

STATES OF JERSEY



ELECTED SPEAKER AND DEPUTY SPEAKER OF THE STATES ASSEMBLY: SELECTION AND APPOINTMENT (P.84/2017) – THIRD AMENDMENT

Lodged au Greffe on 25th October 2017
by Senator Sir P.M. Bailhache

STATES GREFFE

ELECTED SPEAKER AND DEPUTY SPEAKER OF THE STATES ASSEMBLY:
SELECTION AND APPOINTMENT (P.84/2017) – THIRD AMENDMENT

1 PAGE 2, PARAGRAPH (1) –

Before the words “to agree that –” insert the words “subject to paragraph (3),”

2 PAGE 3, PARAGRAPH (2) –

For the full-stop at the end of the paragraph, substitute a semi-colon.

3 PAGE 3, NEW PARAGRAPH (3) –

After paragraph (2), insert the following new paragraph (3) –

“(3) paragraphs (1) and (2) shall be void and of no effect unless the majority of the people voting in a referendum on the question of whether the Bailiff should remain the President of the States, held in accordance with the Referendum (Jersey) Law 2017, have voted against the Bailiff remaining the President of the States.”

SENATOR SIR P.M. BAILHACHE

REPORT

Introduction

1. One of the fundamental flaws of the Chief Minister's proposition ([P.84/2017](#)) is that the appointment of an elected Speaker and Deputy Speaker of the States Assembly is presented as a political issue rather than as a constitutional issue. If it were merely a political issue, it could be argued that the replacement of the Bailiff as Presiding Officer by an elected Speaker was something for the Assembly itself to determine. But it is not a purely political issue. It affects the constitution of the States. On constitutional issues, the opinion of the people is important and should not be brushed aside as being of no significance. The composition of the States was seen as a constitutional issue, and was submitted to the people in a referendum in 2013. The question whether the *Connétables* should remain Members of the States by virtue of their office was seen as a constitutional issue, and was submitted to the people in a referendum in 2014. The same principle should be applied to the question of whether the Bailiff remains the President of the States. It is inconsistent and inappropriate to contemplate removing the Bailiff from the Presidency of the States without seeking the views of the Public in a referendum. It is arguably even more important in this instance that the views of the Public should be sought, because the decision could affect the identity of the civic head of the Island.
2. Unlike the withdrawn proposition of Deputy M. Tadier of St. Brelade, this proposition is entitled "Elected Speaker and Deputy Speaker of the States Assembly: selection and appointment"; but the reality is that it is about removing the Bailiff from the presidency of the States. The Chief Minister's report suggests that: "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". For the reasons given above, it is clearly inconsistent with past practice. Furthermore, to attempt to rush through fundamental constitutional change just before an election without any consultation with the Public is hardly a good example of representative democracy.
3. The Chief Minister is nonetheless to be commended for having, for the first time, articulated what the advocates of change have in mind in terms of replacing the Bailiff with an elected Speaker. There are still significant gaps, but there is greater clarity. The Report does not, however, present Members with a balanced picture, and that seems to me to be a pity. There **are** arguments in favour of having an elected Speaker; but there are **also** strong arguments in favour of the *status quo*. It is the balancing of those arguments which is important, and I deal later in this report with those issues and the need for the public to express a view on where that balance tips.

The case for a referendum

4. The question of whether there is public support for the change is of critical importance. There is at present a complete absence of any public mandate for such a significant constitutional change. There has been no popular clamour for change, there has been little public discussion outside the bubble of the States Assembly, there have been no parish hall meetings, and there has been little indication from comments in the media that the Public is really engaged. Since

the failure of the last proposition, nothing has changed except that there has been an extraordinary passing comment from the Independent Jersey Care Inquiry (“IJCI”). That comment has led to an exchange of correspondence between the Bailiff and the Chief Minister.

