

Event:            Public Hearing  
                    Review of the Roles of the Crown Officers

Date:            29th March 2010

Review Panel:    Lord Carswell, Chairman  
                    Mrs M-L Backhurst  
                    Mr G Crill  
                    Dr S Mountford  
                    Mr I Strang

Witnesses:        Mr T J Le Cocq QC, HM Attorney General

**LORD CARSWELL:** Mr Attorney, we are very grateful to you for coming, for the very careful and thorough written submission which you have given to us, and which we have considered very carefully, and for your coming to speak to us this afternoon.

I made an opening statement this morning for the benefit of everybody who was here and I do not think I need to repeat it now except, perhaps, to say two things: the first is that we are looking at the roles of the Crown Officers in principle, we are not concerned with whether they have been done effectively or less effectively by any particular individual, we are simply looking at the matter in terms of the principles which apply and whether those roles ought to be changed in any way from deduction from principle.

The second thing is to say that there has been a certain amount of discussion in papers which we have received about perceived bias. I should make it publicly clear that there has not been the slightest suggestion in the case of any Crown Officer of anything but the utmost integrity; this is a question, if it comes up in any context, of objective and perceived bias only and I make that publicly clear from the outset.

The States have asked us to hold this and other hearings in public, which we are glad to comply with the request, so we are recording the proceedings, they will transcribed. You, of course, will have an opportunity to check the transcript to make sure that it accurately represents what you have said and it will then be published on the review website and the written submissions will also go onto the website, those that have not already been put there for public access.

This, as I said this morning, is not an inquisition in any way, it is an inquiry in the literal sense; we are trying to inform ourselves and to hear opinions from all sides, all of which are

welcome, and to form a view, reach conclusions, at the end of the process and make recommendations to the States. That will be our function performed.

Mr Attorney, if there is anything you would like to add by way of opening statement to what you have given us by written submission, you would be very welcome to do so.

**MR LE COCQ:** No, my Lord. I don't think there's anything that I wish to say. I do have some additional material which might be of interest to the Review; in a sense I'm in your hands, but it may be helpful if I were to make it available to you now before we get into any kind of discussion. Perhaps if I could explain what those items are and if you feel that they're not of any service, or are unlikely to be, then I'll happily take them home again.

The first is that, for my own guidance, when I took up the office of Solicitor General I began to cut and paste from Hansard examples from about June 2008 onwards of statements made by Law Officers within the Assembly and of questions formally asked, during the oral question period, and answered. It occurred to me that, as an illustration of the way in which this works in practice, simply having access to that document, which includes a number of statements made by my predecessor and questions answered by him and some which, in my capacity as Solicitor General, I've answered myself. That might be of some assistance, if only to give a flavour as to how these things have worked in practice since at least the middle of 2008.

If I may, I have five copies. I certainly don't expect to make any particular reference, but they do contain one or two examples that I might mention if there's any reason to do so as we go.

There are two examples of written comments that the Law Officers have provided on legal aspects of matters subject to debate in the States Assembly. It's fairly unusual for us to have this sort of thing in writing. In fact, as far as I can recall since I became Solicitor General in April 2008, we've only done it twice, although I could be wrong about that. I thought, in order to show the flavour of this kind of thing, the facts are not at all of interest, but the nature of the kind of submission that is made, it might again be helpful to have examples.

As an abundance of caution, these come with the main proposition in front of them so that the advice can be seen as against the points raised in the proposition. Here is a second example. I do hasten to say I'd be totally surprised if anybody here wanted to read these from cover to cover but, as I say, they are really illustrative. There's another.

The last, I thought, would be an interesting example, if the Panel agrees. It is again a cut and pasting exercise from Hansard, and it is an instance in which I thought it appropriate to intervene in the States debate because I felt mistakes of law were falling into the subject matter of the debate. As I do mention that in my written submission, I think it might be helpful to give an example as to when that has taken place. This is very much only a partial extract of the debate in question. The reference it contains is to human rights matters in which the proposer was indicating that, in his view, a situation had to be changed because we were not human rights compliant. I felt the need to inform the Assembly that there were not, in my view, human rights considerations and that it should approve or not the proposition on grounds of policy but not because it felt legally compelled to do so.

**LORD CARSWELL:** One can see that sort of situation arising. People misunderstand the content of the formal human rights that we are involved with.

**MR LE COCQ:** Indeed so. Those were the additional items. I do have one or two minor corrections to my written submission, if I may, having glanced through. I will ignore the typographical errors, of which I am sure there are a number, but paragraph 57, six lines up from the bottom, where it says: "Detention in criminal trials". It should more properly read: "Detention in police custody". That was actually the subject matter. It was nothing to do with the trial process, it was detention in custody prior to charge.

**LORD CARSWELL:** All right.

**MR LE COCQ:** In fact, I think that is the only correction I would make at this point. It might be that I will correct one or two other matters as I go along, but none of them, I think, are important. Thank you for that opportunity.

**LORD CARSWELL:** May I just ask you at the start about your Department and the personnel and the divisions? If you could give us a brief people of what people you have and what they do.

**MR LE COCQ:** Yes. This is a headcount by division. This is a departmental structure, underneath. The simple list with the numbers against it merely indicates full-time-equivalent employees within different categories. Perhaps slightly more informative is the chart. The first page sets out the structure of the Department as its existence since June 2009.

**MR CRILL:** Sorry, can I just interrupt? All those legal advisors are qualified lawyers?

**MR LE COCQ:** Anyone who is a legal advisor will be a qualified but not necessarily Jersey-qualified lawyer.

The first page sets the basic structure of the organisation into the three separate divisions that I mention in my written submission. On the following page there is, in a sense, the first tier of that, and you will see that there are the two Law Officers, myself and the Solicitor General. We each have secretarial support - one secretary each - and we have two assistants that we share. In fact, although it says "SR vacant" in the right-hand box, that position has now been filled since this chart was created. Directly beneath us there are the three directors, criminal, civil, and finance and administration, who is also our accounting officer for the purposes of the Public Finances Law.

The next page deals with the individuals who work within the Finance and Administration Directorate. They clearly deal with office structures, facilities, those kinds of things. The page after that is the Criminal Directorate and you will see there are the five principal areas within which the Criminal Directorate functions. The first is the Magistrate's Court and legal advisors. They are not within the physical offices currently occupied by the rest of the Law Officers' Department but they have a suite of offices in police headquarters, where they provide legal advice to police officers as needed, to Centeniers, and where they appear on a number of matters within the Magistrate's Court. They number among them Jersey-qualified lawyers and non-Jersey-qualified lawyers, but the non-Jersey-qualified lawyers have rights of audience within the Magistrate's Court provided they are within the Attorney General's department.

Next is the Royal Court and Criminal Appeals. In fact, there are only two active persons within that division at the moment. The initial "HS" is Howard Sharp who has become the Solicitor General, so there is a vacancy there to be filled. There is the investigation of fraud area, and mutual legal assistance, and that is headed up by an individual who has someone

responsible to him.

**MR CRILL:** The panel of Crown Advocates would come within the Royal Court and Criminal Appeals.

**MR LE COCQ:** The panel of Crown Advocates, you mean the external Crown Advocates?

**MR CRILL:** Yes.

**MR LE COCQ:** Yes, but obviously we wouldn't include those; this is simply the structure of the Department itself. But, yes, there are a number of individuals who conduct prosecutions on behalf of the Attorney General. They're appointed as Crown Advocates; they take an oath as such before the Royal Court and they are in private practice. And they are paid out of the court and case costs budget of the States.

The last box there, RIPL/PPCE, that simply is an area of work to which no one is specifically allocated. It normally, in fact, comes across my desk. It is where consents are needed for things like intercept warrants and things of that nature.

**MRS BACKHURST:** Sorry, could I just clarify? When you say staff, does that mean full-time employed staff or does that include people in private practice as well?

**MR LE COCQ:** No, that doesn't include private practice. None of the individuals here are Crown Advocates in the sense of private practice Crown Advocates.

**MRS BACKHURST:** Stephen Meiklejohn?

**MR LE COCQ:** No, it is a pure coincidence of names. It's not the same Steve Meiklejohn who is in private practice.

**MRS BACKHURST:** Thank you very much.

**MR LE COCQ:** Then on the next page is the civil division, and you will see that is divided primarily into conveyancing - the Law Officers' Department carries out all of the conveyancing function for the States of Jersey - then various other sections which have areas of specialisation. I hope they're all moderately self-explanatory. Obviously there is a very substantial advisory function within the civil division, including advice on European law, human rights law and it's the civil division that is responsible for the initial human rights consideration and advice given in connection with legislation as it passes through the drafting process prior to lodging.

Litigation, you will see, is divided into certain areas. We have a specialist litigator who deals with planning appeals. He has rights of audience in connection with appeals that follow the abbreviated procedure provided for under rules of court, but in the event that it is not a case suitable for abbreviated procedure then it would either be an advocate within the office that dealt with it or, alternatively, one of the Law Officers might well do it.

Administrative appeals, obviously representing various Ministers in connection with administrative appeals of one form or another. Children's law - we have two people who are dealing with that. Their names are not precisely within this box because this is a slightly out of date. We have two people at the moment dealing with it pretty well full time and some dealing with it part time and we are in the process of recruiting further individuals to cover

that area.

I am not sure I can help much more unless there are specific questions.

**LORD CARSWELL:** Thank you for that. The first area we would like to explore with you is the question of appointment, which you have dealt with in paragraphs 41 and following of your submission. Geoff, would you like to take over?

**MR CRILL:** Thank you. You are appointed by the Crown?

**MR LE COCQ:** Yes.

**MR CRILL:** As is the case with all the Crown Officers. Are you aware of what the process of the appointment is?

**MR LE COCQ:** Yes, from the perspective of one who has experienced it twice. Not in any official sense, but I know that this is the case and I have no reason to believe that what I have set out in my written submission isn't an accurate statement for all recent Crown appointments. I cannot speak to earlier in time than that, but it certainly was the procedure that I understood to be followed when I became Solicitor General and then Attorney General and what I believe was followed when my predecessor became Deputy Bailiff.

**MR CRILL:** Some of the witnesses this morning have said that they regard the appointments process as opaque. Whether that is partly because they are not involved with it or because it is not set out as a written procedure available to all, I am not entirely certain, but would you regard it as opaque?

**MR LE COCQ:** I wouldn't regard it as opaque to me but I accept that it is not published, as far as I'm aware, anywhere. When I was formulating these submissions I made inquiries to make sure I was entirely right in everything I said. I put down largely what I believed it to be from my experience and then did a fact-checking exercise to make sure I hadn't got anything wrong. So it might be fairly said that the average person in Jersey, if there is such a creature, wouldn't necessarily know, as part of the received knowledge of an Islander, how their Crown Officers were appointed. But I think that is more a matter of properly publishing and properly explaining than the fact there is anything inherently opaque in the system.

**MR CRILL:** Jersey being Jersey, what they do not know creates a suspicion, so there may be this suspicion that it all goes on in dark corridors and in smoky rooms - if we are still allowed smoky rooms.

The appointment of the Solicitor General was referred to by one of the witnesses as possibly the most important appointment on the basis that, historically at least, it was the first rung on a fairly straight-line ladder of ascendancy to the Bailiff's post. Do you think that that impression still holds good and, if it is an impression, do you think it is a correct impression? I am not asking for your personal view on the matter.

**MR LE COCQ:** I think it is an impression that holds true, inasmuch as I think people do think that. However, when I became Solicitor General it was made abundantly clear, and by more than one person, that there is no ladder, there is no presumption in favour of any form of advancement, and the best candidate will be appointed out of those who apply. I think, to volunteer a further gloss on that, it would be fair to say, I suppose, that once you have held one office you may well be in a better position to apply for the next office up because you will

be more informed about it, people will be able to have seen how you performed - hopefully well - in the earlier office and so you may have an advantage, but certainly it was made entirely clear to me that there was no automatic progression. Indeed, the last Solicitor General before me remained a Solicitor General for 14 years, by her choice, as far as I understand it, but certainly did so. I think the Solicitor General before her, Terry Sowden QC, remained as Solicitor General and did not move up. So there may be this perception but I don't understand it to be an accurate perception, nor do I understand it to be the reality in modern times.

