

30th March 2010

Dear Lord Carswell,

Review of the Roles of the Jersey Crown officers

Thank you for your letters of 18th February 2010, addressed to each of us, to which we trust you will have no objection that we have considered it appropriate to respond jointly as the Law Officers of the Crown in and for the Bailiwick of Guernsey.

Introduction

You have indicated that the Panel wishes to learn more about the comparable position in Guernsey and asked if we feel able to make any contribution from our experience in Guernsey on the relevant issues. We are pleased to set out some information and thoughts about the position in this Bailiwick; and to the extent that the position here is comparable, will be honoured if our contribution is of some value in your deliberations, but would wish to begin by placing what follows in the context that:

- Whilst we have some considerable experience, from our perspective as Law Officers, of the roles of the Bailiff and Deputy Bailiff in Guernsey, particularly in their judicial and parliamentary aspects, beyond confirming that all holders of those offices in our experience have discharged their often arduous functions with complete fairness, independence and integrity, we do not consider it our place to comment further.
- *A fortiori*, we would not presume to express any views in respect of the offices of Bailiff and Deputy Bailiff of Jersey.
- Whereas there is undoubtedly much correlation between the offices of Attorney General / Solicitor General of Jersey and those of HM Procureur / Comptroller in this Bailiwick, there are also significant differences; some are apparent from your terms of reference, and in the present letter we will try to identify those, and some others which are apparent to us; but we suspect that there are other, less immediately apparent, distinctions deriving from the unique positions and histories of the two Bailiwicks; and we would accordingly commend some caution in reading too much across from our experience into the Jersey context, or indeed from the Panel's findings in the Jersey context into that of the Bailiwick of Guernsey.

Those caveats having been stated, there is one overarching feature of these ancient¹ and independent² Crown Officer appointments which we would wish to stress, and that is that ours are in no sense political offices: our appointments endure despite changes in the

¹ The position of HM Procureur is distinguishable from the fourteenth century and that of HM Comptroller (or "Contrôle") was probably created in the late fifteenth. Both have always been constituent parts of the Royal Court, which of course was a legislative as well as judicial body prior to 1949: For a succinct account of the history see Dr Darryl Ogier's *The Government and Law of Guernsey*, 2005.

² HM Comptroller is not accountable to HM Procureur and may hold and express a different view. This was cited as an important reason for re-instating the former office after its 10 year disappearance from 1851: The interesting circumstances of that episode are set out in Vol I of the *Recueil d'Ordres en Conseil d'un intérêt Général enregistrés sur les records de l'Île de Guernesey*

composition of the legislature (in this Bailiwick, any of the three legislatures) through elections; we hold office, subject to an age limit which in Guernsey is 65 years, for so long as we shall well behave ourselves therein; we cannot and do not engage in political activity, nor in private practice as Advocates. The oaths of the Guernsey Law Officers enjoin “Que vous maintiendrez justement la république de cette Île” (for which we read « Bailliage »), and “garderez et observerez les lois, droits et anciennes libertés et usages accoutumés selon droit en cette Île” (« Bailliage »); and we regard with the utmost seriousness our duties as independent office holders to safeguard and uphold the laws, rights and liberties of the Islands and the public interest therein. We turn now to outline our experience in the Bailiwick of Guernsey with reference to the Panel’s terms of reference in respect of the roles of the Attorney and Solicitor General of Jersey.

A. The Law Officers as legal adviser[s] to the States of Guernsey

1. The States of Deliberation

Both Law Officers are non-voting members of the States of Deliberation, i.e. the Parliamentary Assembly, of the Island of Guernsey (and voting members of the States of Election, the only function of which is now to elect Jurats (*Jurés Justiciérs*) of the Royal Court). We are also available to give advice to (but are not members of) the parliaments of Alderney and Sark. Our functions at meetings of the States of Deliberation are to advise the Assembly on legal and constitutional issues, answer questions about legislation presented for approval, and assist the Presiding Officer regarding procedural matters.

