

Review of the Roles of the Crown Officers

Record of Public Meeting

2nd September 2010, Main Hall, St Paul's Centre

Present Lord Carswell, Chairman
 Mr G. Crill
 Dr S. Mountford
 Mr I. Strang

In attendance 26 Members of the Public
 Mr W. Millow, Project Manager

1. Chairman's Introduction

- 1.1 The Chairman welcomed everyone to the meeting and introduced the Panel Members and the Project Manager. Apologies were presented on behalf of Mrs M-L. Backhurst. He described the background to the Review, explaining that it stemmed from a States decision and that there had been consideration of the Crown Officers' roles in the past. He set out the Panel's Terms of Reference and the areas it had been tasked to consider. The Panel would consider the principles underlying the Crown Officers' roles rather than the personalities of the individual Office holders.
- 1.2 The Chairman explained that the Panel would report to the States in due course. The Panel had invited written submissions and had held public hearings. The large majority of written submissions and hearing transcripts had been uploaded to a dedicated webpage. Notwithstanding the views it had already received, the Panel wished to ascertain whether other people had views and it had therefore arranged the public meeting. A record of the meeting would be taken and would be made available on the webpage in due course. The Chairman highlighted that if anyone present were uncomfortable with that approach, he or she was free to write to the Panel with their views and request confidentiality, a request which the Panel would consider.

2. The Appointment Process

- 2.1 Dr Mountford gave a presentation on how the Crown Officers were appointed. She explained that Crown appointment helped to ensure that the office-holders were free from undue influence. With the exception of the Bailiff's office, all posts were advertised for which applications were made to the Lieutenant-Governor. Applications were considered by, or discussed with, various groups before interviews were held by a panel comprising the Bailiff, Lieutenant-Bailiff and Chairman of the Jersey Appointments Commission. A recommendation was made by the panel to the Lieutenant-Governor who then passed it on to the Crown. This process was followed even if there were only one applicant. However, it was not followed in relation to the Bailiff's appointment as it was assumed that the Deputy Bailiff would be appointed, unless there were good reasons for that not to occur. Dr Mountford mentioned the 'ladder' by which individuals had traditionally progressed 'through the ranks' from Solicitor General through to Bailiff. However, it was stressed during the application process that progression up the 'ladder' was by no means automatic.
- 2.2 The Panel had received opposing arguments about the appointment process. Those in favour of change had stated the process should be more open and transparent while others had suggested that Crown Officers should be elected. On the other hand, those in favour of the system had pointed out that, with the exception of the Bailiff, posts were open to all

applicants and that appointment by the Crown afforded the office-holders independence from political pressure. Following a brief discussion about the structure of the meeting, the floor was opened for comments on the appointment process.

