STATES OF JERSEY

ELECTED SPEAKER AND DEPUTY SPEAKER OF THE STATES ASSEMBLY: SELECTION AND APPOINTMENT

Lodged au Greffe on 26th September 2017
by the Chief Minister

STATES GREFFE

PROPOSITION

THE STATES are asked to decide whether they are of opinion –

(1) to agree that –

(a) the States Assembly should select its Speaker either from amongst the elected members of the Assembly, or by appointing a person who is not a Member of the Assembly but who would be eligible for election to the Assembly;

(b) the States Assembly should select a Deputy Speaker from amongst the elected members of the Assembly;

(c) the selection and appointment of the Speaker and Deputy Speaker should be the first items of business for any new States Assembly and, should either office become vacant during the term of an Assembly, be the first item of business at the next scheduled meeting of the Assembly;

(d) the Speaker and Deputy Speaker should be elected to serve for the duration of an Assembly term, or for the remainder of the Assembly's term if (for any reason) they are elected mid-term;

(e) the process for electing the Speaker and Deputy Speaker should follow a similar format as those for the election of the Chief Minister, Ministers and Scrutiny Panel Chairmen;

(f) provision should be made for the Speaker and Deputy Speaker to resign and/or be removed from office by the States Assembly;

(g) the Speaker should be required to act impartially, and be seen to act impartially, at all times. To that end, the Speaker may not lodge propositions, table questions, participate in debates or vote on propositions. Upon being elected, the Speaker would be required to resign from any membership of a political party;

(h) the Deputy Speaker should be required to act impartially when chairing meetings of the Assembly and undertaking official duties related to their role as Deputy Speaker. When not acting as Deputy Speaker, the Member elected to this post may continue to lodge propositions, table questions, participate in debates, vote on propositions and sit on scrutiny panels;

(i) the functions of the Speaker shall include –

(i) fulfilling all the functions of the Presiding Officer as set out in the States of Jersey Law 2005 and the Standing Orders of the States of Jersey;

(ii) representing the States Assembly both within Jersey and overseas;

(iii) promoting the development of the States Assembly and democracy in Jersey;

(j) the functions of the Deputy Speaker shall include –

(i) fulfilling the functions of the Speaker in the absence of, or at the request of, the Speaker or at any other time when the office of Speaker becomes vacant;

(ii) supporting the Speaker in representing the States Assembly within Jersey and overseas;

(iii) supporting the work of the Speaker in promoting the development of the States Assembly and democracy in Jersey;

(k) the additional resources required to support a Speaker and Deputy Speaker should be provided for within the current structure of the States Greffe;

(l) the Bailiff should remain as the Civic Head of Jersey, continue to swear in Members of the States Assembly in the Royal Court, Preside in the Assembly during the process of electing a Speaker, and be invited to Preside in, or address the Assembly, on ceremonial and other appropriate occasions;

(2) the Privileges and Procedures Committee, with the support of the Chief Minister's Office, should bring forward all necessary actions, including legislative amendments, to implement these changes in time for the Assembly to select and appoint a Speaker and Deputy Speaker at its first meeting following the 2018 General Election.

CHIEF MINISTER

REPORT

Background

1. The office of Chief Minister is responsible within the executive branch of government for constitutional affairs, including constitutional reform and strengthening democracy (see R.14/2016).

2. The selection and appointment of an elected Speaker of the States Assembly has been recommended to the Assembly on previous occasions, notably in the *Report of the Review Panel on the Machinery of Government in Jersey* (December 2000), Chaired by Sir Cecil Clothier, and the *Review of the Roles of the Crown Officers* (December 2010), Chaired by Lord Carswell (R.143/2010).

3. The Independent Jersey Care Inquiry Report (R.59/2017), published on 3rd July 2017, recommended in paragraph 13.42 that further consideration be given to recommendations contained in the Clothier and Carswell Reports. The Report did not otherwise believe that negative perceptions regarding the 'Jersey Way' could be addressed.

4. In consideration of the impartial advice which has been provided to the States Assembly over recent years, the recommendation of the Independent Jersey Care Inquiry, and the relevant principles of governance which the Chief Minister must take account of, it is incumbent upon the Chief Minister to respond accordingly and provide States Members with a detailed proposal for the selection and appointment of a Speaker and Deputy Speaker of the States Assembly.

An Elected Speaker of the States Assembly

5. The arguments supporting a move by the States Assembly to select its own Speaker are well-known and supported by –

- international standards, best practice and principles of governance, as set out in, for example: the 2002 Bangalore Principles of Judicial Conduct "(the 2002 Bangalore Principles"); the 2003 Commonwealth (Latimer House) Principles on the Three Branches of Government ("the 2003 Latimer House Principles"); and, the Commonwealth Parliamentary Association ("CPA") Recommended Benchmarks for Democratic Legislatures (2006) ("the 2006 CPA Benchmarks");

- the Second Interim Report of the Constitution Review Group (December 2007) presented to the Assembly in June 2008 (R.64/2008);

- the recommendations of the Clothier Panel presented to the States Assembly in December 2000; and

- the recommendations of the Carswell Panel as presented to the States Assembly in December 2010, and as set out in Lord Carswell's subsequent presentations to the States Assembly in December 2010, March 2014 and again in November 2016.

6. Both the Clothier and Carswell Panels conducted a detailed consideration of the issues and made their conclusions and recommendations following extensive public consultation processes.

7. In November 2016, Lord Carswell summarised, in a presentation to States Members (attached as **Appendix 1**), the reasons for his Panel's unanimous recommendation that the Assembly should elect its own Speaker, which are summarised below.

- The current arrangements are inconsistent with modern ideas of democracy. Such a practice is contrary to the 2003 Latimer House Principles and the 2002 Bangalore Principles. In western democracies it is unique to Jersey and Guernsey. Lord Carswell described these reasons as having assumed *"the most important place"* in his Panel's thinking. Lord Carswell expanded on this consideration as follows –

  - the separation of powers occupies a fundamental position in modern constitutional theory;

  - the independence of the judiciary from the legislature and the government of the jurisdiction is a necessary guarantee of impartiality, in that it provides freedom from political pressure, detaches judges from the political process and removes a possible source of influence in their decisions;

  - it is universally accepted that those exercising judicial functions should not have been concerned in making the laws which they have to apply and enforce. The reason is that if a judge has been concerned in law-making, there is a risk, or a perceived risk, that his interpretation of statutes may be influenced by his understanding of the meaning of their provisions as they went through the legislature. This principle is widely accepted throughout the Commonwealth and is enshrined in constitutional documents which have been accepted by Commonwealth bodies as correct, including the 2003 Latimer House Principles, the 2002 Bangalore Principles and the 2006 CPA Benchmarks. It is clear from these that members of the judiciary should not be members of the legislature, and in this respect Jersey and Guernsey are the "odd men out" of the western world; and

  - in this respect it might be said that Jersey fails to present to the wider world the image of a modern democratic state.

- It is wasteful of his time and valuable legal skills for the Bailiff to spend large amounts of time sitting in the States.

- The Bailiff should, as chief judge, be more available to carry out judicial work, especially hearing the most important and complex cases, and do so without interruption.

- It is unnecessary to have a person with the Bailiff's high legal ability to preside in the States.

- It leaves the Bailiff at risk of involvement in political controversy, which as a judge he should avoid. Lord Carswell expanded on this as follows –

    - if the States were to decide at some time to limit debate in order to improve procedure, which legislatures commonly do as the pressure of business increases, the Bailiff as President would necessarily be involved in the exercise of discretion in making decisions, which may possibly be controversial;

    - the Bailiff is not in a position to play an active role in determining the procedures and working of the States Assembly, which is commonly done by presiding officers of other legislatures who frequently play a leading part in putting forward procedural amendments. An elected President would be able to take a more proactive part in this;

    - if the Bailiff in his judicial capacity makes any criticism of the executive, it may possibly be seen as political and inconsistent with his position as President of the States Assembly. If he ceased to be President, he would be able to make such criticisms as he thought justified without such a consequence.

8. Lord Carswell described those considerations as sufficiently compelling to bring the Panel to the conclusion that they reached, and that they thought them enough without more.

