

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

Date: 29th March 2010

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

Witnesses: Deputy R G Le Hérissier

LORD CARSWELL: Deputy Le Hérissier, ladies and gentleman, you are very welcome this morning. There will be more chairs.

May I make a preliminary statement before we commence to take the evidence? This is a public hearing of the body appointed to review the roles of the Crown Officers in Jersey. The members of the panel of the Review body you see before you are ... my name is Carswell, Lord Carswell. On my right are Mrs Marie-Louise Backhurst, Dr Sandra Mountford, Mr Geoffrey Crill and Mr Ian Strang and the Project Manager is Mr William Millow, on the extreme left.

May I welcome all those who have come to the hearing today and extend the welcome, in particular, to Deputy Roy Le Hérissier. We are also pleased to see members of the public present and we encourage them to take an interest in our proceedings and to send us any submissions that they would like to make.

Any offices which we are examining are established institutions of the Island of Jersey with a long history in tradition of which the people of Jersey are properly proud. The opinions of the citizens, as well, of course, of those of public representatives and holders of official positions are important to us and we are very glad to receive them and take them into account.

I would just like to emphasise that we are looking at the position and roles of Crown Officers in principle. We are not concerned to judge how any individual has performed his or her office. We are debating and recommending the matters as questions of principle on the assumption, of course, that each office will be effectively and properly carried out by its holder.

The States ask us to hold our hearings in public, as far as possible, and we are glad to comply with their request. The hearing will be recorded by this equipment and it will be transcribed subsequently. The participants will have an opportunity to check the transcript for accuracy and, when that has been done, it will be published on the review website and available to all.

In the same way, all written submissions will be published on the website unless they have been submitted and accepted, wholly or in part, in confidence and we would expect that to be really rather exceptional.

We shall now proceed with this hearing. It is not an inquisition; we are not concerned to try to establish disputed facts. It is an inquiry, in the literal sense; we are seeking to inform ourselves about the workings of the institutions concerned, to hear opinions for and against any changes or amendments of the roles of the Crown Officers. At the end of the proceedings we shall debate and consider ourselves, reach conclusions and then make our recommendations to the States which will complete our function.

Deputy Le Hérissier, we have read your written submission, of course, and we are grateful to you for sending that to us. Is there anything you would like to say by way of statement, yourself, before we inquire into different aspects of the subject matter?

DEPUTY LE HÉRISSEIER: Thank you, Lord Carswell, for that introduction. I suppose, in a sense, it's divided into two. The first part is a rapid run-through of the historical reasons, as I see them, why we've reached this situation. Basically, as some of us know, some of us know to our cost as well, change can be quite slow and hesitant in Jersey. There has been, this long struggle between the Royal Court and the States when ostensibly the division occurred

in 1771 but, since then, there has been an attempt to move away executive government from the Crown and move it into the hands of the States for the big issues. That was never entirely resolved so we've been left what you might term a hybrid kind of situation.

The second part of the presentation is simply the recommendations that I make which will be the subject of this debate. I should add, on the basis, that contrition is good for the soul. I did make one mistake, I'm sure I've made many others, but one to which I will publicly admit, I said that in the Clothier Report there had been no attempt to look at the role of the Crown Officers. Of course, I was wrong.

The Clothier Report did look at the role of the Crown Officers. But what happened was in the follow-up to the Clothier Report, the political bodies that dealt with it, they did not carry forward the recommendations re the Crown Officers. That was done to bring reform forward in manageable amounts, so to speak, and not to open too many controversial fronts at the same time. So, it was the implementation bodies that did not look at it but Clothier obviously did and made certain recommendations re the Bailiff. Thank you.

LORD CARSWELL: There are various aspects, and if we could attempt to take them in chunks and ascertain your view on each and what you would ask us to recommend.

First of all, appointment of the Bailiff and the Law Officers, what would you like to say to us about that?

DEPUTY LE HÉRISSIER: Well, I think I used to -- or it has been jokingly referred to as a process whereby you wait for the white smoke, comparable to the papal system. I think it's been very opaque in regards to the people of Jersey, I don't think they know how it happens.

There was, until quite recently, an assumption that there was a ladder of succession, which started with the office of Solicitor General but that has had a couple of major exceptions in recent years, so the ladder hasn't worked step by step, so to speak. If it was based on the idea of a ladder and starting with the Solicitor General, obviously the most important appointment in that process would be the Solicitor General because once you have entered the system you steadily move through it.

That hasn't happened but, putting that aside, it was based on an idea where there seemed to be soundings where the Crown made the final appointment. But clearly, certain authorities in the Island had a major say. The issue being who were those authorities and how did they take their soundings? I don't think that could last. I know, now, that the Appointments Commission are involved and they, apparently, sign off the appointment.

But, I would like to see that explained much more clearly to people. I think, also, the role of the relevant Privy Counsellor, who is Jack Straw, as I understand it, that needs to be explained: how he intervenes in the process, what oversight he provides because he, I presume, makes the final recommendation to the Crown. I would also like to know, and I think again, the public need to know what the role of the Lieutenant Governor is in the process, as the representative on the Island of the Crown. What feedback he gives or whether he gives his feedback to the process that is run under the auspices of the Appointments Commission.

