

**The Review
of the Roles
of the
Crown Officers**

December 2010

I am not an advocate for frequent changes in laws and constitutions, but laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times.

Thomas Jefferson

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Note

For the sake of economy of language we have used masculine pronouns and adjectives when referring to the Crown Officers throughout the Report. The wording should, however, be taken where the context requires or admits to include also the feminine gender.

Chapter 1

Introduction

- 1.1 The people of Jersey are justly proud of their historic institutions, and have been very well served by a succession of distinguished holders of the Crown Offices of Bailiff, Deputy Bailiff, Attorney General and Solicitor General. The Crown Offices have their roots deep in the history of the Bailiwick and have been central to its civil administration since their inception. The health of its civic institutions owes much to the wise leadership of successive Bailiffs, and the contribution of the Attorney General and Solicitor General ('the Law Officers') to the administration of the affairs of the Island has been increasing with each generation.
- 1.2 We are very conscious from the written submissions received and the oral evidence given to the Review panel of the strength of feeling among many citizens of Jersey that the system has worked very satisfactorily, that it is part of the unique heritage of Jersey and that it is unnecessary to change it. We have taken full account of this feeling, which stems from a natural desire to preserve arrangements which have served Jersey well in the past and with which many people feel content. We are also conscious that to recommend changes which could upset the equilibrium of a stable society would be unfortunate and misguided. For this reason we have been wary of accepting radical proposals which, although logical in terms of constitutional principle, could lead to divisions and create uncertainty. A number of respondents have represented to us that making changes without being sure of the implications could lead to unforeseen and unfortunate results. The analogy has been used of taking one brick out of a wall or the unravelling of fabric following the cutting of

one thread. Jersey has absorbed fundamental changes in its public institutions in the last ten years, and is still in the process of consolidation of those changes. The panel appreciates that it could be difficult to deal with too fundamental an alteration of its constitutional arrangements.

1.3 It might be said, however, that the Jersey institutions have functioned satisfactorily more because of the way in which those who occupied the posts have carried out their duties than because of the inherent suitability to the modern age of the institutions themselves. There has been a definite current of opinion that the present situation is in some respects inconsistent with modern ideas of democracy and that the roles of the several Crown Officers should be amended. Jersey is a maturing and developing society which has seen substantial change in recent years, matching the development of its significant international personality. With that, however, come greater international scrutiny and challenge, and it is therefore important that the Island's core institutions are able to withstand such scrutiny to show themselves to be in keeping with established principles of democracy and good governance.

1.4 The role of the Crown Officers has been the subject of debate in Jersey for some years now and a proposal for change of the Bailiff's role was made in the report of the Clothier Review Panel published in 2000, but was not adopted by the States. In 2009 the States set up the present Review, with the task of examining the issue afresh and making recommendations.

1.5 We have sought to bear in mind the conflicting factors and views in our assessment of the roles of the Crown Officers and bringing forward the recommendations contained in this Report. A number of the recommendations which we shall make

have already been mooted, some of them as part of the package recommended in the Clothier Report. We are of the view that those which we have espoused should be made and are capable of being brought into effect without adverse consequences.

Chapter 2

Constitution and Terms of Reference of the Review

2.1 On 4 February 2009 the States of Jersey adopted, with amendments, a proposition of the Deputy of St Martin that an independent review be conducted into the current roles of the Bailiff, Attorney General and Solicitor General. This crystallised into a formal set of terms of reference, approved by the States on 12 May 2009, constituting a review of the roles of the Crown Officers (including the Deputy Bailiff), taking into account

- (1) the principles of modern, democratic and accountable governance and human rights,
- (2) the nature of a small jurisdiction, the Island's traditions and heritage, the resources required, and the difficulties (if any) which have arisen in practice, and
- (3) such other matters as the Panel may consider relevant.

The full terms of reference are set out in Appendix 1 to this Report.

2.2 On 4 December 2009 the States appointed the members of the Review panel to act in accordance with the terms of reference. The chairman is Lord Carswell, a retired Lord of Appeal in Ordinary (Law Lord) and former Lord Chief Justice of Northern Ireland. The other members of the panel are all Jersey residents, none of whom is a member of the States. They are Mrs Marie-Louise Backhurst, Mr Geoffrey Crill, Dr Sandra Mountford and Advocate Ian Strang, who have all given their services voluntarily.

- 2.3 The panel members commenced work at once and have followed a programme of advertising for and receiving written submissions and interviewing in a series of hearings a number of people who they considered could help them with information and opinions. We concluded the task of gathering evidence by holding a public meeting in St Helier on 2 September 2010. A list of those who made written submissions and/or gave oral evidence to the panel is set out in Appendix 4. We are grateful to all those who took time and trouble in contributing to our Review.
- 2.4 In accordance with the terms of reference the written submissions sent to the Review panel have, with a very few exceptions made for good cause, been published on the Review website for the public to read. The interviews have, again with a very few exceptions, been held in public. The public interviews were recorded and the transcripts were also published on the website. The public have in this way been given as full information as possible about the progress of the Review and the representations made to the panel.
- 2.5 In the course of our work we identified various issues which might be said to arise out of consideration of the roles of the Crown Officers, but which we considered were not within the contemplation of the States when they approved the terms of reference. We shall refer to these in the relevant parts of the Report, but resolved not to pursue them further or put forward recommendations, since they involved larger issues resolution of which would benefit from more specific consideration by the States and the public.

Chapter 3

The Historical Context

3.1 The historic nature of the roles of the Crown Officers, which go back for many centuries, was highlighted in many submissions to the Review, both from those advocating change and from those who favoured the retention of the current position. Each role has developed and altered with the passage of time, and it is of importance in comprehending their significance to understand how each has been modified or extended. We shall deal with the historical background, however, only in so far as is necessary to promote understanding of the present roles of the Crown Officers.

The Bailiff and Deputy Bailiff

3.2 The history of Jersey's institutions, as is pointed out in the Clothier Report, is as much about change as about continuity. The changes in the role of the Bailiff mirror to some extent the changing power of the monarchy, being a progression from absolute power to a role which is limited and defined by convention and statute.

3.3 Jersey was part of Normandy from the early 10th century until 1204, being under the sovereignty of the Dukes of Normandy, who became Kings of England in 1066. King John lost Normandy to France in 1204, but the Channel Islands remained under the English Crown. The Dukes of Normandy appointed a local person as *Bailli*, or Bailiff, for each *Baillage*, or Bailiwick. The first Bailiff of Jersey whose name is recorded was Sir Philippe Levesque in 1277, but the post certainly dates back well before that date. Several sources attribute the first direct mention of the Bailiff of

Jersey to the 13th century documents known as the Constitutions of King John, which describe the privileges and institutions of the Channel Islands, including Jersey. It is this Norman heritage and the manner in which Jersey became linked to the Crown that help to explain its position today as a Crown Dependency.

- 3.4 The Constitutions stated that the Bailiff and 12 Jurats were to administer justice in the Island and to act as Coroners. In essence, they established the Royal Court of today, and the Bailiff's judicial role as President of the Court can therefore be traced back to that time. The Royal Court was afforded judicial independence: with a few exceptions relating to the person of the Crown, justice was to be administered in the Island itself by the Court and cases were only to be heard in the Island. This independence was confirmed in Charters granted by subsequent monarchs, including Edward III, Henry VII and Elizabeth I.
- 3.5 The Bailiff was a Crown appointment, although for a time in the history of the office the appointment seems to have been made by the Governor or Lieutenant Governor of Jersey. In 1615, however, it was confirmed that the Crown appointed the Bailiff and this has remained the position ever since.
- 3.6 In addition to its judicial function, the Royal Court, made up of the Bailiff and Jurats, had a legislative one and could therefore make ordinances. Over time, when carrying out this latter function, the Court came to consult the Connétables and the Rectors of the Island's twelve Parishes. The meetings of these groups came to be known as *Les Etats*, or the States, as they represented the meeting of the three 'estates'. As President of the Royal Court, the Bailiff presided at these assemblies and he thereby became President of the States. The first reference to the States appears in 1497 and the Acts of the States can be traced back to 1524. The States

then comprised the Bailiff, 12 Jurats, 12 Connétables and 12 Rectors, as well as the Governor, Attorney General, Viscount and Solicitor General, and this remained the composition until 1856.

3.7 By the early 17th century, the Bailiff, as President of both the Royal Court and the States, was in a position of pre-eminence. His prominent status was confirmed during the first part of that century following a dispute between the Bailiff and Governor of the day. In 1618 an Order in Council made by the Privy Council confirmed that the Bailiff took precedence over the Governor in the Royal Court and the States. This can be seen today in the fact that the Bailiff's seat in the chamber of each institution is placed higher than that of the Lieutenant Governor. This underlined the importance of the Bailiff's role in the civil administration of the Island, the Governor remaining responsible for military affairs. Although this does not in itself mark the beginning of the Bailiff's position as Jersey's civic head, it is a significant development which helps to explain how the Bailiff came to play that role.

3.8 The Island's legislation and institutions were regulated by the Code of 1771. It confirmed that all legislation applicable to Jersey had to be registered in the Royal Court before it came into force. Moreover, the Code stated that only the States could pass laws and the Royal Court therefore lost its legislative functions. The membership of the States was not altered and the Bailiff and Jurats continued to sit in both bodies.

3.9 In the years following the Code of 1771 a number of disputes occurred between the Bailiff and Jurats (ie the Royal Court) on the one hand, and the Connétables and Rectors on the other. The disputes centred on the workings and decisions of the

States Assembly, requiring a series of Orders in Council to adjudicate on them. Amongst these Orders in Council was one which confirmed the Bailiff's power of dissent: the Bailiff was able to register his dissent from any decision of the States if he believed it to be unlawful or unconstitutional. Some sources have described this power as a tool to be used by the Bailiff in his position of guardian of the constitution. The Bailiff's power of dissent remained until 2005, but was not used in the 20th century, although its use had been threatened twice by the Bailiff.

3.10 During the 19th century the States' revenue-raising capacities increased, as did their legislative independence as they became increasingly empowered to enact legislation. During this time the committee system of government developed, through which a certain amount of executive power was delegated from the States to their committees. In 1856 the membership of the Assembly was altered with the introduction of 14 Deputies who were directly elected to the States alone, ie they were not members by virtue of their office and were not members of any other body.

3.11 The composition of the States remained unaltered until the changes made consequent on the recommendations of the Committee of the Privy Council in 1947. The system of governance was changed in 2005 from the committee system to the ministerial system, following the Clothier Report in 2000. We refer to both of these developments in more detail in chapter 4 below.

3.12 The Bailiff remained throughout President of the States. Until the enactment of the States of Jersey Law 2005 he retained a casting vote and a power of dissent. Until after the Second World War successive Bailiffs retained some executive and administrative functions, a few of which they still possess. They tended to exercise,

to a varying degree, some influence over the public affairs of Jersey, at times being consulted on legislation and regularly leading delegations from Jersey to discuss matters with representatives of other jurisdictions. Since 2005 the Chief Minister has been responsible for external affairs.

- 3.13 The post of Deputy Bailiff was created by enactment of the States in 1958. From time to time Bailiffs have appointed Lieutenant-Bailiffs to carry out certain duties on their behalf, though the extent of those duties has diminished in recent years. By a 1959 enactment, in the event of a vacancy in the office of Bailiff, the Deputy Bailiff, styled *pro tem* 'Bailiff-Delegate', performs the Bailiff's functions until a new Bailiff is appointed and until then the Lieutenant-Bailiffs remain in office.

The Attorney General and Solicitor General

- 3.14 References to the Law Officers can be traced back to at least the mid-14th century, from which time records relating to the 'King's Attorney' (or 'King's Procureur') and the 'King's Advocate' can be found. In time, the offices came to be known as Attorney General and Solicitor General. They were appointed by the Crown although, as with the Bailiff, it appears that for a time they were appointed by the Island's Governor until the principle of appointment by the Crown was confirmed in 1615.

- 3.15 As the early titles might suggest, the Law Officers were effectively the 'King's Men', appointed to 'plead the king's pleas'. They were responsible for bringing cases to the Royal Court and thereby became responsible for prosecutions in the Island and undertaking criminal proceedings. They became members of the Royal Court, although they had no judicial function and no decision-making powers. In order to

be able to defend the interests of the Crown they did have the right of addressing the Court in undertaking their functions and moving conclusions on the various matters within their responsibility. The Law Officers had the sole right to bring prosecutions to the Court.

