

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

**Date:**           **8th June 2010**

**Review**           **Lord Carswell, Chairman**  
**Panel:**

**Mrs M-L Backhurst**  
**Mr G Crill**  
**Dr S Mountford**  
**Mr I Strang**

**Witnesses:**   **Mr J Henwood MBE**

**Lord Carswell (Chairman):** Mr. Henwood, we are the members of the Panel of Review set up by the States to review the roles of the Crown Officers. May I take it that you know all these people or shall I introduce them?

**Mr. J. Henwood M.B.E.:** Well, I was kindly provided with a list but certainly I know all the people by sight.

**Lord Carswell:** Mr. Crill, Mr. Strang.

**Mr. J. Henwood M.B.E.:** Hello.

**Lord Carswell:** Mrs. Backhurst.

**Mr. J. Henwood M.B.E.:** Hello.

**Lord Carswell:** Dr. Mountford, and our secretary, Mr. Millow. We are grateful to you for coming to speak to us, Mr. Henwood, and for giving us your written submissions which, of course, we have read carefully. I have made an opening statement before about the objects and procedures of the review which I need not repeat but perhaps I could say 2 things. We are looking at matters as a question of principle not as to whether A or B has done things well or made mistakes. That is besides the point except as it may show whether the role is a suitable one. The second one is there has been certain discussion, certainly in the case law and in some of the documents, about perceived bias. When we are talking about that, that is very much a question of the outsider's objective view not of any subjective bias on the part of any person who has held these offices. We have endeavoured to make that very clear from

the beginning. As you, I think, are aware the States asked us to hold the review in public and so we have complied with that request. This is a public hearing. The proceedings will be transcribed and you will, of course, have an opportunity to check the accuracy of the transcript but when it is cleared it will then go on to the public website and be available, as are the documents which are provided to it. So the public will be entitled to see exactly what is said and what is going on. So may we start with your experience on the Clothier review and to what extent do your submissions which you provided to us reflect the corporate view or your own view of the position that you described?

**Mr. J. Henwood M.B.E.:** Thank you very much, Lord Carswell, for inviting me here today and I am very happy to try to deal with your questions. Candidly, I probably had not given the issue a great deal of thought until I was invited to be a member of the Clothier Panel and the panel spent very nearly 2 years, 22 months, I think, collecting evidence and, as you are well aware, the role of the Bailiff was included within our terms of reference and we spent considerable time collecting evidence on that issue. Unlike this Panel, we were not required to hear evidence in public although we did have some public hearings and it was the chairman's view and it is a view, incidentally, which he had come to from previous roles as ombudsman and other similar roles that we should hear evidence privately in that it would be likely to encourage people to be more open in expressing their views. I have no such difficulty, I have to say, and would express exactly the same views publicly on this issue as I would privately. But it was during the course of taking that evidence and then formulating our views that I formed my view that the roles currently occupied by one office, that of Bailiff, should be separated and, broadly, I have not changed my view in the 10 years since Clothier was published. I may have modified those views slightly in some regards but broadly I hold to the view that there is a conflict of interest in one office being responsible as Chief Justice and as President of an elected

Assembly for the reasons that I have set out. I am happy to articulate them again but my views are set out in my letter.

**Lord Carswell:** It is helpful to have evidence from somebody who was so closely concerned with the issue and we are hoping to get some more, and may I take the opportunity to say we read with sorrow of the death of Sir Cecil Clothier and I know that the Jersey people owe a considerable debt of gratitude for all of the effort he put into ... whatever people may think of the result is a different matter. He put a lot of time and trouble into it and that was a very worthwhile thing.

**Mr. J. Henwood M.B.E.:** Thank you for saying that. It was indeed a privilege and I know that my local colleagues who were invited, in fact elected, by the States to perform that function regarded it as a great privilege to serve with Cecil Clothier and, indeed, with the other figures from outside the Island, Ken Bloomfield was one from Northern Ireland, Maurice Shock from Oxford. Powerful intellects and it was indeed a privilege to work with them and I felt that the quality of the input, not from myself but from others, was such that I felt that our conclusions were based on evidence and were sound.

**Lord Carswell:** Your basic concern in respect of the Bailiff is the undesirability in principle. Is that based on the feeling that there is a conflict or a prejudice which could be engendered by the fact that the Bailiff has been presiding when legislation goes through? Can you assist us on that?

