

STATES OF JERSEY



CODE OF PRACTICE FOR SCRUTINY PANELS AND THE PUBLIC ACCOUNTS COMMITTEE (P.77/2007): SECOND AMENDMENTS

**Lodged au Greffe on 3rd July 2007
by the Council of Ministers**

STATES GREFFE

CODE OF PRACTICE FOR SCRUTINY PANELS AND THE PUBLIC ACCOUNTS COMMITTEE
(P.77/2007): SECOND AMENDMENTS

At the end of the proposition, after the word “2007” insert the words –

“, except that –

- (a) *in paragraph 3.5^[1] 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,”;*
- (b) *in paragraph 9.10, after the words “properly convened hearing” insert the words “(see also paragraph 10.7)”;*
- (c) *in paragraph 9.20 –*
 - (i) *after the words “within the Panel’s terms of reference” insert the words “as set out in paragraph 4.2 of this Code of Practice”, and*
 - (ii) *after the words “within the Panel’s terms of reference”, for the words “There is a presumption that material will be released to the Panel Chairman, and if appropriate will be provided in accordance with a signed confidentiality agreement.” substitute the words “The Minister will decide whether to release reports, but there will be a general presumption that reports will be released to the Panel Chairman, and this will be provided in accordance with a signed confidentiality agreement.”;*
- (d) *for paragraph 9.21 substitute the following paragraph –*

“9.21 If it has been agreed that a Part B report from a Council of Ministers’ meeting will be provided, this will be promptly forwarded following adequate consideration by the Council and the relevant Minister.”;
- (e) *in paragraph 9.22 delete the sentence beginning “There will be a presumption that the Minister ...” and after the words “he/she will take this up with the Panel Chairman” insert the words “The Minister will then decide whether to release the paper in accordance with the confidentiality agreement”;*
- (f) *in paragraph 9.23, delete the words “and the President, Chairmen’s Committee”;*
- (g) *delete paragraph 9.24;*
- (h) *for paragraphs 9.26 to 9.29 relating to legal advice substitute the following paragraphs –*

“9.26 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 Ministers, the Scrutiny Panels and the PAC seek legal advice from the Law Officers’ Department rather than the private sector. It will be the duty of the Law Officers to seek to ensure that, to the extent that they are advising more

than one party on the same set of facts, the advice is given on a consistent basis and does not by any inconsistency cause embarrassment to States members. It is understood that Ministers, 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 Minister, a Panel or the PAC on a particular matter.

9.27 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.

9.28 It is recognised by the States and the Law Officers 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 Ministers, 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 Minister, the Panel or the PAC for consideration.

9.29 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) on the facts presented to the Law Officers.
- (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. Such exceptional circumstances are likely to arise only where there is a coordinated Law Officer, Ministerial and Scrutiny approach to the release of the advice, where there would be no adverse impact on actual or possible legal proceedings in the court, and where there would be no undesirable precedent set as a result.

- (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 professional 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 given to Scrutiny Panels 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. It is further understood that the Law Officers will endeavour to advise Scrutiny Panels in all cases unless there are exceptional reasons, whether practical or theoretical why they feel unable to do so.
 - (7) The Law Officers have requested that where a Scrutiny Panel seeks advice from them, the Panel ensures that where reasonably possible it makes available to the Law Officers a detailed summary of the facts and documents on which the advice is sought.
 - (8) 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.”;
- (i) *in paragraph 11.6 after the words “factual or descriptive passages.” insert the words “Where possible, this will also include the Panel’s findings and recommendations. This will help to ensure that the Panel has correctly interpreted the evidence and provides an early opportunity for clarification”;*
 - (j) *in paragraph 11.10 –*
 - (i) *after the words “under embargo” insert the words “at least 10 working days prior to publication”,*
 - (ii) *after the words “This is” insert the words “to allow for any inaccuracies to be identified and discussed with the Panel and”,*
 - (iii) *after the words “report’s findings and recommendations.” delete the words “The period of advance notice to be determined by the Chairman”;*
 - (k) *in paragraph 11.17 after the words “on the implementation of” insert the words “the accepted”;*

- (1) *after section 13 insert a new section 14 as follows –*

“14. Compliance

Any alleged infringements of the “Code of Practice for Scrutiny Panels and the Public Accounts Committee” must be reported the Chairmen’s Committee, and the Chairmen’s Committee will determine an appropriate course of action. Where the issue cannot be satisfactorily resolved with the Chairmen’s Committee, the matter may be referred to the Privileges and Procedures Committee.”.

