

## **THE ADMINISTRATIVE DECISIONS (REVIEW) (GUERNSEY) LAW, 1986-93- PROPOSALS FOR CHANGE.**

This Consultation Paper provides a brief description of the current process through which a person aggrieved by a department's administrative decision can challenge that decision under the provisions of *The Administrative Decisions (Review) (Guernsey) Law, 1986-93* ("the Law"). A pdf of the Law can be found [here](#).

Please follow the link at the bottom of the document to access the survey [here](#). Paper copies of the survey and this document are also available upon request from the Government Business Unit, at Sir Charles Frossard House Tel 717000 or via email: [gbu@gov.gg](mailto:gbu@gov.gg).

### **1) Background:**

- 1.1 The Review Board process was introduced to the Island by a Requête (Billet d'État XXIV of 1985). The Law governing the process, which is based on a similar system in Jersey, sets up procedures enabling persons aggrieved by decisions and acts made and done by States' Departments and Committees to apply under s.1 of the Law to the Chief Executive of the States of Guernsey (or H.M. Greffier in respect of complaints against the Policy Council) for a review of that decision or action.
- 1.2 Under section 2 of the Law, the Chief Executive has a duty to investigate the matter and "*if the facts of the matter ... justify a review by a Board, he shall refer the matter to the Chairman of the Panel of Members*", {*who then*} "*forthwith refers the matter to the Board so constituted in accordance with this Law*".
- 1.3 The Chairman will then convene a Review Board to hear the complaint. Review Boards are constituted from a panel consisting of States' Members of than three years' standing and the Deans of all the Douzaines. Each complaint is heard by a Review Board consisting 2 Deputies and a Dean of a Douzaine, which accordance with section 7(3) of the Law considers if the act or decision:
  - (a) was contrary to law;
  - (b) was unjust, oppressive or improperly discriminatory, or was in accordance with a provision of any enactment or practice which is or might be unjust, oppressive or improperly discriminatory;
  - (c) was based wholly or partly on a mistake of law or fact;
  - (d) could not have been made by a reasonable body of persons after proper consideration of all the facts; or

(e) was contrary to the generally accepted principles of natural justice.

- 1.4 The complainant and the department will have the opportunity to put forward their arguments and ask questions during the hearing. Following the hearing, the Review Board will issue a decision and may ask the department to reconsider their original decision or action if it finds that the decision or act contravened any of the criteria set out in paragraph 1.3. In other words, a Review Board cannot itself overturn or alter the decision which is the subject-matter of the complaint. The department is not bound to follow the finding of the Review Board but should the Review Board remain dissatisfied with the department's further actions, the Review Board may refer the matter to the States.
- 1.5 In summary, the purpose of a Review Board is to determine if something significant has “gone wrong” when the Department reached its decision rather than a lower threshold of “this would be a better decision for the Department to reach”.
- 1.6 Section 3 of the Law also sets out 6 circumstances in which the Chief Executive shall not refer a complaint to the Chairman. They are where:
- a) the matter complained of is not within the jurisdiction of a Board;
  - (b) the matter complained of relates to a decision, act or omission of which the complainant has had knowledge for more than twelve months;
  - (c) the subject matter of the complaint is trivial;
  - (d) the complaint is frivolous, vexatious or not made in good faith;
  - (e) the complainant has not a sufficient personal interest in the subject matter of the complaint; or
  - (f) the complainant has in respect of the matter complained of a right of appeal, reference or review or a remedy by way of proceedings in any court of law unless, in any such case, the Chief Executive of the States of Guernsey or Her Majesty's Greffier, as the case may be, is satisfied that in the particular circumstances it is not reasonable to expect the complainant to resort to or to have resorted to that right or remedy.

1.7 The diagram below shows all of the possible stages in the Review Board process.



1.8 Following the introduction of judicial review procedures into Guernsey law and the creation of tribunals in a number of areas, it has been anticipated that Review Boards would be convened less frequently than has been the case in the past. However, 177 applications have been made since 1987. Although the number of cases had levelled over a number of years, there has been a recent resurgence in the number cases submitted for review to the Chief Executive since 2011. Details of cases which have been brought to the Chief Executive's/H.M. Greffier's attention and referred to the Chairman of the Panel of Members for investigation can be seen in the Panel's annual reports published annually in *Billet D'Etats*.

