

# STATES OF JERSEY



## **BAILIFF OF JERSEY: CESSATION OF DUAL ROLE AND THE APPOINTMENT OF AN ELECTED SPEAKER OF THE STATES (P.54/2016) – COMMENTS**

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**Presented to the States on 27th June 2016  
by H.M. Attorney General**

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**STATES GREFFE**

## COMMENTS

1. The question as to whether or not the Bailiff should remain as the President of the States Assembly is, of course, a matter for the Assembly itself. However, the Law Officers provided advice on [P.160/2013](#), which last raised this issue. We have been asked to reconsider and update the advice provided on P.160/2013, and are presenting these comments to inform debate in the Assembly on [P.54/2016](#).
2. P.54/2016 has appended to it the [Chief Minister's comments on P.160/2013](#), which among other things makes reference to the recommendations of Lord Carswell's review. His recommendations on the role of the Bailiff were based in part on legal advice, obtained in 2010, from English leading counsel Mr. Rabinder Singh, Q.C. ("English Counsel"). Furthermore, in a presentation to States Members, we understand that Lord Carswell placed significant emphasis on the human rights issues as advised on by English Counsel, in support of his recommendation that the Bailiff should cease to be President of the Assembly. In the light of this emphasis, the Law Officers think it appropriate to advise the Assembly of the current legal position.

### Summary

3. In summary, in the opinion of the Law Officers –
  - (a) The role of the Bailiff is compatible with the European Convention on Human Rights ("ECHR"); and
  - (b) The position is not likely to change within the time horizon suggested by Lord Carswell, nor necessarily at all.

### Discussion

4. In the Report of Lord Carswell, reference is made to the advice of English Counsel at paragraph 5.15. It states –

*"5.15 After considering these decisions, we felt that it was uncertain what decision might be reached if a challenge were brought in the ECtHR to a decision of the Bailiff on the ground that he had presided in the States. We therefore took the opinion of leading counsel in London, Mr. Rabinder Singh Q.C., who has considerable experience of human rights law and its application in the ECtHR. We have placed the full text of the opinion on our website [www.gov.je/crownofficersreview](http://www.gov.je/crownofficersreview) and it may be read there. Mr. Singh summarises his conclusions in the following terms (para. 2 of his opinion):*

- (1) *On the current state of the authorities, in principle there would be no breach of Article 6 of the European Convention on Human Rights if the status quo were to be maintained.*
- (2) *However, the international trend suggests that the law will change in due course. Within the next 10 years, my view is that the present arrangements will come to be regarded as*

*incompatible with the concept of judicial independence as embodied in Article 6, in particular because the Bailiff and his deputy are both judges and presiding members of the legislature.”.*

5. Lord Carswell referred to Article 6 of the ECHR, which so far as is relevant provides that –

*“(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...” [Emphasis added]*
6. The legal advice obtained by Lord Carswell, and the report of the Carswell Review, correctly accepted that the Bailiff’s role was, at the time of the Review in 2010, compatible with the independence and impartiality requirements in Article 6 of the ECHR. Accordingly, there was at that time no legal requirement identified for the current position to change. In the opinion of the Law Officers, that is still the position.
7. The European Court of Human Rights (the “European Court”) stated in McGonnell v United Kingdom [2000] 30 EHRR 289 (a case regarding the dual role of the Bailiff in Guernsey) and in a number of cases since (cited below), that Article 6 of the ECHR does not require any jurisdiction to conform with any particular theoretical constitutional doctrine regarding the separation of powers or permissible limits on those powers interaction. Accordingly, arguments about the dual role of the Bailiff based purely on constitutional theories do not give rise to an issue of compatibility with Article 6 of the ECHR. The same approach has been taken by the senior courts in the UK, for example in Davidson v Scottish Ministers [2004] UKHL 34. There has been no case law since the Carswell Review which alters that approach.
8. The principle set out in the cases cited above does not preclude a litigant from arguing that the dual role of the Bailiff means that the court determining a civil or criminal matter lacks the appearance of an “*independent and impartial tribunal*”. However, as indicated below, case law suggests that such an argument will not be successful.
9. In the McGonnell case, it was held that if there is a sufficiently close relationship between what the Bailiff said or did previously in the States Assembly and the issue that then arises for determination in subsequent litigation, then the Bailiff presiding in that litigation will breach the independence and impartiality requirements of Article 6 of the ECHR. However, the potential difficulty identified in McGonnell can be avoided as a matter of practice and without constitutional reform. If, applying the principle established in McGonnell, a concern as to the Bailiff’s impartiality would be objectively justified, then the Bailiff can decide not to sit on the particular case, as he can do in any other case where he does not feel it appropriate that he presides. The Code of Conduct for members of the Judiciary of Jersey is published on the States of Jersey website<sup>1</sup>. It sets out the ethical standards to

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<sup>1</sup> <https://www.gov.je/Government/NonexecLegal/JudicialGreffre/Pages/CodeConduct.aspx>

which members of the judiciary are expected to adhere and requires them to ensure they are, and are seen to be, impartial in any matter on which they adjudicate.

