



States of
Guernsey

Access to Public Information Request

Date of receipt: 9 July 2019

Date of response: 10 January 2020

Request regarding the Review of the Relationship between the States of Guernsey and St James Chambers

Request for information:

The Policy & Resources plan makes reference to a review P&R commissioned of the relationship between the States and St James's Chamber which has not been published. I would like to request a copy of that review under the code.

Response (provided by the Policy & Resources Committee and St James Chambers):

'The Review of the Relationship between the States of Guernsey and St James Chambers' is provided as an attached document. Redactions have been applied to the document where appropriate, in line with exceptions 2.3 (Effective management and operations of the public service) and 2.4 (Internal discussion and policy advice) of the Code of Practice for Access to Public Information.

For greater context, the document entitled 'Review of the Relationship between SOG and SJC – SJC response' is also provided, and is similarly redacted in line with exceptions 2.3 (Effective management and operations of the public service) and 2.4 (Internal discussion and policy advice) of the Code of Practice for Access to Public Information.

REVIEW OF THE RELATIONSHIP BETWEEN THE STATES OF GUERNSEY AND ST JAMES' CHAMBERS

**Peter Harwood (Chair)
Deputy Matt Fallaize
Advocate John Langlois
Claire Smith**

21 July 2017

Letter from the Chairman of the Panel to the President of the P&R Committee	4
Definitions	5
Executive summary	6
Conclusions and recommendations	7
Introduction	12
Panel	12
Engagement and consultation	12
Role and responsibilities of the Law Officers of the Crown	13
Mission statement	13
Areas of responsibility	14
Findings of the review	18
Clarification of terms	19
Title of 'Crown Advocate'	19
Distinction between Law Officers and St James' Chambers lawyers	19
Potential structural changes to the relationship	20
Potential for separation of the legislative drafting function	20
Potential for the appointment of a parliamentary clerk	21
Potential for the creation of a separate Guernsey Legal Services Department	22
Potential for the secondment of lawyers from St James' Chambers to the executive teams with the different Committees of the States	22
Potential for the recruitment of a 'general counsel' to the P&R Committee	23
Potential for the outsourcing of commercial advisory functions	23
Potential enhancement of the role of Director of Legal Services within St James' Chambers	24
Non-structural (organisational/cultural) issues	25
Role and independence of the Law Officers	25
Independence from the States of Guernsey	26
Financial controls and transparency	27
Relationship between St James' Chambers and the Chief Executive of the States of Guernsey	28
Defining and embedding best practice in the States of Guernsey	28
Understanding cost and value	30
How the States of Guernsey works with St James' Chambers	30
Commissioning external advice	31
Independent advisory panel	31
Importance of a memorandum of understanding	32
Appendix: draft outline memorandum of understanding	33

Deputy Gavin St Pier
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21 July 2017

[Dear Gavin]

Review of the relationship between the States of Guernsey and St James' Chambers

In autumn the Policy & Resources Committee invited me to chair a review of the relationship between the States of Guernsey and St James' Chambers.

Please find attached a copy of the final draft of the Panel's report. At this stage the draft has not been shared with St James' Chambers, and further to the Policy & Resources Committee having sight of it, my recommendation is that it is then shared with HM Procureur, HM Comptroller, and the Director of Legal Services.

I am very grateful for the expert support provided by the other members of the review panel – Deputy Matt Fallaize, Advocate John Langlois and Claire Smith, and the input of members of the Strategy & Policy unit of the Policy & Resources Committee. We are also grateful for the input and advice of the Law Officers, as well as numerous individuals in Guernsey, Jersey, the Isle of Man and the UK, who shared their ideas and views with the review panel.

I would be pleased to meet the Policy & Resources Committee to present the report's findings and answer any questions. I would like to recommend that the Panel scrutinises progress against the recommendations in 18 months' time.

