

SUBMISSION TO THE REVIEW OF THE ROLE OF THE CROWN OFFICERS

PART 1 HISTORY AND CONTEXT

In this part, I will briefly look at the historical development of the offices and, secondly, draw out some of the features of Jersey society which, in my view, support the case for reform.

There are various perspectives one can apply to the calls for reform of the role of the Crown Officers. On the one hand, one can see it as the end of a stumbling and hesitant process of attempting to reform the island's institutions, particularly in terms of a gradual transfer of executive functions from the Crown to the States. The Bailiff's role also overlapped into the political sphere partly because the States was not a fully "competent" legislature and partly because the States lacked an executive at the centre and, by default, the Bailiff continued to occupy a position of influence in this regard.

On the other, one can see the current situation as a pragmatic outcome of the pressures faced by a small society which aspires to universal standards of governance but has to make certain compromises, largely because of costs and manpower limitations. Overall, the transfer of executive functions to the States has now taken place bar a few exceptions like Immigration (still with the Lieutenant Governor) and Public Entertainment (still with the Bailiff's Office).

As in other Crown Territories and Dependencies, Foreign Affairs and Defence still remain within the prerogative of the Crown.

However, the Bailiff's involvement in political matters (and to an extent that of the other Crown Officers) was not fully resolved despite some significant governmental reviews (notably, the 1947 Review by the Privy Council and the Clothier Report of 2000).

A review of the process of change and the struggles between reformers and what one may term "traditionalists" shows that there has been considerable emphasis in Jersey's recent history upon the retention of tradition. There is a great hesitancy, particularly but not exclusively from those of influence and power, in embarking upon wide ranging reforms which would undermine the distinctiveness of Jersey's institutions. As evidenced by people like Kelleher, whose work "The Triumph of the Country" was a study of these reform struggles in the nineteenth century, much of the resistance to change came from the rural society of Jersey. This society, largely based on small scale farming, was the bedrock of the honorary system and because of the way in which the electoral system was structured, held considerable sway in the States of Jersey and to a lesser extent still does.

In the nineteenth century, Jersey was a society which came under increasing pressure from immigrants, largely from the British Isles, who saw Jersey as some kind of feudal backwater with institutions which were inappropriate to the nineteenth century. Most of these immigrants settled in St Helier and formed part of the business and trading classes of Jersey. They were aghast at the absence of proper laws to regulate commercial activity, at the set up and power of the honorary police system and at the organisation and functioning of the Courts. Thus, the arguments which will be rehearsed around the role of Crown officers are by no means new.

Why have Jersey people fought so avidly against radical reform? In the nineteenth century there grew up the belief that an attack on the island's institutions was an attack on its autonomy. Therefore, there also grew up the parallel belief that in order to retain the island's distinctiveness and by extension its autonomy, it was necessary to retain its distinctive institutions. Thus, some of the major constitutional battles of the nineteenth century centred upon retaining that independence and in several of them (Victoria College, Prison Board Case, Marie Louise case) the Bailiff was placed in the position of asserting the island's autonomy in the sense that his role was seen as superior in the governance of these bodies compared to the role which the Lieutenant Governor played. Ironical, given that both were Crown appointees.

Thus, we had the curious situation of one Crown appointee fighting for the island's autonomy against the apparent rights of another Crown appointee.

Most importantly, there has developed the convention that the Bailiff is Guardian of the Constitution and certainly, according to the actions of the penultimate Bailiff, it appeared that in the exercise of this role he intervened directly in issues where he felt the island's independence or its institutions were under threat. This resulted, for example, in highly controversial comments on the nature of the recommendations made by the Clothier Panel on government reform. He was, and indeed to this day continues to be, outspoken on the need for the island to seriously consider whether it should seek independence.

It could be argued that the role played by the Bailiff in such controversies and to a lesser extent played also by the other Crown officers, was because the States of Jersey was not clearly the dominant governance and political body on the island. Instead executive power was still shared between itself and the Crown. Furthermore, the Bailiff performed the role of "Civic Head" where, in the absence of a political executive, he was seen as the Island's leader.

The Crown also remained powerful because it raised its own sources of revenue. This enabled it to directly finance services like the Prison.

There was therefore a division of responsibility for government and the States was only gradually building up its influence through the establishment of committees which covered each of the specific areas of government.

