Event:	Public Hearing Review of the Roles of the Crown Officers
Date:	8th June 2010
Review Panel:	Lord Carswell, Chairman Mrs M-L Backhurst Mr G Crill Dr S Mountford Mr I Strang
Witnesses:	Advocate R Falle

Lord Carswell (Chairman): Now, you are very welcome to our proceedings. This is the Panel constituting the review set up by the States to review the roles of the Crown Officers in accordance with the terms of reference we have been given. I think you know all or most of the members, Dr. Mountford and beyond her our Secretary, Mr. Millow, Project Officer, Mrs. Backhurst and Messrs. Strang and Crill I am sure you know. What we have to do is to review the roles of the Bailiff and the Law Officers in principle. We are not concerned with the performance of the role by any individual. We are concerned with the position in principle and whether changes should be recommended to the States. It will be for the States to decide in the end what is to be done. When we have been discussing the question of perceived bias which is the sort of buzzword raised in public law these days, it is very much on the question of perceived or objective bias. We make it clear that it is not actual bias or suspicion of it. It has not been alleged against any person. We are not concerned with that at all. It is a question of whether the independent reasonable observer would consider that there might be a question with which lawyers are more familiar than perhaps non-lawyers. We are sitting in public, as the States have requested, and our proceedings are made public so that written submissions go on to our website. The proceedings will be recorded and transcribed and before they are made public, you will have an opportunity to see the transcript to satisfy yourself that it is an accurate record of what has taken place. Then it will also go on to the website and be publicly available. That is the way we have been asked to do it. That is how we are doing it. We will finally make our recommendation to the States, whatever it may be, and the States will then decide. That will be their prerogative. We are grateful to you for being willing to come to speak to us and to give us your views. Would you like to start?

Advocate R. Falle: Mr. Chairman, ladies and gentlemen. Thank you for that introduction, Mr. Chairman. I suppose it would be sensible for me to introduce myself for the purpose of the inquiry. I fear that my offerings are going to be a little thin but since I was invited in one capacity to make some response in the capacity of Acting Magistrate, I am taking the opportunity of, in addition, offering a few more general comments.

I am a native Jerseyman. I was educated at Victoria College and Oxford University. I have been an Advocate at the Jersey Bar since 1968 and I have been Acting Magistrate since 2008 on a slightly ad hoc process in view of a suspension of the Magistrate Designate. Therefore I do not have a term of office. It runs on. To the extent that it may be relevant, I am a former President of La Société Jersiaise, for your benefit a local learned society. I was a founder member of the Jersey Heritage Trust and I am currently Deputy Editor of the Jersey and Guernsey Law Review. I am not an historian but I have always taken an interest in the history of my Island and the health of the body politic. I am particularly interested in the history of our legal system. Apart from involving myself in conservation issues from time to time, historic buildings, against the flooding of valleys, et cetera, I have been on the margins of politics but have therefore had an opportunity of meeting many of the people who have, in recent decades, been in politics. I have a sense, I think, of their perceptions of the Government of this Island and also, of course, of the Crown participation in it. If it is worth adding, my knowledge of the history of Jersey law has been deepened by a long-running battle I have had with the States and the Crown - so I must declare an interest - with the Crown over the ownership of the foreshore, long since now resolved. I have therefore had an opportunity to witness the operation of the Crown in the Island but from the outside. I have never been a Crown Advocate and have not held Crown Office. So I cannot, I think, usefully speak on the internal operation of the Crown Officers'

Department and, of course, you, Sir, and your Panel, will have ample opportunity to hear from those who have great knowledge and better knowledge. I note that a former Bailiff will be appearing before you this afternoon who was more than 30 years in Crown Office. It would be presumptuous of me, I think, to tread on paths which will be much better laid out for you by Crown Officers themselves. I have, however, read, in the course of my life, a number of files in the Public Record Office and in other records, which include correspondence between the insular Law Officers from time to time and officials at the Treasury, the Lords Commissioners, the Home Office, et cetera. I therefore have a sense, at least historically, of the kind of relationship which, certainly in the 19th and early 20th century the Crown Officers had with the Privy Council and its various agents. Perhaps I could just address the matter of my office and the Magistrate's Court insofar as it is concerned with the Crown Officers.

