

**REPORT INTO ALLEGATIONS OF
BULLYING OF STATES EMPLOYEES
PRESENTED TO THE STATES OF
JERSEY EMPLOYMENT BOARD ON
28 SEPTEMBER 2009**

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1. Introduction

1.1. The States of Jersey Employment Board was advised in May 2009 that correspondence dated 15 May 2009 had been received from the Health and Safety Inspectorate on 18th May 2009, in which the Inspectorate had notified the Board-

- (a) that it had received information that led it to conclude that the Board was taking insufficient action to support employees who were suffering harassment and associated stress in the course of their duties; and, that as a consequence the Board might be failing to discharge its duties under Article 3 of the Health and safety at Work (Jersey) Law 1989
- (b) that the Inspectorate had concluded that the Board should take active steps in early course to assess the scale of the problem affecting its employees in order that steps to manage the problem could be identified and implemented effectively.

1.2. The Board resolved to appoint an independent person to carry out an Inquiry with the following original terms of reference-

- (a) *to consider the extent of alleged staff harassment by a local States Senator and the effect this is having on the personal health and welfare of the staff affected and their ability to perform their jobs competently;*
- (b) *to consider the means through which the alleged harassment is perpetrated;*
- (c) *to determine the effect this is having on the general culture, work environment and the self-confidence of staff other than the alleged victims; and,*
- (d) *to make recommendations to the States Employment Board on how best to arrange for the alleged harassment to be addressed.*

Subsequently the terms of paragraph (a) were amended as set out below at paragraphs 4.1 and 4.2 for two reasons: (i) to reflect the nature of the original correspondence that did not identify the source of the alleged bullying and harassment and (ii) secondly to conceal the identity of the Senator in question. With the benefit of hindsight that was an error as Senator Syvret has identified himself on his blog and in the Jersey Evening Post as the subject of the investigation and has described the reference to an ‘external party’ as an attempt to ignore or diminish his status as an elected representative. I address the question of the status of Senator Syvret as an elected representative with its attendant rights and responsibilities later in the report at paragraph 10.13.

1.3. After visiting the Island and meeting with the States of Jersey’s Director of Employee Relations, Mr M Pinel, the Director of Human Resources and the Director of Jersey Advisory and Conciliation Service, I agreed to accept the appointment and the original terms of reference. In section 6 of this report I set out the methodology I adopted in carrying out my investigation. At this stage I wish to thank Mick Pinel and his staff and the staff at Howard Davis Farm where all interviews were carried out. As I did not have the logistical means at my disposal to arrange interviews and secure accommodation to enable me to interview individuals, carry out research and read documents, arrangements were made to offer individuals appointments through the office of the Director of Employee Relations. An office was provided for me at Howard Davis Farm together with a computer to enable me to access relevant documents on the States intranet. I have subsequently obtained a number of additional documents from the various web sites of the States of Jersey. It was unnecessary for me to transcribe notes of my interviews. I have also not included extracts from the various items of correspondence I received after my interviews.

1.4. The report is divided into eleven sections. In the appendix I have decided, contrary to my original intention, not to include extracts from the relevant legislation, due to considerations of length. The relevant sections have either been quoted or summarised. I have however included the exchange of e-mails between myself and Senator Syvret, who declined my invitation to participate in the investigation. I had intended to send a series of questions to Senator Syvret when he declined my initial invitation but decided not to pursue that avenue in the light of the content and tone of his e-mail to me. I note that Senator Syvret similarly declined to engage with Senator Breckon's Scrutiny Panel.

2. My qualifications and experience

- 2.1. I have an honours degree in law (LLB) from the London School of Economics awarded in 1969. I am a solicitor qualifying in 1972. From 1970 until 1995 when I retired from practice on appointment as a part-time Chairman of Employment Tribunals (now Employment Judge) I was engaged in pursuing claims by trade union members for either personal injury or in the Industrial Tribunals (now named Employment Tribunals) against their employers. Since my judicial appointment I have sat regularly adjudicating on all types of claims arising in the Employment Tribunals. In that time I have adjudicated on numerous claims where there have been allegations of bullying and harassment. I am an experienced employment and personal injury lawyer and have in addition to my professional experience written and delivered training on employment and health and safety law.
- 2.2. I am an individual Acas arbitrator on the Acas scheme for resolution of claims for unfair dismissal.
- 2.3. Since 2002 I have been in addition a Deputy Chairman of the Central Arbitration Committee, the body that resolves primarily applications by trade unions for collective bargaining.
- 2.4. As well as being a solicitor and a law graduate, I also hold the qualification of Fellow of the Chartered Institute of Arbitrators. I am a Fellow of the Royal Society of Arts.

2.5. It is a condition of my appointment as an Employment Judge that I declare whether I am a member of the Freemasons. I can state that I am not now nor ever have been a member of the Freemasons and until I visited Jersey for the first time in June 2009 I had neither been to the Island, nor spoken to anybody living on the Island.

3. The initial reference to the States Employment Board and the decision to hold an investigation

3.1. On 15 May 2009 the Health and Safety Inspectorate of the States of Jersey wrote to Mr M Pinel, Head of Employee Relations advising him that further to a meeting that had taken place with Mr Pinel and Mrs J Pollard, Assistant Director-Human Resources, it had come to the attention of the Inspectorate that the States Employment Board (the SEB) was not doing enough to protect its employees in the workplace. The Health and Safety Inspectorate reminded the States of Jersey of their responsibilities under Article 3 of the Health and Safety at Work (Jersey) Law 1989. The letter went on to outline the risks if bullying and harassment is not addressed. The letter additionally referred to the policy dealing with harassment and bullying, but pointed out the limitations in that policy, especially its limitations if the source of the alleged bullying was from an external source. Finally the letter outlined some of the remedial actions that the employer might wish to contemplate: in particular action to manage the risks on a day to day basis.

3.2. The States Employment Board considered the correspondence and initially concluded that the Board should take active steps in early course to assess the scale of the problem affecting its employees in order that steps to manage the problem could be identified and implemented effectively. Steps were taken to identify a suitable person to carry out the initial investigation with the assistance of the Jersey Advisory and Conciliation Service and the UK Advisory, Conciliation and Arbitration Service. That process culminated in a recommendation approved by the States Employment Board to appoint me to conduct the investigation with the terms of reference set out in the next section.

3.3. It was implicit in my decision to accept the appointment that the States Senator in question would be advised of my appointment; of my terms of reference; of my qualifications and experience and finally invited to contribute to the Investigation. As I describe in paragraphs 6.4 to 6.10 all of those requirements were complied with but Senator Syvret did not accept my invitation to participate. I have produced my e-mail invitation to Senator Syvret and his reply in the appendix to this report. The invitation was polite. The response has been produced because it illustrates how the Senator dealt with my courteous and proper approach to him inviting him to participate in the investigation.

4. The appointment and terms of reference

4.1. The original terms of reference on my appointment by the States Employment Board were:

- (a) to consider the extent of alleged staff harassment by a local States Senator and the effect this is having on the personal health and welfare of the staff affected and their ability to perform their jobs competently;*
- (b) to consider the means through which the alleged harassment is perpetrated;*
- (c) to determine the effect this is having on the general culture, work environment and the self-confidence of staff other than the alleged victims; and,*
- (d) to make recommendations to the States Employment Board on how best to arrange for the alleged harassment to be addressed.*

4.2. Subsequently for the reasons set out at paragraph 1.3 the terms of reference were amended and the reference to a States Senator was changed to ‘an external party.’

4.3. I have interpreted those terms of reference to mean that it is not the primary purpose of this investigation to determine whether any individual is guilty of behaviour that could lead to either disciplinary action if appropriate by the employer or to action against any politician by the Privileges and Procedures Committee. I have however had to consider the likelihood of the behaviour being in contravention of defined standards and have therefore made reference in the body of the report to the Code of Conduct for Elected

Members of the States published by that committee and to paragraph 6 of Schedule 3 of the Standing Orders of the States of Jersey which lays down the procedure to be adopted where an elected member wishes to raise any issue of concern in relation to the conduct or capability of an employee of the States. I have not been made aware of any evidence that the Senator or any other elected member has raised any issue in relation to a named employee pursuant to this provision. Members of the States Employment Board will recall that this revision to the Standing Orders was adopted in 2005 following a report by the then Policy and Resources Committee in the light of concerns about the manner in which individuals were being criticised by elected members. The amendment was originally contained in Schedule 2A as a new paragraph 5A and it has been reproduced in section 9 of this report. The present section is identical to the revision adopted in 2005.

