



Economic and International Affairs Scrutiny Panel

Draft Unlawful Public Entertainments (Jersey)

Regulations 202-. Review

Witness: Legislative Drafter

Thursday, 27th June 2024

Panel:

Deputy M. Tadier of St. Brelade (Chair)

Deputy K.M. Wilson of St. Clement

Deputy M.B. Andrews of St. Helier North

Witness:

Advocate J. Harris Viney, Legislative Drafter

[14:17]

Deputy M. Tadier of St. Brelade (Chair):

Thank you for coming and attending this public hearing. We appreciate your time. We know you are busy but we think that you and the department are valuable for us to have a greater understanding of this review that we have called in after the first reading about the unlawful entertainments. We are just going to go through some formalities. We will state our names for the record and if you can do the same as well. I have got a couple of things to draw your attention to and then we can start, but do relax. We know you are not a Minister so we are not going to give you a hard time.

Legislative Drafter:

It is my first time before a Scrutiny Panel.

Deputy M. Tadier:

You are most welcome. I am Deputy Montfort Tadier. I am the chair of this panel.

Deputy K.M. Wilson of St. Clement:

Deputy Karen Wilson, a member of the panel.

Deputy M.B. Andrews of St. Helier North:

Deputy Max Andrews.

Legislative Drafter:

I am Advocate Jackie Harris Viney. I am a legislative drafter.

Deputy M. Tadier:

Thank you. I have just got to draw your attention to that statement there, which is a general statement about how these things work and the privilege. You are obviously covered by parliamentary privilege and as long as you answer reasonably and honestly I think is the usual catchall. Even though it is a public hearing, we hope it is a fairly informal meeting nonetheless. What I will do in a moment is just pass over to Deputy Wilson and she is going to start the questioning. We are really trying to ... I guess if I just give some contextual remarks. One of the areas that we are looking at and we have put an amendment into the regulations is to decide whether or not the Minister might be able to bring a new law in in a timeframe before the end of this term or not. We have got some indication that the Minister thinks he could bring the primary legislation back, which is what he has indicated he wants to do. Initially we were requesting that he might consider bringing a whole new law back before this term ends because there were concerns if it rolls into the next Assembly. We would like to understand a bit more about the work that that entails, including potentially law drafting instructions and the like. So that gives a bit of context. Deputy Andrews, sorry, I will let you start.

Deputy M.B. Andrews:

Thank you very much, Chair. Thank you very much for being in attendance today, Jackie. First of all I would just like to ask you a question in relation to the regulations. What is the usual process from the legislative drafting team's perspective when you receive instructions from the Minister? Has that changed over the years as well?

Legislative Drafter:

Not that I am aware of. I have been with the department 5 years now and it has been the same in that time. So what happens is we receive drafting instructions along with the ministerial decision. All of that goes through to the principal legislative drafter and she assigns a drafter to work on the file. It will be the same drafter that you work with throughout. For a larger piece of work we now

assign 2 drafters just to make sure that there is coverage and so that they are able to converse throughout and there can be an early review process, but it will be the same person working throughout. The principal legislative drafter assigns usually within 48 hours of instructions coming in.

Deputy M.B. Andrews:

Thank you very much for providing the panel with some clarity about the process. I was also interested to know do you link back to the department to ensure that they are happy with the progress that you are making? Is there a process where there are multiple drafts that are drafted and communicated back to the department?

Legislative Drafter:

Yes. Most drafting is an iterative process. It is very rare that we get everything right on the first attempt. We will take the instructions. If we have questions that need to be addressed before we can start drafting then we will send the questions back and engage in a dialogue with the department. Otherwise we will produce a first draft, which will go to the department and they will then come back with their comments and any further instructions. We will go back and forth until there is an agreed text.

Deputy M.B. Andrews:

So in this instance with the regulations when the Minister gives instructions to officers to bring forward the regulations, what was the timeframe for the initial lodging compared to ... when he initially instructed to then initially lodging the regulations in the Assembly?

Legislative Drafter:

The initial instructions I believe came through at the back end of last year and they were assigned to me. I took them forward early this year.

Deputy M.B. Andrews:

Thank you very much for providing that clarity.

Deputy M. Tadier:

I suppose one thing to ask just as a follow-up is does the fact that this legislation used to sit under Home Affairs and now it has moved to Economic Development make any difference from your perspective?