Both the Magistrate's Court and the Petty Debts Court, over which I preside, are creatures of statute. They were formed in 1853 by statute to relieve pressures on the Royal Court and the actual level of further statute in 1864 and there have been a number since and I was formerly the Juge d'Instruction now known as a Magistrate. The office of Magistrate is an appointment of the Bailiff and there is no provision in that power in the Bailiff as to how the Magistrate be appointed, but I can assure you now that there is a process, which is followed, of advertisement and interview by a panel sitting on various applicants and that panel then advises the Bailiff. So the possibility of partiality and a lack of opportunity to the office has been met by an organic change, as it were, in the regulatory environment rather than by any statutory change. The Bailiff also appoints, with rather less consultation, a panel of relief Magistrates from the Jersey Bar, about half a dozen who sit from time to time to relieve pressures on both of the small courts. There is also a panel of laypersons to sit

in the Youth Court and they are also appointed by the Bailiff but their appointment follows again advertisement and interview and the appointment by the Bailiff is therefore relatively formal. All those persons appointed, including myself, are, as is the case in almost all public appointments, sworn by the Royal Court before the Royal Court so to that extent the Bailiff takes our oaths of office.

There is a right of appeal to the Royal Court from both lower courts but save for that, and the matter of appointment that I have referred to, there is no supervision in the operation of the court by the Bailiff or any other Crown Officer. Prosecutions in the lower courts are initiated out of the Parish process, the Centeniers of each Parish bring prosecutions. Where they are dealing with difficult cases, they are now routinely advised in the conduct of those cases by members of the staff of the Law Officers' Department. Theoretically, I suppose, I am sure it would be open to either the Solicitor General or the Attorney General to appear in lieu of one of those subordinate legal advisers but they do not do so because the assistance given to the Centeniers is given by qualified lawyers although not always by persons who are qualified in Jersey law, people, for example, from the Prosecution Service in England, who have not yet or do not intend to qualify as Jersey Advocates.

I do not think there is any point in my dwelling at length on that particular office or those two lower courts because they are, as I have indicated, effectively independent of the Crown Officers. I would like to turn now, if I may, to the role of the Crown Officers in a more general sense and you will forgive me, Sir, if I dip briefly into history and the origins of the court because I believe there is a process which can be observed. I am not proposing to do a scholarly exercise but there is a process whereby one can see changes which have

occurred in the office, particularly of the Law Officers in their attitude to the people of the Island as opposed to their attitude in relationship directly with the Sovereign.

If we take a brief dip into medieval history, the Royal Court in origin was, like its predecessor, the Norman Exchequer, in essence a feudal court. It existed to administer effectively the Royal Estate in the Islands so it is true of Guernsey too. The purely Ducal, – and after 1204 when John lost Normandy the Royal – powers of the Crown, exclusive powers of the Crown representatives who would have presided over the court, were mitigated by the new institution. It looks to have been a new institution in the early decades of the 13th century of the Jurats whereby 12 local persons could be elected by the worthies of the Island to be judges. It was an enormous privilege to the Island because it tended to mitigate what would otherwise have been relatively unregulated royal powers. So the officers of the Crown, including the representative of the Warden of the Islands, the Chief Administrative Officer, presided over the Royal Court but were then forced to do justice with the aid of effectively a panel of Jurats sitting with them. The further limitation on the royal powers at that time and since was always the customary law of Normandy, to which the Islanders were always deeply attached and which they constantly claimed to govern all their doings and also the doings of the court whenever challenged by the royal officers. Despite the Jurats under custom, the medieval records, however, record the concern of the King to secure his estate and his ancient domain and his property and his revenues and privileges. There is, in our records, a whole series of roles of the assizes, many of which are based on the writ of *quo warranto*, by what warrant do you hold your land, by what warrant do you claim to hold the office of Jurat or what law have you got … what governs your people? These questions on that writ were constantly asked of Jersey people from 1279 right up until the eve of the 100 Years' War when it was deemed, I think, politic by

Edward III to stop pestering the Islands with difficult questions if he wished to retain their loyalty. The *quo warrantos* were not unique to Jersey, but they revealed interestingly the attitude of the Crown. It was quite aggressive. The record is almost verbatim. The interrogator, the inquisitor, is the King's attorney. I take that person to be the Attorney General of the day; he is aggressively challenging all the locals on behalf of the King.

