

STATES OF JERSEY



SECOND INTERIM REPORT OF THE CONSTITUTION REVIEW GROUP

Presented to the States on 27th June 2008
by the Council of Ministers

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Second Interim Report of the Constitution Review Group

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December 2007

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SECOND INTERIM REPORT OF THE CONSTITUTION REVIEW GROUP

1. INTRODUCTION

1. The Constitution Review Group ("the Group") was established by a Sub-committee of the Policy and Resources Committee and given terms of reference on 11th July 2005 in the following terms:

"1. To conduct a review and evaluation of the potential advantages and disadvantages for Jersey in seeking independence from the United Kingdom or other incremental change in the constitutional relationship, while retaining the Queen as Head of State.

2. To identify:

(a) the practical and economic costs and benefits of dependence;

(b) the practical and economic costs and benefits of independence;

(c) the consequences of independence in terms of Jersey's relationships with other countries, as well as the UK, and international organisations, particularly the EU, UN, WTO, OECD, and Commonwealth;

(d) the social and cultural consequences of independence.

3. To outline the requirements and processes that would be involved in a transition to independence.

4. To submit to the Chief Minister, by March 2006, a draft Public Consultation Document ("Green Paper") which outlines the factual information and objectively evaluates the implications of independence."

2. The Chief Minister extended that time frame and on 19th December 2006 an Interim Report was submitted to the Constitutional Advisory Panel appointed by the Council of Ministers. The report identified two separate stages in fulfilling the terms of reference, *viz*

- (i) Option A – to undertake further work in areas required if the Island were to find itself **obliged** to seek independence as a result of external pressure; and
- (ii) Option B – to address the wider issues implicit in any desire the Island might have at a future date actively to seek independence on the basis that its interests would be best served by such a move.

Option B clearly required much greater study. The Panel agreed that the Group should continue working on Option A as a first stage. This second Interim Report reflects the Group's consideration of the issues with which the Island would be faced if Jersey were to find itself obliged to seek independence from the UK as a result of external pressure of one form or another.

- 3. To a certain extent, of course, the issues arising under Options A and B overlap, but the Group has tried so far as possible not to engage with matters touching upon the desirability or otherwise of seeking independence. This report is primarily concerned with the extent to which Jersey is equipped to face the challenges of independence at this stage. We have tried not to descend too much into detail in this report, but rather to paint a broad brush picture. Some further details will be found in the appendices.
- 4. One of the results of this exercise has been the identification of actions which might usefully be taken now or in early course to ensure that the Island is better prepared for the contingencies set out in paragraph 2 above. Such actions appear to us to be entirely consistent with the aim of the Chief Minister of securing greater recognition of Jersey's international identity. It is clear from this report that it would be in Jersey's interests, if independence were to be sought in due course, that the transition to full sovereignty should be as smooth and seamless as possible. To the extent that our institutions can be adapted at this stage, it seems to us desirable that such steps should be taken, or at any rate that consideration should be given to them. We therefore include a number of recommendations in each section of this report.
- 5. Our first Interim Report identified a number of heading subjects upon which further work was required. They were (a) defence and internal security, (b) international relations, (c) internal constitutional considerations, (d) economic considerations, (e) other internal considerations. We shall take each of those in turn.

2. DEFENCE AND INTERNAL SECURITY

Current constitutional divisions of responsibility between Jersey and the UK

6. The UK is constitutionally responsible for the defence of Jersey. The corresponding obligation of the Islanders is loyalty to the Crown. There is no obligation to contribute towards the costs of the defence of the Realm^[1] although Jersey has, from time to time, accepted a moral responsibility to make a monetary contribution towards the UK Exchequer. Thus, in 1927, the States agreed to make a “one off” contribution of £300,000 towards the costs of the Great War. Since 1987 the States have made an annual financial contribution to the Ministry of Defence to meet the costs of a Territorial Army Unit (the Jersey Field Squadron) based in Jersey^[2]. The States have also raised taxes from time to time for the purposes of the defence of the Island, e.g. for meeting the cost of the Jersey Militia. If the Island were to be subject to an external military threat, it would however be the constitutional responsibility of the UK to defend the Island against that threat.
7. Apart from threats by external aggressors, the core areas relating to internal security may be summarised as –
- (i) anti-terrorist capability;
 - (ii) search and rescue capability, including territorial waters and sea fisheries protection, international buoyage provision and maintenance, and pollution and environmental incident management;
 - (iii) civil defence;
 - (iv) policing and fire-fighting.
8. The core areas set out in paragraph 7 above fall within the responsibilities of the Island. It is true that, in the event of a terrorist incident which might require the intervention of the military, or in the event of continuing riots involving a collapse of law and order, the UK would have a contingent responsibility. It is also true that in extreme circumstances or for particular events, the local uniformed services might need to call for help from outside the Island under mutual assistance agreements. In general, however, civil defence, fire-fighting and policing are all matters of domestic responsibility. Reaction to any crisis in these areas remains essentially a matter for the government of Jersey.

Replacement of the UK’s responsibility

9. The primary consideration in this section is therefore the assessment of what would need to be done to replace the UK's responsibility for the defence of the Island from external threat or aggression, and for assisting to suppress terrorist activity and internal insurrection.
10. It is worth setting this discussion in an historical context. During the last 250 years Jersey has been invaded twice. The first was a French invasion which led to the Battle of Jersey in 1781. The second was the German invasion in 1940 which led to 5 years of occupation until the Island was liberated by British and other Allied forces in 1945. In terms of internal insurrection, the closest that the Island has come to a breakdown of law and order was the so-called Corn Riots of 1769. But even they were, in the context of the times, a relatively tame affair. In the context of defence against external aggression there appear to us to be three broad options available
- (i) Jersey could seek membership of a defensive alliance;
 - (ii) Jersey could seek to negotiate a defence agreement or memorandum of understanding with another sovereign power (*e.g.* the UK);
 - (iii) Jersey could establish its own defence force.

Each of these is considered in more detail below.

Membership of a defensive alliance

11. There are two relevant alliances:

- (i) The North Atlantic Treaty Organisation, (NATO) formed in 1949, is the world's most powerful regional defence alliance. Within NATO sits the North Atlantic Council, arguably the most important decision making body within NATO, which brings together high level representatives of each member country to discuss policy or operational questions requiring collective decisions. NATO has 26 member states.
- (ii) The Organisation for Security and Cooperation in Europe, (OSCE), formed in 1973, serves as a major forum for political dialogue and aims to secure stability in the region, based on democratic practices and good governance. It is defined as a regional arrangement under the United Nations Charter and is concerned with early warning, conflict prevention, crisis management and post conflict rehabilitation. OSCE has 56 member states and covers most of the northern hemisphere.

12. Pursuing membership of NATO would be based upon the accepted position that NATO has an "open door" policy on enlargement. However, any European country in a position to further the principles of the North Atlantic Treaty and to contribute to security in the Euro Atlantic area, can only become a member of the Alliance when invited to do so by the existing member countries. Membership of NATO is considered very much on an individual basis; an independent state would need to meet all the NATO requirements for membership. The application process is a lengthy one; indeed there are many recent examples of aspiring member states which have been some years along the path to opening accession talks, which can themselves take some time to commence. An aspiring member state must first satisfy existing members in a number of areas as follows:-

- (i) that it has a functioning democratic political system based on a market economy;
- (ii) that it treats minority populations in accordance with the guidelines of the OSCE;
- (iii) that it has resolved any outstanding disputes with neighbours and has made an overall commitment to the peaceful settlement of disputes;
- (iv) that it has the ability and willingness to make a military contribution to the Alliance and to achieve inter-operability with other members' forces;
- (v) that it is committed to democratic civil-military relations and institutional structures.

13. It should be stated that membership of NATO is generally dependent upon the country being able to contribute to security in the Euro-Atlantic area in some way. It is true that Luxembourg is a member of NATO but offers only a token military contribution. Iceland is also a member, and offers nothing in the way of armed forces; it does however contribute important air fields and a military base pursuant to an agreement with the USA. It is clear that Jersey would have nothing to offer NATO in a military sense. The only contribution to NATO which Jersey might be able to offer is financial, but the cost to Jersey would be likely to be disproportionate to any benefit which might be derived from membership of the organisation.
14. Many smaller states which are not members of NATO are however members of OSCE. Such states include Andorra, Liechtenstein, Monaco and San Marino. If Jersey were to obtain membership of OSCE, the cost would be between £150,000 and £200,000 per annum. Membership of OSCE would render Jersey eligible to join NATO's Partnership of Peace. The Group considers that unless there are changes to the structure of or policies of NATO or OSCE, this would be a more desirable solution than membership of NATO. Both options would, however, be available to the Island to pursue.

Defence agreement

15. All the European micro-states are reliant upon their larger neighbours for defence to a greater or lesser extent. Andorra relies upon France and Spain which has a joint formal responsibility for its protection. Liechtenstein relies upon Switzerland, and Monaco upon France. San Marino has a defence agreement with Italy which in 2000/2001 cost San Marino \$700,000.
16. Jersey has, in a sense, an existing agreement with the UK in that she contributes £1.1 million per annum towards the cost of a Territorial Army Unit based in Jersey. A formal defence agreement or Memorandum of Understanding (MOU) could no doubt be negotiated with the UK and/or (possibly) with France. In consideration of an undertaking to defend the Island against external aggression, Jersey could offer to make its territorial waters available to military vessels and its air space open to military aircraft. Training facilities in Jersey could be made available. Jersey citizens would be eligible to serve in the British Armed Forces as at present. Any such arrangements could be the subject of an MOU. Equally the existing TA Unit could continue in existence as part of a package of measures embraced by such an agreement.

Defence force

17. As mentioned above, small sovereign states in Europe have in general chosen not to create a defence capability but to rely upon agreement with a larger neighbour. One exception is Malta, which has a defence force numbering about 1500. Many of the recruits are trained at Sandhurst and at equivalent academies in Italy. Much practical training takes place in Sicily. The defence force is used not only for national defence, but also for search and rescue and for combating illegal immigration from Africa, which is a serious

problem. The force carries out protection duties at foreign embassies and is responsible for airport security and security at international meetings. The defence force occasionally acts in aid of the fisheries protection service when there are serious difficulties at sea. There is an MOU with Italy. Expenditure on defence in 2004 was \$31.1m. or a little over £15m.

18. Less expensive examples of a local defence force can be found amongst small independent states in the Caribbean. In Antigua and Barbuda there is a defence force numbering 170 personnel. It functions principally in civil roles, namely search and rescue, prevention of drug trafficking, fisheries protection, prevention of marine pollution etc. Training of personnel takes place in the United States. Annual expenditure currently runs at between £2m. and £2.5m.
19. The Barbados Defence Force (BDF) is the name given to the combined armed forces of Barbados. The BDF was established in August 1979 and has responsibility for the territorial defence and internal security of the Island. The two main elements of the BDF are the Barbados Regiment, which is the main land force component, embracing both regular and reserve units, and the Barbados Coast Guard. The BDF has two battalions. It participated in the US-led invasion of Grenada in 1983 in order to restore democratic government. The BDF works closely with the Royal Barbados Police Force. The Barbados Coast Guard has responsibility for patrolling territorial waters, for suppressing drug trafficking, and for life saving exercises. It has a small fleet including its flagship HMBS Trident, HMBS Endeavour (a 40ft vessel) and 5 smaller patrol vessels.

Elements of internal security

20. The States of Jersey Police Force was established in 1952. It is a professional force with an establishment of 343 FTE^[3] including specialist sections dealing with criminal investigation, drugs, financial crime, and so on. The organisation is constituted to deal competently with most policing problems presented by a community of less than 100,000 people. Its small size means, however, that a number of specialist skills cannot sensibly be provided within the force, but must be bought in. This is particularly true in the context of forensic skills, but it goes wider than that. In particular its operational efficiency is dependent upon various data bases in the UK. Criminal convictions in Jersey are recorded on the Police National Computer in Hendon. The fingerprint and DNA databases are also in the UK. More accurately, these databases are in England, but access to the Scottish and Irish databases will shortly be achieved. The Jersey Police pay about £100,000 per annum for access to these databases which are an essential tool for any force.
21. Although independence would involve a certain amount of work for the police and for the Attorney General's department, it would present no insuperable difficulties from a policing perspective. There would be a common interest in securing a continuation of the existing good relations and open lines of communication between the Jersey police and their counterparts in the UK. Jersey provides much valuable information to the national police and security agencies, and it is as much in the interests of the UK as of Jersey that this close cooperation should continue. There would be no financial implications because the Jersey police are already treated as if they were an independent force, and pay for any services which they receive.

22. The mutual aid agreement with the Avon and Somerset Constabulary would be expected to continue so that the Jersey police could obtain access to additional resources in manpower and other skills to the extent that they were required. The Group thinks that independence might bring a necessity to examine more closely what might be done in Jersey, rather than by buying in services and skills from the UK, but that is a tangential issue.
23. Under the Shipping (Jersey) Law 2002, the Minister for Economic Development has political responsibility for all matters relating to shipping. Executive responsibility for security at sea within Jersey's territorial waters rests with the Harbourmaster. Independence would bring (absent some provision in a defence MOU with the UK) the cessation of naval protection from the Royal Navy. In practice such protection has not been called upon since 1945. Naval vessels pay courtesy visits to St Helier and that would be expected to continue. Nonetheless, it is likely that some enhancement of the capacity to protect Jersey's fisheries and to act against drug and other traffickers would be desirable. The fisheries protection vessels operated by the States of Jersey have very limited deterrent potential. We think that some further work ought to be done to assess the likely cost in this respect.
24. Since the terrorist attacks in New York of 11th September 2001 maritime security has greatly increased. The relevant conventions and agreements have however been extended to Jersey and the impact of independence in that respect would be negligible. It is likely that Jersey would become party to these conventions in her own right. Independence would bring changes in terms of the registration of shipping, but that is dealt with at paragraph 96 below.
25. So far as buoys and beacons are concerned, these are already, with the exception of the West Minquiers buoy, maintained by the Harbours Department. The department is expected shortly to take over responsibility for the West Minquiers buoy from Trinity House. No financial or other implications arise in this respect.
26. Marine pollution is already dealt with by States Departments. Measures to reduce the risk of pollution are in place either contractually or by law, and compensation in the event of an oil pollution incident is covered by certain conventions (for example, the International Convention on Civil Liability for Oil Pollution Damage, and the Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage) to which it is likely that Jersey would continue to be a party".

Conclusions

27. The Group's broad conclusion is that defence against external aggression would not be a critical

consideration for the Island on assuming sovereign status. The lesson from recent history is that, in the context of any European war, Jersey could not, or would not, irrespective of any defence alliance or agreement, be defended from serious external aggression by a larger power. The stark reality is that Jersey is **in that context** indefensible. Every other sovereign micro-state in Europe has reached a similar conclusion. Neither Liechtenstein, nor Monaco, nor Andorra has any independent defence capability. In Liechtenstein inquiries about defence were met with polite amusement. That is not to say that other precautionary measures should not be taken, but the establishment of a local defence force would not in our view be a sensible use of resources.

28. It is true that some, but not all, of the small states examined by us do have a modest independent defence capability. Malta has such a force, and so does Barbados. On the other hand, Iceland has none. It seems to us that these decisions are all shaped by geography. Barbados is situated in a region of other small or micro Caribbean states, some of which have been shown by history to be less stable than others. Malta is situated in the Mediterranean Sea and has a problem with illegal immigration from Africa. Iceland has a long standing defence agreement with the USA and is home to a NATO air base. It needs no more. The Channel Islands sit geographically in the bosom of Europe. It seems inconceivable that the UK or France, in their own interests, would tolerate territorial aggression against the Island by a non-European power.
29. In our view it would nonetheless be sensible for a sovereign Jersey to consider the balance of advantage in relation to membership of NATO and/or OSCE at the material time. The stated policy of both organisations is an “open door” policy towards new members. The European micro-states are members of OSCE, although not of NATO. Membership of OSCE carries a modest subscription fee of between £150,000 and £200,000 per annum as a contribution towards the administrative costs of the organisation.
30. Membership of other international organisations might however be just as important in a defence context. Membership of the UN and the Commonwealth, which we recommend below, would carry with them a certain assurance of collective interest by other members.
31. In our view it would certainly be sensible to seek to negotiate some form of defence agreement or MOU with the UK. Such an agreement might involve a commitment on Jersey’s part to maintain the existing TA Unit as part of the British Armed Forces. It might also involve a continuing commitment on the part of the UK to accept Jersey citizens as part of the armed forces – we would have the same Sovereign. So far as other aspects of internal security are concerned, we make the recommendations set out below. Nonetheless it is our view that independence would bring no insuperable difficulties for the Island at this stage in the context either of defence or of internal security.

Recommendations

32. We recommend:

- (i) that informal inquiries be made of the Secretary General of OSCE to gain further information as to the implications of membership;
- (ii) that the Economic Development Department examine what resources would be required to achieve reasonable self-sufficiency in terms of protecting the territorial sea, conserving our fisheries and preventing the smuggling of drugs and people; and,
- (iii) that consideration be given to the options for obtaining support from neighbouring countries.

3. INTERNATIONAL RELATIONS

Preliminary

33. The representation of Jersey in relation to international affairs is currently the constitutional responsibility of the UK Government. Clearly, therefore, the assumption of sovereignty would involve the establishment of a Department of Foreign Affairs and some diplomatic missions overseas. Consideration would also need to be given to questions of citizenship and the issue of passports. We deal with citizenship in Section 4 below. Related to the question of overseas missions is the identification of those international organisations in which the Island should participate and those multilateral treaties to which Jersey should seek to accede. There are also a small number of bilateral treaties between the UK and other countries in which Jersey is directly concerned. The most important example is the UK-France Fisheries Agreement in relation to the Bay of Granville.
34. Jersey does not of course exist in an international vacuum. Indeed the Island's growing international identity has already resulted in a number of agreements between Jersey and foreign countries. While a number of those agreements are arguably international agreements^[4] there remains a difference of approach between the UK and Jersey in relation to whether the power to enter international agreements lies with Jersey or the UK^[5] and whether the legal consequence of these agreements is that international obligations have been incurred on behalf of the UK rather than by Jersey. There is no dispute that Jersey is already bound by a number of multilateral treaties which have been extended to the Island by the UK at Jersey's request. The United Nations Charter, the European Convention on Human Rights, the Convention on the Organisation for Economic Co-operation and Development, and parts of the Treaty of Rome are probably the most important examples. Although Jersey could not be said in any real sense to be conducting her own foreign affairs, there is a section in the Chief Minister's Department which is charged with responsibility for Jersey's relations with the UK and for taking forward Jersey's foreign policy in terms of TIEAs and related matters.

35. Discussions with other small states have shown that the conduct of foreign affairs usually has its genesis in the Prime Minister's Department. When Malta achieved independence in 1964 foreign affairs were initially the responsibility of the Prime Minister and administered from within his office. It was only after independence that a distinct ministry was created.^[6] It seems logical therefore that any enhancement of the Island's capabilities in relation to foreign affairs should be placed within the Chief Minister's Department.
36. The assumption of sovereignty would present some challenges for Jersey in relation to the conduct of foreign affairs. There is virtually no political experience of foreign affairs and very restricted experience within the Civil Service. It must be appreciated, however, that the transition from dependent status to independence will always present challenges of this kind. Although full experience of the conduct of foreign affairs can obviously only be gained post-independence, there are nonetheless some precautionary steps which can be taken, and we refer to those more fully below.

