

STATES OF JERSEY

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CODE OF PRACTICE FOR SCRUTINY PANELS AND THE PUBLIC ACCOUNTS COMMITTEE (P.198/2007): AMENDMENT

Lodged au Greffe on 12th February 2008
by the Council of Ministers

STATES GREFFE

CODE OF PRACTICE FOR SCRUTINY PANELS AND THE PUBLIC ACCOUNTS COMMITTEE
(P.198/2007): AMENDMENT

At the end of the proposition, after the word “2007” insert the words –

“, except that –

- (a) *In the paragraph numbered 3.5 after the words “will review the matter and” insert the words “, subject to the preservation of legal professional privilege and the privilege against self-incrimination,”.*
- (b) *In paragraph 9.23 after the words “The information” for the word “will” substitute the word “may”.*
- (c) *In paragraph 9.24, for the words “Part B reports from the Council of Ministers meetings will be promptly forwarded following consideration by the Council and relevant Minister”, substitute the words “If it has been agreed that a Part B report from a Council of Ministers’ meeting will be provided, this will be promptly forwarded following adequate consideration by the Council and the relevant Minister.”*
- (d) *In paragraph 9.26, after the words “and the Chairman, Privileges and Procedures Committee” delete the words “for resolution”.*
- (e) *For paragraphs 9.27 to 9.31 relating to legal advice substitute the following paragraphs –*

“9.27 For the reasons that –

- (i) the States Assembly is not a proper forum for argument about which of two sets of competing legal advice is correct; and
- (ii) there will be a potentially significant cost to the public purse if Scrutiny Panels engage external lawyers on a regular basis,

it is desirable, where possible, that Ministers, the Scrutiny Panels and the PAC seek legal advice from the Law Officers’ Department rather than the private sector. It will be the duty of the Law Officers to seek to ensure that, to the extent that they are advising more than one party on the same set of facts, the advice is given on a consistent basis and does not by any inconsistency cause embarrassment to States members. It is understood that Ministers, Panels or PAC are absolutely entitled to seek private sector advice however if they choose to do so, or if the Law Officers advise that, for whatever reason, they are unable to advise a Minister, a Panel or the PAC on a particular matter.

9.28 It is essential that there is no inhibition on Ministers and their departments, who will usually also be taking advice from the Law Officers, both from seeking that advice, and, when it is sought, from giving the Law Officers all the relevant facts. If such inhibitions do exist, there is the probability that from time to time no advice or the wrong advice will be given, with maladministration as a result. Protection of the confidentiality of communications between the Law Officers and Ministers and their departments is therefore essential.

9.29 It is recognised by the States and the Law Officers that the process of seeking and taking legal advice from the Law Officers is confidential. There are three primary underlying reasons for this –

- (i) to ensure that there is no damage done to the public interest by the publication of

legal advice given by the Law Officers;

- (ii) to ensure that there is no inhibition on the part of Ministers, the Scrutiny Panels or the PAC in taking advice;
- (iii) to ensure that there is no inhibition on the part of the Law Officers or lawyers within their Department in giving full and frank advice on all the matters which are raised with the Law Officers or one of the Departmental lawyers for advice, or which the Law Officers or the advising lawyer consider should reasonably be volunteered to the Minister, the Panel or the PAC for consideration.

9.30 For these reasons, the Protocol agreed between the Scrutiny Panels and the Law Officers, which covers the taking and giving of legal advice, is as follows –

