

STATES OF JERSEY



DRAFT MACHINERY OF GOVERNMENT (MISCELLANEOUS AMENDMENTS) (JERSEY) LAW 201- (P.1/2018): FURTHER COMMENTS

**Presented to the States on 19th March 2018
by the Chairmen's Committee**

STATES GREFFE

COMMENTS

Introduction

1. These comments are presented by the Chairmen's Committee on behalf of the Machinery of Government Review Panel ("the Panel"). The Panel was established by the Chairmen's Committee to review the proposals contained within [P.1/2018 – Draft Machinery of Government \(Miscellaneous Amendments\) \(Jersey\) Law 201-](#) ("the draft Law").
2. The key findings arising from the Panel's review are as follows –
 - **Under the draft Law, the Chief Executive of the States will be the Principal Accountable Officer ("PAO") and will have ultimate responsibility and control of expenditure across the States.**
 - **The Panel is concerned at the wide-ranging powers vested in the Principal Accountable Officer to appoint an Accountable Officer for any independent States body, and the potential for this to conflict with the legal duties of the directors and trustees of the organisation. To ensure clarity for all concerned, the Panel considers that the independent bodies to whom this power is intended to apply should be clearly listed in the draft Law.**
 - **The Panel notes the amendment ([P.1/2018 Amd.](#)) lodged by Senator Sir P.M. Bailhache and supports the comments therein that the process by which the proposals for a single legal entity for government have been brought forward has been rushed, and that Articles 9–11 of the draft Law should be withdrawn or, if pursued, rejected by the States.**
 - **The proposals in the draft Law contained in Articles 15 and 16 regarding ministerial reshuffles represent a significant transfer of power out of the States Assembly and into the office of the Chief Minister. The Panel is concerned that there has not been sufficient consultation with States Members as a whole, nor has the Panel been given sufficient time to consider the impact of the changes. The Panel recommends that Articles 15 and 16 should be withdrawn or, otherwise, rejected by the States.**

Background

3. The principles of the Draft Machinery of Government (Miscellaneous Amendments) (Jersey) Law 201- were approved by the States Assembly on 21st February 2018. The draft Law was then referred for scrutiny, and the Assembly agreed that the Panel would have to report back by 20th March 2018.
4. This is a shorter time period for legislative scrutiny than is customarily allowed, and the Panel wishes to place on record that it has not been able to scrutinise the draft Law in as much detail as such a significant piece of legislation warrants.

5. The Panel notes that an amendment to the draft Law was lodged by the Chief Minister on 6th March 2018. Although the Panel had sight of a draft of the amendment prior to lodging, it had only one week to review the final version, as lodged, before finalising these comments.

Focus of review

6. The draft Law amends 3 cornerstone pieces of Jersey legislation –
 - [Public Finances \(Jersey\) Law 2005](#)
 - [States of Jersey Law 2005](#)
 - [Standing Orders of the States of Jersey](#)¹.
7. The key parts of the draft Law examined by the Panel are –
 - Principal Accountable Officer (Part 2 of the draft Law)
 - Appointment of Accountable Officers for independent bodies (Part 2)
 - Single legal entity to be called “Jersey Ministers” (Part 4)
 - Powers to move Ministers and make changes to ministerial offices (Part 5)
 - Collective Responsibility (Part 5).

Principal Accountable Officer

8. Part 2 of the draft Law concerns the structure of the Civil Service and introduces the role of “Principal Accountable Officer” and “Accountable Officer” to the Public Finances (Jersey) Law 2005 (“PFL”). This replaces an existing provision within the PFL which requires that Chief Officers of States departments and other bodies are also the “Accounting Officer” for their department or body.
9. Currently under the PFL, Accounting Officers are responsible for the expenditure, accounting and record-keeping of their department. The Chief Executive of the States is not differentiated from other Accounting Officers and has no power to hold Chief Officers to account.
10. **Under the draft Law, the Chief Executive of the States will be the Principal Accountable Officer (“PAO”) and will have ultimate responsibility and control of expenditure across the States.**
11. The PAO will have the power to appoint Accountable Officers within the States. This will no longer be linked to States departments or Chief Officers, and will provide the PAO with more flexibility and control in how the Civil Service is structured. The power for the PAO to appoint Officers to oversee public funds in this way replaces an existing provision in the PFL for Ministers to appoint different accounting officers in some circumstances.
12. In a Public Hearing, the Chief Executive explained the problems with the current system –

¹ Standing Orders are the key “rules” governing how the States Assembly operates.