**Mr. J. Henwood M.B.E.:** I start from the position that you articulated clearly at the beginning. One must look at this issue from principles as opposed to persons. We are all here today and

gone tomorrow and it is always wrong, in my view, to try to build a system on the recollection of recent performances of office holders. I think that is very, very dangerous territory. So I would want to preface any further remarks by saying that I have tried to set aside all those considerations. If one, and there are better historians than I on your panel, but one could go back and find that there were some desperate blackguards holding very high public office in Jersey. Somehow we have managed to survive that. Fortunately, by and large, those times are behind us but I illustrate the point; you do not build futures on the performance of individuals. Now, I think my first point is that the Bailiff is unelected and, as such, the Bailiff should not have any means of bringing to bear influence on the political process. Now, you will hear arguments to the effect that the Bailiff cannot influence the political process but of course he can and does in the conduct of presiding over the Assembly. It is the Bailiff who determines whether a proposition is fit to be brought to the House or not. That is a political decision. It is the Bailiff who determines who will speak and in what order. That is a political decision in that it can bear on the ultimate outcome of a States debate and I think it is just fundamentally inappropriate for anyone who has not been elected to have an influence and, in this case, I would say a powerful influence on the political process. The Bailiff sits in determining political outcomes and I do not believe that is appropriate in an unelected individual. You may also hear evidence that the Speaker should be chosen from among the 53 elected representatives. I do not go quite that far. My brand of democracy is such that I am happy to be part of a process which elects 53 individuals and then I am content that they should exercise their responsibilities according to their consciences. So I would be very happy were the 53 elected Members of the States to choose a Speaker, whether from one of their number or not.

**Lord Carswell:** Yes, delegated democracy, if you like.

**Mr. J. Henwood M.B.E.:** Quite so.

**Lord Carswell:** After all, the House of Commons chooses the Speaker from among its own Members. The public does not get any say in who the Speaker is going to be. You might get a different answer sometimes.

**Mr. J. Henwood M.B.E.:** I suppose my thinking in this area is conditioned a little by the fact that there is a sort of pecking order of presiding over the States Assembly. First, the Bailiff; in his absence the Deputy Bailiff; the Greffier; the Deputy Greffier. In times when circumstances dictate that none of those is available, the person who is deemed to be Father of the House, the longest serving Member takes the Chair. Now, there have been quite a number of instances when that has happened in the past and the sky has not fallen in and it has worked quite well.

**Lord Carswell:** We have had a number of people representing to us that if one of the Members were elected the Speaker by the States then his or her constituency would be deprived of representation. A number of people have felt that rather a serious handicap to the constituency. I do not know if you have any views on that.

**Mr. J. Henwood M.B.E.:** Well, I do, Sir, and perhaps I should say: "Do not start me off on the composition of the States" but at present we have 12 Members of the States who are elected by the whole Island collectively. So it is wrong to say that were one of the Deputies or a Connétable be invited by his peers to be Speaker that his constituents are no longer represented. They are, of course, by all those who are currently elected on that Island-wide

mandate. But in practice, as you well know, and the House of Commons is an example, mechanisms are put in place in order that constituents are not disadvantaged.

**Lord Carswell:** Your first proposition that one should not build a system on the performance of recent office holders is really a rebuttal of the motto: “If it ain’t broke, don’t fix it.” It has worked. That is what people have told us from a number of sources. It works. Nobody minds. Nobody cares that it may be contrary to principle. It is working very smoothly. We have had an excellent succession of Bailiffs in recent generations and so on but your answer to that is one of principle not of pragmatism.

**Mr. J. Henwood M.B.E.:** Absolutely, and I am interested and have read, I will not say “all” because there may have been some recent postings, but I have read most of the evidence that you have received that is already in the public domain and it strikes me as interesting that the argument for maintaining the status quo has not moved one iota from that which the Clothier Panel heard 10 or 12 years ago and it does fall into 2 broad areas; the first is, as you say: “If it ain’t broke, don’t fix it” and the other is sort of a very simple: “Well, we should not muck about with our traditions.” Now, I am not an iconoclast. I do value many Jersey traditions, probably none more than our tradition of honorary service but not all traditions are proof against changes in society and what is sometimes referred to as progress and I believe it is appropriate that we examine these important matters from time to time to determine whether, indeed, there is a case for change even though it may not be “broke”.

**Lord Carswell:** Going back to the question of principle, it is based sometimes on one leg, sometimes on another. Sometimes it is based on the theoretical issue of the separation of powers. Separation of powers is really founded upon not letting one element get too powerful

and that was the whole underpinning of the Montesquieu Doctrine which is taken further, I think, in the United States than any other western state and is certainly not observed in most western European states to any degree. But the point of it is that even if you do not have a completely formal separation, you must aim to avoid an excess of power in any one branch of the government. Is there any such risk of an excess power as you see it in the present set up?

**Mr. J. Henwood M.B.E.:** That is an interesting question. Of course, as you say, in most European governments there is a fusing of 2 of the 3 elements, the separate elements; the Executive and the Legislature tend to fuse. But there is pretty well everywhere an appropriate degree of separation between the Legislature and Executive on the one hand and the judiciary on the other. I think where there is cross over, as there is very much in evidence here, I think there is the potential for confusion. I do not know that I would want to go as far as to say a concentration of power but confusion, certainly, and we have seen in the recent past that confusion with allegations of corruption which are all about perception, but perception can be just as damaging as reality, as we have discovered in the recent past. I think if there were the degree of separation that I am proposing, many of those arguments, many of those suggestions which are difficult to put to the sword now about corruption would inevitably fall away. They could not be sustained.