**LORD CARSWELL:** The experience that one of the Law Officers would gain going through and then progressing, if he or she does, to Deputy Bailiff, et cetera, is bound to be helpful. As well as giving that person better knowledge of the procedure and the requirements, it also gives that person experience in dealing with the subject matter, which is bound to make him or her a better candidate.

**MR LE COCQ:** I think that's right.

**LORD CARSWELL:** But if somebody very, very well qualified comes in from the side of the scrum, that can be incorporated into the process and that person would get a chance with anyone else.

**MR LE COCQ:** I would entirely agree with that. The two obvious examples are my immediate two predecessors as Attorney General. Both of them came directly from private practice into the role of attorney and neither had previously been Solicitor General. In fact, I found myself quite unusual to an extent, if I can put it in a flippant way, as being the only one in the shop who had previously been Solicitor General, for quite a while.

**MR CRILL:** The appointees have - I hesitate to say invariably but certainly generally - been called litigators. Given that the function of the Law Officers has broadened substantially, and by your own submission you say that you only rarely prosecute cases, do you think that is something that is appropriate or is something that has happened by default or is advantageous to the role?

**MR LE COCQ:** It's difficult for me to answer that because from a personal perspective I would certainly consider my experience is an advantage in the role. A number of decisions I've had to take in the short time that I've been Attorney General have certainly benefited, as far as I'm concerned, from having an experience in the world of litigation leading up to it. Those where one has to take decisions which might be of a contentious nature or against the strongly argued views of others. There's an example in the case relating to mutual assistance in the Bhojwani case. Although undoubtedly an able individual would be able to take appropriate advice, at the end of the day if there is a comfort with contention, if I can put it that way, I think that can be an advantage. But I speak from someone with that experience and it could be that there are other enormous advantages that people would bring who didn't, and who had a rather different experience. That's why I say I find it rather a difficult question to answer. I've certainly found it to be an advantageous.

There is also another elements, I suppose. The giving of advice in the States is something that one can be reasonably sure that a court advocate won't be uncomfortable with, because they are challenged on a daily basis by judges during the course of their practice. That's not necessarily the case within someone who hasn't had an advocacy background. I'm not saying in all circumstances that it isn't but . I suppose my last observation on that might be that it could be that people who are attracted into the area of litigation, into the area of

advocacy, might also be those who are more attracted to apply for Crown Office in due course. I couldn't say why that would be but there's always a possibility that that's a type of person who likes to do the job.

**MR CRILL:** There has been the suggestion that it is very difficult to recruit from private practice into the Crown Offices, principally because of salary considerations, whereas from the prosecution of cases point of view, it would be a very attractive place for a litigator particularly where, perhaps, private practices are over populated by litigators. Do you think that the structure or the -- I will put it another way. Do you think that there is any possibility that the creation of a separate directorate of public prosecutions would create an environment in which candidates could be more readily attracted, rather than into, shall we say, the more formal Crown Offices?

**MR LE COCQ:** Do you mean attracted to the role of a director of public prosecutions or attracted to Attorney General, if there were a director of public prosecutions?

**MR CRILL:** Directed to the role of director of public prosecutions.

**MR LE COCQ:** No, I don't really think so. I don't know how easy it is to recruit Law Officers. It's not, in a sense, for me to say; much better to ask the Bailiff, perhaps, who has supervised the last few. But, obviously, the ability for individuals, particularly people who are skilled litigators, to make significant amounts of money in private practice is unquestioned, I think, in Jersey. In fact, I think it's something, when I was involved in litigation practice, I always used to refer to as being non-cyclical, inasmuch as when things were good people litigated because they wanted to and when things were bad people litigated in any event. I think there was the opportunity for people who do court work, if they do it well, to make a considerable

amount of money in private practice and I imagine that's still the case.

The term I use, of course, is to do it well. People who may not be doing it well might well not be making very much money and may well be attracted to a role that's outside of private practice. But if the question you're asking me relates to the financial incentives as against a different role, I think the very good litigators will be able to make significant amounts of money and will not be attracted, if we're dealing purely with financial motivation, to the office of DPP.

**LORD CARSWELL:** One finds that in other jurisdictions those who have tried to make a go of advocacy and find that it is not for them, that they are not very successful, may take a government post but they are not seeking Crown Officer posts always. They may have many other good qualities that would make them excellent Officers or they would not be good advocates, so there is room for everybody.

**MR LE COCQ:** There is, I entirely agree, and I wouldn't wish to be thought of as saying that only courtroom individuals are suitable for Crown service. That is not what I mean at all. In fact, in reality, I've never been to court other than in a ceremonial sense in my capacity as Attorney General for 3½ months of that office, and I've been perhaps twice as Solicitor General, three or four times at the most, other than in ceremonial capacity, in contrast to my private practice where I spent significantly more time in court. I don't think the ability to go to court is absolutely essential now that we have Crown Advocates but I think the training is of assistance. I think it is if not essential, however, then it might be important that in certain cases the Law Officer will go to court and will argue the Island's point of view. My predecessor went, for example, to the European Court of Justice and made submissions; I know that, I was on the other side arguing against him.

**LORD CARSWELL:** I have certainly heard him argue in the Privy Council.

**MR LE COCQ:** Then you will know entirely. He certainly took the view, and I would agree with it, that there are some cases where it is incumbent upon the Law Officer to do it personally.

**LORD CARSWELL:** The way that they do it in Washington, of course, would be difficult here with progression because traditionally there the Solicitor General does the heavy litigation for the United States Government, and does it extremely well, but then that person is picked on as a litigator and is not necessarily expected to become Attorney General, so it is a different situation. You have done very little in court, in practice, since you became Solicitor General?

**MR LE COCQ:** Yes, I think I've done one planning appeal and I think I've done one application to the court based on the ability to elect certain people to honorary posts, and perhaps one or two other matters that escape my memory at the moment, but certainly no more than that.

**LORD CARSWELL:** I think that is mirrored in London. One very, very rarely sees a Law Officer in court there these days and yet they are both doing effective work in other ways.

**MR LE COCQ:** Yes. I don't think for a moment it would be feasible for a Law Officer in the way that we used to, decades ago, regularly to prosecute cases. I think the demands on the time in properly preparing a criminal case and the demands on the energy and emotional commitment to any particular trial simply would make it impossible to discharge that, together with the other burdens of the office.

**LORD CARSWELL:** You have set out in paragraph 4 of your submission the process and the people who are consulted. Are you content that that is a wide enough spread of consultees or have you any thoughts as to whether it ought to be amended?

**MR LE COCQ:** It seems to me to be as wide as it reasonably can be. There is a balancing factor, I think, in any form of consultation in a small island like Jersey, and that's the need for anonymity. I think the broader your consultation, the more at risk is the anonymity. Certainly individuals who apply for Crown Office don't necessarily always want the fact of their application to be widely known, particularly as they well recognise that they may not actually be appointed. For them to return to their partners in legal practice or return to their client base and say, "Well, I actually wanted to be somewhere else but I'm now here back working with you" can sometimes cause potential difficulties, even if only of a perceptual nature. It seems to me that one has to balance the width of consultation, breadth of consultation, against that and in a small island, of course, as I say, the wider the consultation, the more risk there is. Under the current system, it seems to me, you have consultation amongst a number of Members of the States, both within government and outside of government. You get consultation with the court and the legal profession.

**LORD CARSWELL:** Is this formalised? Is there an identified group of States members that the Bailiff says, "We have a vacancy, I am coming to see you"?

**MR LE COCQ:** Yes, the Bailiff talks to his Consultative Panel which comprised - I have it written in here somewhere - the Chief Minister and -- yes, whether that's always been the case I couldn't say. I know, or I've been told, that it was the case from the time when I applied for Solicitor General but I may have been the first person ever to be interviewed, I

think, for that job. I'm not sure if they regularly interviewed prior to that.

**LORD CARSWELL:** It goes quite wide with the Jurats as well. That is wider than a lot of places do it.

**MR LE COCQ:** Yes, and of course the Jurats are elected on an electoral college that comprises all of the States Members as well as all of the members of the legal profession, although they are primarily in the court.

**LORD CARSWELL:** The involvement of the Jurats, of course, would, though, reinforce the idea that they are going to be court-recognised advocates who are going to be considered for appointment of the Crown Officers.

**MR LE COCQ:** Undoubtedly, if you are an advocate who regularly goes to court, the court will know you better than the members of the legal profession who don't regularly go to court. One's ability, I suppose, to be known by the Jurats similarly will be the case. But I think, generally speaking, one would expect an application for Crown appointment to be moderately senior, moderately experienced within the Jersey legal profession, whether as an advocate or a solicitor or otherwise, and over the course of a number of years will have rubbed shoulders with any number of individuals who will be part of the consultation process. I don't say it's any more formal than that, and I wouldn't say that it's not more likely that the Jurats will know someone who's appeared in court in front of them. But that might of course be a disadvantage as well as an advantage, depending on the view they take of you.

**LORD CARSWELL:** Could I move then to the question of the Law Officers' membership of the States and ask Dr Mountford if she would deal with that?

**DR MOUNTFORD:** In your submission you make clear that you think perhaps you should stay as a member of the States. Would you be prepared to consider any alternatives? Because it has come up, a number of points raised, that it is not good use of a valuable resource, the amount of time that you have to spend waiting, I guess, to be asked legal advice.

**MR LE COCQ:** Undoubtedly there are times when one sits there for half a day or an hour or two and nobody asks a question and that can feel like a waste of time. It does have the advantage that you become better informed over all on an incremental basis about a number of things, but I agree it would be better were I back at the office able to do other things. In reality, though, if it's not likely I'm going to be needed, I am able to leave the States and sit in my office and I have a direct radio link where I can follow all the proceedings and get reasonable warning if it sounds to me like a question of law is coming up. I'm not stuck in the Assembly necessarily all the time, but there is certainly an element of time but I don't think it's a waste. I think the facility is there to be asked questions, and quite often those questions are completely unanticipated by the person who suddenly thinks that they want to ask them and it really worries them and they stand up and ask for my view on a number of different things. I think that facility is quite important. Whether it can be discharged in another way, I'm not sure.

**LORD CARSWELL:** If you were not present, you or your colleague, how would they get an answer? There are various sorts of questioning. There is the formal one where an act or decision of the Law Officer is in question. That can be staged; that can be given a time in place, that is easy. It is these unforeseen ones.

**MR LE COCQ:** Unscripted, yes.

**LORD CARSWELL:** If you were not there, could they be dealt with by giving notice and dealing with other matters in the meantime?

**MR LE COCQ:** I don't think practically they could, no. The reality is it's a fairly tight ship. It may not always seem so to members of the public, but a fairly tight ship is run during the course of a States debate. My experience is that there are numbers of propositions where it's highly unlikely I'll be asked a question and I tend to, if I can, conveniently leave the Assembly and be on call, with the agreement of the President. For those where I might be asked a question, then it seems to me that I must be there for that if at all possible, because the consequence of not being there is that that question doesn't go answered and it means that possibly the States will proceed on the basis of a misunderstanding of the legal position or simply with a sense of unease that the questions they wanted to have answered haven't been answered. If they feel that it's something important enough, the only way you could then get answers, as you've suggested, would be to defer the debate or to stop the debate or, as you say, put them to one end and the answer can come along later on. But that seems to me that that might well be a recipe for delay in the decision-making process.

**LORD CARSWELL:** But there must be questions which you are unable to answer in a full manner and therefore the same thing will apply, surely.

