Submission to the Review of the Rôles of the Crown Officers

Committee of Enquiry chaired by the Rt Hon Lord Carswell

by William Bailhache, Deputy Bailiff of Jersey

Preliminary

1. I was appointed Attorney General in February 2000, having practised as an advocate since 1976. When I applied for that position, I was well aware that the position of Bailiff, and indeed the machinery of government generally, was under review by the Clothier Panel. If changes to the role of Bailiff come to be thought appropriate, no one should feel constrained by any consideration of the personal impact upon me as an office holder. I say this in this public document more for the benefit of others who happen to read this submission, than for the benefit of the Committee of Enquiry which I would expect only to be concerned with what is best for the Island as indeed am I. For my part, I think that it is good to have a full and open examination of what, if any, difficulties arise in the roles of the Crown Officers, whether from changing those roles or from maintaining them, and I welcome this Review

2. There is a strong tradition that the holders of Crown office should not act in a partisan political manner. I have always tried to adhere to that, but I recognise that where a lawyer gives legal advice on a matter which is sometimes the subject of intense and public political interest, the boundaries between the law and politics are not always clear to everyone, and misconceptions can sometimes arise. It is not always easy for Crown Officers to advance their own views about such misconceptions – either because to do so might inhibit the performance of the functions of the office in question, such as, for example, explaining a prosecution decision (which might adversely effect the rights of the accused to a fair trial, particularly in a small place like Jersey); or because simply engaging with the misconception can sometimes itself be seen as drawing the Crown Officer into politics and political debate.

3. I have mentioned these factors because I have been considering the extent and manner of my contribution to this review. I am obviously influenced by my training and experiences but I have tried to approach this task objectively and dispassionately.

4. I have read the Bailiff's submission to the Committee on the role of the Bailiff and indeed have delayed my own submission until that had been concluded. I agree with what the Bailiff says. Nonetheless, I hope it will be helpful to add a few words of my own, in particular regarding the role of the Law Officers, although I begin with some brief comments generic to all the Crown Officers and then specifically about the role of the Bailiff.

Constitutional Factors

5. The assessment of the Crown Officer roles should in my view take account of the constitutional relationships, both externally and internally. In terms of the external relationships, we are not an independent state. Although the Island claims autonomy in its domestic affairs as reflected by The States of Jersey Law 2005, which one would assume is agreed by the United Kingdom in the sense that Royal assent was given to that piece of legislation, there are still a number of challenges to that autonomy, both politically and legally. Politically, the Island is a very small jurisdiction and must trim its sails to the international wind. Legally, because the international obligations once incurred in respect of the Island are those of the United Kingdom, there is an unanswered question as to the extent to which the domestic autonomy has to be subjugated to the will of the United Kingdom when facing that international obligation. In more recent times, the Island has also faced challenges even where there is no international obligation, but where international politics, particularly European Union politics, result in pressure being brought to bear upon the Island.

6. The Crown Officers between them have a relatively long experience of these types of issues. When the Bailiff indicates at paragraph 23 of his submission that the Bailiff is well placed to give advice on constitutional matters, he is in my view absolutely correct. As is well known, constitutional law is constantly

developing, especially so where there is no written constitution. The Crown Officers have generally been in or about public affairs for quite some time. The Bailiff's predecessor had been a Crown Officer between 1975 and 2009. The Bailiff has been a Crown Officer since 1994. I have been a Crown Officer since February 2000. By comparison, over two thirds of the elected members of the States became members after 2002, 29 since 2005, and 13 entered the States for the first time in 2008. There is not in practice a substantial constitutional expertise among States members, and even the parliamentary experience is relatively limited.

7. It may be thought that one can rely on officials, but even there the corporate memory may not be very extensive. If one looks at the Chief Officers of the various departments, you will see today that most have been in position for less than six years, and that the overwhelming majority are not Islanders who would have an instinctive knowledge of Island affairs and history.

8. Like the Bailiff, I would like to emphasise that the contribution of the Crown Officers is not a decision making contribution. Decisions are for the elected politicians, and as far as I am aware, the theory and the practice have been the same for as long as I have been a Crown Officer. Nonetheless the provision of advice by the Crown Officers in what can be quite tricky areas is a resource which a small Island should only reluctantly surrender.

9. Internally, the independence of the Crown Officers is established by the mode of their appointment and the terms of their Letters Patent. They are appointed by the Crown and hold office during good behaviour until they have attained the age of 70. They are therefore exposed to sanction only if they fail to perform their duties, and then at the instigation of the Crown. This gives the Crown Officers the independence and the confidence they need to take decisions in their respective fields of authority without fear or favour. In my view, it is very important for Ministers, the States and the Island that this should be so, and also for the Crown Officers themselves.

Should the Bailiff continue to be the President of the States

10. My starting point is to ask why not? Change for change's sake has little to commend it. It is sometimes said that the need to make changes arises from the fact that my brother and I were contemporaneously Bailiff and Attorney General respectively. This rather dotty hysteria of the conspiracy theorists is no basis for determining the appropriate structure of these offices, though it might be a reason, if one were so inclined, not to appoint particular individuals to them. It seems to me the most serious argument for change rests upon the alleged need to apply strictly the doctrine of the separation of powers and the perceived conflict which, it is said, the dual role involves.

