

STATES OF JERSEY



RÔLE OF THE UNELECTED MEMBERS OF THE STATES: REVIEW

**Lodged au Greffe on 6th January 2009
by the Deputy of St. Martin**

STATES GREFFE

PROPOSITION

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

- (a) to agree that an independent review be conducted into the current roles of the unelected members of the States, namely the Bailiff, the Lieutenant-Governor, the Attorney General, the Solicitor General and the Dean;
- (b) to request the Council of Ministers, after consultation with the Privileges and Procedures Committee, to submit to the States for approval no later than 31st March 2009 –
 - (i) the names of the proposed Chairman and members of the Panel to conduct the review;
 - (ii) the terms of reference of the Panel and the proposed target dates for the start of the review and the publication of the Panel's subsequent report and recommendations;
- (c) to request the Minister for Treasury and Resources to assess whether the review can be funded from within existing resources and, if not, to bring forward for approval a request under Article 11(8) of the Public Finances (Jersey) Law 2005 for the necessary additional funding to cover the cost of the review.

DEPUTY OF ST. MARTIN

REPORT

The Assembly of the States of Jersey is one of the oldest legislatures of the English-speaking world. It came into existence in the 16th century but its origins were much earlier.

In 933 Jersey, with the other Channel Islands, was annexed by the Duke of Normandy. Following William the Duke of Normandy's victory at the Battle of Hastings in 1066, until 1204, England, Normandy and the Channel Islands were united under the King of England, who was also the Duke of Normandy.

In 1204 King John lost Normandy. However the Channel Isles retained their loyalty to the Crown. It therefore became necessary for the King to substitute administrations for the Norman government from which the Islands had become separated. During the 13th century, the Jurats and the Bailiff(s) formed the Royal Courts in Jersey and Guernsey and they had power to determine all civil and criminal causes apart from prosecutions for treason.

Following the establishment of its separate administration, and right to the present day, Jersey has remained loyal to the Crown. For their part, successive Monarchs conferred many privileges and immunities by Royal Charter. As a result, a separate legal system came into existence for Jersey which has continued to this day. By the middle of the 14th century the Bailiff was appointed directly by the King. Wardens of the Islands were appointed in the 15th century.

Over the ensuing centuries, the shape and form of the Royal Court of Jersey evolved and it developed the practice of consulting representatives of the 12 parishes, namely the Connétables and the Rectors. From this process of consultation eventually emerged a legislative assembly made up of the Jurats, Connétables and Rectors over which the Bailiff presided. The Code of 1771 formally recognised the separation of the Royal Court and the States, although there remained common membership in respect of the Bailiff and the Jurats.

In 1856 the States introduced the first directly elected representatives, namely the Deputies. The law provided for the election of 14 Deputies, 3 for St. Helier and one from each of the other Parishes. Following the Liberation of the Island from enemy occupation in 1945, and a report of the Privy Council Committee, the States enacted legislation in 1948 which brought about significant constitutional change. The Rectors and the Jurats ceased to be Members of the States and were replaced by 12 Senators and an increased number of Deputies.

The Church continued to be represented by the Dean of Jersey, and although he no longer has a right to vote he nevertheless retains his right to speak. The process of separation from the judiciary which had begun in 1771 was effectively completed. The Jurats remained as Members of the Royal Court but no longer exercised legislative functions.

In December 2000, the Report of the Review Panel on the Machinery of Government in Jersey was published. The Report was a result of a review which had been carried out by a distinguished body under the chairmanship of Sir Cecil Clothier, Q.C. and it contained a number of Recommendations. The Report contained an interesting Epilogue which was as follows –

“As we remarked at the outset of this Report, change is uncomfortable. Yet our recommendations amount to a comprehensive plan for revision of the Machinery of Government in Jersey. We hope that the plan will be implemented as a whole, rather than piecemeal. Employing for the last time the metaphor of machinery, it is no use assembling some parts only of a machine and expecting it to work well. In any case we would urge all those concerned to devise a programme for change and not let it slip due what an American judge once described as “the comforts of further inertia” as opposed to “the irksomeness of action”.”

Unfortunately the States chose to act in a piecemeal manner and although some change has ensued, some of the recommendations have not been implemented.

The one major change was the introduction in December 2005 of Ministerial Government with the establishment of the Council of Ministers headed by a Chief Minister. Among the recommendations not brought forward were those relating to the Bailiff.

When commenting on the role of the Bailiff, the Report stated: “It has seemed to us that of all the historic titles in Jersey, protected over centuries by the Island’s autonomy, that of the “Bailiff” is the most ancient and respected and the one most worthy to be preserved no matter what rearrangements the passage of time may require. But while the title must remain, the function needs to be modified.”

The Report gave 3 reasons of principle for saying that the Bailiff should not have a role, both in the States and as Chief Judge in the Royal Court.

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 in the States, about who may or may not be allowed to speak, or put questions in the States, or the propriety of a member’s conduct. Such decisions may well be challenged in the Royal Court on grounds of illegality but, of course, the Bailiff cannot sit to hear and determine those challenges to his own actions.

The Report gave consideration to the reasons and eventually led to 3 recommendations—

1. The Bailiff should cease to act as president of the States or to take any political part in the Island’s government and the States should elect their own Speaker.
2. The Chief Minister should be the direct link to the Home Office in London.
3. The Office of Bailiff should continue to be the highest in the Island on all occasions when the order of precedence is observed.

