

# STATES OF JERSEY



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

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Presented to the States on 25th April 2014  
by the Chief Minister

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STATES GREFFE

## COMMENTS

### 1. Responsibilities of the Chief Minister

The office of Chief Minister is responsible within the executive branch of government for constitutional issues (see initial report on Ministerial responsibilities [R.23/2006](#) and more recently [R.19/2014](#)). The office of Chief Minister is also responsible for justice policy and resources within the executive, including responsibility for safeguarding human rights and for strengthening democracy ([P.92/2013](#) refers).

I have reviewed the relevant principles of governance and the impartial advice which has been provided to the States Assembly over recent years, in order to reach a conclusion on this matter within the context of the responsibilities of my office.

Whilst this is a responsibility of the office of Chief Minister, these comments were considered in draft by the Council of Ministers at their meeting on 21st April 2014 and I am grateful for the helpful input provided by Ministers.

### 2. Separation of powers

The doctrine of the separation of powers suggests that the principal branches of the state – executive, legislature and judiciary – should be divided in person and in function. According to a strict interpretation of the separation of powers, none of the 3 branches may exercise the power of the other, nor should any person be a member of any 2 of the branches. The evolution of British constitutional conventions has tended towards a fusion of the executive and legislature in the membership of an assembly, but with an independent judiciary. This is logical given that the judiciary apply the laws which are usually proposed by the executive and decided upon by the legislature. The requirement for the judiciary to form a separate estate which is fully independent is widely recognised. This separation is reflected in the Commonwealth (Latimer House) Principles on the Three Branches of Government (2003), which provides a framework for the implementation by the executive, legislature and judiciary of the Commonwealth's fundamental values.

When considered against the doctrine of the separation of powers, maintaining the position whereby the Island's chief justice is a member of both legislature and judiciary does not seem to be consistent with the highest standards set by this fundamental principle of good governance.

### 3. Judicial independence

The doctrine of the separation of powers is also at the core of the concept of judicial independence. In order to ensure a completely free and unfettered exercise of independent legal judgment, the judiciary must be free from any inappropriate connections with the other branches of government. This importance of judicial independence is reflected in the Latimer House Principles (2003), which includes the provision below.

**“Independence of the Judiciary**

*An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice. The function of the judiciary is to interpret and apply national constitutions and legislation, consistent with international human rights conventions and international law, to the extent permitted by the domestic law of each Commonwealth country.”*

It is widely accepted that those exercising judicial functions should not have been concerned in making the laws which they have to apply and enforce, as otherwise there is a perceived risk that their interpretation of the law may be influenced by their understanding of the meaning of their provisions as they were debated and considered by the legislature.

Given that the modern principles of judicial independence underpin public confidence in the justice system, it would seem less than ideal to put these at risk, whether real or perceived, simply to provide the Assembly with a speaker.

**4. Clothier Review (2000)**

The *Report of the Review Panel on the Machinery of Government in Jersey* (December 2000), Chaired by Sir Cecil Clothier, recommended that the Bailiff should cease to act as the president of the Assembly or to take any political part in the Island’s government and that States members should elect their own Speaker. In making this recommendation, the Clothier Panel noted the principle of separation of powers, the general consensus that it is undesirable for those who have been involved in making the laws also to adjudicate upon them, and the impossibility of being able to say that a conflict is unlikely ever to arise.

This objective and impartial advice has not, as yet, been acted upon.

**5. The Bangalore Principles of Judicial Conduct (2002)**

The Bangalore Principles establish standards for the ethical conduct of judges. The United Nations Social and Economic Council invited member states to take these principles into consideration. The principles have also been approved by the United Nations Commission on Human Rights. The first value of the Bangalore Principles is independence, as reproduced below.

**“Value 1: INDEPENDENCE**

**Principle:**

*Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.*

**Application:**

*A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom.”*

The application of this principle stresses the importance of the perception of judicial independence and that the test for independence should include that perception. Whilst judicial independence is a status or relationship resting on objective conditions or guarantees, as well as a state of mind or attitude in the actual exercise of judicial functions, the test for independence is thus whether the tribunal may be reasonably perceived as independent.

It is perhaps doubtful whether membership of the legislature would always be perceived as a wholly appropriate connection.

## **6. Second Interim Report of the Constitution Review Group (2007)**

The *Second Interim Report of the Constitution Review Group* (December 2007) presented to the Assembly in June 2008 ([R.64/2008](#)), considered that the dual role of the Bailiff as President of the Royal Court and President of the States would have to be reviewed in the event of independence. The report concluded that, if Jersey were to have the privilege of sovereign status, then it would arguably be of greater importance to avoid any perceptions, however misconceived, that the independence of the judiciary might be compromised, by making provision for an elected or appointed speaker other than the Bailiff.

It could be argued that the position of Jersey in an increasingly globalised world, and our enhanced need to represent our own interests overseas, mean that the conclusion reached is correct even within the context of the current arrangement on sovereignty and that it is indeed of greater importance to avoid any perceptions that judicial independence might be compromised.

