

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

**Date:** 10th June 2010

**Review Panel:** Lord Carswell, Chairman

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

**Witnesses:** Senator B E Shenton,  
President – Chairmen’s Committee

**Lord Carswell (Chairman):** Good morning, Senator Shenton, you are very welcome to give some assistance to the Panel set up to review the roles of the Crown Officers. I have set out in public before, and it has been well circulated, what our objects, aims and methods are. It is simply that the States have requested us to look at the role of the Crown Officers in principle, rather than being concerned with how each may have done it terribly well or terribly not so well. So we are looking at the principle to try and see whether the roles ought to be amended or ought to remain as they are. There has been a certain amount of talk in the papers about an issue which is technically called “perceived bias”, which is how the conflict might be seen by a reasonable observer standing back with knowledge of the facts. It does not mean for a moment that anybody has suggested that there was actual bias on the part of any Crown Officer and we go on the assumption that there is not, but it is a question of perception. We are sitting in public at the request of the States. Our proceedings are made public, the submissions, written submissions, are published on our website, and there will be a transcript of today’s proceedings, as of other days. You will, of course, have an opportunity to check it for accuracy before it is put on the website and into the public domain. So, we are grateful to you for your attendance. We have from you a written submission, but that is in your personal capacity rather than as Chairman of the Committee, and I think today we are concerned with your role as President of the Chairmen’s Committee and what the Chairmen’s Committee find, with particular reference to obtaining advice from the Attorney General or other sources on legal matters. So, is there anything you would like to say to us about that issue? It would be very helpful if you can do.

**Senator B.E. Shenton:** I would just like to start by just clarifying what you said. As you are aware I have done a written submission, a private submission in my own name, but the reason for being here is very much as President of the Chairmen’s Committee and I am not

here in connection with my own personal thoughts. There was a letter written on 23rd March 2010 ...

**Lord Carswell:** Yes, we have that, thank you.

**Senator B.E. Shenton:** ... to give individual Panel's views where they wish to make a submission to the Panel. I think probably where I, perhaps, should start is to say that the opinion, perhaps, is that the Law Officers do not understand Scrutiny.

**Mr. G. Crill:** Sorry, whose opinion is that?

**Senator B.E. Shenton:** Well, if I may just go on to say that the Law Officers do not understand Scrutiny, but in my experience I have not found anyone that actually does understand Scrutiny. So, they are not alone in their view. Scrutiny is a part of government that is there to scrutinise the work of the Executive. Now, that is fairly simple to understand and everyone understands their role inasmuch as our task is to hold the Executive to account, to look at the policies of the Executive and to come up with alternatives, or point out errors or omissions, or, basically, be the checks and balances of the Executive. However, Scrutiny itself is a rather strange animal. If you go all the way back to when someone decides, any politician decides, to stand for government, they go along to the nomination meeting in the hope that they will be elected as a representative to do work on behalf of the Island. If they are fortunate, or unfortunate, enough to be elected, depending on your viewpoint, they are then perceived by the people of Jersey to be a member of the government. Once they are in the Chamber, an election takes place and they either end up on the Executive side of government or on the Scrutiny side of government. Now, their

ambition was to be elected as a member of government. That is why they stood and this is how the public perceive them to be. So, when government does something wrong they take the blame as much as anyone else. Having said all that, the view is, or certainly the view when you look at it from the provision of legal advice, and certainly it is the view of certain Ministers, that if you are on Scrutiny you are not a member of government, only the Executive are the government, and the Scrutiny members are almost like the Back-Benchers. They are Members of the Assembly, but they are not members of government. When it comes to the provision of legal advice, this is when the whole thing starts to get a little bit blurry. I sat for a period of time on the Council of Ministers, where the Attorney General was present at Council of Ministers meetings. I will not go too much into detail on that because that is not why I am here, but certainly as a Minister sitting at the table, when the Attorney General spoke I never knew what hat he was wearing when he was speaking. I did not know whether he was speaking from the point of view as the Attorney General, whether he was speaking as head of the honorary police, whether he was speaking as adviser to the States, or whether he was just giving his personal opinion, and so on and so forth. Scrutiny did have a run-in ... well not a run-in, a difference of opinion with the Attorney General with regard to the provision of legal advice to Scrutiny Panels. I think it was felt by the Attorney General, or certainly felt by Scrutiny, that his priority was to provide advice to the government. In his opinion, the government was the Executive and therefore they took precedence over the Scrutiny Panels with regard to the provision of legal advice. Similarly, from the point of view of Scrutiny, we get on to the publication of that legal advice and the fact the Attorney General did not want advice published, or even the fact that Scrutiny had taken advice from him because ... and you can understand to a certain extent of why that may be the case, but it did make the role of Scrutiny very difficult if you cannot put into a Scrutiny report when you come to a conclusion that you have taken advice and what that advice is. The whole thing remains

