Review of the rôles of the Bailiff and Law Officers

Chaired by the Rt Hon Lord Carswell

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Introduction

1. I became Attorney General in November 2009 and prior to that, from April 2008, I held the office of Solicitor General. Accordingly, my experience as a Crown Officer in Jersey is relatively short and significantly shorter than that of my immediate predecessors.

2. Prior to becoming Solicitor General I was, from 1985, an Advocate in Jersey and for the most part was a partner in a large (by Jersey standards) law firm. I specialised in civil litigation and also prosecuted criminal cases from time to time for the Attorney General as a Crown Advocate.

3. I am Jersey born and aside from my time studying for a degree and for the English Bar Examinations, I have lived in Jersey all of my life.

4. Whilst I have afforded members of the Law Officers' Department some opportunity to comment on my draft submission the views that I express below are personal ones. The historical statement attached at Appendix 1 was prepared by the former Solicitor General, Stéphanie Nicolle Q.C., who has also devoted her time and skill in preparing other legal aspects of this submission and I am grateful to her for doing so.

5. Before turning to the specific questions asked in the review I would make a preliminary observation. Without suggesting that it is in any way unique to this Island, the position of Crown Officer in Jersey in my mind goes hand in glove with a strong tradition of independence and impartiality in and about the discharge of their respective duties. The Crown Officers have never been political appointees and have never been dependent on political support. Their offices are structurally independent of government. There is a strong tradition that they act impartially and that is something that I (and I believe my predecessors) have taken very seriously. It is a safeguard in a relatively small jurisdiction like Jersey, where no system can be free of the potential for a conflict of interest simply because any office holder will know, proportionally, a larger number of the people than will be the case in a large jurisdiction. More institutions or officers cannot and will not cure that. It is imperative that any office holder is appointed with the need for integrity and impartiality at the forefront of consideration for office. It is, I think, the basis that such appointments have worked and it is the safeguard needed in a jurisdiction such as Jersey. I set this out at this

stage because it is the sometimes unspoken understanding that underpins much of the submission that I make below.

The rôle of the Bailiff

6. The questions asked in respect of the Bailiff are:

(a) Should the Bailiff continue to be the President of the States?

(b) If not, how should the States appoint a President and would that be satisfactory?

(c) Should the Bailiff remain as a member of the States?

7. In summary, I do not think that the position of the Bailiff in the States needs to be changed. I do not think that the Bailiff's dual rôles as President of the States and Chief Justice of the Island are inherently incompatible. To the extent that there are any theoretical problems with this dual rôle, in my opinion they are capable of being dealt with within the current structure and the resources of the Royal Court. I am not aware of any actual examples of problems with the Bailiff's dual rôle. The advantages of the present system, in my view, outweigh any such theoretical disadvantages. The States could, of course, appoint an alternative President or Speaker but I do not think that this would be satisfactory. As to the third question, if the Bailiff is not President of the States, I cannot see what purpose would be served by remaining a member of the States.

8. There are, I think, certain advantages to maintaining the rôle of the Bailiff as President of the States. In setting out some factors below I do not suggest that these advantages (other than the first) could not be achieved by a combination of other means. I do not, however, think that other means are necessary or would necessarily result in a better system than exists at present:

(a) The office of the Bailiff is one of antiquity in the Island and at least since before the Second World War has been held by distinguished and able persons of clear integrity who have added lustre to that office. It is a rôle largely understood and respected by Islanders and I think held in affection. In my opinion it has, as a result, authority within the Island and the Assembly.

(b) The fact that the Bailiff holds judicial office also commands respect and gives authority within the Assembly.

(c) The Bailiff is able to provide legal expertise and is trained by dint of long legal experience and as a judge in those skills needed to preside over the Assembly and ensure proper, ordered and balanced debate. The Bailiff can give an authoritative ruling on the interpretation of Standing Orders, for example, without the need to refer to a third person. I elaborate on this slightly below.

(d) The Bailiff is appointed by the Crown. The office is accordingly structurally independent of political influence. The nature of the office and its judicial aspect, whilst not a complete guarantee, is also a safeguard against partiality in the Assembly.

(e) The Bailiff is, in my experience, an impartial and highly effective President of the Assembly.

9. An alternative to maintaining the rôle of Bailiff as President would be the appointment by the States of a President or Speaker from amongst their number. I think that this would be less satisfactory than retaining the *status quo*. It seems to me that the difficulties inherent in appointment by the States from its number can be grouped under the separate headings of legal expertise, impartiality, independence and restricted function as a States member. I accept that many of these are simple corollaries of the points that I have made above about the advantages of retaining the Bailiff as President. They may bear repetition.

(a) Legal Expertise

A number of the decisions which the President takes require legal expertise. The President is called upon, both in the States Assembly and outside it, to decide on a regular basis whether the conduct, the speeches, or the propositions of members do or do not fall within Standing Orders. Inevitably, this calls for an interpretation of the Standing Orders and an assessment of the conduct, speech or proposition to decide whether it falls within the Standing Order

properly interpreted. I think that this is not a task that in this jurisdiction is best discharged by someone without legal training. Although there is one lawyer currently among the elected membership it is highly unlikely that someone with legal training could be guaranteed to be found among members willing to fill the office of speaker. In theory, a *"speakers counsel"* could be appointed or the Attorney General (or Solicitor General) could be asked to advise in the Assembly on the interpretation of Standing Orders. Either of these is less advantageous than having a President who can make the decision himself. In the former case, a *"speakers counsel"* would need to be recruited and be of a standing and ability sufficient to give authoritative advice. It is not clear that recruiting such a person would be easy. Presumably such a counsel would also need to be paid. The latter possibility naturally assumes that the Attorney General (or the Solicitor General) will be present in the Assembly for the entirety of the time when it is sitting which is not currently the case. It would also not be practicable if the matter to be determined itself related to the Attorney General, such as, for example, whether or not a question could be put to him under Standing Orders.

(b) Impartiality

I was not in post at the time that ministerial government was introduced but it appears to me that the introduction of ministerial government in place of the Committee system has resulted in perceived divisions within the States Assembly. Under the Committee system, every member had a prospect, which was generally realised, of being a member of at least one Committee, and often more than one. Under the ministerial system only a limited number of members can be Ministers. Some of those members who are not Ministers refer to themselves, and presumably regard themselves, as *"backbenchers"*. The *"backbenchers"*

refer to the Ministers, and sometimes to those who vote in support of the Ministers, as the *"establishment"*. It appears to me that if a member of the perceived establishment is elected, the *"backbenchers"* will regard any adverse control which he exercises over them as prompted by *"establishment"* sympathies, and vice versa.

(c) Independence

I think that most members would consider the Bailiff to be independent. It is unclear that this would be the case in the event of someone elected after debate within the Assembly. It may be seen as a political appointment. Careful thought would need to be given to the independence of the position of someone thus appointed and how easy it would be to remove a person thus appointed from the office of Speaker. If the Island were to move toward party politics in which there was a political majority then this may be more of a concern as appointing a Speaker from among the membership might be seen in effect as an appointment by the majority party and thereby cause concerns about independence.

(d) Loss of function as a States Member

The same person cannot act at one and the same time as President and as an effective political member on the floor of the House. This means that whoever is appointed will be lost to the legislative and government functions. The rôle of President is demanding and important and if States Members were to select the President from amongst themselves the selection should be made from among those who members thought were most able. This would remove someone who was seen as able from a rôle in government, scrutiny and, indeed, from debate. I would add

that if a Deputy of an electoral district which has only one Deputy were to be elected as President that electoral district would lose its representation by Deputy.

10. The above are the practical reasons why I think that the continuance of the Bailiff as President of the States is preferable to the alternative of appointment by the States from among their number. I think, in addition, there is the somewhat intangible issue of *"standing"*. A combination of all but the last of the matters that I have mentioned above would, it seems to me, have potential impact upon the standing of the President thus appointed. This may well make it very difficult for the individual concerned to discharge those functions effectively and with authority. In contrast, the office of Bailiff has standing.

11. It would be possible to appoint a person who was not a member of the States as its Speaker or President. I understand that this might indeed take place in some jurisdictions although I am unaware of the perceived advantages and pitfalls. There are a number of issues that would arise out of such an appointment concerning, amongst other things, the method of appointment and removal, standing in the Island and the Assembly, remuneration, qualification for office, the availability of suitable candidates, the appointment of a Deputy and the establishment of independence all of which would, it seems to me, require considerable research and investigation to determine whether or not such would be a viable alternative. Because I do not think that the rôle of the Bailiff needs to change, however, I do not address this point further.

