

**Event: Public Hearing
Review of the Roles of the Crown Officers**

Date: 2nd July 2010

**Review Panel: Lord Carswell, Chairman
Mr G Crill
Dr S Mountford
Mr I Strang**

Witnesses: Mr T J Le Cocq QC, HM Attorney General

Lord Carswell (Chairman): We saw the Solicitor General this morning and talked to him and covered a fair bit of ground but there is nothing very remarkably different came out of his evidence to us, you will be happy to hear.

The Attorney General: It will be interesting to read what he said having now had, I suppose, a couple of months in his job.

Lord Carswell: He seems to be getting the feel of things. If you are ready we will get going. Could I just do a bit of sweeping up with a couple of topics of minor consequence? I was reading with interest in Sir Peter Crill's book that there used to be a convention that if there was a dispute between the Crown and the States, the Attorney General would advise the Crown and appear for them and the Solicitor General would appear for the States. The Solicitor General said he thought that was outdated and would not happen now. I take it that is the way you see it too?

The Attorney General: That is the way I see it. I am not entirely sure where that supposed convention came from or if it has ever been carried into effect. Somebody possibly stated it as the theoretical position in the past. But from my perspective we would represent, in effect, the Jersey position in the event of a dispute. We would do so jointly, there would be no distinction between us, I think.

Lord Carswell: That is what I would have expected and I think we can forget that one. If there are occasions, and I understood from Miss Nicolle that occasionally there had been, where the Crown and the States interests diverge then Law Officers would side with the Crown and you

would get advice and representation *ab extra* for the States; is that the position as you would see it?

The Attorney General: I have not had that experience yet. I think we would be advising, by “we” I mean the Law Officers, would advise the Crown in right of Jersey and if there were a dispute to be dealt with between the interests of the States as opposed to the Crown, then it would be sensible, in my view, to seek external advice.

Lord Carswell: That sounds correct in principle. I wonder, are there any occasions, real or in principle, where there might be a difference or a conflict between the Council of Ministers and the States as a whole; is that likely to occur?

The Attorney General: Well, I am sure in one sense there are conflicts which are resolved on the floor of the Assembly from time to time, but in the sense of being a conflict in the legal position between the two, I cannot imagine the circumstances where that is likely to occur.

Lord Carswell: Would you have, in principle, an attachment to one as against the other as a Law Officer?

The Attorney General: No, I would see my responsibility as advising the Council of Ministers and the States with the same legal advice. I cannot imagine a circumstance in which there would be a polarised legal position between the two.

Lord Carswell: I find it very difficult to think of it, yes.

The Attorney General: In one sense, although Ministers are corporations sole, the Council of Ministers is nonetheless an emanation of the States and it is difficult to see why there would be real conflict.

Lord Carswell: One does not want to foster the idea that it is an 'us' and 'them' anyway, quite the reverse.

The Attorney General: No, that is not the philosophy. Indeed, my Lord, that is not the philosophy on which ministerial government is based.

Lord Carswell: One of the functions of the Law Officers is to advise the Crown and Privy Council whether the laws can properly be passed, whether they are convention compliant and so on. Ministers have the duty, do they not, of signing them off as convention compliant before so would that normally have been done on the advice of the Law Officers or with reference to them?

The Attorney General: Yes, Article 16, I believe it is, of the Human Rights (Jersey) Law requires that there is a statement of compatibility with the European Convention. It goes with any *projet* filed or lodged on behalf of a Minister, interestingly not on behalf of any other States Member, but on behalf of Ministers. Invariably, I think, that will be given on the back of advice that had been given to the Minister by the Law Officers' Department.

Lord Carswell: So then there is not going to be an occasion where you will have to report to the Privy Council that this is not convention compliant because you have already satisfied yourselves that it is.

The Attorney General: Yes. If the circumstances came about where there was either something brought on behalf of a Minister where there was a serious issue over whether it was convention compliant, but nonetheless the Minister wished to take the view that it was, but we thought there was the possibility of a negative report, I think the Law Officers would have an obligation to raise that in the States, so that the States would not pass that legislation without being at least aware that it might be subject to a negative report from the Law Officers.

Lord Carswell: Yes, and if they did decide to pass it then you would have to flag that up to the Privy Council in whatever terms you thought appropriate?

The Attorney General: Yes.

Lord Carswell: This all hangs together as I had assumed. I am just glad to have it.

Mr. G. Crill: Are there any other areas outside human rights where the Attorney General would make a comment in respect of legislation?