Apart from legislation, questions and statements, the business of the States of Deliberation mainly comprises consideration of Reports from States Departments, Parliamentary Committees, or the Policy Council. Whilst we or colleagues in the Law Officers’ Chambers may well, and indeed should, have been involved in the legal aspects of such Reports, we are available to advise all States members, and regularly assist with amendments or sursis (delaying motions) for members who may disagree with particular proposals, and with requêtes (non-Department/Committee petitions) to raise other matters for debate and decision. In all of this we never express or espouse any political opinion; where, exceptionally, a genuine issue of confidentiality or potential conflict arises, our experience is that the situation can be managed; and we believe that the constitutional independence which enables us to provide such assistance is widely respected and indeed valued.

* * * *

It is pertinent to preface the following three sections by emphasising that the States of Guernsey remains a single legal entity. Every States Department or Committee (and Departments are technically States Committees) is an agent of the States of Guernsey, mandated to perform specified functions which fall to be exercised by the States (i.e. the legal person which includes the whole undertaking and committee structure administered by what is commonly referred to as “the States”). We opine below that we have not experienced great difficulty in providing independent advice to any of these States agencies, and wonder whether one reason for that happy circumstance is the unitary nature of the States of Guernsey as thus properly understood.

2. The Ministers and Policy Council

The Law Officers of course regularly advise Ministers and Chairmen, individually or at meetings of their Boards. Guernsey’s Policy Council comprises the Chief Minister and the Ministers of the (currently) 10 Departments. The Law Officers are not members of the Policy Council, though we do attend meetings by invitation to advise on constitutional and

legal issues, and meetings of Policy Council groups established to oversee and/or report on various areas and projects. In addition to the development of strategic and corporate policy and co-ordination of States activities, the Policy Council's mandate includes the increasingly crucial areas of constitutional and international relations in which the Law Officers have historically been deeply engaged on behalf of the Island and indeed the Bailiwick of Guernsey, as an emanation of our role as legal and constitutional advisors to the legislatures of the Bailiwick's constituent Islands. We now work in close partnership with the Policy Council and relevant advisers to ensure optimum representation of the Islands in inter-governmental meetings, and to international organisations such as the United Nations, the Commonwealth, the European Union institutions, the International Monetary Fund, the Organisation for Economic Co-operation and Development, etc.

3. States of Guernsey Departments / Committees

The Law Officers are available to advise all States Departments / Committees concerning any legal issues which they encounter. Our advice to States Departments (and to Committees of the States of Alderney and Chief Pleas of Sark) encompasses the development of policy, particularly in matters having constitutional consequences or implications, or where international relations may figure. We must advise and warn the administrations of the Bailiwick concerning such matters; but we are only concerned directly with policy in those areas for which we have responsibility, particularly the development of the criminal law and criminal justice policy. As well as advising generally, we and our colleagues represent the States in legal proceedings, unless the Department / Committee concerned has instructed a firm of Advocates – usually where the States are being sued on a matter covered by insurance in which case the insurer's lawyers will conduct the case. We usually appear on behalf of the States in appeals against administrative decisions – for example housing licence and planning and development appeals. We usually appear, together with counsel acting for the United Kingdom which has responsibility for the Crown Dependencies in foreign affairs, in proceedings in the European Court of Human Rights arising from the Bailiwick, and would similarly appear in the European Court of Justice on any reference to that Court of a European Union issue in which the rights or obligations of the Islands under Protocol 3 were in issue.

4. Scrutiny

As well as on the floor of the Assembly of course, formal Parliamentary scrutiny is conducted in Guernsey through the Scrutiny Committee, Public Accounts Committee and Legislation Select Committee. The Law Officers and our colleagues advise each (in fact the Legislation Select Committee is not properly constituted at formal meetings without the presence of a Law Officer or Crown Advocate). These Committees are not in any sense a quasi-opposition but integral elements of the machinery of government, and the Law Officers have not experienced any difficulty in bringing the necessary degree of independence to the work of assisting any of them.

