

SUBMISSION TO THE  
COMMITTEE UNDER THE CHAIRMANSHIP  
OF THE RT. HON. LORD CARSWELL PC

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March 31st 2010

## **Introduction**

In making this submission to the panel I will focus on;

- the rôle of the Bailiff as President of the States and some of the Bailiff's other functions
- the rôle of the Attorney General and Solicitor General as legal advisors to the States Assembly

## **Submission**

The Panel in its findings will have the opportunity to grasp the issue of separation versus fusion of power and offer robust proposals for the future which will either be sufficiently robust to defend the fused status quo from pressures to reform or embrace change and offer a vision of separated power.

With the “Commonwealth (Latimer House) Principles on the Accountability of and the Relationship Between the Three Branches of Government” <sup>Appendix One</sup> in mind, I do not believe that the status quo is a long-term solution but I also accept that unless scrupulously planned, there may be unintended consequences caused by any change and probably some unforeseen ones as well.

When Sir Cecil Clothier's slim, red, glossy “Report of the Review Panel on the Machinery of Government” arrived on members' doorsteps in 2000, many said “Is that it?” assuming it to be an executive summary and expecting a weightier tome – a “how to” manual to follow. It didn't. Those in favour of the changes lauded the shiny booklet's coherence and simplicity but it did nothing to change the minds of many of those against, unsure or with genuine questions or fears.

If a lesson could be learnt, then I think that whether the panel's conclusion is of a reformist nature or not, I hope the panel will show they have heard any fears and concerns, responded thoughtfully and fleshed out either;

- How the status quo (or essentially the status quo with minor alterations) can be maintained in light of external and indeed some vociferous internal pressure) to change?  
Or
- Why transition is necessary, how the transition will be achieved and how much it is estimated to cost?

I suspect many people, such as members of the Honorary Police, Comite des Connetables, States Members etc, who have had dealings with Crown Officers in the past have thought them to be very decent people with the Island's best interests at heart - apart from some such as Tomes and his supporters who held a different view of the then Bailiff – to the extent that the subject of this review became the dominant issue of the 1993 election when Tomes having been removed as a Crown Officer was subsequently elected as Senator.

Perhaps it is inevitable that when thinking of the rôle it is human nature to focus on the individual and it is hard to separate out the rôle from the person. Each report to the Panel comes, to a greater or lesser extent, from the individual's experience and so is the case with me.

I have mostly come into contact with the rôle of the Bailiff as Speaker during my time in the Assembly (1999 to 2005). My contact with the roles of Attorney General and Solicitor General was that of any States member. In addition as Vice-President of the Privileges and Procedures Committee I came into contact with the Attorney during discussions as we developed the States of Jersey Law.

Structural change seems hard to achieve from where I am standing in 2010. Reform in recent times was achieved with a much bigger beast – the Reform of the Machinery of Government so I hope that if the Panel choose a reformist solution, lessons are learnt from what went wrong and what went right in that process.

I would argue that in the 1990s there was a strong groundswell of public opinion pushing for change. Many members (myself included) were elected in 1999 on a manifesto of supporting change to an executive form of government.

Given the great affection that many (but not all Islanders) have for the individuals who have held the roles in the past, I am not confident that inclusion of proposals for separation of powers in manifestos would find favour with the majority of the electorate at hustings or at the ballot box - unless another issue such as (and I mention this as sensitively as possible) Haut de la Garenne, was conflated with the argument.

Notwithstanding the above point, whatever the Panel's findings, which it goes without saying (but I will say anyway) must be brought to the States for debate, I hope the Panel will cover the following areas;

1. Why?
2. What?
3. When?
4. How?
5. How much?

Eleven years ago, prior to the publication of the Clothier Report, the former Bailiff wrote "the removal of one of the Bailiff's principal functions would involve a **schism** [*My emphasis*] unprecedented in 800 years of constitutional evolution". <sup>Appendix Two</sup>

- Is separation of powers a schism or a natural evolution as our democracy matures?
- Can the microstate argument, that separation is not appropriate in a small island jurisdiction, such as ours, be applied?
- Would Jersey count as a "small or under-resourced jurisdiction" requiring adaptation and latitude? Or is use of this clause in the Latimer House Principles wishful thinking on the part of those who use it? When this was drafted was it envisaged to apply to States such as Jersey?
- How serious are the threats that change will be forced upon us as a result of the European Convention of Human Rights?