It strikes me it's moved to a hybrid kind of process where there has been an attempt to bring in what you might call professional selection techniques to bear upon the process.

LORD CARSWELL: You would welcome it if we were to set out clearly, in our report, how it is actually done at present.

DEPUTY LE HÉRISSIER: How it's done and hopefully from that would flow how it should be done. I was also going to recommend when I mentioned it here that the Judicial Appointments Commission, given that obviously a major part of the role is to be the Chief Justice of Jersey, there should be feedback from that body, also.

LORD CARSWELL: I understand that all appointments are now all advertised and applications invited right through the scale. Do you accept that that's correct? Have I got it right there?

DEPUTY LE HÉRISSIER: Yes, you're right, Lord Carswell, and I've got no problem with that. We all know that there are difficulties in recruitment because of the tremendous rewards available in the private legal sector but I've got no problem that it should be fully advertised.

LORD CARSWELL: I can sympathise. There is this question of the succession and the ladder, however informally and erratically it works. It seems to have two sides to it, one plus and one minus. The plus is that, if a promising person comes in as Solicitor General, gathers experience like moss over several years; he would be very much more able to take on the post of Bailiff, X years ahead. The other, the minus side, is that if a person doesn't fulfil his or her promise and turns out not to have done anything wrong but just not quite to have the weight that one would hope that a developing future Bailiff has. That would militate against ascending the ladder too easily. Are there any ways you can suggest whereby that could be overcome without upsetting the whole system to, sort of, wrecking the appointment system?

DEPUTY LE HÉRISSIER: Well, that has occurred. I think one of the big issues is, of course, it has occurred with a few people in the post-war period.

The hope would be that the reasons as to why a person has left the job would be as transparent as possible. Now, that is very, very difficult to handle, as we know, in a small community, but that would be the hope that it would be as transparent as possible.

LORD CARSWELL: While I am on this subject, we would rather welcome it if you agreed that the passage on pages 6 to 7 about a particular officer did not go on to the website.

DEPUTY LE HÉRISSIER: Yes, yes.

LORD CARSWELL: We have received them, it is perfectly correct of you to make the comments, if you wish, but we feel that it might just not be a great idea to have it published generally. If one started at the middle of page 6 with the paragraph, "A dramatic example" ...

DEPUTY LE HÉRISSIER: Actually, there was an updated version sent. It's on a new page, on pages 8 and 9.

LORD CARSWELL: Yes. I do not have that but if you would be content in principle that that should not be published, I think we would be grateful.

DEPUTY LE HÉRISSIER: Thank you, Lord Carswell. The only comment I would make to that would be I think some of the -- not the lessons learned, because it's not so much the

lessons learned, it's more the issue of what happens in a small society when matters get very personal.

LORD CARSWELL: We have got that point all right.

DEPUTY LE HÉRISSIER: I think those matters should be drawn out.

LORD CARSWELL: Yes, we certainly understand that.

DEPUTY LE HÉRISSIER: I would like to look at it from that point of view to make sure that those ...

LORD CARSWELL: Well, before it goes on to the website, perhaps you would liaise with Mr Millow.

DEPUTY LE HÉRISSIER: Yes, okay.

LORD CARSWELL: Thank you. Geoff, have you got anything to add on appointments?

MR CRILL: Just in relation to your experience in the States, do you see - we are talking about the natural, not the natural, the perceived succession route - that the succession, if you like, works in relation to the position of the Crown Officers as a Member of the States and the President of the States? Do you see that the experience gained in one role is beneficial in the other or do you see that as being of no value at all, necessarily?

DEPUTY LE HÉRISSIER: No, I think it is beneficial because you could argue that the Solicitor and Attorney General, obviously it's their job, within a convention, to give advice on legal matters to the States. But they are giving it within a political environment. Hopefully, they're learning what the constraints are of operating, and other issues about operating in that environment.

MR CRILL: Yes, but that responsibility rests with the Attorney General, within the States.

DEPUTY LE HÉRISSIER: Yes.

MR CRILL: Does what he gains, as the Attorney General, empower him in any way when he becomes he becomes President, or is the President a completely different role?

DEPUTY LE HÉRISSIER: I think it empowers him in the sense that it gives him a feeling for how the States works. It compels him to answer a never-ending series of questions about States issues and legal issues and so forth. So, I would say it gives him an excellent background but it doesn't, per se, train him in the particular skills of being a Speaker.

LORD CARSWELL: It is a bit like the difference between being an advocate and a judge. As an advocate you see how judges do it, well or not so well. Actually doing it, is rather more difficult, it's rather a different thing. It would be same.

DEPUTY LE HÉRISSIER: Yes, it would, yes, very much so, Lord Carswell, yes.

MR CRILL: Do you see any need or benefit for the President of the States to be a lawyer?

