

1 March 2010

Dear Lord Carswell

**Review of the Rôles of the Crown Officers
Submission of certain Jurats of the Royal Court**

There was some debate whether a single submission should be made on behalf of all twelve Jurats, but it was agreed that it would not provide enough scope for certain views to be expressed.

Introduction

Jurats Le Cornu and Fisher have both been Parish Constables, and therefore have sat in the States. They have had first hand experience of the manner in which the President of the States manages the affairs of the House and have an important insight into States' procedures and processes as well as into the role of the Attorney General, both in the States Chamber as legal advisor and out of it in his capacity as head of the Honorary Police. They are in a position to express views from a particular standpoint not open to the other Jurats.

As Jurat Clapham sent me a fairly detailed account of her own thoughts, I have asked her to make an individual submission to you. Thus the views now about to be expressed are an amalgam of those who remain, namely Jurats Tibbo, Le Breton, King, Morgan, Liddiard, Kerley, Marett-Crosby, Nicolle and me. I wish it therefore to be noted that the views in this submission cannot of themselves be said to express the views of the body of Jurats as a whole. However it has been seen by Jurats Clapham, Le Cornu and Fisher who are all in agreement with its general tenor.

Where appropriate I have indicated by quotations where views have been expressed to me directly in writing by a particular Jurat.

Jurats have little contact with the role of either the Bailiff or the Deputy Bailiff in their capacity as President of the States beyond what they read. There is an awareness of the growth in workload and complexity in both the legislature and the judiciary, but that seems to have had no impact on the competences of either office holder down the years. In the judiciary, pressure is relieved by appointed Commissioners, just as the States Greffier occasionally takes the Chair in the States.

Part 1

It is, presumably, beyond debate that the role of Chief Justice can be done by none other than the Bailiff (and Deputy Bailiff). It is critical to remember that, in the Jersey judicial system, he is the judge of law **only** and it is the Jurats who are the judges of fact and who hold all the sentencing powers. Were the Bailiff and Deputy Bailiff to err in law, the matter would be corrected on Appeal.

It is against that background that one must view the other two functions which they currently fulfil.

“... Jersey has to place itself in the world forum; it has to meet the requirements of the twenty-first century (convention of Human Rights, etc), and it has to operate in the context of the changing expectations of its citizens, both now and anticipated for the future. It could be argued that to a certain extent there is a perception from outside Jersey that the current system is flawed”.

Chief Justice and President of the States

The perceived flaw or conflict lies not primarily in the Bailiff's rôle as “civic head”, but directly between that of Chief Justice and President of the States. The purist will quote the classical *trias politica*, the so called Separation of Powers, on the basis that anything that does not follow this particular philosophy must inevitably lead to conflict and abuse. Such an argument seems to some a useful rod with which to beat the Bailiff when he is, very occasionally, called upon to enforce discipline on Members of the States Assembly. The “power” of the Chair in any Assembly could lead to abuse if there were no constraints, actual or moral, to prevent it.

Bearing in mind the role of the Jurats as the sole determiners of fact in the Courts, and that the Bailiff has no vote in the States, there is clearly little or no basis for any argument that he both makes and administers the law.

If it were not the Bailiff, then who? The choice is broadly between an elected Member or an outsider.

“I am not certain that a 'Speaker' or similar person elected or chosen from among the elected members of the States would command the respect of the House or be able to control the day to day business of the House with the same authority. In any case I would feel disenfranchised if my elected representative was chosen as the 'Speaker' and therefore not able to vote on my behalf.”

“It cannot be right, where there is no system of party politics, to make one member 'speaker' thereby depriving anyone who voted for that person of their representation in the Assembly.”

“Whereas I can understand the argument that the Bailiff should not be the head of the Judiciary and the Legislature I can see no better person to oversee the business of the States.”

As a corollary to these views, even if there were to be a Member with those outstanding qualities that could command the respect of the House, the Island needs such persons of calibre to be an active part of the Island's government - we simply do not, unlike the UK, have some 650 representatives from whom to choose. Even if there were to be one outstanding person willing to do the job, that is much too fragile a basis on which to embark on a constitutional reform of this sort.

“The problem of selecting an existing member of the States to be "Speaker" would be the perception (and indeed reality) of political bias during debates when that person's views would already be a matter of public record as a result of previous speeches in the Chamber or during an election campaign. Better surely to start with a truly independent individual with no previously expressed views on the important issues of the day”

What about an outsider? Setting aside how any such person would be likely to earn and command respect, it is difficult to see how anybody might be attracted to the job unless it were to be well remunerated, nor how they would be likely to be recruited unless they had relevant experience.

There is also the matter of economy

“At present, the Bailiff is able to use his legal background to determine issues relating to matters that are going before the States. A speaker drawn from elsewhere would almost certainly need independent advice from a legal expert. In addition, the Bailiff’s Office is run..... with few human resources and great economy. I could well imagine that the appointment of a speaker drawn from elsewhere would almost certainly lead to the growth of an independent and larger bureaucracy.”

