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26th February 2020

Dear Sir

Letter of Comment – Policy Letter entitled “Tribunal of Inquiry” (P.2020/24)

I refer to the above Policy Letter, dated 11th February 2020, which is scheduled for debate by the States of Deliberation on 26th February 2020.

The Scrutiny Management Committee has the mandate, tools and funding to complete the current review further to the introduction of new data protection Regulations. However it has some difficulties in publishing under these Regulations the evidence on which it may predicate its recommendations.

The Policy & Resources Committee is cognisant of forthcoming legislation, specifically the Scrutiny of States and Public Bodies (Guernsey) Ordinance, 2020 which will confer statutory powers on the Scrutiny Management Committee intended better to enable the Committee to undertake its independent scrutiny function. Those statutory powers would enable the Scrutiny Management Committee to overcome many of the challenges described in the Policy Letter. The Policy & Resources Committee has laid an Amendment to this effect.

Context

The Policy & Resources Committee was surprised to receive notification of the publication of this policy letter as, on 13th January 2020 the Scrutiny Management Committee, when seeking additional funding of up to £100,000 for costs associated with the review, had assured it that the QC appointed to conduct the review was able to complete and publish their findings and recommendations under the current powers of the Scrutiny Management Committee.

The Policy & Resources Committee is therefore disappointed, so soon after having received this assurance, to note that this is no longer considered to be the case.

This policy letter is the second time within six months that the Scrutiny Management Committee has sought approval to establish a Tribunal of Inquiry to investigate the circumstances centred on the appointment to the role of Head of Curriculum and Standards.

Section 1 of the Tribunal of Inquiry (Evidence) (Guernsey) Law, 1949 provides that a tribunal may be established to consider matters of “urgent public importance”. The Policy & Resources Committee accepts that the interest in this matter has not diminished since September 2019 but questions whether some 31 weeks since this matter was first reported in the local media, the requirement for “urgent” inquiry can be satisfied. It notes that, during the previous debate, some States’ Members questioned whether the matter was urgent at that time.

The Policy & Resources Committee notes that, if the Propositions are not supported, the Scrutiny Management Committee intends to cease its current investigation for the reasons outlined in the policy letter.

The Policy & Resources Committee acknowledges the current limitation of the Scrutiny Management Committee’s powers when compared with those of a Tribunal of Inquiry. It has sought the advice of Law Officers of the Crown in regards to the advantages of establishing a Tribunal of Inquiry over a review undertaken by the Scrutiny Management Committee. The advantages of establishing a Tribunal of Inquiry, as set out in the previous policy letter, are that a Tribunal:

- (a) has the power to compel the attendance of witnesses and to exam them on oath and required the production of documents;
- (b) may hold hearings in public unless the Tribunal considers it is not in the public interest expedient to do so; and
- (c) may authorise the publication of a report of its findings.

The Scrutiny Management Committee argues that only a Tribunal of Inquiry can overcome the difficulties it has encountered in progressing its review since September 2019. For example, the Scrutiny Management Committee states that the new Data Protection (General Provisions) (Bailiwick of Guernsey) (Amendment) Regulations, 2020, before the Assembly at this same meeting, has been of limited benefit for the purposes of the review.

The Policy & Resources Committee has sought legal advice on these matters and has been advised that the Scrutiny Management Committee has the ability to undertake a review based on all relevant information where a committee agrees to disclose the relevant information which may include personal data where the individual has not agreed to the disclosure. However, in regards the publication of any report, because of the undertaking that Scrutiny Management Committee has to provide under these Regulations, personal data cannot lawfully be published as part of the report without the consent of all data subjects.

Further, the Policy & Resources Committee has been advised that, if the processing of information had commenced upon the legal basis (in terms of Data Protection Law) of being in the public interest rather than on the basis of consent, these barriers to publication would not have applied.

The Law Officers have advised that the establishment of a Tribunal of Inquiry would enable personal data, including that supplied by and/or relating to all the candidates for the post of Head of Curriculum and Standards, to be disclosed lawfully to the Tribunal, with or without the consent of data subjects, and published by the Tribunal as part of a concluding report, potentially without the consent of those concerned.