5. I describe the comment as “extraordinary” because the role of the Bailiff fell outside the terms of reference of the IJCI (as they themselves acknowledged), they heard no evidence from any of the relevant witnesses, and they appeared to base their view that the role of the Bailiff should change upon the testimony of a single anonymous witness. The views of the IJCI were uninformed and add nothing to the reasoned reports of the Clothier Panel and the Carswell Inquiry. They are, in this respect, in my view, an irrelevance.
6. The Chief Minister takes a different view, and I should add a few words in deference to that. He acknowledges that these are constitutional issues outside the remit of the IJCI, and that the ICJI knew that, but the fact that the Inquiry made these comments is of “great significance” because we must counter the negative perception of the “Jersey Way”. Unless one is prepared to abandon one’s critical faculties, and accept that, because the IJCI said it, there is no more to be said, one must surely look at the logic of this approach. The negative perception of the “Jersey Way” is said to be a “perceived system of secrecy, lack of transparency, ... and a perception that serious issues are swept under the carpet”. What has this to do with the Bailiff’s role? The Bailiff’s role is neither secret nor lacking in transparency. How can a perception that serious issues are swept under the carpet have anything to do with the Bailiff when all his decisions both in Court and in the States are open and are required to be reasoned and justified? The IJCI’s justification for Recommendation 7 is that “the future care and safety of children in Jersey will be undermined if [the Bailiff’s role is not reformed].” This seems a complete non-sequitur. The care and safety of children in Jersey have absolutely nothing to do with the Bailiff’s role.
7. The Bailiff’s role as President of the States is inextricably linked to his role as civic head of the Island. The Chief Minister’s proposition acknowledges that link by suggesting that, notwithstanding the election of a Speaker, the Bailiff should continue to be the civic head of the Island.
8. Unfortunately, a recitation in the proposition to that effect is unlikely to hold back the pressure for change that would follow if the Bailiff were no longer the President of the States. An inexorable movement will have been set in train towards a change in the identity of the civic head of the Island. No such change should be contemplated, in my view, without a clear public mandate. The Public are entitled to have a say before their civic head ceases to be the senior office-holder under the Crown.
9. Jersey’s Head of State is the Queen. In the public administration the senior office-holder under the Crown is the Bailiff, who has been the local civic head of the Island for a long time. There was a dispute in the 17th century as to whether the civic head was the Bailiff or the Governor, but an Order-in-Council of 15th June 1618 resolved that dispute in favour of the Bailiff. The role of the Bailiff has of course evolved over the centuries. Four centuries ago, the Bailiff had much greater executive responsibility, and sometimes concurrently held

great offices of state in England as well as his office in Jersey. Many of the local functions were then undertaken by a Lieutenant-Bailiff. Today, the Bailiff exercises a more restrained role as civic head, replicating in a sense the constitutional role of the Queen in the United Kingdom.

10. The Carswell Review acknowledged (at paragraph 5.10.7) that one of the arguments against change was that “removing the Bailiff from the States would detract from his standing and tend to undermine his position as civic head.” In its [comments](#) upon the Connétable of St. Helier’s proposition [P.160/2013](#) (‘Elected Speaker of the States’) the Privileges and Procedures Committee seemed to accept that that was correct. It stated that “PPC is conscious that some States members and members of the public are concerned about a change to the Bailiff’s role because the Bailiff’s role is broader than his presidency of the States and the Royal Court through his wider civic role. It may not be the case, as suggested by the Clothier and Carswell Panels, that this role could continue unchanged in the long term if the Bailiff was principally nothing more than President of the Royal Court.”
11. The Carswell Review concluded that the Bailiff’s role as civic head of the Island could continue even if he were no longer President of the States. It stated (at paragraph 5.11.14) that “A number of respondents expressed concern lest the Bailiff’s position as civic head would be undermined if he were no longer to be President of the States. In our carefully considered opinion it should not be. The Bailiff has a longstanding position of pre-eminence in the affairs of Jersey which does not stem from his position as President of the States: rather the contrary, his function as President of the States derived from his civic pre-eminence. In our view that pre-eminence can be maintained without having to maintain his Presidency. If he remains guardian of the constitution, as we consider he should, that will help to maintain his paramount historic position as Bailiff of the Bailiwick of Jersey”.
12. That was a convenient finding because it supported the recommendation that the Bailiff should cease to be President of the States. There was no reasoning, however, as to how they reached that conclusion. They appeared to arrive there merely because the Bailiff had a longstanding position of pre-eminence and, they stated, the Presidency of the States derived from that pre-eminence. Unfortunately that premise is false. The Presidency of the States did not derive from the Bailiff’s “civic pre-eminence”. It originally derived from the Presidency of the Royal Court. The States of Jersey emerged in 1524 from the coalescence of the Connétables and Rectors with the Royal Court (Bailiff and Jurats) over which the Bailiff presided. It was natural, therefore, that the Bailiff should preside over the larger body. The Bailiff’s “civic pre-eminence” was only established in 1618, as mentioned above, long after the emergence of the States of Jersey or States Assembly. Whatever the historical position, however, it is now the Presidency of the States Assembly that gives the Bailiff his “civic pre-eminence” and supports his position as civic head of the Island. The Chief Minister suggests that how the role of civic head emerged is only of historical interest; but that misunderstands its importance. If the role of civic head is supported by the presidency of the States, it will not survive if the two are separated.

