

Submission to the Review of the Roles of the Crown Officers. 7th February 2010

Senator Sarah Ferguson B.Sc(Tech), M.I.E.T., C.Eng.,Eur.Ing.,M.B.A.(Columbia)

1. There is no evidence that the position of the Bailiff and Deputy Bailiff are compromised by their occupying the position of President of the States. This question was discussed at length in the Guernsey equivalent to our Clothier report – the Harwood Report – a copy of the relevant chapter being appended. I consider that the arguments made, and the legal precedents set, support my view that there should be no major change in the roles being reviewed.
2. There are a number of States Members who seem to want to adopt a Westminster style approach. Since our history is a melange of English and French style systems, it is appropriate that we have a mixture of both.
3. The position of the Bailiff is a historic one which has evolved over centuries and we meddle with tradition at our peril. We need to be sure that the “modernisation” would actually be of benefit. With such a small Assembly, as compared to Westminster, it seems inappropriate to impose Big Government solutions on a small jurisdiction.
4. It is difficult to understand the rationale for the requirement to undertake this review, with the attendant cost, as it seems to come into the category “if it ain’t broke, don’t fix it”.
5. I have lived in Jersey since 1968 and I was elected to the Assembly in 2002. Having seen the performance of Speakers in the UK, I am convinced that we are much better served by the current arrangements. If a member was taken out of the Assembly to be “Speaker” then a much higher, proportionally, part of the electorate would not be represented compared to the position in a large jurisdiction such as the UK.
6. The presence of the Attorney General and Solicitor General and the advice given is extremely helpful in cases where the legislation is technically complex. The difficulties which some members imagine is because the Attorney General considers that advice given to Ministers is for them alone and is not available for scrutiny panels, which is an entirely different question. It has also been solved, although not to the satisfaction of all corners of the Assembly, in that scrutiny panels are entitled to obtain their own legal advice.
7. The Attorney General and Solicitor General do not vote in the Assembly. The Bailiff’s position was changed a few years ago in that he no longer has a casting vote.
8. Whilst there are some members who, as I have said, want a version of Whitehall, I have not detected any groundswell in the community for the any change. Indeed, the comments I have had have been entirely the opposite. In fact there has been a greater concern about the quality of States Members rather than changing the role of the officers.

**Extract from the Harwood Report on the Machinery of Government,
Guernsey.**

SECTION THREE

THE ROLE OF THE BAILIFF IN THE MACHINERY OF GOVERNMENT

1. The Terms of Reference given to the Panel precluded the Panel from considering the external constitutional relationships between the States of Guernsey and the United Kingdom. To the extent that the relationship with the British Crown forms the core of that Constitutional Relationship the nature and the methods of appointments made by the Crown fell outside the scope of this Review. The appointments of the Bailiff, the Deputy Bailiff, H. M. Procureur, H. M. Comptroller and H. M. Greffier therefore fell outside the Panel's terms of reference.
2. In describing the scope of the Review to be undertaken by the Panel, the Advisory and Finance Committee of the States of Guernsey, in the policy letter submitted to the States, recognised that, if during the course of carrying out this Review, the Panel identified issues relating to the roles and responsibilities of the Crown appointees "which significantly impacted on the internal machinery of Government", then it would be appropriate for these issues to be considered in the Panel's Report, following consultations with the relevant Crown appointees.
3. The only issue concerning the roles and responsibilities of the Crown appointees upon which the Panel received any representation during the course of its review, concerned the role of the Bailiff as "President of the States of Deliberation". The Bailiff's role as President of the "States of Election" was never raised as an issue and given that the sole remaining function of the States of Election relates to the election of Jurats, the Panel considers that the States of Election no longer forms part of the machinery of Government.
4. The representations received by the Panel concerned the duality of the roles of the Bailiff and were no doubt influenced by the early report of the Commission to the European Court of Human Rights in the McGonnell case. **The final judgment given by the European Court did not however follow the recommendations in the report of the Commission. In particular, the judgement affirmed that there is no legal basis for contending that there should be a separation of the judicial and parliamentary roles of the Bailiff.**
5. The Panel has received no evidence to suggest that the duality of the roles performed by successive Bailiffs or their Deputies had in any way militated against good government, nor was there any criticism of the way in which they had exercised their roles.
6. The Bailiff's role when acting as President of the States of Deliberation encompasses the publication of the Billet D'Etat convening meetings of the States of Deliberation, presiding at meetings of the States of Deliberation and acting as a formal channel for communications between States Committees and the Lieutenant Governor's Office of the United Kingdom. Given the present Committee system within the States, it is suggested that there is no practical alternative to the use of the office of the Bailiff in that channel of communication.

