

# STATES OF JERSEY



## **BAILIFF OF JERSEY: CESSATION OF DUAL ROLE AND THE APPOINTMENT OF AN ELECTED SPEAKER OF THE STATES (P.62/2017) – COMMENTS**

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**Presented to the States on 21st August 2017  
by the Privileges and Procedures Committee**

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**STATES GREFFE**

## COMMENTS

PPC is of the view that it would assist Members, when considering this important issue, for it to recirculate the comments that it presented in respect of [P.54/2016](#), which was a similarly worded Proposition lodged by Deputy M. Tadier of St. Brelade.

Accordingly, the previous comments are set out below, together with links to previous reports and debates on the subject, and the views of the Independent Jersey Care Inquiry in connection therewith.

Also attached to these comments is a letter which the Bailiff has sent to the Chief Minister, copied to the Chairman of the Committee, which PPC feels that Members should take into consideration.

### **Comments of PPC in respect of P.54/2016**

PPC feels that it is important for the debate on the role of the Bailiff as the Speaker of the States to take place, as it is an issue that has been the subject of much discussion since the publication of the Report of the Review Panel on the Machinery of Government in Jersey in 2000, in which the Panel said: “we recommend that the Bailiff should cease to act as the president of the States or to take any political part in the Island’s government and that the States should elect their own Speaker.”.

PPC does not make a recommendation one way or another as to how States Members should vote on this issue, because the Committee members themselves are not unanimous in their views.

If the States support the proposition of Deputy M. Tadier of St. Brelade, it will be necessary for the Committee to report back to the Assembly with detailed proposals on an elected Speaker and Deputy Speakers, including the full financial implications.

### **Findings of the Independent Jersey Care Inquiry (“I.J.C.I.”)**

Recommendation 7 of the I.J.C.I., which released its report on 3rd July 2017, related to the ‘Jersey Way’. In the Executive Summary of the report, at paragraphs 13.18 and 13.19, the I.J.C.I. stated –

“13.18 Throughout the course of our work we heard the term the “Jersey Way”. While this was, on occasions, used with pride, to describe a strong culture of community and voluntary involvement, it was more often used to describe a perceived system whereby serious issues are swept under the carpet and people avoid being held to account for abuses that have been perpetrated. This was well summarised in the contribution of a Phase 3 witness who told us: “*We (also) have the impossible situation of the non-separation of powers between the judiciary and political and there is a lot of secrecy, non-transparency and a lack of openness. This brings with it the lack of trust, the fear factor that many have spoken about and contributes greatly to the Jersey Way.*”

13.19 That fear factor and lack of trust must be addressed, therefore we recommend that open consideration involving the whole community be given to how this negative perception of the “Jersey Way” can be

countered on a lasting basis. While constitutional matters are outwith our Terms of Reference, we are of the opinion that this matter cannot be addressed without further consideration of the recommendations made in the Clothier and Carswell Reports.”.

Within the main body of its report, the I.J.C.I. further commented –

**“Recommendation 7: The “Jersey Way”**

- 13.41 Throughout the course of the Inquiry, we heard reference to the “Jersey Way” notwithstanding that there did not seem to be any set definition of the term. On some occasions it was used in a positive way, to describe a strong culture of community and voluntary involvement across the island, and this is something we recognise as a strength of the island, from the many contacts we had with voluntary organisations and individuals who give generously of their time to serve the interests of others. On most occasions, however, the “Jersey Way” was used in a pejorative way, to describe a perceived system whereby serious issues are swept under the carpet and people escape being held to account for abuses perpetrated. A Phase 3 witness told us: “we [also] have the impossible situation of the non-separation of powers between the judiciary and political and there is a lot of secrecy, non-transparency and a lack of openness. This brings with it the lack of trust, the fear factor that many have spoken about and contributes greatly to the Jersey Way”. It is this strongly held perception by many of those who experienced abuse that will continue to undermine any attempts to move the island forward from the matters into which we have inquired. We therefore recommend that open consideration involving the whole community is given to how this negative perception of the “Jersey Way” can be countered on a lasting basis.
- 13.42 Jersey has a long and proudly held tradition of governance, but that is not to say that steps should not be taken to reflect the modern world in which the island exists. As with many long-established jurisdictions, there can be a resistance to change, which is something that seems to be acknowledged. We are of the opinion that this serious matter cannot be addressed without further consideration being given, in the light of our findings, to recommendations contained in the Clothier and Carswell Reports.
- 13.43 While these involve constitutional matters, we are firmly of the view that the progress that must be made in relation to future care and safety of children in Jersey will be undermined if they are not dealt with such that all perceptions of there being a negative “Jersey Way” are eradicated once and for all. Achieving this would, in our opinion, provide a very strong visible marker that there was a deep determination in the island to use the conclusion of the Independent Jersey Care Inquiry as a platform to ensure that the island’s children and young people will be looked after in a caring and compassionate system that is underpinned by a system of governance in which there is the utmost confidence among all of the island’s citizens.”.