9. However, Lord Carswell also referred to a further possibility that decisions of the Bailiff and Deputy Bailiff might be held invalid as being in breach of Article 6(1) of the European Convention on Human Rights, which requires for everyone *"a fair and public hearing ... by an independent and impartial tribunal."*.

10. Lord Carswell was very clear however that, far from regarding the human rights as a decisive issue, the Panel looked on it as one further factor which might be taken into account to reinforce the conclusions they had already reached, it being *"important that it should be taken into account, but no more"*.

11. Lord Carswell also identified a number of clear practical advantages of the States Assembly selecting its own Speaker, as summarised below.

    - The Bailiff would be able to spend much more time on his judicial duties. Lord Carswell explains that litigation is growing ever more demanding and complex, and the Jersey courts have to decide a substantial amount of important cases for which the Bailiff would be available to devote his attention and apply his legal skills. He would not have to delegate so many cases, and the necessity for adjournments and recusing himself would tend to disappear. If there are long and complex cases of an important nature, the Bailiff would be available to hear them without interruption, an important function of a chief justice, and it would reduce the necessity to bring in commissioners to decide cases in the Royal Court, with some saving to the public purse.

- An elected President would be able to undertake public engagements and other duties appropriate to his office, which the Bailiff is not always available to carry out because of his workload, or which he currently fulfils by taking time away from his judicial duties. Many presidents of legislative bodies also spend a good deal of time on outreach, telling the Public about the work of the legislature and involving them so as to attract their interest.

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

The Independent Jersey Care Inquiry – Recommendation 7

12. In its Recommendation 7, the Independent Jersey Care Inquiry ("IJCI") commented that, throughout the course of the Inquiry's work, they heard reference to the "Jersey Way."

13. The IJCI reported that it observed 2 different uses of the term –

- a positive use, describing a strong culture of community and voluntary involvement; and

- a negative use, describing a perceived system of secrecy, lack of transparency and a lack of openness leading to a lack of trust, a "fear factor", and a perception that serious issues are swept under the carpet, and people escape being held to account.

14. It is clear that both views exist and are strongly held by different sections of our community. They will be familiar to elected Members of the States Assembly, who often encounter these views when representing their constituents. That is particularly so in respect of those who have been failed by our institutions, including those who suffered the abuse clearly set out in the IJCI Report.

15. The challenge set by Recommendation 7 is how to counter the negative perception of the "Jersey Way" on a lasting basis to ensure that Jersey's children and young people will be looked after in a caring and compassionate system that is underpinned by a system of governance in which there is the utmost confidence among all of Jersey's citizens.

16. The IJCI Report makes 2 specific recommendations as to how that challenge should be met –

- firstly, that open consideration involving the whole community is given to how the negative perception of the "Jersey Way" can be countered on a lasting basis; and

- secondly, that further consideration be given to the recommendations contained in the Clothier and Carswell Reports.

17. Recommendation 7 also sets out why that is thought necessary, explaining that this is because the strongly held negative perception of the "Jersey Way" will continue to undermine any attempts to move Jersey forward from the matters considered by the Inquiry; and that the progress that must be made in relation to the future care and safety of children in Jersey will be undermined if they are not dealt with, such that all perceptions of there being a negative "Jersey Way" are eradicated once and for all.

18. The importance of delivering the vital changes required to ensure the care and protection of children in Jersey is such that we should not, and must not, risk undermining that work.

19. All of the Recommendations of the IJCI, and not just Recommendation 7, reinforce the importance of the proper separation of powers and independence of the judiciary in order that we can put beyond doubt that in Jersey we have in place, and adhere in practice, to the very highest standards of governance.

20. The Inquiry was, however, specifically concerned with the important recommendations of Clothier and Carswell in respect of the separation of powers.

21. Whilst it is the case that constitutional matters did not fall within the terms of reference of the IJCI, it is of great significance that the Inquiry, knowing this was the case, nevertheless took the decision to make their comments on the need to consider further the detailed, considered, and impartial recommendations contained in the Clothier and Carswell Reports. The extent to which the Inquiry felt this was important should remain at the forefront when considering these matters.

A detailed proposal

22. It has previously been observed that the specific details regarding the selection, role and responsibilities of an elected Speaker of the States Assembly, were the States to agree to make this change, have never been clearly set out. Accordingly, a number of Members have been of the view that they could not support an in-principle proposal to move to an elected Speaker, as they had no firm indication of how the alternative arrangements might work.

23. This Proposition provides further details on the issues which will be of interest to Members when considering the proposal for the Assembly to elect its own Speaker.

Who should be eligible to fulfil the role of Speaker?

24. The majority of democratic legislatures elect a Speaker from within their own membership. Examples of this arrangement can be found throughout the British Isles and Commonwealth. In some jurisdictions, for example the Cayman Islands and Malta, either an elected member or non-elected person can be chosen by the members of the legislature to serve as Speaker. In a smaller number of jurisdictions, for example the Falkland Islands and British Virgin Islands, the Speaker is elected by the members from outside the membership of the legislature.

25. With an Assembly of 49 members, it is possible for Jersey to adopt the arrangements of the majority of democratic legislatures and elect a Speaker from within the membership of the States.

26. It is important to note, however, that Recommendation 2 of the Carswell Review stated that the Assembly should elect their own President "either from within or from without the ranks of their members". This Proposition accepts that recommendation, and provision is therefore also made for the Assembly to appoint a person who is not a Member of the Assembly to fulfil the role of Speaker. Any such individual would need to be eligible to stand for election to the Assembly.

27. This arrangement, which is provided for in other smaller jurisdictions, would ensure that the Assembly is able to elect a Speaker even if, for any reason, the role could not be filled from within the membership of the Assembly. It should be noted that, in the event of any future change to the composition of the States Assembly, such as a significant reduction in the number of States Members, it is likely that such a provision would have to be made anyway to take account of those circumstances.

Oath of Office

28. A Speaker who is an elected Member of the States Assembly would swear their oath as a Senator, Deputy or Connétable. There would be no particular requirement for a further oath to be taken in order to serve as Speaker. Further consideration will need to be given to an appropriate oath of office for a person appointed to the role who is not an elected member of the Assembly.

Should there be one or more Deputy Speakers?

29. It is the norm in democratic legislatures for the elected Speaker to be supported by at least one Deputy Speaker, who is also elected by the members of the legislature. The Deputy Speaker chairs proceedings in the unavoidable absence of the Speaker and, in doing so, exercises the same responsibilities and powers as the Speaker.

30. There may be occasions where the Speaker is unable to preside in the Assembly, for example due to illness or attendance at an event outside the Island as part of the Speaker's role as a representative of the States Assembly. It would therefore be necessary for Members to elect a Deputy Speaker from within the membership of the Assembly who is able to take the chair in such circumstances. The Deputy Speaker would also assist the Speaker in his/her other responsibilities as a representative of the Assembly within Jersey and overseas, and in promoting the development of the States Assembly and democracy in Jersey.

31. In the event that both the Speaker and Deputy Speaker are unavailable to Preside, the existing provisions should be maintained for the Assembly's proceedings to be chaired by the Greffier or, in the required circumstances, another elected Member appointed by the States Assembly. Such arrangements would also negate the need for the election of more than one Deputy Speaker.

32. In relation to the approval of Propositions and Questions (which will become part of the Speaker's responsibilities), the Speaker will, as is the case at present, have access to the advice of the States Greffier. In addition, the Speaker would be able to discuss any issues with the Deputy Speaker, especially in relation to matters which might be either novel or contentious.

How would the Speaker/Deputy Speaker be selected and appointed?

33. There are numerous procedures in other parliaments upon which the elections for Speaker and Deputy Speaker could be based. Jersey already has its own process for the elections of the Chief Minister, Ministers and the Chairmen of Panels and Committees. It follows, therefore, that a similar format should be followed for the election of the Speaker and Deputy Speaker. This includes the arrangements as to whether the elections for these positions should be by public recorded vote or by secret ballot.

34. As is the case in other jurisdictions, the election of the Speaker and Deputy Speaker should be the first items of business for any new States Assembly. These elections would then be followed by the election of a Chief Minister.