There is no doubt that the battle to retain the island's autonomy, and the particular role played in that endeavour by the Bailiff, took attention away from reform of the office. It was not until the arrival of the constitutional review body in the immediate post WW2 period that a hard look was taken at the role of the Bailiff of the Crown officers and indeed, other areas of contention in the States like the role of the Constable. As an example of how the island dealt with reform, the 1948 States of Jersey Law is instructive. It went part of the way but not all the way and as ever, there was a degree of pragmatism and compromise brought to bear. The Jurats were removed from the States on the grounds that this conflicted with their judicial role and it was no longer possible to have people who were in both the legislature and the judiciary. Yet that reasoning was not ultimately applied to the role of Bailiff. Neither was it applied to the role of Constables. They remained in the States and continued to be the chiefs of their Parish honorary police.

THE CHARACTERISTICS OF SMALL SCALE SOCIETIES

History provides some explanation as to why change has been embraced in a rather hesitating and at times limited fashion. At the same time, we need to look carefully at the characteristics of small polities like Jersey.

Small societies tend to be more cohesive societies than those of a large scale. However, as alluded to above large-scale immigration did challenge the basis upon which Jersey's society was organised and led to some change. Those who wished to promote change were often criticised as being people who wanted to impose the institutions and the norms of other societies upon Jersey and its distinctive society. This argument was current in the nineteenth century and it remains current to this very day despite major social changes since that period. The advocates of change say that we are increasingly in a world where there are universally accepted norms about matters such as the right to independent Courts, and that Jersey cannot embrace the kind of compromises which have hitherto been the case. They also argue that in a small society it is very hard to be objective and independent because of the nature of the relationships which exist in that society. In a small society, the various structures of that society overlap. Thus, people are often members of religious bodies, political bodies, work places where they often meet the same people on a regular basis. The sociologists call this "multiplex relationships" Nearly every social relationship serves many interests. In analysing the differences between large and small-scale societies Richards (1982) makes comments which will resonate with many people in Jersey.

" ...In smaller polities society is still very closely enmeshed with the state and the state with society. The linkage takes place through individuals and personalities rather than through impersonal, organizational bureaucracies representing the state... The converse of this is that such differences that do occur are more personal, more intense and more emotionally charged".

Put another way, one can say that the person often defines a position, not vice versa.

Another concept which is helpful in understanding how Jersey's society works, and why there is a need to apply universal norms, is that of particularism and universalism. Basically, in particularism there is an emphasis on personal relationships and decisions are often made upon the relationship of one person to another be it through societies, be it through family relationships or be it through the length of time that one person has known another. In universalistic relations people relate to each other impersonally on the basis of clear standards and criteria and, to extend the jargon, these relationships are functionally specific. Thus, when a personnel officer is considering an appointments decision this is done on the basis clearly laid policy, it is impersonal and in no way is the decision maker effected by any relationship they may have or have had with the individual under consideration.

Obviously, Jersey is a place where people do meet and relate to each other in all sorts of contexts and while it may be argued that they are able to leave their official role "at the door of the golf club", there is no doubt that these overlapping and wide relationships have an impact upon the performance of their official roles, if only on the basis of perception.

A dramatic example of the power of particularism was shown in the controversy that surrounded the dismissal from office of the Deputy Bailiff, Mr V Tomes, in the early 1990s. In popular terms, the issue reduced itself to one between loyal supporters of Mr Tomes largely from his Parish of St John's who felt that a talented and able "son of the soil" was being unfairly attacked by some remote elite in St Helier. Concerns had been expressed about the performance of Mr Tomes' judicial duties but in the eyes of his supporters, there was a feeling that these issues were secondary to the fact that the group in charge of Jersey, "the Establishment", did not want an individual who had come from a humble background and who was not prepared to accept their social conventions.

Given the sensitive nature of the case, it obviously became an embarrassing matter and not one that would normally be played out in a public context.

Thus it was the contention of many people that Mr Tomes was “a good chap” and he was being judged on the wrong grounds.

Of course, while the accusations concerning this case were played out publicly, similar accusations of a more muted nature are made about people who do not attract such controversy. The argument is that they socialise and meet regularly with people who they will have to professional engage with at some point and that this makes it very difficult for them to exercise impartial judgment and to be fully independent. It is probably the case that the issue was not that such senior people lack independence but that it is perceived as such.

Institutions and offices should be structured in such a fashion that there is no possibility of there being a conflict of interest.