**Lord Carswell:** If, then, the effect of what you say is to put the matter on to the second leg of principle, that is, perceived bias in that a judge who has been concerned with the making of the laws is not regarded as much as he or she should be as an impartial interpreter of those laws and this is a point that, of course, we are going to have to focus on very considerably.



**Mr. J. Henwood M.B.E.:** Yes. I think you put it better than I could. There exists the potential for the accusation and whether or not it is reasonably founded it seems to me does not matter. But the Bailiff sitting as judge may be inclined to interpret laws as he would wish them or believe them to be as distinct from the way in which the Assembly intended them to be, and I think that is going to be ever present until such time as you remove the Chief Judge from the political process.

**Lord Carswell:** There is a marvellous medieval quotation which sums that up, by a man called Chief Baron Ralph of Hexham who said in court: "Class me not the statute for we wrote it," which is the extreme of your proposition.

**Mr. J. Henwood M.B.E.:** Indeed.

**Lord Carswell:** Sorry, I have been doing all the talking and I will hand over to members of the panel. Sandra?

**Dr. S. Mountford:** I am interested in the statement ... because you have briefly talked about the power of the Bailiff and him helping decide which proposition should go forward and you make a statement about less comprehensible Standing Orders.

**Mr. J. Henwood M.B.E.:** Yes. I think I said: "Less than comprehensive." I think they are comprehensible but they are not comprehensive.

**Dr. S. Mountford:** Comprehensive, yes, you did, sorry.

**Mr. J. Henwood M.B.E.:** I think this is an important aspect of the political side of the Bailiff's role. Standing Orders, have you read the Standing Orders?

**Dr. S. Mountford:** Yes.

**Mr. J. Henwood M.B.E.:** There are plenty of gaps in them and they afford opportunity for a great deal of interpretation. Now, in exercising that interpretation, inevitably, the Bailiff will excite interest from one side of a political debate or another and I would argue that in exercising that judgment, he is exercising a political role.

**Mr. G. Crill:** But someone has to exercise that judgment.

**Mr. J. Henwood M.B.E.:** Of course.

**Mr. G. Crill:** And so would be exercising a political role even if they are supposedly in a political position as the Speaker, Chairman, President or whatever.

**Mr. J. Henwood M.B.E.:** No. I have no difficulty ...

**Mr. G. Crill:** Do you think that it should be removed? That element should be removed from the Speaker's responsibility altogether and placed with privileges or something else?

**Mr. J. Henwood M.B.E.:** No, my problem exists solely because the individual who is making those decisions is making political decisions without a public mandate so to do. He has not been elected. We elect politicians to make those decisions. We do not elect the Bailiff to bear

upon the political process. That is why I argue that those people that we do elect to make decisions should be charged with determining who among them or who they want as their Speaker as the person who will make those judgments.

**Dr. S. Mountford:** What if it was not someone among them? What if it was a Speaker who was independent but elected by the States?

**Mr. J. Henwood M.B.E.:** As you described it, Lord Carswell, democracy by delegation. I would be content with that. I think having elected the 53 representatives, I am content for them to exercise their judgment as to who should be their chosen Speaker and if it is not from among their number then I am equally content.

**Dr. S. Mountford:** Would that person need to have the skills to help them interpret Standing Orders because they may ...

**Mr. J. Henwood M.B.E.:** Well, I think I would not start there, as the saying goes. I think there is a case for a wholesale revision of Standing Orders. It is an issue which is left to Privileges and Procedures Committee and, for reasons which I do not fully understand, that Committee has never been particularly strong and there has never been a great imperative coming from the committee to revise and reform the Standing Orders but in my view they are deficient. I think if you were to talk to the 53 elected representatives, quite a number of them would say that they are deficient in one way or another and it is that deficiency that allows for interpretation which I think is a political act.

**Dr. S. Mountford:** Do they not have the capacity to review them if they are not working?

**Mr. J. Henwood M.B.E.:** Indeed, they do.

**Dr. S. Mountford:** I believe that the Greffier gives a lot of support in interpreting Standing Orders in relation to propositions.

**Mr. J. Henwood M.B.E.:** Indeed he does, and the Assistant Greffier, similarly. But they can only work with what they have and what they have, in my view, is not a particularly good rule book. It is not a particularly helpful rule book but then that is all part and parcel of the deficiency of the whole machinery of government, I would submit.

**Dr. S. Mountford:** You think that, as has been suggested recently, that another review of the machinery is required then?

**Mr. J. Henwood M.B.E.:** Oh dear. **[Laughter]** I suppose I would say this, would I not? But I think it might be helpful were the Review Panel on the Machinery of Government, the Clothier review, revisited. Although it is generally regarded to have been largely overlooked, quite a number of Clothier's recommendations have been implemented. The key omissions are the form of the electoral process which is the fundamental building block of democracy and, of course, the role of the Bailiff and Crown Officers. Those were the really big ones that have not been. Now, it may be that in inviting you to review the role of the Bailiff, someone has had the notion that that process should be looked at again. I would like a review of the electoral process and the composition of the States but I think that is very difficult for sitting Members to do. I think you are bound to have an element of turkeys and Christmas whenever you approach that.