It is also noted that the legislation which will afford the Scrutiny Management Committee the powers necessary to undertake a comprehensive review of any matter is being progressed¹. The Reform (Guernsey) (Amendment) (No.2) Law, 2019 has received Royal Assent and will be registered by the Royal Court on 9th March 2020. Section 201(1) provides:

201(1) The States may by Ordinance make any such provision as might be made by Order in Council to facilitate the effective scrutiny by the Scrutiny Management Committee of the conduct, policies, use of resources, and activities in general, of any committee of the States of Guernsey, any person or statutory body whose functions include functions of a public nature, and any other organisation which is or has been in receipt of public funds.

The first such Ordinance, the Scrutiny of States and Public Bodies (Guernsey) Ordinance, 2020, is attached. It is scheduled to be presented to the States for approval on 22nd April 2020 and, subject to the relevant approvals, the Ordinance will come into force on 4th May 2020.

The Scrutiny of States and Public Bodies (Guernsey) Ordinance, 2020, should afford the Scrutiny Management Committee the statutory powers to overcome the challenges described in the policy letter. Although it does not specifically refer to the publication of reports, the provisions under section 5 indicate a presumption that the proceedings of an inquiry will be published. In the event the provisions of this Ordinance were felt insufficient to address these concerns, a further Ordinance could be drafted to provide for the publication of the proceedings, findings and recommendations in such form as may be necessary to facilitate the effective inquiry by the Scrutiny Management Committee of the conduct of any committee of the States.

Against this background, the Policy & Resources Committee is confident that the Scrutiny Management Committee will shortly have the necessary statutory powers to access the information required to undertake a comprehensive review and to publish a comprehensive report. Therefore, the case for the establishment of a Tribunal of Inquiry is further diminished.

¹ See Article II of Billet d'État IV of 18th February 2016

Further, other changes have been made since this matter was previously debated. In January 2020, the Policy & Resources Committee revised the Senior Appointments Directive (attached for information). The Directive reflects the lessons learned in the recruitment to recent senior roles. Whilst it is not possible to say exactly what the recommendations of a Tribunal of Inquiry would be, this demonstrates that positive actions have already been identified and implemented following the events in question.

Summary

In conclusion, the Policy & Resources Committee considers that the statutory test under the Tribunal of Inquiry (Guernsey) Law, 1949 for establishing a Tribunal of Inquiry is unlikely to be met in terms of the requirement that the matter be of urgent public importance, given that some 31 weeks have elapsed since the matter was first reported.

Further, as the Scrutiny Management Committee will have significantly strengthened powers by early May 2020 to compel the disclosure to documentary evidence and require witnesses to give evidence at hearings, an alternative and effective review can be undertaken without the establishment of a Tribunal of Inquiry.

The Policy & Resources Committee is laying an Amendment which will seek to direct the Scrutiny Management Committee to continue to progress its current review and, having regard to the commencement of the relevant additional powers, to consider whether it is necessary to use any of the additional powers relating to the production of documentary evidence or compelling witnesses to appear to ensure that the review is able to reach a properly evidenced conclusion.

After consideration of the points above, the Policy & Resources Committee recommends that the States of Guernsey should adhere to their Resolution of 4th September 2019, and negative the Propositions when debated at the States' Meeting on 26th February 2020.

Yours faithfully



Deputy G A St Pier
President
Policy & Resources Committee

Enclosed:

- Senior Officer Appointment Directive (updated January 2020)
- The Scrutiny of States and Public Bodies (Guernsey) Ordinance, 2020

SENIOR OFFICER APPOINTMENTS DIRECTIVE (updated January 2020)

In May 2016 the responsibility for all of the States of Guernsey's employment functions was assumed by the Policy & Resources Committee ("P&R").

In June 2019, the States of Deliberation resolved¹ that, P&R shall ensure appropriate political representation from the Committees served by certain senior officer roles in the recruitment process to those roles.

At its meeting on 21st January 2020 P&R agreed that, with immediate effect, the following practice should be adopted in terms of making appointments:

1. Appointment to the role of **Chief Executive** to be made by a selection panel constituted as follows:
 - President of P&R, as employer (Chair);
 - Vice President of P&R, as employer;
 - President representative from a Principal Committee;²
 - Political member or non-States member³, as identified by the Chair; and
 - Director of HR Delivery⁴.

