatment depends on a range of factors. Much will depend on the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects, and in some instances the sex, age and state of health of the victim. The Article is relevant in a wide number of situations including conditions of detention, deportation or extradition (where the state can incur liability if it proposes to remove a person to a country where he or she is likely to suffer ill-treatment), racial discrimination and corporal punishment. Article 3 has been considered relevant in very serious cases involving the protection of vulnerable individuals in the course of legal proceedings.

54.

Governments have positive obligations under Article 3, which mean that they are obliged to secure the rights guaranteed by it and to prevent breaches of the Article by one private individual against another, particularly against children and other vulnerable persons. Governments cannot delegate their obligations in this area to other bodies or individuals.

55.

There is a duty to investigate allegations of torture and to provide explanations for injuries - for example, where a prisoner or mental patient is found to have suffered physical injury.

### **Does my work affect a person's private or family life?**

56.

Article 8 says that everyone has the right to respect for his private and family life, his home and his correspondence.

57.

Article 8 covers a vast range of issues and subjects, including interception of correspondence, telephone tapping and search warrants (at home or at work), access to information about a person's own identity, a person's right to have and to express an identity, the freedom to express one's sexuality, to be free from severe environmental pollution, to consent to medical treatment, to have parental access and custody of children, the collection and use of information concerning an individual, the right to have and form social relationships and the protection of a person's reputation.

58.

A public authority may not interfere with these rights except:

- in accordance with the law; and
- where it is necessary in a democratic society in the interests of national security, public safety, the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

59.

The Strasbourg court has made it clear that it will not substitute its own views on the needs of the state, but it will wish to satisfy itself that the state's act or law falls within a margin of appreciation (see paragraph 32). In deciding whether action is necessary in a democratic society, factors to which the Bailiwick courts will look include:

- whether or not there is a common European standard or approach
- whether the action taken was proportionate to the aim to be achieved
- whether or not a justification would be sufficiently weighty to satisfy the Convention.

60.

As with Article 3, the state and public authorities may have positive obligations under Article 8 to take steps to provide the rights and privileges guaranteed by the Article and to protect people

against the activities of other private individuals that prevent the effective enjoyment of these rights. The meaning of this will depend on the nature of your work and the extent to which Article 8 issues are involved. Legal advice is likely to be needed.

### **Does my work affect the right of a person to freedom of expression?**

61.

Article 10 says that everyone has the right to freedom of expression. As with Article 8, the right is qualified. It may be subject to such restrictions as are:

- prescribed by law; and
- necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

62.

Section 11 of the Human Rights Law is concerned with the right to freedom of expression. It applies if a court (which includes a tribunal) is considering whether to grant any relief that might affect the exercise of the Article 10 right.

- It prevents the grant of such relief *ex parte* unless the court is satisfied that the applicant has taken all practicable steps to notify the respondent, or there are compelling reasons why the respondent should not be notified.
- It prevents the grant of relief so as to restrain publication before trial unless the court is satisfied that the applicant is likely to succeed at a full hearing.
- It requires the court to have particular regard to the importance of the Article 10 right, and, where the proceedings relate to journalistic, literary or artistic material, to the extent to which the material has or is about to become available to the public, the extent to which it is or would be in the public interest for the material to be published, and any relevant privacy code.

63.

Decisions of the Convention institutions in Strasbourg have recognised the fundamental place of the Article 10 right to freedom of expression. The European Court of Human Rights has acknowledged that freedom of expression constitutes an essential foundation of a democratic society and is particularly important as far as the press is concerned.

### **Does my work affect the right of a person or religious organisation to freedom of thought, conscience or religion?**

64.

Article 9 provides that everyone has the right to freedom of thought, conscience and religion. This includes the freedom for people to manifest their religion or belief in worship, teaching, practice and observance.

65.

A person's freedom to manifest their religion or beliefs (but not the other freedoms guaranteed by Article 9) may be subject to specified restrictions similar to those applying in relation to Articles 8 and 10.

66.

Section 12 of the Law requires a court or tribunal to have particular regard to the importance of the Article 9 right, if its determination of any question arising under the Law might affect the exercise of that right by a religious organisation (either itself or its members as a group).

67.

The Convention institutions have not defined what is meant by a religious organisation. However, they have recognised that a church body or other congregation can enjoy the protection of Article 9 in its own capacity as a representative of its members.

68.

The Convention institutions have also accorded Article 9 rights a high degree of protection. The European Court of Human Rights has recognised the need for religious beliefs to be given special regard in determining a case involving competing Convention rights.

### **Does my work affect a person's possessions or his ability to carry on a trade or profession?**

69.

Article 1 of Protocol 1 aims to ensure that a person's (including a company's) possessions are not unfairly interfered with.

70.

Possessions are things of economic value. They include goods, shares, rights under contracts (including leases), land, rights (including licences or registration) to run a business, goodwill and damages or other sums awarded by a court or tribunal. The term has a very wide meaning, but it covers only existing possessions and existing legal rights. It covers, for example, the right to receive benefits under a pension scheme, but not the right to inherit property at some point in the future. Refusal to grant a licence would not bring Article 1 of Protocol 1 into play, but revocation or refusal to renew a licence might. Article 1 of Protocol 1 covers property not just owned by individuals but also owned by a company or other private body, such as a charity or trade union.

71.

Article 1 of Protocol 1 is made up of three rules concerning:

- the principle of the peaceful enjoyment of possessions
- the deprivation of possessions
- the right of the State to control the use of property in the general interest or to secure the payment of taxes or other contributions or penalties.