11. I have only been Deputy Bailiff since November 2009, but my experience more generally is that I have not been aware of any occasion when the dual role has caused a practical difficulty. A good example of this is the case of Syvret –v- Bailhache and Hamon. In that case, the Plaintiff challenged in the Royal Court the lawfulness of the decisions of the Bailiff and Deputy Bailiff in the States Assembly. That challenge was ultimately dismissed, but it was adjudicated upon by the appointment of a Commissioner, the Honourable Michael Beloff QC. This case demonstrates the practicality about the present arrangements; but it also shows that it stands the position on its head, as the Clothier Report did, to remove the Bailiff's positive contribution to the workings of the States simply because in one case the issues had to be considered by a Commissioner judge who was independent of the Island.

12. I have referred to the practicality of the arrangements. The fact is that there are three people who do regularly preside over the States Assembly – the Bailiff, the Deputy Bailiff and the Greffier of the States. The Deputy Greffier has also presided. There are two full time judges of the Royal Court in the Bailiff and Deputy Bailiff, and there is the possibility of the appointment of Commissioners, whether from local lawyers or from outside the Island. There are five Commissioners who sit regularly. In practice therefore, any challenge to the fairness of the trial under Article 6 of the European Convention on Human Rights seems unlikely to get off the ground because it is easily managed on the facts – in every case, it will be possible for a judge to preside in the Court who

has not presided in the States, assuming the States sitting to be relevant to the issues in the case.

13. My view therefore is that the dual role is, in terms of any legal challenge unlikely to cause difficulty for as long as the current approach of the courts is maintained. If ever that approach comes to be reconsidered, it is to be hoped that there may grow a realisation that there is no one size fits all in constitutional theory. In the meantime, the real question is whether the Island is embarrassed in the office of Bailiff carrying the dual role, and that is ultimately a matter for our elected representatives.

Official Correspondence

14. The changes to ministerial government in 2005 have had an important impact on our external dealings with the United Kingdom. Prior to that time, there was demi official communication with the Home Office, later the Lord Chancellor's Department and the Department for Constitutional Affairs by officials – either from the Chief Executive's department or from the Law Officers, in the main, although of course the Chief Officers of different departments would also frequently communicate with the main departments of State in the United Kingdom seeking help or guidance as to the UK position on particular issues, or discussing points of common interest. However the formal commitment of the Island to issues as to whether or not international conventions would be extended to cover Jersey, or consultation on particular provision in Acts of the UK Parliament would always take place through official correspondence. That remains the position, by and large, today. There was however a wider area of official correspondence dealing with general matters of policy where the UK wanted to identify what the Island's views were and what representations might be made on its behalf. Previously these were usually the subject of official correspondence, whereas today they are more likely to be dealt with by inter-departmental or ministerial correspondence.

15. Further discussions are taking place as to the protocols which should govern when a matter is dealt with officially and when it is dealt with inter-

departmentally. This is a matter which will evolve, but there seems to me to be some advantage in having a structure for formal correspondence which ensures that when the Island, as opposed to the Minister, is committed to a particular course of action, the matter is dealt with on a wider basis than simply inter departmental correspondence. It is in that sense that the Bailiff, as President of the States, is the natural route for such official correspondence because the role as President of the States gives him the authority to speak for the States as a whole, and because his experience allows him to raise constitutional issues for consideration as they arise.

16. Again I emphasise as the Bailiff did, that this representative role is not a partisan or political role. The Bailiff does not take any decisions himself. It is a representative role, in accordance with the protocol, that he does not make the representations on behalf of the Island unless he has the political authority to do so.

17. It would be easy to argue that this role of handling official correspondence need not exist, and the matter should just be left to the Chief Minister, who has responsibility for external affairs under Article 18(3)(b) of The States of Jersey Law 2005. If the Island were an independent country in international law, that might well be acceptable albeit there would still need to be a recognised diplomatic channel. But it is not, and for as long as it is a dependency, it is undesirable to confer such responsibility on one man. Article 18(3)(b) was drafted on the basis the official channel would remain, such that the constitutional protection available through the Crown Officers could be maintained. The existence of the official channel means that there is a system for disseminating information about important issues to the Bailiff, the Attorney General (crucially), and the Greffier of the States before there is a reply which commits the Island. No doubt other systems could be devised; but the experience so far is that there is a higher chance of difficulty when the established system is disregarded. One example of this lies in the termination of the Health Agreement between the UK and Jersey. I do not suggest that the problems could have been avoided altogether if the matter had been raised through official correspondence but it seems likely that more attention would

have been given to the issue administratively in the Island had that route been followed.

