

# Foreshore Encroachment Policy Review

Environment, Housing and  
Infrastructure Scrutiny Panel

14th January 2021

S.R.1/2021



States of Jersey  
States Assembly



États de Jersey  
Assemblée des États



# Contents

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<b>Chair’s Foreword</b> .....	1
<b>Executive Summary</b> .....	2
<b>Key Findings</b> .....	6
<b>Recommendations</b> .....	8
<b>1 Introduction</b> .....	9
Foreshore: Policy for Alleged Encroachment Payments [P.101/2020].....	9
Encroachments on the Foreshore: revised policy [P.111/2020] .....	9
Encroachments on the Foreshore: revised policy [P.111/2020]: Amendment .....	10
Rationale for a review of the revised policy .....	11
Review methodology .....	12
<b>2 History of the ownership of the foreshore</b> .....	12
The foreshore and its boundary.....	12
Ownership of the Foreshore .....	14
Alleged encroachments of the Foreshore.....	16
<b>3 Landside Boundary Review: Establishing the Foreshore Boundary</b> .....	18
<b>4 Current encroachments: impact on sea defences</b> .....	22
<b>5 Encroachments and compensation payments</b> .....	26
<b>6 Current foreshore policy vs. revised policy</b> .....	32
The Revised Policy – fair, proportionate and fit for purpose?.....	32
Distinction between deliberate or unintentional encroachments .....	38
The Sliding Scale.....	38
Treating each case on its own merit .....	39
Impact on property transactions due to revised policy development .....	40
Complaints and Appeals Process .....	41
<b>7 Conclusion</b> .....	43
<b>Appendix 1</b> .....	45

# Chair's Foreword

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The need for my panel's review has been stimulated by disquiet amongst all those who have a part to play in managing and indeed living adjacent to Jersey's newly gained foreshore.

It has been suggested by some that property owners have exploited the public of the island by developing their properties beyond the boundaries to which they have contractual right, whereas they might suggest it is as a result of a lack of clarity in the definition of the foreshore and in particular the High Water Mark.

A contributing factor in determining this elusive foreshore is the extraordinary tidal range we experience, added to by variations dictated by weather and atmospheric pressure. So we find ourselves in a juxtaposition whereby it's position is largely defined by nature but we have hard commercial considerations such as land and property values to consider.

There is clearly a need for a policy to which property owners and their legal advisors can refer and those with responsibility for sea defences can derive some certainty.

Discussions have been protracted since the foreshore was gifted to the people of the Jersey by the Crown in 2015 and my hope is that this review will contribute in some way to resolving the unsatisfactory situation which currently prevails.

A handwritten signature in blue ink that reads "M Jackson". The signature is written in a cursive, flowing style.

**Connétable Mike Jackson**  
**Chair**  
**Environment, Housing and Infrastructure Scrutiny Panel**

# Executive Summary

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In 2015, the foreshore was gifted from the Crown (Her Majesty the Queen) to the public of Jersey. Since the time of transfer, Jersey Property Holdings (JPH), under the ministerial remit of the Minister for Infrastructure, has sought encroachment compensation payments from a number of property owners along the foreshore. The sale of a property has typically been the trigger point for collection of these payments, in addition to planning consent applications or an approach made by a property owner to JPH.

In late 2017, complaints regarding the current policy and handling of encroachments of the foreshore came to light. Thereafter, a proposition ([P.101/2020](#)) was lodged in August 2020 by the Deputy of Grouville requesting that a revised policy be brought forward for debate by January 2021. Subsequently, the Minister for Infrastructure lodged an [amendment](#) to P.101/2020.

Although the Minister for Infrastructure largely dismissed the findings of the Complaints Board it was agreed that a review of the policy would be undertaken to re-assess the foreshore encroachment policy, and a revised policy would be issued subject to the outcome of the review. A review of the current policy was undertaken by the Minister for Infrastructure over the last 2 years and the proposition [P.111/2020](#) “Encroachments on the Foreshore: revised policy” was lodged by the Minister for debate on the 19<sup>th</sup> January 2021.

In consideration of numerous emerging key issues and concerns regarding P.111/2020, the Panel agreed to undertake a review of the revised policy. The Panel focused its Terms of Reference on these primary issues, with particular emphasis on the history of the ownership of the foreshore and the issues regarding the definition of its boundary; the establishment of the foreshore boundary; the impact of current encroachments on Jersey’s sea defences and on the maintenance of them; the approach used to seek compensation payments for encroachments; and whether the revised policy is deemed fair, proportionate and fit for purpose.

The Panel sought to gain a better understanding of what was meant by the foreshore, its boundary and encroachments of it. The review found that there is much discrepancy surrounding this issue, particularly the definition of the foreshore’s boundaries. The Panel found that the foreshore is a moveable concept that is impacted by various factors including the changing high-water mark. Moreover, its uncertainty is amplified due to structures including the sea walls and the action of reclaiming of land over the years.

Concerning the ownership of the foreshore, the Panel observed a recurring theme throughout submissions of ambiguity regarding the foreshore land that was initially Crown-owned. The review found that it is disputed that all the foreshore land was indeed Crown-owned to begin with, and therefore could not all have been gifted to the public by the Crown in 2015. Evidence gathered indicates sustained uncertainty over what land was Crown-owned land. This uncertainty of the boundary line is concerning to the Panel. Particularly as the boundary line would be pertinent to any revised policy and understanding of whether an encroachment of the foreshore had occurred or would occur in the future.

When considering alleged encroachments of the foreshore and how an encroachment is defined, the review found that, whilst open to legal interpretation, a recurring view that Clause 2 of the deed of transfer from the Crown to the public implies that any longstanding habitual and recognised custom by the general public should remain unaffected by the transfer of

ownership. The Panel found that it is deemed by many that seeking compensation payments for encroachments on what was previously Crown-owned land would not be in keeping with the spirit of the contract. The Panel has recommended that the Minister for Infrastructure should give further consideration to how encroachments are dealt with in relation to those that pre-date the gifting of the foreshore from the Crown in 2015. Specifically, this should consider whether the land in question was Crown-owned land to begin with and a date determined from when alleged encroachments should be considered. The Panel noted that this should be considered prior to the adoption of the revised policy.

As part of the Minister for Infrastructure's review of the current policy, a review of the landside boundary was undertaken by the Law Officers' Department. The Panel found that a Master Schedule was being compiled to capture all key data including the extent of encroachments around the island and possible resolutions. Although a Master Schedule of encroachments has been provided in confidence to the Panel, there is currently no map showing a definitive boundary line or justification provided to the public as to how this has been determined. Moreover, the review found that the Master Schedule would not be made publicly available. The Panel observed a notable lack of transparency over where the boundary is and how it has been determined. The Panel has recommended, in the interest of greater clarity and transparency, that the Minister for Infrastructure should consider further how the boundary line of the foreshore and the basis of evidence for its determination can be made publicly accessible.

The Panel observed that a primary aspect of the Minister for Infrastructure's review of the current policy was to ensure that essential maintenance of sea defences was possible and not inhibited by any encroachment. The review found that there was insufficient evidence to suggest that encroachments along the foreshore had significantly affected the Minister's ability to maintain sea defences. Additionally, that other policy mechanisms could be explored to ensure that maintenance and upkeep of sea defences is not compromised. Therefore, the Panel questioned whether the revised policy was required to seek compensation payments in the manner it intends. The Panel has recommended that the Minister for Infrastructure should consider a separate Sea Defences Maintenance Policy, in addition to how Planning Obligation Agreements might satisfactorily be utilised going forward to ensure adequate upkeep and maintenance of seawalls where encroachments are concerned.

In relation to the seeking of compensation payments for encroachments, through evidence gathered via meetings and written submissions from members of the public, the Panel observed a recurring view regarding concerns of the handling of foreshore encroachments and the current policy. The recurring view was that the approach in which the current policy was being applied was unfair and discriminatory.

The review found that Jersey conveyancers and lawyers would be aware of the issues and possible ramifications relating to the difficulty in determining the foreshore boundary when an adjoining property is sold and would draw this to the attention of the prospective purchasers during the conveyancing process. Additionally, that property owners seeking planning permission have a legal duty to declare ownership of the land they are seeking planning permission for. Notwithstanding this, the Panel found that in some cases planning approval had been granted where it had already been acknowledged that encroachments either may exist or were likely to be incurred. Furthermore, that prior to the transfer of ownership from the Crown to the public of Jersey, when requests were made for works which would incur an encroachment, under its ownership, the Crown generally acquiesced to these requests. In these instances, property owners have still been required to pay compensation payments for these encroachments. The Panel has recommended that the Minister for Infrastructure should, in collaboration with the Minister for the Environment, seek to put in place a suitable, formal

protocol for dealing with planning permission applications relating to properties along the foreshore. Additionally, the Minister should seek to apply the policy in a fair and non-discriminatory manner, and not solely to those where a trigger event (when either the property is transacted, planning permission sought or a direct approach made to JPH by a property owner) has occurred. Compensation sought or paid should be reflective of the encroachment and limitations agreed. Moreover, the Panel has recommended that this should be reflected in the revised policy prior to its adoption.

During its review, the Panel sought to gain a better understanding regarding whether a varied approach would be undertaken to resolve deliberate as opposed to unintentional encroachments. The review found that there appears to be no clear differentiation between how a deliberate or unintentional encroachment on the foreshore would be dealt with. The Panel has recommended that the Minister for Infrastructure should seek to differentiate between a deliberate or unintentional encroachment in the revised policy and this should be incorporated into the revised policy prior to its adoption.

The Panel found that a sliding scale had previously been applied to determine the level of a foreshore encroachment payment and that the sliding scale mechanism would continue. However, the review found that the criteria for the sliding scale is not included in the current or the revised policy. The Panel has recommended that the Minister for Infrastructure should further define and set out the criteria for a sliding scale into the revised policy so that it is clear and transparent, and this should be incorporated into the revised policy prior to its adoption.

The review found that much emphasis had been placed on the intention for each encroachment to be considered on its own merit. However, the Panel questions what process is in place to ensure this will occur as intended. The Panel found that there is a lack of information contained in the revised policy as to how the approach will be taken to judge each case by its own merits and what processes will be in place to ensure this happens. The Panel has recommended that the Minister for Infrastructure should be explicit in the revised policy as to how each case will be considered on an individual basis and what processes will be in place to ensure this happens. Moreover, this should be incorporated into the policy before its adoption.

Observing that the development of the revised policy might have impacted upon property transactions, the Panel sought to gain an understanding of the degree of impact the policy development process has had on individuals wishing to sell properties adjoining the foreshore. The review found that some degree of impact had been felt in relation to property transactions being delayed due to the policy development process for the revised policy, although the actual scale of this impact is uncertain. It is, however, conceivable that the length of time and approach taken is likely to significantly impact some property owners along the foreshore.

When considering previous complaints procedures evidenced to the Panel and the extensive time taken to arrive at any form of resolution, the Panel raised concern regarding the complaints or appeals process that would be in place regarding the revised policy. The review found that there is currently no suitable complaints or appeals mechanism provided for in either the current or the revised policy to satisfactorily enable individuals to appeal a decision made by the Minister in relation to foreshore encroachment compensation. The only option available to individuals is to make a case to the States of Jersey Complaints Board. This is particularly concerning to the Panel. Consequently, the Panel has recommended that the Minister for Infrastructure should seek to incorporate a suitable and workable process for dealing with complaints relating to foreshore encroachment compensation payments and in addition a clear appeals and arbitration process for dealing with any such complaints. Moreover, this should be incorporated into the policy before its adoption.

In consideration of all the evidence gathered to determine whether the revised policy is fair, proportionate and fit for purpose, the review found an overwhelming and unanimous view that the revised policy remains an unfair approach. Moreover, that it is complicated, unclear and lacks transparency.

On 31 December 2020, the Deputy of Grouville lodged an amendment to the revised policy, P.111/2020: Amendment. The Deputy's accompanying report to her amendment highlights that the revised policy remains ambiguous, confusing, open to interpretation and would not provide comfort to the public. Moreover, states the Minister for Infrastructure has failed to give credence to the views or concerns that might have been expressed by States Members as the revised policy was lodged three days prior to the September debate of P.101/2020. Additionally, it highlights the disregard of the views and findings of the Jersey Complaints Panel. In her accompanying report, the Deputy highlights that, although, the public was entitled to establish a different policy towards encroachments, the policy should be clear and transparent, it should reflect the generosity of the Crown and the fact that the transfer of the foreshore and seabed was made with a different objective, namely renewable energy projects, in mind.

In consideration of all the evidence received the Panel considers the Minister for Infrastructure's revised policy to be fundamentally flawed and lacking in essential detail. It is the Panel's view that the revised policy is not fit for purpose in its current form. Whilst the Deputy of Grouville's amendment goes a large way in its attempt to improve the policy in terms of fairness, clarity and transparency, as highlighted in this report and our recommendations, there are other aspects of the policy which still remain flawed. As a result, we feel we are unable to support the adoption of the revised policy.



# Key Findings

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**KEY FINDING 1:** The Foreshore is a moveable concept that is impacted by various factors including the changing high-water mark. Its uncertainty is amplified due to structures including the sea walls and the action of reclaiming of land over the years.

**KEY FINDING 2:** Numerous submissions received, and information gathered during public hearings, indicate sustained uncertainty over what land was Crown-owned land and this uncertainty of the boundary line is a concern to the Panel. Particularly as the boundary line would be pertinent to any revised policy and understanding of whether an encroachment of the foreshore had occurred or would occur in the future.

**KEY FINDING 3:** Whilst open to legal interpretation, it is a recurring view that Clause 2 of the deed of transfer from the Crown to the public implies that any longstanding habitual and recognised custom by the general public should remain unaffected by the transfer of ownership. Therefore, it is deemed by many that seeking compensation payments for encroachments on what was previously Crown-owned land would not be in keeping with the spirit of the contract.

**KEY FINDING 4:** There is much uncertainty regarding the foreshore boundary, as well as the land that is defined as public-owned foreshore land.

**KEY FINDING 5:** A Master Schedule is being compiled to capture all key data including the extent of encroachments around the island and possible resolutions.