72.

The Bailiwick courts are able to decide whether interference with property rights is justified in the public or general interest. In deciding what the general or public interest is the Government enjoys a “margin of appreciation”, in that the Strasbourg court acknowledges that a State is in a better position to assess the economic needs of society and should therefore be allowed some discretion in setting its objectives (see paragraph 32).

73.

Even so, any measure or law that interferes with property rights, (for example, a compulsory purchase order) must strike a fair balance between the demands of the community or society and the need to protect the individual’s fundamental rights. In considering this balance, one of the things that the court will look for is if compensation is payable. The deprivation of property without compensation will only be acceptable in exceptional circumstances, but the Strasbourg court has granted states considerable latitude as to what is an acceptable level of compensation. Compensation does not always have to be at the market value of the possession.

74.

An interference with property must also satisfy the requirements of legal certainty, in other words, there must be a law which permits the interference and that law must be sufficiently certain and accessible. There must also be procedural safeguards against arbitrary state decisions. The procedural requirements of Article 6 may be relevant.

**Does my work risk discriminating against people in an area involving other Convention rights?**

75.

Article 14 provides for people to enjoy the Convention rights without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

76.

The phrase "or other status" has been interpreted in Strasbourg to include, among other things, sexual orientation, marital status, illegitimacy, status as a trade union, military status and conscientious objection.

77.

The application of Article 14 involves more than simply deciding whether a person has been discriminated against in the enjoyment of a Convention right and if so whether he or she comes within one of the listed categories (including "other status"). The European Court of Human Rights would also consider whether there was an objective and reasonable justification for treating different categories of people in a different way, and whether any such differential treatment was proportionate to the aim pursued.

78.

In applying these additional considerations, the Court can give more or less weight to different types of discrimination. It has stated, for example, that discrimination on the grounds of sex, race or illegitimacy is particularly serious. It would therefore be particularly hard to justify discrimination in these areas. This is one of the reasons that Guernsey's inheritance legislation was changed so as not to discriminate against illegitimate children.

79.

It is not possible to pursue a case on Article 14 grounds alone: there must be another Convention right at issue to which a claim of discrimination can be attached. Where another Convention right does arise, however, it is possible to find a breach of Article 14 even if there is no breach of the other Convention right.

80.

Where the European Court of Human Rights has found a breach of another Convention right, it has in practice tended not to consider whether there is a breach of Article 14 also. The U.K courts have taken a similar approach to Article 14 in determining Convention issues under the Human Rights Act in that they have not considered a breach of article 14 where the discrimination issue is effectively covered by the breach of the other right.

## **6. HUMAN RIGHTS LAW: SOME QUESTIONS AND ANSWERS**

81.

Here are answers to some of the most frequently asked questions about the Human Rights Law.

### **Implementation**

#### **What is the Law for?**

82.

The immediate aim in introducing the Human Rights Law was to allow cases concerning the rights given under the Convention to be brought in the Bailiwick courts. It is hoped that the Law is helping to create a society in which the rights and responsibilities of individuals are properly balanced and in which an awareness of the Convention rights permeates our government and legal systems at all levels.

#### **Can it be used now?**

83.

- Yes. The law has been in force in the Bailiwick since 1<sup>st</sup> September, 2006.

#### **What other official guidance documents are available?**

84.

- “HUMAN RIGHTS COMES TO LIFE” - a leaflet setting out the text of all Human Rights instruments applicable in the Bailiwick. This includes a short description of the Human Rights Law and its implications for Bailiwick public authorities and their staff.
- Guidance for Bailiwick government departments and committees on Human Rights, on the States of Guernsey intranet, The Bridge:  
<http://bridge/hr/Human%20Rights/Forms/AllItems.aspx>.

85.

- Information is also available for the public on human rights on the States of Guernsey website: <http://gov.gg/ccm/navigation/government/human-rights>

## **Using the Law**

### **How can someone use the Law to enforce their human rights?**

86.

If someone thinks that a public authority has breached their Convention rights, they can:

- take the authority to court for breaching their rights
- rely on the Convention rights in the course of any other proceedings involving a public authority.

87.

Adopting the direct route, i.e. taking the authority to court for breaching their rights, they have to bring proceedings within a year or less of the act complained of (in accordance with section 7(3) of the Human Rights Law). However, the court can allow them to bring proceedings after a longer period if it thinks this is fair in the circumstances. Note that shorter time limits may also apply if the rules of the procedure in question impose a stricter time-limit, e.g. six months for appeals against refusals of planning applications.

### **What remedy can be obtained?**

88.

If the court finds that a public authority has breached someone's Convention rights, it can award whatever remedy is open to it and seems just and appropriate. This could include damages. When the court sets damages it will take into account the Strasbourg norm, which tends to be modest.

### **Who can bring a case under the Human Rights Law?**

89.

Proceedings under the Human Rights Law can be brought only by victims of a breach of the Convention rights by a public authority. This mirrors the test of standing for bringing proceedings against the UK at Strasbourg.

90.

Interest groups will not be able to bring cases direct unless they meet the victim test. However, they will be able to assist those who do bring cases.

### **What is a public authority?**

91.

No express definition exists in the Law but it is likely to include:

- Bailiwick government departments and committees
- Parish authorities
- Police, prison, immigration officers
- Public prosecutors
- Courts and tribunals
- Non-committee or - department public bodies e.g. Guernsey Financial Services Commission
- Any person exercising a public function e.g. the Data Protection Commissioner

**Are people still able to take a case to Strasbourg?**

92.