2. Appointment to the roles of **Strategic Lead**⁵, **States Treasurer** and **Managing Director – Trading Assets**⁶ to be made by a selection panel constituted as follows:
 - Chief Executive (Chair);
 - President of P&R, as employer;
 - Vice President of P&R, as employer;
 - President representative from a Principal Committee or President representative from the States Trading Supervisory Board ("**STSB**") in relation to the Managing Director – Trading Assets;
 - a Senior officer of the civil service⁷ or Trading Assets, as appropriate; and
 - Director of HR Delivery.

¹ Billet d'État IX of 2019.

² A President to be nominated by the chair to represent the views of relevant Principal Committees whose business areas are served by the role.

³ A business representative or senior civil service representative from another jurisdiction as a panel member to provide external technical expertise or to act in an advisory role. This option could be in a non-voting supportive capacity, and this should be clarified prior to convening the panel.

⁴ It is noted that in due course the panel member will be the Head of HR and Organisational Development (once appointed and in post).

⁵ Currently Strategic Lead for People Policy, Strategic Lead for Place Policy, Strategic Lead for Supporting Government, Strategic Lead for Future Digital Technology and Communications, and Strategic Lead for Operational Delivery and Support.

⁶ In line with the States (States Review Committee) decision, as Head of Service the Chief Executive has final say on a senior civil service/public sector appointment. However, the States report directed that "the Chief Executive and other senior officers must obtain the views of the President of a Principal Committee and through them the members thereof when appointing and appraising senior staff in the service of that Principal Committee". It is recognised therefore that in the exceptional circumstance that the Chief Executive's selection does not have the confidence of the Principal Committee, or where the decision is split, it may not be practical to proceed with that appointment.

⁷ It is envisaged that this would be a Strategic Lead, to be nominated by the Chief Executive.

3. Appointments to the roles of **Director of Operations** and **Committee Secretaries** to be made by a selection panel constituted as follows:
 - Chief Executive (Chair);
 - President or Vice President of P&R, as employer, at their own discretion;
 - Strategic Lead for Operational Delivery and Support in relation to Directors of Operations, or Strategic Lead for Supporting Government in relation to Committee Secretaries;
 - Relevant President from a Principal Committee; and
 - Director of HR Delivery.
4. The authority to appoint to all roles, other than those roles identified in this Directive and certain statutory officials, rests with the Chief Executive who may in turn choose to delegate that authority to Strategic Leads, with the involvement of the Strategic Lead for Operational Delivery and Support (if appropriate) depending on the nature and seniority of the post.
5. This Directive shall be reviewed regularly, in light of changing working environments and appropriate standards of good governance.

Agreed by P&R 21/1/20

Tim Langlois
HR Director (Delivery)
Human Resources
States of Guernsey

The Scrutiny of States and Public Bodies (Guernsey)

Ordinance, 2020

ARRANGEMENT OF SECTIONS

Formal requirements to give evidence and produce documents

1. Requests and applications for orders to appear, produce documents, or both.
2. Imposition of formal requirement by the Ordinary Court.

Scrutiny hearings before the SMC and scrutiny panels

3. Privilege.
4. Challenge to question put by the SMC or a scrutiny panel.
5. Confidentiality.
6. Immunity of person appearing before, or producing documents to, the SMC or a scrutiny panel.

Offences

7. Disobedience to formal requirement.
8. False or misleading evidence.
9. Interference with witnesses.

General

10. Interpretation.
11. Citation.
12. Commencement.

The Scrutiny of States and Public Bodies (Guernsey) Ordinance, 2020

THE STATES, in pursuance of their Resolutions of the 18th February, 2016^a, and in exercise of the powers conferred on them by sections 20H and 20I of the Reform (Guernsey) Law, 1948 as amended^b, and all other powers enabling them in that behalf, hereby order:-

Formal requirements to give evidence and produce documents

Requests and applications for orders to appear, produce documents, or both.

