

STATES OF JERSEY



ELECTED SPEAKER OF THE STATES (P.160/2013): AMENDMENT

Lodged au Greffe on 15th April 2014
by Senator Sir P.M. Bailhache

STATES GREFFE

PAGE 2 –

After the words “should be implemented” insert the words “, subject to the approval of the public voting in a referendum to be held on 15th October 2014 on the question ‘Should the Bailiff cease to be the President of the States?’ ”.

SENATOR SIR P.M. BAILHACHE

REPORT

1. The report of the Connétable of St. Helier in support of his proposition seeking the implementation of Recommendation 2 of the report entitled: The Review of the Roles of the Crown Officers (“the Carswell Review”) is extremely short. While brevity is sometimes admirable, the report fails to do justice to the arguments for and against implementing a recommendation which would change a constitutional arrangement that has lasted for more than 500 years, and that affects every member of the community in Jersey. Indeed the report does not address any of the arguments. That omission will be a matter for the debate on the Connétable’s proposition.
2. I am opposed to the Connétable’s proposition and will vote against it even if this amendment is adopted. I bring the amendment only to ensure, in the event that the proposition is adopted, that the interests of the public in the outcome of this debate are not forgotten. My amendment is concerned with a narrow but very important aspect of the debate, and that is the complete absence of any public mandate for such a significant constitutional change. There has been no popular clamour for change, there has been hardly any public discussion, there have been no parish hall meetings and there has been virtually no comment in the media. At the last moment, almost as an afterthought, the author of the report, Lord Carswell, was invited to Jersey to address members and to promote for a second time the recommendations of his committee. The Council of Ministers, the Island’s government, has not engaged with the underlying issues. Yet, if the Connétable’s proposition is adopted, the presidency of the States Assembly will change for the first time in the long history of the Assembly.
3. More importantly, the seeds will have been sown for an even more significant constitutional shift. An inexorable movement will have been set in train towards a change in the identity of the civic head of the Island. No such change should be contemplated, in my view, without a clear public mandate. The public are entitled to have a say before their civic head ceases to be the senior office-holder under the Crown.
4. Jersey’s Head of State is the Queen. The senior office-holder under the Crown, the Bailiff, has been, however, the local civic head of the Island for a long time. There was a dispute in the 17th Century as to whether in effect the civic head was the Governor or the Bailiff, but an Order of the Privy Council of 15th June 1618 resolved that dispute in favour of the Bailiff. The role of the Bailiff has of course evolved over the centuries. Four centuries ago, the Bailiff had much greater executive responsibility, and sometimes concurrently held great offices of state in England as well as his office in Jersey. Many of the local functions were then undertaken by a Lieutenant Bailiff. Today, the Bailiff exercises a more restrained constitutional role as civic head, replicating in a sense the constitutional role of the Queen in the United Kingdom.
5. The Carswell Review acknowledged (at paragraph 5.10.7) that one of the arguments against change was that “Removing the Bailiff from the States would detract from his standing and tend to undermine his position as civic head”. The Privileges and Procedures Committee seems to accept that that argument is correct. It states in its Comments that “PPC is conscious that

some States members and members of the public are concerned about a change to the Bailiff's role because the Bailiff's role is broader than his presidency of the States and the Royal Court through his wider civic role. It may not be the case, as suggested by the Clothier and Carswell Panels, that this role could continue unchanged in the long term if the Bailiff was principally nothing more than President of the Royal Court."

