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# STATES OF JERSEY



## REVIEW OF THE ROLE OF THE CROWN OFFICERS (“CARSWELL REVIEW”): ‘IN COMMITTEE’ DEBATE

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Presented to the States on 14th March 2011  
by the Privileges and Procedures Committee

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STATES GREFFE

## REPORT

*This Report is being presented to the States by the Privileges and Procedures Committee but its contents have also been considered by the Council of Ministers.*

The Privileges and Procedures Committee and the Council of Ministers have both given initial consideration to the recommendations of the Review of the Role of the Crown Officers chaired by Lord Carswell which presented its report to the States in December 2010 (R.143/2010).

The Committee and the Council consider that it is important to bring a proposition to the States in the near future so that members can take a view on the recommendations now that the Review has completed its work. PPC and the Council are nevertheless conscious that the main recommendations on making a fundamental change to the historic role of the Bailiff of Jersey are far-reaching and care needs to be taken to plan any changes carefully and ensure that the overall impact of any reform is beneficial for the Island as a whole.

The recommendations of the Review are summarised on pages 66 and 67 of the Report (R.143/2010). Many of the recommendations are relatively straightforward and can be progressed in isolation. A summary of the initial response of PPC and the Council of Ministers to these recommendations is given in Appendix 1.

There are nevertheless 2 key recommendations on the role of the Bailiff that could have very far reaching consequences. These are recommendations 2 and 3 as follows –

- “2. *The Bailiff should cease to act as President of the States and the States should elect their own President, either from within or from without the ranks of their members;*
- 3 *The Bailiff should continue to act and be recognised as the civic head of Jersey.”*

PPC and the Council of Ministers have concerns about the interaction of these 2 recommendations. In written evidence given to the Review Panel the Bailiff and others expressed the view strongly that the role of civic head is closely linked to the Bailiff’s role as President of the States and this view has been reiterated in correspondence from the Bailiff following the publication of the Review. In a letter dated 25th January 2011 (reproduced in full at Appendix 2 with his consent) the Bailiff sets out the reasons why he does not believe it would be a long-term option for a person whose role was a purely judicial one to retain the position of civic head. The Bailiff set out his reasons as follows –

*“It would simply not be sustainable over the longer period. The Bailiff would become a remote figure unknown to members of the States because he would have no regular interaction with them. Nor would there be any good reason for him to be the person to receive visiting dignitaries such as Royalty, Ambassadors etc or for him and the members of the Royal Court to lead important ceremonial occasions such as Liberation Day and Remembrance Sunday or to attend the many community and charitable events as an apolitical representative of the Island. It is his status as President of the States as well as his historical role which gives legitimacy to the performance of*

*those functions. In my view, pressure would soon mount for such functions to be undertaken by the newly elected President of the States.”*

PPC and the Council of Ministers are proposing that the States should discuss the main recommendations of the Carswell Review in relation to the Bailiff’s role ‘in Committee’ where members’ initial views can be expressed without any formal decision been taken on a proposition. An ‘in Committee’ discussion allows members to express views in a more informal way than in a normal debate albeit within the formality of a States sitting and with the proceedings broadcast on Radio Jersey and recorded in Hansard. Once the views expressed have been considered PPC and/or the Council of Ministers (as appropriate) will be able to develop in depth proposals for formal debate and decision in due course.

PPC and the Council of Ministers would like the discussion ‘in Committee’ to be structured around a series of questions relating to recommendations 2 and 3 set out above. Although general discussion of other issues raised by the Review Panel in relation to the Bailiff’s role could, of course, take place during the ‘in Committee’ discussion, PPC and the Council of Ministers believe that the fundamental issues to be discussed during the session can be summarised as follows –

1. **What does the term “civic head of Jersey” mean in practice? Is it important that there is a recognised civic head in Jersey in addition to the roles already undertaken by the Lieutenant Governor and senior political figures, in particular the Chief Minister?**
2. **If the role of civic head is considered to be important is it feasible as a long-term option to separate this role from the Presidency of the States as suggested by the Review Panel?**
  - **If separation of the role of civic head and President of the States is considered feasible is it appropriate to follow the recommendation of the Review Panel that the Bailiff as President of the Royal Court could satisfactorily carry out the Civic Head role in the long-term?**
  - **If it is not considered feasible to separate the role of civic head and the presidency of the States what are the consequences of going against the recommendation of the Review Panel? Does this mean that the status quo should continue with no changes to the role of Bailiff or should a new position of civic head/President of the States be created? If so, how should this person be selected and appointed?**
3. **If there is to be a change to the current role of the Bailiff to separate the States and judicial functions which officeholder should continue to use the traditional title “Bailiff of Jersey” if the title is to be continued? Is it important that traditional aspects of the Bailiff’s historic role such as the use of the Mace are maintained and, if so, how should this be done?**

Once the initial views of States members on these fundamental points of principle have been aired it will be easier for PPC and the Council of Ministers to develop in-depth proposals if changes are considered desirable. Although no formal votes can be

taken during an “in Committee” session it is hoped that it will be possible to gauge members’ views and gain some initial indications about which recommendations are likely to receive majority support from the present Assembly.