Legislative Drafter:

It makes no difference, no. We are non-ministerial so ...

Deputy M. Tadier:

It is just simply a different person presenting.

Legislative Drafter:

It is just a different person signing the ministerial decision.

Deputy M. Tadier:

That is fine, thank you.

Deputy K.M. Wilson:

Advocate, the Draft Unlawful Public Entertainments (Jersey) Regulations establish a penalty of imprisonment for up to 6 months, an unlimited fine or both for an offence of holding a public entertainment without the permission of the Bailiff or contravening a condition of the permission given. That is your understanding also. However, can you tell us in your own words how “unlawful public entertainment” is defined?

Legislative Drafter:

Well, in the draft ... I think it actually defines it within the draft, does it not? Let me just look through my papers. Yes, it is in Article 1 paragraph (2) which says: “a public entertainment is an unlawful public entertainment if it is held without the Bailiff’s permission.”

Deputy K.M. Wilson:

So there is no particular definition of what an unlawful ...

Legislative Drafter:

For the purposes of the legislation and just for the purposes ... it is defined only for the purposes of this regulation. It is unlawful if it does not have the Bailiff’s permission without anything further.

Deputy K.M. Wilson:

Thank you. How does the Bailiff make his decision on that basis? What kind of ...

Legislative Drafter:

You would need to ask the Bailiff on that one. That is beyond the remit of the drafters.

Deputy K.M. Wilson:

Right, okay.

Deputy M. Tadier:

I suppose the question to ask is what is a public entertainment. That is maybe not for you to answer.

Legislative Drafter:

Again, I think if you are talking about interpreting the legislation then you need the Law Officers' Department.

Deputy M. Tadier:

Thank you. I suppose one question you could ask at this point is that if ... and again if this is not your area just tell us. I think there had been a suggestion from another Member who showed an interest in this legislation that there might be a shortcut to amend this by if you wanted to transfer power from the Bailiff to the Minister you could change the word "Bailiff" to "Minister". Do you know anything about that and why that might not be possible?

Legislative Drafter:

I have not heard anything about that.

Deputy M. Tadier:

I think again that might be a Law Officers' question.

Legislative Drafter:

Yes. I think it would probably be a question for the Attorney General as to whether that was possible.

Deputy M. Tadier:

Thank you. That is fine. We will go on, unless you have got any follow-ups on that one, either of you.

Deputy K.M. Wilson:

No, that is fine.

Deputy M. Tadier:

The regulations have indicated that they do go some way to clarifying the responsibility of the Bailiff. Could you outline why that has been clarified in the regulations as to why that is necessary?

Legislative Drafter:

Do you mean in relation to his customary law ability?

Deputy M. Tadier:

Yes.

Legislative Drafter:

Again, I think that is a Law Officers' question. That is not a drafter's question because that is to do with interpretation of the customary law.

Deputy M. Tadier:

Yes, okay. That is fine. Would you be able to provide an outline of the considerations of legislative drafting when dealing with customary law?

Legislative Drafter:

Yes. We have to be mindful that there are various areas in Jersey law where it comes up reasonably often but usually what we do is we work in conjunction with the Law Officers' Department and with the department if it looks like any of our drafting is going to impact on the customary law and we take instruction.

Deputy M. Tadier:

Yes. Is it fair to say ... our understanding of this regulation is that it is quite limited in its scope, so essentially entertainment permissions sit with the Bailiff and his customary powers but in order to limit the scope of any penalties to do with unlawful entertainment that becomes then a ministerial and Assembly matter to limit the scope, so there is ministerial oversight, if you like, of customary law. Is that the way you would ...

Legislative Drafter:

That does seem to be what it is doing, yes. Again, that is an interpretation point again but it is ...

Deputy M. Tadier:

I am guessing this is where it comes to the point when you are drafting laws generally it is important that you know, you have clear instructions around that.

Legislative Drafter:

Absolutely. Yes, indeed. On occasion we are instructed to either amend the customary law or to exclude the customary law.

Deputy M. Tadier:

Thank you. I am going to hand back over to Deputy Andrews.

Deputy M.B. Andrews:

The panel understands that there are a number of pieces of legislation within event and entertainments licensing. Have you received any instructions from the Minister to make any changes to those?