Legal Issues

12. I now turn to the legal issues, and in particular whether the current system may give rise to any challenge based upon the European Convention on Human Rights. The Proposition of the Deputy of St. Martin sets out the three reasons why the Clothier Report concluded that the Bailiff should not have a rôle both in the States and as Chief Judge in the Royal Court. The first is given as follows:

> *"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 also remains Speaker of the States. The 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."*

13. As a preliminary observation I do not think that the Bailiff in fact exercises *"political power or influence"*. He functions in effect as Speaker and presides impartially. Whilst it is of course true that the Bailiff cannot be dismissed by the States any President of an Assembly in a free society presides with the consent of that Assembly.

14. The proposition that no-one should hold or exercise political power unless elected by the people so to do, was considered by the Court of Appeal and the Supreme Court of England and Wales in the case of Regina (Barclay and others) v Lord Chancellor and Secretary of State for Justice and others [2009] 2 WLR 1205 and [2009] 3 WLR 1207

respectively. (In what follows I refer to this case as *"the Barclay Case"* adding *"(CA)"* or *"(SC)"* as the case may be.)

15. The Barclay Case was, so far as it is relevant, a challenge to the position of the Seigneur and the Seneschal in the Chief Pleas, the Legislative Assembly of Sark. The Seigneur was a hereditary position and the Seneschal was an appointment made for life by the Seigneur. Under the Reform (Sark) Law, 2008 both the Seigneur and the Seneschal were members of the Chief Pleas. The Seigneur was described in the judgment of the Court of Appeal as being, in effect and subject to Her Majesty, the Head of State for Sark and the Seneschal was Chief Judge (Paragraph 15).

16. The grounds of challenge to the Reform Law are listed at paragraph 22 of the Court of Appeal Judgment. The first ground was that in providing that the Seigneur and Seneschal, each of whom had extensive powers and duties, should remain unelected members of Chief Pleas the Reform Law breached Article 3 of the First Protocol to the European Convention on Human Rights.

17. The powers of the Seigneur and the Seneschal under the Reform Law are set out in the Court of Appeal's Judgment. Those of the Seigneur are listed at paragraph 26. He had the right to address Chief Pleas; a power at a meeting of Chief Pleas to veto any Ordinance made at that meeting (following such veto the Ordinance was to be laid before Chief Pleas not earlier than ten days and not later than twenty-one days after the meeting and at the later meeting the Chief Pleas could either confirm or refuse to confirm the Ordinance); a power, subject to the approval of the Lieutenant-Governor, to appoint the Deputy Seigneur and the two officers of the Island (the Prévôt and the Greffier); his

consent was necessary before Guernsey Police Officers might attend in Sark; and he was a trustee of the Island. *"The trustees, of whom there were four, have powers to manage property vested in Chief Pleas as agent for Chief Pleas, which power is subject to any direction of Chief Pleas."*

18. The Seneschal's powers are dealt with in paragraphs 24, 25 and 28 of the Court of Appeal Judgment. The Seneschal was ex officio President of Chief Pleas, set the agenda and supervised debate in Chief Pleas. He produced agendas for the meeting of Chief Pleas and attached supporting papers as required. He had the power, subject to permission from the Seigneur, to call an extraordinary meeting of Chief Pleas. He was the returning officer for elections to Chief Pleas, and one of the four trustees of the Island.

19. It appears to me that these powers go beyond the powers of the Bailiff in that the Bailiff has no power to veto any enactment passed by the States, no longer has a casting vote, nor does he appoint the Deputy Bailiff. He is not a trustee or in any other way vested with powers in respect of the management of property belonging to the Public: that is the function of the Treasury Minister. He is not a returning officer. More importantly, he does not control the agenda and has no rôle in setting it or in providing supporting papers.

20. I will not repeat here the extensive review which was made in the Court of Appeal of previous case law in relation to ground 1. I think it is sufficient to say that the Court found that a breach of Article 3 on the ground of the presence of non-elected members in the legislative assembly was not established. At paragraph 42 et seq the Judgement reads –

"On the other hand, the commitment of the Seigneur and Seneschal to this small and comparatively isolated community has advantages in terms of the stability and continuity it provides. It is capable of conferring a standing and expertise Chief Pleas might otherwise lack. Maintenance to some extent of their traditional role on Sark need not involve a breach of Article 3.

The inability of the Seneschal to sit on committees of Chief Pleas which are likely to conduct the day to day management of Sark's affairs (section 45(3)) limits the influence which, it is feared by the claimants, he may possess over the conduct of business on Sark: section 45(3).

44. Each of the voting members of Chief Pleas is elected. They have the voting power which determines what laws are passed and what procedures are followed. Any democracy depends on the robustness with which elected members of a legislature exercise their powers and perform their duties."

21. At paragraph 46 the Judgment continues:

"46. The current Seneschal has stated that he regards himself as the servant of Chief Pleas and I have no reason to believe that he will use his position

as ex officio President to thwart the will of elected members. It cannot, in my view, be assumed that he will conduct himself so as to thwart it. His powers under the present rules of procedure are substantial, as may be expected in a presiding officer under the 1951 Law, but if the rules are not acceptable to the elected and voting members, Chief Pleas may "from time to time by resolution prescribe rules and procedure applicable to meetings": section 36(1).

47. All members of Chief Pleas entitled to vote are elected in accordance with the procedure about which no complaint is made in these proceedings. That, in my judgment, is fundamental to the resolution of the issue raised by ground 1. The electorate in Sark is free to choose each and every member of Chief Pleas with a right to vote. The free expression of the opinion of the people in the choice of the legislature (Mathieu-Mohin's case para 54) is not, in my judgment, impaired or deprived of effectiveness by the presence of a non-elected presiding judge and a non-elected Seigneur. The elected members, who alone have the power to vote, can be expected to assert their democratic will as they see fit. I have no reason to believe that they will be intimidated from doing so by the presence in Chief Pleas of Seigneur and Seneschal, notwithstanding the likely prestige on the Island of the holders of these offices."

22. I would suggest that this meets any argument that the rôle of the Bailiff as a non-elected President of the States is somehow a breach of the European Convention on Human Rights.

23. The second reason given in the Clothier Report is summarised in the proposition of the Deputy of St. Martin as follows:

> *"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."*

24. This point was also under consideration in the Barclay Case, as it had previously been in McGonnell v United Kingdom (2000) 30 EHRR 289, which was considered and referred to in the Judgments in the Barclay Case.

25. The decision in McGonnell v UK is summarised in the Barclay Case (CA) at paragraphs 59 and 60 as follows:

> *"59. The position of the Bailiff of Guernsey, who is President of the Royal Court in Guernsey, was considered by the ECtHR in McGonnell v United Kingdom (2000) 30 EHRR 289. The Bailiff's Court determined a planning appeal and the Bailiff, as Deputy Bailiff, had presided over the States when the development plan under which the planning decision was taken was adopted. The majority position of the European Commission of Human Rights was that there had been a violation of Article 6(1) of the*

Convention. The commission put the objection to the Bailiff's rôle in a general way, at para 61:

"The position in the present case was therefore that when the applicant appeared before the Royal Court on 6 June 1995, the principal judicial officer who sat on his case, the Bailiff, was not only a senior member of the judiciary of the Island, but was also a senior member of the legislature – as President of the States of Deliberation – and, in addition, a senior member of the executive – as titular head of the administration presiding over a number of important committees. It is true, as the Government points out, that the Bailiff's other functions did not directly impinge on his judicial duties in the case and that the Bailiff spends most of his time in judicial functions, but the Commission considers that it is incompatible with the requisite appearances of independence and impartiality for a judge to have legislative and executive functions as substantial as those in the present case. The Commission finds, taking into account the Bailiff's rôles in the administration of Guernsey, that the fact that he has executive and legislative functions means that his independence and impartiality are capable of appearing open to doubt."

"60. Subsequently, the Court found unanimously that there had been a violation of Article 6 of the Convention. It did so, however, on narrower grounds, further information about the Bailiff's rôle

in the particular case having emerged: para 57. The Court held that the mere fact that the Deputy Bailiff had presided over the States when the development plan was adopted was capable of casting doubt on his impartiality when he subsequently determined, as the sole judge of the law in the case, the applicant's planning appeal."

[Emphasis added in both places]

26. The Court of Appeal in the Barclay Case found that although the position of the Seneschal as a non-elected member of Chief Pleas was not a breach of Article 3 of the First Protocol, his position as a member of the legislature and as Chief Judge was a breach of Article 6(1) (right to a trial by an independent and impartial tribunal). It cannot be supposed that the Court of Appeal intended to overrule the decision of the European Court in the McGonnell case, and indeed at paragraph 159 the Judgment of the Court of Appeal in the Barclay Case states:

"The present case is exceptional."