- (1) Neither the Scrutiny Panels (which includes for this purpose their officials) nor the Law Officers will publish without the consent of the other:
 - The fact that legal advice has been sought.
 - The facts which have been given to the Law Officers for the purposes of taking advice.
 - The legal advice which has been given to the Panel (or its officials) on the facts presented to the Law Officers.
- (2) Nothing in paragraph (1) prevents a Panel making a statement in a Report to the States as to what in its opinion the law is, or as to what its understanding is of the legal basis of the policy followed or decision taken. The Law Officers will be afforded the opportunity to review Reports made in order to ensure confidentiality about legal advice is maintained.
- (3) In making a statement under paragraph (2), Panels should be careful to ensure that no implication is given that their statement has been endorsed by the Law Officers.
- (4) Scrutiny Panel members recognise and accept that Ministers and their officials will maintain their claim to legal advice privilege, except in exceptional circumstances, if questioned by a Panel, and will not seek to interfere with that privilege. Such exceptional circumstances are likely to arise only where there is a coordinated Law Officer, Ministerial and Scrutiny approach to the release of the advice, where there would be no adverse impact on actual or possible legal proceedings in the court, and where there would be no undesirable precedent set as a result.
- (5) Scrutiny Panels and the Law Officers recognise that, in exceptional cases, the public interest, which is both different from and wider than the political interests of the Panels and the professional interests of the Law Officers, may override the very strong public interest factors set out in paragraphs 9.27 to 9.29 above, and make it desirable that the legal advice given to Scrutiny Panels is published. In such cases, the Panel and the Law Officers undertake to discuss how the public interest can best be accommodated. If there is no agreement between them, the views of the Privileges and Procedures Committee will be sought. If at the end of those discussions, there remains a lack of consensus, the question of publication or not will be a matter for the judgment of the individual Panel.
- (6) The provision of legal advice to a Scrutiny Panel must take reasonable account of the timetable in which a review is being conducted. If pressure of workload on

the Law Officers' Department prevents a prompt response to a request from a Scrutiny Panel for advice, the Law Officers should notify the Panel Chairman as soon as possible so that other arrangements can be made. It is further understood that the Law Officers will endeavour to advise Scrutiny Panels in all cases unless there are exceptional reasons, whether practical or theoretical why they feel unable to do so.

- (7) The Law Officers have requested that where a Scrutiny Panel seeks advice from them, the Panel ensures that where reasonably possible it makes available to the Law Officers a detailed summary of the facts and documents on which the advice is sought.
- (8) Where a Scrutiny Panel takes legal advice from the private sector, it is desirable that it should consider disclosing that advice to the Law Officers in order that any potential disagreement about what the law is can be identified and so that, in the event of such disagreement, discussions where appropriate can take place between the Panel and the Law Officers so as to minimise any difficulties for States members as a result."

(f) *In paragraph 11.7 –*

- (i) *after the words "all witnesses" delete the words "who are not States members";*
- (ii) *after the words "factual or descriptive passages" insert the words "Where possible, this will also include the Panel's findings and recommendations. This will help to ensure that the Panel has correctly interpreted the evidence and provides an early opportunity for clarification".*

(g) *In paragraph 11.8 –*

- (i) *after the words "circulate draft reports" insert the words "including findings and recommendations, to the relevant Minister";*
- (ii) *after the words "in confidence and" delete the words "when possible";*
- (iii) *after the words "and allow" insert the words "at least";*
- (iv) *after the words "for comments" delete the words "on matters of a technical or factual nature only".*

COUNCIL OF MINISTERS

REPORT

The Council of Ministers welcomes the proposed Code of Practice for Scrutiny Panels and the Public Accounts Committee and is supportive of the vast majority of its contents. In addition, the Council is grateful for the communication and co-operation between the Council and the Chairmen's Committee which has led to a number of agreed changes from earlier versions of the draft. There remain only a small number of areas of disagreement where the Council wishes to make amendments to the Code of Practice. Although few in number, these amendments deal with fundamental and important issues, which are set out below. For clarity, for those paragraphs where there are significant changes, the full text of each of those paragraphs, including the proposed amendments, is attached as an Appendix to this report.

Section 3 – Powers of the PAC and Panels

- (a) Section 3 of the draft Code relates to the powers of the Public Accounts Committee and the Scrutiny Panels, and it sets out the proposed arrangements under which Ministers and other Members of the States will be expected to cooperate with the Panels. It is stated in paragraph 3.2 of the draft Code of Practice that Members are not covered by the States of Jersey (Powers, Privileges and Immunities) (Jersey) Regulations 2006 (“the Regulations”), but the Council of Ministers would like to point out that the procedures set out in section 3 are not consistent with those in the Regulations.

