STATES OF JERSEY

ELECTED SPEAKER OF THE STATES (P.160/2013): ADDITIONAL COMMENTS

Presented to the States on 17th April 2014
by the Privileges and Procedures Committee

STATES GREFFE

ADDITIONAL COMMENTS

The PPC presented comments to the States on 16th December 2013 on the proposition of the Connétable of St. Helier – Elected Speaker of the States (P.160/2013 Com.), but has since been asked to provide members with additional information about how a post of Elected Speaker could work in practice in Jersey if the States decided to support the proposition.

These additional comments are in 4 parts.

Section 1 sets out possible options for a post of Elected Speaker in Jersey.

Section 2 reproduces a letter that the Bailiff sent to PPC on 25th January 2011 after the publication of the 'Carswell' Report. During his recent presentation to States members, Lord Carswell referred to the Bailiff's letter and in the interests of fairness, PPC is recirculating the letter which was originally published in R.28/2011.

Section 3 gives the text of the presentation that Lord Carswell made to members at the Jersey Museum on 27th March 2014, so that this is placed in the official record and made available to members who were not able to attend.

Section 4 sets out the legal opinion given to the Carswell Panel by Mr. Rabinder Singh, Q.C. that was also referred to by Lord Carswell during his recent presentation.

SECTION 1 – OPTIONS FOR AN ELECTED SPEAKER IN JERSEY

Introduction

1. The Privileges and Procedures Committee has been asked by several members of the States to provide further information about how a post of elected Speaker would operate in practice if the proposition of the Connétable of St. Helier is adopted. This section sets out various options that could be used in Jersey and explains how an elected Speaker is selected and operates in a number of other small jurisdictions.

2. The Review of the Roles of the Crown Officers (the 'Carswell' review) published in 2010 proposed 2 main options for selecting an elected Speaker, namely: (i) choosing a current member; or (ii) selecting a person from outside the Assembly. The Connétable of St. Helier has repeated this recommendation of the Carswell review in his proposition. The Carswell review set out its reasoning for this recommendation in section 5.19 of its report as follows –

> *"5.19 We recognise that it may not be entirely straightforward to find a person willing and able to undertake the office of President of the States. We acknowledge the force of the arguments which we have set out above, that it could be difficult to obtain a suitable President from within the ranks of the members of the States, although it may still at times be possible. If a member were appointed, the States might consider whether an additional member should be elected or appointed in his place. It may be preferable to look outside, to find a person of sufficient standing who would be willing to undertake a part-time post of this nature. Notwithstanding the difficulties which there might be in recruiting such a person, which were emphasised by several respondents, we are nevertheless hopeful that with the strong tradition of public service in Jersey it would still be feasible. We therefore favour the election by the States of their President, either from within the membership of the States or outside it."*

Option 1 – Appointing an existing member as Speaker

3. The option of electing an existing member is the most common method used in large jurisdictions around the world. Large parliaments are able to accommodate the 'loss' of a member from active political participation in parliamentary proceedings more easily, although the impact on a member's own future political career varies between different parliaments.

4. Speakers of parliament must set aside all party political allegiances during their term of office, and in the United Kingdom House of Commons it is accepted that the Speaker is unlikely to ever return to his or her political party role. In the UK the Speaker is not traditionally challenged by the main parties at the next election, and stands as 'The Speaker seeking re-election', although in May 2010 Speaker Bercow was challenged in Buckingham by Nigel Farage of UKIP and by former Tory MEP John Stevens, as well as 8 other candidates who were either independents or from minor parties.

5. The UK tradition can be compared with the position in Canada, where the Speaker of the House of Commons stands at the next election on his or her previous party ticket and participates actively in the election as a party member, being opposed by other party candidates in the usual way. In addition, the Canadians do not have the same tradition of seeing a Speaker as someone who will not return to mainstream politics with, for example, Claude Richmond MLA serving as Speaker of the British Columbia Legislative Assembly from 2001 to 2005 before then being appointed as Minister of Employment and Income Assistance.

6. The option of electing a current member as Speaker is the most common method used internationally, and common even in small parliaments. For example, in the Faroe Islands, which have a population of some 49,500, there are 33 members in the legislature (the Løgting) and one of these members is then elected as Speaker at the first meeting after the general election. Three other members are elected as Deputy Speakers and there is a facility for the Speaker to ask one of the Deputy Speakers to preside if the Speaker wishes to take part in any particular debate.

7. In the Canadian Northwest Territories, with a population of some 43,500, 19 members are elected from single-seat constituencies to the Legislative Assembly, and one of these members is elected as Speaker at the first meeting after each general election. The Legislative Assembly's website gives a helpful description of the Speaker's duties –

> *"The Speaker, elected by all Members, assumes the position of highest authority in the Legislative Assembly, and represents the Legislature in all its powers and proceedings. The duties of the office fall into three categories.*
>
> *First, the Speaker acts as a spokesperson of the Assembly in its relations with authorities outside the Legislature. Often, the Speaker officially welcomes visitors to the Legislative Assembly.*
>
> *Second, the Speaker presides over the sitting of the Assembly and enforces the rules, order and conduct of business. The Speaker controls debates in the Chamber and ensures that Members follow the rules and practices of the Legislative Assembly as they ask or answer questions, debate or vote. The key aspects of being Speaker are authority and impartiality. The Speaker does not take part in debates, ask or answer questions, or vote, except to present the Legislative Assembly's budget or to break a tie. All questions and statements during a formal sitting must be directed through the Speaker.*
>
> *Third, the Speaker is responsible for the daily administration of the Legislative Assembly. The many Legislative Assembly employees who provide services for the Members report to the Speaker. When the Speaker cannot be in the Legislative Assembly Chamber, the Deputy Speaker replaces him."*

8. In the Isle of Man, the 2 presiding officers are elected in different ways. The President of Tynwald who presides over meetings of Tynwald Court (the Legislative Council and the House of Keys meeting together) and over meetings of the Legislative Council is elected from the members of Tynwald at the last meeting before a General Election. The President elected, if a member of the House of Keys, does not stand in the election and then remains in office as President throughout the next electoral term. If the person chosen as President at this last meeting before the elections for the House of Keys is a member of the indirectly elected Legislative Council, he or she loses office as a Member of the Legislative Council immediately and it is necessary for a replacement MLC to be elected after the elections. Although this method has the advantage of enabling the President to become effectively a 'supernumerary' member of Tynwald and not affect the number of constituency representatives, it should be noted that it does have the disadvantage that the newly-elected members have no input into the identity of the President for their entire term of office.

9. The Speaker of the House of Keys (the directly elected Branch of Tynwald which has 24 members) is elected in the normal parliamentary way at the first meeting after the elections from among the 24 members of the House. Somewhat unusually, in order to ensure that the Speaker's constituents are not disenfranchised, the Speaker is able to vote at the end of each debate, and the records of the House show that current Speaker, Hon. Steven Rodan SHK, does so systematically. The Speaker is also the only member of the House of Keys who is able to abstain from voting in case he feels this is necessary to preserve his impartiality. As the House of Keys still has a casting vote for the Speaker, the ability to vote normally with other members in fact gives the Speaker 2 votes in the event of a tie, his original vote and, in the case of a tied vote, a casting vote. Because of the unusual tri-cameral system in the Isle of Man, the Speaker of the House of Keys is also able to play a full part as a normal elected member when sitting in Tynwald Court, and in this role he can ask questions, table motions and vote in the same way as every other member. The current Speaker is regarded as a very active politician in the Isle of Man.

10. It is only fair to recognise that, as identified in the Carswell report, there could be difficulties in identifying a suitable elected member willing to act as Speaker in Jersey. In the absence of any reform in the structure of the Assembly, a member who was the sole representative of a parish or electoral district may consider that his or her constituents would be disenfranchised if he or she was appointed as Speaker, although as noted above, this is the position in the Northwest Territory. Although it might be possible to allow the elected Speaker to vote at the end of debates as happens in the House of Keys, many would undoubtedly see this as inappropriate when compared to usual practice for a parliamentary Speaker, and it may be necessary for the elected Speaker to forego his or her right to vote. It is nevertheless not impossible that some members would be willing to serve as Speaker, particularly if they were under the present structure a representative from a parish or district that had several Deputies or elected as a Senator.

Option 2 – Appointing a person from outside the Assembly as Speaker

11. As indicated in the Carswell report and in the proposition of the Connétable of St. Helier, an alternative option is to appoint a Speaker from outside the Assembly.

12. This option is used in a number of other jurisdictions, for example Gibraltar, the Falkland Islands and some Caribbean parliaments. It is a particularly suitable option for relatively small jurisdictions.

