

STATES OF JERSEY



ESTABLISHMENT OF AN ELECTED SPEAKER

Lodged au Greffe on 30th April 2019
by Senator J.A.N. Le Fondré

STATES GREFFE

PROPOSITION

THE STATES are asked to decide whether they are of opinion –

to agree that –

- (a) whilst retaining the Bailiff in his role as President of the States, the States Assembly should select a Speaker from the elected members of the Assembly to be able to preside in the absence of the Bailiff and Deputy Bailiff;
- (b) the selection and appointment of the Speaker should be the first items of business for any new States Assembly and, should the office become vacant during the term of an Assembly, be the first item of business at the next scheduled meeting of the Assembly;
- (c) the Speaker should be elected to serve for the duration of an Assembly term, or for the remainder of the Assembly's term if (for any reason) he or she is elected mid-term;
- (d) the process for electing the Speaker should follow a similar format as those for the election of the Chief Minister, Ministers and Scrutiny Panel Chairmen;
- (e) provision should be made for the Speaker to resign and/or be removed from office by the States Assembly;
- (f) the Speaker should be required to act impartially, and be seen to act impartially, when presiding over the States. Upon being elected, the Speaker would be required to resign from any membership of a political party;
- (g) the Speaker, while presiding at the meeting, shall have the same powers as the Bailiff when presiding at such a meeting;
- (h) the role of the Speaker shall include the promotion of the States Assembly and of democracy in Jersey;
- (i) the additional resources required to support a Speaker should be provided for within the current structure of the States Greffe;
- (j) the Privileges and Procedures Committee should bring forward all necessary actions, including legislative amendments, to implement these changes in time for the Assembly to select and appoint a Speaker as soon as is reasonably practicable.

SENATOR J.A.N. LE FONDRÉ

REPORT

At the time of lodging this proposition, [P.31/2019](#), as lodged by Senator S.Y. Mézec, is proposing the removal of the Bailiff as President of the States Assembly, and is due to be debated during the States Sitting commencing 30th April 2019 (“Elected Speaker and Deputy Speaker of the States Assembly: selection and appointment”).

Members will have their own views on that subject, and I do not propose to dwell on the merits or otherwise of those particular arguments in this report.

Members will know that, jointly with Deputy R. Labey of St. Helier, we instigated a working group looking into the role of the Bailiff, with a report ultimately going to PPC, but which that Committee did not feel should be laid before the Assembly.

As part of the process, the Bailiff wrote to the group, and his letter is attached in the **Appendix** to this report, having previously been circulated to Members on 21st March 2019. Members will also recall that this was discussed at the presentation to States Members held on 26th March 2019, attended by the Bailiff, and held at the Société Jersiaise.

Within the letter the Bailiff has proposed a potential compromise, which does not represent a constitutional change, would retain him as Presiding Officer, but would bring far greater clarity in addressing the perception over whether there is a conflict with the Bailiff presiding when legislation is debated by the Assembly, even though he has no vote.

In essence it would put a structure around some of the informal processes which are presently practised when legislation is being considered by the Assembly. (At present, for certain types of legislation, the Bailiff and Deputy Bailiff do often choose not to preside over the Assembly, in order to avoid any perception of conflict when court cases arise under that legislation.)

Subsequent to the presentation referred to above, I have been approached by a number of Members who were supportive of the principles behind the Bailiff’s proposal, but felt that someone ‘more senior’ should facilitate their debate by the Assembly.

I have agreed to take on this role, and have also enquired as to whether this could be an amendment to P.31/2019, or whether it should be a standalone proposition, and have been advised that it should be the latter.

The principles are outlined in paragraph 19 onwards in the letter from the Bailiff in the attached **Appendix**.

There are certain key points to make –

1. This represents an evolutionary approach to the role, not a revolution. The principle would be that the Speaker and the Bailiff would work together to agree the mechanics of how the 2 roles would work in practice.
2. It would NOT represent a constitutional change.

3. It would resolve the perception issue regarding the Bailiff overseeing any debates involving legislation – as noted above, in practice, this is already addressed – this proposal would just regularise the matter.

I am hugely supportive of the present role of Bailiff in the Assembly. I believe we have been exceptionally well served by all of the Bailiffs I have ever had personal experience of during my political life.