Regulation 2 of the Regulations states that –

“These Regulations shall not –

- (i) confer any power to issue a summons requiring the appearance of or the production of documents by a member of the States; or*
- (ii) confer any privileges or immunity on a member of the States.”*

In paragraph 3.5 of the draft Code of Practice it is stated that where there is a dispute between a Scrutiny Panel and the member or Minister as to whether evidence should be given or documents produced, *‘the Privileges and Procedures Committee will review the matter and direct whether or not the Minister or member concerned should comply with the request. If a Member fails to comply when directed by PPC to do so he or she will be regarded as being in breach of the Code of Conduct and the appropriate disciplinary process will be initiated’*.

This is some way from Regulations 8 and 17 of the Regulations. These two Regulations provide an entitlement to the privilege against self-incrimination and to legal professional privilege. Nothing in the draft Code of Practice replicates that entitlement.

The Council of Ministers considers that this is an important principle and that the entitlement to those privileges, for all States members including Ministers, should be maintained.

The effect of the Council's amendment would be to maintain this entitlement.

Section 9 – Scrutiny Panels: Gathering Evidence

- (b) – (d) Access to Council of Ministers Part B background papers:

Paragraphs 9.20 to 9.26 set out the access that Scrutiny will have to papers on the Council of Ministers' “B” agenda, rather than the more general access to information set out in paragraphs 3.5 and 9.1 to 9.14 of the Code of Practice.

When considering if and when papers should be made available to Scrutiny, and what Scrutiny is allowed to do with those papers, a number of points need to be considered –

- (i) The Minister is legally accountable for information under his/her control. The proposed amendments to paragraph 9.23 and 9.24 seek to clarify that, whilst there is a presumption that confidential Part B papers will be supplied to Scrutiny on request in accordance with a confidentiality agreement, the Minister retains the right to refuse access to confidential information in certain circumstances, e.g. where information is of a personal, commercial or legal nature. If such circumstances arise, the amendment provides for these to be explained to the Panel Chairman, and if unresolved, referred to the Chief Minister and President of the Chairmen's Panel and the Chairman of the Privileges and Procedures Committee for discussion (9.26).
- (ii) Scrutiny Panels are set up to complement particular ministerial responsibilities. It is recognised that policies will sometimes overlap the remits of particular Panels and confidential Part B papers may be provided to more than one Panel if appropriate.
- (iii) Part B papers usually relate to policy under development and may be at an early unrefined stage. Once policy is more developed, policy options/proposals are supplied to Scrutiny for consideration and published, either as consultation documents (green papers) or more informally through the Minister.

(e) Legal Advice:

The Chairmen's Committee has proposed in paragraphs 9.27–9.31 that copies of legal advice should be shared between the Executive and Scrutiny functions. The Council of Ministers does not agree with this proposal, and it recommends that the process of seeking and taking legal advice from the Law Officers Department should be confidential. This would reflect general practice in other jurisdictions, where it is accepted that the Executive should have access to legal advice on a confidential basis.

There are good reasons for this practice which the Council considers to be equally relevant to both the Executive and Scrutiny functions. These have been set out in the comments of the Attorney General on the draft Code of Practice (P.101/2006 Com.), and the Council shares the view expressed by the Attorney General that there should be no inhibition on the part of Ministers or departments both in seeking advice and in giving all the relevant facts. Equally, there should be no inhibition on the part of the Law Officers Department in the giving of full and frank advice.