6. The Carswell Review concluded that the Bailiff's role as civic head of the Island could continue even if he were no longer President of the States. It stated (at paragraph 5.11.14) that "A number of respondents expressed concern lest the Bailiff's position as civic head would be undermined if he were no longer to be President of the States. In our carefully considered opinion it should not be. The Bailiff has a long standing position of pre-eminence in the affairs of Jersey, which does not stem from his position as President of the States: rather the contrary, his function as President of the States derived from his civic pre-eminence. In our view that pre-eminence can be maintained without having to maintain his Presidency. If he remains guardian of the constitution, as we consider he should, that will help to maintain his paramount historic position as Bailiff of the Bailiwick of Jersey".
7. This was a convenient finding because it supported the recommendation that the Bailiff should cease to be the President of the States. There was no reasoning, however, as to how they reached that conclusion. They appeared to arrive at the conclusion merely because the Bailiff had a long-standing position of pre-eminence and, they stated, the Presidency of the States derived from that pre-eminence. Unfortunately that premise is false. The Presidency of the States did not derive from the Bailiff's "civic pre-eminence". It originally derived from the Presidency of the Royal Court. The States of Jersey emerged in 1524 from the coalescence of the Connétables and Rectors with the Royal Court (Bailiff and Jurats) over which the Bailiff presided. It was natural, therefore, that the Bailiff would preside over the larger body. The Bailiff's "civic pre-eminence" was only established in 1618, as mentioned above, long after the emergence of the States of Jersey or States Assembly. Whatever the historical position, however, it is now the Presidency of the States Assembly that gives the Bailiff his "civic pre-eminence" and supports his position as civic head of the Island.
8. Like the current PPC, the Bailiff, Sir Michael Birt, does not agree that the Bailiff could continue as civic head of the Island if he were not President of the States, other than in the short term. The Bailiff was invited by a previous PPC and a previous Chief Minister to comment upon the recommendations of the Carswell Review. He did so in a letter of 25th January 2011 which is attached as an Appendix to this Report. I draw particular attention to paragraph 6(iii) of the letter, which states –

"[I]n modern times it is [the Bailiff's] position as President of the States which has underpinned his status as civic head of the Island. I know of no country or jurisdiction where a person who is merely the Chief Justice is the civic or ceremonial head of the country or jurisdiction. I accept that if, for example, the legislation enacting any reform provided in law for the Bailiff's position as civic head, this would underpin it for a while. However, I do not believe that it would

last for more than a few years. It would simply not be sustainable over the longer period. The Bailiff would become a remote figure unknown to members of the States because he would have no regular interaction with them. Nor would there be any good reason for him to be the person to receive visiting dignitaries such as royalty, ambassadors etc. or for him and the members of the Royal Court to lead important ceremonial occasions such as Liberation day and Remembrance Sunday or to attend the many community and charitable events as an apolitical representative of the Island. It is his status as President of the States as well as his historical role which gives legitimacy to the performance of those functions. In my view, pressure would soon mount for such functions to be undertaken by the new elected president of the States.”

9. There is disagreement as to how long the Bailiff could sustain the position of civic head of the Island if he were no longer President of the States. What is agreed is that a strong risk of unsustainability exists. In these circumstances do the public not have a right to express a view on who should be the civic head of the Island? The office of Bailiff is widely respected, and I believe that, if the Constable’s proposition is adopted, the public should be given the opportunity to decide in a referendum on Election Day whether the Island’s civic head should continue to be the senior office-holder under the Crown, that is the Bailiff.

Financial and manpower implications

There are no additional financial or manpower implications for the States arising from the adoption of this amendment.

APPENDIX

25th January 2011

Connétable Juliette Gallichan
Chairman of Privileges and Procedures Committee
States Greffe
Morier House
St. Helier
JE1 1DD