The fact that the first record that we have of someone holding the position of Bailiff is in 1277 shows the huge cultural and historical impact the role has had during the centuries, and whilst not everyone will agree with style, approach or decisions made by Bailiffs in the past (or present), it is clear that the role has been pivotal in guiding the Island and its residents through hugely tumultuous times in history, and steering the course towards the Island of today, with its democratic ideals and multicultural society, whilst protecting, enhancing and nurturing its constitutional position. A key role that has not (in my opinion) been properly addressed or understood to-date is the important role the Bailiff fulfils as Guardian of the Constitution (i.e. protecting the Constitutional position of this Island against “... *whomsoever may seek to destroy them*”¹).

It seems to me therefore, that a decision to change the role should be an evolutionary approach, rather than just casting down nearly 800 years of Island history, possibly on the balance of one or 2 votes, and potentially without any recourse to the Public. Constitutional change IS important and should not be treated lightly. This proposition addresses the substance of any critical perception, but as previously noted, would NOT be a change in the Constitution of this Assembly and how it represents the Public of this Island.

This is why I have made this proposition, to give Members a choice, towards a compromise, an evolution in the role of our most ancient and historic Member.

I hope Members will understand the rationale behind this proposition, and will give it proper, and due, consideration.

Financial and manpower implications

There are no financial or manpower implications arising from the adoption of this proposition.

¹ *Extract from Oath of Office*

will be little if any of any changed position while I remain Bailiff. So I have no personal axe to grind.

States of Jersey Law

5. I would like to start with a reference to the States of Jersey Law 2005. Article 2 deals with the constitution of the States, and at paragraph (1) provides that the States are constituted by elected members and five unelected members including the Bailiff. Only elected members of course have the right to vote.
6. Article 3 provides for the Presidency of the States and indicates that the Bailiff shall be President. It does not say in terms that the Bailiff will act as a Speaker, but it is implied by paragraph (2) which indicates that if both the Bailiff and Deputy Bailiff are unable to preside, the Bailiff shall choose an elected member, the Greffier of the States or Deputy Greffier to preside at the meeting. The impartiality of the presiding officer is emphasised by paragraph (4) which indicates that an elected member who presides at the meeting of the States shall not have the right to vote.
7. Without I hope disrespect to anyone who has expressed other views, it seems to me that the primary arguments on each side of this debate are these.

Removal of Bailiff

8. Arguments have been run by some members that the presence of the Bailiff in the States breaches the principle of the separation of powers. It is also suggested, perhaps linked to the question of separation of powers, that by having the system we do, the Island loses international respect because the States do not have a reputation for a fully democratic governance. The Speaker is imposed upon the States by the Queen, and any democratically elected assembly ought to be able to elect its own speaker. Perhaps further allied to this last point is that some members wish to have control over their own business, to be in a position to elect and therefore to dismiss a presiding officer according to the views which members might have at any given time.
9. It seems to me the other arguments which are raised by those wanting to see a change are more defensive in nature and are intended to meet the objections of those who do not wish to see change. Thus, for example, it is said that it is a waste of the Bailiff's time as Chief Justice to be sitting in the States and that the cost of an elected Speaker, who would need support, would be more than met by the saving in the costs of Commissioner time for sittings of the Royal Court where additional judges have to be found.

Those against change

10. Those against change generally speak to the lack of public concern about the dual role, as set out above, and about the fact that this is a Bailiwick with a long-standing tradition, going back over hundreds of years, during which the Bailiff has presided in the Assembly. They point to the potential difficulties of finding a competent Speaker amongst the membership, not because nobody could do it but because those who would like to do it are very probably going to be involved in ministerial or senior Scrutiny positions. They make the point that the member who presides as Speaker will have no vote and that will in effect disenfranchise the district or parish which that member represents. They say that the legal knowledge of the Bailiff and Deputy Bailiff presiding over the debates is sometimes helpful. The most regularly produced argument is perhaps that "*if it ain't broke, don't fix*

it", an argument which one can see is deeply frustrating for those who see this as an issue of principle.

My own view

11. I respect entirely that a decision on this point is for members, who may or may not wish to have the help of a referendum to decide what past debate show to be clearly a contentious matter. It is also to my mind clearly a constitutional matter – Article 2 of the States of Jersey Law says so apart from anything else – but not all constitutional changes go to the public for a decision at a referendum and the decision as to whether or not to have a referendum is one for members as well.