a bit of a muddle, but it is not just down to the lack of definition between Scrutiny and the Minister, it is just down to the way the roles tend to merge into each other and there is a general lack of clarity there. In the Code of Practice, Scrutiny Panels, if we look at them, they are very much written with regard to, I do not know, I would tend to see a bias towards what the A.G. (Attorney General) and what the Law Officers want. In the Code of Practice it says: "Neither the Scrutiny Panels nor the Law Officers will publish, without the consent of the other, the fact that legal advice has been sought." So you cannot publish that you have sought legal advice, the facts which have been given to the Law Officers for the purpose of taking advice, or the legal advice that has been given to the Panel. Now, this puts you in a straitjacket if you are looking at something that does require legal advice. How the Scrutiny Panels have handled this is that we have drawn up a list of external lawyers that we can go to for legal advice when we feel that that legal advice is needed and needs to be published.

**Mr. G. Crill:** Sorry, does that Code only apply to the advice obtained from the Crown Officers or does it apply to legal advice sourced from wherever?

**Senator B.E. Shenton:** Only from the Law Officers' Department. However, the Code of Practice do cover the advice from the private sector as well. It says: "Where a Scrutiny Panel takes legal advice from the private sector it is desirable that it should consider disclosing that advice to the Law Officers in order that any potential disagreement about the law can be identified" and so forth. Now, this is a case of the Law Officers wanting to have their cake and eat it. The Law Officers have said that where they have given legal advice to the Executive, under no circumstances will they disclose that legal advice to the Scrutiny Panels.

**Lord Carswell:** May I ask you to pause there for a moment? Is this the Council of Ministers saying they will not produce it or is it the Law Officers?

**Senator B.E. Shenton:** Is this the ...?

**Lord Carswell:** Is it the Council of Ministers saying: "It is our opinion, I am sorry, we will not show it to you", or is it the Law Officers saying: "We will not allow it to be shown"?

**Senator B.E. Shenton:** It is the Law Officers saying: "We will not allow it to be shown."

**Lord Carswell:** Well, I think we will have to discuss that with the Law Officers, who we are seeing again, because I am not sure of the validity of that proposition. An opinion is the property of the person who receives it. But I am not going to come to a firm view on that; I would like to hear the Attorney General on the subject.

**Senator B.E. Shenton:** Okay, the Attorney General, the current Attorney General's views; I mean most of the views of the Attorney General were the previous Attorney General's as opposed to the current Attorney General. So Scrutiny Panels do not have access to advice from the Executive, but what the Code of Practice say is: "You cannot see the Executive's advice, but if you get any advice we want to see it." Now, that is hardly transparent or hardly a level playing field. I sort of reiterate the fact that there tends to be an assumption among Scrutiny that the Ministers take preference as clients of the Law Officers' Department as they are, in the eyes of their boss, the government, whereas Scrutiny is not. In looking back at the occasions when scrutiny has asked for legal advice, it has been, on numerous occasions, submitted both in a timely manner and been submitted and been very useful to the Scrutiny

Panels. So, I should like to make that clear. There has been the odd occasion where the provision of the legal advice has been too slow and that is probably more to do with the fact that when you are dealing with certain issues, especially if you are doing a very quick Scrutiny Review of something that has come into the Chamber, the time constraints are quite onerous.

**Mr. G. Crill:** Is it always the case that Scrutiny works to a set timetable, so it has to deliver a report within a given period?