Legislative Drafter:

I am not aware of any as yet, no, but that means that they have not been ... something might have come into the principal legislative drafter. I would not necessarily know everything that is on her desk but there is not anything that I am aware of.

Deputy M.B. Andrews:

Okay. If we are looking at regulations that are before the States Assembly, and of course the panel are now reviewing the regulations, with the regulations being adopted by the States Assembly do you believe there would be any changes potentially to additional legislation within events and licensing?

Legislative Drafter:

In what timescale?

Deputy M.B. Andrews:

For instance, if it is to be adopted, would there be an instruction potentially from the Minister to make changes to other pieces of legislation?

Legislative Drafter:

If the panel's amendment is adopted?

Deputy M.B. Andrews:

Yes, either way, the Minister's proposition or even say the amendment if it is to be adopted as well.

Deputy M. Tadier:

If I can intervene, I think it is probably good to bring it back to the initial point we made. Essentially, what we are trying to understand here - correct me if I am wrong, Deputy Andrews - is the process and the interaction between the Minister and yourself. When the Minister does decide that he wants to ... it may have started already but he has indicated that he wants to draft a completely new law to deal with unlawful entertainments, possibly to incorporate other things like licensing law. Could you talk us through a little bit about how that process might unfold and how it does normally and what you envisage in this case?

[14:30]

Legislative Drafter:

If it is going to be a completely new law, if it is within the Government Plan then Government Plan commitments go on to the legislative programme and legislative programme projects are always prioritised over non-legislative programme. Our budget is arranged in order to be able to deliver on legislative programme items. If it was on the legislative programme, then we would expect instructions to be coming in.

Deputy M. Tadier:

Maybe we can just talk a little bit more about that process now, if that is all right. We know that the Minister has given an undertaking to the Assembly to bring in new primary legislation to deal with this area. So, at some point presumably that is followed through on. What would be the process from your point of view and what would you be waiting for in order to start any work?

Legislative Drafter:

We would need a ministerial decision and drafting instructions to begin drafting primary legislation.

Deputy M. Tadier:

Do these things happens discretely or are you involved in directing what kind of instructions? Would they approach you early on?

Legislative Drafter:

I do not think so, no. I think usually the ... we occasionally hear when something is coming down or if something is expected within a time period. Particularly if it is part of the Government Plan we can expect what quarter we expect the instructions to hit, but we cannot start any drafting until we have that ministerial signoff and the instructions.

Deputy K.M. Wilson:

Just on that, could I ask if you have already or if the department has already provided the response to those instructions and produced draft regulations previously and then you have also got an indication that they will be coming up for review in another period, do you have any connection or communication with the Minister as to inform him, advise or even suggest any amendments or changes as part of that review process?

Legislative Drafter:

We can advise, and I think previously we have given advice, but ultimately it is the Minister's decision as to how to proceed.

Deputy K.M. Wilson:

Could you let us know the last time that you gave that advice at all?

Legislative Drafter:

The last time that I am aware of that we gave advice was the previous regulations, the ones that came in ... the previous ones I think came in in 2022 and I think advice was given in conjunction with the Minister that they should only be for 2 years on that occasion. That is the last time, I think, that the period was truncated. That might have been a COVID reaction though. I am now speculating and I should not be because I am speaking for my colleagues.

Deputy K.M. Wilson:

That is okay. I am trying to just get an understanding of how these conversations might happen. Having recommended that it could be done in 2 years, can you tell us why it was recommended in that way as opposed to extending it for 3 years again?

Legislative Drafter:

That is a matter for the Minister. That is how long they thought that they required this time.

Deputy K.M. Wilson:

Yes. Even though you would recommend that the regulations could be extended for 2 years, that does not necessarily correlate with how long it might take or what kind of work is needed to be able to prepare for that extension?

Legislative Drafter:

To prepare for an extension is fairly swift because what we are doing is restating the previous regulations. The only thing that Law Drafting needs to do is to check the statute book to make sure if there is anything that is referred to within these regulations that may have changed since the last time they were in and to make sure that the statute book is consolidated and reads appropriately.

Deputy K.M. Wilson:

So that would include any variation to any of the legal frameworks that would impact upon these regulations going forward?

