# STATES OF JERSEY

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

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**Presented to the States on 3rd July 2007**
**by H.M. Attorney General**

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**STATES GREFFE**

## COMMENTS

Introduction

1. Following the practice adopted in relation to P.101/2006, we are presenting a report on this proposition without being requested by the States to do so because we think the way in which legal advice is treated is of fundamental importance to the good administration of the Island. We very much regret that we have not been able to reach agreement with the Chairmen's Committee, and we would like to reaffirm our commitment in principle to assisting Scrutiny Panels as well as individual members wherever it is reasonably possible for us to do so. Given that in our view the States Assembly is not the right place to have legal arguments, we would hope that, given goodwill and understanding, it should be possible for us to assist in the overwhelming majority of cases. Indeed that has been our experience so far.

2. We have noted a hardening of the approach of the Chairmen's Committee compared with the approach taken in P.101/2006. We regret that. This hardening of approach is shown by these substantive changes –

   (i) There is no provision requiring a Panel to afford the Law Officers an opportunity to review the draft Scrutiny Report in order to ensure the confidentiality of their advice is maintained.

   (ii) There is no provision that where an approach to an external Legal Adviser is made, it will be so made through the Law Officers' Department such that the Attorney General is aware of the legal advice given to the Panel, and can be properly prepared to advise the States Assembly should that be necessary.

Executive Summary

3. The proposed protocol in relation to access by Scrutiny Panels to legal advice at paragraphs 9.25 to 9.29 inclusive would cause serious damage to the relationship between the Law Officers' Department and the States Assembly, Ministers and Scrutiny Panels.

4. Without carrying out an exhaustive survey, we think that all jurisdictions accept the need for the executive to have access to confidential legal advice. The public policy underlying this is to ensure that there is no inhibition on the part of Ministers or departments both in seeking advice and in giving all the relevant facts to the lawyer whether they are embarrassing to the Minister or department or not; and to ensure that there is no inhibition on the part of the lawyer in giving full and frank advice.

5. The proposed protocol is likely to drive a wedge between the Minister or the department and the lawyer, affecting adversely the mutual trust between the two which is essential to the relationship.

6. The proposed protocol is likely to affect adversely the nature of the advice which will probably become more conservative and less positive, and the time which it takes to deliver it.

7. The proposed protocol carries a risk, the extent of which we think it is undesirable to say in a public document, that legal advice privilege might be lost if there were to be litigation between the Minister and a member of the public.

8. The proposed protocol is likely to drag the Law Officers personally into political disputes or arguments.

9. Furthermore, at a technical level the protocol does not work even if the principles underlying it were right, which we think strongly is not the case.

The Chairmen's Committee Report

10. In the Chairmen's Committee Report, all that is said about the code of practice insofar as legal advice is concerned is this –

*"Unfortunately it has not been possible to introduce the code of practice as early as the Chairmen would have liked, due to the difficulties arising in reaching a consensus with the Council of Ministers and the Law Officers' Department in respect of Scrutiny's access to legal advice.*

*This access to legal advice covers two distinct areas: First, a Scrutiny Panel's access to advice for its own benefit in pursuit of Scrutiny business, and secondly, access to legal advice that has previously been given to the executive, and upon which advice a particular policy, direction or decision was taken.*

*The Chairmen's Committee does not consider that any further delay in the establishment of a code of practice is acceptable, and has decided to lodge its draft code of practice "au Greffe", with the inclusion of provisions relating to access to legal advice that it considers are appropriate …*

*This Code of Practice was originally lodged on 15th August 2006, but because of continuing difficulties in reaching agreement with relevant parties on the legal advice issue, it was withdrawn. Despite extensive negotiations it has not been possible to resolve the legal advice issue to the satisfaction of all parties. The Committee therefore considers it appropriate to bring the matter to the Assembly for resolution.".*

11. The only justification for the proposed code of practice in relation to access to legal advice is that agreement has not been possible and further delay in the establishment of a code of practice would not be acceptable. By any standards, this is surprising. One might have expected some justification for the proposals to be advanced. This is especially so because, as far as we are aware, the proposal which has been made is inconsistent with worldwide practice, and because one might have expected some statement of the Committee's position by way of response to our comments lodged in relation to P.101/2006.

