

Review of the roles of the Crown Officers

Submissions of Robert MacRae

1. I am an Advocate and a Partner in the Litigation Department of Carey Olsen. I was educated in the Island and after almost ten years practice at the English Bar returned to Jersey to work as a lawyer in 2001.

The role of the Bailiff as Chief Justice, President of the States and civic head of the Island

The role of the Bailiff as Chief Justice

2. I do not think there is any serious suggestion that the Bailiff should not continue to act as Chief Justice. We have been fortunate that the current and previous Bailiff (I mention only those of which I have had immediate personal experience) have been excellent judges whose decisions have been considered and often followed in much larger jurisdictions than our own. A high quality judiciary is essential to the Island's wider success and its reputation as a stable jurisdiction.

The role of the Bailiff as President of the States

3. This is a more difficult issue. Certainly there are much larger jurisdictions than our own where one individual has performed roles in both the legislature and the judiciary. The obvious example is the Lord Chancellor of England whom for centuries was a member of the legislature as Speaker of the House of Lords, the judiciary as senior judge and also the executive, as a member of the Cabinet. Only very recently was the role the subject of reform. However, the risk of conflict between the two roles is likely to be greater in a small jurisdiction with only two full-time judges.
4. There are certain attractions to the arguments put forward by the Clothier Review Panel on the Machinery of Government in Jersey (December 2000) which expressed the view that there "are three reasons of principle" for saying that the Bailiff should

not have a role both as Chief Justice and as President of the States. Those reasons in short were that no-one should hold or exercise political power or influence unless elected, that the principle of separation of powers holds that no-one who is involved in making laws should also be involved judicially in a dispute based upon them, and that the Bailiff in his role as President (or "Speaker" as Clothier describes him) of the States makes decisions about the conduct of States procedures. Although these decisions are challengeable in the Royal Court such challenge could not be determined by the Bailiff in his judicial capacity as he would be considering the propriety of his own actions.

5. As to the three "reasons of principle" described by Clothier, in my opinion the second and third arguments can in practice be overcome without real difficulty by ensuring that another judge of the Royal Court - whether the Deputy Bailiff or a local or UK Commissioner - presides over any dispute consequent upon legislation the passing of which the Bailiff presided over or in which he was in any other way involved. Further, since Clothier reported in 2000, the Bailiff's power of dissent and his casting vote has been removed by legislation. Accordingly his 'political power' (per Clothier) has reduced.
6. However, the first reason of principle remains a significant consideration and the current system does depart from the general principle that a speaker should be "the servant of an assembly, not its master" (Clothier) and should in certain circumstances be capable of being removed from office if unsatisfactory. Clothier perhaps felt that the States Assembly would never be master of its own destiny until it elected its own Speaker.
7. I understand that the Panel's terms of reference require it to have regard to the principles of modern, democratic and accountable governance and (one might almost say on the other hand) the nature of a small jurisdiction, the Island's traditions and heritage, the resources required and the difficulties (if any) which have arisen in practice.
8. Perhaps a key question to ask is what sort of Speaker do Members of the States Assembly and the people of Jersey wish to have? When one considers the United

States of America, perhaps the paradigm example of a modern democracy with strict separation of powers, the role of Speaker of the House of Representatives is highly partisan. Recent Speakers, both Democratic and Republican, have been aggressive political campaigners in support of their respective causes. In my opinion, the Members of the States and the people of Jersey expect a Speaker to act impartially, to fulfil the role fairly, to chair debate so as to allow each member to have his or her say, and to ensure that backbenchers are given as fair a hearing as Ministers. They expect the Speaker to have sound judgment and a reputation for even handedness. In short they expect the Speaker of their Assembly to have reposed in him or her all the qualities that we expect (and in Jersey we are accustomed to find) in a presiding judge.

9. In my view this is a key consideration.
10. Further, although the ministerial system is regarded as having begun to improve the efficiency and effectiveness of Jersey government and to allow the public to more readily identify individuals accountable for governmental decisions more readily than the previous Committee system, it seems to me that the States Assembly has, perhaps inevitably, become a more divided place. That may well be a good thing and is perhaps an inevitable consequence of having a "Government" and an opposition/scrutiny function. In such circumstances a need for an independent Speaker to hold the ring is possibly even more acute than before. The difficulty in identifying a Speaker from amongst the elected States Members who is not regarded as being aligned with one point of view is correspondingly more difficult. There is also a belief that the available pool of States Members with requisite skills to assist in governing a jurisdiction where Government spending now exceeds £500million a year is limited and that it would be unfortunate for one of the most talented members – whether such a person is a potential Minister or a potential Chairman of the Scrutiny Panel – to be required to take up the post of Speaker.
11. Accordingly, I have come to the view that having regard to the matters set out above together with the fact that difficulties have not, in fact, arisen from the current arrangements, that the Bailiff should continue to act as President of the States.