Legislative Drafter:

Yes.

Deputy M. Tadier:

If we get to the point where you think that these questions are not for you or they are too hypothetical let us know, but essentially what we are looking at, I suppose, is that if the Minister ... in order for new primary legislation in this area to be lodged and debated, let us say by April 2026, when would you expect to be given the first law drafting instructions to achieve that timeframe?

Legislative Drafter:

It needs to be as early as possible. We always say it is as early as possible because you do not know. Lodged and debated by April 2026 is not the same thing as in force by April 2026.

Deputy M. Tadier:

We are mindful that he wants to bring a framework and primary legislation around with presumably secondary legislation and regulations to follow, which would probably be in the next Assembly after an election. I know it is a bit of how long is a piece of string and your response is always going to be “as early as possible”, but if I were a Minister or if we were a department and said we need this done in 6 months, is that ...

Legislative Drafter:

Well, 6 months would be an extremely tight timeline and I would not expect to be able to get primary legislation done in 6 months.

Deputy M. Tadier:

No matter what it was?

Legislative Drafter:

I am saying that we could not do that but then obviously during COVID we did, but a lot of things can happen.

Deputy M. Tadier:

For example, 1½ years?

Legislative Drafter:

I would say 12 to 18 months in a reasonably good case scenario where we had good engagement for primary legislation is achievable.

Deputy M. Tadier:

You are obviously dependent on what other legislation is coming through and what the ministerial priorities are.

Legislative Drafter:

Absolutely and, yes, what the ministerial priorities are in order to get early engagement with our drafts and to get feedback on the draft and any further instructions and answers to questions that we like to send out.

Deputy M.B. Andrews:

Can I just ask, Jackie, at the moment what is capacity like in the team?

Legislative Drafter:

We are good. We have good capacity. The way that the department is set up now is that we are able to have surge capacity if we need to if there are emergency things coming in. Everyone is reasonably fully occupied but we do have capacity. We are not overstretched by any means.

Deputy M.B. Andrews:

Would you say on most occasions since the States Assembly reconstituted that the team was working within their statutory hours of say 9 to 5 or have there been occasions where officers have had to work extended hours?

Legislative Drafter:

I am sure there are occasions if you are coming up to a deadline where people will be working beyond their hours. I think that is the case in almost any situation. I am sure you work beyond your hours if something urgent is coming up. I think the vast majority of times, yes, we will be working our hours and we will be fully occupied but we are not flat out.

Deputy M. Tadier:

Thank you. Is the idea that we sometimes hear about that Ministers have to compete for law drafting time, is that a reasonable ... is that how it works?

Legislative Drafter:

No, that is not how it works. If something is on the Government Plan it is going to get done and if it is not on the Government Plan it will be done provided that there is capacity, and there is usually capacity. We operate when instructions come in on more or less a cab rank of whoever has time available will get the next thing assigned to them.

Deputy M. Tadier:

You can and have done sometimes small amendments for Back-Benchers if they are straightforward, I think.

Legislative Drafter:

Yes, absolutely. The way that things usually work with amendments is that the same drafter that drafts the principal legislation will also draft the amendments so that they can pick up if there are any problems that arise, any sort of unintended consequences because of the amendment.

Deputy K.M. Wilson:

We have heard that there are no issues around capacity, that you prefer to have early instruction as soon as possible and that there is work that goes on to compare it to other legislative changes that might have an impact on the piece of legislation that you are working on. Are there any other key elements that need to be addressed at all that you could tell us about when developing new legislation?

Legislative Drafter:

In terms of the time it takes?

Deputy K.M. Wilson:

Yes.

Legislative Drafter:

We have a very robust review process when we are coming towards the end of projects. Once something is in agreed form with the officers and the Minister, then we will have another legislative drafter peer review our work to check that the legal effect is as we expect it to be. We also have an editorial team that do an editorial check to ensure that everything is correct, that the English is all correct. Time needs to be left in order for those reviews to be completed just to ensure that what is lodged before the States is as good as it can possibly be.

Deputy K.M. Wilson:

Yes. Do you have any fixed periods of time? If you take, let us say for argument's sake, checking the English in it, do you define a period of time that you set yourself for these stages?

Legislative Drafter:

We would usually say at least a week for that check. If it is a very long or complex piece then we would ask for longer than that just to make sure that we do catch everything.

