

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 Kelleher**

Lord Carswell (Chairman): People on this side of the table, Mr. Kelleher, are the members of the Panel set up to review the roles of the Crown Officers at the request of the States. You know some at least, I am well aware. On my right is Mrs. Backhurst; on my left, Dr. Mountford. Then the Project Officer and Secretary Mr. Millow you have met. We are to inquire into the roles of the Crown Officers in principle, in other words, looking at the matter constitutionally, not as a matter of performance by any one of them. When we get on to questions of perceived bias, we are looking at it in terms of the jurisprudence, which you are probably well aware these days of what might be thought by the sensible, well-informed observer to create a possibility of bias, not of the actual bias or biased behaviour of any individual, which is nowhere in any of the matters we have had to deal with been suggested.

We are holding this hearing in public as requested by the States and so the written submissions have been, apart from requests for confidentiality, put into the public domain, and it is intended that the hearings and the transcript would be so, but before we go any further, you have a request that your submissions should be treated as confidential and we wondered if you wished to enlarge upon that or whether you are content that it should be published and that today's hearing should be published in the ordinary way. What is your present position about that?

Mr. J. Kelleher: I am happy for it to be published. Just put it down to natural modesty.

Lord Carswell: Well, that settles the matter then. I am grateful to you because it seemed to me, looking at it, that it was very much of a piece with the other submissions we have received and covers grounds which we would expect from somebody such as yourself. We

are grateful to you for producing it, and we, of course, read it with interest and care. Before we go any further, is there anything you would like to add to it?

Mr. J. Kelleher: No, apart from this preface. Before I drafted it, seemed to me I could approach the subject potentially from 2 ways. One from a particularly legalistic point of view which you have already referred to in the sense of conflict of interest, the way these matters are viewed today which, as you say, is generally viewed from the point of view of the potential for conflict, the perceived conflict of interest. Or from the point of view of democracy. My chosen way to deal with it is how I feel personally, from a democratic point of view, but I am aware that one could refer to further cases. One I had not read at the time but I have read now, which is the Barclay Brothers case against the Seneschal of Sark, would have been another which I might refer to, but beyond that, no, I do not think there is anything I would add.

Lord Carswell: Well, we have just had the benefit of Mr. Henwood's views on the questions of principle where he represented to us firmly that he did not consider that it was in accordance with proper principle for the Bailiff, as Chief Judge, to have sat in the States. That is very much your position.

Mr. J. Kelleher: It is my position.

Lord Carswell: Would you like to enlarge on that?

Mr. J. Kelleher: My position is simply that, to have a right to represent people politically, you should be democratically elected. The Chief Justice or the Deputy Chief Justice, as in the

Deputy Bailiff, presiding over the States, plays a political role. To my mind, it is very difficult to argue against that proposition because he makes decisions in relation to what States Members can do within the Chamber, what questions they can ask, ultimately whether they need to cease speaking, whether they may be debarred from the Chamber. Those are political decisions. In addition, it is clear to me, from my own experience, that inevitably judges do play a role behind closed doors politically. Inasmuch that because they are the speaker of the States, it is not unusual for politicians to consult them in relation to political matters. For example, if you wish to draft a proposition and you wish to run it by the Speaker first, you would attend on one of the judges for his input in relation to that. Now, I know that because I have seen that myself. I have personally observed it. I should explain that, in part, that results from the fact that if you are a court lawyer, it is often the case that you have to attend upon the judges. So, in the waiting room, one often would meet politicians and one gets talking to them as to why they would be there. So I am aware of that from that, but I am also aware from discussing this with colleagues and discussing it with some of the judges themselves. So they do play that political role behind closed doors. They also play a political role which is less easy to be definitive about, but by the very fact that they act as Jersey's first citizen, whether that is internally in Jersey in terms of opening the newest building to have been created by the States, attending at the Liberation remembrance days or, more recently, the present Bailiff attending in Germany with the attempts to rekindle good relations with Germany where he is pictured on the front page of our local press as, in effect, representing Jersey. Those are all political roles, and that will be the perception. People seeing the newspapers or listening to the radio, or external perception, so the German authorities who receive the Bailiff; that all goes to the view that he is some form of political representative of Jersey. For me, that is anathema, democratically.