27. I therefore suppose that the Court of Appeal saw a difference between the position of the Seneschal in Sark and the position of the Bailiff in Guernsey. It is quite clear that the European Court thought that the applicant's rights under Article 6 of the Convention had been breached in the McGonnell case because, and only because, the Bailiff had been present in the States when the matter which was the subject of the applicant's appeal to the Royal Court was determined by the Bailiff. The corollary to that is that had the Bailiff not been present in States

when the development plan had been debated there would have been no breach of Article 6.

28. Paragraph 67 of the Court of Appeal's Judgment in the Barclay Case runs as follows:

> *"This is not slavish adherence to an abstract notion of separation of powers but a recognition that it follows from the Seneschal's functions in his non-judicial capacity in Chief Pleas, as already described, that his independence and impartiality are capable of appearing open to doubt. In this respect, the smallness of the community aggravates the problem. The same people and issues with which he is likely to be dealing when presiding at Chief Pleas, including issues arising from the Reform Law itself and the Guernsey Human Rights Law, may be the subject of litigation in his court."*

29. As regards the reference to *"the smallness of the community"*, we are told elsewhere in the Judgment that the electorate is approximately five hundred persons, that is, a fraction of the electorate of Jersey which is currently in excess of some 58,000.[1] At paragraph 68 it is said that provision in the Law for the appointment of Deputies and Lieutenants, giving the Seneschal the power to recuse himself, does not rectify the situation. I would ask why this should be so when it would apparently have been a satisfactory step for the Bailiff to take in the McGonnell

[1] Figure as at the 4th March 2010 give in a written answer tabled on the 9th March 2010 in the States by the Chairman of the Comite des Connetables in response to a question asked by Deputy G.P Southern.

case. The answer is perhaps to be found in paragraph 55 of the Barclay Case Judgment, where it is said:

> *"55 .... however fair-minded he is, the Seneschal's lack of legal training is inevitably a disadvantage in assessing the circumstances in which recusal is appropriate. Unlike lay judges in other jurisdictions the Seneschal does not have a legally qualified colleague or clerk to advise him on the law, including its requirements as to judicially appropriate conduct and fair procedure."*

30. At paragraph 56 the Judgment refers to the submission of the claimants that the fact that the Seneschal is appointed for life makes the position worse because his multiplicity of rôles are enjoyed without limit of time.

31. At 160 the Barclay Case (CA) judgment runs –

> *"As President the Seneschal can be expected to play a rôle in relation to <u>all laws and decisions</u> of the Chief Pleas... any <u>direct</u> involvement in the passage of legislation or executive functions, even of a purely procedural nature, may be sufficient to cast doubt on the Seneschal's impartiality or independence when he is subsequently involved as a judge in a case with which that legislation or executive function is connected: Mc Gonnell's case, paras 52, 55, 57.*

> *161. A litigant cannot be expected to know whether the Seneschal has been involved in a process within the Chief Pleas which, whether in relation to legislation or an executive matter, might have some direct or indirect bearing on the subject matter of the proceedings. The reasonable assumption would be that the Seneschal probably had been, or at least might well have been, so involved, but the litigant cannot reasonably be expected to have researched and discovered any such involvement. Accordingly, in every case, so far as the litigant is concerned, there exists a possibility of lack of independence and impartiality by the Seneschal acting in a judicial capacity. In view of the inevitably limited knowledge of the litigant about the involvement of the Seneschal in the Chief Pleas on any particular occasion or matter the problem is not resolved by rights of appeal or judicial review."*

32. It appears that the following were determining factors in the Barclay Case (CA) which led the Court of Appeal to describe it as *"exceptional"* and to reach a different conclusion from that reached by the Court of Human Rights in the McGonnell case, where the decision was based solely on the fact that the Bailiff who had decided the planning appeal had been in the States when the development plan to which the planning appeal related was debated.

33. Those distinguishing features, and my comments on them as they relate to the office of Bailiff in Jersey, are as follows:

(a) The Seneschal is not a lawyer, and does not have a legally qualified colleague or clerk; he is therefore ill-placed to determine when he should recuse himself.

Comment: The Bailiff and Deputy Bailiff are both lawyers and perfectly well able to recognize cases when they should recuse themselves.

(b) The Seneschal as President of Chief Pleas can be expected to play a rôle in relation to all laws and decisions of Chief Pleas.

Comment: Even were their rôles analogous to that of the Seneschal, the Bailiff and the Deputy Bailiff share between them the Bailiff's functions in the States. Neither of them can be expected to have been present when all laws are debated and all decisions taken. For both the Bailiff and Deputy Bailiff there will be many laws which are debated and passed and many decisions which are debated and taken when the Bailiff or the Deputy Bailiff as the case may be was not present and thus had no *"direct involvement"* even of a purely procedural nature.

(c) A litigant cannot know whether the Seneschal has been involved in a process within the Chief Pleas which might have some direct or indirect

> bearing on the subject matter of the proceedings.
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> Comment: All proceedings of the States are recorded and transcribed and the transcripts of the recordings are in the public domain. It is an easy matter for any lawyer, and for any litigant with access to a computer and knowledge of how to use it, to ascertain whether the Bailiff or the Deputy Bailiff presided when a particular matter was under consideration. There are a number of judges of the Royal Court and there is no practical difficulty in finding another judge were the Bailiff to recuse himself in any case

34. I might add that many of the cases which come before the Royal Court are not concerned in any event with legislation passed or executive decisions taken by the States. Jersey is a customary law jurisdiction and some litigation arises out of customary law matters. In a number of cases there can never be a question of either the Bailiff or the Deputy Bailiff having been in the States when the matter was debated, because the matter will not have been debated in the States.

35. The third reason given by the Clothier Report is set out in the proposition of the Deputy of St. Martin as follows:

> *"The third reason is that the Bailiff in his rôle as the 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 the grounds of illegality but, of course, the Bailiff cannot sit to hear and determine those challenges to his own actions."

36. I have to express doubt as to how far this statement can be applied. In Syvret v Bailhache and Hamon 1998 JLR 128, Beloff, Commissioner, sitting alone as a judge of law of the Royal Court held that the Court's jurisdiction to enquire into proceedings in the States did not extend to whether Standing Orders had been properly interpreted and applied, whether a member had been guilty of misconduct, or whether the actions taken against him in the States had been in accordance with the rules of natural justice or in good faith.

The rôle of the Law Officers

37. Paragraph 2 of the Issues document dated December 2009 ("the Issues Document") states that the history of the offices of Bailiff, Attorney General and Solicitor General are set out in the documents briefed, and that the members of the panel will be familiar with it. That notwithstanding, I feel it appropriate to include a brief account of the history of the office of Attorney General and Solicitor General which is set out in Appendix 1 to this submission. I believe that those offices underwent a modification in the first part of the twentieth century, which is of significance when considering what is, and what ought to be, their present rôle. (I have also included as Appendix 2 to these submissions a brief note on what appear to me to be some errors in the background documents referred to in the Issues Document.)

38. In summary, taken from Appendix 1, the historical position is:

- The Law Officers began as representatives of the Crown. They were appointed by the Crown alone [Order in Council, 1615].

- They were *ex officio* members of the Royal Court, and when the States evolved out of the exercise by the Royal Court of a legislative power, they became members of the States.

- They had a right to speak but not to vote, just as in the Court they had a right to address the Court, but no right to participate in its decision-making. See the extract from Poingdestre at page 24/25, divider 3 –"*Il [le Procureur du Roy] n'a aucune Jurisdiction annexée à sa charge; non plus que l'Aduocat du Roy ... Car l'Office de ces deux personnes ne consiste pas a decider, ny a juger, ny a executer des Loix;*"[2]

  The basis for the right was their need to be able to defend the interests of the Crown, not primarily to advise the States, though they might occasionally do so, see the petition of 1824.

- The Crown is the *parens patriae,* the fount of justice, and the guardian of the public interest. The Law Officers, as the Crown's representatives, were likewise protectors of the public interest. The Attorney General was (and is) the *partie publique* and has a duty to safeguard the public interest in its widest sense, see Le Cocq v. Attorney General 1991 JLR 169 (divider 14). He has the

[2] "*No jurisdiction attaches to the rank of His Majesty's Attorney General; any more than to the Solicitor General . . As the Office of these two persons consists neither of deciding, nor of judging or executing any Laws*"

exclusive right of criminal prosecution, subject only to statutory erosion in the case of Magistrate's Court prosecutions, see Attorney General v. Devonshire Hotel Limited 1988 JLR 577 (Divider 15).

- Up to the end of the nineteenth century, the Law Officers acted for the Crown but did not act for the States unless the States briefed them as they would brief any other private sector lawyer.

