PRIVILEGES AND PROCEDURES COMMITTEE

(12th Meeting)

12th May 2003

PART A

All members were present, with the exception of Deputy J.A. Bernstein, from whom apologies had been received.

Senator C.G.P. Lakeman
Connétable D.F. Gray
Deputy F.J. Hill, B.E.M.
Deputy C.J. Scott-Warren
Deputy R.G. Le Hérissier
Deputy J-A. Bridge

In attendance -

M.N. de la Haye, Greffier of the States
Mrs. A.H. Harris, Deputy Greffier of the States
W.J. Bailhache, H.M. Attorney General
P. Byrne, Executive Officer
M.P. Haden, Committee Clerk.

Note: The Minutes of this meeting comprise Part A only.

Minutes

A1. The Minutes of the meeting held on 25th April 2003, having been previously circulated, were taken as read and were confirmed.

Scrutiny - draft report.
502/1(6)

A2. The Committee, with reference to its Act No. A2 of 25th April 2003, gave further consideration to a draft report regarding the proposed Scrutiny function within the new machinery of government.

Ex.Off.

Consultation process: The Committee considered the following options for consultation once the report had been finalised -

(i) circulate to States members for comment;

(ii) allow a brief period for consideration and then hold a seminar for States members; or

(iii) allow brief period for consideration and then hold an in-Committee debate in the States.

The Committee wished to find the best way of engaging States members in the issues to ensure that they were given an opportunity to address any controversial issues, such as whether or not to include a 'call-in' mechanism, as fully as possible. The Committee was mindful that its proposals for the creation of an appropriate Scrutiny system for Jersey would engender keen interest and discussion among States members, the media and the general public. It was anxious to ensure that the reasoning behind its proposals should be openly debated and fully understood before the States was asked to make a decision on the shape of the Scrutiny function.

The Committee agreed to give further consideration to the options for a consultation process once the substance of the report had been agreed;

Terms of Reference: The Committee considered the comments of H.M. Attorney General on the proposed terms of reference for Scrutiny Panels, as follows -

(a) **Holding Policy Reviews** (paragraph 15.1): H.M. Attorney General asked whether there would be any limitation on number and range of Policy reviews. The Committee noted that reference was made elsewhere in the draft Report to financial and manpower constraints on Scrutiny Panels. It was recognised that it would be important for Scrutiny Panels to be realistic in setting achievable goals, taking due account of the level of resources available to it (paragraph 27.4). It was envisaged that a Committee of Chairmen of Scrutiny Panels would fulfil a co-ordinating role (paragraph 26.1);

(b) **Considering the policy and proposed policy of the Executive** (paragraph 16.4): The H.M. Attorney General took issue with the reference in the draft Report to the tendency in the Scottish Parliament not to consider draft policies '*as they take the view that it can later be claimed, when the Committee wish to comment on the implementation of policy, that the lack of any critical comment at the draft stage amounted to tacit endorsement of the policy*'. The Committee agreed that a caveat should be included in the report clarifying that it did not necessarily ascribe to that view;

(c) **Scrutinising primary legislation:** The H.M. Attorney General outlined his view of a structured scrutiny for all primary legislation, as follows -

(i) **First reading**, where the general principles of the proposed legislation would be debated. The Committee was mindful that, in the United Kingdom, legislation at this stage was often only 'roughly' drafted. It was common for the Government to introduce in later stages many amendments to its own draft legislation arising from further consultation and consideration of the draft legislation. This was unlike the current practice in Jersey where currently legislation was presented to the States in a 'polished' draft, having been previously scrutinised by the sponsoring Committee;

(ii) **Second reading**, where the relevant Scrutiny Panel would consider the draft legislation line by line. The sponsor of the draft legislation would be invited to explain in detail the intentions of the proposed legislation. The advice of the Law Officers Department and the Law Draftsman would also be sought. It was envisaged that co-optees on the Scrutiny Panels could add their expertise at this stage. As a result of the scrutiny at this stage the sponsor might accept amendments to the draft legislation or, if this was refused, the Scrutiny Panel might prepare a report stating its position on points at issue. The Second reading would be open to the public to enable further comments to be aired and taken into account;

(iii) **Third reading**, where the draft legislation would return to the States for debate on any amendments and approval. It was envisaged that the sponsor would have taken account of comments and suggestions made in the Second stage to revise the draft legislation. The final debate in the States would be better informed and more focussed than was generally the case at present.

The Committee recognised that this process would mean a significant change of culture for States members. It was to be hoped that States members who wished to amend draft legislation would engage co-operatively in the process. It was thought that they would have a greater chance of success if they demonstrated their arguments publicly to a Scrutiny Panel in the Second reading.

The Committee was mindful that the process was likely to be time consuming for both members and Scrutiny officers, particularly when considering significant pieces of legislation. Members of Scrutiny Panels would be expected to inform themselves fully of the principles and detail of the legislation. A great deal of their attention might be focussed on legislation at any one time, with consequential less time to carry out policy reviews. The Committee recalled that it had learnt from the Seminar on the Scottish Parliament that the workload of Committees dealing with legislation had arisen as a key issue during the first session of the Scottish Parliament. It also recognised that there might need to be some form of 'fast track' procedure to deal with urgent legislation.

The Committee decided that the proposals for legislative scrutiny merited time for further consideration. It suggested that a flow chart might be devised to illustrate the process.