5. The definition of ‘bullying’ and ‘harassment’.

- 5.1. In investigating the alleged conduct I have adopted a definition of harassment that encompasses the broad definition of harassment in the UK legislation that specifically addresses harassment in a discrimination context and have included within the ambit of harassment bullying as well, using the definition of ‘bullying’ used in the Acas advice leaflet entitled ‘Bullying and Harassment at Work.’ The Bullying and Harassment Policy of the States of Jersey adopts a broadly similar definition to that set out in the next paragraph.
- 5.2. In the UK legislation, which at present is contained in the Sex Discrimination Act 1975; the Race Relations Act 1976; the Disability Discrimination Act 1995; the Employment Equality (Religion or Belief) Regulations 2003; the Employment Equality (Sexual Orientation) Regulations 2003; and the Employment Equality (Age) Regulations 2006, harassment is defined as ‘unwanted conduct which has the purpose or effect of violating a person’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person’. If the conduct in question is for one of the prohibited grounds in the relevant legislation, it will result in legal liability, usually against an employer. Although Jersey has not as yet adopted any anti-discrimination legislation and has not adopted any EU legislation

from which the definition is drawn it is the most easily recognised and understood definition of harassment. Jersey does have legislation which contains a differently worded definition of ‘harassment’ in the context of a specified criminal offence and I set that out in section 7 of this report. For the purposes of the investigation I have used the definitions of both bullying and harassment when considering the alleged conduct in question.

5.3. Harassment as defined can attract legal liability. ‘Bullying’ is not however defined in any relevant legislation. I have used the Acas definition of ‘bullying’ and a similar definition is used by the Jersey Advisory and Conciliation Service in its own publications for employers and employees entitled ‘Bullying and Harassment in the Workplace’. The guidance issued by the Jersey Advisory and Conciliation Service uses the wording of action designed to ‘frighten or denigrate’ the recipient. In its definition of harassment it refers to behaviour viewed as demeaning or unacceptable. For the purposes of this investigation it is immaterial whether one adopts the UK or the Jersey definition although I feel that the broader definition widely used on the mainland encapsulates the nature of the behaviour to be deplored. As will be seen subsequently in my conclusions whatever definition is used the behaviour described clearly falls foul of the definition and therefore for the purposes of this report ‘bullying’ is ‘offensive, intimidating, malicious, or insulting behaviour, an abuse of power through means intended to undermine, humiliate, denigrate or injure the recipient.’ The essential element is the abuse of power. As the policy on Bullying and Harassment itself recognises the terms are often used interchangeably but whichever label is attached to the conduct in question it is important to focus on the effect of the conduct, not the intention of the perpetrator.

5.4. Although Jersey has yet to adopt any legislation addressing discrimination, it does have legislation dealing with unfair dismissal. I outline the main provisions of the law in relation to unfair dismissal, and in particular the concept of ‘constructive dismissal’ in section 7.7 to 7.8 below. In my view an employee claiming constructive dismissal would be able to argue as part of a general assertion that the employer had broken the relationship of mutual trust and confidence, that the employer had failed to protect them from harassment

by an outside party and/or failed to take appropriate remedial action to address the problem once raised with the employer. The only additional issue for the tribunal would be whether the employer was vicariously responsible for the actions of that person. I deal with those issues in my conclusions at paragraph 10.23. For the reasons I set out I consider that the employer would be liable to a finding that it had condoned the actions of the alleged bully by its policy or practice of not responding to or challenging the Senator's behaviour.

6. Excluded matters and the methodology of the investigation.

- 6.1. The terms of reference required me to investigate the extent of the alleged harassment, the means by which it was being perpetrated, and the effect it was having on the individuals concerned and the wider working environment with a view to making recommendations as to how the employer might best address the issue. It was clear in the terms of reference that the problem was not alleged harassment by employees or managers, which might have led to disciplinary action. Equally even if I was to conclude that the perpetrator of the alleged harassment was a States Senator, as was the case, then it was for the Privileges and Procedures Committee of the States of Jersey to determine what action if any was appropriate under its powers.
- 6.2. It was therefore unnecessary for me to conduct an investigation similar to that undertaken by Professor Upex in relation to the circumstances surrounding the dismissal of a former States employee. Paragraph (b) of his terms of reference required him to review and comment on the structure and management of employment practices and procedures. The outcome of his investigations could have resulted in disciplinary action and therefore he had to focus in greater detail on the actions of individuals though I note that he finally concluded at paragraph 8 of his general conclusions that he did not believe that any individual should be made a scapegoat for what was in effect a systemic failure.
- 6.3. I arranged to come to Jersey for two days on 13 and 14 August. Working at Howard Davis Farm I initially reviewed a file of essential papers that I had

previously identified as being relevant to the investigation. While working at the office over those two days I also retrieved from the Intranet and the States of Jersey web site additional documents that I needed to consider, and the majority of these are referred to in the report.

- 6.4. On 11 August 2009 Senator Le Sueur wrote to Senator Syvret advising him of the proposed investigation and the terms of reference. The letter included a copy of the letter of 15 May from the Health and Safety Inspectorate. The letter additionally attached a copy of my full C.V so that the Senator was aware of my background and qualifications. The letter, which was polite, stating that it was seen as a positive way of addressing the concerns raised, sought his participation in that investigation, and made it clear that I wished to see Senator Syvret. He was to be given a full opportunity to put his position particularly as the letter from the Inspectorate was directly implicating him. He replied to that letter and published a copy of the correspondence on his blog. The entry on 12 August is a comprehensive example of the way the Senator uses the vehicle of his blog to insult, and denigrate using language that is offensive, intimidating, malicious, or insulting. The strap line of the entry reads in block capitals: ‘Jersey’s Council of Ministers defends child rapists, liars, wasters of tax-payers’ money, crooks, unemployable buffoons, and shysters’.
- 6.5. In the body of the blog he describes the Chief Executive of Health and Social Services as a ‘lying, lazy, incompetent ethically bankrupt shyster who conceals child abuse’. Senior civil servants are dismissed as ‘poor, maligned, benighted, moronic slackers.’
- 6.6. He attempts to misrepresent the investigation as a ‘horrifying attempt to crush democratic public control-to intimidate, harass and silence your elected representatives’ and ‘fix another layer of armour-plating over the bloated collection of expensive, unethical and incompetent shysters that cost you millions each year.’ He also alleges again that senior civil servants (unnamed in this entry but not in earlier ones) have been guilty for decades of gross professional and criminal failures.
- 6.7. His letter to the Chief Minister, which was published in full on the blog variously accuses the Minister of oppression and abuse of power and civil

servants of ‘unlawful and unethical acts’, ‘incompetence’ and ‘criminal conduct.’ At a later point he describes the senior civil service (again unnamed in this e-mail but not in previous blog entries) as ‘manifestly incompetent, out of control, invulnerable, bloated, expensive, and frequently criminal.’

6.8. On 12 August 2009 two additional documents were generated. Mr Pinel wrote to the Staff Side Secretary of the Jersey Civil Service Joint Council advising him of my appointment and terms of reference and extending an invitation that I had previously recommended for members of the combined executive to meet me. I met a delegation from the Staff side accompanied by Frank Allen, a National Officer of the Trade Union, Prospect when I was in Jersey between 23 and 26 August. After my visit I received further correspondence from Mr Allen, and I refer to the contents of that letter at paragraph 10.7. In addition I subsequently received a further letter from one of the individuals interviewed by me. At the same time a Chief Officer’s Circular was sent to all Chief Officers for cascade to all managers advising them of the independent investigation and inviting anybody who wished to meet me to discuss alleged bullying and harassment to contact Mr Pinel. I assumed that the fact I was in Jersey and wished to meet people was universally known, but accept that my visit did coincide with the school holidays.

6.9. On my return to the UK I sent e-mails to a number of individuals I had identified as being people who could assist me with an invitation to meet me when I next visited Jersey. In particular I wrote to Senator Syvret extending the same invitation. I have included my e-mail and his reply in the appendix. The e-mail to me quotes Article 47 of the States of Jersey Law which creates an offence of blackmail, menace, or compulsion. I have set out the full text of the provision at paragraph 9.2. There is nothing in either the original terms of reference or in my correspondence that any rational individual might construe as a potential breach of Article 47. Senator Syvret advises me that I am a party to a breach of that provision. Even if it was possible to make sense as a lawyer of the badly drafted Article in question it is manifestly absurd to suggest that Article 47 is engaged by the investigation.