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7. The involvement of the Bailiff in the publication of the Billet D'Etat is in practice limited in that the Bailiff's office will include in the Billet D'Etat any matter that is lodged with the Bailiff's office in proper form, before the agreed deadline required to ensure the timely printing and publication of that Billet D'Etat.
8. Once again, given the present Committee system within the States, there is no obvious alternative to the present system for the publication of the Billet D'Etat. As Presiding Officer at States Meetings, the Bailiff, as President of the States of Deliberation is required to ensure fair play between States Members, a task which requires a strong presence, impartiality and independence from political bias.
9. It has been pointed out to the Panel that, in the discharge of his role as President of the States of Deliberation, the Bailiff has very limited back up, other than that primarily available to support him in his judicial role.
10. The Panel does not consider that the Bailiff's role when acting as "President of the States of Deliberation" can be said to impact significantly on the internal machinery of Government in Guernsey.
11. Amongst those who gave evidence to the Panel, some questioned whether the title, "President of the States of Deliberation" was necessarily appropriate. The title, commonly shortened in the minds of many to "President of the States", could, it is argued, be potentially misleading, especially when used in an international context. If a different system of government were to evolve, the present title, "President of the States of Deliberation", could also potentially lead to confusion, since the title of "President" suggests a political rather than purely parliamentary role. In those circumstances, the Panel would suggest that it might be more appropriate to address the Bailiff as "Mr Bailiff", when presiding at meetings of the States of Deliberation and in conjunction with the publication of the Billet D'Etat.
12. Many of those who gave evidence to the Panel argued strongly that the Bailiff should not preside at meetings of the States of Deliberation. The role of President of the States in this context was likened to that of the Speaker in a Parliament, a role universally recognised. If, indeed, the States of Deliberation is to be equated to a parliamentary assembly, then the Panel recognises that role of Speaker would normally be perceived to be a political role. That having been said, in most if not all parliamentary assemblies presided over by a Speaker, there exists a system of party politics, with corresponding party discipline and an executive branch of government. It has been suggested that in the absence of party politics and an executive branch of government, the States of Deliberation is not the equivalent of a Parliamentary Assembly. Given the uniqueness of the present system of government, a politically appointed "Speaker" may not therefore be appropriate. The weight of evidence between those in favour of segregation of functions and those in favour of the status quo was however very finely balanced.
13. Arguments in favour of the retention of the status quo, with the Bailiff continuing to act as presiding officer of Meetings of the States of Deliberation, include the following:-

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- (i) the Bailiff will have detailed knowledge of the Island's machinery of government, the constitutional relationships within the United Kingdom and with the other Islands in the Bailiwick;
- (ii) as a non-elected appointment, the Bailiff is seen to be independent of local political bias and is able to act as a neutral umpire in a non-party political assembly;
- (iii) through his judicial experience the Bailiff will have a suitable bearing and expertise to command the respect of States Members and to maintain order;
- (iv) the available pool of States Members with adequate experience of proceedings of the States of Deliberation is likely to be comparatively small and there may be a lack of willingness amongst able States Members to accept such office as an alternative to active political involvement in the machinery of government;
- (v) contested elections for the position of Speaker or Presiding Officer might be seen to undermine that person's authority;
- (vi) the Bailiff, as a Crown Appointee, is able to enjoy the confidence of the other Islands within the Bailiwick;
- (vii) in the absence of a party political system in the Island, there is no reason why the role of presiding officer should be a political appointment;
- (viii) the Bailiff's tenure of office will invariably span more than one term of the States and will therefore provide continuity.

14. The principal justification used by those who would argue in favour of creating an independent Speaker or Presiding Officer would appear to be one of perception that the Members of the States should be master of their own procedures. The other justification would seem to be founded on a concern that the duality of roles might somehow be seen to compromise the Bailiff's judicial function. The Panel notes that following the judgment in the McGonnell case that concern is no longer an issue.

15. Those who argue in favour of the separation of the roles of Bailiff as President of the Royal Court and as President of the States of Deliberation differ in their views as to how the office of "Speaker" or "Presiding Officer" of the States of Deliberation might be chosen. Logically many argue that it should be a matter for the States to vote one of their number to the office. The choice would be whether such appointment is made by the retiring States before a General Election, with the person chosen then not having to seek re-election, or whether the appointment is made by and from amongst those who are elected at that next General Election. An alternative method of selection would be by means of an elected House Committee of the States itself selecting the Speaker or Presiding Officer. Whichever of those options were chosen, it would be necessary to ensure that the candidates for the office of Speaker were capable of commanding the respect of the States Members over whom he has been elected to

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preside and had sufficient experience of the rules of procedure of the States either as an elected Member of the States or, possibly, as a Crown Officer.

