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Our ref: H/Grr/LawOff/2010/01/tjm

26 April 2010

Lord Carswell
Chairman
Review of the Roles of the Crown Officers
P O Box 1000
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Jersey
JE4 9QA

Dear Lord Carswell,

**Review of the Roles of the Crown Officers in Jersey**

I write in reply to your letter dated 18th February 2010 inviting me to provide you with the benefit of my experience in Guernsey as I note that the Review Panel consider that it would be very valuable to them. I would certainly not consider it appropriate to make representations with the purpose of influencing the outcome of your deliberations and consideration of the role of Crown Officers by the States of Jersey and the Crown. However, in response to your invitation, I am perfectly content to state the position in Guernsey as I have seen it over the years and see it today.

I have read the Terms of Reference and have found it difficult to interpret, in a Guernsey context, some of the factors to be taken into consideration.

It is also difficult without guidance to contemplate what other matters "the Panel may consider relevant." In the circumstance, please forgive me if the Guernsey experience that I have set down in this letter, goes beyond matters which you consider to be relevant in framing your report. The Guernsey experience in recent times has taken into account case law, so I comment on it.

As you may know I have held in succession the offices of Her Majesty's Comptroller (Solicitor General) from 1992–1999, Her Majesty's Procureur (Attorney General) from 1999–2002, Deputy Bailiff (2002-2005) and have held office as Bailiff since 2005.

I stress that what I have said is written from a personal perspective but I have shown this letter to Richard Collas, the Deputy Bailiff of Guernsey (since 2005). He was an Advocate in private practice prior to his appointment as Deputy Bailiff and so has no experience of serving in the offices of H M Procureur and H M Comptroller. However, he concurs with the observations set down in this letter and so does not propose to respond separately to your invitation.

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For ease of reference, I have set down my observations on key subject areas in separate appendices. Should you wish me to elaborate on the experience as set down in the appendices or otherwise wish to raise any matters with me I would be willing to do so in the course of an informal meeting, in Guernsey. That said, I hope that what I have provided will be of interest and is self explanatory.

Yours sincerely

Geoffrey Rowland
Bailiff

Appendix 1
Law Officers of the Crown
So far as the roles of H M Procureur and H M Comptroller are concerned, I understand that our Law Officers of the Crown will also be accepting your invitation to provide the benefit of their experience in this Bailiwick. I do not propose therefore to cover that terrain other than to emphasize a few points that come to mind both from my experience of over a decade as a Law Officer and observations since then.

I consider the independence of the Law Officers of the Crown to be of crucial importance.

I believe it to be an imperative that the Law Officers should be, and be seen to be, independent of the cut and thrust of politics and the civil service and it is important, in Alderney and Sark, that the authorities see that the Law Officers in Guernsey act, when appropriate, independently of the will of Guernsey politicians and civil servants.

The appointment by the Crown of the Law Officers of the Crown is a safeguard against outside pressure and that safeguard should not be undervalued.

The manner of their appointment is of importance. I have always believed that should the Law Officers not be appointed by the Crown, with the substantial independence which is thereby conferred, it would be far more difficult, if not impossible, to recruit the most able Advocates to forsake the rewards of private practice and the interface with private clients, in order to undertake the onerous responsibilities which have to be discharged, day in day out, without fear or favour, by the Law Officers. As a result I believe that if the Law Officers were appointed locally especially by, say, politicians, the quality of lawyers attracted to seek appointment would diminish.

I believe that Advocates appointed as Law Officers from within the public service also value their independence for similar reasons.

The benefit of attracting high quality lawyers into Crown appointments is perhaps given extra strength in the recent report of the United Kingdom Parliament Justice Select Committee when reporting on its investigation of the relationship between the UK and the Crown Dependencies and the role of the Ministry of Justice in administering the relationship. The Select Committee said this in the section of its Conclusions and Recommendations dealing with Legislation and Treaties – paras 7 and 8 at page 45

> *"7. The Islands are more than adequately advised by their own Law Officers and parliamentary counsel. It seems a strange use of Ministry of Justice resources which, we are told, are stretched, to engage in a kind of legislative oversight which does not restrict itself to the constitutional grounds for scrutiny. (Paragraph 63).*
>
> *8. We do not see the need for multiple levels of intense scrutiny of insular legislation, prior to Royal Assent, for laws which are obviously of domestic application only. In such cases, the judgement of the insular Law Officers should normally be relied upon, with a reduced level of scrutiny by Ministry of Justice lawyers. (Paragraph 65)"*

I have heard it said in this Island, by those untutored in the work of the Law Officers, that they are not accountable to anyone. I sense that they may have noted that politicians are accountable at the 4 yearly general election.

The Law Officers are accountable to the Crown in respect of Crown duties. When prosecuting criminal cases the Law Officers act as Officers of the Crown. They may be dismissed if they fall short in discharging their duties.

Their right to sit in the States of Deliberation is to be found in the Reform (Guernsey) Law, 1948 (as amended). It stipulates the composition of the States of Deliberation. They are thereby accountable to the States of Deliberation as servants of the Assembly. Their position in the States of Deliberation could be changed by amending the Reform Law, with the approval of Her Majesty in Council.

There is no requirement in each of the three islands of the Bailiwick that the States of Guernsey must employ the Law Officers to deal with matters of public/civil law which do not involve the Crown although the States of Guernsey, unsurprisingly, are aware of the quality of their advice and almost invariably resort to them. When instructed by the States of Guernsey the Law Officers are accountable to their clients, the States of Guernsey.

Appendix 2

The Bailiwick of Guernsey Dimension

Civic Precedence

The Crown Office roles in the Bailiwick of Guernsey differ to some extent from the roles of their counterparts in Jersey because they encompass to varying degrees Bailiwick wide responsibilities. This is of some importance in this Island.