35. Should, for any reason, the office of Speaker or Deputy Speaker become vacant during the term of an Assembly, the first item of business at the next scheduled meeting of the Assembly should be to elect a new Member to the vacant position.

What would be the term of office of the Speaker and Deputy Speaker?

36. The Speaker and Deputy Speaker would be elected to serve for the duration of an Assembly. If elected in the mid-term of an Assembly, the Speaker or Deputy Speaker would serve for the remainder of that term. This approach is consistent with practice elsewhere in the British Isles and Commonwealth.

37. The Speaker and Deputy Speaker would contest their seats at a general election in the usual manner. At the beginning of a new States Assembly term, the previous Speaker and/or Deputy Speaker would be entitled to seek re-election to the post. Whilst a candidate's previous experience in either role would no doubt be taken into account by States Members, it is not intended that Jersey adopt a system similar to that in the UK House of Commons, where a preference is given, at least in the first instance, to the previous incumbent continuing to serve if that is their will. Fresh elections would take place on their own merits.

38. Provision would need to be made for the Speaker and Deputy Speaker to resign from their position at any time. It is proposed that this be provided for by the Speaker or Deputy Speaker giving notice, in writing, to the Greffier of the States. The Greffier would then take the necessary action to inform Members and make arrangements for an election to the vacant office at the next Sitting of the Assembly.

39. A process would also need to be set out for the States Assembly to debate a proposition to remove the Speaker or Deputy Speaker from office. In accordance with a proposition of no confidence in the Chief Minister, it is proposed that any proposition to remove the Speaker or Deputy Speaker from

office be signed by at least 3 members of the Assembly, in addition to the proposer.

How would the Speaker/Deputy Speaker represent his/her constituents?

The Speaker

40. The Speaker of the Assembly would be required to act impartially, and be seen to act impartially, at all times. This is a key provision in upholding the neutrality of the Chair, and is a requirement placed upon the Speaker in almost all other democratic jurisdictions

41. The Speaker would not, therefore, be entitled to lodge propositions, table questions, participate in debates or vote on propositions. It is not proposed that the Speaker exercise a casting vote. The current arrangements, where a matter can be decided only if a majority of the Members present vote in favour, would be retained. Furthermore, this Proposition would not impact on Standing Order 89A, which states where propositions are required to obtain a majority of the elected members of which the States are constituted (an absolute majority).

42. The Speaker would continue to serve as a Senator, Deputy or Connétable and would carry out their duties as a Member of the States Assembly in assisting constituents. The Speaker would be permitted to become involved in local interests and would be available to advise constituents and discuss their problems and concerns. The Speaker would be able to raise these matters privately with the relevant Minister, Department, Committee or agency. It would be expected that the Speaker would receive replies and have issues addressed on an expedited basis. This would mirror arrangements which work well in the United Kingdom.

The Deputy Speaker

43. Arrangements regarding the role of the Deputy Speaker in this regard differ across other jurisdictions.

44. It should be expected that the Deputy Speaker is required to act impartially, both when in the Chair and undertaking official duties related to their role as Deputy Speaker. Some Members may have a legitimate view that the Deputy Speaker should also be required to demonstrate impartiality at all other times. This is not, however, necessarily an essential requirement for the Deputy Speaker.

45. It should not be expected that the role of Presiding Officer would be shared by the Speaker and Deputy Speaker to the same extent as is currently the case between the Bailiff and Deputy Bailiff. The Speaker's prime and main responsibility will be to Chair sittings of the Assembly. The only reasons for absence should be illness or if representing the Assembly at an event outside of the Island. Accordingly, the occasions on which the Deputy Speaker might be expected to Preside are likely to be limited. It should be noted that this would not impact on the extent to which the Deputy Speaker might become involved in the additional duties of the office which have been outlined in the proposition and elsewhere in this report.

46. For the reasons outlined above, it is recommended that it should be permissible for the Deputy Speaker, when not in the Chair, to lodge propositions, participate in debates, ask questions and vote in the Assembly. It follows that the Deputy Speaker would also continue to serve as a Senator, Deputy or Connétable, and would carry out their duties as a Member of the States Assembly in assisting constituents. It would also not be without precedent for the Deputy Speaker to be available to serve as a member of Scrutiny Panels, should they wish. This would follow the arrangements made for the role of the Deputy Presiding Officers in the Scottish Parliament.

47. Such an approach could, admittedly, lead to circumstances where the Deputy Speaker is conflicted when being asked to Preside, if the debate relates to an issue on which he or she has previously expressed a strong view or participated in a Scrutiny review. This could be managed, however, through the maintenance of a role for the Greffier in chairing proceedings where required. It should be noted that the Deputy Speaker, who is likely to be a respected and experienced member of the Assembly, would be free to determine the extent to which he or she wishes to engage in parliamentary activity, and would undoubtedly have regard to his or her role when doing so.

48. The alternative, of requiring the Deputy Speaker to be impartial at all times, risks preventing a Member from participating at all in proceedings on the floor of the Assembly in exchange for what are likely to be relatively limited occasions in the Chair.

What support would a Speaker/Deputy Speaker require?

49. Additional support would be required for the Speaker and Deputy Speaker. This could be provided for within the current structure of the States Greffe. A new post, at Grade 15, would be needed to ensure the Speaker and Deputy Speaker have adequate executive support and representation. Administrative support to the Speaker and Deputy Speaker could be provided for within the current resources of the States Greffe.

50. The Speaker would continue to receive support and advice from the Greffier, as at present. Similarly, the Speaker would also have access to advice from the Law Officers' Department when required.

51. An appropriate office location would need to be found for the Speaker, either within the States Assembly building or Morier House.

52. Should the Assembly support this Proposition, the States Greffe, Chief Minister's Office, Department for Community and Constitutional Affairs, Treasury and Resources Department and Property Holdings would work together to ensure suitable arrangements are put in place for supporting the Speaker and Deputy Speaker.

What additional functions would the Speaker fulfil?

53. The Speaker would be the primary representative of the States Assembly, and would be expected to represent the Assembly both within Jersey and overseas. Functions which the Speaker might fulfil include receiving official visitors to the States Assembly, developing and maintaining the Assembly's links with other legislatures, and (where appropriate) leading outward Assembly delegations. The Speaker would also attend events such as the Conference of Speakers and Presiding Officers of the Commonwealth.

54. The Speaker would also play a key role in promoting the development of the States Assembly and democracy in Jersey. The Speaker could make visits to schools, sixth-form colleges, businesses and community and voluntary organisations. In addition, the Speaker could host a range of events at the Assembly designed to promote understanding of the Assembly within the community.

55. To that end, the Speaker would be actively involved in discussions to improve and develop the procedures and operation of the Assembly.

56. The debate as to whether the Bailiff attained his civic pre-eminence due to this role as President of the States Assembly, or *vice versa*, is of historical interest, but need not necessarily affect decisions taken in the modern day.

57. The Bailiff is the Civic Head of Jersey, and that is a role which is held separately from his roles as President of the States Assembly and Chief Justice. Both the Clothier and Carswell Reviews recommended that the Bailiff remain as the Civic Head of Jersey. This Proposition therefore makes express provision that the Bailiff would continue as Civic Head.

58. As Civic Head, the Bailiff would continue to fulfil his programme of supporting and attending the functions of charities and community organisations, and any other public engagements which he currently attends in this capacity. The Bailiff's role in this regard is valued by the community and there is no reason why it should not continue.

59. The Bailiff would continue to receive royalty and meet visiting ambassadors and other prominent visitors to Jersey. The Bailiff would continue to act as a Deputy Governor when the Lieutenant Governor is away from the Island. The Bailiff would continue to play the leading role on ceremonial occasions, such as Liberation Day and Remembrance Sunday. On occasions such as that held in 2014 to commemorate the outbreak of the First World War, the Bailiff would also play the primary role as Civic Head.

60. The Speaker would be involved only in matters which relate to the States Assembly. Accordingly, there is no intention or prospect for the Speaker's role to develop in a manner that would impact on the Bailiff's role as Civic Head.

61. The Bailiff's role as Civic Head has evolved through history and by convention. If it is considered necessary however, the Chief Minister's Office would be content to consider further, in consultation with the Bailiff, the potential for providing a statutory basis for the Civic Head role so as to ensure that there could be no doubt as to its future.

