

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: Mr M Wilkins, Viscount and Judicial Greffier

LORD CARSWELL: Mr Wilkins, may I welcome you to the Review. This is a public sitting of the body appointed to review the roles of the Crown Officers. What we are doing is examining the principles; we are not concerned, in any way, with the way that the offices have been carried out by the respective holders. In fact, that has not been the subject of criticism; you have had some distinguished holders of all the offices of which we are concerned. What we have been asked to do is to consider the principles involved and whether there should be any change in the way in which they carry out their different roles, or the extent of each role.

We have had the benefit, thank you, of your written submission, which is very helpful, and it was good of you to provide it for us. Before we go ahead to ask you anything about it, is there anything that you would like to add orally to what you have already put before us?

MR WILKINS: Thank you, Chairman. I would just like to say that I would prefer my submission to be represented by the written submission. I would prefer not, on the one hand, to detract from it in any way this morning nor, on the other, to clothe it with new nuances of meaning. The written submission has been very carefully formulated and it was submitted to the Panel in late February and I have seen no reason since to wish to review it in any way.

LORD CARSWELL: You have had considerable personal experience of the workings of the Royal Court and of various Bailiffs, as you say, Deputy Bailiffs, Attorneys General, Solicitors General, so you are in a position to say, from observation, how you think the system has been working.

Are there ways in which you feel there is a problem about the way in which the Bailiff is able to take cases when he has presided in the States, perhaps in relation to legislation which has been passed when he was presiding? This is one of our central issues in the Article 6 issue. We are very grateful for your thoughts on that.

MR WILKINS: Yes, I appreciate that, Chairman. I have not, in my experience, identified any problems. However, within my written submission I have made a suggestion, the suggestion which relates to recusal when the Bailiff has presided over matters in the States and in circumstances where, perhaps, similar matters could arise when he is presiding in the court. I think, as the Panel will see, that a solution is for the Bailiff to recuse himself from the court to ensure that the standards of impartiality are maintained and I believe that that has happened across the years, without fail.

LORD CARSWELL: How frequently has this arisen, that a Bailiff has felt it advisable to recuse himself because he had presided in the States?

MR WILKINS: I could not answer that question directly. Not very often but I am satisfied that, as and when such a need is perceived, that it does happen.

MR CRILL: Are you aware of it having happened during the course of the trial rather than before the commencement of a trial?

MR WILKINS: No.

LORD CARSWELL: This is something that has been going through my mind as to whether something unforeseen may very well take place in which it would come up in the middle of a case, which had maybe been running for some time, that there was a perceived conflict. That has not been your experience.

MR WILKINS: It has not, and I would expect a Bailiff to be able to anticipate that that sort of problem could arise from the outset and I would expect that that has duly happened, although I

cannot give particular examples probably because, in my experience, it has not happened.

LORD CARSWELL: Supposing a defendant is being prosecuted for breach of a particular statute, and the Bailiff had been sitting as President of the States during a passing of that statute, then that would be a fairly clear case from the outset and the Bailiff could see it without any difficulty.

MR WILKINS: The Bailiff would be able to see that such a difficulty could arise in a case such as that.

LORD CARSWELL: Yes. How about the litigant, if it was a case where a litigant felt that the Bailiff's participation in the States might have been material, how is he to find out whether the Bailiff presided? Is that an easy task?

MR WILKINS: I do not know, in practical terms, how easy it is. Of course the minutes of States recordings are now available; there is a type of Jersey version of Hansard.

MRS BACKHURST: Could I just ask briefly? I am sorry, it sounds a bit funny, I think in the case in Guernsey where the Bailiff could not appear, a Commissioner then took the Bailiff's case; was it Commissioner Beloff? I just wondered if you could explain a bit more fully what the role of the Commissioner is, whether he is a delegate of the Bailiff, or a deputy of the Bailiff, or how that comes about?

MR WILKINS: I would not want to speak with specific reference to the Guernsey case although, of course, I am aware of it. By a statute, which is mentioned in my submission, the Bailiff has authority to appoint Commissioners who sit as judges of the Royal Court in cases where, for whatever reason, the Bailiff, or the Deputy Bailiff, do not preside. In that situation,

they have all the powers of the Bailiff or Deputy Bailiff; they are President of the Court, as constituted at that time.