We also deal at first instance with some criminal cases arising in Alderney and Sark and others on appeal and also deal with all civil appeals from those islands.

In a parliamentary capacity the Bailiff and Deputy Bailiff have no direct responsibility for parliamentary matters in Alderney and Sark but will give guidance, when consulted, to the President of Alderney and the Seneschal of Sark as presiding officers in their parliaments.

In Alderney the Bailiff of Guernsey has civic precedence ranking below a member of the Royal Family or a person who directly represents Her Majesty, and the Lieutenant Governor, but above the President of Alderney (section 40 of The Government of Alderney Law, 2004) but visits to that island in an official capacity are rare for a Bailiff in office.

There is no equivalent legislative provision for civic precedence in Sark but as a matter of convention, the position is similar to Sark as between the Bailiff and the Seigneur or Seneschal as the Seigneur himself acknowledges in his book "The Constitution and Administration of Sark" at p 5:

> *"The Bailiff of Guernsey is the senior civic authority charged with upholding (the Bailiwick's) laws traditions and liberties."*

Points of precedence, in practice are not ordinarily taken by the Bailiff in Alderney and Sark because common courtesy invariably prevails.

The Bailiff's civic precedence does not stem from the Letters Patent appointing the Bailiff of Guernsey nor from the Reform (Guernsey) Law, 19048 as amended. It stems from custom and practice over centuries.

Thomas Le Marchant's manuscript history of Guernsey (said to be c1758) kept in the Royal Court Library says that:

> *"The Bailiff as first civil magistrate in the Island is entitled to take rank next to the Governor, and even at Court his seat is elevated above the rest, which shows his independency from the Lieutenant Governor, in the function of his office."*

In the last century the States' Committee investigating the Management of States Affairs (Billet d'Etat VI 1969, 30 Apr) focussed on the need for Guernsey to have a Deputy Bailiff to support the Bailiff in the discharge of his duties. The Committee in listing the duties of the Bailiff said this at page 257:

> *"As Bailiff he is the civic head of the Island, head of the Judiciary and President of the States of Deliberation and the States of Election."*

Advocate Gordon Dawes in his book "The Law of Guernsey" (2004) at p 23 having referred to the Channel Islands states that:

> *"the Bailiff remains the first citizen of each Bailiwick."*

and at page 25 says this

> *"when the Queen visits the Bailiwick it is the Bailiff who receives Her Majesty at each engagement and introduces others to Her ..."*

Dr Darryl Ogier, in his book, "The Government and Law of Guernsey" (2005) at p 68 states:

> *"that the Bailiff as civic head of the community still represents Guernsey internationally on occasions of a non-political nature and will on behalf of the people of Guernsey greet and welcome members of the Royal Family and dignitaries visiting the Island. His other civic duties within and outside Guernsey are numerous and varied ...."*

Nowadays the civic precedence of the Bailiff in Guernsey is underpinned by a whole range of factors both historical and as manifested or reflected in day to day public life.

(1) the status as the insular official who deputises for the Lieutenant Governor;
(2) the status as the Senior Judge in the Bailiwick;
(3) the status as Presiding Officer;
(4) the constitutions of prominent charitable and other institutions, some of them of great antiquity which name the Bailiff as chairman or President;
(5) the practice of a number of institutions to appoint Patrons independent of politics.

Note also that the wife of the Bailiff, by convention, accepts appointment as Patron of a substantial number of Guernsey charities and historically has been expected to commit considerable personal time in support of the Bailiff's standing in the community although there is no obligation to do so.

I have heard of no move in the States of Deliberation or local organisations to seek to change the order of civic precedence, nor indeed in Alderney and Sark.

Appendix 3

Bailiff and Deputy Bailiff

The points which I have made in relation to the independence of the Law Officers of the Crown apply equally in respect of the appointment of Bailiff and Deputy Bailiff. In my experience it is of crucial importance in this Bailiwick that the independence of the Bailiff and Deputy Bailiff is preserved and this is also of vital importance from an Alderney and Sark perspective.

Furthermore it is important that those appointed are of the highest quality given inter alia the duties of senior judge and President of the Guernsey Court of Appeal. The Guernsey Court of Appeal is held in high regard and continues to attract justices of the highest quality. I believe that the Royal Court in this Island is also highly respected. The quality of justice at first instance in the Royal Court and in the local appellate Court is part of the essential fabric of this Island that attracts first class businesses to establish here.

As noted elsewhere the Bailiff of Guernsey acts as a deputy Lieutenant Governor to discharge the duties of the Lieutenant Governor in certain circumstances. The Deputy Bailiff acts in the absence of both the Lieutenant Governor and the Bailiff and in the absence of all three the duties fall to be discharged by the Senior Jurat. Those matters are set out in the Warrant appointing the Lieutenant Governor.

I am in no doubt that the independence of the Bailiff is of some importance to the Crown, of comfort to Her Majesty's Government and importantly to the Lieutenant Governor for the time being in office.