62. This Proposition further recommends that express provision be made for the States Assembly to invite the Bailiff to Preside in, or address, the Assembly on ceremonial and other appropriate occasions. This would include Liberation Day. The Bailiff would also continue to swear-in Members of the Assembly in the Royal Court. In addition, it is proposed that the Bailiff Presides in the Assembly at the beginning of each new term for the process of electing a Speaker. These arrangements would ensure that proper respect is afforded to the traditional relationship between the Bailiff and the States Assembly, and the link between the two institutions would endure.

The order of precedence

63. In common with other jurisdictions, the Speaker would be the highest authority in the States Assembly. Outside the States Assembly, the Chief Minister would take precedence over the Speaker. Otherwise, the order of precedence would remain unchanged.

64. As outlined above, the Bailiff would remain as Civic Head and, when exercising this function, would retain his current position in the order of precedence.

65. On occasions where the Bailiff is invited to preside in, or address, the Assembly, it should be expected that the Bailiff would be invited by the Speaker to take the Speaker's chair. Such an arrangement would be the appropriate approach when inviting the Civic Head, with the history and traditions of the office, to address the Assembly.

The time for change

66. The Assembly is rightly cautious about making constitutional changes without having first carefully thought through the reasons for the change and having an understanding of how the future arrangements would work.

67. It is not without precedent for the Assembly to amend its relationship with the Bailiff. The Bailiff's casting vote and power to dissent to a resolution of the States were removed by the States of Jersey Law 2005. The time has now come for the relationship between the Bailiff and the States Assembly to be amended further, so as to ensure that it is relevant to the modern context. Otherwise, this will be subject to continual challenge and debate.

68. The proposal for the States Assembly to elect its own Speaker has been considered on several previous occasions, and Members have often stated that, whilst they agree in principle that the change will indeed eventually need to be made, the time was not right. As stated earlier in this report, Members have also requested more detail as to how the impact of the change would be managed.

69. Some Members may argue that the need for the States Assembly to elect its own Speaker existed long before the publication of the Independent Jersey Care Inquiry Report. However, that the Inquiry Report has specifically requested that this issue be considered again, even though the matter fell outside its formal terms of reference, demonstrates that the time has now come for the Assembly to make this change.

70. The lack of a proper separation of powers between the political and judicial spheres has now changed from being one of constitutional interest, where the Island is out of step with almost all other democratic jurisdictions, to one which has contributed to a negative perception of Jersey, both within and outside the Island. This should not be left unaddressed.

71. Members now have additional information around the issues that would necessarily arise were the States to elect its own Speaker. Whilst the finer details will need to be determined by the Privileges and Procedures Committee, Members can be confident that, in agreeing to this change, they are not taking a step into the unknown.

A decision for the States Assembly

72. The decision as to the Speaker of the States Assembly, and how the Speaker is chosen, is one for States Members. It is consistent with Jersey's system of representative democracy for States Members to consider this matter and make a choice which they believe to be in the best interests of the Assembly and of the Island.

Collective responsibility under Standing Order 21(3A)

This proposition relates to a matter regarding the functioning of the States Assembly as a whole. The Council of Ministers are not, therefore, required to adopt a collective position.

Financial and manpower implications

As outlined in the proposition, additional support would be required for the Speaker and Deputy Speaker. This can be provided for within the current structure of the States Greffe. A new post, at Grade 15, would be needed to ensure the Speaker and Deputy Speaker have adequate executive support and representation. Administrative support to the Speaker and Deputy Speaker could be provided for within the current resources of the Greffe. An appropriate office location would also need to be found for the Speaker.

Should the Assembly support this Proposition, the States Greffe, Chief Minister's Office, Department for Community and Constitutional Affairs, Treasury and Resources Department, and Property Holdings Department would work together to ensure suitable arrangements for supporting the Speaker and Deputy Speaker.

APPENDIX 1

Lord Carswell's address to States Members, 11th November 2016

"**Introduction**

It gives me very real pleasure to return to Jersey today and to have the opportunity to address you again. Over many years I have formed a real affection for the island and its people – as they say in Ireland, a real "gra" for them. My family and I have had an annual seaside holiday here every year for nearly 50 years, and we have got to know the island fairly well. Then during the tine of over a year while conducting the process of the Review of the Roles of the Crown Officers and preparing the report for publication, I met a large number of people concerned with the States and public affairs. It is a pleasure to renew acquaintance with some of them today.

I was particularly pleased to accept the invitation of the States in 2009 to conduct this Review. I would add, if I may, the fact that I also come from a small jurisdiction, Northern Ireland, one with long-standing constitutional issues, which gives me some assistance in understanding the feelings and currents of thought of the citizens of Jersey.

The States are now going to revisit the issue of their presidency, on the motion of Deputy Tadier. I have been asked by the Jersey Government to give another presentation to the members of the States, something on the lines of those I gave when we published the Panel's Report in December 2010 and a similar presentation in March 2014. Since I presented the Report in December 2010, the membership of the States has changed to some extent, with a number of new members, and as it is some time since my earlier presentations other members may find a refresher helpful. But rather than focus on all of the various recommendations we made in our Report, I shall concentrate on the issue of the position of the Bailiff as President of the States, as set out in Deputy Tadier's proposition.

I propose to go through that portion of the Panel's Report which deals with that issue. I am not going to do so as advocate or enter into debate about our recommendations. The classic position about making a report to a government or governmental body is that the makers of the report listen to all the matters put before them, attempt to ascertain everything relevant to the issues and all the considerations which may apply. That we have done. They then present the completed report and stand back, leaving it to those to whom it is made to debate all the pros and cons and make their decisions. Classically the makers of the report do not make any further comments or enter into any discussion or debate about their recommendations. They have made their recommendations and given their reasons for their conclusions and stand upon them. I suppose it is not unlike what Martin Luther said, "Here I stand, I can do no other." That is why I thought it inappropriate on the occasion of my previous presentations to take questions or enter into debate, not through any reluctance to support our recommendations, but because we felt we should follow correct principle.

In other circumstances I should be very happy to enter into discussion and debate with you – after all, I spent a large part of my professional life arguing and debating in court. But in present circumstances I fear that it would be in appropriate. Indeed, when I was first asked to give an address to the members of the States about our Report, I thought I should decline. But it was represented to me that it would be of assistance to the members, and I was keen to help them where I could. So we met each

other half way and worked out a compromise, that I would give a detailed presentation but not enter into discussion. So I am following that precedent today.

As I say, I shall not go through the Report as an advocate of our conclusions. I would like to make it quite clear, however, that we were firm about our conclusions, believed then and continue to believe that they were correct and that we were right in putting them forward. I am going to set out the considerations either way and the arguments advanced, and specify our reasons for reaching our conclusions. I would emphasise that it is not an options paper. We have of course looked carefully at the various options. The Report represents the conclusions the Review Panel reached after considering all the arguments and those options. What we have put forward is a set of definite recommendations to the States, as being the unanimous view of all the Panel members. The conclusions and recommendations in the Report were all unanimously agreed, without any dissents or reservations, so in its entirety it is the report of us all. I emphasise that it is the report of all the members, not just of myself as chairman, and you may like to bear this fact in mind when considering the recommendations we have made.

History of Review

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

(1) the principles of modern, democratic and accountable governance and human rights,

(2) the nature of a small jurisdiction, the Island's traditions and heritage, the resources required, and the difficulties (if any) which have arisen in practice, and

(3) such other matters as the Panel may consider relevant.

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

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

The Panel members then reviewed all the material sent to them, together with much other documentation relevant to their task and prepared the Report. I am glad to say that when it was published in December 2010 it was precisely on time and well below budget.