## Links to previous reports and debates on the subject:

To assist Members in their consideration of this Proposition, references to previous reports and debates on the subject are set out below in chronological order of publication –

1. Report of the Review Panel on the Machinery of Government in Jersey (*The Clothier Review*’, published December 2000):  
<http://www.gov.je/SiteCollectionDocuments/Government%20and%20administration/ID%20ClothierReport%20100331%20CC.pdf>
2. ‘The Review of the Roles of the Crown Officers’ (*The Carswell Report*’), **R.143/2010**, presented on 6th December 2010 by the Chief Minister:  
<http://www.statesassembly.gov.je/AssemblyReports/2010/38785-20056-6122010.pdf>
3. ‘Review of the Role of the Crown Officers (“Carswell Review”): ‘in Committee’ debate’, **R.28/2011**, presented on 14th March 2011 by PPC:  
<http://www.statesassembly.gov.je/AssemblyReports/2011/14688-17346-1432011.pdf>
4. ‘Elected Speaker of the States’, **P.160/2013**, lodged on 10th December 2013 by the Connétable of St. Helier:  
<http://www.statesassembly.gov.je/AssemblyPropositions/2013/P.160-2013.pdf>
5. ‘Elected Speaker of the States (P.160/2013): comments’, **P.160/2013 Com.**, presented on 16th December 2013 by PPC:  
<http://www.statesassembly.gov.je/AssemblyPropositions/2013/P.160-2013Com.pdf>
6. ‘Elected Speaker of the States (P.160/2013): amendment’, **P.160/2013 Amd.**, lodged on 15th April 2014 by Senator Sir P.M. Bailhache:  
<http://www.statesassembly.gov.je/AssemblyPropositions/2013/P.160-2013Amd.pdf>
7. ‘Elected Speaker of the States (P.160/2013): additional comments’, **P.160/2013 Com.(2)**, presented on 17th April 2014 by PPC:  
[http://www.statesassembly.gov.je/AssemblyPropositions/2014/P.160-2013Com\(2\).pdf](http://www.statesassembly.gov.je/AssemblyPropositions/2014/P.160-2013Com(2).pdf)
8. ‘Elected Speaker of the States (P.160/2013): comments’, **P.160/2013 Com.(3)**, presented on 22nd April 2014 by H.M. Attorney General:  
[http://www.statesassembly.gov.je/AssemblyPropositions/2013/P.160-2013Com\(3\).pdf](http://www.statesassembly.gov.je/AssemblyPropositions/2013/P.160-2013Com(3).pdf)
9. ‘Elected Speaker of the States (P.160/2013): amendment (P.160/2013 Amd.) – amendment’, **P.160/2013 Amd.Amd.**, lodged on 23rd April 2014 by Deputy R.G. Le Hérisier of St. Saviour:  
<http://www.statesassembly.gov.je/AssemblyPropositions/2013/P.160-2013AmdAmd.pdf>