**Dr. S. Mountford:** I remember when Clothier came out and one key phrase when it came out was: "Please do not cherry pick." Was there a reason for that? Where did it have to ...

**Mr. J. Henwood M.B.E.:** Well, we just felt that it was a piece and though it was criticised by some as being intellectually shallow, it was the product of a great deal of thought and it did hang together as a piece which basically started with the building bricks; with the electoral process, the composition of the States, why at that time it took 15 elections to put in place 53 Members who served for different terms and some of whom had an Island-wide mandate, some of whom had a local mandate. It was a ragbag. To some extent it still is although very gradually the Assembly has allowed itself to be moved towards what it fancifully calls a general election. It is not, really, but there has been some progress and I think I would say the progress has been too slow and far less radical than it, truthfully, needs to be.

**Dr. S. Mountford:** Do you think disregarding, which I think that is what happened, the role of the Bailiff as was suggested in the Clothier report has had an impact on the evolution of the change that has occurred?

**Mr. J. Henwood M.B.E.:** I do not know, frankly. What it has done has been a very, very powerful distraction. I think we have had a very difficult period politically, I think, for a number of reasons, not least the allegations of some that there is corruption within the system, and I think it has been very distracting and most of that is driven by the relationship between the Legislature and the Judiciary, the sort of Crown Officers' *ex officio* role in the States; not just the Bailiff as Presiding Officer but the Attorney General and the Solicitor General and, although it was not specifically mentioned in your terms of reference, for good measure I threw in the

role of the Dean because I believe that should be reviewed, too. I think that has been a huge distraction and it will take either a resolution of the role of the Bailiff and the Crown Officers or a great deal of time for recent events to subside and for us to get back on track with what I would call “business as usual”.

**Lord Carswell:** It is very much harder to amend a constitution than to create one. If you have a blank sheet as our former colonies had, then everything is suddenly put in place and it has all to be dealt with but it is all done in one huge bite. You start amending a constitution, people have all sorts of reasons why you should do it differently or should not do it at all and so on and it does tend to be very slow. The House of Lords, which has been a dog’s dinner process, simply because it is so very difficult and this is one of the problems that is worrying us. We have been warned by sensible people that if you start unpicking an institution you have to be very sure where the unravelling is going to finish and what, in other words, will be in its place. You have to be careful not to abolish something without being sure what the effects will be. Your proposals are really focused upon substituting one Speaker of some sort for the Bailiff and it would end there.

**Mr. J. Henwood M.B.E.:** I would also remove the Crown Officers from their membership of the States. They are unelected Members of the States. Now, I believe they have an important role, an important function to perform, but I believe they should perform that function outwith membership of the States. The States should be comprised solely of elected Members, in my view.

**Lord Carswell:** The Attorney General, for the past 13 years until the recent election, was a Member of the House of Lords.

**Mr. J. Henwood M.B.E.:** Yes, indeed.

**Lord Carswell:** For 11 of those years. Is that contrary to the principle you are espousing?

**Mr. J. Henwood M.B.E.:** Indeed it is, although, of course, he sat in Cabinet and he would have to persuade his Cabinet colleagues as to a particular course of action. So there was, if you like, some scrutiny, some checks, some balance in that case. But may I come back to your challenge, I suppose, about these kind of big step changes? That is what civilisation does; it evolves. It moves forward. Sometimes it moves sideways. Very occasionally it moves backwards in order to find a route to move forward. I think what I am proposing is merely a relatively small step on that evolutionary path. Someone somewhere ultimately will have to have the courage to take that step. You cannot take the step. You can only offer the view that you form after taking evidence but you might be powerfully influential in allowing that step to be taken. I think in my view, politicians need very often to be given the courage to make difficult steps and that courage can come from people spending time thinking deeply about an issue and making a recommendation. It is not revolution. It really is a small step on the ever-changing path of progress that civilisation takes.

**Lord Carswell:** I will just give a specific example of what I was putting more generally. We have had concerns expressed that if the Bailiff ceased to be President of the States, he would lose a great deal of his status and that he could not credibly remain civic head as he is now, although the Clothier Panel said he could be so designated. But I heard it questioned whether that would really work, whether it would be sufficient.

**Mr. J. Henwood M.B.E.:** I think there is a great deal of authority attached to his office by the fact that he is appointed by Her Majesty, by Letters Patent, and I would see no particular merit in changing that. I do not see any reason at all. I can understand the perception in the way you take half a guy's job away and he feels diminished. But again, we must talk about the role and not the individual. A role cannot be diminished, in my view, and I think there is every reason to suppose that the Chief Judge will go on being appointed by the process that we have come to know and I see no difficulty in the Bailiff continuing to be first in the order of precedence where such an order is still required; State occasions, High Days, and so forth.

**Lord Carswell:** I have been a Lord Chief Justice appointed by Her Majesty. I certainly did not regard myself as a civic head or first citizen. It does not go with the job, normally.