The Committee and the Council of Ministers are particularly keen to ensure that no unintended consequences arise from any changes proposed. For example, if the role of the Bailiff is changed so that the States and judicial functions are totally separated it would be necessary to ascertain whether the post of President of the Royal Court would still be sufficiently attractive to potential candidates to ensure that persons of the calibre of the current and former Bailiffs are still willing to apply for the position. Any ‘knock-on’ effect on the recruitment of other officeholders, particularly the Attorney General, would need to be considered. It would similarly be necessary to ascertain whether it would be possible to appoint a person of appropriate calibre from either inside or outside the States to fulfil the role of President of the States.

PPC and the Council of Ministers intend to ask the States to discuss these issues ‘in Committee’ on 29th March 2011 and after that debate the Committee and the Council will be able to consider what proposals, if any, should be brought forward for formal debate. The Bailiff has indicated that he does not believe it would be appropriate for him to chair the ‘in Committee’ debate and the Greffier of the States has therefore been asked to chair it. Standing Order 97, which sets out the procedures followed when the States are sitting ‘in Committee’ is attached at Appendix 5 for convenience.

Members are reminded that the majority of the oral and written evidence given to the Review Panel was published on their website and members may find it useful to read these submissions in advance of 29th March 2011. The website can be found at [www.gov.je/Government/HowGovernmentWorks/ReviewCrownOfficers](http://www.gov.je/Government/HowGovernmentWorks/ReviewCrownOfficers). In addition, in order to assist members in preparing for the “in Committee” debate the external legal advice commissioned by the Review Panel from Mr. Rabinder Singh QC is included at Appendix 3 of this report.

Summary of Recommendations (Page 66 and 67 of Review Panel's Report (R.143/2010))

No.	RECOMMENDATION	INITIAL VIEWS OF PPC AND COUNCIL OF MINISTERS
1.	The Bailiff and Deputy Bailiff should continue to carry out judicial work in the Royal Court.	It is essential for the effective administration of justice in Jersey that a President of the Royal Court of the calibre of the current Bailiff and his predecessors is in place. Whether or not this officeholder continues to be known as 'the Bailiff' may depend on decisions taken in relation to other recommendations.
2.	The Bailiff should cease to act as President of the States and the States should elect their own President, either from within or from without the ranks of their members.	<i>(See report above)</i>
3.	The Bailiff should continue to act and be recognised as the civic head of Jersey.	<i>(See report above)</i>
4.	The Bailiff should continue to be the guardian of the constitution and the conduit through which official correspondence passes. He should also receive copies of communications not forming part of official correspondence which contain potential constitutional implications.	It is not entirely clear what the role of 'guardian of the constitution' involves and in practice less and less correspondence has passed through the official channels in recent years with increasing direct contact between government departments in Jersey and the UK. The response to this recommendation will depend largely on the decisions taken on Recommendations 2 and 3 as it is not clear whether the Bailiff could continue in this role if he or she were no longer President of the States.
5.	The Bailiff should remain as president of the Licensing Assembly, unless an appeal is provided for.	The Licensing Assembly is a quasi-judicial body and it is logical that the President of the Royal Court should continue to preside over it.
6.	The Bailiff should cease to be responsible for giving permission for public entertainments.	The present Bailiff and his predecessor have made it clear that they consider that the licensing of public entertainment should be transferred to

		another authority and this recommendation is supported although it is noted that the present system which brings together all relevant stakeholders (emergency services etc) works well in practice and the resource implications of any alternative will need to be assessed.
7.	The requirement in Article 1(1) of the Crown Advocates (Jersey) Law 1987 of the Bailiff's approval to the appointment of Crown Advocates should be repealed.	This recommendation is accepted.
8a.	The Attorney General should continue to be responsible for prosecutions.	This recommendation is accepted.
8b.	Procedures should be adopted to minimise the possibility of conflict arising from the advisory and prosecuting functions of the Attorney General.	This recommendation is accepted and it is noted that appropriate steps to achieve this are already in place in the Law Officers' Department.
9.	The Law Officers should continue to be <i>ex officio</i> members of the States, restricting their speaking as at present.	This recommendation is accepted.
10.	Ministers and government departments should disclose to Scrutiny panels legal advice received by them where it is possible to do so. If that is not possible, or if Scrutiny panels cannot obtain reasonably prompt advice from the Law Officers, they should be free to obtain independent advice.	Considerable work went into the development of the rules on the disclosure of legal advice to scrutiny in the present Code of Practice for scrutiny panels and the PAC between 2006 and the States debate in 2008. There is no evidence that there have been any difficulties with the present rules since 2008 but Standing Orders require the Chairmen's Committee to keep the Code under review and this issue may therefore be considered by that Committee as part of any general review.
11.	The Attorney General should continue to act as titular head of the Honorary Police until an appropriate substitute has been obtained.	This recommendation is accepted.
12a.	The membership of the recommending panel for the appointment of the Bailiff and Deputy Bailiff should be augmented by the addition of two persons with substantial legal experience, one of whom should be from	Although the implementation of the recommendation will depend on the decisions on the future role of the Bailiff neither PPC nor the Council of Ministers consider it would be appropriate for either His Excellency the Lieutenant Governor or people from outside Jersey should become