Lord Carswell: So the consequence of your proposition is that the Bailiff's role should be limited to that of judge?

Mr. J. Kelleher: Should be judge only. Absolutely.

Lord Carswell: So that you are really envisaging some sort of constitutional set-up, Lieutenant Governor, Chief Minister, Chief Judge?

Mr. J. Kelleher: Absolutely.

Lord Carswell: And you would forget the title of Bailiff?

Mr. J. Kelleher: I do not think it is necessary to remove the title of "Bailiff" because "Bailiff" could be a title which refers simply to a judicial role. After all, in fairness, the Bailiff historically had a much larger and more obvious political role. When that changed, the office was still called "Bailiff". I do not suggest that we change the title "Bailiff". I just suggest that he should not have a political role.

Dr. S. Mountford: Do you consider their internal ceremonial function as political?

Mr. J. Kelleher: Such as?

Dr. S. Mountford: Opening things in Jersey, attending ...

Mr. J. Kelleher: Yes. Well, they are. Let us look at it 2 ways. The first way is it would be unusual for you in England or in France, say, for a judge to be invited to open a civic building, save perhaps if that was linked to the judicial function. I could understand if it was a new court, you might invite the Chief Judge to do that, but outside that, that would seem to me to be an unusual function for a judge. But also, secondly, it is a matter of perception, which is why I put it that way in my note to you which is it would be interesting ... and you are going to be in a position perhaps to assess this. What would the average Jersey person think? If you asked them who is the chief citizen of Jersey, would they say the Chief Minister or would they say the Bailiff? I have no doubt some people would say the Bailiff, and that is a picture built up in various ways. One of the ways that is built up is because the Bailiff or the Deputy Bailiff are regularly on the front page of our only newspaper performing functions which one would anticipate in a democracy would be performed by the Chief Minister.

Dr. S. Mountford: What about the Bailiff's connection to the Crown? Because we are a Crown Dependency; he is representing the presence of the Queen because we are not really under complete ...

Mr. J. Kelleher: It seems to me there are various answers to that, but perhaps the most obvious in the present day is that, as we are moving to increasing independence, that link with the Crown will inevitably become a redundant one. We have seen moves in the 21st century in that regard because it is now recognised in the States of Jersey Law that we do have a measure of independence, both internally and in terms of our external relations. So ultimately one can foresee that Jersey will make its own legislation and it will not need to go to the Privy Council to have that legislation rubber stamped. So it is hard to see why you would not need the Crown representative in Jersey. That is merely a historical tie.

Dr. S. Mountford: I suppose it has to evolve like everything else, the role of the Bailiff.

Mr. J. Kelleher: Yes, indeed.

Dr. S. Mountford: So, at the moment, people do see the Bailiff as a very important role. It is almost like a security. They do not have the Queen but they have got the Bailiff and there is that key connection with the monarchy until the time of independence that you have suggested will happen.

Mr. J. Kelleher: Well, the way you have just described that key connection is as much performed by the Lieutenant Governor because the Bailiff himself has an interesting role because although he is the Crown's representative, he is also the representative of the people of Jersey. So he occupies a role which itself is potentially in conflict. The Lieutenant Governor would never claim that he directly represents the people of Jersey. He represents the Crown's interests in Jersey.

Dr. S. Mountford: But is it not to make sure we behave?

Mr. J. Kelleher: Well, it could be, could it not? You are right, in my view, about the evolution of things, but the main way to evolve things very quickly is by institutional change. So, if that was the people's wish, you would have a very quick evolution if you said, as a matter of statute, that the Bailiff would no longer preside over the States and instead there would be a democratically elected speaker, whoever that might be.

Dr. S. Mountford: So that would be one step in the evolution.

Mr. J. Kelleher: That would be one step.

Mr. I. Strang: Would he still be guardian of the constitution? How would you see that going?

Mr. J. Kelleher: It depends what you mean by that because first of all we do not have a constitution.

Mr. I. Strang: Well, an unwritten one maybe.