The Civic Role

18. This follows very closely from the occupancy of the position as President of the States. When one looks at the type of event which the Bailiff describes at paragraph 22 of his submission, it is clear that the office of Bailiff does indeed involve a significant proportion of the Island community in a way which would be difficult or impossible for a politician, given the partisan nature of politics. It is much the same when it comes to hosting dinners or greeting foreign dignitaries. The Bailiff here fulfils a representative role for the Island. He acts on advice from the politicians, and represents the Island nation as a whole.

Removal of the role in the States

19. Of course it would be possible to remove the role of the Bailiff as President of the States. If, despite my comments about the legal position, there were a decision from a court which required that change, then, of course, change there would have to be. If, as a matter of choice, the States were to decide that it would be appropriate to remove the dual role, then again, change there would have to be. The only issue then is that some careful thought would need to be given to what the replacement system would be.

20. For my part I do not think that the Speaker of the States would necessarily carry the same status as the Bailiff as President of the States. The Speaker is entitled to speak on behalf of the Parliament. The history and tradition behind the role of the Bailiff, and the nature of his appointment, means that he has a higher representative authority.

21. If not the Bailiff, how should the States appoint a President? I agree with the comments which the Bailiff makes at paragraph 52 of his submission. There is however one further point which I think it is right to raise.

22. The States currently consists of 53 elected members, but there is continued pressure to reduce the number of members as a result of the Clothier recommendations. If ever there were to be such a reduction, the comments which I am about to make would have even greater force.

23. The elected members of the States draw their legitimacy as such members from their election, and it is right that that is so. Without exception, I believe States members wish to achieve the best they can for their constituency and for the Island. Politics being what it is, there is always, and there should be, energetic debate about what is actually best for the Island. It is one thing to represent a view, and to articulate it as well as one can. That skill, however, is not necessarily the same skill as makes for a good Minister. I believe members themselves would be the first to admit that they would not all make good Ministers. There are currently some 22 Ministers and Assistant Ministers, and the reality is that the Speaker, if an elected member, would have to chosen from the remaining 31 members. Of those 31, some will be disinclined to put their names forward because they come from a different part of the political spectrum, and wish to maintain their opposition to Ministers. In my view the reality is that it is going to be very difficult to find elected members who would be both prepared and able to act as Speaker.

24. A further possibility is that the States might appoint a Speaker from outside the Assembly. The risk there is that such a person either will have no experience of politics or the Assembly or will come to the role with political baggage. It is perhaps likely that the Speaker would arrive with a political controversy that is avoided with the present procedures.

Attorney General and Solicitor General

25. I think that it would be useful to consider at the outset the functions which the Attorney General and Solicitor General perform. Although they are and should be separate offices, it is convenient for the sake of brevity to refer only to the role of the Attorney. Article 5 of the Departments of the Judiciary and the

Legislature (Jersey) Law 1965 confirms that the Solicitor General discharges the functions of the Attorney in his absence or incapacity.

Prosecution Responsibilities

26. The Attorney General is responsible for the prosecution service. The width of the responsibilities generally means that it is very infrequent that he conducts prosecutions personally. Advocates and Barristers employed within the Law Officers' Department deal with all trials in the Magistrate's Court; the Advocates in the Law Officers' Department deal with trials in the Royal Court except where these are the subject of instructions to external Crown Advocates; and the Attorney General supervises the conduct of prosecution decisions taken by Centeniers in the sense that if there is a difficulty over such a prosecution decision, usually because the Centenier has refused to prosecute, either the victim or indeed a police officer is able to refer the matter to the Attorney for a decision.

27. Guidelines have been published to Centeniers on the conduct of Parish Hall enquiries and on the decision to prosecute. These are available on the Law Officers' website. The Crown Advocates and indeed the Barristers in the Law Officers' Department responsible for prosecutions in the Magistrate's Court are required to adhere to the code on the decision to prosecute.

28. In addition, directions have been issued – and are available on the Law Officers' website - to all the Departments which have responsibility for policing regulatory offences such that where there is a question as to whether a Minister has or has not committed a regulatory offence such as, for example, a breach of the Water Pollution (Jersey) Law 2000, a report of the circumstances and the action taken has to be sent to the Attorney General for consideration. I introduced this requirement to ensure that if there were to be any departmental investigation of a possible offence committed by a Minister or civil servant, it could not be brushed under the carpet in that department. I hoped this could support public confidence in the integrity of the system. More generally, prosecutions which have been started and are sufficiently serious to merit

committal to the Royal Court are not dropped without the consent of the Attorney General. The other rule which I had with members of the Law Officers' Department working at Police Headquarters and conducting prosecutions in the Magistrate's Court was that I was to be informed wherever a potential prosecution arose which was capable of being newsworthy – if there were to be prosecution of a magistrate, a lawyer, a member of the States, a Minister or indeed a Police Officer. In such cases, the file was to be sent to one of the Law Officers for consideration, and should contain recommendations from the lawyer having the conduct of the file as to what if any prosecution should be brought. The reason for this policy was to ensure firstly that those operating at the coal face of prosecution work could not be made the subject of any form of corrupt pressure, and secondly that the existence of this rule might operate to give reassurance to the public. Nonetheless, it is right to emphasise that in the overwhelming majority of cases the Law Officers do not personally take the decision to prosecute.