Deputy K.M. Wilson:

Yes. Have you ever been aware of any situations where perhaps when you have done your peer review you have had to go back and you have had to change or improve and take more time?

Legislative Drafter:

We try to build that time in so that if there are changes that need to be made they can be made before the requested lodging date.

Deputy K.M. Wilson:

Thank you.

Deputy M. Tadier:

I think we have covered most things. I am reluctant to push you too much more on specific timeframes. I do not want to put you in a difficult position but I think what you have said has been helpful, certainly to us, in understanding more of the law drafting process. Have any of the other panel members got questions or anything you think you want to ask?

Deputy K.M. Wilson:

There is just one thing I would like to ask. Are you personally working on this piece of legislation?

Legislative Drafter:

That is why I am here, yes. I am the drafter that works on this.

Deputy K.M. Wilson:

Okay. So my question I think would be to seek your comment on what elements of this new legislation are achievable by 2026.

Legislative Drafter:

It depends when we get the instructions and if it is me that is working on it. Without knowing exactly what it is that they want to do - and I will not know exactly what it is they want to do until we get some sort of instructions - I really could not hazard a guess, I am afraid.

Deputy K.M. Wilson:

Yes, that is fine. That is helpful.

Deputy M. Tadier:

I do have a question. We have been made aware, partly by chance, that in the Isle of Man recently they went from a judicial process to an administrative process. It may not be for entertainment but it may have been for licensing or that kind of area. Do you sometimes look at other jurisdictions, especially Commonwealth Crown Dependencies?

Legislative Drafter:

Yes, absolutely.

Deputy M. Tadier:

Can you give any examples where you might have done that or how that might work?

Legislative Drafter:

Recently, and based on instructions that we received from the Law Officers' Department, we have done something similar to the U.K. (United Kingdom) for criminal procedure. It was 4 or 5 years ago now, I think, that there was a change to the criminal procedure law.

Deputy M. Tadier:

Thank you. Have you got anything else you think you want to tell us or want to ask us?

Legislative Drafter:

I am just thinking, going back to what Deputy Wilson said about additional things that need to be built in for the time, the one thing that does take time if you have a new, large piece of legislation is consequential amendments. This is where anything that public entertainment, in this example, would touch on across the statute book might need to be changed as a result of any new legislation. Combing through the statute book and identifying where those places might be and what they need to be changed to can be a lengthy process, so that is another thing that needs to be considered.

Deputy K.M. Wilson:

Do you consider things like primacy, which piece of legislation takes precedence?

Legislative Drafter:

We take instruction on that.

Deputy K.M. Wilson:

You take instruction?

Legislative Drafter:

Yes. If we are not sure how ... the ideal way of drafting would be that everything works together, meshes together anyway. If it looked like there were going to be any issues, then I think we would take instruction from the Law Officers.

Deputy M. Tadier:

Just arising from that ... it is a bit like a “Columbo” episode, is it not, where he keeps coming back with just one more thing? I will not get tired of using that analogy, especially when there is a new audience.

[14:45]

In terms of the consequential amendments, would they be normally captured by the regulations in the secondary or could it be ...

Legislative Drafter:

They can be. We do try to do them as far as possible within the primary legislation, usually as a schedule, just to make sure that they are not missed or that they are not lost later. After the primary legislation is lodged and comes back from Privy Council, it might be that people want it to come into force very quickly, forgetting that the consequential amendments have not been done, so we try to address it as early as possible.

Deputy M. Tadier:

I suppose this follows, from a law drafter’s point of view or just generally for good lawmaking is it preferable or is it problematic to have primary done first and then secondary to follow?

Legislative Drafter:

Not usually, no. When we are drafting powers to make the secondary legislation, we usually have a reasonably good idea what is going to be in that secondary legislation although we have not got the exact drafting.

Deputy M. Tadier:

I think we are done now. I will just say thanks again for your time. We appreciate you coming here and we know it may be slightly unusual but we think the work that the law drafters do is so fundamentally important and it is often done behind the scenes. So I think it is useful for the scrutiny process and sometimes for the public to be made slightly more aware of that. We appreciate your time and presence today. Thank you.

Legislative Drafter:

You are very welcome.

[14:46]