Mr. J. Kelleher: And if you have had Advocate Richard Falle before me, he may have driven you off into submissions on King John's Constitutions, but we do not have a constitution. As a judge, he would be the guardian of the constitution because you would go to the judge in his capacity as a judge if a constitutional issue arose. It would come within their jurisdiction. I do not see how he is the preserver of our constitution outside his role as a judge. His role does not involve being the guardian of our constitution, as far as I see it.

Mr. G. Crill: The argument is that when the Bailiff is performing public non-judicial function, it is apolitical.

Mr. J. Kelleher: Apolitical?

Mr. G. Crill: Apolitical. If you remove him from the States because you say whatever he does is political, like opening a building or greeting a visiting dignitary or anything else, if you

are then removing him from that function and you are putting the Chief Minister back in there, everything the Chief Minister then does is political. So you would have no apolitical function.

Mr. J. Kelleher: I do not consider that to be a difficulty in terms of opening civic buildings or representing us internationally. My preference from a democratic point of view is that the person who does that is someone in whom I had a say in his or her appointment. Hence it is a democratic point for me. I do not accept that the Bailiff's non-judicial roles are apolitical because they all have political connotations. You can look back in the last 20 years and see episodes where this apolitical role was very blatantly political. For example, the comments of the judiciary on the Clothier Panel's submissions which interestingly got a centre-page spread on the *Jersey Evening Post*. That was not an apolitical position. That was a very blatantly political position.

Mr. G. Crill: Do you think that there is any role for the first citizen?

Mr. J. Kelleher: I do, but I think that should be the Chief Minister because he is the democratically elected first citizen. It is not a perfect process and perhaps there is no perfect process, but he is the person we have chosen as a States Member and the States have chosen him to be the first citizen, in my view.

Mrs. M.-L. Backhurst: So, in a sense, the whole of the Clothier report, which you sat on the review, hangs together because having created the Chief Minister it kind of has bumped the Bailiff off in any case.

Mr. J. Kelleher: Well, as you recall, that was part of what Clothier recommended. You can see the logic behind trying to create a strong executive which Clothier perceived as a difficulty within our current political system. Part of that is to make sure there is not any other heir to the throne, no one presenting himself to be the head of the organisation. So, at the moment, people would be in doubt as to who is the head of the organisation ultimately. By “organisation”, I mean chief citizen of Jersey. So I agree that would endorse the direction that Clothier intended.

Mrs. M.-L. Backhurst: I did ask someone, when they went to Bad Wurzach, who did the Mayor of Bad Wurzach shake hands with first.

Mr. J. Kelleher: What was the answer?

Mrs. M.-L. Backhurst: The Bailiff.

Mr. J. Kelleher: Well.

Mrs. M.-L. Backhurst: Exactly.

Mr. J. Kelleher: It would be interesting to know what the people in Germany, the general authorities consider our Island to be. I do not know if there is such a word as a “judgeocracy”, but it seems to me that it has that potential: “This is a bit strange. This place is holding itself out as close to independent as an offshore financial centre of some import, notwithstanding its size, and as a democracy, but who turns up to represent it? A non-elected official.” That would strike me as a curious thing for a foreign country to see. I mean,

I gave you the other example in my submission in relation to ... it is a criminal matter. You do not need to know the details of that particular case, but a foreign country, in that case Nigeria, would consider it a bit strange that when it argues that its sovereignty has been infringed, that the Chief Minister takes no part in deciding whether it has or how Jersey should react to that complaint of infringement of sovereignty. It leaves it completely to Crown-appointed officers.

Lord Carswell: The consequence then is if the Bailiff does not preside over the States, somebody else has to.

Mr. J. Kelleher: Indeed.

Lord Carswell: What suggestion do you make as to who should be the presiding officer and how should he or she be put up, chosen, elected, appointed or whatever?

Mr. J. Kelleher: I have no strong feelings as long as that person is elected. I would not be opposed to the Westminster model which is that the Chamber of the States would elect one of their own to be the Speaker. That would accord with the way we currently elect our Chief Minister, so I would not have any difficulty with that.

