

## Lord Carswell's Review of the Crown Officers

### Submissions of the Solicitor General

#### **The role of the Attorney General**

*The dual role of the office [as Chief Legal Advisor and Minister of the Crown] is not a constitutional weakness but a fundamental constitutional strength*

English Criminal Bar Association

1. Notwithstanding the very different constitutional histories of England and Jersey, it is my respectful submission that the comments of the Criminal Bar Association are just as apt when considering the role of the Attorney General in Jersey.
2. The office of Attorney General is where politics and the law meet. The principal duties of the Law Officers – legal advisor, prosecutor and upholder of the public interest - all directly flow from this intersection. In my view, these are not separate jobs. The better view is that they are interrelated duties.
3. I do not seek to replicate the detailed submissions of the Attorney General but instead merely offer my personal view on three issues that reflect my experiences to date:
  - (a) The appointment process;
  - (b) The benefits to the States of keeping the Law Officers as members of the Assembly;
  - (c) The Attorney General's role as prosecutor.

#### The appointment of the Attorney General

4. The key to the Attorney General's independence in Jersey is the manner of his appointment. The fact that he is neither elected nor selected by one or more politicians underpins the integrity of his office.

5. In recent years, the Prime Minister's appointment of the Attorney General in England has been the origin of allegations of bias. The criticism is that even if a political appointee can separate the political interests of the party from the public interest, it is very difficult if not impossible to be seen to do so. There are some in England who argue that the Attorney General should be appointed by a non-political process.
6. As I say, the position in Jersey is very different and I would suggest that the present process should be maintained.

#### Member of the States

7. An obvious consequence of preserving the integrity of the Attorney General's office in Jersey is that he is unelected.
8. In my view, an unelected official is not precluded, as a matter of law, from sitting in the States of Jersey as a member.
9. Indeed, it might be thought rather odd to remove someone from the States because of a deliberate selection process designed to enhance that person's integrity in recognition of their special functions and responsibilities.
10. Again, I do not repeat the Attorney General's detailed observations as to the benefits of the Law Officers remaining members of the States. I merely wish to add emphasis to one point that reflects my own experience: In my view, it is essential that the Attorney General remains a States Member so that he is free to offer proper legal advice when appropriate.

#### *The ability to advise*

11. When a Law is passed by the States of Jersey, it is desirable that the States members who vote on the legislation are properly informed as to the legal position. There is nothing worse than a Law being passed which is not compatible with human rights legislation or features some other problem.

12. The Attorney General's present status as a member means that he can properly provide advice without prior invitation. He is not obliged to wait before offering legal advice. If the debate reveals a misunderstanding as to the law, the Attorney can step in and correct it. No harm is done.
13. If his status is removed, the Attorney General will not be able speak. He will be unable to give advice for the benefit of the elected politicians, whatever legal problems might arise and however obvious they might be. Indeed, necessary and even obvious advice would only be given if a member thought to ask for it.
14. In other words, the removal of the Law Officers from the States would result in the States depending on (with one or two exceptions) a non-lawyer spotting a legal point and then asking the right questions.
15. I cannot readily discern the advantage or desirability of such a system. It strikes me that the Attorney General's presence in the Assembly is vitally important.

#### The Attorney General's role as prosecutor

16. I have personally prosecuted Jersey police officers as a Crown Advocate and more recently as Solicitor General authorised a health and safety prosecution against the States Employment Board.
17. The reality is that no prosecutor is ever entirely isolated. The nature of the work requires any senior prosecutor to develop and maintain a number of professional relationships with police officers and many others. However, it does not follow that insurmountable difficulties result.
18. In Jersey, the independence of the office of Attorney General is better protected than elsewhere because of the appointment process.
19. There are many, including the Criminal Bar Association, who regard the Attorney General's dual role as a strength – he is uniquely placed to judge

what the public interest is because of his other interrelated duties. Certainly the House of Lords in Gouriet v Union of Post Officer Workers [1978] AC 435 recognised that the Courts should not attempt to interfere with such matters.

20. The Attorney General has taken an oath *that all transgressors of the law meet their just deserts* and is a trained and experienced lawyer, well capable of analysing a case file in a proper manner. What is paramount is the ability and integrity of the office holder in dealing with the very small number of cases that might give rise to a conflict or perception of conflict.
21. The introduction of an independent prosecutor, although perhaps attractive at first blush, would not resolve the difficulties in so far as they exist. Whatever the exact arrangements, the independent prosecutor will still have similar relationships with the police and others as to raise the same prospect of conflict or difficulties of perception in a small number of cases.
22. Moreover, recent experience tends to suggest that the appointment of an ‘independent’ prosecutor does little to inform public perception in respect of the relatively small number of difficult and controversial cases that arise in all jurisdictions.
23. In England, the decision to stop the criminal investigation into BAE attracted adverse comment. The fact that the decision was taken by the Director of the Serious Fraud Office – an independent prosecutor - did little or nothing to improve the public perception.
24. It may be that the key to maintaining public confidence in respect of such cases is the provision of information in respect of the facts that underpin the relevant decision in so far as that is possible.
25. In Jersey, the historic child abuse enquiry generated controversy. A few individuals set out to create the public perception that there were a large number of evidentially strong criminal cases that were not being prosecuted.

That was simply not so. The publication of (a) the exact number of case files received by the Attorney General from the police; (b) the reasons not to prosecute in respect of certain cases and (c) details surrounding the true nature of the evidence (or lack thereof) that related to the most serious rumours, was the most effective way of responding to the various allegations.

### **The role of the Bailiff**

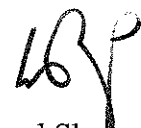
26. I respectfully adopt the detail submissions made by the Attorney General and merely wish to add the following that relates to my own experience.

27. In my view, there is no legal principle that requires the Bailiff to be removed as President of the States. For my part, the case law is clear that the House of Lords (see Davidson v Scottish Ministers [2004] UK HL 34 for example) and the European Court of Human Rights do not adopt an absolutist and/or theoretical approach to issues of perception of bias and the separate of powers. Equally, the presence of an unelected official (or more than one) in the States is not, in my judgment, incompatible with human rights law.

28. I assume that the conclusions of the Clothier Report in respect of the Bailiff's position were expressions of a particular view point rather than assertions of legal principle.

29. If that is correct the Jersey public is left with a choice rather than a legal obligation to act in a certain way.

30. Ideally, the President of the States will have experience of public law, the States Assembly and sitting as a judge. I am not seeking to suggest that the Bailiff is the only candidate but I would venture that he is the obvious one.



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