The Bailiff does not figure materially in those very early records. He was at first an appointee of the Warden, who was himself appointed by the King. It was only towards the end of … well, it was only in 1615 that all the Crown Officers became securely appointees of the Crown by Letters Patent. The Bailiff, however, like the Attorney General, is and always has been a royal officer, even if delegated or appointed by the warden. Even into the 20th century his title is to be found occasionally, that of the Bailli du Roi, and we see that in the welcoming proclamation to the visiting King George V in 1921 read by the Bailiff and signed by William Venables Vernon, the then Bailiff as Bailli du Roi. It clearly identifies the Bailiff as being a Crown official. We can skip forward. The history shows that the medieval court evolved in much the same way as did the parliament in England; a parallel process. The court, when it needed … because like every other medieval court it had administrative and taxation functions as well as judicial functions. Whenever major decisions affecting the whole community were involved, the Royal Court, the Bailiff and the Jurats would summon further representatives serving the community to assist, in particular the Rectors and the Constables of the Parishes. That common council of the Island was the … showed the beginning of a body larger than the purely judicial court. It was called the States largely by reference to the Parlement de Rouen where you have the estates of the realm; the estates in Jersey were purely the Crown Officers, the Jurats and the church in the form of the Rectors and the people in the form of the Constables. The effect of the

increased representation was to reduce the scope and the pure executive discretionary powers of the Crown Officers as they became … as the States were more regularly held, so the representatives tended to flex their muscles more and more. Although, right up until the 20th century the status of the Deputies and the Constables and the Rectors was rather less than that of the Jurats who sat in their offices for life. We see a slight change in the attitude of the Bailiff towards his people, as it were, in the Island and the Crown in a series of struggles that occurred in the late 16th century where the Governor and the Bailiff battled it out as to who it would have precedence. The Governor at the time looking to have the appointment of the Bailiff and the Bailiff insisting that he was effectively the heir to the great Bailiffs of the Cotentin in the days of the Duchy. What one perceives from those battles is a sense on the part of the Bailiff sitting in this Island of identity with the local interest as against the Crown interest and of course the Bailiff, as also most of the Crown Officers were almost invariably - as indeed they still are and have been until recently - drawn from Islanders. The 17th century, however - the middle of the 17th century - and the Civil Wars found Jersey a royalist Island and the power therefore of the Crown Officers, those who were loyal to Charles in his exile and indeed when he stayed in Jersey for some while, meant that the court - specifically the court - was monopolised, or all the Crown positions were monopolised by the Crown loyalists for many years thereafter. It was not until the 18th century, towards the end of the 18th century in 1771, when the stirrings of the people perhaps sniffing the approach of a revolution across the water, perhaps having read their Voltaire and Rousseau, there were riots which were eventually settled by a new Order in Council, which reduced the powers of the court in relation to that of the States in 1771. The power of the court to make regulations, its executive power was effectively taken away from it and that was exclusively given to the States. The growing power in the middle of the 19th century and the growing confidence of the elected representatives in the States showed

something of a suspicion of the Crown intervention in debates. In 1823, for example, there were heated exchanges when the Attorney General was challenged for having taken a full and active role in a debate, a contentious one, in matters which did not really concern the Crown at all but were highly political. The Crown Officers took the matter to the Privy Council who confirmed the right of the Crown Officers to speak, but not to vote. That position is still in play; they have a freedom to speak. I have always had a perception, however - and there was clearly a perception through the 19th century - that the voice of the Crown Officers should be more confined than it was on occasion. I shall touch on that in a moment again. But I think it is worth saying that in the late 19th and 20th century one sees a huge increase in the role of the Crown Officers as they conduct an ever-enlarged correspondence with the council and the Privy Council, largely in response to the fact that the States had begun to enact legislation.