In addition, the “Tomes affair” raised the issue of how a senior Crown officer could be dismissed and the role of the States and other Crown appointees in that dismissal. While it was clearly understood that it was only the Home Secretary (as the then relevant Privy Councillor) who could dismiss, there was much discussion about the part played by the other Crown appointees, specifically the Bailiff and the Lieutenant Governor.

THE POSITION TO DATE

This brief and compressed historical review suggests the following conclusions.

- The identity of the Bailiff's office with Jersey's quest for growing autonomy gave him an influential role in matters which would elsewhere be construed as political.
- The Bailiff (and to some extent, the other Crown officers) was seen as an important element of Jersey's distinctive institutions and, as such, the issue of the overlap between the judiciary and the legislature was not seen as the fundamental issue. The impact of theories like the Separation of Powers was not key.
- The assumption of the role of "Guardian of the Constitution" and "Civic Head" placed the Bailiff in a position which gives him considerable political influence, should he wish to exercise it.
- Because the most recent fundamental review of Jersey Government (Clothier) did not include the role of the Crown Officers, no attention was paid to possible conflicts or overlaps between the office of Bailiff and that of Chief Minister.
- There has been a long, if intermittent and incomplete, process of separating the Executive, Legislature and Judiciary but the Crown Officers have remained remarkably impervious to the logic of this ongoing reform.
- Lastly, there are particular features of a small society which make it difficult to separate out personal and public roles and lead easily and frequently to perceptions of conflicts of interest.

TO REFORM OR NOT TO REFORM

On first flush, it looks to be enormously expensive for a small state to totally reform institutions so that there is true independence and true separation between the three major organs of the States and the state - the legislative arm, the judiciary, and the executive. Under the British system and certainly under the previous committee system in Jersey, there was almost a fusion between the legislative arm and the executive. However, irrespective of how the Executive and Legislature relate in Western style democracies, it is an inviolable principle set out in the Latimer House Principles, that there be judicial independence.

The issue with the Bailiff is not simply that of the Speaker's role; it is a question of being placed at the centre of government. This gives rise to the perception that he is able, should he wish, to influence political decisions.

The focus of this section has been on the role of the Bailiff. However, if the doctrine of Separation of Powers is to be strictly applied and Jersey is to logically complete the very protracted process of reform, then matters such as the Attorney General's role as "titular" head of the Honorary Police, his role as legal adviser to the Executive and Scrutiny his accountability for Prosecution decisions and the whole vexed question of how Crown Officers are appointed and on what advice, have to be addressed.

PART 2

RECOMMENDATIONS

1. **That The Bailiff be divested of the role of Speaker.** This would be a major step in completing the process started in 1771 of separating the Royal Court from the States of Jersey. Other small jurisdictions, like Gibraltar, appear to function successfully with Speakers who have been eminent lawyers, politicians and such like. I would not favour the House of Commons approach of appointing a sitting member.

2. **That the Bailiff be divested of the role of “Guardian of the Constitution”**

In part, this falls to the Bailiff because he is able to rise above the political fray and take a more measured and long-term view.

Ultimately, issues like independence, our relationship to the EU, are political questions. It could be that a strengthened Chief minister’s Department and/or a second chamber would take on some of this role. Furthermore, the Lieutenant –Governor (LG) 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. (While the role of the LG forms no part of this Review, it is difficult to carry it out without reference to his role).

3. **That the Bailiff be divested of other Executive Functions** - Given the central position historically played by the Bailiff, other functions fall to his office.

- President of the Licensing Assembly - this is a vital task given the social and criminal justice issues that underlay it. I would favour an independent Tribunal with a right of appeal to the Royal Court.
- Oversight of Public Entertainment - this was reviewed by a political committee some years ago, with the writer as a member. 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. The Bailiff now operates with an Advisory Panel, the office appears to take a low-key approach responding only to complaints and not actively vetting every entertainment except on the grounds of Health and Safety. Ideally, the long-term solution ought to be the removal of this function.

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

Given that the SG is essentially the alter ego of the AG this section covers both offices.

- 1) **Legal Adviser to the States Assembly** - I have no objection to this remaining as long as it is accompanied by reforms which remove current Conflicts of Interest. Obviously, the convention must be strictly upheld that he does not speak in a political sense.
- 2) **Legal Adviser to the Executive and to Scrutiny**- I have put these together because of the issues that have arisen in relation to both.
 - There has been a long running controversy, resolved by the States Assembly, as to whether Scrutiny Panels can have access to legal advice given by the AG to the Executive.