13. The States of Alderney consists of 10 members and the President. The President is appointed using the same method that is used to appoint members of the States, at an ordinary presidential election. If a vacancy arises in the office of President, a presidential by-election is held within 3 months.

14. In the Falkland Islands, only 8 members are elected to the Legislative Assembly and a member of the community is elected as Speaker by the 8 MLAs. The current Speaker, Hon. Keith Biles JP, was first elected as Speaker in 2009 and he worked for a major international British bank for 25 years before arriving in the Falkland Islands in 1995 to take up the appointment as manager of the local branch of the bank. He retired from that position in 2002 and is active in many roles within the voluntary sector in the Islands.

15. Other small island communities such as Antigua and Barbuda, Grenada, Mauritius and the Cook Islands also have the option of electing a person who is not a member as Speaker. The system has the advantage of ensuring that no electors feel disenfranchised by the appointment of 'their' representative as Speaker, and it also enables the legislature to appoint someone who is not in any way seen to hold strong political views. PPC considers that, as suggested by Lord Carswell, there would be suitable members of the community to act as Speaker and they could, for example, be former members or officers of the States or people who were well respected in the community in Jersey.

Appointing an Elected Speaker

16. PPC considers that if members are minded to support the proposition of the Connétable of St. Helier, it would be possible for the options of either appointing an external Speaker or an internal Speaker to be available in Jersey. In practice the appointment of a Speaker could work as follows:

<u>Option A</u>

16.1 After a general election a given number of elected members, say 6, would be needed to nominate a candidate as Speaker. Those nominated could either be members of the States or persons who were not, with the only restriction being that any person from outside would need to meet the same requirements for qualification for office as an elected member. In order to allow all elected members time to consider the nominations, it would be appropriate to require several days' notice to be given (as happens at present in relation to the nomination of a Chief Minister).

16.2 At the first meeting of the Assembly after a general election, the first task of the new States, even before the appointment of the Chief Minister, would be to elect a Speaker from those nominated. In some parliaments this election is presided over by the 'Father of the House', and in others it is chaired by the Clerk and either option could easily be used in Jersey. Those nominated as Speaker could be invited to address the Assembly in relation to the manner in which they would seek to undertake their duties and there could be a short period of questions allowed. A ballot or ballots would then take place in the usual way to appoint the Speaker.

16.3 If the person appointed was a member of the Assembly, that person would have to set aside active political allegiances during his or her term of office, and as mentioned above this could impact on the number of members willing to put themselves forward for the position of Speaker. The Carswell report suggested that consideration could be given to electing or appointing an additional member to take the place of the member appointed as Speaker, but PPC does not believe this would be appropriate or necessary, as it would entail holding a by-election just after the normal general election. Most parliaments accept that a member elected as Speaker must take a break from normal political duties during his or her term of office, and filling the seat through a by-election could also jeopardize the Speaker's ability to seek re-election in the same seat at the following general election.

16.4 If a person who was not a member of the Assembly was appointed, that person would become an extra member of the Assembly and would be given the same legal protections as elected members throughout his or her term of office. The position would not need to be a full-time position and, although some small honorarium may be payable, PPC does not consider it would be necessary to pay the Speaker the same remuneration as elected members. As it unlikely that the Speaker would play any major civic role outside the Assembly, it would not be necessary for him or her to have any significant degree of administrative support other than that which will need to be provided by the States Greffe.

<u>Option B</u>

16.5 An alternative would be for the Speaker to be elected by the outgoing Assembly in the same way that the President of Tynwald in the Isle of Man is elected from the members of Tynwald at the last meeting before a General Election and then ceases to hold office (see paragraph 8). Under this model, at the last Sitting of the States Assembly before a General Election, the outgoing States Assembly would nominate, from among their number, candidates for the position of Speaker. Those nominated as Speaker would be invited to address the Assembly in relation to the manner in which they would seek to undertake their duties and there could be a short period of questions allowed. A ballot or ballots would then take place in the usual way to appoint the Speaker. The Speaker would be prevented from standing for election to the States Assembly in the subsequent General Election and would become a 'supernumerary' member of the States at the first meeting of the new Assembly.

17. Some have suggested that it would, as happens in other places, be necessary to appoint a Deputy Speaker as well to preside if the Speaker was not available. PPC is not convinced it would be necessary to appoint a permanent Deputy Speaker. It must be remembered that, unlike the present situation where the Bailiff has many other duties and, in addition, shares the presiding role with the Deputy Bailiff, an elected Speaker would be dedicated to this position and would need to give a commitment to be present when the States were meeting. It would be expected, for example, that the elected Speaker did not deliberately take holidays when the States were due to meet. There would, nevertheless, inevitably be occasions when the Speaker was unwell or unavoidably absent, but on these occasions it would simply be necessary for an elected member or the Greffier to preside as happens at present.

18. If the States adopt P.160/2013, there will be 2 steps to the subsequent law drafting process. The first will be to amend Article 2 of the States of Jersey Law 2005 to remove the Bailiff from the constitution of the States of Jersey and to substitute Article 3 as to the presidency of the States. It is feasible that an amending Law could be drafted for debate in July 2014. Standing Orders will also be required to be amended; however, the amendment to Standing Orders will only be able to be debated once the amendment to the States of Jersey Law has been sanctioned by the Privy Council. A possible timetable is as follows –

P.160/2013 adopted by the States	29th April 2014
Draft amendment to the States of Jersey Law 2005 lodged by PPC	2nd June 2014
Draft amendment to the States of Jersey Law 2005 debated by the States	14th July 2014
Work commences on draft amendments to Standing Orders	July 2014
Privy Council sanction obtained in respect of the draft amendment to the States of Jersey Law 2005	By December 2014
Draft amendments to Standing Orders debated by the States	9th December 2014
Bailiff retires and legislation brought into force	January 2015

SECTION 2 – LETTER FROM THE BAILIFF OF JERSEY TO THE CHAIRMAN OF PPC, DATED 25th JANUARY 2011

(IDENTICAL LETTER SENT TO THE CHIEF MINISTER)

Dear Chairman

Review of the roles of the Crown Officers

1. I refer to your letter of 17th December 2010 in which you have asked for my views on the recommendations contained in the Review of the Roles of the Crown Officers chaired by Lord Carswell ("the Review"). I am happy to do so and both the Deputy Bailiff and I would also welcome the opportunity of attending upon the Committee to elaborate upon these views and, perhaps more importantly, to have an opportunity to respond to any other points members of the Committee may wish to raise.

2. As the debate on the establishment of the Review Panel showed, the future role of the office of Bailiff – and indeed Attorney General – is a matter upon which differing political views may be expressed and therefore falls within the sort of topic upon which I would not normally express an opinion. However, it seems to me inevitable and indeed desirable that I should on this occasion express views on the recommendations of the Review. I say this for three reasons. First, you have asked for a contribution from me as has the Chief Minister. Secondly, it seems to me desirable that members should hear from the current holder of the office of Bailiff as to the potential implications of any change to the existing structure. Thirdly, as the Review states, the Bailiff has an important role to play in safeguarding the constitutional position of the Island. A change to the Bailiff's role will have an impact in this area and I therefore consider it proper for the Bailiff to express his views.

3. However, I naturally accept unreservedly that the decision is ultimately one entirely for the democratically elected members of the States and they will decide, having placed such weight as they think fit upon the views expressed in the Review, whether any change to the current position is desirable or not.

4. I made detailed written submissions to the Review and also attended to give oral evidence, as did the Deputy Bailiff. Our respective submissions and evidence can be found on the Review's website and accordingly I do not propose to repeat them. I confine myself to commentary upon the specific recommendations of the Review.

Recommendation 1

"That the Bailiff and Deputy Bailiff should continue to carry out judicial work in the Royal Court"

5. This recommendation is dealt with at paragraphs 5.3 – 5.5 of the Review. I fully agree with the recommendation. The Bailiff has been President of the Royal Court since the 13th century at the latest, well before the States emerged. Judicial work has formed the most significant part of his duties and, as the Review makes clear, the major part of the Bailiff's time is still spent on

such work. The role of the Bailiff is historically associated with the function of Chief Judge. As the Review states at paragraph 5.5, "There was a clear view, unanimous or practically so, among respondents that the Bailiff should continue to act as Chief Judge in the Royal Court. We consider that this is unquestionably correct".