**KEY FINDING 6:** The reasons given for not disclosing the Master Schedule publicly is that it is derived from privileged legal advice and contains information relating to private land owners. This has been contended on the basis that it is the Minister's policy, not Law Officers' advice which is being discussed. Moreover, that the information relating to individual property owners would likely be obtained from research of individual title deeds contained in the Public Registry which is publicly accessible.

**KEY FINDING 7:** There is a notable lack of public transparency over where the boundary is and how it has been determined. A Master Schedule of encroachments has been provided in confidence to the Panel, however there is currently no map showing a definitive boundary line or justification provided to the public as to how this has been determined.

**KEY FINDING 8:** There is insufficient evidence to suggest that encroachments along the foreshore have significantly affected the Minister for Infrastructure's ability to maintain sea defences.

**KEY FINDING 9:** There are other policy mechanisms which could be explored, such as a separate Sea Defences Maintenance Policy and/or Planning Obligation Agreements to ensure that maintenance and upkeep of sea defences is not compromised. Therefore, it is questionable as to whether the revised foreshore encroachment policy is required to seek compensation payments in the matter it currently does.

**KEY FINDING 10:** Jersey conveyancers and / or lawyers would be aware of the issues and possible ramifications relating to the difficulty in determining the foreshore boundary when an adjoining property is sold and would draw this to the attention of the prospective purchasers during the conveyancing process.

**KEY FINDING 11:** Due to the fact the foreshore previously belonged to the Crown, the prescriptive title relating to 40 years exclusive possession, which legally applies to most other forms of ownership, does not apply in relation to land owned by the Crown.

**KEY FINDING 12:** Property owners seeking planning permission have a legal duty to declare ownership of the land they are seeking planning permission for.

**KEY FINDING 13:** In some cases, planning approval has been granted where it has already been acknowledged that encroachments either may exist or were likely to be incurred. Furthermore, that prior to the transfer of ownership from the Crown to the public of Jersey, when requests were made for works which would incur an encroachment, under its ownership, the Crown generally acquiesced to these requests. In these instances, property owners have still been required to pay compensation payments for these encroachments.

**KEY FINDING 14:** The 'trigger' approach utilised in the current policy identifies encroachments when either the property is transacted, planning permission sought or a direct approach made to Jersey Property Holdings by a property owner.

**KEY FINDING 15:** Evidence received by the Panel appears to support an overwhelming and unanimous view that the revised policy remains an unfair approach. That it is complicated, unclear and lacks transparency.

**KEY FINDING 16:** There appears to be no clear differentiation between how a deliberate or unintentional encroachment on the foreshore would be dealt with.

**KEY FINDING 17:** Jersey Property Holdings will continue to apply a sliding scale mechanism to determining the level of a foreshore encroachment compensation payment. However, the criteria for the sliding scale is not included in the current or the revised policy.

**KEY FINDING 18:** There is a lack of information contained in the revised policy as to how the approach will be taken to judge each case by its own merits and what processes will be in place to ensure this happens.

**KEY FINDING 19:** There is some degree of impact felt in relation to property transactions being delayed due to the policy development process for the revised policy, although the actual scale of this impact is uncertain. It is, however, conceivable that the length of time and approach taken is likely to significantly impact some property owners along the foreshore.

**KEY FINDING 20:** There is currently no suitable complaints or appeals mechanism provided for in either the current or the revised policy to satisfactorily enable individuals appeal a decision made by the Minister in relation to foreshore encroachment compensation. The only option available to them is to make a case to the States of Jersey Complaints Board.

## Recommendations

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**RECOMMENDATION 1:** The Minister for Infrastructure should give further consideration to how encroachments are dealt with in relation to those that pre-date the gifting of the foreshore from the Crown in 2015. Specifically, this should consider whether the land in question was Crown-owned land to begin with and a date determined from when alleged encroachments should be considered. This should be considered prior to the adoption of the revised policy.

**RECOMMENDATION 2:** In the interests of greater clarity and transparency, the Minister for Infrastructure should consider further how the boundary line of the foreshore and the basis of evidence for its determination can be made publicly accessible. This should be considered and the outcome reported back to the Panel before the end of Q2 2021.

**RECOMMENDATION 3:** The Minister for Infrastructure should consider a separate Sea Defences Maintenance Policy, in addition to how Planning Obligation Agreements might satisfactorily be utilised going forward, to ensure adequate upkeep and maintenance of seawalls where encroachments are concerned. The Minister should investigate these possibilities and report back to the Panel before the end of Q3 2021.

**RECOMMENDATION 4:** The Minister for Infrastructure should, in collaboration with the Minister for the Environment, seek to put in place a suitable, formal protocol for dealing with planning permission applications relating to properties along the foreshore. This should be put in place before the end of Q2 2021.

**RECOMMENDATION 5:** The Minister for Infrastructure should seek to apply the policy in a fair and non-discriminatory manner, and not solely to those where a trigger event has occurred. Compensation sought or paid should be reflective of the encroachment and limitations agreed. This should be reflected in the revised policy prior to its adoption.

**RECOMMENDATION 6:** The Minister for Infrastructure should seek to differentiate between a deliberate or unintentional encroachment in the revised policy and this should be incorporated into the revised policy prior to its adoption.

**RECOMMENDATION 7:** The Minister for Infrastructure should further define and set out the criteria for a Sliding Scale into the revised policy so that it is clear and transparent. This should be incorporated into the revised policy prior to its adoption.

**RECOMMENDATION 8:** The Minister for Infrastructure should be explicit in the revised policy as to how each case will be considered on an individual basis and what processes will be in place to ensure this happens. This should be incorporated into the policy before its adoption.

**RECOMMENDATION 9:** The Minister for Infrastructure should seek to incorporate a suitable and workable process for dealing with complaints relating to foreshore encroachment compensation payments and in addition a clear appeals and arbitration process for dealing with any such complaints. This should be incorporated into the policy before its adoption.

# 1 Introduction

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In 2015, the foreshore was gifted from the Crown (Her Majesty The Queen) to the public of Jersey. Since the time of transfer, Jersey Property Holdings (JPH), under the ministerial remit of the Minister for Infrastructure, has sought encroachment compensation payments from a number of property owners along the foreshore. The sale of a property has typically been the trigger point for collection of these payments, in addition to planning consent applications or an approach made by a property owner to JPH.

## Foreshore: Policy for Alleged Encroachment Payments [P.101/2020]

It was noted in the proposition ‘Foreshore: Policy for Alleged Encroachment Payments’ [[P.101/2020](#)], lodged in August 2020 by the Deputy of Grouville, that issues had resulted from States compensation payments being levied against certain property sellers for alleged encroachments on the foreshore. Therefore, P.101/2020 requested that a revised policy be brought forward for debate by January 2021 and should confirm the date from which the deemed encroachments will be determined and be accompanied by a map clearly showing the boundaries used to establish land ownership. Subsequently, the Minister for Infrastructure lodged an [Amendment](#) to P.101/2020.

It was highlighted in P.101/2020 that complaints regarding the current policy and handling of encroachments of the foreshore had come to light in late 2017. Two Complainants presented their cases to the Jersey Complaints Board (JCB) and, a public hearing was held in April 2018. The Board’s findings, [R.71/2018](#), were presented to the States Assembly in June 2018.

## Encroachments on the Foreshore: revised policy [P.111/2020]

One of the Complaints Board’s findings called on the Minister for Infrastructure to set out a clear, fair and transparent policy in respect of foreshore encroachment payments. The Board also found that how the Complainants were treated by JPH was “unjust, oppressive or improperly discriminatory and were contrary to the generally accepted principles of natural justice” under the Administrative Decisions (Review) (Jersey) Law 1982.

The Minister for Infrastructure largely dismissed the findings of the Complaints Board in his [response](#). However, it was agreed that a review would be undertaken to re-assess the foreshore encroachment policy and, subject to the outcome of the review, issue a revised policy. In conjunction with this, the Minister also contracted the Law Officers’ Department (LOD) to conduct a landside boundary review in order to ascertain the boundary of the foreshore.

Over the last two years, this review has now been undertaken and the Minister has lodged a revised policy: [P.111/2020 Encroachments on the Foreshore: revised policy](#), which is due to be debated by the States Assembly on the 19<sup>th</sup> January 2021.

## Encroachments on the Foreshore: revised policy [P.111/2020]: Amendment

The Deputy of Grouville lodged an [Amendment](#) to P.111/2020 on 31 December 2020. The accompanying report to the amendment highlights that the revised policy remains ambiguous, confusing, open to interpretation and would not provide comfort to the public. Moreover, states the Minister for Infrastructure has failed to give credence to the views or concerns that might have been expressed by States Members as the revised policy was lodged three days prior to the September debate of P.101/2020. Additionally, it highlights the disregard of the views and findings of the Jersey Complaints Panel.

As the revised policy fails to deliver a map, the amendment would request the Minister for Infrastructure to provide a map, setting out the public boundary, as part of the encroachment policy document.

Regarding historic encroachments, the amendment proposes a date from which the 10-year mark is to be determined to define encroachments. Therefore, historic encroachments would be encroachments which have existed prior to 12<sup>th</sup> June 2015. The revised policy fails to specify a date.

Additionally, the amendment would make numerous deletions to the appendix of the report of P.111/2020 and would substitute the following under the Policies heading.

*Encroachments occurring after the date upon which the States approved this policy document will be required to be removed and the foreshore restored to its prior state at the cost of the encroaching party.*

*Encroachments occurring prior to the date upon which the States approved this policy document, but after 12th June 2015, will be dealt with as follows –*

- (1) Minor encroachments will be permitted to remain subject to such reasonable conditions as the Minister may specify in a licence agreement.*
- (2) Interfering encroachments will be required to be removed and the foreshore restored to its prior state at the cost of the encroaching party.*
- (3) Non-interfering encroachments, which are not minor encroachments, may at the discretion of the Minister be permitted to remain subject to such reasonable conditions as he may specify in a licence agreement, including the payment of reasonable compensation.*

*Encroachments which have occurred prior to 12th June 2015 (historic encroachments) will be dealt with as follows –*

- (1) Minor encroachments will be permitted to remain subject to such reasonable conditions as the Minister may specify in a licence agreement.*
- (2) Interfering encroachments may be required to be removed and the encroaching party may be required, depending on the particular circumstances of the case (including the length of time that the encroachment has existed), to contribute appropriately to the cost of such removal.*

*(3) Non-interfering encroachments, which are not minor encroachments, will be permitted to remain subject to such reasonable conditions as the minister may specify in a licence agreement.*

*Notwithstanding the above policies, if an encroachment at any time affects any duty of the Minister to repair or improve flood defences pursuant to the Drainage (Jersey) Law 2005, he may deal with the matter as he thinks fit.<sup>1</sup>*

The Deputy of Grouville notes that from the outset, the Minister for Infrastructure would have all the powers necessary to require the sea defences to be accessed, maintained and kept free of obstructions in the Drainage (Jersey) Law 2005.

In her accompanying report to her amendment, the Deputy of Grouville highlights that, although, the public was entitled to establish a different policy towards encroachments, the policy should be clear and transparent, it should reflect the generosity of the Crown and the fact that the transfer of the foreshore and seabed was made with a different objective, namely renewable energy projects, in mind.

Whilst the Panel has not had time to fully consult on the Deputy's amendment due to the imminent debate, in principle, the Panel considers that the basis of the Deputy's amendment is in keeping with a number of the findings and recommendations made in this report. Although, it should be emphasised that there are a number of aspects of the revised policy which, in the Panel's view, should be addressed prior to any such adoption of the revised policy and these are highlighted in the Panel's full list of recommendations.

## Rationale for a review of the revised policy

The Panel decided to undertake a review of the revised policy considering numerous key issues that had emerged, primarily, the following:

- The foreshore encroachment policy affects over 400 property owners and concerns have been raised as to the fairness of the policy and its application.
- The foreshore boundary has historically been very difficult to define. A landside boundary project has been undertaken by JPH and the LOD, in order to determine a default boundary line.
- Some property owners have been required to make payments for encroachments made that predated their ownership.
- Some property owners have received planning consent for alleged encroachments which required consent from the Receiver General, yet they were still required to pay a compensation payment.
- The Panel has been made aware that JPH has, in at least once instance, charged a property owner for a valuation for more than it cost to undertake. Whilst the Panel will not seek to comment on individual cases the above examples has assisted the Panel in being able to determine whether, overall, the revised policy is fair to those who it will affect.
- Encroachments, depending on their scale and nature, might have interfered with sea defences or hinder their ongoing maintenance.

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<sup>1</sup> [P.111/2020: Amendment – Deputy of Grouville](#)

## Review methodology

In order to inform the review, the Panel issued a call for evidence between the 28<sup>th</sup> October and 27<sup>th</sup> November 2020 seeking the views of the general public and wrote directly to targeted stakeholders for their views. A list of submissions received can be viewed [here](#). Prior to this, the Panel held meetings with some of the individuals affected by the policy to seek their views, as well as with the Law Society of Jersey. Throughout 2019, the Panel pressed the Minister for Infrastructure on the fairness of the current policy and progress on a revised policy via written correspondence and questioning in Quarterly Public Hearings.

Subsequently, the Panel held Public Hearings with the Minister for Infrastructure on the 27<sup>th</sup> October 2020 as well as a hearing, jointly, with Deputy Carolyn Labey, Deputy of Grouville, and Sir Philip Bailhache on the 8<sup>th</sup> December 2020. The transcripts for both hearings can be viewed [here](#).

The Panel would like to thank everyone who has taken the time to contribute to this review. Including members of the public who contributed their views and personal experiences, the Minister for Infrastructure and his officers, as well as the Deputy of Grouville, Deputy Carolyn Labey, and Sir Philip Bailhache for their engagement in the review process.

## 2 History of the ownership of the foreshore

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As the foreshore boundary has historically been difficult to define, it appears that much discrepancy remains regarding the history of the ownership of the foreshore, as well as the definition of its boundaries. The Panel sought to gain a better understanding of what was meant by the foreshore, its boundary and encroachments of it. Moreover, further detail regarding the ownership of the foreshore.