**Mr. J. Henwood M.B.E.:** I think it does here. I think there is a long and honourable tradition that it does and I think my view is that public sentiment would be such that the individual appointed by the Queen as the holder of the office for the time being and, by the nature of that appointment, should be regarded as the first citizen whereas they elect politicians to be here today and gone tomorrow. It is very much about the role, the office, and not the individual.

**Lord Carswell:** I think we are all very clear about the basic point which you have made about the conflict of roles. One question which has disturbed us in considering this has been a constitutional crisis. Jersey's constitutional position is an interesting and unusual one as a Crown dependency and it is not inconceivable that it may be re-examined in some respects within the measurable future. Now, if that happens, the Bailiff is traditionally the guardian of the constitution for Jersey. Would his authority ... at present he would swing into action both inside and outside the States and would attempt to give the States the sort of strong leadership



and experience and knowledge that the Bailiff has. Would another Speaker be in the position to do that?

**Mr. J. Henwood M.B.E.:** Well, I think the Bailiff's position in such a situation would be greatly strengthened were he operating outwith the political dimension. I have to say this, I will not go into the area of individuals, but in recent times Bailiffs have promoted constitutional change. How do you deal with that situation where from within the political dimension you have a Bailiff promoting, for example, a federation of Channel Island states, promoting the debate about whether Jersey should be independent from the U.K. Government? That is acutely political. Were the Bailiff to be without that process I think he would be in a much stronger position to provide that, if you like, steady figure who was in a position to help support and guide rather than influence.

**Mr. G. Crill:** But you have to define that extension of his role because at the moment that element of the job, if you like, comes from the fusing of the 2 positions, or the holding of the 2 positions. If you remove his activity or his position in the States and leave him as the President of the Royal Court, a judge is nothing without contesting parties. The court never does anything on its own so there has to be something to promote that. So there has to be, then, an extension of the court's role to extend that power so that it can act pre-emptively. Is there any way that you would see, is that not ...

**Mr. J. Henwood M.B.E.:** I am not sure that I agree with that but I am not sure that I am ... I need to think about that. I am not sure that is right but I am not sufficiently sure that it is wrong to be able to argue the point without giving it some thought. That is an interesting issue.

**Mr. G. Crill:** I know that you dealt mostly with the Bailiff's position. Just on the position of the Crown Officers as advisers to the States which has caused and is continuing to cause me some concerns, and I think has created some practical difficulties between the Executive and other components of the States. Clothier envisaged that the States continues as a single entity of government, if you like, made up of segmented parts, if I can put it like that, with the Council of Ministers, Ministers, Scrutiny Panels and so on but still basically working together. Within that concept, the Crown Officers can advise the States as a whole through the component parts. Do you see that still working?

**Mr. J. Henwood M.B.E.:** I think the Attorney General has found it difficult, has he not? Having given advice to the Council of Ministers, it is very difficult if he is then asked by a Scrutiny Panel to give advice which may ... let me start again. He cannot run with a hare and hunt with the hounds. So some mechanism has to be found which will provide equal support for all Members of the States. That is to say, if Scrutiny is to work properly, Scrutiny must be entitled to a quality of advice that is not in any way diminished from the quality of advice that is available to the Ministers. Frankly, I am not clear how that can be achieved but I am clear that because the Attorney General is a Member of the States and because traditionally he has been adviser, prior to ministerial government, to committees and committee presidents and then subsequently to Ministers, that he is perceived to be part of the Executive, if you like, and I think that is a difficult and dangerous position and were the Attorney General and, for that matter, the Solicitor General removed from being Members of the States, I think that would in due time make it easier for the person holding that role to be seen as an independent adviser. Quite how one achieves the equality of advice to all parts of the House is not clear to me yet. Certainly, there is no doubt there is advice of the highest quality available in the market place but then you have the argument of: "Well, who should be entitled to the Attorney General's

advice and who has to go out and buy it?" I think that is a debate that will continue for some time. I think, frankly, there is a lack of maturity within the new system. It is possibly too soon to determine the answer to that.

**Lord Carswell:** I think there is an answer, not an answer, but there is a certain principled position again, here. The Attorney General historically has been the Sovereign's adviser and in that role has always advised the government, not other Back-Benchers or parties or anything else. So if you extrapolate that to Jersey, the Attorney General would, in case of any conflict of roles, be the adviser to the Council of Ministers but not to Scrutiny.

**Mr. J. Henwood M.B.E.:** Now, that is very interesting because you appear to be equating the Council of Ministers to Government.

**Lord Carswell:** I know that is not exact equation, yes.

**Mr. J. Henwood M.B.E.:** I think it is a very imprecise equation because it is very clear that the Council of Ministers cannot determine any primary legislation without the support of the entire Assembly.

**Lord Carswell:** Yes.

**Mr. J. Henwood M.B.E.:** So it is clear to me that the Government of Jersey is the States of Jersey, not the Council of Ministers.