The Attorney General: Yes. Generally the report that we make to the Privy Council is not limited to being compliant with the European Convention of Human Rights. It will also cover compliance with all of the international obligations of the United Kingdom that have been ratified by the U.K. on behalf of Jersey. So our report is intended to address anything of that nature so that could in theory be other conventions that we would need to take into account. There was one example, if I can help with that, in recent times that somebody, a Member of the States, sought to bring forward a proposition which would have moved in the direction of

naming and shaming of young people; a child with criminal offences. We took the view that notwithstanding there was a similar regime in the United Kingdom, as it had been subject to quite round criticism on the international stage as causing difficulties with at least the United Nations Convention on the Rights of a Child and the States had a policy whereas it was seeking to extend ratification in connection with that treaty, that was something we expressly raised in the States during the course of the debate; that if this was passed there may be a difficulty with ratification subsequently.

Lord Carswell: These are all very marginal in terms of the frequency.

The Attorney General: Yes, they are not something that happens all the time.

Lord Carswell: This next question of legal advice to Scrutiny and legal advice to Ministers; 3 months we have had since we spoke to you earlier, how has it been working in that time?

The Attorney General: I have not come across any difficulties in the intervening 3 months or anything really to add to the observations that I made before. That being said, I do not think there have been a large number of occasions in which we have been advising on the same matter both to Government and to Scrutiny. There has at least been one however, possibly 2, but it has not caused us any difficulty at all.

Lord Carswell: I think, very sensibly, you take the view that rather than send Scrutiny off to independent lawyers with delay and money involved, if it is not a controversial issue of law you can advise both and simply tell them what the law is.

The Attorney General: Yes.

Lord Carswell: It is when you get into difficulties of interpretation and application that the interests may diverge more.

The Attorney General: Yes, although this has not been my experience. I suppose the way it could evolve is that one would get a general question relating to a point of law from Scrutiny on a matter on which you have already been advising Ministers. You would revert to Scrutiny with your view on what the law is. Then that might give rise to other questions, which could move from a statement of what the law is into how it might be applied, what the difficulties might be, and there may come a time, I suppose, when one would say: "No, I think you need to seek advice elsewhere on those particular issues." But I have not come across an occasion like that yet.

Lord Carswell: We had when this was raised on behalf of the Scrutiny Panel's ... first raised in a written submission of some little time ago they said that really very often 2 things. They wanted not so much the actual advice as to what the Minister should do but (1) the legal basis, the legal substratum of what the law was that was the background, and (2), the facts upon which the Law Officer was giving his opinion. Now, the first one is easy, you have dealt with it. The second one, does that cause any problem in practice or are you unhappy with that being passed across?

The Attorney General: One would normally give advice against the backdrop of the facts that are communicated to you by the person who is seeking the advice and so to an extent the advice has embedded in it reference to the facts on which it is based. Is the question,

however, on passing the facts on which you have given advice to the Government on to Scrutiny?

Lord Carswell: Yes, that is really what they seem to be seeking in these submissions. They say, I do not know quite with what basis, but they say they need to know the law that the Ministers are being told to apply and, secondly, what facts the Attorney General (and the Solicitor General) has received upon which he has given an opinion, without wanting to have the opinion itself, and the details ... they would like to know the facts so that they can then apply the law to those facts or ask their advisers. Is that a practical problem or is it ... it depends very much on the way that you get the facts.

The Attorney General: I think that is right. The view that I have taken certainly is that when facts are communicated to me they attract to them legal professional privilege in just the same way that any other facts given to a lawyer would. I have not given any thought as to whether it is possible to go to Scrutiny but I can see concerns with that because I think in very many cases that will simply amount to communicating the legal advice.

Lord Carswell: Yes, that really was what was buzzing in my mind. Could I put it in this way; that I am just really looking at it as an outsider in a fairly uninformed way but this is a matter for just constant accommodation between the Ministers and Scrutiny, that cannot have hard and fast rules if the Law Officers and the Ministers are prepared to be sensible and flexible. That is about as much as you can enjoin them to do and leave them to it rather than for us to try to lay down any further rules.

The Attorney General: I think it would be difficult to lay down hard and fast rules in connection with it. There is of course a Code of Practice, which I do not know if you have had the chance to read, which I think, as I mentioned on the last occasion, evolved out of a period of quite strong discussion. It was not an easy document to evolve.

Lord Carswell: I am aware of that.

The Attorney General: It seems to me that if one simply says there should be an element of flexibility one has to ask: "What does that mean?" If it is the case that Ministers will, by and large, say: "Well, we do not really mind if you see the legal advice", I think there is a danger inherent in that. Once one releases the principle of giving legal advice then it becomes a matter of political pressure as to whether legal advice is released in all circumstances. That is, I think, difficult given the structure of the States where Ministers could come under very considerable political pressure to release legal advice. My preference, I think, is for a fairly bright line that legal advice should not, in most circumstances, other than in exceptional public interest circumstances, be released as a matter of course. I do accept that there is always room for flexibility but I can see a situation where it may simply become difficult for Ministers not to release legal advice even when it would not be a good idea to do so.

Mr. I. Strang: Do you apply those rules when you are advising Scrutiny within the Law Officers, i.e. someone else in the Law Officers is advising Scrutiny and, say, yourself ...

