
STATES OF JERSEY



LEGISLATIVE SCRUTINY: A CONSULTATION PAPER

Presented to the States on 18th July 2017
by the Privileges and Procedures Committee

STATES GREFFE

REPORT

Introduction

1. Legislating is the core function of a legislature, the task which differentiates parliamentary assemblies from local authorities or purely deliberative assemblies. Legislation defines the relationship between individuals and the state, setting out rights and entitlements, regulating the activities of companies and public officials, and specifying criminal acts and the penalties associated with them. Legislation is central to the establishment of the ‘rule of law’ which is one of the lynchpins of democracy.
2. The States Assembly is undoubtedly an efficient legislature, adopting 36 draft Laws (for sanction by the Privy Council) and 36 sets of draft Regulations during 2016. However, concerns have been expressed that the Assembly does not always adequately scrutinise the legislation it is invited to pass. For example, writing in the States Assembly’s Annual Report for 2014, the Bailiff, William Bailhache, said –

“One observation may be worth mentioning in that it has been a consistent feature over the 15 years I have been involved in the States and it is this. There are arguably two main purposes which the States should strive to achieve. The first is the election of an executive which is subsequently held to account for what it does. The second is the passage of legislation which achieves the objectives which members have demonstrated by their adoption of the principles of the individual *projets*. One sometimes gains the impression that the detailed legislative provisions are not receiving the scrutiny which in an ideal world might be desirable. I would not say for one moment that this has necessarily caused a problem to date, but it should not be forgotten that the passage of good legislation is one of the primary functions of a legislature, and it may be that some thought could usefully be given to a review of how extensive the current scrutiny of such provisions is and whether there are any improvements which might be made.”

In 2013, the Electoral Commission (which comprised 3 States Members and 3 external members) found that “most primary legislation is enacted by the States with minimal parliamentary scrutiny” and that this constituted a “serious democratic deficit”. Its recommendations to address this matter are discussed later in this report.

3. There have been several recent instances of scrutiny of legislation and other propositions which have led to significant questions being raised and changes being made, demonstrating the value of such scrutiny and the risks being run if scrutiny is insufficient.
4. The statistics bear out the view that the Assembly does not spend enough time considering legislation. In 2016, the Assembly spent just 19% of its time on legislation. This covers debate on both the overall principles and the detailed Articles. Although no breakdown of the division of time between debate on the principles and the Articles exists, it is likely that most of that time is spent on the principles rather than the detailed provisions. The average length of debate

on a draft Law in 2016 was just 41 minutes: the equivalent figure for draft Regulations was a meagre 15 minutes. The averages hide considerable discrepancies. A small number of pieces of legislation were debated for several hours in total, but a larger number were despatched in 5 minutes or less.

5. These figures relate to debate on the floor of the Assembly. Detailed consideration of draft legislation by scrutiny panels is rare. Since 2010, only 6 pieces of legislation have been referred to scrutiny panels under Standing Order 72 (which gives scrutiny panels the automatic right to ‘call in’ legislation for scrutiny) and, since 2005, only 2 pieces of legislation have been referred to scrutiny panels under Standing Order 79 (which enables a scrutiny panel to review a proposition before the adoption of the principles).

Legislative scrutiny elsewhere

6. Jersey’s system of legislative scrutiny is broadly based on the Westminster model, but with some important differences –
 - Detailed legislative scrutiny in the House of Commons usually takes place in a committee, which begins by hearing oral evidence in public from interested parties before undertaking formal consideration of each clause (Article). The number of committee meetings depends on the size and importance of the bill and can vary from one to 20 or more. When detailed consideration of a bill takes place in the Chamber, this can stretch over several days (longer in the House of Lords, which does not use committees for legislative scrutiny).
 - It is unusual in the UK for committee consideration to take place immediately after second reading (i.e. debate on the principles): normally there is a gap of around 2 weeks between stages.
 - Any member can introduce a bill at any time, but the time for debating backbench bills is strictly rationed and many bills are never debated.
 - In Jersey, there are more opportunities for detailed scrutiny of Regulations than in the UK (where Regulations are typically made without parliamentary input).
 - There is no automatic right to call in legislation for select committee scrutiny, and such scrutiny is rare as it is difficult to undertake an inquiry into legislation during its passage through Parliament because of the pace at which a bill moves through the system.
7. There has been pressure in recent years for draft legislation to be subject to ‘pre-legislative’ scrutiny, before it is formally introduced to Parliament. This tends to be popular with backbenchers, enabling scrutiny committees to undertake detailed work on a proposal and secure changes before the formal legislative changes begin. However, successive governments have been reluctant to embrace this form of scrutiny.