29. Perhaps even more in a small place than in a larger jurisdiction where there are other checks and balances, the prime requirement is that those taking prosecution decisions should have integrity. Assuming they do have that integrity, they should recognise when it is necessary to take external advice in relation to the matters which are the subject of consideration for the purposes of prosecution.

30. The second requirement for prosecutors, if the public are to have adequate protection by the prosecution of criminal offences including corruption, is that the prosecutor should act independently. In this context, the appointment of the Attorney General by the Crown is a very significant feature. It certainly led me to think that I could take any prosecution decision on its merits, regardless of the identity of the person who might be the subject of prosecution. Although some have argued that the relationship between the Attorney General and the States members, including members of the Executive, is such that no independent prosecution decision can be taken where States members are concerned, I do not really have any doubt that most people – States members and others - knew that I would take prosecution decisions on their merits. The fact is that I did

prosecute States members from all political camps, including Ministers and the States Employment Board.

31. Some people might urge the creation of an independent office of Director of Public Prosecutions, with statutory independence, in order to guarantee that prosecutorial functions are taken independently and seen to be taken independently. On the other hand, I note that Europe is indeed divided on the key issue as to whether prosecutors should enjoy complete independence of parliament, and indeed Recommendation 19 (2000) of the Committee of Ministers of the Council of Europe does not appear to attempt any harmonisation of the European prosecution systems.

32. A second reason for considering hiving off the criminal functions of the Attorney General into a new office of Director of Public Prosecutions might be the view that the burdens of the office are currently too much for any one office holder.

33. There are many different models internationally. The creation of a Director of Public Prosecutions for Jersey would certainly be one model, which has been adopted in other countries including England and Wales and, I believe, Northern Ireland. However it is right to reflect that there are other models internationally as well – Singapore for example, has an Attorney General, a Solicitor General, a second Solicitor General and below them five divisions – the Civil Division, the Criminal Justice Division, the International Affairs Division, the Law Reform and Revision Division and the Legalisation Division. In Jersey the Law Draftsman does not report to the Attorney General, which I think is probably a structural mistake, but the other Singaporean divisions do reflect functions for which the Attorney General in Jersey is responsible, and the creation of a number of divisions is an alternative organisational structure. It is indeed broadly speaking the structure which we decided to adopt when looking at reforms in the structure of the Law Officers' Department in 2009, and as a result there is now a Director, Civil and a Director, Criminal both of whom report to the Law Officers, and each division is responsible for the performance of the different functions.

34. In the 10 years I was Attorney General, and I think for many years before, the Law Officers were criticised for being too slow in the production of their advice. People will of course have their own views about that, but my own view is that while the Law Officers were sometimes slower than would be desirable, this was caused by inadequate resources being provided to us. If one looks at the Attorney General's Annual review from 2001 onwards there is an almost constant request for more resources. In the current times, it is clear that the Island will see greater constraints on public spending, and it is unlikely that there will be any realistic growth in the number of lawyers in the Department. Nonetheless, in my view there are not enough lawyers there, and they are not well paid enough, certainly in the middle and upper regions of the Department. The salaries look attractive, but one has to remember that the pool in which the Law Officers fish for recruitment is, at all events for the majority of the business, the pool of Jersey Advocates and Solicitors.

35. I think there are good reasons why it would not be desirable to establish the office of Director of Public Prosecutions:

(a) If the DPP would be employed by the States Employment Board and despite any statutory conferring of independence, I think that there might have been a greater reluctance on the part of the DPP to pursue governmental bodies, including the States Employment Board itself, than is the case with the Attorney General. I am not sure that an employed DPP would feel he had the same freedom of action, as I felt I had as Attorney General.

(b) There are times when Jersey's public interest needs to be considered for the purposes of conducting investigations or carrying on prosecutions. These are sometimes big decisions involving the Island's international reputation, major crime or the investment of serious sums of money. A good example, which is in the public domain was the Abacha investigation, although it has in fact had a number of different strands. The significance of the investigation, in the sense of sending a message internationally to governments and fraudsters alike that Jersey was not a place in which to do crooked business, has been considerable. The cost involved several million

pounds in lawyers' and accountants' fees, and as a result approximately US$165 million so far has been returned to the Federal Republic of Nigeria. The recent conviction of Mr Bhojwani raises the possibility of further significant sums of money being returned to Nigeria. During the course of the trial a number of international considerations also arose to be taken into account, on which the present Attorney General is probably better able to speak than I am. A second example of a major prosecution decision would be the decision to prosecute Mr Peter Michel, where consideration of Jersey's public interest was necessary to identify whether one should acquiesce in Mr Michel being prosecuted in the United Kingdom, or whether we would carry out our own investigation with a view to prosecuting him here. A third example would be the investigation into the Foreign Minister of Qatar. In my view, these types of decisions need to be taken at the highest level.