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

To understand the almost unique position of the Bailiff it is helpful to look at the history of the office and its development. That was not deliberately created, as happens when a new written constitution is created, but came about over a long period of Jersey's history. I would not presume to give you a lesson in your own history, but it may be helpful in order to set the present issue in context. So a few signposts may help an understanding (all set out in Ch 3 of the Report). The Bailiff was originally a delegate of the monarch, and possibly before that of the Duke of Normandy. He was in effect put in charge of all the civil affairs of the island, to govern it in all those affairs. He was the King's surrogate, with all the powers of the monarch, including making laws, enforcing them, deciding disputes and running the administration of the island. Under the 13th century Constitutions of King John the Bailiff and 12 Jurats administered justice in the Royal Court. The court could also make ordinances, i.e. legislation governing the island and its people. The Royal Court would consult the Connétables and Rectors, and in time this procedure evolved into the States, in which the Bailiff naturally presided. The composition of the States changed over the course of the centuries and they eventually became a fully legislative body, as opposed to a consultative one. Ever since the inception of the process the Bailiff has remained as the President of the States, though his powers have changed over the years.

The point of this brief survey is to illustrate the development from the complete omnipotence of the Bailiff to his present constitutional position, cf. the monarch in the UK. The Panel consider that his position as civic head definitely does not stem from his position as President, as some critics of our proposals have argued. Quite the reverse, his position both as the President of the States and civic head is a linear descendant of his complete personal power over the civic affairs of the bailiwick, when he was in sole charge of everything. Naturally as the constitution evolved he as civic head took charge of the legislation on which the Royal Court was advised by the Connétables and Rectors. He remains civic head, but he is no longer himself the pre-eminent legislative authority. His presidency of the States remains in our view as the vestigial part of his former absolute power. That and his position as guardian of the constitution and chief judge of the Royal Court stem from his previous position as the all-powerful civic head of Jersey. We think it vitally important to understand this in considering his functions today and where we might go from here.

In our Report we looked at the time spent by the Bailiff on his judicial duties and his presidency of the States. We did our best with the figures available to us then, and I am conscious that they may have varied since 2010. I do not have access to the up-to-date figures, so I shall deal with the issue on the earlier figures, and if they need adjustment you can get reliable information about the present position and take it into account. At least the figures we worked may give you an approximate pattern of the work done by the Bailiff.

On the figures given to us he sits in court on 70 to 100 days a year, typically 80–85. That is materially less than a full judicial load, generally reckoned to be of the order of 200 sitting days. Chief justices generally have to spend some time out of court on administrative and public duties, but even with these they as a rule sit for a substantial proportion of the normal full load. I know this very well from my own experience as Lord Chief Justice of Northern Ireland. When I held this position I set out to ensure that I spent the very large majority of my working days in court on judicial duties, which I regarded as the core function of a chief justice.

The Deputy Bailiff sits for about 100 days or a little more, and Commissioners sit for some 150–200 days between them. The Bailiff presides in the States on varying numbers of days per year, but the best estimate that we can make is that in a typical year he might sit on about 20–30 days. It is difficult to obtain a clear pattern of the number of sitting days of the States, which appeared to show a steady increase for some years and then a decrease, but you as members will be in the best position to judge the extent of the States' sittings and their pattern. Whatever the exact numbers, it is clearly quite a considerable commitment for the Bailiff. In order to accommodate this inevitably he has from time to time to adjourn part heard cases in the Royal Court, which is not regarded as a satisfactory judicial practice if it can be avoided. These are practical factors which have to be taken into account.

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

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

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

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

course, the Bailiff cannot sit to hear and determine those challenges to his own actions.

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

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

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

- It is wasteful of his time and valuable legal skills for the Bailiff to spend large amounts of time sitting in the States.
- He should as chief judge be more available to carry out judicial work, especially hearing the most important and complex cases and do so without interruption.
- It is unnecessary to have a person with the Bailiff's high legal ability to preside in the States.
- It leaves him at risk of involvement in political controversy.

The second group of reasons are based on constitutional principle:

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

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

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

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

The reasons based on principle assumed the most important place in our thinking. The separation of powers occupies a fundamental position in modern constitutional theory. The independence of the judiciary from the legislature and the government of the jurisdiction is a necessary guarantee of impartiality, in that it provides freedom from political pressure and judges' detachment from the political process removes a possible source of influence in their decisions. It is universally accepted that those exercising judicial functions should not have been concerned in making the laws which they have to apply and enforce. The reason is that if a judge has been concerned in lawmaking, there is a risk, or a perceived risk, that his interpretation of statutes may be influenced by his understanding of the meaning of their provisions as they went through the legislature. That may be seen as early as the 13th or 14th century, when the Chief Justice shut down argument on the correct interpretation of a statute by pronouncing "Do not gloss me the statute, for we wrote it."

This principle is widely accepted throughout the Commonwealth, and is enshrined in constitutional documents which have been accepted by Commonwealth bodies as correct. The Latimer House principles are a set of principles and guidelines adopted and agreed in 2003 at a meeting of Commonwealth Heads of Government. The Bangalore Principles of Judicial Conduct were adopted in 2002 by a group of senior Commonwealth judges after wide consultation with common law and civil law judges, and approved in 2006 by the UN Commission on Human Rights. It is clear from these documents, and from the benchmarks for democratic legislatures drawn up by the Commonwealth Parliamentary Association in 2006, that members of the judiciary should not be members of the legislature. In this respect Jersey and Guernsey are the odd men out of the western world. Previous reports pointed to the position of the Lord Chancellor in the UK as being equally anomalous, but that has been changed since 2005 and he no longer sits in any judicial capacity. Similarly, the Seneschal of Sark no longer presides in their legislative body, the Chief Pleas. We were informed that people unfamiliar with the historical development of Jersey and Guernsey who are told about the Bailiff's dual role regularly express surprise, and it might be said that in this respect Jersey fails to present to the wider world the image of a modern democratic state.

We felt that the duality of the Bailiff's role creates some risk of bringing him into political controversy, which as a judge he should avoid. There are a couple of ways in which this could occur. First, the States might well decide at some time to limit debate in order to improve procedure, which legislatures commonly do as the pressure of business increases. If they do, the Bailiff as President would necessarily be involved in the exercise of discretion in making decisions, which may possibly be controversial. Secondly, he is not in a position to play an active role in determining the procedures and working of the States Assembly. That is commonly done by presiding officers of other legislatures, who frequently play a leading part in putting forward procedural amendments. An elected President would be able to take a more proactive part in this. Moreover, at present, if the Bailiff in his judicial capacity makes any criticism of the executive – and I can assure you from experience that judges regularly find it necessary to do this, sometimes very trenchantly – it may possibly be seen as political and inconsistent with his position as President of the States. If he ceased to be President, he

would be able to make such criticisms as he thought justified without such a consequence.

These considerations we thought sufficiently compelling to bring us to the conclusion which we reached, and we thought them enough without more. But there is another factor, that of human rights, which could prove extremely significant and was much discussed by respondents to the Review. Some indeed have fastened on it as an essential plank of our reasoning and have assumed that if it is not as strong a point as we thought it undermines the whole of our recommendation, so these critics have made that the focus of their opposition. I have to say that that is not a correct conclusion to be drawn from our Report. We made it quite clear in paragraph 5.12 that our reasons on the issues other than human rights were sufficient to bring us to our conclusions and the recommendations which we made, and if anyone has any doubt on this let me dispel it now. If we omitted any discussion of human rights and did not take that issue into account at all, our recommendations would remain exactly the same. Far from regarding the human rights as a decisive issue, we looked on it as one further factor which might be taken into account to reinforce the conclusions we had already reached. Of course we think it important that it should be taken into account, but no more. With that caveat in mind I shall attempt now to summarise discussion of the issue in our Report, as we dealt fully with it.

The issue is the possibility that decisions of the Bailiff (in which we include the Deputy Bailiff) might be held invalid as being in breach of Article 6(1) of the European Convention on Human Rights, which requires for everyone "a fair and public hearing … by an independent and impartial tribunal". Some critics of the Report have relied on the fact this has not happened in the six years since we published the Report and have sought to argue that this shows how unlikely it is that our doubts about the validity of such decisions are well founded. I feel it only right to point out that no challenge has been made in that time, for which there may be many possible reasons. The fact remains that the ECtHR has not had a case before it which involved its pronouncing on this or any similar issue. Courts will only deal with the cases that come before them, and do not pronounce on issues which are not the subject of that litigation. One is still left with having to forecast how the Court may regard it if such a case is brought before it, and that requires knowledge of the current of thought and the trend in approach to similar types of issue. We considered the relevant case-law and felt that the issue was significant, even if not decisive. I was myself somewhat concerned about it, for I had considerable contact with issues of human rights law in the course of my judicial work. We felt as a Panel, however, that rather than rely solely on our own views we should obtain expert advice about the extent of the risk from a source in London in close contact with the courts which pronounce on the subject. We obtained an opinion from Mr. Rabinder Singh QC, then leading counsel in London (and now a judge of the High Court). Mr. Singh had considerable experience of practice before the European Court of Human Rights and was regarded as one of the most able lawyers in the human rights field. I shall come back in a moment to the advice which he gave us.