Recommendations 2, 3 and 4

"***2.*** ***The Bailiff should cease to act as President of the States and the States should elect their own President, either from within or from without the ranks of their members.***

3. ***The Bailiff should continue to act and be recognised as the civic head of Jersey.***

4. ***The Bailiff should continue to be the guardian of the constitution and the conduit through which official correspondence passes. He should also receive copies of communications not forming part of the official correspondence which contain potential constitutional implications."***

6. I take these recommendations together because, as the Review suggests, they are closely interlinked and it is not really possible to consider one in isolation from the others. The Review recommends that the Bailiff should cease to preside in the States but should remain as civic head of the Island. I have to say that, whilst this may be a tempting compromise for some, I do not believe it is sustainable other than in the short term. I would summarise my reasons as follows:-

(i) The Review makes clear that a large number of respondents expressed the view that the Bailiff was the most appropriate and acceptable person to act as civic head of the Island in view of the long history and non-political nature of the office. The fact that the Bailiff would normally be in post for a reasonable length of time was also important. The Review went on to conclude (see para 5.25) that it would be of great value to the people of Jersey that the Bailiff should continue to carry out these duties, which give a focus to the public life of the Island. The Review clearly attaches importance to the Bailiff continuing as civic head.

(ii) The Review asserts that the Bailiff could continue to be civic head even if he ceased to be President of the States. The reasons in support of this conclusion are given in para 5.11.14. In effect there is only one reason given, namely a historical one; that the Bailiff's position of pre-eminence in the affairs of Jersey pre-dated his function as President of the States and that his function as President of the States derived from his pre-eminence.

(iii) This is true as a matter of history, but in modern times it is his position as President of the States which has underpinned his status as civic head of the Island. I know of no country or jurisdiction where a person who is merely the Chief Justice is the civic or ceremonial head of the country or jurisdiction. I accept that if, for example, the legislation enacting any reform provided in law for the Bailiff's position as civic head, this would underpin it for a while. However, I

do not believe that it would last for more than a few years. It would simply not be sustainable over the longer period. The Bailiff would become a remote figure unknown to members of the States because he would have no regular interaction with them. Nor would there be any good reason for him to be the person to receive visiting dignitaries such as royalty, ambassadors etc or for him and the members of the Royal Court, to lead important ceremonial occasions such as Liberation Day and Remembrance Sunday or to attend the many community and charitable events as an apolitical representative of the Island. It is his status as President of the States as well as his historical role which gives legitimacy to the performance of those functions. In my view, pressure would soon mount for such functions to be undertaken by the new elected President of the States.

(iv) Indeed, the Review has within it an inbuilt potential for conflict and misunderstanding because it envisages at para 5.11.13 that an elected President would undertake some of the public engagements which the Bailiff undertakes at present. One can readily envisage difficulties arising. Indeed, one would then have a situation where there were four people who would have to be considered in relation to ceremonial and public engagements (including charity and community matters), namely the Lieutenant Governor, the Bailiff, the President of the States and the Chief Minister. The potential for confusion, uncertainty and dispute as to who takes precedence or has responsibility for various occasions would be enormous and would prompt the pressure mentioned at the end of sub-para (iii).

(v) In short, whilst the Review says that it is important that the Bailiff should retain his position as civic head, its recommendation will in practice inevitably lead to in a comparatively short time to the loss of that position.

7. If members of the States are convinced that the Bailiff should no longer be President, I would accept that the recommendation of the Review (that he should cease to be President but remain as civic head) is preferable to an immediate change whereby the newly elected President of the States immediately becomes civic head. This is because it is difficult to foresee the consequences of such a sudden change and such matters are usually best dealt with by way of gradual evolution rather than sudden change. The interregnum would give time for mature reflection as to the exact nature of the role of civic head, whether it should all be performed by one person etc. However, for the reasons which I have given, members should not support the Review proposals in the expectation that, other than in the short term, the Bailiff can remain as civic head of the Island. It is inevitable that at some stage in the future, the new President of the States would become the civic head, which would be contrary to the recommendations of the Review and contrary to the views expressed by respondents to the Review.

8. Turning to recommendation 4, I agree that the Bailiff should continue to be the guardian of the constitution and the conduit through which official correspondence passes. The constitutional relationship between Jersey and the United Kingdom is unwritten and to some extent uncertain. It is based upon custom and practice over many centuries. It is therefore essential from the

point of view of preserving Jersey's constitutional autonomy that day to day practice is consistent with that autonomy. A decision taken by Jersey for short term advantage in relation to a particular matter may create a precedent which weakens Jersey's long term constitutional position. It is therefore of vital importance that the Chief Minister of the day is alerted to any possible implications for the constitutional relationship when a particular matter arises. He cannot rely on his civil servants for this as nowadays they tend to be appointed from the United Kingdom and are therefore unfamiliar with the subtleties of the constitutional relationship; and in any event, as non-lawyers, they would not be in a position to advise on the complexities of the constitutional relationship. As the review makes clear at para 5.26, the Bailiff is particularly well suited to provide advice on the constitutional relationship. He would usually have previously been Attorney General. He will be steeped in the nuances and subtleties of the constitutional relationship. I entirely support the conclusion of the Review that "*It is in our opinion of considerable importance that the Bailiff should continue to occupy this role.*"

9. The difficulty is that it is hard to see how this role could continue if the Bailiff were simply Chief Justice. The underpinning of his role in official correspondence is that he is President of the States. There is no logic in a mere Chief Justice being involved in this correspondence. Again therefore, it seems to me that, whilst this role could continue for a while under the Review proposals, it is inevitable that it will gradually wither in any event and will certainly come to an end if the Bailiff ceases to be civic head.

10. I do not think it appropriate to comment on all the reasoning of the Review in support of its recommendation that the Bailiff should cease to be President of the States. However, it may be helpful if I comment on two aspects.

(i) <u>Who would be the new President?</u>

11. It is easy to assert that the States can simply elect a President from among their number. However, careful thought needs to be given to the practicalities. Jersey is a small community with a small parliamentary body which will in future comprise (following the decision last week) a maximum of 49 members, possibly less if further reforms are implemented in due course. There is therefore a limited pool to choose from. Members tend to stand for election, quite naturally, because they feel strongly about political issues and wish to influence States policy to achieve the outcomes which they desire. This can be achieved by speaking and voting, by becoming a minister or assistant minister or by being on Scrutiny. They would not be able to achieve these objectives as President, as he must remain mute and impartial during debates. They would not therefore represent their constituents on these issues. Thus many members would simply not wish to become President. As to those who might wish to do so, many would not be well suited to the role. The States consists of strong minded individuals and presiding over it is not straightforward. Thus, while in a large parliamentary assembly, one might expect to find a member with the requisite skills who is also willing to take on the role, this will not necessarily be the case in a small assembly such as the States.

12. The election of a member who would otherwise have been a Minister or a leading member of Scrutiny would, I suggest, be a loss to the States and not in the Island's best interests. Conversely, the election as President of someone not well suited to the role would, I suggest, lead to a loss of authority of the Chair and an adverse impact on the conduct of the proceedings of the States.

13. An alternative would be for States Members to elect a non-member as President. If such a person had never previously been a member, there would be a steep learning curve and a lack of familiarity as to what was required of the office and what members expected. It would certainly place a much greater burden upon the Greffier and might well require the appointment of legal counsel to the President. An alternative would be to appoint a former member of the States as President. However he or she might well have considerable "political history" with the consequence that any decision which he or she made against a member who had previously opposed him or her might not be well received.

14. The problems canvassed under this heading become even more acute if one takes into account the need to have a Deputy President as well as a President. It is simply not practicable for one person to preside at all the meetings of the States and I know of no jurisdiction which does not have a Deputy President or Deputy Speaker to assist in carrying out these duties.

15. I accept of course that these concerns are not insurmountable and other small assemblies managed their affairs thus. Nevertheless, one has to pose the question as to whether any change would amount to an improvement. The Bailiff should be in a position to be an effective and impartial President. He will be a qualified lawyer and a judge. These attributes should equip him to rule on procedural matters and to preside with the required authority, dignity and impartiality.

16. The review acknowledges the difficulties of finding a suitable replacement for the Bailiff and is reduced to saying that it is "hopeful" that it would be feasible (see para 5.19). This language does not suggest great confidence on the part of the Review.

(ii) <u>European Convention on Human Rights</u>

17. One of the reasons given by some who propose the removal of the Bailiff from the States is that the mere existence of a judge as Presiding Officer amounts to a breach of the European Convention on Human Rights. The Review has authoritatively concluded that this is not so. The opinion of Mr Rabinder Singh QC (referred to in the Review) states quite clearly that there would be no breach of the ECHR if the status quo were to be maintained. It goes on to say that within the next ten years, counsel's opinion is that the present arrangements will come to be regarded as incompatible, but it is certainly unusual for a lawyer to predict how case law will develop in the future and it is hard to be see the basis upon which he reaches that view. Naturally, if it were to come about, Jersey would have to change at that stage. But it may not come about and it would seem preferable to do what is thought best for Jersey rather than do something which is thought to be second best on the off chance that the law might change in the future.