DEPUTY LE HÉRISSIER: No. No, I think there are other legislatures where they manage quite well without lawyers. Clearly, if you have got judge skills and you're used to handling controversial situations where there is potential conflict. I wouldn't deny for a moment, a lot of those skills can be apposite but I think there are other people who operate in other environments who can bring a similar set of skills.

LORD CARSWELL: They are people skills rather than legal skills, as such.

DEPUTY LE HÉRISSIER: Yes, people skills, precisely. But, I mean, obviously they need to know how to separate out warring factions from time to time, how to react very quickly when people ask you questions about Standing Orders and so forth, how to calm down, sometimes, the big egos that you find in politics.

MR CRILL: Can I ask, does the House behave any differently, when there is a different president?

DEPUTY LE HÉRISSIER: There have only been a very, very few occasions, I've experienced, when there's been a States Member in charge. I mean we try and be -- I mean this sounds terrible, we try and be indulgent when there's one of our peers in charge. But I don't like the idea of a States Member in charge and I would say that there is a slight difference of behaviour then.

But, generally, if the States feel they have what you might call an inexperienced speaker, I think we'll try and, sort of, behave ourselves slightly more.

LORD CARSWELL: On the question of membership of the States, people have raised issues about whether the Law Officers should be members of the States; should be present and the extent to which they should be entitled to speak or answer questions. Can you give us your views on that, Deputy?

DEPUTY LE HÉRISSIER: Yes, thank you, Lord Carswell, yes. I suppose I slightly differ from some of the reformists in this sense. I've got no problem with them being Members as long as they operate to clearly defined conventions, in other words, that they do not directly interfere in political matters, they do not directly comment on political matters and that their answer is focused on the legal issue.

LORD CARSWELL: How often do you feel it is necessary, I know that they endeavour, always, to have one Law Officer present. Does that work well enough? Does it work out that there is always one Law Officer present?

DEPUTY LE HÉRISSIER: No, Lord Carswell, no. Clearly they look at the agenda and make a decision about what are going to be the more legalistic issues, shall we say, and then they will come. But they will, if necessary, if somebody comes up with a question that hadn't originally been thought of, they will come across.

LORD CARSWELL: Yes, I gather that they can keep in touch through what we called an enunciator in Westminster.

DEPUTY LE HÉRISSIER: Yes, the radio.

LORD CARSWELL: Most other legislatures do not necessarily have a lawyer on tap. The House of Commons, you would not see one more than once in a blue moon. How necessary do you think it is for this in the States?

DEPUTY LE HÉRISSIER: Oddly enough I think it's very necessary, assuming it can operate according to the convention to which I referred earlier. I think it's even, in fact, more necessary at the moment, because we've got this situation now where most of the back-benchers are involved with Scrutiny. The issue, of course, is about getting access when you are on Scrutiny to the advice, the legal advice that was given to the Executive.

In a sense it's quite important that we have a Law Officer in the States so some of the questions -- mind you, they may not be the right ones, but some of the questions that we don't get the answers to through the Scrutiny process, certainly, can be asked of the States --

MR CRILL: Directly of the Crown Officer?

DEPUTY LE HÉRISSIER: Directly of the Crown Officer, yes. It is also clear, and this is why we wanted it, although apparently, as you know, this has been a never-ending debate. It's also clear that whether or not we accept the law, or the form in which we accept the law, turns very much on the Law Officer's advice, so it's quite important that we know what the substance of that advice was, in some instances.

LORD CARSWELL: Dr Mountford, have you got anything on this issue that you would like to ask?

DR MOUNTFORD: I would like to go back to the statement that you made about as long as they do not get politically involved. How is it possible to not, when you are giving advice? Where do you see the dividing line is?

DEPUTY LE HÉRISSIER: Well, it's not their job to comment on the merits of a proposal because that is a political question. But if there are legal obstacles to implementing a law, then they should be drawn to our attention. I think, and we'll no doubt come to this later in the evidence. I think part of the problem with the Crown Officers is that they are members of many, many bodies. They spend a lot of their time, for example, with the Executive giving advice to the Executive. I think they have to be very disciplined to ensure that, when they're involved with the Executive, they don't subtly become part of the Executive. At all times they remain legal advisors to the Executive as they should remain legal advisors under the present structure of Scrutiny.

MR CRILL: Do you think that that is a real danger now? Do you think that would be an increasing danger if there is a move towards or actually into party politics?

DEPUTY LE HÉRISSIER: I think it's a danger now, yes, because I think we, on Scrutiny, are aware that advice is given to the Executive, we don't know the advice, we may find out the advice. In some of the cases, we need to know that policy advice so we can form a rounded picture of why they have arrived at the decision they've arrived at. It's very difficult at the moment, sometimes it's very difficult to know that.

I'm not sure it would become a worse issue on the part of politics, not unless the Attorney General became, as in England, appointed by a political party. Although that person would

argue that they keep their roles very separate but I think there is enormous pressure on them.

MR CRILL: But as an advisor to the Executive, the Executive rests within one party.

DEPUTY LE HÉRISSIER: Yes.

MR CRILL: His position would perhaps be slightly more polarised.