Yes. However, the European Court of Human Rights will want to know that someone has exhausted all domestic remedies first - which will include the legal routes opened up by the Human Rights Law.

**ECHR Protocols and other international instruments**

**What ECHR Protocols has the Bailiwick signed up to?**

93.

The UK has ratified Protocol 1 and Protocol 13 on its own behalf and on behalf of the Bailiwick.

94.

The UK has not yet ratified the other Protocols containing substantive rights (Protocol 4 and Protocol 7 on additional rights and freedoms concerning such rights as freedom of movement and the right not to be punished twice).

**How do these rights get into the Human Rights Law?**

95.

The rights in Protocols 1 and 13 are already there. Those in other Protocols can be added in future by Order.

## **7. WHERE TO GET ADVICE**

96.

The Human Rights Law applies to all our legislation, policies and procedures. However, it will not always be easy to understand its precise impact in a particular situation, and what should be done about it. Familiarising yourself with the basic elements of the Law is a start. Nevertheless, you need to be sure that you are reflecting the Law properly in all aspects of your work. You will need help to do this.

97.

If you are unsure about how the Law applies in a particular situation, there are a number of places you could go for assistance:

- your manager
- your organisation's legal officer or adviser (if one exists)
- your Human Rights Law contact point (if one has been appointed)
- if you are in a public authority that is not part of a Bailiwick administration, you may need to seek advice from your parent department or any departments or authorities which have a sponsoring, regulatory or advisory role for your organisation
- if you are in a Bailiwick government department or committee, the Law Officers.

98.

Remember that assessing the precise impact of the Law in a particular case can be a complicated business and in many cases it will be essential to seek legal advice. The need for early and appropriate advice cannot be over-emphasised. However, we must all take responsibility for our own actions, and we must get into the habit of thinking for ourselves about the human rights implications of our work.

99.

There are a number of books and websites relating to the ECHR that you may find of interest:

### **Publications**

- *Rights Brought Home: The Human Rights Bill*, Home Office, Cm 3782
- *European Convention on Human Rights, as amended by Protocol 11 and No 14*, Directorate of Human Rights, Council of Europe, 1<sup>st</sup> June 2010
- *Theory and Practice of the European Convention on Human Rights*, Van Dijk, Van Hoof, Van Rijn and Zwaak – 4<sup>th</sup> edition
- *The European Convention on Human Rights*, Jacobs, White, and Ovey 5<sup>th</sup> Revised Edition 2010
- *Blackstone's Guide to the Human Rights Act 1998*, Wadham, Mountfield and Edmundson, Blackstone, (5<sup>th</sup> Edition), 2009
- *Human Rights Law and Practice*, Lester and Pannick, Butterworths, 3<sup>rd</sup> Revised Edition 2009
- *Cases and Materials on the European Convention on Human Rights*, 2<sup>nd</sup> Edition Mowbray, 2007
- *European Human Rights law* (2<sup>nd</sup> Edition) Starmer, Keir, Kilroy, Charlotte
- *International Human Rights Law: cases materials, commentary* Schutter, 2010
- *Human Rights Act 1998: the Definition of "Public Authority"-Government Response to the Joint Committee on Human Rights' Ninth Report of Session 2006-07*

### **Websites**

- States of Guernsey Human Rights website: <http://gov.gg/ccm/navigation/government/human-rights>
- The Ministry of Justice Website: <http://www.justice.gov.uk/guidance/humanrights.htm>  
This Ministry of Justice website contains guidance material on the Human Rights Act 1998, answers to Parliamentary Questions, speeches and guidance notes for public authorities on the implications of the Act for them, material concerning a 2006 review of the implementation of the Act in the UK, frequently asked questions and links to useful information.
- Jersey Human Rights Website:  
<http://www.gov.je/GOVERNMENT/JERSEYWORLD/INTERNATIONALAFFAIRS/Pages/HumanRights.aspx>

## **Annex A**

### **Outline of the Human Rights (Bailiwick of Guernsey) Law, 2000**

**This annex gives a brief outline of the Human Rights Law itself.**

**Section 1:**

specifies which of the Convention rights are covered by the Human Rights Law.

**Section 2:**

requires courts or tribunals determining questions which have arisen in connection with the Convention rights to take into account the decisions of Strasbourg (the European Court and Commission of Human Rights and the Committee of Ministers) so far as is relevant.

**Section 3:**

requires legislation to be interpreted as far as possible in a way which is compatible with the Convention rights. This applies to all legislation, whenever enacted.

**Section 4:**

allows certain courts, as defined in the section, to make a “declaration of incompatibility” where they find that primary legislation is incompatible with a Convention right. The continuing validity and enforcement of the legislation is not affected by such a declaration.

**Section 5:**

states that when a court is considering making a declaration of incompatibility, HM Procureur is entitled to notice and to be joined as party to the proceedings. This will enable him to provide the court with information that may be relevant to the issue in question.

**Section 6:**

makes it unlawful for a public authority to act in a way which is incompatible with a Convention right unless it is required to do so by primary legislation or inevitably incompatible secondary legislation.

**Section 7:**

victims may rely on the Convention rights in legal proceedings in Bailiwick courts and tribunals or institute separate proceedings. Separate proceedings must be brought within one year of the date on which the act complained of took place or after a longer period if the court or tribunal judges that to be fair under the circumstances. Shorter time periods may also apply. For example, if proceedings concerned a planning appeal, then the shorter planning appeal time limit would apply.