- 6.10. In the e-mail he repeats an allegation that Civil servants have committed criminal offences. He suggests that I have been misled by omission, and fed false, partial and dishonest information. Again that allegation is absurd because the information I have drawn on for my conclusions is either contained in the Laws of the States of Jersey or in the contents of the Senator's own blog. All of the offending material has been published. He advises me not to be identified as the 'man who tried to protect Jersey's child abusers, concealers of child abuse, managers who cause the unlawful death of patients- and who then try frame others-and then lie to the media about it.' Finally he warns me of his intention to make a formal complaint to my professional body concerning my conduct in involving myself in a 'conspiracy to intimidate into silence an elected member of a parliament'. Needless to say I was not deflected by this transparent attempt to bully me into abandoning my investigation.
- 6.11. I returned to Jersey once arrangements to carry out the interviews had been made and between 24 and 26 August interviewed a number of individuals who had either responded to my e-mail invitation or who had indicated they wished to see me. Due to holiday commitments I was unable to interview two individuals and rather than return to Jersey and incur additional expense I arranged to interview them on the telephone. Some of the individuals asked not to be identified. They were concerned that by identifying themselves as persons who had been affected by the actions of the Senator they would be giving him the satisfaction of knowing that his actions had worked. Some confided in me personal information that they did not wish to share with their employer at this stage. Some did not wish to be identified to their employer as a potential disaffected person or trouble-maker. Had I been conducting an investigation into an allegation of the commission of a disciplinary offence I would have needed to treat requests for anonymity with caution. I have to stress that no individual sought an agreement of confidentiality before agreeing to see me. As a Judge I am acutely conscious of the need to be circumspect about the evidence of a person who wished to conceal their identity. Despite that I took the decision at the outset to assure all witnesses, whether they asked for confidentiality or not, that their identity would not be

revealed. Most were aware that it would not be difficult to deduce who had seen me as their names were frequently mentioned either directly on the blog or in the anonymous postings on the blog, moderated by the Senator. Secondly my terms of reference did not require me to deal with individualised allegations: I was looking at a general issue and I had sufficient evidence in the documents and correspondence to be sure of my conclusions without needing to identify my sources except where identification was agreed to.

6.12. It became clear as I read the documents, spoke to individuals, and reflected on the pattern of the information that I was receiving that the main thrust of the allegations of bullying related to the contents of Senator Syvret's blog and the mostly anonymous postings on that blog moderated by him. I therefore deemed it necessary to read the blog in its entirety for the year 2008, and for 2009 to date and some of the postings by other individuals. In the conclusions section of the report I summarise and quote some of the content. When Senator Syvret was dismissed as the Minister for Health and Social Services in August 2007 the eighty one pages report that formed the basis of the recommendation for dismissal did refer to alleged bullying and harassment of staff by threatening and abusive e-mails. I did see some examples of what could be considered as communications meriting that description. Nobody complained of threatening calls, though one witness had overheard a call from the Senator that he considered such. Many of those I spoke to had never once spoken to the Senator; some doubted that he was even aware of their identity. In my report therefore I have concentrated on the blog as it is readily identifiable and irrefutable and constitutes the main source of the behaviour criticised. In the recommendations section I outline in more detail my recommendations for monitoring the content of the blog in the future.

7. The relevant laws of the States of Jersey

Health and Safety legislation

- 7.1. The original letter from the Health and Safety Inspectorate referred to the Health and Safety at Work (Jersey) Law 1989. That legislation is described in its title as a Law to provide for securing the health, safety and welfare of persons at work. Part 2 of the Law primarily sets out the general duties of employers and employees.
- 7.2. Under Article 3(1) it is the duty of every employer to ensure, so far as reasonably practicable, the health, safety and welfare at work of all the employer's employees.
- 7.3. This duty is similar to the duty in the UK Health and Safety at Work Act 1974. It is not legislation that creates a specific civil legal liability on the part of the employer as Article 26(1)(a) expressly provides that nothing in the Law shall be construed as conferring a right of action in any civil proceedings in respect of any failure to comply with any duty imposed by Part 2.
- 7.4. Nevertheless under Article 9 the States are empowered to make Regulations in any area to secure the health and safety of persons at work, and to approve Codes of Practice for the purpose of provision of practical guidance on matters of health and safety under Article 10. Under Article 12 the Inspectors are provided with particular powers in relation to investigation and entering premises.
- 7.5. The enforcement regime is set out in Articles 13 (Improvement Notices) and 14 (Prohibition Notices). In particular if the Inspector is of the opinion that a person (a) is contravening one or more of the relevant statutory provisions, or (b) has contravened them in circumstances where it is likely the contravention will be repeated or prevented, then the Inspector may serve an improvement notice on that person. In the circumstances of this investigation that power is open to the Inspector if he is of the opinion that the States Employment Board has failed in its duty under Article 3. It remains an option.
- 7.6. The Inspector retains a residual power in Article 18 to direct an investigation of any matter relevant to the Law if considered necessary or expedient.

Employment Protection legislation

7.7. The Employment (Jersey) Law 2003 has only been in force since 2005. As Professor Upex pointed out in his report into the circumstances surrounding the dismissal of Mr Bellwood this is a law in the early stages of development and not only are its main provisions not known to employers but equally not known to employees.¹

7.8. The main provisions of relevance to my terms of reference are contained in Part 7 dealing with unfair dismissal. Under Article 61 an employee has the right not to be unfairly dismissed. Article 62, which replicates section 98 of the Employment Rights Act 1996 (the UK legislation dealing with unfair dismissal) defines a dismissal for these purposes. Article 62(1)(c) provides that an employee is deemed to be dismissed where he or she resigns in circumstances where he or she is entitled to do so by reason of the employer's conduct. This type of dismissal is commonly referred to as 'constructive dismissal'. It requires the employee to demonstrate on the balance of probabilities that the employer has been guilty of a fundamental breach of contract. In many cases the employee will rely on a breach by the employer of the relationship of mutual trust and confidence. In the UK there is a substantial body of case law on the parameters of this duty. If an employee was to resign arguing that the States Employment Board had broken that term by failing to address alleged bullying and harassment it would be that case law that would be relevant in determining the outcome. In paragraph 10.23 I express my conclusions as to whether the employer is potentially in breach of that obligation. At present the employer has yet to face a claim for unfair dismissal from an employee relying on a constructive dismissal in circumstances where it is alleged that the employer has failed to address an allegation of bullying.

Legislation prohibiting harassment

7.9. The Crime (Disorderly Conduct and Harassment) (Jersey) Law 2008 came into force on 21 November 2008. Article 3(1) creates a criminal offence that might apply in this case. It provides that:

- (1) A person commits an offence if he or she pursues a course of conduct-
 - (a) that amounts to harassment of another person; and

(b) that he or she knows, or ought to know, amounts to harassment of another person.

7.10. Article 3(2) then sets out the test for determining the objective question of when a person ought to be aware that their conduct could be capable of being considered harassment. Any person accused of an offence under the legislation can escape conviction if he or she proves one or other of the three statutory defences under Article 4 (a) to (c). In this case Article 4 (c) would be relevant as the Senator would if accused invoke that defence based on 'reasonableness' as well as Article 4(a) which enables the person accused to prove that the alleged conduct was for the purpose of preventing or detecting an offence. Although individuals have contemplated using this legislation as yet no formal request has been made to the Police to consider charges.

7.11. In my conclusions I address a different question: whether an employee could bring a claim for breach of statutory duty alleging that the employer had failed to prevent an alleged breach of Article 3 by the Senator. The same question as to whether the employer was liable for the acts of an individual not employed by the States would arise as under the health and safety legislation.

7.12. Jersey has adopted the European Convention on Human Rights. The legislation is contained in the Human Rights (Jersey) Law 2000. Article 12 requires any court to have particular regard to a person's right under the Convention to freedom of expression. In the schedule it is set out at Article 10 what that right entails. In particular Article 10 (2) provides that it is not an absolute right but a qualified right. The SEB as a public authority must respect its employees' right to privacy under Article 8. Whether the Senator's blog infringes that right and whether the States of Jersey have allowed that is outside the scope of the terms of reference.

8. Relevant policies of the States of Jersey and guidance from the Jersey Acas

8.1. The States of Jersey, not surprisingly as a large employer, have adopted a number of policies dealing with the employment relationship, both contractual

and non-contractual. These policies are relevant to issues of the conduct and capability of employees. There are additional policies applicable to internet and e-mail use and particularly the bullying and harassment policy.