It is noteworthy that in 1973 the Royal Commission on the Constitution (Kilbrandon) when reporting on the relationships between the United Kingdom and the Channel Islands and the Isle of Man considered the methods of selecting persons for appointment to Crown offices in the Islands (para 1525-1527 at page 461 and Conclusion 13 at p. 466). Interestingly, Jersey had sought a change and Guernsey had not done so. Importantly at para 1526 Kilbrandon said this:

> *"We do not feel able to support these proposals. We do not think it would be consistent with the responsibility of the Crown for the good government of the Islands for the insular authorities to have the last word in the appointment to Crown offices. It is clearly for the Islands to be consulted, as is now the practice, before appointments are made. And where an Islander is to be appointed, as is generally the case with offices other than that of Lieutenant Governor, the advice of the insular authorities will naturally weigh very heavily in the selection. Acceptance of the Islands' proposals would probably therefore, as they suggest, make little or no difference in practice. But in our view, which was shared by the representatives of the States of Guernsey who gave evidence, it will be preferable for appointments to be made outside the Islands and for advice to remain informal than to be formalised in a body of elected persons who might be swayed to some extent by political considerations. And if the giving of advice were to be restricted (as we understood the Jersey proposals to imply) to such persons, other individuals whose advice might be valuable would be excluded."*

There has been some change in the appointment procedure followed when considering the appointment of a Lieutenant Governor and also with regard to the appointment of the Bailiff, Deputy Bailiff, Procureur and Comptroller, but it is still the case that the appointment process whilst more structured has a degree of informality. Great weight is placed on recommendations made from Guernsey in the case of the appointments of the Lieutenant Governor, Bailiff, Deputy Bailiff, Procureur and Comptroller, but the ultimate decision is one made by the Crown.

In Guernsey, we have never contemplated, in recent centuries that circumstances are likely to arise which would result in the need for there to be any intervention in island affairs by the Crown on the grounds of enforcing good government. The maturity of our community, its parliament and its organs of government are such that a breakdown of good government is unlikely ever to arise. However I suspect that it is of ultimate comfort to our community that independently appointed Crown Officers, acting on behalf of the Crown, and also on behalf of the people of Guernsey, in whose interest and on whose behalf any intervention would take place, have a continuing Crown responsibility to have regard to how continuing good government can be maintained or in an extreme case to advise the Crown on how it might be restored.

When a few years ago the Chief Minister of the day and the ten Ministers of government departments resigned, the Bailiff was able to play a key parliamentary role in ensuring that meetings of the States of Deliberation be held expeditiously for the election to the posts and to assuage unfounded concerns in London and locally that government might not function pending elections.

It is worth recalling that Kilbrandon (para 1527 at page 461) also considered proposals put by private organisations in Guernsey and Jersey for splitting the office of Bailiff.

Kilbrandon dealt with the representations as follows:

> *"On the proposal put to us by private organisations in Jersey and Guernsey for splitting the office of Bailiff, we take the same view as the Privy Council Committee of 1947. Although an arrangement under which one person presides over both the Royal Court and the legislative assembly may be considered to be contrary to good democratic principle and to be potentially open to abuse, it appears in practice to have some advantages and not to have given grounds for complaint; and as the office of Bailiff is an ancient and honourable one which the States in each island wish to see continued with its present range of functions, we see no reason for recommending a change."*

The reference to "good democratic principle" is interesting. Kilbrandon concluded that the appointment should continue to be made by the Crown, albeit on recommendation from Guernsey rather than by a democratically elected local parliament or by a local panel of some sort. I see it as certainly important from a Guernsey perspective that the appointment should not be made by United Kingdom politicians given the fact that Guernsey is not represented in the UK parliament. I have no problem with appointments being made by the Crown even if some might say that that is contrary to good democratic principle.

The reference to the possibility of abuse is also interesting. In my view, given the consensus system of politics in Guernsey, if ever there were to be abuse, it is unlikely to arise from the

duality of the role of the Bailiff, but rather from the appointment by the Crown of a Bailiff who unforeseeably proved to have been a poor choice. It is difficult in the absence of a party political system to see what might give rise to abuse. The absence of abuse or complaint over the centuries is perhaps testimony to the fact that the system works. In the circumstances Kilbrandon found no practical fault with the system and was not prepared to let theoretical considerations apply.

I am not aware that any private organisations have since then campaigned for splitting the office of Bailiff. There has been no recommendation to the States of Deliberation made by any department of government in Guernsey or by any parliamentary committee of the States or by requete (a procedural device in the States of Deliberation for 7 members to raise an issue for debate in the States of Deliberation).

There is no reference in the Letters Patent appointing the Bailiff to the effect that he shall be the Presiding Officer of the States of Deliberation or the States of Election (an electoral college constituted solely for the election of Jurats). It is the Reform (Guernsey) Law, 1948, as amended, (an Order in Council) which stipulates the composition of the States of Deliberation and the States of Election.

Section 1 (2) provides as follows:

> *"(2) the Bailiff shall be ex-officio the Presiding Officer of the States of Deliberation and shall from time to time nominate in writing one or more Members to perform the duties of Acting Presiding Officer in the absence or incapacity of both the Bailiff and the Deputy Bailiff or in the absence of the Deputy Bailiff during a vacancy in the office of Bailiff, and may at any time in writing revoke such nominations or any of them. The Member who is at the time senior in order of appointment shall perform the duties of Acting Presiding Officer, unless such senior Member shall for any reason decline to act, whether generally or in relation to any particular matters, in which case the Member next senior in order of appointment shall act either generally or in the particular matter, as the case may be, and with the like power of declining to act, and so in turn until the Member junior in order of appointment shall have been reached, who shall be bound to act."*

For the sake of completeness I refer to "The Review of the Machinery of Government" (often styled 'the Harwood Report' which was chaired by Advocate Peter Harwood). The Panel was appointed by the States of Deliberation in December 1998 as an independent body to report on the options that might be pursued by the States of Deliberation when considering what changes might be made to Guernsey's machinery of government. The Panel was required to submit a Report setting out possible options for the future, without developing a favoured option. In January 2001 the Advisory and Finance Committee and the Procedures and Constitution Committee having received the initial report requested the Panel to produce a statement of the views of the Panel, as to which of the various options the States should pursue. The Committee reported in 2001.

The mandate of the Panel had not required it to consider the roles of the Crown Officers. Nevertheless it is evident from the Harwood Report that some representations had been received by the Panel from private individuals concerning the duality of the roles of the Bailiff. The Panel made it clear in their report that islanders making representations may have been influenced by the report of the Commission to the European Court of Human

Rights on Mc Gonnel prior to the judgement of the European Court of Human Rights in McGonnell v UK. The Court did not follow the opinion of the Committee on the subject of the separation of powers.

