
STATES OF JERSEY



LEGISLATIVE SCRUTINY: PROPOSALS FOR FURTHER CONSIDERATION

Presented to the States on 14th November 2017
by the Privileges and Procedures Committee

STATES GREFFE

REPORT

Introduction

In July 2017, we published a consultation paper on the scrutiny of legislation by the States Assembly. The original consultation paper can be found at:

[http://www.statesassembly.gov.je/assemblyreports/2017/r.88-2017\(re-issue\).pdf](http://www.statesassembly.gov.je/assemblyreports/2017/r.88-2017(re-issue).pdf).

The impetus for the consultation was a number of concerns expressed by the Bailiff and others about whether the Assembly's procedures for considering legislation were sufficiently rigorous to hold the Executive to account for its legislative proposals, and to ensure that draft legislation achieves the policy objectives for which it is intended. We drew attention to the speed at which legislation is approved by the Assembly – draft Laws were each debated for 41 minutes on average in 2016 – and looking at international comparators we noted that –

- the short minimum period between lodging and consideration of all stages of the legislation is a challenge to effective scrutiny
- the rarity of detailed scrutiny by a committee is striking
- the absence of input from civil society also stands out.

We set out different models for legislative scrutiny, including one put to us by the Chairmen's Committee, and we asked for views on the following questions –

- **What should be the scope of “legislative scrutiny”?** Should it be restricted to draft Laws and Regulations or extended to include propositions? Some propositions are legislative in nature (for example, those dealing with the extension of UK legislation to the Jersey); some can be significant in policy terms (for example, [P.130/2016](#) on future hospital funding); but some may not be appropriate for detailed committee consideration (for example, appointments propositions). Is it possible to delineate the class of propositions which should be brought within a system of detailed scrutiny by Committee/Panel?
- **When should scrutiny take place?** Should Jersey move towards scrutiny before legislation (or other items) are lodged? Should there be detailed consideration of lodged propositions before debate on the principles? Should scrutiny only take place once the principles have been adopted?
- **What timescales should be provided for scrutiny?**
- How should the **views of stakeholders** be taken into account during the scrutiny process?
- Can the current system of Scrutiny Panels take on the **additional workload** necessary to undertake more effective legislative scrutiny? Would other work by those Panels have to cease and, if so, what effect would that have? If a new Legislative Scrutiny Panel is set up, how could it manage its workload, given the variation throughout the year in the number of legislative propositions lodged? Is there sufficient spare capacity amongst the backbench membership of the Assembly to enable a new Scrutiny Panel to be set up? If not, what would need to give to accommodate this change?

- Is there a case for a **second Chamber** of the Assembly to scrutinise legislation? What would be its powers and how would its Members be elected? What would be the relationship between the two Chambers? How would a second Chamber be resourced?
- **What support do Members require in order to scrutinise legislation?** Is there a need for training or additional staff support? How should this be funded given current funding constraints?

Response to the consultation

We received 12 responses from –

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| Chairmen’s Committee | A law draftsman |
| Chief Minister | Jersey Association of Trust Companies |
| Deputy of St. John | Jersey Bankers Association |
| Deputy J.M. Maçon of St. Saviour | Early Years and Childhood Partnership |
| Deputy S.Y. Mézec of St. Helier | NSPCC Jersey |
| Deputy of St. Ouen | Ms. N. Heath |

Points raised were as follows:

General

- Widespread support for better scrutiny; good scrutiny throws up issues which require time to be considered properly; scrutiny is a quality safeguard; importance of sound law making and a good pace of legislation.
- Effective legislation is the “key to the future of the Island” so scrutiny should be a priority.
- Legislative scrutiny is deficient, but the “entire parliamentary system is dysfunctional and illogical”, and it is hard to consider elements of the system in isolation from the general malaise.
- Legislation often lacks a solid policy base.
- One respondent argued for the ‘departmental board’ idea where most Members have a role on an executive departmental board and there is a separate legislative scrutiny board.
- Three respondents argued for more input from civil society.
- One respondent argued for more scrutiny of ministerial Orders.

Scope

- Legislative scrutiny must be obligatory to avoid the perception that scrutiny unreasonably causes delay.
- Briefing a Panel about forthcoming legislation is not the same as scrutiny.

- All propositions should be scrutinised; just legislation should be subject to structured scrutiny as propositions can already be called in if required.

Timing

- Scrutiny before the principles are debated is essential (3 respondents; one said “as early as possible” – no contrary view expressed).
- Debate on principles and Articles must be separated, and public interest argument should not be allowed to enable debates to be brought together.
- 4 weeks should be sufficient for scrutiny.
- Departments should be better at communicating about *Projets* in the pipeline (2 States Members; although 2 respondents said they had good sight of ministerial plans in their area).
- Input from scrutiny too often sought as an afterthought.