Yours sincerely,

Peter A Harwood
Chair of the Review Panel

time for improvements and changes to be embedded), and the conclusion that there is no strong case for change should be reviewed.

- The Panel fully recognise and acknowledge the importance of the independence of the Law Officers in respect of criminal and constitutional matters, and some of the other work undertaken by lawyers at SJC. It is their view that the independence must be upheld. However the preservation of that independence does not need to be at the expense of accountability, a point acknowledged by HM Procureur and the Chief Executive of the States of Guernsey.
- The responsibilities and duties of the Law Officers are often under-estimated and occasionally misunderstood. The Panel recognise the significant role they play, and believe it is vital to ensure that they have the capacity to undertake that role, not least given the current challenging times. In order to do that it is important that some of the responsibilities they have acquired by default and incremental change should be delegated elsewhere. For that reason the Panel believe it is important to consider the establishment of a dedicated parliamentary clerk to provide parliamentary and procedural advice to the presiding officer and to members of the States of Deliberation; and the Panel Recommend the strengthening of the role of Director of Legal Services at SJC to ensure strong management of the relationship between SJC and the States of Guernsey.

1F Once the new time management system is in place, and as part of further enhancing performance/financial management reporting, SJC to advise in their annual report the financial value of legal advice provided to each Committee of the States of Guernsey in accordance with the notional tariff and fee rates already published by the Law Officers.

In ensuring value-for-money, what options should the States of Guernsey explore with regard to commissioning advice from third parties, either generally or on an ad hoc basis?

1G A closer relationship between the finance management at SJC and the States Treasurer's team would enable greater financial management and transparency that would be to the mutual interest of both SJC and the States of Guernsey. This would assist in financial reporting and planning. The Panel proposes that a finance business partner model, as used in other areas of the States of Guernsey and the public service, would be a very constructive step to take.

1H The States of Guernsey should ask for comment on the proposed cost and on the advice from SJC and assess the notional hourly cost of the legal advice provided by SJC against an average external benchmark rate.



2. What processes need to be advised or adopted to ensure that advice received by the States of Guernsey is used appropriately and effectively?

What constitutes legal privilege and legal confidence in relation to government?

2A Legal privilege and legal confidence should be aligned to the principles of the States of Guernsey Access to Public Information framework and code. This will provide consistency and enable greater understanding for those in the community who have an interest in the issues to which legal privilege and legal confidence may be applied. SJC should continue to advise the States of Guernsey – as the client – on whether the States may claim legal privilege. If a Committee does claim legal privilege, it should explain why.

What is the clearest and most effective way of presenting advice to Committees and Offices?

2B The text of the advice should be appended to any memorandum where its points are used to make a recommendation to a Committee. A copy of any memorandum where any advice from SJC is included or referred to should also be sent to SJC, whose lawyers should reserve the right to present their advice in person. In any event it may be helpful to have a lawyer from SJC (preferably the lawyer who gave the advice) in attendance to brief the Committee and/or answer any questions on the advice.

How should external legal advice commissioned by St James' Chambers be presented to the Committees and Offices?

appropriate. Where possible the advice should consist of different options and potential outcomes.

What would be the role of St James' Chambers in the project management process?

3D As a member of the project board in the role of legal adviser.

How would the project management ensure that external legal advisers are also accountable to the States of Guernsey in an appropriate way?

3E To ensure that where cross-Committee boards are established to develop significant policy or to make significant infrastructure and/or commercial decisions, representatives of SJC should be included on the boards to provide legislative and/or legal advice.

3F In order to ensure that the States of Guernsey is able to get the best possible value for money from external legal advisers, it is essential that potential providers are prepared to offer their services within an agreed financial envelope, and that they are not deterred from doing so by a complex or bureaucratic procurement framework. The Panel's view is that an effective way of addressing these risks would be to establish a framework for providers, akin to the consultancy framework established by the States of Guernsey's Treasury team. In so doing, advice from SJC on best practice and criteria for external firms being admitted to the framework via competitive tender would be essential.