Lord Carswell: There are 2 problems in this with different sides of the same coin. If it requires considerable legal and interpretative skills, it requires somebody with the background of the Bailiff, and a Member of the States is perhaps unlikely to have that, but if it does not require great skills and interpretation, it may be that the Bailiff's role does not involve a political element as you suggest. Which way would you see it?

Mr. J. Kelleher: With respect to that argument, I think that is a red herring argument because in Westminster it is not a requirement that the speaker has a legal training.

Lord Carswell: Because he has got back-up.

Mr. J. Kelleher: Indeed, and that is what you would need, but of course there is back-up here in any event because the Greffier of the States or the Deputy Greffier provides back-up, and I know from experience if one has a question on an aspect of States procedure, you can address those questions to him. I have done it myself, and you will get a very helpful and informed answer as to the rules.

Lord Carswell: It has been represented to us that the Bailiff's function in the Assembly is really only to apply Standing Orders and that he has no real element of discretion. I do not think you would agree with that, from what you have told us.

Mr. J. Kelleher: I would not agree with that at all.

Lord Carswell: No.

Mr. J. Kelleher: I gave you the example of the chastisement of one of the Deputies last year which, when you heard it on the radio, did immediately strike one as going beyond simply the implementation of the rules.

Lord Carswell: Is that possibly an instance not of the defect in the role of the Bailiff but in the way in which it may have been misperformed in one instance?

Mr. J. Kelleher: It shows that it is possible in those circumstances, as in many others, to end up stepping over the mark where you are not being involved in any sort of political role to becoming involved in a political role, because if you are a member of the voting public listening to that and listening to it against the background where you hold the Bailiff in great deference for historical reasons (we are speaking theoretically), that could influence you next time when you come to vote for the said Deputy in the elections because someone in seniority has torn a strip off them and effectively said he does not know what he is doing. That is, in my view, a political statement made by the Chair.

Lord Carswell: The propositions and questions that he must allow are, in principle, limited by Standing Orders. In fact, is the interpretation of those Standing Orders a matter of consequence in the day-to-day working of the States?

Mr. J. Kelleher: I do not see how it can be otherwise and you can use an example, can you not? If I, as the Deputy for the small country Parish, feel a need to go and speak to the Speaker or the Deputy Speaker as to what I can ask or how I can properly frame it, or if I have drafted one and I have heard a reply saying: "No, you must come and speak to me as to how you frame it", you can see immediately that the speaker can influence what you ask or how you ask it, and that is then asked in a public forum, so he is involved in politics yet again, in my view.

Lord Carswell: It can influence it, but the proposition we had given to us is that he can only influence it in one way and that is the right way the Standing Orders tell him to do, that he has no authority to go outside them and therefore his influence is only to correct principle and not to move things one way or the other.

Mr. J. Kelleher: I have spent most of my professional career interpreting laws and there is no right way to interpret them. They will be interpreted the way they are on the day and that is subject to a whole variety of factors, including the particular views of the person you appear before, the particular views of society at that time. I think it would be naïve to suggest there is only one way to interpret them and, with respect, even more naïve to think that they are always going to be interpreted in the right way, if such a thing exists.

Lord Carswell: Yes. I am familiar with that jurisprudence. What about the question of the order of calling Deputies and Senators to speak? Is that a significant matter in the performance of the Bailiff's function?

Mr. J. Kelleher: I do not consider that particularly important. I think it would be more important if we had a party political system, whereas here, because we do not, it is not always going to be easy to discern beforehand what a particular Member's views are going to be on the subject in terms of the ability to then choose them as if to influence what went on thereafter. I think that would be difficult.

Lord Carswell: I have heard complaints of certain Speakers in Westminster that he exercised favouritism in calling Members to speak and disregarded Members to whom he was opposed. Perhaps in a body the size of the States, that does not really come into effect.

Mr. J. Kelleher: I do not know. I have never studied the order in which people are called on a particular subject. States Members would be in a better position to answer that, I suspect.

Lord Carswell: Okay.

Mr. G. Crill: Turning to the Attorney General's role, you refer in your submission to the potential conflict of interest as between legal advice and political opinion where I think we probably accept that any advice is given in context and therefore the advice can therefore assume a political dimension. Do you have a particular view with regard to the function of the Attorney General as adviser to the States and as the prosecutor?