DEPUTY LE HÉRISSIER: Yes, as you know, we have a very individualistic system at the moment. Now, some people say it's not quite true that we have 53 political parties - that is an exaggeration. But insofar as there is a "unified body" in the House at the moment, and I use the term in inverted commas, it is probably the Executive, so I would say that danger already exists, actually, it's one we have to be wary of.

LORD CASRWELL: There has been considerable discussion in England about the position of the Attorney General because she is a member of the governing party. The Attorney General always will be, is appointed by the Prime Minister, can be removed by the Prime Minister and it happens and, therefore, is concerned to uphold the political party which forms the government.

It would appear to me that it makes the position of the Attorney General and Solicitor General easier here in that they do not have a political affiliation which would pull them one way or the other. It makes it easier for them to be properly independent. Would that be your view?

DEPUTY LE HÉRISSIER: Yes, I would agree with you, Lord Carswell, but, as they say, the price of democracy is eternal vigilance. I think it's very easy, when you spend a lot of your time working with the Executive or with its bodies to identify with that group, to slip into a way of thinking and so forth. But I would agree with you and certainly the Iraq War advice was the classic case where the Attorney General seemed to be put under enormous pressure.

LORD CARSWELL: Certainly the public perception was one of concern about it; one cannot go further than that.

You raised this a moment ago in the context of the advice given by the Law Officers to the Council of Ministers, and then consideration by Scrutiny. I would just like to follow that one up a bit more if you could. There has been some issue, I understand, about seeing the advice and being given the advice. This raises two problems, as I see it: one is that legal advice given by a lawyer to a client is the property of the client, the lawyer is not entitled to reveal it, the client is not obliged to because it is given in confidence. The other is how does Scrutiny work to its fullest effect if you do not know why a decision was taken? Is there any way through that that you can see?

DEPUTY LE HÉRISSIER: Yes, thank you, Lord Carswell, you summed up the situation very well. The only way I can see through that, which I mentioned briefly here, is basically that the Law Officer speaks confidentially to Scrutiny. Now, there has been a suspicion - and this is how things get terribly personalised in a small place - on the part of certain people that if you give advice to Scrutiny, it will, be leaked into the public domain. But I think that's just something you have to deal with.

I mean we deal, or Scrutiny deals, with a lot of sensitive advice: for example, commercial advice, as well as legal advice, I would say it should be dealt with on the same basis.

LORD CARSWELL: How necessary; I am afraid I am very much dependent on people giving me the working of this as they actually see it; I get the feel of it. How necessary is it for a Scrutiny Panel to know all about the insides of every decision that they are investigating?

DEPUTY LE HÉRISSIER: It isn't, Lord Carswell. It depends on the nature of the issues. There are some issues where the legal ramifications are much more important, than other issues. No, it's not important but what I would argue is it's a right that we should have, because what we're being driven into is a situation, and it's already been done. We have in the audience somebody who was involved in such an issue, where you have to go to an outside law firm for advice.

Of course, we then end up in this conundrum which I know the Law Officer wanted to avoid, where the States is then presented with two sets of legal advice and it finds itself trying to be a quasi court, I suppose, trying to decide, which is a very odd situation to be in.

LORD CARSWELL: How would one resolve that? How do you see, what is the best means of trying to get a way of working it?

DEPUTY LE HÉRISSIER: Well, as I've just said, we would certainly want to hear the Attorney General's advice in confidence as Scrutiny Panels. If the Scrutiny Panel felt happy, or they still had some doubt then I think, yes they would have to go to an outside source if they felt there was another view.

The two instances that have arisen have been about human rights issues; the two that I've been involved with, or seen, have been about human rights issues. If that were to be the case then we will end up, quite frankly, with two sets of advice, unless there could be recourse to yet another wise person the process could go on forever.

LORD CARSWELL: The difficulty with legal opinions and advices, I know myself, is it is not just simply, as a rule, saying, "The law is this". It is a very much a gradation of shades, if you like. In the simple case you can say, "The law is this, what you must do is that, you have no choice", that is it, end of story. In another case you may say, "The law looks as if it should end up this way, this is how a court would decide it, but I would give you odds of 75:25, that it is this way and you would be well advised, because of the ramifications on some other transaction, or the public reaction or so on, to follow that course". That is the sort of thing a lawyer is asked to do. To come to a decision and the decision, inevitably, in anything but the simplest case, involves recommending, taking into account the background. It is not a simple thing.

Lawyer B, is consulted, let us say by Scrutiny, he looks at the same set of facts, insofar as he knows all the facts, as far as the Scrutiny Members have given them. He then says, "The law is not clear, I would say it is 50:50 that it can go this way or that". The impact upon other sets of policy things coming up is such that Scrutiny might feel that they ought to take course B, or, indeed, that the public would support that very much better than course A, which has been recommended to the Council of Ministers.

That sort of advice is very difficult for one side to give the other when they have received it, is it not?

DEPUTY LE HÉRISSIER: Absolutely.

LORD CARSWELL: Where do you resolve that and how?