### The foreshore and its boundary

During the Public Hearing with the Minister for Infrastructure, the Panel requested clarity regarding the definition of the foreshore. The following response was received from Jersey Property Holding's Director of Property:

***Director of Property, Jersey Property Holdings:***

*...Well, the foreshore is defined in law as the strip of land that is lying between the low water mark of the lowest tide of the year and the high water mark of the highest tide of the year, and the foreshore originally belonged to the Crown until it was gifted in its entirety to the public of the Island in 2015...<sup>2</sup>*

Regarding the boundary, it was explained that the high-water mark at the highest tide of the year represented the boundary between the publicly owned foreshore and the private properties and that in particular this applied to a number of properties in the south and south-east corners of the Island.<sup>3</sup>

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<sup>2</sup> [Transcript – Minister for Infrastructure- Foreshore Encroachment Policy Review – Pg. 2](#)

<sup>3</sup> [Transcript – Minister for Infrastructure- Foreshore Encroachment Policy Review – Pg. 3](#)

The sea wall had been constructed in front of the high-water mark resulting in a strip of publicly owned land. Therefore, in some circumstances the strip of land behind the sea wall had been included in individual's properties. It was highlighted that this could have been as a result of a commission or a lack of knowledge of the existence of the boundary line.<sup>4</sup>

The Deputy of Grouville, during the States Assembly debate on the 24<sup>th</sup> September 2020 in relation to P.101/2020, raised concern regarding the position of the high-water mark.

**Deputy of Grouville:**

*Complications had arisen in determining the high tide mark because, with the sand dunes, the cliffs of the north coast, the sea defences built by slave workers in World War II, the harbours and reclaimed land around the Island, and more recently La Collette and the waterfront, the position of the high tide mark has changed over time.*<sup>5</sup>

Within a submission received from a member of the legal profession, the uncertainty of boundaries when dealing with properties adjoining areas affected by the foreshore was highlighted. It was emphasised that the combination of the high spring tide mark and the construction of various sea walls made it very difficult to ascertain a boundary with the desired accuracy. Moreover, that it has been made more difficult by global warming and the changing levels of the high spring tide.<sup>6</sup>

During the States debate on P.101/2020, in response to a question regarding the changing high-water mark in the future in respect of the foreshore, the Attorney General emphasised that the situation raised interesting questions and that the answer in legal terms would be complex as it had not been considered in Jersey:

**Mr Mark Temple QC, HM Attorney General:**

*The fact is that foreshore is a movable concept; there are various cases from England, which confirm that. So those cases have not yet been considered in Jersey, but if a Jersey court were to follow those principles then it would potentially find that the high-water mark has moved and therefore possession has moved to the public of the Island. However, obviously there are plenty of counterarguments because people's property, they have built their properties on areas of what was previously the foreshore or what was never the foreshore up until the date of future movement. So that sort of situation raises interesting questions.*<sup>7</sup>

Within a submission received from Mr Mallinson, one of the two Complainants to have presented his case to the Complaints Board, he notes that the LOD had confirmed the following in writing in February 2009:

*The Receiver General is not satisfied that our records are definitive enough to ascertain the extent of the foreshore.*<sup>8</sup>

The exchange of emails confirming this was presented as evidence as part of Mr Mallinson's submission to the Complaints Board in order to highlight that the LOD were unaware of the position of the foreshore and its boundary at the time Mr Mallinson purchased the property.

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<sup>4</sup> [Transcript – Minister for Infrastructure- Foreshore Encroachment Policy Review – Pg. 3](#)

<sup>5</sup> [Hansard – 24 September 2020 – Section 4.1](#)

<sup>6</sup> [Submission – B.F.H. Le Feuvre](#)

<sup>7</sup> [Hansard – 24 September 2020 -Section 4.2.1](#)

<sup>8</sup> [Submission – Julian Mallinson \(Initial\)](#)



During the Public Hearing with the Minister for Infrastructure, mention was made of the historic uncertainty regarding the location of the boundary line and the requirement for a study to be undertaken by the LOD into historical documents to determine the location of the boundary line:

**Director of Property, Jersey Property Holdings:**

*...So there has historically been uncertainty about the precise location. It can be perhaps brought about by the shifting sands or lack of record of where the high water mark was and so a study was undertaken recently to determine exactly where that line was. That has been done by a reference to historical documents...<sup>9</sup>*

**KEY FINDING 1:** The Foreshore is a moveable concept that is impacted by various factors including the changing high-water mark. Its uncertainty is amplified due to structures including the sea walls and the action of reclaiming of land over the years.

## Ownership of the Foreshore

Within a submission received from Save our Shoreline Jersey it was explained that the reason for the gift of the foreshore by the Crown to the Public of Jersey was to enable the public to make use of the foreshore (the beaches and the seabed). In response to the gift, the then Lieutenant Governor, General Sir John McColl, and then Chief Minister, Senator Ian Gorst, contributed the following messages:<sup>10</sup>

**Lieutenant Governor, General Sir John McColl**

*...Her Majesty wishes to support the interests and aspirations of the people of Jersey as expressed through their elected representatives....The government of Jersey has expressed a view that the ownership of the foreshore would assist affected management economic development particularly in the area of renewable energy projects.”*

**The Chief Minister, Ian Gorst:**

*“It is important for Jersey to have ownership of its seabed and foreshore, and I would like to express gratitude on behalf of the public of Jersey for this decision.”*

Save our Shoreline Jersey, further explained that the reclamation of the foreshore by the States of Jersey had begun in earnest in the 1960s and 70s. The St Helier town, beaches and the rocky outcrops of La Collette had been reclaimed and developed over several decades. Jersey now has a port and waterfront area which is mainly used as commercial development. Further areas (including land West of Albert and the Waterfront) had been acquired from the Crown by buying the land for the public by contracts passed respectively in 1983, 1985 and 1989. It highlights that few people now think of the areas now reclaimed area as ‘foreshore’, but for centuries, the area was used by boats for shelter, for commerce, fishing and recreation, and at Havre des Pas, for shipbuilding.<sup>11</sup>

A submission received from the Law Society of Jersey, which reflected the collective and considered views of property law practitioners, suggested that it was an assumption that the sea walls were built above the high-water mark and on Crown-owned land:

<sup>9</sup> [Transcript – Minister for Infrastructure- Foreshore Encroachment Policy Review – Pg. 3](#)

<sup>10</sup> [Submission – Save our Shoreline Jersey](#)

<sup>11</sup> [Submission – Save our Shoreline Jersey](#)

### **The Law Society of Jersey:**

*...The Government of Jersey previously paid a large sum of money to Les Pas to avoid a finding that the harbour and reclaimed land was built on Les Pas' land including the foreshore. Time might not run against the Crown, but it would run against a private Seigneur. If a wall was built on a private Seigneur's land, and a private land owner continued to treat the land as his own and adjoined the wall, how can it be said to have encroached?<sup>12</sup>*

The Panel notes that a recurring theme throughout the submissions received is the ambiguity with regard to the foreshore land that was initially Crown-owned. It is disputed that all the foreshore land was Crown-owned to begin with, therefore could not all have been gifted to the public by the Crown in 2015.

In an initial submission received from Mr Mallinson in 2019, Mr Mallinson explains that Les Pas Holdings Ltd had acquired the Seigneur's rights in 1986 and had brought action against the Crown and the public to prove title to the foreshore at La Collette and Harve des Pas. Despite the Crown and the public refuting that claim the case never reached court as in 2003 Les Pas Holdings agreed to accept a transfer of reclaimed land on the Waterfront in return for the company disclaiming any further title to the foreshore of the Fief de la Fosse. This area of reclaimed land was subsequently sold to Dandara for £10 million who then built the Castle Quay development upon it.<sup>13</sup> Similar insight is shared in a submission received from Save our Shoreline Jersey.<sup>14</sup>

It was Mr Mallinson's view that it would be very difficult to litigate the ownership of the foreshore given it would draw in centuries of records and the compilation of disparate pieces of evidence. He therefore contends it is clear that there are strong arguments to be made to say the Crown did not own the Foreshore everywhere.<sup>15</sup>

Mr Mallinson's highlights further that although the foreshore was gifted to the public many lawyers claim parts of the foreshore are subject to fiefs and owned by the Seigneurs and therefore the whole of the foreshore is not owned by the public as the Crown cannot give what is not theirs to give.<sup>16</sup> This view is echoed by Advocate Richard Falle in his letter to the Editor of the Jersey and Guernsey Law Review in 2018 and in his submission to the Panel he states:

*My object in writing that letter was to explain how the 2015 gift to the Public of this Island could pass title only to those foreshores which had been in the immemorial possession of the Crown and accordingly necessarily excluded all those foreshores not so possessed. It is not in issue that the Public has no legal title in the soil of the foreshores except in relation to what it has acquired by purchase, gift or other lawful process there. Any claim therefore based upon the 2015 contract must by definition be limited to what passed in virtue of that contract.*

*It follows that there can be no legal basis for the Minister for Infrastructure to advance proprietary claims to much of the foreshore surrounding this Island and any policy based upon such claims, equally groundless. Accordingly in those instances where proprietors with land on the littoral have suffered loss as a result of the implementation*

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<sup>12</sup> [Submission – The Law Society of Jersey](#)

<sup>13</sup> [Submission – Julian Mallinson \(Initial\)](#)

<sup>14</sup> [Submission – Save our Shoreline Jersey](#)

<sup>15</sup> [Submission – Julian Mallinson \(Initial\)](#)

<sup>16</sup> [Submission – Julian Mallinson \(Initial\)](#)

of this policy it is clear that the Minister is under a legal obligation to compensate such persons for that loss.<sup>17</sup>

**KEY FINDING 2:** Numerous submissions received and information gathered during public hearings indicate sustained uncertainty over what land was Crown-owned land and this uncertainty of the boundary line is a concern to the Panel. Particularly as the boundary line would be pertinent to any revised policy and understanding of whether an encroachment of the foreshore had occurred or would occur in the future.

## Alleged encroachments of the Foreshore

Regarding how an encroachment of the foreshore is defined, the following was explained during the Public Hearing with the Minister for Infrastructure:

**Director of Property, Jersey Property Holdings:**

*...So an encroachment occurs, as I said, where either wittingly or unwittingly a landowner uses or occupies, or has access to, or has advantage of that bit of the public land behind the sea wall that was transferred from the Crown to the public of the Island in 2015.<sup>18</sup>*

Within their submission, the Law Society highlighted that the Crown was previously “untroubled” by alleged encroachments. Although the Law Society is understanding of the States’ concern to avoid further encroachments, they are not understanding of their demands over previously alleged encroachments:

**The Law Society of Jersey:**

*The key issue is that the Crown was previously untroubled by alleged encroachments. It gave the foreshore (to the extent it owned it) to the States. The States have chosen to exploit a previously tacitly accepted position to make money. We understand their concern to avoid further encroachments, but not their rapacious demands over previous alleged encroachments established (effectively) on their watch.<sup>19</sup>*

Within a written submission received from Sir Philip Bailhache, the clause contained within the contract of the gift of the foreshore by the Crown to the Public of Jersey was highlighted as follows:

*"That any right of access or of exploitation exercised as a matter of longstanding habitual and recognised custom by the general public of the Island or by any member thereof shall be and remain unaffected by this contract of gift cession and transfer."<sup>20</sup>*

Within Mr Mallinson’s initial submission to the Panel, he reiterates a similar view and states that the deed makes no mention of alleged encroachments and there are no publicly reported comments by the Crown or the States referring to encroachments.<sup>21</sup> Within a submission received from Save our Shoreline Jersey, this view is reiterated.<sup>22</sup>

<sup>17</sup> [Submission – Advocate Richard Falle](#)

<sup>18</sup> [Transcript – Public Hearing with the Minister for Infrastructure– Pg. 3](#)

<sup>19</sup> [Submission – The Law Society of Jersey](#)

<sup>20</sup> [Submission – Sir Philip Bailhache](#)

<sup>21</sup> [Submission – Julian Mallinson \(Initial\)](#)

<sup>22</sup> [Submission – Save our Shoreline Jersey](#)

**KEY FINDING 3:** Whilst open to legal interpretation, it is a recurring view that Clause 2 of the deed of transfer from the Crown to the Public implies that any longstanding habitual and recognised custom by the general public should remain unaffected by the transfer of ownership. Therefore it is deemed by many that seeking compensation payments for encroachments on what was previously Crown-owned land would not be in keeping with the spirit of the contract.

It was Sir Philip Bailhache's view that although it is axiomatic that as a general policy the public should not tolerate encroachments on public land, encroachments upon the foreshore are different. Sir Philip Bailhache provides three reasons for this:<sup>23</sup>

*First, The Crown, as owner of the foreshore for centuries until 2015, adopted a very tolerant attitude to most encroachments. When the foreshore was gifted to the Public, it was not envisaged that that policy would be reversed.*

*Secondly, the Public itself, as the contract lessee of the foreshore for more than 50 years, acquiesced in the tolerant attitude of the Crown, and did little, if anything, to change it until the Public acquired the foreshore in 2015.*

*Thirdly, the Public was the beneficiary of a considerable act of generosity by the Crown. It seems churlish in the extreme to take advantage of that generosity by extracting compensation for encroachments approved or tolerated by the Crown when the purpose of the gift was actually to make possible renewable energy projects on the seabed.*

During a Public Hearing, the Deputy of Grouville emphasised uncertainty regarding the boundary and alleged encroachments:

***The Deputy of Grouville:***

*How far do you take back these alleged encroachments? While the Crown gifted it to the people of Jersey on 12th June 2015, if we are going to take encroachments back before then, as Property Holdings are indicating that is what they are going to do or may do, how far back do we go?...How are we deeming or where are we deeming these encroachments to be from?<sup>24</sup>*

A submission received from a member of the public similarly highlights the recurring theme that Jersey has not accepted the gift of the foreshore and the wording as it was intended from the Crown to the People of Jersey:

**Peter Vincenti**

*There is no doubt in my mind that Jersey has NOT accepted the Gift and the wording as it was intended to the People of Jersey from the Crown and that blatant profiteering and oneupmanship from so called smart Civil Servants should be brought to light.<sup>25</sup>*

The Panel is understanding of the fact that deliberate encroachments on public land should not be allowed. However, is mindful of the uncertainty regarding the foreshore boundary as well as the land that is defined as public-owned foreshore land. Further consideration should be given to how alleged encroachments are dealt with in relation to those that pre-date the gift of the foreshore from the Crown. Moreover, consideration should be given to the ownership of the land, whether it was Crown-owned land to begin with, that was gifted to the public. This

<sup>23</sup> [Submission – Sir Philip Bailhache](#)

<sup>24</sup> [Transcript – Public Hearing with Deputy Labey and Sir Philip Bailhache – Pg. 5](#)

<sup>25</sup> [Submission – Peter Vincenti](#)

highlights the importance of defining an agreeable explicit boundary line and the allocation of a date from when alleged encroachments should be considered.