12. By way of example of that worldwide practice, on the Law Officers' website in the United Kingdom there appeared the following statement, posted in 2004 prior to the leak of the Attorney's advice in relation to Iraq –

*"There is a longstanding convention, adhered to by successive governments, that neither the fact that the Law Officers have been consulted in relation to a particular matter, nor the substance of any advice they may have given is disclosed outside government. The purpose of the convention is to enable the government, like everyone else, to obtain full and frank legal advice in confidence. There is a strong public interest in the government seeking legal advice so that it acts in accordance with the law. If there were a risk that Law Officers' advice would be made public, this might inhibit the provision of full and frank legal advice. The rationale for the convention is the same as that which underpins the doctrine of legal professional privilege, which also applies to Law Officers' advice.*

*Parliamentary debates as long ago as 1865 refer to a general rule that Law Officers' advice is not disclosed. Erskine May mentions a number of cases in which the views of the Law Officers on a particular matter were disclosed to Parliament. As far as LSLO [Legal Secretary to the Law Officers] are aware, there are in fact only three examples in the past one hundred years of the actual advice of the Law Officers being disclosed publicly. Two of these examples relate to the provision of documents in judicial proceedings, namely the Factortame litigation and the Scott Enquiry. In both of these cases, the advice given by the Law Officers was central to the issues in the proceedings. The third example arose from the Westland Affair when the Solicitor General's letter to Michael Heseltine was disclosed. However, this followed a leak in breach of the convention, gave rise to serious consideration of prosecutions under the Official Secrets Act and led to or contributed to the resignation of two Cabinet Ministers."*

13. The former Attorney General, the Honourable Darrell Williams, AM, QC, in the early years of the current Australian Government said this –

*"I am not going to speculate about advice that the Government may or may not have received, nor*

*am I going to provide any of that advice. On many occasions, the previous Government declined to say whether it had legal advice on an issue and what that advice was. That is, of course, the traditional response."*

We are advised that this remains the position in Australia.

14. There is an implication from the Report that there have been extensive negotiations since P.101/2006 was withdrawn. For the avoidance of doubt, the only contact between the Law Officers and the Chairmen's Committee on this subject has been –

(i) A meeting between the Attorney General, the President of the Chairmen's Committee and Deputy Le Hérissier held on 4th May 2007, the upshot of which was that the Attorney General was asked to draft a more user-friendly version than that proposed on the last occasion by the Council of Ministers, but which, it was understood, would adhere to the same principles as Ministers had put forward.

(ii) An e-mail dated 17th May 2006, from the Attorney General to the President attaching such a revised version and offering to meet either the Chairmen's Committee or all members of Scrutiny together.

(iii) An e-mail dated 31st May 2006, from the President to the Attorney General expressing regret that the proposed Code of Conduct was unacceptable and indicating that the Chairmen's Committee would bring forward its own provisions for consideration by the States. The President offered a meeting on the subject, if we so desired, but given that P.77/2007 was lodged a few days later, such a meeting seemed to us to be without merit.

We regret there have in reality been no negotiations at all, let alone extensive negotiations, between the Chairmen's Committee and ourselves. We particularly regret that neither the Committee nor Scrutiny members generally were prepared to meet us before P.77/2007 was lodged.

15. In Jersey, prior to the move to Ministerial Government, and despite the fact that there was no clear distinction in the States of Jersey between the executive and the legislature, the general principle was that legal advice given to Committees of the States was confidential unless otherwise agreed with the Law Officers. Although there may from time to time have been mistakes made either by politicians or by civil servants as a result of which legal advice has been published, the approach historically adopted in Jersey has been similar to that adopted by jurisdictions elsewhere. Of course, the Law Officers have regularly given advice to the States Assembly in addition to advising Committees and individual members.