I think that if one steps back, what one needs in the position of speaker in a small jurisdiction is a person who is independent of politics, impartial in the application of standing orders so that the parliament and all individual members are protected, and perhaps a person who has some experience of the law and constitution in order that advice can be given where a potential problem lies around the next bend. The latter is a support – a kind of long stop – for the Attorney who has the first responsibility in advising government and members on these things because he or she is likely to learn of them first. If one takes this step back, it is unsurprising that Bailiffs have been presiding officers – leaving me aside to de-personalise the argument, they should have these qualities of independence, impartiality and legal and constitutional knowledge. In my view, members should be very alert to the potential risks of having a Speaker who is not independent of politics. In Westminster that is now taken as a given as a result of centuries of experience. In our small parliament, there is a question as to whether that assumption can be made if the position changes, and in my view members should think about that.

12. I do wish to say something about the separation of powers arguments however. First of all, the doctrine of the separation of powers was given substantial life and impetus by Montesquieu in his writings in the 18th century. It is interesting that Montesquieu thought that England – which divided power between the King (who enforced laws), Parliament (which made laws) and the judges (who interpreted laws) was a good model for best government. By recording that there were these three separate branches of government with equal but different powers, the government of the people would avoid placing too much power with one individual or group of individuals. When you look at that theory of the separation of powers and compare it with what we have in Jersey at the moment, I suggest it is obvious that what we have does not breach the theory in any way at all. The Bailiff has no power in the States – no vote, and any trespassing on the right of members to express views as to what ought to be done would very soon be criticised. He has practically no executive power – the extent to which this exists really lies in the unlawful entertainment regulations, and even in that respect the Bailiff has little or no personal involvement, and I and my predecessors have always indicated that we would have no objection whatsoever if this particular responsibility were taken away from us.
13. It is I think also important to emphasise in this connection that these separation arguments in so far as they affect the work of the Courts are relevant only to the extent that it could be said that the Article 6 Convention Rights to a fair trial are adversely affected. In an appeal brought by Mr Gosselin against decisions of one or more Social Security Tribunals, the appellant challenged the Bailiff's dual role head on. I gave a judgment in which there was a full review of the legal authorities and refer particularly to paragraphs 2 to 60. I enclose it for your interest. There was no appeal, and it is fair to say therefore that this judgment represents the law of Jersey at the moment. For those who think that I

was judge in my own cause in this respect, I emphasise that it was a point raised by the appellant and it had to be dealt with. I also point out that Lord Carswell himself accepted that the law at the time of his report was that there was no difficulty in the Bailiff remaining in the States with the functions which he had.

14. At the heart of the separation of powers argument are these questions:

- i) Does our model allow the judiciary to hold the executive to account?
- ii) Does our model allow the legislature to hold the executive to account?

In both cases the answer is yes – so in truth, there is no issue around the separation of powers.

15. I want to move on to the question of relationships. It is sometimes said that the judiciary are the most vulnerable branch of government – vulnerable because their terms and conditions of service are generally set by the executive (in our case the States Employment Board) and because it is always open to the legislature to pass legislation which might directly affect them. One sees this vulnerability elsewhere. There are real threats to the independence of the judiciary all over the world and we should not be so complacent as to think they do not or cannot exist in the United Kingdom or in Jersey. My own view – and it is shared by numbers of senior judges in the United Kingdom – is that the changes introduced there by the Supreme Court Act 2005, which took the Law Lords out of Parliament and removed the Lord Chancellor from the judiciary, have substantially and adversely affected the judiciary. Politicians seem to criticise the judiciary much more freely than hitherto, and, worse, seem to have much less respect for judges. One sees that lack of respect coming through in social media of different kinds as well. I emphasise that it is not that judges are entitled to respect – they have to earn it. Equally, however, judges are entitled, like everyone else, not to be disrespected without cause.

16. It is a fact that at present there are some 25 High Court judge positions vacant in the United Kingdom. Senior lawyers are not applying for these positions and no doubt there are many practical reasons why; but it is not unconnected in my view with the constitutional changes in 2005 and the other changes in terms and conditions, working practices and public exposure which have followed since then. What we have seen is a hard-edged angularity between politicians and judges, and it is simply not good for the government of the community that that should have taken place.