**KEY FINDING 4:** There is much uncertainty regarding the foreshore boundary, as well as the land that is defined as public-owned foreshore land.

**RECOMMENDATION 1:** The Minister for Infrastructure should give further consideration to how encroachments are dealt with in relation to those that pre-date the gifting of the foreshore from the Crown in 2015. Specifically, this should consider whether the land in question was Crown-owned land to begin with and a date determined from when alleged encroachments should be considered. This should be considered prior to the adoption of the revised policy.

### 3 Landside Boundary Review: Establishing the Foreshore Boundary

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The Complaints Board detailed that it would be in the public's best interest for the landside boundary of the foreshore towards private properties to be clarified. The Board's findings found that JPH had no regard to the benefit to the public in establishing a clear landside boundary of the foreshore. Similarly the Minister for Infrastructure, in his response to the findings of the Board, makes no acknowledgement of the benefit to the Island community of a substantial number of local home-owners being able to identify, for the first time, a clear seaside boundary of their properties, which a well-defined and consistent foreshore policy would provide.<sup>26</sup>

The Deputy of Grouville highlighted some of her concerns regarding the foreshore boundary to the Panel during the Public Hearing. She emphasised that a purpose of her proposition, P.101/2020 was to request maps and dates, so that members of the public who own property along the foreshore could be clear as to what they own.<sup>27</sup>

During the Public Hearing with the Minister for Infrastructure, the Panel sought information in relation to the review of the landside boundary. The Panel noted that, during the States Assembly debate on P.101/2020, it had been commented that Jersey did not have a land register and that the boundaries were based on histories of past transactions and contracts. Ultimately it had been highlighted that identifying boundaries was a complex system:<sup>28</sup>

***The Connétable of St. Brelade:***

*...Could you explain how ownership of land would be determined in establishing default boundary lines and what evidence would be used to determine that?*

***Director of Property, Jersey Property Holdings:***

*I will give it a go, Chair, but I am not sure I will do the explanation justice. The Law Officers' Department have spent a lot of time and effort researching this and there is a huge volume of historical data that they consulted to determine these default lines. So it is a legal question and it is one that would deserve a legal response.*

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<sup>26</sup> [Report – R.71/2018 - Response](#)

<sup>27</sup> [Transcript – Public Hearing with Deputy Labey and Sir Philip Bailhache – Pg. 2](#)

<sup>28</sup> [Transcript – Public Hearing with the Minister for Infrastructure- Pg. 7](#)

As part of the Panel's evidence gathering in relation to the work being undertaken to review the landside boundary, the Panel requested documentation and research from Jersey Property Holdings relating to the landside boundary review. The Panel notes that this information was not in the public domain and could not be commented on.<sup>29</sup>

During the Public Hearing with the Minister for Infrastructure, the Panel sought confirmation for when the work to define the default boundary lines would be complete. The following response was received:

**Director of Property, Jersey Property Holdings:**

*If I could just step in. We have the information on where the actual encroachments we believe are for individual properties. The default is a little bit more challenging and requires sort of a wider view and for that we do need to refer back to the Law Officers' Department to make sure that the line we are coming up with is defensible and logical. We are hoping that by Christmas time we will be in a position to have that default line squared away and so it will be ready for the debate of the proposition in the New Year.<sup>30</sup>*

Further on in the Hearing, the Panel pursued confirmation whether it was anticipated that the default line would be represented on a map. The Director of Property for Jersey Property Holdings confirmed that it would:<sup>31</sup>

**Director of Property, Jersey Property Holdings:**

*Yes, it will be a line on the map.*

The Panel was informed that a Master Schedule was being compiled to capture all key data on the opined boundary line around the coast, the extent of the encroachments and possible resolutions. During the Public Hearing with the Minister for Infrastructure the Panel sought further detail with regard to this.<sup>32</sup>

**The Connétable of St. Brelade:**

*...When will this schedule be provided in confidence to the panel?*

**Director of Property, Jersey Property Holdings:**

*That schedule we are intending to send through to you as it is now. The areas that are outstanding are bits of the north coast, which is the last piece of the actual review of the foreshore and so do not have a huge amount of bearing on some of the more common topics of conversation...It covers the current ... the areas considered to contentious.*

**KEY FINDING 5:** A Master Schedule is being compiled to capture all key data including the extent of encroachments around the island and possible resolutions.

The Panel notes that the Master Schedule was shared with them in confidence. However, it is the Minister for Infrastructure's intention to keep it outside of the public domain.

<sup>29</sup> [Transcript – Public Hearing with the Minister for Infrastructure- Pg. 11-12](#)

<sup>30</sup> [Transcript – Public Hearing with the Minister for Infrastructure- Pg. 12](#)

<sup>31</sup> [Transcript – Public Hearing with the Minister for Infrastructure- Pg. 12](#)

<sup>32</sup> [Transcript – Public Hearing with the Minister for Infrastructure- Pg. 12](#)

The Director of Property for JPH noted that certain aspects would need to remain outside of the public domain including anyone suspected of encroaching. It was the assumption of JPH that it would not be fair to identify people and properties publicly.<sup>33</sup>

During the States Debate on P.101/2020 on the 25<sup>th</sup> September 2020, the Minister for Infrastructure shared his view regarding making the map public:

***The Minister for Infrastructure:***

*I suppose there is an argument that a map would provide clarity but it would also be rather dictatorial and could be seen as naming and shaming. We feel it is more courteous to deal with parties on an individual basis.<sup>34</sup>*

During the Public Hearing, the Deputy of Grouville commented on the revised policy which makes mention of the Master Schedule and the default boundary for the foreshore. Moreover, on the Minister for Infrastructure's intention to not make the information available to the public. The Deputy of Grouville contested how the revised policy would be transparent in the absence of the Master Schedule or the map being publicly accessible:

***The Deputy of Grouville:***

*...It talks about things like a master schedule and feels that it would be in appropriate to openly publish that. How is that open and transparent? It then talks about default boundary but nobody knows where that is. It refuses to publish a map even a map that the applicants, who are about to sell their property, are going from to sell...<sup>35</sup>*

It is the Law Society of Jersey's view that the lack of publicity of the research or findings of the LOD and the Master Schedule is flawed in principle, within a submission received a number of reasons had been provided:

***The Law Society of Jersey:***

*... (a) the foundations of the research being found in the Public Registry (and thus not private) and (b) the policy itself comprising the approach to be taken by the Minister (which must be clear so as to stand up to scrutiny on administrative review) which necessarily includes the Master Schedule, which while prepared by LOD does not at that point represent legal advice, and thus cannot be said to be privileged).<sup>36</sup>*

*It does not sit well that the Minister / JPH (allegedly on behalf of Le Public de cette Ile) is pronouncing the 'real truth' as to the extent of the foreshore. It was not so defined in the contract by which the Public acquired it from the Crown, and it is wrong that owners of land adjoining the foreshore are unable to review, agree with or reject the assertions being made by the Minister / JPH.<sup>37</sup>*

The importance of the Master Schedule being made publicly available was highlighted within a submission received from the Complaints Board. The Board noted that there were two distinct elements that should be considered:

*There are two distinct elements to this whole matter: the first is the (presumably unquestioned) benefit to adjoining owners of land to have clear boundaries and clearly expressed rights and obligations vis a vis one another. The second is the obligation of*

<sup>33</sup> [Transcript – Public Hearing with the Minister for Infrastructure- Pg. 12](#)

<sup>34</sup> [Hansard – 25 September 2020 – Section 1.1.11](#)

<sup>35</sup> [Transcript – Public Hearing with Deputy Labey and Sir Philip Bailhache – Pg. 2 -3](#)

<sup>36</sup> [Submission – The Law Society of Jersey](#)

<sup>37</sup> [Submission – The Law Society of Jersey](#)

*the Public to protect the Island population and property generally and to be able to fulfill its statutory obligations in that respect.*<sup>38</sup>

Within its submission, the Board notes that according to the Policy document, the reasons given for not disclosing the Master Schedule publicly included that it had been derived from privileged legal advice to the Minister, and contained information which was effectively private to individual property owners. However, it was the Board's view that regarding the information that would be private to the individual property owners, that information would have presumably been obtained by research of individual title deeds contained in the Public Registry, and which were by definition, publicly available. Regarding the first point concerned, it had been derived from legal advice, it was the view of the Board that it was the Minister's policy, not the Law Officer's advice which was being discussed. The Board noted that whether the policy slavishly followed the advice was immaterial - it was the policy of the Minister, and the Master Schedule was at its absolute heart.<sup>39</sup>

**KEY FINDING 6:** The reasons given for not disclosing the Master Schedule publicly is that is derived from privileged legal advice and contains information relating to private land owners. This has been contended on the basis that it is the Minister's policy, not Law Officers' advice which is being discussed. Moreover that the information relating to individual property owners would likely be obtained from research of individual title deeds contained in the Public Registry which is publicly accessible.

The Board noted that P.111/2020 acknowledged that the landside boundary of the foreshore required clarification, not least because the High-Water Mark (HWM) had changed over time or had been obscured by the construction of sea defences. However, the report gave the impression that, rather than being a starting point for discussions with neighbouring owners as to the establishment of a mutually acceptable boundary, the Master Schedule would be a definitive statement of the position of the HWM (and thus the legal boundary) and that the "default boundary line positions" as set out in the Master Schedule would be non-negotiable. The Board emphasised that without seeing the Master Schedule, it would be difficult – indeed, impossible- to say whether the proposed default boundary lines were reasonable or not.<sup>40</sup>

The Panel is mindful of the requirement to not cause undue public concern regarding alleged encroachments. Notwithstanding this, the Panel is concerned regarding the lack of transparency by not allowing the public access to the research undertaken, the Master Schedule, or aspects thereof, or map in relation to informing an explicit boundary line for the foreshore. Noting that a substantial number of properties (approximately 400 properties) are being considered regarding alleged encroachments, this is particularly concerning. The Panel considers that all members of the public wishing to purchase or sell properties that adjoin the foreshore should be knowledgeable of the boundaries that apply, and the information used to define them. The Panel is minded that for the purposes of clarity, transparency, due diligence and fairness, this information should be publicly accessible. Considering the lack of detailed evidence as to the location of the foreshore prior to the landside boundary review, and hence the undertaking of the review of the landside boundary to determine this and to provide a revised policy of the foreshore, the public should have an awareness of how the boundary line was informed and should have a means to dispute it if they so wished. Therefore, consideration should be given to how this information could be shared without causing

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<sup>38</sup> [Submission – States Complaints Board](#)

<sup>39</sup> [Submission – States Complaints Board](#)

<sup>40</sup> [Submission – States Complaints Board](#)



unnecessary due concern to members of the public. This would be pertinent to any revised foreshore policy as the boundary is the determining factor for any alleged encroachment.

**KEY FINDING 7:** There is a notable lack of public transparency over where the boundary is and how it has been determined. A Master Schedule of encroachments has been provided in confidence to the Panel, however there is currently no map showing a definitive boundary line or justification provided to the public as to how this has been determined.

**RECOMMENDATION 2:** In the interests of greater clarity and transparency, the Minister for Infrastructure should consider further how the boundary line of the foreshore and the basis of evidence for its determination can be made publicly accessible. This should be considered and the outcome reported back to the Panel before the end of Q2 2021.

## 4 Current encroachments: impact on sea defences

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A primary aspect of the review of the current policy was to ensure that essential maintenance was possible and not inhibited by any encroachment. Regarding the impact of encroachments on sea defences the following was commented during the States debate on P.101/2020:

***The Minister for Infrastructure:***

*But as the Minister for Infrastructure, I am responsible for the seawall and the safety of the people predominantly on the east coast where most of these encroachments have taken place...<sup>41</sup>*

***The Chief Minister:***

*The other issue which has also been alluded to is the future global warming, if one likes, impacts. In other words, the issues that the department as a whole will face in maintaining the seawall. As there have been experiences, the Minister himself had some the last time he was a Minister I think it was, when chunks of the southeast corner of the seawall were basically destroyed by a very high tide, coupled with high winds. Of course water does not respect boundaries so it is no good if 9 of 10 landowners are co-operative and allow access, if one does not then they threaten the other 9 landowners as well as themselves. I go back to the 1990s - the big storms we had in the early 1990s - and I saw entire sections, hundreds of metres long maybe, of the seawall in St. Ouen moved by a couple of feet forward. If you think of the power of the sea that was quite an awe-inspiring event, as far as I was concerned. But that gives us indications of the challenges over the next 10, 20, up to 100 years, that the Minister and his successors will be facing on protecting the coastline. That is why ownership and access to the seawalls will becoming increasingly important. I think what I tried to lay out is I have been aware of many of these issues for a long time and I am glad, one way or another, that these will be sought to be addressed.<sup>42</sup>*

<sup>41</sup> [Hansard – 25 September 2020 – Section 1.1.11](#)

<sup>42</sup> [Hansard – 25 September 2020 – Section 1.1.11](#)

**The Deputy of Grouville:**

*If the Minister needs an enhanced sea defence policy, then why does he not bring it? If he needs a joint planning obligation agreement to help him maintain the seawall, let him bring it, or is the purpose to stop further encroachments to the foreshore?<sup>43</sup>*

Within a written submission received from Sir Philip Bailhache he commented that a government department or entity should engage with the public in a sympathetic and fair-minded way befitting a government elected to serve the people. Though, Sir Philip Bailhache emphasises that is not to suggest that encroachers over the foreshore should be allowed to ride roughshod over public rights or interfere in any way with sea defences.<sup>44</sup>