What is the appropriate political governance for the project management?

3G A set of clear guidelines should be commissioned by the Policy & Resources Committee on the role of political members on project boards, having regard in particular to the appropriate level of political governance in relation to operational matters.

How can Committees and Offices develop an enhanced awareness and handling of the legal and financial risks associated with litigation?

3F/4B It is recommended below that SJC work with the Chief Operating Officer and the human resources business partners, through the public service reform People Plan, to establish a programme of training for senior civil servants and graduate officers to better understand legislative processes, and to build greater civil service capability in areas such as drafting routine ordinances and minor subsidiary legislation. Awareness of legal and financial risks should be included in this training to senior civil servants.

4. How can best practice best be standardised, implemented and benchmarked?

Is there a potential role for service level agreements and/or a memorandum of understanding to embed best practice?

4A A memorandum of understanding should be put in place as a priority, incorporating the recommendations of this review. This should be published.

Introduction

1. On 27 September 2016 the Policy & Resources Committee commissioned a review of the relationship between the States of Guernsey and SJC, in line with the recommendations of the April 2016 PwC review of the States of Guernsey's PFOS settlement, the work of the States Review Committee in the previous States term, and discussions between the President of Policy & Resources and the Law Officers.

Panel

2. The review was undertaken by a panel comprising:

- Peter Harwood (previously involved in the work of the former States Review Committee) (Chair)
- Deputy Matt Fallaize (President of the States Assembly and Constitution Committee and a member of the former States Review Committee)
- Claire Smith (lawyer at Ogiers, and a member of the former States Review Committee)
- Advocate John Langlois, OBE (now retired from private practice)

Engagement and consultation

3. In order to gain understanding of the relationship between the States of Guernsey and SJC, the Panel received written representations and held formal meetings with a number of stakeholders in Guernsey and Jersey. In total the Panel met with 23 individuals, which included:

- Former and present Law Officers in both Guernsey and Jersey
- Former Bailiffs and Deputy Bailiffs
- Former and present Chief Executive Officers of the States of Guernsey
- Deputies
- Chief Secretaries to Principal Committees of the States of Guernsey
- Private practising lawyers
- The Guernsey Financial Services Commission

The following paragraphs (6-13) are taken from the Law Officers' section of the States of Guernsey website.

"Areas of responsibility"

Law Officer functions

6. *The Law Officers perform the following professional and constitutional duties :*

- *Advice to States Committees and individual Members (eg, on the preparation of States amendments and requêtes and reports published in Billets d'État), ensuring compliance with the law, constitution and States' procedure and also with ECHR, relevant EU law and other international obligations*
- *Non-voting member of States of Deliberation (the Law Officers attend the States of Deliberation's meetings and advise on constitutional, procedural and legal issues)*
- *Members of the States of Election under the Reform (Guernsey) Law, 1948 (the function of which is to elect Jurats of the Royal Court)*
- *Acting as amicus curiae in order to give independent and impartial advice on legal or constitutional issues that arise during the course of proceedings and performing customary law duties as partie publique, in civil proceedings where appropriate to represent the public interest or the interests of those who may not be able to represent themselves*
- *Coronial functions for the Bailiwick, eg, in connection with deaths, cremations, inquests and post mortems*
- *Statutory functions, eg, in the fields of mental health, children in care and at risk, investigatory powers. These and other functions noted above require both Law Officers (and, when sick or absent, the Comptroller's 4 Senior Crown Advocate délégués) to provide 24 hour cover*
- *Responsibility for the development of criminal law and the administration of criminal justice, all criminal proceedings being brought in the name of the Law Officers,*
- *Liaising with and advising the Lieutenant Governor and liaising with the Ministry of Justice, where requested and in relation to the progress of legislation and other constitutional matters*
- *Acting as head of the Guernsey Bar (the Law Officers are required to attend certain ceremonial occasions in this capacity, to welcome new aspirants to the Bar before the Royal Court and, where appropriate, to liaise with the Batonnier and Royal Court)*
- *Representing Guernsey internationally as appropriate, and particularly, in relation to International Cooperation & Mutual Legal Assistance and the civil forfeiture of money, acting as the central authority in the Bailiwick for assistance*
- *The work of HM Receiver-General, a post currently held by the Procureur, whose functions include the collection within the Bailiwick of Crown revenues and the administration of Crown property (including Jethou), the foreshores (in those places where the Crown possesses the fiefs contiguous with the coast), the seabed (out to the limit of the territorial seas) and those immovable and moveable assets and interests that have escheated to the Crown or devolved as bona vacantia e.g. assets undistributed on the dissolution of a company.*

