

# STATES OF JERSEY



## **CODE OF PRACTICE FOR SCRUTINY PANELS AND THE PUBLIC ACCOUNTS COMMITTEE (P.101/2006): SECOND AMENDMENT**

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Lodged au Greffe on 13th September 2006  
by the Council of Ministers

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**STATES GREFFE**

CODE OF PRACTICE FOR SCRUTINY PANELS AND THE PUBLIC ACCOUNTS COMMITTEE  
(P.101/2006): SECOND AMENDMENT

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*After the words “dated 15th August 2006” insert the words –*

- (a) “except that in Section 9 of the Code of Practice, delete paragraphs 9.17 to 9.21 relating to legal advice and substitute the paragraphs attached as the Appendix to the report of the Council of Ministers dated 13th September 2006”; and*
- (b) “except that in paragraph 3.5, after the words “will review the matter and” insert the words “, subject to the preservation of legal professional privilege and the privilege against self-incrimination,”.”.*

COUNCIL OF MINISTERS

## REPORT

The Council of Ministers wishes to propose two amendments to the draft Code of Practice –

### (a) Legal Advice

The Chairmen's Committee has proposed in paragraphs 9.17-9.21 that copies of legal advice should be shared between the Executive and Scrutiny functions. The Council of Ministers does not agree with this proposal, and it recommends that the process of seeking and taking legal advice from the Law Officers Department should be confidential. This would reflect general practice in other jurisdictions, where it is accepted that the Executive should have access to legal advice on a confidential basis.

There are good reasons for this practice which the Council considers to be equally relevant to both the Executive and Scrutiny functions. These have been set out in the comments of the Attorney General on the draft Code of Practice (P.101/2006 Com.), and the Council shares the view expressed by the Attorney General that there should be no inhibition on the part of Ministers or departments both in seeking advice and in giving all the relevant facts. Equally, there should be no inhibition on the part of the Law Officers Department in the giving of full and frank advice.

The proposal set out by the Chairmen's Committee in paragraphs 9.17 to 9.21 would represent a radical departure from the current arrangements, and in the Council's view this would be detrimental to good government. In this connection the Council endorses the comments made by the Attorney General in paragraphs 28-33 of his report. The Council is therefore proposing an alternative arrangement in which the Scrutiny function would be able to seek advice from the Law Officers in the knowledge that this advice would remain confidential. There is nothing in this arrangement that would prevent a Scrutiny Panel from making a statement as to its understanding of the legal position, and the same would apply of course to the Executive.

The Council's recommended approach is set out in the Appendix to this report.

### (b) Powers of PAC and Panels

Section 3 of the draft Code relates to the powers of the Public Accounts Committee and the Scrutiny Panels, and it sets out the proposed arrangements under which Ministers and other Members of the States will be expected to cooperate with the Panels. It is stated in paragraph 3.2 of the draft Code of Practice that Members are not covered by the States of Jersey (Powers, Privileges and Immunities) (Jersey) Regulations 2006 ("the Regulations"), but the Council of Ministers would like to point out that the procedures set out in section 3 are not consistent with those in the Regulations.

Regulation 2 of the Regulations state that –

*"These Regulations shall not –*

- (a) confer any power to issue a summons requiring the appearance of or the production of documents by a member of the States; or*
- (b) confer any privileges or immunity on a member of the States."*

In paragraph 3.5 of the draft Code of Practice it is stated that where there is a dispute between a Scrutiny Panel and the member or Minister as to whether evidence should be given or documents produced, *'the Privileges and Procedures Committee will review the matter and direct whether or not the Minister or member concerned should comply with the request. If a Member fails to comply when directed by PPC to do so he or she will be regarded as being in breach of the Code of Conduct and the appropriate disciplinary process will be initiated'*.

This is some way from Regulations 8 and 17 of the Regulations. These two Regulations provide an entitlement to the privilege against self-incrimination and to legal professional privilege. Nothing in the draft Code of Practice replicates that entitlement.

The Council of Ministers considers that this is an important principle and that the entitlement to those privileges, for all States members including Ministers, should be maintained.

The effect of the Council's amendment would be to maintain this entitlement.

This amendment does not have any additional financial or manpower implications.