MRS BACKHURST: Thank you, sir. There is an acceptable alternative to the Bailiff sitting, that is what really --

MR WILKINS: Commissioners sit quite frequently for a variety of reasons, many of them not connected with Article 6 reasons; it may be that the Bailiff or Deputy Bailiff is indisposed, unavailable, that there is potentially a long trial, which very often happens in civil cases particularly, say, in a trust matter, something set down for six weeks, and one could not actually take the Bailiff or Deputy Bailiff out of circulation for that period of time very conveniently.

MRS BACKHURST: Thank you.

MR CRILL: Could I ask, on a practical level, the extent to which the Bailiff's involvement as President of the States interferes with the function of the Court? In other words, interruption of trials, interference with the timetable for setting down cases?

MR WILKINS: Well I think you would have to address the Bailiff's Chambers, who deal with the administrative arrangements. But, in my experience, my perception is that that sort of difficulty has not arisen and that the court diary and so on, presumably the States diary in as far as the Bailiff is concerned, are well conducted and well ordered, and I would expect that to be so.

LORD CARSWELL: Do you have many long trials which require the constant attendance of the judge who is sitting on it?

MR WILKINS: In criminal cases some trials, as you will know, are longer than others. In civil cases particularly, as I just mentioned in commercial trust matters, then litigation can be ongoing and, indeed, it may be considered advisable to bring a specialist judge in and appoint him Commissioner, if not already appointed, to preside over such a matter in terms of managing resources effectively.

LORD CARSWELL: The fraud trials, in particular, tend to be quite long and drawn out.

MR WILKINS: They can be, if they are assize trials of course, where there is further infrastructure, such as juries and so on, in place.

LORD CARSWELL: Does it mean that it is rather difficult for the Bailiff to preside at long trials because of the calls on his time made by presidency of the States?

MR WILKINS: I think there are various reasons which would cause the Bailiff to decide that a trial might be too long in terms of the commitment of time but, as I say, there will be various reasons, and perhaps States commitments would be one of them, and it is really a question that the Bailiff's Chambers would answer.

LORD CARSWELL: This problem has exercised me a little bit because I have seen it from the other end in my time. You get some long trials, for which a judicial chief will immediately try to get somebody else lined up, because that trial will require a lot of time and that other judge can handle it perfectly adequately. But there are some which are inevitably going to be long and difficult, and may be sensitive, where it is desirable that the head of the judiciary should himself preside. If you get trials like that it may be that the Bailiff would find it difficult to do that, even if he felt he should preside, because of the other calls on himself.

MR WILKINS: He might, but with great respect, it would be a question I think for the Bailiff's Chambers.

LORD CARSWELL: I think, to be fair to you, the Bailiff is the man to ask that one, but we will see, in due course, what he says about it.

The Attorney General, as the officer in charge of prosecutions, how frequently do you actually see him appearing in the Royal Court conducting cases?

MR WILKINS: Infrequently these days. It used to be the case that the Attorney acted more often in court. The Attorney has lots of duties and, in addition, the office of the Crown Advocate was created some years ago, so there is a level of courtroom assistance available there. Of course, there are further staff within the Law Officers' Department who are now available, who would not have been some years before.

LORD CARSWELL: Yes. These officers present prosecution cases on his behalf?

MR WILKINS: They tend to be Crown Advocates, too.

LORD CARSWELL: Yes. Fairly similar to the Advocate Deputes in Scotland, who act on behalf of the Lord Advocate.

MR WILKINS: I am not aware of that system, but it sounds as if it is similar.

LORD CARSWELL: Yes. From your perspective, does it work all right?

MR WILKINS: From my perspective, yes.

LORD CARSWELL: The cases are dealt with, they are covered, and they are satisfactorily put before the court?

MR WILKINS: Yes, and there is reference in my written submission to the mechanics of the prosecution system.

LORD CARSWELL: We have had a certain amount of written submission calling into question whether the Attorney General should continue to be the Head of Prosecutions and whether there ought to be a Director of Public Prosecutions, as the Rutherford Report recommended. Have you any views on that that you would like to put before us, Mr Wilkins?

MR WILKINS: I have expressed a view, Mr Chairman, within my written submission, a view which I maintain.

MRS BACKHURST: Could I?

LORD CARSWELL: Please.

MRS BACKHURST: Just to clarify something. The role of the Attorney General as Honorary Police, and I do not like to call this a titular head because I think it is very honorary, but obviously there are several roles within it. If one element of that was taken out, would it be more difficult, then, to continue with the other roles?