3.16 It seems probable that as members of the Royal Court the Law Officers became members of the States, in the same way as the Bailiff and Jurats came to consult the Connétables and the Rectors. As with the Royal Court, however, the Law Officers had the right to address the States but not to take part in the decision-making, and so did not have the right to vote. Their right to speak was confirmed by an Order in Council of 1824 and provision to that effect has been included in various Laws of the States of Jersey over the last 60 years.

3.17 Although members of the States, the Law Officers remained representatives of the Crown and were the Crown's legal advisers. They therefore advised the Crown on legislation passed by the States and protected the Crown's interests in the Assembly. There is some evidence that they did also provide legal advice to the States and that they also at times represented the public interest within the Assembly, but these were not their primary function. The Attorney General was expected to advise the Crown, in essence against the interests of the States.

3.18 With the establishment of the Petty Debts Court and the Magistrate's Court the Law Officers lost some of their exclusive right to bring prosecutions, as cases in the Magistrate's Court were presented by the Connétable or a Centenier of the relevant Parish. It was later confirmed, however, that this did not derogate from the Attorney General's right to institute proceedings in the Royal Court and the

Attorney General was able to direct a Centenier whether a case should be instituted or discontinued.

3.19 The Attorney General therefore came to have the direction of those members of the Honorary Police with responsibilities in the Magistrate's Court. It is not clear, however, whether this led to his being styled the titular head of the Honorary Police and the origin of that position remains somewhat obscure.

3.20 During the first part of the 20th century, the Law Officers' advisory role increased from merely advising the Crown to advising the States as well. The situation had arisen whereby negative reports could be given to the Crown, through the Lieutenant Governor, on legislation approved by the States, which necessitated the legislation being brought back to the States for further work. The necessity for this was removed by an enactment of the States in 1930. The Law Officers became advisers to the States in the fullest sense, and from then on they were involved in providing legal advice at all stages of legislation, from the formulation of underlying policy to the debate in the States Assembly. Prior to that time, the States were able to engage the Law Officers, but would have been required to pay them a fee for any such work undertaken.

3.21 With the establishment of ministerial government in 2005 and the abolition of the committee system, the Law Officers retained their advisory capacity, but advised both the executive and non-executive branches of the Assembly, the Council of Ministers and Scrutiny Panels. Furthermore, some legislation passed in recent years has assigned a wide variety of specific responsibilities to the Attorney General. These are referred to in his job description set out in Appendix 2 to this Report.

Chapter 4

Previous Reports

- 4.1 The governing institutions of Jersey have been the subject of a number of inquiries and consequent reports since the end of the Second World War. Some of these were internal inquiries or reviews carried out by committees of the States, but several reports have been prepared by outside bodies, generally at the request of the States. A number of recommendations have been put forward, in relation to the functions of both the Bailiff and the Law Officers. Not all of the proposals have been accepted by the States, so we think it helpful to recount the previous recommendations in order to determine where each proposal now stands and ascertain how each has fared and the reasoning behind it.
- 4.2 In 1946 a Committee of the Privy Council, under the chairmanship of the Home Secretary, was appointed to inquire into reforms of the constitution and procedure of the States of Jersey and Guernsey which had been proposed by the States of each Bailiwick. The Committee reported in 1947 with a series of recommendations. In consequence the Jurats and Rectors ceased to be members of the States and were replaced by Senators, the number of Deputies being increased. No change was recommended in the appointment of the Attorney General and Solicitor General or the functions carried out by them. In respect of the Bailiff's functions the Committee reported as follows:

“In the course of evidence it was suggested that in order to ensure a proper separation between the Judiciary and the Legislature, the Bailiff's functions should be confined to the Court and that the President of the States should be appointed by the States from among their members.

But support for this view was limited and the weight of evidence was against any change in the present arrangement.

We consider that the objection to the combination of the dual functions in the Bailiff would be justified only if it could be established that in the States the Bailiff exercised undue influence in the course of the deliberations, or in the Court allowed his political position to influence his decisions. No evidence was tendered to us in support of such contentions. We also consider that the Bailiff as President of the States exercises important functions in advising the assembly on constitutional procedure which, from the nature of the constitution, requires an intimate knowledge of the privileges, rights and customs of the Island, the exercise of the Dissent being a pertinent example. It is an advantage in a small community and in a legislative body very limited in numbers that this Dissent should be expressed (or an intimation given that it may have to be expressed), directly to the States."

The Committee accordingly recommended that there should be no alteration in the functions of the Bailiff, and none was effected.

- 4.3 The Royal Commission on the Constitution was set up in 1969 and reported in 1973, the chairman then being Lord Kilbrandon. The main part of the report was concerned with examining fundamental problems of possible devolution of government in the constituent parts of the United Kingdom, but a section was devoted to the Channel Islands. It was recommended that the Crown continue to make the appointments to Crown Offices, since the Crown is responsible for good government in the Islands. It was considered, however, that the advice of the insular authorities should continue to "weigh heavily in the selection." Representations were made to the Commission by some parties that the office of Bailiff should be split into a Head of the Judiciary and a presiding officer of the States. In the Report the Commission referred to the conclusions reached by the Privy Council Committee in 1947 and concluded:

"On the proposal put to us by private organisations in Jersey and Guernsey for splitting the office of Bailiff we take the same view as the

Privy Council Committee of 1947. Although an arrangement under which one person presides over both the Royal Court and the Legislative Assembly may be considered to be contrary to good democratic principle and to be potentially open to abuse, it appears in practice to have some advantages and not to have given grounds for complaint; and as the office of Bailiff is an ancient and honourable one which the States in each Island wish to see continued with its present range of functions, we see no reason for recommending a change.”

- 4.4 In 1990 the Jersey Judicial and Legal Resources Committee, set up by the States and chaired by Sir Godfray Le Quesne QC, issued its second interim report. It focused on the work of the Royal Court, concluding that the Bailiff should continue to be the chief judge. It recommended, however, that a full-time judge should be appointed to sit in place of the Deputy Bailiff, whose office should be discontinued. The Policy and Resources Committee of the States supported this proposal in a report in 1993 and also proposed that an elected member of the States be appointed Vice-President of the States to replace the Deputy Bailiff. These proposals did not find favour with the States and were not adopted.
- 4.5 The most recent report which dealt with the role of the Bailiff was that of the Review Panel on the Machinery of Government in Jersey, chaired by Sir Cecil Clothier KCB QC (‘the Clothier Report’). It was given the task in 1999 of undertaking a review of all aspects of the machinery of government in Jersey, which included the role of the Bailiff. In its report, presented in December 2000, the Panel recommended substantial and wide-ranging changes in the government of the Island, in particular the composition of the States and the replacement of the system of committees of the States by a number of Ministers, making up a Council of Ministers. They also proposed that a number of Scrutiny Committees be formed

from the non-executive members of States to examine the performance of government in discharging its responsibilities and the delivery of services.

4.6 The Clothier Panel concluded that although the historic title of Bailiff is the most ancient and respected in Jersey and should remain, the role nevertheless required to be modified. The basic reasons for this conclusion were expressed in paragraph 8.4 of their Report:

“There are three reasons of principle for saying that the Bailiff should not have a role, both in the States and as Chief Judge in the Royal Court:-

- The first is that no one should hold or exercise political power or influence unless elected by the people so to do. It is impossible for the Bailiff to be entirely non-political so long as he remains also Speaker of the States. A Speaker is the servant of an assembly, not its master and can be removed from office if unsatisfactory. The Bailiff, appointed by the Queen’s Letters Patent to a high and ancient office, should not hold a post subservient to the States.
- The second reason is that the principle of separation of powers rightly holds that no one who is involved in making the laws should also be involved judicially in a dispute based upon them.
- The third reason is that the Bailiff in his role as Speaker of the States, makes decisions about who may or may not be allowed to speak, or put questions in the States, or about the propriety of a member’s conduct. Such decisions may well be challenged in the Royal Court on grounds of illegality but, of course, the Bailiff cannot sit to hear and determine those challenges to his own actions.”

The sufficiency of these reasons has been criticised by several respondents to our Review, and we shall consider them in Chapter 5 of the Report. The Clothier Review Panel went on, however, to develop them in the remaining paragraphs of Chapter 8 of the Report and their full reasons require to be examined and weighed. The States accepted a number of the recommendations made in the Clothier Report, in particular the change from a committee to a ministerial form of government.

They did not, however, accept the recommendation that the Bailiff should cease to be the presiding officer in the States, although the States of Jersey Law 2005 removed the Bailiff's casting vote and power of dissent.

4.7 Two reports were issued which made recommendations affecting the role of the Law Officers. The first, on the policing system in Jersey, was published in 1996 by an independent review body chaired by Sir Cecil Clothier, which was commissioned by the States the previous year. The review recommended the constitution of a Police Authority and a Police Complaints Authority. It further recommended the creation of the post of Chief of the Honorary Police, who would be the equivalent in all respects of the Chief Officer of the States of Jersey Police. In consequence the Attorney General would cease to be the titular head of the Honorary Police. The Police Complaints Authority has now been constituted and consideration has been given to setting up a Police Authority; but although the States supported the creation of the post of Chief of the Honorary Police that has not been put into effect and the Attorney General remains the titular head of the Honorary Police.

4.8 The second report was that of a review of the criminal justice policy of Jersey, chaired by Professor Andrew Rutherford, which reported to the Home Affairs Committee of the States in 2002. Among its recommendations was one that a public prosecution service should be created under a Director of Public Prosecutions, responsible to the Attorney General. This suggestion was not adopted by the States.

4.9 We shall discuss the recommendations of each of these two reports when dealing with the role of the Attorney General.

Chapter 5

The Role of the Bailiff

- 5.1 The role of the Bailiff of Jersey has become modified by convention and statute over many years as the public institutions of government developed. The first Bailiffs were entirely responsible for the civic affairs of the Island, and their modern successors are still in charge of many aspects of its public life, but within more defined limits. The several functions of the Bailiff have derived from his position as civic head, which is more than a matter of status but is a reflection of his dominant position in public affairs in Jersey over the centuries. We believe that understanding of this is important when considering his functions today.
- 5.2 The Bailiff and Deputy Bailiff can be considered together, for the function of the Deputy Bailiff is to deputise for the Bailiff and there are no independent duties attached to the post. The three major functions of the Bailiff are presiding in the Royal Court as chief judge, acting as President of the States and carrying out a variety of duties in his capacity as civic head of Jersey. Allied to this last function is his role as guardian of the constitution of Jersey. In our view these functions all stem from the Bailiff's historic pre-eminent position as civic head of Jersey.

The Bailiff as Chief Judge

- 5.3 The major part of the Bailiff's time is spent on his judicial duties. The former Bailiff Sir Philip Bailhache estimated that they took up roughly two thirds of his time, but thought that the time required for presiding in the States was increasing, which would affect that proportion. The Bailiff's role in the Royal Court needs little

elaboration. The Deputy Bailiff performs exactly the same function and has the same powers when sitting in the Royal Court, as do the Commissioners when they are deputising for the Bailiff. They each sit to try cases, both criminal and civil, along with the Jurats and, in criminal trials at an Assize, a jury. The Bailiff is also the president of the Court of Appeal, but in practice rarely sits with that court. Each judge will, depending on the cases he has tried, have to spend varying amounts of time, which may be considerable, out of court preparing for hearings and writing judgments. The Bailiff has also a range of administrative functions to perform in relation to the running of the Royal Court.

- 5.4 In Appendix 3 we have set out figures provided by the Bailiff of days spent by himself and others in the years 2006 to 2009 in the Royal Court and presiding in the States together with his other public activities. They have to be interpreted with caution, due to the distortion of the figures caused by the then Bailiff's illness in 2008 and the hiatus between appointments in 2009. It appears, however, that the Bailiff would ordinarily sit in the Royal Court and the Licensing Assembly on between 70 and 100 days, typically about 80 to 85 days, while the Deputy Bailiff would sit on somewhere over 100 days. The Commissioners' total of sitting days varied in the relevant years between 150 and 200 days.
- 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. The Bailiff is a highly trained and experienced lawyer, as is the Deputy Bailiff, and they are the persons best placed to carry out these judicial duties. We do not support the proposal made in 1990 by the Committee chaired by Sir Godfray Le Quesne that a permanent judge be appointed

to carry out a substantial proportion of the Bailiff's judicial duties in place of the Deputy Bailiff.