Before I do so, may I explain briefly the concept of a perceived risk, which is of importance in determining this issue. Even though a judge may not have been in fact influenced by any personal bias – commonly termed subjective bias – it may be perceived by reasonable people that he may have been influenced by extraneous factors. That is commonly termed objective bias, and its existence has been the ground for setting aside many decisions. We of course are confident that the Bailiff will be free of subjective bias in reaching his decisions, but the issue on which we must focus is whether it might reasonably be thought that objective bias is established by reason of

his membership and Presidency of the States. If that were so, it could be held that his decisions in some cases were in breach of Article 6 of the Convention.

The full text of Mr. Singh's opinion is on the Review website. He summarised his conclusions as follows:

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

In our view this conclusion provided an **additional** reason why the Bailiff should cease to be President of the States. If a challenge were brought now, it might or might not succeed, though the climate of judicial opinion is such that I myself fear that the risk is real and present.

The Bailiff is no doubt likely to adopt the practice of recusing himself from sitting in any case where he has presided in the States during the passage of any legislation whose interpretation or application is in issue. That sounds easy, but in practice it is not. It is all right if the judge can see the problem before the hearing begins and take steps to get someone else to step in. The difficulty in putting this practice into effect is that it is not always apparent at the outset of a hearing that a particular piece of legislation will become material in this way. Stopping a case part way through inevitably involves delay and expense when it has to start again, which can be a big problem for those taking part. Moreover, it is not regarded as desirable that a judge should have to concern himself on a regular basis with the question of recusing himself. We feared that it is at least possible that in the foreseeable future a successful challenge could be mounted. We do not think that it would be good for Jersey's international reputation if it had to make the change reluctantly after litigation, which could be protracted and expensive and in which strident attacks could be very publicly made on Jersey's institutions. Whereas if the States made a change now they could retain control of the process and remove the risk of having a change imposed on them.

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

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

Secondly, an elected President would be able to undertake public engagements and other duties appropriate to his office, which the Bailiff is not always available to carry out because of his workload or which he currently fulfils by taking time away from his judicial duties. Many presidents of legislative bodies also spend a good deal of time on outreach, telling the public about the work of legislation and involving them so as to attract their interest.

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

I should mention at this point the question of the cost of a change. I think that would depend to a large extent on who is elected president. If it is a member of the States, it might be fairly small, if an outsider it is bound to be more substantial. It is difficult to be more specific, as much will depend on what you might decide.

Two major issues remain, both of which have figured largely in representations and in comments made subsequent to publication of our Report. The first is whether it would be readily possible to find a suitable person to act as President of the States. I may say at this stage that while we acknowledged that the Bailiff has pre-eminent legal skills and authority when presiding, we did not consider that it was essential for a President to possess such a high degree of skills in order to be able to preside effectively. Many legislative assemblies have presiding officers who are not in the same league as the Bailiff as lawyers or constitutional experts, but are able to carry out their duties satisfactorily, with the assistance of experienced parliamentary clerks when they need to turn to them. The premium qualities seem rather to be an abundance of common sense, a keen sense of fairness and a degree of understanding in dealing with other people.

I shall not go into the question now of the possibility of finding a suitable President from outside the membership of the States, since Deputy Tadier's proposition is based on electing one of the members to the post. But if you want to consider going outside, I would simply refer you to section 5.20 of our Report and leave you to reflect on what we say there.

The second issue is the position of the Bailiff as civic head and whether he could retain it if he ceased to be President of the States. To a large extent the contrary argument depends on the premise that his civic headship stems from that Presidency, but we regard that as quite mistaken. You will have to decide from your own close knowledge of Jersey and its affairs whether his status would be so diminished if he ceased to be President of the States that he could no longer be regarded as civic head. We as members of the Review Panel concluded that he could; and you will recollect that this not just my view. I am an outsider, though one with a keen interest in the welfare of the island, but the other members of the Panel are all residents of Jersey with intimate knowledge of the island.

He has the position of Bailiff, to which considerable power and prestige have long been attached. One has to ask whether removal of one part of his many functions, even so important a part, would diminish his standing to that degree. You can and will form your own views on this and other issues and it is ultimately your decision. It is

even possible that if you may reach the conclusion that even if the Bailiff cannot retain the civic headship it is still necessary to make the change we propose.

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

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

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

So we place these matters before for your consideration and decision, your function as members of the States. Whatever conclusion you reach, may I suggest that you keep in mind the quotation from Thomas Jefferson which we placed at the beginning of our Report – and I make no apology for repeating it yet again, for the views of that wise man, steeped in constitutional learning, seem to us to encapsulate the present issue:

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

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

APPENDIX 2

Letter from the Bailiff to the Chief Minister, 24th July 2017

THE BAILIFF OF JERSEY
SIR WILLIAM BAILHACHE

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24th July 2017

Senator I J Gorst
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Chief Minister's Department
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Dear Chief Minister

This letter is sent to you and copied to the Council of Ministers and, as it concerns that body, to the Privileges and Procedures Committee. I write it because you have announced to the States that you intend to urge the States to accept and implement all the recommendations of the Care Enquiry, one of which relates to the role of the Bailiff.

I would like to make clear at the outset that I am commenting only on Recommendation 7 of the Care Enquiry's report. The other recommendations do not concern my office and are in the exclusively political domain. I make no comment on or criticism of the remainder of the Report.

I am writing to you at this point given the proposition again lodged by Deputy Tadier to remove the Bailiff from the Presidency of the States, presently due to be debated in September. That is his prerogative, and obviously Members will make their individual decisions in relation to that proposition as they think fit. Both the Deputy Bailiff and I completely accept that it is a matter for the States to decide upon. Members also know that the Bailiff does not comment on political matters. They are for politicians, and not for the President of the Assembly. However, it would be absurd if the Bailiff were not ever allowed to comment on a matter affecting his own role, especially given the constitutional nature of the subject matter. Neither the Deputy Bailiff nor I will preside over the debate on Deputy Tadier's proposition, and it follows that no conflict of interest arises by my making the comments which I am about to make. My comments can be accepted or rejected, as can the comments of anyone else.

I set out below Recommendation 7 of the Report of the Care Inquiry, which is taken for convenience from the Executive Summary:-

> *"Recommendation 7: "The Jersey Way"*
>
> *13.18 Throughout the course of our work we heard the term the "Jersey Way". While this was, on occasions, used with pride, to describe a strong culture of community and voluntary involvement, it was more often used to describe a perceived system whereby serious issues*

are swept under the carpet and people avoid being held to account for abuses that have been perpetrated. This was well summarised in the contribution of a Phase 3 witness who told us:

'We (also) have the impossible situation of the non-separation of powers between the judiciary and political and there is a lot of secrecy, non-transparency and a lack of openness. This brings with it the lack of trust, the fear factor that many have spoken about and contributes greatly to the Jersey Way.'

That fear factor and lack of trust must be addressed, therefore we recommend that open consideration involving the whole community be given to how this negative perception of the "Jersey Way" can be countered on a lasting basis. While constitutional matters are outwith our Terms of Reference, we are of the opinion that this matter cannot be addressed without further consideration of the recommendations made in the Clothier and Carswell Reports."

So there we have it – the Committee of Inquiry has made a direct link between the Clothier and Carswell Reports concerning the Bailiff's dual role and the sweeping of serious issues under the carpet so as to avoid people being held to account for abuses that have been perpetrated.

I think this Recommendation is both illogical and unnecessary.