International personality

37. International personality is an essential concomitant of sovereignty. A state may regard itself as independent, but its sovereign status will only be truly established once its international personality has been generally recognised. State recognition may be granted on a country by country basis.^[7] Membership of certain international organisations, especially the UN, is however generally regarded as the acid test of sovereignty. Every state must make a judgement as to the extent it involves itself in international affairs, and that judgement will naturally be informed by that state's assessment of its national interest. Liechtenstein, for example, accords a high priority to human rights policy issues. That priority led to the establishment of a mission in Geneva where the UN Commission is based. Barbados attaches great importance to the Commonwealth, not least because of the advantages of membership. Amongst other advantages, nationals of any Commonwealth country may rely, free of charge, upon UK missions for consular assistance. If expenses are incurred by the UK, for example in repatriation, they must be reimbursed, but the services of British personnel are given *gratis*. CARICOM, the regional association of Caribbean States, is also of importance to Barbados. Jersey would therefore have to decide how best to concentrate her limited resources on associations and organisations which served Jersey's national interest. Clearly the extent to which Jersey could engage in international affairs would depend upon the resources allocated. On the basis that the Group is considering in this Interim Report the minimum requirements, we have reached the following conclusions.
38. Membership of the UN itself would be crucial. Not only would it be compelling evidence of the Island's sovereignty, but it would also provide the opportunity to be heard in a global forum in the event of need. The UN has a number of key agencies, e.g. United Nations Educational, Scientific and Cultural Organisation (UNESCO) and the World Health Organisation (WHO) and membership of these agencies would need to be assessed on a careful cost/benefit basis. Other UN agencies membership of which is likely to be considered essential include the International Civil Aviation Organisation (ICAO), the International Maritime Organisation (IMO), International Telecommunications Union (ITU), and the Universal Postal Union (UPU). Membership of the International Monetary Fund (IMF) would be important having regard to the financial

services industry and the existing links with that organisation. The IMF is based in Washington.

39. Membership of the Commonwealth would be important not least for the reason given in paragraph 37 above, but also because of the close connection with her Majesty the Queen, the size of the organisation and the particular assistance which the Commonwealth historically has given to small states. There is a complex formula for calculating the cost of membership, but it is not anticipated that would be likely to exceed a five figure sum by much if at all. Jersey already plays a prominent role in many of the Commonwealth Associations, the important exception being the Commonwealth Heads of Government Meeting (CHOGM).
40. We also consider that membership of the World Trade Organisation (WTO)^[8] could be valuable. It is the only global organisation dealing with trade between nations. Jersey is already associated with the European Bank for Reconstruction and Development (EBRD) which was established in 1990 to encourage market economies and democracy in the former Eastern Bloc countries.^[9] The EBRD is owned by 61 countries and two inter-governmental institutions. On achieving sovereignty it would be open to Jersey to invest in the EBRD. By way of example, Liechtenstein has a commitment of €3 million (£2.25 million) of which €1 million (£.75 million) has been paid in, and Iceland has a commitment of €15 million (£11.22 million) of which €5 million (£3.74 million) has been paid in.
41. There is also the World Bank Group which comprises a number of different organisations including the IBRD; few sovereign states are not members of the World Bank. We think it is likely that Jersey would wish to be associated with the Bank as a measure of its international personality. Further research should however be undertaken on the financial implications of membership.
42. The Group had a number of informal discussions with officials of the European Commission and other key individuals based in Brussels. It is difficult to say whether any application by Jersey to join either the EU or the European Free Trade Association (EFTA)^[10] would necessarily be successful. The Group believes, however, that no useful purpose is served at this stage, in the context of the task that we have set ourselves in this paper, by considering in great detail the advantages and disadvantages of membership of the EU or membership of EFTA and the European Economic Area (EEA). It is clear that independence would bring to an end Jersey's current relationship with the European Union which is founded on a protocol to the UK's Treaty of Accession. An independent Jersey would need to negotiate with the EU an agreement for free trade in goods which would replicate the existing provisions of protocol 3. The extent to which Jersey might be able, or indeed might wish to negotiate a more extensive agreement with the EU or to seek membership of EFTA (and the EEA), would depend upon the prevailing circumstances at that time. This is, however, a key issue because any terms which the EU might seek to impose might affect the Island's whole approach to relations with the EU. The Group considers that further work should be undertaken as a high priority in this area.

Treaties and other international agreements

43. As stated in paragraph 34 above, Jersey is already bound by a number of treaties and other international agreements which have been extended to Jersey by the UK usually with the consent of the States.^[11] As a matter of international law, all these agreements would cease to have effect upon the assumption of sovereignty. It would then be open to the new state to decide whether, and to what extent, it wished to accede to these agreements. In the past, many new states have on independence given notice by unilateral declaration of their intentions concerning treaties applicable in respect of their territory immediately before independence. Almost all former UK dependent territories have made such a declaration notifying depositaries of the intention to continue to apply all treaties provisionally until they have had time to consider which they wish to continue to apply. Sir Roy Marshall described the process in the following way -

“Upon achieving independence newly independent states now make, and deposit with the United Nations’ Secretary General, a declaration of their intention to undertake a systematic review of all applicable treaties entered into by the United Kingdom. Obligations under every existing treaty (except a bilateral treaty that is inconsistent with the advent of independence) are declared to be maintained in force ‘provisionally and on the basis of reciprocity’ until the review of that treaty has been completed and action is decided upon and undertaken. Provided that the other party or parties assent, newly independent states in this way enjoy temporary reliance upon existing treaty rights”.^[12]

44. Detailed consideration would have to be given to each treaty or convention, whether it was one that was extended to Jersey by the UK prior to the Foreign Office Letters of 1951, or was a treaty or convention which the States have agreed should be extended to the Island. Some work has already been done by the Chief Minister’s Department to establish a comprehensive list of international agreements applicable to Jersey. Such treaty obligations would need to be reviewed in the light of decisions as to which international organisations Jersey wished to join. In due course Jersey would need to indicate which international agreements it wished to ratify in its own right, and which agreements it might decide to denounce. It is likely that in the majority of cases a decision would be made to seek to ratify the agreement as a new state party.

45. Some treaties, as indicated above, are of particular importance. They include the UN Charter, the Treaty of London which established the Council of Europe, the ECHR and the various declarations establishing the Commonwealth. There is no reason to suppose that an independent Jersey would not be able to achieve membership of all the organisations mentioned in paragraphs 37-45. Some informal soundings could however usefully be undertaken so as to establish the full implications in terms of resources and cost of becoming a member of each organisation. A provisional calculation can be found at **Appendix 1**.

Establishment of a foreign office

46. The establishment of a foreign office would be essential. The resources to be applied need not be

extensive, but some diplomatic missions overseas would be required as would some investment in the skills necessary for the proper conduct of foreign affairs. The Group has considered what would be the minimum requirement, as well as what could sensibly be expected within (say) five years of independence. We deal below with the establishment of missions and investment in diplomatic skills. The establishment of missions is obviously related to membership of international organisations as well as to political and economic links with other states.

47. A minimum requirement of three overseas missions would be necessary, namely London, New York and Brussels^[13]. Most of the Island's political and economic links are with the UK. Furthermore the Commonwealth Associations are based in London. A mission in New York (UN and its agencies) could also cover Washington, USA, (World Bank and IMF) and Ottawa, Canada. A mission in Brussels could deal with relations with the EU and of course Belgium. It could also cover Strasbourg (Council of Europe and ECHR), Vienna (UN office against Drugs and Crime) and Geneva (UN agencies and WTO). In due course one might envisage further missions being established in Paris (France and the OECD), and Geneva. Trade offices might also be established in, e.g. Dubai (or one of the Gulf states), and Shanghai.
48. Clearly small states cannot afford the extensive number of overseas missions which can be established by a large country. There are a number of ways, however, in which small countries have been able to mitigate the disadvantages of size. First, membership of the Commonwealth affords consular assistance wherever a British mission has been established. Secondly, it is possible for a diplomat to have multiple accreditations. For example, the Icelandic Ambassador to London is also accredited to eight other countries^[14]. He does not maintain residencies in all these places, but travels to them from time to time as Icelandic interests require. Thirdly, some small states share the expenses of establishing an overseas mission. Fourthly, the use of honorary consuls can be a very cost effective method of maintaining a presence in a large number of overseas countries and territories. Malta, by way of example, has approximately 160 honorary consuls throughout the world.
49. So far as the staffing of a foreign office is concerned, a minimum of 20 officials, of which approximately a third would be based in Jersey, might be envisaged. It is likely that that number would rise to 30 or 40 over a five year period. The Group has based its estimations on the figures for Liechtenstein (pop. 34,000), Barbados (pop. 274,000) and Iceland (pop. 297,000). Liechtenstein employs 20 staff of which ten are based in Vaduz. We were told that parliament's approval had been requested for two extra staff, one to be based in Vaduz and the other in Geneva. Barbados employs a complement of 250 officials, of which 100 are based in Bridgetown. Iceland employs 200 staff of which about half are based in Reykjavik. Its largest mission is in Brussels employing 20 staff.
50. Recruitment and training of staff are clearly important, and sometimes difficult. The creation of the necessary skills base is vital, and in a small state the loss of trained personnel to the private sector can cause particular problems. The studies made by the Group indicate that special care is taken to develop an *esprit de corps* and to encourage rapid advancement of talented young people. In Liechtenstein there is an established structure involving various selection tests, including linguistic ability, initial training in Vaduz for a two to three year period, and then service abroad. Some help is obtained from Switzerland and Austria in

terms of placements. In Barbados new entrants are given an induction course on the essentials of diplomacy and protocol, and of the country's foreign objectives. After a period they are sent on a graduate training course at the School of International Relations in Trinidad, where the theory of international politics and elements of international law are taught. In-house training courses were also offered by retired diplomats. Some officials were sent on training courses at the University of Malta, which also offered a distance learning programme on bilateral and multilateral diplomacy.

51. All small states appear to make extensive use of their diplomatic missions for tourism and trade-related purposes. In Malta the policy is to be pro-active in this respect. Whenever the foreign minister travels abroad, he or she is accompanied by a trade delegation. In Barbados all overseas missions double up as trade and/or tourism offices, thus mitigating the expense by the sharing of costs.

52. The existing complement of officials charged with representing Jersey's interests overseas is very modest, even compared with Liechtenstein which has less than half of Jersey's population. In fact there is only one official in the Chief Minister's Department whose sole responsibility is to deal with international matters. The Chief Executive of the States has oversight of international affairs, but many other responsibilities as well. The Director, International Finance, spends the bulk of his time on the finance industry rather than on international issues. The Attorney General also has wide ranging responsibilities in the criminal field which bring him into contact with various government agencies world wide apart from his occasional representative role on international legal matters. The part time adviser on international affairs has huge experience of international negotiations and many important contacts arising both from those negotiations and from his lengthy chairmanship of the Offshore Group of Banking Supervisors, but hardly anyone with whom to share and to pass on that experience. One of the Group's recommendations is to take steps to enhance Jersey's capabilities both as a precautionary measure and in the Island's immediate interests.

53. The establishment of a foreign office and a small number of overseas missions could of course be done in relatively short order. The competence of such a foreign office would be immeasurably enhanced if precautionary steps were now to be taken to begin to build up within the civil service and the body politic the knowledge and skills associated with sovereign status. Jersey has a small office in Caen dedicated to the Island's interests in Normandy and Brittany, but no other overseas representation. We think that there is an argument for strengthening our links with Brussels both to build upon existing relationships with officials in the European Commission and to acquire new contacts and sources of information in the heart of the EU. This would also afford a valuable training ground for officials. A section exclusively dedicated to international affairs should also be established within the Chief Minister's Department as the nucleus of a future foreign office. If established, it should be staffed by two or three full-time senior officials and a number of talented graduates who could be offered training in the skills of diplomacy and international affairs. Such graduates would not necessarily remain in the Chief Minister's Department, but could eventually be deployed elsewhere in the Civil Service. The Island would thereby be able to build up a "bank" of skills which would be useful now but also invaluable in the event of independence. Deployment overseas for short periods of training in the FCO and, perhaps more importantly, in the foreign ministries or embassies of other small states, would add greatly to the skills and experience of the international section. A rough estimate of the cost of a foreign service as envisaged in paragraphs 46-53 above is set out in **Appendix 2.**

54. We have referred to the need to build up a broader knowledge of international affairs within the body politic. The Group suggests that consideration might be given by the Chief Minister to ways in which a larger number of elected members might be involved in or informed about the Island's foreign affairs thus leading to a greater awareness of the subtleties of international exchanges.

Conclusion

55. The Group's broad conclusion is that it is desirable that some steps should be taken now in order that the Island is not faced with a serious skills gap if obliged to consider independence. Clearly other much smaller communities have been able successfully to engage in international relations as sovereign states. Jersey is, however, a relatively sophisticated player in financial and jurisprudential terms, and expectations would accordingly be higher than would be the case in a state which was less economically advanced.

Recommendations

56. We recommend –

- (i) that as a priority, action should be taken to strengthen Jersey's links with Brussels and that further detailed research be undertaken in relation to the likely options available in terms of Jersey's relationship with Europe;
- (ii) that informal soundings be taken so as to establish the implications of membership of the UN, the Commonwealth, and the Council of Europe and other key international organisations;
- (iii) that consideration be given by the Chief Minister to the establishment of a dedicated section in the Chief Minister's Department charged with responsibility for international affairs, and that that section be appropriately staffed;
- (iv) that a training programme be introduced to ensure that the Civil Service contains a sufficient number of officials with some knowledge and experience of diplomacy and international relations;
- (v) that consideration be given by the Chief Minister to ways in which a larger number of elected members might be informed about foreign affairs.

4. INTERNAL CONSTITUTIONAL CONSIDERATIONS.

The Governor General

57. The Group has been asked to assume that The Queen will continue to be the Head of State as a constitutional monarch. What that means is that she would fulfil her functions through a Governor General whom she would appoint on the advice of the Prime Minister of Jersey.^[15] The Governor General would have very different functions from those of the Lieutenant Governor. The Lieutenant Governor is the formal channel of communication between the government of Jersey and the government of the UK and is the impartial conduit of such communications. But he also has the broader duty of representing the people of Jersey to their monarch. We consider below what functions the Governor General might have, but we must first examine the powers and duties of the Lieutenant Governor.
58. The Lieutenant Governor does not have the wide executive responsibilities enjoyed by many governors of the UK's remaining overseas territories. Jersey has a much deeper autonomy than any of the UK's overseas territories. Nonetheless, the Lieutenant Governor does have certain executive functions under the current constitutional relationship with the UK. Those functions relate broadly to citizenship, and may be considered under three headings, *viz.* passports, deportation and nationality. As the Lieutenant Governor would be replaced on independence by a Governor General it is necessary to consider to what extent his functions would be assigned elsewhere.
59. "Jersey" passports are British passports issued on behalf of the Lieutenant Governor in the exercise of the royal prerogative. The Lieutenant Governor acts through the Passport Office which is funded by the States to provide this service, and in return retains any revenue which is generated. At present Jersey is able to buy into the standards of a British passport and to use a specialist printing company operating in a very secure environment. The style of British passports is undergoing great changes in that each passport will in future require an electronic chip capable of holding two biometric measures, *viz.* facial recognition and fingerprints. Jersey has already invested in the necessary technology to achieve these requirements. Independence would not lead to any greater manpower resources in that passports are already produced in Jersey. There is no practical reason why Jersey should not produce her own national passport although the initial cost of design, data systems and production would be greater. It is estimated by the Passport Office that recovery of these additional costs might add £20 to the cost of each Jersey passport. It is likely that a Jersey national passport would be issued in the name of the Minister for Foreign Affairs.
60. Deportation from Jersey can only be ordered at present by the Lieutenant Governor although the Royal Court plays an important part in this process. Deportation is generally ordered where a foreign national has committed a serious criminal offence and the Court has recommended that deportation should follow. Independence would bring two practical changes. First, deportation would be likely to be ordered by the Minister for Home Affairs. Secondly, a British citizen (if he or she did not concurrently hold a Jersey passport) could in principle be deported because he or she would of course become a "foreign national". There would be no resource implications.
61. Certificates of naturalisation as a British citizen are currently issued by the Lieutenant Governor after

inquiries have been made by the Immigration and Nationality Department. The oath of allegiance is taken before the Royal Court. Entitlement to Jersey citizenship would be a matter for inclusion in the Constitution, supplemented no doubt by legislation. The granting of Jersey citizenship to foreign nationals would probably be a matter for legislation. The formalities relating to the grant of Jersey citizenship could be very similar, but the decision to make a grant would be a ministerial decision probably under the authority of the Minister for Home Affairs. Citizenship is considered in more detail at paragraph 78 below. Again, there are no resource implications in relation to naturalisation.

A Constitution for Jersey

62. The precise functions of the Governor General would be set out in the Constitution. Jersey has at present no written Constitution, but such a document would be a necessary concomitant of independence. The Constitution would set out the basic institutions of government (i.e. Head of State and government, legislature, executive and judiciary) and would probably establish various Commissions including a Judicial Appointments Commission, but would leave it to legislation to supply other details. The Governor General would be The Queen's personal representative in Jersey and would be expected to represent The Queen on most formal and ceremonial occasions. The extent of any other functions, e.g. the giving of royal assent to primary legislation, would be set out in the Constitution.
63. The Group commissioned some preliminary work on the possible contents of a Constitution from Professor Jeffrey Jowell QC and Mr Iain Steele of Blackstone Chambers. Their paper is attached as **Appendix 3**. The paper raises a number of significant issues worthy of careful analysis and discussion. We have however reminded ourselves that our task in this second interim report is to identify those parts of our existing constitutional structure which would require amendment or adaptation if independence were thrust upon us. In a sense, of course, all the issues raised by Professor Jowell and Mr Steele require consideration because their advice is, and we accept it, that an independent Jersey would need a written constitution. Nonetheless, there are specific issues which we think are worthy of discussion here and we deal with them under the sub headings used in the paper.

Bill of Rights

64. The Group agrees that the Constitution should contain a statement identifying and protecting the basic human rights accorded to each individual citizen. As to the rights to be included, we think that there would be advantage in expressly incorporating the rights protected by the ECHR. Jersey has been bound by the ECHR for more than fifty years, and has now incorporated the Convention into domestic law. The courts of Jersey could be required, as now, to "have regard to" the jurisprudence of the European Court of Human Rights. The courts could have the right to make a declaration of incompatibility (as now) or the Canadian model could be adopted, whereby the courts can strike down offending legislation but it may be re-enacted under a "notwithstanding" clause.