- 8.2. Under the Civil Service Disciplinary Policy and Procedure, revised in 2008, applicable to all Civil Servants, there is a procedure to be followed when contemplating dismissal. In format it mirrors the recommended stages of the Acas Code of Practice and provides for warnings and dismissal including dismissal for gross misconduct. It contains a detailed section dealing with disciplinary rules and identifies the types of conduct capable of being classified as gross misconduct. In particular section 4.8 provides that any action, omission, or failure to act which threatens the health and safety of a member of staff, customer or members of the public, may be considered gross misconduct. Procedures for dealing with disciplinary matters including appeals are spelled out in appendices.
- 8.3. The Capability Policy revised in May 2009 enables the employer to address issues of capability in relation to an employee. The document sets out the procedural steps to be followed and there are useful flow charts to assist managers. Without setting out the various provisions in full there are more than adequate procedures in place to enable the employer to address any issues of conduct and capability in relation to States employees whilst at the same time protecting the rights of employees and ensuring compliance with current employment law and practice.
- 8.4. The Civil Service Grievance Procedure also encompasses best employment practice enabling an employee to raise issues in relation to their terms and conditions of employment and working environment. Again it contains formal stages, sets out the procedure to be followed by the employer and the employee, and reinforces the guidance with illustrative flow charts.
- 8.5. The Bullying and Harassment Policy, subtitled Dignity at Work: Tackling Harassment and Bullying in the Workplace, sets out the applicable procedure to be followed where an employee's grievance is that he or she has been harassed by another employee or a manager. It adopts similar definitions to those set out in section 5 above. In particular at section 4.4 and 4.5 it gives examples of the types of unacceptable behaviour: included are 'ridiculing or

demeaning' a person; 'public humiliation'; 'spreading malicious rumours'; 'misuse of power or position'. Employees can be referred to occupational health where the alleged conduct has led to health problems. Section 10 sets out the procedure to be followed where it is alleged that the perpetrator is not an employee or manager. In particular paragraph 10.2 requires Chief Officers to develop departmental procedures to support bullied employees. I return to that section in my recommendations. Section 10.3 however only enables the Chief Officer to progress a complaint about the behaviour of an elected member in accordance with States Standing Orders in liaison with the Privileges and Procedure Committee. Again I address the weakness of that section in my conclusions and recommendations.

- 8.6. As there has been an unfounded suggestion in some of the postings on the blog that States employees cannot or are inhibited from raising issues of concern in Jersey it is necessary to record that the States have a Policy on Reporting Serious Concerns (Whistleblowing Policy) with flow charts to guide the employee and the employer. Again the detailed provisions of that policy reflect best employment practice and are similar to the types of policies I have seen repeatedly in my position as an Employment Judge. However I do note that Part 7 of the Employment (Jersey) Law 2005 does not extend to 'whistleblowers' the same protection, if disciplined or dismissed for making a protected disclosure, that is contained in Part IVA of the Employment Rights Act 1996 in the UK. I am not aware of the reasons for excluding similar provisions when the legislation was introduced in 2005. It is outside my terms of reference to make recommendations in that respect but I note with surprise that the policy has no legislative reinforcement.
- 8.7. Finally it is necessary to set out in slightly more detail, in the context of my terms of reference, the elements of the Health and Safety Policy. In the preamble it is recorded that the 'States of Jersey attaches the greatest importance to the health, welfare and safety of its employees.' The document summarises the employer's responsibilities and states that Chief Officers and managers are 'personally responsible for all aspects of health, safety and welfare' including securing the necessary resources. They are required to publish as part of their business plan, detailed Health and Safety Policies.

Specifically the policies are required to ensure as a minimum (my emphasis added) Health and Safety Audits taking place on a regular basis. It contains a section reminding employees of their own responsibilities under the Health and Safety at Work (Jersey) Law 1989. Although I return to this issue in my recommendations at this juncture I merely observe that the policy does not indicate when it was last updated, it is different in format to other policy documents, in that it is unstructured and discursive, and seems to demonstrate either a lack of commitment to the question of modern practice and procedures or at least the need to bring the document up to date and give it a more coherent and easier to follow appearance.

8.8. As mentioned at section 5 of the report, the Jersey Advisory and Conciliation Service have published two booklets addressed separately to employees and employers providing guidance on bullying and harassment at work. It spells out to all employers the consequences of failing to address bullying and harassment. Again it is similar to publications in the UK.

9. Relevant aspects of the States of Jersey Law and Standing Orders

9.1. As Senator Syvret has referred to Article 47 of the States of Jersey Law 2005 in e-mails I have looked at the relevant section and I reproduce it in the next paragraph.

9.2. Article 47 was I am informed a provision drafted or introduced into the law by Senator Syvret and it is set out here in full:

47 Offence of blackmail, menace or compulsion

A person who blackmails or attempts to blackmail or who offers any threat, assault, obstruction or molestation or attempt to compel by force or menace any member of the States, member of a committee of inquiry established under standing orders or officer of the States in order to influence him or her in his or her conduct as such member or officer, or for, or in respect of the promotion of or opposition to any matter, proposition, question, bill, or other thing submitted or intended to be submitted to the States, the Council of Ministers, the Chief Minister, any other Minister, an Assistant Minister or any committee or panel established under standing orders, or who is a party

to such an offence, shall be guilty of an offence and liable to imprisonment for a term of 5 years and a fine.

9.3. I deal briefly in my introduction and again in my conclusions with the question of whether this investigation in any way contravenes that curiously opaque provision. I have seen and endorse the advice given to all members of the States of Jersey by the Attorney General on the problems of deducing what Article 47 is meant to mean and what mischief it is attempting to address. It is ultimately a question for a court to deduce what the provision is meant to mean. As a lawyer I have to say that it is a difficult provision to construe.

9.4. Article 48 directs the States to make standing orders to give effect to this Law. The present Standing Orders of the States of Jersey provide for the procedure to be followed by an elected member wishing to raise concerns about the conduct or capability of a States employee or officer. At schedule 3, paragraph 6 it provides:

Public comments etc. regarding a States' employee or officer

Elected members who have a complaint about the conduct, or concerns about the capability, of a States' employee or officer should raise the matter, without undue delay, with the employee's or officer's line manager (or, if he or she has none, the person who has the power to suspend the employee or officer), in order that the disciplinary or capability procedures applicable to the employee or officer are commenced, rather than raising the matter in public.

Elected members should observe the confidentiality of any disciplinary or capability procedure regarding a States' employee or officer and its outcome. If an elected member is nevertheless of the opinion that it is in the wider public interest that he or she makes a public disclosure of or comment upon the outcome of any such procedure, he or she should inform the parties to the procedure before so doing and, when so doing, refer to the individual by the title of his or her employment or office rather than by his or her name.

In this paragraph, "States' employee or officer" means a States' employee within the meaning of the Employment of States of Jersey Employees (Jersey) Law 2005, a member of the States of Jersey Police Force and any officer mentioned in the Schedule to that Law who is not a member of the States.

9.5. In 2005 the Privileges and Procedures Committee published a Code of Conduct for Elected Members of the States. It was approved by the States and members are required by the Standing Orders of the States to comply with the Code. The relevant provisions at paragraphs 2, 3, 5 and 6 remind elected members of their public duty and of the general Nolan principles of conduct for the holders of public office. Paragraph 5 reminds members of their obligations to ‘at all times treat other members of the States, officers, and members of the public with respect and courtesy and without malice, notwithstanding the disagreements on issues and policy which are a normal part of the political process’. In my conclusions I express the view that this paragraph has been infringed by the Senator not only in his comments on the blog, but in his communications with the Chief Minister and me in relation to this investigation. However I accept that ultimately that is a matter solely for the Privileges and Procedure Committee. Finally paragraph 6 of the Code reproduces paragraph 6 of Schedule 3 of the Standing Orders set out at 9.4 above.

10. Conclusions on the issues raised by the terms of reference

10.1. The publication *‘Bullying and Harassment at Work*, published by IDS (an independent research association providing information and analysis on employment law and personnel practice in the UK and Europe) sets out in its introduction an analysis of the effects of uncontrolled bullying and harassment and I have adopted their analysis as it represents current best practice and understanding of the insidious nature of bullying if not addressed by an employer. An employer who fails to take steps to ascertain whether bullying and harassment is taking place in the workplace and then to address it risks legal action by the employees concerned or by the Health and Safety Inspectorate. I set out in paragraphs 10.23 to 10.25 the potential areas of legal liability.

- 10.2. The employer is not just at risk of legal action. Quoting from the IDS publication: ‘Bullying and harassment can lead to illness, absenteeism, and poor performance, all of which have an impact on the organisation as a whole. A working environment in which bullying is allowed to thrive will feel intimidating, unwelcoming and threatening, even to those not directly targeted. Increased levels of stress caused by bullying lead to low morale and reduced productivity.’
- 10.3. My terms of reference required me to consider the means through which the alleged harassment was being perpetrated and the extent of that alleged harassment. I was then required to determine the effect that was having on the personal health and safety of the staff affected and ability to perform their jobs competently and then the effect this was having on the general culture, work environment and self-confidence of staff. Finally I was required to make recommendations on how best to address the problem.
- 10.4. In the following paragraphs I set out my specific and my general conclusions. Before setting out my conclusions it is necessary to explain the context for the decision to conduct this investigation. It was obvious that the original concern reported to the Health and Safety Inspectorate focussed on the impact on individuals. The source of the alleged bullying at that stage was not identified. It rapidly became clear that the focus of my investigation had to concentrate on the blog created by Senator Syvret as it was the most insidious form and most widely published source of the criticised behaviour.
- 10.5. The blog, or web based log or newsletter is a recent internet phenomenon. Used by some people it can be a diary updated regularly or used to keep people in touch with a journey or project. Increasingly it is used by politicians to communicate with constituents or the wider public. It is global, instant, impersonal and largely uncontrollable as it cannot be censored. Ultimately only a court can control what is written: either the usual search engine companies are required by law to restrict access or to shut a blog down, as with any web based information. It can, if used responsibly be a vehicle to expose corruption or wrong-doing. Equally it can be used as a vehicle to intimidate, and spread lies and propaganda. Unlike the playground bully the internet bully rarely personally confronts the victim. A perceptive

description of the internet bully was contained in a letter written to the Jersey Evening Post by Senator Perchard quoted on Senator Syvret's blog in 2009. I have not reproduced the letter. It has been placed on Senator Syvret's blog. Not surprisingly he rejects the analysis in the letter.

