

Event: Public Hearing
Review of the Roles of the Crown Officers

Date: 5th May 2010

Review Panel: Lord Carswell, Chairman
Mrs M-L Backhurst
Mr G Crill
Mr I Strang

Witnesses: Mr M Dun

THE CHAIRMAN: Good morning, Mr Dun. I do not need to bid you welcome because you have been here quite a bit of the time already and I do not need to explain what our purpose is, because you will have heard it repeated several times. So thank you for coming to assist us with your observations. We have had a two-part submission from you already and, at this stage, is there anything you would like to add to what you have given us in writing?

MR DUN: Well, you had a three-part submission from me but I don't know if the third part has reached you yet. I sent you a copy of my submission that I sent to the Justice Committee of the Justice Department in England, in which it covers much of the same ground that this review is looking at. I've had it and Mr Millow did acknowledge it.

MR MILLOW: As far as I am aware, the Panel has received the three documents.

THE CHAIRMAN: Yes, very good.

MRS BACKHURST: Could I ask, just for correction, on one point? In your first submission, number 15, it says:

“Another sub-department provides legal advice to government departments under the authority of the Attorney/Solicitor General. These Crown Officers would be abolished in their current form, would be local appointments. They would not advise the UK government.”

I do not understand ...

MR DUN: Well, historically, as I understand it, part of the role - because they're Crown appointments - was that, if called upon, they will advise the UK government. That was part of

the duty of the Crown Officers, to advise them on legal matters arising and this is the reason that --

MRS BACKHURST: Okay, I was not clear that that is what they did, so I wondered whether that was just a mistake.

MR DUN: Yes, and I'm suggesting that that is probably something that the UK government should sort out for itself.

MRS BACKHURST: Yes, I was not clear that that is what they do, that they would in any way advise the UK government.

MR DUN: Yes, the Attorney General. In those circumstances, if there's a dispute between the UK government and -- the Attorney General traditionally advises the UK government and the Solicitor General advises the States of Jersey. Whether that still holds, I don't know, but that was the ...

MRS BACKHURST: Okay, okay. I just was not sure whether that was true or not. Okay, thank you.

MR DUN: There's one area in my second submission - if I can find it, which I can't seem to find at the moment - but it's a reference there to the Magistrate, the former Magistrate. Some years ago, the Magistrate wanted -- it's paragraph 46 in my second submission. What it should say is:

“Some years ago the senior Magistrate complained that he was frustrated because of the lack of onward promotion to Deputy Bailiff. There was no career structure. He had previously been Solicitor General but his career did not progress any further.”

That’s what it should say. Just one small point, I did feel it was necessary to make a historical point about the role of the Crown Officers in Jersey, that it has been 800 years, but it hasn’t been benevolence all the way. The love of supporters of the ‘system’ - if I may use that word in inverted commas - present a rather rose-tinted view of the role of the Crown Officers in Jersey, and it has not traditionally been all that wonderful. That’s why I wanted to stress at some length some of the historical peculiarities, some of the things that really aren’t quite so attractive, some of the things that you don’t read in the guide books.

THE CHAIRMAN: You have made a case clearly in your submissions that historically it has not been entirely plain sailing, shall I put it that way. What we are interested in now is, against that background, what do you suggest should be done? What would you ask us to recommend to the States?

MR DUN: Well, one of the ancient and recurring themes is the lack of clarity. It’s the people of the Island and people elsewhere who had traded with the Island or had dealings with the Island who have consistently claimed that they don’t know what the laws are of the Island, they don’t know what the practices are, they don’t know the conduct and I think this is a great opportunity for Jersey to make some substantial strides forward in bringing that part of it - the legal representation which takes part in the States, the manifesto, the arrangement of the courts - all of it, bring it up to, if I can use it, up-to-date, if that’s the correct expression. This needs to be modernised and clarification needs to run throughout the system.

THE CHAIRMAN: Would you like to specify what exactly then should be done about the role of the Bailiff, Deputy Bailiff and the Attorney General and Solicitor General, because that is really what we have to decide --

MR DUN: Indeed, in my submissions to you I outline the creation of a specific department of the Ministry of Justice, and I think rather than just in hearing what the previous witness was saying was about the future role of Jersey, where it's going, because it's got this international perspective - it's not a little farming and fishing community anymore - and these ancient roles are not easily adapted for the international role.