Dear Chairman

Review of the roles of the Crown Officers

1. I refer to your letter of 17th December 2010 in which you have asked for my views on the recommendations contained in the Review of the Roles of the Crown Officers chaired by Lord Carswell (“the Review”). I am happy to do so and both the Deputy Bailiff and I would also welcome the opportunity of attending upon the Committee to elaborate upon these views and, perhaps more importantly, to have an opportunity to respond to any other points members of the Committee may wish to raise.
2. As the debate on the establishment of the Review Panel showed, the future role of the office of Bailiff – and indeed Attorney General – is a matter upon which differing political views may be expressed and therefore falls within the sort of topic upon which I would not normally express an opinion. However, it seems to me inevitable and indeed desirable that I should on this occasion express views on the recommendations of the Review. I say this for three reasons. First, you have asked for a contribution from me as has the Chief Minister. Secondly, it seems to me desirable that members should hear from the current holder of the office of Bailiff as to the potential implications of any change to the existing structure. Thirdly, as the Review states, the Bailiff has an important role to play in safeguarding the constitutional position of the Island. A change to the Bailiff’s role will have an impact in this area and I therefore consider it proper for the Bailiff to express his views.
3. However, I naturally accept unreservedly that the decision is ultimately one entirely for the democratically elected members of the States and they will decide, having placed such weight as they think fit upon the views expressed in the Review, whether any change to the current position is desirable or not.
4. I made detailed written submissions to the Review and also attended to give oral evidence, as did the Deputy Bailiff. Our respective submissions and evidence can be found on the Review’s website and accordingly I do not propose to repeat them. I confine myself to commentary upon the specific recommendations of the Review.

Recommendation 1

“That the Bailiff and Deputy Bailiff should continue to carry out judicial work in the Royal Court”

5. This recommendation is dealt with at paragraphs 5.3 – 5.5 of the Review. I fully agree with the recommendation. The Bailiff has been President of the Royal Court since the 13th century at the latest, well before the States emerged. Judicial work has formed the most significant part of his duties and, as the Review makes clear, the major part of the Bailiff’s time is still spent on such work. The role of the Bailiff is historically associated with the function of Chief Judge. As the Review states at paragraph 5.5, “There was a clear view, unanimous or practically so, among respondents that the Bailiff should continue to act as Chief Judge in the Royal Court. We consider that this is unquestionably correct”.

Recommendations 2, 3 and 4

“2. The Bailiff should cease to act as President of the States and the States should elect their own President, either from within or from without the ranks of their members.

3. The Bailiff should continue to act and be recognised as the civic head of Jersey.

4. The Bailiff should continue to be the guardian of the constitution and the conduit through which official correspondence passes. He should also receive copies of communications not forming part of the official correspondence which contain potential constitutional implications.”

6. I take these recommendations together because, as the Review suggests, they are closely interlinked and it is not really possible to consider one in isolation from the others. The Review recommends that the Bailiff should cease to preside in the States but should remain as civic head of the Island. I have to say that, whilst this may be a tempting compromise for some, I do not believe it is sustainable other than in the short term. I would summarise my reasons as follows:-

- (i) The Review makes clear that a large number of respondents expressed the view that the Bailiff was the most appropriate and acceptable person to act as civic head of the Island in view of the long history and non-political nature of the office. The fact that the Bailiff would normally be in post for a reasonable length of time was also important. The Review went on to conclude (see para 5.25) that it would be of great value to the people of Jersey that the Bailiff should continue to carry out these duties, which give a focus to the public life of the Island. The Review clearly attaches importance to the Bailiff continuing as civic head.
- (ii) The Review asserts that the Bailiff could continue to be civic head even if he ceased to be President of the States. The reasons in support of this conclusion are given in para 5.11.14. In effect there is only one reason given, namely a historical one; that the Bailiff’s position of pre-eminence in the affairs of Jersey pre-dated his function as President of the States and that his function as President of the States derived from his pre-eminence.
- (iii) This is true as a matter of history, but in modern times it is his position as President of the States which has underpinned his status as civic head of the Island. I know of no country or jurisdiction where a person who is merely the Chief Justice is the civic or ceremonial head of the country or jurisdiction.

I accept that if, for example, the legislation enacting any reform provided in law for the Bailiff's position as civic head, this would underpin it for a while. However, I do not believe that it would last for more than a few years. It would simply not be sustainable over the longer period. The Bailiff would become a remote figure unknown to members of the States because he would have no regular interaction with them. Nor would there be any good reason for him to be the person to receive visiting dignitaries such as royalty, ambassadors etc. or for him and the members of the Royal Court, to lead important ceremonial occasions such as Liberation Day and Remembrance Sunday or to attend the many community and charitable events as an apolitical representative of the Island. It is his status as President of the States as well as his historical role which gives legitimacy to the performance of those functions. In my view, pressure would soon mount for such functions to be undertaken by the new elected President of the States.