- The foundations for change were laid with the passing of the *Loi (1930) constituant le Département des Officiers de la Couronne.* Since then the offices of Attorney General and Solicitor have steadily and progressively evolved into what they are at the present day. The Attorney General, and by extension the Solicitor General, who discharges the Attorney General's functions at need, have retained their original rôle as adviser to the Crown and as *partie publique.*

- In addition they are now advisers to the States in the fullest sense. They advise the States on proposed legislation, putting an end to the unsatisfactory situation described by Lord Coutanche, and they act for the States in civil matters. There have also been a number of statutes, particularly in the post World War II years, which lay upon the Attorney General *ex officio* a number of functions in addition to those imposed on him by customary law as *partie publique.*

39. Before 1930, the Law Officers were the advisers to the Crown and the protectors of the public interest; after it, they were advisers to the

States in the fullest sense. The result has been an end to the unsatisfactory situation where laws were passed which then had to be re-drafted. The Law Officers can and do provide the necessary legal advice at all stages of legislation, from the formulation of the underlying policy to the debate in the States Assembly. A further development since 1930 is the number of enactments which name the Attorney General as the responsible office-holder for the statutory functions created. A list (not comprehensive) of these is included at divider 16.

40. I now turn to the questions set out in the Issues Document.

41. (a) How should the Attorney General and the Solicitor General be appointed?

42. In my view the Attorney General and the Solicitor General should continue to be appointed by the Crown after consultation with the holders of appropriate offices in Jersey (whose identity I consider below). It appears to me that the choice must lie between the Crown as at present, or the States, the Royal Court, the Chief Minister or Council of Ministers, or an electoral college similar to that which elects the Jurats (this consists of members of the States, members of the Bar who have renewed their Oaths, and Solicitors of the Royal Court). I think that each of the other options has disadvantages and none of them has the breadth or depth of consultation of the existing system.

(a) An electoral college I think inappropriate for the following reasons:

- The Jurats are the judges of fact not of law, and a Jurat is therefore chosen not for legal knowledge, experience or

competence, but on the basis of past experience and character generally. These are factors which can be assessed by an electoral college in the way that it could not assess the abilities needed for a Law Officer.

- An electoral college is dependent on the speeches made by a proposer and a seconder, and could not interview candidates, an essential step in the appointment of a Law Officer, and now established practice.

- There are candidates for the post of Law Officer, probably the majority, who do not wish their candidature to be generally known. An individual considering giving up private practice will rightly view that as commercially sensitive. If unsuccessful, he or she may be disadvantaged thereafter. Election by an electoral college would make anonymity an impossibility.

- A candidate for the post of Attorney General or Solicitor should not be in the position of seeking to canvass support for his/her election.

(b) The Royal Court would be well-placed to assess the forensic ability of candidates who had appeared before the Court. I do not think this sufficient to outweigh the disadvantages for the following reasons:

- Much of the work of the Law Officers is not Court work. A good court-room lawyer will not necessarily be equally strong in other areas of practice, and appearances in the Royal Court will not necessarily give any idea of a candidate's ability in other, equally

relevant, spheres. Some candidates for appointment may have specialised in non-court work.

- The Court, like an electoral college, could not conduct an interview with candidates.

- The Law Officers should be seen to be independent of the influence of the Court. If the Law Officers were to be appointed by the Court there is a risk that they would be perceived to be the creatures of the Court, which would damage public confidence in their ability to stand up to the bench if the circumstances of a case require it.

- Conversely, the Law Officers should appear before the Court on an equal footing with advocates in the private sector. If the Law Officers were to be appointed by the Court there is a risk that third parties might assume that the Court would be more favourable to them, which would damage public confidence in the impartiality of the Court.

(c) An appointment made by the Chief Minister or Council of Ministers would also be inappropriate:

- The Attorney General would potentially lose the perception of independence to the Assembly.

- The Attorney General's ability to give and to be perceived to give independent advice to government would be prejudiced. It is essential, in my view, that the Attorney General maintains

independence both structurally and in effect from political influence and in a small jurisdiction it is even more important that this is so.

(d) I think that appointment or election by the States would be inappropriate for the following reasons:

- If the appointment were to be delegated by the States to a small Committee, the Committee would be able to conduct interviews but the appointment would be open to attack from other members.

- If the appointment were to be made by the entire Assembly it would be impossible to interview candidates. The most which might be achieved would be for candidates to appear before the Assembly, present their candidature, and then answer questions from members (as is done in the case of elections for Chief Minister). An Assembly of laymen cannot assess legal ability.

- Candidates who do not want their applications to become public knowledge would be inhibited from applying. As I have mentioned above, the possibility of leaving private practice is commercially sensitive to the unsuccessful candidate.

- The Attorney General is the *partie publique* and the Law Officers should not be subject to political domination. Candidates should not be in the position of having to canvass votes among the members of the legislature, nor should they be seen to owe their position to a political vote.

- There is a risk of prejudice to the subsequent relationship between the members who did not vote for the appointment of the successful candidate and the successful candidate. Such members may feel inhibited from seeking advice. If they receive unfavourable advice, they may attribute it to the fact that they voted against the successful candidate. If a member who did vote for the successful candidate receives legal advice from the successful candidate, members who are opposed to that member may argue that the successful candidate's advice is influenced by the favourable vote.

43. It appears to me that appointment by the Crown is a method of appointment which is not beset with such difficulties. I also think that the procedure which is followed is as fair as it could be, and the most likely to attract and to appoint the best candidate. That procedure now begins with the advertising of the vacancy. The advertisements are placed prominently in the Jersey Evening Post. The law firms are circulated inviting applications; lawyers who are not members of any law firm are contacted individually.

44. There is a job description and a statement of the terms and conditions is available to any potential applicant who cares to ask for it, and any lawyer with the requisite qualifications is entitled to apply. Applications are made to the Lieutenant Governor. After the closing date for the submission of applications consultation takes place with the Bailiff's Consultative Panel, senior members of the legal profession and existing holders of Crown Office, the Jurats and the Chief Minister and members of the judiciary. The Consultative Panel was created by the States in 1992, and its composition subsequently modified, also by the

States. Currently it comprises the Chairman of the Comité des Connétables, the Chief Minister, the Chairman of the Privileges and Procedures Committee, the Minister for Treasury and Resources, and five other members elected by ballot by the States for a period of three years.

45. The candidate is interviewed by a Panel convened by the Bailiff and consisting of the Bailiff, a Lieutenant-Bailiff and the Chairman of the Appointments Commission. That Commission is a body set up by the States in accordance with Article 18(1) of the Employment of States of Jersey Employees (Jersey) Law, 2005. Its purpose is, in the words of the preamble to the Law, to oversee the appointment of persons to significant public positions and to determine procedures for the appointment of States' employees and certain persons employed by other persons on behalf of the States. Its members are appointed by the States Assembly. I do not think that the Commission on its own would be the proper body to conduct the interview of to make the final recommendation, as I do not think that the members of the Commission have sufficient familiarity with the practice of law, the functions of the Law Officers, and the legal profession to identify the best candidate, but I think it an added guarantee that its Chairman should participate and that the interviews will follow the appropriate course.

46. Once the consultation process and the interviews have taken place the Panel makes its recommendation to the Lieutenant-Governor, who transmits it to the Crown.

47. It appears to me that this procedure combines the optimum level of consultation for the purpose of ensuring that the successful candidate will be both the most able lawyer from among the applicants and the

person most acceptable to the States as their adviser. It also affords a measure of anonymity to unsuccessful candidates which can, as I have mentioned, be important.

48. It also seems to me that appointment by the Crown is a guarantee of independence and freedom from potential political influence.

49. It would of course be possible to establish a Judicial Appointments Commission that makes a recommendation to the Crown. I do not see, however, that this would be an improvement on the wide consultation that the present system provides.

50. (b) Should they continue to be members of the States?

51. I think that the Law Officers should continue to be members of the States. This enables the States to receive appropriate legal advice as and when they need it. The Memoirs of Lord Coutanche, to which reference is made in Appendix 1, show clearly the unsatisfactory position which obtained when the Law Officers, though members of the States, were regarded primarily as the representatives of the Crown, and were neither regarded, nor acted, as the legal advisers to the States. Laws were passed upon which the Law Officers had not advised, and which were then regularly sent back by the Privy Council for re-drafting. I think that it is self-evident that the legislature should receive full, appropriate, and informed advice before it passes any enactment. I do not think that there is any workable way of answering this need other than by having a Law Officer in the States who is able not only to answer questions which may arise but who can also intervene to volunteer advice when s/he perceives it to be necessary.

52. I am aware that other measures have or may be suggested, but none appears to me likely to work satisfactorily. When a draft law, policy, or other matter is debated in the States, members will often ask questions which can best be answered by a lawyer, and which in the case of a law etc., of any complexity can only be answered by a lawyer who is familiar with it. Under the current system the Law Officers' Department advises on the legal aspects of the preparation of draft laws, policies etc. The Law Officer who attends the sitting of the States can familiarise him or herself with the file in advance of the sitting.