- Advice to the Executive has been seen as privileged in that it is given in the context of a client-lawyer relationship.
- That said, Scrutiny is tasked with examining the basic fundamentals and assumptions of draft policy.
- Often, the legal advice is crucial in determining the nature of the policy.
- There should be provision for Scrutiny, under confidential cover, to have access to the advice otherwise it cannot, in certain instances, reach a well rounded decision about the suitability or otherwise of a draft policy.
- The AG also acts as a legal adviser to Scrutiny although there have been a few cases where a Panel has sought outside advice. It seems unfortunate that legal advice which directly contributes to policy making cannot be released, under confidential cover, to Scrutiny Panels.
- Again, the arguments have been well rehearsed over the last few years and a reluctant conclusion has been reached that, given the AG's role in relation to the Executive, there will have to be more, if not exclusive, recourse to independent legal advice.

3) Titular Head of the Honorary Police

- In the writer's view, it is totally wrong that the AG should be Head of the Honorary Police, titular or otherwise!
- It is difficult to see how he can perform his role as Public Prosecutor when he is essentially in charge of the Police who are responsible for a large amount of policing and, specifically, the charging of individuals.

4) Public Prosecutor

- Aside of the conflict between his responsibility for honorary policing and his role as the Public Prosecutor, the issue arises of whether the AG is properly accountable for the performance of this role. While the independence of the role needs to be secured and respected, the role cannot be performed in a vacuum.
- Controversy over the low numbers of suspects who were charged in relation to the Historic Abuse Inquiry, led to the AG's Chambers issuing a statement justifying their position in relation to the key cases.
- The AG should submit an annual report to the States on his prosecutorial role. This should be subject to both external and Scrutiny Review of a qualitative and quantitative kind.

5) Advising on Constitutional Matters

This is an important if currently grey area. It is one that, historically, has "grown like Topsy".

Indeed, the whole way in which the Island relates to the UK, and to international bodies needs a thorough review. Several parties are involved such as the "Crown", the LG, the Bailiff and the States, usually through the Chief Minister.

General Observations

Interconnectedness of Issues

- There is a view that if one pulls on one strand of "wool", or one thread, then the whole system of government in Jersey will unravel.
- There is no doubt that by attempting to separate out the roles of the Bailiff there will be major implications for other offices of government.

- There will also be the issue of whether the Bailiff retains his role as “Civic Head “ or simply becomes the Chief Justice. Clothier recommended that the Bailiff’s role be confined to the Courts but that he should remain “Civic Head “.
- It is difficult to see how this could be meaningful should the proposed reform of his roles take place.
- Inevitably, there will need to be a study of how a reformed office of Bailiff would relate to the offices of the LG and the Chief Minister.

Appointments and Dismissal Procedures.

- Bois mentions in his “Constitutional History of Jersey” that, “Jersey and Guernsey are possibly the only places in the Commonwealth where holders of high judicial office may be dismissed on grounds other than of failure to be of good behaviour.”
- Traditionally there was seen to be a ladder of promotion from the office of SG to that of Bailiff. There have been major exceptions in recent years.
- There has also been opaqueness about the appointment procedures with soundings taking place.
- The writer is aware that the procedures have been reformed of late by the involvement of the Appointments Commission.
- Were the Bailiff’s role to be reformed, it would be advisable to involve a body like the Judicial Appointments Commission. Similarly, and as graphically illustrated in the “Tomes Affair “, there needs to be much more transparency in the matter of assessing performance and

dismissal. I am not suggesting that all these matters can be conducted in the public domain.

Rather, there need to be transparent and robust procedures in place.

CONCLUSION

Anyone who has been involved in government reform in Jersey is aware of how treacherous the process can be and is also aware of how the affection in which institutions are held, can seriously hinder an attempt at rational reform.

That said, reform of the Crown Offices is overdue.

It is particularly important that the principle of judicial independence is strongly established. The Review Body has undoubtedly studied the attempts at reform that followed the Clothier Report. Although the Report had a coherence and interconnectedness, implementation foundered because of the view that it was “all or nothing”. If a major separation of the States and Judiciary takes place, the Bailiff’s role as Civic Head will be emasculated. Ironically, reform in this case must be based on the “whole package.” It is hard to see how incremental reform could work.