Mr. J. Kelleher: In terms of potential conflict?

Mr. G. Crill: Yes.

Mr. J. Kelleher: I can think of one where I would have a concern is that this is really ... his role as prosecutor, his role as an officer with the ear of Government is that he does have an immediate channel to legislation being presented before the States which would assist the role of prosecutor, or in other ways. I can give an example, which one of the Panel may remember, but this is Assise d'Héritage which is where Advocates go to swear their oath once a year before they are called, and I have seen an Attorney General, in effect, threaten that if the Bar did not do as he wished them to do, he had an A1 route straight into legislation to make them do what he wanted to do. So I do see that as a conflict. I mean, my ideal in terms of how I think society should be organised is that you should have a separate

prosecution organisation. That should be a role on its own, not influenced by a straight route to government and not influence in any respect the ability to go and speak to the States on issues. We should have separate prosecution role.

Mr. G. Crill: Would that prosecution role come under the executive through a Ministry of Justice or would that be a current appointment?

Mr. J. Kelleher: There would ultimately be a Minister who would be responsible for it, but as with the C.P.S. (Crown Prosecution Service), they would make their own decisions as to who they prosecute or do not prosecute, in a similar way to the way the police are organised so that they are a step aside from being under direct ministerial control on a day-to-day basis.

Mrs. M.-L. Backhurst: Would you extend that then to the role of Centeniers as well?

Mr. J. Kelleher: Do you mean in terms of the Attorney General's role as the chief discipliner of the Centeniers?

Mrs. M.-L. Backhurst: No, more the Centeniers deciding whether to prosecute or not, or indeed what to prosecute, what charge to bring.

Mr. J. Kelleher: Yes, they only decide what to charge or who to charge. They do not decide who to prosecute. Yes, I mean, that is slightly out of the ambit of this Panel, I imagine, but yes, I think that is something of an anachronism, to be honest.

Mrs. M.-L. Backhurst: I suppose it takes part of the whole Prosecution Service in charging ...

Mr. J. Kelleher: It does. It is odd, is it not, that we have a fully functioning police force other than in that particular aspect? One sees that in practice, and I have seen it in practice where people are interviewed by the police and then there is several hours delay as they try to find an Honorary Policeman to come down and charge a suspect, but that seems to me perhaps a different point.

Mrs. M.-L. Backhurst: Could I also ask you, Mr. Henwood has already mentioned that he was opposed to the Attorney General and the Solicitor General being Members of the States; are you similarly minded?

Mr. J. Kelleher: If in that he means by having the ability to come and speak in the States, I am opposed to that, but again that is a historical position when they would come and speak to the States, when the Crown's interests were affected. Now it is extended to give the States, generally, legal advice. It is not necessary for that to be the Attorney General. If the States wish to have a legal adviser, they can have their own legal adviser.

Mr. I. Strang: Did you hear there are conflicts at the moment in the Attorney General giving advice to the States, also giving advice to the Executive, the Chief Minister ...

Mr. J. Kelleher: There were very clear conflicts and I have seen that in practice, and with some sympathy for the Attorney General in the sense that wanted to give advice to the Executive but concern on a sensitive matter that the opposition then want to see that advice

and then you might have to reveal that to the whole of the Legislature in the States Chamber. Seeing it from his point of view, that is a conflict, but also you can see it gives the potential for huge ability to become a decider rather than adviser because you potentially can have your views put to all parts of the government and if you are politically minded you can put those of a particular spin.

Mr. I. Strang: So what is the solution? Do you think that private practice is used to advise other areas like Scrutiny, for instance?

Mr. J. Kelleher: Well, they are already. To my own knowledge, the Executive had sought separate legal advice on occasions. The opposition, for want of a better word, or Scrutiny clearly does because they sent a letter out to all law firms asking if people would be interested in providing separate legal advice. That is a matter for Government as to what is the most efficient way to do that. Another way of doing it would be that the Executive have its own small body of lawyers and they could have a pool of lawyers available to Scrutiny.