1. (1) Before applying for an Order imposing a formal requirement under section 2 that a person –

- (a) produce documents to the SMC, or
- (b) appear before the SMC or a scrutiny panel to give evidence, or to give evidence and produce documents,

the SMC must request the person so to produce documents, appear to give evidence, or appear to give evidence and produce documents (as the case may be).

^a Article II of Billet d'État No. IV of 2016.

^b Ordres en Conseil Vol. XIII, p. 288; amended by Order in Council No. II of 2007; No. XXII of 2008; and the Reform (Guernsey) (Amendment) (No. 2) Law, 2019. There are other amendments not relevant to this Law.

(2) A request under subsection (1) may be in such form as the SMC thinks fit.

(3) Where a request is made under subsection (1) for the person to appear before the SMC or a scrutiny panel, the SMC must –

(a) accommodate any reasonable request by the person as to the date and time of the appearance, and

(b) where it appears to the SMC appropriate to do so, having regard to the nature of the evidence or documents and the grounds set out in section 4(1), undertake to hear the evidence in closed session or receive the documents in confidence.

(4) If a person refuses to comply with a request made under subsection (1), the SMC may apply to the Ordinary Court for an Order under section 2 on the grounds that -

(a) the SMC or scrutiny panel is, or is about to be, engaged in scrutiny of the conduct, policies, use of resources, or activities in general, of one or more committees of the States of Guernsey, other public bodies or organisations in receipt of public funds, and

(b) the person to whom the request has been made appears to the SMC to have knowledge or information which is relevant to that scrutiny, and

- (c) the SMC has complied with subsection (1) and (if applicable) subsection (3), but
 - (d) the person has refused without reasonable cause to comply with the request made under subsection (1).
- (5) An application under subsection (4) must in all cases –
 - (a) describe the conduct, policies, use of resources, or activities in general which are or are about to be scrutinised,
 - (b) specify each of the committees of the States of Guernsey, other public bodies or organisations in receipt of public funds which are or are about to become the subjects of that scrutiny, and
 - (c) subject to Rules made under section 2(6), be served on the person.
- (6) Where an application under subsection (4) is for an Order that the person be required to appear, the application must -
 - (a) indicate, in general terms, the issues on which the SMC or scrutiny panel proposes to question the person, and
 - (b) state the date and time when, and place where, the SMC requests that that person be required to appear.

(7) Where an application under subsection (4) is for an Order that the person be required to produce documents, the application must describe the documents that are the subject of the application (whether by specifying the documents, or by reference to their subject matter or any other factor) and state how they are relevant to the matter that the SMC or a scrutiny panel is investigating.

Imposition of formal requirement by the Ordinary Court.

2. (1) On an application being made under section 1(4), if the Ordinary Court is satisfied (on the balance of probabilities) that –

- (a) the scrutiny referred to in the application falls within the mandate of the SMC,
- (b) the person to whom the proposed Order is requested to be addressed has knowledge or information which is relevant to that scrutiny,
- (c) the SMC has complied with section 1(1) and (if applicable) section 1(3) but the person has refused without reasonable cause to comply with the request made under section 1(1), and
- (d) it is reasonable in all the circumstances for that person to be required to do so,

the court shall make an Order imposing a formal requirement on that person to –

- (i) produce documents to the SMC, or

- (ii) appear before the SMC or a scrutiny panel and give evidence, or give evidence and produce documents, as the case may be.

(2) An Order imposing a formal requirement to produce documents may require the person to whom it is addressed to produce –

- (a) all documents,
- (b) specified documents,
- (c) documents described by reference to their subject matter or any other factor,

which in the opinion of the court are relevant to the matter that the SMC or a scrutiny panel is investigating; and may include ancillary provisions concerning, for example, the preservation, security and confidentiality of such documents.

(3) If the court makes an Order under subsection (1) requiring a person to appear before the SMC or a scrutiny panel, the date on which that person is to appear must be at least five working days after the date on which the Order is served on the person.

(4) The SMC shall cause the Order imposing a formal requirement to be served on the person to whom it is addressed by delivering it to that person personally, or by leaving it at that person's business or private address with another apparently responsible person who undertakes to bring it to the attention of the person to whom it is addressed; and the person effecting service on behalf of the SMC

shall endorse the method and date of service on a copy of the Order.