10.6. Senator Syvret began writing his own blog in 2008. The frequency of postings varies but the themes are recurring. Many of the items are clearly of interest not only to the electors of Jersey, but a wider audience. Entries over the two years since he began writing the blog have focussed primarily on the historical child abuse enquiry and in particular the police investigation initially by the Jersey police and recently by officers from the mainland. He has written on environmental issues, the constitutional position of the government law officers, and the legal system in Jersey. Recently he has written about his own legal problems. Entries are rarely brief. Readers can post their own comments. As moderator of the blog Senator Syvret has complete control over which entries are posted: he has the means to disassociate himself if he wished to do so from some of the more offensive postings from anonymous readers. On some occasions he has modified a posting to protect privacy. Increasingly over the last two years Senator Syvret has used the blog to attack individuals in the legal establishment, the Data Protection Commissioner, magistrates, the Jersey Evening Post, fellow politicians, the Chief Minister, Judges, and named civil servants. The language used has become progressively more colourful and tendentious: the Senator does not express himself in moderate or measured tones.

10.7. The subjects on which he writes are in the main legitimate topics for an elected senior politician and former Minister. In his e-mail to me declining my invitation to contribute to the investigation Senator Syvret quite properly reminded me that he is an elected member and Jersey's most senior politician. I do not dispute that an elected member is entitled, if not obliged, to hold Ministers and civil servants to account. Equally civil servants are exactly that: servants of the Ministers and citizens of Jersey and as such entitled to expect their support when discharging their duties honestly and professionally. That point was made to me strongly by the delegation from the Staff side when I met them and I agree. Mr Allen, the National Secretary who attended the

meeting wrote to me after my visit. In his letter he pointed out that the issue of politicians criticising individual civil servants is not unique to Jersey and is common in the offshore jurisdictions. The civil service staff association is quite clear that politicians are free to raise issues of genuine public concern. The Standing Orders and the policies in place prescribe how that should be done if the concerns in question relate to the conduct or capability of an individual.

10.8. In the report in the Jersey Evening Post at the time of my appointment Senator Syvret justified his actions on the basis that sometimes he had to get ‘rough.’ That epithet is a misleading misrepresentation of the quality of the language used and an attempt in my view to downplay what is being said. I surmise that few people have read the blog in its entirety. I did. As a Judge I have had to read a substantial amount of offensive material over the years and have become quite thick-skinned to the point of not being easily shocked. I was visibly taken aback by the ferocity and abusiveness of many of the postings on the blog from the Senator and his contributors.

10.9. In my introduction I quoted some of the comments made by Senator Syvret. In the course of the last two years Senator Syvret’s blog, and I have included not only his entries but the anonymous postings, has described employees of the States Employment Board in this language:

10.9.1. ‘There is a perception in Jersey that the senior civil service are out of control – unaccountable and invulnerable. An entirely accurate perception, at that. A bloated and monstrous incubus feeding upon islanders’ taxes in ever more insatiable quantities.’

10.9.2. ‘civil servants who have demonstrably lied, schemed, manipulated and been dangerously incompetent’;

10.9.3. ‘incompetent, dishonest and responsible for systemic failures to detect and prevent the abuse of children, and the concealment of abuse’;

10.9.4. ‘bloated, inefficient, out-of-control and wholly unaccountable senior civil service.’ ‘Here you can be demonstrably incompetent, idle, over-

promoted, unethical, a danger to service clients, utterly ineffectual and provably criminal – and yet be completely invulnerable. perverting the course of justice.’

10.9.5. ‘a tsunami of outrageous lies from the inter-departmental clique of senior civil servants responsible for the conspiracy to conceal the illegality of the system they had been so incompetently running, and secondly, a determined and ruthless campaign on their part to have me removed from office as a Minister.’

10.9.6. ‘stagnant and corrupt are the upper-reaches of Jersey’s civil service.’

10.9.7. ‘the corrupted self-interest endemic to Jersey’s public administration; the self-same “culture” which has permitted and concealed the foul abuse of children for decades’.

10.9.8. ‘The clowns – the liars – the ethically bankrupt shysters and other assorted con-men who seem to gravitate towards highly paid positions in Jersey, are – even as I write – still trying to conceal failures.’

10.9.9. ‘The Jersey civil service “culture” which has enabled the concealment of the battery, rape and torture of vulnerable children.’

10.10 These extracts are merely examples chosen at random but illustrative of the flavour of the general remarks made. They are certainly ‘rough’. What they are not in my considered view are acceptable comments from an elected politician supposedly bound by the Code of Conduct and Standing Orders. However that must be ultimately a matter for the Privileges and Procedures Committee because of the weaknesses in the Bullying and Harassment Policy. It is language that clearly falls into the category of ‘the unjust exercise of power of one individual over another by the use of means intended to humiliate, frighten, denigrate or injure.’ (the Jersey Acas definition.) It ‘ridicules and demeans’. (the language used in the Bullying and Harassment Policy). It clearly merits the definition of being ‘unwanted conduct which

has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person'. (the legal definition)

10.11 The blog names individuals. In my selection I have omitted the names of the individuals to whom the comments are directed as I have no wish to subject the named individuals to further humiliation. I have already given a flavour of the language used in the introduction. The following are again just random examples. On more than one occasion an individual is named and identified as a 'child rapist' and 'paedophile' That individual, an employee of the SEB, has not been charged let alone convicted of a criminal offence. A senior civil servant was called a 'scum-bucket.' Another was accused of having an affair with a Jersey politician. Another was alleged to have committed a serious criminal assault. There was no prosecution. Allegations of perjury have been levelled: no prosecutions took place.

10.12 Named civil servants have been accused of 'corrupt attempts to conceal their own incompetence.' Named Civil Servants are accused of lying, scheming and manipulating, and dismissed as unethical shysters. A named individual was described as 'demonstrably incompetent, idle, over-promoted, unethical, a danger to service clients, utterly ineffectual and provably criminal.' 'Ineptitude' 'incompetence' and 'corrupt' are words used frequently with reference to named individuals. I draw the same conclusions in relation to named individuals as I do in paragraph 10.10 above.

Conclusions on the nature and extent of the alleged harassment and bullying

Conclusion 1

10.13 The topics on which Senator Syvret writes are legitimate matters of interest not only to electors in Jersey but to a wider audience. The Staff side recognise the legitimate interest of the Senator in raising those issues. However the language used extends beyond legitimate criticism, and has trespassed far beyond the legitimate expression of concern by an elected

politician into unacceptable bullying and misuse of power. There are established methods and procedures to enable issues of concern to be raised by an elected politician in relation to the conduct or capability of an employee, including civil servants. I saw no evidence that this accepted route had been utilised; consequently at present no employee has been able to resort to these clearly defined routes to enable those accused of misconduct or lack of capability to defend themselves. Denying these employees the opportunity to defend themselves against what they believe to be unsubstantiated and unsustainable allegations is just as much if not more so a denial of human rights as the alleged infringement of Senator Syvret's right to free speech.

Conclusion 2

10.14 On the basis of primarily what I have read in the entries on Senator Syvret's blog, reinforced by the comments made by the Staff Side of the Jersey Civil Service Joint Council, I have no hesitation in concluding that there is extensive evidence of widespread harassment and bullying of staff primarily but not exclusively employed in the Health and Social Services Department. It is primarily conducted by the Senator's blog but there is some evidence of similar behaviour in e-mails to individual recipients.

Conclusion3

10.15 I am equally clear that based on the evidence of the contents of the blog the alleged conduct, none of which is denied by Senator Syvret, in fact quite the opposite as it is admitted and justified, is clearly conduct justifying the description of unacceptable bullying and harassment within the meaning of any of the accepted definitions set out in section 5 of this report. If I had been deciding this matter in the Employment Tribunal I would have had more than enough evidence to reach that conclusion. The critical issue is the perception of the individual on the receiving end of the conduct complained of unless that individual is unduly sensitive. That is not the case in respect of any of the victims I met. Some are remarkably resilient, but not all.