The role of the Bailiff as civic head of the Island

12. Historically, the Bailiff has and continues to carry out this role to the satisfaction of the vast majority of Islanders. As first citizen of Jersey, appointed by the Crown, he is also guardian of the Islanders' privileges and freedoms. The Clothier Report did recommend that the Bailiff, notwithstanding his removal from the States, should continue to be accorded with the respect in which the office had been held and that the office should "continue to be the highest in the Island on all occasions when the order of precedence is observed". However, I think that in reality such precedence would cease if the Bailiff no longer presided over the States, particularly with the advent of an elected Chief Minister.
13. With the advent of a Chief Minister, matters of a purely political nature concerning the Island and other jurisdictions have become the responsibility of an elected politician. Prior to this time, it frequently fell to the Bailiff to serve as the principal link between the Jersey Government and other governments, particularly the United Kingdom. This change should have gone a long way towards removing any concerns about the Bailiff's role in day to day political affairs particularly, for these purposes, his role as President of the States.
14. Whether or not the Bailiff continues to preside over the States (and I have expressed my view that he should) there can be little doubt that, as civic head of the Island, successive Bailiffs have served Jersey well, and there is perhaps a general feeling that the role which he currently fills is one that many Islanders feel should be held by someone with no political allegiance.
15. Regard also needs to be had to the effect upon the role of Lieutenant-Governor if the role of the Bailiff is altered. Both are Crown appointments. Both will be seen by the Crown and its agents as fulfilling important roles of historic and current significance to the Crown and to the Island. Diminishing the ancient and well-defined role of Jersey's first citizen could have unforeseen consequences upon relationships between the United Kingdom and Jersey and its status as a self-governing Dependency of the Crown.

The role of the Attorney General and the Solicitor General

As legal adviser to the States of Jersey

16. The Attorney General and Solicitor General provide legal advice on a wide range of issues to Government departments and I understand that they generally have the confidence of those they advise. There is a wealth of expertise in the Law Officers' Department including lawyers who assist the Attorney and Solicitor General, many of whom have served the Department for decades and have a strong commitment to public service and to the provision of high quality legal advice. It is sensible for the Attorney General to continue to be a non-voting Member of the States for the purpose of giving and explaining such advice to all States Members.

As legal adviser to the Council of Ministers and to Scrutiny Panels

17. I am aware of the potential for difficulties to arise from the Attorney General and Solicitor General serving as advisers to both the Council of Ministers and the Scrutiny Panels. Having said that, there are significant advantages in terms of cost, speed and consistency of advice which flow from a single department providing advice to the States, its Ministers and Scrutiny. I understand that if a Minister and Scrutiny require separate advice, it is possible for both to be advised in confidence by different legal advisers employed by the Law Officers' Department. There is nothing unusual about giving confidential advice to two parties with different interests (so long as they are not involved in hostile proceedings against each other). Indeed, such an approach is a common feature of advice given by private law firms. I accept that there may be circumstances when such an approach is impracticable. On those occasions the solution is perhaps for the Scrutiny Panels to have sufficient funding to take advice from independent Advocates in private practice. Such occasions should be exceptional in my view and wherever possible advice given to a Minister should be shared with all States Members.

As chief prosecutor

18. As a Crown Advocate, I have experience of conducting criminal cases on behalf of the Attorney General. Having prosecuted cases for nearly ten years at the English Bar, I can say that the prosecution of criminal cases in Jersey is conducted to a higher standard than would typically be found in an English region served by the Crown Prosecution Service.
19. The Law Officers' Department, with the assistance of Crown Advocates in private practice where necessary, prosecute cases of very substantial complexity efficiently and effectively.
20. Establishing a Criminal Prosecution Department separate from and outside the Law Officers' Department with perhaps a Jersey Director of Public Prosecutions at its head - rather like the Crown Prosecution Service in England – would not in my opinion be an improvement on the current system. Having had several years experience of receiving instructions from various branches of the Crown Prosecution Service, in my opinion such a move would be detrimental to the Jersey prosecution system. There would be a real difficulty in attracting talented lawyers and a new "start up" prosecution service would experience real difficulties at any time but especially when the Island's financial resources are limited. In my view, it is very important that oversight of criminal prosecutions remains part of the Attorney General's role.

As head of the Jersey honorary police

21. The honorary police are the backbone of Jersey's honorary system and play a central role in the prosecution process. The Parish Hall system, particularly for young offenders, is the envy of larger jurisdictions. I understand that generally the honorary police are strongly in favour of maintaining the Attorney General as their titular head. Accordingly, I do not see a reason for changing current arrangements.

Acting in the interests of the Crown in Jersey

22. There is always a potential for a conflict between the interests of the Crown on the one hand and the States, and other persons who may be advised by the Attorney General, on the other. Such conflicts can be dealt with in a number of ways and have been managed historically, for example by erecting Chinese walls within the Law Officers' Department with separate legal advisers assisting each side. In the alternative, the States can instruct a private law firm to advise them. The system is tried and tested and works well.

Conclusion

23. Jersey is a small Island. It has undergone rapid change in the last twenty to thirty years. The institutions which are the subject of this review have coped well with those changes. The Crown Officers have successfully adapted to Jersey's expanding role on the international stage over recent years and they have confronted and overcome parallel challenges in Jersey.

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