Recommendation 1: The Bailiff and Deputy Bailiff should continue to carry out judicial work in the Royal Court.

The Bailiff as President of the States

5.6 The Bailiff has historically presided over sittings of the States ever since the legislature developed out of the Royal Court. His position as President of the States is now provided for by section 3(1) of the States of Jersey Law 2005. The figures set out in the table in Appendix 3 show the steady increase in the number of sitting days of the States in the past few years, a trend which shows no signs of diminishing. The number of days on which the Bailiff and Deputy Bailiff presided has also been on the increase, rising between 2006 and 2008 from 24 to over 36 days (the 2009 figure was distorted and so is not typical). The Bailiff has power under section 3(2) of the States of Jersey Law 2005 to delegate sitting to certain other persons. The Greffier of the States has regularly deputised for him and the Deputy Greffier has done so at times. On occasion in past years a senior member of the States has presided in this way.

5.7 The Bailiff's function as President of the States is to act as presiding officer or speaker. It is his duty to act impartially and in accordance with the provisions of the Standing Orders of the States. He chairs debates and question time, calls upon members to speak and rules on any points of order, in all of these functions following Standing Orders. Debates in the States are not time-limited, unless, exceptionally, a motion of closure is passed, and all members who indicate a wish to

speak will be called upon. Outside the Chamber, the Bailiff has to consider draft propositions and draft questions, which he must admit unless they contravene Standing Orders. Members will commonly consult the Greffier about the content of a proposed question. The Greffier can generally answer their inquiries, but if he is in doubt about an issue he will consult the Bailiff and obtain his ruling. The Bailiff may on occasion discuss these matters with individual members of the States. If questions are not properly framed, the Greffier or the Bailiff will regularly suggest amendments to address the defect and allow the questions to proceed.

5.8 It was represented to us by a number of respondents that although the Bailiff must apply Standing Orders in all decisions which he makes and is bound to give all members an opportunity to speak when they express a wish to do so, he nevertheless exerts a degree of political influence by the manner in which he carries out his function. To some extent this may be dependent on the personality of the Bailiff and the style which he adopts when presiding or when discussing matters with members of the States. It also is a matter of perception: if the Bailiff in fact exercises little or no influence on the decisions of the States, it may nevertheless appear to those outside the States that he has such influence, particularly on account of his standing as civic head. Members of the States may also suppose that the Bailiff has allowed political considerations to affect his application of Standing Orders, particularly when he has ruled against their submissions.

5.9 The reasons advanced by those supporting the proposition that the Bailiff should cease to be President of the States were as follows:

5.9.1 The three reasons set out in the Clothier Report, which we have set out in Chapter 4, paragraph 4.6 above.

5.9.2 The current practice is inconsistent with modern ideas of democracy. It offends against the Latimer House principles (which we shall discuss below), although those supporting the status quo point to the exception relating to small jurisdictions with limited resources. It projects an inappropriate image of Jersey to the wider world.

5.9.3 The practice is unique to Jersey and Guernsey, as in every other democratic jurisdiction there is a separation of the judiciary from the legislature (the multiple roles of the Lord Chancellor were formerly cited as an exception, but since the changes made in 2005 in England that no longer applies).

5.9.4 Spending large amounts of time presiding in the States is a wasteful use of the time of a skilled lawyer with judicial ability and experience.

5.9.5 Presiding does not need an officer at the Bailiff's level and other people could carry out the function adequately.

5.9.6 If the States decided to limit debate, eg by fixing time limits for speeches, or to increase the power of the President to intervene in debates to rule members out of order or discipline them, the President could be brought into areas of greater political controversy.

5.9.7 There is a risk of a successful challenge under Article 6 of the European Convention on Human Rights to decisions of the Bailiff or Deputy Bailiff when sitting in the Royal Court. It is not a satisfactory solution for them to recuse themselves from time to time.

5.10 The arguments against change may be summarised as follows:

5.10.1 It is part of the valued tradition and heritage of Jersey that the Bailiff should preside in the States.

- 5.10.2 The reasons propounded in the Clothier Report have insufficient weight to outbalance this factor.
- 5.10.3 The Bailiff has a unique standing, which gives him unequalled authority as a presiding officer in the States.
- 5.10.4 There is no evidence that Bailiffs have exercised or attempted to exercise any political influence.
- 5.10.5 The Bailiff has pre-eminently the legal skills required for interpretation and application of Standing Orders.
- 5.10.6 It is not practicable to have a member of the States as the regular President, because (i) this would disenfranchise his constituents, which is particularly important in the absence of political parties, (ii) the more able members would hope for appointment as Ministers and so would be unwilling to accept the post of President. It would be difficult to find an outside person who has the necessary time and qualities to act as President. It would be inappropriate for the Greffier to act as permanent President.
- 5.10.7 Removing the Bailiff from the States would detract from his standing and tend to undermine his position as civic head.
- 5.10.8 The risk of a successful challenge under Article 6 to his decisions in the Royal Court is low and is worth running. Most litigation does not involve statute law, the more so since much of Jersey law is customary law. The Bailiff and Deputy Bailiff are well able to decide if they need to recuse themselves.
- 5.11 We have considered all these arguments with great care and devoted much time and thought to the issue. We have reached the conclusion that the Bailiff should not

continue to act as the President of the States. The reasons which have brought us to this conclusion are the following:

5.11.1 Clothier's first reason has some force, but the weight to be placed upon it is a matter on which opinions may vary. It in fact contains two grounds:

5.11.1.1 The first is that the Bailiff exercises political power or influence, and only elected politicians should do that. Those supporting the Bailiff's present role deny that he exercises any significant political power or influence, since he must operate within the Standing Orders of the States. As against that, a number of respondents have maintained that Bailiffs have in the past exercised something of a political role in the way they have carried out their presiding function and that they have been decidedly influential. There may be some force in this contention, and certainly there seems to be at least a perception in some quarters that it continues to be correct.

5.11.1.2 The second ground is that the speaker should be the servant of the legislature, which can remove him from office if the members see fit. It is standard in most jurisdictions for the speaker or presiding officer to be appointed by the legislature. In that position the speaker is commonly described as the servant of the legislature. What that appears to mean in reality is that the speaker must act in accordance with the standing orders laid down by the legislature. The Bailiff accepts that he must do this and that it is open to the members to amend Standing Orders if they choose. His function is therefore in most respects very little different from

that of a speaker appointed by the legislature. The exception is that the Bailiff cannot be removed by the States from the office of President, although it would appear to be possible for them to pass a vote of no confidence in him.

5.11.2 Clothier's third reason would contain more significance if challenges to the President's rulings could be readily or regularly brought. It was authoritatively decided, however, in the Royal Court by Mr Commissioner Beloff in *Syoret v Bailhache* [1998] JLR 128 that rulings of the President of the States relate to the regulation of the internal proceedings of the States, a legislative privilege which is subject to the exclusive jurisdiction of the States and with which the courts cannot interfere. This principle is generally followed in other jurisdictions. The only ground on which a legal challenge could be made is one on which judicial review of the ruling would lie. That ground would have to be that it fell outside the legal powers of the President or, conceivably, that it was irrational, ie that no reasonable presiding officer could possibly have made it. Such challenges would be exceedingly rare, and we consider the significance of the reason to be slight.

5.11.3 Clothier's second reason, based on the separation of powers, is in our view of greater importance. As has been pointed out in the Clothier Report para 8.11 and in submissions to our Review, the pure doctrine of the separation of powers has not generally been adopted in the jurisdictions of the western world. What has been widely accepted is that sufficient separation should be in place to prevent any one of the three estates of the realm from

exercising excessive power. The independence of the judiciary from the legislature and the government of the jurisdiction is a necessary guarantee of impartiality, in that it provides freedom from political pressure and judges' detachment from the political process removes a possible source of influence in their decisions. It is universally accepted that those exercising judicial functions should not have been concerned in making the laws which they have to apply and enforce. If a judge has been concerned in lawmaking, there is a risk, or a perceived risk, that his interpretation of statutes may be influenced by his understanding of the meaning of their provisions as they went through the legislature.

5.11.4 This approach is inherent in what are known as the Latimer House principles. These are a set of principles and guidelines for Commonwealth jurisdictions, adopted and agreed at a meeting of Commonwealth Heads of Government in Nigeria in 2003. They were based on a set of guidelines drawn up at a conference of Commonwealth parliamentarians and lawyers at Latimer House in 1998. It is abundantly clear from the content of the principles, and also from the benchmarks for democratic legislatures drawn up by the Commonwealth Parliamentary Association in 2006, that the framers considered that members of the judiciary should not also be members of the legislature.

5.11.5 Several respondents have, however, drawn our attention to a qualifying provision in the 1998 guidelines:

“It is recognised that the special circumstances of small and/or under-resourced jurisdictions may require an adaptation of these Guidelines.”

No doubt there are jurisdictions which are so lacking in financial resources or in the availability of able and educated people that they could not readily comply with the Latimer House principles. We are, however, unaware of any other democratic jurisdiction outside the Channel Islands, no matter how small, in which a judge presides in the legislature. In any event, we are unable to suppose that modern Jersey falls into such a category. We do not think that the conditions for invoking the exception are fulfilled, or that it would be a proper reflection of Jersey's international standing and image for it to seek to do so.

5.11.6 We should mention also the Bangalore Principles of Judicial Conduct 2002, which were adopted by a group of senior Commonwealth judges after wide consultation with common law and civil law judges, and approved in 2003 by the UN Commission on Human Rights. They require that a judge should uphold and exemplify judicial independence. They go on to state that 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." We regard it as unlikely that membership of a legislative body would be regarded as an appropriate connection.

5.11.7 The present arrangement is unique to Jersey and Guernsey. People outside the Channel Islands, who are unfamiliar with the historical development of the Bailiwicks, regularly express their surprise about it. It fails to present to the wider world the image of a modern democratic state.

- 5.11.8 The Presidency of the States makes excessive demands on the time of the Bailiff and Deputy Bailiff, which would be better employed in the judicial work for which they are particularly fitted. The Bailiff would also be more available for the type of exacting case on which it is preferable that he should sit as the chief judge. The need for adjournments occasioned by his requirement to preside in the States would be reduced, as would the cost of using Commissioners to deputise for him in judicial work.
- 5.11.9 The Bailiff has to avoid being brought into political controversy. This has two practical consequences. First, if the States decided to limit debate in order to improve procedure, the Bailiff as President would necessarily be involved in the exercise of discretion in making decisions, which are likely to be controversial. Secondly, he is not in a position to play an active role in determining the procedures and working of the States Assembly, which is commonly done by presiding officers of other legislatures. An elected President would be able to take a more proactive part in this.
- 5.11.10 At present, if the Bailiff in his judicial capacity makes any criticism of the executive, it may possibly be seen as political and inconsistent with his position as President of the States. If he ceased to be President, he would be able to make such criticisms as he thought justified without such a consequence.
- 5.11.11 If the States were to pass a vote of no confidence in the Bailiff as their President, he would feel impelled to resign his office. Although such an event may be unlikely, if it did occur Jersey would lose the services of a

valued and experienced judge. Such a possibility would not arise if the Bailiff ceased to be President of the States.

5.11.12 We consider that a President elected by the States, from within or without the ranks of its members, would be able to run its proceedings satisfactorily, notwithstanding that he or she may not have the standing, authority and legal skills of the Bailiff. The Bailiff is undoubtedly pre-eminent in these respects. But it does not follow that he is the only person who could carry out the duties of President of the States or that it is necessary for the proper functioning of the Assembly that the Bailiff should occupy this position. The fact that the Greffier has presided from time to time with conspicuous ability goes to show that it can be done. In other deliberative bodies this is found to be possible, with the assistance of skilled and experienced advice which an official such as the Greffier can provide. Nor do we consider that legal skills and experience, though undoubtedly helpful, are an essential quality for a speaker to possess, if he can call upon advice from officials.