**Senator B.E. Shenton:** No, it is not. Certain reports will be limited by the fact that, for example, a proposition may be up for debate on a certain time. Obviously, the Scrutiny Report has to be prepared and in the public domain before the debate so that people can take on board the recommendations. Other more generic reports can drift. In my experience sometimes when you are undertaking a Scrutiny Report you may start off with something that looks fairly simple in essence, but as you take evidence you find the more you dig the more you uncover, and what starts off as a fairly simple review turns into an absolute nightmare, going off in all directions, and does take longer to come out into the public domain and be finished.

**Mr. G. Crill:** Would you be able to say whether there is a more frequent requirement for legal advice in respect of propositions, so where there is a timetable, or your own scrutiny investigations?

**Senator B.E. Shenton:** Probably more in own scrutiny investigations rather than the other. Having said that, one of the weaknesses identified by the Chairmen's Committee is the lack

of legislative scrutiny that has been undertaken by the Scrutiny Panels and it is something that we would try to improve upon. Because we cannot, as Scrutiny, record the legal advice that has been sought from the Law Officers, it means that we cannot be wholly transparent in the reports that we produce. The fact that we have to, where we do use it, negotiate with the Law Officers' Department whether we can use the legal advice and how it may be used can be quite restrictive and also very time consuming if you are going back and forth. When we have used independent lawyers and taken independent legal advice, we have never had any problem with the publication of that legal advice, albeit we would obviously make it clear when we were employing the lawyer that the advice would be published and that we would like to publish the advice.

**Mrs. M-L. Backhurst:** Could I ask the point, are there budgetary constraints which might stop you from taking private advice?

**Senator B.E. Shenton:** No, there is not; not at the moment because our budget is sufficient to do this. If we undertook a significant amount of further legislative scrutiny, we may find ourselves a little bit tight on the budget. I have some examples here of where we took on ... in 2006, on the Age of Consent review, we received advice from the Solicitor General. In the role of the Centenier in the Magistrate's Court we went outside and received advice from Mr. Jonathan Cooper in London. In 2008, we received advice from the A.G. but on the income support panel we took legal advice from Viberts, locally. Prison Board of Visitors, we took advice from Mr. Cooper and Data Protection, we have also taken advice from an independent advocate. We did have one case where the Panel took advice from the A.G. and then decided to take independent advice because of the constraints of not being able to publish or refer to it. Now, this obviously caused a little bit of concern by the Attorney



General who felt that, rightly or wrongly, that perhaps he was being used a little, inasmuch as the advice was taken from him and then the Panel went out and took second advice just to see whether his advice was correct or not, or, you know, the Panel was somehow playing games.

**Mr. I. Strang:** So was that advice shown to the second set of lawyers?

**Senator B.E. Shenton:** No, I do not believe it was, but because it could not be used or published it rendered it fairly ... useless is too strong a word but, you know ...

**Lord Carswell:** Was the second set of advice shown to the Council of Ministers?

**Senator B.E. Shenton:** The second set of advice was published in the Scrutiny Report, so it went out into the public domain.

**Lord Carswell:** Did it vary? I do not want to know details or particular cases, but have you found, in that case or in any other, that your independent advice seems to vary from the advice the Council of Ministers obtained so that it puts you into questioning the wisdom of a proposition because of the different legal advice you have received? How often and how serious is this an issue of difference, Senator?

**Senator B.E. Shenton:** Well, speaking personally, I have never found 2 lawyers that ever agree on anything so ... I mean I brought a proposition to do with *voisinage* and quoted the legal advice that had been published by I think it was Crill Canavan, which was on the newsletter to do with *voisinage*, and the Attorney General stood up and thought that was

totally wrong and inaccurate. So, I think it is fairly common for people to interpret the meaning of the law in different ways.

**Lord Carswell:** I must say personally I find it a little strange for a lawyer to feel slighted if someone else's opinion is sought. I cannot say that I had ever felt that, but certainly if you want to get another opinion, you are very welcome; I think mine is right, go ahead.

**Senator B.E. Shenton:** But if you were fighting a court case, or you anticipated that something may lead to a court case in the future, you would not necessarily want your legal advice to go out in the public domain.