8. In other parliaments, greater onus tends to be placed on the consideration of legislation in committee than is the case under the traditional Westminster model. For example, in the European Parliament, a legislative proposal made by the European Commission is referred to a committee, which appoints a rapporteur to prepare a report on the proposal and amendments to it. The committee plays a key role throughout subsequent discussions in shaping consideration of the proposal in plenary.
9. In Scotland, bills are referred to a committee when first introduced, which must report on the principles before they are debated in plenary. Detailed scrutiny is then undertaken by a committee (usually the same one as reported on the principles) before the bill returns (perhaps with amendments) to the plenary.
10. Comparing Jersey with other jurisdictions, the main points to note are –
 - 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.

Proposals for change in Jersey

11. The Privileges and Procedures Committee has considered changes to the current system of legislative scrutiny, which can be summarised as follows –
 - The minimum period between the lodging of a draft Law or draft Regulations, and debate on the principles, reduced to 2 weeks.
 - The minimum period between agreement to the principles of a draft Law or Regulations and debate on the Articles set at 4 weeks. This would ensure that the minimum period between lodging and debate on the Articles remained at 6 weeks.
 - Once the principles of a draft Law or Regulations are adopted, the scrutiny panel covering the relevant policy area has the option of scrutinising the Articles (for a minimum period of at least 4 weeks). If the relevant panel decides not to scrutinise the *projet*, it will automatically be referred to a new Legislative Scrutiny Panel, which will conduct the necessary scrutiny and report to the Assembly in time to inform debate on the Articles.
 - Explicit recognition in Standing Orders that the Assembly may agree to consider the principles and the Articles at the same meeting, if they are of opinion that it is in the public interest to do so.

More detail about this scheme can be found in the **Appendix** to this Report.

12. These proposed changes would retain the current timetable for the passage of legislation and provide for automatic scrutiny by a panel, but within a tighter timescale than is provided now (unless the relevant Minister or the Assembly decided to permit a longer period of scrutiny).

13. In discussing these changes, the Chairmen’s Committee proposed a more far-reaching scheme which would –
- include propositions as well as legislation
 - provide for detailed legislative scrutiny to take place before debate on the principles
 - retain the provision for legislative *projets* to be called in for scrutiny after consideration of the principles.

Details of the Chairmen’s Committee’s proposals can also be found in the Appendix to this document.

14. The Electoral Commission’s concerns about the inadequacy of legislative scrutiny in Jersey were noted in paragraph 2. It concluded that “a separate body should be established to consider whether parliamentary democracy in the Island would be strengthened by the constitution of a secondary legislative chamber or a new parliamentary committee dedicated to legislative scrutiny”. No action was taken in relation to this recommendation.

15. These proposals, and the examples of different forms of legislative scrutiny elsewhere, raise a number of issues on which PPC would like to hear views before bringing forward proposals for reform. These are –

- 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 2 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?

Conclusion

16. Although discussion of the Assembly's procedural rules may seem obscure or arcane, how the Assembly deals with legislation is a central feature of the Island's governance. Modest reform of the current system is likely to deliver more effective examination of the proposals brought forward by Ministers. However, even this will raise questions about whether an enhanced scrutiny system is sustainable with the current number of backbenchers, or whether Assistant Ministers ought to be involved, at least to some extent. However, the Chairmen's Committee has gone further, in suggesting that all members of the Assembly should be more heavily involved in the development and passage of Ministers' legislative and policy proposals. This would not herald a return to the former committee system, but would represent a shift towards a parliamentary style more akin to the continental European model, where Ministers initiate propositions, but committees play a fundamental role in shaping such proposals before adoption. Consequently, discussion of this issue must take account of the views expressed by the Chief Minister about the desirability of moving to a more inclusive form of government. Addressing the questions set out above will go a long way towards defining how a more inclusive system of government might work.

Consultation

17. The Committee wishes to hear views on how to improve the process of passing legislation in Jersey, so that it can make recommendations for change which are well thought through and likely to command support. You can send comments to the Greffier of the States, Mark Egan, at Morier House, Halkett Place, St. Helier, JE1 1DD, or by e-mail to: StatesGrefe@gov.je. It would be helpful to receive responses by Friday 22nd September 2017.

Re-issue Note

This Report is re-issued at the request of the President of the Chairman's Committee to delete a signature included in the image of the Chairmen's Committee letter.