So very interesting to hear what Mr Walker had to say, the divergence between -- the need for a political person to go out there and speak to the world, and that obviously - clearly, as far as I'm concerned - the idea what he had to say, "That cannot be the Bailiff, that cannot be the judge" or at least, "He can be a Bailiff, but he cannot be a judge". The judge has to be a judge and he should not be a political person.

That's the sort of a clarification that needs to be the Ministry of Justice, a Department of Justice, is the sort of basis on most places around the world have a department of justice, the way these things are arranged. And just because Jersey is a small place it's no longer an acceptable excuse to say, "It's small, therefore it can't do these things" especially if you want to have an international perspective. You've got to get to grip with these things, and it's not such a major change. In fact, all the people are here, you just have to arrange them in a proper cohesive department. You have the judges here, you have the Law Officers, you have prosecutors, you have all these people there, Greffiers, they're all here, but they need to be organised in a proper constructive department.

MR CRILL: Is it not one of the big problems with that is that if you are going to have a Ministry of Justice, does that not go against one of the fundamental principles of good governance, namely the separation of powers who are bringing the judicial element within the Executive?

MR DUN: No, I don't think it does. If you have a department, if you have --

MR CRILL: So who appoints the judges?

MR DUN: Well, they would be like, as was being explained, that the role of the judges are appointed by a process, a vague process which the public have no participation in, but at some point the general public have to participate in that process --

MR CRILL: You mean they should be allowed --

MR DUN: -- and where you have an appointments panel, a properly structured appointments panel to appoint judges. Now, obviously ultimately everything has to go through the government. The government has to lay down the rules for how you have an appointments panel so that's -- but you don't have judges making their own rules about how judges will be appointed. That's what's wrong with the system and there's nothing frightening about that. That's what happens in those countries. The rules are laid down, and you have an independent appointments panel. They appoint the judges and they appoint, as they must do now, all senior civil public officials, even the Lieutenant Governor, I am told - that's when I spoke with Government House the other day - and the next Lieutenant Governor will be appointed after advertisements and will be advertised, the job will be advertised and that's how it will be.

MRS BACKHURST: It was advertised last time as well.

MR DUN: Sorry?

MRS BACKHURST: It was advertised last time.

MR DUN: Okay. Well, they told me it wasn't, but I remember when it was advertised previously in the Labour Government, there was talk of - I think it was - Betty Boothroyd or somebody taking the job and they sort of got rather afraid at that prospect and it sort of went by the by. But they assure me that next time it won't be - but correct me if it has been advertised - but they said to me it hadn't been advertised.

But in the current rules with current principles on appointing any public officials, this should run throughout the system, should run throughout the judgeships, the Attorney General, Solicitor General. They should be appointed openly, publicly, the public should be aware what the process is, people should be encouraged to apply. In terms of their employment, there shouldn't be any of these secret little discussions behind closed doors. That's not acceptable in the 21st century.

MRS BACKHURST: In America, of course, judges are elected.

MR DUN: Sorry?

THE CHAIRMAN: Some.

MRS BACKHURST: Some judges, right, thank you.

THE CHAIRMAN: Yes, only some States, and some are appointed and some are done by a very complicated process, and the federal judges are appointed by the President.

MRS BACKHURST: Okay, thank you, but it is an alternative method as well of an election.

THE CHAIRMAN: It is, yes. It is not really regarded very highly these days.

MRS BACKHURST: No, no, I was just wondering if Mr Dun would prefer the appointment rather than the election.

MR DUN: Well, I haven't attempted to produce an absolutely finite plan. I've merely given you what I think are the basics, the design, the rough design for what I think should happen. I mean, obviously there will be intimate details which have to be worked out, but I think it's fairly obvious - listening to the witnesses that I've heard here, and I've heard all the witnesses so far that have come here - that the system at the moment, in my perception, from a public democratic point of view, does not work.

THE CHAIRMAN: In your model then the Bailiff, whether he continues to hold that title, would be a judge of the Royal Court, but nothing more, is that ...?

MR DUN: I don't want a judge mainly in Appeal Court but judging, that would be his job, judging. Whether there are other duties which are compatible with being the judge which he should do, I don't know. I haven't looked into that, but that's what he would be, a judge.

THE CHAIRMAN: So he would not have the role of civic head --

MR DUN: No.

THE CHAIRMAN: -- and not have the role of President of the States?