Regarding the Minister for Infrastructure's legal powers in terms of intervening to construct seawalls, if necessary, in order to deal with climate change and sea levels rising. During the States debate on P.101/2020 on the 25<sup>th</sup> September 2020, it was asked of the Attorney General, irrespective of individual boundaries and owners, whether the Minister for Infrastructure would have any legal powers to intervene if required.<sup>45</sup> The Attorney General explained that as part of the Drainage (Jersey) Law 2005 powers did exist, however, it would be easier for the Minister for Infrastructure to construct a flood defence on land that he does own rather than on land that he does not:

**The Attorney General:**

*...There is a provision whereby the public or the Minister can build a sea defence on land which it does not own or control, but that can only be done by Ministerial Order. So there would be challenges available to a third party who is affected by that Order. In summary the position is - to put it in simple terms - it is easier for the Minister to construct a flood defence on land that he does own than on land that he does not, albeit there is a provision that he can by Ministerial Order specify land which he does not own to build sea defences on.*

Regarding the government's right to access and repair sea defences a member of the public shared their view as follows:

**Peter Vincenti:**

*Properties who have encroached prior to the Gift and are on any part of the sea defences should be notified that on any breach of these defences then the Government reserves the right, without warning, to access for repair - that is the choice the home owner has taken.<sup>46</sup>*

The Panel pursued a better understanding of the level of disruption that encroachments had caused to date in relation to the maintenance of the sea walls or the upkeep of Jersey's coastal defences. The Panel asked this of the Minister for Infrastructure during a Public Hearing and the following response was received:

**The Minister for Infrastructure:**

*I am not aware of any serious incidents but obviously there is a 2-fold problem here inasmuch as ... it is very much like the Forth Bridge where the team are constantly maintaining the sea wall. ... we are increasing the height of some sea walls due to*

<sup>43</sup> [Hansard – 25 September 2020 – Section 1.2.11](#)

<sup>44</sup> [Submission – Sir Philip Bailhache](#)

<sup>45</sup> [Hansard – 25 September 2020 – Section 1.1.2](#)

<sup>46</sup> [Submission – Peter Vincenti](#)

*global warming and rising tides. So we may need to raise the wall further around the coast but we will take that under advice. There is also a question of liability should somebody have cut an opening in the sea wall and there is some flooding, and likewise if someone has steps going down to the beach which are not well maintained and was put there without permission and somebody should take a tumble, there would be a question of liability there...but the sea wall itself is not just sloping out to sea underground but slopes back the other way as well in a bracing motion, if you like, and there may be times when we are having to dig down that side to make some repairs, which is very difficult if someone has built over it.<sup>47</sup>*

Considering the Minister's response, the Panel reiterated that it appeared there had not been any foreshore encroachments that had caused difficulties in the maintenance of the sea walls to date. Therefore, questioned what had changed within the revised policy as a result:

***The Connétable of St. Brelade:***

*Has anything changed within the revised policy as a result of this, shall we say, non-incident? What provision has been made in the policy that is different from what we already have to ensure that maintenance can take place?<sup>48</sup>*

***The Minister for Infrastructure:***

*We did have a major incident a few years ago in St. Clement. The Le Bourg area of the sea wall, there was an area several hundred feet long and it was a relatively new sea wall, I think built in the 1970s or 1980s, huge blocks of concrete were thrown around as if they were children's toys. There was some damage to the end of people's gardens who had, shall we say, claimed that area of land. So I think that had cost the best part of £500,000 to repair and took several months to implement...*

The Panel asked the Minister whether the Le Bourg incident had informed the revised policy, to which the Minister responded that it had fed into it:

***The Minister for Infrastructure:***

*I would say it has fed into, yes. We know that mother nature wins every time and we must prepare for changes in tides and, indeed, climate.<sup>49</sup>*

During a Public Hearing, the Panel asked the Deputy of Grouville for her view regarding the aspect of the review of the policy to ensure essential maintenance was possible and not inhibited by encroachments. It was the Deputy's view that there were policies in place for that, namely the sea defences policy, which would give the Minister the right to maintain the sea walls and access to them. She emphasised, however, that if there were encroachments that impinged on that and his ability to do that then he must take issue.<sup>50</sup>

The Panel held a meeting with representatives of the Law Society on 28<sup>th</sup> May 2019. Regarding sea defences, representatives suggested that more interest should be taken by the Minister for Infrastructure for Planning Applications that involved a sea defence wall. Furthermore, that Planning Obligation Agreements, making landowners jointly responsible for the maintenance of the sea walls, could be utilised for ring-fencing funds for that purpose.<sup>51</sup>

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<sup>47</sup> [Transcript – Public Hearing with the Minister for Infrastructure- Pg. 9](#)

<sup>48</sup> [Transcript – Public Hearing with the Minister for Infrastructure- Pg. 9](#)

<sup>49</sup> [Transcript – Public Hearing with the Minister for Infrastructure- Pg. 9](#)

<sup>50</sup> [Transcript – Public Hearing with Deputy Labey and Sir Philip Bailhache – Pg. 10](#)

<sup>51</sup> [Submission – Law Society of Jersey](#)

Regarding sea defences, the Complaints Board, acknowledged that the public should retain additional landside land it considers essential for sea defence. However, the Board took the view that any residual landside land should be transferred to the adjoining owner “for an appropriate consideration”.<sup>52</sup>

### **States Complaints Board**

*The Board acknowledges that if there is a transfer of land landside of the sea wall, it may well be appropriate for the Public to retain access rights onto the land transferred for the purposes of essential defence work. The Board would hope that the Master Schedule would include standard clauses to be included in any conveyancing contracts in order that owners could understand the limitations on the land and the extent of the land restricted. By retaining such rights over the land transferred (including an actual or implied restriction against any building on the land) the land is largely valueless other than for landscaping purposes and this should be reflected in the price charged.*<sup>53</sup>

The Panel is mindful that Jersey’s sea defences should not be placed at risk or inhibited as a result of encroachments. Moreover, that the Minister should be able to maintain and repair them as required to ensure the safety of Jersey’s community now and in the future. The Panel realises that a policy is needed to ensure the Minister can maintain and access Jersey’s sea defences as required. However, regarding the degree of direct impact which current encroachments have had on Jersey’s sea defences to date or the government’s ability to protect sea defences as a result of current encroachments, the Panel is uncertain and suggests that further evidence is required to detail and justify any impact of foreshore encroachments on that aspect. The Panel suggests that it may be beneficial to consider the maintenance and upkeep of the sea wall and sea defences as a separate policy if that aspect is a primary concern of the Minister for Infrastructure. Additionally, to explore what policies currently exist to support the Minister’s obligations in that regard. The Panel is mindful that the revised Policy should not be founded on the obligation of maintaining sea defences as a route to acquire compensation for encroachments. Transparency is pertinent in that regard.

**KEY FINDING 8:** There is insufficient evidence to suggest that encroachments along the foreshore have significantly affected the Minister for Infrastructure’s ability to maintain sea defences.

**KEY FINDING 9:** There are other policy mechanisms which could be explored, such as a separate Sea Defences Maintenance Policy and/or Planning Obligation Agreements to ensure that maintenance and upkeep of sea defences is not compromised. Therefore, it is questionable as to whether the revised foreshore encroachment policy is required to seek compensation payments in the matter it currently does.

**RECOMMENDATION 3:** The Minister for Infrastructure should consider a separate Sea Defences Maintenance Policy, in addition to how Planning Obligation Agreements might satisfactorily be utilised going forward to ensure adequate upkeep and maintenance of seawalls where encroachments are concerned. The Minister should investigate these possibilities and report back to the Panel before the end of Q3 2021.

<sup>52</sup> [Submission – States Complaints Board](#)

<sup>53</sup> [Submission – States Complaints Board](#)

## 5 Encroachments and compensation payments

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The Panel has received submissions from and has held meetings with a number of members of the public regarding concerns in relation to the handling of foreshore encroachments and the current policy. A recurring view was that the approach in which the current policy was being applied was unfair and discriminatory:

### **Mr Mallinson**

*Mr Mallinson advised that in his view JPHs' policy did not work and that it was applied inconsistently. He advised that JPH had only committed initially to pursuing claims where a 'trigger' event had occurred. For example, a planning application or the sale of a property. Where there was no 'trigger' event, these properties would essentially remain 'under the radar' and that if they did so for more than forty years then, under Jersey Law, they would be entitled to the land having never been challenged on ownership. After challenging this apparent inequity Mr Mallinson advised that JPH had issued a commitment to action all property encroachments within a period of 5 years. However, Mr Mallinson noted that this timeframe was almost up and there had been no further challenges that he was aware of.*

*In this respect, Mr Mallinson reiterated that there was an unfairness as not every property owner was being treated the same under the policy. Mr Mallinson gave the example of another property which appeared to have very similar encroachments but had been advised by JPH that they did not and so no further action would be taken.<sup>54</sup>*

### **Mr Luce**

*"I would rather deal with ... gangsters" ... was a key phrase delivered to me in deciding my accepting the sad status-quo as dictated by JPH and paying a levy or fine to sell my house. In accepting it was not because I wanted to - because I had to in the Royal Court I now perjure (and warned so prior to the Complaints Board hearing) myself in questioning how owns the land, ironically the same court transacted the gift with clauses that have largely been overridden by JPH.<sup>55</sup>*

Regarding the application of the current foreshore policy, within a submission received from Mr Mallinson in 2019, it was noted that on 15 August 2017 the Department for Infrastructure was forced to publish a statement due to numerous articles being published in the local media who referred to JPH actions as a 'Backdated Foreshore Infringement Tax'.

The statement as written by JPH confirmed the approach taken by JPH was to:

*"contact relevant parties when a 'trigger' event occurs, these are typically;*

- *Notification of a potential disposal of a relevant property by sale or contract*
- *Submission of a planning consent potentially involving the Foreshore*
- *An approach to the Department"<sup>56</sup>*

It was the view of Mr Mallinson that the JPH 'trigger' system resulted in prejudice to those property owners who were seeking to sell or apply for planning permission. Mr Mallinson

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<sup>54</sup> [Minutes – Environment, Housing and Infrastructure Panel – 2019.04.16](#)

<sup>55</sup> [Submission – Mr A Luce](#)

<sup>56</sup> [Submission – Julian Mallinson \(Initial\)](#)

emphasised that all encroachment claims should be issued in a uniform manner, regardless of the property owner status and should not be discriminatory.<sup>57</sup>

Mr Luce, within his submission to the Panel, established his disdain for the policy approach and astonishment regarding how the injustice expressed through the policy approach continued despite the criticism from so many including the Public, the legal profession and the media:

*Strong words published “the government has extorted monies from these Islanders” and “unfair, discriminatory and against natural justice” openly published by learned law professionals would in most circumstances not be taken lightly, certainly not disregarded...<sup>58</sup>*

Regarding JPH’s approach to compensation payments, Mr Mallinson stated the following within his initial submission of 2019:

*...In all 3 cases of Foreshore compensation payments since the Foreshore was gifted to the Public, the Department has waited for the properties to be in the process of being transacted, when the owners are at their most vulnerable and intentionally blighting the owner’s prospects of selling the property. JPH can then sit back and do nothing and the only way an owner can proceed matters is to agree to whatever terms JPH require or to force a resolution by costly and protracted litigation.<sup>59</sup>*

Regarding the approach which targets owners wishing to sell, the following view was received from a member of the public:<sup>60</sup>

**Peter Vincenti:**

*The very fact that anyone encroaching who do not sell will never be fined for any encroachment - how can that be equitable.*

*More sinister and an explanation should be sought, is why it is only sellers. This would seem quite obvious, is it because the greatest culprit of encroachment is the States themselves and although they have encroached would not sell - the foreshore at Gorey is the principle example with the reclamation site to follow and the reclamation up to the Royal Yacht as raised, but there are many other instances of the States having encroached. This is why JPH have cunningly used sellers only!*

In relation to the application of the current policy, during the Public Hearing the Minister for Infrastructure, he stated the following about the perception of the approach undertaken by JPH:

**Minister for Infrastructure:**

*But I would like to clear up some misinformation that is out there that obviously Property Holdings have been accused of pursuing people when, in fact, on the contrary, Property Holdings have been perceived ... this is normally when a house or property is being transacted and, as I have said before, any lawyer or solicitor worth their salt would know exactly where the boundaries are. Normally when a house is being transacted the new buyer will contact a lawyer and the lawyer will come along and look at the plans and look at the whole site. If they know what they are doing, which most*

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<sup>57</sup> [Submission – Julian Mallinson \(Initial\)](#)

<sup>58</sup> [Submission – Mr A Luce](#)

<sup>59</sup> [Submission – Julian Mallinson \(Initial\)](#)

<sup>60</sup> [Submission – Peter Vincenti](#)

*of them do, they will say: "I think you need to clarify your boundary because this area over here does not look right." It is at that point that Property Holdings are contacted and that is when these problems come to light.<sup>61</sup>*

Within a submission from a member of the legal profession regarding the conveyancing process of properties adjoining the foreshore, the following view was received:

**Mr Le Feuvre:**

*Any conveyancer or lawyer dealing with properties adjoining areas affected by the foreshore would have been aware that the boundary of any such properties would be uncertain with it in many cases being given as the high spring tide mark which with the construction of various sea walls would at best be difficult to ascertain with the desired accuracy. The situation has of course been made more difficult by global warming and the changing levels of the high spring tide. There was held by one of IHE's predecessors (Public Works I believe) plans showing the approximate area which was claimed by the Crown but it is difficult to say how precise such plans were. It is my view that any lawyer or conveyancer should have at the very least drawn any potential purchaser's attention to such problems and the possible ramifications thereof.<sup>62</sup>*

**KEY FINDING 10:** Jersey conveyancers and / or lawyers would be aware of the issues and possible ramifications relating to the difficulty in determining the foreshore boundary when an adjoining property is sold and would draw this to the attention of the prospective purchasers during the conveyancing process.

