

STATES OF JERSEY

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MACHINERY OF GOVERNMENT: ESTABLISHMENT OF SCRUTINY PANELS AND PUBLIC ACCOUNTS COMMITTEE (P.79/2003) – AMENDMENTS

Lodged au Greffe on 24th June 2003
by Senator S. Syvret

STATES GREFFE

MACHINERY OF GOVERNMENT: ESTABLISHMENT OF SCRUTINY PANELS AND PUBLIC ACCOUNTS
COMMITTEE (P.79/2003) – AMENDMENTS

- (1) *After paragraph (b)(iv) insert the following sub-paragraph –*
 - (v) to call in decisions of the Executive and review such decisions, and report thereon to the States and Executive;

and renumber subsequent sub-paragraphs of paragraph (b) accordingly.
- (2) *In paragraph (h)(iii) delete the words ‘and, in particular, no later than 12 months after the establishment of the Scrutiny Panels, to make recommendations on the desirability or otherwise of introducing a mechanism to enable the ‘call-in’ of Executive decisions’.*

SENATOR S. SYVRET

REPORT

The move to executive government will, by definition, involve many more decisions being taken in an 'Executive' manner. Whilst Committees of the States make executive decisions at present, there can be little doubt the powers and responsibilities of the Council of Ministers and individual Ministers will lead to many more decisions being taken without the present broad involvement of other States Members in Committees. It appears from the comments of the Privileges and Procedures Committee that they concluded a 'call-in' mechanism was, on balance, not desirable as it may slow down the processes of government, in any event could be introduced at a later date if it was proved necessary, and may lead to disillusionment because of an ultimate lack of power to overturn the decision. These arguments are not plausible.

I include for convenience an extract and an Appendix from the Privileges and Procedures Committee's report below. In the Committee's section on 'call-in' much reference is made to how those examining local government have found that *pre-decision scrutiny* is actually of greater effect and importance than 'call-in'. That may well be so, but the arguments for a 'call-in' mechanism do not depend on imagining it to be a substitute for pre-decision scrutiny. They are different processes for different circumstances. Whilst it is refreshing to finally see in print a confession that the new system of government is in fact highly analogous to the Local Government Act 2000, we are not in fact a Local Authority. We are a parliament with law-making, tax-raising powers and the ability to make decisions of immense consequence to our community. One of the main arguments for the new system of government was that peoples should not be concerned about the great centralisation of power and creation of enhanced executive powers, because highly effective checks and balances would be included in the non-executive function. We now see, as I feared all along, the first signs of renegeing on those promises.

The report of the PPC asserts, somewhat disingenuously, that as 'call-in' would not, ultimately, have the power to overturn decisions, its very existence might lead to disillusionment on the part of scrutinising members. This is simply not so. As already observed, 'call-in' is *not* in any way a replacement for good pre-decision scrutiny, during which most non-executive input will take place. 'Call-in' is, however, an important check and balance by which executive decisions may be checked, exposed to the scrutiny process and reported upon. It is true that, of itself, 'call-in' would not have the power to overturn bad decisions, but it would produce a record of the 'call-in' of the decision and whether the decision was well made, debatable or plain wrong. By such records would those exercising executive power be held accountable.

We are in a period of experiment with new systems of government. Our present adventure involves a great, centralised concentration of power. If we are serious about the need for checks and balances it is now that we must include all such powers. Should 'call-in' prove unnecessary or unworkable, a proposal to amend or remove it can be introduced in the future. But as we are experimenting with a new system, we must surely err on the side of caution and introduce greater safeguards at this stage, rather than too few with the view that we could remedy the situation at a later date.

I agree with the view that pre-decision scrutiny must be the main focus of non-executive work. If scrutiny is working well there ought to be little need for the *frequent* use of 'call-in', so I do not envisage it as a day-to-day occurrence. But it must be there as a safeguard. Appendix 4 of the PPC report (included below at Appendix Two explains how 'call-in' could work. Included in the explanation are clear time limits for the process, so we can see that the view that 'call-in' would lead to significant delays is not particularly convincing.

If the Assembly does not include 'call-in' at this stage, the fears that many people had concerning the difficulty in holding the Executive to account, will be realised.