In the event the observations of the Panel did not provoke any move by the Advisory and Finance Committee, the Procedures and Constitution Committee or members of the States of Deliberation to sever the duality of the roles of the Bailiff.

The Harwood Panel did indicate that it might be preferable that the Bailiff, might be styled "Presiding Officer" in the States of Deliberation and that the leader of the Policy Council be styled "Chief Minster" that is to say, neither of them should bear the style "President". The offices have been so styled by an amendment to the Reform Law of 1948 following the recommendation of the Harwood Panel. *I append a copy of Section Three of the Harwood Committee's Report rather than attempt to summarise it.*

In the States of Deliberation the Presiding Officer is addressed simply as Mr Bailiff or Mr Deputy Bailiff, as indeed was always the case.

If there were to be a will on the part of the Policy Council, the States Assembly and Constitution Committee (which is the successor to the Procedures and Constitution Committee) or seven States members by means of a Requete then the matter of the duality of roles of the Bailiff could be the subject of a debate with a view to seeking an amendment to the Reform Law of 1948 or re-affirming the status quo.

At an earlier stage perhaps whilst proposals were being formulated before debate, or certainly before legislation were to be drafted, I would expect that soundings would be taken of the Crown as to whether in light of the Kilbrandon conclusion they held any different view and whether Royal Commission or Committee of the Privy Council should be mandated to consider the matter and advise the Crown.

In the event that Islanders were to be aggrieved by any proposed change they would also have the right, on submission of any Order in Council, to petition Her Majesty following the customary procedure, although the prospect of a petition achieving success in such circumstances would, I suggest, be remote if the Guernsey authorities had already received an indication of no objection from the Crown.

In Guernsey the perpetuation of the duality of the role is cost effective. It occupies in total about five days of the Bailiff's time each month other than in August when the States of Deliberation does not sit. Two days in total in preparation and 2-3 days presiding in the Chamber. It is evident that it is by no means a full time job although if the officeholder were to be someone other than the Bailiff then it may be that it would become a full time job.

I am not aware that any attempt has been made by authorities in Guernsey or the Harwood Panel to explore the financial cost of installing and maintaining an independently appointed Presiding Officer but I imagine that the office would attract a substantial salary and additionally there would be a substantial pension commitment. There would be a need for support staff and the cost of maintaining separate accommodation and equipment. I suspect that Guernsey would seek guidance from the Isle of Man concerning the annual cost incurred in maintaining in office a Speaker in the House of Keys. The Speaker of the House of Keys

is not the only speaker as there is also a Tynwald Court Speaker. Nevertheless, the Isle of Man experience would provide a useful yardstick.

In Guernsey the same chamber is used by the Royal Court and by the States of Deliberation and States of Election. There would be no room in the Royal Court building to house a separate presiding officer and supporting staff so separate premises would have to be found.

Appendix 4

The case of McGonnell v The United Kingdom (2000) 30 ECHR 289

Judgement of the European Court of Human Rights - 8th February 2000

The decision of the European Court of Human Rights concerned the office of the Bailiff of Guernsey and was focussed on whether there had been a breach of Article 6 of the European Convention of Human Rights by reason of the doubt cast on the impartiality of the Bailiff when sitting with Jurats in the determination of a planning appeal.

When hearing the planning appeal the Bailiff had not disclosed to Mr McGonnell or his Advocate (a former States Deputy) that he had presided in the States of Deliberation when the plan which was relevant to the determination of the planning appeal had been adopted. In the event the European Court of Human Rights concluded that there had been a breach of Article 6 by the Bailiff when sitting on the appeal case.

In a clear (though not express) reference to the doctrine of separation of powers the Court states that the McGonnell case did not require the application of any particular doctrine of constitutional law to the position. The question was, rather, whether in a given case, the requirements of the Convention were met.

That was not a surprising conclusion given the wide range of constitutions in countries which are member states of the Council of Europe and given that in few countries in the world is there a strict separation of powers. In Guernsey we are mindful that in many countries the executive appoints the judges. In Guernsey members of the States of Deliberation and the Parish Douzaines are dominant in the States of Election (the electoral college which elects Jurats.) The salaries of judges in Guernsey are determined by politicians. There is also in Guernsey a considerable overlap between those who serve in the legislature and the executive, as indeed there is also in the United Kingdom and many other parliaments.

In Guernsey we are of course familiar with Montesquieu, Book XI, Chapter 6, *"L'Esprit des Lois"(1748)* who, following attempts by Aristotle and Locke, divided the powers of government into :

(i) the legislative power;
(ii) the executive power; and
(iii) the power of judging; and so arriving at the modern classification to which we are now accustomed, viz: (i) legislative, (ii) executive and (iii) judicial.

We are also mindful that he was concerned about despotic governments. In a democracy, Montesquieu argued, the corruption of the government sets in when the people attempt to govern directly and try:

*"to debate for the senate, to execute for the magistrate, and to decide for the judges."*

We are also aware that he described a judicial system without professional judges and that he did not maintain the pure doctrine of the separation of powers but combined with it ideas of mixed government and checks and balances. The doctrine of separation of powers was not recognised or applied to my knowledge in Normandy. We are also mindful of the echo in

Blackstones Commentaries (1765). Blackstone highlighted that the broad doctrine was concerned with the prevention of tyranny by the conferment of too much power on any one person or body, and the check of one power by another. Blackstone, I recall, said this:

> *"In all tyrannical Governments ..... the right of making and of enforcing the laws is vested in one or the same man, or the same body of men; and wheresoever these two powers are united together there can be no liberty".*

I have not heard it said in Guernsey that in nearly two centuries any Bailiff has acted dictatorially and certainly not tyrannically in the way that would have offended Montesquieu, that is to say both making and enforcing laws so that there was a deprivation of liberty.