The roles of the Crown Officers have been reviewed in the past (notably in the 1860's, 1940's and 1970's) but certain issues remain unresolved. Most recently, the proposed removal of Bailiff as speaker (but keeping him as Chief Citizen) can be found in the Report of the Review Panel on the Machinery of Government in 2000. This recommendation was quickly dropped by the then Policy and Resources Committee,

which, perhaps, was keen to get the main recommendations on the new Executive system of government through the States. Or perhaps on that occasion they felt that the chicken did need to come before the egg and that having the new Executive was structurally necessary before any reforms could be made to the rôle of the Crown Officers.

Taking a very broad brush, I think there are four camps;

- 1 Separation of powers – structural change abiding to the Latimer House Principles
- 2 Fusion of powers – status quo
- 3 Pragmatic incremental separation – process over hundreds of years (began in 1771)
- 4 Status quo – wait until external pressures force the Island to act

As I fall into the “Separation Camp”, I make the following observations. I would like to say that these proposals arise out of a structural decision and should not be construed as criticism of any present or past incumbent in the various rôles.

Given our Island’s history and general reluctance to change, which some might argue has stood us in good stead in the past and has contributed to the view externally that Jersey is considered a stable jurisdiction, I fear it is inevitable that if the Panel make a robust proposal for significant change, it will be rejected by the States Assembly unless three key issues can be addressed;

- 1 The extent of external pressure to change and the probability of the Island having its hand forced. Is there feverish activity behind the scenes that the public do not know about?
- 2 The mode of transition (including countering any argument that change would be de-stabilising)
- 3 Cost

In fact, even if these issues are addressed it may be another thirty years before they are accepted.

The review asks the public to concentrate on the current rôles – but I would argue that it is impossible to comment meaningfully without an analysis of the historical context of those rôles and also the broader world context of the rôles and functions. To this end I am enormously grateful to have had the opportunity to discuss these issues at length with Dr. Roy Le Hérissier and to have been present at his attendance in front of the panel on March 29th 2010. With regard to the world context I am grateful to have had the opportunity to read Adrian Lee's draft submission to the Panel.

## Proposals

### 1 I propose that the Bailiff is divested of;

#### 1.1 The rôle of Speaker

1.1.1 This would be a major step in the pragmatic incrementalism that first began in 1771 with the separation of the Royal Court from the States of Jersey. Curiously, and perhaps you might think, counter-intuitively, I would argue that the article in the October 1999 publication of the Jersey Law Review written by the former Bailiff, Sir Philip Bailhache, entitled “The Cry for Constitutional Reform – a Perspective from the Office of Bailiff” would form an excellent basis for an analysis of what needs to be changed. A quick perusal of this article with an eye of the current position will show the panel that already a number of key steps have been taken towards reform. Sir Philip gives an analysis of the obvious, not so obvious and indeed subtle features of his rôle, including his rôle as Speaker. Any proposal for change would need to ensure that all the points he raises are covered.

1.1.2 Some may at this point be asking, “What is the harm in maintaining the status quo with regard to the speaker?” I have also heard it said on many occasions that, “The Greffier does a perfectly good job in the Chair, so why can’t he just do it all the time?” The extent of the Bailiff’s rôle as speaker is far greater than chairing the Assembly and simply removing him as Speaker and replacing the Chair of the debates would leave a vacuum, which of course, nature abhors.

1.1.3 Returning to the issue of harm, Sir Cecil Clothier said in his report of December 2000, “Indeed it is only in Jersey and Guernsey that one finds this most unusual arrangement whereby the Speaker of the Island Assembly and the Chief Justice are one and the same person”. Notwithstanding the case of *McGonnell* (which ruled that Guernsey’s Bailiff should dispense with his executive roles for his dual rôle to be acceptable), I would say that

there is more than a perception of conflict. We have a situation unknown elsewhere (save for Guernsey) where the Bailiff could preside over the debate of a proposition for a law, speak outside of the States on the issue the law addresses making his or her views public, and then preside over a case in the Royal Court covered by that legislation. Some argue that if that is the concern then rather than remove the Bailiff as Speaker, he or she should be barred from speaking in public on issues related to laws being passed in the States. Firstly this is unworkable, given the Bailiff's extensive rôle and responsibilities and secondly, it does not address the fundamental structural change needed for separation. A second suggestion is that where there is real or perceived conflict that the Bailiff and Deputy Bailiff share out the roles. In answer to that I would pose the question, "Does this, in any way, meet the standards required to argue true separation of powers?"