Legislative Scrutiny Panel

- Members want to focus on policy or constituency work, and few will want to serve on a legislative scrutiny Panel (3 respondents).

Resources

- Members need to look more at the detail.
- Perhaps a role for Assistant Ministers in legislative scrutiny (subject to caveats) (one respondent, one argued against this).
- Members need better understanding of what legislative scrutiny entails and how to do it.
- Scrutiny Panels should be better at communicating with stakeholders about their work and might benefit from more technical assistance.
- Could lay members be added to Scrutiny Panels? (one respondent)
- Can the scrutiny budget afford more expenditure on advisers?
- How will Panels cope with peaks in ministerial lodging, e.g. before the summer break?
- Will there be training for Members and legal support?
- Is legislative scrutiny what the Public want Members to be doing?

Second Chamber

- Two respondents commented, one strongly in favour, one argued it should be considered only if reform of legislative scrutiny fails.

Proposals for further consideration

The consultation responses support the case for change, and also encourage us to take a far-reaching look at the current system. However, there is clearly need for further consideration of reform, particularly by States Members, before changes to Standing Order are proposed. We are therefore publishing these proposals for further consideration, with a view to bringing forward changes to Standing Orders in the new year, for implementation after the next election. **We invite comments on this broad scheme and detailed points, which we flag up below.**

Our proposals for further consideration are as follows –

- With some exceptions (see below) when a proposition is lodged it is referred automatically to the relevant Scrutiny Panel.
- The Panel would have a minimum of 6 weeks to scrutinise and report back on the proposition (in the case of legislation, scrutiny could cover both the principles and the Articles/Regulations).
- The Panel and Minister/Member could agree for extra time to be provided for scrutiny (without limit) or the Panel could request the Assembly to allow up to an additional 4 weeks for scrutiny (i.e. on the basis of an application to the Presiding Officer, which would be debated and decided by the Assembly).
- In the case of legislation, the Panel would have the option of automatically triggering a further period of scrutiny of the Articles/Regulations after the Assembly has agreed to the principles: otherwise, it would remain possible for the legislation to go through all its stages in one Sitting.
- This new process of automatic referral to a Panel would not apply to propositions lodged under Standing Order 26(3) [i.e. dismissal of a Minister, votes of no confidence, censure, suspension, annulment of an Order, opposing a land transaction], appointment propositions, amendments, a draft budget or a draft medium term financial plan. It would apply to backbench propositions.

In many cases, the period between lodging and debate of ministerial *Projets* would remain 6 weeks. However, as we often witness in the Assembly, complex proposals often take longer to scrutinise, and this ought to be reflected in the Standing Orders. Under these proposals, we suggest that the minimum period between lodging and debate could be extended by the Assembly to 10 weeks. **We invite comments on this proposed timescale.** As now, a Minister or Member could agree informally a timescale for scrutiny and simply defer consideration of a proposition until scrutiny's work is concluded.

We would expect in most cases for Panels to conduct all of their scrutiny work before consideration of the principles, but issues may arise at that stage which merit further scrutiny. We suggest that an automatic option for call-in should be retained after debate on the principles, although the time allowed could be reduced. **We invite comments on this point.**

In our view, it would be sensible to retain a provision in Standing Orders for a lodging period (which would also mean a scrutiny period) to be reduced, if it is in the public interest to do so. However, use of this procedure can be unpopular with Members, and is sometimes seen as an abuse of the Assembly's well-established rules. **We seek views on this point.**

We also seek further views on whether backbenchers' propositions should be included within the scope of this new approach. Our conclusion is that they should, both to reflect the equal status of Members in the Assembly, and because a backbench proposition can have far-reaching consequences which ought to be scrutinised before debate.

We had previously expressed support for a separate legislative scrutiny committee to look at legislation, but this idea was not welcomed. As existing Panels would not be barred from considering legislation, the legislative Scrutiny Panel would be left the more technical pieces of legislation, and it would be a challenge to find Members to serve on it. We now suggest building consideration of legislation and propositions into the work-streams of existing Panels. This would have resource implications, especially if the calls from pressure groups for more evidence taking on legislation are heeded. The main constraint is likely to be pressure on Members' time, and **we seek views on whether Scrutiny Panels should include Assistant Ministers from different policy areas to those scrutinised by a Panel.**

Several Members expressed concern at the staff resources available to assist Panels with legislative scrutiny, whether specialist skills were required, and whether Members themselves were equipped to undertake what some saw as a technical exercise for lawyers. In our view, legislative scrutiny is not a technical exercise reserved for specialists. It is core parliamentary work where Members ask questions to test what the Law means, how it will work, and whether it will achieve the policy outcomes Ministers are aiming for. This is a political function, not a legal one, although staff with legal knowledge could usefully assist. The Greffe can assist Members with this work, including by tapping into international networks (such as the CPA) for advice and support from parliamentarians experienced in legislative scrutiny elsewhere. Current scrutiny staff have experience of legislative scrutiny and can be trained to hone their skills: if necessary, the Greffe could seek legal support externally or, if necessary, recruit a lawyer to support the scrutiny process.