- 2.3 Mr Darren O'Toole wished to know the identity of the Chairman of the Jersey Appointments Commission. It was confirmed that it was not the Chief Minister and the Chairman explained that the Commission was intended to be independent of the States.
- 2.4 Advocate Philip Sinel questioned what was meant by the 'Crown' when talking of the appointment process. The Chairman explained the distinction between the Crown in right of Jersey and the Crown in right of the United Kingdom (UK). In the appointment of Crown Officers, it was the former situation. Advocate Sinel suggested that this was not in fact the case and that the appointment decision was ultimately taken by a UK politician. In his experience, there was little interest in the UK in the process and the UK civil service was uninterested in receiving the views of Islanders on the matter. As a result, the UK would not interfere in the process even if representations were made by Islanders.
- 2.5 Deputy Paul Le Claire acknowledged the subtleties in attempting to define 'the Crown' in relation to Jersey. In his view, the appointment process was little understood and involved little accountability and few checks and balances.
- 2.6 Mr Guy de Faye explained that it was appropriate for decisions about the appointment of Crown Officers to be made by lawyers. If they were to be appointed via an election, it should therefore be by members of the legal profession. From his perspective, however, the current procedure was already largely aligned with that principle and, indeed, the only criticism he might make was that too many non-lawyers were involved. He stated that if the system were not broken, there was no need to fix it. In response to a question from Mr Crill about the involvement of politicians in the appointment process, Mr de Faye stated that politicians in fact had little understanding of the relevant matters.
- 2.7 Deputy Le Claire stated that the Bailiff had more than simply judicial responsibilities but also presided over the States which was a political body.
- 2.8 Mr Ted Vibert highlighted that if an electoral process were implemented, it could follow the arrangements currently in place for the election of Jurats.
- 2.9 Mr O'Toole asked who appointed the Chairman of the Jersey Appointments Commission. The Chairman noted that the Panel would look into the matter.
- 2.10 Advocate Sinel stressed that it was a bad idea for judges to be elected. A better system was needed than that which currently operated and the UK should take greater heed of the views of Islanders.
- 2.11 Mrs Barbara Corbett highlighted that a previous report from 2008 had advocated the establishment of a 'Judicial Appointments Commission' in the Island. She asked whether this fell within the remit of the Panel although she herself had no ideas as to how such a commission would be constituted. The Chairman indicated that the Panel would consider the matter.
- 2.12 Mr Mike Dun stated that Jersey was capable of choosing its own judges but, for some reason, the Island wanted the involvement of the Crown in the appointment of the Crown Officers. At present, the Bailiff's office involved a 'mélange' of duties – it would be simpler for the Island's Chief Justice to be solely a judge of the Royal Court who was selected by an appointments commission.

3. The Bailiff

- 3.1 Mr Strang subsequently gave a presentation on the role of the Bailiff, explaining that it could be divided into three aspects: Chief Justice, President of the States and 'Civic Head'.
- 3.2 Most of the submissions to the Panel had suggested that the Bailiff should remain the Island's Chief Justice. In terms of his role as President of the States, however, the 'Clothier Review' had recommended that this should cease. Submissions to the Panel had suggested that presiding over the States was ultimately a waste of time for a highly qualified judge and that there was the potential for the Bailiff to become politicised. Submissions advocating change had also highlighted the risk of a successful challenge to the Bailiff's role in the European Court of Human Rights. On the other hand, other submissions had recommended the maintenance of the current position. These submissions had highlighted the traditional aspect of the role and had stated that the system worked well. The Bailiff had the required standing to preside over the States and it was difficult to think of a better alternative. In terms of the European Court of Human Rights, these submissions had suggested that there was little risk that a challenge would be successful.
- 3.3 With regard to the Bailiff's role as 'Civic Head', Mr Strang highlighted that several submissions had tied this part of the Bailiff's functions to his role in the States. As a consequence, in their view he could no longer be 'Civic Head' if he were not President of the States. The 'Civic Head' role was also linked to that of 'Guardian of the Constitution'.
- 3.4 Mr Vibert recommended that the Panel should accept the recommendations of the 'Clothier Review'. The 'Clothier Review' panel had comprised eminent individuals and it had received numerous submissions. Mr Vibert continued by stating that the Bailiff did have an influence over elected States Members. When Mr Vibert himself had been a States Member, he had been required at times to meet the Bailiff in the Bailiff's Chambers: notwithstanding that individual Bailiffs were good people, this could be an intimidating experience for elected Members given the Bailiff's position as 'Head of the Island'. At times, it had been necessary to visit the Bailiff as a group of States Members in order to carry sufficient weight in the meetings. The arguments about the Bailiff's influence over States Members arose predominantly from his responsibility for approving questions. Questions initially passed through the States Greffe but the Bailiff was ultimately able to prevent a question from being asked. It was therefore not true to say that the Bailiff was simply a 'referee' in the Assembly. It was also not true that legal qualifications were required to preside – the Greffier of the States presided at times and had garnered the respect of elected Members. Finally, Mr Vibert highlighted the international perspective of the Island: people from overseas were often incredulous if the role of the Bailiff was explained to them.
- 3.5 Mr O'Toole explained the facts of the 'McGonnell Case' and asked whether the Panel was aware of its implications. The Chairman explained that the Panel was aware of all the relevant jurisprudence and that the Panel intended to seek external legal advice on the issues at hand.
- 3.6 Advocate Sinel stated that he had previously advised some elected Members in relation to the 'interference' that had emanated from the Bailiff's position: the Bailiff in fact had an 'iron control' on proceedings. Advocate Sinel also spoke of the fact that Jersey's constitution was the subject of derision outside the Island. In relation to the legal advice that the Panel intended to seek, he asked whether the Panel would publish it and the instructions given to the lawyer. The Chairman advised that Panel would publish information at the time of its report and that the Panel would be as open as it could be. Advocate Sinel subsequently advised that, in his view, it was only a matter of time before the relevant jurisprudence developed to make it more likely that a legal challenge would succeed. It would not be good for Jersey to be criticised in such a way. Advocate Sinel continued that the Island's chief judge should not be the Bailiff. The Bailiff historically was a representative of a