## 2) To repeal or to amend the Law?

2.1 The Policy Council and the Chairman of the Panel of Members are of the view that the repeal of the Law at this juncture, without an ombudsmen-type service to replace it, would be counterproductive, inappropriate and contrary to universally accepted principles of natural justice. Both are of the view, however, that repeal of the Law at some later stage is inevitable given that Judicial Review is now firmly part of Guernsey's legal system. In the interim, the Policy Council would like to hear your views on its recommendation to amend the Law for the reasons that follow.

2.2 Absent an Ombudsman-type service on Island, The Policy Council is of the view that there are real benefits to the States and Islanders in retaining the Law, which would be enhanced further should the proposals be accepted. To list some of these, the process:

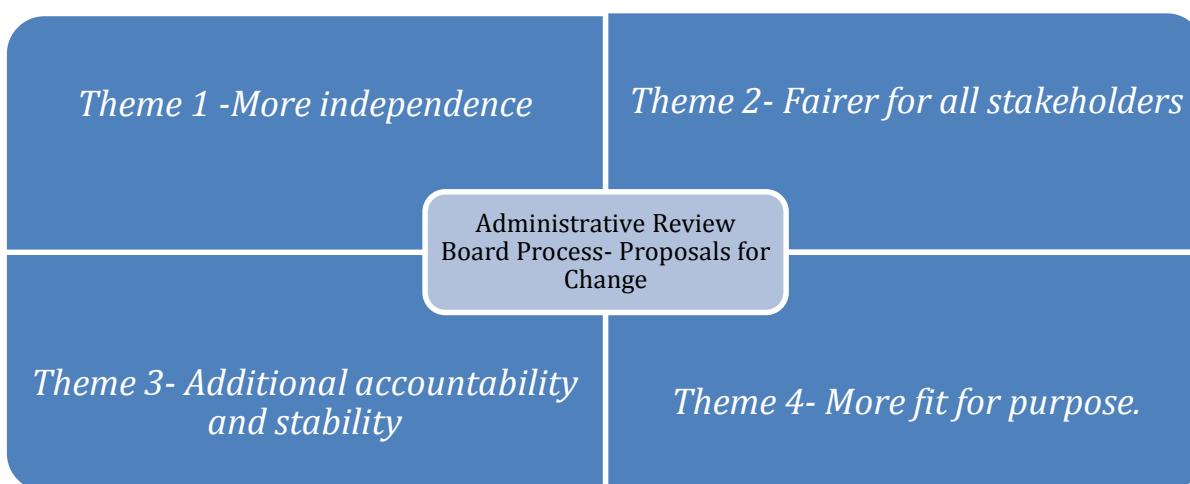
- *supports Islanders by listening to and acting upon their concerns and complaints against departments actions or decisions in an impartial manner,*
- *is impartial and provides an opportunity for further negotiations and resolution between the parties*
- *is accessible to all regardless of ability to afford legal/professional representation*
- *most importantly, it acts as a “Change agent” – it assists/ positively influences the organization by looking at the root causes of the issues that caused the dispute and provides a basis to avoid those disputes in the future, **for the benefit of the public and the States overall, all at no additional cost***
- *provides additional scrutiny over the decision and acts of the States and their Departments in tandem with the roles performed by the Scrutiny Committees of the States*
- *in addition to the Courts, acts as a guardian of the principles of natural justice*
- *provides a further opportunity to disseminate or clarify information to the public through liaison with Departments about services available to them which may have been overlooked at departmental level*
- *promotes the principles of Good Governance generally but especially as it encourages/provides an opportunity for Departments to carefully re-visit their decisions, even if no referral is made to a Review the Board*
- *is relatively inexpensive to operate*
- *is flexible as a wide range of administrative matters can be reviewed*
- *is responsive to need, as Review Boards can be arranged fairly quickly and although there has been an increase in cases, the number is still manageable*
- *is “Tried and Tested” and proportionate to the Island in the current times of fiscal restraint*

2.3 The Law can only be amended by a Projet de Loi and not by ordinance, which will therefore take several months to accomplish, subject to the outcome of this consultation and States' decision in this regard at the March 2016 States meeting. The Reform (Guernsey) Law, 1948 which would also require amendment, may be amended by Ordinance more quickly.