The Attorney General: That would depend entirely on the nature of the question. By and large, the kind of advice that we give to Scrutiny is not particularly controversial, the kind of advice we give to Government would not be controversial and there would not be a difficulty

with the same individual with that expertise in the law giving the advice in both directions, and would therefore be aware of both requests. What they would not do is to communicate what advice had been given to Government, to Scrutiny, and vice versa. There could, I think, theoretically be a circumstance in which there clearly was a rather more difficult set of facts ... not facts, but a difficult position to resolve and it might be more appropriate for someone different within the Law Officers' Department to advise Scrutiny.

Mr. I. Strang: It could get difficult, one adviser advising both. I mean, okay, not all the time but it might transpire that if there is any additional question then it shows that it would make it doable and you have already got the knowledge.

Mr. G. Crill: Or, as you say, the advice is dependent upon the facts delivered by the person seeking the advice, if the person seeking the advice is working on what you know to be a wrongful premise because they have perhaps misconstrued the position which you know from having advised the other party, if you like, then perhaps you are in a slightly difficult position.

The Attorney General: Yes, I think it is a situation needs to be managed on an issue by issue basis. Sometimes there are circumstances in which it is not appropriate for the same person to advise or it is not appropriate for us to advise at all. The vast majority of cases I think we can advise without any difficulty and that carries with it what I think is a very significant advantage of consistency when you get into the Assembly.

Lord Carswell: By and large, have you found it possible to work with the Code of Practice in its present form?

The Attorney General: Yes. I am not aware of an enormous number of requests for legal advice from Scrutiny. I think usefully there could be more. But I am certainly not aware of any circumstances where it has been difficult to follow the Code of Practice. There have been one or 2 occasions where Ministers have mentioned Law Officers' advice as they have gone through a Scrutiny hearing, which is not in accordance with the Code of Practice, and I have drawn it to their attention, but no particular problems.

Lord Carswell: I take it, it would be quite open to the States to make amendments to the Code of Practice if experience showed it was necessary?

The Attorney General: Absolutely. It is simply a matter of a proposition followed by a debate.

Lord Carswell: Has there been any move since the present version was adopted to change it?

The Attorney General: I think the Codes of Practice are under broad review at the moment by the Privileges and Procedures Committee. I might be wrong about that. Whether there are moves to change that particular code I am not certain.

Mr. G. Crill: If they said that all legal advice should be freely interchangeable, would that create a problem for you? I am not suggesting that there is any reason why it should.

The Attorney General: I think there are a number of problems, certainly one problem in practice which that would cause, is that I am not sure that it would not discourage people from seeking legal advice. Quite often, for example, and I think I mentioned on the last occasion,

the real benefit of seeking legal advice is when something is in the process of going wrong, when there is a problem. If you knew that something was going wrong, you would wish your instructions to be as frank as possible. If you knew that they were going to be automatically revealed to a Scrutiny Panel or in the Assembly, then I think fewer people will come along and say: "I may have made a mistake here, how do we put it right?"

Lord Carswell: Also, it would inhibit the giver of advice from producing the sort of really useful, helpful advice that you can give when you are being as candid as we would expect to be.

The Attorney General: Absolutely.

Lord Carswell: Coming back to the question of facts, cases to advise may say the facts are clear there, A, B, C, D and E, but not all of them do.

The Attorney General: No.

Lord Carswell: They can go into questions which are disputed and things that you would not wish to put into the public domain.

The Attorney General: I think that is right.

Lord Carswell: It is why I say that I would be very slow myself to try to tell you how to do things hard and fast at all.

The Attorney General: The difficulty with a wide dissemination of advice, in general, is that it does rather expose the States in litigation if a matter falls into dispute later on.

Lord Carswell: I think possibly that having adopted a Code of Practice, whatever the difficulties in getting it agreed and working it without great problems for a while, is probably the best way forward from the point of view of leaving it open to the Scrutiny Panels if they need to but not encouraging them to fly off every case that comes up.

The Attorney General: I am sure the vast majority of cases there would be no difficulty at all with Scrutiny Panels seeking advice from the Law Officers and the Law Officers providing it.

Lord Carswell: Naturally the ones that have been highlighted to us are where there are difficulties, not where there are not because there is no point in worrying the Panel about them. Anything else on that issue, gentlemen?

Could I move on to the position of the Bailiff, which we did not really get examining with you ...

The Attorney General: We started, did we not, and we did not quite ...

Lord Carswell: We did not really get going. Could I ask a very small peripheral question, which I think the Solicitor General was able to clear up for us, the Licensing Assembly, I think I am right in saying there is not an appeal from that, is that right, apart from judicial review?

The Attorney General: I think apart from judicial review there is no right of appeal from the Licensing Assembly. That is my recollection. I must say I have had little to do in practice with

licensing since I took office and so it would be wrong to say I have detailed understanding of the statute, but I think that is right.