13. The Chief Minister argues that nothing would change in relation to the role of civic head. He states, correctly, that the role has evolved through history and by convention. He sets out the various functions in relation to Liberation day and Remembrance Sunday, etc., which would be expected to continue. What is ignored, however, is the chemistry of relations between the Bailiff and States Members, in particular between the Bailiff and the Speaker and Chief Minister. A former Bailiff, Sir Michael Birt, put it very well in a letter of 25th January 2011 to a previous PPC commenting on the Carswell Review (at paragraph 6(iii)) –

“[I]n modern times it is [the Bailiff’s] position as President of the States which has underpinned his status as civic head of the Island. I know of no country or jurisdiction where a person who is merely the Chief Justice is the civic or ceremonial head of the country or jurisdiction. I accept that, if, for example, the legislation enacting any reform provided in law for the Bailiff’s position as civic head, this would underpin it for a while. However, I do not believe that it would last for more than a few years. It would simply not be sustainable over the longer period. The Bailiff would become a remote figure unknown to members of the States because he would have no regular interaction with them. Nor would there be any good reason for him to be the person to receive visiting dignitaries such as royalty, ambassadors etc. or for him and members of the Royal Court to lead important ceremonial occasions such as Liberation day and Remembrance Sunday or to attend the many community and charitable events as an apolitical representative of the Island. It is his status as President of the States as well as his historical role which gives legitimacy to the performance of those functions. In my view pressure would soon mount for such functions to be undertaken by the newly elected president of the States [Speaker].”

14. Some may think that these questions are unimportant details, but they are all relevant to the status of the Bailiff and his standing within the community. If it is seriously suggested that the Bailiff should retain his position as civic head of the Island, they need to be answered. To put it at its lowest, there is disagreement as to how long the Bailiff could sustain the position of civic head of the Island if he were no longer President of the States. What is agreed is that a strong risk of unsustainability exists. In these circumstances, do the Public not have a right to express a view on the Presidency of the States and, incidentally, who should be the civic head of the Island? The office of Bailiff is widely respected, and it is suggested that the Public have a right to be consulted in a referendum as to whether the Island’s civic head should remain the senior office-holder under the Crown, that is, the Bailiff.

Guardian of the Constitution

15. A second fundamental flaw in the Chief Minister’s proposition is the absence of any reference to the Bailiff’s duty to act as guardian of the Constitution. The Carswell Report suggested that it should continue. Whether or not that is also the view of the Chief Minister is unclear. The rationale for the existence of this duty was explained by the Privy Council Committee, chaired by the Home Secretary, which reported in 1947. It stated –

“We also consider that the Bailiff as President of the States exercises important functions in advising the Assembly on constitutional procedure which, from the nature of the constitution, requires an intimate knowledge of the privileges, rights and customs of the Island ...”.

16. The duty to act as guardian of the Island’s constitutional privileges finds expression in the oath which the Bailiff takes upon assuming office –

“You swear and promise before God ... that you will uphold and maintain ... the privileges and freedoms of this Island and that you will vigorously oppose whomsoever may seek to destroy them ...”