There is however one possibility that might merit further exploration, but which probably would not negate the above comment. The Island is fortunate in currently having a States Greffier who is well able to preside over the States in the absence of the Bailiff or Deputy Bailiff and it may well be the case that, if the post of Speaker were to take a greater prominence in the recruitment process of his successors, appropriate appointees might be available in the future. But that too would be a fragile course - if he (or she) were to be absent for any reason who would take over? With the current system, the States Greffier is the third reserve after the Bailiff and Deputy Bailiff - if he (or she) were the appointed Speaker, there would be very much less cover for any absences.

In practical terms, is there a problem?

“since Ministerial government was introduced The President of the States no longer has a casting vote, and therefore cannot influence decisions of the elected members. So where is the conflict?”

“the role of Bailiff is removed from the political arena and is a position that commands respect and the Bailiff is widely regarded as a person of integrity and dignity”.

“Furthermore, the present system works, is known to work, and indeed has done so for many hundreds of years. The present States Assembly, in my opinion, is still ‘bedding down’ since the introduction of Ministerial Government, and is probably not yet working to its full potential. Is this the right time to change? I think not. Furthermore, the present regime is part of the Island’s heritage and helps to make Jersey unique”

Chief Justice and Civic Head

The Island is fortunate in having had, for very many years, Bailiffs (and Deputy Bailiffs) of undoubted quality and integrity. It has also been fortunate in the choice of Lieutenant Governor. The Office of Chief Minister is still comparatively untested with a short track record, and because it is held by an elected representative, is of limited duration.

Do those three seem to have a conflict that demands some radical constitutional change? On the contrary, they seem to work in close accord and this to the great benefit of the Island and its inhabitants. It is difficult to see what benefit there would be in defining the “civic head” to the detriment of any part of this particular triumvirate.

Would there be a benefit to the Island if the Bailiff and Deputy Bailiff ceased to have any part to play in representing the Island both within and beyond its shores to be replaced by the Chief Minister? We see no reason to make any significant change to the status quo which has served us well for many centuries. We are a Bailiwick and have been for many centuries

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Taking into consideration those matters listed

“i.e. democratic and accountable governance and human rights, and Jersey’s traditions and heritage, Jersey also being a small jurisdiction, I am of the opinion that the current roles do not need to be changed”

That seems to be the general tenor insofar as concerns my own views and those of the Jurats associated with this submission.

Part 2

The Jurats see little of the activity of the Attorney General (and Solicitor General) in their roles as legal advisors to the States, to the Council of Ministers and to the Scrutiny Panels. We have contact with both in their capacity as public prosecutors; however contact is indirect as they rarely appear in person in Court, their function largely being undertaken by appointed Crown Advocates. We are aware that sentencing conclusions presented to the Royal Court by the Crown have been reviewed by the Attorney General’s office.

Legal adviser. There is clearly scope for potential difficulty with issues surrounding confidentiality and conflicts of interest in providing legal advice to the States, the Council of Ministers and Scrutiny Panels. In that equation it is likely that the conflicts are likely to surround advice to the Scrutiny Panels and their ability to measure the confidential advice given by the AG and SG to the Council of Ministers. Some of that conflict is probably unable to be resolved but

“much could be overcome by the simple expedient of having a team of experienced Advocates on whom the Scrutiny Panels could draw for independent advice”.

Honorary Police. We see little of the AG’s role in connection with the honorary police but one of our number, who has been a parochial honorary officer for six years, was more than sure that

“within our system he is the best person to fulfil that role”

The Crown. We are unaware of the scope of the advice given by the AG to the Crown.

Conclusion

Those Jurats who have chosen to express their views through me are of the view that there is nothing fundamentally flawed in the present arrangements. The constitution of an Island like Jersey, which has broadly remained unchanged for centuries, would need some glaring and deep-rooted fault which threatened its stability and its future before significant change could be justified. We are not aware that any area of Human Rights is threatened by the present rôles as

conducted, nor have we been aware that any relevant processes have been prejudiced by the roles as they stand.

In short, the thrust of this submission is that the *status quo* should be objectively set against any alternatives that might be proposed and change should follow only if there is a clear and demonstrable advantage to the Island in the future.

“On 15th February 2001, a letter was printed in the Jersey Evening Post written by Sir Philip Bailhache in response to an invitation from Sir Cecil Clothier to express his views regarding the recommendations of the Review Panel on the Machinery of Government in Jersey, It did serve as a reminder to all of us of our unique historical situation, and his views in relation to the roles of the Bailiff are especially significant at this time”

“Decapitation should be the last resort, and certainly not to be considered unless processes are manifestly wrong and unalterable in some other way”

I hope the expression of these views has been of use. Please do not hesitate to revert if there is any further way in which we may be able to help.

Yours sincerely

Jurat P.J. de Veulle OBE
Lieutenant Bailiff

The Lord Carswell
c/o PO Box 1000
Highlands College
St Saviour
Jersey
JE4 9QA