16. We will go on to set out the reasons why the Law Officers' advice should be kept confidential, but in doing so we would not want members to be under the impression that we are advancing a departure from the status quo. The status quo is firmly that both legal professional privilege and the confidentiality of the Law Officers' advice does exist and it is for those who wish to propose a departure from that arrangement to justify their position rather than the other way round. To date, we have seen nothing which begins to establish such a case. It is in those circumstances all the more surprising that the Chairmen's Committee does not set out in its report some reasons for the proposals which it makes other than the reason that the Committee does not wish to encounter further delay.

<u>What we do</u>

17. Most departments do not have employed lawyers working within them. It follows that the Law Officers are not just the principal legal advisers to government, but in most cases are the only legal advisers providing advice to the civil servants or the Ministers. It is therefore very important that as administrative decisions are taken or challenged or as new proposals are worked up and developed, the Law Officers are actively engaged with the aim of ensuring that the policies of the administration are achieved, and that there is proper respect for the rule of law, for human rights obligations and for the Island's international obligations. The process of policy formulation involves civil servants with policy making responsibilities,

Ministers with political responsibilities and the Law Officers. Of course the civil servants tend to be well-informed about the legal framework which is applicable to their particular type of business, as well as the policy behind a particular set of proposals. Of course the Law Draftsman, whose duty it is to reduce to a piece of legislation the proposals which are made, also has some experience of the Island's international obligations as well as of the law generally. But ultimately it is for the Law Officers to advise on new proposals, preferably at an early stage so as to avoid otherwise potentially embarrassing results for the Ministers or for the States as a whole.

18. The Law Officers do not advise only on policy. Indeed, policy advice forms a relatively small part of those of our functions which are relevant to this debate. The majority of our advice is on particular decisions under existing legislation, decisions which are about to be taken or have been taken.

19. This type of administrative decision affects one citizen directly or sometimes more than one. Such decisions can usually be challenged in a court of law, either on appeal or by way of judicial review. It seems unlikely that, on the whole, Scrutiny Panels will want to scrutinise individual decisions. But it is essential that, for the reasons which are set out later, the advice on these decisions as well as the request for advice is kept confidential.

20. In giving advice we recognise that there are three principles which we should apply. The first, and by far the most important, is that our advice should be independent and impartial. The second is that our approach should if possible be constructive. The third is that wherever we give unwelcome advice, we must be prepared to stand firm where that is called for. Similar to the lawyer's duty in the private sector, it is our function not to tell the Minister or civil servant what he wants to hear – rather it is to tell him what he ought to be told.

21. Sometimes the best advice which can be given to a Minister or a department may be wholly unwelcome if not unacceptable to them. Nonetheless, if we think what has been done, or is proposed to be done, is open to fatal legal objections, we expect to say so. However, on the assumption that we analyse the position properly and set out our reasons in sufficient detail, it is our belief that even advice which the Minister or the department was hoping not to hear will nevertheless be respected and followed.

<u>The proposed Protocol does not work</u>

22. The protocol on legal advice is to be found in paragraph 9.2<u>5</u> of the draft code of practice. Although we go on to consider it in more detail below, the effect of it is that on every occasion when the Minister or his Department seek legal advice or the Law Officers give it, both sides must assume that the request for advice and the advice itself will be the subject of a request by a Scrutiny Panel to see it. It is rightly said at paragraph 9.27 that legal advice covers a broad spectrum. The advice may go to new legislation, or to policy issues, or to particular issues which either are the subject of or which might subsequently lead to litigation. Advice on policy may equally often be very relevant indeed to matters which will become, or may become, the subject of litigation. The proposed Protocol is silent on whether the Executive are expected to acquiesce to the Scrutiny Panel's request to see the advice. If adopted, the Protocol would leave this point in the air, unresolved.