17. As the Chief Minister states at paragraph 61 of his report, the Bailiff’s role, and his relationship with the States, have evolved, particularly since the introduction of ministerial government. Prior to 2005, one of the ways in which the Bailiff was enabled to inform himself in relation to his duty as guardian of the constitution was through the Official Channel. This was the arrangement by which official communications between the States and the UK Government were transmitted by the Greffier on behalf of States Committees through the Bailiff and Lieutenant-Governor to the Under-Secretary of State. This system enabled the Bailiff to make himself aware of potential constitutional difficulties to which the attention of States Members should be drawn. In recent years the Official Channel has atrophied and all but expired. Official communications now go from Ministers directly to Ministers in the UK Government. Copies should go to the Bailiff, but that does not always happen. In any event, it would then be too late to raise a constitutional issue because the correspondence would have gone.

18. The principal remaining means whereby the Bailiff can inform himself of prospective constitutional risks is in the exercise of his function to approve propositions before lodging *au Greffe*. Occasionally the Bailiff will draw to the attention of Ministers or officials some issue which appears to him to have constitutional implications. If the Bailiff is no longer the President of the States, it is difficult to see how he will be able to inform himself and fulfil his duty of guardian of the Constitution.

19. It is not clear how the Chief Minister proposes to address this problem.

The case against changing the Presidency of the States

20. The principal case put forward in favour of removing the Bailiff from the Presidency of the States appears to be based on perception. No argument has been made that the Bailiff is not competent to do the job of presiding over the States – if anything, it is suggested that he is too highly qualified for the task. The argument is that the presence of a judicial officer in the Speaker’s role appears to be unusual and is inconsistent with current practice across the Commonwealth. It is not that the qualities desirable in a Speaker are different from the qualities usually found in a judicial officer – indeed fairness, objectivity, integrity and procedural competence are precisely the qualities for which one would look in an elected Speaker. It is because Jersey and Guernsey are different from other countries that outsiders, particularly distinguished

outsiders with experience of different parliaments, find it strange that the Bailiffs preside over the legislatures.

21. Channel Islanders know that the reasons why their Bailiffs preside over the legislatures are historical and traditional, as well as practical. History and tradition are naturally not a bar to change – but they are a reason why one should think carefully before changing systems that have worked satisfactorily for hundreds of years. Sometimes traditions do become outmoded, or result in inefficiency, and then it is time to change. The Bailiff’s dual role is certainly unusual in contemporary parliamentary terms, but there is no evidence that it is outmoded or results in inefficiency. On the contrary, it is very much fit for purpose.
22. The Chief Minister suggests that the ‘Second Interim Report of the Constitution Review Group’ presented to the States on 27th June 2008 ([R.64/2008](#)) supports the notion of an elected Speaker. That is not quite correct. The Group did report that the dual role of the Bailiff would have to be reviewed in the event of independence. The Report stated (at paragraph 76) that: “While the dual role can be justified while Jersey is a Crown Dependency (*inter alia*) because the Bailiff has a representational role and is the guardian of the Island’s constitutional privileges, the latter justification would not exist post-independence. Jersey’s constitutional privileges vis-à-vis the UK would cease because Jersey would have the greater privilege of sovereign status. In those circumstances 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”. The Report did not consider, while Jersey remained a Crown Dependency, that there was any need for change.
23. Other reports, such as the Latimer House Principles, the Bangalore Principles and the CPA 2006 Benchmarks, are all concerned with international standards and principally with ensuring that the judiciary is free from political interference. This is important in “new” democracies emerging from communist suppression or colonial domination where there is no or no substantial history of judicial independence. Jersey’s history is not a blank sheet of paper. The Royal Court has enjoyed judicial independence for centuries. There is no evidence that the Bailiff’s Presidency of the States Assembly has affected the independence of the Royal Court.
24. The Bangalore Principles, for example, refer to the desirability of a judge being free from “inappropriate connections with, and influence by, the executive and legislative branches of government”. Lord Carswell argued that the mere fact of the Bailiff’s Presidency of the States was an “inappropriate connection”. But if one asks the question: “Are the judges of the Royal Court influenced by the Bailiff’s Presidency of the States?”, the answer must surely be “No”. There is no evidence that judgements in the Royal Court are influenced by the fact that the Bailiff is President of the States. Lord Carswell asked Rabinder Singh, Q.C., then a respected Silk specialising in human rights law, now a Judge of the English Court of Appeal, to consider whether the role of the Bailiff conflicted with the European Convention on Human Rights. The short answer was that it did not conflict, and more recently the Jersey Law Officers have confirmed that that advice remains correct.