B. The Law Officers and criminal prosecutions / law enforcement

All criminal proceedings are brought in the name of the Law Officers and under our control throughout the Bailiwick; there is no right to bring a private prosecution in any court. In broad terms, and subject to what is said below, the position within Chambers is similar to the relationship that exists in England and Wales between the Attorney General and the Director of Public Prosecutions in that we superintend the prosecution process but delegate day to day

responsibility to the Director of Prosecutions who has a team of five other lawyers to assist him.

Although minor routine Magistrate's Court work is delegated to the police (mainly road traffic offences) our criminal prosecutions team will provide appropriate advice and guidance when required and conduct prosecutions personally in the Magistrate's Court in the majority of cases, as well as, where necessary, in the Courts of Alderney and Sark. And of course, one of the criminal specialist Advocates from Chambers will always appear in the Royal Court to prosecute, and on criminal appeals in the Court of Appeal.

We strive to maintain a good and close working relationship with the local law enforcement agencies (police and customs) whilst acknowledging and respecting their independence. Customs officers exercise their functions Bailiwick-wide. The Guernsey Police operate in Guernsey and Alderney (policing being one of the transferred services under the 1948 arrangements), with assistance from unpaid Special Constables responsible to the Chief Officer of Police. The (two only) resident Officers in Sark are non-stipendiary; they seek our advice, and work closely with Guernsey Police where appropriate. Certain statutory functions regarding the investigation of suspected crime are vested in (and mainly discharged personally by) the Law Officers; and those are frequently exercised in international criminal co-operation cases as well as purely domestic investigations. But subject to those important exceptions, we are mindful that, until papers are formally submitted for our consideration of prosecution, our role in criminal investigations is only advisory. There is no cadre of honorary police, and as Law Officers we would not wish to be given responsibilities at the head of any such cadre.

C. The Law Officers and the Crown in right of the Bailiwick of Guernsey

It is sometimes said that the Law Officers' primary duty is to the Crown, and that would in our estimation probably not be an inaccurate statement if properly understood, but it is frequently misconstrued. The Crown in this context ordinarily means the Crown in right of the *république* of the Bailiwick of Guernsey. Even on a narrow construction, what we hold to be here in view is the collective governmental and civic institutions, established by and under the authority of the Monarch, for the governance of these Islands, including the States of Guernsey and legislatures in the other Islands, the Royal Court and other courts, the Lieutenant Governor, Parish authorities, and the Crown acting in and through the Privy Council. A less structurally focussed analysis might, especially when read in the context of our duties mentioned above to uphold the laws, rights and liberties of the Islands, produce a more succinct assessment of our Crown responsibility as being simply to safeguard the public interest on behalf of the Monarch. On either view, a UK government department is naturally afforded responsibility for our relationship with the United Kingdom (currently the Ministry of Justice, whose political head, the Secretary of State, is concurrently the Lord Chancellor, and of course is a Privy Councillor). But on either and any sustainable view, the Crown very clearly does not mean the United Kingdom Government for the time being. It is wholly fallacious to opine that the loyalties of the Law Officers are somehow split between the good of these Islands on the one hand, and the interests of whatever political party forms the government of the United Kingdom for the time being on the other; and further that this incorrectly perceived divided loyalty must ultimately be resolved in favour of the latter and against the people of the Bailiwick. Thus properly appreciated, we anticipate that the independence of the Law Officers, just as that of the Courts, should be capable of being valued as an integral element within a balanced governance system.