**MR LE COCQ:** Yes. I mean, it's fair to say one does the best one can and I'd like to think that, generally speaking, the answer that the Law Officer is able to give is sufficient for the purpose of the debate. It's normally on a matter of statutory interpretation. Occasionally I've said that this is a matter that requires more thought than my ability to answer immediately

and I've given what answer I can and heavily caveated it. At that point it's a matter, I think, for the States to decide, if it is of such an importance to their debate that they want the answer before they continue or --

**LORD CARSWELL:** Have you known the debate to be suspended?

**MR LE COCQ:** No, not in the time since I've been Solicitor General, no. I think there is a high desire when a debate starts for it to be concluded in one way or another and I'd be very, very surprised -- it would only be in the most exceptional circumstances, I think, that it would be stood over for the purposes of getting legal advice. It might certainly be stood over for other purposes, a reference to Scrutiny or the like, but for the purposes of legal advice --

**LORD CARSWELL:** But that would be on a Member's proposition anyway?

**MR LE COCQ:** That would be on a proposition, indeed.

**DR MOUNTFORD:** Could anyone else give that advice? Does it have to be you? Because when I look at the breadth of your responsibilities, three directorates, you really have a very broad area that you're supporting.

**MR LE COCQ:** Yes, it's true, it is a very broad area. I think the purpose of forming into the directorates was actually to create a structure so that a great deal of the work can continue without the immediate supervision of the Law Officer, which tended to be the case up until just a year or two ago. There weren't very many areas that the Law Officer didn't have a direct hand in himself. I think the importance of being a Member of the States is not simply the giving of advice, it's also in the areas like accountability where we can be asked

questions on areas for which we are responsible. We don't answer about decisions relating to prosecutions whilst those prosecutions are current, of course, but in other areas. You'll see from the rather heavy bundle that I handed to you at the beginning, there are lots of areas where we are asked for formal answers to questions during the question period.

Sorry, I've slightly lost track of the answer but I think the importance of having the Attorney General in the States, or the Solicitor General, is in part about accountability. It's the fact that ultimately I am responsible for whatever item of legal advice government has received, Scrutiny has received or the States has been given. People, I think, are entitled to look me in the eyes as it were when I advise.

**MR STRANG:** You produce an annual report. Is that actually presented to the States at all?

**MR LE COCQ:** No, I don't believe it is. I haven't ever produced an annual report yet. I'm still, as I say, trying to find time to prepare one. But, no, I don't think it's formally produced to the States but it is published. But we don't present a report and then get questioned on it, no.

**MR STRANG:** Would that be an appropriate thing to do, in your view?

**MR LE COCQ:** I don't think there would be any harm in doing so. There would obviously, like I think in any jurisdiction, be areas which would be no-go areas for discussion and debate relating to prosecutions and things of that nature, but I don't see any harm in presenting a report.

**LORD CARSWELL:** The English attorney is now doing that, I understand; that is instituted.

**MR LE COCQ:** I didn't know that.

**LORD CARSWELL:** You clearly have to be available to account for decisions; that is part of the democratic process. For that purpose there are several possible models. There is the one that you have in which you are an actual member of the States and can be questioned at any appropriate time on the work of yourself and your department. There is the possible model whereby the Attorney General is not a member but can be asked to attend to account, or a third possibility where a prosecution is divorced from the position of the Attorney General entrusted to a DPP. The Attorney General is not responsible, in some places, and there has to be a procedure whereby the DPP can account, through some formal or informal means, to the legislature. Do you see any advantages in systems other than one that you have at present that you might think we should consider?

**MR LE COCQ:** In my submission I've sought to look at other systems, and it may sound, perhaps, smug to say that I don't think that there are any great advantages. I don't pretend that any other system is not perfectly workable, I'm sure that it is. It's a question of whether it is materially better than the system that we have, and I don't believe that those other models necessarily are particularly better.

I suppose in terms of the position where an Attorney is invited to the States to account for particular matters removes what I might call the "push" rather than "call" option for legal advice. I think it's important and I think one of the benefits to the Law Officers being in the States is that we can offer advice even when it's not asked for, provided it is legal advice and proper to do so. I think the last document I handed to you was an example where I thought it important that we offered advice because I thought, rightly or wrongly, the States were not

going down the correct route from a legal point of view.

I think having an attorney general there by invitation of the Assembly would deal with the accountability issue, undoubtedly, but would not, in my view, deal with the offering of legal advice in appropriate circumstances. Also, it wouldn't entail being available to answer those, as I say, unscripted, unforeseen questions, or to answer those, as and when they came up.

In terms of there being a separate director of public prosecutions, I'm not sure of a mechanism whereby the DPP would be accountable, other than through the Attorney General. If accountable through the Attorney General, I'm not sure that it makes any particular difference at all. If accountable otherwise, I would have to -- I'm not familiar with systems in which it works that way, and I apologise for that but I just don't have any experience of them.

**DR MOUNTFORD:** During the process of giving advice it has been suggested that at times you can stray into the political area and this can maybe cause a little friction.

**MR LE COCQ:** I can entirely understand why that is an impression that some people might get. The nature of giving advice, if you're giving it independently and in an unbiased way, is that some people are going to like it and some people aren't. Whoever is sitting in the Assembly, if the advice doesn't accord with the view that they would like to be able to take, then it will feel like political advice. Equally, if it supports the line that another member would take, it will feel like political advice.

Speaking personally, I'm not aware that I've ever given advice which has been flavoured in one way or another. It's been the position as I've seen it. I'm not aware that any of my

predecessors have in fact given politically flavoured advice but I can certainly understand how it may feel that way if you're on the receipt of it and it doesn't meet with the argument that you're wishing to put before the Assembly.

**MR CRILL:** Within the States Chamber, are you the sole guardian of the Island constitution, or protector of the Island constitution, or does the Bailiff have a role in that as well? If there is a duality of the role, how do they sit together?

**MR LE COCQ:** I've not thought of that before. I think the reality is that within the States Assembly, the Bailiff functions as speaker and I don't think functions in any other way, certainly not in my experience since early 2008. Any issues of law are referred to the Attorney General or whichever of the Law Officers is it the States at the time. Occasionally, I suppose, if a Law Officer isn't there and the matter is really something completely within the knowledge of the Bailiff, he might say, "Well, we'll call the Attorney General if you want but I think the answer is X, Y and Z" and that might be sufficient. But normally the Bailiff will not offer any kind of legal voice, he will simply deal with the presidency of the States and they will call for the Attorney General.

I have not had enough experience, I think, to say whether there is any difference in that when one is considering constitutional matters, but I would expect to advise the States on constitutional issues within a debate in the Assembly. I suppose the Bailiff might turn around to me and say, "Mr Attorney, is there a constitutional issue here?" or something of that nature but he hasn't done that yet. In theory it's possible. That's not to say the Attorney doesn't have, in my view, an enormously important role outside of the States in constitutional matters but within I don't think he functions as more than a speaker.

**LORD CARSWELL:** The Bailiff, do you mean?

**MR LE COCQ:** The Bailiff, yes.

**LORD CARSWELL:** Some of the contributors have raised the issue as to whether it is appropriate that the Law Officers should be appointed and thereby become ex officio Members of the States rather than elected. Do you think there is substance in that concern or is it unworkable? What do you think yourself?

**MR LE COCQ:** I don't have any experience outside of this jurisdiction as to how things work, so I don't want to be seen to make a comment on something that works perfectly well, for example, in the United Kingdom, if it does, or anything like that. Should they be elected? I'm not sure if you mean elected as a Member of the States and appointed from the membership of the States to become Attorney General or elected by universal suffrage as Attorney General, for example. It might sound arrogant to say so but I'm not sure the electorate is best placed to choose a Law Officer in any way, shape or form.

**LORD CARSWELL:** Yes, I accept that, knowing exactly what you mean. It is not discreditable to anyone at all involved, but those who have the task of choosing an Attorney General ought to be those who can judge best what he brings to the job, what the candidates bring to the job and who is best fitted. That is not something that the citizen necessarily has, but there must be some - and this is how you have set it out in your submission - public input as well to satisfy the legitimate demands of democracy. There have to be compromises.

**MR LE COCQ:** I agree.

**LORD CARSWELL:** What there is is a sort of a compromise between somebody at the top saying, “Oh, we will have Mr X, I like him, I think he will be very good” or everybody chipping in and having a huge election.

**MR LE COCQ:** I entirely agree, which is why I rather go back to the system we’ve got, which is that there is an input from those who are elected. There’s an input from those who are appointed and those who are elected. I mean in each case the Bailiff’s Consultative Panel and the Jurats, and there is an input from those who are likely to know the individual by reputation or by direct experience and form a view as to their personal abilities and qualities. I think it is a role that is too important for it simply to be appointed as a finger out of the darkness and said, “You are the next one”. I agree that there should be a consultation and it should be a fairly broad consultation, but I believe that we have that broad consultation.

**LORD CARSWELL:** It would also be a little constitutionally difficult, if it is a Crown appointment, for it not to be made by the Crown on advice rather than by election.

**MR LE COCQ:** Yes, that must be the case. I think if you were to move it to an elected function, it must follow that it is no longer a Crown appointment, it seems to me. I don’t think that the appointment of a Law Officer in a jurisdiction such as this can be a political or should be a political matter.

**LORD CARSWELL:** This is, I think, a rather good example of what we were discussing this morning, that when you change one thing it tends to set up a whole chain of effects which you need to think about very carefully before you take a brick out of the constitutional wall.

**MR LE COCQ:** I could only respectfully say that I think that that is right. It is quite difficult, if

you say, "Well, the Attorney should be elected", then he can't be appointed by the Crown. He won't necessarily be the person best placed to have those guardianship roles in connection with the constitution. If elected, then how will he be, in a political sense within the States? For example, if he remains as a Member of the States and he is elected, he will have a larger democratic mandate than anyone other than the 12 senators because he will be elected on an Island-wide basis. Now, it seems to me that that creates a problem not necessarily of independence but very possibly of undue influence - not undue in the technical sense but unfortunate potential for influence.

**LORD CARSWELL:** Because it has been the subject of some concern in England recently that the Attorney General being the appointee of the governing party, and dismissible by the Prime Minister too, may be perceived to be readier to favour solutions in his or her advice which favour that political party. Without political parties, that is reduced here. There is a suggestion, which I only repeat not because I think it is fair but because it has been made, that the Law Officers may feel more disposed to the side of the governing body here at the Council of Ministers than to others. I just throw that out for you to offer any comment if you think fit.

**MR LE COCQ:** All I can speak to is my experience and my experience is that that is not the case. But I can understand why the perception could, in certain circumstances, be there. I do sit by invitation around the Council of Ministers table for the purpose of offering legal advice, although I don't by any sense attend all of the meetings of the Council of Ministers; I will choose those things where I think it's useful for me to be there in terms of legal advice.

But perhaps more to the point is that people think that a Law Officer might favour the "powers that be". Can I suggest that one reason that that perception might, but it would be a wrong

perception, come into existence is this: quite often laws and propositions are proposed by people in ministerial office. In the process of settling the policy and drafting the particular law, they will have taken legal advice from the Law Officers' Department. It would be surprising if the Law Officer's advice would be different on the floor of the Assembly than it had been when that legal advice was being given during the course of the preparation of a piece of legislation. So it may sound like the Law Officer is simply saying, "This legislation is fine" but that is a view the Law Officer will have formed independently during the process of the preparation of the legislation. I suppose that could -- and I'm stretching to work out why people express that view-- but I suppose that might be a reason why they would. In contrast, it's quite often the case that people who are not Ministers or members of the Council of Ministers, when they bring propositions, they won't necessarily seek the advice of the Law Officers in advance and therefore they are perhaps slightly more likely to attract an adverse legal point when the matter falls to be debated. That doesn't mean that they can't ask for our advice, it just means that quite often we simply don't get asked for it.

**LORD CARSWELL:** The Law Officers will give advice as a matter of routine on Convention compliance, is that so?

**MR LE COCQ:** Yes, we will give advice on Convention compliance relating to all items of law that are put to us from the Council of Ministers, because there is a statutory requirement that there is a declaration of Convention compliance within each --

**LORD CARSWELL:** Yes, and when the Minister makes that, it is on the advice of the Law Officers?

**MR LE COCQ:** In my experience, that is invariably the case.

**LORD CARSWELL:** When the Attorney General advises the Crown on assent to legislation, on the legitimacy of legislation, is that one of the major factors that comes into the advice?