**Section 8:**

the court may grant such relief as it considers just and appropriate, provided they are within its powers.

**Section 9:**

concerns methods of challenging acts of courts and tribunals which are alleged to be incompatible with a Convention right.

**Section 10:**

makes clear that the Law does not restrict any existing rights that an individual might have under the law or his right to bring proceedings under existing law.

**Section 11:**

contains safeguards concerning court or tribunal orders (particularly injunctions) which might breach the right to freedom of expression.

**Section 12:**

obliges the courts to have particular regard to the importance of the right to freedom of thought, conscience and religion.

**Section 17:**

interpretation section, in particular defining the meaning of primary and subordinate legislation

**Section 18:**

ensures that victims can rely on their Convention rights in proceedings brought by a public authority, even if the act in question took place before section 7 came into force.

## **Annex B**

### **The Convention Rights**

**These are the Convention rights set out in the Human Rights Law.**

Brief details of relevant Bailiwick case law is referred to below. This is included to show issues which have raised before the Bailiwick courts although each case will be decided on its own particular facts. There may also be other relevant local case law, cases from the Strasbourg Court to which regard must be had and persuasive U.K case law. If having read details of a particular case you are concerned that a particular decision you are making or legislation being prepared may involve a breach of convention rights you should take legal advice.

#### **Article 2 - Right to life**

1.

Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2.

Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

- (a) in defence of any person from unlawful violence;
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

#### **Article 3 - Prohibition of torture**

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

#### **Article 4 - Prohibition of slavery and forced labour**

1.

No one shall be held in slavery or servitude.

2.

No one shall be required to perform forced or compulsory labour.

3.

For the purpose of this article the term "forced or compulsory labour" shall not include:

- (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
- (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;

- (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
- (d) any work or service which forms part of normal civic obligations.

**Article 5 - Right to liberty and security  
(subject to a derogation applicable to terrorism)**

1.

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound minds, alcoholics or drug addicts or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2.

Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3.

Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4.

Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5.

Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

## **Article 6 - Right to a fair trial**

1.

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2.

Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3.

Everyone charged with a criminal offence has the following minimum rights:

- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- (b) to have adequate time and facilities for the preparation of his defence;
- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

### **Bailiwick cases on article 6 since the Law come into force.**

**Ogier v Jeffrey (2009-10 GLR 89)** concerned a case where the plaintiff sought to stop a firm of Advocates acting for the defendant in particular as one of the partners had advised the plaintiff at one meeting when with another firm in relation to the conveyance he was now seeking to rescind. One of the reasons the Royal Court gave for ordering the firm to stop acting for the defendant was that the right to equality of arms might be breached since it guaranteed that each party to litigation should have, and be seen to have, a reasonable opportunity of presenting his case under conditions which did not place him at a disadvantage compared to his opponent.

In **Allen v Law Officers of the Crown**, 24<sup>th</sup> November, 2008 the appellant questioned whether the Magistrate should not have had reasonable doubts about the complainant's evidence since it was accepted that the complainant had not told the truth in every respect; The Royal Court in making its decision considered article 6 and stated that the Magistrate had satisfied article 6 by going into considerable detail in relation to the facts and reasons for the decision; the Royal Court considered it would have been sufficient to indicate the basis of the decision without any elaborate form of

words or preparing a judgment since the requirement that the facts be set out adequately had been observed allowing the appellant to understand the basis of the findings and why he had been found guilty.

**Cable and Wireless Guernsey Ltd v Office of Utility Regulation and Others**, May 24<sup>th</sup>, 2007, the Utilities Appeals Tribunal made a reference to the Royal Court on points of law relating to its powers to extend time for appeal beyond the tight 14 day period prescribed by the Utilities (Bailiwick of Guernsey) Law, 2001. The Royal Court held that the Tribunal had no powers to extend the time limit. As part of its decision the Royal Court held that it was neither arbitrary nor disproportionate to interpret the time limit for appeal in the law as inflexible; the applicant's advocates were well aware of the requirements of the legislation and compliance was within their capabilities if they proceeded quickly and followed the correct procedures. It was not contrary to the principle of equality of arms (and so deny the applicant a reasonable opportunity to present his case) to deprive the Tribunal of the right to extend the 14 day period merely because the respondent had 42 days to respond. This was especially so when the applicant had known for several months that it was to be refused a licence.

The Cable and Wireless case might seem rather surprising but each case will turn on its particular facts and this did concern a system where the appellants would be large companies represented by Advocates rather than litigants acting for themselves and a situation where they had known for some months that a licence was to be refused.

#### **Article 7 - No punishment without law**

1.

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2.

This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

#### **Article 8 - Right to respect for private and family life**

1.

Everyone has the right to respect for his private and family life, his home and his correspondence.

2.

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

## **Bailiwick cases on article 8 since the law came into force**

There have been a significant number of cases in the Bailiwick concerning article 8 since the Law came into force and together with article 6 it is one of the most likely convention rights to be relied upon to challenge decisions.

**Housing cases**-there have been several cases concerning Article 8 in relation to decisions about applications for housing licences under the Housing (Control of Occupation) (Guernsey) Law, 1994; These cases and the case law before the Law came into force emphasise the need for particular care with such decisions in view of the nature of the powers under the Housing Law.