## **7. Commonwealth Parliamentary Association (CPA) Recommended Benchmarks for Democratic Legislatures (2006)**

The CPA has published benchmarks for democratic legislatures, working in association with the World Bank Institute and with support from the United Nations Development Programme, the European Parliament and the National Democratic Institute for International Affairs. The benchmark standard for presiding officers is reproduced below.

“Presiding Officers  
*The Legislature shall select or elect presiding officers pursuant to criteria and procedures clearly defined in the rules of procedure.*”

An officer appointed into this role by the Crown would seem to fall short of this benchmark standard.

## **8. Carswell Review (2010)**

The *Review of the Roles of the Crown Officers* (December 2010) ([R.143/2010](#)), chaired by Lord Carswell, was tasked with undertaking an independent review, taking into consideration the principles of modern, democratic and accountable governance and human rights, the nature of a small jurisdiction, and the Island’s traditions and heritage. The review recommended that the Bailiff should cease to act as President of the States and

that the States should elect their own President, either from within or from without the ranks of their members.

In making this recommendation, the Panel concluded that the current arrangement was inconsistent with modern ideas of democracy, contrary to the Latimer House Principles and Bangalore Principles, and open to challenge on grounds based on the European Convention on Human Rights. The Panel felt that it was abundantly clear from the content of the principles, and also from the benchmarks for democratic legislatures drawn up by the Commonwealth Parliamentary Association in 2006, that the framers considered that members of the judiciary should not also be members of the legislature. The Panel also considered that there would be practical advantages in the Bailiff being able to spend more time on his judicial duties.

As with the Clothier Review, this objective and impartial advice has not, as yet, been acted upon.

## **9. European Convention on Human Rights**

The Carswell Review Panel sought advice from Mr. Rabinder Singh, Q.C., a lawyer with knowledge and experience of human rights at all levels. Mr. Singh's opinion was that, whilst Article 6(1) of the ECHR provides that: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal ...", there would be no breach of Article 6 of the ECHR if the status quo were to be maintained. He noted that whilst the doctrine of the separation of powers has assumed growing importance in case law, the ECHR does not require states to comply with theoretical constitutional concepts. Rather, whether there is a breach of Article 6 of the ECHR will depend on the particular facts of a given case, including what role the Bailiff may have played in relation to legislation that may be in issue in judicial proceedings before him. Mr. Singh also concluded that the international trend suggests that the law will change in due course, and 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.

It is perhaps regrettable that a decision in a given case might be open to challenge on grounds based on the ECHR as a result of the present arrangements, particularly when this risk could be alleviated by the introduction of an elected speaker. As Lord Carswell noted, if the Assembly made a change now, then they could retain control of the process and remove the risk of having a change imposed on them.

## **10. Other Jurisdictions**

The Carswell Review Panel noted that they were unaware of any other democratic jurisdiction outside the Channel Islands, no matter how small, in which a judge presides in the legislature.

In the UK, before 2005, the office of Lord Chancellor was head of the judiciary and Speaker of the House of Lords. However, the Constitutional

Reform Act 2005 removed the judicial functions of the Lord Chancellor, and he no longer sits as Speaker of the House of Lords, which now elects its own Speaker. This change was intended to create a more formal separation of powers.

The Review of the Machinery of Government in Guernsey (November 2000) noted that the terms of reference for the review precluded the Panel from considering the role of Bailiff and other Crown appointments. In their final report, the Panel noted that they had not received evidence that the roles and responsibilities of the Crown appointees significantly impact on the internal machinery of Government. However, the Panel went on to note that if it were considered appropriate to have some person independent of the Bailiff to chair meetings of the States, then the qualification for selection as Speaker of the States might be either: (i) that the person must be a sitting Member of the States or someone who has previously served in the States for at least one full term; or (ii) that the person need not have previously have been an elected Member of the States, but must have had experience of States Proceedings, possibly having attended as a Crown Officer.

It would seem that all other democracies of the Commonwealth apart from the Channel Islands have now made the changes necessary to fully separate the membership of the judiciary from the legislature.

## **11. Chief Justice**

The Carswell Review also made a number of practical points regarding the best use of time by the Bailiff. The Panel concluded that it is unnecessary to have a person with the Bailiff's high legal ability to preside in the Assembly, that it is wasteful of his valuable legal skills to spend large amounts of time sitting in the Assembly, and that the chief judge should be more available to carry out judicial work, especially hearing the most important and complex cases.

It would seem that the interests of justice in the Island would be better served if our chief justice were able to spend more time on this aspect of his role, where his depth and breadth of legal and judicial experience could be put to best use.

## **12. An Elected Speaker**

The Privileges and Procedures Committee (PPC) has presented additional comments in order to suggest how an elected speaker might be selected (see [P.160/2013 Com.\(2\)](#)). In summary, the first option is that, at the initial meeting of the Assembly after a general election, the first task of the new Assembly, before the appointment of the Chief Minister, would be to elect the Speaker from those nominated. Those nominated by elected members could either be members of the States or persons from outside, with the only restriction being that any person from outside would need to meet the same requirements for qualification for office as an elected member.