APPENDIX**Legislative scrutiny proposal put forward by PPC**

- Minimum period between the lodging of a draft Law or draft subordinate enactments, and debate on the principles, of 2 weeks.
- Minimum period between agreement to the principles of a draft Law or draft subordinate enactments, and debate on the Articles, of 4 weeks.
- Once principles of a draft Law or draft subordinate enactments have been adopted, the *projet* shall be referred to the relevant scrutiny panel, if the chairman of that panel has previously informed the States or confirms, when asked, that he or she wishes the *projet* to be referred to the panel. Current procedure for specification of when the *projet* will be returned from scrutiny to the Assembly under Standing Order 72 unchanged (although minimum 4-week scrutiny period would now apply).
- If the *projet* is not so referred, it shall be automatically referred to a new Legislative Scrutiny Committee (“L.S.C.”), which shall scrutinise draft Laws and draft subordinate enactments referred to it, gather evidence from interested parties and the Public on such draft legislation, consider amendments to them, and report to the States in order to inform debate on the Articles. The new committee should broadly operate in the same way as a Scrutiny Panel.
- The absence of a comment or report from a panel or the L.S.C. on a draft Law or draft subordinate enactment should not prevent it from being debated 6 weeks from lodging.
- Standing Order 73 to provide for a scenario where a member has asked for a panel to scrutinise a piece of draft legislation, the Panel has come back at the next meeting and said no, so the draft is referred to the Legislative Scrutiny Committee. In this case, the 4-week scrutiny period begins when the draft legislation is referred to the L.S.C.
- Consideration of Articles and 3rd Reading will proceed post-scrutiny as now.
- Explicit recognition in Standing Orders that the States may agree to consider principles and Articles at the same meeting if they are of opinion that it is in the public interest to do so (i.e. modelled on Standing Order 26(7)), in which case relevant Standing Orders (which would need to be specified) are disapplied. This would permit legislation to be passed in one meeting without provision for scrutiny, except for Standing Order 79 reference to scrutiny.

Letter from the Chairmen's Committee to PPC on legislative scrutiny

States of Jersey
States Assembly



États de Jersey
Assemblée des États

Scrutiny Office

Connétable of St Clement
Chairman, PPC
Morier House
St Helier

5th May 2017

Dear Chairman,

Legislative Scrutiny

As you will be aware from previous correspondence, the Chairmen's Committee has been examining opportunities to appropriately update Standing Orders with the aim of ensuring that the States Assembly's Scrutiny Panels and the PAC are provided with a framework to enable them to operate as effectively as possible as a key component of the machinery of government. Consideration has been given to benchmarking such opportunities against common practice found in established Commonwealth parliaments. This has been undertaken in conjunction with ongoing work to update the Scrutiny and PAC Code of Practice and the States of Jersey (Powers, Privileges and Immunities) Regulations.

A notable area that we have discussed, and are very keen to see implemented shortly, is improvement to the process of legislative scrutiny. As part of our work on this matter, the Committee responded in April 2016 to the consultation carried out by PPC's Standing Orders Sub-Committee (Standing Orders Review). We commented on the Sub-Committee's proposal that 'All legislation should be scrutinised as a matter of course' as follows.

The Committee is in firm agreement with this suggestion. It proposes that (with the appropriate resources provided via the States Greffe's Scrutiny Office) it would be most practical, efficient and effective for this responsibility to fall to the existing Panels, with the back-up of Review Panels should the need arise.

The Committee suggests that Standing Orders should provide for all legislation to be automatically referred to Scrutiny at the point of lodging. The relevant Panel would then be required to inform the Assembly about any further intended scrutiny of that legislation at the second meeting of the States following lodging. In a number of cases, it may well be that this period has provided adequate time for a Panel to ascertain, via a briefing etc – and notwithstanding earlier work that can be achieved through good communication between Ministers and Panels - that no further work is envisaged at that time. In these circumstances, to provide clarity and information, the Panel would still report on the work it has done and its conclusion(s) in writing to the States. If on the other hand a Panel is to undertake further work, the relevant Panel would report to that effect and nominate a date for completion of its work, which (unless the States agrees to allow longer) will be no later than the fourth meeting after informing the States.

Scrutiny Office | States Greffe | Morier House | St Helier | Jersey | JE1 IDD
Tel: 01534 441080 | Fax: 01534 441077 | email: scrutiny@gov.je

It is anticipated that all legislative scrutiny would be completed within the phase outlined above, which could be reflected in the relevant Standing Orders. However, if this process (or similar) is approved, the Committee would suggest that the principal of enabling referrals similar to those in SO72 should remain, established between second and third readings to account for cases of unforeseen matters arising during debates.

Having recently re-visited this area, we have agreed to write to inform you that, whilst we maintain almost all of the above, we do now believe that the the establishment of a permanent 'Legislative Scrutiny Panel' as back-up capacity to the existing Panels would be preferable to using Review Panels for such purpose. I attach an outline framework to help illustrate how our proposals may work.