Lord Carswell: Because it is not really our function to say whether there should be or thought it should be but if there were then one would have to consider the position of the Bailiff where he should come in but if that does not happen we will leave that for somebody else to deal with some other time. One of the central issues, of course, is the Bailiff's role in the States, this has been the subject of most of the material we have had to consider. One of the questions we have had before us is whether anybody else could do the job as well. But the immediate subsidiary question is, is it really necessary to have somebody of the skills and qualities that the Bailiff is likely to possess to preside over an Assembly such as the States of Jersey or could it be done quite satisfactorily by what I might call crudely downsizing? You have had some experience now in the Assembly, in the States, do you feel able to offer a view on that?

The Attorney General: Yes, it is very much a personal view obviously. Growing up as a Jerseyman, the Bailiff was President of the States and always has been President of the States. I believe the knowledge that the Bailiff is President of the States is part of the way that we think about the Government of our Island, the way we think about the States as operating and I think that it is important for the standing of the States in the Island. That is my personal view. Whether someone other than the Bailiff or his Deputy could effectively do the job, I am sure there are other people who could function as a President of the Assembly quite well. One would have to get into the issues as to who that might be, how they would be selected, whether they would be remunerated, the level of legal support that they might or might not need, their standing, their ability to deal with issues as and when they arose and my instinct is that the Bailiff brings by dint of his training, by dint of his status as Chief Justice in the Island, a

standing and gravitas to the role which makes it that much easier to deal with issues as and when they arise in the Assembly.

Lord Carswell: I do not think anyone would dispute that, Mr. Attorney. I think that has been accepted by everybody. The question is, you are having a Rolls Royce job done by the Bailiff, would a lesser vehicle be sufficient bearing in mind that there are substantial deliberative bodies, local authorities and things in the mainland which have presiding officers from within who do not have formal qualifications but seem to manage very well.

The Attorney General: I do not know the answer. It is a difficult question to my mind. The Bailiff, I think, certainly does do the job quite superbly and deals with the Assembly in a very fair impartial way, which I believe has the respect of most Members. I think that that is a view reflected in the Island. It is from my perspective at least.

Lord Carswell: We have heard that universally.

The Attorney General: I apologise for saying it again, in that case.

Lord Carswell: No, I would be glad to have it from you.

The Attorney General: In terms of the Rolls Royce and other vehicle analogy; I am sure another vehicle will get you there most of the time. A Rolls Royce will get you there all of the time and probably in considerable comfort even though the road is very bumpy and difficult. I am sure there are a large number of sittings where it would be perfectly feasible for anybody

else of a certain calibre to deal with them. There are those sittings, I am sure, when it being the Bailiff is a very important thing indeed.

Lord Carswell: May I just interrupt you for one moment while I mention; we have been sitting early because the Attorney General was available and rather than keep him waiting we will get an opportunity to let you take your footage and break for a minute or two. The other half of this is, and I can very well understand the view that a number of people have presented to us that there is no particular magic in the job. It is just done very well with a Bailiff that could be done quite satisfactorily by a range of other people, but looking at now the Bailiff's standing if one takes away, if that were our recommendation, if one advised and the States accepted that he should not preside anymore but some other arrangement should be made, we have had people saying to us, perfectly sensibly, then his main job would be Chief Judge. The Chief Judge in most societies is an honoured position but he is not the number one man. He is not the Civic Head and would not expect to be. I wondered if that is putting the cart before the horse. The Bailiff is the Civic Head because he descends from the all powerful person in charge of all civic affairs. One of the components of being that was that he was Chief Judge and another component was that he was President of the States. A third component was that he represented the people of Jersey symbolically but importantly in a lot of public appearances and dealings with other people, the latter part has somewhat receded since ministerial government but not disappeared, the formal part is still there. To put it frankly, do you think he could still carry it off and be accepted as the person of standing, the number one citizen that he is, if he were not President of the States? That is a long way of putting a difficult question.

The Attorney General: There are a number of things that occur to me to say in answer to that. I think the Bailiff's position as Civic Head of the Island is an emanation of the various functions

that he holds: Presidency of the States, Chief Justice, those kinds of things. I do not think it sits as a separate head in my mind, it is an emanation of the combination of the two. If you take away one engine from the plane, however it is you put it, then the underpinning for that position, I think, falls away very significantly. If a switch were to be flicked tomorrow and the Bailiff were no longer to be President of the States, it feels to me like he could continue as Civic Head for a period, but ultimately that would be, to my mind, a significant undermining of the position of the Bailiff, which will be reflected in the reality over a period of time. The office would cease to have the same standing over a period as people come to appreciate the reality of the Bailiff's reduced role.

Dr. S. Mountford: Would he not still be Guardian of the Constitution because that is part of the Civic Head responsibilities?