The cases show -

- Article 8 is interpreted widely by the Guernsey courts, having regard to the Strasbourg case law, as covering all aspects of a person's physical identity and mental integrity and the right to establish and develop relationships, personal development, gender identification, name and sexual orientation-see **Thomas v Minister of the Housing Department (2007-2008 GLR 252)** ("**Thomas**") and **Kinley v Minister of the Housing Department (GLR 158)** ("**Kinley**"),
- the need to consider fully the particular circumstances of the applicant, to supply full reasoning where to show that any interference with the right in Article 8 is proportionate and justified-e.g. see **Jolly v Minister of the Housing Department (2007-8 GLR 427)** and **Kinley**; Departmental or committee board minutes and any decision letter should provide a full record of a decision so as to demonstrate, where a convention right is interfered with, that a high degree of care has been exercised in balancing the conflicting interests of the individual and of Guernsey-see **Kinley**

## **Deportation cases**

There have been several cases relating to a court's discretion, as part of the sentencing process, to recommend deportation of foreign nationals convicted of criminal offences. The Lieutenant-Governor has a power under Immigration legislation to make a deportation order where a recommended by a court. Some of these are Jersey cases but are likely to be persuasive for a Guernsey court as the relevant legislation is very similar.

It is hard to draw wider lessons from these cases for decision making by public bodies other than the courts or the drawing up of legislation but they are of significance in emphasising that where legislation is different in significant respects in the Bailiwick from in the U.K. the Bailiwick courts may not follow U.K human rights caselaw. The cases are also interesting in that they are requiring a consideration of human rights before an actual decision has been made but only on a recommendation (albeit a weighty one made by the court-see **de Gouveia** referred to below).

In **O'Dette and O'Dette v Law Officers of the Crown-CA 2007-8 GLR 17** the Royal Court had followed English Court of Appeal case law by not considering the convention rights (primarily article 8) of the offender in recommending deportation as this would be considered by the Lieutenant Governor at the time he made the decision on the deportation order.

The Guernsey Court of Appeal held that in Guernsey the court should address them at the time of the recommendation in view of the differences between Guernsey and the U.K. including that the Lieutenant-Governor had few of the investigative resources available to the UK authorities and there was in Guernsey no appeal from the Lieutenant-Governor's decision to deport whereas in the UK there was an appeal to an independent Tribunal.

In **Camacho v Attorney General [2007 JLR 462] CA** the Jersey Court of Appeal followed, in broad terms, the approach of the Guernsey Court of Appeal in O'Dette in holding that the convention rights had to be considered by the court although some of the detailed reasoning differed; the Jersey Court placed particular emphasis on the lack of a right of appeal to the decision of the Lieutenant-Governor.

In **de Gouveia v A G-Jersey CA May 2009 (JGLR Miscellany-October 2009, p. 246) ("De Gouveia")**-the Jersey Court of Appeal rejected an argument that a right to judicially review the decision of the Lieutenant-Governor was a sufficient safeguard for the offender's rights as a judicial review challenge could only be made on much narrower grounds than an appeal to the UK Tribunal. The Court also rejected the argument that as the convention rights were not engaged until the actual deportation order was made stating that a public authority could not properly recommend an action which might affect Convention rights without considering whether it did affect them. This later reasoning seems contrary to the English case law.

The **de Gouveia** case is also of interest in rejecting a Jersey Royal Court decision to allow separate representation of an offender's family to represent their article 8 rights in relation to the deportation.

### **Re X**

**The Matter of X-GLR 2007-8 GLR 162**-in this case the Registrar-General of Births and Deaths (the Greffier) sought permission of the court to rectify an entry in the Register of Births in respect of X so that a new birth certificate could be issued to her, following gender reassignment in the UK, in her new gender and name. The Royal Court agreed that the solution proposed by the Greffier of inserting an additional entry for X in the Register complied with the relevant Registration law. The Court held that it was obliged to recognise the convention rights of a person with reassigned gender to whom a full gender recognition certificate has been issued under UK legislation. X's Article 8 rights required respect to be given to X's private and family life which was not being given at present as she was unable to prove her identity by production of her Guernsey birth certificate as doing so caused embarrassment and confusion.

### **Article 9 - Freedom of thought, conscience and religion**

1.

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2.

Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

### **Article 10 - Freedom of expression**

1.

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2.

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

### **Article 11 - Freedom of assembly and association**

1.

Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2.

No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

### **Article 12 - Right to marry**

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

The Strasbourg Court has interpreted this article as providing post-operative transsexual people with the right to marry and to found a family.

### **Article 14 - Prohibition of discrimination**

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

### **Article 16 - Restrictions on political activity of aliens**

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

### **Article 17 - Prohibition of abuse of rights**

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

**Article 18 - Limitation on use of restrictions on rights**

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

## **The First Protocol**

### **Article 1 - Protection of property**

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

#### **Bailiwick case on article 1 of the first Protocol since the Law came into force.**

**E v E (2007-8 GLR 375)** concerned divorce proceedings in the Royal Court where there was a long dispute as to whether the wife should have the sole interest in the former matrimonial home. One of the grounds of appeal was that the Royal Court's final order, transferring the property back into the sole name of the wife, was a breach of the husband's right to peaceful enjoyment of his possessions guaranteed by article 1 of the First Protocol.

The Guernsey Court of Appeal held as part of its judgment that the Royal Court's decision to transfer the house into the sole name of the wife was wrong as it deprived the husband of his entire interest in the property without providing any compensation or mechanism by which he could recover it once refinancing was complete and, therefore, was in breach of his right under article 1 of Protocol 1. The Royal Court had made no attempt to balance his rights against the wife's rights to secure compliance with the directions of the Court of Appeal [*which the husband had failed to comply with when the Court of Appeal had earlier ruled that the property be vested in both parties jointly*] and had made a disproportionate response.