The Report also drew readers’ attention to Human Rights issues with possible challenges regarding the “duality” of the Bailiff’s office. It should be recalled that in May 2007 the Education and Home Affairs Scrutiny Panel sought an opinion from Jonathan Cooper, O.B.E. of Doughty Street Chambers, in relation to the Magistrate’s “duality” in our Island’s Courts. Mr. Cooper was of the opinion that the practice was not European Convention compliant. That practice has now ceased.

I do not know whether the Bailiff’s dual role is Convention-compliant but to date, and to the best of my knowledge, no Human Right audit has been conducted. However there are occasions when, in my opinion, there may be violations. This arises when the Bailiff determines whether to approve Members’ Propositions, Oral and Written Questions or Personal Statements. There is no right of appeal against a refusal and the situation is identical when the Deputy Bailiff is sitting.

It is also pertinent to note that in Guernsey the role of the Bailiff was considered by the European Court of Human Rights in the case of McGonnell -v- UK (2000) and that there were implications so far as the analogous role of the Lord Chancellor in the UK too was concerned. Furthermore that the role of the Seneschal in Sark, which is in some ways similar to that of the Bailiff, has also been judicially considered very recently in UK Court of Appeal (2008) and found to be not compatible in part with the European Convention of Human Rights.

As referred to above, through the passage of time there have been a number of changes in the composition and constitution of the States. Probably the most important was in 1856 when the role of Deputy was introduced. Their introduction arose from recommendations in the Report that was published following a review of the composition of the States. Concerns had been expressed because the States was represented by Jurats, Connétables and Rectors, none of whom was elected but were Members by virtue of their office. Deputies are

now elected to the States and accountable to their electorate.

The question of accountability has rightly become more relevant, particularly as Jersey is a signatory to the Convention on Human Rights. Therefore the role of the non-elected Members of the States should not be overlooked just because it might interfere with tradition. Significantly too, under the States of Jersey Law 2005 which removed the Bailiff's power of dissent and the Lieutenant-Governor's power of veto, the preamble also declared that "Jersey wishes to enhance and promote democratic, accountable and responsive governance in the Island and implement fair, effective and efficient policies, in accordance with the international principles of human rights."

At Present there are 53 Elected Members of the States. The 12 Connétables are governed by the Connétables (Jersey) Law 2008. The other 41 States Members, Deputies and Senators, are governed by the States of Jersey Law 2005 which also states that the Connétables are members of the States by virtue of their office.

All 53 Members are accountable to their electorate and are elected for either a 3 or 6 year term of office. They are also subject to the Law and Codes of Practice. The 53 Members are free to speak and vote, but this is not the case with the Bailiff and Lieutenant-Governor, the Attorney and Solicitor General and the Dean. Whilst they have the right to speak they have no right to vote. However they are neither elected nor accountable to the States. The Officers are appointed by the Crown.

Quite understandably, the 5 non-elected Members are merely adhering to convention and tradition and as such no criticism should be levelled against them. However, I believe the time is right to review their ancient roles. If they are to remain they should be subject to a process which is democratic and accountable and is also Human Rights-compliant, not only with regard to the European Convention but also with regard to Jersey's many other Human Rights obligations, such as the UN Covenant on Civil and Political Rights.

I have outlined above when it is questionable whether some of the Bailiff's powers are Convention-compliant. I also question how Officers appointed by the Crown can play a part in the States Assembly when they are not accountable to it.

The Attorney General and Solicitor General have been members of the States for as long as records go back – dating from the time when the States emerged from the Royal Court.

It should be noted that the role of the English Attorney-General is currently subject to UK Parliamentary scrutiny and report.

The Attorney General wears 3 hats: that of Advisor to the States, Head of our Prosecution Service and also titular Head of the Honorary Police. Whilst the Attorney General regularly gives Members legal advice, because of his 3 hats, there are occasions when he is conflicted. There are also occasions when both the Attorney and Solicitor General exercise their right to address the Assembly. Whilst I do not criticise their right to speak or question the content of their speeches, I do question whether as unelected and unaccountable members such practices should continue? It should be noted that following the 1996 Clothier Review of the Police Services in Jersey it was recommended that the Attorney General should no longer be the titular head of the Honorary Police.

It is for the reasons above that I believe the time is right to carry out a major review of the role of the 5 non-elected members.

During the passage of time there have been a number of Reviews conducted, most noticeably those carried out in 1996 and 1999. Those Reviews were undertaken on the Police Services in Jersey and the Machinery of Government under the Chairmanship of Sir Cecil Clothier. The composition of the Review panels was diverse and Reports on the Panels' findings were subsequently published.

In the first instance I seek Members' support for a review to be carried out.

And if supported, to request the Council of Ministers to select, for States approval, a Chairman and Panel to conduct the Review with Terms of Reference together with a target date for the Review's completion and

subsequent Report. Support is also sought for funding the Review.

Should approval be given, I would hope that the Panel will start with a clean sheet of paper but take into consideration the fact that Jersey is an Island with a rich heritage and a desire to remain loyal to the Crown.

Financial and manpower implications

There will be financial and manpower implications which will be dependent on the form the Review will take and the membership of the Panel. Therefore it is difficult to comment, because if the review is a far-reaching matter from a constitutional point of view and needs to be undertaken by people of appropriate calibre, it will have a significant cost as it may be necessary to pay those undertaking it. Legal advice may be needed and it will need administrative support. In 2001 it was said that the Clothier Report cost £234,481.83.