(c) If the DPP were to be a Crown appointment, one possibility is that he would in practice be accountable to the Attorney General. If that were so, I do not think that there would be any real advantage to be gained by the perception that the DPP acted independently of the Attorney General. If he had no domestic accountability, then there are potential problems for the reasons set out in (b) above. There would be no direct link between the prosecution service and Jersey's public interest.

(d) Very much linked to the points made above, I think there might well be difficulties in recruiting a Jersey qualified DPP with the requisite skill set not least because in the present financial climate it does not appear obvious that the States would be prepared to afford that expense.

(e) In the course of their charging decisions, the Centeniers, as part of the Honorary Police, are accountable to the Attorney General. I think that the Centeniers would not respond so positively to direction by a Director of Public Prosecutions.

(f) Finally, it would be costly, and the efficient use of resources by containing some of the administrative costs within the AG's department where they will be needed anyway would be lost by duplication.

Advice to the States, Ministers, PPC and Scrutiny Panels

The States

36. The Law Officers are frequently involved in explaining in the course of debates the meaning of provisions in particular pieces of legislation and answering other questions of a legal nature which arise. Members are used to asking the Law Officers such questions, and I think that most members would regard it as undesirable if they were not able to do so. The Law Officers also speak in the States when dealing with constitutional queries, or questions in relation to international law generally, and when speaking for matters for which they are particularly accountable – the prosecution service, mutual legal assistance, the conduct of serious fraud enquiries, matters involving the Honorary Police on occasion, and budgetary spending within the Law Officers' Department.

37. There are different models through the Commonwealth as to whether the Attorney General is an official appointed by the Government or by Parliament; is an elected member appointed by the Chief Minister; is conferred membership of the parliamentary assembly with or without a right to vote. Jersey's present model fits within the international norm as far as that is concerned.

38. I have heard some States members suggest that it would be desirable to restrict as a matter of law the right of the Law Officers to speak other than to give legal advice, or alternatively except when requested to speak. Both those proposed caveats seem to me to be extremely undesirable. As to the first of them, it is almost impossible, when giving legal advice on a matter which lies at the heart of some political dispute, to avoid giving advice which favours one side and disappoints the other. It would be wholly undesirable to have the Law Officer subject to the constant criticism (which it seems to me would be inevitable) that he or she had not advised on a point of law but instead had made a political speech hidden in the robes of giving legal advice. In practice that would inhibit the ability of the Law Officer to give frank and clear advice. Secondly, those of us who have given advice in political matters know that while there are occasions when a discrete point of law arises, there are very many occasions where the point of law is mixed up with points of judicial policy, or where there

is no straightforward answer on the law, and a judgment call has to be exercised as to what the most likely legal outcome might be were the matter to arrive in a court. The definitional difficulties of establishing what is or is not a point of law might be significant – and does one leave that determination to the Speaker, who may or may not be a lawyer, or does one leave it to the majority view of the Assembly, who almost certainly will not be lawyers? To me, this is not a sensible structure. As to the proposal that the Law Officers should only give advice when asked for it, it is of course true that the Law Officers generally do not volunteer advice unless asked for it – but there have been occasions when I have done so, particularly where I have thought that the advice would be useful in the context of the debate that was drifting towards an impossible conclusion. There is a more compelling reason however. The Law Officers do have an obligation to report to the Crown on legislation which is adopted by the States. The form of their report is an explanatory memorandum which explains the purpose of the legislation and identifies if there are any reasons why royal assent should not be given. Part of that work includes a check on whether the legislation is compatible with the European Convention on Human Rights, and a verification that there is no breach of this or any other international obligation which binds the UK on account of Jersey. It is accepted custom that if the Law Officers consider that they will need to qualify their Report to the Crown in this respect, they must advise the States before the legislation is adopted and if that were to come to pass, then I have no doubt that States members would expect a full explanation of the position and difficulties. It is not always possible to see draft legislation in advance, especially amendments to legislation promoted by back benchers, and membership of the States thus fulfils an important function in ensuring the Law Officers can be present to give advice were the circumstance to arise.

39. Most parliaments have a number of lawyers as members. It is very disappointing that in the States of Jersey over the last 10 years there have, at different times, been only two lawyers who have been elected. For many years, the Law Officer has been the only qualified lawyer in the States apart from the Bailiff or Deputy Bailiff. Whether there are lawyers in the States or not, it does seem to me however that it would be very undesirable to have debates in the

States Assembly turn upon the views of members as to what the law might be – in other words to have legal disputes on the floor of the Assembly. The tradition and history has been that the Assembly must accept the view of the Law Officer as to what the law is, although naturally one understands that in coming to vote upon a particular proposition, members would vote whichever way they think is right, and may thereby cast their own views on the legal advice which has been given. However it seems to me that it would be sterile to see debates in the States dominated by arguments as to what the law was. I will return to this later in the context of scrutiny panels.

Privileges and Procedures Committee

40. Generally speaking the Greffier provides advice to the Privileges and Procedures Committee, although occasionally the Law Officers have been asked to advise on disciplinary matters, public election matters, any amendments to the States of Jersey Law and on questions of freedom of information. I do not believe that the giving of this advice to PPC has ever caused any difficulty.