**DRAFT CODE OF PRACTICE FOR THE HANDLING OF LEGAL ADVICE GIVEN TO SCRUTINY  
PANELS AND THE PUBLIC ACCOUNTS COMMITTEE (“PAC”)**

9.17 For the reasons that:

- (i) the States Assembly is not a proper forum for argument about which of two sets of competing legal advice is correct; and
- (ii) there will be a potentially significant cost to the public purse if Scrutiny Panels engage external lawyers on a regular basis,

it is desirable, where possible, that Scrutiny Panels and PAC seek legal advice from the Law Officers' Department rather than the private sector. It is understood that Panels or PAC are absolutely entitled to seek private sector advice however if they choose to do so, or if the Law Officers advise that, for whatever reason, they are unable to advise a Panel or the PAC on a particular matter.

9.18 It is essential that there is no inhibition on Ministers and their departments, who will usually also be taking advice from the Law Officers, both from seeking that advice, and, when it is sought, from giving the Law Officers all the relevant facts. If such inhibitions do exist, there is the probability that from time to time no advice or the wrong advice will be given, with maladministration as a result. Protection of the confidentiality of communications between the Law Officers and Ministers and their departments is therefore essential.

9.19 It is recognised by Scrutiny Panels and PAC that the process of seeking and taking legal advice from the Law Officers is confidential. There are three primary underlying reasons for this:

- (i) to ensure that there is no damage done to the public interest by the publication of legal advice given by the Law Officers;
- (ii) to ensure that there is no inhibition on the part of the Scrutiny Panels or the PAC in taking advice;
- (iii) to ensure that there is no inhibition on the part of the Law Officers or lawyers within their Department in giving full and frank advice on all the matters which are raised with the Law Officers or one of the Departmental lawyers for advice, or which the Law Officers or the advising lawyer consider should reasonably be volunteered to the Panel or PAC for its consideration.

9.20 For these reasons, the Protocol agreed between the Scrutiny Panels and the Law Officers, which covers the taking and giving of legal advice, is as follows:

- (1) Neither the Scrutiny Panels (which includes for this purpose their officials) nor the Law Officers will publish without the consent of the other.
  - The fact that legal advice has been sought.
  - The facts which have been given to the Law Officers for the purposes of taking advice.
  - The legal advice which has been given to the Panel (or its officials) as a result.
- (2) Nothing in paragraph (1) prevents a Panel making a statement in a Report to the States as to what in its opinion the law is, or as to what its understanding is of the legal basis of the policy followed or decision taken. The Law Officers will be afforded the opportunity to review Reports made in order to ensure confidentiality about legal advice is maintained.

- (3) In making a statement under paragraph (2), Panels should be careful to ensure that no implication is given that their statement has been endorsed by the Law Officers.
- (4) Scrutiny Panel members recognise and accept that Ministers and their officials will maintain their claim to legal advice privilege, except in exceptional circumstances, if questioned by a Panel, and will not seek to interfere with that privilege.
- (5) Scrutiny Panels and the Law Officers recognise that, in exceptional cases, the public interest, which is both different from and wider than the political interests of the Panels and the personal interests of the Law Officers, may override the very strong public interest factors set out in paragraphs 9.17 to 9.19 above, and make it desirable that the legal advice is published. In such cases, the Panel and the Law Officers undertake to discuss how the public interest can best be accommodated. If there is no agreement between them, the views of the Privileges and Procedures Committee will be sought. If at the end of those discussions, there remains a lack of consensus, the question of publication or not will be a matter for the judgment of the individual Panel.
- (6) The provision of legal advice to a Scrutiny Panel must take reasonable account of the timetable in which a review is being conducted. If pressure of workload on the Law Officers' Department prevents a prompt response to a request from a Scrutiny Panel for advice, the Law Officers should notify the Panel Chairman as soon as possible so that other arrangements can be made.
- (7) Where a Scrutiny Panel takes legal advice from the private sector, it is desirable that it should consider disclosing that advice to the Law Officers in order that any potential disagreement about what the law is can be identified and so that, in the event of such disagreement, discussions where appropriate can take place between the Panel and the Law Officers so as to minimise any difficulties for States members as a result.