You will also see attached a parallel proposed framework for the scrutiny of Propositions. This appears to be a timely opportunity to revise this area, which we suggest would be of benefit in a number of ways, including:

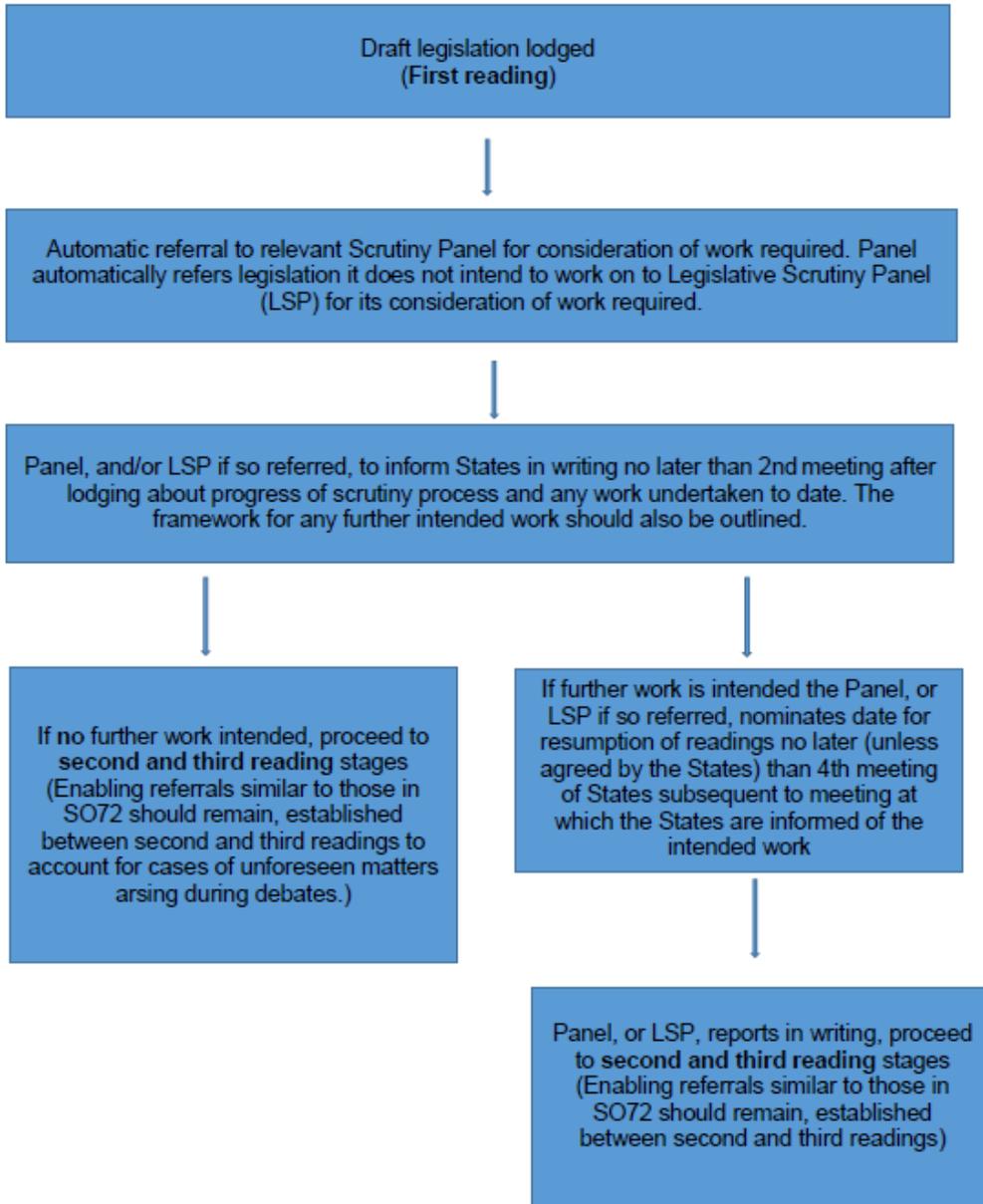
- help underpin the importance of Scrutiny within the machinery of government
- provide far more clarity and certainty to Ministers and those Members serving in Scrutiny about the timing of scrutiny work, reducing the confusion and conflict that arises within the current framework
- encourage more effective, focused and timely scrutiny as a result of the certainty of process
- encourage meaningful and earlier engagement between the Executive and Scrutiny as policy develops (eg briefings on progress and communication about forthcoming work), due to the certainty of the initial stage of referral to Scrutiny
- provide the opportunity for greater inclusivity of members in policy development, due to the guaranteed initial referral stage (eg see above bullet point)
- as a result of all of the above, provide for better and more informed policy and decision making

My Committee believes that these are important, priority matters and we would be grateful if you could provide us with an update about the progress made developing related amendments to Standing Orders and the anticipated timeframe for such proposals to reach the States Assembly. We would be very happy to discuss our ideas with you if that would be of assistance, and/or comment on any proposals you may have developed.

Yours sincerely,

Deputy J.A.N. Le Fondré
President, Chairmen's Committee

Chairmen's Committee: Outline Proposal of framework for Legislative Scrutiny



Chairmen's Committee: Outline Proposal of framework for Scrutiny of Propositions

