

STATES OF JERSEY

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A PEOPLE'S ADVOCATE (P.202/2004): COMMENTS

**Presented to the States on 18th January 2005
by H.M. Attorney General**

STATES GREFFE

COMMENTS

1. The proposition is for the appointment of what it refers to as “*A People’s Advocate*” but both the proposition and the report make it clear that the function of the postholder will be confined exclusively to giving legal advice to the States Assembly, members of the Assembly and Scrutiny Panels. There is no suggestion that the postholder will advise members of the public.
2. We have made this seemingly trivial point because the choice of a title such as “*A People’s Advocate*” for a postholder who is not going to advise members of the public suggests to us that the proposition and the report are based on a mistaken perception that there are some elected members within the States Assembly who represent “*the People*” whereas others do not. This is a concept with which we have some difficulty in coming to terms. The fact is that all elected members of the States are there because they have been elected by the electorate, or (in the case of a minority) because no member of the electorate has felt a need to oppose them.
3. We agree that the Assembly frequently needs independent legal advice. It has always been one of the functions of the Law Officers to provide that advice. If the Assembly has no confidence that the Law Officers do provide independent legal advice, the remedy is to seek other individuals to occupy the offices of Attorney General and/or Solicitor General rather than create a new position of Legal Adviser.
4. There is a distinction between legal advice which is independent and legal advice which the recipient wants to hear. This is so whether the recipient is the Assembly, a Committee or an individual member, or in the future a Minister or the Council of Ministers. If legal advice is only acceptable when it fits the wishes of the recipient, there is not much point in having it.
5. We hope that members will recognise the importance of protecting the independence of the Law Officers because it is in the interests of the Assembly and the Island as a whole that they should feel able to give advice fearlessly to the Assembly without being subject to the sort of personal attacks which regrettably two or three members have made over the last couple of years.

Advice to the Assembly

6. Paragraph (a)(ii) of the proposition sets out the purposes of the post, of which there are five. The first three refer to the giving of “*independent*” legal advice. The fourth and fifth purposes are “*to hear, consider, scrutinise and/or peer review legal or other advice ... and, when appropriate, challenge that advice or offer an alternative opinion.*”
7. There are two possibilities here. The first is that the postholder will agree with the advice of the Law Officer. What will have been achieved in that case is that the States will have paid twice for the same advice.
8. Alternatively the postholder may disagree. Lawyers frequently do. If they did not, there would rarely be contested court cases. Disagreement will certainly not be an indication that the advice of the Law Officers is either biased in favour of the “*establishment*” or that it is wrong.
9. States members will, however, have to choose between the advice of the Law Officers and the advice of the postholder. This raises the question of how they will do so. The very fact that they are asking for legal advice suggests that they themselves do not know the answer to their question. If that is so, it is difficult to see how they can decide between the conflicting advices. It is to be recognised that in many cases the advice which is given, whether by the Law Officers or by the postholder, would represent a professional exercise of judgment as to what a court would make of particular language in a statute, or in a Treaty, or of a particular course of conduct if adopted by the “*executive*” in whatever guise it acts.
10. If there is a conflict in the advice, members would have to decide which they preferred in one of the following ways –

- (i) Deciding which source of advice (i.e. Law Officer or postholder) they personally prefer. That seems a bad basis for making a decision.
- (ii) By choosing the advice which fits in with what they want to hear and rejecting the advice which does not. That would seem to be as bad if not worse.
- (iii) By deciding as best they can which is the more sound legal advice, without in fact having any qualifications to reach that decision.

In summary, the risk is that members would take their decisions not on the basis of the law but on the basis of what they wanted or hoped the law to be, which surely cannot provide a sure foundation for good decision-taking.