**Lord Carswell:** No, I am saying ...

**Senator B.E. Shenton:** Where the opposition's lawyers will be able to see exactly how you have advised your client and it is a bit like showing your hands in a game of poker, is it not?

**Lord Carswell:** No, of course not. You are perfectly right there. What I was thinking was there is a feeling of resentment that advice should be questioned. I would have thought most lawyers ought to feel that they have done their best, given their best shot at the advice and someone else looks at it differently, so what?

**Senator B.E. Shenton:** Yes, well, I think one of the first impressions I got when I became a politician in 2005 was that I have never ever been in a place where paranoia has been so high. Perhaps that has something to do with it.

**Lord Carswell:** Have you any figures of the ... and I appreciate this may be very difficult indeed, any figure or even any guestimates of the number of times this becomes material in the course of the year?

**Senator B.E. Shenton:** We do not keep records of when advice was sought as such. We can try and dig out what we can from our records.

**Lord Carswell:** If you could give me a sort of impression now it would be helpful, even if you do not feel it is accurate.

**Senator B.E. Shenton:** It is not something that comes up too often.

**Mr. G. Crill:** So you would not require it for every report or is it a matter of course?

**Senator B.E. Shenton:** Absolutely not. In fact, I am Chairman of the Public Accounts Committee and we have never seen the need to obtain legal advice. As a States Member, I have sought legal advice from the Attorney General on certain issues but, obviously, that is completely different because as a States Member you do not go off and publish a report and the advice is taken and kept confidential as you would expect in any sort of client lawyer relationship. I think where Scrutiny is slightly different is you are trying to produce a report that is looking at the issues and when you come to a conclusion in the interests of transparency you should really put down all the stages and all the reasons for coming to that conclusion. If you have to leave out the fact that you obtained advice and what that advice was it is, perhaps, slightly misleading and opaque.

**Lord Carswell:** As a former practising lawyer, I know very well there are 2 ways of writing an opinion. There is one in which you are looking at the facts and the law, advising on that and advising on tactics or policy. There is another in which you simply set out the law for the benefit of your client on the basis that that is likely to be made public. In which case you do not go into partisan issues or questions of policy or anything else, you just simply set out the law, something like a judicial judgment: this is the law as I understand it to be and you can take it from there. I take it we are talking of opinions of the former policy kind rather than the latter objective kind?

**Senator B.E. Shenton:** Yes, yes, you are probably correct there. I think another problem is the fact that the Attorney General, as adviser to the government as such ... let us try and think of an example. Say, for example, a Scrutiny Report found that a Department was breaking a certain law to do with waste management or something like that, and breaking the law. The Attorney General would then be on both sides of the fence, so to speak. He is giving advice to the Scrutiny Panel to say that the Department has broken the law, but he ultimately will be there to defend the Department if the Scrutiny Panel should push it to take criminal action, which has not happened, but if they wanted to push it to take criminal action against the Department for breaking the law. I had a situation when I was the Minister for Health, when we sought advice from the Attorney General because Transport and Technical Services were not complying to certain health protection laws with regard to the green waste facility down at ... We took action against T.T.S. (Transport and Technical Services) which is the first time it has ever been done, I think, where a Minister has taken action against another Minister. The Minister for T.T.S. was not very happy about it because: "We had got in there first", to use his phrase. In other words, we were using the services of the A.G., which does not cost Health and Social Services anything, whereas because we were using the A.G. he

had to go out and employ a private sector lawyer to defend the action from Health and Social Services.

**Mr. G. Crill:** Was the prosecution actually brought?

**Senator B.E. Shenton:** No, it was not. No. Because the problem is when you get into a situation like that, although ultimately the concerns that we had were sorted out, but the problem that you have with that is it is taxpayers' money and you are passing it around. We had to make sure that they did take action because they were not operating to best practice. If we had pushed it they would have spent a considerable amount on legal fees to the private sector to defend themselves and maybe had to pay a fine. Ultimately, that is just taxpayers' money.

**Mr. G. Crill:** But as far as the Crown Officers' role is concerned, my understanding would have been in that case the Crown Officers would have prosecuted and the respondent Minister would have taken the independent defence advice.