If 'call-in' is added to the terms of reference of the Scrutiny Panels there will inevitably be some resource implications in relation to each decision that is called in, but I believe that 'call-in' would simply be undertaken within the level of resources already identified for the scrutiny function.

EXTRACT FROM P.79/2002

25. 'Call-in' of Executive decisions

- 25.1 The Committee has thoroughly researched the operation of the 'call-in' mechanism which has been an innovation in the local government modernisation programme in the United Kingdom. After considerable thought the Committee has decided to propose that a 'call-in' mechanism should not be included as part of the initial proposals although the matter should be kept under review in the first year of operation of the new system of government and the Chairmen's Committee will be charged by the States, as set out in paragraph (h)(iii) of the proposition, to *'report to the Privileges and Procedures Committee on the operation of the scrutiny function and to make recommendations for change as appropriate and, in particular, no later than 12 months after the establishment of the Scrutiny Panels, to make recommendations on the desirability or otherwise of introducing a mechanism to enable the 'call-in' of Executive decisions'*.
- 25.2 In essence, a 'call-in' mechanism would give Scrutiny Panels the ability to delay the implementation of 'key decisions' taken by the Executive, if it was felt that the decision in question was inconsistent with approved policies or strategies, appropriate consultation had not taken place or some relevant consideration had been overlooked. Further details on how a 'call-in' mechanism could operate are set out in Appendix Four.
- 25.3 The principal concern of the PPC is that the introduction of 'call-in' could simply lead to disillusionment on the part of non-Executive members as the mechanism would, effectively, be without any real power. The Council of Ministers, or individual members of the Executive, could be asked to reconsider decisions but could not, because of the legal power vested in Ministers, be required to change a decision. This could lead to frustration and criticism similar to that which has been voiced when the recommendations of Boards of Administrative Appeal or Committees of Inquiry are ignored by Committees at the present time. There is therefore a danger that 'call-in' could be very resource intensive with few tangible and useful results. In evidence given to a House of Commons Select Committee the Labour Group on Essex County Council stated *"Our experience over the last few months makes us conclude that the 'call-in' procedure is failing in its primary role of holding the executive to account (...) For example the cost of call-ins at Essex has been considerable, with little outcome to show for that financial expenditure"*. The Committee's research to date has led it to conclude that the benefits of 'call-in' are not yet proven.
- 25.4 The operation of 'call-in', in dealing with controversial issues, was considered by the House of Commons Transport, Local Government and the Regions Select Committee in its fourteenth report of the 2001-2002 session, entitled 'How the Local Government Act 2000 is Working'. It noted the following submission from the Liberal Democrat Group at the Local Government Association (LGA 12) –

'Those that feel their scrutiny committees have a real influence tend to be from those authorities where a substantial amount of pre-decision scrutiny is taking place ... Making all the information available to scrutiny members, members of the public and stakeholder organisations well in advance of a decision being taken is a key part of effective pre-decision scrutiny and ensures they are able to participate, object or submit alternative proposals.'

The Select Committee comment was as follows:

'It is therefore surprising that Government guidance on overview and scrutiny under executive arrangements is dominated by provisions for the 'call-in' of a decision after it has been made and before it is implemented. Councils should give emphasis to a high quality pre, rather than post, decision scrutiny of controversial matters.'

- 25.5 The Committee's research has also shown that many U.K. local authorities were wary of this innovation in the early days, concerned that it would be over-used and bring the decision making to a halt. In a paper

for the Local Government Association 'A Hard Nut to Crack: Making Overview and Scrutiny Work' (April, 2001) Stephanie Snape and Frances Taylor commented: *'it will be a challenge for all authorities to develop the right balance...Too hostile and adversarial, and the Executive will simply refuse to co-operate, producing dangerous, damaging divisions within an authority. But too cosy and cordial, and overview and scrutiny will have failed to undertake its 'critical friend' role.*

25.6 The Committee's overall conclusion is experience in the U.K. to date has been somewhat inconclusive. In some local authorities 'call-in' appears to operate in a positive way whereas in others it is regarded as being of marginal benefit. The Committee has given detailed consideration to the finely balanced arguments on both sides and considers that scrutiny will be considerably more effective, and more satisfying for those involved in it, if it sets its own priorities for reviews and investigations rather than constantly looking again at decisions made by the Executive. It is also likely that the Executive will be more responsive to reports from Scrutiny Panels when they are related to issues chosen by the Panels rather than if reports are simply requests for the Executive to reconsider decisions already taken. The Committee is proposing a system of scrutiny where non-Executive members can feel they have a positive and effective role to play and does not, at present, think that the operation of 'call-in' would necessarily meet this objective.