In Guernsey we have noted the way that the doctrine has been espoused and developed in the United Kingdom particularly in recent decades. Seen in context, that development of the doctrine in the United Kingdom appears from Guernsey to have been driven in response to political developments in the United Kingdom, in particular an ever dominant form of party political executive government, unknown in Guernsey where we have a consensus based system without political parties and without cabinet government.

Following the Court's determination that there had been an Article 6 violation it was necessary for H M Government, having consulted with the Guernsey authorities, to come up with a response. My predecessor as Bailiff, Sir de Vic Carey, volunteered that whether or not it was strictly necessary, Bailiffs ought no longer to preside nor sit as a member on the undermentioned committees of which the Bailiff was a member and that the States of Deliberation should take the necessary steps to effect that change:-

1. <u>The Appointments Board</u>
   The Board, which no longer exists, met from time to time to consider who should be appointed to a number of specified senior Civil Service posts. (The Appointments Board was abolished).

2. <u>The Legislation Committee</u>
   The Committee considered legislation drafted by the Law Officers of the Crown, to ensure before consideration by the States of Deliberation, that the draft Projet de Loi or Ordinance complied with the applicable States' Resolution directing the preparation of legislation (the Committee is now known as the Legislation Select Committee).

3. <u>The Rules of Procedure Committee</u>
   The Committee recommended to the States of Deliberation changes to the Rules of Procedure of the States of Deliberation. The successor committee is now known as The States Assembly and Constitution Committee.

As a consequence resolutions of the States were passed and law reform enacted where necessary to the intent that the Bailiff no longer presides nor sits as a member of each of the Committees.

The Bailiff of the day also recommended that the Bailiff should no longer preside over the Emergency Council constituted under The Emergency Powers (Bailiwick of Guernsey) Law, 1965. Again there has been law reform. The Bailiff no longer sits as Chairman nor as a

member of the Emergency Powers Authority, as it is now known. However, Paragraph 17 of the Constitution and Operation of States Departments and Committees provides at sub-para (5) as follows:

> *"The Bailiff shall be given prior notice of all meetings of the Authority and shall be entitled to advise and warn the Authority with regard to any matter relevant to its deliberation."*

The Bailiff has no vote on the Emergency Powers Authority.

Paragraph 14 of the Constitution and Operation of States Departments and Committees provides at sub-para (6) as follows:

> *"The Presiding Officer and HM Greffier shall be entitled to attend meetings of the States Assembly and Constitution Committee for the purpose of advising that Committee in matters relating to the Rules of Procedure and on matters relating to the functioning of the States".*

The Bailiff as Presiding Officer is often invited to comment in writing on the likely practical application of any proposal to reform the Rules of Procedure. The right to attend meetings is exercised only after consultation with the Chairman of the Committee. It has only been exercised when the President of the Committee has expressed a wish that the Bailiff and/or Her Majesty's Greffier should attend so that the Committee can benefit from the Presiding Officer's experience in moderating debate in accordance with the Rules of Procedure.

Prior to the case of McGonnell the Bailiff had a casting vote in the States of Deliberation. The occasions when a casting vote was exercised were exceedingly rare and a convention had developed that the Bailiff would exercise it in order to maintain the status quo before the vote.

The Reform (Guernsey) Law, 1948 as amended, was further amended.

Article 1 at subsection (5) (a) provides as follows:

> *"The Presiding Officer, or the Acting Presiding Officer, as the case may be, shall have no original vote and no casting vote and in the event of an equality of votes he shall except in the case of an election declare the proposition lost."*

In the case of a tied election the Rules of Procedure provide for re-voting. If a majority vote cannot be achieved then the Rules provide that candidates shall draw lots to achieve a result (Rule 20 (2) (b)).

Following the judgement in McGonnell, the Royal Court issued a Practice Direction (No. 1 of 2001) formalising what had been the informal practice since the McGonnell judgment. *(I append a copy).* It is self explanatory. The Bailiff, like other judges, will not sit in cases where self evidently partiality is an issue. In other cases, where a McGonnell type issue may arise, he may sit as a result of no objection being taken to his sitting, but only after an informed express waiver has been sought and obtained.

The Bailiff would also not sit in any cases where we might be requested to interpret a provision of any legislation where he has had direct involvement in the passage of the legislation. Such cases are in the event exceptionally rare. Most cases require a determination of fact where legislation may be applicable but the interpretation of a law is not in dispute.

The volume of litigated cases not involving the States of Guernsey and not involving interpretation of legislation passed when the Bailiff or Deputy Bailiff had presided in the States of Deliberation, are numerous and constitute the overwhelming number of cases. Nowadays it is easy for cases that might raise a perception of bias because of the duality of the roles of Bailiff to be allocated to another judge, whether it be the Judge of the Royal Court or one of the many resident or non-resident Lieutenant Bailiffs. By way of information there are some 800 civil cases in various stages in the Royal Court of Guernsey at any one time. They are allocated between the Bailiff, Deputy Bailiff, Judge of the Royal Court, three resident Lieutenant Bailiffs or any one of the 7 non-resident Lieutenant Bailiffs, none of whom have a parliamentary involvement. The days when there were few cases to be dealt with and all cases were dealt with by the Bailiff or Deputy Bailiff is now a fast receding memory in Guernsey.