foreign jurisdiction. It was therefore odd that the 'Guardian of the Constitution' was appointed by the UK, the jurisdiction from which Jersey's constitution needed most protection. The Island's chief judge should not be its 'Civic Head', a fact borne out by the circumstances surrounding the Liberation Day speech which had been given in 2008.

- 3.7 Deputy Le Claire stated that it could be difficult to separate the personalities from the offices they inhabited. He advised that he too had often been to see the Bailiff in the Bailiff's Chambers *en masse* with other elected Members. He had personal experience of bringing propositions which had ultimately been refused. Deputy Le Claire admired the Bailiff; however, it was time for his role to be put to rest as the question continued to tear at the community. He hoped that the Panel could untangle the situation through its Review.
- 3.8 Mr Vibert acknowledged that somebody had to vet Members' questions and that, consequently, there would always be arguments. However, it should be on a more equal footing than that which occurred at the moment where elected Members had to attend upon the Bailiff who was also 'Head of the Island'. He continued by saying that it was not right to say a Speaker chosen from the elected Members would disenfranchise a Parish or District. If an elected Member were chosen, a second election could be held in his or her constituency, or the person finishing in second place in the initial election could take the seat.
- 3.9 In response to a general question from Mr Crill, Deputy Le Claire advised that the *Standing Orders of the States of Jersey* had been reviewed and amended. The Privileges and Procedures Committee (PPC) had responsibility for that work. Changes were in fact difficult to implement, however.
- 3.10 Deputy Robert Duhamel spoke of his experience on trips for the Commonwealth Parliamentary Association (CPA) which had given him the opportunity to speak to people from other legislatures. He highlighted the arrangements that existed in Gibraltar, where the equivalent of the Crown Officers were not part of the government and where the government could seek legal advice from whomever it chose. He asked whether the Panel was aware of the situation in Gibraltar. The Chairman confirmed that the Panel had received some information on Gibraltar but that it would look further into the matter.
- 3.11 Mrs Corbett highlighted that the pertinent issue was the Bailiff's discretion in relation to decisions regarding questions et al. There would always be some form of discretion; however, it was not possible to subject these decisions to judicial review (as might otherwise be expected) given the Bailiff's judicial functions. Advocate Sinel advised that the Royal Court had no jurisdiction over the procedures of the States.
- 3.12 Mr de Faye stated that he had never felt embarrassed by Jersey's unique constitutional arrangements. Jersey was different but its consensus-style of government worked well. He believed that the European Court of Human Rights had not taken sufficient account of the Channel Islands' unique systems and that the Court did not like systems that were different. Mr de Faye referred to the historical position that the Bailiff had always generally been a local appointment. He stated that before the current system was amended, consideration should be given to the alternatives. In his view, the alternatives were unpalatable. It was difficult to foresee how an elected Member could feasibly be chosen as Speaker from an Assembly of only 53 Members with no developed party system. An independent person could be appointed. However, any Speaker would face the same accusations that were currently made against the Bailiff regarding undue involvement in politics. Given that fact, having a politician as Speaker appeared undesirable. In relation to Standing Orders, Mr de Faye said it was important to have someone of the Bailiff's judicial quality to apply them. The Bailiff had no final control over who spoke in the States and generally called Members in the order in which they were seen. The States Assembly itself controlled how long it sat and the Bailiff often indicated to Members that he was in the hands of the States in terms of how a debate should proceed. It was therefore a myth to say that the Bailiff had control. The Bailiff would have experience, generally having risen