### **Article 2 - Right to education**

**(subject to a reservation about unreasonable expenditure)**

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

### **Article 3 - Right to free elections**

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

#### **UK case of relevance to the Bailiwick on article 3 of the first Protocol since the Law came into force.**

**R (on the application of Barclay and others) (Appellants) v Secretary of State for Justice and others (Respondents) [2009] UKSC 9** – in this case the appellants were appealing against a decision of the English Court of Appeal that the Reform (Sark) Law, 2008 was compliant with the right to free elections under article 3 of the First Protocol. The appellants argued that since two office-holders of the Chief Pleas of Sark, namely the Seigneur and the Seneschal, were unelected [neither had the right to vote, but the Seigneur could speak in debate and had the right of temporary veto of Ordinances and the Seneschal was the Presiding Officer of Chief Pleas'],

that this constituted a breach of article 3 of the First Protocol, as did the prohibition on persons who were classed as "aliens" under the Reform Law from standing for election to the Chief Pleas.

The Supreme Court held as part of its judgment that the effect of principles emerging from the jurisprudence of the European Court of Human Rights was that there was no narrow focus on one particular element of democracy, and the electoral rules had to be looked at in the round and in the light of historical and political factors. The proper application of those principles led to the conclusion that the Reform Law was not in breach of article 3 of the First Protocol. This was based on the fact that only Conseillers were entitled to vote in the Chief Pleas, and therefore determine whether legislation was to be enacted, and that the electorate of Sark consisted of fewer than 500 voters, who chose 28 elected Conseillers (one Conseiller for every 17-18 persons in the electorate). The Court held that it was not easy to envisage, in the words of article 3, conditions which were more likely to ensure the expression of the opinion of the people in the choice of legislature. "Membership" of two unelected individuals in these circumstances did not breach article 3, and even if article 3 did in principle require that non-voting members be elected, the Court held that a limitation on that principle by having two prominent non-voting members would be well within the margin of appreciation in light of the constitutional history and the political factors relevant to Sark.

With regard to the exclusion of "aliens" from standing for election to the Chief Pleas, it was held that this was justifiable as it was well established that stricter requirements could be imposed on the eligibility to stand for election, as distinguished from voting eligibility. It was noted that both in international law and under the European Convention, as reflected in the decisions of the Strasbourg court, it was citizens, and not non-resident aliens, which had the right to vote and stand for election.

## **The Thirteenth Protocol**

### **Article 1 - Abolition of the death penalty**

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

## **Annex C**

### **Convention Check List**

#### **Am I interfering with a Convention right?**

1.  
The Human Rights Law makes it unlawful for a public authority to act or fail to act in a way that is incompatible with the Convention rights.
2.  
Everyone working in a public authority needs to make sure that everything they do reflects a respect for human rights and is compatible with the Convention rights.
3.  
It will not always be easy to tell if this is the case. The need for early and appropriate legal advice cannot be over-emphasised. However, we all need to take responsibility for our own actions, and we must get into the habit of thinking for ourselves about the human rights implications of our work.
4.  
There is a logical series of questions you can ask yourself in trying to identify if you may be interfering with a Convention right. By following the steps outlined below, you should be able to carry out at least an initial assessment of the compatibility of your work.

#### **Could what you are doing touch on one of the Convention rights?**

5.  
You need to know enough about the Convention rights to tell when they might come into play. For example, if your policy or procedure affects someone's ability to carry on a trade, Article 1 of Protocol 1 could be relevant.

#### **Is there a victim?**

6.  
Could someone argue that they have suffered, or might do, as a result of what you are doing? For example, if your tribunal or decision-making body is not independent and there is no right of appeal to an independent body, someone might be able to show a reasonable likelihood that their Article 6 right to a fair trial had been infringed.

#### **Are there circumstances when the right can legitimately be limited or interfered with?**

7.  
Convention rights are formulated in three broad ways:
  - Some, such as the right to freedom from torture (Article 3), are absolute.
  - Some are subject to express exceptions. These are constructed with a protected right (in the first paragraph) followed by permitted exceptions (in the second). For example, the right to liberty and security (Article 5) clearly defines the six circumstances when it is acceptable for someone to be detained.

- Others are subject to implied exceptions. These usually follow general principles established in the Strasbourg case law. For example, the right to respect for private and family life (Article 8) can be interfered with, but only in a way that is in accordance with the law and necessary in a democratic society in certain interests, such as national security.

### **Does the interference meet the general criteria established by the Strasbourg authorities?**

8.

You may need to show that:

- The action is prescribed by law. This does not just mean that it must be lawful. You also need to think about the clarity, accessibility and foreseeability of the law. The law must be expressed in a way that people understand.
- It pursues a legitimate aim. Look at the wording of the individual rights to find out what might be a legitimate reason for interfering with them. These differ from Article to Article. In the case of Article 8, for example, legitimate grounds for interference with the right to privacy include acts done in the interests of national security or for the prevention of disorder or crime. No restriction is ever justified if it impairs “the very essence of a right”. For example, the Strasbourg Court has held that a temporary ban on re-marriage following divorce was disproportionate on the grounds that it impaired the very essence of the right to marry under Article 12.
- It is necessary in a democratic society. There are three aspects to this:
  - Does it pursue a pressing social need?
  - Is your policy, procedure or action proportionate to the aims you are pursuing? Are you using a sledgehammer to crack a nut?
  - Do you have relevant and sufficient reasons for the interference?