(5) An Order imposing a formal requirement may only be served in the Bailiwick of Guernsey.

(6) For the avoidance of doubt the Royal Court may make Rules of Court governing the procedure for the making, hearing and determination of applications for Orders under this section, including rules prescribing circumstances in which such applications may be dealt with ex parte.

Scrutiny hearings before the SMC and scrutiny panels

Privilege.

3. (1) In Article 20E of the Reform (Guernsey) Law, 1948 -

(a) for paragraph (a), substitute -

"(a) the Scrutiny Management Committee or any standing or ad hoc panel appointed pursuant to the powers and duties of that Committee to carry out particular aspects of its mandate, or to scrutinise particular matters within its mandate, on that Committee's behalf," and

(b) at the end of the words insert ", including privilege against self-incrimination and legal professional privilege".

(2) A person appearing before the SMC or a scrutiny panel may at

any time refuse to answer a question on the ground of a privilege conferred by that Article.

Challenge to question put by the SMC or a scrutiny panel.

4. (1) A person appearing before the SMC or a scrutiny panel may challenge a question put by the SMC or scrutiny panel on the ground that –

- (a) the question is not relevant to, or necessary for the consideration of, the matter that the SMC or scrutiny panel is investigating,
- (b) the question concerns matters which are currently, or are shortly to be, under consideration by a court,
- (c) if the person is a Member of the States of Deliberation or a civil servant, giving the evidence or producing the documents would contravene the Code of Conduct binding upon that person as such, or
- (d) the prejudice to the person, the States of Guernsey or any third party that would ensue if he or she answered the question so far outweighs the usefulness of the answer to the SMC or scrutiny panel that it would be unreasonable to require the person to answer.

(2) The SMC or scrutiny panel shall consider any such challenge in closed session and thereafter (in public session if evidence is being taken in public session) shall -

- (a) direct that the question be answered, or that the question need not be answered, and
- (b) inform the person of the reasons for that direction.

Confidentiality.

5. (1) A person appearing before the SMC or a scrutiny panel may at any time request that the SMC or panel -

- (a) go into closed session to hear all or any part of the oral evidence which the person has been requested or required to give, or when examining any document which the person has been requested or required to produce, or
- (b) undertake not to publish, or to publish only in redacted form, all or any part of the oral evidence which the person has been requested or required to give, or any document which the witness has been requested or required to produce, or
- (c) both,

and may insist that the SMC or scrutiny panel go into closed session whilst the person makes, and whilst the SMC or scrutiny panel rules on, that request.

(2) The grounds for making a request under subsection (1) are that further disclosure of the evidence or information would or may -

- (a) risk serious damage to the public interest,
- (b) constitute a contempt of court in respect of matters which are currently, or are shortly to be, under consideration by a court,
- (c) endanger any significant public or private commercial interest,
- (d) if the person is a Member of the States of Deliberation or civil servant, contravene the Code of Conduct binding upon that person as such,
- (e) prejudice the person, the States of Guernsey, or any third party, to such extent as to so far outweigh the value of publication that it would be unreasonable to require the person to answer questions or produce documents without acceding to the confidentiality request.

(3) For the avoidance of doubt, if the SMC or scrutiny panel rules against a request under subsection (1) made by a person who has been required to give evidence, the person may nevertheless thereafter challenge a question under section 4 (unless a challenge to that question has already been made under that section).

Immunity of person appearing before, or producing documents to, the SMC or a scrutiny panel.

6. (1) Subject to the succeeding provisions of this section -

- (a) no civil or criminal proceedings may be instituted against any person in respect of any words spoken or written by that person in the course of giving evidence, or contained in any document produced by that person and accepted by the SMC or a scrutiny panel in the course of a scrutiny investigation, and
- (b) an answer given by a person to a question put to that person, an oral or written statement made by a person, or a document produced by a person, in the course of the person's appearance before the SMC or a scrutiny panel shall not be admissible in evidence against the person in any other civil or criminal proceedings.

(2) Subsection (1) does not preclude the institution of criminal proceedings under section 8 (false or misleading evidence).