2.4 The Policy Council has consulted with the Chairman of the Review Board Panel of Members, Deputy Matthew Fallaize, the Chief Executive and H.M. Greffier who are all supportive of these proposals for change.

### **3) The Proposals For Change- The Four Themes**

3.1 Four themes govern the rationale for the proposals for change; those of making the process more independent; fairer for all stakeholders; providing additional accountability for and stability to the process and finally, that of making the process more fit for purpose, as shown in the graphic below.



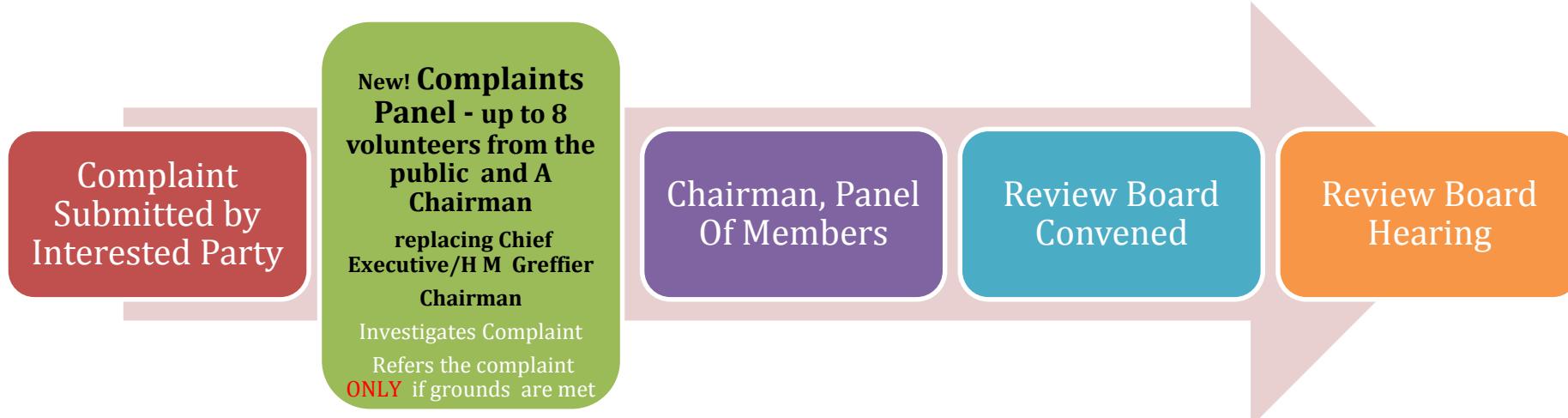
#### **(a) Theme 1: Making the Process more independent of The States / Civil Service**

Although the integrity and impartiality with which he and officers assisting him undertake their roles under the Law are not being called into question, the involvement of the Chief Executive in the process has the potential of impacting on the independence of the process. There is an argument that, at that particular stage when he is investigating and assessing the merits of the complaint, the process is *possibly* not sufficiently independent of the government, or at least there exists perception of possible bias, given that Chief Officers report to the Chief Executive.

The Policy Council therefore suggests:

**Proposal i): to remove any possible allegations of conflicts of interest, impartiality or perception of bias on behalf of the Chief Executive or HM Greffier wherever they are involved in the process under the Law by the Amendment of Sections 1, 2, and 3 of the Administrative Decisions (Review) (Guernsey) Law 1986- 2003 and any other relevant parts of the Law by replacing their role with that of a new independent body called “the Complaints Panel”.**

Complainants would apply to “the Complaints Panel”, an independent body, constituting of a standing panel of up to 8 volunteers, independent of the States, with a Chair (ideally legally- qualified) appointed by the States who will recruit such a panel and sit as a team of 3 to consider all applications for a review, which will subsume the roles of the Chief Executive and HM Greffier under section 1, 2, 3, and as applicable under the Law.