10. 'Elected Speaker of the States (P.160/2013): comments', **P.160/2013 Com.(4)**, presented on 25th April 2014 by the Chief Minister:  
[http://www.statesassembly.gov.je/AssemblyPropositions/2013/P.160-2013Com\(4\) corrected.pdf](http://www.statesassembly.gov.je/AssemblyPropositions/2013/P.160-2013Com(4) corrected.pdf)
11. 'Elected Speaker of the States (P.160/2013): amendment (P.160/2013 Amd.) – comments', **P.160/2013 Amd.Com.**, presented on 25th April 2014 by PPC:  
<http://www.statesassembly.gov.je/AssemblyPropositions/2013/P.160-2013AmdCom.pdf>
12. The debate on P.160/2013 and its associated amendments took place on 29th and 30th April 2014:  
<http://www.statesassembly.gov.je/AssemblyHansard/2014/2014.04.29%20States%20-%20Edited%20Transcript.pdf>  
and  
<http://www.statesassembly.gov.je/AssemblyHansard/2014/2014.04.30%20States%20-%20Edited%20Transcript.pdf>
13. 'Bailiff of Jersey: cessation of dual role and the appointment of an elected Speaker of the States, **P.54/2016**, lodged on 24th May 2016 by Deputy M. Tadier of St. Brelade:  
<http://www.statesassembly.gov.je/AssemblyPropositions/2016/P.54-2016withCorrigendum.pdf>
14. 'Bailiff of Jersey: cessation of dual role and the appointment of an elected Speaker of the States (P.54/2016) – comments', **P.54/2016 Com**, presented on 22nd June 2016 by PPC:  
<http://www.statesassembly.gov.je/AssemblyPropositions/2016/P.54-2016Com.pdf>
15. 'Bailiff of Jersey: cessation of dual role and the appointment of an elected Speaker of the States(P.54/2016) – comments', **P.54/2016 Com.(2)**, presented on 27th June 2016 by H.M. Attorney General:  
[http://www.statesassembly.gov.je/AssemblyPropositions/2016/P.54-2016Com\(2\).pdf](http://www.statesassembly.gov.je/AssemblyPropositions/2016/P.54-2016Com(2).pdf)
16. 'Bailiff of Jersey: cessation of dual role and the appointment of an elected Speaker of the States (P.54/2016) – amendment', **P.54/2016 Amd.**, lodged by Deputy M. Tadier of St. Brelade on 8th November 2016:  
<http://www.statesassembly.gov.je/AssemblyPropositions/2016/P.54-2016Amd.pdf>
17. The debate on P.54/2016 and its associated amendments took place on 15th November 2016:  
<http://www.statesassembly.gov.je/AssemblyHansard/2016/2016.11.15%20States%20-%20Edited%20Transcript.pdf>

THE BAILIFF OF JERSEY  
SIR WILLIAM BAILHACHE



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24<sup>th</sup> July 2017

Senator I J Gorst  
Chief Minister  
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Dear Chief Minister

This letter is sent to you and copied to the Council of Ministers and, as it concerns that body, to the Privileges and Procedures Committee. I write it because you have announced to the States that you intend to urge the States to accept and implement all the recommendations of the Care Enquiry, one of which relates to the role of the Bailiff.

I would like to make clear at the outset that I am commenting only on Recommendation 7 of the Care Enquiry's report. The other recommendations do not concern my office and are in the exclusively political domain. I make no comment on or criticism of the remainder of the Report.

I am writing to you at this point given the proposition again lodged by Deputy Tadier to remove the Bailiff from the Presidency of the States, presently due to be debated in September. That is his prerogative, and obviously Members will make their individual decisions in relation to that proposition as they think fit. Both the Deputy Bailiff and I completely accept that it is a matter for the States to decide upon. Members also know that the Bailiff does not comment on political matters. They are for politicians, and not for the President of the Assembly. However, it would be absurd if the Bailiff were not ever allowed to comment on a matter affecting his own role, especially given the constitutional nature of the subject matter. Neither the Deputy Bailiff nor I will preside over the debate on Deputy Tadier's proposition, and it follows that no conflict of interest arises by my making the comments which I am about to make. My comments can be accepted or rejected, as can the comments of anyone else.