- 11. In a sense, these comments reflect what is said at paragraph 3 above. In the private sector, clients who lose confidence in their lawyers go to other lawyers. They do not maintain two sets of lawyers to give conflicting advice because that leads only to confusion.
- 12. It would be wrong not to point out that the adoption of this proposition would change the landscape for giving legal advice in a way which would almost certainly be unacceptable both to the Law Officers and the other lawyer appointed by the States. Lawyers are used to their advice being scrutinised by other lawyers and if necessary having to defend their advice before a competent court. No lawyer worth his salt minds that. There is frequently an appeal process too where the legal advice can be defended and dissected. But to defend the competence of the advice not before a court but, instead, before a group of politicians which may include those who will accept it or reject it on the basis of what suits them, and not on the basis of whether as legal advice it is objectively right or wrong, and without any ability to appeal, would be to release one's professional reputation very publicly into very uncertain territory.

Advice to Scrutiny Panels

- 13. Scrutiny Panels will report to the States on draft legislation which is to be presented to the States and will review policies which have come under consideration by the executive or those which have not, and decisions taken by the executive. Legal advice may be necessary or critical to each of these functions.
- 14. The Privileges and Procedures Committee has previously accepted that the Law Officers should be the first port of call for providing that advice. We think that is the correct approach. Scrutiny is a political exercise, carried out for the most part by politicians of decisions taken by other politicians. In order to carry out that exercise effectively, members may need to have an amount of technical information which sometimes will be legal and sometimes other technical advice.
- 15. We accept that sometimes it will be appropriate or even necessary for Scrutiny Panels to have access to alternative technical advice; but it seems to us that this should be the exception rather than the norm. The question arises again as to how or where any dispute over technical advice – whether legal or other – would be resolved.
- 16. If politicians take a political decision based on legal advice from the Law Officers' Department, the obvious political scrutiny is whether that decision, based on that advice, is or is not the right decision. If the scrutiny is on whether the legal advice should have been different, the scrutiny is not of the decisions of the politicians but of the advice of the lawyers. We do not suggest that such scrutiny would never be appropriate or necessary but it would require politicians to form a view on legal matters which fall outside their technical competence and for that reason does not seem to us to be an obviously desirable course to follow.
- 17. The results of any such scrutiny would ultimately be measured in the States Assembly which is not a court qualified to assess conflicting legal or other technical advice.
- 18. There are, however, other factors which are relevant and present difficulty particularly in respect of legal

advice.

19. As we have said, legal advice reflects an exercise of judgment as to what a court might make, for example, of a particular course of conduct if adopted by “*the executive*”. That requires one to have regard to all relevant facts. In order for the postholder to give advice which could be compared with the advice of the Law Officer, the “*executive*” would have to make available to the postholder all available facts. It is unclear how practicable a proposition this would be, whether for privacy, confidentiality or other reasons.
20. Though the lawyer needs to identify all the relevant facts, the ascertainment of these facts in the context of Assembly business is primarily not a legal function but a political one. The function of lawyers is to advise on the facts as presented. The appointment of a People’s Advocate as proposed would be likely to achieve exactly that of which the proposer complains, namely the use of lawyers for political purposes.
21. The essence of legal advice is that it goes to what a court might make of the issue under debate. In the background of each issue lies the possibility that a court might have to construe the piece of legislation or determine the validity of a piece of executive action. A litigant is not in the position of having to disclose to his opponent the strengths and weaknesses of his case on the basis of the legal advice received and there is no obvious reason why the executive organs of the States should be in any worse position.
22. The way in which Scrutiny Panels handle the receipt of legal advice from the Law Officers is a matter which is under consideration and will be the subject of further discussion. However, for the purposes of this Report and Proposition, it is probably enough to note that a public discussion of the merits of the legal advice provided is unlikely to be in the public interest.

Advice to Individual Members

23. The Report suggests that the postholder would be available to give advice to backbenchers. We recognise that members currently have to wait longer for advice than we would wish. However, the remedy for that is to provide more resources to the Law Officers in order that extra lawyers can be recruited, not to set up an alternative source of legal advice which will potentially create all the same problems as are listed above.
24. There is an issue around the desirability of the Law Officers providing individual members with advice. Sometimes it is entirely right we should be asked to do so, as when a member is contemplating bringing an amendment to a piece of legislation or a proposition of a committee where there are legal implications. On other occasions however, members seek legal advice on behalf of a constituent. While this is very understandable, we think members must guard against putting themselves in a position whereby they seek confidential advice given to Committees or, post ministerial government, ministers for the purposes of using the advice to launch an attack on the decision. In this type of case, the constituents should be seeking their own legal advice, if necessary making an application for legal aid and should not be using government lawyers, through individual States members, to attack the decisions which government has taken.