COUNCIL OF MINISTERS

REPORT

The Council of Ministers wishes to make a number of amendments to the Code of Practice for Scrutiny Panels and the Public Accounts Committee. For clarity, for those paragraphs where there are significant changes, the full text of each of those paragraphs, including the proposed amendments, is attached as an appendix to this report.

Section 3 – Powers of the PAC and Panels

- (a) 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 –

- (i) confer any power to issue a summons requiring the appearance of or the production of documents by a member of the States; or*
- (ii) 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.

Section 9 Scrutiny Panels: Gathering Evidence

- (b) For clarification, the Council proposes inserting a reference in paragraph 9.10 to the related paragraph in section 10 which also deals with the arrangements for officers attending public Scrutiny hearings.
- (c) – (g) Access to Council of Ministers Part B background papers–

Paragraphs 9.17 to 9.24 set out the access that Scrutiny will have to papers on the Council of Minister’s “B” agenda, rather than the more general access to information set out in paragraphs 3.5 and 9.1 to 9.14 of the Code of Practice.

When considering if and when papers should be made available to Scrutiny, and what Scrutiny is allowed to do with those papers, a number of points need to be considered –

- (i) the Minister is legally accountable for information under his/her control. It therefore follows that the Minister must retain control over the distribution of confidential information. For this reason, confidential information supplied to a particular Panel must remain confidential to that Panel and must not be shared in a wider forum without the permission of the Minister. The proposed amendments to paragraphs 9.20 to 9.23 seek to make it clear that, whilst there is a presumption that confidential Part B papers will be supplied to Scrutiny on request in accordance with a confidentiality agreement, the Minister must retain the right to refuse access to confidential information in certain circumstances. If such circumstances arise, the amendments provide for these to be explained to the Panel Chairman, and if unresolved, a right of appeal to the Chief Minister. It must be understood, however, that as the legal responsibility rests with the Minister concerned, the role of the Chief Minister can only be to discuss and mediate;
 - (ii) Scrutiny Panels are set up to complement particular ministerial responsibilities. It is recognised that policies will frequently overlap the remits of particular Panels and as set out in (i) above, confidential Part B papers will be provided to more than one Panel if appropriate. It must be recognized, however, the considerable impact that requests for information and papers relating to Part B papers which are not the subject of a formal scrutiny review has on departments;
 - (iii) Part B papers usually relate to policy under development and may not reflect the final position of the Council. Once policy development is mature, the agreed papers are supplied to Scrutiny for consideration and published, either as consultation documents or information papers prior to presentation to the States for approval. Whilst the Council accepts that it may be useful for Scrutiny to examine such papers in the context of a formal Scrutiny review, the provision of immature policy considerations may also be misleading when taken in isolation;
 - (iv) the Council proposes that paragraph 9.24 is deleted as the issue is already covered in paragraphs 9.1 to 9.16.
- (h) Legal Advice –

The Chairmen’s Committee has proposed in paragraphs 9.26-9.29 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 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 9.26 to 9.29 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. 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.

Section 11 Scrutiny Panels: Reports

- (i) – (j) The Code of Practice provides for Scrutiny Panels to circulate “relevant draft sections” of a scrutiny report to the appropriate witness without the Panel’s own findings and recommendations and allow

(normally) 5 working days for a witness to comment on the factual accuracy of their submission (paragraphs 11.6/7), and for the full report to be released to the Minister in advance of publication “so that an informed comment can be prepared” (paragraph 11.10). In practice, timescales between the Minister receiving a copy of the report and publication have been very short in most cases and there is little or no opportunity for the Minister to comment on the conclusions and recommendations.