(In the Bailiwick of Jersey the legislative role is performed by the holders of separately remunerated offices.)

Civil Advisory and Legislation

10. Provide legal advice on behalf of the Law Officers concerning domestic, constitutional, international, public and employment law issues facing the States of Guernsey, the States of Alderney and the Chief Pleas of Sark and other public service clients, including:

- Matters relating to the constitutional relationship of the Islands of the Bailiwick and the UK and EU*
- Assisting and advising in the formulation of policy and the preparation of policy reports to be debated by the Island legislatures and the preparation of amendments to policy reports and of petitions for debate*
- Advising on the application and implementation of international law (for example, EU Directives and Regulations, ECHR jurisprudence and WTO arrangements) and on the administrative or legislative action needed to implement international obligations*
- Advising public officials and public authorities (such as the Financial Services Commission, the Guernsey Competition and Regulatory Authority, the Data Protection Commissioner, the Director of Civil Aviation, Planning Inspectors and the Registrar General of Electors) on the exercise of their functions*
- The provision of a comprehensive employment law service, including, where appropriate, representation before the Employment and Discrimination Tribunal,*
- Providing litigation services and litigation support services, in particular for disputes involving constitutional or international law issues.*

Commercial Law

11. Deliver specialised projects, contract drafting, conveyancing services, property and general commercial law support on behalf of the Law Officers to the States of Guernsey, the States of Alderney and the Chief Pleas of Sark and other public service clients, including:

- Drafting project documentation and contracts and advising States Committees on project implementation and realisation*
- Assist the civil litigation team on commercial disputes, arbitration, dispute resolution and litigation matters*
- Undertake property matters and provide conveyancing services including the acquisition and disposal of property for the States of Guernsey*
- Provide corporate and commercial advice support to States Trading Companies and other corporate bodies including company secretarial support*
- Advise, through specialist designated lawyers, the Commerce and Employment Department, Finance Sector Development Unit and Financial Services Commission and other bodies on policy and legal developments for the finance and financial services sectors and to instruct the legislative drafters in the implementation of such developments*
- Advising on and drafting the Civil Service pension rules*

Findings of the review

Introduction

14. The consultation undertaken by the Panel highlighted that overall the views of the relationship between the States of Guernsey and SJC were positive. **The Panel noted that there was no overwhelming argument in favour of advocating any fundamental change in the relationship between the States of Guernsey and SJC.**

15. There were however a number of matters raised or misunderstandings expressed during the period of its consultation that touch upon the basis of the relationship. These in turn potentially impact upon certain aspects of the matters covered in the Panel's terms of reference. In order to address its terms of reference the Panel consider that it is necessary to comment upon certain aspects of organisational arrangements in the States of Guernsey, certain aspects of the existing constitutional and organisational arrangements under which SJC operates, and certain points at which both parties interact.