10. The Carswell Report went further in its conclusions, influenced by English Counsel, who predicted that the concept of judicial *independence* provided for in Article 6 of the ECHR would develop so that, regardless of whether there is a connection between what the Bailiff has said or done in the States Assembly, his position as presiding member of the legislature would be incompatible with his being independent for the purposes of Article 6 in any proceedings.
11. The Law Officers' Department was not invited to respond to this point at the time the Carswell Report was published, and they respectfully disagree with it.
12. In making his prediction, English Counsel did not refer to the European jurisprudence predating his opinion on the distinct requirement for a court to be independent, as well as impartial. However, the European Court had held, before English Counsel's opinion was published, that a court must be sufficiently independent of the executive, of the parties and of the legislature to present an objective appearance of independence.
13. The European Court took this approach in its decision in the case of Sacilor Lormines v France [2006] ECHR 1168, in which it explained –

*“In order to establish whether a tribunal can be considered “independent” within the meaning of art.6(1) , regard must be had, inter alia, to the manner of appointment of its members and their term of office, the existence of safeguards against extraneous pressure and the question whether the body presents an appearance of independence. As to the question of independence being defined as the separation of powers between the executive and the judiciary, neither art.6 nor any other provision of the Convention requires states to comply with any theoretical constitutional concepts regarding the permissible limits of the powers’ interaction.”*

14. The same approach has been taken by the European Court in cases since English Counsel's opinion was published, for example in Pohoska v Poland [2012] ECHR 4; and in Volkov v Ukraine [2013] ECHR 32. In each of these cases, the European Court drew a distinction between the Article 6 ECHR requirement for a court to be independent and the requirement for it to be impartial. While the 2 issues are not dealt with entirely separately and are closely linked, the requirement that a court be independent is said by the European Court to require that the judiciary is, viewed objectively, institutionally independent *of influence* from the executive and legislature. The European Court uses a similar form of words in each case when it says –

*“In order to establish whether a tribunal can be considered “independent” within the meaning of Article 6 § 1, regard must be had, inter alia, to the manner of appointment of its members and their term of office, the existence of safeguards against external pressure and the question whether the body presents an appearance of independence.”* [paragraph 103 of the decision in Volkov].

15. In view of the above, it is questionable whether English Counsel's opinion was predicting the future or rather highlighting a principle that had already, albeit recently, been established. However, the Law Officers note that the European Court's approach to independence has remained consistent since English Counsel's opinion was published, and we are aware of no authority to suggest that it will change.
16. It is clear, based on this jurisprudence, that if the institutional arrangements between the executive, legislature and judiciary give rise to an objective appearance that a court is not independent, that may be enough to breach Article 6 ECHR. However, neither English Counsel's opinion nor the Carswell Report explain why the dual role of the Bailiff in Jersey might be said to give rise to an objective appearance that a court is not independent of influence by the executive or legislature.
17. To challenge a decision of the Bailiff on Article 6 *independence* grounds, a litigant in a particular case would have to assert that some aspect of the Bailiff's role, or perhaps arrangements surrounding their appointment, tenure or removal from office, means that the Bailiff does not appear, objectively, independent of influence from the executive or legislature. As the office of Bailiff enjoys a high degree of constitutional protection from influence by virtue of appointment by the Crown, we do not consider that such an argument would be successful.
18. English Counsel cites the Bangalore Principles of Judicial Conduct 2002 in support of his views. These principles return to the same overarching point about the need to protect the judiciary from interference, and appear to add little or nothing to the Article 6 ECHR case law.
19. Although it does not affect the analysis above, it may assist Members to explain that in one relevant respect, the recommendation in paragraph 8.15 of the Clothier Report cited in P.54/2016 appears to be based on a mistake as to the law. Specifically, the third reason given for this recommendation at paragraph 8.4 of the Clothier Report was that –

*“the Bailiff in his role as Speaker of the States, makes decisions about who may or may not be allowed to speak, or put questions in the States, or about the propriety of a member's conduct. Such decisions may well be challenged in the Royal Court on grounds of illegality but, of course, the Bailiff cannot sit to hear and determine those challenges to his own actions.”*
20. However, the decision of the Jersey Court of Appeal in *Syvret v Bailhache and Hamon* 1998 JLR 128 (para. 39), established that the propriety of the Bailiff's decisions relating to the regulation of the internal proceedings of the States Assembly were covered by parliamentary privilege<sup>2</sup> and not amenable to challenge in the courts. As such, the risk of the Bailiff being conflicted in the way that Clothier suggested above, should not arise.

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<sup>2</sup> For further information see R.79/2009: 'Parliamentary Privilege in Jersey', presented by the Privileges and Procedures Committee on 22nd July 2009:  
<http://www.statesassembly.gov.je/AssemblyReports/2009/41985-12019-2272009.pdf>

21. In conclusion, in general there is no issue from a human rights perspective with the Bailiff continuing to preside in the Assembly and to sit as a judge. Any issue that may arise in an individual court case, from the principle established in McGonnell, can be addressed by the Bailiff exercising his usual discretion not to sit in such a case where, viewed objectively, he may not appear to be impartial.

**Note:** These comments reflect the joint view of H.M. Attorney General and H.M. Solicitor General.