9.

By following these basic steps you should at least be able to tell if a particular policy or procedure has Convention implications, and if so, what they may be. Legal advice may be needed to ensure that what you are doing is compatible with the Convention rights.

10.

If you believe that a law you are working under, or one of your policies or procedures, is incompatible with the Convention, there are a number of steps you should take:

- Alert your line manager, explaining why you think an incompatibility arises
- Take legal advice as soon as possible
- Agree on a course of action for addressing any incompatibility. This could involve changing a procedure, or finding a way to interpret a law compatibly with the Convention rights
- Alert any colleagues who deal with similar issues and who could also be affected

- Working through your line manager, make sure that the issue is reported in any corporate monitoring or reporting of Convention issues being done by your department or public authority.

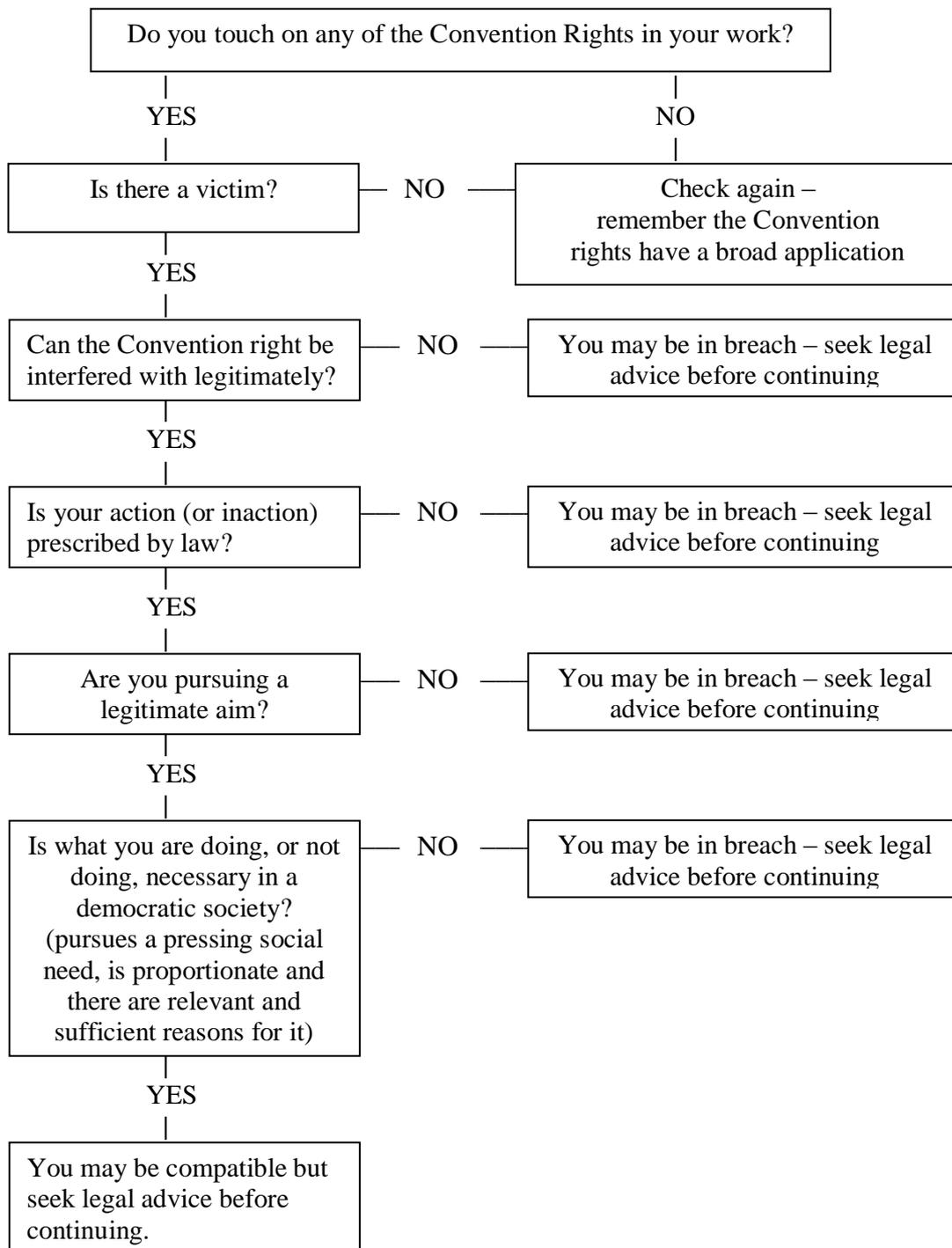
11.

Remember that if the law cannot be read compatibly, and is a piece of primary legislation, or subordinate legislation that is inevitably incompatible, you are still required to apply it.

12.

By becoming familiar with the Convention rights and what they mean in practice you will be in a much better position to identify a potential Convention issue and take action quickly to ensure that it is resolved.

## Convention Checklist



## **Annex D**

### **Hybrid bodies**

#### **Is the Human Rights Law relevant to private sector bodies?**

1.

The Human Rights Law gives every person clear legal rights based on the European Convention on Human Rights. Those rights can be enforced in Bailiwick courts and tribunals against public authorities – including private bodies that are carrying out public functions.

#### **How do I know if my organisation is included?**

2.