23. At paragraph 9.26, the code of practice asserts that because both executive and Scrutiny are both branches of government, they are not to be considered as separate clients. As a matter of law, we think this is not correct. The whole concept of the States of Jersey Law 2005 and the move to Ministerial Government is based on the premise that the States Assembly is no longer to take executive decisions through its Committees, because, by and large, these will instead be taken by Ministers independently. That is why the States of Jersey Law provides that Ministers are corporations sole. They have a separate legal status. As a matter of law, Ministers are separate bodies from the States Assembly, Scrutiny Panels and from members.

24. Scrutiny Panels are not corporations sole. They have no need to be, because they do not take executive decisions in relation to individual cases. Scrutiny is an important parliamentary process for holding the executive to account. Accordingly, one cannot see any probability that a Scrutiny Panel will be the

subject of legal proceedings. On the other hand, one can see every probability that Ministers may from time to time be the subject of legal proceedings. It follows that the advice which is given to Ministers, whether in the context of a particular case or in the context of general policy which may ultimately be relevant in particular cases, should be kept confidential. If it were any other way, then in any litigation between a member of the public and the Minister, it would follow that the Minister's advice would be known to the member of the public, but the private sector legal advice would not be known to the Minister. Given that the Minister's decisions are, or should be, taken in the public interest, it is very hard to see why it should be in the public interest to put the Minister at a disadvantage.

25. At paragraph 9.29.2, the proposal is that the Panel may ask the executive for a copy of the legal advice received. We do not think this is likely to be practical, at least in the majority of cases. This part of the protocol assumes that there is one document which contains the legal advice – but often that is not the case. Often advice is given over a protracted period in letters of advice or at meetings or over the telephone. In the latter two cases, the civil servant or Minister may have made his own note of the advice which has been given. What is meant then by the proposal that the executive will provide a copy of the legal advice received? If it means that the Scrutiny Panel will receive from the executive the civil servant's note of the legal advice which has been given, that would seem to be a course pitted with danger. It would mean that the Scrutiny Panel would be operating not on the basis of what the legal position was, but on the basis of what the civil servant believed the legal position was, which might be a completely different matter. So identification of what the legal advice actually is or was, is not a straightforward matter.

26. We wish to add that the protocol set out at paragraph 9.29 poses some problems even as it stands, and even if one assumed the underlying objective was appropriate, which in our view it is not. This is because –

(i) At sub-paragraph 9.29.6, it is proposed that where a dispute arises, a meeting will take place between the executive, the Law Officers and the Presidents of the Chairmen's Committee. It is to be recognised that the dispute will have arisen because the Scrutiny Panel considers it ought to have access to legal advice and the executive considers it ought not. Often the executive's reasons for not disclosing the legal advice will be inextricably linked to the advice itself, and it will be impossible to have any sensible meeting as to why the advice should not be disclosed other than to say that the nature of the advice means that it should not be disclosed. It is hard to see how this dispute resolution provision will take anyone anywhere.

(ii) The protocol suggests that the Scrutiny Panel will have access to legal advice given to Ministers but must keep it confidential. This presumably means that the Scrutiny Panel cannot use the advice in any public way. It does not seem to us that this is in the Panels' interests, nor in the interest of the public. If the Minister has disregarded legal advice, what is the purpose of the Scrutiny Panel being handed the equivalent of a politically loaded gun and not being able to use it?

<u>The reasons for the Rule</u>

27. Whether in the public or private sector, legal advice is treated confidentially. It is qualitatively different from other sorts of advice. This is primarily because a third party – the Court – sits to consider the case of the party to whom the legal advice is given. As far as we are aware, everywhere in the civilised world, private and public sector clients have an entitlement to legal professional privilege, and lawyers advise them in the knowledge that this is so. That legal professional privilege is an entitlement because it is necessary for the protection of the client. There are two primary reasons for this. They are –

(i) To ensure that there is no inhibition on the part of the client in seeking legal advice, and no inhibition in ensuring that all relevant facts, whether they tell against him or not, are given to the lawyer to ensure that a balanced view can be taken.