through the ranks from Solicitor General. Mr de Faye asked whether any other 'Speaker' would have the requisite experience and knowledge of what to do.

- 3.13 Deputy Le Claire advised that the Greffier of the States had presided over a recent debate relating to compulsory purchase. This showed that the Bailiff (or Deputy Bailiff) were not required to preside over sensitive or significant debates.
- 3.14 Mr O'Toole agreed with Mr de Faye that Jersey was unique but highlighted that this did not necessarily make Jersey right in its constitutional arrangements.
- 3.15 Mr Donald Perrier highlighted an incident from the past when the Bailiff had suspended a Member for six months and confiscated his mail. Mr Vibert clarified that it had been the States Assembly itself which had chosen to suspend that Member.
- 3.16 The Chairman asked for comments on the Bailiff's role as 'Civic Head'. Deputy Le Claire stated that it was somewhat quaint and highlighted that on Remembrance Sunday the Jurats of the Royal Court took precedence over the elected Members of the States. This highlighted a need to consider the hierarchy that existed in the Island. Mr O'Toole stated that Remembrance Sunday was potentially a bad example as it was a Parish event.
- 3.17 Mr Dun stated that the Bailiff had a sufficient number of responsibilities without needing to be worried about being 'Civic Head'. It was a confusing situation. If the people of the Island wanted a 'Civic Head', they could have the Lieutenant-Governor who was also ultimately a Crown appointment. Other territories had chosen their Governors as 'Civic Head'. There was no need to 'contaminate' the judge's role.
- 3.18 Mr Vibert referred to Paragraph 8.15 of the report prepared by the 'Clothier Review' and urged the Panel to follow the recommendations that the 'Clothier Review' had made in relation to the Bailiff's civic role.

4. The Attorney General

- 4.1 Mr Crill described the functions of the Law Officers (Attorney General and Solicitor General), explaining that each was a Crown appointment and that the Attorney General was the senior office. Their functions included the prosecution service: they had sole responsibility for prosecution, which was conducted in the name of the Crown. Some submissions to the Panel had suggested this caused a conflict with the Law Officers' role as legal advisers. As a consequence, some had suggested that an independent Director of Public Prosecutions (DPP) be established in Jersey. The Law Officers were legal advisers to the States and all its constituent parts: Ministers, the Council of Ministers, Scrutiny Panels and individual Members. They had the right to speak in the Assembly but had no right to vote. The convention was that they only spoke on matters relating to their area of responsibility or when asked for legal advice. However, their right to speak was not fettered in any way. The Law Officers were also advisers to the Crown and were the *Partie Publique*. The Attorney General was Head of the Honorary Police in which some saw a conflict with his prosecutorial responsibilities. This raised the question of who else could be Head of the Honorary Police if it were not the Attorney General. There was also a question of whether the Law Officers should be Members of the States but the Panel had heard from several elected Members that they welcomed the Law Officers' presence in the Assembly.
- 4.2 Mr O'Toole stated that the Law Officers' right to speak in the States could influence elected Members. This was wrong as they were unelected officials.
- 4.3 Mr Vibert concurred that only elected Members should sit in the States. In his own time as a States Member, the Attorney General had spoken frequently in what appeared to Mr Vibert a political manner. The Attorney General's role should be narrowly confined to the provision of legal advice. In that regard, it was unnecessary for one Law Officer to be

present throughout the sitting. As the Law Officers' Department was near to the States Chamber, it would be relatively easy for the Assembly to adjourn for a short time to seek legal advice. He could think of instances where the States had been required to go *in camera* in order to receive legal advice. There had also been times when Members had been unable to ask questions regarding legal advice as the matters in question were said to have been sub-judice.

