

Appendix 2 - Previous Independent Advice relating to Judicial Selection, Appointment and Tenure

Department for Community and Constitutional Affairs

The 2008 Jowell Report

1. The possibility of creating a Commission, with responsibility for making recommendations for judicial appointments and discipline was considered in detail in the report of Professor Jeffrey Jowell QC appended to the *Second Interim Report of the Constitution Review Group* published in December 2007 ('the Jowell Report' and 'the Second Report')¹.

2. As Professor Jowell recalls, judicial independence is a fundamental tenet of democracy and the Rule of Law and a necessary ingredient in a fair trial for the purposes of Article 6(1) of the European Convention of Human Rights ("ECHR"), which requires that:

"in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

3. Professor Jowell noted that the doctrine of separation of powers² might suggest that the Executive should have no role to play in appointing, disciplining or removing judges, but that many established democracies involve the Executive in making such decisions³. Therefore, the Jowell Report recommended that, with reference to a number of relevant international standards, Jersey should ensure that any:

¹ <http://www.statesassembly.gov.je/AssemblyReports/2008/46527-24954-2762008.pdf>

² According to this doctrine, the executive, the legislature and the judiciary constitute three separate and independent branches of government, which, constitute a system of mutual checks and balances aimed at preventing abuses of power to the detriment of a free society.

³ Paragraph 108. As Professor Jowell notes, this includes a number of common law jurisdictions, the United States of America being perhaps the prime example. In many other common law democracies judges are appointed by the Head of State following selection by the executive. For example, in Australia and New Zealand judges are appointed by the Governor General on the advice of the Attorney General.

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“decision relating to a judge’s appointment or career should be based on objective criteria and be either taken by an independent authority or subject to guarantees to ensure that it is not taken other than on the basis of such criteria.”⁴

4. The Jowell Report recommended that the objective criteria referred to should be published and should seek to ensure that decisions concerning the selection and careers of judges are *“based on merit, having regard to qualifications, integrity, ability and efficiency”*⁵. Professor Jowell suggests that most modern democracies have an independent Commission of some sort, which is tasked with ensuring that decisions affecting judicial careers are made on merit. Professor Jowell notes that such a Commission is often referred to as a Judicial Services Commission when it has responsibility for appointments and discipline.

5. The Jowell Report and the Second Report recommend that in the event that Jersey becomes independent, the Crown Officers should be appointed by the Queen on the recommendation of a ‘Governor General’⁶, who should act in accordance with the advice of an independent Commission and should have no substantive discretion in these matters. The Jowell Report suggests that a similar mode of appointment might be used for other judicial office holders selected by a Commission. According to Professor Jowell, if it were deemed prudent to reserve a ‘veto’ power to the Governor General in respect of appointments recommended by a Commission, the circumstances in which that power could be exercised should be expressly defined and the Governor General should be required to give reasons for its exercise in any given case.

⁴ This quote, cited in the Jowell Report, is taken from Opinion No 1 (2001) of the Consultative Council of European Judges for the attention of the Committee of Ministers of the Council of Europe on Standards concerning the Independence of the Judiciary and the Irremovability of Judges, dated 23 November 2001 (“the CCJE Opinion”). Professor Jowell cites other sources of international principles and standards to support his view, including the United Nations Basic Principles on the Independence of the Judiciary, endorsed by General Assembly resolutions in November and December 1985. Professor Jowell refers to a Council of Europe Recommendation No. R (94) 12, which has since been substantially updated by Recommendation CM/REC (2010) 12 of the Committee of Ministers to Member States on judges: independence, efficiency and responsibilities, adopted by the Committee of Ministers on 17 November 2010 (“The European Charter”).

⁵ See paragraph 109 *ibid*, quote taken from the CCJE opinion.

⁶ The role of Governor General might replace the existing role of the Lieutenant Governor, but would remain the Queen’s representative in the Island and might act in a similar capacity to the other Governors General in independent Commonwealth States.

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6. The Jowell Report's recommendations concerning the composition of the Commission are quite general. Professor Jowell suggested that there may be advantages in the judiciary occupying slightly less than half of the positions on the Commission to ensure that there is an effective check on their power.

7. Professor Jowell recommended that the members of the Commission should be selected for a fixed term in accordance with pre-determined, objective and transparent criteria. The Jowell Report also suggested, with regard to the appointment of the Bailiff, that there may be an argument for giving elected politicians some input into the appointment. Professor Jowell notes that some countries secure such input by requiring the head of state to consult the Prime Minister and the Leader of the Opposition about senior judicial appointments.

8. As regards the terms and conditions of appointment, Professor Jowell recommended that, because of the importance of security of tenure for judges' independence, appointments should usually be until a mandatory retirement age and should only exceptionally be for a limited period and only then where there are clear guidelines about re-appointment.

9. With regard to discipline and removal from office, Professor Jowell recommended that judges should only be prematurely removed from office if they have been proven to be unable to discharge their judicial duties or proven to have committed misconduct. Disciplinary decisions should, therefore, be made by an independent body such as the Commission, who might advise whoever is responsible for making the ultimate decision on disciplinary action or removal from office⁷. The Commission may then, depending on the circumstances, be responsible for appointing an independent tribunal to investigate any question of misconduct. Professor Jowell recommended that, overall, the solution

⁷ In the event of independence Professor Jowell again sees this as a function for a Governor-General or perhaps even the Judicial Committee of the Privy Council.

adopted should ensure judges “*enjoy due process rights*”. Professor Jowell also suggested that the Commission could be responsible for setting standards of conduct to which judges must adhere and the likely sanctions for departure from those standards.

The 2010 Carswell Review

10. The *Review of the Roles of the Crown Officers* published in December 2010 (‘the Carswell Review’)⁸ published in December 2010 reviewed the roles of the Bailiff, Deputy Bailiff, Attorney General and Solicitor General (the ‘Crown Officers’).

11. Although the Carswell Review was not concerned with judicial appointments generally, it is perhaps relevant to note that it did not advance the proposal that the Crown Officers should be appointed by a Judicial Appointments Commission on the basis that establishing a Commission for that purpose might be unnecessarily cumbersome and involve disproportionate delay and expense. It considered that there was an appropriate amount of openness and transparency in the procedure now in operation, but that it would be advisable for the panel making the final recommendation to review the procedure from time to time to ensure that it corresponds with best practice.

⁸ <http://www.gov.je/Government/Pages/StatesReports.aspx?ReportID=491>