5.11.13 An elected President would be able to undertake public engagements and other duties appropriate to his office, which the Bailiff is not always in a position at present to carry out because of his increasing workload or which he currently fulfils by taking time away from his judicial duties.

5.11.14 A number of respondents expressed concern lest the Bailiff's position as civic head would be undermined if he were no longer to be President of the States. In our carefully considered opinion it should not be. The Bailiff has a long-standing position of pre-eminence in the affairs of Jersey, which

does not stem from his function as President of the States: rather the contrary, his function as President of the States derived from his civic pre-eminence. In our view that pre-eminence can be maintained without having to maintain his Presidency. If he remains guardian of the constitution, as we consider he should, that will help to maintain his paramount historic position as Bailiff of the Bailiwick of Jersey.

The European Convention on Human Rights

5.12 Whilst we consider that these reasons are sufficient to bring us to our conclusion, there has been a good deal of discussion by respondents of another important issue. That is the possibility that decisions of the Bailiff (in which we include the Deputy Bailiff) might be held invalid as being in breach of Article 6(1) of the European Convention on Human Rights. Article 6(1) provides, so far as material:

“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.”

5.13 The concept of a perceived risk is of importance in determining this issue. Even though a judge may not have been in fact influenced by any personal bias – commonly termed subjective bias – it may be perceived by reasonable people that he may have been influenced by extraneous factors. The test is that summarised by Lord Hope of Craighead in *Porter v Magill* [2001] 2 AC 357, 494, para 103:

“The question is whether the fair-minded and informed observer, having considered the facts, will conclude that there was a real possibility that the tribunal was biased.”

This is termed objective bias. The test in European human rights jurisprudence is phrased slightly differently, that the arrangements must provide sufficient

guarantees “to exclude any legitimate doubt” as to the tribunal’s impartiality. It is now well established both in UK domestic law and in the jurisprudence of the European Court of Human Rights (‘ECtHR’) that objective bias will invalidate a judicial decision. The same will follow in the law of Jersey, as the Royal Court is bound by Article 3 of the Human Rights (Jersey) Law 2000 to take account of decisions of the ECtHR. We of course presume that the Bailiff will be free of subjective bias in reaching his decisions, but the issue on which we must focus is whether it might reasonably be thought that objective bias is established by reason of his membership and Presidency of the States. If that were so, it could be held that his decisions in some cases were in breach of Article 6 of the Convention.

5.14 We have given careful consideration to the decision of the ECtHR in *McGonnell v UK* (2000) 30 EHRR 289, together with the antecedent opinion of the European Commission of Human Rights, and to the decision in *Pabla Ky v Finland* (2006) 42 EHRR 688. We have also taken account of the decisions of the House of Lords in *Davidson v Scottish Ministers* [2004] UKHL 4, the Scottish Court of Session in *Starrs v Ruxton* 2000 JC 208 and the English Court of Appeal in *R (Barclay) v Lord Chancellor* [2009] 2 WLR 1205. We do not find it necessary to set out the contents of those decisions and their import, as they are fully dealt with in the opinion of counsel to which we refer below.

5.15 After considering these decisions, we felt that it was uncertain what decision might be reached if a challenge were brought in the ECtHR to a decision of the Bailiff on the ground that he had presided in the States. We therefore took the opinion of leading counsel in London, Mr Rabinder Singh QC, who has considerable experience of human rights law and its application in the ECtHR. We have placed

the full text of the opinion on our website www.gov.je/crownofficersreview and it may be read there. Mr Singh summarises his conclusions in the following terms (para 2 of his opinion):

“(1) On the current state of the authorities, in principle there would be no breach of Article 6 of the European Convention on Human Rights if the status quo were to be maintained.

(2) However, the international trend suggests that the law will change in due course. Within the next 10 years, my view is that the present arrangements will come to be regarded as incompatible with the concept of judicial independence as embodied in Article 6, in particular because the Bailiff and his deputy are both judges and presiding members of the legislature.”

5.16 In our view this conclusion provides an additional reason why the Bailiff should cease to be President of the States. If a challenge were brought now, though it is not altogether easy to forecast the decision with any certainty, it would not in counsel’s view be likely to succeed. The Bailiff is no doubt likely to adopt the practice of recusing himself from sitting in any case where he has presided in the States during the passage of any legislation whose interpretation or application is in issue. The difficulty in putting this practice into effect is that it is not always apparent at the outset of a hearing that a particular piece of legislation will become material in this way. Moreover, we do not think it desirable that a judge should have to concern himself on a regular basis with the question of recusing himself, as the commentary on the Bangalore Principles recognises. In a few years, perhaps very few, judicial opinion may well come down in favour of the view that a breach of Article 6 may be established in a variety of cases. We do not think that it would be good for Jersey’s international reputation if it had to make the change reluctantly after litigation which may be protracted and expensive and in which strident attacks could be

made on Jersey's institutions. If the States make a change now they can retain control of the process and reduce the risk of having reform imposed upon them. In our view it constitutes a further reason for proceeding to make a change now.

5.17 The suggestion was made to us that the Greffier should be the President, as he has acted very ably in that post from time to time. We do not consider that this is an appropriate solution. The Greffier has an important administrative function to perform, being in a position to give advice to the members in the process. He would be placed at times in a difficult position if he were also required to preside and make final rulings. The separation customary in legislative assemblies between the presiding officer and the clerk of the assembly is a correct division of functions, which should be preserved.

5.18 A compromise solution was proposed by some respondents, whereby the Bailiff should continue to be nominal President of the States, but should not sit in its day-to-day work, delegating to substitutes nominated by him (possibly with the agreement of the States) and presiding only on ceremonial occasions or in case of emergency. Such an expedient might help to negate the suggestion that the Bailiff was no longer civic head. We consider, however, that it would leave the substitute presiding officer in a somewhat invidious position, liable to be displaced in unspecified circumstances and relegated on important occasions. The suggested solution remains in our view no more than an expedient, which would not only be difficult to operate and capable of being misunderstood, but would fail to tackle the issue properly.

5.19 We recognise that it may not be entirely straightforward to find a person willing and able to undertake the office of President of the States. We acknowledge the

force of the arguments which we have set out above, that it could be difficult to obtain a suitable President from within the ranks of the members of the States, although it may still at times be possible. If a member were appointed, the States might consider whether an additional member should be elected or appointed in his place. It may be preferable to look outside, to find a person of sufficient standing who would be willing to undertake a part-time post of this nature. Notwithstanding the difficulties which there might be in recruiting such a person, which were emphasised by several respondents, we are nevertheless hopeful that with the strong tradition of public service in Jersey it would still be feasible. We therefore favour the election by the States of their President, either from within the membership of the States or outside it.

Cost Implications

5.20 We have endeavoured to establish the resource implications of removing the Bailiff from the Presidency of the States, but any estimate must necessarily be very tentative and approximate, depending on the way in which the office would be organised. The cost would involve the salary of a President (or an extra member of the States if one is elected on the appointment of a member as President), the possible cost of ancillary staff and separate office accommodation.

5.21 There would be a rental charge for office accommodation, the amount of which would depend on the amount of space assigned and its location. It is likely to be not less than £8000 to £10,000 per annum. It appears probable that the States Greffe could provide administrative and secretarial support from within its current resources, but if extra assistance has to be provided there would be a further cost. If

the President undertook some ceremonial or representative functions currently discharged by the Bailiff or which the Bailiff is unable at present to undertake, there would be some added cost, though some at least might be met by a budget transfer from the Bailiff's Chambers.

5.22 Against that can be set off the reduction in the need to engage Commissioners to sit in the Royal Court. It is estimated by the Bailiff's Chambers that the Bailiff and Deputy Bailiff could be freed for approximately 20 days per year by the appointment of a President of the States, so at the present figure of £785 per day the saving in fees would be of the order of £15,700. To that may be added travel and subsistence expenses if fewer Commissioners from England are required, which might be estimated very roughly at £5000 per annum.

5.23 The net cost would therefore depend on the pattern adopted. In very approximate terms, it would appear to be a minimum of £31,000 to £33,000, but these are bottom figures and it might be advisable to contemplate a somewhat higher amount.

Recommendation 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.

The Bailiff as Civic Head and Guardian of the Constitution

5.24 The Bailiff's role as civic head stems from his historic position of responsibility for all the civic affairs of Jersey. In this role he carries out a number of ceremonial and public duties. He receives Royalty, visiting ambassadors and other prominent visitors to Jersey, plays the leading part in the Liberation Day and Remembrance Sunday ceremonies and hosts a number of official dinners. When the Lieutenant

Governor is away from the Island the Bailiff acts as Deputy Governor. He is a member of various public committees, supports and attends functions of a number of charities and community organisations and has a constant round of public engagements to fulfil.

5.25 It was suggested by some respondents that the Lieutenant Governor or the Chief Minister should carry out the duties now performed by the Bailiff as civic head. Although the Lieutenant Governor's position carries great prestige, he is appointed for a relatively short term and is almost invariably from outside Jersey. The Chief Minister is also likely to be in office for a limited term and has a primarily political alignment. It is true to say that in some jurisdictions the head of state is also a politician, but we see value in the unifying factor of the civic head being non-political. The Bailiff will ordinarily be a Jersey resident of long standing and will be in post for a longer period. We consider that it is 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. As we stated in paragraph 5.11.14, in our view he could readily continue to do so if he ceased to be President of the States. We therefore agree with the views expressed by a large number of respondents that the Bailiff is the most appropriate and acceptable person to act as civic head.

Recommendation 3: The Bailiff should continue to act and be recognised as the civic head of Jersey.

5.26 The constitutional relationship between the United Kingdom and Jersey as a Crown Dependency is subtle and unwritten, enshrined in custom and practice developed over many years. The Bailiff has historically been the guardian of the Island's constitution and protector of its privileges and freedoms, and one of his major

concerns historically has been to uphold them against erosion, as is recognised by the terms of his oath of office. He is still well placed to carry out this role, as he is generally the Crown Officer with most experience of the constitutional affairs of Jersey, the nuances of the relationship and the matters on which a watch requires to be kept. The Attorney General has an important role in advising on such constitutional matters, but the Bailiff will usually have even more experience of the subject and from that is likely to be more familiar with it than Ministers and members of the States and their officials. It is in our opinion of considerable importance that the Bailiff should continue to occupy this role.

5.27 In recent generations the Bailiff has been less proactive in this role than some of his predecessors before the Second World War and by virtue of Article 18(3)(b) of the States of Jersey Law 2005 the Chief Minister assumed responsibility for the external affairs of Jersey. The Bailiff may on occasion be a member of a delegation making representations about a matter with constitutional implications, but he will ordinarily confine himself to tendering legal and constitutional advice and will leave political decisions to elected politicians.

5.28 It is in this role that the Bailiff deals with official correspondence between the United Kingdom and Jersey, and it was clearly envisaged when responsibility for external affairs was conferred on the Chief Minister that the Bailiff would continue to do so. Outgoing official correspondence to the Ministry of Justice goes from the Chief Minister's Department through the Bailiff and the Lieutenant Governor, with input where required from the Attorney General. Incoming correspondence follows the same route in reverse. The Bailiff is in this way kept informed of matters which may have a constitutional implication and so is in a strong position to advise the

Attorney General or the Chief Minister if they require consideration from this aspect. Such occasions are infrequent, and the Bailiff confines himself to tendering advice, but we consider that it continues to be important that he should be in a position to bring his experience and mature judgment to bear in such situations. This correctly stems from his position as civic head and gives a valuable measure of protection to the citizens of Jersey in maintaining their proper constitutional position vis-à-vis the United Kingdom.

5.29 In modern practice, however, there is a considerable bulk of communication between the respective government departments which has no constitutional implications and is carried on by letter or less formal means between Ministers and officials. Until the changes to ministerial government in Jersey in 2005 a certain amount of communication about policy and similarly significant matters was effected through the medium of official correspondence. It is now generally dealt with more directly through ministerial and inter-departmental correspondence.

5.30 There remains a modicum of communications concerning matters which touch upon the relationship between Jersey and the United Kingdom. This category of communication may be of constitutional significance but may nevertheless not be dealt with through the medium of official correspondence. We would recommend that a procedure be put in place whereby the Bailiff would be furnished with copies of communications not forming part of official correspondence but which contain potential constitutional implications.