**MR LE COCQ:** Yes. In any letter that we send, when a law is passed by the States there is what's called a Privy Council report that the Law Officers prepare. It's actually prepared by someone who is extremely good at doing those things but within the Law Officers' Department, and it's signed, provided both are in the office, by both the Attorney General and the Solicitor General. It explains the basic purposes of the law and it explains what issues might be needed to be explained in order to have those receiving them in the United Kingdom understand what's going on, in other words peculiar issues of Jersey law on which the piece of legislation might touch. But it also indicates whether, in the view of the Law Officers, the law is Convention compliant or it otherwise impinges upon the international obligations of the United Kingdom. We have to be satisfied about that and we have to, in my view, be in a position to tell the States during the course of debate if there is a problem in that area, otherwise you'll end up in the unfortunate situation, which I understand to have existed prior to the 1950s, where the States would pass legislation, the Law Officers' would give it a disadvantageous report or it would come back redrafted with lots of questions from the Privy Council and would then have to go before the States for further debate.

**LORD CARSWELL:** This is one of the issues that the Justice Committee, the Select Committee of the House of Commons raised, because they, understandably, do not want the United Kingdom dragged off to Strasbourg if the Convention compliance is not done properly. But it is carefully looked at by you and your colleagues?

**MR LE COCQ:** Yes, every piece of legislation in respect of which we would make a Privy

Council report, if it had come from the Minister, would have a full human rights audit prior to being lodged, and that's what gives the Minister the ability to say, "Yes, this is Convention compliant".

**MR CRILL:** Do I get the impression that you would, effectively, prefer to sign off on every proposed piece of legislation, whatever its source? You were saying that some of the private Members' propositions are perhaps subject to comment from you in the house, whereas Ministers' draft legislation has already been vetted.

**MR LE COCQ:** Generally speaking, I think, when a private member - if I can call non-ministerial States members that - wishes a piece of legislation to be enacted, they will create a proposition which asks the Minister to bring forward the legislation, so in fact legislation is ultimately ministerial. But when private members bring propositions of a different kind or propose changes to legislation by way of an amendment, then we are not always asked to give that kind of advice, and I think it would be useful if we could do so.

**MR CRILL:** Would that create a logjam in your Department or for the States process?

**MR LE COCQ:** You will see that although I have done it in a throwaway paragraph, perhaps, there is an issue relating to the resources in the Law Officers' Department, without doubt. There is an issue which our restructuring has been intended to cure, which it hasn't yet for reasons purely of the logistical fact that we haven't had two Law Officers for quite a while. There's also the question of having enough lawyers to do the job. It's not so much the breadth of our responsibilities that troubles me, it's having the resources to discharge them in a timely and sufficient manner.

**MRS BACKHURST:** In a sense what I think I am understanding is that you sit in the States and questions on legal matters can be posed to you or you might interpose where there is something. Then when the law is coming almost into formation - it has not quite been drafted yet but it has been thought out - you give advice then as well. You are kind of a safety net before it goes to the drafting or going up to Privy Council. If there was not this position at all and the States decided to seek independent legal advice, they would not have somebody, as it were, on standby all the times checking everything. They would have to go out themselves and say, "We think we ought to do this" whereas in fact you are doing it in any case. Is that my understanding?

**MR LE COCQ:** Yes, I think that is right. I think there are a number of problems with seeking independent legal advice and I think there are times where it is certainly a good thing to do. The problem with independent legal advice is -- there are a number of them. Firstly, who do you have on call if an issue comes up relating to that piece of legislation? Is the Law Officer to have sat there and read it against the off chance, without any prior involvement in the legislation, that there might be an issue and if so consider what that issue might be? Ideally, even if I haven't personally studied every piece of law before it is lodged, my Department will have done so, will have advised on it, at least from a human rights and sometimes other perspectives, but mostly from a human rights perspective. I will then have the file which I will read and which I'll prepare for when I go down to the States so I know what the issues may or may not be and a sense as to what questions might arise.

If you were to get independent advice then there is a risk that you would have, over a period, inconsistent advice. The thing about having it from one source is that it will be, right or wrong, at least consistent. I think that's important because I think over a period inconsistencies in approach can cause very large legislative problems and gulfs as you go

forward.

**MR STRANG:** It has been raised with us this morning that the reasons for the advice are not available, i.e. that it is just a broad statement thing that the law complies with human rights or whatever. Is there any reason why those reasons should not be available?

**MR LE COCQ:** I think there's no particular reason why I cannot be asked any question relating to human rights or indeed anything else relating to a new piece of legislation whilst I am in the Assembly. There is, of course, the issue - and I know it can be a contentious issue- of legal professional privilege relating to advice. Advice given in connection with new legislation is advice given to the minister who is a corporation sole under our 2005 law and therefore, as a matter of structure, is entitled to have that advice or the confidentiality of that advice respected. I think it would be almost inconceivable, though, that a Minister would give an Article 16 human rights law statement saying, "This is convention compliant", having been advised by the Law Officers that it was not. He would do so at his peril because I would stand up in the States in those circumstances and say, "We note there is a certificate but it isn't compliant, in our view".

**LORD CARSWELL:** And you would have to show a report to the Privy Council.

**MR LE COCQ:** Indeed, yes, I would have to report to the Privy Council.

**LORD CARSWELL:** May I move a little bit down your functions? Criminal justice policy, is this part of your responsibility or do you take a hand in it?

**MR LE COCQ:** It's certainly not something for which I'm solely responsible or, if I am, it has

not been explained to me that I am!

**LORD CARSWELL:** Is this Home Affairs?

**MR LE COCQ:** I would have said Home Affairs is responsible but it's one of those areas that clearly because we have a great deal of experience at the coalface and any system must be made to work, we would have an enormous input in areas of criminal justice policy. We would often see where things might be going wrong or there may be tensions or stresses within the system which need to be addressed but that's something that I would be inclined to raise with the Minister for Home Affairs and his Department. There could be, I suppose, areas of ... I'm trying to characterise it but I suppose I'm really saying that there could be areas where I would be comfortable that provided there was no ministerial objection, I would move ahead and seek to have a piece of legislation brought in.

**LORD CARSWELL:** To take a not so hypothetical example, some jurisdictions have brought in pretty well mandatory sentencing guidelines. There are those who say who if there had been wider consultation they would have been told that that would have a lot of problems, as has exactly turned out to be. Would you expect to be consulted before Home Affairs decided - if they so decided - that that should be followed here?

**MR LE COCQ:** I would expect to be consulted. I would be very surprised if I wasn't, because I'm in the best place, or rather my Department is best placed, to say what the practical effects of those kinds of things would be. When, for example, we introduced guideline cases relating to sentencing for drugs prosecutions, that was a matter done by my predecessor but one, the current Bailiff when he was Attorney General. He took the application to the courts in that case, because they were judge-made guidelines, and

introduced a fairly clear set of policies relating to how the commercial --

**LORD CARSWELL:** Was it done as part of a judgment, as has been done in London?

**MR LE COCQ:** It was done as part of a five-man Court of Appeal. It was convened, he made submissions, I think there was an amicus curiae but certainly it was done in the context of an actual case and guidelines were handed down by the court. Now, I have to say I don't know the extent to which he consulted outside of his own advice when making that application, because generally sentencing is a matter that the Attorney General takes particular responsibility for and ensures consistency. But I'm sure if there were a political will to change sentencing policy in any particular area, then that's something on which I would very much expect to be consulted and I would be surprised were I not.

**LORD CARSWELL:** Not only by Home Affairs but, just coming back to your actual example, would it be advantageous in practice if the Royal Court actually made sure that the Attorney's views were known, either through a Crown Advocate in the particular case or by some other mechanism before there was a radical change in sentencing policy?

**MR LE COCQ:** If the change was to be judge implemented, then there is no way that the Attorney General couldn't be informed and couldn't have a say, simply because sentencing is always done by the moving of conclusions by or on behalf of the Attorney General.

**LORD CARSWELL:** Can you fill me in on that a little bit? It is a slightly unfamiliar procedure.

**MR LE COCQ:** Certainly. For any criminal matter that falls to be sentenced before the Royal

Court, it's adjourned to a sentencing date. The prosecution advocate will invariably be - there is no other mechanism - a Crown Advocate from either private practice or from within the Attorney General's chambers. He will, in preparing for sentencing, come in for a conclusions conference with the Attorney General or, in my absence, the Solicitor General or, in both of our absences, the Director Criminal, and will discuss with us the conclusions which he proposes to move. We will have read the file in advance, hopefully, otherwise he'll have to give us a very quick briefing as he sits in front of us, and we will decide between us at that point. Or perhaps I'll ask for more information but by and large we will decide then whether I agree with the conclusions for which the Crown Advocate is proposing to move. That's the invariable practice.

**LORD CARSWELL:** Then when it goes into court what does the Crown Advocate do at the sentencing time? This is the part that departs a little from what I am accustomed to.

**MR LE COCQ:** The part that you are unfamiliar with, yes. Traditionally in this Island the Attorney General has always moved conclusions. In part, I suppose, it came from the fact that many, many, many years ago the Bailiff didn't have to be legally qualified and nor did the Jurats.

**LORD CARSWELL:** Is the Crown Advocate actually proposing the sentence?

**MR LE COCQ:** Yes.

**LORD CARSWELL:** Yes, that is the interesting part.

**MR LE COCQ:** Yes, he moves the conclusions. He will file a document, in two parts. The

first will be the statement of facts which will be agreed with the defence or the result of either a trial or a Newton hearing on the sentencing. Then there will be the conclusions with which he will bring any relevant authorities or example cases and factors for or against any particular sentence. He will move the conclusions which he, in consultation with the Attorney General or the Director of the Criminal Division believes are the correct conclusions. For example, it's not like a civil case, if I can call it that, where you, for one party, might plead your case as high as you can in the knowledge that there may be some middle ground. He will move the conclusions that he believes are --

**LORD CARSWELL:** The Minister of Justice.

**MR LE COCQ:** Yes, absolutely so, and he will move those conclusions. The Court is entirely free to depart from them.

**LORD CARSWELL:** Then the defence counsel can then say, "The emphasis is wrong here, because and because and because".

**MR LE COCQ:** Exactly, "The starting point is wrong, the finishing point, not sufficient allowances are made, there is this authority which has not been taken into account", do all the mitigating arguments both as to law and fact that occur to him to do so, and then the Court will make a decision.

**LORD CARSWELL:** That is very interesting, thank you. I think your court is very well served that way.

**MR LE COCQ:** When I was a Crown Advocate it was certainly a very interesting and useful

exercise to be doing. I may have misled you in thinking that the Attorney General is the one primarily involved in agreeing conclusions. In reality, for well-travelled sentencing paths, quite often the Director Criminal will be the first port of call but on anything which is the slightest bit sensitive - sentencing of young offenders for very serious offences, for example, where there are unique circumstances, where it is a more of a policy decision to be taken - then the Attorney General will be the person who will take that decision.

**LORD CARSWELL:** Could we move, then, to prosecuting function? You have already made it clear that through the machinery that you have and the staffing, that is done on your behalf by Crown Advocates. Further down in the Magistrate's Court, the Centeniers have considerable say in prosecuting.

**MR LE COCQ:** Yes.

**LORD CARSWELL:** Can you assist me on the extent to which there is liaison with the Attorney General's department or supervision, so that if there was a decision with which you did not agree you would pick it up and be able to review it?

**MR LE COCQ:** Yes. Could I start by saying that my predecessor will be much better placed to answer that kind of question than I will because he's had ten years of making it work in practice? But the position is that Centeniers are entitled to make charging decisions to the Magistrate's Court. They are subject to the ultimate authority of the Attorney General either to require them to charge if they elect not to or to discontinue in the event that the Attorney General doesn't think that there should have been a charge. My understanding of the current system - and it's an imperfect understanding, which is why I say please do ask my predecessor - is that there is now quite regular liaison between the Centeniers and the Legal

Advisors who are located at police headquarters but who are part of the Attorney General's department.