16. If the role of Speaker or Presiding Officer is to be created independently to that of Bailiff, the functions attaching to that new office would need to be established. In the opinion of the Panel, those duties would include the following:-

- (i) presiding at and maintaining order at meetings of the States;
- (ii) enforcing disciplinary matters amongst Members of the States;
- (iii) resolving points of order and procedure;
- (iv) authorising publication of the agenda for Meetings of the States;
- (v) protecting the rights of backbenchers against the powers of the executive (if such a style of government were to be adopted).

17. Almost certainly the post of “Speaker” or “Presiding Officer” would require a support staff. If, as suggested in Section Ten of this Report, a separate post of “States Greffier” were to be created, then the office and staff of that States Greffier would be able to provide the support staff and facilities needed by the “Speaker” or “Presiding Officer”. In those circumstances, the States Greffier could also be nominated as the Deputy to the Speaker or Presiding Officer. The cost of establishing the office of “Speaker” or “Presiding Officer” and providing such support would however need to be borne in mind. If a person who was not legally qualified was to be chosen as “Speaker” or “Presiding Officer”, the States Greffier would need to be legally qualified. The Panel recognises that there would be not insignificant cost and resource issues with such an appointment.

18. Even amongst those who advocated the separation of the roles of Bailiff and Speaker or Presiding Officer concerns were expressed at the efficacy of the States electing such an officer from amongst its own number. In particular it was recognised that any sitting or recent States Member selected for such office may be perceived as bearing his or her own preconceived political bias.

19. Some argued that it may be difficult to find persons of sufficient calibre or qualifications able to command the respect of the Members of the States. As an alternative process, some suggested that the office of Speaker or Presiding Officer might best be selected by Crown Appointment. The Panel would question however whether such an appointment would necessarily offer a satisfactory career alternative.

20. The Panel recognises however that a further solution might be sought by accepting that the Bailiff “ex officio” continues as at present as the Presiding Officer of the States, but without the title of “President”. A further alternative would be that the Bailiff remain formally ex officio as presiding officer but only in attendance at formal sessions of the States, e.g., swearing in of States Members and the opening of each Meeting of the States but he would

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withdraw for all debates and take no part in the publication of the agenda for States Meetings. The States Greffier could act as the Presiding Officer in his absence for debates and be responsible for publishing the agenda for Meetings.

21. The Panel recognises that, in the absence of clearly established political leadership in the Island, the Bailiff has of necessity tended to act as the principal ambassador for the Island. To that extent, there has been no other person who could claim to be the Island's chief citizen and representative and no one else to whom fell the title of head of the administration. Since the Panel first met, certain of the administrative functions that previously attached "ex officio" to the Bailiff have been abolished. The presidencies of the Legislation Committee, the former Rules of Procedure Committee (whose functions are now merged into the States Procedure and Constitution Committee) and the Appointments Board (which is soon to be abolished by Order in Council) no longer attach to the office of the Bailiff. Elsewhere in this Review the Panel considers the issue of political leadership for the Island. If such a leader was to emerge as a result of the options put forward by the Panel, certain of the ambassadorial functions described at the beginning of this paragraph might naturally fall upon that political leader.

SECTION THREE

SUMMARY OF ISSUES IDENTIFIED BY THE PANEL

- A. There is no evidence that the roles and responsibilities of any of the Crown appointees significantly impact on the internal machinery of Government. . There is no evidence to suggest any malfunction in the machinery of government caused by the duality of the Bailiff's functions.
- B. Consideration might be given to using a title other than "President of the States of Deliberation" for the person presiding at Meetings of the States.
- C. That if it is considered appropriate to have some person independent of the Bailiff to chair meetings of the States then a person selected as Speaker of the States independent of the office of Bailiff might be selected either:-
- (i) by election of the Members of the States before a General Election, and not therefore needing to seek re-election if elected from amongst the sitting Members; or
 - (ii) by election of the Members of the States immediately after a General Election; or
 - (iii) by selection by a special committee representing elected Members of the States.
- D. The qualification for selection as Speaker of the States might be either:-
- (i) that the person must be a sitting Member of the States or someone who has previously served in the States for at least one full term; or
 - (ii) that the person need not have previously have been an elected Member of the States, but must have had experience of States Proceedings, possibly having attended as a Crown Officer.

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E. Any attempt to separate the present dual roles of the Bailiff by creating the separate office of Speaker or Presiding Officer is likely to have material cost and resource implications.