Structures of government

65. At present, all Laws require the approval of Her Majesty in Council before they can be registered in the Royal Court and come into force. . The Privy Council Committee for the Affairs of Jersey and Guernsey which recommends to The Queen that Royal Assent be granted or withheld, is in effect the decision-making body.^[16] Constitutionally, the Committee should examine the merits of a draft Law (*Projet de Loi*) from the perspective of what is right and proper for The Queen's subjects in Jersey, and not from the perspective of the UK's domestic interests. Consideration of what is right and proper for Her Majesty's subjects in Jersey will be heavily influenced by the fact that the *projet de loi* has been adopted by the democratically elected legislature of the Island, and by any international obligations incurred by the UK on behalf of the Island with its consent. However, whatever may happen at present, all this would vanish on independence. If Royal Assent were to continue to be a legal requirement for Jersey's primary legislation, such Assent would be given by the Governor General. The question is whether the Governor General should have any power to withhold Royal Assent. In the UK, the position is that "[t]he veto could now only be exercised [by The Queen] on ministerial advice and no government would wish to veto Bills for which it was responsible or for the passage of which it had afforded facilities through Parliament".^[17] It would be a matter for political decision whether there should be any such veto in Jersey. If the States had adopted a Law, a power could be conferred on the Prime Minister of Jersey to advise that Royal Assent should be withheld. Alternatively parliamentary approval could be made sufficient to engender the consequential grant of Royal Assent. We would envisage that Laws would in any event continue to be registered in the Royal Court after Royal Assent had been granted. That could be the place in which any constitutional defect was addressed and any legal challenge brought.
66. In the UK the power of dissolving Parliament is vested in The Queen, but only when advised to do so by the Prime Minister. In Jersey there are fixed parliamentary terms. It is possible, however, that in the future an election might produce a politically inconclusive result; one option would be to confer a power on the Governor General to dissolve the States and to require an election in strictly defined circumstances (e.g. where no aspiring Prime Minister could obtain the support of more than 50% of members of the Assembly.) Alternatively, the status quo could be preserved, requiring a coalition of different interests or some other political solution.
67. At present Jersey has a unicameral legislature. The checks and balances to the arbitrary exercise of power are in theory supplied by the requirement that Royal Assent be granted by the Privy Council, by the citizen's right to petition Her Majesty in Council^[18], and by the scrutiny system. In addition there are the safeguards provided by the independence of the Crown Offices. With independence the first and second of those checks and balances^[19] would go^[20], and the question is whether they should be replaced, particularly in the absence of a party system. Other small states (e.g. Iceland and Malta) have unicameral legislatures but they have political parties, and the government is held in check to a greater or lesser extent by the opposition. Many small states have found that a bi-cameral legislature is an effective means of ensuring that legislation is properly scrutinised and examined. Barbados has a House of Assembly of thirty members and a Senate of twenty one members. Members of the Senate are distinguished Barbadians who are appointed for a period coterminous with that of the elected members of the House of Assembly. Twelve Senators are appointed by the Prime Minister, two by the Leader of the Opposition and seven independent members are appointed by the Governor General. It must debate bills passed by the House of Assembly

within seven months and money bills within one month. Occasionally bills are sent back, usually for correction of technical errors. Senators are paid an allowance rather than a salary. About twenty per cent of their time is spent on political work. A significant percentage has a legal background. The independent members represent different interests; there is a former trade unionist and others with experience of education or business. The Senate is regarded in Barbados as a very useful institution and as an effective check against extremism. Members of the Barbadian House of Assembly are full time parliamentarians and are paid a salary. Ministers are paid relatively generously.

68. We think that there would be merit in introducing a bi-cameral legislature in Jersey in the event of independence. A similar system to that in Barbados could have the double advantage of saving money and ensuring a more effective scrutiny of legislation, leaving the scrutiny of policy to scrutiny panels or select committees. In the absence of a party system, members of such a second chamber could be appointed by an independent commission^[21]. The numbers of representatives in the States Assembly and in the Senate (second chamber) and their respective political terms, would be a matter for political consideration.
69. In Jersey there is an Executive in the form of the Council of Ministers, although the similarity with other Commonwealth models ends there. Jersey has no developed sense of the distinction between the Executive and the legislature. There is no collective responsibility in the Executive, and the Chief Minister has no means of ensuring that Ministers stand by a decision taken collectively. He cannot appoint or dismiss his Ministers. An independent Jersey would need a Prime Minister who was able to lead and command the Executive, subject of course to being liable to removal on a vote of confidence by the Assembly as a whole.
70. Independence would require consideration to be given to the mechanisms for entering treaties and international agreements. We favour retaining the “duallist” system which separates the signature of a treaty from its being brought into effect. The Prime Minister would have power to sign treaties, but they would require ratification before they could come into force. A procedure could and should be developed at this stage for resolving the formalities which need to be adopted before ratification can take place.
71. Relations between church and state would need to be considered, although independence would create no requirement for change. It is possible that independence would create pressure for Jersey’s own Anglican Bishop or other adjustments in the relations between the state and other faith groups, but such change is not a necessary corollary of sovereignty.^[22]

The Judiciary and other institutions of government

72. The key issues are examined in the Jowell/Steele paper under the headings “The Judiciary” and “Other Institutions of Government”. Independence would require some important changes. The Crown Offices have represented for many centuries an important safeguard against the abuse of power. Until 2005 the Lieutenant Governor and the Bailiff possessed formal rights of veto and dissent respectively in relation to

resolutions of the Assembly. The independent legal advice of the Law Officers constitutes an important protection for the rights of individual States members and indeed of the citizen. The Crown Officers and ordinary judges of the Court of Appeal are at present appointed, and may be removed, on the recommendation of the Privy Councillor with responsibility for the affairs of Jersey, and those arrangements would have to be replaced. The Magistrate and Judicial Greffier may also be removed only by the Privy Council, on the same recommendation.

73. The process for appointing and removing Crown Officers should be explained. With the exception of the Bailiff, ^[23] all appointments to Crown Office are advertised and open to all members of the legal profession. Applications are submitted to the Lieutenant Governor who forwards them to the Bailiff. The Bailiff then consults with the Jurats, the other Crown Officers, his Consultative Panel of States Members ^[24], and Senior Members of the Bar before sending his recommendation to the Lieutenant Governor. That recommendation will record the consultations and the views expressed on the merits of the different applicants. The Lieutenant Governor forwards the Bailiff's recommendation to the Privy Councillor with responsibility for relations with Jersey (currently the Secretary of State for Justice) who will ordinarily transmit it to The Queen. Theoretically the Secretary of State could substitute his own recommendation, but it has now become a constitutional convention that the recommendation of the Bailiff on behalf of the Royal Court, the States, and the Bar should be forwarded to The Queen. A similar process of consultation should be observed on those very rare occasions when it is necessary to remove a Crown Officer from office. On such occasions the Secretary of State could be expected to take a more personal interest.

74. The Group considers that this process could be refined in the event of independence so that the Crown Officers were appointed by The Queen on the recommendation of the Governor General who would act in accordance with the advice of a Judicial Appointments Commission. ^[25] The Judicial Appointments Commission would probably be chaired by the Bailiff and would consist of one or more Jurats (representing lay opinion) an ordinary Judge of the Court of Appeal and senior members of the Bar. The Group thinks that, as in England, a majority of members should be legally qualified and able to express an informed view as to the professional competence of the applicants. It would be for consideration whether the Judicial Appointments Commission should include any political representative. At present the Electoral College which appoints Jurats includes members of the States and, as mentioned above, some members are also consulted on the appointment of Crown Officers. On the other hand, the Latimer House guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence, provides for each institution to operate "within its own constitutional sphere so as not to encroach on the legitimate discharge of constitutional functions by the other institutions". ^[26] The Judicial Appointments Commission could perhaps be required to consult the Prime Minister before any advice was given to the Governor General. Removal of a Crown Officer would involve the same process, except that they could be removed only on specified grounds, e.g. gross misbehaviour or incompetence, set out in the Constitution.

75. The roles of the Attorney General and Solicitor General, and their mode of appointment, may require specific consideration. Within the Commonwealth there are many different models. In most independent states the Attorney General is a member of and legal adviser to the Government.

76. The dual role of the Bailiff as President of the Royal Court and President of the States would have to be reviewed in the event of independence. While the dual role can be justified while Jersey is a Crown dependency (*inter alia*) because the Bailiff has a representational role and is the guardian of the Island's constitutional privileges^[27], the latter justification would not exist post-independence. Jersey's constitutional privileges vis-à-vis the UK would cease because Jersey would have the greater privilege of sovereign status. In those circumstances it would arguably be of greater importance to avoid any perceptions, however misconceived, that the independence of the judiciary might be compromised by making provision for an elected or appointed speaker other than the Bailiff. In other respects no changes would be required in relation to the judiciary. The Court of Appeal would continue in existence, although the ordinary judges would be appointed on the recommendation of the Governor General acting on advice from the Judicial Appointments Commission. Appeal would continue to lie from the Court of Appeal to the Judicial Committee of the Privy Council.
77. Although not perhaps essential, it would be desirable in our view for the independence and impartiality of the civil service and the police force to be guaranteed by the Constitution.

Citizenship

78. The Constitution would have to address the question of those individuals who would qualify for citizenship, although it would be possible for supplementary provisions to be made later by law. Often, those who are ordinarily resident and entitled to vote in the country at the time of the referendum on the question of independence would *ipso facto* qualify for citizenship. Broadly speaking, anyone born in Jersey or outside Jersey to a father or mother with Jersey citizenship would also be entitled to become a citizen. Residence for (say) five years would entitle a person to seek Jersey citizenship. Only citizens would be entitled to vote in national elections. It would be for consideration whether mere residence for (say) twelve months would entitle a person to vote in municipal elections for parochial offices other than that of Connétable. Entitlement to citizenship would be a crucial issue and one deserving of mature consideration^[28]. Many countries, including the UK and France, allow dual citizenship of another country as well. Jersey citizens who were entitled by birth or otherwise to British nationality would accordingly (as a matter of British law) be able to hold both passports. It would be open to Jersey to make similar provision under Jersey law so that its citizens were able lawfully to be nationals of other countries as well.

Emergency powers

79. The Constitution would make provision for the exercise of emergency powers. The Emergency Powers and Planning (Jersey) Law 1990 has recently been the subject of review but might usefully be re-examined with

the possibility of independence in mind. The power to make a declaration of emergency would vest in the Emergencies Council (if that continued to exist) or Governor General acting on the advice of the Prime Minister.

Conclusion

80. It will be clear from the above paragraphs that independence would require some adaptation of Jersey's internal constitutional arrangements.

Recommendations

81. We recommend that consideration be given to –

- (i) the steps required to create a senate (second chamber) as part of a bi-cameral legislature;
- (ii) the formalization of the procedure for the ratification of international agreements by the States;
- (iii) the creation of a Judicial Appointments Commission;
- (iv) the appropriate qualifications for citizenship of Jersey and related electoral issues;
- (v) a review of the provisions of the Emergency Planning and Procedure (Jersey) Law 1990.
- (vi) undertaking further work on a draft Constitution.

5. ECONOMIC CONSIDERATIONS

The economy in general

82. In principle, there seems no reason why independence should diminish the Island's fundamental economic strengths. Jersey is already fiscally and economically independent, and requires no subsidies nor economic assistance to provide the public and social services currently enjoyed by the Island's inhabitants. Jersey

enjoys a remarkable financial stability with virtually no public debt and strong annual revenues. The decision of the States to broaden the tax base by introducing GST will add predictability and solidity to the Island's finances.

83. The greatest threat posed by independence would come from any uncertainties which might be perceived by the business community as to the stability of a sovereign Jersey. To that extent the resolution of as many of the issues raised in this paper as possible would remove many of those uncertainties and strengthen the Island's ability to cope with any serious future external threat.

84. The Group assumes that for the foreseeable future the economy will remain largely dependent upon the finance industry. Attention should therefore continue to be focused on the factors which form the basis of the Island's success as an international financial centre, *viz*,

- (i) relatively low rates of taxation;
- (ii) responsiveness to market needs;
- (iii) political and fiscal stability;
- (iv) confidentiality for those engaged in legitimate business;
- (v) flexibility;
- (vi) ability through legislation and political decisions to exploit niche market opportunities;
- (vii) quality of service;
- (viii) range and depth of experience/expertise.

85. Although independence may not require any change in the status quo as far as Jersey's currency is concerned, it would nonetheless be useful (and contribute to the removal of uncertainty), if consideration were now to be given to the available options. Those options are –

- (i) maintaining the present position whereby Jersey issues its own currency but also grants legal tender status to the currency of the United Kingdom;

- (ii) following the Liechtenstein relationship with Switzerland, and seeking to conclude a formal agreement with the United Kingdom on monetary union so that the United Kingdom currency became the only legal tender;
 - (iii) following Andorra, Monaco and San Marino in adopting the euro as the legal tender with the formal agreement of the European Central Bank; or
 - (iv) following jurisdictions such as the Bahamas and Iceland in the establishment of a central bank or monetary authority, which would have responsibility for issuing the Island's own currency and defending its value either at parity or a pegged exchange rate with the pound sterling or the euro.
86. While the preservation of the *status quo* (i.e. option (i) above) might prove to be the preferred outcome, particularly from a resourcing standpoint, the experience of other jurisdictions suggests that it could be prudent to consider the enactment of enabling primary legislation. This would permit the Island to adopt option (iv) as and when it was thought appropriate to do so. Experience elsewhere would also suggest that consideration should also be given to the possible transfer to any central bank or monetary authority which was established of the regulatory responsibilities of the Jersey Financial Services Commission.

Transport Issues

87. Independence would create opportunities for Jersey in the sense that membership of various international organizations would be possible, in particular, membership of the International Maritime Organization (IMO) and the International Civil Aviation Organization (ICAO). At present, Jersey is responsible for air traffic control in the Channel Islands Control Zone, but is not a member of Eurocontrol. Reimbursement of the expenses of operating air traffic control involves negotiation with France through the intermediary of the UK, which is not always straightforward. Whether it is possible to become a member of Eurocontrol, and the implications of membership, should be explored.
88. Broadly speaking, however, there would seem to be no reason for Jersey's policies towards the provision of shipping and air services to change with independence. The "open market" approach currently adopted is thought to be best suited to cope with future market differences.

Recommendation

89. We recommend –

- (i) That further consideration be given to the enactment of enabling primary legislation to establish a central bank or monetary authority.
- (ii) That informal soundings be taken so as to establish whether or not membership of Eurocontrol would be available to Jersey;
- (iii) That the Island should continue to build up and strengthen its economy and reserves and to pursue policies of countering inflation, managing migration, ensuring that the Island remains competitive in the global market place, and maintains confidence in the business community.

6. OTHER INTERNAL CONSIDERATIONS

Wireless telegraphy

90. Satellite and digital communications are bringing rapid changes to radio and telecommunications. In terms of radio spectrums Jersey currently falls in the remit of the UK and is represented in the International Telecommunications Union (ITU) by the Office of Communications (OFCOM) under a memorandum of understanding pursuant to The Wireless Telegraphy Act 2006 (extended to Jersey in 2007). The memorandum of understanding was drawn up in consultation with Jersey and the other Crown Dependencies and is between the UK and OFCOM. Independence would bring this arrangement to an end and Jersey would become a member of the ITU in her own right.

91. Commercial and satellite television channels are obtainable currently in Jersey either free or at the fee charged by the service provider. Independence would not bring any material changes in that respect. So far as the BBC is concerned, islanders pay a licence fee which is in effect a tax imposed by the UK Government to meet the costs of the BBC's activities. The fee is chargeable as a result of the extension to the Island of the Communications Act, 2003. After independence, this mechanism would fall away, and the licence fee would cease to be payable. BBC national channels would continue to be receivable in Jersey but the local radio channel would cease in default of an agreement between the States and the BBC for provision of the service in exchange for a fee. It is currently estimated that Jersey residents contribute no less than £4 million by payment of the licence fee. Whether or not to enter into an agreement with the BBC would clearly be a matter for political decision.

Common travel area

92. The common travel area (CTA) comprises the whole of the British Islands (UK, Jersey, Guernsey and the

Isle of Man) and Ireland. British and Irish citizens have the right to travel anywhere within the CTA. The right to travel needs to be distinguished from the right of abode and the right to work. The Group thinks that it can be assumed that Jersey could remain part of the CTA following independence. There would naturally be a requirement, as with Ireland, that Jersey's Immigration Law should broadly reflect the provisions of the Immigration Act, 1971 which currently applies with modifications to Jersey. The right of abode and the right to work in the UK would, however, depend on whether the Jersey citizen was also a British national. There are currently some 7,000 Jersey residents who qualify as "Channel Islanders" under protocol 3 and whose passports are stamped with the words "The holder is not entitled to benefit from European Community provisions relating to employment or establishment". Such residents would lose their automatic right, if their British passports were withdrawn, to live in the UK. In terms of employment, they would be treated as other Commonwealth citizens and would accordingly require a work permit. That assumes, of course, that Jersey did not become a member of the EU. Freedom of movement for her citizens would be a factor to be taken into account in considering Jersey's future relationship with Europe.

Health, Education and Prison issues

93. The Group's enquiries indicate that Jersey already pays at the full rate for all health services obtained from the UK. There is an agreement between the States of Jersey and the Department of Health in the UK by virtue of which reciprocal health care is given to Jersey and UK residents who fall ill outside their place of residence. Advice is currently obtained from the Health Protection Agency on such matters as precautions against possible epidemics, but the current commercial relationship could or would continue post-independence. The registration of various health professionals depends upon the qualifications obtained from their respective professional bodies. Nothing need change in that respect.
94. Similarly, in the sphere of education, tertiary education and training in the UK is only available to Jersey students at the full cost. This arrangement stems from an agreement between the UK Government and the Crown Dependencies made some years ago. However, negotiations on fees chargeable to Jersey students are now in practice conducted with Universities UK, which acts for educational institutions and in which the UK Government plays no part. Indeed a recent decision of the UK Government means that students from the UK's overseas territories, such as Bermuda and the Cayman Islands, are treated more favourably than students from the Crown dependencies. For all practical purposes, Jersey is already treated as a foreign country by educational institutions, and pays the full cost of students' education. The Island also pays the full economic cost of public examinations.
95. A decade or so ago, prisoners serving more than four years' imprisonment were automatically transferred to English prisons to serve their sentences there. Transfers now take place on an *ad hoc* basis depending on the nature of the offence and connections of the prisoner with the UK. There are currently some 40 prisoners serving sentences imposed by Jersey Courts in the UK. The costs of the majority of such transferred prisoners are met by the UK; the prison authorities treat the situation as if the Repatriation of Offenders Convention were in force. The Group understands that legislation is in draft which would enable the Convention to be extended formally to Jersey. Independence would not have any significant implications in terms of the prison service. Prisoners with a UK connection would continue to be transferred

to the UK. Those prisoners with special problems would continue to be transferred to specialist institutions at the expense of the Island.

Shipping

96. Ships registered in the St Helier port of registry are currently "British Ships". Sovereignty would obviously mean that Jersey became a flag state in her own right and would have to seek membership of the International Maritime Organisation (IMO). A number of additional administrative burdens would ensue, but it is judged that there would be no major cost implications. A decision would have to be taken as to whether to change the category of the shipping register, but there would be no obligation to do so.

Recommendations

97. We recommend that –

- (i) Informal soundings be undertaken so as to ascertain the likely approach of the UK Government to citizenship issues in relation to citizens of an independent Jersey; and,
- (ii) Informal soundings be taken as to the implications of independence on the issues in this section.

7. CONCLUSION

98. The Group has been assisted by a large number of senior public servants and others in Jersey, and by discussions with numbers of individuals in other small states, such as Barbados, Iceland, Liechtenstein and Malta. Officials in the European Commission and others in Brussels have also been very helpful. We have not found it necessary at this stage to engage in discussions with officials in Whitehall, although the Department of Justice has been kept informed in broad terms of the work being undertaken by the Group. His Excellency the Lieutenant Governor gave us very helpful advice in relation particularly to the section on defence.

99. Again in broad terms, our conclusion is that Jersey is equipped to face the challenges of independence. This is not a surprising conclusion. We have had an independent legal and judicial system since 1204. We have never been colonized, nor has the Island ever been incorporated into the realm of England or the UK. We have had our own administration since 1204 and have enjoyed political autonomy in domestic affairs for many centuries. The constitutional relationship with England, and subsequently the UK, has allowed the Island to develop its own institutions and system of government under the protection of the Crown. Jersey enjoys much greater autonomy than, for example, other overseas territories such as Bermuda or Gibraltar and devolved administrations such as Scotland and Wales. Jersey is in reality already only one or two steps away from sovereignty.