53. It may be suggested that a Minister or other States member who proposes to present a Proposition to the States could instruct a private sector lawyer who would advise for that particular matter, and attend in States to answer questions. I think that that system would be cumbersome, expensive, and only partially successful. No private sector firm or individual lawyer can build up the expertise which is inevitably acquired by a Law Officer who habitually advises the States. Every time a private sector firm was instructed some lawyer in it would start from scratch and spend time, for which fees would be charged, acquainting himself with matters with which the Law Officers are already familiar, without, I feel, attaining the same level of expertise. It would also not promote consistency of approach.

54. It might be suggested that full legal written briefings could be provided with each proposition either by the Law Offices of by lawyers in each governmental department. I think that this would be problematic. The provision in advance of a written brief for all propositions by the Law Officers would be burdensome and especially difficult to achieve where complex amendments are concerned. Moreover, this would not cover the need for unanticipated advice which

often arises during the course of debate. Furthermore, in the event that lawyers advised from within the various departments they would need to be under the supervision of the Law Officers or other centralised legal service to ensure any kind of consistency of advice. Otherwise, for example, the lawyer in the Housing Department might take a wholly different view of a human rights issue than the lawyer in the Planning and Environment Department and both may take a different view to the Attorney General.

55. The Law Officers are frequently asked questions in the Assembly. I suspect that the facility to ask questions of a lawyer in the States is welcomed by most members. Often these questions are unanticipated and only occur to members during the course of debate. Should the Law Officers not be present then members could not seek advice quickly and it would be open to members to advance competing legal arguments in debate citing their own lawyer's opinions or none at all in support. The Assembly is ill equipped to resolve any such disputes and it would not be in the interest of speed and efficiency to adjourn a debate for formal advice.

56. Whereas the Law Officers' right to speak in the Assembly is unfettered, in practice we do not generally speak other than in respect of matters for which we are accountable, have a direct interest (such as relating to the courts or justice) or to give advice. We give that advice when asked and do not often volunteer it. I have, however, sometimes submitted a written comment if I think that the Assembly needs to be properly briefed on the legal position relating to or consequences of a proposition and I have also volunteered advice in the Assembly during debate to correct a misapprehension about the legal position. I think

that this is an important rôle in helping the Assembly to avoid legal error.

57. If the Law Officers remain in the States then it is essential, it seems to me, that their right to speak remains unfettered. It is important that the Law Officers can volunteer advice as much of their rôle is to prevent the States from proceeding on the basis of a legal error. It also seems to me to be advantageous to have a Law Officer in the States capable of speaking on those matters of direct concern to a Law Officer (such as justice matters) and to answer questions for about matters for which they are accountable or can provide information. My predecessor has made statements in the States about periods of detention in criminal trials and the conduct in general terms of the Historic Child Abuse prosecution process. In both cases these were matters of material public interest and he was asked questions about them in the Assembly by members. As the Law Officers cannot vote, I can see no structural difficulty and many advantages to their continued membership of the Assembly.

58. There is an additional matter to mention. The Law Officers are responsible for advising the Crown as to whether Her Majesty can properly grant Royal Assent to any piece of legislation. Amongst those matters about which the Law Officers must be satisfied is that any legislation would not place the United Kingdom in breach of the European Convention on Human Rights or any other Convention extended to Jersey. A formal statement is made about Human Rights matters by the Minister proposing any new legislation. It is desirable that the Law Officers are on hand to answer any questions that arise to warn the Assembly if, for those reasons, a negative report to the Crown might need to be made.

59. (c) Any other issues relating to the Law Officers' jurisdiction and powers.

60. The Issues Document includes at paragraph 9 the statement that:

> *"The rôles of the Jersey Attorney General as legal adviser to the States, Executive and Scrutiny and his rôle as titular head of the Honorary Police have been considered in Scrutiny reports and we shall want to have regard to this material. One possibility for Jersey mooted by Professor Jowell as a "compromise solution" is the creation of an independent Director of Public Prosecutions, retaining the Attorney's rôle as guardian of the rule of law within government."*

61. **Director of Public Prosecutions ("DPP"):** As from 1st July, 2009, the Law Officers' Department has been organised in three divisions, a Criminal Division, Civil Division and an Administration Division. The Criminal Division comprises the Legal Advisers to the Police, who are based at Police Headquarters, the lawyers who deal with prosecutions in the Royal Court and subsequent appeals to the Court of Appeal, and those who deal with mutual assistance requests from other jurisdictions. Both the Criminal Division and the Civil Division are headed by a Principal Legal Adviser who are known as the *"Director Criminal"* and the *"Director Civil"* respectively.

62. In practical terms, the prosecution work of the Criminal Division is almost entirely contained within that Division. There are four main elements to the work of the Division: advising the police; the conduct of

cases in the Magistrate's Court and the Royal Court; investigating major fraud cases; and Mutual Legal Assistance. The Director of the Criminal Division has responsibility for the day to day management of the Division and all criminal matters are channelled through him. Day to day liaison with all of Jersey's prosecuting authorities (States of Jersey Police, Customs) is conducted by the Criminal Division. The current Director Criminal was formerly with the Crown Prosecution Service in the United Kingdom.

63. In practice, the rôle of the Attorney General, in whose name all cases are brought, is largely one of supervision and superintendence. The Attorney General is consulted and informed about all issues which are serious and/or sensitive and becomes personally involved in the more serious matters with which the Law Officers' Department is dealing. This involvement is almost invariably conducted in conjunction with the Director Criminal. The Law Officers seldom take prosecution decisions personally and without advice. I have not done so. The Law Officers must be consulted if the decision would be not to prosecute in a serious or sensitive matter on public interest grounds. The Attorney General can of course call in any matter for his personal consideration. In part, the Attorney General's supervision is achieved because he signs all indictments and requests for mutual legal assistance.

64. The Attorney General is also responsible for moving sentencing conclusions in the Royal Court. Crown Advocates instructed by him make representations for the appropriate penalty following conviction in the Royal Court. In practice, the internal Crown Advocates liaise either with a Law Officer or the Director Criminal to identify the appropriate penalty.

65. I have the following observations about whether or not it would be desirable to have a DPP either responsible to the Attorney General or otherwise or whether or not the Attorney General should remain as the person with final responsibility for taking a prosecution decision:

- The person with ultimate responsibility for a prosecution decision needs to be in a position to evaluate the Jersey public interest. He or she would accordingly need to be a Jersey lawyer or resident in Jersey for a significant period and would also need to be a lawyer of high calibre. This would potentially raise issues as to recruitment.

- In a relatively small jurisdiction such as Jersey where everyone will know a higher percentage of the total population than in a large jurisdiction there is always the possibility of a conflict of interest arising. This is met best by recruiting people of integrity who might be expected to recognise a conflict and govern themselves accordingly.

- The Attorney General is not a political appointment and therefore is free of structural political interference. Attorneys General have certainly prosecuted parts of government in the past as have I on one occasion since taking office. Although I have not encountered difficulties in doing so, in the event that I might feel that I should not take a decision personally or felt otherwise that the administration of justice would benefit from such a step I would pass the matter to the Solicitor General or would seek independent external advice either from an independent Jersey Advocate or from a senior barrister in the United Kingdom. This

practice is not unusual and I am aware that this is how my predecessor exercised his office. It is not at all uncommon to seek specialist external advice on prosecution decisions.

- A DPP would not be free of difficult prosecution decisions or conflict *per se*. A DPP would work closely with the police, for example, but would still need to be in a position to take a decision to prosecute a police officer as indeed the Attorney General has done on a number of occasions in the past. A DPP might well know Ministers and other members of the States, or persons in public employment. I mention this merely to illustrate that the potential for a conflict arising is inherent in any system and more so in a small jurisdiction. This is safeguarded not by creating a multiplicity of offices (with their own attendant structural and recruitment issues and expense) as this would simply replace one set of potential conflicts for another, but rather in ensuring the best calibre of professional is appointed.

- The Attorney General would take no decision about prosecution that was unknown to the Director Criminal and the investigatory body concerned.

- The Attorney General in dealing with criminal matters is not merely concerned with the prosecution decisions but also with matters such as mutual legal assistance and complex fraud investigations and the dissemination of information under the Proceeds of Crime Law, for example. Sometimes fine judgments have to be exercised and consideration given to the public interest of the Island in the wider sense. In my short time as Attorney General I have certainly had to take such decisions. One example

of such a decision may be found in the recently reported judgment in the case of Attorney General –v- Raj Bhojwani (Divider 17).