Within his submission, Mr Le Feuvre shared his view regarding whether it would be reasonable and fair for compensation to be sought from parties who were less likely to have been made aware of an alleged encroachment, for example, properties that had been purchased in 1950s 1960s. He noted that it would be a matter for the Minister of Infrastructure to decide whether it was reasonable and fair to claim compensation in all cases:

*It could be said that to a certain extent any owner of a property which has encroached on the foreshore has been unlucky in as much as the foreshore belonged to the Crown and it is not possible to get a prescriptive title by way of 40 years exclusive possession as would have been the case in most other forms of ownership. Many of the properties, especially along the Greve d'Azette coastline, were and are set up in such a way that the owners of those properties and their guests would, following the construction of the sea wall, have been the only persons able to access the affected parts of the foreshore and would have been able to claim ownership by 40 years possession "nee vi, nee clam, nee precario"[sic nec vi, nec clam nec precario]. It is a matter for the Minister of Infrastructure to decide whether or not it is reasonable and fair to claim compensation in all cases. For example people who purchased in the 1950s or 1960s would have been less likely to have been made aware of the problem that those acquiring at a later date when the existence of the foreshore plan was more widely known.<sup>63</sup>*

**KEY FINDING 11:** Due to the fact the foreshore previously belonged to the Crown, the prescriptive title relating to 40 years exclusive possession, which legally applies to most other forms of ownership, does not apply in relation to land owned by the Crown.

Noting that within the Minister for Infrastructure's report to his amendment to P.101/2020 the Minister had asserted that encroachments made predating the current ownership should

<sup>61</sup> [Transcript – Public Hearing with the Minister for Infrastructure- Pg. 3](#)

<sup>62</sup> [Submission – B.F.H. Le Feuvre](#)

<sup>63</sup> [Submission – B.F.H. Le Feuvre](#)

remain subject to compensation claims due to the conveyancing process that takes place when a property is transacted, the Panel asked the following of the Minister for Infrastructure during the Public Hearing:<sup>64</sup>

***The Connétable of St. Brelade:***

*... It suggests, and I quote: "It would be highly surprising if buyers had no knowledge of the position, for instance the encroachment."*

*Do you still stand by this view? Do you consider this is a fair assumption to make when dealing with these cases, given that some properties have been in the same family ownership for many, many years and will not have been transacted, shall we say, by the existing generations even? How would you respond to that, Tim?*

***Director of Property, Jersey Property Holdings:***

*Again, I think that the foreshore has always been a challenging area and I do think that Jersey lawyers, in particular, are well aware of it as an area that needs particularly close concern, as in any boundary transactions. But you are absolutely right there may well be historical cases where that has not been case. I do think that generally in the more recent epoch and certainly since the transfer of the foreshore from the Crown to the public, that it is clearly very common knowledge that it is an issue. The fact that transactions were undertaken by the Crown again shows the fact that this was in common knowledge prior to 2015, so I do think it is a fair assumption to make that generally the legal profession on the Island would have been aware of challenges and that perhaps it may have been down to individual landowners who took an element of risk perhaps and felt that they were prepared to accept the situation if they felt that they were going to be in possession of the property for a long time and that it would not be an issue if they wanted to sell.*

The Panel asked for confirmation that the revised policy will handle these sort of situations in a more robust or formal manner than was the case in the past and that the conveyancing officers within law firms in the Island would be fully aware of what the department was doing:

***The Director of Property for Jersey Property Holdings responded as follows:***

*I believe that law firms are fully aware of the issues and certainly the conveyancing profession as a whole are aware of the challenges.*<sup>65</sup>

It was Mr Le Feuvre's view that information was available but not well publicised and therefore the average person would not have been aware of the existence of the plans held by IHE (under its former identity). Moreover, that making such information as publicly available as possible could only be regarded as a positive move.<sup>66</sup>

For alleged encroachments that predate the public's ownership of the foreshore, Mr Mallinson questions whether the compensation payments should revert to the Crown. Within his initial submission he notes that JPH had confirmed that the Crown was unaware of the intention of the States to obtain backdated fines for historic encroachments that predate the public's ownership.<sup>67</sup>

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<sup>64</sup> [Transcript – Public Hearing with the Minister for Infrastructure- Pg. 5](#)

<sup>65</sup> [Transcript – Public Hearing with the Minister for Infrastructure- Pg. 5 -6](#)

<sup>66</sup> [Submission – B.F.H. Le Feuvre](#)

<sup>67</sup> [Submission – Julian Mallinson \(Initial\)](#)



Considering that the planning application process had been highlighted as a trigger point in the compensation process, the Panel raised concern during a Public Hearing with the Minister for Infrastructure regarding planning consent being acquired for alleged encroachments and asked the following:<sup>68</sup>

***The Connétable of St. Brelade:***

*...The panel is aware that on occasion property owners have received planning consent for alleged encroachments, how will the revised policy deal with situations like this and what work has been undertaken to prevent planning permission from being granted in such situations?*

***Director of Property, Jersey Property Holdings:***

*Yes, you are absolutely right. I think that the planners have considered, if you like, the bare bones of the case in the past but certainly we will make sure the Planning Department are now aware that anything in the area of the foreshore must be referred in the first instance to Jersey Property Holdings and, indeed, the Law Officers' Department to make sure that the ownership of areas that are being applied for planning are clearly identified and are as assertions are made.*

The Panel sought confirmation that the Minister for Infrastructure and JPH would collaborate with the planning team within the Department for Infrastructure to ensure joined up working so that everybody knows what the position is. The Panel questioned whether there was agreement that this needed to be done.<sup>69</sup>

***Director of Property, Jersey Property Holdings:***

*We are definitely joined up and certainly, you are right, we need to make sure that the situation you outlined does not occur in the future.*

Regarding the above the Acting Director General for Infrastructure, Housing and Environment had the following view:<sup>70</sup>

*I was just going to make the point that it is a legal duty on anyone applying for a planning application to declare the land ownership. So either they are the total owner and they have to sign accordingly or they get the landowner's permission to make that application. So that is a requirement in our Jersey Planning Law that all our owners have to sign. The starting point is for the person making the application to be very clear around their ownership and then accordingly if they do understand that there is public ownership of part of the site then Property Holdings would need to sign as well.*

During the Hearing with Sir Philip Bailhache, the Panel asked for his view on landowners being granted planning permission that might have resulted in an encroachment.

Sir Philip Bailhache explained that it was up to the landowner to establish what his boundary was prior to making a planning application. However, he explained that, in his view, what had often happened was that a landowner knew that there either was an encroachment or there might have been an encroachment upon Crown land and before approaching the Planning Department for planning permission had approached the Crown to say: "This is what I am proposing to do, is it okay with you?" Subsequently, the Crown had, mostly it seems, acquiesced and then the landowner had gone on to make the application. It was Sir Philip's

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<sup>68</sup> [Transcript – Public Hearing with the Minister for Infrastructure- Pg. 6](#)

<sup>69</sup> [Transcript – Public Hearing with the Minister for Infrastructure- Pg. 6](#)

<sup>70</sup> [Transcript – Public Hearing with the Minister for Infrastructure- Pg. 6 -7](#)

view that it would be unfair to leave that out of account when one is in dispute about where the boundary may lie.<sup>71</sup>

**KEY FINDING 12:** Property owners seeking planning permission have a legal duty to declare ownership of the land they are seeking planning permission for.

**KEY FINDING 13:** In some cases planning approval has been granted where it has already been acknowledged that encroachments either may exist or were likely to be incurred. Furthermore, that prior to the transfer of ownership from the Crown to the Public of Jersey, when requests were made for works which would incur an encroachment, under its ownership, the Crown generally acquiesced to these requests. In these instances property owners have still been required to pay compensation payments for these encroachments.

**RECOMMENDATION 4:** The Minister for Infrastructure should, in collaboration with the Minister for the Environment, seek to put in place a suitable, formal protocol for dealing with planning permission applications relating to properties along the foreshore. This should be put in place before the end of Q2 2021.

It was noted within Mr Mallinson's submission that once JPH had decided a party was encroaching on the foreshore, the party was made to sign a non-negotiable contract which included a Clause, Clause 6, which allowed the public to require encroachments to be removed anytime in the future.<sup>72</sup>

The Complaints Board, within its submission, noted that it objected to this approach:<sup>73</sup>

*What the Board objected to (apart from the "take it or leave it" approach in "negotiations" with the complainants, was that whilst the complainants were charged significant amounts of money for alleged encroachments to be allowed to remain, the Public reserved the right to require the encroachments to be removed at the complainants' cost in the event that access was required in the future for defence works (Para 8.13 of R71/2018).*

The Board noted that the complainants had received very little for their money and if the public was going to demand large sums for permitting encroaching buildings to remain, then that right to remain should be clear and absolute:

*The whole point is that both the Public and the landowner should have certainty. That is not to say that it could not be agreed that a particular encroaching structure could remain but could not be replaced or enlarged, but that limitation should be reflected in the compensation paid.*

The Panel is mindful that any process considered for seeking compensation should be fair and non-discriminatory. The Panel raised concern that the 'trigger' approach utilised in the current policy is not indicative of a fair and non-discriminatory approach and does target property owners at their most vulnerable leaving many with little choice but to oblige and make the payment asked of them. The Panel is mindful that the revised policy should address this to ensure that a fairer approach was possible. The Panel is minded that any negotiations should be fair, and contracts should not be forced onto property owners, but fairly negotiated and agreed by all parties involved. Additionally, any compensation sought or paid should be

<sup>71</sup> [Transcript – Public Hearing with Deputy Labey and Sir Philip Bailhache – Pg. 10](#)

<sup>72</sup> [Submission – Julian Mallinson \(Initial\)](#)

<sup>73</sup> [Submission – States Complaints Board](#)

reflective of the encroachment and the limitations agreed. This should be clearly addressed within the revised policy.

**KEY FINDING 14:** The ‘trigger’ approach utilised in the current policy identifies encroachments when either the property is transacted, planning permission sought or a direct approach made to Jersey Property Holdings by a property owner.

**RECOMMENDATION 5:** The Minister for Infrastructure should seek to apply the policy in a fair and non-discriminatory manner, and not solely to those where a trigger event has occurred. Compensation sought or paid should be reflective of the encroachment and limitations agreed. This should be reflected in the revised policy prior to its adoption.

## 6 Current foreshore policy vs. revised policy

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### The Revised Policy – fair, proportionate and fit for purpose?

Considering that a primary issue with the current policy was the “unjust, oppressive or improperly discriminatory” way in which JPH treated property owners adjoining the foreshore, the Panel sought to gain a better understanding whether the revised policy was fair, proportionate and fit for purpose.

During a Public Hearing with the Minister for Infrastructure, the Panel asked whether the Minister could outline how the proposed revised policy provided a more fair and pragmatic approach when handling foreshore encroachment matters.

It was explained that the revised policy was divided into four general sections, the first of which established the principle of a proactive approach. It was explained that the historical approach of JPH had always been - and would continue to be - to engage with the affected individuals and to make sure that other than a blanket settlement that the specific incidence and context of their particular case was considered, and that the challenges that were faced were resolved in light of the specifics of the individual cases.<sup>74</sup>

The Director of Property for Jersey Property Holdings outlined the four sections of the policy as follows:

*...so the first part of the policy is a proactive and pragmatic engagement. The second part covers the identification early of new or recent encroachments and establishes the requirement to settle those and to make sure that the encroachment is again resolved. The third part of the policy looks to historic encroachments and I think it is obvious that these are the areas that are particularly challenging. Then the final part of the policy looks at minor encroachments and, again, establishes that there will be a pragmatic approach to how these are solved.*

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<sup>74</sup> [Transcript – Public Hearing with the Minister for Infrastructure- Pg. 2](#)

Regarding historic encroachments, The Panel was informed that a number of methodologies could be sought from removal of the encroachment to a financial or legal regularisation of any encroachment to ensure the landowner and the Public had the outcome that was desired.

With regard to minor encroachments, it was explained that these would include wooden steps down over the breakwater or opening of a gate on the public foreshore and that these would be considered on their own merits and a resolution agreed.

A similar question was asked during the Public Hearing with the Deputy of Grouville and Sir Philip Bailhache to gather their views on the fairness of the revised policy. The following was asked of the Deputy of Grouville:

***The Connétable of St. Brelade:***

*...Obviously you are raising concerns about the fairness of the current policy and its application, we get the impression the revised policy proposes to provide a fairer approach. In your view do you believe the revised policy could deliver a fairer approach in contrast to what we have at present, do you think it would allay the concerns of your constituents and how might that be?*

The Deputy of Grouville was adamant that the revised policy did not provide a fairer approach. She explained that the revised policy was very complex and, in her view, did not provide the transparency required. It was her view that the revised policy was not the way forward. The Deputy emphasised that the revised policy was very unclear:<sup>75</sup>

***The Deputy of Grouville***

*... in actual fact the conclusion in the report that goes with it, and I quote: "The conclusion and recommendation of the review of this aspect is that the current position should stand." They are unrepentant about it, in which case why are they bringing forward a revised policy if the current position should stand, and what is that current position? Is that the current position that they were going from before a policy was laid down after we received the gift, that Property Holdings should extract the maximum amount ... I am not sure of the wording, is it: "The maximum amount of value from the public"?*

The Panel requested Sir Philip Bailhache's view regarding whether the revised policy was a fairer approach and received this response:<sup>76</sup>

***Sir Philip Bailhache***

*No, I do not, Constable...I think the real problem with the revised policy is that it is not a revised policy. It is adopting the very same approach that the Jersey Property Holdings have adopted in the last 2 to 3 years. The reason for that is, I think to be fair to J.P.H. (Jersey Property Holdings), that they believe that they are operating under a political mandate which was given by the Minister for Infrastructure some time ago in 2016 [sic 2006], which was that - and I quote again - "J.P.H. should extract the optimum benefit from property assets." When one looks at the face of those words one can well understand that J.P.H. might think that their duty is to extract from landowners who may or may not have encroached upon the foreshore the maximum amount of money that they can.*

<sup>75</sup> [Transcript – Public Hearing with Deputy Labey and Sir Philip Bailhache – Pg. 3](#)

<sup>76</sup> [Transcript – Public Hearing with Deputy Labey and Sir Philip Bailhache – Pg. 3](#)

Sir Philip Bailhache explained that it was his view that the approach (as highlighted above) was not a proper approach and that the same approach was found again in the revised policy. He quoted what was stated in the revised policy: "A main principle of it is that J.P.H. is a body established by the States Assembly to manage land and buildings owned by the public of Jersey and ensure best value is realised." He explained that was why he expected that JPH would feel under a mandate to adopt what was really a commercial property developer's approach in its dealings with the Public of Jersey. Sir Philip Bailhache emphasised it was his view that the approach did not seem to be right.