The Attorney General: The guardianship of the Constitution is not so much in the public eye. It is not really a public function. It is not secretive, but it occurs very much as part of the office function the Bailiff fulfils. He is part of the official correspondence sequence, as I am sure you have heard other witnesses talk about. In that capacity he is able to have an input into warning and advising in connection with constitutional affairs. But I am not sure that is in any sense at the forefront of the public mind when they think of what the Bailiff does. I think when people think of what the Bailiff does, he is the Chief Judge, and he is the President of the States.

Lord Carswell: And the man who fronts at Liberation Day and royal visits and all the important public occasions.

The Attorney General: I am sure, without making the link, people would go on to say “and for that reason” is “the man who fronts...”. That would be my understanding of it.

Lord Carswell: It is, just as a matter of pen and paper, perfectly possible to have a protocol list, they have it in other places, who ranks before whom and if the Bailiff is put firmly up where he is with the Lieutenant Governor, one in front in one place and one in front in the other, his position is formally assured. You are concerned that it would not carry the standing in the public mind?

The Attorney General: As I mentioned, I think from the change day plus one, there would not be any appreciable difference. I think the change day plus 101, if I can put it that way, there would be a difference. I think it would begin the scaling down of the Bailiff’s standing within the Island.

Mr. G. Crill: Would that matter?

The Attorney General: That is very much a matter of personal judgment and opinion.

Mr. G. Crill: I was going to say, from the matter of the public perception does the public not understand better the position of an elected head rather than some historical emanation?

The Attorney General: I did not mean to say it was an emanation of history. I meant to say it was an emanation of the current positions that the Bailiff holds. I do not wish to be flippant and say, in a sense, one would have to ask the public that. Speaking personally, I have grown up

understanding what the Bailiff was about and so, no, I would not say that I agree with that proposition. But it could be that other people would.

Lord Carswell: It is something we are just going to have to think about very carefully, Mr. Attorney, but you have articulated that view very clearly and we are grateful to you, thank you.

The Attorney General: I think it is a very difficult issue indeed. It is 800 years of history.

Mr. G. Crill: Can I just ask if there is any dialogue as between yourself and the Bailiff on States matters?

The Attorney General: No.

Mr. G. Crill: Outside the Assembly?

The Attorney General: Outside the Assembly, a dialogue on States matters?

Mr. G. Crill: Whether you discuss the Order Paper or anything like that?

The Attorney General: No. There is a dialogue on constitutional matters. If something comes through the official channels and I receive it via the Bailiff's office or however it comes to me. I might well have a conversation with the Bailiff on matters of constitutional import: matters relating to Royal Assent, things of that nature. But, no, I cannot recall a conversation with the Bailiff on anything in particular relating to the order paper. I suppose I might have had

a practical discussion with him about something but I cannot immediately recall anything of that nature.

Lord Carswell: You would have some occasions on court matters but, by in large, an Attorney General does not go and bother the Lord Chief Justice, he is not expected to.

The Attorney General: No. I think there were certain aspects of constitutional matters where the Bailiff and the Attorney General do work closely together and so I would speak to the Bailiff moderately regularly about constitutional matters, but not really about anything else.

Lord Carswell: You have set out in your written submission very fully and carefully your view on the Article 6 issue. If I may just come back and explore that a little bit further with you. It is very simple to distinguish cases such as *McGonnell* and *Barclay* on the facts, any competent lawyer can do that. If they stood alone one might say with some confidence that you simply would look at each case and decide what connection the Bailiff had had with the piece of legislation, if any, and the answer would become quite clear.

Applying the principle, which the Solicitor General referred quite correctly this morning, that the Strasbourg Court is interested in particular cases and their effect on the fairness of proceedings, but what has troubled us, and I am just putting it that way deliberately, is that the Commission was prepared to look wider and it has never been reversed overtly by the court. The Commission was really prepared to say, in effect, that the position was not compatible, whether or not there had been any direct contact with the legislation. The Court of Appeal in *Barclay* was of the same opinion; it does not govern, it does not bind, but it is the opinion of 3

pretty experienced public lawyers. I wonder to what extent there might be a risk that that is the way the court's opinion might be moving in Strasbourg.

The Attorney General: I am not aware of any additional case law that touches on this particular point so ...

Lord Carswell: No, I think you have referred to it all; that I know of certainly.

The Attorney General: Absolutely. So I think anything that one would say about the way things might be moving in Strasbourg, must inevitably be speculative. My understanding of the *McGonnell* case is whereas indeed the majority of the Commission, I think Sir John Laws took a different view, but the majority of the Commission did indeed give its opinion on the basis of the larger structural issue. It was open to the European Court to go with that larger structural issue but it elected not to do so. I agree it did not deal with it and say that it was not correct. But equally it could have gone in that direction but chose not to. It chose to go on the narrower point of the specifics of the case.

Lord Carswell: The courts are always doing this, Mr. Attorney.