Recommendation 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.

Other functions of the Bailiff

(a) Licensing Assembly

5.31 The Bailiff acts as president of the Licensing Assembly, which has the function of deciding whether to grant licences for the sale of alcoholic liquor. Historically, this function descends from the revenue-raising jurisdiction of the Assembly of the Governor, Bailiff and Jurats, which they exercised between 1669 and 1921. Some respondents represented to us that this was an executive function, involving policy decisions on occasion, and should not be carried out by the Bailiff. In many jurisdictions, however, it is a judicial function which is dealt with by ordinary courts, and we do not consider that it is inappropriate that the Bailiff should perform it. Public consultation on the Licensing Law is in progress and decisions on possible changes have not been made. If, however, it were decided that an appeal should lie from decisions of the Licensing Assembly, which was proposed by some respondents – a matter which we consider lies outside our terms of reference – then the Bailiff should no longer be a member of the Licensing Assembly and would be in a position to hear such appeals.

Recommendation 5: The Bailiff should remain as president of the Licensing Assembly, unless an appeal is provided for.

(b) Public Entertainment

5.32 The Bailiff is responsible by long-established custom for giving permission for certain public entertainments, notably theatre, cinema and cabaret performances. In

this role he has to ensure adequate standards of safety – which he delegates to departments of the States – and to act as censor over the content of performances, concerning which he consults other bodies. It is recognised generally that this is an executive function which is not appropriate for the Bailiff to carry out, and successive Bailiffs have wished to be relieved of it. The States have given this consideration, but it has not yet been possible to decide on an appropriate replacement, which raises difficult questions, not least of cost. Nevertheless, it is incorrect in principle for the Bailiff to hold this responsibility and we must express our opinion that a way should be found to remove it from him.

Recommendation 6: The Bailiff should cease to be responsible for giving permission for public entertainments.

(c) Appointment of Crown Advocates

5.33 Under the Crown Advocates (Jersey) Law 1987 the Bailiff has to approve the appointment by the Attorney General of Crown Advocates. A chief justice would not ordinarily expect to have any say in the appointment of a prosecutor and we regard it as inappropriate that such an appointment is made subject to the approval of the Bailiff.

Recommendation 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.

Chapter 6

The Role of the Law Officers

The Attorney General and Solicitor General

6.1 The two Law Officers, the Attorney General and Solicitor General, can be considered together. As in the case of the Deputy Bailiff, it is the function of the Solicitor General to deputise for and assist the Attorney General and he has no independent functions. Historically the Law Officers had the responsibility of advising the Crown on legal matters and representing it in legal proceedings. After the Law Officers commenced advising the States at the end of the 19th century a view emerged that in the case of conflict between the Crown and the States the Attorney General would advise the Crown and the Solicitor General the States. The correctness in principle of this view was questioned in memoranda between the Law Officers in 1990. In our opinion they were quite right to call it into question, as the present Law Officers both confirmed in their evidence to us. The two Law Officers ought to act together without any divergence of function or representation. Accordingly, if such a conflict should arise, the Law Officers should advise one – presumably the Crown, to whom their primary historic obligation is due – and independent advice should be obtained for the other.

Responsibility for Prosecutions

6.2 The prosecution of offenders is one of the major functions of the Attorney General. His is essentially a supervisory role in modern conditions, for the width of his responsibilities means that only on infrequent occasions is he able to conduct

prosecutions in person. He is, however, in daily contact with the staff of the Law Officers' Department in charge of prosecutions. Matters are constantly referred to and discussed with him, and he is kept informed of all prosecutions, retaining ultimate responsibility for all prosecuting decisions.

6.3 In July 2009 the Law Officers' Department was organised in three divisions, one of which is the Criminal Division. This Division is headed by a Principal Legal Adviser, who is known as the Director Criminal. The Attorney General is consulted and informed about all issues which are serious or sensitive and becomes involved personally in the more serious matters with which the Law Officers' Department is dealing. This involvement is almost invariably conducted in conjunction with the Director Criminal. The Attorney General is closely concerned with decisions about major prosecutions, which in some areas such as serious fraud and money laundering can involve very large sums of money.

6.4 The Attorney General is answerable to the States for the performance of his duties, which is regarded as a fundamental part of a democratic society. Members may ask questions about criminal justice policy and the handling of prosecutions in general, though he will not (with rare exceptions such as the historic child abuse cases) answer questions about specific prosecuting decisions.

6.5 It may be seen from the foregoing that the Attorney General as the person with ultimate responsibility for prosecuting decisions requires to have considerable familiarity with and experience of Jersey affairs, as well as comprehensive knowledge of the Island's criminal law. He has on occasion to make fine judgments on the public interest when determining whether prosecutions should be brought and the offences to be charged. He must be and be seen to be independent of

influence from outside, political or otherwise, and present and past Law Officers laid stress upon the importance of their Crown appointment as a guarantee of independence.

6.6 Concerns have been expressed to us about the possible conflict if the Attorney General had advised a department of government about its course of action and then had to consider a prosecution against it. Prosecutions of government departments or agencies have been rare in Jersey, but have taken place. If one is contemplated, a Law Officer who had advised the potential defendant would certainly have to detach himself from any prosecuting decision, entrusting it instead to a fellow Law Officer, the Director Criminal or outside counsel brought in to advise, depending on the circumstances.

6.7 On account of these concerns suggestions have been made that Jersey should have a separate Director of Public Prosecutions ('DPP'), who would assume all responsibility for prosecutions, which would no longer rest with the Attorney General. It has recently been decided in England that the Attorney General should no longer take any part in prosecuting decisions, which are to be the ultimate responsibility of the DPP, with the exception of cases involving national security. This step has been taken because of public unease over decisions of a former Attorney General in respect of the decision not to prosecute BAE or in connection with 'loans for peerages' and his advice about the legality of the war against Iraq. It has to be borne in mind, however, that in England the Attorney General is aligned to the governing political party and is appointed by, and may be dismissed by, the Prime Minister of the day. There were suggestions that the then Attorney General may have been unduly influenced in his decisions by considerations of favouring

his own party – or, at least, if these suspicions were unfounded, that this was a reasonable perception. As Jersey does not have party political government and the Crown Officers are appointed by the Crown, the same considerations do not arise, though some respondents suggested that successive Law Officers have tended to side with what they termed ‘the Establishment’.

- 6.8 If the Attorney General is to be removed from the prosecution process altogether, as in England, then it would be necessary to have a high-quality lawyer with a Jersey qualification, possessed of expertise and experience in criminal law and judgment in deciding on prosecutions. He would also need to have sufficient standing in the eyes of the public to have their confidence and sufficient acquaintance with Jersey and its society and institutions to be able to make fine judgments on the public interest. That would require a person of high calibre who has been resident in Jersey, if not for his whole life, at least for a significant time. It is probable that it would require quite a high ranking and salary scale.
- 6.9 If the DPP and not the Attorney General were to be in charge of final prosecuting decisions, the DPP could not be accountable to the States in the same way as the Attorney General is now. It appears that in some European jurisdictions the public prosecutor is not answerable to the legislature, but we cannot suppose that this would be acceptable to the States. A mechanism would have to be devised, such as a select committee of the States, whereby the DPP could be required to attend to answer appropriate questions about his work.
- 6.10 The cost implications of appointing a separate DPP would have to be taken into account. The person appointed would have to be paid a salary commensurate with his standing and experience, and would require separate staff members and offices.

We have not been able to make any useful estimate of what this would cost, but it was agreed on all sides that it would be substantial.

6.11 We are of the opinion that the Attorney General is the person best fitted by training, experience and standing to exercise the judgment and discretion required in deciding on prosecutions. A DPP would be in no better position, and might well be regarded as lacking the Attorney General's degree of independence. His only advantage would be the absence of any conflict by reason of the fact that he would not be advising States' departments.

6.12 Our conclusion is that it would be disproportionately cumbersome and expensive to create the post of DPP on this ground alone. It is important, however, to minimise as far as reasonably feasible the possibility of conflict. We consider that a clear procedure should be evolved for that purpose. A Law Officer or any other person in the Law Officers' Department who has been concerned in giving advice to any emanation of government, such as a government department or agency, should not be involved in any decision about prosecuting that department or agency. It would be desirable to organise the administration of the Law Officers' Department in such a way that those persons considering decisions on prosecuting emanations of government should have no access to materials concerned with advice to the potential defendants. If such arrangements are put in place, allied to the integrity of the Law Officers and their staff, we consider that it would be proper and satisfactory that the Attorney General should continue to be responsible for prosecutions.

Recommendation 8(a): The Attorney General should continue to be responsible for prosecutions.

(b) Procedures should be adopted to minimise the possibility of conflict arising from the advisory and prosecuting functions of the Attorney General.

Membership of the States

6.13 The Law Officers are both *ex officio* members of the States, with a right to speak but not to vote. In practice they follow a now well-established convention of restricting themselves to answering questions or making statements about legal matters. Only occasionally do they interject if they consider it necessary to warn members of possible adverse legal consequences of a proposition put forward.

6.14 It was represented to us that the Attorney General and Solicitor General should not be members of the States, being appointed and not elected. It is true that in some jurisdictions the Attorney General is not a member of the legislature and gives his advice to government when a request is made, but that is not the usual situation. In many legislatures the Law Officers are members, either elected or appointed, and a variety of patterns can be regarded as legitimate. There appears to be no reason rooted in principle against the Law Officers being members of the legislature.

6.15 We therefore do not see any basic objection to the Law Officers being members of the States or to their being appointed rather than elected, though we consider that in view of the latter fact their self-imposed restriction on speaking in the States is appropriate. It recognises the Law Officers' acceptance of their role as legal and not policy advisers in the States Assembly. It has been suggested that since they cannot vote there is no need for them to be members of the States, and they could attend when required, if necessary throughout a sitting. We consider, however, that there are significant practical advantages in their being members: they are on hand and

do not have to be specially requested to attend to give advice, and they are in a position to advise the States at once if a proposition would involve legal difficulties, so possibly saving significant waste of time and effort in addressing errors at a later stage.

Recommendation 9: The Law Officers should continue to be *ex officio* members of the States, restricting their speaking as at present.

6.16 There was some discussion of the question whether it was a profitable use of the Law Officers' time to attend so constantly in the States chamber. It was suggested that the States could function quite satisfactorily without having the luxury of a Law Officer constantly in attendance to give advice on legal matters, and that the frequency and range of requests for advice could be reduced or such requests could be made to a greater extent on notice rather than *ex tempore*. While we can see some force in this suggestion, we feel that it is a matter for discussion and agreement between the States and the Law Officers, rather than a formal recommendation from the Review. We shall confine ourselves to encouraging them to look at the issue constructively.

6.17 Similarly, we do not propose to enter into discussion of the issue, which was aired in the course of our hearings, whether the Centeniers should continue to play a part in the bringing of prosecutions or whether it should be taken over in its entirety by the Attorney General and his department. It could be said that this is part of the role of the Attorney General and so falls with the remit of the Review. The panel took the view, however, that it did not appear to have been an issue within the contemplation of the States when the terms of reference were framed. It may be a subject which could profitably be considered, but that would best be done after

debate in the States and with more specific notice to the bodies concerned and the public as a whole.

Legal Advice

6.18 One of the major functions of the Law Officers, which may be regarded as their core function, is giving legal advice, not only to the Crown, their original function, but in modern practice to the States and their different emanations. This involves, as we have discussed, advising the States while in session on legal issues which arise during debate or in the course of questions. Before the change from committee to ministerial government it included advising the several committees of the States by which business was carried on. Under ministerial government it comprises advice to the Council of Ministers, which the Law Officers may attend, and also Scrutiny panels.

6.19 Scrutiny panels were constituted in consequence of the recommendations in the Clothier Report. Paragraph 3.5 of that Report described the operation of scrutiny as embracing the examination of:

- The performance of government in discharging its responsibilities and the delivery of services;
- Expenditure and the use of public resources to provide value for money;
- The budget and other financial plans;
- Decisions made by the Executive;
- Policy issues and ideas, including consideration of draft legislation.