**Senator B.E. Shenton:** Yes, which he had to do, which he was not very happy about because we had got in there first and got the free advice of the A.G.

**Mr. G. Crill:** But the A.G. would still have put his prosecutory role first.

**Senator B.E. Shenton:** Yes, he would, yes. He would have done. Now, I am not quite sure what would happen if it had been a Scrutiny Panel that had gone to the A.G. and said: "You know, we believe that this is wrong. We would like to request criminal charges to be taken."

**Lord Carswell:** If, in that case, you are talking about the Council of Ministers, or a particular Minister, taking the Attorney General's advice first and the Attorney General had said there may be a case against you, you may have been in breach of the law. Then if it came to prosecution he would have to hand that over to somebody else anyway. He could hardly advise the defendant and then prosecute him. This must occur in all societies, not just Jersey.

**Senator B.E. Shenton:** Yes, but I think where it goes down under the Code of Practice ... the Code of Practice says that where we do take independent advice we should tell the A.G. Whereas the Council of Ministers, when they take advice, they do not have to publish, disclose that advice or ...

**Lord Carswell:** From your experience of it, do you think that is a practice that should be liberalised? Bearing in mind that certain things must remain confidential but not all, how do you see it yourselves? You are much closer to it.

**Senator B.E. Shenton:** I think the first thing you have to do is clarify what Scrutiny is and move away from this ridiculous idea that only members of the Executive are members of government. You know, it is contrary to the beliefs of every politician that ever got elected, that sits on the other side of the Chamber.

**Lord Carswell:** Decisions are all decisions of the States; all Members of the States are supposed to participate, only there is ... instead of the committee system, there are Ministers carrying out these functions, but there is not an opposition. It is a testing process which

Scrutiny is set up to do. It sort of falls somewhere between a completely unilateral chamber and the set of government and opposition in a chamber. I can appreciate that it cannot be easy to ...

**Senator B.E. Shenton:** Yes, I think in theory that is the case, in practice it is not the case. In practice it is divisory and it leads to the actions of the Law Officers' Department as it is where they seem to give preference to the Executive side of government.

**Lord Carswell:** From what you have seen, would you regard the practice as being too rigid about withholding advice in terms of practical effect as well as theory?

**Senator B.E. Shenton:** Well, the way we operate now, going forward, is that we would now tend to seek external advice and not go to the Law Officers' Department.

**Lord Carswell:** Because one could very well see the situation being that in a certain percentage of cases, whether it is large or small, the advice the Ministers have obtained, there is no need to withhold it. To what extent do you think that is the case from what you have seen of the work?

**Senator B.E. Shenton:** In my experience, whether there is any need to withhold it or not, they will withhold it.

**Lord Carswell:** But are you able to give us any assistance on how necessary it is; if they liberalised their approach to it and only held back those where, obviously, it would cause problems if Scrutiny obtained the advice?

**Senator B.E. Shenton:** I would prefer to go down the road that we are going down, which is to seek independent advice. Because if, ultimately, the advice we receive is that a Department is breaking the law, I would not necessarily want to share that with the Law Officers' Department at an early stage.

**Mr. I. Strang:** So you would not share that advice to the Law Officers then? You would keep it confidential?

**Senator B.E. Shenton:** We may well show that to the Law Officers, but the timing of the disclosure to the Law Officers may be quite crucial.

**Mrs. M-L. Backhurst:** I think it is possible, but I am not 100 per cent clear on this, that the Law Officers are concerned about the confidentiality and if advice that they gave to the Ministers was given to Scrutiny, they would want to ensure confidentiality, or is simply that they just do not want to give the advice, show the advice at all, because it does not belong to Scrutiny because Scrutiny is not a part of government? Is that the position?

**Senator B.E. Shenton:** I think that is the logic of the sort of rationale, I believe, the Law Officers have taken that Scrutiny is not part of government and, therefore, there is no necessity to show them the advice. With regard to confidentiality, I do not think that is particularly an issue. I do not think Members that work on Scrutiny are any less trusted than people ... With legal advice that may escalate into a court case, I cannot really see that it is in anyone's interest to give either side an advantage by, you know, publication of information that may be relevant at a later stage.