In a submission received from Sir Philip Bailhache, he explained that the complaint about the previous policy was in essence that a government department or entity should not conduct itself as might a rapacious property developer in the private sector, but should engage with the public in a sympathetic and fair-minded way befitting a government elected to serve the people. Additionally, that JPH should have regard to the special circumstances affecting the foreshore, namely its history and the general approach over many centuries of the Crown, the previous owner.<sup>77</sup>

Sir Philip Bailhache highlighted the following within his submission to the Panel:

*The revised Policy states that a main principle is that "JPH is a body established by the States Assembly to manage land and buildings owned by the public of Jersey and ensure best value is realised..."*

Sir Philip Bailhache explained, regarding the revised policy, that the value of the land would be realised by the calculations of professional valuers as if an area of sand on the foreshore were a piece of terrain in St Helier to be built over for some commercial purpose. He continued; the Minister graciously conceded that the length of time that an encroachment had existed was a relevant factor. However, the professional valuation would remain the starting point, but in the case of historic encroachments it would be "subject to a reduction in the price to reflect the period for which the historic encroachment has existed".

It is Sir Philip's view that what that reduction might be is not made clear and that If there was a sliding scale, it had not been published.

Regarding the revised policy, Sir Philip highlighted that the fact that an owner may have obtained the consent of the Crown and obtained planning permission for steps on to the beach, would be irrelevant. The "fair and proper price" would still to be exacted for the privilege of allowing the steps to remain. It was Sir Philip's view that this was an unacceptable way for a government department to treat members of the public.

Within his submission to the Panel, Sir Philip proposed the principles that he would include if he were drafting, in his view, a fair and reasonable policy as follows:<sup>78</sup>

*(1) Encroachments occurring after approval of the Policy by the States should be required to be removed and the foreshore restored to its prior state at the expense of the encroaching party.*

*(2) Encroachments occurring prior to approval of the Policy but after 1st January 2010, should be dealt with as follows –*

*(a) Minor encroachments will be permitted to remain subject to such reasonable conditions as the Minister may specify in a licence agreement.*

<sup>77</sup> [Submission – Sir Philip Bailhache](#)

<sup>78</sup> [Submission – Sir Philip Bailhache](#)

*(b) Interfering encroachments will be required to be removed and the foreshore restored to its prior state at the expense of the encroaching party.*

*(c) Non-interfering encroachments, which are not minor encroachments, may at the discretion of the Minister be permitted to remain subject to such reasonable conditions as he may specify in a licence agreement, including the payment of reasonable compensation.*

*(3) Encroachments which have occurred prior to 1st January 2010 (historic encroachments) should be dealt with as follows –*

*(a) Minor encroachments will be permitted to remain subject to such reasonable conditions as the Minister may specify in a licence agreement.*

*(b) Interfering encroachments may be required to be removed and the encroaching party may be required, depending on the particular circumstances of the case, (including the length of time that the encroachment has existed), to contribute appropriately to the cost of such removal.*

*(c) Non-interfering encroachments, which are not minor encroachments, will be permitted to remain subject to such reasonable conditions as the Minister may specify in a licence agreement.*

*(4) Notwithstanding the above policies, if an encroachment at any time affects any duty of the Minister to repair or improve flood defences pursuant to the Drainage (Jersey) Law 2005, he may deal with the matter as he thinks fit.*

Within his submission, Sir Philip commented that the Minister's proposed revised policy was shameful and that it pitted the unbridled power of the State against the individual members of the public.<sup>79</sup>

Having met with the Law Society of Jersey previously in May 2019 regarding concerns of the current foreshore policy, in a recent submission received, the Law Society maintained its position previously presented.

Considering the minutes of the Panel's meeting with representatives of the Law Society in 2019, it was their opinion that it was not right to apply a new policy retrospectively to landowners, some of which may not have made the encroachment, as in some cases it may have been a previous landowner. It was also felt that it was not fair to apply the policy only to landowners in the process of selling their property and not to those who were not selling their property.<sup>80</sup>

It was the view of the Law Society that the alleged encroachments predating 2015 would have happened on the States watch and by not taking any action during that time, it was felt that it was not appropriate to penalise, and effectively take advantage of, homeowners in relation to changes that had, in some cases, taken place prior to the current ownership of the property.<sup>81</sup>

Within the latest submission received from the Law Society the following view was expressed:

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<sup>79</sup> [Submission – Sir Philip Bailhache](#)

<sup>80</sup> [Meeting Minutes – Environment, Housing and Infrastructure Panel – 2019.05.19](#)

<sup>81</sup> [Meeting Minutes – Environment, Housing and Infrastructure Panel – 2019.05.19](#)

**Law Society of Jersey:**

*We are still at a loss to understand how the Public actually benefits in real terms from the aggressive approach taken by the Minister for the Environment and the Law Officers' to date<sup>82</sup>*

Regarding the revised policy the Law Society had made a number of observations as follows:<sup>83</sup>

*Under historic encroachments (3.c.), it states that changes to historic encroachments will restart the clock. What is a change and how significant must it be to have this effect – replacing rusty / rotten steps? Rebuilding an old wall?*

*Sliding scale must be published – are they using 40 years as the benchmark? i.e. the value decreases by 1/40th for each year or part that the encroachment has been in situ? See above point re difficulty in assessing actual value.*

*How is value for a licence determined – and how does this compare to a lease or sale of the land?*

*When would a lease be used instead of a sale?*

Mr Mallinson, in his submission to the Panel questioned how the conduct of JPH as a result of the revised policy would change. He considered this in relation to legal issues and commercial implications.<sup>84</sup> Regarding legal issues, Mr Mallinson explained that in his view it was inconceivable that the LOD would have advised JPH that it had a clear-cut case to fine members of the public for alleged encroachments that predate the government's ownership and contrary to long established customary legal practices. Mr Mallinson noted that the revised policy contains no provision to prevent the take-it-or-leave-it JPH approach from continuing.

Moreover, the revised policy did not refer to amending the contract between JPH and the encroaching party, that did not give full title, and which contains a clause stating the agreement can be rescinded without notice and without repayment of the fine. He noted that this was despite the former Director of Estates, JPH, having informed the Complaints Panel in April 2018 that his department would investigate that aspect.

Mr Mallinson explained that the complete lack of legal transparency was illustrated in the revised policy which states the "Master Schedule" containing the "Default Boundary Line" could not be publicly disclosed, despite the fact that the Default Boundary Line would have been assessed from public information obtained within the Public Registry.

Regarding commercial implications, it was Mr Mallinson's view that the revised policy did not allay the fundamental concerns of the previous policy, being that members of the public who need to sell their property were matched against the might and unlimited resources of the Government of Jersey who could, at its absolute discretion, determine if an encroachment existed, the extent of the encroachment and the appropriate fine.

Moreover, the revised policy was silent on the modus operandi of JPH to extract the maximum fine for alleged encroachments and it must therefore be assumed that this policy would continue, without regard to the historic way alleged encroachments had been dealt with prior to the gifting of the foreshore. Furthermore, the revised policy would still be retrospectively

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<sup>82</sup> [Submission – Law Society of Jersey](#)

<sup>83</sup> [Meeting Minutes – Environment, Housing and Infrastructure Panel – 2019.05.19](#)

<sup>84</sup> [Submission – Mr Mallinson](#)

applied to members of the public, many of the alleged encroachments which predate their ownership.

Mr Mallinson noted that the revised policy made no provision to ensure that alleged encroachments were dealt with in a timely manner. Moreover, made no mention of how valuations would be assessed.

It is Mr Mallinson's view that all the recommendations of the Complaints Board had been ignored within the revised policy. Including the recommendation that JPH "*make public its policy with regard to its stewardship of the foreshore with a publication of a fair and transparent policy regarding the boundaries of the foreshore and encroachments towards it..... and to identify the default location of the landside boundary of the foreshore*".

Within his submission Mr Mallinson suggested a simplified, more equitable, revised policy as follows:<sup>85</sup>

*1) There will be no fines for encroachments that predate the gifting of the foreshore to the Public on 12th June 2015, provided these encroachments do not interfere with the duty of the Government of Jersey to maintain sea defences as detailed in the Drainage (Jersey) Law 2005.*

*2) If the encroachments predate the Government's ownership and if they interfere with the Government's duty to maintain sea defences, the Government will have its existing right to enforce the Drainage (Jersey) Law 2005.*

*3) For any encroachments that were created after the Government's ownership, the Government will have the right to ask for their removal or request a fair price for their benefit to the landowner, each case to be judged on its own merit, having regard to factors such as planning consent and the extent of the encroachment.*

*Note: Under Part 4 of the Drainage (Jersey) Law 2005 (as revised 1st January 2018) the Minister for Infrastructure may construct and maintain flood defence works on or over any land at his absolute discretion.*

Within a submission received from Mr A. Luce the following view was expressed:

*If not controlled it will proceed to be stealthy perpetrated by an unfettered JPH in an un-transparent manner against single stand alone property owners, who like myself will capitulate, not because they are wrong, because they cannot take on an invincible (and in the main secretive) resource. JPH like pursuing sellers as they are vulnerable as they hold the ace card.<sup>86</sup>*

The Panel notes that a recurring view regarding the revised policy is that it remains an unfair approach. It would not be workable and it would not benefit the public. Moreover, it has not accomplished what it had set out to accomplish - a fair, proportionate and fit for purpose policy. It contains the same principles within the current policy and does not address the recommendation made by the Complaints Board regarding the current policy. It is complicated, unclear and lacks transparency.

**KEY FINDING 15:** Evidence received by the Panel appears to support an overwhelming and unanimous view that the revised policy remains an unfair approach. That it is complicated, unclear and lacks transparency.

<sup>85</sup> [Submission – Mr Mallinson](#)

<sup>86</sup> [Submission – Mr A Luce](#)



## Distinction between deliberate or unintentional encroachments

The Panel sought to gain a better understanding regarding whether a varied approach would be undertaken to resolve deliberate as opposed to unintentional encroachments. The following was asked during the Public Hearing with the Minister for Infrastructure:<sup>87</sup>

***The Connétable of St. Brelade:***

*...Regarding deliberate versus unintentional encroachments, the panel would imagine this could be an area of concern as ultimately a difference exists between these 2 groups. Would you foresee any complication regarding this and, if so, what measures would be taken to resolve them?*

***Director of Property, Jersey Property Holdings:***

*... our policy, when it is presented, will show that there is a specific requirement for a pragmatic and logical approach to resolving these issues. I think that it will be clear if there is a property that has not changed hands over a couple of generations or that could claim to have a lack of knowledge of an encroachment, in certain circumstances those claims can be quite easily refuted. There is photographic evidence for the majority of ... certainly in the southern and south-eastern corner of the Island. I think that where there is a legitimate claim to lack of understanding and knowledge of encroachment then, of course, that will be dealt with. We have, in the past, applied a sliding scale where there has been a long held encroachment but which settlement has been sought then a reduction of the monetary value or the increase of monetary value of the property has been levied. So, again, in the past we have had that pragmatic and problem solving approach. That is the approach that we will continue to have in the future.*

The Panel notes that it appears the sliding scale has not been published, therefore, there is uncertainty regarding what it would involve and how compensation would be calculated. Moreover, the criteria that would be used to inform it. It appears that no clear differentiation would be made regarding a deliberate or unintentional encroachment.

**KEY FINDING 16:** There appears to be no clear differentiation between how a deliberate or unintentional encroachment on the foreshore would be dealt with.

**RECOMMENDATION 6:** The Minister for Infrastructure should seek to differentiate between a deliberate or unintentional encroachment in the revised policy and this should be incorporated into the revised policy prior to its adoption.

## The Sliding Scale

During the Public Hearing with the Minister for Infrastructure, the Director of Property for JPH commented that, in the past, a sliding scale had been applied to ensure a pragmatic and problem-solving approach. It was suggested that the approach involving the sliding scale would continue.<sup>88</sup>

<sup>87</sup> [Transcript – Public Hearing with the Minister for Infrastructure- Pg. 8](#)

<sup>88</sup> [Transcript – Public Hearing with the Minister for Infrastructure- Pg. 8](#)

**Director of Property, Jersey Property Holdings:**

*We have, in the past, applied a sliding scale where there has been a long held encroachment but which settlement has been sought then a reduction of the monetary value or the increase of monetary value of the property has been levied. So, again, in the past we have had that pragmatic and problem solving approach. That is the approach that we will continue to have in the future.*

Within a submission received from the Complaints Board, the Board highlighted the requirement for a sliding scale, however, noted that the report accompanying the revised policy offered no indication of what that sliding scale might look like, or the difference between one end of the scale and the other. The Board maintains the view that a sliding scale based purely on the length of time a particular encroachment has been in existence is unfair, discriminatory and arbitrary.<sup>89</sup>

The Board considers that the appropriate compensation should be negotiated on a case by case basis, taking into account the value added to the landside property by virtue of such encroachment, but taking into account also any approval (whether by the planning authorities or by the Crown) explicit or otherwise of such encroachment.<sup>90</sup>

As it was confirmed by JPH that the sliding-scale mechanism would continue. The sliding scale should be defined in the revised policy.

**KEY FINDING 17:** Jersey Property Holdings will continue to apply a sliding scale mechanism to determining the level of a foreshore encroachment compensation payment. However, the criteria for the sliding scale is not included in the current or the revised policy.

**RECOMMENDATION 7:** The Minister for Infrastructure should further define and set out the criteria for a Sliding Scale into the revised policy so that it is clear and transparent. This should be incorporated into the revised policy prior to its adoption.