MR DUN: Exactly. They keep saying this expression "President of the States" but when it comes down to it, as presidential role of President of the States, it amounts to very little, doesn't it? When it comes down to it, all he is being is Speaker. When they push him on, a President of the States as the political role, and he's pushed on, "What's your political role?" all of a sudden there isn't one. So rather than just don't call him Speaker of the States rather than President, even in his existing role, I don't know. Why is he President of the States at all? It's a bit of a nonsense, really, isn't it?

THE CHAIRMAN: Who would then act as Speaker of the States?

MR DUN: Well, in my suggested plan obviously that's as exists at the moment. The Greffier, the States Greffier would act as Speaker and they do it perfectly well. I've spoken to previous Speakers and they're perfectly happy with the job and they say it was not onerous, they could do it quite happily. They have the Attorney General and Solicitor General to call on if difficult legal questions arose, but generally speaking, certainly the 40 years that I've been looking at these

things, they've managed perfectly capably to do the job and there's no need for them to be a lawyer.

The general public can produce people, as they have done, especially if you have got a department in the Ministry of Justice which is training people up for these sorts of jobs. This is all part of the process of training people, and you have to have a structured employment process and this is a training process, gaining experience.

One of the strange things is we have lots of people coming here and saying it, but not one of them has suggested, "Why shouldn't the Attorney General and Solicitor General, of course under my scheme they wouldn't be Crown Officers but they would be locally appointed legal advisors?" Why shouldn't they step in on occasions and be Speaker? I would see no reason, if they weren't prosecutors, why they shouldn't be a Speaker in the States. I can see no problem with that.

I mean, there are difficulties, but why shouldn't they step in? Maybe why shouldn't they be the Speaker, if that's what you want? But I think they've already got enough duties to be dealing with their legal advice and so on, but they could be. If they're not Crown Officers and if they're not prosecutors, why shouldn't the Attorney General and Solicitor General be a Speaker, if the Greffier or somebody acceptable? To me the Greffier is acceptable.

On occasions you can have a States Member or a senior States Member can step in, as they have done and do do on occasions; then if that's not acceptable use the Attorney General or the Solicitor General to step in and speak. What's the problem?

THE CHAIRMAN: We have had suggestions that a permanent Speaker should be sought either from election among the Members or by election of an outside person. What would your thoughts be on that, Mr Dun?

MR DUN: I don't favour either idea. I think it's a small House, 53 States Members at the moment. I don't think the arguments have been made, and don't deprive a constituency of having an elected States member. You can do it with 650 parliamentarians. You can afford to lose one maybe and they can double up, and even that tradition is up for grabs in the UK when they're contesting the Speaker's election. So everything is up for grabs, but I certainly don't see the role of a permanent States Member being Speaker. I don't see that role.

You've got to have a back-up Speaker, you've got have somebody to deputise. I don't think somebody from outside it, I can't see why. You've already got the Greffier. In Guernsey, where the Greffier now is the States Greffier and he's the Royal Court Greffier, he doesn't preside in the States Assembly, but he does act as a clerk. He's the clerk for the States and he's the clerk for the Royal Court and he sits in the Royal Court as a clerk, so he's quite active in that role. So his role is slightly more Royal Court than States, but he does that role and that's my preference. I can't see the point in bringing in an outside person. You've already got people there being paid and they being within the career structure of the Ministry of Justice - as I call it - or Department of Justice.

THE CHAIRMAN: What would the Department of Justice be responsible for?

MR DUN: Well, in my scenario they would have a division for the judges, Jurats, which include magistrates. That department would be a part of it, but it would be a sub-division of the main

Department of Justice, which would be Attorney General and Solicitor General advising the States, and rather like Guernsey, giving advice to any States Member. The ones at the Guernsey level, they seem to manage okay giving advice to anybody.

So they would have the Attorney General and Solicitor General, there would also be the Judicial Greffe who would be included, because obviously there are duties which are integral with the Judicial Greffe, the Viscount's office, which is really integral with the Judicial Greffe maybe, publication of legal information and research and information; legal aid scheme, that would include the legal aid scheme. That should be properly arranged. We have a dreadful legal aid system here.

THE CHAIRMAN: Could a Ministry of Justice properly be responsible for an Attorney General who is in charge of prosecutions?

MR DUN: Well, no. This is what I say, it would be a subdivision, rather like the police officer, Mr Warcup, I think it was, was explaining they already have a department at the police headquarters or alongside police headquarters where prosecutors are engaged. They have a team of prosecutors, these are separate divisions. I would have them within the structure of a Department of Justice but they wouldn't be physically possibly in the same building like they are now, they're in separate buildings --

THE CHAIRMAN: I've received a note, Mr Dun, that your voice is not catching in the recording equipment. If you slow down just a tiny bit, then I think we will get your remarks. It is not the volume, it is the speed, if you do not mind.