McGonnell focussed not so much on the Bailiff's position as Presiding Officer of the States of Deliberation, but on problems which could arise when sitting in Court. The Guernsey Bar Council has at no time made complaint publicly or privately that it harbours any concern about the duality of the role of Bailiff. Indeed my perception of their view is that the Guernsey Bar and the community at large respects the stature and independence of thought and action of the Bailiffs and Deputy Bailiffs and there is no perception that they might act in a partial or biased way, or in any way politically. It is also worthy of note that the right to apply for a judge to be recused is well known in this jurisdiction. The number of cases when a judge recuses himself or herself and hence does not sit are not infrequent because of previous involvement in private practice and relationships within the community. Issues of bias or a perception of bias apply to all judges in the course of their career and are not confined to the Bailiff or Deputy Bailiff.

The narrow point in judgement in the case of McGonnell may also be seen in perspective when the basis on which the Committee of Ministers of the Council of Europe saw fit to dispose of the case is analysed. The Committee of Ministers were advised of the measures which had been taken in Guernsey in consequence of the judgment of 8th February 2000 having regard to the United Kingdom's obligation under Article 46, paragraph 1, of the Convention to abide by it. The Committee of Ministers needed to be satisfied about the measures taken in order that new violations of the same kind as had been found in McGonnell would not arise. The Committee of Ministers was satisfied by the measures taken. See the resolution adopted by the Committee of Ministers on 15th October 2001 *(copy attached)*. Reference is made to Royal Court Practice Direction No. 1 of 2001 and the procedures to be followed by the Bailiff or Deputy Bailiff.

I note the reference in the Terms of Reference for the review that you are conducting in Jersey that consideration should be given to the principles of modern, democratic and accountable governance and human rights. I find it difficult to comment on the Guernsey experience in terms of modernity. I have no experience of any suggestion that being modern is a relevant requirement rather than to analyse whether or not the system can operate efficiently or effectively. As I have pointed out a Crown appointment process could be said

not to be either modern or democratic but there is accountability in the case of the judiciary to the Crown and the system works.
I suspect that the appointment of members of the judiciary in most countries is not by election by the whole population or even those who are on the electoral role. Certainly I have never heard it said in Guernsey that members of the judiciary should be democratically elected.

Appendix 5

The case of Pabla Ky v Finland

The Judgement of the European Court of Human Rights

22nd June 2004

We have noted in Guernsey that in this case a complaint was made about a member of the Finnish Parliament being a member of a Division of the Court of Appeal. In relation to the Article 6 guarantee that the judiciary is impartial, the Court emphasised that this is tested objectively (para 27 and repeated at para 30).

The question, as it was in McGonnell, was whether there are ascertainable facts which may raise doubts as to a judge's impartiality and "even appearances may be of certain importance" (para 27).

The Court restated that there is no requirement to comply with theoretical constitutional concepts, even if (emphasis provided)

> *"the notion of the separation of powers between the political organs of government and the judiciary has assumed growing importance" (para 29).*

The Court, in Pabla Ky, found no violation, there being no indication that the judge had played any role in respect of the legislation that was in issue in the case.

In Guernsey, we have also noted the judgement of the House of Lords in Davidson v Scottish Ministers [2004] UKHL 34. Their Lordships concentrated on the test for perceived or apparent bias that had been distilled from previous cases. It was set out in para 7, per Lord Bingham – (emphasis provided)

> *"The question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".*

Lord Hope (para 53) in Davidson explained that Pabla Ky v Finland demonstrates that (emphasis provided) –

> *"..... there is no fundamental objection to member of either House of Parliament serving, while still members of the House, as members of a court. Arguments based on the theory of separation of powers alone will not suffice. It all depends on what they say and do in Parliament and how that relates to the issue which they have to decide as members of that tribunal".*

Accordingly, in Guernsey we have not concluded that mere presence in the States of Deliberation as Presiding Officer automatically means that there can be any fundamental objection when the Bailiff sits in Court and therefore an argument based on the theory of separation of powers alone will not suffice. The Presiding Officer in the States of Deliberation does not speak in debate nor does he have a vote. Put simply the issue in any case in Guernsey which we have to determine would depend on anything said in the States of

Deliberation in the context of the issue(s) to be determined in the case, but it is unlikely such problems can arise when the Presiding Officer does not have a voice in debate nor a vote. During debate in the States of Deliberation we also draw comfort from the fact that the Presiding Officer should not have to express any opinion on the substance of any legal issue arising in debate. That is the province of the Law Officers. It is acknowledged that the Seneschal of Sark is in a more difficult position as he does not have the support of Law Officers as legal advisers to the States, although as he is not a lawyer he is unlikely to be tempted into commenting on legal points.

Appendix 6

In R (Barclay) v Secretary of States for Justice

Judgement 2nd December 2008 [2009] EWCA Civ 1319 2 WLR 1205

and in the Supreme Court 1st December 2009 ([2009] UKSC9) on appeal from the Court of Appeal

Sir David and Sir Frederick Barclay (the Appellants) in their grounds of appeal had in their second ground of challenge stated as follows (emphasis provided) –

> *"The functions and powers of the Seneschal under the Reform Law breach article 6 of the Convention in particular his dual role as President of Chief Pleas and Senior Judge on Sark."*

The Appellants did not rely exclusively on the duality of the role of Seneschal, although they relied heavily on it. They concentrated on the background facts.

The Appellants referred to the fact that the Seneschal is appointed for life. They also emphasised the Seneschal's multiplicity of powers (including the position as Returning Officer in elections and Trustee of property held by Chief Pleas). They contended that these functions:

> *"give him an influence which should not be enjoyed and enjoyed for life, by an unelected official. Nor it is appropriate that an extraordinary meeting of Chief Pleas, if requested by nine or more members, requires the Seneschal's consent."*

The Appellants claimed that the need to ensure impartial and independent adjudication, and to preserve the importance of it, is heightened in a small community such as that of Sark. The Appellants also emphasised the fact that the Seneschal is a lay judge who does not have a legally qualified colleague, or clerk, to advise him on the law, including requirements as to judicially appropriate conduct and fair procedure.