	outside Jersey, to be appointed by the Lieutenant Governor.	involved in the appointment process. This concern is shared by His Excellency whose letter on this subject dated 18th February 2011 is reproduced at Appendix 4 with his consent. The recommendation is not therefore accepted.
12b.	The membership of the recommending panel for the appointment of the Law Officers should be augmented by the addition of two members of the States, to be appointed by the States.	There is concern that this recommendation could politicise the appointment process and the present system, whereby the Bailiff's Consultative Panel is consulted, is considered to be preferable.
12c.	If the Bailiff is not available to sit on either panel, the Deputy Bailiff should be a member of the panel and preside in his place, except in the case of the appointment of the Bailiff.	This recommendation is accepted.
12d.	The Bailiff's Consultative Panel should no longer be consulted about the appointment of the Crown Officers.	This recommendation is not supported. As referred to in 12b above it is considered that the present system works well.

## APPENDIX 2

## LETTER FROM THE BAILIFF OF JERSEY TO THE CHAIRMAN OF PPC

*(IDENTICAL LETTER SENT TO THE CHIEF MINISTER)*

Dear Chairman

**Review of the roles of the Crown Officers**

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

**Recommendation 1**

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

5. This recommendation is dealt with at paragraphs 5.3 – 5.5 of the Review. I fully agree with the recommendation. The Bailiff has been President of the Royal Court since the 13th century at the latest, well before the States

emerged. Judicial work has formed the most significant part of his duties and, as the Review makes clear, the major part of the Bailiff's time is still spent on such work. The role of the Bailiff is historically associated with the function of Chief Judge. As the Review states at paragraph 5.5, "There was a clear view, unanimous or practically so, among respondents that the Bailiff should continue to act as Chief Judge in the Royal Court. We consider that this is unquestionably correct".

#### **Recommendations 2, 3 and 4**

- “2. *The Bailiff should cease to act as President of the States and the States should elect their own President, either from within or from without the ranks of their members.*
3. *The Bailiff should continue to act and be recognised as the civic head of Jersey.*
4. *The Bailiff should continue to be the guardian of the constitution and the conduit through which official correspondence passes. He should also receive copies of communications not forming part of the official correspondence which contain potential constitutional implications.”*

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

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

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

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

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

8. Turning to recommendation 4, I agree that the Bailiff should continue to be the guardian of the constitution and the conduit through which official correspondence passes. The constitutional relationship between Jersey and the United Kingdom is unwritten and to some extent uncertain. It is based upon custom and practice over many centuries. It is therefore essential from the point of view of preserving Jersey's constitutional autonomy that day to day practice is consistent with that autonomy. A decision taken by Jersey for short term advantage in relation to a particular matter may create a precedent which weakens Jersey's long term constitutional position. It is therefore of vital importance that the Chief Minister of the day is alerted to any possible implications for the constitutional relationship when a particular matter arises. He cannot rely on his civil servants for this as nowadays they tend to be appointed from the United Kingdom and are therefore unfamiliar with the subtleties of the constitutional relationship; and in any event, as non-lawyers, they would not be in a position to advise on the complexities of the constitutional relationship. As the review makes clear at para 5.26, the Bailiff is particularly well suited to provide advice on the constitutional relationship. He would usually have previously been Attorney General. He will be steeped in the nuances and subtleties of the constitutional relationship. I entirely support the conclusion of the Review that "*It is in our opinion of considerable importance that the Bailiff should continue to occupy this role.*"
9. The difficulty is that it is hard to see how this role could continue if the Bailiff were simply Chief Justice. The underpinning of his role in official correspondence is that he is President of the States. There is no logic in a mere Chief Justice being involved in this correspondence. Again therefore, it seems to me that, whilst this role could continue for a while under the Review proposals, it is inevitable that it will gradually wither in any event and will certainly come to an end if the Bailiff ceases to be civic head.
10. I do not think it appropriate to comment on all the reasoning of the Review in support of its recommendation that the Bailiff should cease to be President of the States. However, it may be helpful if I comment on two aspects.