1.1.4 Some may at this point be saying, "I'm not prepared to make an in principle decision to divest the Bailiff of this rôle without being absolutely clear to whom the rôle and its functions will go. Adrian Lee's draft submission goes some way in answering this point by at least elucidating the possible structures found elsewhere in Commonwealth small jurisdictions and in British Overseas Territories. Adrian Lee makes the point that there are remarkable similarities in the rôle of speakers in small jurisdictions. To quote, they "place similar high value on;

- Election or selection of the Speaker by the Assembly as a whole
- Speakership being a singular office not held with any other
- On the impartiality of the Speaker as the servant of the Assembly and the defender of its roles and privileges"

1.1.5 A valid question may be to ask who might want this rôle? And would there be a queue of appropriate people wanting to do this? In a sense this was the argument used in 1948 against removing the Jurats from the Assembly and replacing them with Senators.



The concern was that they would not find twelve men (sic) of standing to replace them – but of course, they did. I can see the rôle of Speaker being attractive to a retired States Member (if a legal qualification is not a requirement and assuming themember does not possess a legal qualification), a retired lawyer or perhaps a retired Greffier, or even a retired Crown Officer. But I am not suggesting that the rôle be limited to that narrow group of people.

1.1.6 In summary, I am proposing an elected speaker from outside the Assembly who is then voted in by the Assembly as a whole. I appreciate that even to draw up an “in principle” proposition, considerable work would be needed in drawing up the rôle and analysing costs.

- Would an elected speaker need to be legally qualified?  
(not all in the Commonwealth are)
- Would an office staffed by senior grade officers and legal staff be needed?
- Would the Greffier have to be legally qualified?
- If the answer is “yes” to any or all of the above, is it a price we are willing to pay?

## 1.2 The rôle of Chief Citizen and “Guardian of the Constitution”

1.2.1 As I make this proposal I can hear the voices of outrage rising up and shouting “Who else could do it? Would you trust X [insert name as appropriate]?” Accepting some valid concerns, I maintain this to be a logical step in separation of powers. Sir Philip in his article of 1999 said it is “inconceivable that a Bailiff could remain the Island’s Chief Citizen if he were not the President of the States”. It is perhaps worth noting at this point that the origins of the Bailiff’s guardianship of the constitution appear unclear but perhaps were reinforced following a series of arguments with Governors of the Island in the 19th century – this is documented by Dr. Le Hérissier in his PhD thesis, “The Constitution of Jersey 1771 to 1972”.

It is also interesting to compare the oaths of the Governor, Bailiff, AG, States member and even Advocates. The Bailiff's oath states, "that you will uphold and maintain the laws and usages and the privileges and the freedoms of this island and that you will **vigorously oppose whomsoever may seek to destroy them**" [*My emphasis*]. The States Member's Oath is strikingly similar, "that you will uphold and maintain the laws, privileges, liberties and franchises of Jersey, **opposing whomsoever may wish to infringe the same**" [*my emphasis*]. Even the Advocates' oath states "...vous opposant à quiconque les voudrait enfreindre".

