

STATES OF JERSEY



DRAFT EDUCATION (AMENDMENT No. 3) (JERSEY) LAW 201- (P.15/2016): COMMENTS

**Presented to the States on 31st May 2016
by the Education and Home Affairs Scrutiny Panel**

STATES GREFFE

COMMENTS

Introduction

The Minister for Education has lodged P.15/2016 – the Draft Education (Amendment No. 3) (Jersey) Law 201- (“the draft amending Law”), which proposes an amendment to the Education (Jersey) Law 1999 (“the Education Law”) to replace the Regulation-making power in Article 3(4) with a power for the Minister to amend Schedule 1 (i.e. the full list of provided schools) by Order. The Minister is primarily seeking approval of the draft amending Law in order to be able to update the names of schools in the Education Law more quickly and efficiently in future. The Minister has maintained that the current system involves more bureaucracy than is necessary, which causes timing issues in the naming or renaming of schools because of the requirement for it to go through the U.K. Ministry of Justice and Privy Council and then registration in the Royal Court of Jersey after approval by the States. Changing the Regulation-making power to an Order-making power removes the necessity for a States debate. To this aim, the Panel is supportive of the Minister’s draft amending Law.

However, shortly before the scheduled debate on the draft amending Law, the Panel’s attention was drawn to the previously unobserved concerns that by removing the name of a school from the Schedule of provided schools, a Minister might consequently be able to amend its funding structure (for example introduce a fee-paying element) or even to close it by Order – without a decision by the States. Due to the proximity of the debate, the Panel was unable to fully explore the matters in advance, and therefore asked associated questions of the Attorney General during the debate in order to explore whether further examination of the possible implications of the draft amending Law would be merited. As a result of continued uncertainty about the precise implications of the draft amending Law, the Panel duly referred the legislation for further consideration.

Issues arising

Careful consideration of the advice provided to the States and further examination of the possible implications of the draft amending Law have allowed the Panel to establish a clearer view on the original concerns, as well as other issues that have arisen from our work.

(1) Does removal from the list mean a school is closed and therefore pre-consultation is required?

Whilst the removal of the name of a school from the list of provided schools in Schedule 1 would mean that the school is no longer a provided school, this is not to say (automatically) that it would be ‘closed’ for the purposes of the Education Law. It may, for example, be removed in order to be registered as a non-provided school – a process of transition rather than closure. Under such circumstances, should this draft amending Law be passed, a Minister could bring into effect this notable change by Order, and without necessarily being obliged to follow the process of extensive consultation and subsequent reporting to the States which is required for cases of proposed closure.

On the specific matter of a school closure, the Panel understands that where closure is brought about by using removal from the list as an ‘indirect means’ of achieving such an objective and bypassing the necessary process outlined above, this could well leave a Minister open to significant challenge, including judicial review.

(2) Would this amendment to the Law enable a Minister to make material changes to schools (such as create an academy-type school, introduce an element of fee-paying, or test an alternative curriculum or ethos) by Order?

The Panel has examined the full potential scope for material changes to the character of schools to be achieved by Order as a result of this draft amending Law, specifically addressing concerns about academisation, introduction of fees and alternative curriculum/ethos.

Concerns regarding academisation have been somewhat allayed. The Panel is now of the opinion that such a change would in fact require either extensive amendments to be made to the existing Law or an entirely new Law to be drafted, in order to be achieved. In effect, this draft amending Law has no consequences either way if such an ambition were to be pursued by a Minister for Education.

Similarly, having been provided time to explore the matter in more detail, the Panel is somewhat re-assured on the matter of Curriculum changes. The Panel is aware that alterations to the Curriculum can only be achieved after the Minister has completed a required process of consultation with the Jersey Curriculum Council. Wider-ranging changes, or even exemption from the Curriculum, would be subject to amendment of the Education Law.

However, concerns remain with regard to the possible introduction of fee-paying to traditionally non-fee-paying provided schools. The Panel's conclusion is that this level of change could be achieved as a result of a Minister being able to more easily amend the Schedules. If so, this would **not** require the Minister to adhere to Article 7 of the Education Law, i.e. this change could be brought into effect without any requirement for consultation, let alone a States vote.

It might be noted that the Education Law currently only refers to the following (paragraph (8) of Article 7) as grounds on which the character of a school is deemed to be altered. The Panel questions whether the Education Law has kept pace with the changes in education provision and associated debate, and remains fit for purpose?

“7 Duty of Minister to review the provision of school places

... ..

- (8) For the purposes of paragraph (3)(b), the character of a school is altered if –
 - (a) education begins or ceases to be provided in it for pupils above or below a particular age;
 - (b) education begins or ceases to be provided in it for girls as well as boys or vice versa;
 - (c) arrangements for the admission of pupils by reference to ability or aptitude are made or altered; or
 - (d) the school premises are significantly enlarged or altered, or the school transferred to a new site.”.

(3) Checks and balances – Role of the Minister v Role of the States

The work of the Panel has raised an area of significant concern relevant to Article 7, namely the role of the Minister v the role of the States in respect of significant changes to provided schools.

The checks and balances under Article 7(7) of the Education Law require the Minister to simply report to the States after the relevant period of consultation has been undertaken. There are certain requirements he must meet –

- “(7) The Minister’s report to the States shall –
- (a) state the proposal and the reasons for it;
 - (b) indicate any revision of the proposal having regard to representations made under paragraph (5);
 - (c) summarize any representation made under paragraph (5) which has not resulted in a revision of the proposal and the reason why no revision has been made; and
 - (d) the Minister’s recommendation in respect of the proposal.”.

This reporting to the States does not require the States to be involved in the decision-making process. There is no requirement for the Minister to lodge a Proposition for debate and vote, and whilst the opportunity exists for an interested individual Member who may be aware of a possible significant change to a school to bring a related Proposition, this is an area of some concern for the Panel. The Panel strongly believes that any such closure or significant alteration of the character of a provided school is of such public interest that elected representatives must be involved in the decision-making process – including being subject to debate and vote in the States.

Conclusion

The Panel is supportive of the underlying aim of the Minister’s draft amending Law to enable a Minister for Education to update the names of schools in the Education Law more quickly and efficiently in future.

However, concerns remain about additional, and quite possibly unintended, implications of the States approving this draft amending Law as worded. The wording leaves the door open to a wider scope of change being achievable by Order, rather than by Regulations, as is presently the case. Significant changes to the character of any provided school should continue to be subject to effective input and scrutiny by the States Assembly.

The Panel is therefore unable to support the Minister’s draft amending Law as currently drafted, and strongly recommends that the Projet is withdrawn in order that due consideration can be given to the issues identified.

The Panel is also mindful of associated potential deficiencies in the Education (Jersey) Law 1999 raised as a result of this work, which it will follow up with the Minister for Education.