**(i) Who would be the new President?**

11. It is easy to assert that the States can simply elect a President from among their number. However, careful thought needs to be given to the practicalities. Jersey is a small community with a small parliamentary body which will in future comprise (following the decision last week) a maximum of 49 members, possibly less if further reforms are implemented in due course. There is therefore a limited pool to choose from. Members tend to stand for election, quite naturally, because they feel strongly about political issues and wish to influence States policy to achieve the outcomes which they desire. This can be achieved by speaking and voting, by becoming a minister or assistant minister or by being on Scrutiny. They would not be able to achieve these objectives as President, as he must remain mute and impartial during debates. They would not therefore represent their constituents on these issues. Thus many members would simply not wish to become President. As to those who might wish to do so, many would not be well suited to the role. The States consists of strong minded individuals and presiding over it is not straightforward. Thus, while in a large parliamentary assembly, one might

expect to find a member with the requisite skills who is also willing to take on the role, this will not necessarily be the case in a small assembly such as the States.

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

**(ii) European Convention on Human Rights**

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

Naturally, if it were to come about, Jersey would have to change at that stage. But it may not come about and it would seem preferable to do what is thought best for Jersey rather than do something which is thought to be second best on the off chance that the law might change in the future.

**Recommendation 5**

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

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

**Recommendation 6**

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

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

**Recommendation 7**

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

20. I agree with this recommendation.

**Appointment of Bailiff and Deputy Bailiff**

**Recommendation 12(a)**

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

21. It seems to me that this is ultimately a matter for the Crown. However I believe it to be a very unsatisfactory recommendation. I would hope that, when the time for the next round of Crown Officer appointments takes place, I shall be able to say to the Ministry of Justice that the Council of Ministers and the Privileges and Procedures Committee are thoroughly opposed to the Review recommendation in this respect.
22. It removes power from the Insular authorities to the Lieutenant Governor. The position hitherto has been that recommendations for appointments to Bailiff and Deputy Bailiff have been made entirely from within the Island; thus those consulted, namely the Bailiff’s Consultative Panel (representing the States), the Chief Minister, existing Crown Officers, members of the Judiciary and the

senior members of the legal profession, have all been residents of the Island as has the recommending body itself (previously the Bailiff and now the Panel chaired by the Bailiff). The Lieutenant Governor has had no direct role to play, although he has undoubtedly reported to the Ministry of Justice (representing the Crown) as to the rigour of the process which has been followed by the Insular authorities in making their recommendations. He is in a good position to give an objective assessment.

23. Now, for the first time, it is suggested that the Lieutenant Governor should nominate two out of the five members of the Panel and furthermore that one of these should be a non-resident of Jersey. This seems to me to be a highly undesirable dilution of the Island's autonomy and no good reason is given for it. It gives the Lieutenant Governor a role and influence which he has not had hitherto. We have only moved recently to a Panel making the recommendation rather than the Bailiff alone and I have not heard any criticism of the procedure followed by the Panel. On the contrary, it seems to me an ideal process. It involves the States and the Chief Minister to some degree (by way of consultation) but ensures that political considerations play no part in the appointments because States members are only consultees. The system is thus entirely consistent with good practice as laid down in the various international standards referred to in the Review. Furthermore, it is hard to see what a non-resident of the Island could bring to the process. It is those in the Island who would be familiar with the reputation and expertise of the candidates and it is the Island's Bailiff and Deputy Bailiff who are being chosen.
24. Indeed, it may well be that Lieutenant Governors themselves would not wish to undertake this role in that it would draw them more fully into the process and therefore possibly into matters of controversy. It is important for the office of Lieutenant Governor that it be seen as entirely 'above the fray'. The proposal would prevent the Lieutenant Governor giving the entirely objective assessment of the process which he can give under the present system.

### **Law Officers**

25. I do not think it necessary to comment on recommendations 8 to 11 concerning the Law Officers save to say that I have been sent a copy of the joint memorandum of the Attorney General and Solicitor General dated 5th January 2011 expressing their view and I do not dissent from any of their observations.
26. I would however wish to comment on Recommendation 12(b), which recommends that the recommending panel for the appointment of the Law Officers should be augmented by the addition of two members of the States, to be appointed by the States and that, as a consequence, the Bailiff's Consultative Panel should no longer be consulted about the appointment of the Law Officers. I agree with the observations of the Law Officers in relation to this recommendation. Given that the Attorney General is responsible for prosecutions, it seems to me very important that his or her appointment should be free from political influence. There have been occasions in the last three years when some elected members have quite wrongly sought to politicise the prosecution process; so my objections are not merely theoretical. Placing two members of the States on a Panel of five runs contrary to the requirement that

the appointment should be free from political influence. Conversely, consultation with the Bailiff's Consultative Panel not only avoids this difficulty (because it is only consultation) but the number of States members whose views can be sought is much wider than a mere two members. No good reason is given for the change in the Review. Again it is a matter for the Crown but I would invite the Council of Minister and PPC to agree formally that there is no objection to the current system (which involves very wide consultation but maintains the decision as to whom to recommend in a non political forum) and that the proposed change is not acceptable.

