

Review of the Roles of the Crown Officers

1. These written submissions are made pursuant to the invitation extended to members of the Law Society by Lord Carswell in respect of the public review to consider the roles of the Bailiff, Deputy Bailiff, Attorney General and Solicitor General.

Roles of the Bailiff

As first citizen

2. To help assist Jersey's increasing independence, the Bailiff should actively reduce his perceived role as first citizen of the Island.
3. Historically, since the late 18th Century the government of Jersey has evolved from what Le Herissier in his work, *The Development of the Government of Jersey, 1771 to 1972* (1972), calls 'a body of petitioners'. This was a government devoid of any meaningful independent mind or powers, entirely ancillary to and reliant upon the Crown. As such a powerless body, it is little wonder that the Bailiff, the Crown's senior representative in the Island, and inevitably an educated man, dominated the local political landscape. He was Jersey's 'first citizen'.
4. The evolution of the Jersey government to something proximate to a functioning government of an independent state has however changed the landscape to some degree. Jersey's focus is increasingly and rightfully placed upon democratically elected representation and leadership of the Island. In the 1980s, a de facto leadership arose via the Policy & Resources Committee which, in turn, gave way to the Council of Ministers. Today, the Chief Minister is the democratically elected leader of Jersey. Despite this, the Bailiff nonetheless continues to play a role outside his purely judicial function akin to that of first citizen. Indeed, it would be an interesting question to ask the Jersey people who they consider to be the first citizen. No doubt, old habits die hard and it is for the Chief Minister to assert his position, but the time must have come where the people of Jersey have a right to expect that their first citizen is elected and those who are not elected perform the functions to which their respective office strictly relates.

As speaker of the States

5. The Bailiff's role currently also extends into the sphere of government via his position as Speaker of the States. The Royal Commissioners in 1861 (appointed to examine the civil, municipal and ecclesiastical laws of Jersey) considered the small nature of Jersey's jurisdiction, to explain the Bailiff's legislative role:

"The Bailiff, in the first place, as President both of the States and of the Royal Court, combines legislative with judicial functions. Whatever may, in the abstract, be the objections to this combination, it will suffice for our present purpose to state that in Jersey there neither exists, nor can be provided, any other functionary at once learned in the law and of sufficient dignity to preside in the legislative body, and we therefore do not recommend any change in this respect."

6. In many respects, the role typifies the archaic nature of much of Jersey's constitution and it must be questioned whether, especially now in the context of the Island's move to ministerial government and what I hope is an increasingly democratic system, such a role remains sustainable. It is worthy of note that the Report of the Review Panel on the Machinery of Government (the "Clothier Report"), which served as a precursor to the recent reform of the Island's government, recommended that the Bailiff should cease to act as the president of the States or to take any political part in the Island's government. The reasons for this were expressed as follows, namely:-

- (i) No one should hold or exercise political power or influence unless elected by the people so to do. It is impossible for the Bailiff to be entirely non-political so long as he remains also Speaker of the States.
- (ii) The separation of powers rightly holds that no one who is involved in making the laws should also be involved judicially in a dispute based upon them.

- (iii) In his role as Speaker of the States, the Bailiff makes decisions about who may or may not be allowed to speak, put questions in the States, or about the propriety of a member's conduct. Such decisions may well be challenged on grounds of illegality but the Bailiff, of course, cannot sit to hear and determine those issues.

7. The Report noted that, whilst many witnesses before the Panel had alluded to the fact that the supposed conflict between legislative and judicial functions of the Bailiff was merely one of theory and perception, there existed recent and practical examples where a conflict had in reality manifested. One example cited was the Bailiff's decision to suspend a Member of the States from sitting. Another example is recurring: the Speaker imposing discipline on elected members; for example the 'telling-off' given to Deputy Wimberley in 2009 for his lack of preparation and organisation in a debate. Such a headmaster-like approach was inappropriate in itself, but all the more so when it derives from a non-elected official. No-one would seek to argue the importance of the speaker's role or the need, from time to time, for the speaker to impose discipline on the chamber. However it is an infringement of democracy for that role to be performed by an unelected official. It enables someone in whom the electorate have no say or sway disciplining and therefore having influence over those who have been freely elected.
8. The role of the Speaker inevitably draws the Bailiff into the centre of local politics. There is a steady stream of local politicians attending before the Bailiff in chambers seeking his advice and assistance. The Bailiff is thus inevitably a *eminence gris* and the relationship between the average States member and the Bailiff is one of deference.
9. The potential for a conflict of roles to arise is heightened by the lack of any codification as to the exercise and extent of the Bailiff's powers in these spheres. Much of the Bailiff's influence depends upon his interpretation of his role and history reveals several examples of how some previous Bailiffs have pushed the boundaries of their inherent powers. There remains the potential for a future Bailiff to adopt an expansive view of his executive powers.

10. The potential for conflict between the multi-faceted roles possessed by the Bailiff is not an infrequent source of criticism. This includes accusations of apparent bias, see for example the litigation in *Mayo Associates v Cantrade* January 22nd, 1999 Unreported (CA).

11. In the latter case it was argued that neither the Bailiff nor the Deputy Bailiff should hear the case on the basis that they carry out both judicial and executive functions. In rejecting this argument, the Court of Appeal relied on the dicta of Le Quesne V-P in the Guernsey Court of Appeal decision of *Bordeaux Vineries Limited v States Board of Administration* (1993) 16 G.L.R. 33. The relationship between the Bailiff of Guernsey's duties in the Royal Court and the States was summed up as follows:-

"He can properly discharge both responsibilities because although he is a member of the States his special position there mean he is not responsible for the decisions of the States or acts of its agencies, nor has he any pecuniary interest or, indeed, any other interest, in those decisions or those acts."