The appropriate witnesses and, in particular, the appropriate Minister should have an opportunity to review the findings and recommendations in good time prior to publication because –

- without sight of the findings and recommendations, it is impossible to assess whether the Panel has interpreted the information correctly. This has led to a number of Scrutiny reports including inaccurate or misleading information;
- it is unreasonable to expect a Minister or officer to review what are often substantial documents and prepare comments in so short a timescale.

The proposed arrangements would not at all compromise or interfere in Scrutiny’s ability to publish its findings, but it would ensure that final reports were more accurate.

- (k) Paragraph 11.7 relates to the implementation of Scrutiny recommendations. Ministers do not have to accept the recommendations made in Scrutiny Reports. It is accepted that Ministers should respond to Scrutiny reports in good time setting out any reasons for rejecting a particular recommendation. It is then up to the Scrutiny Panel whether it wishes to refer the matter to the States for discussion.

Section 14: Compliance

- (l) The Code of Practice is silent on compliance. Notwithstanding Standing Order 141 which states that “*A scrutiny panel, a sub-panel of a scrutiny panel and any member of a scrutiny panel appointed to undertake any review shall comply with any code of practice prepared by the chairmen’s committee and approved by the States*”, which would result in any complaint being referred directly to the Privileges and Procedures Committee under Standing Orders, the Council proposes that a section be included in the Code of Practice which is similar to that included in the Council of Ministers Code of Conduct. This would ensure that members of Scrutiny are aware that they are required to comply with the Code of Practice and what the mechanism is if there is non-compliance.

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

Full text of paragraphs ‘as amended’ where there are complex proposed amendments to the text

Amendment (a)

3.5 The Greffier will immediately refer the matter to the Privileges and Procedures Committee which will review the matter and, subject to the preservation of legal professional privilege and the privilege against self-incrimination, 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.

Amendment (c)

9.20 Any Panel Chairman may request a copy of a Part B report from a Minister whose department falls within the Panel’s terms of reference as set out in paragraph 4.2 of this Code of Practice. The Minister will decide whether to release reports, but there will be a general presumption that reports will be released to the Panel Chairman, and this will be provided in accordance with a signed confidentiality agreement (see Appendix 1). If there are exceptional circumstances surrounding the release of information, those circumstances will be explained to the relevant Panel Chairman by the Minister. All Part B reports will be treated as confidential until the Minister specifies otherwise, or until the report is made public.

Amendment (e)

9.22 In the event that another Scrutiny Panel wishes to be provided with a copy of the same Part B report, as referred to in 9.20^[2] above, the Chairman of that Panel will need to submit a request to the relevant Minister. If the Minister is in doubt of the relevance of the request, he/she will take this up with the Panel Chairman. The Minister will then decide whether to release the paper in accordance with the confidentiality agreement. Any exceptional circumstances which might surround the release of information will be explained to the Panel Chairman who requested the information.

Amendment (f)

9.23 In the event of a disagreement about access to a Part B report, the matter will be referred to the Chief Minister for discussion.

Amendment (i)

11.6 In order to ensure that the evidence received is fairly and accurately reported, the Panel will circulate relevant draft sections of the report to all witnesses for comment in advance of finalising the report. Normally these draft sections will be factual or descriptive passages. Where possible, this will also include the Panel’s findings and recommendations. This will help to ensure that the Panel has correctly interpreted the evidence and provides an early opportunity for clarification. If recommendations are provided this is done to provide the context of the report.

Amendment (j)

11.10 Copies of the finalised report will be released in advance to the appropriate Minister under embargo at least 10 working days prior to publication. This is to allow for any inaccuracies to be identified and

discussed with the Panel and to enable the Minister to prepare an informed comment in response to the report's findings and recommendations.

Amendment (k)

11.17 The Panels may request, at an appropriate interval, a progress report from the Executive on the implementation of the accepted recommendations made in the report or on key developments regarding the policy or issue in question.

[1] Paragraph on page 8 originally numbered 3.4 in error, numbering corrected by Second Corrigendum

[2] Numbering corrected by Second Corrigendum