It is because we regard scrutiny of legislation as core parliamentary work that we are not tempted by calls to set up a second Chamber to focus on legislation. It is a misunderstanding of bicameral legislatures, such as the UK, to assume that one Chamber focuses on legislation, whereas the other deals with 'policy', as some respondents suggested. In reality, both Chambers work together (or, occasionally, in conflict) on legislation. It is also unclear to us how a second Chamber comprised of Connétables would be more effective at scrutinising legislation than the current Assembly. There would also be difficulties in defining the respective powers and responsibilities of 2 Chambers.

Finally, it will be obvious that our proposal extends the remit of the scrutiny system significantly to create a system more akin to European parliaments, in which the Executive works together with parliamentary committees to craft legislation. This is closer in some respects to the previous committee system, although without Panels having formal executive responsibilities. It might be worth considering using the term committees for this new structure, should it be agreed.

Case studies

This is how we think the new system should work.

Example 1:

The Draft Health and Safety (Minor Change) (Jersey) Regulations – 3 Regulations which make minor changes to health and safety law to reflect new practice in the UK. The Panel publicises that the Regulations are under scrutiny and 2 letters are received, raising relatively minor points. These are the subject of a letter to the Minister, along with routine questions asking for an impact assessment, more details about the rationale

for the Regulations, and a cost estimate for implementation. The Minister's comprehensive reply satisfies the Panel, which publishes the letters and makes no further comments. The Regulations are debated 6 weeks after lodging and pass all stages in one Sitting.

Example 2:

The Draft Health and Safety (Amendment No. 17) (Jersey) Law – a reasonably significant piece of work, which the Department has worked on for some time, comprising 17 Articles. The Panel was aware of the work, but did not know that lodging was imminent. Eight submissions are received from the Public, including some raising concerns about how new rules on ladders will be implemented and what they might mean for small businesses. The Minister's reply (which also covers the standard questions asked about any legislation, mentioned above) raises concerns, and a Public Hearing takes place. More questions are raised about whether the Law is correctly framed, and the Panel asks the Minister for extra time for scrutiny. The Minister does not agree, so the Panel publishes comments explaining the situation and indicating that it will be requesting the Assembly to agree to a further 4 weeks' scrutiny. The matter is debated and the Assembly votes for a further 2 weeks' scrutiny. The Panel rushes to get its report out, in which it gives agreement to the principles but recommends more work on the Articles. After the principles are agreed, the Panel calls the legislation in for a further 2 weeks' scrutiny. This time is used to lodge amendments, which are debated when the principles are discussed.

Example 3:

The Draft Artificial Intelligence (Regulation of Robots) (Jersey) Law – a major piece of work, legislating on the issue of robot ethics for the first time, comprising 100 Articles. The Panel is involved in the drafting work from the outset, seeing 3 drafts prior to lodging, and discussing the issues at length with the Minister and officials. The Panel has also had time to appoint a world-leading specialist adviser on robot ethics, and to talk to Swedish robot ethics experts via Skype. Lodging starts the clock on formal scrutiny, but this is simply a continuation of a pre-existing process. The Minister makes clear from the start that he will delay debate on the principles until the Panel is ready with its report, and the meeting in 8 weeks is identified as suitable for both parties. The Panel's report identified improvements which could be made to the Articles, and the Minister lodges the necessary amendments, which are taken as read when the Articles are debated.

Example 4:

Senator Le Feuvre decided over the Christmas break to lodge a proposition calling for Jersey to introduce a bitcoin regulator. She is the most knowledgeable person in the Assembly on the subject, and her report gives a compelling case for regulation. The Panel receives several submissions on the proposition, including from a number of financial firms, raising concerns. A US academic, contacted online, also provides a critique of the proposition which suggests that if Jersey adopted the form of regulation proposed, international competitiveness could be affected. The Senator agrees that the scrutiny process has thrown up some questions which she had not previously considered, and lodges an amendment to ask the Minister to work with her to undertake more research. Her report summarises the outcome of the scrutiny process, and the Panel chairman e-mails Members before the debate to say she supports the proposition as amended, for the reasons set out in the report. The proposition, as amended, is adopted.