(iv) Indeed, the Review has within it an inbuilt potential for conflict and misunderstanding because it envisages at para 5.11.13 that an elected President would undertake some of the public engagements which the Bailiff undertakes at present. One can readily envisage difficulties arising. Indeed, one would then have a situation where there were four people who would have to be considered in relation to ceremonial and public engagements (including charity and community matters), namely the Lieutenant Governor, the Bailiff, the President of the States and the Chief Minister. The potential for confusion, uncertainty and dispute as to who takes precedence or has responsibility for various occasions would be enormous and would prompt the pressure mentioned at the end of sub-para (iii).

(v) In short, whilst the Review says that it is important that the Bailiff should retain his position as civic head, its recommendation will in practice inevitably lead to in a comparatively short time to the loss of that position.

7. If members of the States are convinced that the Bailiff should no longer be President, I would accept that the recommendation of the Review (that he should cease to be President but remain as civic head) is preferable to an immediate change whereby the newly elected President of the States immediately becomes civic head. This is because it is difficult to foresee the consequences of such a sudden change and such matters are usually best dealt with by way of gradual evolution rather than sudden change. The interregnum would give time for mature reflection as to the exact nature of the role of civic head, whether it should all be performed by one person etc. However, for the reasons which I have given, members should not support the Review proposals in the expectation that, other than in the short term, the Bailiff can remain as civic head of the Island. It is inevitable that at some stage in the future, the new President of the States would become the civic head, which would be contrary to the recommendations of the Review and contrary to the views expressed by respondents to the Review.

8. Turning to recommendation 4, I agree that the Bailiff should continue to be the guardian of the constitution and the conduit through which official correspondence passes. The constitutional relationship between Jersey and the United Kingdom is unwritten and to some extent uncertain. It is based upon custom and practice over many centuries. It is therefore essential from the point of view of preserving Jersey's constitutional autonomy that day to day practice is consistent with that

autonomy. A decision taken by Jersey for short term advantage in relation to a particular matter may create a precedent which weakens Jersey's long term constitutional position. It is therefore of vital importance that the Chief Minister of the day is alerted to any possible implications for the constitutional relationship when a particular matter arises. He cannot rely on his civil servants for this as nowadays they tend to be appointed from the United Kingdom and are therefore unfamiliar with the subtleties of the constitutional relationship; and in any event, as non-lawyers, they would not be in a position to advise on the complexities of the constitutional relationship. As the review makes clear at para 5.26, the Bailiff is particularly well suited to provide advice on the constitutional relationship. He would usually have previously been Attorney General. He will be steeped in the nuances and subtleties of the constitutional relationship. I entirely support the conclusion of the Review that *"It is in our opinion of considerable importance that the Bailiff should continue to occupy this role."*

9. The difficulty is that it is hard to see how this role could continue if the Bailiff were simply Chief Justice. The underpinning of his role in official correspondence is that he is President of the States. There is no logic in a mere Chief Justice being involved in this correspondence. Again therefore, it seems to me that, whilst this role could continue for a while under the Review proposals, it is inevitable that it will gradually wither in any event and will certainly come to an end if the Bailiff ceases to be civic head.
10. I do not think it appropriate to comment on all the reasoning of the Review in support of its recommendation that the Bailiff should cease to be President of the States. However, it may be helpful if I comment on two aspects.

(i) Who would be the new President?