DEPUTY LE HÉRISSIER: Well, I suppose ultimately, if the will is there it will be resolved with a court of law. It would look rather stupid, I suppose, if the two sides were operating with different approaches to the legal issues.

LORD CARSWELL: If it is a matter of really what is the best thing to do bearing in mind how the law is likely to be, rushing into court to get a black and white answer is not always the best thing in the public interest.

DEPUTY LE HÉRISSIER: No, no.

LORD CARSWELL: Some third way is very often the best of all. On the assumption that outside legal advice will be required from time to time by Scrutiny, with the best will in the world, would it be advisable to consider having a constant source of that advice, one post holder or one firm on suitable terms, rather than people who might not get the same experience?

DEPUTY LE HÉRISSIER: Ideally, yes, Lord Carswell, in the sense that it would enable you to build a relationship. But it would also depend on the subjects. I mean if it was human rights, for example, you might have to go to a specialist chambers, as indeed has been the case.

On the issue of how can we resolve it. I mean, in a sense, rather than always having to go to a court, you could argue it's up to each party to, be engaged in a process of educating each other. One of the things that happens at the moment is that every law has a statement, saying it is hereby confirmed that the law is compliant. Now there is no explanation as to how that was arrived at, that decision. If there were proper explanations I think that would go some way to starting to engage members, you know, in the process. They would start to see the rationale. But to have a bald statement like that, again, which plays a very important role in some laws as to whether or not they go through strikes me as, again, putting the back-benchers in the dark. It doesn't enable them to really appreciate what the thinking is that has gone on. You should be able to see that.

LORD CARSWELL: That is pretty standard of other legislatures as well. It comes into court and you see the minister has certified that this is compliance with human rights and there is a sort of ripple goes around, "Well that is what he thinks".

DEPUTY LE HÉRISSIER: Yes

LORD CARSWELL: Ian, anything you would like to follow up with, at all.

MR STRANG: Do you think that there is a danger that the advice is too close to the establishment, i.e. the advice from the Attorney General or whatever? You know, it is close to the establishment line and therefore it might not be as independent as one might wish. He is giving advice to them, the Ministers, you know, is he likely to have wanted, you know, to reach their conclusion and therefore, possibly, not be as objective as he might be if it was, say, a third party, a firm, or different counsel giving the advice to the States on a particular issue?

DEPUTY LE HÉRISSIER: Yes, I think you've got a very good point. I'm sure the Attorney General will argue otherwise, you know, that he keeps within those strict parameters when he gives advice. But there is always that danger, yes.

MR STRANG: The reasons why the advice, I appreciate the normal reasons that the advice is confidential to the people you are giving it to, but do you think there are real reasons why that should not be public when it is being given to the States, which is an elected body? Do you think there are reasons why that -- I mean you are saying it is being given confidentially to Scrutiny, but should it be more widely available?

DEPUTY LE HÉRISSIER: I've got no problem. I mean the Attorney General's argument always was to Scrutiny the very well-known one that Lord Carswell used, that is the client/lawyer relationship. If there were to be a legal case down the line, then we would be compromised if that advice were to be revealed. But my view would be it could be done on a case by case basis. I mean all the Les Pas advice, as I recall, was ultimately revealed, even though a lot of people at the end of the episode, of course, felt very unhappy with what had gone on for political as well as legal reasons.

MR STRANG: Yes.

LORD CARSWELL: Can we get on to a quite different topic? You mentioned, in passing, a conflict between the Attorney General's role, as prosecutor, and his role as titular head of the Honorary Police. In which particular way do you see this conflict arising?

DEPUTY LE HÉRISSIER: Well, although, Lord Carswell, we know that it's the States Police who carry out most of the investigations - - but the file is prepared and it is Honorary Police who make that decision about charging an individual.

My view would be, as the Attorney General is head of these police, it strikes me as very odd that he should then be - - he should be separate from that process. He should not be the person who is -- I mean we struggle with this term "titular" whether it means operational head, broad picture head or whatever, or notional head, but it's a strange term. But, at the end of the day, the Attorney General makes some very fundamental issues about the Honorary Police -- sorry, fundamental decisions about individuals, about whether to discipline them or not and so forth and so on. It strikes me as very odd, holding these very serious managerial responsibilities for the police, he then also, as prosecutor, has to make an independent decision about the decisions that they have made for possible prosecution.

LORD CARSWELL: Well, historically, the police have been involved in prosecuting for generations. It is only in relatively recent years, in parts of the United Kingdom, that separate prosecutions, separate from the Police, has evolved.

That, if I remember correctly, was because of resources and administration rather than because it was felt that there was any great conflict between the roles of investigation and the role of prosecuting. Do you feel that there is a conflict between those roles?

DEPUTY LE HÉRISSIER: I'm not sure there is a conflict but I think there is a perception that, in a small society, people monitor these decisions very closely and they get very, not obsessed with them, but they get very interested in them. My view is, Lord Carswell, that the Honorary Police carry out policing in our society and, in order to avoid any allegation that

they are not being superintended in as rigorous a fashion as possible, the person who is responsible for their overall management should not be our Law Officer.