Conclusions on the impact of the bullying and harassment

- 10.16 I now turn to the two related issues covered by the terms of reference and that is (a) the effect this is having on the personal health, safety and welfare of the staff affected, and (b) the effect this is having on the general culture, work environment and self-confidence.
- 10.17 I was initially surprised to find that almost without exception individuals named in the blog had either never read it or rarely read it. Needless to say their friends, families and colleagues had. Many of the individuals named have reputations that extend beyond Jersey: the blog has been read by their peers and of course potential employers. I saw documented evidence of the effect the incessant campaign has had on individuals. Two individuals to my knowledge were arrested and detained in custody without any criminal charges being laid as a result of entries on the blog and reports to the police. Individuals were reluctant to admit that the bullying had impacted on their personal health and welfare, because to do so would in their words 'give the Senator the satisfaction of knowing the bullying had worked.' However I was provided with evidence of employees having difficulty sleeping, concentrating at work, socialising and maintaining normal family life. Relationships with partners and children had been placed under strain. Children had been bullied at school or subjected to a campaign of whispering. There had been consultations with occupational health and employees had sought medical advice.
- 10.18 People were concerned that their peers at work or in their social relationships were of the belief that the allegations might be true. All spoke of difficulties they would face seeking employment elsewhere in the knowledge that a prospective employer carrying out a search on the internet would be immediately taken to the blog.
- 10.19 Of equal concern, was the evidence I saw of a lack of confidence in staff to take critical decisions in relation to important issues, not exclusively in the field of child care, because of anxiety that it would immediately lead to identification and the inevitable entry on the log. As it was put to me on more than one occasion: 'people are keeping their heads down.' To an outsider that is a critical concern as if action is not taken to address the problem it will

firstly lead to inertia in the decision making process and ultimately a potential breakdown in normal day to day government. For example I understand that the States will in due course be required to decide whether to set up a Committee of Inquiry to investigate allegations of misconduct and incompetence within the management of Health and Social Services. I am aware from my own research for the purposes of this investigation that there have already been seven independent investigations and reviews covering much of the same ground. In the course of my research I read four of those documents either in whole or in part. It was quite clear that no evidence had been found in any of those reviews to justify any of the allegations made and the call for a further Inquiry appeared to me as an external observer to indicate an inability to move on and manage the present situation, rather than continue to rake over old ground.

Conclusion 4

10.20 I was not only convinced that there was evidence of some staff experiencing health problems but general evidence of staff feeling undervalued and unsupported by their employer. Individuals spoke highly of support from individual managers but of an absence of collective support from the employer. In general the staff are now detecting a reluctance to confront the activities of the Senator and consider that the hitherto strategy of ignoring the blog has now become counter-productive. The problem has not gone away. The employer's silence has been construed as passive acceptance that there might be substance in the allegations, however outrageous.

10.21 I was also persuaded that the employer risks losing a number of critical staff unless it is seen to be addressing the bullying problem. That will have serious consequences for the management of services and risks the employer being negatively perceived as a poor employer and therefore at a competitive disadvantage when recruiting staff. A senior manager told me of the present difficulties being experienced in that respect. Job applicants refer to the negativity of the blog as one aspect affecting decisions not to pursue an application for employment.

10.22 Regrettably if those staff were to leave it would be seen by the Senator as a vindication of his activity, not because his allegations had merit but because the staff involved no longer had confidence in the willingness or capacity of their employer to support them.

Conclusion 5

10.23 If staff do leave there is the risk that they will bring claims for unfair dismissal. That was mentioned by at least one individual in my discussions. In that respect employees would argue that the employer has broken the relationship of trust and confidence by failing to address the issue of the contents of the blog. At present based on what I have seen in relation to the employer's response so far it is my considered view as an employment judge that the employee(s) would have a strong chance of succeeding. The only legal issue for the Tribunal would be the question of whether the employer was responsible for the acts of the Senator. If the alleged bullying was an isolated act that would be difficult to establish. However in this case the employee would be able to point to the history of inappropriate e-mail usage in 2007; the continuity of the entries on the blog; the wording of the Code of Conduct; and the correspondence with the employer from the Civil Service Joint Council. In my considered view there is a strong case for the proposition that the employer would be held liable if not for the actual bullying but for the failure to address it once aware of the problem.

Conclusion 6

10.24 Although it is not strictly set out in my terms of reference it is implicit from the correspondence that prompted this investigation that I am to consider whether the employer is at present complying with its statutory responsibilities under the Health and Safety at Work (Jersey) Law 1989. Having interviewed a member of the staff of the Inspectorate and considered the letter of 15 May 2009 again following my investigation I am firmly of the view from my experience as both a practitioner and Judge that unless the employer had taken and continues to take the steps already taken to investigate the problem it would have been at serious risk of action under

Article 13 of the Law by means of an Improvement Notice. Although the employer could argue that it is limited in its ability to prevent the action, a point accepted by the Inspector, it can take other steps, including but not limited to the steps identified in the Inspector's letter. I deal with that in my recommendations.

10.25 It is also arguable that an employee might bring a claim against the employer for breach of statutory duty relying on either or both the Safety at Work Law and the criminal legislation referred to at paragraph 7. However advice on the potential liability under that legislation is outside my terms of reference and I merely alert the SEB to its existence. I do make recommendations for alerting staff to the existence of the legislation and the steps they need to take if contemplating action. Whereas an employee would have to leave to bring a claim for unfair dismissal the same does not apply to the other legislation considered in this section.

Overall conclusions on this Investigation

10.26 Finally I should record that staff who saw me were not of a consistent view about the potential outcome of this investigation. Most if not all accepted that the blog could not be shut down. Many were worried about the effect the constant exposure was having on the ability to attract the necessary expertise to Jersey to manage the recognised issues confronting Jersey. Many spoke of feeling exposed and unprotected and were sceptical about the ability or willingness of the SEB to begin the task of addressing the issues raised by the investigation. The point was made that it did not need an independent expert to tell the SEB what was wrong or what needed to be done to remedy the position. In a sense that reflects the lack of confidence in the ability of Jersey to govern itself.

10.27 Part of the problem is that Jersey does not have the political and legal infrastructure to support it in the present situation. The absence of political parties is reflected in the absence of party discipline and the limited capacity of the political system to address this problem. The system of Ministerial government is in its infancy. The point was made to me that over the period

of time covered by my investigation Health and Social Services had four different Ministers and five different Assistant Ministers.

10.28 As was pointed out by Professor Upex in the report already cited the employment relationship has only been supported by legislation on unfair dismissal since 2005, whereas in the UK it has existed since 1971. Not only is the employer having to understand the ramifications of that legislation, and the procedural requirements that underpin it, (the point made by Professor Upex), but employees also have a limited and superficial understanding of their basic employment rights, as evidenced by the fact that Jersey has yet to face a claim arising from the issues that resulted in this investigation. Even now there is no legislation addressing any of the usual strands of discrimination law.

10.29 In conclusion I was completely convinced of the honesty and objectivity of the people I interviewed. The information I received was frank and not self serving. I met people who were professional in their approach and dedicated to serving the people of Jersey. They fully accepted the right of politicians to question and to criticise but equally expected that to be done professionally and in accordance with the obligations and responsibilities of those given a different and privileged position by virtue of their elected status. Just as the politician is entitled to question civil servants the civil servant is entitled to the respect and support of the politician and most importantly the employer when carrying out those duties.

11. Recommendations

11.1. The terms of reference require me to make recommendations to the States Employment Board on how best to address the alleged harassment. If the source had been an employee the first recommendation would be to commence disciplinary proceedings with the possibility of dismissal for gross misconduct. Bullying and harassment of the magnitude and frequency illustrated in this case would clearly fall into that category. Senator Syvret is not an employee and only the Privileges and Procedures Committee are

enabled to address the behaviour of an elected member. In any event even dismissal of an employee would not prevent continued publication of the blog: it would only prevent e-mail communication which is not the main source of the alleged harassment in any event.

11.2. The first step is to ensure that the SEB discharges its duty under the Health and Safety at Work (Jersey) Law 1989 as soon as possible, not just to ensure compliance with law, a commendable aim in itself, but to ensure that the employer is seen as an employer aware of its responsibilities to its staff to ensure their health, safety and welfare.

11.3. The steps that can be taken are already set out in the letter of 15 May 2009 from the Health and Safety Inspectorate. The first step is to acknowledge the scale of the problem and the responsibility of the employer to address it. In the main the response so far has been to ignore the problem in the vain hope that eventually it would go away. It will not. Recently the Senator has been posting entries addressing his pending prosecutions. His misguided challenge to the jurisdiction of the Magistrate was comprehensively dismissed by the Judge in the Royal Court as being ‘frivolous and fanciful and without any merit.’ To reflect that the Court made an order for costs against the Senator, which he has publicly indicated he has no intention of paying. Significantly the need for the Senator to engage with the legal process has temporarily deflected him from his usual blog entries.