There was almost no legislation, properly speaking, into the middle of the 19th century. I felt it interesting to note the tone of that correspondence; perhaps the Attorney General to the Solicitor for Treasury. There is always a sense that the Crown Officer in Jersey is in one camp with the Privy Council and the States in another; possibly a dangerous sense. But it is not confined to the 19th century. I came across recently a correspondence by Venables Vernon, who was Bailiff for 30 years and Attorney General in the early years of the 20th century, and he was advising on the alienation of Crown property. He was not prepared to release his advice to the States who were forced to get council's opinion on the issue. Much nearer to date, in the late 1930s, Alexander Coutanche, who was then Attorney General, and later a long-serving Bailiff, was conducting correspondence with, again, the Solicitor for Treasury on matters concerning the foreshore and in the latter days of one of our railway companies. It eventually emerged that the Crown had a relatively

small interest in the outcome of a dispute. The Attorney General was very careful to ask whether the Crown would have any objection to his now advising the States on the matter and using the opinions he had already given. It is quite interesting to see that the question as to whether or not the Jersey Attorney General could advise the States on the issue. It was the subject of perhaps a dozen letters to-ing and fro-ing. That rather reinforces one's sensation of the Crown Officers at that time, prior to the First World War, still being perhaps closer to the Council, the Privy Council, than to the States themselves. Perhaps there was a sort of suggestion that the States were "other". Maybe it was a sort of aristocratic view taken by Crown Officers and the Crown that the Island was composed of small citizens and the Crown was looking in a very paternalistic way. As to the vast extension of the Crown work in the 20th century, you will hear more of that from others.

I am going to make some general points now, rather more on the contemporary scene. The Crown, as I have suggested, was concerned with its private interest, its *ius privatum*, in the early period. Gradually that shrank away. There is almost no Crown estate in the Island; castles, forts, towers, et cetera, have been transferred to the … given over to the States and the revenues have been diverted to the general revenues of the States in return for the States undertaking to meet the cost of the establishment of the Lieutenant Governor. But the identity of the Crown as the *parens patriae* has grown as the estate has shrunk. Despite the perhaps patronising tone that I have indicated, there is no doubt that in the 19th and late 19th centuries and the early part of the 20th century, there was a benevolent overview available to the Island by the Council, by the Technical Services of the Home Office, ready to exchange advice and give advice to the Crown Officers on difficulties, current matters. That sort of general courteous concern for the interests of the Island itself and its community is very apparent in the 19th and 20th centuries. It is clear,

however, that that situation is now under some stress today because in the evolving economic world in which we move and where Jersey sits in the E.U. (European Union) and in the wider economic groupings, such as, for example, the G20, the U.K. Government has responsibility for Jersey's external relations. It has, however, its own concerns. Jersey has become a significant financial centre where the movements of capital through it and the activities in the Island are of concern to other nations. One has a perception that Jersey and Guernsey and the other Crown Dependencies are potential pawns on a much larger scene. There is a perception of conflict, which has grown quite dramatically over the last decade. This has of course thrown into some light the relation of the Crown to the Crown patentees. What is that relationship? Is it a relationship between the Crown patentees and the U.K. Government, or is it something else? I recall in relation to this an interesting speech made in welcome by William Bailhache, now Deputy Bailiff, who was then Attorney General. He was welcoming a new Governor to the Island after his swearing in and he advised the Lieutenant Governor not to confuse the identity of the Queen of the United Kingdom with that of the Queen of Jersey. I think that was an extremely important distinction to draw. It had not, I think, been stated openly before. It was a distinction that needed to be made. The Island, I believe, is as loyal to the nation of the Crown and its relationship to the Crown as it ever has been, but it does not see its relationship with the Queen as being necessarily coincident with a competitive and sometimes unfriendly Queen's Government at Whitehall. That perception has, in my opinion, been clearly shown in that reorientation, if I could put it that way, of the Crown Officers' perception of where loyalty lies. It was unheralded and not much reported, I think, at the time, but I think that is where the Crown Officers see their loyalty. They have a loyalty to the Crown, but their first and prime loyalty in accordance with their oath is the maintenance of the privileges and interests of the people of this Island. It would be wrong, therefore, if the States were to