LORD CARSWELL: Obviously, if the question arose of prosecuting a member of the Honorary Police, the Attorney General could stand aside; that goes without saying. But this is really not what you are talking about, it is actually using their investigation whether it is felt that it melds in correctly with his role as deciding on prosecutions.

DEPUTY LE HÉRISSIER: Yes. But actually I would also support the inference of your first comment. Clearly, he or she will know a lot of the officers, they will work with them and depending -- particularly in the town area, obviously there's a lot of work goes on there. They will know them, they will know of their work. So, there is a closeness there and I'm not sure, sir, it's wise to retain it.

LORD CARSWELL: If the Attorney General were not to retain that function with the Honorary Police, to whom should it be given?

DEPUTY LE HÉRISSIER: A very good point. Well the Island is struggling, as you may have heard at the moment, with the possible establishment of a police authority. The intention is, ultimately, although there have been a few hiccups along the way, that there needs to be an authority --

LORD CARSWELL: But that would not deal with everything. That would deal with resources and policy. Police Authorities do not deal with discipline.

DEPUTY LE HÉRISSIER: Yes. No, no.

LORD CARSWELL: Who would be the one who would say, “So and so has to have his knuckles rapped”?

DEPUTY LE HÉRISSIER: Well, you’ve raised a very good point. There can either be somebody from within the body of the Honorary Police who would be elected as a Chef des Chefs, so to speak, the chief of the chiefs, and if the Honorary Police want to keep it. My political reading of the situation is that they would want to keep that prerogative within their circle, so to speak.

LORD CARSWELL: It would have to be somebody who would have the same authority of the Chief Officer of the States Police.

DEPUTY LE HÉRISSIER: Yes.

LORD CARSWELL: Because, if I understand the position correctly, say the Police Complaints Authority gets a complaint, it investigates it, it says this is wrong, refers it over with a recommendation to the States Police that a disciplinary proceeding is to be taken against Sergeant X. That then is set up within the police discipline procedures and a senior officer presides on it. The disciplinary body comes to a conclusion, yes or no; if yes, then that body and the Chief Officer decide on the sanction, whatever it might be.

That is clear, that is structured; you would have to have somebody with that same authority for the Honorary Police if the Attorney General did not do it.

DEPUTY LE HÉRISSIER: Yes, but the Police Complaints Authority does apply to the Honorary Police as much as to the States Police.

LORD CARSWELL: Yes, but they do not judge, they only recommend.

DEPUTY LE HÉRISSIER: They only recommend, yes.

LORD CARSWELL: It is a very clear dichotomy. Well, we will be hearing lots of things about that. Before we do, Mrs Backhurst, have you any further thoughts on Honorary Police?

MRS BACKHURST: I think you have actually covered them, most of them, thank you.

LORD CARSWELL: One of the major issues is whether the Bailiff should remain as President of the States and confine himself to his other functions, particularly judicial functions. I think you have made it fairly clear that you think he should not hold both offices.

DEPUTY LE HÉRISSIER: Yes, yes. Yes, I would tend to that view, Lord Carswell. I know it's a role that is held in very great affection; it is a role that has played a very important part, as you said in the earlier comments, in the history of the Island. But I think we've reached a point, well we reached it some time ago, where I think there has to be a clear separation between the Royal Court and the States.

LORD CARSWELL: Is that on the grounds of perceived conflict for the purpose of human rights or that you felt that the States would function better with a different President, or both?

DEPUTY LE HÉRISSIER: I would say perceived conflicts probably, yes.

As I say in my paper, as part of that role he assumes - and it's been a "he" until now - the role of guardian of the constitution and civic head. Certainly, in terms of guardian of the constitution, I don't think any of us can quite determine how this evolved, but it is there and it is a term that's now entered the lexicon. In terms of guardian of the constitution it does involve the possibility of moving into political areas.

The previous Bailiff, Bailiff Bailhache, made some quite strong comments, for example, on the Clothier Report, just before we were due to go to debate, as I was to know to my cost. He made some quite strong comments: that this was an interference with tradition and it would really undermine things. He has also written an article - which I think is a very interesting one - in the Jersey Law Review, outlining what he sees as the importance of the role of speaker but, even more to the point, sort of ancillary aspects that go with the role of speaker. It is hard just to detach the speaker from the States when you do that; you have to realise you are detaching other things.

There was a Liberation Day speech, which you will doubtless hear about, when he commented on how he felt the Island was being treated with reference to Haut de la Garenne, and he was also very outspoken on the conditions under which we should seek independence, and I felt that those were political issues. It was very hard. Others would argue, well, he is above the fray, he sees the bigger picture, he is not involved in day-to-day politics, so he can see the need to preserve the constitution and so forth.

But in my view, Lord Carswell, ultimately these are political issues and, although the reputation of the States is not at its highest at the moment, I think would be one way of putting it, these are issues we have got to wrestle with, we have got to face up to.