I set out below Recommendation 7 of the Report of the Care Inquiry, which is taken for convenience from the Executive Summary:-

*"Recommendation 7: "The Jersey Way"*

*13.18 Throughout the course of our work we heard the term the "Jersey Way". While this was, on occasions, used with pride, to describe a strong culture of community and voluntary involvement, it was more often used to describe a perceived system whereby serious issues*

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*are swept under the carpet and people avoid being held to account for abuses that have been perpetrated. This was well summarised in the contribution of a Phase 3 witness who told us:*

*'We (also) have the impossible situation of the non-separation of powers between the judiciary and political and there is a lot of secrecy, non-transparency and a lack of openness. This brings with it the lack of trust, the fear factor that many have spoken about and contributes greatly to the Jersey Way.'*

*That fear factor and lack of trust must be addressed, therefore we recommend that open consideration involving the whole community be given to how this negative perception of the "Jersey Way" can be countered on a lasting basis. While constitutional matters are outwith our Terms of Reference, we are of the opinion that this matter cannot be addressed without further consideration of the recommendations made in the Clothier and Carswell Reports."*

So there we have it – the Committee of Inquiry has made a direct link between the Clothier and Carswell Reports concerning the Bailiff's dual role and the sweeping of serious issues under the carpet so as to avoid people being held to account for abuses that have been perpetrated.

I think this Recommendation is both illogical and unnecessary.

The Committee links an alleged system of sweeping serious issues under the carpet so that people avoid being held to account for abuses that have been perpetrated with the Bailiff's dual role. The link between any so called brushing under the carpet and the judiciary is not just unproven but it is intrinsically illogical. Once issues get to the judiciary (that is, to court), they have by definition not been brushed under the carpet, because the court sits in public. Furthermore, there is no proper defence of the recommendation in an assertion that it is all about perception. If perceptions are not capable of being rationally linked to reality, they should not form the basis of decision taking. To hold otherwise is to take decisions in a fantasy world and not the real world. The lack of logic in its approach demonstrates why the Committee's Recommendation – outside its remit and without the evidence to reach a valid conclusion on this issue – should carry no or little weight. Expressing an opinion on matters outside its Terms of Reference without taking appropriate evidence removes its credibility in respect of its conclusion.

It is unnecessary because Recommendations 1 to 3 involve the establishment of the Office of Commissioner for Children, the appointment of a Children's Rights Officer to give children and young people a voice, the development of a partnership with an independent external children's advocacy service such as Become, and the establishment of a professional and truly independent Children's Inspectorate operating to a statutory basis. Assuming those recommendations are adopted, the issues of lack of trust and any fear of reporting on the part of those who have been abused, are comprehensively addressed. The Recommendation that open consideration involving the whole community be given to the negative perceptions of "The Jersey Way" adds nothing to the Recommendations of substance set out above and is in any event so general in nature as to carry little meaning. However, the juxtaposition of the Recommendation that the whole community be involved with the recommendation that Carswell and Clothier be revisited does suggest that the Care Enquiry considered that the public – the whole community – should be consulted on the Bailiff's role by the holding of a referendum. Some might think that the outcome of such a referendum would be helpful whatever the result – it would silence those opposed to change if the vote were in favour of that change, and it would silence all critics whether in or outside the island if it were not.

Of course I am personally sad that the Committee of Inquiry appears to have given fresh impetus to the negativity of those who have taken and abused the expression "The Jersey Way" – which I have

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previously tried to overcome by re-capturing that expression and using it in a more positive context for the future. The negative use of the expression carries the connotation that somehow it is the people of Jersey who sweep things under the carpet. That is simply not the case. If anyone is guilty of this, it is not the people but the States of Jersey, whether the politicians or the administration. My own view is that the evidence before the Care Inquiry clearly demonstrated that the States did not set out to do so deliberately but rather failed to give sufficient attention to having a proper system in place and to monitoring appropriately the limited number of people who were actually responsible for the abuse which took place. The very fact that the Committee of Inquiry fans the flames as it has in this part of its Report is unhelpful as well as being unnecessary. It is unfortunate because the Committee has ventured into constitutional matters on which it took very limited evidence, and none from those who might be thought to know what they are talking about, including me, the Deputy Bailiff, and the two former Bailiffs who gave evidence. If the Committee had been required to consider constitutional matters, that requirement would have appeared in the Terms of Reference, and it knew it. It would in those circumstances have been required to receive evidence, much of it no doubt going contrary to the views which the Committee has expressed under Recommendation 7.