16. Some of the findings and subsequent recommendations consider operational matters; others assess what might be termed cultural matters; and as part of this review the Panel has evaluated other potential models for the relationship between the States of Guernsey and SJC. The following areas are covered below:

	States of Guernsey	St James' Chambers
Potential structural changes to the relationship	<ul style="list-style-type: none"> • Potential for the separation of the legislative function • Potential for the creation of a separate States of Guernsey Legal Services Department • Potential for the secondment of lawyers from SJC to the executive teams within different Committees of the States of Guernsey • Potential for the recruitment of a General Counsel to the Policy & Resources Committee • Potential for the outsourcing of commercial advisory functions • Enhanced role of the Director of Legal Services • Potential for the role of a dedicated parliamentary clerk 	
Non-structural (organisational/ Cultural) issues	<ul style="list-style-type: none"> • Defining and embedding best practice in the States of Guernsey • Understanding the cost and value of legal advice • How the States of Guernsey works with SJC • Commissioning of external advice 	<ul style="list-style-type: none"> • Clarification of terms • Role and independence of the Law Officers • Independence of SJC from the States of Guernsey
	<ul style="list-style-type: none"> • Financial control and transparency • Relationship between SJC and the Chief Executive of the States of Guernsey 	

Potential structural changes to the relationship

21. During the course of its review the Panel was invited to consider other models that might be applied to the provision of legal services to the States of Guernsey in addition to or as an alternative to the current model. The justification put forward for the consideration of such alternatives was a desire to remove a barrier that was perceived by many to exist between SJC and the rest of the States of Guernsey especially at civil service levels.

Potential for separation of the legislative drafting function

22. In particular the Panel was invited to investigate the model used in Jersey where the legislative drafting function has been absorbed into the body of the Jersey civil service. The consideration of any alternative model should however be seen in the context of the cost to the taxpayer. It is possible to draw a comparison between the total expenditure incurred by the two Islands in the provision of services equivalent to those provided by SJC as follows:

	2014	2015
Guernsey	£4.765 million	£4.711 million
Jersey	£9.5 million	£9.9 million

23. This alternative model would most clearly follow that used in Jersey whereby legislative drafting would be transferred from SJC to a new department within the States of Guernsey under the direction of a new civil service role equivalent to that of the States Greffier in Jersey. The resources for such a department would need further consideration but would be unlikely to be less than the eight people within SJC currently most directly involved in legislative drafting in addition to the new post mentioned above.

24. The establishment of such a new department would be unlikely to result in any savings of costs but on the contrary may well lead to an increase especially given that those currently involved in legislative drafting within SJC are also qualified and able to provide non-drafting legal advisory support and staff may need to be retained within SJC for that purpose. The Law Officers would also need to retain legislative drafting expertise in order to assist in the preparation of legislation for the Royal Court, the States of Alderney and the Chief Pleas of Sark. The main arguments in favour of such an alternative model are: firstly, that it would give greater political and executive control over the legislative drafting process; secondly, that it might speed up the legislative drafting process and thirdly, that it would address a possible conflict that might otherwise arise where those involved in the drafting of the legislation and those involved in advising on its interpretation and implementation (such as criminal legislation) are located within the one body.

25. The Panel consulted in Jersey with two former Bailiffs and a former States Greffier. The Panel noted that opinions differed significantly as to the success of the Jersey model particularly on the issue of political control of the process. There was no particular evidence to suggest that the legislative process in Jersey was significantly either more effective or faster given that all draft primary legislation still requires further review and consideration by the Jersey Law Officers before its transmission to the Privy Council. The argument in favour of the avoidance of potential conflict would come at a not insignificant cost to the taxpayer.

32. The Panel recommends that, by the end of 2017 the States' Assembly and Constitution Committee should assess this idea and set out the steps need to establish the role. The Panel acknowledges that it will be important to undertake this work in close consultation with the presiding officer and SJC.

Potential for the creation of a separate States of Guernsey Legal Services Department

33. This model would envisage the establishment of a new government department to take over the legal advisory roles and legislative drafting functions currently undertaken by SJC. It would act independently of the Law Officers who would still need to maintain their own teams in parallel to provide prosecution services, to exercise the constitutional and statutory functions attaching to their offices and to provide legal and legislative services to the States of Alderney and the Chief Pleas of Sark.