Ministers

41. It is very important to note that with the exception of the Economic Development Department, the other departments do not have any lawyers seconded to them or working within them. This is relevant in three respects. First of all, it is necessary for the Law Officers to give advice on some of the ideas that are generated in the departments which might have human rights or other difficulties attached to them if they were developed. Secondly, there is the need for advice to be given regularly in cases where the department has an administrative role to play, and where its decisions might be challenged by members of the public.

42. The third area in which the Law Officers must give advice to Ministers is in relation to the development of new legislation. It is one thing for the department officials to give instructions to the Law Draftsman as to what they want a new law to achieve, and quite a different thing for the departmental officials to

scrutinise adequately – by which I mean from a legal perspective – the draft legislation that is produced by the Law Draftsman. There is therefore a particularly important job to be done by the Law Officers' Department in analysing and reviewing draft legislation which has been produced.

43. It would be possible to overcome the latter difficulty by departments recruiting their own lawyers or seeking external advice from the private sector. I am not in favour of either course – firstly on the grounds of the extended resources which would need to be found in order for that course to be followed, and secondly, because there is a need for some centralised legal advice to government to ensure that a consistent approach is taken.

Scrutiny Panels

44. The issue of giving advice to scrutiny panels has largely arisen only since the advent of ministerial government in 2005. There were some discussions between the Chairman's Committee and the Law Officers in 2007 and 2008, but ultimately the matter was not agreed, and was put to the States for determination. The Chairman's Committee thought that it was appropriate that they should have access directly to the legal advice which the Law Officers gave to Ministers. The Chairman's Committee also took the view that a scrutiny panel should be able to refer that legal advice to their own legal advisers, whose advice could be published. While the Law Officers of course recognised that scrutiny panels might wish to seek their own legal advice from time to time, in our view there was in general terms a disadvantage in having essentially legal debates on the floor of the States Assembly for the reasons already given, and there were particular objections to the suggestions from the Chairman's Committee that the advice given by Law Officers to Ministers should be available to panels. The competing positions are set out in the approach taken by the Chairman's Committee in P198/2007, and in the comments on that proposition as filed by me as Attorney General, available from the States Assembly website. In the event, the States agreed to accept the amendments to the Chairman's Committee's proposed code of conduct for scrutiny panels which amendments were proposed by the Council of Ministers.

45. I recognise that some States members are still not content with the decision of the majority in the debate on P198. For the reasons set out in my comments at that time, I continue to take the view that the approach which the Chairman's Committee were adopting would not be right. I recognise that a position where both Ministers and scrutiny panels take legal advice from the same lawyers means that the lawyers see both sides of the political argument. If the lawyers in question do not act with integrity, then of course it does provide a possibility for advice to be given whether to a scrutiny panel or to a Minister which improperly undermines the position of the political opponents. There was one occasion pre-2005 in the shadow scrutiny era immediately before ministerial government where, with hindsight, I think that advice given by the Law Officers was wrongly disclosed to the relevant Committee President. This related to the question of the international obligations of the Island in dealing with the export of waste. The error arose because in writing for advice in the first instance, the shadow panel had copied its request for advice to the Executive. When the advice was given, it was also copied to the Executive. This was an administrative oversight down simply to the fact that the incoming instructions had been so copied; but, as I say with hindsight, it would have been better if that course had not been pursued. That apart, I cannot recall any occasions when there was particular embarrassment at dealing with scrutiny separately from dealing with Ministers on essentially the same issues. However, I would be the first to say that the additional load of giving advice to scrutiny panels does bring its own management problems. It may be that the Law Officers were too accommodating in agreeing to act for scrutiny panels as well as Ministers, and if necessary that would have to change. Nonetheless, given that the Law Officers give advice to the States Assembly as a whole, I remain of the view that it is slightly preferable that the amended code of conduct adopted by the States continues insofar as the scrutiny obligations in relation to legal advice are concerned.

Mutual Legal Assistance and Serious Fraud Investigations

46. It is right just to start with an identification of the relevant legislation. There are provisions to be found in legislation such as the Proceeds of Crime (Jersey) Law 1999, which regulate the passage of information outside the Island once suspicious activity reports have been received by the Joint Financial Crimes Unit. The requirements are that the Attorney General's consent must be given before details of any of the suspicious activity reports can be disseminated. The Attorney General has issued guidelines to the Joint Financial Crimes Unit which give some delegated powers to the Unit in certain cases. There are occasions when the JFCU continues to refer questions to the Attorney for his consent in specific cases.

47. The Investigation of Fraud (Jersey) Law 1991 confers powers on the Attorney General to carry out investigations in relation to serious fraud. These powers are very similar to the powers conferred on the Director of the Serious Fraud Office in the relevant Criminal Justice Act provisions in the United Kingdom.

48. The Criminal Justice (International Cooperation) (Jersey) Law 2001 confers on the Attorney General the power to give assistance in criminal cases to appropriate authorities in other jurisdictions. In practice, the Attorney uses either the powers contained under the 2001 Law or the slightly wider powers contained in the Fraud Law of 1991 for the purposes of giving such assistance.