**MR CRILL:** Do you mean directly to Centeniers, not through the Association or whatever?

**MR LE COCQ:** Yes, I believe so. No, not through the association. There may be one or two Centeniers who effectively function as liaison but that is, I think, an ad hoc arrangement rather than a formal one. Quite often now, cases will not be prosecuted by the Centenier himself but will be done much more frequently, if not exclusively, by a Legal Advisor down at the -- situated down at police headquarters. The Centeniers I believe frequently, if there's any doubt in their mind, will ask for advice as to whether this is something that they should charge or is it being charged in the right way. So there's quite often a high measure of co-operation at that stage of the process.

There is a default position where if there is anything of particular sensitivity the Legal Advisors will refer it up to the law officers.

**MR CRILL:** But that would be very unusual in any matter which is going to remain at the Magistrate's Court?

**MR LE COCQ:** Yes. Not unheard of. I mean, in the time that I've been Attorney General, the possibility of the prosecution of, I suppose -- well, perhaps not when I've been Attorney General, but the kind of thing that one might think of as sensitive are those where you would wish to make sure people were insulated from any kind of pressure in taking the decision. So, prosecutions relating to politicians, to members of the legal profession, people of that in a small island like this where it is particular sensitive, quite often those kinds of decision might

well be automatically sent up to the Attorney General on the basis that he will be in a position to insulate anyone from the pressure of making that decision.

**LORD CARSWELL:** That is entirely understandable. Are there various subjects of prosecution, various offences, to which you have to give your personal consent, as there are certainly in the UK?

**MR LE COCQ:** There are, yes. I mean, there are a number. I have to give my consent to prosecutions for certain sexual offences, I think, for pornographic imagery, that kind of thing, and under the torture law. There is a tranche, I think, of statutes under which my consent is needed, but I am afraid I don't have that list at my fingertips, but, yes, there are.

**LORD CARSWELL:** I am not really concerned with that, but there is a tranche of legislation. In the ordinary way, does that come up through a file to you with the recommendation of one of your officers who has looked at it and directed you to the consideration in the usual administrative fashion?

**MR LE COCQ:** Indeed, in fact I don't have a great deal of experience as Attorney General in doing this, but those one or two that have come to me in the last 3½ months have normally had, I think, 2 layers of advice on them. There has been the person from the Legal Advisors at the police headquarters who has made a recommendation which has itself been reviewed by the Director Criminal before it has come to me.

**LORD CARSWELL:** Yes, that is what one would expect, really. Stopping prosecutions, the Attorney General has the power to do that. Is it exercised rarely, ever, frequently?

**MR LE COCQ:** I can't remember it being exercised in the two years that I've been a Law Officer. That's not to say it hasn't but, if it has, it's passed me by, stopping prosecutions that centeniers have started. There have been times when I have authorised the withdrawal of prosecutions if it's appeared, after further inquiry, that the evidentiary test isn't passed, for example. The Crown Advocate has come and said, "We thought it was A, B and C. It turns out we've got this problem with this witness and I can no longer, realistically, have the prospect of securing a conviction". Well, if I'm satisfied then I will authorise the withdrawal of that prosecution.

**LORD CARSWELL:** There is machinery for that, is there, in your system?

**MR LE COCQ:** There is machinery. It's not formal machinery. The Crown Advocate will definitely come to me. If they're an external Crown Advocate they might come directly to me, if they are internal they may come through the Director Criminal but I would normally on anything that's of particular significance have a conference and possibly involve the investigating officers or something of that nature before deciding to withdraw.

**LORD CARSWELL:** Then sometimes one gets - I hope not very often in Jersey but in London it does occur - that a prosecution is well through and then a question of disclosure arises and the exposure of an informant, at which stage the Attorney has to make a decision, or somebody has, and it would go up quite a long way as a rule, and the decision is taken to present no further evidence. You would expect that to come up to you?

**MR LE COCQ:** I would expect it to come up to me. I have to say it hasn't in the short time I've been Attorney but I'm aware that such decisions have troubled Attorneys in the past and they've had to make those kinds of judgement calls.

**LORD CARSWELL:** But it is definitely part of your responsibility, and one would expect it to be.

**MR LE COCQ:** Absolutely. I would not expect any discontinuance of any serious trial - I use the word "serious" with care - but anything that was related to a serious crime to be withdrawn on those kinds of grounds without reference to me.

**LORD CARSWELL:** It is a serious decision to take.

**MR LE COCQ:** It is.

**LORD CARSWELL:** One contributor raised an issue, and I am not sure just what there is in it, that there may be some conflict in your position as titular head of the Honorary Police and your position as Attorney General in respect of human rights. I am not sure if you have thought about this or if there is something in it. I have not been able to think quite what it would be.

**MR LE COCQ:** No, I honestly can't. I mean, I've obviously heard the idea that the Attorney General shouldn't be the titular head of the Honorary Police. There is a meaning in the word titular and the way that it's used.

**LORD CARSWELL:** We are going to come back to that but, just on the question of conflict, do you see any -- apart from the fact that if you had to prosecute a member of the Honorary Police, you would get someone else to deal with it.

**MR LE COCQ:** Yes. Well, I wouldn't, as a matter of practice, personally prosecute anybody in terms of take them to court, because I just don't have the time to prepare a case of that nature. In terms of taking a decision to prosecute a member of the Honorary Police, I wouldn't have any difficulty doing so, I don't think. I have a disciplinary role in connection with the Honorary Police that is provided for under the various statutes governing complaints and discipline. I have one or two other roles, I think, in terms of advising and in terms of giving direction for the conduct of Parish Hall Inquiries that come as a result of being the prosecutor. But certainly I have, in the time that I've been a Law Officer, seen circumstances in which members of the Honorary Police have been suspended pending criminal investigation by the Law Officer and I don't think a Law Officer would have any difficulty taking a decision to prosecute if justified in other circumstances.

I think in terms of a decision to prosecute, we're a small island and it must be the case that I will know a higher percentage of the population than would be the case for an Attorney General in a much, much larger jurisdiction. That just, I think, comes with the territory, but we have well-trodden, if informal, mechanisms for dealing with those kinds of issues such as handing it on to the other Law Officer and taking external advice, although I think, as a matter of law, we're not in a position to duck the decision at least being taken at the level of the Law Officer.

**LORD CARSWELL:** Does the situation arise from time to time where it is thought desirable to take advice on a prosecution from outside?

**MR LE COCQ:** Yes. We would certainly do it if there, I think, was a specialist area of law that we were considering, that would certainly be one. It might be, to pluck one out of the head perhaps, a prosecution under the Data Protection Law might be something on which

one would choose to take external advice, or it might not, depending upon precisely what was being considered. It's not at all unusual for the Attorney to place matters in the hands of external legal advisors. Perhaps one of the key examples and, again, my predecessor would be much better placed to explain this, and it's contained within the papers I've just handed to you because it was an answer given by him in the States but in connection with the Historic Child Abuse Inquiry. For a number of reasons, amongst which was the need for a consistency of approach and an understanding of the whole range of evidence on what was a huge investigation, the Attorney placed the prosecution decisions in the hands of an external local firm who specialised in criminal work, with access to advice from London counsel and on the assumption, or on the basis, rather, that he would only be consulted if the view had been taken that there was an evidentiary test that had been passed but there were public interest considerations for not bringing a prosecution, the Attorney of the day's position being that it would be highly unlikely that there would ever be a public interest in not prosecuting a charge of that nature....., if there was a thought that there were public interest considerations that might give rise to that kind of decision, he would expect to be consulted. But, if the evidentiary test was passed and there were no public interest considerations to the mind of the person reviewing the case at that point, he had left the authority to take the decision to prosecute with that individual.

**LORD CARSWELL:** It is certainly not uncommon in other jurisdictions for an Attorney General or DPP to do exactly that and it is quite a standard thing. It happens, that is really all I am concerned about.

**MR LE COCQ:** Yes.

**LORD CARSWELL:** Just to come back to this question of the need for a DPP. To put it in blunt terms, can your Department cope without one? Now that you have got the machinery which you have, do you see a practical need for one?

**MR LE COCQ:** No, I don't, I see a practical need for more resources. I see very much a practical need for more resources within the Criminal Division and for more resources within the Law Officers' Department generally. Undoubtedly, that's the case, but I don't see a practical need for a DPP, per se.

**LORD CARSWELL:** Is there any conceptual need for one that has occurred to you in considering all this?

**MR LE COCQ:** Of course, I understand the arguments about the appearance of being separate and not connected with government and all of those kinds of things so, of course, those conceptual arguments have occurred to me. Hopefully, within my statement I have set out why I think that that is not a real advantage, or necessarily a real problem within this jurisdiction.

But as I think my submissions hopefully make clear, more than on balance, I am satisfied that there will be no material advantage to having someone separate as a DPP. The reasons that I have come up with, I think, are set out at paragraph 65 and thereafter in my submission.

Perhaps I might add, I suppose, to one of them, which is that it seems to me that if you appoint a director of public prosecutions you need someone who is a very able Jersey lawyer. I do not think you can appoint someone from outside of the Island, firstly, because they will not have an instinctive feel of what the Jersey public interest might be and there are

obvious cases in which there is a Jersey public interest. There is a public interest in prosecuting a Jersey money launderer in Jersey as opposed to another jurisdiction, for example, which may not be readily apparent to someone who is not steeped in the circumstances of being a Jersey person and Jersey-qualified. They would also, in the role of DPP, need to give directions to Jersey advocates and to people who are steeped in Jersey law and I think that would be quite difficult for someone who was not a Jersey advocate to do.

But I think, more than that, there is the problem relating to how they are appointed: if they were not to be appointed by the Crown, if they were to be appointed from within the Island, there is always the problem of independence. If they were to be appointed by the Crown and they were not a Jersey advocate, you would effectively have the possibility of someone from outside of Jersey to bring somebody into Jersey who had no connection with the Island, who may be a very good lawyer and may be perfectly suitable for the job in other respects, who effectively was to take a large amount of the autonomy associated with being a separate jurisdiction out of the hands of Islanders. I have got that additional conceptual problem with it but that is only one aspect and the others, hopefully, I have set out in the submission.

**MR CRILL:** You outsource some of your prosecution work.

**MR LE COCQ:** Quite a lot, in fact, yes.

**MR CRILL:** Is there an argument for outsourcing more of it?

**MR LE COCQ:** There is an argument for outsourcing all of it; the argument against outsourcing all of it is expense.

**MR CRILL:** Purely.

**MR LE COCQ:** Not solely purely but very significantly. I have not got the figures to hand but, undoubtedly, the advantage to outsourcing some is that there are certain cases where it is useful to have an external rather than independent view, but an external view, where it is useful to be able to put particular groups of cases and where it is useful to, effectively, broaden the experience of those people out in the private sector to deal with prosecution-type work. There are a number of reasons, structurally and otherwise, for going outside from time to time, and certainly we would not be in a position, as currently resourced, to deal with all criminal matters internally; there just are not enough Crown Advocates to do so. But it is an extremely expensive exercise. I cannot give you the comparative figures, I do not have them and I would very happily provide them.

**LORD CARSWELL:** It is very well known that is it an economy for in-house lawyers, DPP staff, to conduct the cases.

**MR LE COCQ:** Yes. It is exactly that and I would say even more so in Jersey. There is a Crown Advocate's rate which is significantly under the full commercial charge-out rate for a number of lawyers.

**LORD CARSWELL:** Tell me something new.

**MR LE COCQ:** But, even so, that is still very, very significantly more expensive than paying to have another person within the walls of the Law Officers' Department capable of

conducting prosecution. But there may be recruitment issues where that is concerned as well.

**MR CRILL:** On the question of resources, you are saying that you would like additional resources generally. Who sets and approves your budget?