MR WILKINS: I think, to a large extent, they do interconnect. It is not a question that I have asked myself before now and, as I said to the Chairman, I have given some detail within my

written submission in relation to the use of legal advisors, peer review and so on. There are advisors too, who act in the lower court, the Magistrate's Court, on behalf of the Attorney, which seems to me to represent a good system of checks and balances.

MRS BACKHURST: If, for example, however, part of the responsibility that now resides with the AG, with the Honorary Police perhaps, the disciplinary part or some part of it was taken to, say, a police authority, would that impact then on the remaining roles that would preside with the AG?

MR WILKINS: I do not know at this moment. Can I respectfully suggest that that is a question for the Attorney?

MRS BACKHURST: Yes, thank you.

DR MOUNTFORD: Can I ask a question? I am fascinated by the statement you have made in your submission. You have acknowledged that change has developed organically but you have almost alerted to the possibility of, if people embarked on a process of fundamental deconstruction, that this would have a negative effect. I tried to understand what you meant, I read on. Can you enlarge on that a little bit?

MR WILKINS: I am sorry if my language has been misleading. What I meant by, "Organic change" is change that happens over a very long period of time. If we look at Jersey's history we see many examples of that, and I was trying to make the point that if you fundamentally change something that has developed over many centuries in that way then that is likely to destabilise the situation which we have presently arrived at. I cannot say in what ways it would destabilise it, but just to explain that apparent dichotomy between those two statements.

DR MOUNTFORD: Yes.

LORD CARSWELL: I think this is a very serious point about the effect of a fairly substantial change on a constitution which has its component parts, whether they are right or wrong, but we all know what they are and how they work at present. Once you take a brick out of the wall to put somewhere else, you get the question of whether the stability has been weakened and it may lead to other consequences. I think this is what you were hinting at, quite strongly.

MR WILKINS: Yes, Chairman. In fact, I almost used that expression when answering Dr Mountford, "Removing the brick from the wall", and decided not to because I am trying to be as objective as possible but I think it is a good illustration. This is a very important question, in my view.

LORD CARSWELL: But specifically we were discussing this with Deputy Le Hérissier about where the Bailiff would stand as civic head if he ceased to be President of the States and his major role was then President of the Royal Court. Would he then be able to maintain his primacy, which he has at present, because that has descended from the position where it was almost absolute to a role of primacy now, and would there be what you might call a power shift, or even a power vacuum as to who represented the Island, who was the number one person there. This is more than a theoretical concern, I think.

MR WILKINS: I agree, it is a very important question. As I say in my written submission, one could hardly have a Bailiwick, without a Bailiff.

LORD CARSWELL: Yes. Yes, well, that is a good terminological point, but it has got more to it than that, as you say. The Clothier recommendation was that the Bailiff cease to preside in the States but he should be declared still to be civic head. Would that solve it? Is a

declaration going to be the reality?

MR WILKINS: I do not know. I think that this question of organic growth over many centuries is so important that I think, as one begins to withdraw threads, one enters into a type of no man's land that could be very difficult for the Island, and it is not something I am personally in favour of, simply on the basis of my experience. I think it will be a step into the unknown and it would be discarding a resource which is very valuable to us.

LORD CARSWELL: Certainly it is a very clear warning to us to be very careful and thoughtful about any recommendation we might make.

MR WILKINS: Yes, Chairman, I think the greatest possible care is needed. I would agree, absolutely.

LORD CARSWELL: Because, as somebody a little jocularly said, that if the President of the United States rings up the Island and says, "I want to speak to the boss", who is it going to be, then?

MR WILKINS: Yes. I also mentioned in my written submission there is the protocol at the present time, as I understand it, whereby relations with the United Kingdom are mediated through the Bailiff as a channel of communication; of course, the Chief Minister is involved in that process, but it is a very delicate, I think, arrangement.

LORD CARSWELL: It is potentially productive of problems. At the present, happily, relations are good and it is not producing problems but one could see that, if relations were less harmonious, it could cause some friction as to who does what and who sends off what deputation, representation letter, et cetera.

MR WILKINS: Yes, and also who receives distinguished visitors, who receives Ministers of the Crown. It is a very complex question which I think needs lots of thought before any changes are made.

LORD CARSWELL: Yes. Because, at present, if there are distinguished visitors coming to the Island, the Bailiff will receive them and perhaps host an official entertainment for them. Is that not the usual course of events?