- 1.2.2 I believe that the logical conclusion is that the Chief Citizen would be the Chief Minister. I appreciate this puts fear into many hearts – not least my own. Democratic deficit (which I will turn to in point 1.2.3) coupled with fear about concentration of power into the hands of the few, and insufficient checks and balances (notwithstanding the steps forwards that Scrutiny is taking) may lead even those with an intellectual/theoretical support of separation to hesitate.
- 1.2.3 I certainly don't wish to appear flippant when I say that if the general populace are keen that the Chief Citizenship remain in the hands of individuals such as the former incumbent in the Bailiff's rôle then I hope they would encourage those persons to stand for election and continue to defend the Island's rights and freedoms – but via a different rôle.
- 1.2.4 Democratic deficit is a real concern. Numerous propositions, in the past few years, on every conceivable option for changing the Constitution of the Assembly have failed, resulting in the status quo which is a unicameral system with different types of members with different lengths of office, elected on different days. Some members of the same type (Deputies) have different sized constituencies whilst some share a constituency. Efforts to achieve a harmonised election day have failed. The consequences of all of these issues are many, not least of which is a contribution

to low voter turn-out leading in some cases to what some might describe politely as unintended consequences. Unless the constitution of the Assembly and voting mechanism is changed we have the real possibility that a person is elected either on a very small mandate (e.g. 200 votes or indeed none at all if the election is not contested) and then that person could be voted by the Assembly to become Chief Minister and thus Chief Citizen under the separation model. If the Chief Minister is to become Chief Citizen then I think direct election for this rôle has to be a consequence.

1.2.5 The Terms of Reference of this review specifically leave out the rôle of the Lieutenant Governor, even though his rôle is pertinent to the very question of the rôle of Chief Citizen. At a recent debate in advance of this review an audience member asked, “Who is the conduit to the UK Government?” To which an unnamed individual replied “Stuart Syvret!” Joking aside, currently the Bailiff has a rôle in communications between the Island and Her Majesty’s Government and the consequent changes in removing the Bailiff as Speaker and thus Chief Citizen must be fully considered. As I understand it, the current position is that the Bailiff will receive a letter from the Chief Minister. He or she will then draft a letter (taking the advice of the AG/SG) to the Lieutenant Governor expressing the views that the Executive wish to put forward – checking for correct diplomacy and that the letter is in-line with the Island’s constitutional position. The LG then writes to the UK and then a response is received by the LG and so and so forth. Were changes to be made, is it inconceivable that officers of the Executive could adequately draft a constitutionally appropriate and diplomatic letter?

1.2.6 In developing a new structure, much thought will need to be given to the conduit of discussions with the UK. If the Chief Minister becomes Chief Citizen, then in the absence of the Bailiff, an unintended consequence could be that, from the UK’s view, the Governor’s rôle is enhanced as he or she “exercises an

oversight function and presumably monitors and reports back to the Crown on significant developments in order that assessments can be made as to whether ‘good governance’ is in place” to quote Dr. Le Hérissier.

- 1.2.7 Clearly in the past, perhaps in the absence of strong political leadership, certain Bailiffs have stepped into areas such as the question of independence, arguing from under the umbrella of guardianship of the constitution. However, to quote the recent past President of the Policy & Resources Committee and the former Chief Minister, as we develop as a “maturing democracy” with an “increasing international personality” I think the logical conclusion is that the reforms that were begun in 1771 must be completed and that leadership must come from the Executive.

### 1.3 Some other functions to be transferred

#### 1.3.1 President of the Licensing Assembly

- 1.3.1.1 I propose an Independent Tribunal with a right of appeal to the Royal Court.

- 1.3.1.2 As with the other recommendations I have made – this would of course require a full analysis of the financial and staffing implications.

#### 1.3.2 Oversight of Public Entertainment

- 1.3.2.1 As Dr. Le Hérissier states “Past Bailiffs have been happy to lose this function but, the committee which reviewed the matter saw the logic of removal but also thought that, pragmatically, it should remain with the Bailiff’s Office”, Putting it simply, those who asked the question began to wish they hadn’t. There clearly was a will but no one could find the way. <sup>R.C 26 2002 – Appendix Three</sup>

- 1.3.2.2 Following through the logic, this is an Executive Function and as such I would propose the panel sits under the leadership of the Executive.

- 1.3.2.3 As it was the late former Senator Lakeman who brought the proposition on the Working Party on Public

Entertainment (p.168 2000) I feel I should mention a few words that he wrote on this subject prior to his death. He had spent hours working on a submission to the panel and had discussions with Dr. Le Hérissier and myself. Unfortunately, he did not complete his submission and the few notes remaining are not sufficient to be pieced together. Further, I wouldn't feel confident in reflecting what I thought might be his views save to say on this issue he wrote, "No recommendation for change faute de mieux identifier. The Bailiff's Panel (under management of ESC Ministry) should conform to best practice and the Chairman should not hold office dum bene se gesserit"

## 2. The Attorney and Solicitor Generals (The AG and the SG)

### 2.1 Legal Adviser to the States Assembly

2.1.1 Some will propose that the convention that the AG and SG confine themselves to speaking on legal matters be enforced. Others may argue that the AG and SG should only speak when asked to.