**MR LE COCQ:** We are part of the budgetary process of the States in the normal way. We are a Non-Ministerial Department which means that our budget is subsumed within the responsibility of the Chief Minister's Department. There is a very detailed process that one goes through, which I am afraid I simply do not have at my fingertips to tell you. If it would help, I can certainly provide you with a note as to how the budget is worked out; whether it will continue to be worked out in precisely this way, I do not know because, as you know, we have a Comprehensive Spending Review coming along and a radical rethink, I think, of how the finances in the public sector work, in any event, but I would have to give you a separate note if that was thought to be helpful.

**MR STRANG:** As far as you are aware, is your budget separate from the Bailiff's budget?

**MR LE COCQ:** Yes. They are all Non-Ministerial Departments, but they are not subsumed into one budget. There is a common area of funding which relates to court and case costs, which is a separate fund that the various legal services have a measure of access to but, generally, our budget is separate.

**MRS BACKHURST:** Could I ask you who assesses the performance of the Crown Officers?

**MR LE COCQ:** There is no formal mechanism for assessing the performance of the Crown Officers, that is absolutely right, in the same way that there is no formal mechanism, that I am aware, for assessing the performance of either the Bailiff or any of the Commissioners or any of the other judges. In a sense, a lot of what we do is publicly visible; that is a first form, I suppose, of assessment. We are accountable to the States on a whole raft of areas, that will be another form, I suppose, of assessment. But there is no formal method. I think, if there were a significant problem with a Crown Officer, it would be a matter to be resolved between the insular authorities and the Crown in the United Kingdom.

**MRS BACKHURST:** When you say the Crown, excuse me, that would be the Ministry of Justice, is it?

**MR LE COCQ:** At the moment, it is the Ministry of Justice, not qua department of Government in the United Kingdom, but because the Secretary provides the Privy Council role, I think, who deals -- and, yes, it is the Department of Justice. It has been, before that, the Home Office and the Department of Constitutional Affairs, I think; wherever it is convenient to slot us.

**LORD CARSWELL:** You have been round the houses a bit.

**MR LE COCQ:** We have, yes.

**LORD CARSWELL:** That is the nuclear option that, if things really, really went astray, the Crown would come in through the Ministry of Justice.

**MR LE COCQ:** I think it is the Bailiff who has the primary responsibility for assuring the administration of justice within the Island and, undoubtedly, if the Attorney General or Solicitor General were getting it wrong in a material sense the Bailiff would become involved. Other than the unfortunate case that applied to our Deputy Bailiff of some many years ago, I am not aware that that has ever happened in the past.

**MRS BACKHURST:** Could it become a more formal process, do you think? Would that help or not?

**MR LE COCQ:** I do not have any difficulty with the idea of a formal process of review in some manner. I do think, though, it is important to make sure that that does not impinge upon the independence of the Law Officers. One of the great strengths is that we are structurally independent, we have no political accountability, which means that when we take the decisions that we do to prosecute (and of course, they are decisions, as particularly local people will be all too aware, fall into the public eye, and as a subject of public comment and criticism) we do so, at least, without any concern that there may be a political consequence about doing so.

I think for an island, a small island, with a limited number of people and where people have a lot of connections and interconnectivity between them, having a Crown Officer who is absolutely structurally independent from any of the other branches of government, is hugely important and an important guarantee. But I go back, if I may if you do not mind me just talking on a peripheral bit, as it were, to the first sort of substantive paragraph in my submission. Really, it is independence, it is a very, very strong tradition that we are independent and, really, the best guarantee of that is to appoint to the posts people who have clear integrity and independence of mind.

**LORD CARSWELL:** Could we perhaps move on to the issue of provision of legal advice?

**MR STRANG:** Yes. We have touched on this a bit earlier, obviously, you are giving legal advice to a number of different parties, obviously Ministers and the Executive, the States, the Crown, I think the Privileges and Procedures Committee probably, the Comité des Chefs de Police and also Scrutiny Panels. Particularly in relation to Scrutiny Panels (I think we have also touched on that) there is the slight problem of whether your advice should be available to Scrutiny Panels or whether they should take independent advice or whether there is a conflict in you advising Scrutiny and, say, the Minister.

**MR LE COCQ:** I think it is important not to conflate, if I can respectfully say so, the question of whether our legal advice to government should be available to Scrutiny panels, with whether we are capable of advising both government and Scrutiny panels. I know there is an issue about the former; that was subject to a very, I think, fairly strongly-argued debate in March 2008 as a result of which the Code of Practice for Scrutiny panels and the Public Accounts Committee was brought into force, and I put a copy of that Code into the papers. I think to understand those issues and, in a sense, the accessibility to legal advice, it is quite useful to read the transcript.

I park that as an issue, if I may, and come on to talk about whether we can advise Scrutiny. I suppose, I start from the position, which I am afraid I have said more than once, we are independent, politically independent; the legal advice we give is independent advice. We advise on the questions that we are asked, and sometimes on the questions that we are not asked, and we give that advice in accordance with what we believe the law to be and how it applies in the circumstances. There was absolutely no problem conceptually with giving that

advice both to government and to Scrutiny. It could well be, of course, that both will come from a slightly different political perspective, sometimes a very different political perspective, I would expect and, in those circumstances, we might have to make a judgement call as to whether the same person can reasonably advise Scrutiny and government or whether it is just too difficult an issue to give entirely clear advice. We certainly would not hesitate saying to Scrutiny, "No, you should seek independent advice" and I have no objection to Scrutiny seeking independent advice, which is entirely within the Code of Practice. Although, for hopefully obvious reasons, we would like to see that advice because otherwise it would be rather embarrassing if Scrutiny stood up and said, "Well, the law is A" and the Law Officer in the States said, "No, it is not, it is B". That would cause a potential difficulty which the States is not really equipped to resolve. But there is no reason why we cannot advise both; it is a matter of management, though. I do not think there is any reason that we have to advise both, but our tradition is of independent advice and the advice in the States should be the same as the advice to government and the advice to Scrutiny, in terms of legal advice.

**MR STRANG:** It has been suggested that maybe one private firm in practice, or something, should maybe advise Scrutiny so that they would have the sort of consistency. Would you see any merit in that as a sort of possibility?

**MR LE COCQ:** I would see no objection to it. I do not think it is necessity but I would not say that it is an impossible idea or that one could not have a separate system of advice for Scrutiny. I think one difficulty with that in practice, however, is when one comes to give advice on the floor of the States because the lawyer for Scrutiny would not have a voice whereas the Attorney General is the advisor to the States during debate, and if the Attorney General does not agree with the advice that is given, not only will he say so, but he has an absolute obligation to say so. In a sense, that is one of the reasons, to my mind, where it is

sensible that the Law Officers provide advice in all directions. But Scrutiny does, I say quite often, but only last week was going off to find its own legal advice and coming back and giving us the opportunity to comment on it and I have no objection to that at all, in principle; it seems to be a healthy thing to do.

**MR STRANG:** Yes. Slightly one-sided, though, because you are going to see the advice, or you say you should see the advice of the Scrutiny advisors, but they are not going to see your advice.

**MR LE COCQ:** Not necessarily. The Code of Practice provides that Scrutiny must consider whether or not to share with the Law Officers the advice they have received, they have no obligation to do so and they fully understand they have no obligation to do so. The reason that they should consider sharing it is to avoid potential embarrassment when advice is given on the floor of the Assembly, which would be unfortunate for States Members. But we certainly do not insist upon it, there is no rule that says they have to.

**LORD CARSWELL:** When you get a situation, or perhaps you do not get it, but if you get a situation where you have advised the Council of Ministers that answer X is the right way to do it and an independent firm has advised Scrutiny, "No, we do not agree with that, we think it is wrong, it should be Y", are there any means of resolving that, are there possible ways that the lawyers can resolve it between themselves?

**MR LE COCQ:** I have not had that experience but I do not see any reason why I would not be in a position to communicate with the lawyer who has offered advice and say, you know, "Well, have you considered this?" and they will say, "No, have you considered that?" and, if there is an issue then I could, I suppose, raise it with the Minister who we previously advised

and say, well, actually either, "We think that it is slightly different now and should be looked at in a slightly different way" or not, as the case may be. But, of course, to be able to do that depends upon us seeing, or at least knowing, what the advice given to Scrutiny is.

**LORD CARSWELL:** Speaking from litigation experience, one gets situations whereby the counsel are discussing a possible settlement and one says, "Well, you cannot do that because and because and because" and the other one says, "Well, I have come to a different view and I will tell you why". That is quite possible, without betraying confidential material, and it can very often bring parties much closer together if two intelligent, responsible lawyers are listening to each other.

**MR LE COCQ:** Yes. I am sorry, absolutely. I entirely agree with that and I do not have any difficulty at all with trying to seek a synthesised view.

**LORD CARSWELL:** There are two problems that have been niggling at me a bit because legal advice is not, by any means, just saying what the law is; it is applying the law as you see it to the set of facts as you understand them and trying to predict what conclusion a court might reach and what direction the litigant might take in public affairs. Leave the court bit out of it, perhaps, but what will be the best answer to advise your public client to do? That necessarily contains more than mere recitation of what the law is. It can be quite delicate policy advice if you are doing your job as effectively as you can.

**MR LE COCQ:** Yes.

**LORD CARSWELL:** The other part is it may look, when you start out on some transaction or some set of advices, if there is no problem between Ministers and Scrutiny and that may turn

into a problem half way, in which case, you are rather messed up because you cannot act for both, you cannot act for either if you are left in that position. Is this a real problem in practice?

**MR LE COCQ:** I have to say, I have never encountered it as a problem. I can certainly recall one time as Solicitor General, considering a particular piece of legislation. I had a letter from a Scrutiny Panel saying, "A submission has been made by an external lawyer" (because it was part of a consultation process; they did not actually seek legal advice, but the submission was made) "who has raised two problems with this proposed piece of legislation, what do you think?" and I went back to Scrutiny and indicated that I thought there was significant merit in one of the points that had been made and, in my view, no merit in the other. Of course, that formed part of the Scrutiny report on the potential piece of legislation. I did inform myself as to what legal advice had been given on related issues before out of the Department and that is as far as I went, and that is a practical way in which we dealt with it. But I have never experienced a situation of the kind that you have described.

**LORD CARSWELL:** I can think of writing opinions as counsel, deliberately with the knowledge and intention that they would be available to both sides, and you write them in those terms, that you are not putting it into terms that your client would not want revealed to the other side. Equally, one can think of opinions that they would be horrified if the other side saw it. You cannot really have a blanket rule, can you, that opinions must be made available; it will depend?

**MR LE COCQ:** Yes. Absolutely, yes. It will depend and there are a number of factors which I think support the current system where, as a general rule, advice is not disclosed, given to government, to Scrutiny or vice versa. It does work the other way: if Scrutiny's advice is not

disclosed to government either, we treat either sets of advice that we give with confidentiality as against the other.

I think the moment you routinely disclose advice then that has a whole knock-on effect about the preparedness of individuals to take advice. If somebody has a problem, they have messed up in some manner and they come to you and they say, "Legally, what do I do?" they are less likely to be completely frank, I would guess, if they know that piece of advice is going to be available much more broadly than otherwise. I would rather have people come with problems that we can solve rather than not come at all when it is too late and there is a significant insoluble problem, at the end of the day.

I think the routine passing of advice is not a good thing but the Code of Practice certainly supports the view that there can be times when the public interest does require that advice is disclosed and, certainly at the moment, I am going through a process of disclosing, in what I think to be an appropriate case, the advice given to government at the time to a person inquiring into it.

**LORD CARSWELL:** From the experience you have had with working with the Code of Practice, do you feel that it has operated satisfactorily?

**MR LE COCQ:** I'm aware of no problems but I have to say I don't think we're asked by Scrutiny for advice very often and I'm not sure that's a good thing; I think it would probably be better if Scrutiny did ask us more often for advice. I have to say, I haven't made inquiry within my own Department to know if that sense that I've got is correct or not, it may be inaccurate. But I don't remember seeing a great number of Scrutiny files.

**LORD CARSWELL:** In terms of good government, you do not want to have conflicting advice flying about if it is sensibly avoidable because it means that the States are not really placed in the position to know what they are being advised canonically. Yet, there are situations where it cannot be escaped, inherent in the relationship between the Council of Ministers and Scrutiny.