(ii) To ensure that there is no inhibition on the part of the lawyer in giving full and frank advice on all

the matters which are raised with the lawyer for advice, or which the lawyer considers should reasonably be volunteered to the client for his consideration when he takes his next step.

28. These principles are fundamentally important both to the client and to the lawyer. It is essential that Ministers and/or Departments do take legal advice, and that when they take it, they provide all the relevant facts, whether those facts tell against them or not. Anything which inhibits Ministers or Departments from taking legal advice or from giving the full facts to the lawyers at the time they do so, would be very bad for the integrity of the administration.

29. It is also essential that the lawyers are not inhibited in giving advice. We both accept that there may be occasions when our advice is disregarded. The Committee or Minister may take a view, as paragraph 9.27 of the protocol suggests, that the Law Officers' advice is only an expression of opinion, and might or might not be right. If a Minister or Committee takes that view, then the Minister or Committee accepts the risks which go with that decision.

The consequences of the proposed change

30. If the draft Code were accepted, one has to contemplate what the result, in political terms, would be if a Minister decides not to act in accordance with the legal advice received. That legal advice has been shared with the Scrutiny Panel, which might naturally wish to scrutinise the Minister upon it. Is the Minister to trust to luck that the Scrutiny Panel will overlook this particular piece of advice, and if luck goes against him and it is scrutinised, is it to be assumed that he will concede he was wrong not to act consistently with that advice? That seems unlikely. Far more likely is that the Minister would assert to the Scrutiny Panel that he or she thought the advice received from the Law Officers or from lawyers within the Department was bad advice, or was wrong, or was unrealistic. In other words, the tendency would be for the Minister to justify the decision taken, belittling the legal advice received. What is then the position of the Law Officer or the lawyer in the Department? Is it to be expected that the lawyer will say to the Scrutiny Panel that may be the advice given was not correct? That seems unlikely. He is likely to justify it. The proposal which has been put forward by the Chairmen's Committee in effect will therefore drive a wedge between the Minister and the lawyer who advises him or her, and over a period of time, relationships between the Minister and the lawyer stand the risk of becoming ever more fractured. This presumably would only not arise if the Minister always followed to the letter the advice given by the Law Officers' Department, whether strictly legal advice or not. Such a possibility is neither reasonable nor desirable. It is the Minister who is accountable for the decisions taken.

31. We think that there are other, and even more damaging, consequences of the proposal that legal advice given to Ministers should be shared with Scrutiny Panels. First of all, it is likely that the advice given to Ministers will be more conservative and less positive. It is not that we, or the lawyers in our Department, have at the moment carte blanche to give risky advice. It is simply a reflection that at present, the lawyer and the client are broadly speaking on the same side. This is so whether we advise Ministers or Scrutiny Panels. But where the legal advice is going to be made available to someone who may be a political opponent, whether that be the Minister or the Scrutiny Panel, it seems to us to be inevitable that the advice will contain more doubts and more reservations and will focus much more on all the potential drawbacks in relation to the course which the Minister or Department may have sought advice about. There is a real risk therefore that the written advice will become less positive and will take even longer to produce.

32. There is certainly a substantial risk that if something became the subject of litigation between a Minister and a member of the public, the privilege over legal advice could not be claimed in the proceedings because the Minister has disclosed the information voluntarily to a third party, namely the Scrutiny Panel. Arguments could be run both ways on that point, and it is unclear to us why this risk should be taken.

33. It is very likely that the advice to Ministers will no longer include what we might call strategic or tactical advice on the next steps forward. Some members may think that this is not part of a lawyer's advice anyway. For our part, we strongly disagree with that. Lawyers in both the public and the private sectors have long since tried to give added value to clients by expressing a lawyer's view on the next steps

forward or a lawyer's analysis of the problems which have to be tackled. It is part of his professional function. We doubt very much whether it would be desirable or indeed always possible to redact advice so that one could take out the strategic or tactical advice from the legal advice which had been given. The likely result would be that strategic or tactical advice would not be offered at all, and we have no doubt that the quality of the Ministerial decision would be worse as a result. We say that not because the lawyer's advice is always followed, but because it is a contribution in the overall process through which the Minister goes to reach a decision.