Mrs. M.-L. Backhurst: It does seem, with the greatest respect, that the Clothier was a ... I mean, I know a lot of it was not implemented. It was a kind of halfway house. Because we do not have political parties, therefore, although there is Scrutiny, that is not in opposition and therefore we have got this sort of slightly uneasy thing, and it has been said by Mr. Henwood that it is all the States Members who are the Government; it is not just the Council of Ministers.

Mr. J. Kelleher: Well, my perception is different. I think that there has been a shift since the Clothier reforms were implemented but we do have something more of an Executive, but I

agree. I mean, what happened is the Clothier reforms were tempered and in fact some of the teeth taken out of them, which has undermined the ability of an Executive to form properly, in my view. I mean, the most obvious one is that the Chief Minister does not have the power to hire and fire his Cabinet Members, which seemed to me at the time was the teeth needed if you were going to have a strong Executive. I understand the opposing view which was people were unhappy to have that because they thought it gave too much power to the Executive, but the thrust of Clothier in that regard was to try and create a strong Executive, and so some of the teeth are missing.

Mr. G. Crill: One of the concerns which has been raised with regard to the position of the Attorney General as the provider of legal advice to the States is that if there is an alternative or a second source of legal advice, then the States Assembly has got to determine which is the better advice. Do you see that as creating a difficulty or is that just part of the normal ...

Mr. J. Kelleher: That is just life, is it not?

Mr. G. Crill: Yes.

Mr. J. Kelleher: Legal advice differs between people, does it not?

Mr. G. Crill: You would not have court cases without it.

Mr. J. Kelleher: Indeed, yes. I would be out of a job. No, I do not see that as a particular difficulty. Even between different lawyers, there is usually a core common ground on legal opinion. It is on the edges that it is often the area of dispute. I will just add something to that

which is another thought I have. I do not know if it is peculiarly Jersey. Really Jersey is what I know most about, but part of the issue in relation to both the Bailiff and the Attorney General is the Jersey population generally is very deferential to lawyers and we seem to occupy some sort of exalted status in Jersey compared to other professions. For example, one will often hear said in the press or even in private: "Oh, we should have more lawyers in the States." Whenever I hear that, I think to myself: "But why? Why not more accountants or postmen or dustmen?" but, you know, there is a deference and I have seen it often with States Members. They do find themselves acting deferentially to lawyers, and that in itself is an issue when you have got, as in the case of an Attorney General, someone who occupies so many roles and has potentially so much influence. I mean, it is important to observe that in Jersey we are very lucky; we do have very able judges and we do have very able incumbents in the Law Officers, but with that ability does come the power to influence.

Lord Carswell: Could I just go back then to a point Mr. Crill was making about diversity of opinion? Supposing you had a proposition which was put before the States and you had an opinion from the Attorney General that it would not be in contravention of the Convention of Human Rights but you had an opinion given by another source, a private source, let us say to Scrutiny, it is very doubtful and, on balance, the adviser thinks that it would be in contravention of the convention and would not withstand inquiry in Strasbourg. Now, how did the States resolve that advice?

Mr. J. Kelleher: In the same way that any private person resolves legal advice which is contradictory.

Lord Carswell: A private person gets legal advice. There is somebody else advising the other way. There is a dispute and it will be resolved in court if they cannot settle it. You cannot do that in the States.

Mr. J. Kelleher: In practice, your lawyer comes to you and says: "I think X but it could be Y." As a client, you have to decide which way you are going to go, X or Y. You may get a second opinion which says "Y"; you still have to decide. Ultimately, the only person who decides a point of law is a court. So advice is only advice. Secondly, that would occur in any event, I think, currently, because, as I understand the practice in some respects, the Law Officers, where the Attorney General has to advise one limb of government and is then asked to advise another limb of government on the same point, someone else within the Law Officers' Department will do that. So you could already have a situation where different views are taken. The States have to decide. A good example would be the foreshore case in Jersey where the States were given legal advice in camera. We do not know what that legal advice would have been, but I would bet \$1 that was not advice that they were going to win or lose definitively. They had to take the advice and, as any person would have to do, consider what their position was and reach a decision accordingly. It would seem spurious for me for that to be put up as an argument as to why the same party should advise different parties who sometimes have different interests. That was just a reflection.