2.1.2 I would like to start by going back in time to a States debate on 4th October 1823 on the cutting and collecting of seaweed when the Constable of St. Peter said that "the Crown Officers had no right to speak in this assembly on any questions but those which concerned your majesty's interests or when required by the States". Moving forward in time to 19th March 1824 and we find ourselves at a meeting of the Privy Council, held at Carlton House in the presence of the King;

"...And his Majesty doth hereby Order and direct that no interruption be given to the Procureur, Vicomte, and Avocat du Roi in the exercise of their Right to be present in the Assembly of the States of Jersey, nor to the Procureur and **Avocat du Roi in the exercise of their Right to speak in the said Assembly upon any subject which may be brought under consideration**

*[my emphasis]*. .....this Order be forthwith registered in the Royal Court of the said Island. Whereof all Persons concerned are to take notice and govern themselves accordingly”. <sup>Appendix four</sup>

- 2.1.3 It is clear to me that the AG and SG have an unfettered right to speak but have chosen (some to a greater and some to a lesser degree) to observe the convention to confine their speech to certain parameters.
- 2.1.4 Perhaps the challenge for members is to identify when an Attorney General might be attempting to sway a debate by giving a political opinion from under cloak of “legal opinion”?
- 2.1.5 It could be argued that having the AG/SG in the Assembly is an unnecessary luxury. Most other jurisdictions do not have a legal advisor on tap. However, I feel removing the AG/SG and only calling them when needed would create an unnecessary delay and as they would have to be listening to the debate via transmission to their office I see no benefit in this. In practice I suspect with electronic communication and a laptop computer the legal advisor is able to continue with some work discreetly in between offering advice.

## 2.2 Legal Adviser to the Executive and to Scrutiny

- 2.2.1 There has been continued tension around the issue of the AG and SG’s rôle as legal advisor to the States. It is important to try to understand why this should be. On a number occasions, it has been said in the Assembly that the intervention of the AG/SG in advising a Committee (under the old system) or the Executive that has caused the body to take a particular line. To the frustration of members, they would then find it impossible to determine how a policy or decision was arrived at in the absence of seeing the advice given.
- 2.2.2 Currently, if a scrutiny member happens to ask the right question then they might get the same answer that the Attorney had given

to the Executive, but this does seem to be an opaque and long-winded way of going about things.

2.2.3 I think Jersey will end up with separate costly legal advice to Scrutiny because looking elsewhere for legal advice will be the only solution. Scrutiny are of course, currently able to seek and pay for external legal advice and have had recourse to doing this. Equally, Scrutiny may decide to pay for advice to try to find out what legal advice might have been given to the Executive. Scrutiny Panels wish to have access to advice given by the AG/SG to the Executive. The AG/SG argue that any advice given by a lawyer to his or her client is confidential and it is not for the lawyer to agree to disclosure but the client i.e. the Minister. I would argue that the client is the States and the AG/SG is advisor to a delegated body of the States so that information should be shared (on a confidential basis) with scrutiny.

2.2.4 I hope that the panel choose to ask for access to the minutes of the Privileges and Procedures Committee during the period prior to the debate on the States of Jersey Law as these minutes and associated correspondence with the then Attorney-General will give the panel a flavour of the complexity of this issue and strength of feeling on either side. I believe to this day the issues have not been resolved.

## Ending

I have chosen to comment on part of the jigsaw. Where I have not commented it can be assumed that the position I would take is one that would;

- complete the structural change required to achieve separation of powers in the purest sense
- conform to the highest standards of disclosure in the public interest, providing as much information to the public as possible e.g. transparency in how job descriptions are defined (For example - why and on whose authority was the SG's job description "dumbed down" prior to the recent appointment?)<sup>Appendix Five</sup>