LORD CARSWELL: A number of people have mentioned to us the advantage that the Bailiff has as presiding officer, that he has the standing and the experience and the ability to be the most effective person as president. Do you go along with that? Do you think other people could do it as well or at least satisfactorily?

DEPUTY LE HERISSIER: I think at the very least satisfactorily, yes, I think so. I mean there is experience in other legislatures. Gibraltar is a very interesting one, because they go for a retired person; it tends to be a retired lawyer, and as I understand it, it works very well. Okay, it is a much smaller legislature than ours; we are looking at under 20. But no, I do not think it is beyond the wit of man and woman with the right experience, once they grasp how the States operates, to master the job.

LORD CARSWELL: Will you have a long queue of people wanting to do it?

DEPUTY LE HERISSIER: Probably not, no. No, they would see the States as a bit of a bear pit and they would, no doubt, be reluctant. But I am sure people would appear.

MRS BACKHURST: If you did have somebody like that, you would want to apply, theoretically, the same branches that you are trying to say that they have, are you non-political, and yet inevitably you have got Political, with a large capital and the lower case, and there would be areas that this person might develop this role in some way.

I was interested, you mentioned a previous Bailiff, and I will not go into any detail, but there were some things that were quasi-political but which you might have agreed with, and therefore you would not have trouble with, and yet you are kind of saying, "No, the Bailiff or

the President of State should disassociate themselves completely from any political issues”.

I think it is very difficult to decide what is political and what is not, and I could see this role developing, because otherwise you are going to have a bit of a power vacuum. Perhaps the Lieutenant Governor will move into it; I do not know. Maybe the Chief Minister will develop in other ways. I am not quite sure I see how it will work - nobody can see that entirely. I wonder about your comments on that.

DEPUTY LE HERISSIER: I do not see a problem. Obviously sometimes it will depend on the person, and as I said in here, sometimes on the Island it is the person who defines the position rather than vice versa. But if we take the Bailiff's role under the description of speaker, it is basically somebody who can run the States in an efficient, procedural sense, and I do not see how that could lead them into political areas, unless they wanted deliberately to move into those areas.

It is a very full-time job running the States in a procedural sense; it is a very active body; there are all sorts of questions to answer about Standing Orders; there are issues to resolve, both in and out of the House around Standing Orders. I think there would have to be a mechanism if the House felt they had no further faith in the person because they were moving into political areas, then there would have to be a mechanism to deal with that.

MRS BACKHURST: The Bailiff could still abide - the present situation - by those rules, could they not?

DEPUTY LE HERISSIER: Yes, they could. But it strikes me - and this is the difficulty I have had - a lot of the prestige of the office, or the attributed prestige, comes from the fact that the

Bailiff rises above the fray. He is guardian of the constitution. He is civic head. All these things flow from being Bailiff.

MRS BACKHURST: Would the same thing happen, then, if he was head of States? Would they take on those things as well, or not?

DEPUTY LE HERISSIER: No.

MRS BACKHURST: They would not. The President of States would not have a part in the constitution?

DEPUTY LE HERISSIER: No. Those things ultimately will have to revert, as you intimated, to maybe the Chief Minister. Maybe we need a group of wise people, which we are told we already have, but maybe we could put them in a second house, and we could look at that structure. There is no doubt one of the issues, and I do allude to it in the paper, which Clothier found, it is very difficult to reform Jersey Government in an ad hoc way, as I am sure you have found out much more than I have. Once you start interfering with one thing, other things start tumbling or they start being affected.

But I think ultimately the development has to be that, if an issue is political in the broad/political/constitutional sense, it has to be dealt with by the political side.

LORD CARSWELL: Could I just understand the implications of what you are saying as clearly as I can? If the Bailiff ceased to be President of the States, do you think that he then could no longer hold himself out as civic head?

DEPUTY LE HERISSIER: Thank you, Lord Carswell. Yes, I think it would be very difficult, and I know Clothier recommended that he be divested of the States role and he stay as civic head.

LORD CARSWELL: But how?

DEPUTY LE HERISSIER: Well, exactly. I do not think it is fair to the individual; I do not think you would give them a job of any substance in that side of the work.

LORD CARSWELL: You can declare that somebody ranks first in precedence but, if everybody else thinks he is number four or five, that is not an awful lot of use.

DEPUTY LE HERISSIER: Yes.

LORD CARSWELL: To be a chief justice is, I hope, a decent position, but you do not regard yourself as number one in the state.

DEPUTY LE HERISSIER: No.

MR CRILL: Do you consider that the role of civic head would disappear, and it would just morph into the Chief Minister's function?

DEPUTY LE HERISSIER: I think you are right; I think it would partly morph into the Chief Minister's function. But there is another attending at the party, so to speak - the Lieutenant Governor. I think there would have to be further discussion. It is a great pity that your Panel was not tasked with looking at that role, although you might be glad of some limitations.

MR CRILL: Given that the Chief Minister is almost, by definition, something of a polarising and divisive character; for example, a 15,000 petition against GST alienated him from a significant proportion of the community. What would the removal of the Bailiff as civic head do to that sense of community? Would it be replaced by the morphing into the Chief Minister, do you think? Or do you think there is no sense of community that is held by the civic head?