6.20 Both Ministers and Scrutiny panels are emanations of the States, but they have different functions. Ministers generally make decisions or propound legislative

initiatives, while Scrutiny panels examine those decisions or proposals. Ministers and the Law Officers have taken the view that Ministers have first call on the Law Officers' services in relation to advice. When Scrutiny panels come to examine Ministers' decisions or proposals they wish at times to know the basis on which they were reached. This at times may involve obtaining information about the facts on which they were based and also the Ministers' view of the law on which they worked. The panels may wish on occasion to have the advice of the Law Officers on the law or to obtain their own advice.

6.21 Differences have arisen from time to time concerning the extent to which Scrutiny panels and Ministers should each have access to the legal advice obtained by the other. The Scrutiny panels informed us that they had experienced a degree of difficulty in relation to the obtaining of legal advice and, specifically, ascertaining from Ministers the legal propositions on which they based particular decisions or proposals. They submitted that it was necessary for them to know on what legal advice Ministers relied, so that they could examine and test the soundness of those decisions or proposals. Notwithstanding the adoption of the Code of Practice designed to provide a *modus vivendi*, they did not always obtain that information or the advice of the Law Officers when they needed it or as promptly as they would have liked.

6.22 Scrutiny panels are to be regarded in principle as members of the States on an equal footing with Ministers, which might lead to the conclusion that they are equally entitled to access to all advice given to Ministers. The difficulty lies in the fact that in carrying out their function they may have to examine critically the decisions or proposals of Ministers and their departments. The reality is that they may find

themselves from time to time in a position somewhat adverse to Ministers and departments, in which they feel bound to criticise their decisions or proposals. In such situations it is not unnatural that neither Ministers nor Scrutiny panels may wish to disclose their advice to the other.

6.23 A client who has received professional legal advice cannot be compelled to disclose it. The object of the privilege is to make the advice effectual by ensuring completeness of candour and lack of inhibition on the part of the client in instructing the lawyer and on the part of the lawyer in giving advice. It is the privilege of the client who receives the advice and not of the lawyer who gives it. It is for the client alone to decide whether or not to waive the privilege and disclose the advice to any other person, and the lawyer is not entitled to decide on waiver.

6.24 Legal advice will commonly contain one or more of the following components:

- (a) It may consist solely of statements of the content of existing law, where it is clear.
- (b) It may go on to apply the law to the facts, which may or may not require an estimate of how that application would be made in the event of difference and a ruling by a court.
- (c) The lawyer may speculate on how a doubtful area of law may develop or the conclusion which a court may reach where the law is in a state of uncertainty.
- (d) Finally, he may advise on tactics to be adopted or the policy implications of one decision or another.

It is therefore impossible to generalise about the circumstances in which it is reasonable for a client to be asked to reveal the legal advice received by him to another party. There would not normally be any difficulty about disclosing advice

on (a). Conversely, it would generally be quite inappropriate to disclose advice on (d). Advice of type (b) will vary widely, and disclosure would have to be considered case by case. It may be possible to disclose advice of type (c), depending on how it is framed (sometimes a lawyer will construct his advice of this type in terms which can readily be disclosed, and this may even be envisaged when the advice is sought).

6.25 In some, perhaps many, situations Ministers would have no difficulty about disclosing the advice which they have received. Where the advice is of a type disclosure of which would not cause any difficulty to Ministers, they may feel that it is appropriate and in the interests of speed and economy to furnish it to a Scrutiny panel, and vice versa. Alternatively, they may find it possible to pass on to Scrutiny a summary of what the law is according to the advice they have received and leave it to the Scrutiny panel to question that statement of law and obtain advice if they think fit. Where the Law Officers have not already given legal advice to Ministers, then Scrutiny panels would be free to consult them, which would avoid the incurring of unnecessary expenditure. Where the Law Officers have given advice to Ministers, the latter will have to consider, consulting the Law Officers again if necessary, what, if anything, they can disclose without causing any difficulty to the carrying on of governmental affairs. If they can disclose some or all of the content of the advice, then no doubt they will be willing to do so, again in the interests of speed and economy. If sufficient disclosure is not possible for the Scrutiny panel's purpose, the panel should be free to take independent advice without delay. How that is to be done is a matter for the Scrutiny panels to decide, preferably collectively, so that it can be arranged in a way which takes advantage of the

accumulation of experience of lawyers regularly consulted on topics of this nature, with the consequent possible advantages of speed and keeping down the cost. It is, however, desirable that where possible the Law Officers should be informed of the content of the advice if it differs from theirs, so that attempts may be made to resolve the differences and avoid presenting the States with conflicting legal opinions.

6.26 We have set out this approach in some detail so that Ministers and Scrutiny panels can attempt to follow it, along with the Code of Practice. We hope that this guidance will assist their understanding of the topic and allow them to deal with most situations in a spirit of goodwill.

Recommendation 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.

Partie Publique

6.27 In undertaking their prosecutorial duties, the Law Officers are representatives of the Crown, but are also seen as representing the public interest. The Crown is the *parens patriae*, the fount of justice and guardian of the public interest. The Law Officers, as the Crown representatives, also have a role to play: the Attorney General occupies the role of the *partie publique*, with a duty to safeguard the public interest in the widest sense and to uphold public order. In this capacity he looks after the interests of persons requiring protection, such as children and persons of unsound mind. He also safeguards the interests of charities and acts as *amicus*

curiae, ie appears in court or sends a representative where no party appears to uphold an interest or an argument but it is in the public interest that the arguments in its favour should be placed before the court. We do not see the need to make any recommendation about this part of the Attorney General's functions.

Head of the Honorary Police

6.28 Some respondents questioned the propriety of the Attorney General holding the position generally described as titular head of the Honorary Police. The appropriateness of this name has also been questioned, since the Connétable in each Parish has responsibility for the Honorary Police in his Parish. There is no antecedent French title from which it has been translated and one is reduced to using it in the absence of a better one: the important thing is to understand clearly what the position involves.

6.29 Operational matters concerning the work of the Honorary Police are generally the province of each Parish, with the unifying influence of the Comité des Chefs de Police. The Attorney General may overrule the decision of a Centenier in relation to charging a person suspected of having committed a criminal offence, but this is part of his responsibility for prosecutions. He may give instructions to the Honorary Police in relation to policy matters, but the occasion for doing so appears to be infrequent. He has the right to decline to recommend confirmation by the Royal Court of the appointment of a person to the Honorary Police, effectively vetoing the appointment. The main function of the Attorney General in this sphere is that of responsibility for disciplinary matters. If a complaint is made to the Police Complaints Authority and they consider that a disciplinary offence may have been

committed, they will pass on their conclusions to the Attorney General, who will then cause a disciplinary hearing to be held. If the tribunal finds that the officer has committed a disciplinary offence, the Attorney General has to determine what sanction is to be imposed.

6.30 Responsibility for disciplinary matters has to lie with some person or body. It could not be the province of a Police Authority, if one is constituted, as such bodies ordinarily deal with matters of policy and resources, not discipline, which is usually the responsibility of the chief officer of a police force. Although it may be unusual for a law officer, we do not think that there is any breach of principle in the Attorney General carrying out this function. We are aware that the Honorary Police themselves value the connection, but if it is proposed to make another person or body responsible for discipline this function could readily be transferred.

Recommendation 11: The Attorney General should continue to act as titular head of the Honorary Police until an appropriate substitute has been obtained.

Chapter 7

Appointment of Crown Officers

7.1 The Crown Officers are appointed by the Crown, which is a guarantee of their independence and freedom from political pressure. They formerly held office during pleasure, but now hold during good behaviour, the customary tenure of judicial and similar appointments. The method of appointment of each of the Crown Officers is now arranged on similar lines – with the exception of the Bailiff, mentioned below. It has been amended in recent years and is more formal and transparent than formerly. The post in question is advertised and brought to the attention of all Jersey practitioners. Any lawyer possessing the requisite qualifications is entitled to apply to the Lieutenant Governor for consideration for appointment to the post. A job description and a statement of the terms and conditions are available to all who are interested in applying. Consultation then takes place with the Bailiff's Consultative Panel and with existing holders of Crown Offices, the Jurats, the Chief Minister, members of the judiciary and senior members of the legal profession. The Consultative Panel comprises the Chairman of the Comité des Connétables, the Chief Minister, the Chairman of the Privileges and Procedures Committee, the Minister for Treasury and Resources and five other members elected by ballot by the States for a period of three years. Consultees are asked to give their opinion of the candidates by reference to the qualities and abilities listed in the job description. Applicants are interviewed by a panel (which we shall term for convenience 'the recommending panel'), consisting of the Bailiff, a Lieutenant-Bailiff and the Chairman of the Jersey Appointments Commission. The

panel then makes a recommendation to the Lieutenant Governor, who transmits it to the Crown. This procedure is followed even when, as in the case of the appointment of the present Deputy Bailiff, there is only one applicant, so that the panel must satisfy themselves that the candidate is suitable for appointment.

7.2 The exception to this procedure is the appointment of the Bailiff. When the Deputy Bailiff is appointed, it is envisaged that the person appointed will proceed in due course to succeed to the post of Bailiff, so the suitability of that person for the latter post is considered at the time of the appointment. Then when the post of Bailiff requires to be filled the recommending panel goes on the assumption that, in the absence of any adverse factor relating to his performance of the duties of Deputy Bailiff, he will be appointed as Bailiff without following the process of advertisement, consultation and interview followed in respect of the other Crown Offices. As the Constitution Review Group expressed it in its Second Interim Report (2008), appointment to the office of Deputy Bailiff is assumed to be “a training for appointment as Bailiff.” We consider that this procedure for the appointment of the Bailiff is satisfactory, so long as the record of the Deputy Bailiff is examined by the recommending panel with the requisite degree of critical care to ensure that there are no adverse factors which would make it undesirable to confirm his appointment as Bailiff.

7.3 It has been common, though by no means invariable, for the holders of the Crown Offices to progress through a series of posts from Solicitor General to Bailiff. Some respondents raised questions about this *cursus honorum*. It is now made clear, however, to candidates for the respective appointments that promotion through the succession of offices is not automatic, that there is no presumption of advancement

and that other applicants will be considered for each (except that of Bailiff, as mentioned above). The point was strongly made that there is a limited pool of able lawyers willing to undertake Crown Offices, when their earning potential in private practice is significantly greater, and that the prospect of promotion is an important incentive. Moreover, the experience gathered in the process of performing the duties of a series of Crown Offices is of considerable advantage as the Crown Officer concerned progresses to senior posts.

7.4 We have given consideration to other possible methods of appointment. Election by public vote of judges is commonly considered undesirable, and we consider that it would also be inappropriate for the Law Officers. Appointment by the States, the Chief Minister or Council of Ministers, an electoral college similar to that which elects the Jurats, the Royal Court or a Judicial Appointments Commission, all of which have been suggested to us, would not in our view be satisfactory. There are manifold reasons, some of which are common to all of these suggested methods:

7.4.1 It is desirable that the appointing body should be able to conduct interviews of the candidates, which some bodies could not arrange.

7.4.2 There should be an element of participation by representatives of the public in the appointing process, which assists transparency. It is achieved by the present process through consultation with the Consultative Panel and the presence on the recommending panel of the Chairman of the Appointments Commission, but would be absent from appointment by the Royal Court or an electoral college.

7.4.3 Appointment by the Chief Minister or Council of Ministers could detract from the independence which the Law Officers should be seen to possess in

giving their advice to the States. That independence, which we consider to be a very valuable feature, is much greater than if the appointments were seen to be of a political nature.

7.4.4 We consider that the constitution of a Judicial Appointments Commission, although adopted in the several jurisdictions in the UK, would be unnecessarily cumbersome and would involve disproportionate delay and expense.

7.4.5 In most, if not all such methods, the degree of anonymity would be reduced. Many applicants would not wish the fact that they are applying to become public knowledge, as the possibility that they may be considering leaving private practice is commercially sensitive for unsuccessful candidates and would make potential applicants hesitate to put their names forward.

7.4.6 Most important, all Crown Officers should be and be seen to be independent of any political influence, from which it follows that they should be free from dependence on any political support in their appointment.