- The addition of a prosecutor in the form of a DPP may add little if anything to public perception of independence. An example of this might be the BAE investigation where the decision of the Director of the SFO was criticised as not being his own. Rather closer to home, my predecessor explained in the Assembly and elsewhere how the prosecution decisions had been taken in the Historic Child Abuse investigations, where four lawyers looked at the files, and this information, I believe, was the key to maintaining public confidence.

- There is, also, a potential conflict between the desire for an entirely independent prosecutor on the one hand and the need for some accountability on the other. I am informed that many English Attorneys General have said that their accountability to Parliament was a fundamental part of democratic society. The Attorney General in Jersey is not accountable to the States as such for individual prosecution decisions and will not generally comment on them. He can be asked, it seems to me, about the prosecution process in general and may chose, if there is an important public interest to consider, to explain his prosecution decisions in a statement in the house and he can be questioned on it in that case. My predecessor did just that in explaining decisions to prosecute and not to prosecute under the Public Elections Law.

66. **Head of the Honorary Police:** The Attorney General is also known as the *"Titular Head of the Honorary Police"*. I do not think that

this means that the Attorney General is in any sense in operational charge of the Honorary Police of the twelve Parishes. Operational control in each Parish lies with the Chef de Police and co-ordination between Parishes is dealt with through the Comité des Chefs. As I understand it, the rôle of the Attorney General is limited to disciplinary functions and to giving directions in general terms primarily on legal issues. He also retains the right to override any prosecution decision taken by a Centenier (as appears below) but I think that such a function arises more as a result of the Attorney General's rôle as the prosecution authority rather than anything else. Were the Attorney General to cease to be *"Head of the Honorary Police"* there would still need to be a disciplinary and advisory function. The only likely benefit to a change in the position would be to free the Attorney General from the disciplinary function and to place those duties elsewhere.

67. Although the term *"Head of the Honorary Police"* is now firmly established, I am unable to say how and when it first became so. So far as I have been able to discover, it is not an English translation, or even an English equivalent, of a historic French title. The Attorney General would not have been known as the *Chef de Police,* as that is the title which devolves upon the senior Centenier of a Parish, and I suspect in any event that if the Attorney General had historically been known as something such as *"Chef de la Police Honoraire"* the title would have survived un-translated in the way in which the Attorney General is still known as the *Partie Publique,* and not the Public Party.

68. I think that the title may have been intended to reflect the Attorney General's customary law power to give directions to the Honorary Police in the matter of prosecutions. This is reviewed in Attorney General v. Devonshire Hotel Ltd. 1987-88 JLR 577 [divider

15], starting at page 588, line 30. The Attorney General had a power to give instructions to the Honorary Police. At page 591 line 24 *et seq.* and over the page, where the judgment sets out a number of the questions and answers given to the Criminal Law Commissioners of 1847, it is stated that the Attorney General may call on a Constable or Centenier to arrest a person and bring him before the Court.

69. The power has been preserved in the Police Force (Jersey) Law, 1974, Article 3 of which was under consideration in the Devonshire Hotel case. The Attorney General also exercises a power to direct a Centenier not to proceed with a prosecution which is taking place in the Magistrate's Court (in the case of a prosecution in the Royal Court, he can of course simply discontinue the prosecution).

70. I do not think that the Attorney General's powers as Head of the Honorary Police are such as to create any conflict. Most of the substantive involvement with the prosecution work of the Honorary Police is discharged by the members of the Criminal Division. Whilst generally in my view an investigatory function should be separated from the prosecution function it should be recalled that at the present day crimes are largely investigated, not by the Honorary Police, but by the States Police, who are the responsibility, politically, of the Minister for Home Affairs, not of the Attorney General.

71. I do not think, however, that the Attorney General must necessarily remain as titular head of the Honorary Police. I merely do not think that there is any strong reason for changing the current position. The Honorary Police make an important contribution to policing in the Island and are amongst the foremost examples of the Jersey tradition of honorary service. I think that the Honorary Police

would wish the Attorney General to remain as the *"head"* and I certainly do not wish to do otherwise. However, if a suitable alternative authority could be established I do not think that the Attorney General must remain as its head. I would repeat, however, that I do not think that this would alter per se the Attorney General's ability and authority to give direction about the conduct of Parish Hall Enquiries and related matters.

72. **Partie Publique:** I think that the Attorney General should remain *partie publique*. This rôle includes not only functions of the kind instanced in Le Cocq v. Attorney General 1991 JLR 169 [divider 14], but also appearances as *amicus curiae* as and when called upon by the Court. I do not think that it would be an acceptable alternative to instruct private sector lawyers on an ad hoc basis. Such a course appears to me to be an unnecessary burden on the public purse. It would moreover provide no solution for those matters where the Attorney General is not instructed, but intervenes of his own notion. Moreover, the vesting of these responsibilities in the hands of the Attorney General promotes consistency which is unlikely if instructions are given to counsel in private practice.

73. **Legal Advisor to Ministers and Scrutiny:** The Law Officers are the legal advisers to both Ministers and to Scrutiny Panels as well as to the States as a whole. Ministerial advice will tend to be legal advice about policy or legislation, including Human Rights matters, or about the exercise by Ministers of administrative functions. This will also include representing Ministers whose decisions are challenged on appeal or by Judicial Review or in connection with Public Law matters (including a substantial amount of work under the Children's Law). Advice to Scrutiny Panels will generally be on matters relating to

proposed legislation or Human Rights considerations of a matter under scrutiny. I have already made reference to the advisory function of the Law Officers within the States Assembly but the Law Officers will also advise individual States members on legal issues relating to their functions within the Assembly. Although we do not advise members on matters relating to their constituency work we would advise, if asked, on matters such as private member's propositions or the legal aspects of other business in and about the States. I have certainly done so and this can be of assistance to private members who will then know what advice the Law Officers will likely give in the States if questions are asked about the Proposition that the private member wishes to introduce or whether or not the are problems inherent in the proposition that could prejudice the grant of Royal Assent. Whilst I accept that this might appear to give rise to a potential for conflict in my experience it has not in fact done so. This is however a matter that requires management to ensure that conflicts do not arise. My comments, in no particular order of importance, on the fact that the Law Officers advise Ministers, Scrutiny the States as a whole, are as follows:

- In one legal service advising all three the States are ensured of consistent legal advice. This is important, provided of course that the advice is of a high standard, as the Assembly is not best place to resolve differing legal opinions and advice. It also, as the Law Officers are members of the States, ensures that no difficulties are caused in debate by the Law Officer expressing a view on the law that is different from the advice on which the Minister, Scrutiny Panel or member has proceeded.

- It was accepted, although not without debate, that in the large majority of cases Scrutiny may not see the legal advice given to ministers or vice versa. Accordingly, confidentiality is maintained.

- It is a matter of internal judgment and management whether or not the same person advises both Ministers and Scrutiny on the same matter. Generally there is no problem with that being the case as the questions to be addressed are purely legal. It has the advantage of speed, familiarity and high consistency. If there is any reason why separate advice might be more appropriate then it is possible to allocate the file to a different adviser. To ensure consistency, however, I would expect such an adviser to review any legal analysis carried out within the office and, in the case of statutory analysis, to have regard to the legislation file if appropriate. In effect therefore the adviser would be able to see if wished both political complexions to an issue. However, as with all areas, it is assumed and part of the Law Officers' Departmental ethos that the legal adviser will act with integrity and would not tailor advice to politically advantage one side over the other.

- It is understood that Scrutiny Panels are free to seek external legal advice although it is advisable that any external advice is disclosed to the Law Officers so that if the Law Officers differ from that advice it can be discussed to avoid difficulties for States members in debate. The Code of Practice for Scrutiny Panels and the Public Accounts Committee [divider 18] at paragraph 9.27 *et seq* sets out the principles agreed and applicable to the provision of legal advice.

- I am aware of no problems in practice with advice being given to Ministers, Scrutiny and the States as a whole.

- It would of course be possible at a cost to establish a legal advisory service for Scrutiny or for Ministers on different models. For the reasons mentioned above I do not however think that such is necessary or would promote consistency of or independence of advice. If the Law Officers remain in the States then it seems to me that in some manner any advice that is related to a matter in the Assembly would at last have to be approved by the Law Officers department.

74. **Resourcing:** It might be said that the need to advise all three as well as discharge all of the other functions of the Law Officers' Department causes substantial delays in the provision of legal advice. I think that there is a delay in the provision of some advice but my comments on that are as follows:

    - In part the re-structuring of the Law Officers' Department has been undertaken with this in mind. The purpose of ensuring that administration of certain work areas is dealt with by the Directors Civil and Criminal is to ensure that the Law Officers are not personally burdened by administrative duties unnecessarily and that work is prioritised and work flow actively managed. In theory, the perceived bottle neck that might sometimes be said to occur when matters reach a Law Officer should be alleviated. That has not yet worked in practice as the new system had only been in place for a short period when the number of Law Officers was reduced to one following the appointment of the former Attorney General to

the office of Deputy Bailiff. That has now been remedied by the appointment of a Solicitor General in March and I would anticipate that the delays will improve fairly shortly as the new system is allowed to work as intended.