### **Conclusion**

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

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

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

Yours sincerely

**Bailiff**

**APPENDIX 3****Review of the Roles of the Crown Officers in Jersey**

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**OPINION**

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**Introduction and Summary of Advice**

1. I am asked to advise the Independent Review Panel (chaired by Lord Carswell) which has been established by the States of Jersey, by resolution dated 4 February 2009, to examine the roles of the Crown Officers (in particular the Bailiff and Deputy Bailiff).
2. For the reasons set out below, my opinion is that:
  - (1) On the current state of the authorities, in principle there would be no breach of Article 6 of the European Convention on Human Rights (“ECHR”) if the status quo were to be maintained.
  - (2) However, the international trend suggests that the law will change in due course. Within the next 10 years, my view is that the present arrangements will come to be regarded as incompatible with the concept of judicial independence as embodied in Article 6, in particular because the Bailiff and his deputy are both judges and presiding members of the legislature.

**Background**

3. There has been interest in the possible reform of the roles of the Crown Officers in Jersey for some time. The Royal Commissioners of 1861, the Privy Council Committee of 1946 and the Royal Commission on the Constitution in 1973 all recommended no change in the roles of the Bailiff. In 1999 the States appointed a committee chaired by Sir Cecil Clothier KCB QC, whose report in December 2000 recommended fundamental changes to the governance of Jersey, many of which were accepted and implemented by the States of Jersey Law 2005. However, one important recommendation was not accepted. This was that the Bailiff should cease to act as the president of the States or to take any political part in the governance of Jersey: see chapter 8 of the Clothier Report. The only change made to the role of the Bailiff in the States was the removal of his casting vote.
  4. The office of Bailiff has its origins in the 13th Century, when the Bailiff, appointed by the Monarch, became responsible for the civil administration of Jersey. In due course, there developed both the Royal Court and the States of Jersey to assist the Bailiff. The three present roles of the Bailiff are: (i) to act as Chief Judge of the Royal Court; (ii) to act as President of the States of Jersey; and (iii) to act as civic head of Jersey.
  5. In his capacity as Chief Judge, the Bailiff sits in both criminal and civil cases and on occasion presides in the Court of Appeal. In addition, as Chief Judge, he carries out a number of administrative duties, of a kind which are appropriate for a chief justice.
  6. The Bailiff and his deputy are non-voting members of the States of Jersey. The casting vote was abolished by the law enacted in 2005. However, it should be noted that that law confirmed that the presidency of the States is to be held by the Bailiff. The former Bailiff, Sir Philip Bailhache, has estimated that approximately two-thirds of his time was spent in his role as Chief Judge and on related administrative duties, and one-third was spent in the States.
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7. When acting as President of the States, the Bailiff's role is to act as an impartial speaker, ensuring in particular that Standing Orders are observed.

#### **Material treaty and legislative provisions**

8. Although Jersey is not part of the United Kingdom, it is not a state for the purposes of international law. The UK is responsible for the conduct of international relations and in particular is responsible for the compliance by Jersey with the UK's obligations under the ECHR.
9. The Jersey Human Rights Law 2000 gives effect in Jersey to the main provisions of the ECHR in a manner which is similar to the UK's Human Rights Act 1998.
10. Article 6(1) of the ECHR, so far as material, provides that:  
 "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal ..."

#### **ECHR jurisprudence**

11. The principal authority in the jurisprudence of the European Court of Human Rights is *McGonnell v United Kingdom* (2000) 30 EHRR 289. That case concerned the Bailiff of Guernsey, whose functions were similar to those of the Bailiff of Jersey. The applicant in that case had his judicial proceedings concerning planning matters determined by the Bailiff.
12. The European Commission of Human Rights, which has since been abolished, decided by a majority of 25 to 5 that there had been a violation of Article 6(1) ECHR. It did so on a broad basis. At paras. 60-61 of its Opinion the Commission stated that:

“[60] The Commission notes the plethora of important positions held by the Bailiff in Guernsey. The Bailiff presides over the States of Election, (where he has a casting vote), the States of Deliberation, (the Island legislature, where he also has a casting vote), the Royal Court and the Court of Appeal. He is also the head of the administration of the Island and presides over four States Committees including the Appointments Board, the Legislation Committee (which deals with the drafting of legislation), and the Rules of Procedure Committee. The Commission also notes that the Jurats, who decide the cases before the Royal Court, are appointed by the States of Election and that the Bailiff is the President of the States of Election and has a casting vote in the event of an equality of votes. The Commission further notes that no appeal lay against the decision of the IDC [Island Development Committee] beyond that of the Royal Court and that therefore the Royal Court was the final – and, indeed, the sole – court of the applicant's case.

[61] The position in the present case was therefore that when the applicant appeared before the Royal Court on 6 June 1995, the principal judicial officer who sat on his case, the Bailiff, was not only a senior member of the judiciary of the Island, but was also a senior member of the legislature – as President of the States of Deliberation – and, in addition, a senior member of the executive – as titular head of the administration presiding over a number of important committees. It is true, as the Government points out, that the Bailiff's other functions did not directly impinge on his judicial duties in the case and that the Bailiff spends most of his time in judicial functions, but the Commission considers that it is incompatible with the requisite appearances of independence and impartiality for a judge to have legislative and executive functions as substantial as those in the present case. The Commission finds, taking into account the Bailiff's roles in the administration of Guernsey, that

the fact that he has executive and legislative functions means that his independence and impartiality are capable of appearing open to doubt.”