11.4. I was surprised to find when I commenced this Investigation that there was no document in existence either as an electronic document or as a paper file containing the full text of not only the blog entries posted by the Senator but by others. Such a document can be easily prepared: one is already in existence prepared by the Jersey Data Protection Commissioner. I myself prepared an edited electronic version. Preparation of such a document recording historical entries and updated weekly must be an immediate responsibility. This is implicit in the first and third recommendations of the Health and Safety Inspectorate. The document must specifically highlight and collate, with the necessary cross-referencing, all entries in the blog and the postings identifying an individual or a post in situations where the person is identified as an employee of the States. It may be necessary to clear this with

the Data Protection Commissioner to ensure compliance with the relevant legislation if necessary after obtaining the appropriate advice.

Recommendation One

- 11.5. **I therefore recommend that the appropriate steps are taken to compile an appropriately cross-referenced paper and/or electronic copy of the Senator’s blog. If any other person prepares a similar blog that action must be extended to encompass any other web-based electronic publication identifying States employees.**
- 11.6. Although the source of the bullying and harassment only emanates from one person at present that may not always be the case and if appropriate the step recommended in the previous paragraph should be extended to any future similar publication.
- 11.7. Once the named individuals have been identified the appropriate steps must be implemented to ensure that they are contacted by both Human Resources and an appropriate line manager to reassure the individual that the allegation has been noted, and will be addressed where appropriate. **The employee should be advised of the existence of (a) the grievance procedure (b) the bullying and harassment procedure (c) the guidance on the Crime (Disorderly Conduct and Harassment) (Jersey) Law 2008 [see Recommendation Five at 11.14] and (d) the availability where appropriate of assistance from occupational health.** At the same time staff can be referred to the publications published by the Jersey Advisory and Conciliation Service. Steps must be taken at subsequent intervals to ascertain whether the employee in question needs further assistance

Recommendation Two

- 11.8. **I recommend that responsibility for the steps recommended in paragraph 11.7 is that of the SEB, who may delegate the Chief Officer**

for Human Resources to implement the appropriate steps by the appropriate staff.

11.9. At present the wording of paragraph 10.3 of the Bullying and Harassment Policy is worded very vaguely reflecting the inability of the SEB to address conduct which infringes the policy where the alleged harassment is committed by an elected member. It suggests that the employer is powerless to deal with the matter at best or at worst is not committed to addressing the question. By way of contrast section 10.2 of the policy recognises the problem where the alleged harasser is a member of the public. Responsibility is given to Chief Officers to develop departmental procedures. The difficulty with that section is that it risks contradictory policies and a variable (in the sense of the timescale) approach. There must be an ability to share best practice but with a recognition, as recommended by the Health and Safety Inspectorate, that this is seen as a responsibility of the employer across all departments, not the responsibility of Chief Officers on a case by case basis.

Recommendation Three

11.10. **I recommend that responsibility for (a) redrafting the Bullying and Harassment Policy (b) drafting and disseminating appropriate procedures and (c) communicating the outcome of that exercise is assumed by the SEB and delegated to the appropriate Chief Officer with a designated timescale for preparation and approval.** In that respect it may also be advisable to seek the assistance of the Inspectorate and the Trade Unions and Civil Service Council, with if necessary the assistance of the Jersey Advisory and Conciliation Service.

11.11. At the same time serious attention needs to be given to the Health and Safety Policy. The problems associated with bullying and harassment raise issues of health and safety of just as much importance as the risks associated with machinery, plant and equipment. The consequences for the employer of either an Improvement Notice or prosecution are serious. The Inspector has already pointed out the general requirement in Article 3. The letter of 15 May 2009 does not specifically deal with the present policy but applying my experience as a practitioner and a Judge I can say as a minimum it requires revision in relation to both format and content. There are no subject or

paragraph headings in the document. It does not cross-refer to other policies, not least the Bullying and Harassment Policy. In the bulleted list there is little by way of practical advice to either managers or employees on what the listed matters require and little by way of direction as to where employees may find the additional documents or further information. The various responsibilities placed on departmental heads, or co-ordinators are merely listed with little by way of structure and co-ordination. There are references to Safety Audits, but no mention of risk assessments. As a policy it has not kept pace with developments in the law, although I recognise that the relevant EU law on the management and assessment of risk does not apply to Jersey. Essentially the document lacks the structure and content of other policies in force in Jersey.

Recommendation Four

11.12. **I therefore recommend that the existing Health and Safety Policy is rewritten and restructured to identify (a) legal requirements (b) the aims and contents of all departmental policies (c) and the relationship of the policy to other relevant policies.**

11.13. I have outlined the effect of The Crime (Disorderly Conduct and Harassment) (Jersey) Law 2008 in paragraph 7.9 of the report. The legislation may provide employees with a remedy. I know from my discussions with employees that at least two have considered using the legislation. It requires a complaint to the police. The statutory defence is available and would lead to any person accused being able to produce evidence to establish either that the behaviour was reasonable or that it was to disclose the commission of an offence. It would expose the complainant to cross-examination and therefore is not something to be resorted to by a person who is not sufficiently resilient. However staff should be aware of the legislation and the procedure for seeking to enforce it. The advice should cover what has to be proved, the available defences, the procedure for reporting an alleged offence and how the complaint would be dealt with in court.

Recommendation Five

11.14. **I recommend that a briefing document is prepared on the Crime (Disorderly Conduct and Harassment) (Jersey) Law 2008 to be made**

available to all staff covering (a) the nature of the offence under the legislation (b) the available defences (c) the procedure for reporting a complaint under the legislation (d) an outline of the court procedure that would be followed and (e) where to seek guidance on using the legislation.

11.15. The letter from the Health and Safety Inspectorate of 15 May 2009 itemises a number of actions that could be taken. It is not an exhaustive list and to a large extent my recommendations cover much of that ground. I endorse the conclusion that a collective approach is adopted. Although the individuals named are employed primarily in Health and Social Services that might not remain the case and in any event the impact of the campaign is felt across all departments, whether or not employees read the blog.

Recommendation Six

11.16. **I therefore do recommend that the SEB adopts the suggestion of dealing with this issue collectively and adopts the recommendations set out in the letter of 15 May 2009 from the Health and Safety Inspectorate in their entirety unless already covered by my specific recommendations above.**

11.17. I have left my most fundamental observation to the end and recognising that this will require further consideration by the SEB, have avoided making it a specific recommendation.. All the staff I spoke to referred to a feeling of isolation, of not being defended or supported. One spoke of welcoming a disciplinary investigation as an ‘opportunity to clear her name’ in the face of the allegations made. I can understand how at one stage a strategy of ignoring and not responding to the bullying was a strategy with the aim of allowing the attacks to wither away. Even if that was a proper strategy at the time it has not worked: the attacks have intensified.

11.18. In one sense it has left the employees themselves, their families and friends, and the wider public in the situation of concluding that there must be something in the allegations. If of course there was any substance in the allegations the employer would be failing in its duty in not investigating the allegations in question. Therefore as the Senator has not used the proper procedure under the Standing Orders or the Code of Conduct to raise concerns in relation to the conduct or capability of staff then there is only one

conclusion to draw. There is nothing in the allegations and the employer should make that clear because if there was, an investigation would have been undertaken. The Senator has reminded me and others that he is an elected member. He can't have it both ways. If he denies the right of the SEB to conduct an investigation because he is an elected member, even going to the length of warning me off and justifying that by reference to Article 47, then he must also accept the reciprocal responsibilities attached to that position as set out in the Standing Orders. As such he is bound by the Standing Orders and the Code. He has not used that procedure. Either he has evidence, in which case he should utilise the procedure and make the evidence available, or the SEB as the employer should protect its staff who as public servants are unable to defend themselves publicly. As the Senator has declined to cooperate with either the Scrutiny Committee or my investigation the employer should respond accordingly.

11.19. Staff can properly expect their employer to defend them against unfounded allegations. Putting aside the tone of the language used in the blog, the thrust of the postings is that (a) staff have committed criminal offences (b) staff are corrupt (c) staff are incompetent (d) staff have lied (d) staff are unqualified (e) staff are lazy and (f) staff are unethical. I am prepared to accept that staff make mistakes. I would be willing to consider that the SEB does not consider that any of the epithets used applies to any of its employees let alone those identified in the blog. That is irrespective of the more unsavoury epithets favoured by the author of the blog and its contributors. I have a clear view that I had formed shortly after commencing my investigation and pressed on me by many of those who gave evidence to me that it is the responsibility of the SEB as the employer to refute publicly any such allegation that is made in clear, unequivocal and firm but moderate language that the allegation is baseless. On each occasion the statement should be backed up wherever possible with the evidence refuting the allegation. In addition to making the denial as widely available as possible staff should be made aware it has been done and the material widely disseminated. It should be posted on the blog. If the Senator refuses to accept the posting that fact should also be publicised. It might require a co-ordinated

response across departments and a corresponding allocation of resources. It should not be done in secret and the SEB should announce its intention of doing so. It would send a clear message to all staff that their employer is aware of the attacks on them and the dispiriting effect that is having and will send a message that at present is not being received that the employer values its staff and will endeavour to protect them from unwanted attacks of this nature. If a parallel is required all offices of the States of Jersey display notices telling the public that it will not tolerate verbal and physical attacks on staff. This action would convey that same message.