“... the Chief Executive has oversight of the public services but does not have accountability and therefore there are opportunities for people to make decisions independently of the intent and the ambition and the expectation of Ministers, States Assembly Members, and ultimately the public ... it is clear that there are issues of accounting and decision making in reference to funds and money which could be discharged better, more effectively and in a way that avoids duplication ...”²

13. The Chief Executive went on to explain, in his opinion, the importance to his role of the introduction of the PAO and Accountable Officers –

“... for me it is pretty essential to be able to deliver some of the modernisation and improvements to the accountability of public funds, the use of that money to meet the objectives of the Council of Ministers and the Assembly, and ultimately to hold us, as officers, to account, as to how that happens.”

independent bodies

14. The new structure of Accounting Officers is extended under the draft Law to independent States bodies³.
15. The definition of an independent States body extends to any organisation that receives money from the States to carry out its activities. The Panel notes that this means, in practice, that it could extend to an organisation that receives as little as £1 from the States. The Panel asked the Chief Executive of the States about this –

Chief Executive:

“... I think if you are referring back to what was raised in the States Assembly debate, which is the £1 example, that would not be of use of anybody’s time or effort, and that is not the intent here. But if you are talking about organisations in the £20 million, there is perhaps a different scale of where you would want to focus your energies.”

16. Whilst the Panel notes that it is not the intent to appoint an Accountable Officer for an amount as small as £1, the draft Law does not preclude this. The Panel was informed that this mirrors the scope of the powers of the Comptroller and Auditor General to conduct an audit of any organisation in receipt of States funding. However it should be noted that the full powers of the Accountable Officer have not yet been defined.
17. The Panel wrote to some of the larger independent States bodies which will come within the scope of this part of the draft Law. The submissions that the Panel received were generally supportive of improving accountability and governance. However, concerns were expressed at any move to reduce the independence of bodies that the States had deliberately set up to be independent of government.⁴

² [Public Hearing with the Chief Minister, 1st March 2018](#)

³ The relevant provisions of the draft Law cover “independently audited States bodies” and “States aided independent bodies”. For brevity, independent States bodies is used in this report.

⁴ The [submissions](#) can be accessed on the scrutiny website.

18. The draft Law allows for an Accountable Officer to be an employee of the States or an employee of the relevant independent body. This led the Panel to be concerned that a civil servant could be imposed upon an independent States body, over and above any existing oversight arrangements already in place. In the case of a company or trust, for example, this could conflict with the legal responsibilities of the directors or trustees.
19. The Panel understands that it is intended that an Accountable Officer in such arrangements will be an employee of the relevant independent States body. The Panel notes that, while this may be the current intention, the wording of the draft Law is much wider and would, potentially, allow a civil servant to be appointed as an Accountable Officer.
20. The Panel also considered the role and functions of an Accountable Officer. These are not defined in the draft Law, and the Panel was advised that they would be set out in a Financial Direction which will be finalised after the draft Law is approved. This approach makes it difficult to understand at this stage the precise relationship between an Accountable Officer, an independent States body and the States.
21. Such a lack of clarity at this stage in the law-making process is unhelpful.
- 22. The Panel is concerned at the wide-ranging powers vested in the Principal Accountable Officer to appoint an Accountable Officer for any independent States body, and the potential for this to conflict with the legal duties of the directors and trustees of the organisation. To ensure clarity for all concerned, the Panel considers that the independent bodies to whom this power is intended to apply should be clearly listed in the draft Law.**
23. The Panel notes the amendment lodged by the Chief Minister ([P.1/2018 Amd.\(2\)](#)) which would require the PAO to maintain a list of independent States bodies for which an Accountable Officer can be appointed. In the Panel's view, this does not bring sufficient certainty to what is a significant change in the relationship that the States has with independent bodies.
24. The Panel has therefore lodged an amendment to the Chief Minister's amendment to bring additional certainty and clarity ([P.1/2018 Amd.\(2\).Amd.](#)). This amendment requires that organisations for which this power could be applied must be listed in the Law and any changes made by Ministerial Order.

Single legal entity

25. Part 4 of the draft Law proposes to amend the States of Jersey Law 2005 to implement a single legal entity for government. Under the proposals, Ministers will be a "corporation aggregate", referred to as the "Jersey Ministers"⁵.
26. This replaces the current structure of Ministers being "corporations sole", which means that, at present, Ministers have sole legal responsibility for the areas of government that they represent.

⁵ One of the proposals contained within the [Chief Minister's amendment](#) lodged on 6th March 2018 is to rename "Jersey Ministers" as "Government of Jersey".

27. The Chief Minister explained the benefits of moving to a single legal entity –

“It is about removing the silos ... You have the accountability structure for the [civil] service and in the political side you remove the silo as well, because otherwise you potentially would end up with a single accountability structure in the service, but you would still have Ministers saying: ‘No, I am going to go off, because the law allows me in my personality of corporation sole, to do my own thing rather than working together.’ ”.