The English Court of Appeal, considered *McGonnell v United Kingdom* (2000) 30 EHRR 289, including the fact-specific concurring judgment of Sir John Laws.
Pill LJ continued (at para [67]) (emphasis provided)

> *"This is not slavish adherence to an abstract notion of separation of powers but a recognition that it follows from the Seneschal's functions in his non-judicial capacity in Chief Pleas, as already described, that his independence and impartiality are capable of appearing open to doubt. In this respect, the smallness of the community aggravates the problem. The same people and issues with which he is likely to be dealing when presiding at Chief Pleas, including issues arising from the Reform Law itself and the Guernsey Human Rights Law, may be the subject of litigation in his court."*

Etherton LJ put the position as follows (at paras [160]-161]) (emphasis provided):

> *"As President, the Seneschal can be expected to play a role in relation to all laws and decisions of the Chief Pleas. Further, the committees of the Chief Pleas constitute, in*

> *effect, the Executive. Although the Seneschal cannot be elected to the committees, from the public perspective the Chief Pleas and the Executive comprise the same individuals and are embraced within the same institution. ... A litigant cannot be expected to know whether the Seneschal has been involved in a process within the Chief Pleas which, whether in relation to legislation or an executive matter, might have some direct or indirect bearing on the subject matter of the proceedings. The reasonable assumption would be that the Seneschal probably had been, or at least might well have been, so involved, but the litigant cannot reasonably be expected to have researched and discovered any such involvement. Accordingly, in every case, so far as the litigant is concerned, there exists a possibility of lack of independence and impartiality by the Seneschal acting in a judicial capacity."*

Pill LJ in finding for the Appellants stressed the broad range of functions including those outside the parliament when stating as follows (emphasis provided) at paras 65 and 67:-

> *"65. I do however, see the continuation in Sark of the judicial with the other functions of the Seneschal"*
>
> *67. it follows from the Seneschal's functions in his non judicial capacity in Chief Pleas ...."*

The Guernsey judiciary have noted that the English Court of Appeal did not find that the fact that the Seneschal was unelected constituted a breach of Article 3 of the Convention. That is to say it did not offend the requirement to ensure free expression of the opinion of the people or in the choice of the legislature.

The Bailiff of Guernsey, in the States of Deliberation, does not have the multiplicity of functions of the Seneschal or of functions conferred by the legislature outside of it. The English Court of Appeal's conclusion that there was a violation of Article 6 of the Convention also highlights the smallness of Sark's community. Guernsey's population is some 100 times larger than Sark so this aspect of the Court's reasoning can also be distinguished.

Etherton LJ also appears to have overlooked the manner in which involvement in any relevant parliamentary proceedings can be disclosed to all litigants by the Seneschal. He is best-placed to recall his involvement, so as to enable litigants to assess whether they fear that their right to a fair trial may be compromised. This approach is the one that was adopted since McGonnell. It operates well.

Alternative arrangements for constituting the Court can also be made. On the basis that the English Court of Appeal in the case of Barclay recognised, as stated in *Pabla Ky v Finland* (2006) 42 EHRR 34, that

> *"although the notion of the separation of powers between the political organs of government and the judiciary has assumed growing importance in the Court's case law, neither Article 6 nor any other provision of the Convention requires states to comply with any theoretical constitutional concepts regarding the permissible limits of the powers' interaction"*

its decision in relation to the Seneschal and Article 6 must depend on the particular circumstances of Sark.

It is not taken as having a direct read-across to the judiciary in Guernsey. In Guernsey there is real transparency and facts can readily be obtained so that 'a fair minded and informed observer having considered the facts' (to quote Lord Bingham) can come to a conclusion as to whether there is a real possibility that a tribunal was biased. Proceedings in the States of Deliberation are broadcast on the radio as well as being recorded, enabling audio copies and transcripts to be obtained many years after the sittings. Therefore, when the Bailiff or Deputy Bailiff subsequently sits as a judge, there exists an ability to investigate fully any concerns as to whether there is a real possibility of some lack of independence or impartiality from previous participation in the parliament as Presiding Officer.

In the Supreme Court judgment ([2009] UKSC 9) on appeal from the Court of Appeal, Lord Collins with reference to the submission that Article 3 of the Convention had been breached said this at para [83]:

> "... *it is true that it is anomalous that the presiding officer of an elected assembly should be an unelected official appointed by another unelected (and indeed hereditary) official. ... But it does not follow that legislation which provides for an unelected presiding officer is contrary to the duty to allow free elections for the choice of the legislature under Article 3 of the First Protocol. ... the position of the Seneschal is well within the margin of appreciation, taking into account historical and political factors, and cannot realistically be said to impair the essence of the rights under Article 3 nor to deprive them of effectiveness.*"

As a political Presiding Officer exercising the procedural powers within the States of Deliberation that would have to be conferred on <u>any</u> presiding officer (see also para. [84]), the positions of the Bailiff and Deputy Bailiff in the States of Deliberation are regarded similarly as well within the margin of appreciation afforded by Article 3. If those powers were to be misused, then in a similar fashion to the options mentioned in the judgment, the States of Deliberation could amend the Rules or, with the Sanction of Her Majesty in Council, could amend the Reform (Guernsey) Law, 1948 to constitute the States of Deliberation differently.

In the opinion of the Guernsey judiciary, there is nothing in the judgments in the Barclay case in the Court of Appeal or in the House of Lords/Supreme Court about the office of Seneschal that leads inevitably to the conclusion that the dual judicial and parliamentary rôles of the Bailiff and Deputy Bailiff violate the Convention, save that McGonnell recognises that special care is necessary when the Bailiff sits in Court. As noted earlier the judgment in McGonnell has been implemented domestically to the satisfaction of the Committee of Ministers and there have been no appeals since then based on the duality of roles.

