

# STATES OF JERSEY



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

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Presented to the States on 22nd April 2014  
by H.M. Attorney General

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STATES GREFFE

## COMMENTS

1. The question as to whether or not the Bailiff should remain as the President of the States Assembly is, of course, a matter for the Assembly itself. The Law Officers gave evidence to the Carswell Review (Report December 2010) and that evidence is available on the States Assembly website to be consulted if members wish.
2. Reference is made in P.160/2013 to the recommendations of Lord Carswell's review. His recommendations on the rôle of the Bailiff were based in part on legal advice, obtained in 2010, from English leading counsel Mr. Rabinder Singh, Q.C. ("English Counsel"). Furthermore, in his presentation to States Members on 27th March 2014, Lord Carswell placed significant weight on the human rights issues as advised on by English Counsel, in support of his recommendation that the Bailiff should cease to be President of the Assembly. In the light of this emphasis, the Law Officers think it necessary to advise the Assembly of the current legal position.

### Summary

3. In summary, in the opinion of the Law Officers –
  - (i) The rôle of the Bailiff is currently Human Rights compliant; and
  - (ii) There is no judicial authority to suggest that that position is likely to change within the time horizon suggest by Lord Carswell or at all.

### Discussion

4. Reference is made to the advice of English Counsel at paragraph 5.16 of the Report of Lord Carswell. It states –

*“5.15 After considering these decisions, we felt that it was uncertain what decision might be reached if a challenge were brought in the ECtHR to a decision of the Bailiff on the ground that he had presided in the States. We therefore took the opinion of leading counsel in London, Mr. Rabinder Singh QC, who has considerable experience of human rights law and its application in the ECtHR. We have placed the full text of the opinion on our website [www.gov.je/crownofficersreview](http://www.gov.je/crownofficersreview) and it may be read there. Mr Singh summarises his conclusions in the following terms (para 2 of his opinion):*

- “(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.”*

5. The legal advice obtained by Lord Carswell, and the report of the Carswell Review, correctly accepts that the Bailiff’s rôle was, at the time of the Review in 2010, human rights law compatible. Accordingly, there was at that time no legal requirement identified for the current position to change. In the opinion of the Law Officers that is still the clear position in law.
6. The European Court stated in McGonnell v United Kingdom [2000] 30 EHRR 289 and repeatedly in cases since, that human rights law does not require any jurisdiction to conform with any particular political doctrine such as that of the separation of powers. Accordingly, arguments about the rôle of the Bailiff based purely on constitutional theories do not engage human rights law at all: see also Pabla KY v Finland [2006] 42 EHRR 688 and Davidson v Scottish Ministers [2004] UKHL 34. That remains the position. There has been no case law since the Carswell Review that alters that approach or, so far as the Law Officers are aware, suggests that it will be altered in the future. The Law Officers accordingly agree with the acceptance in the Carswell Review that the current position does not cause any difficulties from a human rights perspective. No legal issues arise.
7. Human rights law is only potentially relevant in limited circumstances. A litigant may raise concerns that the Bailiff lacks the appearance of an independent and impartial tribunal if it can be shown that there is a sufficiently close relationship between what the Bailiff said or did previously in the States Assembly, and the issue that then arises for determination in subsequent litigation. As a matter of practice, if the concern is justified as a matter of law, the Bailiff can recuse himself from the particular case as he can do from any other case where he does not feel it appropriate that he preside.
8. However, the Carswell Report went further in its conclusions with the predictions of English Counsel mentioned above 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”*.
9. The Law Officers’ Department were not invited to respond to this point at the time the Carswell Report was published and they respectfully disagree with it.
10. English Counsel did not refer in his written opinion to the extensive European jurisprudence on the principle of an independent tribunal within the meaning of Article 6 ECHR. That body of case law confirms that a tribunal must be independent of the executive, of the parties and of the legislature. In determining whether this requirement is met, regard must be had to the manner of appointment, their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.

11. English Counsel also did not mention that the European Court has consistently held that constitutional theories are not relevant to determining judicial independence: see Kleyn v Netherlands [2004] 38 EHRR 14 at paragraph 193 onwards –

*Although the notion of the separation of powers between the political organs of government and the judiciary has assumed growing importance in the Court's case law, neither Art.6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts regarding the permissible limits of the powers interaction. The question is always whether, in a given case, the requirements of the Convention are met. The present case does not, therefore, require the application of any particular doctrine of constitutional law to the position of the Netherlands Council of State. The Court is faced solely with the question whether, in the circumstances of the case, the Administrative Jurisdiction Division had the requisite "appearance" of independence, or the requisite "objective" impartiality.*

*In deciding whether in a given case there is a legitimate reason to fear that these requirements are not met, the standpoint of a party is important but not decisive. What is decisive is whether this fear can be held to be objectively justified.* <sup>63</sup>

12. The European Court repeated those observations in the 2006 case of Sacilor Lormines v France –

*"In order to establish whether a tribunal can be considered "independent" within the meaning of art.6(1), regard must be had, inter alia, to the manner of appointment of its members and their term of office, the existence of safeguards against extraneous pressure and the question whether the body presents an appearance of independence. <sup>27</sup> As to the question of independence being defined as the separation of powers between the executive and the judiciary, neither art.6 nor any other provision of the Convention requires states to comply with any theoretical constitutional concepts regarding the permissible limits of the powers' interaction. The Court would however emphasise that the notion of the separation of powers between the political organs of government and the judiciary has assumed growing importance in its case law."*

(emphasis added)

13. English Counsel cites the Bangalore Principles of Judicial Conduct 2002 in support of his views. These principles return to the same overarching point about the need to protect the judiciary from interference and appear to add little or nothing to the Article 6 ECHR case law.
14. Also missing from English Counsel's advice and the Carswell Report, is an explanation as to how it can be said that the Bailiff, appointed by the Crown and holding office independent of the legislature and executive, is not independent within the meaning of Article 6 ECHR.

15. Given the supposed 10 year timescale contemplated by English Counsel, it may be apposite to note that the Law Officers are not aware of any case Law in the 3+ years since the publication of the Carswell Review that supports the view that the approach of the European Court is likely to change sufficiently so that the position of Bailiff would not continue to be human rights law compatible.

Note: These comments reflect the joint view of the Attorney General and the Solicitor General.