**Lord Carswell:** How obvious is it in those cases that this is going to be a question which may end up in prosecution or litigation?

**Senator B.E. Shenton:** It is not something that would happen very often, but I think with anything you have to work on the basis that it may happen and have a process that works to that.

**Mrs. M-L. Backhurst:** I have noticed that Senator Breckon has brought a proposition to change the machinery of government. It is likely that in future other ... I do not know whether this will be successful or not, we will see, but that other attempts will be made to ... perhaps because of the difficulties of Scrutiny as it is composed. If one changed or the Law Officers' attitude was different, one would not want them to have to change it again and again and again, to adapt to each new situation. Perhaps one would want an element of flexibility so that they could adjust to each new situation without a radical attitude. I mean, it may just be attitude; it may not be anything more than that. But I would not want to make anything too rigid: "You must give this advice or you must do this." It must be appropriate for the scenario at the time.

**Senator B.E. Shenton:** No, certainly. In my position as chairman of the P.A.C. (Public Accounts Committee), if we felt that we needed to take ... we have not taken legal advice, but if we felt as a committee we needed to take legal advice, I am pretty certain that we would take it from the independent sector and that that advice would belong to the Public Accounts Committee.

**Mrs. M-L. Backhurst:** Because you are feeling rebuffed by the A.G. or ...?

**Senator B.E. Shenton:** No, because if we are taking advice it is obviously in connection with something to do with government. We only look at issues of government.

**Mrs. M-L. Backhurst:** And, of course, you are part of government.

**Senator B.E. Shenton:** Well, not according to the Chief Minister and Deputy Chief Minister and the Attorney General, and quite a few others. We are not part of government; we are part of the Assembly.

**Mr. G. Crill:** So, are you saying in effect then that the ... your taking of independent advice is an acknowledgement that there is a general move towards a de facto opposition which needs to take independent advice? Whether it is because the Crown Officers or the Council of Ministers regard Scrutiny as an opposition, or you regard that you are not getting the same service as other branches of government, or simply because certain members of the Scrutiny Panels simply do not trust Law Officers to give impartial advice?

**Senator B.E. Shenton:** Well, I think where we were taking independent advice is because ultimately, if we believe that a Department or Minister has acted improperly, the A.G. will be called upon to defend that Minister or Department. I think it would be much cleaner for there to be 2 independent sources of legal advice, i.e. the A.G. on one side defending the department or the Minister, and the P.A.C. on the other side, as opposed to the mish mash that we tend to have at the moment where the A.G. is providing the legal advice and also

perceived to be defending the Minister whose legal advice he perceives may be in trouble. So, I think it would be much cleaner to ...

**Mr. G. Crill:** But the Minister would presumably be going out on something of a limb if he went against the legal advice, would he not?

**Senator B.E. Shenton:** It could be something just down to the interpretation of legal advice. We could take legal advice where the interpretation of the lawyer is that a human rights law or some other law has been broken, whereas it may well be the interpretation of the A.G. that that is not the case. You tend to get that as ... well, you are a lawyer, so you know how ...

**Mr. G. Crill:** The words “a grey area” are not unknown to the legal profession.

**Senator B.E. Shenton:** Yes, the words “a grey area”. Yes, I had a slight disagreement with the current Solicitor General in the Chamber on Tuesday just about the definition of an Article because he said it said: “Substantial” and the Article said: “Not insubstantial”, and he read that to be substantial, whereas I had put a different meaning on it. If they had meant “substantial” they would have written “substantial”. What they wrote was “not insubstantial”, which is slightly different. So there is the nuance there and you tend to get these little nuances all the time.

**Dr. S. Mountford:** Can I ask has your Chairmen’s Committee thought of any ways of overcoming the perception that Scrutiny is not part of government? Because you seem to be dividing more and more whereas ...

**Senator B.E. Shenton:** It is not perception. It is a fact.

**Dr. S. Mountford:** It is a fact?

**Senator B.E. Shenton:** Well, it is a fact as the Ministers would always say that Scrutiny is not part of government.

**Dr. S. Mountford:** Is this not part of ... because Scrutiny is as old as the change in government and it is not very long, it is probably still evolving. Do you think that in time it could be resolved or is this division going to get bigger and bigger between Scrutiny and the supposed Executive government?