The Committee links an alleged system of sweeping serious issues under the carpet so that people avoid being held to account for abuses that have been perpetrated with the Bailiff's dual role. The link between any so called brushing under the carpet and the judiciary is not just unproven but it is intrinsically illogical. Once issues get to the judiciary (that is, to court), they have by definition not been brushed under the carpet, because the court sits in public. Furthermore, there is no proper defence of the recommendation in an assertion that it is all about perception. If perceptions are not capable of being rationally linked to reality, they should not form the basis of decision taking. To hold otherwise is to take decisions in a fantasy world and not the real world. The lack of logic in its approach demonstrates why the Committee's Recommendation – outside its remit and without the evidence to reach a valid conclusion on this issue – should carry no or little weight. Expressing an opinion on matters outside its Terms of Reference without taking appropriate evidence removes its credibility in respect of its conclusion.

It is unnecessary because Recommendations 1 to 3 involve the establishment of the Office of Commissioner for Children, the appointment of a Children's Rights Officer to give children and young people a voice, the development of a partnership with an independent external children's advocacy service such as Become, and the establishment of a professional and truly independent Children's Inspectorate operating to a statutory basis. Assuming those recommendations are adopted, the issues of lack of trust and any fear of reporting on the part of those who have been abused, are comprehensively addressed. The Recommendation that open consideration involving the whole community be given to the negative perceptions of "The Jersey Way" adds nothing to the Recommendations of substance set out above and is in any event so general in nature as to carry little meaning. However, the juxtaposition of the Recommendation that the whole community be involved with the recommendation that Carswell and Clothier be revisited does suggest that the Care Enquiry considered that the public – the whole community – should be consulted on the Bailiff's role by the holding of a referendum. Some might think that the outcome of such a referendum would be helpful whatever the result – it would silence those opposed to change if the vote were in favour of that change, and it would silence all critics whether in or outside the island if it were not.

Of course I am personally sad that the Committee of Inquiry appears to have given fresh impetus to the negativity of those who have taken and abused the expression "The Jersey Way" – which I have

previously tried to overcome by re-capturing that expression and using it in a more positive context for the future. The negative use of the expression carries the connotation that somehow it is the people of Jersey who sweep things under the carpet. That is simply not the case. If anyone is guilty of this, it is not the people but the States of Jersey, whether the politicians or the administration. My own view is that the evidence before the Care Inquiry clearly demonstrated that the States did not set out to do so deliberately but rather failed to give sufficient attention to having a proper system in place and to monitoring appropriately the limited number of people who were actually responsible for the abuse which took place. The very fact that the Committee of Inquiry fans the flames as it has in this part of its Report is unhelpful as well as being unnecessary. It is unfortunate because the Committee has ventured into constitutional matters on which it took very limited evidence, and none from those who might be thought to know what they are talking about, including me, the Deputy Bailiff, and the two former Bailiffs who gave evidence. If the Committee had been required to consider constitutional matters, that requirement would have appeared in the Terms of Reference, and it knew it. It would in those circumstances have been required to receive evidence, much of it no doubt going contrary to the views which the Committee has expressed under Recommendation 7.

If there is debate on the dual role of the Bailiff, let it take place on its merits. Those merits do not include any support by the Care Inquiry. But I will now mention that I have been struck by the apparently uncritical acceptance of the proposition that there is something constitutionally wrong with the position we have in this island. There is not, and there are many different constitutional structures across the world. The system which we have, for the record, does not come nearly as close to breaching the rules around the separation of powers as did that in the UK as recently as 2005. There, the Lord Chancellor was not only a member of the judiciary and the legislature, but also a member of the Cabinet with executive responsibilities. Dicey, that great English constitutional lawyer of the 19th century did not regard that position with disfavour. Indeed, until the changes in 2005, the United Kingdom would not assert that there was something constitutionally wrong with its system of government. Far from it. The defence of Guernsey before the European Court of Human Rights in the McGonnell case was as much about defending the UK as it was defending Guernsey. It is right also to add that my own experience is that there are a number of very senior thinkers in the United Kingdom, including senior judges, who do not regard the constitutional changes of 2005 with favour. They have led to a hard edged angularity which is unhelpful, as was witnessed by the failure of senior politicians there adequately to defend the judiciary against the disgraceful attack by some parts of the media (describing the judges as "Enemies of the people") following the decision in the administrative court on the lawfulness of the government's proposed Brexit strategy. There have been other examples. If that can happen in a large jurisdiction like the UK, how much more is it possible in a small island like Jersey, and how much more damaging to the rule of law would be the result.

Let it also not be thought that removal of the Bailiff from the States would mean the island was not still breaching the principle of separation of powers as those in favour have implied. The executive and the legislature would still be in the same assembly. Unless one has a presidential system, that will occur, and indeed all constitutional arrangements modelled on the Westminster parliament breach this strict definition of the separation of powers.

Summary

i. As the Inquiry itself admits at paragraph 13.19 of the Executive Summary, constitutional matters were outside its terms of reference. Yet it has recommended in Recommendation 7 that further consideration to given to the Clothier and Carswell reports, ie that the Bailiff's dual role should come to an end.

ii. As this topic was outside the Inquiry's terms of reference, it is not surprising that the Inquiry did not invite evidence or submissions on the subject, nor was any such evidence submitted by witnesses who might have been in a position to do so had they thought the issue was up for consideration. For example, none of the present or former Bailiffs were asked about the matter.

iii. As a result, the recommendation appears out of nowhere. There is no suggestion anywhere in the Report that the dual role of the Bailiff contributed in any way to the extent of the abuse or the failure to uncover it or deal with it. There is simply no link between the findings of the Inquiry and the Bailiff's position and the Inquiry gives no reason for concluding that a change in the Bailiff's position would somehow improve child protection in Jersey.

iv. The sole evidence in relation to the Bailiff's position which is referred to in support of Recommendation 7 is the quotation set out above. However, Paragraph 2.11 of Volume 2 of the Report makes it clear that this is an anonymous witness and it is therefore impossible to know the context of the observation, what evidence (if any) lay in support of it and the weight which ought to be attached to it. I suggest that a simple remark of this nature is a very inadequate basis upon which to recommend a far reaching and important constitutional change.

v. In its passage on "the Jersey Way", the Inquiry quotes evidence from the former Deputy Trevor Pitman and former Deputy Bob Hill, both of whom have a long-standing view in relation to the Bailiff's position but even they are not quoted as asserting any connection between the Bailiff's position and the matters under review by the Inquiry.

I realise that you have expressed the view previously that the dual role of the Bailiff should change and I am sorry that you have never been willing to discuss that either with me or my predecessors. However, in the forthcoming debate, I should be grateful for your assurance that you will not take the line that the Care Enquiry's Recommendation 7 is a reason for supporting the proposition of Deputy Tadier, or indeed for re-visiting the issue of the Bailiff's role generally.

Yours sincerely

M. Liam Bailhache.

Bailiff

cc: Council of Ministers
Chairman of Privileges and Procedures Committee

APPENDIX 3

Letter from the Chief Minister to the Bailiff, 24th August 2017

Chief Minister of Jersey
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States of Jersey

Sir William Bailhache
Bailiff of Jersey
Bailiff's Chambers
Royal Court House
St Helier
Jersey JE1 1BA

24th August 2017

Dear Bailiff

Independent Jersey Care Inquiry – Recommendation 7

Thank you for your letter of 24th July, which I have now had the opportunity to consider having been on leave.

As you have helpfully set out your views as President of the States Assembly, I thought that it would assist if I were to also set out my position.

Recommendation 7

In Recommendation 7 the Independent Jersey Care Inquiry (IJCI) reports that it observed two different uses of the term, the "Jersey Way":

- a positive use, describing a strong culture of community and voluntary involvement; and

- a negative use, describing a perceived system of secrecy, lack of transparency and a lack of openness leading to a lack of trust, a "fear factor", and a perception that serious issues are swept under the carpet and people escape being held to account.

It is clear that both views exist and are strongly held by different sections of our community. I believe that they are familiar to elected Members of the States Assembly who, in my experience, often encounter these views when representing their constituents. That is particularly so in respect of those who have been failed by our institutions, including those who suffered the abuse clearly set out in the IJCI Report.