11. It is easy to assert that the States can simply elect a President from among their number. However, careful thought needs to be given to the practicalities. Jersey is a small community with a small parliamentary body which will in future comprise (following the decision last week) a maximum of 49 members, possibly less if further reforms are implemented in due course. There is therefore a limited pool to choose from. Members tend to stand for election, quite naturally, because they feel strongly about political issues and wish to influence States policy to achieve the outcomes which they desire. This can be achieved by speaking and voting, by becoming a minister or assistant minister or by being on Scrutiny. They would not be able to achieve these objectives as President, as he must remain mute and impartial during debates. They would not therefore represent their constituents on these issues. Thus many members would simply not wish to become President. As to those who might wish to do so, many would not be well suited to the role. The States consists of strong minded individuals and presiding over it is not straightforward. Thus, while in a large parliamentary assembly, one might expect to find a member with the requisite skills who is also willing to take on the role, this will not necessarily be the case in a small assembly such as the States.
12. The election of a member who would otherwise have been a Minister or a leading member of Scrutiny would, I suggest, be a loss to the States and not in the Island's best interests. Conversely, the election as President of someone not well suited to the role would, I suggest, lead to a loss of authority of the Chair and an adverse impact on the conduct of the proceedings of the States.

13. An alternative would be for States Members to elect a non-member as President. If such a person had never previously been a member, there would be a steep learning curve and a lack of familiarity as to what was required of the office and what members expected. It would certainly place a much greater burden upon the Greffier and might well require the appointment of legal counsel to the President. An alternative would be to appoint a former member of the States as President. However he or she might well have considerable “political history” with the consequence that any decision which he or she made against a member who had previously opposed him or her might not be well received.
14. The problems canvassed under this heading become even more acute if one takes into account the need to have a Deputy President as well as a President. It is simply not practicable for one person to preside at all the meetings of the States and I know of no jurisdiction which does not have a Deputy President or Deputy Speaker to assist in carrying out these duties.
15. I accept of course that these concerns are not insurmountable and other small assemblies managed their affairs thus. Nevertheless, one has to pose the question as to whether any change would amount to an improvement. The Bailiff should be in a position to be an effective and impartial President. He will be a qualified lawyer and a judge. These attributes should equip him to rule on procedural matters and to preside with the required authority, dignity and impartiality.
16. The review acknowledges the difficulties of finding a suitable replacement for the Bailiff and is reduced to saying that it is “hopeful” that it would be feasible (see para 5.19). This language does not suggest great confidence on the part of the Review.

(ii) European Convention on Human Rights

17. One of the reasons given by some who propose the removal of the Bailiff from the States is that the mere existence of a judge as Presiding Officer amounts to a breach of the European Convention on Human Rights. The Review has authoritatively concluded that this is not so. The opinion of Mr. Rabinder Singh QC (referred to in the Review) states quite clearly that there would be no breach of the ECHR if the status quo were to be maintained. It goes on to say that within the next ten years, counsel’s opinion is that the present arrangements will come to be regarded as incompatible, but it is certainly unusual for a lawyer to predict how case law will develop in the future and it is hard to see the basis upon which he reaches that view. Naturally, if it were to come about, Jersey would have to change at that stage. But it may not come about and it would seem preferable to do what is thought best for Jersey rather than do something which is thought to be second best on the off chance that the law might change in the future.

Recommendation 5

“The Bailiff should remain as President of the Licensing Assembly, unless an appeal is provided for.”

18. I have no observation to make on this recommendation, with which I agree.

Recommendation 6

“The Bailiff should cease to be responsible for giving permission for public entertainments.”

19. Successive Bailiffs have indicated that they would be happy to transfer responsibility for public entertainments to some other body. I repeated this comment in my submission to the Review. It is nowadays largely uncontroversial and, for my own part, I am happy to continue to undertake it until a replacement body is provided for but I agree with the recommendation.

Recommendation 7

“The requirement of Article 1(1) of the Crown Advocates (Jersey) Law 1987 of the Bailiff’s approval to the appointment of Crown Advocates should be repealed.”

20. I agree with this recommendation.

Appointment of Bailiff and Deputy Bailiff

Recommendation 12(a)

“The membership of the recommending panel for the appointment of the Bailiff and Deputy Bailiff should be augmented by the addition of two persons with substantial legal experience, one of whom should be from outside Jersey to be appointed by the Lieutenant Governor.”