(3) If it appears to the person chairing a meeting of the SMC or a scrutiny panel ("**the chairperson**") at which evidence is being taken that a person is or may be abusing the immunity or exclusion provided for in subsection (1), the chairperson shall warn that person ("**the witness**") that he or she may withdraw those rights if the witness continues in his or her abuse of the immunity or exclusion; and that warning must be recorded in the minutes of the meeting.

(4) If, having issued a warning under subsection (3), the chairperson is of the opinion that the witness is persisting in his or her abuse of the immunity or exclusion, and that its withdrawal is in the public interest, the chairperson may withdraw it by so informing the witness, whereupon the immunity,

the exclusion, or both (as the case may be), shall not apply in respect of any further evidence given to that meeting by that witness, and that withdrawal must be recorded in the minutes of the meeting.

Offences

Disobedience to formal requirement.

7. (1) A person who, without reasonable excuse –
 - (a) disobeys an Order of the court imposing a formal requirement to appear before the SMC or a scrutiny panel, or
 - (b) having so appeared, refuses to comply with a requirement to be examined before, or to answer any lawful and relevant question put by, the SMC or scrutiny panel as the case may be,

is guilty of an offence; and for the avoidance of doubt, exercise of the rights conferred by sections 3 to 5 constitutes a reasonable excuse for the purposes of subparagraph (b).

(2) A person guilty of an offence under subsection (1) shall be liable to imprisonment for a term not exceeding six months, or to a fine not exceeding level 4 on the uniform scale, or to both.

False or misleading evidence.

8. (1) A person is guilty of an offence if he or she, when giving evidence or producing documents in response to a request made, or an Order

imposing a formal requirement, under this Ordinance -

- (a) makes a statement which he or she knows or has reasonable cause to believe to be false, deceptive or misleading in a material particular,
- (b) recklessly makes a statement, dishonestly or otherwise, which is false, deceptive or misleading in a material particular,
- (c) produces or furnishes, or causes or permits to be produced or furnished, any information or document which he or she knows or has reasonable cause to believe to be false, deceptive or misleading in a material particular, or
- (d) recklessly produces or furnishes, or recklessly causes or permits to be produced or furnished, dishonestly or otherwise, any information or document which is false, deceptive or misleading in a material particular.

(2) A person guilty of an offence under subsection (1) shall be liable to imprisonment for a term not exceeding 12 months, or to a fine not exceeding level 5 on the uniform scale, or to both.

Interference with witnesses.

9. (1) A person is guilty of an offence if he or she, by fraud, intimidation, force or threat, by the offer or promise of any inducement or benefit, or by other improper means -

- (a) induces or attempts to induce another person who has been requested or formally required to appear before or produce documents to the SMC or a scrutiny panel, to refrain from doing as requested or formally required, or
- (b) influences or attempts to influence another person in respect of any evidence given before the SMC or a scrutiny panel in response to such a request or formal requirement.

(2) A person guilty of an offence under subsection (1) shall be liable to imprisonment for a term not exceeding 2 years, or to a fine not exceeding level 5 on the uniform scale, or to both.

General

Interpretation.

10. In this Ordinance -

"**closed session**" means a part (or the whole) of a meeting of the SMC or a scrutiny panel from which the public and media are excluded, and which is not to be publicly reported; and "public session" is to be construed accordingly,

"**a scrutiny investigation**" means an investigation being conducted by the SMC or by a scrutiny panel within the terms of the SMC's mandate,

"**a scrutiny panel**" means a standing or *ad hoc* panel appointed pursuant to the powers and duties of the SMC to carry out particular aspects of the SMC's mandate, or to scrutinise particular matters within the SMC's mandate, on the SMC's behalf, and

"**the SMC**" means the States Scrutiny Management Committee, or such other committee as the States may from time to time constitute with a mandate to scrutinise the conduct, policies, use of resources, and activities in general, of committees of the States of Guernsey, other public bodies and organisations in receipt of public funds.

Citation.

11. This Ordinance may be cited as the Scrutiny of States and Public Bodies (Guernsey) Ordinance, 2020.

Commencement.

12. This Ordinance shall come into force on the day appointed by regulations of the SMC, and such regulations may appoint different days for different provisions and different purposes.