**Senator B.E. Shenton:** It is going to get bigger and bigger.

**Mr. G. Crill:** The ultimate conclusion of that is you finish up with party politics and you have then an Executive and you have an opposition. Would you think, then, it appropriate that the Law Officers provide the legal advice to the government in power?

**Senator B.E. Shenton:** I think this is the problem with Clothier, to be honest with you, because the system was designed to work with party politics. Now, to force party politics on an Island that does not want party politics because you have designed a system of government that works better with party politics is not particularly democratic. I think ... personally, I think Senator Breckon's changes, where we move to a sort quasi committee system, may well have some success.

**Dr. S. Mountford:** What would happen to Scrutiny, which I see as a very important part of accountability? Would you see that disappear?

**Senator B.E. Shenton:** No, Scrutiny would be more defined than as a body that is not opposition but is an independent body within the Chamber to scrutinise the workings of government.

**Dr. S. Mountford:** So you are vesting ... I mean, I do not know much about Senator Breckon's proposition, but is it vesting more power in the group rather than the individual?

**Senator B.E. Shenton:** It is increasing the size of the Executive so that more people can feel part of government.

**Dr. S. Mountford:** So you still have Ministers but ...?

**Senator B.E. Shenton:** You still have Ministers but you have more Assistant Ministers and, therefore, you can have a more inclusive government, where you can take more Ministers ... more politicians with diverse views and include them in the Executive.

**Lord Carswell:** So far, Senator, we have been talking about the cases where the issue is likely to head towards litigation, and it is more straightforward in a way because at least you know that if the advice is one way it may determine what the parties should do, and if it is the other way then there is a fair enough case for keeping it confidential, at least on one side if not on both. But are there cases - and, if so, to what extent - where what Scrutiny simply wants to know is what is the legal basis upon which the policy decision was made where that

is not really in question, it is just a simple matter of finding out to make sure that you are looking at it on the same basis as the Ministers? I am sorry if that is a bit confused but I am sure you understand what I am getting at.

**Senator B.E. Shenton:** Yes, I think if the ... I will ask the department to forward you a copy of the Scrutiny Report on the role of the Centenier in the Magistrate's Court where the view of the Attorney General was that the role of the Centenier in the Magistrate's Court - it has been a number of years since I read the review - was completely human rights compliant and compliant in every way. The view of the ... the Scrutiny Panel took independent advice that said that this was not the case, or not necessarily the case. The Attorney General, as well as being the adviser to the Council of Ministers, is also the head of the honorary police and, therefore, ultimately the chief officer of Centeniers, if you like. So, this was very much a role that he would have to look at ... police and policy he would have to look at it with more than one hat on. Now, it is the ... as I say, the advice given has not really affected policy inasmuch as we still have a similar policy going forward, albeit the advice received was that perhaps it is not compliant. The judge and jury with regard to whether it is compliant, it seems to me, it is the A.G. who decided that there is no need for any changes.

**Lord Carswell:** Could I pose a hypothetical example which illustrates what I am trying to get at? Supposing there is a proposition regarding waste management and Scrutiny look at this and say: "Well, it may be okay but we need to know what the legal requirements are for waste management, particularly from the E.U. (European Union)." That probably will not lead to any great legal conflict because these questions can very often be ascertained relatively clearly one way or the other. Would you expect to get that advice passed on to you if it has been given by the Attorney General to the Council of Ministers?

**Senator B.E. Shenton:** If it is fairly straightforward basic advice, I do not think we would have any problem asking the A.G. Although, in 2009, he did make a complaint to Scrutiny ... I will just read the note here. This is to do with Ramsar: "The Panel approached the A.G. for guidance on what constituted *sub judice* re the Ramsar review, an ongoing investigation by the regulator." Now, I think that is quite a legitimate question because lawyers do throw up and tell you things are *sub judice* when they are not, in my opinion or my experience. They received a response but this was immediately followed by a complaint from the A.G.: "Response received but followed by a complaint when the A.G. discovered that the Department knew the Panel had asked them for the most basic advice." So, although they asked him for advice, because it was quite, in his terms, basic he then complained that they were misusing him.