D. The Law Officers' other functions

We suspect that an in-depth analysis may disclose that many of the other functions exercised by the Law Officers in this Bailiwick are predicated on our "Crown" rôle, as thus broadly understood. Clearly our duties to advise His Excellency the Lieutenant Governor, as the Queen's personal representative throughout the Bailiwick, are so derived. The same might be said with some confidence of our advice to the officers of the Courts, such as HM Sheriff and HM Sergeant; and, we suppose, the Courts themselves, wherein we are often called upon to appear as *amici curiae* to give independent and impartial advice on a legal or constitutional issue, and less frequently intervene of our own motion as *partie publique* in civil proceedings, when it is deemed appropriate to represent the public interest or the interests of those who may not be able to represent themselves. Similarly we will advise the Established Church on constitutional and ecclesiastical law issues, and the Parish Authorities concerning public law matters.

We also provide advice to, and sometimes appear in litigation on behalf of, a number of more recent statutory public bodies exercising public functions, such as the Guernsey Financial Services Commission. Some of the legislation administered by some of those bodies does expressly confer functions on the Law Officers; but in other respects it is not always immediately apparent whether their choice to employ our services (for it certainly is a matter of choice) is to any extent based on a perception of our public persona, or is perhaps more a product of history (in that some perform functions previously undertaken by the States of Guernsey for example), perceived expertise, or value for money. We believe it is fair to say that we have not encountered any unmanageable conflicts, there are perhaps synergies, and we are pleased to assist those organisations where we can properly do so; but these are perhaps areas where some greater clarity might be desirable.

It should be noted that the Law Officers also have a range of what might be termed *partie publique* functions concerning the safeguarding of vulnerable people and groups. As there has been legislative development of the regimes around, for example, the protection of children and young people, the mentally ill, and (which is quite different) those unable to manage their own affairs, the historic roles of the Law Officers quite rightly have been revisited and refined, but it is interesting that some value in our continuing involvement has often been recognised. Other areas which have not been seriously revisited for some time include the procedures following deaths; in inquests and other respects we have a significant level of involvement which is otherwise dealt with elsewhere; but, whilst some streamlining may well be helpful we do not anticipate any need or desire to employ or deploy other resources to these areas.

Since 1985 the holder of the office of H.M. Procureur has also been appointed H.M. Receiver General; and H.M. Comptroller is authorised by warrant to act as the "Deputy Receiver General". Our functions in that capacity include the collection within the Bailiwick of Crown revenues, and the administration of Crown property, which include Jethou, the foreshores (in those places where the Crown owns the fiefs contiguous with the coast), and the seabed.

Some of these additional functions may well also be similarly discharged by the Law Officers in Jersey; others we believe are not. Some are more demanding in terms of time and/or expertise than others. Some appear to be more firmly rooted in the fundamental precepts of our Offices than others. But there is one further major area of the work of the Law Officers in the Bailiwick of Guernsey, and that is the drafting of legislation. We acknowledge that the highly intellectual, specialist function of legislative drafting is dealt with in other ways both in Jersey and other jurisdictions; but, as well as the clear synergies and efficiencies of shared expertise and talents, we value enormously the collegiate

cohesion, and simply the camaraderie, to be derived from the co-location of this important function within the Law Officers' Chambers.

Conclusion

In concluding, we would sincerely thank you for this opportunity to contribute to the Panel's consideration of the rôles of the Law Officers in Jersey, whilst respectfully re-emphasising that, whereas our Jersey colleagues share similar functions to many of ours, and, we suspect, the value which we identify on behalf of the community in our independent Offices, there are some not insignificant differences of which we are aware, and, we suspect, others of which we are not. We would accordingly counsel some caution in your consideration of the comparability of the position as between the two Bailiwicks. For our part we would not presume to suggest any conclusions to your Panel for Jersey arising from our experience in this Bailiwick; nor, though we look forward with interest to seeing your Report, would we expect that all of your conclusions in respect of Jersey will necessarily be of direct relevance to us. We simply offer our experience for what it may be worth.

Yours sincerely

H E Roberts QC
HM Procureur

R J McMahon QC
HM Comptroller