(d) **Subordinate legislation**: The Committee considered whether the proposed process with three readings was appropriate for subordinate legislation. It was of the view that there should be a clearer distinction between Regulations and Orders. Regulations should continue to be considered by the States. However, the Chairmen of Scrutiny Panels might be given the option of deciding whether or not Regulations on relatively minor matters required the full process of scrutiny through a Second reading.

(e) **Scrutinising proposed international conventions and agreements and considering any relevant European Union legislation:** The H.M. Attorney General questioned whether it would be appropriate, as proposed in the draft report (Paragraph 19.2), that '*no decision should be taken on extensions to the Island of proposed international conventions and agreements until the matter has been considered by the States with a report from a Scrutiny Panel'*. He stated that decisions on these matters were often required with some urgency. In his view, international conventions and agreements were a matter for the Executive to approve. They should be scrutinised by Scrutiny Panels but should not necessarily require consideration by the States. Whether or not a convention or agreement should be referred to the States might be decided by the Scrutiny Panel. The Committee was minded to accept this view.

H.M. Attorney General was of the view that the Island should not sign up to international conventions and agreements unless appropriate legislation was in place. He advised that the position in the Island was different to that of the United Kingdom where the government might sign up to international conventions or agreements relying on its majority in Parliament to ensure that it would be able to pass the required legislation. The Island's Executive, in a permanent minority in with an Assembly based on independent members, could not rely on such confidence.

(f) **Reviewing key decisions of the Executive that have been 'called-in'**: The Committee, with reference to its Act No. A6 of 14th February

2003, recalled the arguments expressed by the H.M. Attorney General opposing the introduction of the power of 'call-in' for Scrutiny Panels. He felt that the power of 'call-in' suggested that the States could not trust the Executive or the ability of the machinery of government to control the Executive. 'Call-in' would undermine the separation of the Legislature from the Executive and encourage the Legislature to become involved inappropriately in the detail of Executive decisions. In his view, the proposed criteria for 'call-in', as contained in the options included in the draft report (paragraph 21.3) would allow a wide range of opportunities for any dissatisfied member to 'call-in' decisions made by the Executive and could easily lead to abuse of the system. No other sovereign legislature, to his knowledge, retained the power of 'call-in', which was more relevant to local government circumstances. The States, as a sovereign body, would empower the Executive to make decisions in government; if it lost confidence in the Executive it would have the power to vote the Executive out of office.

The Committee requested the H.M. Attorney General to set out his arguments in a written Memorandum.

The Committee considered the arguments in favour of the introduction of 'call-in' for the Island. It was suggested that 'call-in' should be available, as a final resort, in cases where the Executive appeared to have taken a decision contrary to approved policies or strategies, where appropriate consultation appeared not to have taken place and where high cost projects were undertaken by the States. It was suggested that, although the Executive would always be theoretically in a minority position in the States, the reality of the situation was that the group of non-Executive group members in the States was likely to be fragmented and difficult to mobilise into a cohesive opposition on any particular issue. A number of States members had publicly expressed the view that 'call-in' would be vital to the effectiveness of the Scrutiny function and that without such a mechanism they would have little ability to influence or change Executive policies and their implementation.

The Committee agreed that it was essential for States members to understand the true nature and limitations of the Scrutiny function. Scrutiny, as had been clearly evident from its visit to the London Assembly, had little formal power. Its impact was in highlighting issues of public concern, questioning Ministers and officials, calling for witnesses to give background and depth to reviews and drawing up evidence-based reports. The fact that 'call-in' ultimately had no teeth was often overlooked: 'call-in' was simply the power to delay implementation of decisions and request re-consideration, not a power to change or stop decisions. It was suggested that 'call-in' might prove a diversion from the principal role of Scrutiny. The Committee felt that it was important instead to lead States members to understand the full range of potential which was offered by Scrutiny (paragraph 7.2.1). 'Call-in', it was suggested, would also impose a considerable bureaucratic burden on Scrutiny Panels who would have to sift all Executive decisions in order to determine whether or not any particular decision should be subject to 'call-in' within the given time period. It would also be necessary as a consequence to create an extensive system to track Executive decisions.

Deputy R.G. Le Hérissier expressed his dissent from this view of 'call-in' and advised that he was prepared to submit a minority report on this element of the Scrutiny function. He felt that, ultimately, this power should be available as a reserve to any States members who

might feel that Executive power was being manipulated or misused. Individual matters might reveal a pattern of inconsistent or wrong decisions on the part of the Executive. He did not think that it would be necessary for Scrutiny Panels to trawl through all decisions made by the Executive. Deputy Le Hérissier requested that both sides of the argument, for and against the introduction of 'call-in', be included in the final Scrutiny Report.

The Committee deferred further consideration of the draft Scrutiny report to its next meeting.

Matters for information.

A3. The Committee noted the following matters for information -

(a) that it had been invited to attend the meeting of the Policy and Resources Committee on 29th May 2003 to discuss the pace of reform to the machinery of government;

(b) the advice of H.M. Attorney General that the States might give an independent review body binding powers to determine States members pay if it passed legislation to that effect. In the event of such legislation being in place and of a review body making recommendations considered unacceptable by States members it would be open to them to apply for a judicial review;

(c) that the President had written to Deputy P.N. Troy in an attempt to clarify the current difference of opinion between them and remove some of the misrepresentation contained in press reporting of the matter. Deputy Troy had declined the offer of a joint meeting with the Bailiff. H.M. Attorney General advised that it was not the policy of the Law Officers Department to represent either member in a dispute between States members.