## Treating each case on its own merit

During a Public Hearing with the Minister for Infrastructure the Panel highlighted that it was their understanding that the intention of the revised policy was for each encroachment involving the foreshore to be considered on its own merit. The Panel questioned the process in place to ensure this:<sup>91</sup>

**The Minister for Infrastructure:**

*If I may defer to Tim again.*

**Director of Property, Jersey Property Holdings:**

*It is absolutely the case each individual encroachment would be considered. There are a number of types of encroachment so we have got an interfering encroachment, a major encroachment that has a potentially material impact on the Department for Infrastructure's ability to maintain the sea wall or the ability of the public to access the foreshore. In those circumstances if the encroachment cannot be removed then a legal process will have to be determined to understand what the value of that encroachment might be and then for a settlement, acknowledging the value to be*

<sup>89</sup> [Submission – States Complaints Board](#)

<sup>90</sup> [Submission – States Complaints Board](#)

<sup>91</sup> [Transcript – Public Hearing with the Minister for Infrastructure- Pg. 3](#)

*agreed on between the landowner and the public. There are, as I mentioned earlier, non-interfering encroachments which could be a sort of gate opening or stairs that are lying on but not interfering with the fabric of the sea wall. In those circumstances if there is no material gain then a legal regularisation could occur, again to the satisfaction of both the landowner and the public, which would allow the situation to be recorded in law and the ownership to be determined.*

Mr Le Feuvre shared his view that each case should be judged on its merits within his submission to the Panel.<sup>92</sup>

The Panel is mindful of how this approach will be ensured. Moreover, what processes would be in place to safeguard the owners of property adjoining the foreshore in that regard. Further clarity and certainty as to how each case will be considered on an individual basis is required.

**KEY FINDING 18:** There is a lack of information contained in the revised policy as to how the approach will be taken to judge each case by its own merits and what processes will be in place to ensure this happens.

**RECOMMENDATION 8:** The Minister for Infrastructure should be explicit in the revised policy as to how each case will be considered on an individual basis and what processes will be in place to ensure this happens. This should be incorporated into the policy before its adoption.

## Impact on property transactions due to revised policy development

Noting that the development of the revised policy might have impacted upon property transactions, the Panel sought to gain an understanding of the degree of impact the policy development process has had on individuals wishing to sell properties adjoining the foreshore.

Therefore, the Panel asked the Minister for Infrastructure during the Public Hearing if he had been made aware of any property or land transactions that had needed to be halted or of any transaction issues or disruptions that had been caused as a result of the revised policy development process. The Minister requested that the Director of JPH respond, and the following response was received:

### **Director of Property, Jersey Property Holdings:**

*Yes, there are 2 that are currently on the books awaiting for the hearings to be had. The revision that we put to the proposition asked that the transactions would be halted until the policy was debated. So there are 2 that are currently on hold. There may be others that people are not bringing forward but there are certainly 2 that we are aware of.*

During the Public Hearing with the Deputy of Grouville, she explained that individuals had contacted her that were concerned regarding selling their homes. She explained that a couple had been considering downsizing, however, were nervous to put their house on the market as they did not know whether they would be approached by JPH and asked for a sum of money.<sup>93</sup>

In his submission to the Panel, Mr Luce makes it clear how the policy afflicted him, not solely in monetary terms but also the profound impact the long drawn out process had on his health

<sup>92</sup> [Submission – B.F.H. Le Feuvre](#)

<sup>93</sup> [Transcript – Public Hearing with Deputy Labey and Sir Philip Bailhache – Pg. 3](#)

and wellbeing and the personal anguish he suffered as a direct impact of the policy's application. Moreover that his "...overwhelming hope is that others do not suffer the same struggle, that pragmatism ultimately prevails, that the JPH admit a failing in judgement, scoping and execution; moreover adopt a sense of does it really matter in the current big picture".<sup>94</sup>

The Panel is uncertain with regard to the extent of impact the policy development process has had on owners of properties adjoining the foreshore. It appears that some degree of impact has been felt although it inconclusive as to the degree of that impact. However, it appears that without a clear and transparent policy, there is a likelihood that property owners with properties adjoining the foreshore would choose not to sell out of concern regarding the policy approach and its bearings. Furthermore, the Panel considers that in the absence of a fairer, more transparent approach, it is likely that an adverse impact has the potential to be felt by the numerous individuals who own property along the foreshore, both in monetary and personal terms, as highlighted in Mr Luce's submission.

**KEY FINDING 19:** There is some degree of impact felt in relation to property transactions being delayed due to the policy development process for the revised policy, although the actual scale of this impact is uncertain. It is, however, conceivable that the length of time and approach taken is likely to significantly impact some property owners along the foreshore.

## Complaints and Appeals Process

In consideration of previous complaints procedures highlighted to the Panel and the extensive time taken to arrive at any form of resolution, the Panel raised concern regarding the complaints or appeals process that would be in place with regard to the revised policy.

During the Public Hearing with the Minister for Infrastructure, the Panel asked whether a complaints system could be followed if a property owner disagreed with the outcome of a valuation and, if so, would the process be made easily accessible to the public:

**Director of Property, Jersey Property Holdings:**

*Yes, I think that is one area that we need to make sure is identified more completely in the forthcoming policy and I think that there is a process in law. The value of said interfering encroachment was to be established by an Institute of Chartered Surveyors valuer and that would be the basis for the value to be determined. However, I think at the moment it is unclear as to what the actual recourse might be if somebody disagreed with that valuation. We look to the Law Officers to make sure that we get a more detailed and clear understanding of what the recourse might be.*

The Panel highlighted that developers may take a commercial view, however regarding the public resolving issues related to land disputes, resolution was generally not so simple, and they were faced with a concern of risk and cost. Therefore, the Panel questioned what other mechanisms were available to the public other than using the Complaints Board.

**Director of Property, Jersey Property Holdings:**

*The disputes would be through the Complaints Board and at the moment that is the only opportunity that we have. But, as I say, I think we need to make sure that there can be a more formal process that is not as dramatic, if you like, or of such a high level*

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<sup>94</sup> [Submission – Mr A Luce](#)

*so that it will not be daunting to landowners if they feel that they have to enter into a full blown legal process to voice their concerns.*

During the Public Hearing with the Minister for Infrastructure, JPH confirmed that it was under resourced.<sup>95</sup> The Panel is mindful of the fact that JPH is under resourced and is concerned that it would not have the manpower to manage a complaints or appeals process effectively and in a timely manner.

The Panel is aware that a simple and accessible complaints or appeals system does not exist. The Panel is mindful that the revised policy will not allay the issues regarding the complaints procedure or to reduce the exceptionally long time taken to arrive at a resolution. It would not allay the concerns that essentially the public are pitted against the government and JPH, who have the resources on their side, but for the public it would remain a risky and costly battle to fight.

The revised policy should include a workable complaints/appeals/arbitration process which is easily accessible to the public involved in disputes of the foreshore.

**KEY FINDING 20:** There is currently no suitable complaints or appeals mechanism provided for in either the current or the revised policy to satisfactorily enable individuals appeal a decision made by the Minister in relation to foreshore encroachment compensation. The only option available to them is to make a case to the States of Jersey Complaints Board.

**RECOMMENDATION 9:** The Minister for Infrastructure should seek to incorporate a suitable and workable process for dealing with complaints relating to foreshore encroachment compensation payments and in addition a clear appeals and arbitration process for dealing with any such complaints. This should be incorporated into the policy before its adoption.

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<sup>95</sup> [Transcript – Public Hearing with the Minister for Infrastructure- Pg. 10](#)

## 7 Conclusion

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It is clear that historically there has been great difficulty in being able to define a clear boundary along the foreshore and this has led to growing uncertainty as to where a boundary line should exist. Numerous submissions received and information gathered during Public Hearings, alluded to a sustained uncertainty over what land was Crown-owned land and this uncertainty of the boundary line remains a concern. This is particularly pertinent given that a defined boundary line would be vital in establishing an understanding of whether an encroachment of the foreshore had occurred or would occur in the future.

The Panel shares the general view that encroachments on public land should not be allowed. However, it is mindful of the particular uncertainty regarding the foreshore boundary, as well as the history of its ownership. It therefore presents an unusual case in this regard. In view of this, the Panel considers that further consideration should be given to how alleged encroachments are dealt with in relation to those that pre-date the gift of the foreshore to the Crown. Moreover, consideration should be given to the ownership of the land, whether it was Crown-owned land to begin with that was then gifted to the public. This highlights the importance of defining an agreeable and explicit boundary line and the allocation of a date from when alleged encroachments should be considered.

A 'work in progress' Master Schedule was presented to the Panel in confidence, outlining where encroachments have been identified to date. However, there is lack of transparency in not allowing the public access to the research undertaken, the Master Schedule, or aspects thereof, or map in relation to informing an explicit boundary line for the foreshore. Noting that a substantial number of properties (approximately 400 properties) are being considered regarding alleged encroachments, this is particularly concerning. The Panel considers that all members of the public wishing to purchase or sell properties that adjoin the foreshore should be knowledgeable of the boundaries that apply, and the information used to define them. The Panel is minded that for the purposes of clarity, transparency, due diligence and fairness, this information should be publicly accessible. Considering the lack of detailed evidence as to the location of the foreshore prior to the landside boundary review, and hence the undertaking of the review to determine this and to provide a revised policy of the foreshore, the public should have an awareness of how the boundary line was informed and should have a means to dispute it if they so wished. Therefore, consideration should be given to how this information could be made public without causing unnecessary concern to the individuals concerned. This would be pertinent to any revised foreshore policy as the boundary is the determining factor for any alleged encroachment.

The Panel agrees that Jersey's sea defences should not be placed at risk or inhibited as a result of encroachments. Moreover, that the Minister for Infrastructure should be able to maintain and repair them as required. However, there was insufficient evidence to suggest that encroachments on the foreshore have significantly affected the ability to do so. Furthermore, the Panel considers that this could be achieved by a separate policy and / or Planning Obligation Agreements and charges the Minister for Infrastructure to consider this approach further. The Panel is of the view that the revised foreshore policy should not be founded on the obligation of maintaining sea defences as a route to acquire compensation for encroachments.

The Panel is mindful that any process considered for seeking compensation should be fair and non-discriminatory. The Panel raises concern that the 'trigger' approach utilised in the current policy is not inductive of a fair and non-discriminatory approach and does target

property owners at their most vulnerable leaving many with little choice but to oblige and make the payment requested of them. The Panel is mindful that the revised policy should address this to ensure that a fairer approach is possible.

The Panel notes that a recurring view regarding the revised policy is that it remains an unfair approach. It would not be workable and it would not benefit the Public of Jersey. Moreover, it has not accomplished what it had set out to accomplish - a fair, proportionate and fit for purpose policy. It contains the same principles within the current policy and does not address the recommendation made by the Complaints Board regarding the current policy. It is complicated, unclear and lacks transparency. In addition, it lacks necessary detail and there is no differentiation between a deliberate or unintentional encroachment. Further clarity and certainty as to how each case will be considered on an individual basis is required.

Furthermore, the Panel considers that, in the absence of a fairer, more transparent approach, it is conceivable that an adverse impact is likely to be felt by the numerous individuals who own property along the foreshore, both in monetary and personal terms, as expressly highlighted in a submission to the Panel.

A simple and accessible complaints or appeals system does not exist and the Panel is mindful that the revised policy will not allay the issues regarding a lack of a suitable complaints procedure or to reduce the exceptionally long time taken to arrive at a resolution. It is imperative that a revised policy should include a workable appeals and arbitration process which is easily accessible to individuals involved in disputes relating to foreshore encroachments.

In light of the evidence presented, the Panel considers the Minister's revised policy to be fundamentally flawed and lacking in essential detail. The policy is not fit for purpose in its current form and notwithstanding the Deputy of Grouville's amendment, the Panel is unable to support the adoption of the revised policy.

## Appendix 1

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### Panel Membership



Constable Mike Jackson (Chair)



Constable John Le Maistre (Vice-Chair)



Constable Sadie Le Sueur-Rennard



Deputy Kirsten Morel\*\*



Deputy Inna Gardiner

\*\*Deputy Morel resigned from the Panel on 7<sup>th</sup> December 2020 and therefore only participated in the initial call for evidence phase of the review.

### Terms of Reference

The Panel agreed the following Terms of Reference (ToR) for its review of the revised policy.

1. To explore the history of the ownership of the foreshore and the issues surrounding the definition of its boundary.
2. To understand how the foreshore boundary has been established following the outcome of the landside boundary review.
3. To understand if, and to what degree or scale, current encroachments on the foreshore have affected sea defences and/or might hinder their ongoing maintenance.
4. To explore how the current foreshore policy has been applied in seeking compensation payments previously and the reasons why this approach was taken.
5. To compare both the current policy with the revised one and to determine whether the foreshore encroachment revised policy is fair, proportionate and fit for purpose.



## Evidence Considered

### Public hearings

- Minister for Infrastructure
- Deputy of Grouville – Carolyn Labey and Sir Philip Bailhache

The Public Hearing transcripts can be viewed on the States Assembly website [here](#). The webcast of the hearings can also be viewed [here](#) up until 6 months after the hearing was held.

### Written Submissions

A total of 10 written submissions were received by the Panel and can be viewed [here](#).

### Other evidence considered

- Hansard 24/09/2020 and 25/09/2020 [debate on P.101/2020]
- Letters of correspondence to the Panel from the Minister for Infrastructure
- Environment, Housing and Infrastructure Panel 2019 Quarterly Hearing transcripts
- Panel meeting minutes
- Media press coverage

### Review costs

The costs of this review totaled £192.50 for Public Hearing transcription costs.

## What is Scrutiny?

Scrutiny panels and the Public Accounts Committee (PAC) work on behalf of the States Assembly (Jersey's parliament). Parliamentary Scrutiny examines and investigates the work of the Government, holding ministers to account for their decisions and actions. They do this by reviewing and publishing reports on a number of areas:

- Government policy;
- new laws and changes to existing laws;
- work and expenditure of the Government;
- issues of public importance.

This helps improve government policies, legislation and public services. If changes are suggested, Scrutiny helps to make sure that the changes are fit for purpose and justified.

The Environment, Housing and Infrastructure Scrutiny Panel, scrutinise Government on matters within these three remits. To learn more about the Panel's work – [CLICK HERE](#)



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