Recommendation 5

"The Bailiff should remain as President of the Licensing Assembly, unless an appeal is provided for"

18. I have no observation to make on this recommendation, with which I agree.

Recommendation 6

"The Bailiff should cease to be responsible for giving permission for public entertainments"

19. Successive Bailiffs have indicated that they would be happy to transfer responsibility for public entertainments to some other body. I repeated this comment in my submission to the Review. It is nowadays largely uncontroversial and, for my own part, I am happy to continue to undertake it until a replacement body is provided for but I agree with the recommendation.

Recommendation 7

"The requirement of Article 1(1) of the Crown Advocates (Jersey) Law 1987 of the Bailiff's approval to the appointment of Crown Advocates should be repealed."

20. I agree with this recommendation.

Appointment of Bailiff and Deputy Bailiff

Recommendation 12(a)

"The membership of the recommending panel for the appointment of the Bailiff and Deputy Bailiff should be augmented by the addition of two persons with substantial legal experience, one of whom should be from outside Jersey to be appointed by the Lieutenant Governor."

21. It seems to me that this is ultimately a matter for the Crown. However I believe it to be a very unsatisfactory recommendation. I would hope that, when the time for the next round of Crown Officer appointments takes place, I shall be able to say to the Ministry of Justice that the Council of Ministers and the Privileges and Procedures Committee are thoroughly opposed to the Review recommendation in this respect.

22. It removes power from the Insular authorities to the Lieutenant Governor. The position hitherto has been that recommendations for appointments to Bailiff and Deputy Bailiff have been made entirely from within the Island; thus those consulted, namely the Bailiff's Consultative Panel (representing the States), the Chief Minister, existing Crown Officers, members of the Judiciary and the senior members of the legal profession, have all been residents of the Island as has the recommending body itself (previously the Bailiff and now the Panel chaired by the Bailiff). The Lieutenant Governor has had no direct role to play, although he has undoubtedly reported to the Ministry of Justice (representing the Crown) as to the rigour of the process which has been

followed by the Insular authorities in making their recommendations. He is in a good position to give an objective assessment.

23. Now, for the first time, it is suggested that the Lieutenant Governor should nominate two out of the five members of the Panel and furthermore that one of these should be a non-resident of Jersey. This seems to me to be a highly undesirable dilution of the Island's autonomy and no good reason is given for it. It gives the Lieutenant Governor a role and influence which he has not had hitherto. We have only moved recently to a Panel making the recommendation rather than the Bailiff alone and I have not heard any criticism of the procedure followed by the Panel. On the contrary, it seems to me an ideal process. It involves the States and the Chief Minister to some degree (by way of consultation) but ensures that political considerations play no part in the appointments because States members are only consultees. The system is thus entirely consistent with good practice as laid down in the various international standards referred to in the Review. Furthermore, it is hard to see what a non-resident of the Island could bring to the process. It is those in the Island who would be familiar with the reputation and expertise of the candidates and it is the Island's Bailiff and Deputy Bailiff who are being chosen.

24. Indeed, it may well be that Lieutenant Governors themselves would not wish to undertake this role in that it would draw them more fully into the process and therefore possibly into matters of controversy. It is important for the office of Lieutenant Governor that it be seen as entirely 'above the fray'. The proposal would prevent the Lieutenant Governor giving the entirely objective assessment of the process which he can give under the present system.

Law Officers

25. I do not think it necessary to comment on recommendations 8 to 11 concerning the Law Officers save to say that I have been sent a copy of the joint memorandum of the Attorney General and Solicitor General dated 5th January 2011 expressing their view and I do not dissent from any of their observations.

26. I would however wish to comment on Recommendation 12(b), which recommends that the recommending panel for the appointment of the Law Officers should be augmented by the addition of two members of the States, to be appointed by the States and that, as a consequence, the Bailiff's Consultative Panel should no longer be consulted about the appointment of the Law Officers. I agree with the observations of the Law Officers in relation to this recommendation. Given that the Attorney General is responsible for prosecutions, it seems to me very important that his or her appointment should be free from political influence. There have been occasions in the last three years when some elected members have quite wrongly sought to politicise the prosecution process; so my objections are not merely theoretical. Placing two members of the States on a Panel of five runs contrary to the requirement that the appointment should be free from political influence. Conversely, consultation with the Bailiff's Consultative Panel not only avoids this difficulty (because it is only consultation) but the number of States members whose views can be sought is much wider than a mere two members. No good reason is given for the change in the Review. Again it is a matter for the Crown but I would invite the Council of Minister and PPC to agree formally

that there is no objection to the current system (which involves very wide consultation but maintains the decision as to whom to recommend in a non political forum) and that the proposed change is not acceptable.

Conclusion

27. By way of conclusion I would mention two additional matters:-

(i) The Deputy Bailiff has been fully consulted in relation to this letter and the views expressed herein are the views of both of us.

(ii) The Chief Minister has also written seeking my views on the recommendations contained in the Review and I am responding to him with an identical letter.

28. I hope that this letter is of assistance to the Committee and, as stated at paragraph 1, Deputy Bailiff and I would welcome the opportunity of attending upon the Committee to discuss the matter further.

Yours sincerely

Bailiff

SECTION 3 – PRESENTATION TO STATES MEMBERS BY LORD CARSWELL ON 27th MARCH 2014

Introduction

It is to me a great pleasure to return to Jersey, which has a very special place in my family's affections. We have visited the island on holiday every year for over 40 years, and I have got to know it fairly well. I visited more frequently over the period of rather over a year when I was concerned with the Review of the Roles of the Crown Officers, and met a large number of people concerned with the States and public affairs. It is a pleasure to renew acquaintance today with some of them. I shall be back once again on holiday next July, but I expect then to be rather more concerned with the state of the tides than the state of the nation.

The States are now going to revisit the issue of their presidency, as it seems an appropriate time in the light of the Bailiff's pending retirement. I have been asked by the PPC to give another presentation to the members of the States, something on the lines of the one I gave when we published the Panel's Report in December 2010, but focussing on the issue of the position of the Bailiff as President of the States.

Since I presented the Report in December 2010, the membership of the States has changed to some extent, some new members, and as it is some time since my earlier presentation other members may find a refresher helpful.

I propose to go through that portion of the Panel's Report which deals with that issue. I am not going to do so as advocate or enter into debate about our recommendations, though we were clear about our conclusions, believed then and continue to believe that they were correct and that we were right in putting them forward. I am going to set out the considerations either way and the arguments advanced, and specify our reasons for reaching our conclusions.

History of Review

In February 2009 the States accepted a proposition that an independent review be conducted into the roles of the Crown Officers. The formal terms of reference, adopted in May 2009, required the review to look into the current role of, inter alios, the Bailiff, with particular regard to his role as Chief Justice, President of the States and civic head of the island, taking into account

(1) the principles of modern, democratic and accountable governance and human rights,
(2) the nature of a small jurisdiction, the Island's traditions and heritage, the resources required, and the difficulties (if any) which have arisen in practice, and
(3) such other matters as the Panel may consider relevant.

The Panel members were appointed by the States in December 2009. They consisted of four Jersey residents, all local people of standing who had no connection with the work of the States. They were Mrs Marie-Louise Backhurst, Mr Geoffrey Crill, Dr Sandra Mountford and Advocate Ian Strang, with myself as Chairman. They all brought long experience of Jersey life and much perceptive good sense to the deliberations of the Panel. All the local members gave their services on an entirely voluntary basis and expended a great deal of time and effort on the work of the

Review. The Project Manager was William Millow, a Jersey civil servant, who carried out the support work with exemplary efficiency and economy and made an invaluable contribution to the Review.

The Panel set to work at once and during 2010 held a series of interviews with some 26 witnesses. The interviews were all transcribed and virtually all placed on the public website of the Review. We invited submissions from any interested person or body and received some 67 written submissions, which assisted us greatly and again virtually all were placed on the website. We held a public meeting in St Helier for all who might wish to attend, 26 people did and gave us their contributions.

The Panel members then reviewed all the material sent to them, together with much other documentation relevant to their task and prepared the Report, which was published in December 2010, precisely on time and well below budget. I am glad to say that the conclusions and recommendations in the Report were all unanimously agreed, without any dissents or reservations, so it is the report of us all. I emphasise that it is the report of all the members, not just of myself as chairman.