100. Whether those steps should be taken is not within the remit of this paper. The Group has not considered the balance of advantage and disadvantage as between sovereignty and dependence. There is no doubt that sovereignty is available to Jersey should the people decide that it was desirable. Independence was offered at the time when the UK was negotiating its accession to the European Communities. Since 1945, many states with a population much smaller than that of Jersey have successfully achieved independence. Even in Europe, there are four sovereign micro-states, viz. Andorra, Liechtenstein, Monaco and San Marino. Other small British territories have examined the independence question in recent years. The government of Bermuda found in favour of independence, but Bermudians rejected the motion in a referendum. The government of the Isle of Man published a paper entitled "*The Implications of Independence*" in 2000 which concluded that there was insufficient advantage at that time but that it should be reconsidered in the event of changed circumstances.
101. Whether or not it is appropriate to examine the balance of advantage and disadvantage is of course a matter for political decision. We have reached the conclusion that, subject to the qualifications set out in this report, Jersey would be able to pursue a policy of independence if that were in effect thrust upon us. Equally, however, it is clear that if we were to become independent, it would be highly desirable that any transition to independence should take place in as orderly and seamless a way as possible. If it were to be decided that independence was the best way forward in the Island's long term interests, it would be much more satisfactory to proceed to sovereignty of our own volition rather than because changed circumstances had forced the option upon us. To that extent it seems to us that the Council of Ministers might think it sensible to examine the balance sheet at a time of constitutional equilibrium so that an informed and measured decision can be taken on this important question.
102. We have not touched upon one important aspect of these constitutional issues and that concerns our sister Bailiwick of Guernsey. If Jersey were to be placed in a position of having to consider independence, it is highly likely that Guernsey would be similarly placed. It is obviously beyond our remit and inappropriate for us to consider whether and to what extent the Bailiwick of Guernsey would be equipped to face the challenges considered in this report in relation to Jersey. It is known, however, that a group has been established in Guernsey to consider these constitutional issues and it would seem sensible to engage in discussions with our sister Bailiwick at one level or another assuming, of course, that ministers in both bailiwicks so wished.

Recommendation

103. We recommend that -
- (i) the outstanding issues identified in this report be investigated and specific proposals be brought forward as soon as possible with appropriate involvement of the Crown Officers;

- (ii) consideration be given as to how discussions with Guernsey might best be handled; and,

- (iii) the Council of Ministers should consider authorizing the Group to report on Option B set out in paragraph 2 above.

8. SUMMARY OF RECOMMENDATIONS

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The Group recommends that –

1. Defence and Internal Security –

- (i) informal inquiries be made of the Secretary General of OSCE to gain further information as to the implications of membership;
- (ii) the Economic Development Department examine what resources would be required to achieve reasonable self-sufficiency in terms of protecting the territorial sea, conserving our fisheries and preventing the smuggling of drugs and people; and,
- (iii) consideration be given to the options for obtaining support from neighbouring countries.

2. International Relations –

- (iv) as a priority, action should be taken to strengthen Jersey's links with Brussels and that further detailed research be undertaken in relation to the likely options available in terms of Jersey's relationship with Europe;
- (v) informal soundings be taken so as to establish the implications of membership of the UN, the Commonwealth, and the Council of Europe and other key international organisations;
- (vi) that consideration be given by the Chief Minister to the establishment of a dedicated section in the Chief Minister's Department charged with responsibility for international affairs, and that that section be appropriately staffed;
- (vii) a training programme be introduced to ensure that the Civil Service contains a sufficient number of officials with some knowledge and experience of diplomacy and international relations;
- (viii) consideration be given by the Chief Minister to ways in which a larger number of elected members might be informed about foreign affairs.

3. Internal Constitutional Considerations–

consideration be given to –

- (ix) the steps required to create a senate (second chamber) as part of a bi-cameral legislature;
- (x) the procedure for the ratification of international agreements by the States be formalized;
- (xi) consideration be given to the creation of a Judicial Appointments Commission;
- (xii) consideration be given to the appropriate qualifications for citizenship of Jersey and related electoral issues;
- (xiii) a review of the provisions of the Emergency Planning and Procedure (Jersey) Law 1990 be undertaken;
- (xiv) further work on a draft Constitution be undertaken.

4. Economic Considerations

- (xv) the enactment of enabling primary legislation to establish a central bank or monetary authority be considered;
- (xvi) informal soundings be taken so as to establish whether or not membership of Eurocontrol would be available to Jersey;
- (xvii) the Island should continue to build up and strengthen its economy and reserves and to pursue policies of countering inflation, managing migration, ensuring that the Island remains competitive in the global market place, and maintains confidence in the business community.

5. Other Internal Considerations

- (xviii) Informal soundings be undertaken so as to ascertain the likely approach of the UK Government to citizenship issues in relation to citizens of an independent Jersey;
- (xix) Informal soundings be taken as to the implications of independence on the issues in this section.

6. General Conclusion

- (xx) the outstanding issues identified in this report be investigated and specific proposals be brought forward as soon as possible with appropriate involvement of the Crown Officers;

- (xxi) consideration be given as to how discussions with Guernsey might best be handled; and,

- (xxii) the Council of Ministers should consider authorizing the Group to report on Option B set out in paragraph 2 of this report.

9. APPENDICES

Appendix 1 - Cost of participation in selected international organisations

Key organisations	Priority	Annual Cost £ (minimum)	Annual Cost £ (maximum)
United Nations (scale fees 0.015 – 0.020%)	***		
Regular budget contributions (based on 2006)		£150,000	£190,000
Peacekeeping operations (approved 2007-8)		£395,000	£530,000
Working capital fund (based on 2006-7)		£8,000	£10,000
Food and Agriculture Organisation	*	£120,000	£160,000
UNESCO	*	£90,000	£115,000
WHO	*	£630,000	£840,000
Commonwealth – Secretariat contribution (0.59% budget - currently under review)	***	£70,000	£70,000
Other programmes – e.g. CFTC, CYP (voluntary contributions)		£150,000	£300,000
Regional organisations			
Council of Europe (scale fees 0.15 – 0.20%)	***	£300,000	£395,000
Organisation for Security and Cooperation in Europe (scale fee 0.125 %)	*	£150,000	£200,000
Transport and Communications			
International Maritime Organisation (Based on tonnage registered – minimal tonnage presently registered in Jersey)	***	£1,000	£1,000
International Civil Aviation Organisation	***	£290,000	£580,000
International Telecommunications Union (contribution ¼ unit)		£33,000	£33,000
International trade and employment			
World Trade Organisation / GATT (% international trade)	*	£25,000	£50,000
International Labour Organisation (scale fees 0.010 – 0.015%)	***	£25,000	£38,000
Organisation for Economic Cooperation and Development	*	£210,000	£210,000
World Intellectual Property Organisation	*	-	-
Universal Postal Union (1 unit = scale 0.114%)	***	£17,000	£17,000
Capital investments (non-recurring) Revenue cost based on investment income lost			
World Bank – IBRD investment £1 million at 5%	*	£50,000	£50,000
European Bank for Reconstruction and Development Minimum subscription required £1.4 million at 5%	*	£70,000	£140,000
International Monetary Fund quota (N.B. Investment - Jersey estimated quota £55 million at 3% yield loss)	*	£1,650,000	£1,650,000

TOTAL	£4,434,000	£5,579,000
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Appendix 2 – Summary of overall costs of independence for Jersey

Cost estimates are based on an assumption of the minimum requirements in the first five years to establish an effective foreign service, together with broad estimates of manpower levels and premises costs, and the costs of additional facilities, as follows:

Cost heading		Estimated annual revenue costs (£ million)
Membership of international organisations (see appendix)	Including UN and agencies, Commonwealth, Council of Europe, OSCE, IMO, ICAO, ITU, WTO, ILO, OECD, UPU	4.4 – 5.6
Jersey – Diplomatic / admin staff	Approx 10 fte	0.5 – 0.7
Office accommodation and facilities		0.4
Training and development		0.1
Overseas missions – Premises – rent, maintenance, security	London, Brussels, New York (depending on location etc)	1.0 – 1.5
Overseas staff – diplomatic /admin	Approx 20 fte	1.0 – 1.4
Travel (incl. official visits / delegations)		0.15
Hon. Consuls expenses	20 Hon. Consuls	0.1
Immigration and Passports (additional costs)	Immigration controls and passport production	0.1
Coastguard / fisheries protection vessel	40-metre vessel (c.f. Barbados coast guard HMBS 'Banfield') 15 fte crew	Capital cost 3.0 0.8 – 1.5
Internal government reorganisation – e.g. Second States Chamber, judicial appointment, monetary authority, etc.	Requirements uncertain	unknown
Total estimated cost	Annual revenue Capital	£8.5 – 11.5 million £3.0 million

CONSTITUTIONAL ARRANGEMENTS IN JERSEY:
POSSIBLE OPTIONS FOR FUTURE REFORM

I. Introduction

1. We are instructed by the Attorney-General of Jersey to advise the Constitutional Working Group established by the Council of Ministers in Jersey on internal constitutional structures that would be necessary or desirable in the event that Jersey were to become independent.
2. The Attorney-General has emphasised that there is no current political intention to seek independence for Jersey, but that the work currently being done is necessary background work in case it should become necessary or desirable to take that step at some future date.
3. We take the view that, if Jersey were to become independent, a written constitution would be necessary. This would mirror the approach taken by almost every other country upon attaining independence. A written constitution has the advantage of being accessible and comprehensible. An unwritten constitution would take many years to emerge, during which period uncertainty would be inevitable.
4. This does not mean, however, that a written constitution is writ in stone. Some clauses will permit of development in the light of interpretation in accordance with current values (this applies particularly, but not exclusively, to the Bill of Rights section). Nor does a written constitution need to be overloaded with detail about all governmental structures and practices. The basic institutions of government (Head of State and Government, Legislature, Executive and Judiciary) need to be established in some detail but others (e.g. the detail of electoral law, and some of the Commissions) may simply be established in the constitution, leaving it to future legislation to supply the detail.
5. Accordingly, we set out below the central structure of a written constitution and consider different options in the following sequence:
 - (1) Preamble (*paragraphs 8-11 below*).
 - (2) Bill of Rights (*paragraphs 12-37 below*).
 - (3) Structures of government (*paragraphs 38-96 below*).
 - (4) Scrutiny of legislation and the Executive (*paragraphs 97-104 below*).
 - (5) The judiciary (*paragraphs 105-127 below*).

- (6) Other institutions of government (*paragraphs 128-154 below*).
- (7) Citizenship (*paragraph 155 below*).
- (8) Emergency powers (*paragraphs 156-163 below*).
- (9) Amendments provisions (*paragraphs 164-168 below*).

A constitution might also address additional matters, such as public finances and defence, which we are not asked to consider. A further issue that would require careful consideration would be how to move from Jersey's present constitutional arrangements to the new constitution. Various options in terms of transitional provisions would need to be considered. We leave this issue to one side for present purposes.

6. As instructed, we have drawn upon the constitutional arrangements in other jurisdictions – especially those in small Commonwealth states. We also draw frequently on the South African constitution because it provides an example of the most comprehensive modern constitution in the common law tradition. These often provide useful models but it is of course important to bear in mind the limits of constitutional transplantation. The point is well made in the following passage:

“[T]he constitution-makers in different countries, or for that matter at different moments in the history of any one country, have quite different preoccupations. The reason they are drafting a new instrument of government at all can only be that they are reacting to what is perceived to be a new set of circumstances. Were this not so, the old constitution would go on serving perfectly well.

“So all constitutions contain elements that are autobiographical and correspondingly idiosyncratic. Such features are sometimes made explicit in preambles and often in transitional provisions. They are less apparent in the main text unless and until we adopt the comparative method. Then they begin to stand out. ...”^[29]

7. In identifying options for Jersey we give particular attention to its particular historical, political, economic and social conditions.

II. Preamble

8. Most written constitutions begin with a brief Preamble. The Preamble generally performs two important functions. First, it puts the new written constitution into historical context, briefly explaining what came before and why a new constitution was required. Secondly, it sets out the fundamental values and objectives which the state and its citizens aspire to promote and achieve.
9. The South African Constitution (1996) provides a good example of both functions:

*“We, the people of South Africa,
Recognise the injustices of our past;*

Honour those who suffered for justice and freedom in our land;

Respect those who have worked to build and develop our country; and

Believe that South Africa belongs to all who live in it, united in our diversity.

We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to-

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;

Improve the quality of life of all citizens and free the potential of each person; and

Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

May God protect our people.

..."

10. The Preamble will generally not be an "operative" provision with binding effect. However, it will provide a general interpretative guide to the operative provisions in the chapters which follow.
11. The Preamble to any future Jersey Constitution could be expected to refer to Jersey's commitment to democracy, the rule of law, human rights and a commitment to effective and stable governance of the highest probity. It would also be an obvious place in which briefly to explain the past and intended future relationship with the United Kingdom. This could build upon and develop the preamble to the States of Jersey Law 2005^[30] and the "Framework for developing the international identity of Jersey" agreed by the Chief Minister of Jersey and the UK Secretary of State for Constitutional Affairs in January 2007.

III. Bill of Rights

12. We take the view that any modern, democratic state must set out in writing the basic human rights which it accords to every individual. The concept of democracy no longer rests upon majority rule alone. There must be limits to the power of government, however popular, to invade fundamental human and democratic rights. The "Bill of Rights" chapter is typically among the first chapters to feature in a written constitution, in order to emphasise its importance.
13. Three key questions must be considered:
 - (1) What particular rights will be included in the Bill of Rights?
 - (2) Under what conditions may these rights be limited or derogated from?

(3) To what extent should the courts have the power to strike down legislation which is contrary to the Bill of Rights?

14. These questions are theoretically separate and distinct. However, one will inevitably influence the other. It is important to recognise at the outset that a Bill of Rights imposes constraints upon action by the three branches of government.^[31] The strength of constraints may vary from one constitution to another. The stronger the constraints imposed by the Bill of Rights, the greater the need to choose with care the rights to be included. Conversely, the wider the range of rights to be included, the greater the temptation to minimise their binding effect. Different rights may be treated in different ways.
15. A further important question, to which we return in the section entitled “Amendment provisions” below, is whether the Bill of Rights provisions should be “entrenched” – that is, given partial or complete protection from amendment.

Content of the Bill of Rights

16. Most small Commonwealth jurisdictions have included in their constitutions the core ‘**civil and political rights**’ found in the International Covenant of Civil and Political Rights (“ICCPR”) and in the European Convention on Human Rights (“ECHR”). These include the right to life, the right to personal liberty, protection from slavery and forced labour, protection from inhuman or degrading punishment or treatment, protection from deprivation of property, protection against arbitrary search or entry, freedom of conscience, freedom of assembly and association, freedom of expression, and so on.
17. Such countries include Antigua and Barbuda (1981; ss.3-19), the Bahamas (1973; ss.15-27), Barbados (1966; ss.11-23), Belize (1981; ss.3-19), Dominica (1978; ss.1-13), Grenada (1973; ss.1-15), Jamaica (1962, ss.13-24) and Malta (1964; ss.32-45).
18. Other countries go beyond this basic list of civil and political rights and incorporate also **environmental rights** – for instance, Section 29 of the new Virgin Islands Constitution Order 2007.^[32]
19. Other countries incorporate a third type of right, referred to as **social and economic rights**. Constitutions which do so tend to be those promulgated more recently (i.e. in the 1990s or thereafter) and drafted without the same level of involvement of the UK.
20. One of the most extensive Bills of Rights is in the South African Constitution (1996). It expands the basic civil and political rights, for example by including the right to just administrative action (s.33).^[33] It also contains a right to information held by the state or held by another person and required for the exercise or protection of any rights (s.32), as well as environmental rights (s.24), and a number of socio-economic rights, including the right of access to adequate housing (s.26) and to health care, food, water and social security (s.27).
21. Another example of a Bill of Rights that goes beyond the traditional list of civil and political rights is found in the Seychelles Constitution (1993), which protects the right of access to one’s own information held by a public authority (s.28), the right to protection of health (s.29), rights

of the child (s.31), the right to education (s.33), the right to decent shelter (s.34), the right to work (s.35), rights of the aged and disabled (s.36), the right to a decent and dignified existence (s.38), the right to a clean environment (s.38) and the right to take part in cultural life (s.39).

22. Some of the rights which go beyond those found in the ECHR are themselves founded upon international obligations, including obligations which arise from treaties binding on the UK and extended to Jersey. The rights of the child included in the South African and Virgin Islands Constitutions are an example of this; those rights are designed to give effect to obligations under the UN Convention on the Rights of the Child.
23. Socio-economic rights have tended to be more controversial and less universally accepted than civil and political rights, particularly in Western countries. This stems largely from a belief that socio-economic matters should remain part of the political process rather than being elevated to the level of binding legal standards and thereby placed within the jurisdiction of the courts, which are not well equipped to make decisions about the allocation of scarce resources.
24. The Indian constitution deals with this problem by listing socio-economic goals, not as directly justiciable rights, but as "*directive principles of state policy*". In South Africa the socio-economic rights listed above are part of the Bill of Rights section of the Constitution, but are qualified in that there what is protected is only "*access*" to the particular social good (e.g. social security), and a requirement only that there shall be "*progressive realisation*" of those rights, "*within available resources*".
25. In addition to considering which rights to include, consideration must be given to what the *precise content* of those rights will be. Differing formulations may be used for any given right, giving more or less extensive protection and more or less detail. For example, a constitution may simply state that everyone shall enjoy a right to personal liberty, or may go further and specify the circumstances in which deprivation of liberty is permitted.
26. This point can be illustrated by comparing the free speech/expression provision in the United States constitution with that in the ECHR and the South African Constitution. The First Amendment to the US Constitution merely provides that "*Congress shall make no law ... abridging the freedom of speech*". In contrast, Article 10 of the ECHR provides:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

"2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

And Section 16 of the South African Constitution provides:

- “16. Freedom of expression.** – (1) *Everyone has the right to freedom of expression, which includes –*
- (a) *freedom of the press and other media;*
 - (b) *freedom to receive or impart information or ideas;*
 - (c) *freedom of artistic creativity; and*
 - (d) *academic freedom and freedom of scientific research.*
- (2) *The right in subsection (1) does not extend to-*
- (a) *propaganda for war;*
 - (b) *incitement of imminent violence; or*
 - (c) *advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.”*

27. It is important to recognise that, however extensive the formulation used, it would be virtually impossible to set out exhaustively the circumstances in which any given right will and will not be infringed. The precise ambit and effect of a right can only be elucidated through judicial interpretation and application. Even an absolute right (such as, in many legal systems, the right not to be subjected to torture) calls for interpretation (for example, as to what “torture” means).

Limitation of rights

28. Rights may be limited in different ways in respect of different rights.
- Some rights in some Bills of Rights are absolute, that is, they cannot be limited (unless of course the constitution is amended). Such rights include the prohibitions against torture and slavery.
 - Other rights may be limited in some general circumstances (e.g. only at a time of public emergency).
 - Some Bills of Rights contain a general limitation clause which sets out the strict standard by which any right may be limited. An example is the Canadian Charter of Rights and Freedoms, Section 1 of which guarantees the rights and freedoms there set out “*subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society*”. The courts have interpreted this formulation to import the notion of proportionality. The burden is on the state to justify the breach of right and it may only do so if the breach is necessary, rationally connected to the goal pursued and on the basis of the least restrictive option to achieve that goal.
 - Other Bills of Rights specify the way that particular rights can be limited. Article 10(2) of the ECHR, set out above, is an example of such internal limitation. It then becomes a nice jurisprudential point as to whether the limitation results in a breach of the right being justified, or results in there being no breach of the right in the first place.
 - Some Bills of Rights specify that a legislative process different from the usual process is required to limit some or all rights (e.g. two-thirds or three-quarters majority needed).