**MR LE COCQ:** That there will be different legal positions taken and advice. Yes. I think that's right but it is, of course, the case that the Attorney General is the advisor to the States and when the matter comes for debate, as things stand, it's the Attorney General who gives the legal advice and that, I think, is a fairly important reason why we should have a role in advice, where that advice is going to be mentioned within the chamber.

**LORD CARSWELL:** You would encourage Scrutiny to come to the Law Officers, except where it is clear that there is a problem by doing it.

**MR LE COCQ:** Yes. We would, hopefully, say, "No, don't come" in certain circumstances. But it was always anticipated, as I understand it, that Scrutiny would have a totally free hand to go and get independent advice if they wanted to, and that's always been the case.

**LORD CARSWELL:** But you do not want that to be their first port of call.

**MR LE COCQ:** No. I would rather, in most circumstances, they felt able to say, "Yes, we're happy to have the advice of the Law Officers' on this point". But I fully appreciate that there will be times when Scrutiny, quite reasonably, won't want to do that.

**LORD CARSWELL:** Yes. Thank you.

**MRS BACKHURST:** Can I just ask just, again, to get some clarification? The States, they have been involved over centuries, but when this ministerial government came in, you say you are the legal advisor to the States and yet the States now are not necessarily 53 members, they are now a Council of Ministers and a Scrutiny, and maybe some who do not fit into either, I do not know. Therefore, in a sense, you are the advisor to the government rather than to the States, which is what the AG would have been previously because, previously, all States Members were part of government. Is that correct or not?

**MR LE COCQ:** It's correct that previous States Members were part of government and it's correct that the Attorney General was advisor to the States in the sense that you're referring to it, which is all of the 53 members exercising their function as politicians. But when I said earlier I'm the advisor to the States, I mean I am the advisor to the States when it is sitting in the Assembly and I will give independent legal advice to all 53 members of the States during the course of that Assembly and I will give that, as I believe my predecessors have done, to the best of my ability.

The Law Officers' Department, and therefore me, also advise government and also advise Scrutiny and there are a number of States members who are part of neither government nor Scrutiny who fall into the general Assembly. There is the Privileges and Procedures Committee and a number of other organs of civic life in Jersey that we will advise. I don't see that as a difficulty and I don't think, in practice, it's proven to be a difficulty because of the independent nature of our appointment and the independent way that we are supposed to, and I believe do, give advice.

**MRS BACKHURST:** I suppose, what I can see is that those people who have been Members of the States for a considerable length of time have found that actually quite difficult to understand that they are no longer part of government, if they are either on Scrutiny or not on anything, if they are thinking, "But this is legal advice we are given to the States; I should be privy to all of that legal advice, whether I am on Scrutiny, nothing or on the ministerial bit". I think I am getting this idea because what has been suggested is that members of Scrutiny are upset that they cannot see the legal advice given to the Council of Ministers and they feel it is because they are not being trusted, that they would somehow spill the beans to the public and that confidential advice would filter out, somehow. They sort of said, "No, we should be able to see that advice, of course we will keep it confidential, that is not a problem" and I think maybe that is looking at it from the wrong angle, but I am not quite sure.

**MR LE COCQ:** I have not been a Law Officer at any time other than during ministerial government so my knowledge of how it has worked in the old committee system is not very sure. I am fairly satisfied, though, that I agree with you that those people who have been Members of the States prior to the move to ministerial government may not have understood the full consequence of the move to ministerial government. The States of Jersey Law 2005 creates the concept of the Minister, makes of them a corporation sole, and they therefore have an independent legal relationship with the States and with government.

Consequently, concepts of legal professional privilege arise which may not have arisen under the old committee system where everybody was simply a committee of a larger body which was the States. That is, I think, an inevitable consequence. There would still have been times, though, when Law Officer advice would not have been available to the States as a whole but that, I think, would have been more about questions of sensitivity and confidentiality by reason of the nature of the advice itself. An obvious example might be legal

advice given in connection with legal proceedings which should not be out in the public domain and available to 53 people to talk about and to have broadcast or on Hansard, at least until the relevant case is over.

**MR CRILL:** Can I just ask about the other, shall we say, conflict? The question which arises is in relation to the conflict as between your position as an advisor to the executive and the various departments and your position as prosecutor. Where, for example, there could be a health and safety matter or a data protection, or whatever other type of matter, where you are advising on the one hand and prosecuting on the other, how do you actually deal with that?

**MR LE COCQ:** The simple answer is, if there is a breach of the criminal law, we prosecute it. My predecessor has prosecuted the States Employment Board, I have prosecuted the States Employment Board which comprise, amongst others, the Chief Minister and the Deputy Chief Minister and the Chief Executive, I believe, in connection with health and safety at work. My predecessor, I believe, has started prosecutions against the Minister for Planning and Environment in connection with breaches of statutory duty or something of that nature.

My first point, I suppose, is that we do prosecute government and we have no difficulty with doing so. Structurally, I do not see it as at all an issue. Of course, it might theoretically be the case that I personally would have been involved in giving advice to a Minister and then the question that entirely touches upon that advice arises in the decision whether or not to prosecute. That is a theoretical case, I would imagine the possibility of it happening is extremely slight given the way we function and the structure, but it is at least a theoretical possibility.

In those circumstances, because I would be personally embarrassed, not embarrassed in my office but personally embarrassed in the same way as if it were someone that I knew really well who might be prosecuted, or a member of my family, I would hand that decision to the Solicitor General and it might be that that is precisely the kind of matter where, even though it might be a straightforward matter, we would seek external legal advice to resolve, either within the Island or outside of the Island, depending.

That could only be advice, the decision would still have to ultimately be taken by a law officer, but I think a Law Officer would place very high weight on independent advice to prosecute if that, indeed, is what the case is.

I accept there is always the theoretical possibility but I would perhaps go on to say that that would also be a theoretical possibility for the Director of Public Prosecutions because if, indeed, he was in Jersey for a protracted period, as he must be, or a Jersey lawyer, he will have met a lot of people who it is popular to refer to as “the establishment”; he might well know Ministers just socially. There could be any number of -- I am merely saying, in a small jurisdiction, you just have to be alert to conflicts.

**LORD CARSWELL:** You have just got to be alert to these things. The principle is clear enough and they are just dependent on their own good sense and integrity, really.

**MR LE COCQ:** Yes. If I can say, that is why I revert to the preface to my submissions; if this is all about integrity, you have to appoint people who can be relied upon to spot a conflict of interest. Because in a small island, your doctor will have a conflict of interest from time to time, so will a dentist, so will your lawyer and so will the judges.

**LORD CARSWELL:** Would it be a good idea to take a five-minute break? We have been going pretty hard at it for two hours now and we have not quite finished all the items we wanted to talk to you about.

**MR LE COCQ:** Certainly. I might ask for an indication as to when you are planning to finish. The reason I say so is that I might have foolishly booked a 5.30pm appointment and which needs to be in St Peter's; I would have to go from here to St Peter's.

**LORD CARSWELL:** I would be very disappointed if we imperilled that and I would hope we could finish within another half hour.

**MR LE COCQ:** Fine. Because if that were not to be the case then I would phone and see if I could change the arrangement, but --

**LORD CARSWELL:** I do not think we will put that into jeopardy.

**MR LE COCQ:** Thank you.

(Short Adjournment)

**LORD CARSWELL:** If we may just return shortly to the question of the headship of the Honorary Police. Mrs Backhurst, if you would like to ask about that?

**MRS BACKHURST:** Yes. In relationship to the Honorary Police, there are various elements of that relationship, it is not just the ones that are being -- and reading the history, I get the impression that sometimes it is not by default but, in a sense, some elements of it have been

that more parts of it have ended up with the AG than with anybody else. We were particularly interested to hear some of your comments on that, or to read them, and I wondered if you would like to expand a little bit more, particularly about this idea of this police authority being set up and therefore some of that function being passed over to that.

**MR LE COCQ:** Yes. I think that where I come from in terms of being titular ahead of the Honorary Police is that, firstly, that is absolutely not an operational function at all. There is no question that the Attorney General has any role in operational policing where the Honorary Police Force is concerned, he does not. That is dealt with entirely at the level of Chef de Police in the respective parishes. I would see my role as limited, and I do not know if I have been full enough in my description in the submission, in the way largely that I have said in it.

There are a number of functions which need to be discharged and, at the moment, they are discharged by the Attorney General: disciplinary functions, those kinds of things. There is no reason in my view, structurally, why they have to be discharged by the Attorney General; they could, as a matter of structure, be discharged by another appropriate body. I do not think there is any embarrassment in the Attorney General discharging them, in doing the job but, equally, I do not think there is anything hugely gained to the process by that being the case from the perspective of the proper administration of Island policing.

But because I do not think that there is a reason why the Attorney General should not do it, I think then one falls back as to whether or not it is important that someone else does and I think the views of the Honorary Police themselves are most important. If the Honorary Police are more comfortable with the Attorney General as their titular head then I would say that that would be a very strong reason not to change it because honorary policing is, of course, entirely a voluntary exercise; nobody has to join the Honorary Police Force. In a sense,

provided it is seen to be doing a good job (and, in my view, it does an exceptionally good job and fulfils a very important function in the Island) there should be an element of choice in voluntary service as to how that voluntary service is run, provided there is nothing inherently wrong with the way in which it is being run. It is being run at the moment with the Attorney General as its titular head. I am not advocating a change but I do not think, as a matter of structure, it is important that it is run by the Attorney General, other than the preference of the Honorary Police. I am entirely pleased to be titular head of the Honorary Police, I think it is a good thing.

**MRS BACKHURST:** Other than the prosecution element; that would be one you would wish to retain if --

**MR LE COCQ:** I do not think that I have control over the prosecution process in my capacity as titular head of the Honorary Police, I think I have the control of the prosecution process in my capacity as Attorney General. I think, if you handed someone else the headship of the Honorary Police and put someone else in the disciplinary function, then I would still retain control over the prosecution service and what happens in the parish hall.

**LORD CARSWELL:** That is very clear, Mr Attorney, but if one thought that it would be preferable for someone else to take it over or if a police authority were formed, who would still be the ultimate disciplinary tribunal, because a police authority does not do that?

**MR LE COCQ:** No. That would have to be defined. There is a Jersey Police Complaints --

**LORD CARSWELL:** Yes, I am aware of that. Yes, but they do not discipline, they recommend.

**MR LE COCQ:** No it does not, they make recommendations and they have oversight function. You would have to create a new disciplinary tribunal or a mechanism of some sort and that, in a sense, is where I come from, I suppose. The new proposition passed by the States to consider the setting up of a police authority has kept the Honorary Police outside of the remit of that debate, as far as I understand it. My recollection is that the proposition did not include the Honorary Police.

**LORD CARSWELL:** Even if they were covered by it, they are not a disciplinary body, they cannot be, that is not their function.

**MR LE COCQ:** No, indeed not. The States of Jersey Police discipline themselves, the Chief Officer.

**LORD CARSWELL:** Yes. The Chief Officer is ultimately responsible for discipline within the police force.

**MR LE COCQ:** Yes. One would have to create a brand new mechanism that does not currently exist for disciplining the Honorary Police.

**LORD CARSWELL:** I thought that was the situation, I am glad to have your confirmation. Yes.

**MR LE COCQ:** No, it is, undoubtedly. It is absolutely the situation. You would need to create it and what that would be, I really do not know. At the moment, I am the disciplinary body.

**MRS BACKHURST:** Are you saying the States Police Force discipline themselves?

**MR LE COCQ:** Yes. The Chief Officer of Police is responsible for discipline. The disciplining of the Chief Officer of Police is dealt with through the Home Affairs Minister under the provisions of Article 9 of the Police Force (Jersey) Law.

**MRS BACKHURST:** A similar set up could be arranged if this was felt necessary.

**MR LE COCQ:** There is no head of the Honorary Police if it is not the Attorney General because the Honorary Police, of course, is effectively 12 different police forces in 12 different parishes.