The people of Jersey are justly proud of their historic institutions, and have been very well served by a succession of distinguished Bailiffs (amongst whom the present holder of the office has a highly honoured place). The office has its roots deep in the history of the Bailiwick, and the health of its civic institutions owes much to the wise leadership of successive Bailiffs. We were very conscious from the written submissions received and the oral evidence given to the Review panel of the strength of feeling among many citizens of Jersey that the system has worked very satisfactorily, that it is part of the unique heritage of Jersey and that it is unnecessary to change it. We took full account of this feeling, which stems from a natural desire to preserve arrangements which have served Jersey well in the past and with which many people feel content. We were also conscious that to recommend changes which could upset the equilibrium of a stable society would be unfortunate and misguided, and for that reason we looked most carefully at any proposed change before recommending it.

To understand the almost unique position of the Bailiff it is helpful to look at the history of the office and its development. That was not deliberately created, as happens when a new written constitution is created, but came about over a long period of Jersey's history. I would not presume to give you a lesson in your own history, but a few signposts may help an understanding (all set out in Ch 3 of the Report). The Bailiff was originally a delegate of the monarch, and possibly before that of the Duke of Normandy. He was in effect put in charge of all the civil affairs of the island, to govern it in all those affairs. Under the 13th century Constitutions of King John the Bailiff and 12 Jurats administered justice in the Royal Court. The court could also make ordinances, ie legislation governing the island and its people. The Royal Court would consult the Connetables and Rectors, and in time this procedure evolved into the States, in which the Bailiff naturally presided. The composition of the States changed over the course of the centuries and they eventually became a fully legislative body, as opposed to a consultative one. Ever since the inception of the process the Bailiff has remained as the President of the States. The point of this brief survey is to illustrate the development from the complete omnipotence of the Bailiff to his present constitutional position, cf the monarch in the UK. The Panel consider that his position as civic head does not stem from his position as President. Quite the reverse, his position both as the President of the States and civic head is a linear descendant of his complete personal power over the island affairs, when he was in sole charge of everything. Naturally as the constitution evolved he as civic head took charge of the

legislation on which the Royal Court was advised by the Connetables and Rectors. He remains civic head, but he is no longer himself the pre-eminent legislative authority. His presidency of the States remains in our view as the vestigial part of his former absolute power. That and his position as guardian of the constitution and chief judge of the Royal Court stem from his previous position as the all-powerful civic head of Jersey. We think it important to understand this in considering his functions today and where we might go from here.

In our Report we looked at the time spent by the Bailiff on his judicial duties and his presidency of the States. On the figures given to us he sits in court on 70 to 100 days a year, typically 80-85. That is materially less than a full judicial load. Chief justices generally have to spend some time out of court on administrative and public duties, but even with these they as a rule sit for a substantial proportion of the normal full load. The Deputy Bailiff sits for about 100 days or a little more, and Commissioners sit for some 150-200 days between them. The Bailiff presides in the States on varying numbers of days per year, but the best estimate that we can make is that in a typical year he might sit on about 20-30 days. It is difficult to obtain a clear pattern of the number of sitting days of the States, which appeared to show a steady increase for some years and then a decrease, but you as members will be in the best position to judge the extent of the States' sittings and their pattern. Whatever the exact numbers, it is clearly quite a considerable commitment for the Bailiff. In order to accommodate this inevitably he has from time to time to adjourn part heard cases in the Royal Court, which is not regarded as a satisfactory judicial practice if it can be avoided. These are practical factors which have to be taken into account.

Several previous reports considered the position of the Bailiff as President of the States. In 1946 a committee of the Privy Council decided against recommending a change. The Royal Commission which reported in 1973 came to the same conclusion. But that was then: many things have changed and somewhat different views now prevail about such constitutional matters. In 2000 the Clothier Committee concluded that the role of the Bailiff should be modified and that he should no longer sit both as chief judge and as President of the States. They set out three reasons of principle for this conclusion:

- The first is that no one should hold or exercise political power or influence unless elected by the people so to do. It is impossible for the Bailiff to be entirely non-political so long as he remains also Speaker of the States. A Speaker is the servant of an assembly, not its master and can be removed from office if unsatisfactory. The Bailiff, appointed by the Queen's Letters Patent to a high and ancient office, should not hold a post subservient to the States.

- The second reason is that the principle of separation of powers rightly holds that no one who is involved in making the laws should also be involved judicially in a dispute based upon them.

- The third reason is that the Bailiff in his role as Speaker of the States, makes decisions about who may or may not be allowed to speak, or put questions in the States, or about the propriety of a member's conduct. Such decisions may well be challenged in the Royal Court on grounds of illegality but, of course, the Bailiff cannot sit to hear and determine those challenges to his own actions.

The States accepted other far-reaching changes recommended by Clothier, but not this one. There has been some criticism of the sufficiency of the reasons given in the Clothier report, but it did expand on them in a later passage. Conscious of this, we set out our reasons as fully as possible, so that members can give consideration to all the relevant points for and against our recommendation.

In Ch 5 of our Report we set out a series of reasons which had been advanced, those in favour of the change we proposed and those against. Rather than set them all out again, I shall try to group them into categories.

The reasons in favour fall into two main groups: the first is practical considerations:

- It is wasteful of his time and valuable legal skills for the Bailiff to spend large amounts of time sitting in the States.
- He should as chief judge be more available to carry out judicial work, especially hearing the most important and complex cases.
- It is unnecessary to have a person with the Bailiff's high legal ability to preside in the States.
- It leaves him at risk of involvement in political controversy.

The second group of reasons are based on constitutional principle:

- It is inconsistent with modern ideas of democracy. Such a practice is contrary to the Latimer House Principles and Bangalore Principles. In western democracies it is unique to Jersey and Guernsey.
- It is open to challenge on grounds based on the European Convention on Human Rights.

Those who oppose the change do not accept the validity of the reasons based on constitutional principle. They also point to a number of practical reasons in favour of keeping the status quo:

- The present system works satisfactorily. The Bailiff can if required delegate court work to the Deputy Bailiff and Commissioners, or sitting in the States to the Deputy Bailiff or the Greffier.
- The Bailiff has pre-eminent legal skills, and unique authority, both of which make him by far the best fitted person to preside in the States.
- Finding another suitable person to act as President would be difficult.
- There is not a great risk of a Convention challenge. Such risk as there is can be minimised by the Bailiff recusing himself from a case where the point might arise.
- The change would detract from his position as civic head of Jersey.

We set out our discussion of all of these reasons at some length, taking up some 20 pages of our Report, and I would urge members to read these carefully and weigh them up in their minds. What I propose to do now is to set out in fairly short compass the reasons which prevailed with us in reaching our conclusions, and attempt to put them into perspective, without attempting to repeat at length the contents of our Report.

The reasons based on principle assumed the most important place in our thinking. The separation of powers occupies a fundamental position in modern constitutional theory. The independence of the judiciary from the legislature and the government of the jurisdiction is a necessary guarantee of impartiality, in that it provides freedom from political pressure and judges' detachment from the political process removes a possible source of influence in their decisions. It is universally accepted that those exercising judicial functions should not have been concerned in making the laws which they have to apply and enforce. The reason is that if a judge has been concerned in lawmaking, there is a risk, or a perceived risk, that his interpretation of statutes may be influenced by his understanding of the meaning of their provisions as they went through the legislature. This principle is widely accepted throughout the Commonwealth, and is enshrined in constitutional documents which have been accepted by Commonwealth bodies as correct. The Latimer House principles are a set of principles and guidelines adopted and agreed in 2003 at a meeting of Commonwealth Heads of Government. The Bangalore Principles of Judicial Conduct were adopted in 2002 by a group of senior Commonwealth judges after wide consultation with common law and civil law judges, and approved in 2006 by the UN Commission on Human Rights. It is clear from these documents, and from the benchmarks for democratic legislatures drawn up by the Commonwealth Parliamentary Association in 2006, that members of the judiciary should not be members of the legislature. In this respect Jersey and Guernsey are the odd men out of the western world. Previous reports pointed to the position of the Lord Chancellor in the UK as being equally anomalous, but that has been changed since 2005 and he no longer sits in any judicial capacity. Similarly, the Seneschal of Sark no longer presides in their legislative body the Chief Pleas. We were informed that people unfamiliar with the historical development of Jersey and Guernsey who are told about the Bailiff's dual role regularly express surprise, and it may be said that In this respect Jersey fails to present to the wider world the image of a modern democratic state.

We felt that the duality of the Bailiff's role creates some risk of bringing him into political controversy, which as a judge he should avoid. There are a couple of ways in which this could occur. First, if the States decided to limit debate in order to improve procedure, the Bailiff as President would necessarily be involved in the exercise of discretion in making decisions, which may possibly be controversial. Secondly, he is not in a position to play an active role in determining the procedures and working of the States Assembly, which is commonly done by presiding officers of other legislatures. An elected President would be able to take a more proactive part in this. Moreover, at present, if the Bailiff in his judicial capacity makes any criticism of the executive, it may possibly be seen as political and inconsistent with his position as President of the States. If he ceased to be President, he would be able to make such criticisms as he thought justified without such a consequence.