25. The European Court of Human Rights has never subscribed to any fundamentalist view of the separation of powers. Some people do, however, continue to assert that there is something wrong in principle with simultaneously holding a position in a court and in a legislature. Without understanding the principle, people refer to the notion of separation of powers as enunciated by Montesquieu as if it were an obvious consequence that something is wrong with the current role of the Bailiff.
26. In fact, what Montesquieu so admired about the British constitution in the 18th century was the division of governmental power between the legislature, the executive and the judiciary, which he thought to be the foundation of liberty. It was the power of the judiciary to keep the executive in check that appealed to him. Montesquieu understood very well that an overlap between some of these divisions existed in Britain. He knew that the Lord Chancellor presided in the House of Lords as well as being a judge of the court of chancery. Further afield, he knew that the Vice-President of the United States, a member of the Executive, was also *ex officio* the President of the Senate. Montesquieu did not hold the fundamentalist view of the separation of powers which considers that the 3 branches of government should be wholly insulated from each other. James Madison, the 4th President of the United States, and the principal author of the American Constitution, explained Montesquieu's thinking when he wrote (of the notion that the power of judging should be separated from legislative and executive power) that "[Montesquieu] did not mean that these departments ought to have no partial agency in ... the acts of each other. His meaning ... can amount to no more than this, that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted."
27. What are the positive advantages of retaining the status quo? They include –
- (i) The Bailiff is independent, particularly of government. Back-benchers may not always agree with the rulings of the Bailiff, but they know that his rulings are independent. If a Speaker were to be elected by the States, in which the Chief Minister and the government have a *de facto* majority, that independence could not always be assumed. In some small dependent territories where the Speaker is elected by parliament, there is a perception that the Speaker is in the government's pocket.
 - (ii) The qualities required of a Speaker, namely fairness, objectivity, integrity and procedural competence, are inherent in a judicial officer. They may not be so easy to find in Members who are available for appointment to such a post.
 - (iii) Conversely, those Members who do possess the qualities required for a Speaker may have entered politics with a view to holding political office as a Minister or in a senior Scrutiny role. To divert such a person to the Speaker's office would deprive the States of his or her political talents.
 - (iv) The Bailiff has a deputy, who may be assumed to have the same qualities as are set out in paragraph (ii) above; such qualities may not be so easy to find in a Deputy Speaker.

- (v) Because the Bailiff is a lawyer, there is no need for a Speaker's Counsel, which would probably be the position if a lay elected Speaker were in post. Procedural rulings do occasionally require legal knowledge or alternatively benefit from such knowledge.
 - (vi) The traditions of the Bailiff's ancient office, including the Royal Mace, and the links with the Crown, are part of the traditions of the States Assembly, and would be lost.
28. These advantages do not amount to insuperable objections to the removal of the Bailiff from the States and the election of a Speaker from the ranks of elected Members. They are, however, important factors to be taken into account when arriving at a balanced judgement.

Financial and manpower implications

29. Holding the referendum on the same day as the general election would lead to considerable savings, as it would not be necessary to set up polling stations separately, and all the systems for postal and pre-poll voting will already be in place. There would nevertheless be some additional costs for the printing of ballot papers and the requisite media campaign, which should not exceed £20,000 in total. If the referendum is not held on election day, there would be a minor increase in those costs. There are no manpower or other resource implications arising from this amendment.
30. The Chief Minister has not specified the ongoing revenue costs of his proposition, but they cannot be less than £150,000 p.a. and may be considerably more if the Speaker were elected from outside the States Assembly. The costs of this amendment are comparatively insignificant.