The suggestion forms a good basis for further work to agree the finer details of a system of electing a speaker from within or without, to be developed as per the timetable provided by PPC, which would be well suited to an Island

community and which should strengthen the democratic basis of our Assembly.

**13. A decision for the States Assembly**

The letter from the Bailiff dated 25 January 2011 in response to the Carswell Review (as reproduced in the second PPC comments) states that “I naturally accept unreservedly that the decision is ultimately one entirely for the democratically elected members of the States and they will decide, having placed such weight as they think fit upon the views expressed in the Review, whether any change to the current position is desirable or not.” This stance was repeated by the Bailiff during his speech to the Conference of the Commonwealth Magistrates’ and Judges Association held in Jersey in September 2013, where he stated that “ultimately it is entirely a matter for the States whether they wish the Bailiff – who is appointed by the Crown – to continue as their Speaker or whether they would prefer to have an elected Speaker.”

I agree that this is a decision for the democratically elected and independent representatives of the people of the Island.

**14. A final decision to be taken following the forthcoming election**

Whilst this is clearly a decision to be made by States members, I am conscious that the forthcoming election may lead to a change of composition within the Assembly. Also, whether to implement a decision in principle to move to an elected speaker is a matter which Islanders may wish to discuss with those who present themselves for election to the Assembly. However, work to make the necessary changes to the Law must start in the coming months if the transition is to come about seamlessly upon the retirement of the current Bailiff in January 2015.

The proposition asks the Assembly to agree with the recommendation of the Carswell Review that States members should elect their own President, either from within or without the ranks of their members. This would be an agreement in principle to address the recommendation of the Carswell Review, whilst accepting that States members will wish to consider and decide upon the fine detail of the process for electing a speaker (which does not form part of this initial proposition).

If there is agreement in principle to address the Carswell Review recommendation, then the Privileges and Procedures Committee will bring forward the finer details as draft amendments to the States of Jersey Law and Standing Orders, with the proposals being lodged for debate by 2nd June 2014, as per the timetable provided in the additional comments presented by the Committee (P.160/2013 Com.(2)).

I propose to request that the Privileges and Procedures Committee includes an Appointed Day Act provision within these draft amendments to the Law in order to ensure that the final decision on whether to implement the system agreed would be taken by the Assembly following the forthcoming elections. If the Privileges and Procedures Committee do not wish to include such an

Appointed Day Act provision, then I will lodge an amendment so that members can decide upon the matter.

In this way, it would be possible for the current States members to undertake the necessary ground-work, but to leave the final decision to the members of the Assembly following the forthcoming election.

## **15. Guardian of Constitutional Privileges and Freedoms and Civic Head of the Island**

The Bailiff has an important function, as enshrined in the oath of office, to “uphold and maintain the laws and usages and the privileges and freedoms of this Island and that you will vigorously oppose whomsoever may seek to destroy them”. The oath of office is contained within the Schedule to the Departments of the Judiciary and the Legislature (Jersey) Law 1965, and will be unchanged by the introduction of an elected speaker.

Successive Bailiffs have been suitably vigorous in undertaking this aspect of their responsibilities and I have no reason to suppose that they will be any less vigorous in future.

The Carswell Review Panel recommended that the Bailiff should continue to act and be recognised as the civic head of Jersey. The Panel considered that the role of civic head is of great value to the people of Jersey, that the Bailiff should continue to carry out these duties, and that he could readily continue to do so if he ceased to be President of the States. I agree with the Panel, and the office of Chief Minister is committed to continuing to support the Bailiff as civic head of Jersey, both now and in the future.

I believe that the people of Jersey expect that the Bailiff would continue to undertake his responsibilities as civic head. I would hope that future Bailiffs would devote themselves to this aspect of their role with the same strong sense of duty and public service as their predecessors.

## **16. Evolution**

The opening to the report of the Carswell Review included a thoughtful quotation –

*“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.”*

Thomas Jefferson

Those of us who respect, value and wish to preserve the office of Bailiff long into the future, will recognise that history indicates that it is those institutions of the Crown which have evolved with the times which have prospered and found a successful place alongside more modern democratic structures. I believe that the best way to preserve the role of Bailiff for the benefit of future generations of Islanders is to support the evolution of this role through



adaptation to the changed circumstances of ever higher standards of good democratic government.

## **17. Conclusion**

In conclusion, it would seem that best practice and ever higher standards of governance must inevitably lead to change, as it has in almost every other democracy within the Commonwealth. In addition, the objective and impartial recommendations provided to the Assembly by Sir Cecil Clothier and Lord Carswell are firmly in favour of change. A decision by States members to elect their own Speaker would seem to be in the best interests of democracy and the best interests of justice. Change is inevitable. The best way to safeguard the role of Bailiff for the future is to take the initiative and adapt to keep pace with the times. The Privileges and Procedures Committee has provided an outline of how an elected speaker might be established, and a timetable for making a seamless transition given the retirement of the current Bailiff. I believe that we should take the opportunity to move forward and decide upon the changes to the Law which would be necessary for an elected speaker, whilst leaving the final decision to the members of the Assembly following the forthcoming election.