These considerations we thought sufficiently compelling to bring us to the conclusion which we reached, but there is another factor which could prove extremely significant and was much discussed by respondents to the Review. We think it important that it should be taken into account. That is the possibility that decisions of the Bailiff (in which we include the Deputy Bailiff) might be held invalid as being in breach of Article 6(1) of the European Convention on Human Rights, which requires for everyone "a fair and public hearing … by an independent and impartial tribunal."

The concept of a perceived risk is of importance in determining this issue. Even though a judge may not have been in fact influenced by any personal bias – commonly termed subjective bias – it may be perceived by reasonable people that he may have

been influenced by extraneous factors. That is commonly termed objective bias, and its existence has been the ground for setting aside many decisions. We of course presume that the Bailiff will be free of subjective bias in reaching his decisions, but the issue on which we must focus is whether it might reasonably be thought that objective bias is established by reason of his membership and Presidency of the States. If that were so, it could be held that his decisions in some cases were in breach of Article 6 of the Convention.

We considered the relevant case-law and felt that the issue was significant and that expert opinion was required about the extent of the risk. We obtained an opinion from Mr Rabinder Singh QC, leading counsel in London with considerable experience (now a judge). The full text is on the Review website. He summarised his conclusions as follows:

> "(1) On the current state of the authorities, in principle there would be no breach of Article 6 of the European Convention on Human Rights if the status quo were to be maintained.
>
> (2) However, the international trend suggests that the law will change in due course. Within the next 10 years, my view is that the present arrangements will come to be regarded as incompatible with the concept of judicial independence as embodied in Article 6, in particular because the Bailiff and his deputy are both judges and presiding members of the legislature."

In our view this conclusion provided an additional reason why the Bailiff should cease to be President of the States. If a challenge were brought now, it might not succeed, though the climate of judicial opinion is such that I myself fear that the risk is real and present. The Bailiff is no doubt likely to adopt the practice of recusing himself from sitting in any case where he has presided in the States during the passage of any legislation whose interpretation or application is in issue. The difficulty in putting this practice into effect is that it is not always apparent at the outset of a hearing that a particular piece of legislation will become material in this way. Moreover, it is not regarded as desirable that a judge should have to concern himself on a regular basis with the question of recusing himself. I fear that in the foreseeable future a successful challenge could be mounted. We do not think that it would be good for Jersey's international reputation if it had to make the change reluctantly after litigation, which could be protracted and expensive and in which strident attacks could be very publicly made on Jersey's institutions. Whereas if the States made a change now they could retain control of the process and remove the risk of having a change imposed on them.

Actions have consequences and you will want to consider carefully what results will follow if you adopt the proposal. We have done so ourselves, and formed our considered opinion after a good deal of thought and discussion.

There are certain clear practical advantages. First, the Bailiff would be able to spend much more time on his judicial duties. Litigation is growing ever more demanding and complex and the Jersey courts have to decide a substantial amount of important cases for which the Bailiff would be available to devote his attention and apply his legal skills. He would not have to delegate so many cases and the necessity for adjournments and recusing himself would tend to disappear. If there are long and complex cases of an important nature the Bailiff would be available to hear them without interruption, an important function of a chief justice.

Secondly, an elected President would be able to undertake public engagements and other duties appropriate to his office, which the Bailiff is not always available to carry out because of his workload or which he currently fulfils by taking time away from his judicial duties.

Thirdly, the Bailiff would be freed from the risk of political controversy. The States would be able to make changes to their procedure which might involve the President in making rulings. The President would be able to do this without having to feel concern lest that involve him in possible political controversy which a judge would have to avoid.

I should mention at this point the question of the cost of a change. We made a very tentative estimate in our Report of a minimum of £31,000 to £33,000 pa, but freely acknowledged that it could be higher. As a "ballpark" figure that might give you the sort of level which you might contemplate.

Two major issues remain, both of which have figured largely in representations and in comments made subsequent to publication of our Report. The first is whether it would be readily possible to find a suitable person to act as President of the States. I may say at this stage that while we acknowledged that the Bailiff has pre-eminent legal skills and authority when presiding, we did not consider that it was essential for a President to possess such a high degree of skills in order to be able to preside effectively. Many legislative assemblies have presiding officers who are not in the same league as the Bailiff as lawyers or constitutional experts, but are able to carry out their duties satisfactorily, with the assistance of experienced parliamentary clerks when they need to turn to them. We acknowledge that it could be difficult to obtain a suitable President from within the ranks of the members of the States, although it may still at times be possible. If a member were appointed, the States might consider whether an additional member should be elected or appointed in his place. It may be preferable to look outside, to find a person of sufficient standing who would be willing to undertake a part-time post of this nature. Notwithstanding the difficulties which there might be in recruiting such a person, which were emphasised by several respondents, we are nevertheless hopeful that with the strong tradition of public service in Jersey it would still be feasible.

The second issue is the position of the Bailiff as civic head and whether he could retain it if he ceased to be President of the States. To a large extent the contrary argument depends on the premise that his civic headship stems from that Presidency, but we regard that as quite mistaken. You will have to decide from your own close knowledge of Jersey and its affairs whether his status would be so diminished if he ceased to be President of the States that he could no longer be regarded as civic head. We as members of the Review Panel, all but myself residents of Jersey, concluded that he could. He has the position of Bailiff, to which considerable power and prestige have long been attached. One has to ask whether removal of one part of his many functions, even so important a part, would diminish his standing to that degree. We did not think so, but the Bailiff in his letter to the PPC thought that it would, and he has publicly expressed the same opinion. In that letter he placed considerable importance on his status as President of the States rather than his historical role as giving legitimacy to the performance of his functions as civic head. The Bailiff's views must naturally carry great weight, but I would only point out that they are not conclusive. You can and will form your own views on this and other issues and it is ultimately

your decision. You may also reach the conclusion that even if the Bailiff cannot retain the civic headship it is still necessary to make the change we propose.

We also took the view, which we set out in some detail, that the Bailiff should continue to be the guardian of the constitution and to be the conduit through which official correspondence passes. I need not go into the details of this argument, but our view was that he has unique knowledge and experience of Jersey's constitutional affairs and that he should continue to be in a position where he can bring his experience and judgment to bear on matters which may have a constitutional implication.

The members of the panel are conscious of the high quality of service given to Jersey by generations of Crown Officers and the esteem in which they are held. That has led many respondents to urge upon us that the institutions should not be changed. We did not dismiss that view, but understood the feeling and brought it into account. It is necessary nevertheless to take account of the developments in the democratic world of the 21st century. Jersey occupies an increasingly important part in that world and its institutions are the subject of scrutiny from outside as they never were before. It has committed itself to best practice in areas of regulation and good governance, a factor which we have borne in mind in considering our recommendations.

It might be said that the Jersey institutions have functioned satisfactorily more because of the way in which those who occupied the posts have carried out their duties than because of the inherent suitability to the modern age of the institutions themselves. One could say that the quality of their work masked the problems of principle that were there. There has been a definite current of opinion that the present situation is in some respects inconsistent with modern ideas of democracy and that the roles of the several Crown Officers should be amended. Jersey is a maturing and developing society which has seen substantial change in recent years, matching the development of its significant international personality. In many ways it punches above its international weight. With that, however, come greater international scrutiny and challenge, and it is therefore important that the Island's core institutions are able to withstand such scrutiny, to show themselves to be in keeping with established principles of democracy and good governance. Our examination of the issues and the evidence put before us brought us to the conclusion that some further change in the institutions is required if Jersey is to maintain its position.

So we place these matters before for your consideration and decision, your function as members of the States. Whatever conclusion you reach, may I suggest that you keep in mind the quotation from Thomas Jefferson which we placed at the beginning of our Report:

"I am not an advocate for frequent changes in laws and constitutions, but laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times."

The members of the Panel send their best wishes to you in your deliberations.

SECTION 4 – OPINION OF MR. RABINDER SINGH, Q.C.

Introduction and Summary of Advice

1. I am asked to advise the Independent Review Panel (chaired by Lord Carswell) which has been established by the States of Jersey, by resolution dated 4 February 2009, to examine the roles of the Crown Officers (in particular the Bailiff and Deputy Bailiff).

2. For the reasons set out below, my opinion is that:

   (1) On the current state of the authorities, in principle there would be no breach of Article 6 of the European Convention on Human Rights ("ECHR") if the status quo were to be maintained.