The Law ensures that the Bailiwick governments' responsibilities for Human Rights can be met even when a private body carries out the public function in question. If you regulate, direct or affect the public, or a group of the public, you are likely to be covered by the Law for those activities because you will be carrying out a "public function".

3.

The Law deliberately does not explain in detail the meaning of "public authority" or "public function". It is for the courts to interpret the Law and to decide what are "public authorities" and "public functions" and what are not. There has been significant U.K. case law on the meaning of the term followed by extensive policy debate on the implications of that case law as referred to at paragraphs 21 to 23. It is clear from the case law that the decision as to whether a particular body is exercising functions of a public nature is specific to the particular facts of that case.

4.

Private bodies that have some public functions are sometimes referred to as "hybrid bodies". Examples include:

- corporatised utilities that exercise public functions
- regulatory bodies
- professional associations in their regulatory capacities
- some charities or other voluntary organisations that carry out public functions for or instead of a Bailiwick government. This could include running residential homes private or independent schools
- private sector companies undertaking contracted-out work for Bailiwick government departments that may directly affect the public, such as security services at the Airport.

## What does the Law say?

5.

The Human Rights Law makes it unlawful for a public/private hybrid body to carry out its public functions in a way that is incompatible with a Convention right. The only exception is where primary legislation (or inevitably incompatible subordinate legislation) cannot be interpreted compatibly with the Convention rights, thus clearly leaving no choice in the matter.

6.

People may rely on the Convention rights in any proceedings or bring a freestanding case.

7.

The Convention has a very wide reach. It matters in any area of work where public functions affect people's Convention rights (see Annex B). These include:

- **the right to freedom from inhumane or degrading treatment**, which could be relevant to conditions in a residential care facility where the care is carried out as a public function (Article 3)
- **the right to a fair hearing** – not just in criminal trials but also in things like planning appeal procedures (Article 6)
- **the right to respect for private and family life**, which could be relevant to issues involving respect for someone's private information or privacy in a residential care facility (Article 8)
- **the right to freedom of thought, conscience and religion**. For example, there could be situations where someone's religious beliefs require them to do, or prevent them from doing, something like wearing particular clothes or working on a holiday (Article 9)
- **the right to the protection of property**, which could be relevant to decisions affecting someone's ability to carry out a trade (Article 1 of Protocol 1).

8.

A hybrid body is not directly liable under the Law for its purely private functions. For example, a security company would probably have obligations under the Law in any work on behalf of the States Airport, but not in its private security work.

## What should I consider?

9.

Consider the work of your organisation:

- Does any of it depend on powers under legislation, including orders, rules and regulations?
- Was the work, or part of the work, you are doing once done by a Bailiwick government committee or department or other public authority such as a Parish?
- Is the work something that would be done by a Bailiwick government committee or department if you did not do it?
- Does your work involve regulating the activities of the public or a section of the public?

10.

These are just a few of the questions that might be asked. If your answer is yes to any, you should seek advice from a suitably qualified lawyer about whether you are likely to be treated as a public authority.

11.

If you work with legislation or rules laid down by a Bailiwick government, you should talk to the department or committee responsible for that.

12.

Staff training is very important. You should look at how you raise awareness of the Law with your staff and whether your organisation needs a named person to help make sure that everyone knows about it.

## **Annex E**

### **Glossary of terms**

#### **Convention rights**

are defined under the Law, but consist of the rights set out in Annex B.

#### **declaration of incompatibility**

certain courts (the Royal Court, the Court of Appeal, the Judicial Committee of the Privy Council and, except in criminal matters, the Court of Alderney and the Court of the Seneschal of Sark) may give a declaration of incompatibility where they find that a provision of primary legislation (or inevitably incompatible subordinate legislation) is incompatible with a Convention right. A declaration does not affect the validity and continuing operation or enforcement of the legislation.

#### **inevitably incompatible subordinate legislation**

subordinate legislation which is incompatible with a Convention right but where primary legislation prevents the removal of the incompatibility.

#### **in accordance with the law**

the restriction created must be governed by legal rules (including the customary law), which are sufficiently clear and accessible to enable the individual to discover what the rules are and mean. This prevents a state from making up the rules as it goes along. This is a Convention term.

#### **margin of appreciation**

the Strasbourg Court supervises a state's application of the Convention. In carrying out its supervision it affords a state a margin of appreciation. This means that the state must act reasonably, but the Strasbourg Court will not substitute its own view for that of the state except where the state steps outside these bounds. This is an expression found in the case-law of the Strasbourg Court.

#### **necessary in a democratic society**

the restriction must meet a pressing social need and be proportionate. This is a Convention term.

#### **positive obligation**

this is an obligation on the State to secure the rights under the Convention, particularly to secure they are met in relations between two private individuals. This is an expression found in the case-law of the Strasbourg Court.

#### **prescribed by law**

see "in accordance with the law".

#### **primary legislation**

This includes Laws passed by the Bailiwick legislatures and Acts of the UK Parliament that apply or extend to Islands of the Bailiwick. The term is defined in the Law, to which reference should be made for a full explanation.

**proportionate**

there must be a reasonable relationship between the aim to be achieved and the means used. This is an expression found in the case-law of the Strasbourg Court.

**public authority**

this is explained in paragraph 21 et seq.

**subordinate legislation**

this includes Orders, Regulations, rules and most Ordinances. The term is defined in the Law, to which reference should be made for a full explanation.

**victim**

this is explained in paragraphs 29 - 31.