Power of the courts

29. The rights protected in the Bill of Rights section of a constitution would normally be enforced by the courts. Certainly, decisions of public officials could be struck down by the courts if they offended the rights. However, legislation has been subjected to different treatment. This is mainly because the idea that the courts might rule upon the legality of – and perhaps even strike down – legislation which has been duly enacted by Parliament is highly controversial in countries which espouse the principle of Parliamentary sovereignty. That principle states that Parliament may make or unmake any law as it sees fit.
30. Nevertheless, in many other countries, it is accepted that even Parliament must act within certain specified bounds. It may even be viewed as an inescapable corollary of having a written constitution that all organs of State – even the Legislature – must act within the bounds of the powers granted to them by that constitution.
31. Four methods of judicial review of legislation have been adopted:
- *Strike down* – under which the offending law is regarded as null and void, and the legislature would have to amend the law in conformity with the right. This is the model adopted in South Africa, the USA and Caribbean states, independent and, increasingly, British Overseas Territories (such as the recent constitutions of the Turks and Cocos Islands (2006) and the British Virgin Islands (2007)).
 - *A declaration of incompatibility*. This is the version employed in the UK and New Zealand, and under the current Human Rights (Jersey) Law 2000, so as to reconcile legislative supremacy with a rights-based democracy. The offending law, although declared incompatible with the right in question, nevertheless remains valid until amended or repealed by Parliament. In all cases so far Parliament has abided by the courts' declaration.^[34]
 - *Strike down with the possibility of re-enactment*. This is the Canadian model. Section 33 of the Canadian Charter provides that an Act of Parliament or a bill may declare that it shall operate notwithstanding that it has previously been struck down by the courts.
 - *Pre-legislative scrutiny*. In France the *Conseil Constitutionnel* may hold that a Bill (but not an Act of Parliament) is contrary to the Bill of Rights or other constitutional provision and the Bill must then be withdrawn. We revisit this option below (paragraphs 100-102).

Options

32. One possibility is to promulgate a Bill of Rights which contains its own formulation of rights, and then to leave it to the courts to “flesh out” their precise content. The obvious problem with such an approach is that the courts would probably only be able to rule upon the correct interpretation of human rights when a suitable case came before them. Given the low volume of litigation in a small jurisdiction, adopting a “new” set of rights would inevitably lead to a long period of legal uncertainty.
33. For this reason, there is a distinct advantage in expressly including the ECHR rights in a

future Jersey Constitution, as opposed to merely drawing inspiration from those rights. This would give the Jersey courts access to the jurisprudence of the European Court of Human Rights and perhaps also that of the English courts under the UK's Human Rights Act 1998.

34. It should be noted that there is no need to adopt that jurisprudence wholesale. Instead of making the Jersey courts bound by that jurisprudence, they could merely be required to “*have regard to*” it (as is currently the position under Article 3 of the Human Rights (Jersey) Law 2000). It should also be made clear that some rights may be redrafted to suit Jersey conditions, both in terms of their content and their limitation.

35. In any event, we take the view that the core civil and political rights set out in the ECHR should probably be viewed as the minimum content for a Jersey Bill of Rights – even if Jersey chooses to formulate its own versions of those rights. In addition, serious consideration should be given to the inclusion of additional rights, such as environmental rights, and perhaps the right to good or just administrative action, or to health care. Such rights would signal Jersey's own values and project an image of an efficient and just administrative and political culture.

36. An additional point to consider in relation to the Bill of Rights is whether to include provision for the duties which each individual owes. Such provision is not particularly common but can be seen in, for example, the Constitution of the Maldives (1998), which provides for a duty of loyalty to the State and obedience to the Constitution and the law (s.29) and a duty to protect and uphold the Constitution and to honour the rights and freedoms of others (s.30). We also note that the recent UK government proposals for constitutional change raise the possibility of a “British Bill of Rights and Duties”.^[35]

37. A political choice needs to be made as to whether to permit the courts to strike down laws, or to maintain the current model of a declaration of incompatibility, or to adopt the Canadian model of the possibility of re-enactment under a “*notwithstanding*” clause.

IV. Structures of government

38. A basic task of any constitution is to make provision regarding each of the three branches of government – Executive, Legislature and Judiciary. Provision must be made as to:

“the persons who shall be entitled collectively or individually to exercise the plenitude of legislative, executive or judicial powers – their qualifications for legislative, executive or judicial office, the methods of selecting them, their tenure of office, the procedure to be followed where powers are conferred upon a class of persons acting collectively and the majorities required for the exercise of those powers”.^[36]

39. The pure doctrine of separation of powers posits that the branches should be independent of each other, with no overlap between any two of them in terms of either function or personnel. However, in practice, most countries – particularly those which employ the Westminster model of government – exhibit some degree of overlap between the Executive and Legislative branches. On the other hand, safeguarding judicial independence from the Legislature and, in

particular, from the Executive has increasingly been recognized as an imperative of a constitutional democracy.

40. For these reasons, we consider issues relating to the composition and functions of the Executive and the Legislature under one heading, and those relating to the composition and functions of the Judiciary under a separate heading.

Head of State

41. We understand that it is likely that Jersey would choose to retain the Queen as Head of State in the event that it became independent and have worked on that assumption. However, there are other options. In particular, Jersey could become a Republic in the Commonwealth with a President as Head of State, or could decide not to be in the Commonwealth at all.
42. The model adopted by Commonwealth countries which have retained the Queen as Head of State upon attaining independence has been to appoint a Governor-General to represent the Queen in the particular country and to take decisions on her behalf. This is likely to be appropriate in Jersey too.
43. There are a number of functions which the Queen (through the Governor-General) typically retains as a matter of form. These include a power to block the enactment of legislation by withholding the Royal Assent; a power to prorogue or dissolve Parliament; a power to appoint the Prime Minister; and other “prerogative powers”. The key question is how much *substantive* power the Queen should have in these areas.
44. Withholding the Royal Assent. The position in the UK is that “[t]he veto could now only be exercised on ministerial advice and no government would wish to veto Bills for which it was responsible or for the passage of which it had afforded facilities through Parliament”.^[37] A similar position might be appropriate in Jersey. Alternatively, it may be felt that the Queen should have no power at all to withhold the Royal Assent, even on the advice of the Chief Minister, on the basis that it should be for the States Assembly – not the Executive – to decide what legislation should be enacted. It may be felt that it is in principle objectionable for the Queen to have any substantive discretion since she is not democratically elected.
45. It is important to emphasise that any substantive power that the Queen might have in the legislative process in an independent Jersey would be exercisable only *qua* Head of State of Jersey, and not *qua* Head of State of the UK. The Court of Appeal of England and Wales has held that the Crown is not single and indivisible but rather is separate in respect of each self governing territory within the Commonwealth.^[38] No question should arise of the Queen refusing the Royal Assent on the basis that the proposed legislation would not be in the UK’s interests.
46. Dissolving Parliament. Again the UK position is that the Queen may only do so, and save in exceptional circumstances will do so, when so advised by the Prime Minister. However, a general objection to this arrangement is that it places considerable power at the disposal of the Prime Minister, who may choose a politically opportune moment at which to dissolve Parliament and hold a general election (for example, when there has been a revival in the

economy or when the government's popularity is rising).

47. For this reason, there is much to be said for having fixed Parliamentary terms, with elections being held at prescribed intervals (for example, once every four years), or at least requiring some form of Parliamentary approval for the dissolving of Parliament. We note that there have recently been proposals in the UK to require that the Prime Minister obtain the approval of the House of Commons before asking the Queen to dissolve Parliament.^[39]
48. On the other hand, there is one important advantage of the Westminster system of Parliaments of unspecified duration (subject only to a maximum duration of five years). If a general election produces a politically inconclusive result – in particular, a “hung Parliament”, whereby no political party has an outright majority of members – a second election can be called soon after in an effort to produce a workable government and Parliament.
49. In our Instructions, there was a suggestion that the Queen might be given a power to disband the Jersey Parliament in the event that it was acting outside its constitutional framework, so as to force an election. While such a power is conceivable, we are generally of the view that questions as to the legality of any action – by the Parliament or otherwise – are better left to the courts (although there might be difficulty in some cases if the courts do not have the jurisdiction to inquire into internal proceedings in Parliament).
50. Appointing the Chief Minister. We return to this issue in the section entitled “The Executive” below (paragraphs 79-86).
51. Other prerogative powers. In the UK, certain powers of State – for example, the power to declare war and peace or grant pardons – are termed “prerogative powers”. This term denotes that the power is derived from the common law, as opposed to statute. Historically, the term further denotes that the power is exercisable by the monarch personally – hence the term “Royal Prerogative”.
52. For many years, however, most prerogative powers have in practice been exercised by government ministers. Moreover, there is a growing tendency for prerogative matters to be brought within the purview of Parliament. Recent government proposals would further transfer power away from the Executive, including in sensitive areas such as declaring war.^[40] There has also been a growing willingness in the courts to apply the ordinary principles of judicial review to decisions taken under prerogative powers.^[41]
53. In Jersey, it may be thought appropriate for executive decisions to be taken by ministers, rather than being formally matters for the Queen to decide, and to have an appropriate level of input from the Legislature.

Governor-General

54. A further issue concerns the appointment of the Governor-General. In other Commonwealth countries, the Queen appoints the Governor-General on the advice of the Prime Minister, having consulted the Leader of the Opposition. The requirement for the Queen to act on that advice is usually a matter of constitutional convention, as opposed to being expressly set out

in the written constitution. It is designed to ensure that the appointment is made on a bipartisan basis, since the Governor-General should not favour any particular party.

55. However, we are aware that political parties are not strong in Jersey and that at present only three current Members of the States Assembly represent a political party. Accordingly, although the Queen could be required to act on the advice of the Chief Minister, there is no Leader of the Opposition whose views should also be taken into account. The Chief Minister would perhaps be expected therefore to consult more widely with the members of the States Assembly before submitting his or her recommendation to Her Majesty.

Parliament

56. The key questions under this heading include whether to have a unicameral or bi-cameral Legislature, and what the composition of the Legislature should be. We are aware that there is currently debate in Jersey as to whether the present composition of the States Assembly is appropriate, with options under consideration including the removal of the Connetablés, the removal of the Senators (who have an island-wide mandate) and the creation of large multi-member constituencies.

57. However, before either of these key questions can be answered, a decision must be taken on precisely what the role of the Legislature – and in particular that of any possible second chamber – would be.

58. The general position in bi-cameral systems is that political power rests firmly with the “lower house”, with the role of the “upper house” being to scrutinise Bills passed by the lower house and generally act as a “brake” on the lower house. The upper house will often only have the power to delay, but not veto, the enactment of Bills passed by the lower house. In addition, primary responsibility for holding the Executive to account rests with the lower house.

59. The differing roles of the two houses are generally reflected in their respective compositions. Ordinarily, the lower house is composed entirely of career politicians who are directly elected by the electorate. The upper house tends to have fewer members, who have a broader range of professional backgrounds or represent different regions of the country (as in Italy, France and South Africa). Members of the upper house may be elected, but generally the mode of election is less direct – for example, by means of proportional representation on the basis of party lists, or election by regions. Members of the upper house may also be appointed, either on the basis of party allegiance (such that the overall balance of membership reflects the balance in the lower house – as in the Bahamas) or on the basis of expertise – for example, expert lawyers, scientists, economists, business leaders and so on.

60. The advantage in any future Jersey Legislature of having some unelected members, appointed on the basis of their expertise in a particular field, is that such expertise will assist the Legislature in the formulation of suitable policies and the production of suitably-drafted legislation to give effect to those policies.

61. It would be possible for the elected and unelected members to sit together in a single house, as in the present States Assembly. It is not uncommon for unicameral systems to have a mix of

elected and appointed members. A good example is Dominica, which has a single House of Assembly which contains one elected Representative per constituency, plus nine appointed Senators.

62. However, there are certain advantages in separating out elected and unelected members into distinct chambers. First, this allows for a clearer demarcation of the roles performed by elected and unelected members. Secondly, if the upper house does not have a power of veto, it reduces concerns that having unelected members is undemocratic. Thirdly, from a practical perspective, it may be easier to attract talented individuals to become members of a more deliberative upper house which may not require full-time attendance, allowing them to continue in their ordinary jobs.
63. In general, countries with small populations are more likely to have a unicameral Legislature. However, there are examples of countries with comparable populations to that of Jersey which use a bi-cameral system – for instance, Antigua and Barbuda (population 85,000) and Grenada (106,000).
64. If Jersey were to have a second chamber, it would be necessary to decide whether it should comprise only appointed members, or a mix of appointed and elected members. Having some elected members would clothe the second chamber with additional democratic legitimacy. However, there might be a tendency for observers to attribute greater political weight to the views and votes of the elected members than to those of unelected members.
65. Where members of the Legislature are to be appointed rather than elected, there is a difficult issue in deciding who should appoint them and according to what criteria.
66. In countries which have established political parties, one option is to appoint members on the basis of party membership. This ensures that the appointed members have some degree of democratic legitimacy, despite not being elected. Thus, in Dominica, the President appoints five Senators nominated by the Prime Minister and four nominated by the Leader of the Opposition (s.34). A similar system is used in, for example, Jamaica, St Kitts and Nevis, and St Vincent and the Grenadines.
67. However, given the absence of strong political parties, this type of arrangement would not be appropriate in Jersey. The best option may be to create an Appointments Commission responsible for appointing a certain number of members who should, for example, reflect the composition of the States or represent various interests of society.
68. It would not be necessary to set out in the written constitution the criteria to be applied by the Commission; these criteria could be devised by the Commission in due course. General guidance could be given along the lines of Section 40 of the Constitution of Trinidad and Tobago (1976), which provides that, in addition to appointing sixteen Senators on the advice of the Prime Minister and six on the advice of the Leader of the Opposition, the President shall appoint nine Senators “*from outstanding persons from economic or social or community organisations and other major fields of endeavour*”.

69. The legislative process will to a large extent be determined by the options selected as regards the composition of Parliament (discussed in the previous section).
70. In a unicameral system, legislation would be enacted by the single chamber passing a Bill and the Queen (through the Governor-General) giving the Royal Assent. The circumstances in which the Queen might withhold the Royal Assent were discussed at paragraphs 44-45 above.
71. The position would be somewhat more complicated in a bi-cameral system. In particular, the constitution would have to address in some detail the circumstances in which the failure or refusal of the upper house to pass a Bill could delay or prevent the Bill from being presented to the Queen for the Royal Assent.
72. In this regard, a common approach in Commonwealth constitutions which institute a bi-cameral system is for a distinction to be drawn between “money Bills” – in general terms, those which address taxation or charges on any public fund – and other Bills. The distinction is derived from the UK’s Parliament Acts 1911-49, which stipulate where a Bill may be introduced and when it may be presented for the Royal Assent.
73. Money Bills may only be introduced in the lower house and the lower house may only proceed on money Bills which impose or increase taxation or charges on any public fund on the recommendation of the Governor-General or the Cabinet signified by a Minister.
74. If the upper house fails to pass a money Bill within one month of its being passed by the lower house, the Bill will be presented for Royal Assent. If the upper house refuses in two successive sessions to pass a non-money Bill which has been passed by the lower house in those two sessions, the Bill will be presented for the Royal Assent, provided that a set period of time – usually a few months – has elapsed between the dates on which the lower house passed the Bill. The effect of provisions of this nature is to give the upper house a power to delay (but not to veto) non-money Bills but no power to veto or delay money Bills.
75. Examples of this type of provision include the Constitutions of Barbados (1966; ss.54-57), Grenada (1973; ss.46-49) and Jamaica (1962; ss.55-58).
76. It may be that provisions of this nature are considered appropriate in any future Jersey constitution.

Elections

77. Most constitutions make fairly general provision as regards elections. Typically, the constitution will set out who is eligible to vote and create a mechanism for the division of the country into constituencies. The minutiae of electoral law are then dealt with in legislation or rules created under the constitution.
78. Provision will normally also be made on who is eligible to become a Member of Parliament (for example, excluding undischarged bankrupts and those certified as insane).

The Executive

79. The usual model in Commonwealth jurisdictions is for the Governor-General to appoint the Prime Minister, mirroring the fact that the Queen appoints the Prime Minister in the United Kingdom. The Governor-General then appoints other Ministers on the advice of the Prime Minister, and the Prime Minister and other Ministers form a Cabinet.
80. Provision is often made in the constitution requiring the Governor-General to appoint as Prime Minister the Member of the lower House of Parliament who is the leader of the party which commands the support of the majority of the members of that House, or, if that party does not have an undisputed leader or if no party commands the support of such a majority, the Member who, in his judgment, is most likely to command the support of the majority of members of that House. See, for example, the Constitution of Antigua and Barbuda (1981; s.69), the Bahamas (1973; s.73) and Belize (1981; s.37) and Malta (1964; ss.32-45).
81. Other Commonwealth constitutions merely state that the Governor-General shall appoint the Member who, in his judgment, is best able to command the confidence of a majority of the members of the House. See, for example, the Constitutions of Barbados (1966; s.65), Dominica (1978; s.59), Grenada (1973; s.58), Jamaica (1962; s.70) and St Christopher and Nevis (1983; s.52).
82. As well as appointing the Prime Minister, the Governor-General has a power to dismiss him or her. In practice, this power is only exercised if Parliament has lost confidence in the Prime Minister. However, identifying when there has been a loss of confidence may not be straightforward, particularly in a bi-cameral system.
83. This is illustrated by the controversial dismissal of Australian Prime Minister Gough Whitlam by the Governor-General, Sir John Kerr. Whitlam retained the confidence of the lower House but was unable to obtain supply (i.e. approval for spending plans) from the upper House. Opinion is divided as to whether it was an appropriate use of the dismissal power. Supporters of Sir John's action argue that a Government must be able to secure supply in order to function properly, and therefore must retain the confidence in both houses. Others argue that it has never been a requirement for a Government to enjoy the confidence of both houses and that acceptance of the Kerr approach would undermine responsible government and would automatically call into question the legitimacy of any government which does not have a Senate majority.
84. In countries with strong political parties, identifying the Member of Parliament who commands the support of a majority of Members will often be very straightforward. Accordingly, the Governor-General will have little or no substantive discretion in the selection process. However, in a country which does not have strong political parties, the position may be quite different. For this reason, any proposal to transfer the task of appointing the Chief Minister from the Members of the States Assembly to the Governor-General might prove controversial.
85. We take the view that it would be acceptable for the Members of the States Assembly (if it is to remain as it now is) to retain their power to appoint the Chief Minister.
86. In a number of independent countries the chief minister is called "Prime Minister" or

“Premier”, titles that more accurately reflect the role.

Local government

87. The United Kingdom is somewhat unusual in treating local government entirely as a “creature of statute”, which can be altered or abolished by an ordinary Act of Parliament. In contrast, most European countries (e.g. Italy and France) make provision for both regional and local government. Chapter 7 of the South African Constitution provides that “*The local sphere of government consists of municipalities, which must be established for the whole territory of the Republic*” (s.151(1)) and “*A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation as provided for in the Constitution*” (s.151(3)). The objects of local government are then set out as: democratic and accountable government at the local level; to ensure the provision of sustainable services to communities; to promote social and economic development and a safe and healthy environment and to encourage the involvement of communities and community organisations (s.152(1)).
88. We understand that the Parishes perform an important role and hold a strong position within Jersey. We can perceive advantages in giving the Parishes constitutional status. There would be various options here. In particular, the existing Parishes system could be entrenched under the new constitution, or alternatively the constitution could merely provide that there shall be protection for local government.