   (2) However, the international trend suggests that the law will change in due course. Within the next 10 years, my view is that the present arrangements will come to be regarded as incompatible with the concept of judicial independence as embodied in Article 6, in particular because the Bailiff and his deputy are both judges and presiding members of the legislature.

Background

3. There has been interest in the possible reform of the roles of the Crown Officers in Jersey for some time. The Royal Commissioners of 1861, the Privy Council Committee of 1946 and the Royal Commission on the Constitution in 1973 all recommended no change in the roles of the Bailiff. In 1999 the States appointed a committee chaired by Sir Cecil Clothier, K.C.B., Q.C., whose report in December 2000 recommended fundamental changes to the governance of Jersey, many of which were accepted and implemented by the States of Jersey Law 2005. However, one important recommendation was not accepted. This was that the Bailiff should cease to act as the president of the States or to take any political part in the governance of Jersey: see chapter 8 of the Clothier Report. The only change made to the role of the Bailiff in the States was the removal of his casting vote.

4. The office of Bailiff has its origins in the 13th Century, when the Bailiff, appointed by the Monarch, became responsible for the civil administration of Jersey. In due course, there developed both the Royal Court and the States of Jersey to assist the Bailiff. The three present roles of the Bailiff are: (i) to act as Chief Judge of the Royal Court; (ii) to act as President of the States of Jersey; and (iii) to act as civic head of Jersey.

5. In his capacity as Chief Judge, the Bailiff sits in both criminal and civil cases and on occasion presides in the Court of Appeal. In addition, as Chief Judge, he carries out a number of administrative duties, of a kind which are appropriate for a chief justice.

6. The Bailiff and his deputy are non-voting members of the States of Jersey. The casting vote was abolished by the law enacted in 2005. However, it should be noted that that law confirmed that the presidency of the States is to be held by the Bailiff. The former Bailiff, Sir Philip Bailhache, has estimated

that approximately two-thirds of his time was spent in his role as Chief Judge and on related administrative duties, and one-third was spent in the States.

7. When acting as President of the States, the Bailiff's role is to act as an impartial speaker, ensuring in particular that Standing Orders are observed.

Material treaty and legislative provisions

8. Although Jersey is not part of the United Kingdom, it is not a state for the purposes of international law. The UK is responsible for the conduct of international relations and in particular is responsible for the compliance by Jersey with the UK's obligations under the ECHR.

9. The Human Rights (Jersey) Law 2000 gives effect in Jersey to the main provisions of the ECHR in a manner which is similar to the UK's Human Rights Act 1998.

10. Article 6(1) of the ECHR, so far as material, provides that:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing … by an independent and impartial tribunal …"

ECHR jurisprudence

11. The principal authority in the jurisprudence of the European Court of Human Rights is *McGonnell v United Kingdom* (2000) 30 EHRR 289. That case concerned the Bailiff of Guernsey, whose functions were similar to those of the Bailiff of Jersey. The applicant in that case had his judicial proceedings concerning planning matters determined by the Bailiff.

12. The European Commission of Human Rights, which has since been abolished, decided by a majority of 25 to 5 that there had been a violation of Article 6(1) ECHR. It did so on a broad basis. At paras. 60–61 of its Opinion the Commission stated that:

> "[60] The Commission notes the plethora of important positions held by the Bailiff in Guernsey. The Bailiff presides over the States of Election, (where he has a casting vote), the States of Deliberation, (the Island legislature, where he also has a casting vote), the Royal Court and the Court of Appeal. He is also the head of the administration of the Island and presides over four States Committees including the Appointments Board, the Legislation Committee (which deals with the drafting of legislation), and the Rules of Procedure Committee. The Commission also notes that the Jurats, who decide the cases before the Royal Court, are appointed by the States of Election and that the Bailiff is the President of the States of Election and has a casting vote in the event of an equality of votes. The Commission further notes that no appeal lay against the decision of the IDC [Island Development Committee] beyond that of the Royal Court and

that therefore the Royal Court was the final – and, indeed, the sole – court of the applicant's case.

[61] The position in the present case was therefore that when the applicant appeared before the Royal Court on 6 June 1995, the principal judicial officer who sat on his case, the Bailiff, was not only a senior member of the judiciary of the Island, but was also a senior member of the legislature – as President of the States of Deliberation – and, in addition, a senior member of the executive – as titular head of the administration presiding over a number of important committees. It is true, as the Government points out, that the Bailiff's other functions did not directly impinge on his judicial duties in the case and that the Bailiff spends most of his time in judicial functions, but the Commission considers that it is incompatible with the requisite appearances of independence and impartiality for a judge to have legislative and executive functions as substantial as those in the present case. The Commission finds, taking into account the Bailiff's roles in the administration of Guernsey, that the fact that he has executive and legislative functions means that his independence and impartiality are capable of appearing open to doubt."

13. A short Concurring Opinion was given by Mr. Nicolas Bratza, as he then was. He made it clear that his concurring view was confined to cases where the Bailiff sits in judicial proceedings which relate to acts or decisions of the executive; and that different considerations would apply in cases where he sat in disputes between private parties, "in which there was no lack of the requisite appearance of independence."

14. When the case went to the European Court of Human Rights, that Court too found there had been a violation of Article 6(1) ECHR but did so on a narrower ground than the Commission. At para. 47 of its Judgment, the Court noted the Government's submission that the Convention does not require compliance with any particular doctrine of the separation of powers. At para. 51 the Court then stated that:

> "The Court can agree with the Government that neither Article 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts as such. The question is always whether, in a given case, the requirements of the Convention are met. The present case does not, therefore, require the application of any particular doctrine of constitutional law to the position in Guernsey: the Court is faced solely with questions of whether the Bailiff had the required 'appearance' of independence, or the required 'objective' impartiality."

15. The Court then considered the particular facts of the case before it and noted at para. 53 that the Bailiff had had personal involvement in the applicant's case on two separate occasions, once as Deputy Bailiff in 1990, when he presided over the States of Deliberation when it adopted DDP6 (Detailed Development Plan 6); and the second when he presided over the Royal Court

in judicial proceedings flowing from the applicant's planning appeal. At para. 57 the Court expressed the basis for its conclusion as follows:

> "The Court thus considers that the mere fact that the Deputy Bailiff presided over the States of Deliberation when DDP6 was adopted in 1990 is capable of casting doubt on his impartiality when he subsequently determined, as the sole judge of the law in the case, the applicant's planning appeal. The applicant therefore had legitimate grounds for fearing that the Bailiff may have been influenced by his prior participation in the adoption of DDP6. That doubt in itself, however slight its justification, is sufficient to vitiate the impartiality of the Royal Court, and it is therefore unnecessary for the Court to look into the other aspects of the complaint."

16. It will be noted that, in effect, the reasoning of the Court treated the requirement of independence in Article 6 ECHR as being the same as the requirement of (objective) impartiality. It was the fact that the Bailiff had previously had a personal involvement in the matter when acting as President of the States of Deliberation which led to a legitimate doubt about his objective impartiality in the particular case before him. The Court was not concerned, as the Commission had been, with more abstract concerns about whether a judge should be a member of the legislature and executive.

17. In this case Sir John Laws sat as an *ad hoc* member of the Court and gave a short Concurring Opinion. He emphasised that "the only basis upon which, on the facts of this case, a violation of Article 6(1) may properly be found depends … entirely upon the fact that the Bailiff who presided over the Royal Court in the legal proceedings giving rise to this case presided also (as Deputy Bailiff) over the States of Deliberation in 1990 when DDP6 was adopted." He went on to say that:

> "If it were thought arguable that a violation might be shown on any wider basis, having regard to the Bailiff's multiple roles, I would express my firm dissent from any such view. Where there is no question of actual bias, our task under Article 6(1) must be to determine whether the reasonable bystander – a fully informed layman who has no axe to grind – would on objective grounds fear that the Royal Court lacks independence and impartiality. I am clear that but for the coincidence of the Bailiff's presidency over the States in 1990, and over the Royal Court in 1995, there are no such objective grounds whatsoever."

18. Again, it will be seen that Sir John Laws in effect treated the requirement of independence in Article 6(1) as being the same as the requirement of objective impartiality and not as requiring any separation in principle from the legislature or executive.

19. In the light of the Court's judgment the Royal Court in Guernsey adopted a Practice Direction in 2001 with the effect that the Bailiff was no longer the president or a member of three committees of the States: the Appointments Board, the Legislation Committee and the Rules of Procedure Committee. In addition, it was made clear that at the beginning of administrative proceedings in the Royal Court counsel would have to raise any objection to the presiding

judge sitting in that particular case and the grounds for such objection. The judge would also inform the parties in writing before the hearing of any previous involvement by him in issues to be considered by the court.