**Lord Carswell:** I take the point.

**Mr. J. Henwood M.B.E.:** Which adds to the confusion about who is entitled to the Attorney General's advice.

**Lord Carswell:** But if Scrutiny is set up in order to question and examine, not necessarily oppose but to question the workings of the Executive which is, in effect, the Council of Ministers acting on behalf of the States, then there is a perceptible conflict.

**Mr. J. Henwood M.B.E.:** You crystallise the argument exactly.

**Lord Carswell:** We are entirely clear about that. What the answer is going to be is something we will have to resolve but we are very clearly aware that exists. But I am wondering, to come back to your point that Crown Officers should not be Members of the States, they do not have a vote and by fairly clear convention now they limit their speaking to answering questions asked by the States dealing with legal issues or occasionally chipping in to say: "You would be very ill-advised to do that because you run into the convention or some treaty" or something like that. Given that, is there any particular reason why they should not do that?

**Mr. J. Henwood M.B.E.:** It is the same argument about the Bailiff. The 3 unelected Members of the States; the Attorney General, the Solicitor General and the Dean can and do offer advice which bears upon the political process and they are not elected so to do. I accept that advice is important and it should be available to States Members. But I do think it should be available outwith membership of the States.

**Lord Carswell:** Let us say the Attorney General carries on everything he does at present except attend the States, they say: "Help, we need some advice. Please ask the Attorney General for his advice."

**Mr. J. Henwood M.B.E.:** This may be a very, very fine point that I am arguing. I have no difficulty with the Attorney General or the Solicitor General attending the States. My problem is their membership of the States, their bearing upon the political process without being elected so to do.

**Lord Carswell:** My concern with that proposition is that if they do precisely the same function although they are not actually nominally Members of the States, what is the point of the trouble?

**Mr. J. Henwood M.B.E.:** Well, it is about authority, is it not? I think, as Members of the States, while there are unelected Members, they appear to have an authority over the elected Members and I think they are not servants of the Members, which is what I believe they should be.

**Lord Carswell:** Because in some countries, the Attorney General is not a member of the Legislature at all but is appointed by the government of the day and so does not attend Parliament but gives all the governmental advice that is required. May also be in charge of prosecutions or may not. Just turning to this question of prosecution ...

**Mr. J. Henwood M.B.E.:** Sorry, may I just comment on that?

**Lord Carswell:** Yes.

**Mr. J. Henwood M.B.E.:** They are appointed by governments. Of course, here is part of the issue. Our Crown Officers and, indeed, the Dean, are appointed through some mysterious and secretive process that is not understood by the people.

**Lord Carswell:** It is more open and transparent than it was, I understand, and ...

**Mr. J. Henwood M.B.E.:** Oh, absolutely, and it was totally mysterious but I think what you said, "more open". But I am sure if you were to canvas opinion among the Jersey equivalent of the Man on the Clapham Omnibus, shall we say Mr Ecobichon from St. Ouen, he would not have the faintest notion how any of the Crown Officers came to get their jobs, how the Dean came to be appointed. "Well, the Queen does it" is probably the answer as close as we get to understanding of the process. So it is mysterious and it is secretive although perhaps not quite as deeply mysterious or secretive as once it was. In other words, if you really want to find out, there are ways nowadays in which one can draw down information but that is the extent to which it is modernised, I think.

**Lord Carswell:** There have been very serious concerns in England over several decisions of successive Attorneys General, the Iraq advice, the prosecution of British Aerospace and so on, where accusations have been made of political bias because the advice was alleged - and I am being very careful what I say - alleged to have been favourable to the Government and so the Attorney General, consciously or unconsciously, leaned that way. But, of course, that is because of a political party affiliation which does not at present exist in Jersey. I do not know whether it is ever likely to develop.

**Mr. J. Henwood M.B.E.:** Well, I have a view about that. I believe that political parties are not made. They grow in the hearts and minds of people and they emerge. Party politics are not unknown to Jersey. Eminent work has been written by a former Clothier colleague, Dr. John Kelleher, and, indeed, a present Member of the States, Deputy Roy Le Hérissier, has written very learned works on this matter. My own view is that I do not detect sufficient appetite in the hearts and minds of the people of Jersey at the present time for party politics to thrive. We are seeing an attempt to form and build a political party. It has a number of elected representatives but it has not sparked an upwelling of support for the notion of party politics and, in my view, it is some way off. Perhaps, in the Biblical sense, we have had too many years of plenty. Maybe party politics in Jersey will emerge from some years of lean, which I suspect we are going to have to go through.

**Lord Carswell:** Well, I think we better be rather careful in our forecasting of that sort of thing.

**Mr. J. Henwood M.B.E.:** Yes, I commend you not to go there.

**Mr. G. Crill:** Do you have any particular view on the position of the Attorney General as prosecutor while at the same time being adviser to the Government?