**Lord Carswell:** I could see the work of Scrutiny in something like, let us say, waste management. You are looking at whether the proposal to carry it out is a good idea, whether it is inadequate, whether it is over-egging the pudding, or too expensive, or that something should be done in a different way. That is a perfectly sensible and proper operation of the Scrutiny Panel. But to know what you are obliged to do by E.U. law is a starting place and that would have been ascertained by the Minister in the ordinary way before the proposition is put forward. Speaking for myself, one would not see that there should be any problem about Scrutiny being told: "This is what we are advised, this is the law, this is the way we think it should be done. If you think it should be done in a different way that complies with that law, that is your function."

**Senator B.E. Shenton:** But how does Scrutiny then follow that up?

**Lord Carswell:** Well, I would have thought, myself, that that would be a pretty straightforward case in which there should be no difficulty in giving you the legal advice. Then you look at its application to see whether the waste disposal plan is a good idea or a bad idea, or should be somewhere else.

**Senator B.E. Shenton:** I think you are right. I mean, the Scrutiny Panels employ consultants that will often look at the regulation and say: "Well, actually it is in breach of this E.U. regulation or that regulation or this regulation." The report is produced on that basis. The question with regard to the effectiveness of Scrutiny is how do you move to the next level and make sure that these things are ... how do you hold people to account?

**Lord Carswell:** It is a complex system which, I am sure, is not into its final form yet.

**Mr. G. Crill:** There have been suggestions that there should be a separate Director of Public Prosecutions so that the Crown Officers' function as advisers would be separated out. Do you think that that would ease the burden on Scrutiny if the prosecutory function of the Attorney General was distanced, at least?

**Senator B.E. Shenton:** It is difficult to answer that as such because ... and this goes back to the whole of how Scrutiny works ...

**Mr. G. Crill:** What I really mean, I suppose, is which is the greater conflict that troubles you? Is it the conflict as between adviser to the Executive and the adviser to Scrutiny, or the conflict as between adviser to the Executive and the potential prosecution of the Executive?



**Senator B.E. Shenton:** I think both conflicts are fairly equal, to be honest, and both fairly relevant.

**Mrs. M-L. Backhurst:** I wondered if you had a view on the fact A.G. and S.G. (Solicitor General) are Members of the Assembly?

**Senator B.E. Shenton:** Well, I am here as President of the Chairmen's Committee. This goes back to ... I mean, as I mentioned to you, the Law Officers do not understand Scrutiny, but no one tends to understand Scrutiny and it is pretty clear from a letter that the Chairmen's Committee got from the Privileges and Procedures Committee earlier this week that that they do not have a clear understanding of Scrutiny either.

**Mrs. M-L. Backhurst:** You do not need to answer that question if you do not want to.

**Senator B.E. Shenton:** The Chairmen's Committee, as such, is just a co-ordinating body with the 5 heads of the Scrutiny Panels, which is mainly there to look at any problems that they have and also to make sure that the budget is allocated correctly and so on and so forth. The Chairmen's Committee has no real power as such, it has no opinion as such, which is why when we submitted the letter of 23rd June we just put down the views of the Panels. We did not submit a view of the Chairmen's Committee as such.

**Lord Carswell:** Well, Senator, we are grateful to you for your assistance today. We have appreciated that you are here in your official capacity and we have restricted ourselves to that. We have your own submission which is a different matter and I do not think it is the

time and place to go into that with you, but, of course, we will take it into account with the other submissions we have received. We are moving on with our process now. We have some distance to go but when we have completed taking evidence we will form our conclusions, prepare a report and submit it to the States for their consideration.

**Senator B.E. Shenton:** I imagine this is a bit like one of these simple Scrutiny Reviews that we think is going to take a week and then we end up taking 6 months, and spending hours and hours going in directions that we never even thought existed, let alone perceived that we would go down.

**Lord Carswell:** We shall see. Thank you very much, Senator.

**Senator B.E. Shenton:** Thank you.