take the view that people in the States - and the wider community - that because one is dealing with a Crown appointee whose patent derives from the Crown in England that there in that, the holder of such an office, there is a stranger in one's midst. I believe the Crown Officers indeed play a crucial role in what is a very small politic. The authorities in the Bailiwick have to deal with the consequences of our being a very large and dynamic financial centre. There are real stresses for government in housing, planning, regulation of financial services and so on. There are huge powers which have been taken on by the States and huge discretions going with them. The Royal Court has assumed a jurisdiction to give judicial review of executive action and that is a very welcome development over the past 15 to 20 years. It has, to a certain extent, not countervailed but provided the mechanism for reviewing the exercise of discretions for these great powerful discretions. The fact remains, however, that the States of Jersey, the community, struggles to find the quality of representative that the Bailiwick needs given the scale of its business and concerns. It is as important as ever - perhaps more important than ever - that independent and dispassionate advice be available and that we have an independent judiciary. The Crown patentees therefore who are independent of local interest and pressure are a vital support to the common good. I think of 2 examples where … there will be many others, but I think … which have stuck in my mind over the years where the freedom of feeling fearlessly to speak, fearlessly to deal with pressures, has been exercised by a Crown patentee, I think of a young Solicitor General in the 1970s, Philip Bailhache, who spoke in the States when there was a debate on the Regulation of Undertakings. This was a major piece of legislation, importing enormous powers and discretions over the right of ordinary enterprise for the citizen. There were huge issues which required some kind of Olympian overview to be given to that debate. The Solicitor General felt free to do so. He had what he considered to be an imperative duty to advise the States. There was clearly no one in

the body among the representative Members of the States who was offering such an insight. More recently a Minister resigned when it was revealed in court that he had sought to use his influence to persuade the Attorney General to drop the prosecution of a long-time political associate. The Attorney General was of course immune to any such improper political intervention. His spokesman, the Crown Advocate, who was appearing for the Attorney General felt free in the strength and the independence of the Attorney's office to censure, effectively, the actions of the Minister. This is very important, in my view. It is very important that the court should have that absolute independence of the political process. In recent years also the Attorney General has brought prosecutions against a sitting States President for polluting the environment under the Pollution (Jersey) Law 2000. Indeed, at about the same time a past President was himself prosecuted for the escape of oil from his own property.

There is no question in my view that the court and the Law Officers have felt under any pressure to avoid prosecuting offences, wherever they occurred, by who they had been … whoever has offended.

There is, of course - and I turn now to the position of the Bailiff - much controversy over the duality of his position as President of the States and Judge of the Royal Court. The objectors base their concerns on the classic constitutional doctrine of the separation of powers. Some would see the presence of the Bailiff as part of the process of the separation, which had begun - as I indicated earlier - in 1771. It is unfinished business to have the Bailiff presiding in the States. They take the view that it is wrong to have a Crown appointee there; possibly a stranger. This is a representative and democratic body. But in my opinion there is not a problem. The Bailiff's role is not a political one. Since the

constitutional reforms of 1948, the Bailiff has always taken an absolutely neutral position on all political issues that have been debated before him when presiding over the States. His role is the equivalent of the Speaker in the House of Commons.

In my view, the States would be greatly impoverished by the removal of the Bailiff from the States. Again, we are faced by the realities of a small polity. It is hard enough to find able and independent politicians to take an active role in government. The office of President of the States demands a person of stature and someone with knowledge of law and procedure, someone who is independent of party. A rare creature indeed among those thrown up by the elective process. Such persons, where they exist as Deputies or Senators, are better, in my view, taking an active role in government.

The Bailiff and his Deputy are, in my opinion, pre-eminently qualified to preside. The use of a casting vote when there is inequality in the States is always by convention used to preserve the status quo. Given that convention, the notion of partiality is entirely avoided. No case, in my view, has been made for the removal of the Bailiff from the States. As I suggested, the opposition is based on a purely theoretical, idealistic model, but takes no account of our history and the fact that quite apart from the usefulness of having the skills and the judgment of a Bailiff in the office of Speaker, effectively, quite apart from that, the office of Bailiff with its ancient history in this Island adds a gilt to the proceedings, in my opinion. You may wish to ask me questions if I have not …

Lord Carswell: I will ask members of the Panel if they have any points they would like to take up.

Mrs. M.-L. Backhurst: There are a couple of things I would like to ask, if I could; 2 totally different. One is in the Clothier report, they equate the role of President of the States as being that of Speaker, which I do not think is quite right, but never mind; that is a personal view. "It is impossible for the Bailiff to be entirely non-political, so long as he remains also Speaker of the States. A Speaker is the servant of an Assembly, not its master, and can be removed from office if unsatisfactory. The Bailiff appointed by the Queen's Letters Patent to a high and ancient office should not hold a post subservient to the States." I rather feel that that is where the confusion arises and I wondered what your interpretation of that was?