If there is debate on the dual role of the Bailiff, let it take place on its merits. Those merits do not include any support by the Care Inquiry. But I will now mention that I have been struck by the apparently uncritical acceptance of the proposition that there is something constitutionally wrong with the position we have in this island. There is not, and there are many different constitutional structures across the world. The system which we have, for the record, does not come nearly as close to breaching the rules around the separation of powers as did that in the UK as recently as 2005. There, the Lord Chancellor was not only a member of the judiciary and the legislature, but also a member of the Cabinet with executive responsibilities. Dickey, that great English constitutional lawyer of the 19<sup>th</sup> century did not regard that position with disfavour. Indeed, until the changes in 2005, the United Kingdom would not assert that there was something constitutionally wrong with its system of government. Far from it. The defence of Guernsey before the European Court of Human Rights in the McGonnell case was as much about defending the UK as it was defending Guernsey. It is right also to add that my own experience is that there are a number of very senior thinkers in the United Kingdom, including senior judges, who do not regard the constitutional changes of 2005 with favour. They have led to a hard edged angularity which is unhelpful, as was witnessed by the failure of senior politicians there adequately to defend the judiciary against the disgraceful attack by some parts of the media (describing the judges as “Enemies of the people”) following the decision in the administrative court on the lawfulness of the government’s proposed Brexit strategy. There have been other examples. If that can happen in a large jurisdiction like the UK, how much more is it possible in a small island like Jersey, and how much more damaging to the rule of law would be the result.

Let it also not be thought that removal of the Bailiff from the States would mean the island was not still breaching the principle of separation of powers as those in favour have implied. The executive and the legislature would still be in the same assembly. Unless one has a presidential system, that will occur, and indeed all constitutional arrangements modelled on the Westminster parliament breach this strict definition of the separation of powers.

#### **Summary**

- i. As the Inquiry itself admits at paragraph 13.19 of the Executive Summary, constitutional matters were outside its terms of reference. Yet it has recommended in Recommendation 7 that further consideration be given to the Clothier and Carswell reports, ie that the Bailiff’s dual role should come to an end.

- ii. As this topic was outside the Inquiry's terms of reference, it is not surprising that the Inquiry did not invite evidence or submissions on the subject, nor was any such evidence submitted by witnesses who might have been in a position to do so had they thought the issue was up for consideration. For example, none of the present or former Bailiffs were asked about the matter.
- iii. As a result, the recommendation appears out of nowhere. There is no suggestion anywhere in the Report that the dual role of the Bailiff contributed in any way to the extent of the abuse or the failure to uncover it or deal with it. There is simply no link between the findings of the Inquiry and the Bailiff's position and the Inquiry gives no reason for concluding that a change in the Bailiff's position would somehow improve child protection in Jersey.
- iv. The sole evidence in relation to the Bailiff's position which is referred to in support of Recommendation 7 is the quotation set out above. However, Paragraph 2.11 of Volume 2 of the Report makes it clear that this is an anonymous witness and it is therefore impossible to know the context of the observation, what evidence (if any) lay in support of it and the weight which ought to be attached to it. I suggest that a simple remark of this nature is a very inadequate basis upon which to recommend a far reaching and important constitutional change.
- v. In its passage on "the Jersey Way", the Inquiry quotes evidence from the former Deputy Trevor Pitman and former Deputy Bob Hill, both of whom have a long-standing view in relation to the Bailiff's position but even they are not quoted as asserting any connection between the Bailiff's position and the matters under review by the Inquiry.

I realise that you have expressed the view previously that the dual role of the Bailiff should change and I am sorry that you have never been willing to discuss that either with me or my predecessors. However, in the forthcoming debate, I should be grateful for your assurance that you will not take the line that the Care Enquiry's Recommendation 7 is a reason for supporting the proposition of Deputy Tadier, or indeed for re-visiting the issue of the Bailiff's role generally.

Yours sincerely



**Bailiff**

cc: Council of Ministers  
Chairman of Privileges and Procedures Committee

25th January 2011

Connétable Juliette Gallichan  
Chairman of Privileges and Procedures Committee  
States Greffe  
Morier House  
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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 be 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 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**

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