20. The Committee of Ministers of the Council of Europe, which has the function of supervising the implementation of judgments of the Court of Human Rights, was informed of these developments; and by resolution ResDH(2001) 120 dated 8 February 2000 decided that this information was sufficient to comply with the judgment in *McGonnell* and constituted measures taken "preventing new violations of the same kind."

21. The Court's approach in *McGonnell* was followed in the later case of *Pabla KY v Finland* (2006) 42 EHRR 688. At para. 28 of its Judgment the Court again emphasised that the concepts of independence and objective impartiality are closely linked. At para. 29 the Court observed that, although the notion of separation of powers between the political organs of government and the judiciary has assumed growing importance in the Court's case law, "neither Article 6 nor any other provision in the Convention requires States to comply with any theoretical constitutional concepts regarding the permissible limits of the powers' interaction." The facts of *Pabla KY* concerned an expert member of the Court of Appeal who was also a member of parliament in Finland. The Court did not consider that the political affiliation of the MP in question had had any bearing on the case before him. Nor had the MP had any prior involvement in respect of the legislation in issue. At para. 34, therefore, the Court concluded that:

> "unlike the situation examined by it in the cases of *Procola v Luxembourg* … and *McGonnell v UK* … [the MP] had not exercised any prior legislative, executive or advisory function in respect of the subject-matter or legal issues before the Court of Appeal for decision in the applicant's appeal. The judicial proceedings therefore cannot be regarded as involving 'the same case' or 'the same decision' in the sense which was found to infringe Article 6(1) in the two judgments cited above. The Court is not persuaded that the mere fact that the MP was a member of the legislature at the time when he sat on the applicant's appeal is sufficient to raise doubts as to the independence and impartiality of the Court of Appeal. While the applicant relies on the theory of separation of powers, this principle is not decisive in the abstract."

Domestic jurisprudence

22. The above European jurisprudence has been applied in the domestic legal context. In *Davidson v Scottish Ministers* [2004] UKHL 34, the particular facts raised the question whether a judge had been apparently biased (on the objective test) in circumstances where he had previously been Lord Advocate and had spoken about proposed legislation which was in issue before him in court. The House held that on the facts there had been apparent bias. Of particular interest for present purposes is the following statement by Lord Hope of Craighead, at para 53:

> "Applied to our own constitutional arrangements, *Pabla KY v Finland* teaches us that there is no fundamental objection to members of either House of Parliament serving, while still members of the House, as members of a court. Arguments based on the theory of the separation of powers alone will not suffice. It all depends on what they say and do in Parliament and how that relates to the issue which they have to decide as members of that tribunal. … the objection has to be justified on the facts of the case, not by relying on a theoretical principle. There must be a sufficiently close relationship between the previous words or conduct and the issue which was before the tribunal to justify the conclusion that when it came to decide that issue the tribunal was not impartial or, as the common law puts it, that there was a real possibility that it was biased …"

23. Again, it will be seen that the way Lord Hope expresses the principle in a way which treats the requirement of independence as being in effect the same as the requirement of objective impartiality and not a matter of theoretical constitutional doctrine.

24. There are indications, however, that the requirements of independence and impartiality are not necessarily the same. In *Starrs v Ruxton* 2000 JC 208, at 232, Lord Prosser, considering the position of temporary sheriffs in the administration of criminal justice in Scotland, observed that:

> "I am inclined to see independence – the need for a judge not to be dependent on others – as an additional substantive requirement, rather than simply a means of achieving impartiality or a perception of impartiality. Independence will guarantee not only that the judge is disinterested in relation to the parties and the cause, but also that in fulfilling his judicial function, generally as well as in individual cases, he is and can be seen to be free of links with others (whether it is the executive, or indeed the judiciary, or in outside life) which might, or might be thought to, affect his assessment of the matters entrusted to him."

25. This passage was cited with approval by Pill LJ in the English Court of Appeal in *R (Barclay) v Lord Chancellor* [2009] 2 WLR 1205 (that case went to the House of Lords but not on this issue).

26. In that case the Court of Appeal held that the position of the Seneschal of Sark was materially different from that of others whose positions had been considered in cases such as *Pabla KY* and that he did not comply with the requirement of independence in Article 6. However, that case does not, in my view, assist in relation to the position in Jersey, as the Seneschal is not legally qualified and the decision turned on the very particular nature of the various roles played by the Seneschal in Sark: see paras. 52–69 in the judgment of Pill LJ. Again, at para. 67, Pill was at pains to stress that there is no requirement in law for "slavish adherence to an abstract notion of separation of powers".

Discussion

27. In the light of the above authorities, it is clear, in my view, that the present state of the law does not require a fundamental alteration to the roles of the Bailiff in Jersey. On the present state of the authorities, the broad basis for the conclusion in *McGonnell* which found favour with the Commission did not find favour with the Court (as the Concurring Opinion of Sir John Laws in particular made clear). The narrower reasoning of the Court has subsequently been applied by the European Court in *Pabla KY* and by the domestic courts in cases such as *Davidson*.

28. On the present state of the authorities, therefore, there can be no objection in principle to the Bailiff having the role of both chief judge and president of the States of Jersey. Whether there is a breach of Article 6 ECHR will depend on a close analysis of the particular facts of a given case, including what (if any) role the Bailiff played in relation to legislation that may be in issue in judicial proceedings before him. In effect, as I have said earlier, the principal authorities appear to treat the requirement of independence as being the same as the requirement of objective impartiality.

29. However, it is also my view that the present Review offers the opportunity to take a longer-term view, even though the current state of the authorities does not require it. In my view, there are indications that the requirement of independence is in truth a separate and additional requirement to that of impartiality. This is for the following reasons.

30. First, the text of Article 6 ECHR itself requires both independence and impartiality.

31. Secondly, the passage I have cited from *Starrs* above contains the important insight by Lord Prosser that the requirement of independence means something more than the requirement that a judge should be disinterested in relation to the parties and the cause before him.

32. Thirdly, the authorities to date appear not to have considered the impact of emerging international thinking on this question, in particular the Bangalore Principles of Judicial Conduct 2002, which were approved on 29 April 2003 by the UN Commission on Human Rights. At the time that *McGonnell* was decided, of course, this statement of international opinion was not available. The Bangalore Principles make it clear that the value of judicial independence (called in that declaration value 1) is separate from and additional to the value of impartiality (called value 2). The principle of independence is defined as follows: "Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence *in both its individual and institutional aspects*." (Emphasis added) Principle 1.3 then sets out a specific application of this principle as follows: "A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom." (This does beg the question of what are "inappropriate" connections with the legislature but it is doubtful whether membership of the legislature would be regarded as an appropriate connection.)

33. The Bangalore Principles then have as value 4 the principle of propriety. Principle 4.11.3 is of some interest in the present context and states that a judge may "serve as a member of an official body, or other government commission, committee or advisory body, if such membership is not inconsistent with the perceived impartiality and political neutrality of a judge." This would clearly permit, for example, membership of a law reform body but it is unlikely, in my view, to permit membership of the legislature, which is not expressly mentioned in this context.

34. Fourthly, the trend in the UK appears to support the view expressed in chapter 8 of the Clothier Report, which may in due course come to be accepted as reflecting modern sensibilities. As recently as 2000 the Lord Chancellor was the head of the judiciary in England and Wales, sat as a judge in the Appellate Committee of the House of Lords and made judicial appointments. Since then, partly as a consequence of the Constitutional Reform Act 2005, the Lord Chancellor has been replaced as head of the judiciary by the Lord Chief justice; no longer sits as a judge and makes appointments on the recommendation of the Judicial Appointments Commission. Moreover, the Law Lords have been removed from the legislature by the Constitutional Reform Act 2005 and are now Justices of the Supreme Court. Even though there was no ground to fear that they were behaving inappropriately as members of the House of Lords, public policy has moved away from having judges as members of the legislature and there is now a clearer separation of powers in the UK than there was just 10 years ago.

35. If the issue were to be litigated again in the European Court of Human Rights, in another 10 years time, I consider that the reasoning of the Commission in *McGonnell* might well find favour with the Court. The Court does not have a strict doctrine of precedent and often departs from its own decisions or its own reasoning, in particular to keep up with changing social norms, as the Convention is a "living instrument."

Conclusion

36. For the reasons set out above, my opinion is that there is no reason in law why the present constitutional arrangements in respect of the Bailiff should be altered. However, the trend suggests that the tide of history is in favour of reform and that the legal position will be different in 10 years time.

37. If I can be of further assistance, those instructing me should not hesitate to contact me again.

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