Advocate R. Falle: The position being that he could not … if he were not a successful Speaker he could not be removed by the elected representative.

Mrs. M.-L. Backhurst: Also this business about him being subservient to the States, not its master.

Advocate R. Falle: Well, I do not think a chairman is a master; he directs the proceedings, but only procedurally speaking. He is not master. I think that is a slightly unfortunate description of the office.

Mrs. M.-L. Backhurst: I do not think he is subservient. Is that …

Advocate R. Falle: No, he is not subservient.

Mrs. M.-L. Backhurst: No, exactly. Thank you. The other query was about your role, and you may not wish to comment on it, as Acting Magistrate with the prosecution by Centeniers; if you feel that that is a satisfactory method?

Advocate R. Falle: Centeniers are not Crown Officers, of course.

Mrs. M.-L. Backhurst: Indeed, but they are under the …

Advocate R. Falle: In fact, I think the system works extremely well. It is one of the glories of Jersey that we have men of judgment and idealism willing to serve in that function. I recommend you to go along to the Magistrates Court; you would be tremendously impressed with the skill, energy and devotion to their duty shown by Centeniers from all Parishes.

Lord Carswell: How many Centeniers are there, Mr. Falle?

Advocate R. Falle: There are usually about 40 in all, I think, perhaps. Yes, about 40; 2 or 3 in each Parish and some more in the town.

Lord Carswell: In a society the size of Jersey is it possible to get 40 Centeniers who have the necessary skills for deciding prosecutions?

Advocate R. Falle: Well, that is a fair question. The main burden comes clearly with the Centeniers in the town; the countryside fortunately is a more peaceful place. One does notice that the Centeniers from the countryside are perhaps a little rustier. But I indicated

earlier on the Crown does offer advice, so wherever there is a case that requires a review, for example, where there is a plea of not guilty having been presented, a plea of not guilty will usually be adjourned for 2 weeks to enable the Centenier to take legal advice from the Prosecution Service – the Law Officers.

Lord Carswell: Is there any need, given that there is in effect a Prosecution Service, being a number of people of legal experience in the Attorney General's Department, now for Centeniers? Do they contribute? Apart from the fact that they obviously do something from the goodness of their voluntary obligations that they undertake, but leaving that aside, is there a lot of point or object in having Centeniers do the prosecuting?

Advocate R. Falle: Well, they do. Before matters come to the Magistrates Court there is an inquiry at the Parish Hall.

Lord Carswell: Yes, I know.

Advocate R. Falle: That procedure has been applauded. So quite a lot of matters do not go beyond the Parish Hall. The Centenier has to exercise some judgment before he takes the matter further. If it is clear that he is out of his depth then effectively he is handing over the file. So the question is whether … as I understand it, should the Centenier, having handed over some of the collection of material for the prosecution to the Law Officer, should he have a continuing responsibility for it?

Lord Carswell: The Centeniers and the Parish Hall Inquiry have received a lot of praise from people during our review, but what I am thinking of more is more serious offences

which may, pending upon the judgment of the prosecutor, be charged at various levels. Is a Centenier necessarily the best person to decide whether a case should be a common assault, aggravated assault, assault occasioning actual bodily harm, unlawful wounding, wounding with intent? There is a terrific gradation and it requires a little bit of skill and judgment and experience to get that right at the start. In other places, people make great complaints of undercharging or overcharging through bad policy, bad judgment or lack of knowledge. Can the Centeniers handle that? That is what I am trying to get at.

Advocate R. Falle: I would be misleading the inquiry if I suggested that they always get it right. On occasion I have seen cases where for example what should be charged as a grave and criminal assault going in as a common assault. It is not unknown for a legal adviser to advise further charges to be made when he has had an opportunity to review the file. So, it does occasionally happen, that is certainly true, that the charge is not entirely misconceived, but perhaps the level of charge is wrong.

Lord Carswell: Thank you, Mr. Falle, for coming and giving us the benefit of your experience. We are grateful to you. We will of course give you a copy of the transcript to make sure that it is accurate before it is put on the website. We continue with taking evidence and then consider our conclusions and report back in due course to the States who will receive our report and act as they see fit. Thank you very much.

Advocate R. Falle: Thank you. I am very grateful to you for hearing me.