**Mr. J. Henwood M.B.E.:** Yes, you published, I think, alongside your terms of reference, a list of the jobs which fall presently to the Attorney General and it is a very full and complex and interlocking set of tasks. I will come back, if I may, later to one that I think you have missed, a very important part of the Attorney General's role, or not that you have missed but the terms of reference missed. Yes, I think there are inherent conflicts within the role of the Attorney

General. He is said to be titular head of the Honorary Police Force. There is no titular about it, he is the head of the Honorary Police Force. He is “the” Prosecution Service. He is adviser to the States. Of course, there is opportunity for suggestions that there are conflicts and, indeed, there are conflicts there. It is very difficult to unpick it but one way might be to form a Justice Ministry and from the Justice Ministry, you might have a Prosecution Service. It all feels a bit bureaucratic but it may be a process which would help to clarify and unpick some of these crossovers. Yes, I think that is coming.

**Mr. G. Crill:** Do you feel comfortable with the current sort of *de facto* manner in which it is dealt with so that, for example, where there is a particular conflict where the Attorney General deals with the advisory side and the Solicitor General deals with the prosecutory side or is that too convenient?

**Mr. J. Henwood M.B.E.:** No, I will answer the question as you put it. I personally am not uncomfortable with it but it is very clear that there are a number of people who are very uncomfortable with it and who are suggesting that all manner of ills flow from that situation. I think while the status quo remains, it is very difficult to deal effectively with those allegations.

**Mrs. M.-L. Backhurst:** You said you were going to add something about what the Attorney General did.

**Mr. J. Henwood M.B.E.:** Yes, since writing to you, for reasons with which I will not bore you, I came across what seemed to me to be something of an anomalous situation. In addition to the roles identified, the Attorney General is also what in military terms you would call quartermaster to the Royal Court or in business terms, you would call Financial Controller or in



political terms, you would call Treasurer. To the Attorney General falls the role of obtaining finance for the Royal Court. Now, I inquired how in practice this works and I do not mind telling you my inquiry was driven by what I perceive as a startling growth in the Probation Service which has grown from 3 employees to 40 and they are still recruiting.

**Mrs. M.-L. Backhurst:** Sorry, did you say 1-4 or 4-0?

**Mr. J. Henwood M.B.E.:** 4-0 and increasing, in little more than a generation, and my question was unsurprisingly to the Minister for Home Affairs who is responsible, as you know, for the Police and the Prison Service and he said: "No, Probation Service has nothing to do with me." It is administered by the Royal Court and, in practice, the Probation Service answers to a panel of Jurats. That is why I started my process of learning how the funding works and it seems that to the Attorney General falls the role of asking for a sum of money which the Royal Court needs in order to perform its various functions, including running the Probation Service. I asked how the Attorney General arrives at a sum and what scrutiny there is and, put crudely, the answer is the Attorney General thinks of a number and there is no scrutiny. He comes up with a number, which is presented presumably to the Minister for Treasury and Resources, and Minister for Treasury and Resources, in practice, signs the cheque. Now, that is quite worrying in my view.

**Lord Carswell:** Is that a result of lack of effective scrutiny rather than the fact that the Attorney General should not be doing it because there are different models, as I am sure you are aware, around the world of how courts are financed?

**Mr. J. Henwood M.B.E.:** Yes.

**Lord Carswell:** The commonest one in our common law world is that there is a Department of the State, used to be the Lord Chancellor and now Ministry of Justice, which is responsible for obtaining and putting to use the finance needed and there are very considerable checks and balances in that process. In the United States, certainly in the Federal end, the Chief Judge of each circuit has to go and fight his corner in Washington every year and put up his budget and get it hammered about by the members of ... I think it is the Senate he has to put it up to. But, again, it is a question somebody has to put it up, somebody has to scrutinise it.

**Mr. J. Henwood M.B.E.:** Indeed.

**Lord Carswell:** Is there anything wrong with the fact the Attorney General puts it up or is what is wrong the fact that it is not sufficiently opposed and scrutinised?

**Mr. J. Henwood M.B.E.:** The latter, really. It is public money and I would suggest that the fundamental principle which suggests that some elected individual has to be answerable for the expenditure of all public money applies.

**Lord Carswell:** Yes.

**Mr. J. Henwood M.B.E.:** My understanding is there is a process by which the Attorney General comes up with a number. As you say, it does not matter really whether it is the Attorney General or the Solicitor General or some other officer of the court but presumably there is a dialogue between the Minister for Treasury and Resources and the Attorney General as it is in this case. But my understanding is that there is really no scrutiny of the process

whatsoever and I have to say I think that that is right in the sense that the process was described to me informally by the Comptroller and Auditor General, so I believe it to be correct. I just feel that there must be some check and some balance on the way in which the Royal Court obtains funds. I am not saying that the funds in any sense are improperly used but if you take the evidence, the Probation Service, which is an organ of the Court, it has grown wholly disproportionately to the growth in both the population and the crime rate and one imagines were it a function of the Minister for Home Affairs that there would be much more scrutiny of that budget. I just thought it was an interesting extra part of the Attorney's role. Goodness knows, he has got enough to do and I just felt that there was a deficiency within the system somewhere which, in practical terms, did not allow adequate challenge to that process.