The Attorney General: This is true. So I suppose that would lead me to take the view the court in Strasbourg is going to ... the only example we have is that it goes with the specifics of the case, when it had the option and the argument before it put in quite clear terms that it should look at the larger structural picture. So I suppose that would be the first point. My understanding of the *Barclay* judgment, (and I would have some, perhaps, with respect to the judges involved, less than complimentary observations about the way the arguments might

have been put and by whom), but letting that stand to one side for a moment, my understanding is that what the court did say was that one should not go along the basis of any theoretical principle of separation of powers or anything like that, but look at the specifics.

Lord Carswell: No, they accepted the general position.

The Attorney General: That seems to me to be an example in which the court has gone a different way, from the European jurisprudence coming from Strasbourg. I suppose putting those two together, my view is that as things presently stand it would amount to a sea change in the attitude of the courts, if they were to say “no, something fails because structurally there is an issue”, as opposed to on the particular circumstances of each case. I suppose I would accept that it is always possible that the court will go in that direction. But another principle that I think emerges from the case law is that it is important to look to the peculiarities of the jurisdiction that you are considering, particularly where small jurisdictions are concerned, in determining the answer in any particular case. Adding that to the pot, my view is that there is a fairly clear statement of the European Court’s position to the effect that one looks at the particularities of the case and does not come to it from a larger structural question. I would go on to say that that is where we are and it is speculation to think that we might go in any other direction. I suppose it would be possible for the court to affirm or reinforce the attitude that it should deal only with the specifics of the case and pay a great deal of mind to the needs of small jurisdictions. I do not mean to dismiss the point in any way at all, but I just think we are where we are, and I am not sure there is any impetus that I can detect that it is going in a different direction.

Lord Carswell: Thank you very much. Will you excuse me just a moment? I am afraid we started early because the Attorney General was here and rather than keep him waiting until the public arrived at the advertised time, which you are correctly at, we felt we should go ahead, but the transcript will be published. Our apologies to you for starting without, but we felt it was better to do that.

Member of the Public:

I have an interest because I am also a lawyer and I have worked in many small jurisdictions, but I happened to be in a course next door and I heard you were sitting here. I have only popped in for 5 minutes.

Lord Carswell: You are perfectly welcome, Sir.

Member of the Public: Thank you very much.

Lord Carswell: The position then, Mr. Attorney, is that if the Bailiff has been sitting at ... I better repeat for the benefit of Mr. Dun, who is a very faithful attendee. I am sorry we have started before the scheduled time, Mr. Dun, but the Attorney General was here and we felt that rather than keep him it would be better to go ahead, but on the basis that the transcript will be available and you will be able to catch up. I apologise to you if it is inconvenient.

Member of the Public: I was in the ante-room. I could have been woken, but never mind.

Lord Carswell: If the Bailiff had been concerned as the Deputy Bailiff was in *McGonnell* fairly directly with the passage of the legislation no doubt he would recuse himself or it would be

brought to his attention and he would look at it and say: “Yes, that is a case where I should not sit”, it obviously has not happened very often in recent times as far as we are aware; would that be your impression?

The Attorney General: The court has recused itself from time to time but not, as far as I am aware, for those reasons.

Lord Carswell: There was one commentary in an article that was drawn to our attention which suggested that the only safe rule would be for the Bailiff to recuse himself if the subject of the litigation, particularly if it had been interpreted, if the law had been passed when he was in the Chair, whether or not he actually did anything but just sit there; have you any observation on that idea?

The Attorney General: I think merely sitting there during the course of a debate would not necessarily give rise to any Article 6 difficulties. That would not be in accordance with the case law examples, as I understand them, but I think a conflict is one of those things that one relies to a great extent upon a judge to recognise and to govern himself accordingly. It may be more prudent, if the Bailiff has sat as a President on a particular matter, that he would recuse himself in a particular case. But I think that might very well depend upon the circumstances. Not merely the fact of his sitting.

Lord Carswell: It is a very delicate matter of recusing oneself and it is one of the more difficult things that judges have to tackle – sometimes very delicate indeed. But, in general, this is all turning on perceptions. This is perceived bias, not by any stretch actual bias, and if that were all that were in it the subject could be closed. But it is the question of perceived bias, as

Strasbourg has said, that the person outside the movement of political affairs might think that the Bailiff had been too close to it and would be perhaps unconsciously motivated to uphold a particular view. Is it desirable, even if it is rare enough that a judge should be having to recuse himself because of other activities like that? I just have a sort of concern that it does not look right to the outside observer.

The Attorney General: That a judge would deal with the case arising out of a statute which is passed while he has sat as President of the Assembly?

Lord Carswell: That and the question of being very conscientious, recusing himself whenever anything arose that might remotely be regarded as giving him any tilt either way, should that position really be removed by taking it out at the root?