25.7 The Committee believes that scrutiny will be at its most effective when the Scrutiny Panels set their own priorities and decide to investigate issues in a proactive and novel way. The introduction of a 'call-in' mechanism could hamper this effectiveness. There will be many decisions taken each year by Ministers and by the Council of Ministers and a system of 'call-in' might require Scrutiny Panels to consider long lists of these decisions on a daily basis to ascertain whether or not the decisions should be called in. This could lead the Scrutiny Panels to be extremely reactive to the Executive's agenda and the Panels could spend a disproportionate amount of time investigating decisions being made by the Executive. The Committee would nevertheless stress that it believes that it will be important for all non-Executive members to have access to full information about decisions being taken so that those involved in the scrutiny function can monitor the actions of the Executive.

25.8 In reaching its decision the Committee has been conscious that 'call-in' is very much a feature of local government, not used at the House of Commons or parliaments with delegated powers such as Scotland, and the Committee can find no evidence that it exists in any national parliaments. The Committee believes that the States of Jersey have more in common with these national parliaments than with local authorities especially once the new system of government is introduced and a clear distinction between the legislature and the Executive is created for the first time. Jersey is not a local authority, and to introduce a mechanism that could lead to a perception that the Island was, could be inappropriate at a time when the Island's policy is to assert a greater, if limited, international personality.

25.9 In many U.K. local authorities all key decisions would be taken by the Council as a whole whereas in Jersey legal authority for decisions will be vested in individual Ministers, meaning that a complex system of publishing decisions would need to be researched by Scrutiny Panels and others to identify any decisions capable of being called in. Although it is important that the Executive is subject to adequate checks and balances this must be weighed against the fact that the Committee's research, as described elsewhere in this report, has shown that one of the most effective ways to 'kill' scrutiny is to burden Panels with too much information and to recreate a traditional Committee system where long agendas are imposed on Panels rather than allowing Panels to create their own priorities.

25.10 The States have agreed to move forward to a new ministerial form of government. One of the reasons for doing this is to enable decisions to be made in a more timely and effective way than through the present Committee system. It is clear that some of the benefits of the new system could be lost if decision making was subject to 'call-in' which would prevent decisions being implemented for a minimum of some 2 to 3 weeks. The new system of government will require a degree of trust between the Executive and the non-Executive and the introduction of 'call-in' could be seen to suggest that, not only will the Executive not be trusted, but that the political system to control the Executive is not trusted.

25.11 The Committee is conscious that Scrutiny Panels will wish to remain free to choose issues for

investigation and comment on the full range of the Executive's policies. The existence of a 'call-in' mechanism could, paradoxically, hamper the Scrutiny Panels' ability to do this. If a decision was not called in, the Executive could, at a later date, claim that the decision had already had the tacit approval of the relevant Scrutiny Panel and of other non-Executive members, being able to argue, with some justification, that if the Scrutiny Panel had had any concerns about the decision it should have called it in.

25.12 Procedures under the new system of government will inevitably need to be amended and adapted in the light of experience. The Committee is hopeful that a genuine spirit of co-operation will exist between the Executive and the Scrutiny Panels, notwithstanding the tensions that will inevitably, and quite properly, exist on occasions. The new system of government will not be able to operate properly if there is not cooperation and trust between the members of the Executive and other members of the States. If the Executive operates in an open and transparent manner, ensuring that major decisions are notified publicly before they are made so that comments can be received from Scrutiny Panels and others, the Committee does not believe that a system of 'call-in' will be required. However the Committee accepts that for some members of the States this is an issue of some concern as they believe that the new system of government may be investing too much power in the Executive. It is for this reason that the Committee is proposing that this matter should be reviewed in 12 months time as, by then, it should be possible to make a preliminary assessment of whether the broad thrust of scrutiny, together with the traditional powers still exercisable by members, will make 'call-in' unnecessary. As noted above the Chairmen of the Scrutiny Panels will be asked to bring forward recommendations after the new system has been operating for 12 months. If, in the light of their recommendations, it is clear that more formal methods of intervening in the decision-making process are required, it will be open to the non-Executive members, who will, it should be remembered, always, numerically, be in the majority, to bring forward a proposition to introduce a 'call-in' mechanism at a later date.