MR WILKINS: I believe that it is so.

LORD CARSWELL: But if the Bailiff's role was reduced, one could see questions being raised, "Well, should the Bailiff be doing that, or should someone else do it? Should the Chief Minister, should it be the Lieutenant Governor?" and heads being scratched a bit about it.

MR WILKINS: Indeed.

LORD CARSWELL: Apart from leaving things as they are, which is a perfectly understandable situation and we will look at it very carefully, but if they were to be changed, can you see any means of alleviating that problem?

MR WILKINS: It is not something I have addressed up to now and I think it is so complex a question that I would prefer not to speculate.

LORD CARSWELL: I can understand that, Mr Wilkins. Are there any other areas?

MR STRANG: You mention in your report the possibility of a conflict with the Attorney General

giving advice to the States; that if there was a conflict he would represent the Crown and the Assistant General might represent the States in that situation. Obviously, with a move to ministerial government and things, we have got a situation whereby the Scrutiny committees are seeking legal advice as well, and there has been some concern about whether the advice can be passed on that has been given to the Executive, the Minister. Are you aware of any problems there or, you --

MR WILKINS: I am not aware, I am sorry. I am not aware of any that have arisen.

MR STRANG: Right.

MR CRILL: We are concerned with the dual role of the Bailiff as President of the Court and also of the States. Is there any interrelation between the Judicial Greffe and the States Greffe?

MR WILKINS: I think the short answer is no.

MR CRILL: They are naturally separate by virtue of, obviously, the court would be quite separate from legislature; there is not any overlap deriving from the Bailiff's role.

MR WILKINS: No.

MRS BACKHURST: Over the centuries, there have obviously been changes. There are roles, and then the role slightly changes according to the circumstances. Do I understand that the role of the Viscount is a Crown appointment now, or no longer?

MR WILKINS: No, it is currently a Bailiff's appointment.

MRS BACKHURST: It is a Bailiff's appointment. Thank you. Originally the Judicial Greffier role was a separate role, or held by a separate person and it just happens that the two roles have been put together, is that correct??

MR WILKINS: Yes. Yes.

MRS BACKHURST: But the Judicial Greffe now administers the court system?

MR WILKINS: Yes.

MRS BACKHURST: But the Bailiff's Chambers does something else.

MR WILKINS: The Bailiff's Chambers provide the infrastructure for the operation of the Bailiff and the Deputy Bailiff and they deal with court timetables and so on, fixing dates for appearances before court, arranging for commissioners to come and preside over courts.

MRS BACKHURST: Okay, so that is no longer a function of the Judicial Greffe then, if it ever was?

MR WILKINS: If it ever was. It is no longer a function, yes.

LORD CARSWELL: So long as that works, I do not think it is going to be for us to interfere with it. Certainly, one can understand that the Judicial Greffe and the States Greffe would not need to have much contact with each other because they are in totally different spheres, everywhere.

MR WILKINS: Exactly, Chairman, yes.

LORD CARSWELL: Jersey is not unusual in that.

MR WILKINS: No.

LORD CARSWELL: The Crown Officers are accountable to the Crown, they are appointed by the Crown and, in theory at least, dismissible by the Crown.

MR WILKINS: Yes.

LORD CARSWELL: There has been conventional progression over the years, through Solicitor General up to Bailiff, not always automatic, but we have had discussion with that, both on paper and from previous witnesses; it has advantages and disadvantages. There is now a more open appointment procedure for all the Officers which, in theory at least, opens them up to all-comers. Have you any thoughts, or do you feel able or willing to comment on the appointment system?

MR WILKINS: No, I think I would accept the point that you have just made: there are advantages and disadvantages in terms of either approach.

LORD CARSWELL: The advantages are the gathering of experience, which I am sure you have seen operating over the years as Solicitor General, Attorney General, Deputy Bailiff, gather experience and know-how and it fits that person better for carrying out the duties of Bailiff. On the other hand, you may get one who, frankly, is a disappointment and just has not matured or developed and you have got this problem of whether one officer should, in fact, go forward to the next step. But if it is at least open in theory, then it may become more open in practice.

MR WILKINS: Yes. I think that I used the word in my paper in relation to this advancement that, generally speaking, that has been the case. But there have been Officers who hold those particular roles, the functioning of those roles, and yet have not been advanced; I can think of one Deputy Bailiff who did not become Bailiff.