34. It is likely also that the mechanism for giving advice would change. We anticipate there is a risk that there would be a conservative advice note, and at least the possibility that more positive advice might be given orally. We do not think this particularly helps Scrutiny Panels, especially so if they were in danger of thinking they had received all the advice when they had not. We do not think that it assists the executive because there would be an added risk of misunderstanding as to what advice had actually been given, and no way of identifying later what that advice was, with the probability then of a subsequent mutual loss of confidence between the executive and the Law Officers' Department; and finally, the result would not be helpful for us, because it would create the risk of quality control problems within our Department. We cannot possibly give all advice personally and an important quality control mechanism is the review of outgoing correspondence containing written advice.

35. Perhaps worst of all from our perspective is the increased likelihood that the Law Officers would be dragged into political disputes or arguments. It is wrong that the Law Officers should be drawn into any public support for or criticism of the executive. If Scrutiny Panels were to see the Law Officers' advice, the risk of our being dragged into political debates would be very high. Indeed we think it would be inevitable.

Conclusion

36. We are very sorry that the Chairmen's Committee has decided to promote this protocol regarding access to legal advice which, as that Committee is aware, the Law Officers have advised against strongly and which the majority of the Council of Ministers is thought to regard as unacceptable. The fact of so doing means that we have already been driven into taking up a position which is more critical of the Chairmen's Committee than we would have liked. In our view, however difficult it is on occasions, we think that generally speaking the Law Officers ought to be able to advise Scrutiny Panels as well as Ministers, and in doing so the advice given would be confidential to the Panel or Minister requesting it. With a little goodwill and common sense, we believe this to be manageable. Of course one can anticipate that from time to time there will be difficulties, perhaps because the matter is of such sensitivity that for any number of possible reasons we will be obliged to indicate to the Scrutiny Panel that it would be embarrassing for us to continue to advise, or to advise at all. On those occasions the Scrutiny Panels would be required to get advice from outside the Law Officers' Department. While that has occurred on one occasion so far, we think that, with goodwill, these occasions will be few and far between.

37. We fully recognise that Scrutiny Panels may from time to time need to have legal advice in order to evaluate what the Minister has done. What is critical, however, is that the Panel does not need to see the advice which was given to the Minister to scrutinise his decision taking process. That confuses the scrutiny of decisions, which is an important public objective, with the process of taking decisions, which is private. A Minister may reach a brilliant decision on good or bad or no advice, and for any number of reasons which are very good or very poor. Alternatively, he may reach a very poor decision on the basis of misreading some very good advice, or perhaps on the basis of some very bad advice. In each case the critical thing is the decision which the Minister makes. Where we think we can usually help is to give legal advice which will enable the Scrutiny Panel to understand the parameters within which the Ministerial decision has been taken or policy adopted.

38. An approach which means that Scrutiny Panels will assess the quality of all legal advice put to the Minister all the time could not be adopted without affecting the trust which must exist between the Minister and the lawyer and the nature of the legal advice and the pace with and extent to which the legal advice is provided. In any event, Panels are not equipped to assess the quality of legal advice. Nor would

it be easy for us to find lawyers prepared to work in such a system whereby judgment calls continually have to be defended against those who question them for political reasons rather than from any informed legal basis. It is the decision or the policy which is to be scrutinised.

39. There is in our view no justification for departing from the general rule that the Law Officers' advice is to be treated confidentially. Accordingly Scrutiny Panels should not see the legal advice given to the executive. We are firmly opposed to the proposal that Scrutiny and the executive will each have access to legal advice given to the other, and we consider that such a proposal will, if implemented, be bad for Ministers, bad for Scrutiny Panels and bad for the Law Officers. As a result, implementation would be bad for the States and bad for the Island.

July 2007

H.M. Attorney General
H.M. Solicitor General