MR DUB: Okay.

THE CHAIRMAN: What do you suggest should be the future role of the Attorney General and Solicitor General?

MR DUN: Well, they should cease to be prosecutors. They should cease to be Crown-appointed officers. They should be appointed locally by a popular appointments process. They should not necessarily be Jersey lawyers. They should be appointed in the wild horizon. Applicants should be received from anybody who thinks he's qualified and competent to do the job. They should be encouraged to be trained up locally obviously, but their role would be to advise States Members, Scrutiny Panels on matters as arising, of any matters that the States need to get information on or a little bit of advice on.

THE CHAIRMAN: What about prosecutions then?

MR DUN: Well, you'd have a DPP. You'd have the equivalent of a DPP, which effectively you have the equivalent of a DPP. We have all sorts of external employed people, freelancers and all sorts of people who are employed at extraordinary cost. These can be a properly integrated department with proper salaries, proper appointment, proper pensions, public service seen as a career, certainty ...

MR STRANG: They would be accountable to who?

MR DUN: Well, ultimately everything is accountable in the government, hopefully.

MR STRANG: So therefore the States would be looking at ...

MR DUN: Well, ultimately that's what a democratic government is all about, isn't it? Obviously there is a diversion, there's obviously a constant battle between judge, the judicial side of life and the governmental side of life. That's necessary and healthy that there is a constant battle going on between -- and it moves, going like the tide, that the judges are stronger one year and the government is stronger the next, but this is how it goes on and presumably the same will be with prosecutions. Prosecutions will be bought. Some people will always accuse the prosecutors of having political views, but that's part and parcel of the game, isn't it?

THE CHAIRMAN: How would the DPP be accountable then? What would be the machinery of being accountable?

MR DUN: I'm not sure if I've worked it out in minute detail, but whatever the machinery is that the DPP operates in the UK, that would be something to look at, but ultimately it has to be paid for out of government funds, it has to be structured, you have to be employed --

THE CHAIRMAN: The DPP is accountable through the Attorney General in the United Kingdom. The Attorney General answers questions in parliament, not the DPP's.

MR DUN: Yes, I heard the discussion.

THE CHAIRMAN: So if you have taken the Attorney General's prosecuting role away from him, he cannot do that, so where do we go?

MR DUN: No, I don't see it as a problem. I don't see why it won't work and have a separate DPP. I can't see what the problem is, and the fact that they don't do it in other places I don't see it's a problem. If you want to call them, the law can be adapted for some extraordinary reason on very rare occasions. If the government wants to call the DPP to account for some actions, I don't see why the government system here can't allow for that to happen, but it would be a very rare and unusual circumstance.

MRS BACKHURST: The independence of the judiciary is something that is highly valued.

MR DUN: Sorry?

MRS BACKHURST: What you are suggesting might prejudice the independence of the judiciary.

MR DUN: How do you mean?

MRS BACKHURST: Because they would be accountable to the States so there would be a political influence --

MR DUN: No, they would only be appointed by an appointments panel insofar as that is set up by the States report people. There would be no further accountability in the States as such.

MRS BACKHURST: So the States could not dismiss them?

MR DUN: Well, whatever structure they're appointed under there would be rules laid down and there would be a procedure for dismissing or disciplining judges. I mean, there would have to be a body to do that, but it's not to say that the States are going to suddenly put it in a proposition that we're getting the right law and judgment on such and such a case and it's just not going to happen with --

MRS BACKHURST: It might be a separate body, separate from the States?

MR DUN: Yes. Well, ultimately it's all answerable to the States, isn't it? I don't know whether it's answerable ultimately to the States, because the States controls the finances.

MRS BACKHURST: Well, it is answerable to the Crown at the moment.

MR DUN: Well, effectively, I don't know if it is, is it, because the worked example which I suggested in one of my submissions, where your panel ought to be vigorous, looking at the case of Vernon Tomes where the public knowledge of what actually happened, how he was disciplined and how he was dismissed, was not at all clear. Who actually dismissed him? Was he dismissed locally or in London was not at all clear. Now, that sort of thing ought to be made absolutely clear. Where is the discipline process?