12. Appendix

12.1. I invited Senator Syvret to meet me. I set out below the full text of my e-mail and his reply. The email was sent on the morning of 15/8/09, the day after my return from Jersey before I had interviewed any witnesses, with one exception.

Dear Senator Syvret

I have been asked by the States Employment Board to carry out an investigation as detailed in the letter to you of 11 August 2009 from Senator Le Seur.

The terms of reference for the investigation are as follows:

- to consider the extent of alleged staff harassment by an external party and the effect this is having on the personal health and welfare of the staff affected and their ability to perform their jobs competently;*
- to consider the means through which the alleged harassment is perpetrated;*
- to determine the effect this is having on the general culture, work environment and the self-confidence of staff other than the alleged victims;*
- to make recommendations to the States Employment Board on how best to arrange for the alleged harassment to be addressed*

Following my initial visit to Jersey this week I have arranged to return to Jersey initially from 24/8 to 26/8. Arrangements are being made for me to interview a number of States employees and individuals who have either requested to meet me or who I have invited to meet me.

I made it clear when appointed that it was important that I met you in the course of my investigation and that was reiterated in the letter from Senator le Seur.

I was disappointed to read in your reply to Senator Le Seur that you were neither prepared to meet me nor speak to me. I hope that you will reconsider that decision. I accept that you are not obliged to do so but I am anxious to give you the opportunity to contribute to my investigation.

I am able to meet you, subject to your availability, and my own commitments on any of those dates. I am working from Howard Davis Farm and if that is convenient would prefer to meet you there. If that is convenient may I ask you to make the arrangements through Mr Pinel's office (Sue Reid) as they are dealing with the practical arrangements now that I have returned to the UK.

I can be contacted on either the e-mail address from which this has been sent or on the phone at 0114 296 2203, although I am fulfilling judicial duties next week in Manchester.

I am sending this by e-mail rather than in the post to the e-mail address on your blog as I am aware that postal delays might impact on the ability of people including yourself to respond in time. If you do reconsider your decision but cannot make any of the suggested dates I will be visiting Jersey again but will not be able to confirm dates until I am next in Jersey.

Yours sincerely

Chris Chapman

12.2. He replied on the same day, in the afternoon, as follows:

Dear Mr. Chapman

Firstly - let me draw your attention to the following Article of the States of Jersey Law:

"Article 47

Offence of blackmail, menace or compulsion

A person who blackmails or attempts to blackmail or who offers any threat, assault, obstruction or molestation or attempt to compel by force or menace any member of the States, member of a committee of inquiry established under standing orders or officer of the States in order to influence him or her in his or her conduct as such member or officer, or for, or in respect of the promotion of or of opposition to any matter, proposition, question, bill, petition or other thing submitted or intended to be submitted to the States, the Council of Ministers, the Chief Minister, any other Minister, an Assistant Minister or any committee or panel established under standing orders, or who is a party to such an offence, shall be guilty of an offence and liable to imprisonment for a term of 5 years and a fine."

Let me warn you now that you are a party to the criminal act of breaking this law. You are only a "component" in the criminality - an "inchoate" party, is, I think, the legal phrase.

You may - until now - have been an unwitting party. But nevertheless - you are engaging in the criminal offence of attempting to "threaten...obstruct...compel by menace...a member of the States...in order to influence him...in his conduct

as such member....or for, or in respect of the promotion of or of opposition to any matter, proposition, question, bill, petition or other thing submitted or intended to be submitted to the States, the Council of Ministers, the Chief Minister, any other Minister, an Assistant Minister or any committee or panel established under standing orders....

An - in particular - I would draw your attention to the following words in Article 47: - "or who is a party to such an offence".

Let me explain to you - as I doubt you have grasped it - the magnitude of what it is you have foolishly become involved in.

Ask yourself this question: "How many legislatures of respectable, Western European democracies would even countenance - let alone tolerate - a brazen attempt by corrupt and inadequate civil servants, using some bureaucrat such as yourself - an "external party" - to interfere with the rights of the elected members of that legislature to challenge and hold to account the executive?"

And this question: "How many respectable, democratic legislatures would allow the historic and powerfully entrenched rights of parliamentary privilege to be menaced and undermined by some quangocrat?"

The plain and obvious answer to those questions - Mr. Chapman - is none.

Do you think the entrenched oligarchy that has employed you aren't aware of these considerations? Have you failed to notice how Senator Le Sueur has very, very carefully used the phrase "external party" to falsely and dishonestly describe me?

I am not - Mr. Chapman - an "external party".

I am an elected member of the Jersey parliament; that parliament has three categories of member - the most senior being the Senators - as the Senators are elected by the entire island - as opposed to a mere district.

I also have the highest electoral mandate of all current States members - having topped the poll in my two most recent elections.

I am also 'Father of the House', by dint of being the longest continuously serving Senator.

I am very popular Mr. Chapman - because of what I do politically. You think - do you - that a UK bureaucrat such as yourself has the right to interfere with the democratic will of the 15,000 people who voted for me, by being a party to an unlawful act of harassment, intimidation - and "bullying" - against me?

I shall issue you with some information, some advice - and a warning.

Firstly - you should be aware that the senior cohort of Jersey civil servants behind this exercise are, indeed, criminals. Setting aside the vast degree of bribery and corruption generally engaged in - let us just consider the Jersey Child Abuse Disaster.

A current Departmental Chief Officer is a child abuser - having spent much of the 1980's savagely battering dozens of children in the child secure unit. There are also other, actual child abusers employed in the public sector.

However, most of the criminality engaged in by the present cohort of top civil servants consists of a variety of well-evidenced examples of:

Perverting the course of justice.

Conspiracy to pervert the course of justice.

Misconduct in a public office.

Why - you may ask - have the Jersey authorities not acted against these people? Because the senior civil servants - to use a metaphor - know where the skeletons are buried" in respect of various illegal dealings by Jersey politicians.

And it is also - obviously - the case that the Jersey oligarchy doesn't want to sack - or prosecute - any current employees - because that would be bad for the island's "image".

Instead - the Jersey establishment has engaged in increasingly desperate acts of harassment, intimidation, threats - and "bullying" - of the kind you are now participating in.

Did your pay-masters inform you of the climate of fear that grips the vast majority of ordinary public employees? Did they explain how a culture of concealment is maintained by the senior civil service through harassment, intimidation, denial of promotions - and general "bullying" - routinely engaged in for decades by the very malodorous clique you have been wheeled in to defend?

No - I don't imagine they did.

Let me now give you some advice. I strongly suspect that you have been fed a vast amount of utterly false, partial and dishonest information, and have been misled by omission.

Were I in your shoes - I would be abandoning this job first thing Monday morning. I'm certain you'd still receive your contracted fee - as the States have broken that contract by lying to you.

I would also point out that a great deal of the gross incompetence, malfeasances and out-right criminality exhibited by those you have been employed to defend - is going to emerge - notwithstanding the very best efforts of the Jersey authorities. I can give you that assurance.

If I were you - I certainly wouldn't want to be known professionally as "the man who tried to protect Jersey's child abusers, concealers of child abuse, managers who cause the unlawful deaths of patients - and who then try frame others - and then lie to the media about it."

For that is what you are doing.

As explained above - in me, you are not dealing with an "external party"; you are, in fact, a component in a criminal attempt to interfere with the rights of an elected member of the Jersey parliament - in an attempt to prevent him from doing his parliamentary duty and hold the executive to account.

You are also being a party to the furtherance of the concealment of a variety of the most monstrous and foul crimes.

Crimes such as the rape and battery of children.

And the unlawful killing of patients.

Having supplied you with the above information - every word of which I'd happily attest to under oath in a court of law - I must, therefore warn you that I will, on Monday, be making formal complaints to your professional body concerning your conduct in involving yourself in a conspiracy to intimidate into silence an elected member of a parliament.

Remember - I am not an "external party".

I advise you again - you have been conned and manipulated into accepting a contract on entirely false pretenses. You are running the risk of being a party to at least two criminal acts - the concealment of serious crimes - and the unlawful interference with a democratically elected politician.

My advice to you is to abandon all involvement in these matters - and still claim your fee (advice I offer on the assumption that what I surmise above is correct, and that you have been misled as to the true picture?)

Yours sincerely,

Senator Stuart Syvret

¹ *Circumstances surrounding the dismissal of an employee by the States of Jersey:
Report by Professor Robert Upex, July 2008*