The civil service would continue to provide support to the Panel and each Review Board as per currently resulting in a cost neutral proposal.

Equally, there is a perception that 2 States Members on each Review Board makes the process more political than it should be. A fourth lay person on each Review Board would redress this perceived imbalance, with the Chairman having a casting vote in the event of deadlock.

**Proposal (ii): Amend Section of the 5 of the Law to enable a fourth person who is not a States Member or a dean of the Douzaine to be appointed to a Review Board by the Chairman and Deputy Chairman of Panel of Members. The Chairman would have a casting vote in the event of deadlock.**

These changes should be considered to be a significant improvement in terms of compliance with Human Rights legislation generally, given the size of our jurisdiction.

## (b) Theme 2: Making the process fairer for all stakeholders

### (i) Time Limitation

A person aggrieved by a department's decision has 12 months from the date that person had knowledge of the matter to lodge a request for an administrative review to the Chief Executive of the States of Guernsey. In some circumstances, this time limit poses difficulties, especially when a complainant has not exhausted internal departmental complaints procedures prior to lodging the request.

**Proposal:** To give the discretion to the body investigating the matter to accept, in exceptional circumstances only, requests for an Administrative Review beyond that of 12 months from the date that the complainant had knowledge of the issue; extending this by a period deemed reasonable. It will be for the complainant to justify the exception request.

#### **(ii) Protection of Review Board Members**

The Dean of the Douzaine is the only member of each Review Board, who unlike the two States Members, arguably does not under the Law currently receive the full protection from legal proceedings under section 20A of the Reform (Guernsey) Law, 1948. E] All witnesses to a Review Board hearing are fully protected by the Law. The Policy Council is of the view that the legislation should be amended to afford the Dean with the same protection as other members of the Review Board and witnesses receive. This can be achieved through the amendment of section 20A of the Reform (Guernsey) Law, 1948 by Ordinance to extend the absolute privilege to members of the States of Deliberation in relation to words spoken before the States or a department to the Dean of the Douzaine and all other Members of a Review Board when acting in that capacity. Specific amendment should also be made to section 6 of the Law also to include reference to the protection afforded to all members of the Review Board.

**Proposal:** To amend the Law and section 20A of the Reform (Guernsey) Law, 1948 to provide the Dean of the Douzaine protection from legal proceedings.

#### **C) Theme 3 - Providing additional accountability for and stability to the process**

The Policy Council is of the view that the tenure of Chairman and Deputy Chairman of the Panel, who are appointed annually by the States of Deliberation should be extended. This would provide more accountability and stability to the process and the proposal is that the length of office for these posts match a States' political term in order for the process and the public to gain the maximum benefit of their experience.

**Proposal:** To Amend of Section 4 of the Administrative Decisions (Review) (Guernsey) Law 1986- 2003 and any other relevant parts of the Law in order that the length of Office the Chairmen and Deputy Chairman of the Panel of Members be 4 years.

#### **4) Theme 4- Making the process more fit for purpose**

Some applications for Administrative Review are simply not suitable for determination within that the process due to their complexity, especially when there are also allegations of negligence included in the administrative decisions being challenged. It is the Policy Council's view that complaints which include allegations of medical negligence are particularly relevant and should only be dealt with in the courts.

Its proposals are therefore that the Law be amended to enable the body investigating the request for an administrative review the right to reject applications which include allegations of negligence which go further than the limitations under section 3 (f) of the Law.

In addition, some complainants refer their complaints to the Chief Executive without first lodging their complaint with the department(s) in question. The Policy Council proposes that the Law make specific reference to the need for the complainant to have exhausted the departmental complaints procedures prior to referring a request for an administrative review to the Chief Executive.

**Proposals: To i) amend section 3 of the Administrative Decisions (Review) (Guernsey) Law 1986-2003 to exclude complaints which include allegations of medical negligence; and ii) in addition, to amend section 3 of the Administrative Decisions (Review) (Guernsey) Law 1986-2003 to allow the rejection of applications which are made prior to the complainant exhausting departmental complaints procedures.**

The Policy Council will be taking its draft proposals to the States in March 2016. Your views are important and will inform the final proposals. Please consider the survey [here](#).

Thank you.