International law

89. An important issue to consider in any future Jersey constitution is by what mechanism international treaties and conventions should become binding as a matter of Jersey’s domestic law.
90. There are two main options here. First, the “monist” approach entails treaties becoming binding in domestic law as soon as they become binding in international law. Secondly, the “dualist” approach separates out the two, such that a specific procedure must occur after a treaty has become binding in international law before it will be binding in domestic law.
91. In general, Anglo-Saxon and Scandinavian countries have favoured the dualist system. The particular advantage of the dualist system is that it preserves Parliamentary sovereignty by ensuring that the Executive – which tends to have sole responsibility for signing treaties – cannot itself alter domestic law without the approval of Parliament.
92. Further issues to consider are whether the government would require Parliamentary authorisation to begin negotiating a treaty in the first place or to ratify a treaty, and whether the Royal Assent would be required before Jersey could sign or ratify a treaty. The latter issue raises the possibility that the Queen might be asked to sign a treaty on behalf of Jersey which the UK had decided not to sign.
93. As regards ratification, it would be possible to adopt the UK’s approach, as embodied in the “Ponsonby Rule”:

“The Ponsonby Rule requires that every treaty signed by the United Kingdom subject to ratification should be laid before Parliament for 21 sitting days (although they need not be continuous). The FCO interprets the Ponsonby Rule as applying to acceptance, approval and accession as well as to ratification. ‘Acceptance’ and ‘approval’ have the same legal effect as ratification, and ‘accession’ arises when the United Kingdom Government consents to be bound by a treaty of which it was not an original signatory. The Ponsonby Rule does not apply to treaties that enter into force on signature.”^[42]

94. We note that there are currently proposals in the UK to put the Ponsonby Rule on a statutory footing.^[43]

Religious matters

95. The present position in Jersey is that the Church of England is the established Church and has specific connections at parochial level – for example, the Rectors of the ancient Parish churches are invariably members of the Roads Committees of their own Parishes.
96. Although this is a politically controversial issue, we are generally of the view that, although there may be an argument for having faith-based representation, for example in a second legislative chamber, in general it is appropriate to separate Church and State and no particular religion should automatically enjoy membership of any Legislative or Executive body.

V. Scrutiny of legislation and the Executive

97. There are various constitutional mechanisms which can be used to ensure that proposed legislation is carefully examined and tested prior to its enactment and that past or proposed Executive action is similarly subjected to scrutiny. The same body may carry out one or both of these tasks.

Houses of Parliament

98. As discussed above, in bicameral systems the lower house will often be primarily responsible for holding the Executive to account, while the upper house is often responsible for providing detailed analysis of Bills.

Parliamentary Committees

99. Many Parliaments contain committees composed of members of Parliament to scrutinise legislation and executive action and to address matters of policy. The Select Committee system used in the UK is a good example. Members are exclusively backbenchers, from all parties and normally chaired by an opposition member. The committees either shadow government departments or deal with general matters, such as the Select Committee on Public Administration or the Joint Committee on Human Rights (“joint” because it contains members of each House of Parliament) and the Constitutional Committee of the House of Lords. The Select Committees hear evidence and write reports and in general “*emphasise the additional role of Parliament as constitutional watchdog*”.^[44]

External scrutiny

100. Some countries have a body *external* to Parliament which conducts pre-legislative scrutiny of Bills. A well known example is the system employed in France, which entails scrutiny by two external bodies – the *Conseil d’Etat* and the *Conseil Constitutionnel*.
101. The *Conseil d’Etat*, composed of elite civil servants, has a dual role as both adviser and judge of the administration, although those members who perform its consultative functions are now separated from those performing its judicial functions. Under the France’s Constitution of the Fifth Republic, any bill (*projet de loi*) introduced into Parliament by the government (as opposed to private members) must have been submitted for the *Conseil*’s advice. That advice will address both the legality of the bill under the Constitution and its general merits and suitability as a means of giving legislative expression to what has been for the Ministry an *option politique* – the political choice itself not being a matter upon which the *Conseil* may express a view.^[45]
102. Neither the government nor parliament is not obliged to follow the advice tendered by the *Conseil d’Etat*. However, a bill may be referred, before promulgation – i.e. after it has parliamentary consent but before the equivalent of Royal Assent – to the *Conseil Constitutionnel*. If the *Conseil Constitutionnel* finds the bill to be unconstitutional, it may not be promulgated. But once a bill has been promulgated the courts must apply it.
103. A further example is provided by the Constitution of Kiribati (1980). Under section 66, the President may withhold his consent from a Bill which he believes is inconsistent with the constitution. If he does so, the Bill is returned to Parliament for amendment. If the Bill is again presented for the President’s assent and again he believes it to be unconstitutional, he must refer it to the High Court for a declaration. If the High Court declares that it is unconstitutional, the Bill is again returned to Parliament for reconsideration.

Mode of establishing scrutiny mechanisms

104. Some of the options outlined above – for example, a body akin to the *Conseil d’Etat* or the *Conseil Constitutionnel* – would need to be provided for in the written constitution itself. Others – such as Parliamentary Select Committees – could be provided for by standing orders.

VI. The judiciary

105. The key issues concerning the judiciary are (a) the method of appointing judges; (b) disciplining and removing judges; and (c) the extent of the courts’ jurisdiction.

Judicial appointments

106. Judicial independence is a fundamental tenet of democracy and the rule of law and a necessary ingredient in a fair trial. In particular, it is necessary to avoid judges being or appearing to be biased towards the Executive. An independent judiciary ensures that

governments and administrations may be held to account and that duly enacted laws are enforced.

107. In recent years certain key international texts have set out the standards to guide judicial appointments etc. within the strict confines of the independence of the judiciary.^[46] None of these texts at present has any mandatory force, except insofar as the new democracies in the countries of the former Soviet Union are required substantially to attain them if they wish to achieve membership of bodies such as the Council of Europe or the European Union. However, in our view the principles set out in these texts should be adhered to in any future constitution for Jersey. Also of relevance in the present context is Article 6(1) of the ECHR, which provides that “[i]n 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”.^[47]
108. The doctrine of separation of powers suggests that the Executive should have no role to play in appointing, disciplining or removing judges. However, strict compliance with the doctrine is not achieved in many established democracies. A well-known example is the United States, where the President nominates members of the Supreme Court who must be confirmed by the Senate. Moreover, while the key international texts all emphasise the need for non-executive involvement in the appointment of judges, they adopt a pragmatic approach which does not prohibit executive involvement. The central requirement is that:
- “every decision relating to a judge’s appointment or career should be based on objective criteria and be either taken by an independent authority or subject to guarantees to ensure that it is not taken other than on the basis of such criteria”.*^[48]
109. The objective criteria referred to seek to ensure that the selection and career of judges are “based on merit, having regard to qualifications, integrity, ability and efficiency”. It is recommended that the authorities responsible for making and advising on appointments should publish these criteria.^[49]
110. Most modern democracies (including the UK under the Constitutional Reform Act 2005) have a body named the “Judicial Appointments Commission” or the “Judicial Services Commission” (“JSC”) or something similar. Since it is desirable for such a body to have a remit beyond appointments, the latter term is preferable. The key questions concern the composition of the JSC and whether it has the final say.
111. Composition of the JSC. The European Charter recommends that at least half of the members should be judges.^[50] However, there may be advantages in the judiciary occupying slightly less than half of the positions, since this “avoids any suggestion that judges could by themselves control the process”.^[51] There is no requirement that the JSC be chaired by a judge,^[52] but if it were decided that a judge should be the Chair, the Bailiff would be an obvious choice.
112. The European Charter recommends that the judicial members be elected by their peers, but concerns about Executive selection of judicial members would equally be obviated if certain judges were to become members *ex officio*. This is particularly likely to be appropriate in a country like Jersey which has a very small judiciary. The need to avoid the appearance of

Executive bias is again present when considering the selection of non-judicial members. Accordingly, even if they are to be selected by the Executive, they must be (i) selected in accordance with pre-determined, objective and transparent criteria, and (ii) appointed until expiry of a fixed term or until their removal from office for inability to perform or misbehaviour. Provision should also be made as to the quorum required for JSC decisions.

113. Jersey is fortunate already to have, in the Jurats, a group of individuals who are highly respected non-lawyers with experience of the legal system. We imagine that the Jurats would be ideally suited to membership of a JSC for Jersey.
114. Function of the JSC. It will generally be appropriate for the *substantive* decision in a matter concerning the judiciary to be taken by the JSC, even if *formally* the decision remains one for the Governor-General. A formulation frequently found in other Commonwealth constitutions is that decisions shall be taken by the Governor-General “*acting in accordance with the advice of*” the JSC.^[53] There may, however, be an argument for giving elected politicians some input into the appointment of the most senior judge, the Bailiff. Some countries secure such input by requiring the head of state to consult the Prime Minister and the Leader of the Opposition.^[54] However, given that Jersey does not have well-developed political parties, this method would not be appropriate for Jersey. We further note the recent proposal by the new British Prime Minister “*that the Government should consider relinquishing its residual role in the appointment of judges*”.^[55]

Disciplining and removing judges

115. Certain specific issues arise in relation to disciplining and removal of judges. First, the importance of security of tenure for judges, either until a mandatory retirement age or the expiry of their term of office, is emphasised in the key international texts.^[56] A full-time judicial appointment should only exceptionally be for a limited period.^[57] If the Constitution is to provide for fixed-term appointments, it should make some provision regarding the circumstances in which a judge appointed on a fixed-term basis will or may be reappointed (even if it is merely a power to create further legislation or rules on the issue).
116. Secondly, judges should only be prematurely removed from office if they have been proven to be unable to discharge their judicial duties or proven to have committed misconduct. Devising the precise mechanism by which such matters should be determined is a matter requiring some care. At the very least, one would wish to see the decision being taken by an independent body such as the JSC (again, the JSC could formally be characterised as “advising” the Governor-General). However, some Commonwealth jurisdictions go further, for example by providing that the JSC should decide whether to refer the question to the Judicial Committee of the Privy Council. Indeed, a further layer can be inserted by requiring the JSC to decide whether to appoint an independent tribunal consisting of members who hold or have held high judicial office to investigate the question of inability or misconduct, which must then decide whether to refer the question to the Privy Council.^[58]
117. Whichever body is chosen to decide the ultimate issue of inability or misconduct, provision must be made for a procedure which ensures that judges accused of misconduct enjoy due

process rights.^[59] Although the Constitution itself need not set out the detail of such a procedure, in order to meet ideal European standards it should at least make express provision for the creation of legislation or rules setting out such a procedure.^[60] Provision should also be made for the creation of legislation or rules setting out in detail the standards of conduct to which judges must adhere and the likely sanctions for departure from those standards.

118. Veto power. Again, an important point concerns the circumstances (if any) in which the Governor-General might lawfully depart from the advice which he receives from the JSC, the Privy Council, or any other independent body which advises him on the disciplining and removal of judges. In general, it would be preferable for the Governor-General to have no substantive discretion or power in these matters.
119. However, if it were deemed prudent to reserve a “veto” power to the Governor-General, the circumstances in which that power could be exercised should be expressly defined and the Governor-General should be required to give reasons for its exercise in any given case.^[61] Moreover, there is a strong argument for restricting any veto power such that it is exercisable only to maintain the status quo – in other words, to keep existing judges in office and to keep new candidates out of office. It would in principle be improper for the Governor-General or any member of the Executive to appoint or dismiss a judge against the wishes of the JSC.

The courts’ jurisdiction

120. Any future written constitution for Jersey should set out what the various courts of Jersey are, which judges they are composed of, and what their functions are.
121. In addition to matters of ordinary civil law and criminal law, three particular legal issues will or might fall to be determined by the courts in Jersey:
- (1) The correct interpretation of the written constitution.
 - (2) The legality of administrative action, by reference to the constitution and other general principles of judicial review.
 - (3) The validity of legislation, by reference to the constitution and in particular the Bill of Rights.

As regards the first two issues, the key decision to be taken is which courts should decide these issues. As regards the third, a prior decision needs to be taken as to whether *any* court should have jurisdiction to assess the validity of legislation which on its face has been duly enacted.

122. Interpreting the constitution. The key question here is whether to have a separate Constitutional Court to rule on the correct interpretation of the written constitution, or whether merely to leave matters of constitutional law to the ordinary courts. International practice varies on this matter. Most Commonwealth countries follow the UK in adopting the latter option.

123. Linked to this issue is the question of whether to provide for a final appeal to the Judicial Committee of the Privy Council. The Judicial Committee is the court of final appeal for the UK overseas territories and Crown dependencies, and for those Commonwealth countries that have retained the appeal to Her Majesty in Council or, in the case of Republics, to the Judicial Committee.
124. Appeals lie to Her Majesty in Council from Antigua and Barbuda, Bahamas, Barbados, Belize, the Cayman Islands, the Cook Islands and Niue, Grenada, Jamaica, Saint Christopher and Nevis, Saint Lucia, Saint Vincent and the Grenadines and Tuvalu. Appeals lie to the Judicial Committee itself from Trinidad and Tobago, Dominica, Kiribati and Mauritius. It is important to note that the latter group of countries have not retained the Queen as Head of State – such retention is therefore not a precondition for appeals to the Judicial Committee.
125. We can perceive two particular advantages in providing for appeals to the Judicial Committee under any future constitution for Jersey. First, it would maintain continuity with the present arrangements, whereby it is possible to appeal from a decision of the Court of Appeal to the Judicial Committee. Secondly, it would give access to the particular expertise of the Judicial Committee and its substantial body of jurisprudence on constitutional law matters.
126. Judicial review of administrative acts. Again, some countries have specific courts designed to carry out this function, while others leave it to the ordinary civil courts. In a country of Jersey's size there may not be a sufficient volume of legal challenges to administrative acts to justify having a separate Administrative Court. However, there are certainly advantages in such challenges being ruled upon by judges who are well versed in the principles of public law and judicial review – which explains the emergence of a distinct Administrative Court as a division of the Queen's Bench Division of the High Court of England and Wales.
127. Judicial review of legislation. The options in terms of post-legislative judicial review of legislation were set out in paragraphs 29-31 above, while pre-legislative review was examined in paragraphs 100-103 above.

VII. Other institutions of government

128. In addition to the institutions already mentioned, any future Jersey constitution might be expected to make provision in respect of the following institutions. The South African Constitution groups together several such institutions under the heading "State Institutions Supporting Constitutional Democracy" (Chapter 9).

Attorney-General

129. Most Commonwealth constitutions make provision for the appointment and functions of the Attorney-General.
130. Under present arrangements, the Attorney-General of Jersey is appointed by the Queen on the recommendation of the Island Authorities, and, like the Solicitor-General, is an unelected member of the States Assembly. He currently has a wide range of functions. In particular, he

advises the States Assembly on constitutional and legal matters; provides legal advice to the Crown and the States Assembly; provides and oversees the prosecution service; ensures that the interests of the Crown and the States are protected by acting on their behalf in civil proceedings brought by or against the Crown or the States; performs the functions and duties arising from custom and statute – in particular, running the Island’s equivalent of the Serious Fraud Office under the Investigation of Fraud (Jersey) Law 1991. The Attorney-General is also the titular head of the Honorary Police and has functions in this regard, in particular disciplinary functions under the Police (Complaints and Discipline) (Jersey) Law 1999. He additionally provides a conveyancing service in relation to property matters affecting the Crown and the States.

131. Given the paucity of lawyers in the States Assembly, there is merit in having the Attorney present there to offer legal advice. However, there is a growing view in the UK that the combination of the Attorney’s political and legal roles creates the impression of conflict of interest. In respect of the UK Attorney’s role in providing legal advice to government, his independence was questioned in relation to his opinion on the legality of the invasion of Iraq. And in respect of his role in superintending criminal prosecutions, criticism was made of his agreement to the dropping of charges in the BAe bribery affair and his insistence on being involved in the decision whether to prosecute in the “loans for peerages” issue. The need for change appears to have been accepted by the UK government.^[62]
132. A compromise solution might be to create an independent Director of Public Prosecutions, retaining the Attorney’s role as guardian of the rule of law within government.

Civil service

133. In the UK, there is no legislation at present establishing the civil service, which is established under the Royal prerogative (although there are currently proposals to place the core principles governing the civil service on a statutory footing^[63]). In contrast, most constitutions make provision for the civil service. In order to ensure that the civil service is impartial as between governments, a number of Commonwealth countries have a Public Service Commission, on whose advice civil service and other public appointments are made by the Governor-General.
134. The South African constitution provides a useful model. Section 195 sets out “*Basic values and principles governing public administration*”, which include professional ethics, efficient use of resources, impartial and fair provision of services and transparency. Section 196 establishes a Public Service Commission, whose tasks include: promoting the section 195 principles; investigating, monitoring and evaluating the organisation and administration and personnel practices of the public service; and proposing measures to ensure effective and efficient performance within the public service. Section 197 provides that “[w]ithin public administration there is a public service for the Republic, which must function, and be structured, in terms of national legislation, and which must loyally execute the lawful policies of the government of the day”.
135. We recommend that any future Jersey constitution make express provision enshrining the independence and impartiality of the civil service, and establish a Public Service Commission

to help achieve that. It would also be desirable to make specific provision regarding the appointment, disciplining and dismissal of key personnel, such as the Chief Executive.

The police

136. As with the civil service, most constitutions make fairly brief provision regarding the police. Again, the key principle which ought to be enshrined is the police's independence from any particular government. Ultimate responsibility for policing matters – as with security and intelligence matters – should rest with politicians, but day-to-day management of those matters should not.
137. Many Commonwealth constitutions establish an independent Police Service Commission, which either directly takes decisions concerning the appointment, disciplining and dismissal of police officers, or on whose advice the Governor-General takes those decisions. This is the structure adopted in, for instance, the Constitutions of Antigua and Barbuda (1981; ss.104-105), Barbados (1966; ss.91 and 96) and St Kitts and Nevis (1983; ss.84-85).
138. There is usually limited scope for political involvement in these matters. For example, there may be a requirement that the Prime Minister be consulted on (and perhaps have a veto over) appointments to the most senior positions. However, some Commonwealth constitutions allow for more political involvement. For instance, the Bahamas Constitution (1973; ss.118-119) reserves the power to appoint the most senior officer or officers to the Governor-General acting on the recommendation of the Prime Minister after consultation with the Leader of the Opposition. Even the appointment of other officers is done by the Governor-General acting on the recommendation of the Prime Minister after consultation with the Police Service Commission.
139. We are generally of the view that the government should have minimal involvement in appointing (at least to positions below the highest level), disciplining or dismissing police officers. The present arrangements, whereby the Chief Officer of the States of Jersey Police is appointed and dismissed by the States Assembly as a whole is probably acceptable, insofar as no one politician or political group has control of this matter. However, creating a truly independent Police Service Commission would have advantages.
140. Another option to consider would be simply giving the task of making decisions regarding police personnel to the Public Service Commission which we recommend be created to address civil service matters. Giving both functions to a single Public Service Commission is the approach taken in, for example, the Constitution of Grenada (1973; ss.84 and 89).
141. A final point to make is that, as with judges (discussed above), police officers facing disciplinary action should enjoy appropriate due process rights.

Other commissions

142. There are a number of other commissions which Jersey might consider establishing under any future constitution. We take the view that any modern democratic country should consider establishing independent bodies with responsibility for the following matters.