- In my view, and I think that of my predecessor, the Law Officers' Department is under resourced for the amount of work that it deals with. I do not in this submission go into that issue but I think that more timely advice could be provided by better resourcing the department.

75. **Constitutional Advice:** Jersey's constitutional position is unique and governs our relationship with the United Kingdom. Furthermore, our relationship with the European Union is also, save for the other Crown Dependencies, unique. Both of these matters are of enormous importance to the island. The Crown Officers advise on European matters and on Constitutional issues and are uniquely placed to do so.

76. **Other advice given:** The Law Officers also provide advice from time to time to the Privileges and Procedures Committee on legal issues and to other bodies, such as the Comité des Connétables on matters of general island wide application (such as arising under the Rates Law for example). I am not aware that there is a problem in that area.

77. The Law Officers conduct the Public Conveyancing function and have a section of conveyancing specialists as part of the Law Officers' Department.

78. **Other statutory duties and responsibilities of the Attorney General:** There are of course a number of other duties of the Attorney General to be found in various Laws. I do not herein consider whether any of them could conveniently pass into other hands. That may be so, in some cases, and I suspect that some powers were vested in the Attorney General before the advent of Ministerial Government when there was no single other person (such as a Minister) who could discharge such duties. If it would assist to giver such consideration then I can of course do so.

79. By way of a general observation, whilst I have tried to identify the different areas in which the Attorney General functions, in fact these various functions form a mosaic and are interrelated. It might be said that the overall spectrum of the Attorney General's functions makes him or her more effective in each. I have not in this submission sought to *"unpick"* the fabric of the Attorney General's responsibilities but the removal of one may well have an effect on others. That would need careful consideration, it seems to me.

Appendix 1

1. There is a summary account of the offices of Attorney General and Solicitor General in Bois, **A Constitutional History of Jersey**, 5/9 to 5/15 inclusive and 5/40 to 5/50 inclusive, a copy of which is at divider 1.

2. There is an account of the origin of the Law Officers in Le Patourel, **The Medieval Administration of the Channel Islands,** page 94, a copy of which is at divider 2.

3. Poingdestre deals with the Law Officers of the Crown in ***Les Lois et Coutumes de l'Ile de Jersey***, page 23, *De l'Office du Procureur & Advocat du Roi.* A copy of the relevant section is at Divider 3. He regards them as representing the interests of both the Crown and the Public; at page 24, he states that their function is –

> "... *a proposer les Droicts de Sa Maté* [= Majesté] *& du Public* ..."

4. At page 25 Poingdestre deals with actions *en ajonction*, which he explains by saying that if there is a breach of the peace, -

> "... *de laquelle le Roy est le Souuerain Gardien,*"[3]

[3] "…..of which the King is Sovereign Keeper."

the Attorney General is joined with the *partie civile*, at the *partie civile*'s request if requested to do so, otherwise *ex officio* ["*de son office*"].

5. In summary, Poingdestre describes the Law Officers (more particularly the Attorney General) as representatives of the Crown, but also as representatives of the public interest, perhaps because the Crown was the guardian of the public interest (the public peace being the King's peace, the Crown being the source of justice, etc.).

6. Le Geyt deals with the Law Officers of the Crown in ***La Constitution, les Lois, & les Usages de Jersey,*** *Tome IV,* page 96, *De Procureur et de l'Avocat du Roy* [copy at divider 4]. According to his account, these offices were constituted by the Crown to protect the Crown's interest –

> "*Le Roy ayant établi ces deux officers pour la meilleur poursuite de son droit,*"[4] [p.98]

7. Nevertheless, they had a wide jurisdiction in the pursuit and the protection of the Public interest –

"*... outre le particulier interest du Prince et la poursuite des crimes, ils sont chargés de la poursuite générale de tous les infracteurs des lois, privileges, libertez et franchises de l'isle, et l'on a de coutume de les*

[4] "The King having established these two officers for the better pursuit of his right."

entendre quand il s'agit de la police, des communautez et des pauvres."[5] [page 104]

8. Like Poingestre, Le Geyt sees the Law Officers as representing the interest of the Crown and the interest of the Public. There is less suggestion that he thought that they represented the interest of the Public because the Crown was the protector of the Public interest; he may have taken it as read.

9. At divider 5 there is a copy of the Order in Council of the 23rd November 1749 referred to in Bois, 5/46, which arose out of a dispute between

the two Law Officers over their functions. It declares that the Attorney General is the superior officer –

> *"and the proper Person to Commence and Carry on all Criminal Prosecutions and all suits Relating to the Kings Revenue and all others Suits in which the King's Interest is Concerned; That he likewise is the proper Person to be made a Party in all Adjunct Causes".*

It then went on to provide for those cases in which the Solicitor General could prosecute, or be joined in what is referred to as "an Adjunct Cause" (these were the cases arising out of an action, such as assault,

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[5] ". . beyond the private interest of the Prince and the prosecution of crimes, they are responsible for the prosecution generally of all those who breach the laws, privileges, liberties and franchises of the Island, and it is customary for them to have a right of audience in matters concerning public order, communal property and the poor."

which was both a criminal offence and a civil wrong, in which the Law Officer joined the injured party in bringing proceedings).

10. At divider 6 there is a copy of an Order in Council of the 6th April 1771, contemporaneous with the Code of 1771, which records the appointment by the Crown of a Solicitor General. It also states that the Solicitor General may act as *ajoint* in any case where the Attorney General has declined to do so, and that the Solicitor General can act as Attorney General if the Attorney General is prevented by illness or absence or any other cause from acting.

11. At divider 7 there is a copy of the Order in Council, 25th March 1824 which confirms the right of the Attorney General, Solicitor General and Viscount to sit in the States, and of the Attorney General and Solicitor General to speak. Their petition, which is set out in the Order in Council, states –

> *"That their [the Law Officers'] Predecessors in Office as well as themselves have generally exercised the right of speaking on all matters brought before the states [sic] whether they concerned Your Majesty's Prerogative or not, cannot be denied ..."*

12. Although the Law Officers claimed a right to speak on matters which did not affect the Crown, they referred to the effect on the standing of the Crown if they were deprived of the right to speak:

> *" ... it will have the immediate effect of lessening in a great degree the influence of the Crown and lowering the Petitioners in Public opinion."*

13. They further based their right to speak on the desirability that they, with their knowledge of the law, should be able to assist in the debates –

> *"... it cannot be considered in any way contrary to the Constitution of the Country or detrimental to the public welfare, that Persons who are supposed to be well acquainted with the Laws should be allowed to join in the debates of the Legislative Assembly, and make such observations as may be dictated to them by their knowledge and experience."*

14. At divider 8 there is a copy of the Order in Council of the 20th December 1845 which rejected a petition by the Viscount seeking the right to speak in the States. The Order in Council includes the answer of the States to the petition, in which they refer to the Order in Council of 1824, and to the right of the Law Officers to speak, which suggests that the Law Officers were regarded as having a right to speak not only to protect the Crown's interests, but also to give advice to the States –

> *"That if it should be considered that the privilege annexed to the office of "Procureur" and to that of "Avocat de la Reine" was granted, not only in order that those*

> *functionaries might defend the interests of the Crown, but also that they might be enabled to give to the legislature the benefit of their advice, it will not therefore follow that the same advantage would result from conceding a similar privilege to the Viscount."*

15. The background to the production of the Reports by Hemery & Dumaresq and Pipon & Durell illustrates the extent to which the Law Officers did not fulfil the rôle which they fulfil today of advising and acting for the States in disputes. I do not wish to overburden these submissions with historical matter, so I will merely summarise what is relevant. In briefest outline, in 1786 the States passed a law for what was referred to as the re-establishment of jury trials in civil, mixed, and criminal matters. The proposition, which had been brought by Jean Dumaresq, Constable of St. Peter, had been directly or indirectly critical of the judicial and legal system, and included allegations that the Royal Court had "*étendu son autorité*" and that it reserved to itself and used "*un pouvoir arbitraire*". The Royal Court objected to the proposition and after some preliminary skirmishing the Privy Council ordered that Thomas Pipon, the Attorney General, and John Thomas Durell, the Solicitor General (*apparently representing the Court, though the papers do not make this clear*), and James Hemery, one of the Jurats, and Jean Dumaresq, Constable of St. Peter, appointed by the States to be their agents in the matter, should, conjointly or separately, set out what they believed to be the mode of going to trial in all causes, civil, criminal and mixed, and what the criminal law of Jersey was.

