

Submission
to the Review of the
Rôles of the Crown Officers
chaired by
the Rt Hon Lord Carswell
by M C St J Birt, Bailiff of Jersey
Re: The Law Officers

Introduction

1. It is now ten years since I was Attorney General and I understand that the current Attorney General and the Deputy Bailiff (who was Attorney General from 2000 – 2009) will be making detailed submissions. In the circumstances I have concentrated my main submission on the rôle of the Bailiff. I propose in this supplementary submission to make only a few brief observations in relation to the Law Officers under the three headings raised in the issues paper of the Review Panel.

(i) Appointment

2. I believe it to be important that both Law Officers continue to be appointed by the Crown. So far as the procedure is concerned, there is a wide consultation process involving the Jurats, the Bailiff's Consultative Panel (States Members), the Chief Minister, senior members of the legal profession, the judiciary and the other Crown Officers. Such consultation should be expected to give a good picture of the skills and reputation of the applicants. There is also an interview with a Panel, chaired by the Bailiff, which assesses the applicant against the requirements of the job description, which is of course made available to all applicants. This procedure has been agreed with the Ministry of Justice and I suggest it is a robust process well calculated to identify the best candidate.
3. The great advantage of appointment (and removal) by the Crown is that the Law Officers have genuine independence. This is important. In the first place it is vital for the criminal prosecution process. The person who has ultimate responsibility for the decision to prosecute or not to prosecute, particularly in a small community, must be free of political pressure. Secondly, it is also important for advising the States and the constituent parts of the States such as Ministers or Scrutiny Panels. Again, this is particularly so in a small jurisdiction. I would submit that the position of the Law Officers in Jersey compares very favourably with that of England and Wales where they are appointed by the Prime Minister and may be dismissed at his whim. There must ultimately be pressure on the Law Officers in the United Kingdom to produce the opinion which the Government wishes to receive. Any Attorney General

who regularly displeases the Prime Minister is likely to find himself out of a job at the next re-shuffle. I think it would be most unfortunate if the Law Officers in Jersey were appointed or could be removed by local political entities (whether the Chief Minister or the States) where political considerations could be expected to hold sway over legal ones.

(ii) Should the Law Officers remain as members of the States?

4. I believe it to be advantageous that they are members of the States. During my time as Attorney General, Deputy Bailiff and now Bailiff, I have been present in the Assembly on numerous occasions when members have raised legal issues which the proposer of the proposition or legislation has not been in a position to answer authoritatively. Members regularly turn to the Law Officer who is present in the States and he or she is usually able to clarify the position so that the decision made by the members is made on an informed basis. It may be argued that the brief to the proposing Minister should contain all the necessary legal advice. However, there are no lawyers in the relevant departments and, being a small jurisdiction with limited resources, it would be an enormous task for the Law Officers to prepare detailed legal briefs for every proposition. Furthermore legal issues quite often arise on private member's propositions.
5. It is ultimately a question of preference for the elected members. However, my own view is that the ability to receive immediate legal advice from the Attorney General or Solicitor General, who should by definition be a very competent lawyer, is of advantage and leads to better decision making in the States. I accept of course that the Law Officers must confine themselves to legal advice or to other matters where it is proper for them to speak eg matters directly affecting the administration of justice where they can be expected to provide helpful information to States Members.

(iii) Other issues relevant to the Law Officers

6. Jurisdiction and powers

(i) The discussion document refers to the possibility of the appointment of an independent DPP. This has some superficial attraction as it would avoid the perceived problem where the Attorney General is called upon to decide whether to prosecute government bodies, senior civil servants or politicians whom he advises. However, I am of the view that the balance of advantage lies in retaining the present position for the following reasons:-

- (a) I do not think there is a serious problem in practice. I cannot recall any difficulty which arose whilst I was Attorney General.
- (b) In any small jurisdiction, the integrity of the decision to prosecute will ultimately depend upon the integrity of the relevant office holder who takes the decision rather than on any structural independence. Inevitably, in a small jurisdiction, people know other people. A DPP, for example, would be likely to build up a close relationship with the police; yet he may be called upon to decide whether to prosecute individual police officers. A DPP would also be called upon to consider prosecuting senior politicians and senior civil servants whom he could be expected to know. What is required is that the decision maker reaches the decision to prosecute upon an objective assessment of the evidence. In this respect experience shows that Attorneys General have been willing to prosecute government bodies, politicians and other influential bodies, such as leading financial institutions.
- (c) Such decisions also depend upon the ability of the decision maker. I have to say that it is not easy to extract the best members of the legal profession from private practice in order to be appointed as Law Officers, given the drop in salary and the increased exposure to public comment. It would be even more difficult to find an additional person

of the appropriate calibre to fulfil the office of DPP. Criminal law is not one of the high paying areas in Jersey and I very much doubt that many Jersey lawyers would be attracted by a post which dealt only in criminal law. If the DPP were not to be a Jersey qualified lawyer, this would amount to a substantial change and would mean that a non-Jersey lawyer would have to decide what lay in Jersey's public interest in any particular case.

- (ii) The other issue for consideration is whether the Attorney General should continue to be legal adviser to the States, in the sense that he advises the Executive, Scrutiny and the States as a whole, or whether Scrutiny should receive separate legal advice. I think there are some advantages in the present position, in that it means that all three entities should be receiving the same legal advice but, as the division between the Executive and backbenchers was introduced after I ceased to be Attorney General, I do not feel well qualified to speak on any practical issues which may arise.
- (iii) One rôle which could be considered for transfer is the Attorney General's rôle as titular head of the Honorary Police. I do not include in this his ability ultimately to give directions in relation to the conduct of Parish Hall enquiries because that is part of a prosecution process. However, he is also the disciplinary authority for more general honorary policing. For my own part, if there were to be a satisfactory police authority established with which the Honorary Police was content, it would be possible to transfer the rôle to that police authority. However, this is very much a matter for consultation with the Honorary Police and I know that successive Attorneys General have valued their relationship with the Honorary Police.
- (iv) What is certainly true is that the pressure on the two Law Officers is very considerable. This does result in delays in obtaining legal advice sometimes. However, it seems to me that this is ultimately a question of resourcing. Although additional resources have been provided over the

years, the demands have increased even faster. As mentioned already, it is difficult to compete with the salaries offered in the private sector but nevertheless adequate funding and resources would alleviate the problem to a considerable extent.