7.5 We accordingly consider that appointment by the Crown, having received the advice of a recommending panel, is the best method of meeting these points and securing the appointment of the best person for each post. There is in our opinion an appropriate amount of openness and transparency in the procedure now in operation. It would, however, be advisable for the panel making the final recommendation to review the procedure from time to time to ensure that it corresponds with best practice.

7.6 There remains the question of the composition of the panels recommending the appointments and the groups which are consulted about them. We are conscious

that it is not in accordance with accepted best practice that judges should be concerned with the appointment of Law Officers or members of the legislature with the appointment of judges. It may also be questionable whether an office holder should be largely instrumental in appointing his successor. If these principles were followed in all respects the Bailiff would have to stand aside entirely from the appointment of Crown Officers. This would involve a fundamental shift in the method of appointment of Crown Officers. In favour of the present mode of appointment are two factors: first, that the Bailiff is civic head and not solely a judge, and has historically had a central function in such appointments; secondly, that Jersey is a small society and it is not always practicable to arrange matters in a way which can more readily be done in a larger society. Notwithstanding the reservations which we have expressed, having weighed the factors on each side we have concluded that it would be best to maintain the essence of the present system, but with the modifications which we shall recommend.

7.7 It is important that the process should be designed to preserve the independence of the Crown Officers. It should aim to ensure that appointments are made objectively on the grounds of merit, that the requisite degree of transparency is incorporated and that the process is kept reasonably simple and expeditious. We therefore consider that the composition of the recommending panels be widened and that the panel for the appointment of the Bailiff and Deputy Bailiff should differ from that for the appointment of the Law Officers.

7.8 In our opinion the recommending panel for the Bailiff and Deputy Bailiff should be augmented by the inclusion of other persons who have substantial legal experience. We recommend that there be added to the panel as presently composed two

persons, to be appointed by the Lieutenant Governor (who would no doubt consult as he saw fit in order to identify suitable persons). These members should have had substantial legal experience, either in practice or judicial, and could be retired or still engaged in practice or judicial work. We recommend that one should be from outside Jersey.

7.9 The appointment of the Law Officers, requires in our view a somewhat different approach, on the basis that they are advisers to the States. We accordingly recommend for these appointments that there be added to the panel as presently constituted two members of the States, to be appointed by the States.

7.10 If for any reason the Bailiff is not available to sit on either recommending panel, we recommend that the Deputy Bailiff should be a member and preside in his place (except of course in the case of the appointment of the Bailiff).

7.11 If the recommending panels are augmented in this way, we consider that it would no longer be necessary to involve the Bailiff's Consultative Panel in the consultation process. The States would have representatives on the recommending panel for appointment of the Law Officers and further consultation with them through the Bailiff's Consultative Panel would not appear to be necessary. Since the Bailiff would no longer be President of the States, if our recommendation in that behalf is accepted, it would not be appropriate to consult representatives of the States about the appointment of the Bailiff or the Deputy Bailiff. The Chief Minister should, however, continue to be consulted on account of the public nature of the Bailiff's role as civic head.

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.

(b) 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.

(c) 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.

(d) The Bailiff's Consultative Panel should no longer be consulted about the appointment of the Crown Officers.

Chapter 8

Summary of Recommendations

The Role of the Bailiff

1. The Bailiff and Deputy Bailiff should continue to carry out judicial work in the Royal Court.
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 official correspondence which contain potential constitutional implications.
5. The Bailiff should remain as president of the Licensing Assembly, unless an appeal is provided for.
6. The Bailiff should cease to be responsible for giving permission for public entertainments.
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.

The Role of the Law Officers

8. (a) The Attorney General should continue to be responsible for prosecutions.
(b) Procedures should be adopted to minimise the possibility of conflict arising from the advisory and prosecuting functions of the Attorney General.

9. The Law Officers should continue to be *ex officio* members of the States, restricting their speaking as at present.
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.
11. The Attorney General should continue to act as titular head of the Honorary Police until an appropriate substitute has been obtained.

Appointment of Crown Officers

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.

(b) 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.

(c) 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.

(d) The Bailiff's Consultative Panel should no longer be consulted about the appointment of the Crown Officers.

Chapter 9

Envoi

- 9.1 Jersey has seen a significant amount of change and development in its institutions of government in the last decade. It is still in the process of consolidation of those changes and the States have given further consideration to them on a number of occasions. In December 2009 they resolved, in order to re-examine the roles of the Crown Officers, to constitute a review, which has been carried out by the independent Review panel appointed by them.
- 9.2 We, the members of the panel, are conscious, as we earlier stated, of the high quality of service given to Jersey by generations of Crown Officers and the esteem in which they are held. That has led many respondents to urge upon us that the institutions should not be changed. It is necessary nevertheless to take account of the developments in the democratic world of the 21st century. Jersey occupies an increasingly important part in that world and its institutions are the subject of scrutiny from outside as they never were before. It has committed itself to best practice in areas of regulation and good governance, a factor which we have borne in mind in considering our recommendations.
- 9.3 Our examination has brought us to the conclusion that some further change in the institutions is required if Jersey is to occupy and maintain that position. We have not made any of our recommendations without long and careful consideration of the issues, with the assistance of many written and oral submissions from the people of Jersey. We have endeavoured in this Report to set out in some detail the factors involved in the recommendations and our reasons for reaching our conclusions.

9.4 We consider that the changes which we recommend are necessary reforms of the institutions of government of Jersey and will help to maintain its place as a well-ordered polity. In that spirit we commend our Report to the States and the people of Jersey.

Appendices

1. Terms of Reference

1. In accordance with the decision of the States on 4th February 2009 that an independent review shall be conducted into the current roles of the Bailiff, the Attorney General and the Solicitor General, and with particular regard to –

Part 1 – roles of the Bailiff (and Deputy Bailiff)

- The role of the Bailiff as Chief Justice, President of the States and civic head of the Island;

Part 2 – roles of the Attorney General and Solicitor General

- The roles of the Attorney General (and Solicitor General) as legal adviser to the States of Jersey, to the Council of Ministers and to Scrutiny Panels, chief prosecutor, head of the Jersey honorary police, and acting in the interests of the Crown in Jersey;

and taking into consideration –

- (1) the principles of modern, democratic and accountable governance and human rights,
- (2) the nature of a small jurisdiction, the Island’s traditions and heritage, the resources required, and the difficulties (if any) which have arisen in practice, and
- (3) such other matters as the Panel may consider relevant,

to prepare a report for consideration by the States –

- (a) on whether the current roles should be changed, and
- (b) if so, how they should be changed and what the likely cost implications of any such change might be.

2. The views of the public and local interest groups in Jersey should be sought and all such views taken into consideration.
3. Formal meetings and hearings of the Review Panel should be held publicly in Jersey unless the Panel believes that there are reasonable grounds for holding a meeting or hearing in camera.
4. The content of all written submissions to the Review Panel will be made available to the public, unless the Panel believes that there are reasonable grounds for non-disclosure of a submission or part of a submission, and should be attributed unless

the submitter explicitly requests that a submission shall be non-attributed and the Panel accepts the reasons for such a request.

2. Job Description of HM Attorney General



JOB DESCRIPTION

Department: Law Officers' Department
Appointment: Her Majesty's Attorney General
Reports To: The Crown

Purpose of Job

1. The Attorney General is a Crown appointment and is the chief law officer of the Island of Jersey.
2. The post holder will hold office during good behaviour until the age of 70.
3. The Attorney General acts as legal adviser to the Crown, the States Assembly, Ministers, Scrutiny Panels and other public bodies, and will be expected where reasonable to act to assist individual States members in the exercise of their public functions.
4. The Attorney General is an ex-officio member of the States of Jersey and is expected to attend meetings of the States.
5. The Attorney General is responsible for the prosecution service in all Courts.
6. The Attorney General is head of the Honorary Police. This involves:
 - Offering help and guidance to the Comité des Connétables, the Comité des Chefs and the Honorary Police Association in respect of honorary police matters;
 - Exercising statutory functions under the Police Force (Jersey) Law 1974, the Police (Complaints and Discipline)(Jersey) Law 1999 and the Honorary Police (Jersey) Regulations 2005
 - Offering guidance to Centenier as prosecutors
7. The Attorney General acts in a number of miscellaneous functions. These include –

- Acting as the competent authority for mutual legal assistance and extradition from overseas authorities.
 - Conducting investigations under the Investigation of Fraud (Jersey) Law 1991.
 - Issuing warrants under the Regulation of Investigatory Powers (Jersey) Law 2005, and the Police Procedures and Criminal Evidence (Jersey) Law 2003.
 - Acting as Partie Publique where appropriate in any court proceedings.
8. The Attorney General leads the Law Officers' Department, overseeing the work of the Solicitor General and other staff in all sections as well as his or her own workload.

The work of the Law Officers' Department is complex, wide-ranging and intellectually taxing. It is also frequently the subject of public scrutiny.

Principal Accountabilities

The Attorney General, who is supported by H.M. Solicitor General, sets and aspires to the objectives of the Law Officers' Department which are as follows:

1. To provide objective strategic advice to the States of Jersey directly or through the Council of Ministers having regard to constitutional and legal developments.
2. To provide objective legal advice of a high quality within reasonable timescales to the Crown, the States of Jersey and all others it serves.
3. To provide and oversee a high quality prosecution service working in the interests of justice and contributing to a reduction in the level of crime in the Island.
4. To ensure that the interests of the Crown and the States of Jersey are protected by acting on their behalf in civil proceedings brought by or against the Crown or the States.
5. To ensure that the functions and duties of the Attorney General arising from custom or statute are performed to a high standard and in a timely manner.
6. To offer effective assistance within reasonable timescales to overseas judicial and law enforcement agencies in criminal matters.
7. To provide an efficient conveyancing service in relation to property matters affecting the Crown and the States of Jersey.

Knowledge and Experience

Applicants must meet the following criteria:

1. A qualified Jersey advocate or solicitor.
2. A comprehensive knowledge of the laws of Jersey.
3. A comprehensive knowledge of the practice and procedure of the courts of Jersey.
4. A high level of professional achievement in a broad range of legal activity.

It would be an advantage if the applicant were to have a good knowledge of public law.

Qualities and Abilities

In addition to the knowledge and experience listed above, candidates should be able to demonstrate the following qualities and abilities:

1. Outstanding Intellectual Capacity

- Sound intellectual and analytical ability
- High level of legal expertise
- Appropriate knowledge of the law and its underlying principles and the ability, where appropriate, to master unfamiliar areas of law

2. Personal Qualities

- Integrity and independence of mind.
- Sound judgement.
- Decisiveness
- Objectivity
- Commitment, conscientiousness and diligence
- Ability and willingness to learn and develop professionally
- Ability to manage appropriately a public profile

3. Ability to Understand and Deal Fairly

- Ability to treat everyone with respect and sensitivity whatever their background
- Willingness to listen with patience and courtesy

4. Authority and Communication Skills

- Ability to express and explain clearly and succinctly to all concerned matters of law and procedure.
- Ability to inspire respect and confidence.
- Ability to maintain authority when challenged
- Strong administration and management skills

5. Efficiency

- The ability to work under considerable pressure and to prioritise conflicting demands on time.
- Ability to organise time effectively and produce clear reasoned advice expeditiously.
- Ability to work constructively with others (including leadership and management skills).

Health

If recommended for appointment, you must be able to fulfil the duties of the Attorney General. Reasonable arrangements will be made for you if you have a disability. A disability is a physical or mental impairment, which has a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities.

Applications from applicants with disabilities are welcomed. Any reasonable arrangements to enable such an applicant to take up appointment will be discussed in person with the Recruitment Selection Panel.

Applicants may be required to undergo a medical examination before taking up appointment. No one will be rejected on the basis of the medical examination unless reasonable arrangements to accommodate a disability cannot be agreed with the applicant.

Organisation

The Law Officers' Department works at the centre of the Island's government. The Department's current establishment consists of the two Law Officers appointed by the Crown (Attorney General and Solicitor General), thirteen Legal Advisers and ten Assistant Legal Advisers, supported by secretarial and administrative staff. The Department's budget is £5.9 million.

The Law Officers' Department occupies office accommodation both at Morier House and at Police Headquarters.