16. The significance of this incident lies in the side taken by the Law Officers in the dispute. They were (like the Jurats) members of the

States, but far from representing the States in the presentation of the arguments in support of the proposition they clearly sided with the Court in its opposition to it.

17. As the foregoing shows, historically, and for many centuries, the Law Officers were appointed by the Crown, by no other person, and without necessarily consulting any other person. They represented the interest of the Crown. They also represented the public interest; this may be because the Crown as *parens patriae* was itself the guardian of the public interest. There is a reference in the Order in Council of 1824 to their advising the States, but the overriding stress is on their acting for the Crown.

18. Originally the Crown alone paid the salaries of the Law Officers for their public duties. The rest of their income came from their private work. Historically, they had always taken private work: the only limitation was that the private work should not interfere with the public office, and in particular that they should not act against the Crown. In the extract from Le Geyt referred to above he states that –

> *"Le Procureur et l'Avocat peuvent néanmoins ester Procureurs desparticuliers et plaider pour eux, si le Roy ny a point d'intérest. On le leur permet à cause de la modicitéde leurs gages; mais c'est une tolerance don't ils ne doivent point abuser. Il leur est défendu de plaider ou consulter contre le Roy."*[6] [page 101]

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[6] *"The Attorney General and Solicitor General may nonetheless act for private persons and plead on their behalf, if the King has no interest in the matter. They are permitted to do so because of their*

19. The Law Officers did not act for the States *ex officio*. If the States wished a Law Officer to represent them, they (the States) had to instruct and pay him just as any private client would do, or just as they would do any member of the private sector. There are two memoranda dated 3rd and 9th November 1990 respectively by T. C. Sowden Q. C., then Solicitor General, dealing with the issue at divider **9.** The Law Officers' advice was not necessarily sought by the States prior to the passing of enactments: they received draft legislation for comment after it had been sent by the Greffier of the States to the Privy Council and by the Privy Council to the Lieutenant Governor, see the extract from **The Memoirs of Lord Coutanche** pp. 202 *et seq.,* (divider 10) at page 205.

20. This arrangement appears to have lasted virtually unchanged until the late Alexander Coutanche took office as Solicitor General. The situation which he found was as described above. Furthermore, the Law Officers had no office provided for them by either the States or the Crown. They worked from their own offices. They also owned all the paperwork generated during their respective terms of office. When a Law Officer left office, he was entitled to retain his paperwork.

21. Typed extracts from **The Memoirs of Lord Coutanche** prepared by T. C. Sowden Q. C. are at divider 11. A copy of the Appendix

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modest wages; but it is a concession that they must not abuse. They are forbidden to plead or to give a legal opinion against the King."

to those **Memoirs**, which gives an account of arrangements as Coutanche found them, is at divider 10.

22. Once he had appreciated the defects of this arrangement, Coutanche set about changing it. The result of his efforts was the passing of the *Loi (1930) constituent le Département des Officiers de la Couronne.* Neither the Law Officers' Department nor the States Greffe has located a file relating to the passing of this law. On reflection, that is not as surprising as it might seem: as stated above, prior to the passing of this law there was no Law Officers' Department and individual holders of office owned any paperwork generated during their terms of office.

23. On the 29th October 1929 the States adopted the principle of fixed payments for those holding office in the Courts and tribunals of the Island, following which they passed the *Loi (1930) consitituant le Département des Officiers de la Couronne,* a copy of which is at divider 12. It is the passing of this law, and the changed arrangements which lay behind it and which it helped to implement, which in my opinion marks a watershed in the nature of the office of the Law Officers. The Law Officers were still named by the Crown, but they now had a department set up and funded by the States, see Article 4. They were paid a salary from the General Revenues of the States as well as any emoluments from the Crown, see Article 5. They were now recognisably the legal advisers to the States as well as the legal representatives of the Crown.

24. In 1946 a Royal Commission sat to consider proposed reforms to the constitutional system. The Commission was followed by the passing of the Royal Court (Jersey) Law 1948 and the States of Jersey Law 1948,

which effected radical changes to the composition of the States, but which left the Bailiff as President of the States and the Law Officers as members with a right to speak but not to vote.

25. When a later Royal Commission sat to hear evidence in 1970 a number of witnesses spoke about the Crown appointments. In what follows we refer to this Commission as the Kilbrandon Commission, the title by which it is colloquially known. A copy of an extract from the evidence is at divider 13. At page 118 the then Bailiff, Sir Robert Le Masurier, described the Law Officers as "legal advisers both of the Crown and the States, who alone have the right of prosecuting criminal cases in the Royal Court.". The mode of appointment to the offices of, among others, Attorney General and Solicitor General is dealt with at pages 125 et seq. The evidence discloses a sense on the part of those giving it that there was then no, or no sufficient, consultation about the identity of those appointed.

26. In summary –

- The Law Officers began as representatives of the Crown. They were appointed by the Crown alone [Order in Council, 1615].

- They were *ex officio* members of the Royal Court, and when the States evolved out of the exercise by the Royal Court of a legislative power, they became members of the States.

- They had a right to speak but not to vote, just as in the Court they had a right to address the Court, but no right to participate in its decision-making. See the extract from Poingdestre at page 24/25, divider 3 –"*Il [le Procureur du Roy] n'a aucune Jurisdictiion*

annexée à sa charge; non plus que l'Aduocat du Roy ... Car l'Office de ces deux personnes ne consiste pas a decider, ny a juger, ny a executer des Loix;"[7]

The basis for the right was their need to be able to defend the interests of the Crown, not primarily to advise the States, though they might occasionally do so, see the petition of 1824.

- The Crown is the *parens patriae,* the fount of justice, and the guardian of the public interest. The Law Officers, as the Crown's representatives, were likewise protectors of the public interest. The Attorney General was (and is) the *partie publique* and has a duty to safeguard the public interest in its widest sense, see **Le Cocq v. Attorney General** 1991 JLR 169 (divider 14). He has the exclusive right of criminal prosecution, subject only to statutory erosion in the case of Magistrate's Court prosecutions, see **Attorney General v. Devonshire Hotel Limited** 1988 JLR 577 (Divider 15).

- Up to the end of the nineteenth century, the Law Officers acted for the Crown but did not act for the States unless the States briefed them as they would brief any other private sector lawyer.

[7] *"No jurisdiction attaches to the rank of His Majesty's Attorney General; any more than to the Solicitor General . . As the Office of these two persons consists neither of deciding, nor of judging or executing any Laws"*

- The foundations for change were laid with the passing of the *Loi (1930) constituant le Département des Officiers de la Couronne.* Since then the offices of Attorney General and Solicitor have steadily and progressively evolved into what they are at the present day. The Attorney General, and by extension the Solicitor General, who discharges the Attorney General's functions at need, have retained their original rôle as adviser to the Crown and as *partie publique.*

- In addition they are now advisers to the States in the fullest sense. They advise the States on proposed legislation, putting an end to the unsatisfactory situation described by Lord Coutanche, and they act for the States in civil matters. There have also been a number of statutes, particularly in the post World War II years, which lay upon the Attorney General *ex officio* a number of functions in addition to those imposed on him by customary law as *partie publique.*

Appendix 2

1 Paragraph 2 of the Issues document dated December 2009 states that the history of the offices of Bailiff, Attorney General and Solicitor General is set out in, inter alia, the report of the Deputy of St. Martin of the 6th January, 2009. I feel that there are some corrections for the sake of completeness which I should make in respect of that report.

2 Paragraph 6 of the report states that in 1856 the States introduced the first *"directly elected"* representatives, namely the Deputies, and paragraph 20 that none of the Jurats, Constables or Rectors was elected. While this is correct of the Rectors, the Jurats and the Constables were elected. The Constables were, as they still are, elected by the Parish Assembly. (This was not a universal suffrage, as it was restricted to those who contributed to public taxes and provision for the poor and were masters of families, and women could not vote, but such restrictions were not peculiar to Jersey at that date.) Under the Royal Court (Jersey) Law 1948 the Jurats are elected by an electoral college, but historically they were, in accordance with an Order in Council of the 19th May 1671, elected in the same way as the Constables, see the evidence given to and the report of Osgoode, Swabey and Hobhouse, and the later Order in Council of the 15th July 1813. The 1856 Law which created the Deputies provided that those could vote who were able to vote for Constables.3 Paragraph 21 states that Jersey is a signatory to the [European] Convention on Human Rights. Jersey is not a sovereign state and cannot be a signatory to international conventions. The Convention has been extended to Jersey, but it is the United Kingdom which is the signatory