21. It seems to me that this is ultimately a matter for the Crown. However I believe it to be a very unsatisfactory recommendation. I would hope that, when the time for the next round of Crown Officer appointments takes place, I shall be able to say to the Ministry of Justice that the Council of Ministers and the Privileges and Procedures Committee are thoroughly opposed to the Review recommendation in this respect.
22. It removes power from the Insular authorities to the Lieutenant Governor. The position hitherto has been that recommendations for appointments to Bailiff and Deputy Bailiff have been made entirely from within the Island; thus those consulted, namely the Bailiff’s Consultative Panel (representing the States), the Chief Minister, existing Crown Officers, members of the Judiciary and the senior members of the legal profession, have all been residents of the Island as has the recommending body itself (previously the Bailiff and now the Panel chaired by the Bailiff). The Lieutenant Governor has had no direct role to play, although he has undoubtedly reported to the Ministry of Justice (representing the Crown) as to the rigour of the process which has been followed by the Insular authorities in making their recommendations. He is in a good position to give an objective assessment.
23. Now, for the first time, it is suggested that the Lieutenant Governor should nominate two out of the five members of the Panel and furthermore that one of these should be a non-resident of Jersey. This seems to me to be a highly undesirable dilution of the Island’s autonomy and no good reason is given for it. It gives the Lieutenant Governor a role and influence which he has not had hitherto. We have only moved recently to a Panel making the recommendation rather than the Bailiff alone and I have not heard any criticism of the procedure followed by

the Panel. On the contrary, it seems to me an ideal process. It involves the States and the Chief Minister to some degree (by way of consultation) but ensures that political considerations play no part in the appointments because States members are only consultees. The system is thus entirely consistent with good practice as laid down in the various international standards referred to in the Review. Furthermore, it is hard to see what a non-resident of the Island could bring to the process. It is those in the Island who would be familiar with the reputation and expertise of the candidates and it is the Island's Bailiff and Deputy Bailiff who are being chosen.

24. Indeed, it may well be that Lieutenant Governors themselves would not wish to undertake this role in that it would draw them more fully into the process and therefore possibly into matters of controversy. It is important for the office of Lieutenant Governor that it be seen as entirely 'above the fray'. The proposal would prevent the Lieutenant Governor giving the entirely objective assessment of the process which he can give under the present system.

Law Officers

25. I do not think it necessary to comment on recommendations 8 to 11 concerning the Law Officers save to say that I have been sent a copy of the joint memorandum of the Attorney General and Solicitor General dated 5th January 2011 expressing their view and I do not dissent from any of their observations.
26. I would however wish to comment on Recommendation 12(b), which recommends that the recommending panel for the appointment of the Law Officers should be augmented by the addition of two members of the States, to be appointed by the States and that, as a consequence, the Bailiff's Consultative Panel should no longer be consulted about the appointment of the Law Officers. I agree with the observations of the Law Officers in relation to this recommendation. Given that the Attorney General is responsible for prosecutions, it seems to me very important that his or her appointment should be free from political influence. There have been occasions in the last three years when some elected members have quite wrongly sought to politicise the prosecution process; so my objections are not merely theoretical. Placing two members of the States on a Panel of five runs contrary to the requirement that the appointment should be free from political influence. Conversely, consultation with the Bailiff's Consultative Panel not only avoids this difficulty (because it is only consultation) but the number of States members whose views can be sought is much wider than a mere two members. No good reason is given for the change in the Review. Again it is a matter for the Crown but I would invite the Council of Minister and PPC to agree formally that there is no objection to the current system (which involves very wide consultation but maintains the decision as to whom to recommend in a non-political forum) and that the proposed change is not acceptable.

Conclusion

27. By way of conclusion I would mention two additional matters:-

- (i) The Deputy Bailiff has been fully consulted in relation to this letter and the views expressed herein are the views of both of us.
- (ii) The Chief Minister has also written seeking my views on the recommendations contained in the Review and I am responding to him with an identical letter.

28. I hope that this letter is of assistance to the Committee and, as stated at paragraph 1, Deputy Bailiff and I would welcome the opportunity of attending upon the Committee to discuss the matter further.

Yours sincerely

Bailiff