The Attorney General: I think one can take an absolutely purist view of these things and disregard a large number of other important factors, factors which are important in my view, and say that if you were designing a system from the bottom up you would not start from here. I think that is clear. However, whereas I can see the argument that one could completely remove any suggestion of even the slightest frisson, smallest frown, that might arise out of a particular set of circumstances along the lines that you have described, I am far from certain that that outweighs all of the other points that have been made.

Lord Carswell: If I turn it round a little bit, and put it another way. Any sensible judge tries to make sure that the things that he does in other capacities are not likely to cause any problem in his judicial capacity and if they do he recuses himself, but the wise judge has avoided that in the first place very, very often, by simply seeing that doing something that could be a problem

if I had to decide upon it I will not do it. Now would it be wise, as a matter of principle, for a Bailiff rather than having, from time to time, to recuse himself, simply to remove the cause? I am putting the ball into the second row there.

The Attorney General: I understand and, in a sense, it is difficult to know how to answer that because I come back to the fact that as a matter of pure theory I am sure that there is force in that, one could draw a bright line and even the slightest possibility could be removed. I think the price would be altogether too high.

Lord Carswell: Yes, you have made your position entirely clear. Thank you.

The Attorney General: I am sorry if I have perhaps made it too clear.

Mr. I. Strang: On the other side, if there was a finding of breach of Article 6(1) then presumably Jersey will need to take some action. If it can happen once there will be a danger it could happen again.

The Attorney General: Yes, it would depend very much on the facts of the case, but quite clearly if there was a finding in Strasbourg of a breach of Article 6(1) by dint of the fact that the Bailiff presided both over a court and as President of the States on a particular occasion one would then have to look at the process again. I am sure that would be right.

Mr. I. Strang: So then Jersey would almost be forced into a situation where the States have to look very carefully at taking leave and bringing it back to the States. Would that not bring us into some disrepute internationally?

The Attorney General: I think it is quite difficult to speculate, but I suppose what I would say to that against the hypothetical possibility that such a finding were to be made, I am sure one could immediately manage the operation of the Bailiff's office in a way which prevented anything similar happening in the future, as a matter of practicality. I am sure, although I am not aware of them, that steps are made to do that now. I am certain that the Bailiff and the Deputy Bailiff receive the order papers of the States in advance, they may well take views that there are things that they should not preside on and they may well make those adjustments between them. I would be surprised in the light of the *McGonnell* case that they did not make those kind of judgments already, so I am sure one could make internal arrangements that would manage it.

Mr. G. Crill: I believe that the Bailiff and the Deputy Bailiff keep a note of those laws over which they have presided in the Assembly. Do the Crown Officers do the same?

The Attorney General: No.

Mr. G. Crill: In the event that they might be sitting in judgment at some future time over a matter in which they have perhaps been advising the Chamber?

The Attorney General: No. No, I do not.

Lord Carswell: You have not been tempted, Mr. Attorney?"

The Attorney General: I am just about to make a note to myself! I suppose that one could say that there is no secret to what happens in the Assembly. It is broadcast. There is a Hansard and merely hearing the course of a debate I am not sure would ever give rise to any difficulty. I suppose if one had advised during the course of that debate ...

Mr. G. Crill: That is really what I was thinking of.

The Attorney General: Then that might be ...

Mr. G. Crill:

In fact more so perhaps than merely sitting as President of the Assembly at the time ...

The Attorney General: I agree with that, I think.

Mr. I. Strang: So there could be some problems with that, if there were a problem there, because we have got a Bailiff who was formerly the Attorney General and advised the States.

Lord Carswell: This happens in all societies where people change roles as they move up. Inescapable. But it is always transitory because there is a transition period always when you get a new person in a job such as Bailiff or Chief Justice or whatever, where things have been done before, will be back and immediately will recognise the problem and say: "Well, cannot do that because ..."

The Attorney General: That is certainly my experience.

Lord Carswell: That does not run the general principle. That is just workable as a method of transition.

The Attorney General: I think it is, it happened to me when I moved from private practice into the Law Officers, and I know there were things that the Deputy Bailiff could not sit on because they had a currency within the Law Officers' Department while he was Attorney General.

Lord Carswell: There is nothing new in that. I think I have covered all the ground I wanted to.

Mr. G. Crill: On the sort of miscellaneous items, the position as the *partie publique* where the Crown Officers' chambers are generally the repository of all matters which do not have a natural home elsewhere, apart from the question of resourcing that, is there any area that causes you difficulty with any of that?

The Attorney General: No. There are no areas where one has been either the *partie publique* or has various functions to fulfil which are historic of nature, curatorships, those kinds of things, which have caused me any difficulty. That is something we manage within the workload of the Department. As I say, resourcing is a different question.

Lord Carswell: There was one minor organisational thing I did want to ask you. Your Department which runs prosecutions under a Director of Criminal is pretty well self-contained, is it not?

The Attorney General: Yes, until it reaches the level of the Law Officers, yes it is.

Lord Carswell: In practice, the Director of Criminal, if he has a difficult case, may be free to consult either Law Officer?