**‘CALL-IN’ OF EXECUTIVE DECISIONS
(APPENDIX FOUR OF P.79/2002)**

IV.1 Although, as set out in Section 25, the PPC has decided not to recommend the immediate introduction of a ‘call-in’ mechanism the Committee believes that it is helpful to set out how such a system could operate if introduced at a later date.

IV.2 It would almost certainly be necessary to define ‘key decisions’ of the Executive which would be those capable of being called in. These might be ones that involving significant expenditure or savings and/or would be significant in terms of their effect on the community. Typical criteria for a key decision might be that –

- the decision involved expenditure of over £100,000;
- the decision appeared to be contrary to one or more of the approved policies or strategies of the States;
- the decision appeared to be inconsistent with any form of policy approved by the Council of Ministers;
- the decision appeared to be inconsistent with recommendations previously made by a Scrutiny Panel and accepted by the States or the Council of Ministers;
- the Minister or the Council of Ministers appeared to have overlooked some relevant and material consideration in arriving at the decision;
- the Minister or Council of Ministers appeared to have failed to consult relevant stakeholders or other interested persons before arriving at the decision;
- the decision in question had already generated particular controversy amongst those likely to be affected by it or, in the opinion of the Scrutiny Panel, was likely to do so;
- the decision appeared to be particularly novel and therefore likely to set an important precedent.

Panels would, nevertheless be expected to satisfy themselves that –

- the decision in question was more than ‘a day to day management or operational decision of the type normally taken by officers’ – such a decision should not normally be called in;
- that the request for ‘call-in’ was not intended simply to delay or slow down the decision making process;
- that the delay which would ensue as a consequence of calling in the decision in question was unlikely to cause prejudice to the interests of the States of Jersey, the public or third parties; and
- the request for ‘call-in’ might not be dealt with more appropriately in another way, for example through a question, complaint or appeal procedure.

IV.3 If a ‘call-in’ mechanism were introduced the request for ‘call-in’ would need to be made within a set period, typically three working days of the decision being recorded and published. It is important to stress that the fixed period would run from the date of publication of the decision, not from the date it was made, and if there was any delay by the Executive in recording and publishing the decision this would not

prevent 'call-in' although it would, of course, increase the time between a decision being made and its possible implementation. It would be vital that all decisions made by Ministers and by the Council of Ministers were correctly recorded and published, with supporting papers and reasons for the decision being made available, so that non-Executive members could consider whether or not a decision met the criteria of a 'key decision' capable of being called in.

IV.4 Once a request to 'call in' a decision had been notified to the Executive a meeting of the relevant Scrutiny Panel would be held within a set period, typically within eight working days, to consider the matter. The opportunity for any action to be taken would lapse if the meeting was not held within the fixed period.

IV.5 The members requesting 'call-in' would be required to prepare a report giving their reasons for taking this action (in accordance with one or more of the criteria set out for 'call-in') and the relevant Minister and/or officers would be requested to attend the meeting of the Scrutiny Panel to discuss the matter. All the reports and background papers on which the original decision was based would be available to the Scrutiny Panel and officers who prepared the reports would attend the meeting to provide relevant advice and information.

IV.6 If the Scrutiny Panel decided to take no action after its initial inquiries, the Executive would be notified and the decision could be implemented. Alternatively the Scrutiny Panel might decide to ask the Minister or Council of Ministers to reconsider the decision.

IV.7 The reconsideration would have to take place as soon as possible, as the decision would not be capable of implementation until the Executive had responded to the Scrutiny Panel. The Chairman of the relevant Scrutiny Panel and/or any other members who made the original request would have the right to be heard to set out the reasons why they believed the decision should be reconsidered.

IV.8 The Minister concerned, or the Council of Ministers in the case of a Council decision, would decide whether or not to amend the original decision in the light of the request for reconsideration. The outcome would be notified to the relevant Scrutiny Panel and, as soon as this had been done, the decision, amended or not as the case might be, could be implemented. It is important to stress that the Executive could not be forced to amend the decision and might decide to maintain the original decision notwithstanding the 'call-in' request. There would be no second round of 'call-in'.