13. A short Concurring Opinion was given by Mr Nicolas Bratza, as he then was. He made it clear that his concurring view was confined to cases where the Bailiff sits in judicial proceedings which relate to acts or decisions of the executive; and that different considerations would apply in cases where he sat in disputes between private parties, “in which there was no lack of the requisite appearance of independence.”
14. When the case went to the European Court of Human Rights, that Court too found there had been a violation of Article 6(1) ECHR but did so on a narrower ground than the Commission. At para. 47 of its Judgment, the Court noted the Government’s submission that the Convention does not require compliance with any particular doctrine of the separation of powers. At para. 51 the Court then stated that:
 

“The Court can agree with the Government that neither Article 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts as such. The question is always whether, in a given case, the requirements of the Convention are met. The present case does not, therefore, require the application of any particular doctrine of constitutional law to the position in Guernsey: the Court is faced solely with questions of whether the Bailiff had the required ‘appearance’ of independence, or the required ‘objective’ impartiality.”
15. The Court then considered the particular facts of the case before it and noted at para. 53 that the Bailiff had had personal involvement in the applicant’s case on two separate occasions, once as Deputy Bailiff in 1990, when he presided over the States of Deliberation when it adopted DDP6 (Detailed Development Plan 6); and the second when he presided over the Royal Court in judicial proceedings flowing from the applicant’s planning appeal. At para. 57 the Court expressed the basis for its conclusion as follows:
 

“The Court thus considers that the mere fact that the Deputy Bailiff presided over the States of Deliberation when DDP6 was adopted in 1990 is capable of casting doubt on his impartiality when he subsequently determined, as the sole judge of the law in the case, the applicant’s planning appeal. The applicant therefore had legitimate grounds for fearing that the Bailiff may have been influenced by his prior participation in the adoption of DDP6. That doubt in itself, however slight its justification, is sufficient to vitiate the impartiality of the Royal Court, and it is therefore unnecessary for the Court to look into the other aspects of the complaint.”
16. It will be noted that, in effect, the reasoning of the Court treated the requirement of independence in Article 6 ECHR as being the same as the requirement of (objective) impartiality. It was the fact that the Bailiff had previously had a personal involvement in the matter when acting as President of the States of Deliberation which led to a legitimate doubt about his objective impartiality in the particular case before him. The Court was not concerned, as the Commission had been, with more abstract concerns about whether a judge should be a member of the legislature and executive.
17. In this case Sir John Laws sat as an *ad hoc* member of the Court and gave a short Concurring Opinion. He emphasised that “the only basis upon which, on the facts of this case, a violation of Article 6(1) may properly be found depends ... entirely upon the fact that the Bailiff who presided over the Royal Court in the legal proceedings giving rise to this case presided also (as Deputy Bailiff) over the States of Deliberation in 1990 when DDP6 was adopted.” He went on to say that:

“If it were thought arguable that a violation might be shown on any wider basis, having regard to the Bailiff’s multiple roles, I would express my firm dissent from any such view. Where there is no question of actual bias, our task under Article 6(1) must be to determine whether the reasonable bystander – a fully informed layman who has no axe to grind – would on objective grounds fear that the Royal Court lacks independence and impartiality. I am clear that but for the coincidence of the Bailiff’s presidency over the States in 1990, and over the Royal Court in 1995, there are no such objective grounds whatsoever.”

18. Again, it will be seen that Sir John Laws in effect treated the requirement of independence in Article 6(1) as being the same as the requirement of objective impartiality and not as requiring any separation in principle from the legislature or executive.
19. In the light of the Court’s judgment the Royal Court in Guernsey adopted a Practice Direction in 2001 with the effect that the Bailiff was no longer the president or a member of three committees of the States: the Appointments Board, the Legislation Committee and the Rules of Procedure Committee. In addition, it was made clear that at the beginning of administrative proceedings in the Royal Court counsel would have to raise any objection to the presiding judge sitting in that particular case and the grounds for such objection. The judge would also inform the parties in writing before the hearing of any previous involvement by him in issues to be considered by the court.
20. The Committee of Ministers of the Council of Europe, which has the function of supervising the implementation of judgments of the Court of Human Rights, was informed of these developments; and by resolution ResDH(2001) 120 dated 8 February 2000 decided that this information was sufficient to comply with the judgment in *McGonnell* and constituted measures taken “preventing new violations of the same kind.”
21. The Court’s approach in *McGonnell* was followed in the later case of *Pabla KY v Finland* (2006) 42 EHRR 688. At para. 28 of its Judgment the Court again emphasised that the concepts of independence and objective impartiality are closely linked. At para. 29 the Court observed that, although the notion of separation of powers between the political organs of government and the judiciary has assumed growing importance in the Court’s case law, “neither Article 6 nor any other provision in the Convention requires States to comply with any theoretical constitutional concepts regarding the permissible limits of the powers’ interaction.” The facts of *Pabla KY* concerned an expert member of the Court of Appeal who was also a member of parliament in Finland. The Court did not consider that the political affiliation of the MP in question had had any bearing on the case before him. Nor had the MP had any prior involvement in respect of the legislation in issue. At para. 34, therefore, the Court concluded that:

“unlike the situation examined by it in the cases of *Procola v Luxembourg* ... and *McGonnell v UK* ... [the MP] had not exercised any prior legislative, executive or advisory function in respect of the subject-matter or legal issues before the Court of Appeal for decision in the applicant’s appeal. The judicial proceedings therefore cannot be regarded as involving ‘the same case’ or ‘the same decision’ in the sense which was found to infringe Article 6(1) in the two judgments cited above. The Court is not persuaded that the mere fact that the MP was a member of the legislature at the time when he sat on the applicant’s appeal is sufficient to raise doubts as to the independence and impartiality of the Court of Appeal. While the applicant relies on the theory of separation of powers, this principle is not decisive in the abstract.”

### Domestic jurisprudence

22. The above European jurisprudence has been applied in the domestic legal context. In *Davidson v Scottish Ministers* [2004] UKHL 34, the particular facts raised the question whether a judge had been apparently biased (on the objective test) in circumstances where he had previously been Lord Advocate and had spoken about proposed legislation which was in issue before him in court. The House held that on the facts there had been apparent bias. Of particular interest for present purposes is the following statement by Lord Hope of Craighead, at para 53:

“Applied to our own constitutional arrangements, *Pabla KY v Finland* teaches us that there is no fundamental objection to members of either House of Parliament serving, while still members of the House, as members of a court. Arguments based on the theory of the separation of powers alone will not suffice. It all depends on what they say and do in Parliament and how that relates to the issue which they have to decide as members of that tribunal. ... the objection has to be justified on the facts of the case, not by relying on a theoretical principle. There must be a sufficiently close relationship between the previous words or conduct and the issue which was before the tribunal to justify the conclusion that when it came to decide that issue the tribunal was not impartial or, as the common law puts it, that there was a real possibility that it was biased ...”

23. Again, it will be seen that the way Lord Hope expresses the principle in a way which treats the requirement of independence as being in effect the same as the requirement of objective impartiality and not a matter of theoretical constitutional doctrine.
24. There are indications, however, that the requirements of independence and impartiality are not necessarily the same. In *Starrs v Ruxton* 2000 JC 208, at 232, Lord Prosser, considering the position of temporary sheriffs in the administration of criminal justice in Scotland, observed that:

“I am inclined to see independence – the need for a judge not to be dependent on others – as an additional substantive requirement, rather than simply a means of achieving impartiality or a perception of impartiality. Independence will guarantee not only that the judge is disinterested in relation to the parties and the cause, but also that in fulfilling his judicial function, generally as well as in individual cases, he is and can be seen to be free of links with others (whether it is the executive, or indeed the judiciary, or in outside life) which might, or might be thought to, affect his assessment of the matters entrusted to him.”

25. This passage was cited with approval by Pill LJ in the English Court of Appeal in *R (Barclay) v Lord Chancellor* [2009] 2 WLR 1205 (that case went to the House of Lords but not on this issue).
26. In that case the Court of Appeal held that the position of the Seneschal of Sark was materially different from that of others whose positions had been considered in cases such as *Pabla KY* and that he did not comply with the requirement of independence in Article 6. However, that case does not, in my view, assist in relation to the position in Jersey, as the Seneschal is not legally qualified and the decision turned on the very particular nature of the various roles played by the Seneschal in Sark: see paras. 52-69 in the judgment of Pill LJ. Again, at para. 67, Pill was at pains to stress that there is no requirement in law for “slavish adherence to an abstract notion of separation of powers”.