LORD CARSWELL: Yes. One or two Officers served in one post for a while and then, for various reasons, perfectly ordinary reasons, did not wish to go further. I think that has happened, has it not?

MR WILKINS: Exactly. Solicitors General have remained Solicitors General until, for whatever reason, they have decided to go and do something else.

LORD CARSWELL: It is perfectly understandable that an Officer in one office might find, "Well, maybe it was not a good idea for me", or, "Maybe I have other things that I should be doing", family requirements, et cetera, and it will not work out. There might be a dozen perfectly reasonable causes for not going forward. How likely is it, in the state of the profession, that there would be a big rush into these Crown Offices which are onerous enough and may or may not be as remunerative as private practice?

MR WILKINS: I do not know about the possibility of a rush. For instance, I am not personally aware of how many applications there were for the recently-filled post of Solicitor General. But, of course, anyone who aspires to achieving Crown Office has to be prepared to work within the public sector, to become the servant of the Island, and different criteria obviously apply to a person in that position as opposed to a practitioner who is a senior practitioner in the private sector. As you know, public service actually brings about quite a sea change in terms of what one has to experience and what one has to undergo. But, in my experience, there

have always been people in this Island, quality people, who have been willing to serve the Island in that way and I think there still are. I actually think that Jersey has been very well served by all of those people who have assumed, in one guise or another, the type of position we are speaking of.

LORD CARSWELL: Yes, I think you have been fortunate because there has been some increasing difficulty in England, I know, in getting the best people to serve as judges, for various reasons to do with the work and the pay and the conditions. We had difficulty in Northern Ireland with security added onto that, and well-documented cases of people being approached and saying, "No, I am not interested, I am afraid I will not stand", which is a pity but, if you have done better than that in Jersey, then you have done well.

MR CRILL: From the point of view of the efficiency of the Court, and the management of a particular hearing, is there a particular or evident difference between a trial which is presided over by a judge who has, shall I say, come up through the ranks, than one who has been parachuted in, whether as a Commissioner or as a Deputy Bailiff who has not been a Crown Officer?

MR WILKINS: I think all judges are different.

LORD CARSWELL: Good point.

MR WILKINS: One attempts to adapt to the differences that we recognise and to assist them in fulfilling their function in the best way that they are able to and, in turn, the judges attempt to adapt to us. We are all there at the end of the day, trying to be the servants of justice.

LORD CARSWELL: I think that Mr Crill's point will certainly be one to ask the Bailiff and the

Deputy Bailiff, how their experience has helped them, but we will not press it with you.

MR WILKINS: Thank you.

MRS BACKHURST: I was just thinking that you mentioned about Crown Officers being servants of the Island, essentially they are also servants of the Crown. What happens in the situation where there is no Crown, and that has arisen several times in Jersey's history? But, also, what would happen if, as in America, the legal officers are elected? These are going to be subtle changes. I mean, I get your feeling that you would rather evolution than revolution and you would like to see a wide enough definition of roles that the roles can change, they can adapt to the different circumstances. But would you see any particular preference to a non-Crown or an elected position? I mean, I think you are quite happy with the position as it is, because that is what you have to work with. I do not want to put words in your mouth, sorry. But I just wondered if you were suddenly told, "Well, sorry, there is no British Crown anymore", how would you react as a servant of the Island?

MR WILKINS: It is a really difficult question.

MRS BACKHURST: Sorry.

LORD CARSWELL: I hope, hypothetical.

MR WILKINS: Yes. To answer, I think that one would find that, certainly speaking for myself, when I use the term, "Servant of the Island", that is to say that, in terms of one's basic terms of reference, we are trying to serve the people of this Island in the best way that we can. We are also servants of the Crown in as much as, as you know, Jersey is very loyal to the actual Crown, rather than to the government of the United Kingdom, and that goes back; you are

better informed than I am in relation to the reasons for that. But it is a constituent part of one's feeling of service, which I think is probably a very singular experience, why the public service here means so much to us. We are serving the Royal Court, we are serving justice, we are serving the people of this Island, and we are serving the Crown. All of these things mean much to us, but perhaps at different levels. They all do interconnect. That is one of the reasons it is such a privilege to work here and to be part of this little Island-State.

MRS BACKHURST: Thank you.

LORD CARSWELL: What a very fine note to end on, Mr Wilkins, thank you very much indeed for your contributions. We are very grateful to you for coming.

MR WILKINS: Thank you very much. Thank you for your consideration.