28. The proposals would include the ability for any Minister or any Assistant Minister to execute documents on behalf of the Jersey Ministers, even if it does not relate to their own area of responsibility. The Chief Officer of Community and Constitutional Affairs told the Panel that, while technically possible under the law, the convention elsewhere is that this does not happen –

“When you move from multiple legal entities and multiple silos to a single entity then it is certainly the case that you just have one entity and you are signing on behalf of that one entity. That has been the case in the United Kingdom for over 100 years. There has been a convention that while legally possible it does not happen. The Secretary of State for Transport does not sign a document on behalf of the Secretary of State for Health.”.

29. Despite the assurances given by the Chief Officer, the Panel remains concerned and has not been given time to explore these issues fully.

30. The Panel notes the amendment ([P.1/2018 Amd.](#)) lodged by Senator Sir P.M. Bailhache, and supports the comments therein that the process by which the proposals for a single legal entity for government have been brought forward has been rushed, and that Articles 9–11 of the draft Law should be withdrawn or, if pursued, rejected by the States.

Collective responsibility

31. Articles 13 and 14 of the draft Law cover collective responsibility.

32. Articles 13 and 14 remove the principle of collective responsibility from the States of Jersey Law 2005. The Chief Minister explained why he is proposing to remove collective responsibility only 4 years after he introduced it –

“... If I look back now, I think it has not achieved what it could have achieved in the way that Ministers have worked together. In actual fact, rather than it enhancing the efficiency of Government, many people feel that it has been a barrier to openness. I am not sure that it has, but it has certainly created a scenario where some have said: “I have only voted for it because I was bound by collective responsibility” rather than standing up and saying: ‘I did not agree with it.’ ”.

33. Whilst noting the removal of collective responsibility, the Panel would question whether or not the greater powers being vested in the office of Chief Minister merely replaces one form of collective responsibility with another. If Ministers disagree with the Chief Minister, they can simply be moved to a different ministry or dismissed.

Powers to move Ministers and make changes to ministerial offices

34. Articles 15 and 16 of the draft Law amend the current provisions contained within the States of Jersey Law 2005, for the Chief Minister to move Ministers and make changes to ministerial offices. The current position is that the Chief Minister may move Ministers from one office to another, subject to the approval of the States.
35. In future, if this part of the draft Law is approved, the Chief Minister would be able to move Ministers and make changes to ministerial offices by Order. This would mean that the States Assembly would not be involved in the decision-making to move Ministers around, other than after the event through the powers to challenge Ministerial Orders.
36. The Chief Minister told the Panel that the current provisions for moving Ministers mean that the power is unlikely to be used –

“It is easy to try and translate what happens elsewhere and say: “Why did the Chief Minister not just do a reshuffle? We do not like that person. We think they have made a bit of a mess. Why do you not just reshuffle them or move them? A year down the line we think we will be better off if they were doing this job rather than doing another job.” No Chief Minister is going to do that under the current system because you get halfway through that process under the current system, you would have to have 2 resignations, or 3 resignations if you wanted a reshuffle, and then you would be in the hands of the Assembly. So you would not set down the course of action over which you had no control.”

37. Given that the States Assembly will still retain the power to appoint Ministers into office, this gives rise to a situation where the Assembly could elect an individual to a particular ministerial office one day, and the Chief Minister could then legitimately move that person to a different office the following day.
38. The Chief Minister explained to the Panel that this would not be the intention –

“... Any Chief Minister that did that would, I think, potentially face that vote of no confidence straight away because your first ... you would then be saying one of the first acts of the incoming Chief Minister would be to overturn a decision of the Assembly the next day and they just would not do that because their own job would potentially then be at risk.”

39. Notwithstanding this intention and the proposal by the Chief Minister that reshuffles should not take place within 6 months of a Council of Ministers being elected, the Panel notes the comments of the Privileges and Procedures Committee that this change to the Law would require Standing Order 117 to be reviewed.
40. It would appear to the Panel that a change to Standing Orders will be necessary to give full effect to the Chief Minister’s policy objective. The Panel is concerned that such a change has not been brought forward at the same time as the other Standing Order changes proposed in the draft Law. Should this part of the draft Law be adopted, it could lead to a conflict between the States of Jersey Law and Standing Orders.

41. The proposals in the draft Law contained in Articles 15 and 16, regarding ministerial reshuffles, represent a significant transfer of power out of the States Assembly and into the office of the Chief Minister. The Panel is concerned that there has not been sufficient consultation with States Members as a whole, nor has the Panel been given sufficient time to consider the impact of the changes. The Panel recommends that Articles 15 and 16 should be withdrawn or, otherwise, rejected by the States.

Statement under Standing Order 37A [Presentation of comment relating to a proposition]

These comments were submitted to the States Greffe after the noon deadline as set out in Standing Order 37A due to the short timeframe for the review to be completed in.