49. Finally there is the Extradition (Jersey) Law 2004 which confers on the Attorney General the powers to make extradition orders once the Court has a pined on the matters which are reserved to the Courts.

50. Insofar as mutual legal assistance is concerned, the work in the Law Officers' Department was essentially done by two assistant legal advisers, one Crown Advocate reporting to the Attorney General and the Attorney General himself who carried out a review prior to authorising the issue of the relevant notices to obtain information, mostly from financial services institutions. I am not aware whether that position has changed since November 2009. The Director, Criminal, had overall supervision of this part of the work of the Law Officers' Department, and might be asked by the Attorney to give additional advice in

particularly complex cases. The serious fraud investigation work was generally done by external barristers and accountants reporting to a legal adviser or to the Director, Criminal, and thence onto the Attorney General. As a rough thumbnail guide, my memory is that the Department could not really cope with more than four to six investigations at any given time, partly for financial resource reasons, and partly for the additional supervisory work that was needed in the Law Officers' Department itself. The serious fraud enquiries were generally carried out in matters of serious fraud, corruption, money laundering and sanctions breaches. The cost of the fraud investigation work was met out of the court and case costs vote. Substantially this vote has been funded from the Criminal Offences Confiscation Fund in the last five years or so. I am aware that the COCF has recently had many demands upon its reserves, although it is possible that recent convictions may result in some replenishment of that fund.

51. Extradition work was done generally by a legal adviser in the Law Officers' Department reporting directly to the Attorney General. Extradition cases come by relatively infrequently, but they are occasionally very high profile cases. Almost invariably the issues which arise in extradition cases are predominately legal issues, and the exercise of discretion that goes into making an extradition order should more naturally fall into the skill set of the Attorney General rather than a politician who would almost certainly require detailed legal advice before reaching a decision anyway. Nonetheless, the extradition functions of the Attorney General could now probably be given over to the Minister for Home Affairs or to the Chief Minister. I am not sure that there would be any significant saving of work insofar as the Attorney is concerned.

52. I note that in London, the Judicial Cooperation Unit, which deals with mutual legal assistance and extradition, reports to the Home Secretary who is politically accountable for the decisions. I note that the Director of the Serious Fraud Office reports to the Attorney General.

53. It would be wrong not to emphasise the importance to the Island's financial services industry of this mutual legal assistance and fraud investigation work being professionally and competently undertaken. For many years, I believe the

Island kept its head below the international parapet as far as this work was concerned – this did not mean that mutual legal assistance was not given, but probably insufficient time was spent ensuring that other countries knew that the Island did not operate a secrecy regime which benefited criminals. In my predecessor's last two years in office, in my 10 years as Attorney General and as far as I am aware during the current term of office of Mr Le Cocq, considerable efforts have been made to address the Island's international reputation. This has partly been achieved through international reviews – the Edwards Review in 1998, the Financial Action Task Force Uncooperative Jurisdictions exercise of 2000/2001, and the IMF Reviews of 2003 and 2008/2009. In part the matter has been addressed by visits by the Attorney General, often in conjunction with the Director General of the Financial Services Commission, to Washington (annually), to London, Dublin and Edinburgh, to Paris, Rome and Madrid, and by sending delegates to the European Judicial Network. There seems little doubt that the positive review on the last occasion by the IMF has been of significant benefit to the Island's business, and it is due both to the existence of the relevant legislation, for which States members and the Law Draftsman must have credit and to the practical implementation of that legislation which was a particular focus of the IMF visitors. The good implementation of the legislation is down to the professionalism of the Jersey Financial Services Commission, the Joint Financial Crimes Unit and the Law Officers. It would be easy to argue that mutual legal assistance and fraud investigation ought to be supervised by those who are directly politically accountable. However the States have chosen to confer the powers to which I referred earlier upon the Attorney General, and as these are all justice related matters which heavily rely on legal input and judgment, one can see the reason why that was a sensible decision in this small community. It is certainly the case that there is a natural synergy between these functions. I recall fraud investigations being opened as a result of letters of request received in mutual legal assistance cases. Other investigations were commenced as a result of suspicious activity reports filed with the Joint Financial Crimes Unit which raised money laundering in respect of criminal offences committed abroad and where there was a reference to the Attorney for a view as to whether the information should be disseminated with law

enforcement authorities abroad. All these functions fit naturally with the prosecution function.

54. For my part, I am proud of the work done by the Law Officers' Department in these areas while I was Attorney General, and pleased to have been able to make my own contribution in that respect. I am strongly of the view that this in an area where, in our small jurisdiction, the structure enables this work to be done most efficiently though the office of the Attorney.