The Attorney General: Yes. I will meet with the Director of Criminal by and large on a daily basis and I will discuss a range of issues with him relating to the current state of certain investigations, the current state of certain prosecutions, where decisions have to be made that are material he will generally come along and inform me.

Lord Carswell: That is a very regular affair in your office?

The Attorney General: Yes, it is.

Lord Carswell: Perhaps much more so than the Attorney General in England and Wales who is only consulted when there is some very particular issue but it does not surprise me at all.

The Attorney General: No, it is certainly not as rare as it would be for the Attorney General in England and Wales.

Lord Carswell: It is a different set up.

The Attorney General: The Director of Criminal would not consult me on anything relating to administration within his division unless, I suppose, there was a major problem. But he would bring to my attention anything that was out of the routine or of particular importance to the Island.

Lord Carswell: There was some mention of the possibility of pretty well self-contained departments so that if advice had been given via one part of your office to Ministers and then a question of prosecuting a Minister arose a Chinese wall would keep them apart, but it does not seem to be as easy as that because both ends of it are in constant contact with the Law Officers.

The Attorney General: At the Directorate level?

Lord Carswell: Yes.

The Attorney General: Yes, there is fairly frequent contact between the Law Officers. All the Directors plus the Law Officers form the senior management team dealing with matters of general administration within the Department in any event, so there is a kind of plenary group that sits and discusses issues relating to the Department as a whole. There is not much discussion I believe if any between divisions about the business of the individual divisions, but in matters of common interest, there would be a fair amount of discussion. I am not sure that I would characterise it as “constant contact”, and my contact with the Directors, which would probably be daily, would generally be on specific matters of current concern. There will be many matters, items of work in each division, which I will not discuss with the relevant Director. They will be processed without my involvement.

Lord Carswell: So you and the Solicitor General are very much hands on in all activities that go on within your Department?

The Attorney General: I am trying not to mischaracterise it to give you a false impression because it is quite difficult to give you an entirely accurate impression. There are some days of course that will go by when I might not see the Director of the Criminal Division, there are other days when I will see him on 2 or 3 occasions during the course of the day. The Solicitor General will have a much lesser involvement with any criminal matters, as traditionally the Solicitor General has not tended to deal with those and the Attorney General has.

Mr. G. Crill: It has been suggested in some of the submissions that the question of whether to prosecute could be influenced by potential embarrassment either to a Minister or to the Crown Officer in relation to advice that had been given on a particular subject in which prosecution was contemplated. What practical steps are there to ensure that the considerations of prosecution are entirely separate from the record of advice?

The Attorney General: Considerations such as embarrassment, in other words? I think I mentioned on the last occasion, possibly here or possibly in my written submissions, I cannot remember which, that in the event that a possibility of a prosecution arose in a matter where I had given advice to the Minister, which was directly relevant to the subject matter, then I would hand that to the Solicitor General or it would go out to an external advocate for external counsel to advise on prosecution, and I would, if it were appropriate to do so, take no further part in it. There is a continued, in a sense, mutual oversight because these decisions are not taken in isolation. I have given authority for prosecutions to be brought or not but only after some discussion with the Director of Criminal, or outside counsel for example. I have not encountered difficulty in the form that you mentioned. There is however no formal mechanism in place. It would be difficult to see how one would come into place in terms of making the

prosecution decision, but whenever we come across a matter where we think it would be important to have this considered outside then it goes outside for consideration.

Lord Carswell: I think that covers everything then. Mr. Attorney, we are grateful to you. We have troubled you very considerably over the course of this review but we have received a great deal of assistance from you. We are grateful indeed and particularly for today's session, which I think has amplified and covered a number of things that we wanted to clear. It has all helped to give us a very good picture of what is happening and how it is viewed, so thank you very much for coming to speak to us again today.

The Attorney General: Thank you very much. May I make one additional point, if I may? It may be that it is wholly unnecessary to do so, but I have not had the opportunity to review all of the evidence that has been given to you, but I did notice one thing that was said to you, which is just wrong in fact, in my opinion. The evidence of Mr. Henwood, when he gave you, referred, I think at page 25 of the transcript, to the role that he suggests the Attorney General has in acting as the Quartermaster, as I believe he puts it, to the funding requirements of the court and the Probation Service and things of that nature. He goes on to say that the Attorney General, I think ... I cannot say precisely how he puts it, the Attorney General thinks of a number and there is no scrutiny. I do not know whether that is in any sense relevant to your deliberations but what I can say is that that is a process which I do not recognise. As far as I am aware the Attorney General has no role at all in the funding of the court, either to recommend a figure, pluck one out of the air, or otherwise, and I am just not sure where that has come from. So to the extent it is of any relevance at all, I wish to correct it, if I may.

Lord Carswell: Thank you very much. I am not wildly surprised. Thank you so much, Mr. Attorney.

The Attorney General: Thank you very much.