**MRS BACKHURST:** All right. You cannot say there is a Chef des Chefs de Police, can you?

**MR LE COCQ:** You could theoretically create a system where there is a Chef des Chefs de Police, a chairman of the Chefs de Police, who could be involved in that. But honorary policemen are volunteers from all walks of life and from all levels of skills. The senior Centenier is appointed by the Connétable to be the Chef de Police in their respective parishes and they form part of the Comité des Chefs and they co-operate on a parish-to-parish basis with operational policing matters and that is the function of the Comité des Chefs, really.

Above that, and in a different way, is of course, the Comité des Connétables, who co-operate on general parochial matters but, I suppose in theory, to the extent that the Constable is still

head of the Honorary Police in his or her individual parish, they can have common interest, discussions, about that aspect as well. But there is no one who is, other than the Attorney General, in a position that they can, if I can use the expression, bestride the entire Honorary Police Force and therefore act as the moderator as to discipline.

**MRS BACKHURST:** These committees, actually, have only sprung up relatively recently, as well: the Comité des Connétables, the Chefs de Police, all these ones.

**MR LE COCQ:** Yes. I think the Comité des Chefs, I cannot recall if it is a product of legislation in the 1990s, I believe, possibly even more recently than that.

**MRS BACKHURST:** Relatively recently.

**MR LE COCQ:** Relatively recently, I could be wrong.

**MRS BACKHURST:** One particular thing I was interested in was your role vis-à-vis the -- it is not really approval of the appointment of members to the Honorary Police, because that is not quite how it works, because they are actually elected. In one particular instance the parish knew that there was a small problem, put it up to the AG. The AG had assumed that, because the parish had put the name forward for final approval, therefore they were happy with it and was not aware that they were asking for the AG's sanction and vice-versa. I am hoping that that situation has changed and that you are now aware, when names that have been elected are put up to you for final approval, there is some sort of process of screening or discussion or something like that.

**MR LE COCQ:** There is not a process of discussion unless there is an issue that arises on the papers when they are sent to me. I believe that what I receive is the product of a criminal record check, I think. If there is an issue that has come out, or that of something of a disciplinary nature that has come out in the past, then I might have a conversation with the Connétable. What I do have to be satisfied that, when I move for an oath of office to be taken, that there is nothing that the court should be aware of which might militate against that oath being administered and therefore, to my mind, it would be something that would impinge upon that person's suitability or ability to carry out their policing function.

**LORD CARSWELL:** Has it ever come to that; that the Attorney General, in your knowledge, has declined to approve the appointment in the court?

**MR LE COCQ:** Yes. I have not done so personally but, as far as I can recall - and again this is a matter better addressed by my predecessor - the Attorney General has in the past gone back and said, "I would have a difficulty. Would you like that person to consider whether they still wish me to administer --

**LORD CARSWELL:** It is dealt with at that stage.

**MR LE COCQ:** It is dealt with at that stage. Because naturally people, if they are going to be sworn in, they bring their families, it is a family event. The last thing you would want to do is embarrass someone who has volunteered for public service. But if there was an issue that the Attorney General would feel obligated to draw to the Court's attention -- I think if someone insisted that they had been elected and they were going to serve as an honorary policeman, I would not refuse to present them to the court but I would then tell the Court what I knew so the Court could decide whether or not to administer the oath. That would be, it

seems to me, appallingly embarrassing and difficult for the individual concerned so I would naturally alert them in advance to any concerns that I had so that they could decide if they really wanted to push the -- that has not happened to me so far, I have to say. But that, I think, is what the system would be.

**MRS BACKHURST:** The oath would be taken before the Bailiff and two Jurats, is it?

**MR LE COCQ:** It would be before the Inferior Number on a Friday morning in the ordinary public business.

**MRS BACKHURST:** Thank you very much.

**LORD CARSWELL:** There is a sort of sweep-up category of a number of miscellaneous functions which, I think, Mr Crill would like to ask you about.

**MR CRILL:** Your Department is, to a certain extent, the bucket shop for a number of things, which in other jurisdictions are dealt with by an official solicitor or whatever, and I am thinking about the matters of the Licensing Assembly and your conclusions to the Assembly there, the administrative function you are performing for them, the appointment of curators in the investigations under the Mental Health Law, amicus curiae for children and in civil matters as well. Do you think these are appropriate areas of responsibility for your Department, shall we say, in an ideal world?

**MR LE COCQ:** Some are and some are not. There is a whole raft of things, and I have not tried to be exhaustive, as you will see. We are not, as I see it, amicus curiae for children, we represent the Minister for Health and Social Services and the Children's Service and

therefore we are involved in children in terms of acting as advocates, a legal advisor or legal representatives in that case.

As to licensing, I think, as a matter of practice, that the administration is now largely dealt with by the Judicial Greffe and, I think, we may have a role in a formal sense but the only role that I have exercised myself in connection with licensing is making applications under, I think, Article 9 of the Licensing Law to refer licences to the Licensing Assembly where there has been a problem with the way the licence has been conducted. So the Licensing Assembly can suspend it, withdraw it --

**MR CRILL:** Quasi prosecutorial matters, yes.

**MR LE COCQ:** Yes, a quasi prosecution, in effect. I have certainly done that on a number of occasions and that seems to me appropriate for the Attorney General to do, it is a quasi-prosecutorial function.

As for curatorships, there is no particular reason why the Attorney has to deal with those kinds of things. We have a fairly automated system of progressing them which is only referred up to the Law Officer in the event of a problem, of course, because --

**MR CRILL:** But that could reside quite happily in another administrative department.

**MR LE COCQ:** It could but, if it were to be referred up to a Law Officer, it would normally be because one would have to go and argue before the Court in connection with the appointment or the removal of a curator, for example, or a tuteur.

**MR CRILL:** On the property side, obviously your Department is responsible for all the public property transactions.

**MR LE COCQ:** Yes.

**MR CRILL:** There does not appear to be a lawyer directly responsible for that area of your Department.

**MR LE COCQ:** It is traditionally fitted within the purview of the Solicitor General and the Solicitor General continues to have responsibility for dealing with the property matters. But I suspect the Solicitor General is not troubled very often with property questions which are dealt with by people who are skilled conveyancers. I have perhaps involved myself in specific property issues during my time, my 18 months as Solicitor General, perhaps a half dozen times, and that would be a guess. I should not think the new Solicitor General has been troubled with it yet.

**MR STRANG:** Would it be appropriate to outsource that or --

**MR LE COCQ:** Potentially, I think again, extremely expensive. I suppose the first point I would make in addition to that is that there is a large corpus of institutional knowledge sitting within the Conveyancing Department which a private practice law firm would have difficulty in assimilating. Our experience is that, in those times where some Departments have outsourced conveyancing work, what can happen is the law firm who has received the instruction then picks up the phone to the Law Officers' Department -- Conveyancing --and asks all the questions as to what the factual background and the position is and we often get asked to look at documentation and give it the final thumbs up. In other words, the reality of

it is it does not necessarily help in terms of reducing the workload, and it would be extremely expensive.

**MR STRANG:** You are almost doing the same work again.

**MR CRILL:** Sorry, just on the miscellaneous functions, if you like, to what extent does your Department get involved in the commercial advice to Departments for finalisation of contracts or --

**MR LE COCQ:** We will give any advice that a lawyer might give that is legal advice. We say --

**MR CRILL:** Say, for example, major civil engineering works.

**MR LE COCQ:** I see. I am not sure if we are the only people who give it but we do give commercial contractual advice within the Law Officers' Department. It could well be that a strong element of that is outsourced as well, but I simply do not know. If it is outsourced, it is not outsourced by my Department.

**MR CRILL:** But that would quite probably be done directly by the contracting Department.

**MR LE COCQ:** It could be. It could be; I just cannot answer that.

**LORD CARSWELL:** One small point, do you get asked in your practice ever, to the point on amicus curiae, to represent a corner which ought to be represented? Do the courts ever ask you to do that?

**MR LE COCQ:** The court does ask for the appointment of an amicus from time to time. I do not think the Attorney General's Department gets asked to act in that way; I certainly acted as an amicus at the request of the Court in connection with a sentencing matter where the Court wished to have it argued from a particular perspective which was not the way the Attorney wanted to argue it. They wanted a particular point of view and they appointed me to advance that point of view.

**LORD CARSWELL:** That is more usually done by the Court in Jersey rather than by the AG; it is a question of just who is conveniently to do it.

**MR LE COCQ:** Yes. I think, actually, in the case in question, which was the Attorney General v Harrison, which discussed the use of starting points in sentencing practice other than for drugs offences, there was a plenary Court of Appeal that sat. The Attorney General had one argument to put, defence counsel for the client had another point to put and the Court of Appeal wished to hear a different argument. I think I was appointed by the court but with collaboration with the Attorney General, so that will be the way it would work. The Attorney General is, of course, the partie publique and that has a very broad meaning. I am not yet sure that I understand the full ambit of what that role might have but I would feel fairly comfortable in making any application that I felt was necessary where there was a public interest to protect.

**LORD CARSWELL:** Very good. You have dealt quite a good deal in your written submission, and very helpfully if I may say so, on the position of the Bailiff and it occurs to me that it might be something which we could more usefully ask you to come back to on another occasion when we have got quite a bit more evidence on it.

**MR LE COCQ:** Of course.

**LORD CARSWELL:** But may I just ask you about one facet of it for now and then leave it for the future, and that is the Article 6 issue?

**MR LE COCQ:** Yes.

**LORD CARSWELL:** You feel reasonably comfortable with that, do you, that it would not go the other way in Strasbourg if somebody challenged it?

**MR LE COCQ:** It is always difficult, obviously, to predict what might happen, but my understanding of the authorities and the attitude is that one does not take a politically theoristic approach to these things but looks in practice as to whether there has been an infringement of Article 6 in any given case. I am very comfortable with the fact that the Bailiff or the Deputy Bailiff will only, in a very limited number of cases, need to consider whether they should sit because of some form of read-across from their function in the States to their function in the Royal Court. My best estimate is that they should not, as I currently understand the case law and the approach of the courts, have any Article 6 difficulty structurally.

**LORD CARSWELL:** What is concerning me from my reading of it is that it has been a little distorted by the fact that the Court itself in McGonnell elected to decide it on the narrow ground whereas the Commission had decided it on the broader ground and the Court did not need to. The Court was not disapproving the broader ground, it simply did not pronounce on it. In Pabla Key it was not the presiding officer, it was a back-bencher who had been sitting

quietly which, I think, is what may have influenced the English Court of Appeal in the Barclay case that they felt that is the way the law was heading. Do you feel that is a significant risk?

**MR LE COCQ:** As I understand the judgment in the McGonnell case, the Commission formed a view and expressed it, the Court found on the more narrow basis after having a better understanding, as the judgment reads, of the role of the Bailiff. In other words, more information came before the court than had necessarily informed the Commission's view. My understanding is also that the authority suggests that you do not simply apply a broad theoretical approach, that you look at the reality of the perception of bias in order to determine --

**LORD CARSWELL:** Yes. That is their standard approach, I know.

**MR LE COCQ:** Yes. I think applying that standard approach, as I understand the position of the Bailiff, I am confident that at the moment there would be no basis for suggesting that structurally there was a problem under article 6. However, I have to say I am not fully steeped in how the judgments might be moving. In other words, looked at as a quantum at the moment, I am comfortable; from a vector point of view, I have not considered it.

**LORD CARSWELL:** We will, I am sure, hear rather more about this in the coming weeks and we will possibly pursue it ourselves so I think it might be helpful if we simply left it there for today on the basis, Mr Attorney, that if we would like your further assistance later, we hope that you will be willing to give it to us.

**MR LE COCQ:** Of course, I would be delighted to, yes.

**LORD CARSWELL:** But may I thank you warmly, on behalf of the Panel, for your assistance both in the careful submission and in the way that you have discussed it this afternoon; our very best thanks.

**MR LE COCQ:** Thank you very much. Thank you.