Lord Carswell: Is it as simple as that? A businessman will get counsel's opinion: "I think your chances are 65:35 of succeeding", but if he then is involved in a transaction and there are people on the other side who have been advised exactly the same only the other way around, there is no way of resolving that or deciding unless they decide to compromise

themselves or unless they take it to court and the court decides it is either A or B, black or white.

Mr. J. Kelleher: Absolutely.

Lord Carswell: That is why, if the States are faced with 2 opinions, one of which says: "Pretty sure you are all right" and the other one which says: "Pretty sure you are all wrong", is that helping the States to that mixture of opinion?

Mr. J. Kelleher: Well, let us test it. Supposing the opinion that says they are right is ultimately determined by a court to have been wrong. So you are back to the position that you just have to take a view on the advice that has been given to you, as anybody else does.

Lord Carswell: Any more issues, gentlemen?

Mr. G. Crill: Just one thing in relation to the succession through Crown Officers to Bailiff. Do you think that this is positive certainly in terms of the constitutional knowledge that remains enhanced within that, or do you consider that perhaps too many good judges or potentially good judges are ruled out of the opportunity to become judges by the perception of the succession?

Mr. J. Kelleher: I think that is difficult to form a view on because it has never been tested, as I am aware of, in the sense that I am not aware that someone in my profession considered a prime candidate has applied direct for the job of Deputy Bailiff or Bailiff and found themselves overlooked by the incumbent Attorney General, Solicitor General, simply by virtue of the fact

they had occupied that office. So it is quite difficult. Secondly, which is the personal view, I think that the incumbents of Solicitor General and Attorney General in the past probably have been the best candidates for the job. So, I mean, that is why I am dealing with theory. I would be disappointed if a candidate who chose not to be Solicitor General or Attorney General but was eminently suitable to be a judge was not appointed to be a judge, but if you think about it, the role of Commissioner does ... and we have got recent examples of Commissioners who have been appointed who are well-respected lawyers and are now well-respected judges and they never were Solicitor General or Attorney General. So the only bit they are missing is they are not Deputy Bailiff or Bailiff. So I do not feel particularly strongly about that. I think that may come to be tested. Someone may one day have chosen not to have been S.G. (Solicitor General) or A.G. (Attorney General) and decide that they wish to apply to be Deputy Bailiff and be appointed to be that.

Lord Carswell: Certainly when the present Deputy Bailiff was appointed, there was a process. It was not just automatic. It happened that no one else did apply, but it was quite open to other people to apply and the process was such, as we were assured by the present Bailiff, that it would have been a serious consideration. So that may assist the point that you are making.

Mr. J. Kelleher: Well, I was aware it was advertised as a post so if you were qualified, you could apply for it. That is not something that particularly troubles me. I think, ultimately, or I have the faith that ultimately they will choose the best person for the job. That is not an aspect that I am concerned with.

Mrs. M.-L. Backhurst: Can I just ask, when you say they were qualified, they did not ask for anyone to be a lawyer, did they, I do not think?

Mr. J. Kelleher: I am sure it must be a requirement that you are a Jersey-qualified lawyer to be Bailiff or Deputy Bailiff.

Mrs. M.-L. Backhurst: Yes, I agree it should be, but ...

Mr. J. Kelleher: Yes. It would seem strange not to be.

Lord Carswell: It would be impossible.

Mr. J. Kelleher: Impossible, I would imagine. Well, I hesitate to say “impossible” because, of course, our Court of Appeal judges are not Jersey-qualified lawyers, so ...

Lord Carswell: Yes. They have a learning curve.

Mr. J. Kelleher: They have a big learning curve, I imagine, yes.

Lord Carswell: Well, Mr. Kelleher, thank you very much indeed for the assistance you have given us. We will add into the mix all that you have said to us and what you have written, and then, when we have finished this process with everybody, we will endeavour to form our conclusions, make our report to the States and put the matter into their lap.

Mr. J. Kelleher: Well, thank you for taking all the efforts to do it.

Lord Carswell: Thank you very much for your assistance.

Mr. J. Kelleher: I will look forward to the report. Thank you.