- 4.4 Ms Caroline Powell agreed that only elected Members should sit in the States. She was unhappy that Jersey did not have separation of powers and she advised that there was a groundswell of dissatisfaction in the Island with its government. Furthermore, it did not help in international circles for Jersey to be seen to have an archaic government.
- 4.5 Deputy Duhamel advised that since the advent of ministerial government, he had had discussions with the Law Officers regarding their role as legal advisers to the States. He had been advised that the Law Officers' first call of duty was to the relevant Minister, as a corporation sole, followed by the Council of Ministers. Before the introduction of ministerial government, he (along with other Members) had asked whether the sovereignty of the States would remain. They had been advised that the States would remain sovereign but the opinion on that appeared to have shifted. In response to a question from Mr O'Toole, Deputy Duhamel stated that there was a difference in how the Law Officers advised the Executive and how they advised Scrutiny.
- 4.6 Advocate Sinel advised of his belief that no Department in Jersey had been prosecuted for breaching criminal law, a strange situation in comparison to the UK. This situation arose due to the conflict between the Attorney General's role as Head of the Prosecution and as legal adviser to Departments. The Historic Child Abuse Enquiry had made the conflict apparent. It should be resolved by the establishment of a DPP. Advocate Sinel also stated the Scrutiny should benefit from its own legal advisers.
- 4.7 Deputy Le Claire said that, in his experience, the Law Officers were hard-working and trying to do their best for the Island with limited resources. However, they were in an impossible position because of the conflicts inherent in their roles. He also believed that the Attorney General, as Head of the Honorary Police, had an undue influence over the Connétables. There had been recent occasions when Connétables had chosen to attend sittings of the Royal Court (to see Honorary Police of their Parish sworn in) rather than a sitting of the States. This was as Parishes would be fined if they did not find a sufficient number of Honorary Police. Deputy Le Claire agreed with Mr Vibert that the States often sat *in camera* to receive legal advice. He had recently corresponded with the Solicitor General as to how an individual could prosecute a Department. He said it was difficult to bring about change as the advisers were also the prosecutors. He could not say which body should replace the Attorney General as Head of the Honorary Police.
- 4.8 Mr Vibert highlighted that there was a Comité des Connétables which could feasibly elect a 'Head of the Honorary Police'.
- 4.9 Advocate Sinel advised that it was not possible to bring private prosecutions in the Island.
- 4.10 Mr Nicholas Le Cornu asked the Panel to 'bite the bullet' in making any recommendations. The political class did not wish the Offices to be reformed although it was apparent that elements of the business class did wish to see change. The position of the Crown Officers in Jersey was seen as an embarrassment elsewhere. This could be seen, for instance, in the citation of the 'McGonnell Case' in other European cases in which the Channel Islands were singled out as having a bizarre system. Mr Le Cornu also made reference to the fact that change had historically come about slowly in Jersey. He therefore hoped the Panel would be brave and state clearly in its report what should be done.
- 4.11 Mr Neil McMurray referred to the argument that had been put to the Panel during its review that there was no groundswell within the community for change. He disagreed with that

assertion and stated that there was a mass of evidence of dissatisfaction with the Island's government.

4.12 Ms Powell stated that justice needed to be seen to be done and indicated that there was a perception in the Island that there had been corruption.

4.13 The MahaChohan stated that people should consider the purpose of 'government' and, in particular, what they wished the government to do. She highlighted that Jersey had no written constitution but that such a document would bring clarity as to who was responsible for what. It was possible that the old systems were no longer appropriate today.

5. Concluding Remarks

5.1 The Chairman thanked all present for their attendance and for the views that had been expressed. He explained that the Panel would report to the States in due course and that it would subsequently be for the States to decide on the next steps.