143. Supervising elections. Several Commonwealth constitutions establish an Electoral Commission, which is responsible for voter registration and the conduct of elections to Parliament. One of the key functions of such Commissions or Supervisors is to ensure that elections are free and fair. See, for example, the Constitutions of Dominica (1978; ss.38 and 56), Kiribati (1980; ss.62-63), Malta (1964; ss.60-61), St Kitts and Nevis (1983; ss.33-34), Solomon Islands (1978; ss.57-58), South Africa (1996; ss.190-191) and Vanuatu (1980; ss.18 and 20).
144. Other constitutions establish a Supervisor of Elections or Electoral Commissioner to perform the same functions. See, for example, the Constitutions of Antigua and Barbuda (1981; s.67), St Kitts and Nevis (1983; s.34), St Vincent and the Grenadines (1979; s.34) and the Seychelles (1993; s.116).
145. Reviewing constituency boundaries. Many constitutions provide for the creation of a body to review the number and boundaries of constituencies and submit a report to the government recommending changes on these matters. Some constitutions leave it to the relevant body to identify the principles which will guide it. Others expressly provide what those principles are – for example the Constitution of Dominica (1978; Schedule 2), which provides:
- “All constituencies shall contain as nearly equal numbers of inhabitants as appears to the Constituency Boundaries Commission to be reasonably practicable but the Commission may depart from this principle to such extent as it considers expedient to take account of the following factors, that is to say:-*
- a. *the density of population, and in particular the need to ensure the adequate representation of sparsely populated rural areas;*
- b. *the means of communication;*
- c. *geographical features, and*
- d. *the boundaries of administrative areas.”*
146. Sometimes this function is performed by the same body which has responsibility regarding elections. See, for example, the Elections and Boundaries Commission established by the Trinidad and Tobago Constitution (1976; s.70) and the Constituency Boundaries and Electoral Commission in St Lucia (1978; s.57). However, this function is often performed by a separate body, called the Constituencies Boundaries Commission (Antigua and Barbuda (1981; s.63)), the Constituency Boundary Commission (the Bahamas (1973; s.69)) or the Constituency Boundaries Commission (Kitts and Nevis (1983; s.49), St Vincent and the Grenadines (1979; s.32) and the Solomon Islands (1978; s.53)).
147. Investigating maladministration. Many constitutions establish an independent supervisory agency whose role is to protect the rights and interests of citizens by investigating whether acts of the Executive disclose maladministration and, if so, taking (or recommending that the Executive takes) appropriate remedial action.
148. The agency may be known as the Ombudsman, as in Antigua and Barbuda (1981; s.66), Mauritius (1968; s.96), Seychelles (1993; s.143), Solomon Islands (1978; s.96), Trinidad and Tobago (1976; s.91) and Vanuatu (1980; ss.61), or the Parliamentary Commissioner, as in Dominica (1978; ss.108) and St Lucia (1978; ss.110)), the Commissioner for the Administration of Justice, as in Malta (1964; s.101A) or the Public Protector, as in South Africa (1996; s.182).

149. Maintaining standards in public life. Some constitutions establish an independent body with functions designed to maintain standards in public life. For example, the Constitutions of St Lucia (1978; s.118) and Trinidad and Tobago (1976; s.138) establish an Integrity Commission. The latter provides that the Commission shall be charged with the following duties:

- “(a) receiving, from time to time, declarations in writing of the assets, liabilities and income of Senators, Judges, Magistrates, Permanent Secretaries, Chief Technical Officers, members of the Tobago House of Assembly, Members of Municipalities, Members of Local Government Authorities and members of the Boards of all Statutory Bodies, State Enterprises and the holders of such other offices as may be prescribed;*
- (b) the supervision of all matters connected therewith as may be prescribed;*
- (c) the supervision and monitoring of standards of ethical conduct prescribed by Parliament to be observed by the holders of offices referred to in paragraph (a), as well as members of the Diplomatic Service, Advisers to the Government and any person appointed by a Service Commission or the Statutory Authorities’ Service Commission;*
- (d) the monitoring and investigating of conduct, practices and procedures which are dishonest or corrupt.”*

150. The equivalent in the UK is the Committee on Standards in Public Life (originally called the “Nolan Committee” after its first chairman, Lord Nolan). The Committee’s original terms of reference when established in 1994 were:

“To examine current concerns about standards of conduct of all holders of public office, including arrangements relating to financial and commercial activities, and make recommendations as to any changes in present arrangements which might be required to ensure the highest standards of propriety in public life.”

In 1997 the terms of reference were extended, requiring the Committee “[t]o review issues in relation to the funding of political parties, and to make recommendations as to any changes in present arrangements”.

151. Promoting compliance with human rights. It is increasingly common for countries to create a body, often called the Human Rights Commission (“HRC”), whose role is to receive and investigate complaints of breaches of human rights; promote settlement of disputes regarding those breaches; impart knowledge to the public regarding human rights; submit reports to Parliament; and so on.

152. The advantage of having a HRC is that it can promote a “human rights culture” whereby awareness of human rights considerations permeates society and those considerations are addressed proactively, not merely in reaction to judicial decisions.

153. For example, by Section 184 of the South African Constitution, the South African Human Rights Commission is required to *“(a) promote respect for human rights and a culture of human rights; (b) promote the protection, development and attainment of human rights; and (c) monitor and assess the observance of human rights in the Republic”*. Similarly, the tasks of the HRC established by Section 34 of the Virgin Islands Constitution Order 2007 include:

- “(a) the receipt and investigation of complaints of breaches or infringements of any right or freedom referred to in this Chapter;*
- (b) the provision of a forum for dealing with, and participation of the commission in promoting*

conciliation with respect to, complaints and disputes concerning any matter relating to this Chapter;

(c) *issuing guidance on procedures for dealing with any complaints of breaches or infringements of rights and freedoms referred to in this Chapter;*

(d) *imparting knowledge to the public with respect to the rights and freedoms referred to in this Chapter or in relation to any international instrument or activity relating to human rights; and*

(e) *preparing and submitting periodically reports concerning its activities to the Legislature.”*

154. The equivalent body in the UK is the Commission for Equality and Human Rights (“CEHR”), established by the Equality Act 2006, whose functions in relation to human rights are to “(a) *promote understanding of the importance of human rights, (b) encourage good practice in relation to human rights, (c) promote awareness, understanding and protection of human rights, and (d) encourage public authorities to comply with section 6 of the Human Rights Act 1998 (c. 42) (compliance with Convention rights)”* (Section 9). The CEHR also has important functions in relation to promoting equality and diversity and eliminating unlawful discrimination (Section 8). There are advantages and disadvantages in having a single body to perform these two groups of functions.^[64]

VIII. Citizenship

155. Every constitution must address the question of which individuals qualify for citizenship. Provision must be made specifying who will automatically become a citizen at the commencement of the constitution (for example, those born in the country and who were citizens of the previous regime), who will automatically become a citizen after the commencement of the constitution (for example, those born in the country and those born outside the country whose parents are citizens), and who will become entitled to citizenship by registration (for example, those who marry a citizen). Provision may also be made as to the circumstances in which it will be possible to hold dual citizenship and the circumstances, if any, in which an individual may be deprived of citizenship. Another issue which might be considered under this heading is whether to have a Pledge or Oath of Loyalty as a precondition for citizenship.

IX. Emergency powers

156. Almost every written constitution addresses the circumstances in which emergency powers may be exercised by the Executive and Legislature. The relevant considerations in this regard can be summarised thus:

“The greater the constitutional commitment to a Bill of Rights, the more difficult it is to frame emergency powers. The following issues have to be resolved: the events or circumstances which count

as an emergency; the body which can decide whether these circumstances obtain; the body which can exercise emergency powers; the extent to which these powers can contravene normal rights and liberties; and the procedure for and the supervision of their exercise. ... On the one hand, the executive must be permitted to take emergency action; on the other the emergency power should not be capable of being used to subvert both the legislature and the Bill of Rights.”^[65]

157. The tension between these competing considerations – giving the Executive sufficient emergency powers while preserving human rights – has been an increasingly controversial topic in recent years.
158. The broad structure outlined below is adopted in several Commonwealth constitutions, including those of Antigua and Barbuda (1981; s.20), the Bahamas (1973; s.29), Barbados (1966; s.25), Belize (1981; s.18), Grenada (1973; s.17), Jamaica (1962; s.26), St Kitts and Nevis (1983; s.19), St Lucia (1978; s.17) and St Vincent and the Grenadines (1979; s.17).
159. The Governor-General may, by Proclamation, declare that a state of public emergency exists. The declaration will lapse within a short period (e.g. seven days if Parliament is sitting, otherwise twenty-one days). If the declaration is approved by resolutions of both houses of Parliament (which require a majority of all members of those houses), it shall remain in force while those resolutions remain in force, unless revoked by the Governor-General. The maximum length of the resolutions is limited (e.g. three months), such that both houses must make further resolutions if the declaration is to last for a longer period.
160. Nothing contained in or done under the authority of a law enacted by Parliament shall be held to be inconsistent with or in contravention of certain provisions of the Bill of Rights, typically including the right not to be deprived of one’s liberty, to the extent that the law authorises the taking during any period of public emergency of measures that are reasonably justifiable, for dealing with the situation that exists during that period. There may also be provision enabling the Governor-General to make regulations necessary or expedient for securing public safety, defence of the realm, maintenance of public order and suppression of mutiny, rebellion and riot, and for maintaining supplies and services essential to the life of the community.
161. Also of note is the approach taken in the ECHR, Article 15 of which provides:

“Derogation in time of emergency

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.”

162. It is important to note that, under Article 15(2), there can be no derogation from the right to life, the right not to be subjected to torture or to inhuman or degrading treatment or punishment, the right not to be held in slavery or servitude and the right not to be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.
163. The European Court of Human Rights tends to accord a fairly wide margin of appreciation to national authorities in deciding “both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it”.^[66] While the domestic courts could be expected to review the Executive’s decision on the first point with a relatively light touch, they should conduct much more anxious scrutiny in respect of the second.^[67]

X. Amendment provisions

164. Almost every written constitution makes provision setting out how its own terms might in future be amended. In this regard, a distinction is typically drawn between different categories of terms. There is a spectrum of positions on amendment, ranging from merely requiring an ordinary majority of Parliament – in other words, the same procedure as would be used to pass ordinary legislation – to absolute entrenchment, whereby certain provisions of the constitution are deemed so fundamental that they may never be altered. The position is usefully summarised by the following quotation:

“The provisions on the means by which a constitution may be amended are of both juridical and political importance: they are themselves an exercise of the constituent power in spelling out how its own creation may be changed; they divide the amending power among people, legislature, and the executive, or between federation and its components; and they may express basic values. The last are revealed in those features stated to be unamendable: the republican form of government in France, and in Germany the basic human rights and the federal structure.”^[68]

165. In Commonwealth constitutions, it is relatively rare for any provision to be *absolutely* entrenched. However, it is common to require a special majority of Parliament to amend any provision – for example, two-thirds of the lower house is required in Antigua and Barbuda (1981; s.47), Belize (1981; s.69) and Dominica (1978; s.42).
166. Moreover, it is common to require an even higher majority – for example, three-quarters of the lower house in Belize and Dominica – and/or the approval of the electorate in a referendum – for example in Grenada (1973; s.39) – to amend certain provisions, which usually include the Bills of Rights provisions and the amendment provisions themselves. The purpose of such provisions has been explained thus:

“[W]here, as in the instant case, a constitution on the Westminster model represents the final step in the attainment of full independence by the peoples of a former colony or protectorate, the constitution provides machinery whereby any of its provisions, whether relating to fundamental rights and freedoms or to the structure of government and the allocation to its various organs of legislative, executive or judicial powers, may be altered by those peoples through their elected representatives in

the Parliament acting by specified majorities, which is generally all that is required, though exceptionally as respects some provisions the alteration may be subject also to confirmation by a direct vote of the majority of the peoples themselves. The purpose served by this machinery for 'entrenchment' is to ensure that those provisions which were regarded as important safeguards by the political parties in Jamaica, minority and majority alike, who took part in the negotiations which led up to the constitution, should not be altered without mature consideration by the Parliament and the consent of a larger proportion of its members than the bare majority required for ordinary laws."^[69]

167. Any future Jersey constitution would have to set out precisely how any particular provision could in the future be amended.
168. One further matter which might be considered would be a provision enabling amendment in the event that Jersey wished to form a federation or confederation with the other Channel Islands.

XI. Summary and concluding remarks

169. In summary, any future constitution for Jersey would have to address the following issues:
- (1) Preamble: setting out why the new constitution has been promulgated and what values Jersey stands for (*paragraphs 8-11 above*).
 - (2) Bill of Rights: setting out the fundamental rights accorded to every individual, the conditions in which these rights may be limited or derogated from, and the extent to which the courts may strike down legislation contrary to these rights (*paragraphs 12-37 above*).
 - (3) Structures of government: comprising Chapters on the Head of State, the Executive, the Legislature, Elections and local government (*paragraphs 38-96 above*).
 - (4) Scrutiny of legislation and the Executive: decisions would need to be taken on which internal and/or external scrutiny mechanisms would be employed (*paragraphs 97-104 above*).
 - (5) The judiciary: setting out the methods for appointing, disciplining and removing judges, and the extent of the courts' jurisdiction (*paragraphs 105-127 above*).
 - (6) Other institutions of government: provision for the Attorney-General, the Civil Service and the Police, and perhaps also creating an Electoral Commission, a Constituency Boundaries Commission, an Ombudsman, an Integrity Commission and a Human Rights Commission (*paragraphs 128-154 above*).
 - (7) Citizenship: setting out the conditions which must be satisfied in order to attain citizenship (*paragraph 155 above*).
 - (8) Emergency powers: addressing how a state of emergency is declared and what powers

may then be exercised and by whom; in particular, addressing which human rights may or may not be limited or derogated from during a state of emergency (*paragraphs 156-163 above*).

(9) Amendments provisions: setting out the mechanism by which any particular term of the Constitution might in future be amended (*paragraphs 164-168 above*).

170. We hope that the above discussion of the options available to Jersey is of assistance to the Working Group. Should the Working Group decide to pursue this matter, for example in terms of producing a draft Constitution, we should be pleased to assist further.

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Appendix 4 – Comparison of small jurisdictions
CONSTITUTION WORKING GROUP

Comparative overview of small jurisdictions ^[70] (updated Dec 2007)

Country	Population	Size km ²	Constitutional status	Government	Economy / currency
Cook Islands	21,750	240	1900 - administrative control transferred to New Zealand; 1965 residents chose self-government in free association with NZ; Has the right at any time to move to full independence by unilateral action. Head of State: the Queen represented by NZ High Commissioner	Unicameral Parliament Executive: Prime Minister and Cabinet Cook Islands fully responsible for internal affairs; House of Ariki (chiefs) advises on traditional matters	GDP US\$183 million GDP/cap US\$ 9,100 Agriculture, development Currency: New Zealand (NZD) Monetary authority: Reserve Bank of NZ
Marino	29,600	61.2	Independent republic Head of state: two Captains Regent	Unicameral Parliament – Grand & General Council. Head of govt – Secretary of State for Foreign & Political Affairs Cabinet (Congress of State) elected by Council	GDP US\$ 850m GDP/cap US\$ 34,600 Tourism, 50% GDP; Clothes, electronics. Currency: Euro Monetary Authority: Central Bank / San Marino Credit Institute
San Marino	32,670	1.95	Independent principality Head of State: Prince Albert	Unicameral National Council Executive: Minister of State (appointed by the Prince on recommendation of French govt) and Council of Government	GDP est. US\$976 million GDP/cap est US\$30,000 Tourism and construction Currency: Euro Monetary Authority: Central Bank
Liechtenstein	34,250	160	Independent State Hereditary constitutional monarchy on a democratic and parliamentary basis Constitution 1921, Head of State: Prince Alois	Unicameral parliament Executive: Prime Minister and cabinet	GDP US\$1.786 billion (CHF) GDP/cap US\$25,000 Dental products, electrical, metal manufacture, tourism, ceramics etc Currency: Swiss franc Monetary Authority: national Bank
St Kitts and Nevis	39,350	166	Federation of 2 islands Self-governing in association with UK from 1967; independence 1983. Head of state: the Queen represented by Governor General	Unicameral parliament (House of Assembly) (St Kitts represented; also has separate assembly) Executive: Prime Minister and cabinet	GDP US\$ 726 million GDP/cap US\$ 8,200 Tourism, financial services, manufacture Currency: Eastern Caribbean Dollar Monetary Authority: Caribbean Central Bank

Bermuda	66,200	53.3	UK Overseas Territory. Referendum in 1995 indicated 65% opposed to self-governance. Current Government is pro-independence. Bermuda Independence Commission formed in Dec 2004.	Britain's oldest colony - its Parliament first met in 1620. Bicameral Parliament - Senate (11-members) and the House of Assembly (36 seats). Self-governing with a high degree of control over its own affairs. Governor appointed by the Crown, in turn appoints the Premier. The Premier chooses the Cabinet of 10 Ministers.	GDP: US \$4.5 billion GDP /cap: US \$69,900 Insurance, re-insurance, international finance light manufacturing Major trading partner Currency: Bermuda dollar (parity with US Dollar) Bermuda Monetary Authority issue of Bermuda notes, coins, licensing, supervision of financial institutions
Guernsey	65,500	63.1	Crown dependency Head of State: the Queen represented by Lt Governor Civic head: the Bailiff Dependencies: Alderney and Sark	Unicameral States of Deliberation. Executive: Chief Minister and Policy Council (since 2004) Limited autonomy for States of Alderney and Chief Pleas of Sark.	GDP: £1.386 billion (US\$2.74 billion) GNP: £1.456 billion (US\$2.9 billion) GDP/cap: £23,175 (US\$36,000) (ppp: US\$44,600) Financial services - investment fund management, insurance, also tourism, manufacturing and horticulture. Currency: British pound also a Guernsey pound Monetary Authority: England
Andorra	71,800	468	Independent Co-principality / Parliamentary democracy since 1993. The first written constitution was effective 4 May 1993. Head of state: President of France & Bishop of Seo de Urgel (Spain)	Unicameral General Council. Written constitution came into force 1993; President and Executive Council	GDP US\$ 2.7bn GDP/cap US\$38,800 Tourism (80%GDP) finance Currency: Euro Monetary Authority: Central Bank
Dominica	69,500	442	Independence 1981 as a single state Constitutional monarchy; Head of State: the Queen	Bicameral parliament Federal govt considered but rejected Joint Consultative Committee between Antigua and Barbuda Council Prime Minister and cabinet executive	GDP US\$1.14 billion GDP/cap US\$ 10,900 Tourism; construction; manufacturing; offshoring Currency: E Caribbean dollar Monetary Authority: Caribbean Central Bank
Jersey	91,000	118	Crown dependency Head of State: the Queen represented by Lt Governor Civic head: the Bailiff	Unicameral States Assembly Executive: Chief Minister and Council of Ministers	GDP (US\$5.1bn)* GVA £3.46 billion (2004) GNI £3.26 billion (2004) GNI/cap £34,000 (2004) (US\$40,000)* International finance agriculture Currency: British pound there is also a Jersey pound Monetary Authority:

					England * according to CIA factbook
barbados	281,000	430	<p>Independent democracy 1966</p> <p>Head of State: the Queen represented by Governor General</p> <p>Proposal to become a Republic within the Commonwealth – to appoint a President as ceremonial Head of State</p>	<p>Bicameral parliament</p> <p>Internal self-government in 1961 progressing to full independence.</p> <p>Bicameral Legislature.</p> <p>Executive: Prime minister and cabinet</p>	<p>GDP US\$ 5.15 bn</p> <p>GDP/cap US\$ 18,400</p> <p>Tourism, offshore finance, sugar, light manufacturing</p> <p>Currency: Barbadian Dollar</p> <p>Monetary authority: Central Bank of Barbados</p>
iceland	302,000	103,000	<p>Constitutional republic</p> <p>Independent for over 300 years, Iceland was subsequently ruled by Norway and Denmark.</p> <p>Limited home rule from Denmark was granted in 1874; became a sovereign state under the Danish Crown in 1918; complete independence attained in 1944.</p>	<p>The world's oldest functioning unicameral legislative assembly, the Althing, established in 930.</p> <p>President is largely a ceremonial post. Cabinet (currently 11 Ministers) appointed by the Prime Minister and approved by parliament.</p>	<p>GDP: US \$11.6bn (2004)</p> <p>GDP/cap: US \$38,000</p> <p>Fish processing, aluminium smelting, ferrosilicon</p> <p>geothermal power, tourism</p> <p>Trying to encourage tourism and to diversify from energy intensive industry</p> <p>Currency: Icelandic Krona</p> <p>Monetary authority: Central Bank of Iceland</p>
bahamas	305,600	13,940	<p>Independent 1973</p> <p>Constitutional parliamentary democracy</p> <p>Head of State: the Queen represented by Governor General</p> <p>2003 Constitutional Review Commission appointed</p>	<p>Internal self-governing from 1964, progressing to full independence</p> <p>Executive: Prime Minister and cabinet</p>	<p>GDP US\$ 6.6 bn</p> <p>GDP/cap US\$ 21,600</p> <p>Tourism; (60% GDP)</p> <p>finance, agriculture/fishing</p> <p>Currency: Bahamian Dollar</p> <p>Monetary authority: Central Bank</p>
malta	402,000	316	<p>Independence from UK in 1964;</p> <p>Republic in 1974; President head of state</p> <p>Neutral alignment.</p>	<p>Unicameral parliament.</p> <p>Executive: Prime Minister and cabinet</p> <p>Former links with communist regimes; now Nationalist Party - focus on EU membership (May 2004)</p>	<p>GDP US\$ 8.5bn</p> <p>GDP/cap US\$21,000</p> <p>Tourism; electronics, financial services; drinking water</p> <p>Currency: Maltese Lira</p> <p>Monetary authority: Central Bank of Malta</p>

em- rg	480,000	2,586	Hereditary Grand Duchy Full independence from Netherlands in 1839.	Unicameral parliamentary system - Chamber of Deputies (60 seats) Council of State (21 members appointed by the Grand Duke on the advice of the prime minister) - advisory body to the Chamber of Deputies	GDP: US\$33.9 bn (€ GDP/cap (ppp) US\$ Banking/financial se telecommunications, and chemicals Currency: Euro Monetary authority: I Central Bank / Centr Luxembourg
onia	1,316,000	45,227	Parliamentary democracy Independence from Russia 1920 until annexed by Soviet Union 1940; then German occupation. Soviet domination from 1944; independence restored 1991. Head of State: President	Unicameral Parliament Executive: Prime Minister and Council of Ministers	GDP: US\$26.8 bn GDP/cap US\$20,300 Timber, food proces- machine production. Successful transitor market economy. Currency: Kroon – r Euro Monetary authority: I Estonia

Abbreviations

ACCT	Agency for the French-Speaking Community (see International Organization of the French-speaking World)
ACP Group	African, Caribbean, and Pacific Group of States
BIS	Bank for International Settlements
C	Commonwealth
Caricom	Caribbean Community and Common Market
CBSS	Council of the Baltic Sea States
CDB	Caribbean Development Bank
CE	Council of Europe
EAPC	Euro-Atlantic Partnership Council
EBRD	European Bank for Reconstruction and Development
EC	European Community
EEC	European Economic Community
EFTA	European Free Trade Association
EIB	European Investment Bank
EU	European Union
FAO	Food and Agriculture Organization
G-77	Group of 77
GATT	General Agreement on Tariffs and Trade; now WTO
IADB	Inter-American Development Bank
IAEA	International Atomic Energy Agency
IBRD	International Bank for Reconstruction and Development (World Bank)
ICAO	International Civil Aviation Organization
ICC	International Chamber of Commerce
ICt	International Criminal Court
ICJ	International Court of Justice (World Court)
ICRC	International Committee of the Red Cross
ICRM	International Red Cross and Red Crescent Movement
IDA	International Development Association
IFAD	International Fund for Agricultural Development
IFC	International Finance Corporation
IFRCS	International Federation of Red Cross and Red Crescent Societies
ILO	International Labour Organization
IMF	International Monetary Fund
IMO	International Maritime Organization
Inmarsat	International Maritime Satellite Organization
Intelsat	International Telecommunications Satellite Organization
Interpol	International Criminal Police Organization
IOC	International Olympic Committee
IOM	International Organization for Migration
IPU	Inter-parliamentary Union
ISO	International Organization for Standardization
ITU	International Telecommunication Union
ITUC	International Trade Union Confederation (the successor to ICFTU (International Confederation of Free Trade Unions) and the WCL (World Confederation of Labor)
MIGA	Multilateral Investment Geographic Agency
NATO	North Atlantic Treaty Organization
NC	Nordic Council
NEA	Nuclear Energy Agency
NIB	Nordic Investment Bank
OAS	Organization of American States
OECD	Organization for Economic Cooperation and Development
OECS	Organization of Eastern Caribbean States
OIF	International Organization of the French-speaking World
OPANAL	Agency for the Prohibition of Nuclear Weapons in Latin America and the Caribbean
OPCW	Organization for the Prohibition of Chemical Weapons
OSCE	Organization for Security and Cooperation in Europe
Sparteca	South Pacific Regional Trade and Economic Cooperation Agreement
SPC	Secretariat of the Pacific Communities

UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific, and Cultural Organization
UNHCR	United Nations High Commissioner for Refugees
UNIDO	United Nations Industrial Development Organization
UNTSO	United Nations Truce Supervision Organization
UNWTO	World Tourism Organization
UPU	Universal Postal Union
WCL	World Confederation of Labour
WCO	World Customs Organization
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

[1] Historically the Island did of course accept the responsibility for contributing towards its own defence against French aggression

[2] The budgeted costs in 2007 were £1.1 million

[3] 245 police officers and 88 civilians

[4] The so called “savings tax” agreements and a number of tax information exchange agreements are the main examples.

[5] The UK maintains that the Island can enter international agreements only under “entrustment” from the UK, while Jersey asserts that as a matter of international law there is nothing to prevent a sovereign state from contracting with a non-sovereign entity.

[6] The Barbados Ministry of Foreign Affairs was only established in April 1967, one year after independence, having formerly been administered as a division of the Office of the Prime Minister.

[7] The Turkish Republic of Northern Cyprus, for example, which declared its independence in 1983, is recognised only by Turkey. Its sovereign status has been rejected by the UN.

[8] The WTO was established in 1955 and is based in Geneva.

[9] Jersey has enacted the European Bank for Reconstruction and Development (Immunities and Privileges (Jersey) Regulations 1999 conferring *inter alia* immunities etc. on bank officials.

[10] EFTA was established in 1960. Its member countries are Norway, Iceland, Liechtenstein and Switzerland. The EEA is made up of the first three only and of course the member states of the EU. Switzerland opted instead to negotiate bilateral agreements with the EU.

[11] In 1951 a circular from the Secretary of State for Foreign Affairs (the so-called “Foreign Office Letters”) made it clear that in future the UK’s procedures would be adapted to ensure that the Island was not “bound by treaties on which they had not been consulted or which, when they were consulted, they did not wish to have applied to the [Island]”.

[12] Marshall, *The response of the law to the challenge of independence: a review of the past and an agenda for the future, with particular reference to Barbados*, in G Kodilinye and P K Menon (EDS), *Commonwealth Caribbean legal studies*, Butterworths, 1992.

[13] By way of comparison Barbados opened three missions in London, Ottawa and Washington on achieving independence. Within ten years New York, Caracas and Brussels had been added. Barbados now has ten missions overseas employing about 150 people. Liechtenstein has eight missions, all in Europe with the exception of its embassy in New York.

[14] Ireland, Netherlands, Malta, Macedonia, Lebanon, Jordan, Qatar and Nigeria.

[15] The current position is that the Lieutenant Governor is appointed by The Queen on the advice of the Secretary of State for Justice after consultation with the Bailiff as chief citizen, who in turn consults with the Chief Minister and the senior Lieutenant Bailiff. The appointment of a Governor General is dealt with in more detail below.

[16] The Committee is currently composed of the President of the Council, the Lord Chancellor and Baroness Scotland of Astha. It is advised by officials of the Department of Justice.

[17] Bradley and Ewing, *Constitutional and Administrative Law*, 13th edition, 2003, p192.

[18] This was exercised in opposition to the draft Queen's Valley Reservoir Law which was eventually sanctioned in 1988, 2 years after being adopted by the States. The Home Office scrutinised the whole procedure for fairness and due process.

[19] It is possible that, dependant upon the model adopted for the role of the Attorney General and Solicitor General, the protection approved by the independence of those offices might go.

[20] The extent to which the Privy Council actually now provides a constitutional check and balance is a moot point. It seems inconceivable, particularly in the light of human rights norms, that UK officials, or even Ministers, should be able to overrule a decision of the people's elected representatives in Jersey.

[21] The commission could be placed under a statutory duty to appoint persons of distinction or proven experience in given spheres. Consideration would need to be given to options for appointing commissioners.

[22] The Isle of Man has its own Bishop. Indeed it could be argued that a Bishop of Jersey should be appointed even if the constitutional relationship with the UK does not change

[23] Appointment to the office of Deputy Bailiff is assumed to be a training for appointment as Bailiff.

[24] Before the dismissal of a former Deputy Bailiff it was the Presidents of major committees

[25] The Judicial Appointments Commission could also assume responsibility for the appointment of the Magistrates, the members of the Youth Court, the Chairmen of tribunals and, arguably, the Jurats.

[26] *Parliamentary Supremacy and Judicial Independence*, ed. J Hatchard and P Slim, Cavendish Publishing Ltd. 1999.

[27] Official communications with the UK pass through the Bailiff's office so that constitutional advice or guidance can be offered to the Chief Minister as may be appropriate.

[28] The usual practice is that persons on the electoral role at the time when independence is achieved are entitled to citizenship.

[29] Finer, Bogdanor and Rudder, *Comparing Constitutions* (1995), pp.6-7.

[30] Which provides:

"WHEREAS it is recognized that Jersey has autonomous capacity in domestic affairs;

AND WHEREAS it is further recognized that there is an increasing need for Jersey to participate in matters of international affairs;

AND WHEREAS Jersey wishes to enhance and promote democratic, accountable and responsive governance in the island and implement fair, effective and efficient policies, in accordance with the international principles of human rights –

THE STATES, subject to the sanction of Her Most Excellent Majesty in Council, have adopted the following Law ..."

[31] See Lord Diplock for the Privy Council in *Hinds v The Queen* [1977] AC 195 at 213: "*The more recent constitutions on the Westminster model, unlike their earlier prototypes, include a Chapter dealing with fundamental rights and freedoms. The provisions of this Chapter form part of the substantive law of the state and until amended by whatever special procedure is laid down in the Constitution for this purpose, impose a fetter upon the exercise by the legislature, the executive and the judiciary of the plenitude of their respective powers.*"

[32] Section 29 provides:

"29. Every person has the right to an environment that is generally not harmful to his or her health or well-being and to have the environment protected, for the benefit of present and future generations, through such laws as may be enacted by the Legislature including laws to –

(a) prevent pollution and ecological degradation;

(b) promote conservation; and

(c) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

[33] Section 33 provides:

“33. **Just administrative action.** – (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights and must –

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and

(c) promote an efficient administration.”

[34] Under the 2000 Law, the States Assembly may ultimately pass legislation which is incompatible with Convention rights (as defined in Article 1) and where public authorities act incompatibly with Convention rights because they are required by primary legislation to do so, they do not act unlawfully (Article 7). In this way, Parliamentary sovereignty is preserved. However, there are various safeguards to minimise the possibility of incompatible legislation. First, when introducing a *projet de loi*, a Minister must make a statement as to whether the *projet* is compatible with Convention rights (Article 16). If the Minister states that the *projet* is not compatible, one can expect the Members to require cogent reasons before passing the *projet*. Secondly, if the *projet* is passed, the courts will read and give effect to it in a way which is compatible with Convention rights so far as it is possible to do so (Article 4). This imposes a strong interpretative duty upon the courts.^[34] Thirdly, if the courts cannot construe legislation in such a way as to be compatible, they may make a declaration of incompatibility (Article 5). Such a declaration may be expected to receive prompt reconsideration of the matter by the States Assembly.

[35] See the Green Paper “The Governance of Britain” (July 2007) at paragraphs 204-210. The Green Paper, available at www.official-documents.gov.uk/document/cm71/7170/7170.pdf, makes numerous important proposals for constitutional change. See also the statement of the new Prime Minister to Parliament on 3 July 2007, available at www.number10.gov.uk/output/Page12274.asp.

[36] Lord Diplock for the Privy Council in *Hinds v The Queen* [1977] AC 195 at 213.

[37] Bradley and Ewing, *Constitutional and Administrative Law* (13th ed, 2003), p.192.

[38] *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta* [1982] QB 892.

[39] See the Green Paper “The Governance of Britain” (July 2007) at paragraphs 34-36.

[40] See the Green Paper “The Governance of Britain” (July 2007), Section 1.

[41] See, in particular, *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 and the recent Court of Appeal decision in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2007] EWCA Civ 498.

[42] See the Foreign and Commonwealth Office note, “The Ponsonby Rule” (January 2001), available at <http://www.fco.gov.uk/Files/kfile/ponsonbyrule,0.pdf>.

[43] See the Green Paper “The Governance of Britain” (July 2007) at paragraphs 31-33.

[44] Bradley and Ewing, *Constitutional and Administrative Law* (13th ed, 2003), p. 213.

[45] For a more detailed analysis of the pre-legislative scrutiny performed by the Conseil d’Etat, see Brown and Bell, *French Administrative Law* (1998), Chapter 4.

[46] The starting point is the United Nations Basic Principles on the Independence of the Judiciary, endorsed by General Assembly resolutions in November and December 1985 (“the UN Basic Principles”).

The most authoritative text in Europe is the Council of Europe Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges, adopted by the Committee of Ministers on 13 October 1994 (“the CoE Recommendation”).

The European Charter on the statute for judges dated 8-10 July 1998 provides more concrete applications of the general

principles (“the European Charter”).

Finally, the most detailed provision is made by Opinion No 1 (2001) of the Consultative Council of European Judges for the attention of the Committee of Ministers of the Council of Europe on Standards concerning the Independence of the Judiciary and the Irremovability of Judges, dated 23 November 2001 (“the CCJE Opinion”).

[47] The precise meaning of “independent” has been elaborated in the case law of the European Court. The Court has repeatedly held that “*in order to establish whether a tribunal can be considered as ‘independent’, regard must be had inter alia to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence*” (e.g. *Findlay v United Kingdom* (1997) 24 EHRR 221 at [73]). The key question is whether any judge or tribunal can be regarded as independent and impartial in the particular circumstances. The principle of separation of powers “*is not decisive in the abstract*” (*Pabla KY v Finland* (2006) 42 EHRR 34).

[48] CCJE Opinion, paragraph 37.

[49] CCJE Opinion, paragraph 25.

[50] European Charter, paragraph 1.3.

[51] Lord Mance, “Constitutional reforms, the Supreme Court and the Law Lords” [2006] CJQ 155.

[52] Indeed, under the Constitutional Reform Act 2005, the Chairman of the Judicial Appointments Commission must be a lay person (see Schedule 12, paragraph 2(1)).

[53] See, for example, the Constitution of Antigua and Barbuda (1981; s.103).

[54] For instance, the Constitution of Trinidad and Tobago (1976) provides that the Chief Justice shall be appointed by the President after consulting the Prime Minister and the Leader of Opposition (s.102).

[55] See Mr Brown’s statement to Parliament on 3 July 2007.

[56] UN Principles, Article 12; CoE Recommendation, Principle I-3;

[57] CCJE Opinion, paragraph 52.

[58] As in the Constitution of Trinidad and Tobago (1976; s.136). The new Constitution of Gibraltar (2006) provides that if the Governor considers that the question of removing a judge from office for inability or misbehaviour ought to be investigated, he shall appoint a tribunal which shall inquire into the matter and advise the Governor whether to refer the question to the Privy Council, which advise he must act upon (s.64(4)).

[59] See CCJE Opinion, paragraph 60; CoE Recommendation, Principle VI-3; European Charter, paragraph 5.1.

[60] See the approach taken in section 108 of the Constitutional Reform Act 2005, which provides that “*prescribed procedures*” must have been followed prior to any disciplinary action being taken. “*Prescribed procedures*” are defined by section 122 as procedures prescribed by the Lord Chief Justice with the agreement of the Lord Chancellor in regulations made under section 115 or rules made under section 117. See further the Judicial Discipline (Prescribed Procedures) Regulations 2006, in particular Regulation 24(1) (“*[t]he investigating judge must invite the subject of the disciplinary proceedings to give evidence and make representations about the case*”).

[61] On reasons, see the Explanatory Memorandum to the European Charter, comment on Article 3.1. See also section 91(3) of the Constitutional Reform Act 2005, which requires the Lord Chancellor to give the Judicial Appointments Commission written reasons for rejecting or requiring reconsideration of a selection which the Commission has made.

[62] See the Green Paper “The Governance of Britain” (July 2007) at paragraphs 52-56.

[63] See the Green Paper “The Governance of Britain” (July 2007) at paragraphs 40-48. The proposal was summarized thus in the Prime Minister’s statement to Parliament on 3 July 2007: “*To reinforce the neutrality of the civil service, the core principles governing it will no longer be set at the discretion of the executive but will be legislated by Parliament - and so this Government has finally responded to the central recommendation of the Northcote-Trevelyan report on the civil service made over 150 years ago in 1854.*”

[64] See the discussion of the Parliamentary Joint Committee on Human Rights, Sixth Report of Session 2002-03, *The Case for a Human Rights Commission*, HL Paper 67-I, HC 489-I at paragraphs 189-203. The JCHR concluded: "A powerful argument for bringing all strands of the human rights agenda into a single body is that this would strengthen the ability to promote a culture that respects the dignity, worth and human rights of everyone. Provided that this were done in a way that did not blunt the cutting edge of the specialised compliance work in tackling unjustifiable discrimination by means of monitoring and law enforcement, we consider that, on balance a single body would be the more desirable of the two options. However, the option of creating two separate bodies that has been used both in Northern Ireland and in the Republic of Ireland, would be a viable alternative, provided that they were closely linked in their work."

[65] Finer, Bogdanor and Rudder, Comparing Constitutions (1995), pp.32-33.

[66] Ireland v United Kingdom (1978) 2 EHRR 25, at paragraph 207.

[67] A good example is provided by the decision of the House of Lords in A v Secretary of State for the Home Department [2004] UKHL 56, [2005] 2 AC 68.

[68] Finer, Bogdanor and Rudder, Comparing Constitutions (1995), p.13.

[69] Lord Diplock for the Privy Council in Hinds v The Queen [1977] AC 195 at 214.

[70] Sources - FCO website (www.fco.gov.uk) and CIA world factbook: updated Dec 2007 (www.cia.gov/cia)