12. Whether this position still remains the case since the implementation of the European Convention on Human Rights may be doubtful. In *McGonnell v United Kingdom* (2000) 30 EHRR the Commission held, in the context of a planning appeal, that the Guernsey Bailiff's executive and legislative functions mean that his independence and impartiality as a judge were capable of appearing open to doubt and his position did not meet the criteria of 'objective impartiality':

"... it is incompatible with the requisite appearance of independence and impartiality for a judge to have legislative and executive functions as substantial as those in the present case. The Commission finds, taking into account the Bailiff's roles in the administration of Guernsey, that the fact that he has executive and legislative functions means that his independence and impartiality are capable of appearing open to doubt."

13. Whilst this was a case concerning the Guernsey Bailiff, it could equally have been his Jersey counterpart since their roles are in many respects similar (albeit that the administrative responsibilities of the Guernsey Bailiff are, prima facie, more

extensive). The case casts considerable doubt as to whether, in circumstances where the Bailiff (or Deputy Bailiff) has presided over the adoption by the States of particular legislation, he is able to take part in any judicial proceedings in relation to that legislation. Whilst the likelihood of this situation coming to pass is perhaps remote (since the power of the States to enact legislation is limited), the potential nevertheless exists. The introduction of the Human Rights legislation is likely to lead to more challenges such as those raised in *McGonnell*.

Roles of the Attorney General and the Solicitor General

14. In certain respects some of the roles of the Attorney General (less so the Solicitor General whose role has tended to be of a lower profile) are demonstrative of a Crown elected official playing a dominant role in Government.

15. The nature of the Attorney General's role was considered by Le Hérissier in his above cited work. Le Hérissier defines the functions of the Crown Officers in the States as:

- i. speaking as representative of the Crown;
- ii. speaking to matters for which he is directly responsible (e.g. the Honorary Police service);
- iii. providing general advice on proposed legislation;
- iv. defending legal actions brought against States committees; and
- v. appearing on behalf of States committees (compulsory purchase of Land / appeal to the Royal Court from administrative decisions of States committee /tribunal).

16. He concludes that:

"...Crown Officers are involved closely with the work of both the States and the Royal Court. Such involvement would seem to run counter to the increasing separation of powers which has characterised the post war development of the insular government. The fact that the Crown Officers are now seen to act as impartial advisers makes their constitutional position

tenable. Their appointment, in an independent manner, as opposed to the political appointment of Crown Officers in the United Kingdom, strengthens this interpretation of their role." (p.171)

17. It would be interesting whether now and, many years after writing this, a serving States member, Le Hérissier remains of the same view. Politically, the Attorney General has his fingers in many pies. He is a representative of the Crown with the right to speak to Crown interests in the States. He is adviser to the Executive, to the 'opposition' and to the States as a whole. In the latter role, he is entitled to speak in the States. As chief prosecutor he has direct access to those who make the laws. The States have tended to do as they are told by the Attorney General when it comes to implementing criminal legislation. In addition, he is head of the Honorary Police and the person responsible for imposing discipline on that body.
18. The multi-faceted and conflicting roles of the Attorney General are probably less obvious to those who have no insight into Government. To those who do have such an insight, the influential role he plays is not dissimilar to that of the Bailiff. Politicians and civil servants are deferential to the Attorney General. In Committee meetings, I have myself witnessed his involvement in political matters. It is clear that the lines between the provision of legal advice and political opinion can and often do be blurred.
19. A very recent example shows the deference in action. In Jersey, one might expect that insofar as the Island conducts its own foreign affairs, such conduct would be in the hands of an elected official. Indeed, the States of Jersey Law indicates that it is for the Chief Minister, assisted by the Council of Ministers, to play this role: see Articles 18 (2) (c) and 18 (3) (b) of the States of Jersey Law 2005. He, or any other member of the Executive, may seek the Attorney General's legal advice on matters including questions of international law, but the power to take decisions in that field rests exclusively with the Executive. However when Nigeria recently complained that Jersey's proposed use before a Jersey Court of evidence gathered unlawfully in Nigeria breached its sovereignty, the Royal Court's response was to suggest that the

Chief Minister had no role to play in such matters: see AG v Bhojwani [2010] JRC 042¹

20. In England, the decisions regarding the gathering of evidence abroad or responses to a foreign government's request for evidence to be gathered in England is entrusted to a Secretary of State. In Jersey, that power is in the hands of the prosecution. How might the prosecution balance his duty to prosecute a crime with the requirement under international law that one State treat another's sovereignty with respect, not least when the latter is not a concern of the prosecution. As Jersey gets ever closer to independence, it is going to have to take its role in inter-state relations more seriously.
21. In this respect, there exists a blurring of boundaries between the roles and functions of the Attorney General and the Chief Minister. In the context of giving mutual legal assistance, the Attorney General has two issues to consider, namely: (1) his role as prosecutor; and (2) Jersey's international relations. He should not be responsible for the latter, particularly when it conflicts with the former. The Attorney General's decisions and, in particular, his view of the public interest, should take proper account of the policies of the Executive. In essence, the Executive has a duty to set the parameters and priorities which define the "public interest".

¹ Ironically, the case was heard at the same time as Jersey was hosting a conference entitled "States of Jersey - International conference on financial crime and asset recovery closes".