The Department is in the course of being reorganised into Criminal and Civil Directorates, each headed by a Principal Legal Advisor accountable to the Attorney General and responsible for the management of the criminal and civil advice and litigation which falls within the Department's remit. Both Directorates will be supported by the Chief Clerk in relation to financing, resources and human resource functions.

The Director Criminal will be responsible to the Attorney General for the delivery of an efficient prosecution service, the giving of mutual legal assistance to requesting jurisdictions where appropriate, the handling of extraditions cases and the supervision of investigations carried on under the Investigation of Fraud (Jersey) Law 1991.

The Director Civil will be responsible to the Attorney General for the delivery of advice to Ministers in civil matters, including advice on the constitutional relationship between the Island and the U.K., the creation of international obligations, the applicability of EU law, human rights implications for prospective legislation, the preparation of Privy Council Reports, conveyancing and all civil and administrative litigation.

The Attorney General is ultimately responsible for the advice which is given, the civil and criminal litigation involved and the transactional business concluded. The Attorney General is also the international representative of the Island in the context of mutual legal assistance, extradition and in the practical administration of meeting international standards in criminal matters.

The work of the Department is reported in the Attorney General's Annual Reviews which are published on the States internet site (www.gov.je/LawOfficers/default.htm), where the Department's annual Business Plans are also available.

This job description may be subject to review in light of the current States decision to review the office of Bailiff, Attorney General and Solicitor General, and the outcome of any such review might bear upon the responsibilities and functions of the Attorney General.

3. The Bailiff's Duties

Royal Court Statistics - 2006 - 2009

	<u>2009</u>	<u>2008</u>	<u>2007</u>	<u>2006</u>
Royal Court sittings:	476 ½ days (breakdown attached)	348 days	359 days	362 ½ days
% of civil/criminal cases (in number of days sat)	Civil - 67% Criminal - 33%	Civil - 63% Criminal - 37%	Civil - 61% Criminal - 39%	Civil - 68% Criminal - 32%
Licensing Assembly sittings:	4 days	6 days	6 ½ days	5 ½ days
Warrants issued:	197	162	151	152
Production Orders issued:	105	68	97	122

Note - Sittings of the Licensing Assembly are additional to sittings of the Royal Court.

Presiding Judges

<u>Days in Court</u>	<u>2009</u>	<u>2008</u>	<u>2007</u>	<u>2006</u>
Bailiff (PMB)	36.5	53.5	67	99.5
Bailiff (MStJB)	33	0	0	0
Deputy Bailiff (MStJB)	44.5	107.5	102.5	113
Deputy Bailiff (WJB)	16.5	0	0	0
Mr F Hamon	23	33.5	29	24
Mr P Le Cras	0	0	3	4.5
Commissioner Bailhache	34.5	0	0	0
Mr J Clyde-Smith	133	103.5	61.5	0
Mr H Page QC	86	35.5	19	60
Sir Richard Tucker	41.5	11.5	7	38.5
Mr B Blair QC	0	0	2.5	3
Sir Geoffrey Nice QC	0	1.5	45.5	1.5
Miss P Scriven QC	2	0	17.5	0
Sir Christopher Pitchers	24	0.5	0	0
Sir de Vic Carey	0	0	2.5	2
Mr R Southwell QC	0	0	0.5	9
Lt Bailiff de Veulle	0.5	0.5	1	5
Lt Bailiff Le Brocq	1.5	0.5	0.5	2.5
Total Court days	476.5	348	359	362.5

Total days sitting in Court and Licensing Assembly by the Bailiff and Deputy Bailiff

	2009	2008	2007	2006
Bailiff	69.5	53.5	67	99.5
Deputy Bailiff	61	107.5	102.5	113
Total days in Court	130.5	161	169.5	212.5
Sittings in Licensing Assembly	4	6	6.5	5.5
Total days in Court and Licensing Assembly	134.5	167	176	218

Note 1 - The figures for 2009 are distorted by the fact that there was no Deputy Bailiff for four months due to the delay by the Ministry of Justice in making Crown appointments.

Note 2 - The figures for 2008 are distorted by the fact that the Bailiff was absent from the office for a period of six weeks due to illness.

1. Number of States meeting days

	TOTAL	Ordinary business	Ceremonial, etc.
2006	38	35	3
2007	45	44	1
2008	51	50	1
2009	60	59	1

2. Presiding in the States (hours)

	2006	2007	2008	2009
PM Bailhache	108h 09m	135h 37m	112h 15m	28h 27m
MC Birt	49h 34m	55h 40m	125h 51m	172h 57m
M de la Haye	33h 22m	49h 32m	58h 28m	99h 01m
AH Harris	0	0	2h 16m	8h 17m
WJ Bailhache	-	-	-	42h 20m

3. Presiding in the States (days)

	2006	2007	2008	2009
PM Bailhache	16.6	20.9	17.3	4.4
MC Birt	7.6	8.6	19.4	26.6
M de la Haye	5.1	7.6	9.0	15.3
AH Harris	0	0	0.3	1.3
WJ Bailhache	-	-	-	6.5

Bailiff's list of engagements

		<u>2009</u> *	<u>2008</u>	<u>2007</u>	<u>2006</u>	
Annual ceremonial *		7	7	7	7	Holocaust Mem Day, Liberation Day, D Day, Visite Royale, Battle of Britain Service, Assise d'Héritage, Remembrance Sunday
Concerts/Shows		16	18	15	13	eg Panto, Music Concerts, BoF, RJA shows
Receptions/Exhibitions		37	31	22	25	Inc receptions hosted by Bailiff, Sw In receptions (Jurats, Advocates), Exhibitions launches, Queens Official B'day
Conferences	<i>Bailiff</i>	1	2	2	3	Eg Rotary District conf
	<i>Judicial</i>	5	3	2	3	Eg Domestic Violence, CMJA, Family Law, Rencontre du droit Normande, Criminal Law Review
	<i>States</i>	2	2	2		Eg AFP Conf, BIPRA
Dinners/ Lunches	<i>Bailiff</i>	42	23	26	26	Inc dinners hosted by Bailiff and dinners attended as Patron etc
	<i>Judicial</i>	11	8	5	8	Inc retirement dinners for judges, legal conferences, Law Soc Annual Dinner
	<i>States</i>	6	10	5	5	eg CPA dinner, APF dinner, BIC summit dinner, BIPRA dinner
Off Island Meetings	<i>Bailiff</i>	2	4	7	10	
	<i>Judicial</i>	6	7	4	2	Inc JGLR
	<i>States</i>			1		States meetings off Island are usually conferences
Sporting Events		1	2		1	eg Muratti, Jeux Intervilles, Swim Chmp
Royal Visits		1	1	2		
Local Visits		4	5	9	6	Eg Post Office, Hospital, Police HQ, Prison, JEP
Ambassador visits		2	2	4	2	
		143	125	113	111	

NB: 2009 Retirement of Sir Philip Bailhache and swearing in of Mr Michael Birt as Bailiff

4. List of persons providing oral or written submissions

Written Submissions

On 3 February 2010, the Review panel placed an advertisement in the Jersey Evening Post asking for written submissions. Further advertisements were placed during the initial consultation period (that lasted until 31 March 2010) while the Review panel also wrote directly to key parties. Submissions were subsequently received from the following parties. Parties are listed with the title they held at the time of making their submission.

Attac Jersey	Mr Reginald Jeune CBE
Sir Philip Bailhache	Jurats of the Royal Court
Mr William Bailhache, Deputy Bailiff of Jersey	Mr John Kelleher
Mr Derek Bernard	The Very Reverend Robert Key, Dean of Jersey
Mr Michael Birt, Bailiff of Jersey	Ms Suzanne Le Brocq
Mr Peter Bisson	Deputy Paul Le Claire
Ms Jennifer Bridge	Mr Timothy Le Cocq QC, HM Attorney General
Chairmen's Committee	Mr Nicholas Le Cornu
Jurat Jill Clapham	Jurat Stanley Le Cornu
Mrs Barbara Clarke	Deputy John Le Fondré
Comité des Chefs de Police	Deputy Roy Le Hérisier
Comité des Connétables	Mr Bob Le Sueur
Major-General C G Cornock	Major Mark Le Sueur
Mr Geoffrey Cornwall	Mr Adrian Lee
Mr Peter Davis	Mr Robert MacRae
Mr A C K Day	Mrs Bridget Murphy
Mr Michael de la Haye, Greffier of the States	Miss Stéphanie Nicolle QC and Mr Terence Sowden QC

Mr Maurice Dubras	Mr Howard Page QC, Royal Court Commissioner
Mr Michael Dun	Mr Howard Roberts QC, HM Procureur of Guernsey, and Mr Richard MacMahon QC, HM Comptroller of Guernsey
Deputy Anne Dupré	Deputy Philip Rondel
Senator Sarah Ferguson	Sir Geoffrey Rowland, Bailiff of Guernsey
Jurat Geoffrey Fisher	Mr Howard Sharp QC, HM Solicitor General
Mr Derrick Frost	Senator Ben Shenton
Mr Joel Gindill	Advocate Philip Sinel
Mr Robin Hacquoil	Mr Robin Stevenson
Connétable Peter Hanning	Air Marshal Sir John Sutton
Advocate Timothy Hanson	Senator Stuart Syvret
Mr John Henwood MBE	Deputy Tracey Vallois
Mr Tim Herbert	Mr Nik van Leuven QC
Deputy F J (Bob) Hill BEM	Ms Vivien Vibert
Honorary Police Association	Mr David Warcup, Acting Chief Officer - States of Jersey Police
Mr Pierre Horsfall CBE	Mr Colin Wilton-Davies
Mr James Jenkin	Mr Michael Wilkins, Viscount and Judicial Greffier
Jersey Human Rights Group	

Legal Opinion

The Review panel agreed on 7 June 2010 to seek advice from a lawyer with knowledge and experience of the European Court of Human Rights on the Bailiff's roles in the Royal Court and States Assembly. The panel engaged Mr Rabinder Singh QC who has experience at all levels, from the Employment Tribunal to the House of Lords, the Privy Council, the European Court of

Justice and the European Court of Human Rights. A copy of Mr Singh's opinion has been made available on the Review panel's webpage (www.gov.je/crownofficersreview).

Hearings

The Review panel held four sessions of hearings (29 and 30 March, 4 and 5 May, 8 to 10 June and 1 and 2 July 2010). All hearings were recorded in order that a transcript could be made. The following parties were invited to appear. Parties are listed with the title they held at the time of their appearance.

Sir Philip Bailhache	Mr Robert Le Brocq
Mr William Bailhache, Deputy Bailiff of Jersey	Mr Timothy Le Cocq QC, HM Attorney General
Mr Michael Birt, Bailiff of Jersey	Mr Nicholas Le Cornu
Mr Michael de la Haye, Greffier of the States	Jurat Stanley Le Cornu
Jurats John de Veulle OBE, John Le Breton and Jean King MBE	Deputy Roy Le Hérissier
Mr Maurice Dubras	Miss Stéphanie Nicolle QC
Mr Michael Dun	Mr Colin Powell CBE
Advocate Richard Falle, Acting Magistrate	Mr Howard Sharp QC, HM Solicitor General
Mr John Henwood MBE	Senator Ben Shenton, President - Chairmen's Committee
Deputy F J (Bob) Hill BEM	Connétable Ken Vibert, Chairman - Comité des Connétables, and Centenier Danny Scaife, Chairman - Comité des Chefs de Police
Mr Reginald Jeune CBE	Mr Frank Walker
Mr John Kelleher	Mr David Warcup, Acting Chief Officer - States of Jersey Police
The Very Reverend Robert Key, Dean of Jersey	Mr Michael Wilkins, Viscount and Judicial Greffier

Visit to Guernsey

On 12 August 2010, the panel undertook a visit to Guernsey to learn about the corresponding systems that operate in that Island. During the visit, meetings were undertaken with the following parties:

- Sir Geoffrey Rowland, Bailiff of Guernsey
- Mr Howard Roberts QC, HM Procureur
- Mr Nik van Leuven QC
- Sir Charles Frossard

Public Meeting

On 2 September 2010, the panel held a public meeting at St Paul's Centre as a final opportunity for the public to give its views to the Review. 26 people attended and the record of the meeting was made available on the Review webpage.

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