It is also appropriate to note that the authorities in Sark have recently stressed the decision of the Court of Appeal in England in the Barclay case is not strictly binding on the Courts of the Bailiwick of Guernsey. Sark's position is that there can be no certainty that the Judicial Committee of the Privy Council would have come to the same conclusion with respect to the duality of roles of the Seneschal.

Suffice it to say from the perspective of the Guernsey judiciary there is much to distinguish between functions and powers considered to be of relevance in the case of the Seneschal and the considerably reformed role of the Bailiff in Guernsey. Whether or not the Judicial Committee of the Privy Council would pick up on some of the points emerging from the judgements in the Supreme Court on the appeal grounds that the Supreme Court judges were required to consider and would come to the same conclusion as the Court of Appeal if another similar case arises from Sark, will be of interest. What is clear is that a decision of the English Court of Appeal is not binding on the Guernsey Courts although note would be taken of points raised, issues considered and the judgements.

R. McMAHON

K. H. TOUGH
HER MAJESTY'S GREFFIER

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PRACTICE DIRECTION No. 1 of 2001

18th January, 2001

Administrative proceedings

I am directed by the Bailiff, to issue the following Practice Direction. This Practice Direction formalises and extends the recent informal practice as regards administrative proceedings including IDC and Housing Appeals.

At the commencement of the hearing of any administrative proceedings, Counsel for all parties will be required to state whether their respective clients have any objection to the presiding judge sitting in that particular case, and if so, the grounds for such objection. It is, therefore, incumbent upon Counsel prior to the hearing to have obtained full instructions in this regard.

To enable Counsel to obtain satisfactory instructions, the presiding judge will inform them in writing, prior to the hearing, of the judge's recollection of his previous involvement, in any way, in the issues to be considered or determined by the court.

K.H. Tough,
Her Majesty's Greffier.

**Appendix 17**

**Section 1.1**
(item H46-3)

COUNCIL OF EUROPE
COMMITTEE OF MINISTERS

**Resolution ResDH(2001)120**
**concerning the judgment of the European Court of Human Rights**
**of 8 February 2000**
**in the case of McGonnell against the United Kingdom**

*(Adopted by the Committee of Ministers on 15 October 2001*
*at the 764th meeting of the Ministers' Deputies)*

The Committee of Ministers, under the terms of Article 46, paragraph 2, of the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11 (hereinafter referred to as "the Convention"),

Having regard to the final judgment of the European Court of Human Rights in the McGonnell case delivered on 8 February 2000 and transmitted the same day to the Committee of Ministers under Article 46 of the Convention;

Recalling that the case originated in an application (No. 28488/95) against the United Kingdom, lodged with the European Commission of Human Rights on 29 June 1995 under former Article 25 of the Convention by Mr Richard James Joseph McGonnell, a British national, and that the Commission declared admissible the complaint in particular of the lack of independence and impartiality of the Royal Court of Guernsey on account of the presence of the Bailiff as a judge of the Royal Court, the latter being in addition vested with legislative and executive functions in Guernsey;

Recalling that the case was brought before the Court by the Commission on 9 December 1998;

Whereas in its judgment of 8 February 2000 the Court, in particular:

- held, unanimously, that there had been a violation of Article 6 of the Convention;

- held, unanimously, that the government of the respondent state was to pay the applicant, within three months, 20 913,90 pounds sterling in respect of costs and expenses, together with any value-added tax that may be chargeable, and that simple interest at an annual rate of 7.5% would be payable on this sum from the expiry of the above-mentioned three months until settlement;

- dismissed, unanimously, the remainder of the applicant's claim for just satisfaction;

Having regard to the Rules adopted by the Committee of Ministers concerning the application of Article 46, paragraph 2, of the Convention;

Having invited the government of the respondent state to inform it of the measures which had been taken in consequence of the judgment of 8 February 2000, having regard to the United Kingdom's obligation under Article 46, paragraph 1, of the Convention to abide by it;

Whereas during the examination of the case by the Committee of Ministers, the government of the respondent state gave the Committee information about the measures taken preventing new violations of the same kind as that found in the present judgment: this information appears in the Appendix to this resolution;

Having satisfied itself that on 22 March 2000, within the time-limit set, the government of the respondent state had paid the applicant the sum provided for in the judgment of 8 February 2000,

Declares, after having taken note of the information supplied by the Government of the United Kingdom, that it has exercised its functions under Article 46, paragraph 2, of the Convention in this case.

**Appendix to Resolution ResDH(2001)120**

*Information provided by the Government of the United Kingdom during the examination of the McGonnell case by the Committee of Ministers*

The Royal Court in Guernsey adopted a Practice Direction No. 1 of 2001 formalising and extending the recent informal practice as regards administrative proceedings after the judgment of the European Court of Human Rights in this case with effect from 31 May 2000, the Bailiff is no longer either the President or a member of three committees, namely the Appointments Board, the Legislation Committee and the Rules of Procedure Committee.

At the same time, at the commencement of the hearing of any administrative proceedings, Counsel for all parties will be required to state whether their respective clients have any objection to the presiding judge sitting in that particular case, and if so, the grounds for such objection. It is, therefore, incumbent upon Counsel prior to the hearing to have obtained full instructions in this regard.

To enable Counsel to obtain satisfactory instructions, the presiding judge will inform them in writing, prior to the hearing, of the judge's recollection of this previous involvement, in any way, in the issues to be considered or determined by the Court.

The Government of the United Kingdom also informed the Committee of Ministers' that the judgement of the European Court had been transmitted to all authorities directly concerned, apart from a large diffusion notably in the local press (the Guernsey Globe and Guernsey Press) as well as in widely distributed series of law reports.

The government considers, in view of these measures, that it has met its obligations under Article 46, paragraph 1, of the Convention.