The proposal set out by the Chairmen's Committee in paragraphs 9.27 to 9.31 would represent a radical departure from the current arrangements, and in the Council's view this would be detrimental to good government. In this connection the Council endorses the comments made by the Attorney General in paragraphs 28–33 of his report. The Council is therefore proposing an alternative arrangement in which the Scrutiny function would be able to seek advice from the Law Officers in the knowledge that this advice would remain confidential. There is nothing in this arrangement that would prevent a Scrutiny Panel from making a statement as to its understanding of the legal position, and the same would apply of course to the Executive.

Section 11 – Scrutiny Panels: Reports

- (f) – (g) The Code of Practice provides for Scrutiny Panels to circulate “relevant draft sections” of a scrutiny report to “all witnesses who are not States Members” and allows 5 working days for a witness to comment on the factual accuracy of their submission (paragraph 11.7). This relates to factual and descriptive passages of the report only. The Council believes that all witnesses, including those who are States members, should receive the “relevant draft sections” and be allowed 5 working days to comment.

Paragraph 11.8 makes provision for Panels to “circulate finalised draft reports in confidence and, when possible, allow five working days for comments on matters of a technical or factual nature only”. The paragraph does not say who the reports will be circulated to. Paragraph 11.11, whilst providing for reports to be released “in advance to the appropriate Minister”, does not give any timescale for this.

The Council believes that the appropriate witnesses and, in particular, the appropriate Minister should

have an opportunity to review the draft report's findings and recommendations in good time prior to publication because:

- Without sight of the findings and recommendations, it is impossible to assess whether the Panel has interpreted the information correctly. This has led to a number of Scrutiny reports including inaccurate or misleading information.
- It is unreasonable to expect a Minister or officer to review what are often substantial documents on complex issues and prepare an "informed comment" in what is often a very short timescale between receiving a copy of the report and publication.

The Council's proposed amendments to paragraphs 11.7 and 11.8 would ensure fairness and not at all compromise Scrutiny's ability to publish its final findings.

This amendment does not have any additional financial or manpower implications for the States.

Full text of paragraphs ‘as amended’ where there are complex proposed amendments to the text.

Amendment (a)

3.5 The Greffier will immediately refer the matter to the Privileges and Procedures Committee which will review the matter and, subject to the preservation of legal professional privilege and the privilege against self-incrimination, direct whether or not the Minister or Member concerned should comply with the request. If a Member fails to comply when directed by PPC to do so, he or she will be regarded as being in breach of the Code of Conduct and the appropriate disciplinary process will be initiated.

Amendment (b)

9.23 Any Panel Chairman may request a copy of a Part B report from a Minister whose department falls within the Panel’s terms of reference as set out in paragraph 4.2 of this Code of Practice. There is a presumption that material will be released to the Panel Chairman for consideration by the relevant Panel. However, if the Minister considers the material to be of a sensitive or commercial nature, or if there are exceptional circumstances surrounding the release of information, those circumstances will be explained to the relevant Panel Chairman by the Minister. The information may then be provided in accordance with a signed confidentiality agreement (see Appendix 1). All Part B reports will be treated as confidential until the Minister specifies otherwise, or until the report is made public.

Amendment (c)

9.24 If it has been agreed that a Part B report from a Council of Minister’s meeting will be provided, this will be promptly forwarded following adequate consideration by the Council and the relevant Minister.

Amendment (d)

9.25 In the event of a disagreement about access to a Part B report, the matter will be referred to the Chief Minister and the President, Chairmen’s Committee and the Chairman of the Privileges and Procedures Committee.

Amendment (f)

11.7 In order to ensure that the evidence received is fairly and accurately reported, the Panel will circulate relevant draft sections of the report to all witnesses and allow five working days for comment in advance of finalising the report. Normally these draft sections will be factual or descriptive passages. Where possible, this will also include the Panel’s findings and recommendations. This will help to ensure that the Panel has correctly interpreted the evidence and provides an early opportunity for clarification. If recommendations are provided this is done to provide the context of the report.

Amendment (g)

11.8 Panels will circulate finalised draft reports, including findings and recommendations, to the relevant Minister in confidence and allow at least five working days for comments.