THE CHAIRMAN: Crown Officers at present are Crown appointments. This would remove them from being Crown appointments, appointable or dismissable by the Crown. With whatever intermediate steps, what is the likely reaction, in your opinion, that the Crown authorities would have to this?

MR DUN: The Crown authorities I don't think it would affect too much. I can't speak for them, but I guess it wouldn't worry them too much. I mean, one less problem to have to worry about, I would think. I think they'd probably be quite glad, but I presume in the overseas territories such arrangements are made for the appointment of judges and people in Crown offices and I expect they manage quite well. Have they enough in these places to do it, I don't ...

THE CHAIRMAN: The requirement that the government in the United Kingdom, having a responsibility for Jersey as a Crown Dependency, maintains an interest in what happens in Jersey and what is done mostly because I think they feel a concern that it would drag them into controversy if things went wrong. Do you think they would be as willing as all that just to say, "Well, you just get on with it yourselves and do not worry about us"?

MR DUN: Well, of course the United Nations has declared that all the territories, even dependencies, should be encouraged to self-government and independence, so it's part of an international movement that territories should stand on their own two feet. So I don't think the United Kingdom government will resist from an international perspective. They might have financial reasons why they want to keep a close relationship with the level of money that comes from Jersey and goes to the city of London.

I daresay there are all sorts of hidden political perspectives to this, but as far as the international 21st century obligation of the United Kingdom government is concerned, I should think they'd be delighted to see greater independence, greater self-government, greater self-control in places like Jersey and Guernsey and the Isle of Man.

MRS BACKHURST: We have a Court of Appeal at the moment and we can then, after the Court of Appeal, go to the Privy Council. If there were no longer Crown appointments or other connections with the Crown, what would then happen? Where would Jersey people go to?

MR DUN: Well, I was interested yesterday. I mean, it was the day before the Deputy Bailiff raised the very point, but because of the establishment of the Supreme Court in the United Kingdom and the lessening of the role of the Privy Council in the United Kingdom, whether a sounding was made in Jersey - not to the general public, I hasten to add - but somebody, through behind closed doors, made the decision that Jersey didn't want to be aligned to the Supreme Court, which would have been a much better arrangement, we wanted to stay with the mysteries of the Privy Council. Whoever made that decision, I think it was a wrong one. I think democratically it was a very dubious decision. The public of Jersey should have made that decision, not behind closed doors with the Bailiff and his friends, but the Privy Council procedure is a very onerous procedure for people to have to take and I would have thought there's no reason at all why there shouldn't be an ultimate appeal, if necessary, to another body which could include Channel Islands and the Isle of Man or it could be the Supreme Court in the United Kingdom. There is no reason, just because you're getting rid of one institution, that you can't create another one which is better and thought out and clear and certain ...

MRS BACKHURST: It would be a very different relationship though, would it not?

MR DUN: Well, people would catch planes to London. They would go to a place in Westminster, if that's where it was, and they would hear their appeal or have their appeal heard before judges where they've all the same sorts of robes that they wear in Privy Council, I suspect. I don't know if there would be that much difference, with their due respect.

THE CHAIRMAN: I do not think it is likely to be any less complex or less expensive either. I think it is going to be very much the same thing.

MR DUN: Well, I would hope that as part of the process of review, a simpler more user-friendly process might evolve, because after all, for people who have to go to the Court of Human Rights, they have to exhaust all domestic remedies. Now, the Privy Council is not a realistic tribunal for the general public to be going to if they're going to exhaust all the domestic remedies.

I hope the Supreme Court will be more accessible and I note in one of my submissions that the Barclay brothers have made use of the English appeal court system. Now, I appreciate they've got slight advantage of a pocketful of money to go and pursue these things, but it's rather interesting that they've been able to do that. They've been able to enter English courts and take a Channel Island appeal and I think that raises some very, very fundamental questions about the appeal process which already exists.

THE CHAIRMAN: I think we are getting slightly beyond our terms of reference somehow. Anything further ...?

MR CRILL: No, I do not think so.

MRS BACKHURST: That has been very helpful, thank you.

THE CHAIRMAN: I think we have covered all the ground that we wished to discuss, Mr Dun. We are grateful to you for your assistance. We shall forward to you a copy of the transcript for you to ascertain that it represents accurately what you said before it is put on the website and then that will be published on the website in due course, along with your submissions which are already there. We shall, at the end of the process, endeavour to reach conclusions, prepare a report and advise the States accordingly.

MR DUN: I shall read it with interest.

THE CHAIRMAN: Thank you very much for your attendance this morning.