Regulation of Investigatory Powers

55. The Regulation of Investigatory Powers (Jersey) Law 2005, conferred various powers upon the Attorney General. These are, first, powers under Chapter 1 of Part 2 to grant interception warrants for telephone communications, and secondly powers under Part 3 in relation to surveillance and covert human intelligent sources. The Regulation of Investigatory Powers (Jersey) Law was introduced to enable the Island to bring into effect the Human Rights (Jersey) Law 2000. Prior to the Regulation of Investigatory Powers Law, there had only been an ability in the Attorney General to issue warrants for telephone interception pursuant to the Interception of Telecommunications (Jersey) Law 1993. My understanding of the reason for conferring power on the Attorney to issue intercept warrants in 1993 was that it was thought to be the most politically acceptable method of proceeding with what was a necessary power, politicians in those days perhaps being unwilling to confer such a power on other politicians. A factor would undoubtedly also have been that in 1993 we did not have a ministerial system of government and therefore applications for warrants would have had to be considered by a Committee, which might not have resulted in appropriate security. It would be possible for the Attorney's obligations under the Regulation of Investigatory Powers Law to be moved to the Home Affairs Minister, as is the case in the United Kingdom. The contrary arguments are first that this is a quasi judicial power best executed by an independent person within law enforcement, and, second, that the Attorney's department is already set up to deal effectively with these various applications. It may be thought that the relationship between the States of Jersey Police, who with the Customs Service

are main applicants for the relevant warrants, is too close to the Home Affairs Minister for a change of this kind to carry credibility as a real check and balance. At the end of the day, these are matters for elected politicians, but the Committee will perhaps wish to consider them.

Honorary Police

56. The Attorney's role as titular head of the Honorary Police is one which to my mind has always been hard to define, but arises from these functions: control of the prosecution, disciplinary functions under the Police (Complaints and Discipline) (Jersey) Law 1999; and the customary law whereby the Attorney moves conclusions before any Honorary Officer is sworn into office before the Royal Court.

57. The combination of these various powers has led the Attorney to issue directives to the Honorary Police on matters such as conduct on duty, the conduct of Parish Hall enquiries, the code on the decision to prosecute, and other matters. Copies of these directives can be found on the Law Officers website. In addition, the States established the Honorary Police Association by the Honorary Police (Jersey) Regulations 2005, and the Comité des Chefs de Police by the same regulations. By Regulation 4, the Attorney General is conferred power to set aside any decision of the Honorary Police Association at any time. By Regulation 5 a member of the Honorary Police may only resign from office of his or her own volition if the member has notified the Connétable of the Parish and the Attorney General of his reasons for wishing to do so, and those reasons are accepted by the Attorney General. By Regulation 8, the Attorney General may set aside any decision of the Comité des Chefs de Police at any time – these decisions are almost certainly likely to be in the areas of steps being taken to strengthen and uphold the Honorary Police by fostering and maintaining the unity of its members and co-ordinating the activities and operational practices of the Honorary Police Forces in each parish.

58. It may well be that if there is to be established a police authority, that authority would have jurisdiction over both the States of Jersey Police and the Honorary

Police. If so, many of these functions of the Attorney General might in fact be removed from him. However, in the discussions which have taken place to date on the question of a Police Authority, the prevalent view amongst politicians appears to have been that the Police Authority should not have jurisdiction over the Honorary Police.

59. My own position as Attorney General was clear. I did not think that, barring the necessary control of the prosecutions, it was strictly necessary for the Attorney General to be titular head of the Honorary Police, or to have the other powers which the different pieces of legislation have conferred upon him. Ultimately a decision on the right structure for the Honorary Police is a matter for politicians and I have always understood that the politicians would very much be guided by the views which the Honorary Police themselves expressed.

Conveyancing

60. The Attorney General assumed responsibility for the conveyancing work of the States in the 1980s or 1990s when the office of Autorise de la Partie Publique was abolished. It is work which involves some legal supervision and as the law currently stands, hereditary contracts which have to be passed before the Royal Court must be presented by a person who is legally qualified in Jersey. It would technically be possible to reach an arrangement whereby those who did the conveyancing work were moved into the Property Services department, or indeed if the work were outsourced to the private sector. I do not think there would be any savings from the former change, although it might be one less thing for the Attorney to have to worry about as part of his responsibilities, and to adopt the latter change would in my view increase the overall cost to the public significantly.

Partie Publique

61. I think the remaining residual function of the Attorney General is to act as the Partie Publique. In essence this means that whenever the Court has a matter upon which the public interest is engaged, it reserves the right to ask the

Attorney to be convened and to assist the Court in that respect. Frequently of course this involves representing the charitable interest in trust cases, or where charities are involved given that we do not currently have a charities commission. This part of the Attorney's role is not onerous and in my view there is no reason to consider making any changes in this respect.

Conclusions

62. Finally therefore I turn to the questions posed:

(a) How should the AG and SG be appointed? In my view appointment by the Crown is an important safeguard of the Law Officers independence, particularly in prosecution matters. The fact that there may be split accountabilities to the Crown and to the States does not in practice in my view cause any particular difficulty.

(b) Should they continue to be members of the States? My belief is that most members of the States do want the Law Officers to remain members, and indeed I think the Law Officers perform a useful function in the Assembly.

(c) Any other issues? These are canvassed in detail above. I would not be in favour of any change to the more substantial roles which the Law Officers have.

15th March 2010

William Bailhache.