DEPUTY LE HERISSIER: No, I think the civic head in their own way did take the community role very seriously, does take it very seriously. But I think we would have to look to a rearrangement of the Chief Minister's job. I do not think a Chief Minister is always polarised. It is understood, for example, with the Prime Minister of Britain that there are things that they do where they have to rise above the political fray, and it is understood that they are doing that. They seem to be able combine both. Okay, things do get intense at times, but there are things like relating to the military and so forth and so on where to an extent - they have to operate in an "apolitical" way.

MRS BACKHURST: Just following on from that, the opaqueness of the appointment of the Bailiff and all that, could you explain to us how the Chief Minister, if the Chief Minister then took on the job, it seems to me that there might be an opaqueness about that election or whatever it is.

DEPUTY LE HERISSIER: You are quite right. There is talk of changing it. As we know, we have got into change in Jersey; it is a fairly rocky road at the moment. Well, he is basically indirectly elected; the people elect the members of the States.

MRS BACKHURST: But if you were somebody who stood for, say, a council, and quite often

you stand for council, nobody else stands against you, so you are elected, but there has been no actual voting process gone on. You could then come straight in as Chief Minister, never been elected; there is all this positioning, obviously, but there is nobody then who oversees that perhaps the wrong person has been chosen as Chief Minister, and perhaps government breaks down and anarchy breaks out. Is the Lieutenant Governor going to then march in? I do not know.

DEPUTY LE HERISSIER: Yes, yes. Well, there are two answers to that. One, of course, is to reform the States, but as you know, that has been a very slow and arduous process, but it appears at the moment, insofar as you can read the tea leaves, it appears that people want the current composition.

The other way around it, of course, is to go for direct election of Chief Minister, because when you go and vote in a party system obviously, you know, essentially, unless you are going to get a hung parliament - which I suppose is a possibility - you know essentially when you vote for a party, you know who their leader is and you know if that party wins, that leader will, to all intents and purposes, become the Prime Minister or the Chief Minister.

MRS BACKHURST: The person could be dismissed by lack of electoral -- in other words, a vote of no confidence.

DEPUTY LE HERISSIER: Yes. We are not famous for running votes of no confidence in the States, but that would trigger off another election, if we were talking about direct election of the Chief Minister, yes.

MRS BACKHURST: As you say, you move one thing, and that knock-on effect might need

yet another thing to be done.

DEPUTY LE HERISSIER: Absolutely.

LORD CARSWELL: Certainly it would be a very, very considerable change, once again, in the affairs of Jersey. When you go back a few generations to Lord Coutanche's time, the Bailiff was quite clearly the kingpin of the whole thing. His functions have changed since then, I think, modified with the passage of time, but your suggestion would necessarily involve a very significant change right around at the top of government in Jersey. One has to face that.

DEPUTY LE HERISSIER: Absolutely.

LORD CARSWELL: Whether it is right or wrong, but one has to accept that that would be the consequence.

DEPUTY LE HERISSIER: Quite. I think when we brought in part of Clothier, when we brought in the role of the Chief Minister, we did not really think about what the other implications would be, I am afraid.

LORD CARSWELL: May I ask, have any other members anything before we close this? Yes, please.

DR MOUNTFORD: Can I just clarify about if the Bailiff was not in the States, as the leader of the States, are you saying that the Chief Minister could take that role? Or you would not, because you are not happy about --

DEPUTY LE HERISSIER: No, I think the word “leader” is a misnomer. The Bailiff is in the States as the President, although much of the discussion focuses on his role as speaker physically within the States. It is those associated roles like guardian of the constitution, where he starts getting into what I would say is the political side. But no, there is no way the Chief Minister could become the speaker of the States. It would have to be another person.

DR MOUNTFORD: With the knowledge to deal with Standing Orders.

DEPUTY LE HERISSIER: Yes.

DR MOUNTFORD: How do you see his role at the moment, absolutely, as someone who is in that situation? When you are part of a group where he is the speaker, what do you see as the most valuable role?

DEPUTY LE HERISSIER: Well, so much depends on the individual, obviously, how they run the Assembly. But the most valuable role, obviously, is keeping order but ensuring that all sides of the Assembly have their say and getting through the business.

DR MOUNTFORD: So procedural?

DEPUTY LE HERISSIER: Yes. Well, that is in the Assembly. Obviously, these issues that I have alluded to like the call for independence, the comments on Clothier, Liberation Day speech, they flow from the role, but they did not actually physically take place in the Assembly.

LORD CARSWELL: Well, you have given us a great deal to think about, Deputy Le Hérisier, and we are very grateful to you for the trouble you have taken both in your written submissions and in your oral evidence. We will have it recorded, transcribed; you will have an opportunity to make sure that it represents what you actually did say.

DEPUTY LE HERISSIER: Yes.

LORD CARSWELL: We will, of course, take it into consideration along with the rest of the evidence when we come to our conclusions. Our best thanks to you.

DEPUTY LE HERISSIER: Thank you.