### Discussion

27. In the light of the above authorities, it is clear, in my view, that the present state of the law does not require a fundamental alteration to the roles of the Bailiff in Jersey. On the present state of the authorities, the broad basis for the conclusion in *McGonnell* which found favour with the Commission did not find favour with the Court (as the Concurring Opinion of Sir John Laws in particular made clear). The narrower reasoning of the Court has subsequently been applied by the European Court in *Pabla KY* and by the domestic courts in cases such as *Davidson*.
28. On the present state of the authorities, therefore, there can be no objection in principle to the Bailiff having the role of both chief judge and president of the States of Jersey. Whether there is a breach of Article 6 ECHR will depend on a close analysis of the particular facts of a given case, including what (if any) role the Bailiff played in relation to legislation that may be in issue in judicial proceedings before him. In effect, as I have said earlier, the principal authorities appear to treat the requirement of independence as being the same as the requirement of objective impartiality.
29. However, it is also my view that the present Review offers the opportunity to take a longer-term view, even though the current state of the authorities does not require it. In my view, there are indications that the requirement of independence is in truth a separate and additional requirement to that of impartiality. This is for the following reasons.
30. First, the text of Article 6 ECHR itself requires both independence and impartiality.
31. Secondly, the passage I have cited from *Starrs* above contains the important insight by Lord Prosser that the requirement of independence means something more than the requirement that a judge should be disinterested in relation to the parties and the cause before him.
32. Thirdly, the authorities to date appear not to have considered the impact of emerging international thinking on this question, in particular the Bangalore Principles of Judicial Conduct 2002, which were approved on 29 April 2003 by the UN Commission on Human Rights. At the time that *McGonnell* was decided, of course, this statement of international opinion was not available. The Bangalore Principles make it clear that the value of judicial independence (called in that declaration value 1) is separate from and additional to the value of impartiality (called value 2). The principle of independence is defined as follows: "Judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence *in both its individual and institutional aspects*." (Emphasis added) Principle 1.3 then sets out a specific application of this principle as follows: "A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom." (This does beg the question of what are "inappropriate" connections with the legislature but it is doubtful whether membership of the legislature would be regarded as an appropriate connection.)
33. The Bangalore Principles then have as value 4 the principle of propriety. Principle 4.11.3 is of some interest in the present context and states that a judge may "serve as a member of an official body, or other government commission, committee or advisory body, if such membership is not inconsistent with the perceived impartiality and political neutrality of a judge." This would clearly permit, for example, membership of a law reform body but it is unlikely, in my view, to permit membership of the legislature, which is not expressly mentioned in this context.
34. Fourthly, the trend in the UK appears to support the view expressed in chapter 8 of the Clothier Report, which may in due course come to be accepted as reflecting modern sensibilities. As recently as 2000 the Lord Chancellor was the head of the judiciary in

England and Wales, sat as a judge in the Appellate Committee of the House of Lords and made judicial appointments. Since then, partly as a consequence of the Constitutional Reform Act 2005, the Lord Chancellor has been replaced as head of the judiciary by the Lord Chief Justice; no longer sits as a judge and makes appointments on the recommendation of the Judicial Appointments Commission. Moreover, the Law Lords have been removed from the legislature by the Constitutional Reform Act 2005 and are now Justices of the Supreme Court. Even though there was no ground to fear that they were behaving inappropriately as members of the House of Lords, public policy has moved away from having judges as members of the legislature and there is now a clearer separation of powers in the UK than there was just 10 years ago.

35. If the issue were to be litigated again in the European Court of Human Rights, in another 10 years time, I consider that the reasoning of the Commission in *McGonnell* might well find favour with the Court. The Court does not have a strict doctrine of precedent and often departs from its own decisions or its own reasoning, in particular to keep up with changing social norms, as the Convention is a “living instrument.”

### **Conclusion**

36. For the reasons set out above, my opinion is that there is no reason in law why the present constitutional arrangements in respect of the Bailiff should be altered. However, the trend suggests that the tide of history is in favour of reform and that the legal position will be different in 10 years time.
37. If I can be of further assistance, those instructing me should not hesitate to contact me again.

**Rabinder Singh QC**  
**Matrix Chambers**  
**Gray's Inn**  
**London WC1R 5LN**

**30 August 2010**

**TEXT OF LETTER FROM HIS EXCELLENCY THE LIEUTENANT-  
GOVERNOR TO THE CHAIRMAN OF PPC**

*(IDENTICAL LETTER SENT TO CHIEF MINISTER)*

“I was not intending to comment publicly on the findings of Lord Carswell’s Review of the Roles of the Crown Officers in Jersey. I do, however, feel compelled to respond to the suggestion at Paragraph 7.8 that the Lieutenant-Governor should play an active part in forming the Recommending Panel for the appointment of the Bailiff and Deputy Bailiff and, indeed, that he should be personally responsible for appointing two members of this panel.

I firmly believe that this would be a retrograde step. One of the strengths of the current system is that the Lieutenant-Governor is able to stand separate from the process. He is thus in a position to monitor the conduct of the selection process and report, completely independently, to the Lord Chancellor as to its efficacy. This important independent scrutiny capability would be lost if the Lieutenant-Governor were to be drawn, even peripherally, into the selection process.”

**APPENDIX 5****STANDING ORDERS OF THE STATES OF JERSEY***States sitting in committee***97 States sitting in committee: procedure and rules of discussion**

- (1) While the States are sitting in committee, the chairman shall have the powers and duties of the presiding officer.
- (2) The rules of order, conduct and debate in a meeting shall apply while the States are sitting in committee to discuss any matter save that –
  - (a) a member of the States may speak more than once during the discussion;
  - (b) the chairman may allow any person to be present in the Chamber and invite that person to speak;
  - (c) the matter under discussion shall not be voted upon;
  - (d) the chairman shall decide when sufficient time has been allowed for a discussion on any part or aspect of the matter;
  - (e) the chairman shall decide when the sitting shall end.