The challenge set by Recommendation 7 is how to counter the negative perception of the "Jersey Way" on a lasting basis to ensure that Jersey's children and young people will be looked after in a caring and compassionate system that is underpinned by a system of governance in which there is the utmost confidence among all of Jersey's citizens.

The IJCI Report makes two specific recommendations as to how that challenge should be met:

- firstly, that open consideration involving the whole community is given to how the negative perception of the "Jersey Way" can be countered on a lasting basis; and

- secondly, that further consideration be given to the recommendations contained in the Clothier and Carswell Reports.

Recommendation 7 also sets out why that is thought necessary: it is because the strongly held negative perception of the "Jersey Way" will continue to undermine any attempts to move Jersey forward from the matters considered by the IJCI, and that the progress that must be made in relation to future care and safety of children in Jersey will be undermined if they are not dealt with, such that all perceptions of there being a negative "Jersey Way" are eradicated once and for all.

The importance of delivering the vital changes required to ensure the care and protection of children in Jersey is such that we should not, and must not, risk undermining that work.

Formal Response to the IJCI Report

Consideration is currently being given as to how the overarching recommendation of an open consideration by the whole community of the "Jersey Way" could best be achieved. Proposals to achieve that will be set out in the formal response to the IJCI Report to be presented to the Assembly by the end of October.

The Clothier and Carswell Recommendations

The Clothier and Carswell Reports made a number of recommendations that remain outstanding. In my view, those recommendations should be considered as part of that "open conversation" and will also, no doubt, be reconsidered by the States Assembly in due course.

The IJCI was, however, specifically concerned with the important recommendations of Clothier and Carswell in respect of the separation of powers.

You are already aware of my views on this matter, which I have previously clearly and publically expressed; a decision by States members to elect their own Speaker is, in my view, in the best interests of democracy and in the best long term interests of Jersey.

That view is supported by:

- international standards, best practice and principles of governance, as set out in, for example: the 2002 Bangalore Principles of Judicial Conduct (the 2002 Bangalore Principles); the 2003 Commonwealth (Latimer House) Principles on the Three Branches of Government (the 2003 Latimer House Principles); and, the Commonwealth Parliamentary Association (CPA) Recommended Benchmarks for Democratic Legislatures (2006) (the 2006 CPA Benchmarks).

- the Second Interim Report of the Constitution Review Group (December 2007) presented to the Assembly in June 2008 (R.64/2008);

- the recommendations of the Clothier Panel presented to the States Assembly in December 2000; and

- the recommendations of the Carswell Panel as presented to the States Assembly in December 2010 and as set out in Lord Carswell's subsequent presentations to the States Assembly in December 2010, March 2014 and again in November 2016.

It should be noted that both the Clothier and Carswell Panels carried out a detailed consideration of the issues and made their conclusions and recommendations following an extensive public consultation process. Further, the membership of both Panels included Jersey residents of standing and were chaired respectively, by Sir Cecil Clothier, KBC, QC and the Right Honourable Lord Carswell PC, QC.

In his 2016 presentation (attached) Lord Carswell summarised the reasons for his Panel's unanimous recommendation that the Assembly should elect its own Speaker as follows:

- It is inconsistent with modern ideas of democracy. Such a practice is contrary to the 2003 Latimer House Principles and the 2002 Bangalore Principles. In western democracies it is unique to Jersey and Guernsey. Lord Carswell described these reasons as having assumed *"the most important place"* in his Panel's thinking. Lord Carswell expanded on this consideration as follows:
    - the separation of powers occupies a fundamental position in modern constitutional theory;
    - the independence of the judiciary from the legislature and the government of the jurisdiction is a necessary guarantee of impartiality, in that it provides freedom from political pressure, detaches judges from the political process and removes a possible source of influence in their decisions;
    - it is universally accepted that those exercising judicial functions should not have been concerned in making the laws which they have to apply and enforce. The reason is that if a judge has been concerned in law-making, there is a risk, or a perceived risk, that his interpretation of statutes may be influenced by his understanding of the meaning of their provisions as they went through the legislature. This principle is widely accepted throughout the Commonwealth and is enshrined in constitutional documents which have been accepted by Commonwealth bodies as correct, including the 2003 Latimer House Principles, the 2002 Bangalore Principles and the 2006 CPA Benchmarks. It is clear from these that members of the judiciary should not be members of the legislature and in this respect Jersey and Guernsey are the "odd men out" of the western world; and
    - in this respect it might be said that Jersey fails to present to the wider world the image of a modern democratic state.
- It is wasteful of his time and valuable legal skills for the Bailiff to spend large amounts of time sitting in the States.
- The Bailiff should as chief judge be more available to carry out judicial work, especially hearing the most important and complex cases, and do so without interruption.

- It is unnecessary to have a person with the Bailiff's high legal ability to preside in the States.

- It leaves the Bailiff at risk of involvement in political controversy, which as a judge he should avoid. Lord Carswell expanded on this as follows:

    - if the States were to decide at some time to limit debate in order to improve procedure, which legislatures commonly do as the pressure of business increases, the Bailiff as President would necessarily be involved in the exercise of discretion in making decisions, which may possibly be controversial;

    - the Bailiff is not in a position to play an active role in determining the procedures and working of the States Assembly which is commonly done by presiding officers of other legislatures who frequently play a leading part in putting forward procedural amendments. An elected President would be able to take a more proactive part in this;

    - if the Bailiff in his judicial capacity makes any criticism of the executive it may possibly be seen as political and inconsistent with his position as President of the States Assembly. If he ceased to be President he would be able to make such criticisms as he thought justified without such a consequence.

Lord Carswell described those considerations as sufficiently compelling to bring the Panel to the conclusion that they reached, and that they thought them enough without more.

However, Lord Carswell also referred to a further possibility that decisions of the Bailiff and Deputy Bailiff might be held invalid as being in breach of Article 6(1) of the European Convention on Human Rights, which requires for everyone *"a fair and public hearing… by an independent and impartial tribunal."*

Lord Carswell was very clear however that, far from regarding the human rights as a decisive issue, the Panel looked on it as one further factor which might be taken into account to reinforce the conclusions they had already reached, it being *"important that it should be taken into account, but no more"*.

Lord Carswell identified the following clear practical advantages:

- The Bailiff would be able to spend much more time on his judicial duties. Lord Carswell explains that litigation is growing ever more demanding and complex and the Jersey courts have to decide a substantial amount of important cases for which the Bailiff would be available to devote his attention and apply his legal skills. He would not have to delegate so many cases and the necessity for adjournments and recusing himself would tend to disappear. If there are long and complex cases of an important nature the Bailiff would be available to hear them without interruption, an important function of a chief justice, and it would reduce the necessity to bring in commissioners to decide cases in the Royal Court with some saving to the public purse;

- An elected President would be able to undertake public engagements and other duties appropriate to his office, which the Bailiff is not always available to carry out because of his workload or which he currently fulfils by taking time away from his judicial duties. Many presidents of legislative bodies also spend a good deal of time on outreach, telling the public about the work of the legislature and involving them so as to attract their interest; and

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

All of the Recommendations of the IJCI, and not just Recommendation 7, reinforce the importance of the proper separation of powers and independence of the judiciary in order that we can put beyond doubt that in Jersey we have in place, and adhere in practice, to the very highest standards of governance. It is by doing that that we can begin to counter any negative perception of the "Jersey Way" and until that is the case any attempt to reclaim the phrase "the Jersey Way" is unlikely to succeed.

The Way Forward

In order to ensure that States Members can make decisions on this matter with an understanding of both the principle and the detail, I have established a panel to advise me on how this change could be delivered in practice.

In my view, a referendum is not a suitable method for deciding whether the States Assembly should elect its own speaker. The 2006 CPA Benchmarks make clear that it is for the legislature to select or elect presiding officers pursuant to criteria and procedures clearly defined in the rules of procedure. This is, therefore, a decision that the States Assembly should make and that the people of Jersey, rightly, can expect their elected representatives to make.

In making that decision, elected Members will, no doubt, take into account all relevant considerations, including respecting all the recommendations of the IJCI, when deciding who should serve as their speaker.

Yours sincerely

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cc: Council of Ministers
Chairman of the Privileges and Procedures Committee