17. In our personal lives, we try to avoid that hard-edged approach. We try to find ways of living with our neighbours, with whom we do not necessarily agree, by politeness, by courtesy and by compromise. For my part I do not think one should create a constitutional structure which is inimical to the way in which most of us go about our personal lives. The presence of the Bailiff and Deputy Bailiff in the States enables members to see at close quarters two judges acting and speaking, one hopes, fairly and intelligently in relation to the problems which have arisen in the States. It enables members to get to a point of feeling comfortable that when the same judges sit in court they will also act fairly and intelligently. Conversely, the Bailiff and Deputy Bailiff see members speaking with passion and care about the political subjects of the day. Although those subjects will not be the same as those which arise in court, the Bailiff and Deputy Bailiff will be better informed generally about the Assembly and ministerial procedures. The important thing is that the interaction in the States enables both judges and politicians to view each other with respect and without that interaction, it seems to me, one would need to establish

some much more defined and hard-edged boundaries in law. For my part, that is a positive disadvantage in any ideological insistence that the separation of powers has to be so absolute that the powers can never talk to each other. In a small place like Jersey, which does not have the strength of the non-governmental institutions and a broader spectrum of media which exist in larger places like the UK, this is even more important.

18. The last point I wish to make concerns the presidency of the States and the Bailiff's role as civic head of the Island. There seems to be general acceptance by all that the civic headship role should continue. I do not think this is possible unless the Bailiff remains President of the States. It is the fact of that presidency which enables the Bailiff to greet ambassadors, to speak at Liberation Day, to lay wreaths at Remembrance Sunday and to attend the many civic events that he does. There is no obvious basis for a Chief Justice to act in these areas. It is all very well for those who wish to see a change in the speakership in the States to assert that the civic headship role will continue, but they simply are not addressing the basis upon which, if only at a personal level, the Bailiff feels able to do the things he traditionally has to do. For the avoidance of doubt, I feel personally able to do these things because I know that the Bailiff is President of the States and that is what gives me authority to do so.

A possible solution

19. I would like to suggest that there is a softer solution to the issue which might incorporate this approach. It avoids the hard-edged angularity to which I have referred, and is this more consistent with the way we have traditionally approached constitutional issues.
20. The Bailiff would remain President of the States and the States of Jersey Law would make it plain that he can preside over the Assembly if he wishes to do so.
21. The States would however have the right to elect a Speaker who will preside if the Bailiff or Deputy Bailiff are not presiding.
22. The Bailiff and if not him, the Speaker would have the right to appoint a temporary presiding officer, probably the Greffier or Deputy Greffier.
23. Taking this approach would require – and we would always expect – the development of an understanding that Bailiffs and elected Speakers will reach a consensus over the apportionment of the role as Speaker. There would probably be an understanding that the Bailiff will not preside whenever legislation or for example the Island Plan is being adopted; that the Bailiff would preside over questions and votes of no confidence and on the election of ministers and so on; that perhaps in the first instance policy debates might be dealt with by the Bailiff, or might be shared, depending on whether the elected Speaker felt strongly about the policy issue in question or on the convenience generally which arose at that time.
24. In other words, we would have an arrangement which was closer to meeting the desired objectives of those who wish to see change – the States would elect their own Speaker, even if he or she did not always preside, and in so far as there was a technical argument in relation to legislation, the fact that the Bailiff did not preside over debates introducing legislation would appear to meet that argument. All in all, the solution which I propose for consideration would seem to me to have the advantage that Bailiffs and Speakers can “*feel*” their way forward with mutual respect for the future.

25. My proposal would accommodate the problem which would arise if in fact it should turn out at a future date that no elected member wanted the Speaker's role.
26. If this were thought to be acceptable, I might also suggest perhaps that it will become obvious if the system is not working. In that event, a further change would seem to be reasonably straightforward. Equally, if it is working, it would be desirable to take the controversy around the Bailiff's role away for a reasonable period at least. I would propose therefore that either there should be introduced a rule that any change in the Bailiff's role thereafter would require a two-thirds majority of members present and voting, or there should be a commitment enshrined in the law that no further amendment take place for a prescribed period, perhaps of 10 years.
27. I have shared these ideas with the Deputy Bailiff, who is I believe broadly supportive of them.
28. I would be very happy to attend on your working party to discuss any of these ideas if that would be helpful. I would like to reach a position if possible that leaves my successor without this problem.

William Bailhache

William Bailhache
Bailiff