**Lord Carswell:** Well, I think we will have to leave the States and the Ministers a few things to sort out for themselves.

**Mr. J. Henwood M.B.E.:** I am sure that is right, Sir, I am sure that is right. I just think sometimes they need a bit of help and a bit of a nudge.

**Lord Carswell:** Ladies and gentlemen, are there any further questions?

**Dr. S. Mountford:** I have only got one question. It is quick one.

**Lord Carswell:** Yes.

**Dr. S. Mountford:** You said earlier that because you have been following on the website the submissions, that the argument for the status quo has not moved since Clothier 10 years ago. What about the argument for change? Is that different?

**Mr. J. Henwood M.B.E.:** Well, immodestly, I would say that Clothier did move the thinking on a bit. I think there were people who, like me, had not given this question a great deal of thought. It was as it always had been and it seemed to be okay, and I think when Clothier did look at it really for the first time for a very, very long time, it caused others to recognise that there were some questions of principle here that needed to be addressed. So I think the debate on the one side has probably moved forward a bit. We are a very conservative community and I think there will always be a propensity to kind of stick with the devil you know and: "It is okay, do we really have to do anything", and that is still very present.

**Mrs. M.-L. Backhurst:** This is a sort of funny one and I appreciate this is just coming up to my head at the moment. This principle of election or choosing by the people of the President of the States, it assumes that the President of the Royal Court would still be unelected, would be still an appointment by the Crown?

**Mr. J. Henwood M.B.E.:** Yes.

**Mrs. M.-L. Backhurst:** Supposing one said no, that that was not satisfactory either. One really should have an election of some sort or some method of choosing that person by the people rather than an appointment by the Crown. Then would it be possible that if the President of the States would actually be the Bailiff elected in some measure or chosen by the people in some way and there would be the separate role which would be the Chief Justice,

again not necessarily appointed by the Crown, but as a separate thing, the term “Bailiff” which would then give this status of civic head and all the other roles that the Bailiff does, would that then give that a greater meaning?

**Mr. J. Henwood M.B.E.:** I am not quite sure I am following your hypothesis on the election of a Chief Justice. I am shooting from the hip a bit. I think my feeling is that a Crown appointment will always carry a degree of weight in the minds of people. I think, crudely, there is a great deal of respect for the office of Bailiff. There is not a great deal of respect for the office of Senator or Deputy or Connétable. We tend to put up our heroes and knock them down quite quickly politically but I think in the public mind, however mysterious and secretive the process and perhaps because of mysteriousness and secretiveness of the process, someone that the Queen has chosen carries an authority that would be hard to duplicate in another way. So, in my view, to go back to Lord Carswell’s earlier question, I do not think there is any difficulty about the Bailiff still being the first citizen if he is President of the Royal Court and no longer President of the States.

**Mrs. M.-L. Backhurst:** I can see some sort of bind with the Chief Minister and the reduced Bailiff, as it were, I do not know.

**Mr. J. Henwood M.B.E.:** I do not know if this is the same area but certainly one has seen, since the advent of ministerial government, whether formally or informally, the role of liaison between the U.K. Government and the Jersey Government being largely moving from the office of the Bailiff to the office of the Chief Minister and I think that is appropriate. Whether that needs to be formalised in any way, I am not clear.

**Mrs. M.-L. Backhurst:** We have heard that although that process happens, the Bailiff still has to have quite a role in that because it is quite clear that the Chief Minister's office is not necessarily set up to deal with those sorts of matters. They do not have the legal advice. They still need to go the Bailiff and there is some option as to whether they do or not but there is some ...

**Mr. J. Henwood M.B.E.:** Yes, frankly, I think that process should be completed. I do not believe that it is appropriate again for an unelected individual to be the organ of communication government to government. It must be the role of the Chief Minister or someone delegated by the Chief Minister to talk to his or her opposite number in other governments, either the United Kingdom or any other government.

**Lord Carswell:** Mr. Henwood, we could listen to you all morning but unfortunately ...

**Mr. J. Henwood M.B.E.:** I shall spare you that, Sir.

**Lord Carswell:** We are very grateful to you. You have given us a great deal to think about. We shall take it all into account and, as I say, you will be offered the opportunity to make sure the transcript of what you have said is correct. We shall then proceed with the evidence and, at the end, in the same process as you have been through yourself, we will endeavour to reach conclusions, make our recommendations, and that will be our function completed. Thank you very much for your attendance. We are very grateful.

**Mr. J. Henwood M.B.E.:** Thank you. Thank you for being gentle with me. May I offer you a parting shot. I remember very well when the Clothier Panel was taking evidence, we saw,

among many others, the late Senator Ralph Vibert, who was an eminent lawyer, an eminent statesman and a generally well-regarded individual and he looked Sir Cecil Clothier in the eye and said: "I do not suppose you have got the courage to do nothing" and it made him feel a little uncomfortable. My parting shot to you is, I do hope you have the courage to do something. Thank you very much indeed for your time.

**Lord Carswell:** Thank you, Mr. Henwood.