Generally

25. The basis of this Report and Proposition is that the advice of the Law Officers adversely affects the outcome of important public decisions and goes beyond matters of law.
26. As was said in the debates on the amendments to the States of Jersey Law, it is not always easy to distinguish between points of law and mixed points of fact or policy and law. Courts have long appreciated that there are points which are actually mixed fact and law. Furthermore there is the additional difficulty that the background to nearly all questions of law put to the Law Officers is political, and the question often involves mixed points of law and policy where an answer on the legal part would be impossible without a reference to policy or structural issues.

27. Clients in the private sector recognise that they get a lawyer's advice not only for pure points of law but also because they get value from the assessment by a legally trained person of the consequences of particular decisions they might take. They do not always accept that assessment, nor should they; but it informs their decision-taking.
28. We think it is no different in the public sector. Members frequently express appreciation of the structural advice which they receive from the Law Officers in Committee without ever being bound to follow it even in cases where the point is a mixed one of fact and law, or policy and law. In our view not only is there room for the Assembly to gain benefit from such advice too, again of course without being bound to follow it, but also that is there no harm in such a process. Members are perfectly able to indicate – and they do – when they consider the Law Officer has gone too far into political issues, and are equally able to form – and are elected to form – their own judgments on the political implications of any matter whatever the legal advice might be.
29. We have noted how some members appear keen that Jersey should have party politics. Without passing any comment on the merits of such a possibility, we pause to reflect that the position of a lawyer appointed by the States ostensibly to give independent legal advice would be very precarious in such a system because the party in power would soon be able to dispose of his services if his advice were found to be inconvenient. To whom would such a lawyer owe his allegiance? Clearly to the States Assembly, and yet the existence of the party majority would be the very thing which compromised his position. By contrast, the independence of the Law Officers is obvious. That independence should be protected and nurtured rather than attacked.
30. It will be noted that we have not yet commented upon the potential difficulties of recruiting someone to the position that the proposer seeks, nor on the costs which would be associated with it. As to the potential difficulties of recruitment, we comment only to suggest that members might wish to consider whether a Jersey lawyer of the necessary calibre would want to apply for a job which offered neither the financial or other rewards available in the private sector nor the status of the Law Officers, and whether, conversely, if the job does offer any of those things, there would be any impact on the ability to recruit applicants to the office of Attorney General or Solicitor General.
31. As to the resource implications, we have two comments. First of all, we consider the proposition should be rejected for its intrinsic absence of merit. Secondly, the resources which would be needed would be very considerable, and, if there are resources to spare for additional legal capacity, they are urgently needed for the purposes of recruiting additional lawyers to the Law Officers' Department where there would be a much more productive use made of their skills.
32. Finally, we wish to add these personal comments. We have been taken aback by the allegations which Senator Syvret has made and by the language in which he has chosen to make them. The allegation is made not just that the Law Officers "*routinely make political speeches*" but also that the "*interventions are customarily designed to intercede on behalf of Committees ... or ... to rescue the "establishment" position*" and that the Law Officers give "*pseudo legal advice*". (Emphasis added.) No examples have been given of such allegedly political speeches or interventions and we absolutely reject the suggestion.
33. It is the professional duty of a lawyer to give to the client the advice which the lawyer believes is right. Whether he realises it or not, Senator Syvret, in accusing us of tailoring our advice to suit a particular political purpose, rather than giving independent legal advice, is accusing us of conduct which is professionally improper. These remarks are therefore a direct attack on our professional integrity and they ought not to have been made.

H.M. Attorney General

H.M. Solicitor General

11th January 2005.