34. The resources for such a new department would require further consideration but it is likely that there would be an element of duplication between the continuation of SJC and the new government department. The main arguments in favour of such a model mirror those set out above in relation to the separation of the legislative drafting function but with the addition of those in favour of greater accountability and transparency. The Panel believes that the issues of accountability and transparency can and are being properly addressed within the existing structure. The legislative drafting process would share the same difficulties as noted above. The Panel would be concerned with the potential difficulty of recruiting and retaining suitably qualified staff to a new government department in competition to the recruitment of equivalent staff to the Law Officers' team.

35. The Panel also notes the potential for future conflict between the two sets of offices and the breakdown of the collegiate approach that currently operates to the benefit of SJC.

36. The view of the Panel is that the benefits from a separate States of Guernsey Legal Services Department would be minimal, particularly if the other recommendations of this review are taken forward. Moreover these benefits would only come at significant and disproportionate cost to the taxpayer. For this reason, the Panel has decided not to support this model.

Potential for the secondment of lawyers from St James' Chambers to the executive teams within the different Committees of the States

37. The Panel understands that this model has been used in the past with some degree of success where the cost of the secondee is born by the Committee accepting the secondment. This approach has the benefit of possibly enabling SJC to recruit someone with specialist legal skills to satisfy the particular mandate requirements of a Committee when such an opportunity might not otherwise be justified within the budget of SJC.

38. The Panel also understands however that where such secondments have been used the secondee remains resident within and fully accountable to SJC. Attempts to "embed" a member of SJC by locating that person within the executive team of a particular Committee have perhaps been less successful given the uncertainty of the function of the secondee (e.g.

44. There is a recognition however that, [REDACTED] the cost of outsourcing to local legal firms at “commercial rates” is likely to be considerably greater than the cost of providing the service “in-house” at SJC. In the introduction to this section of its report the Panel drew attention to a comparison of the costs of the provision of legal services between Guernsey and Jersey (paragraph 22). The Panel understands that Jersey has historically made considerable use of outsourcing some of its legal services including some prosecution work. The Panel suggests that this approach may have contributed to the greater costs incurred in Jersey.

45. The Panel has also noted reservations expressed by some concerning aspects of confidentiality and conflicts associated with outsourcing within a small jurisdiction. The Panel does however take note that outsourcing of legal services may become more prevalent if SJC is unable, for whatever reason, to attract staff of sufficient expertise to satisfy the demands for specialist legal advice from States’ Committees. The Panel notes that the commercial advisory function of SJC is held in high regard inside and outside of the States of Guernsey.

46. With that in mind, the Panel does not think that the commercial advisory functions of SJC should be outsourced, [REDACTED]

Potential enhancement of the role of Director of Legal Services within St James’ Chambers

47. The possibility of re-defining and enhancing the role of the Director of Legal Services within SJC is an important mechanism for strengthening the relationship between the States of Guernsey and SJC. Although not representing a fundamental change of model, such changes would in the Panel’s opinion help to bridge a gap that appears to exist between the two parties. It would also provide further momentum to the effective discharging of the responsibilities of the Law Officers and SJC set out in para 13.

48. The role of Director of Legal Services is effectively that of the functional head for legal advice and the ‘managing partner’ of SJC. The Director of Legal Services is the most senior civil servant at SJC, and while it is acceptable and necessary for there to be a reporting line to the Law Officers, the Panel also believes it is important that as a senior civil servant the Director of Legal Services is also directly accountable to the Chief Executive Officer of the States of Guernsey.

49. The Director of Legal Services should join other functional leads – Chief Operating Officer, Chief Strategy and Policy Officer, States Treasurer and Chief Information Officer – in the Chief Executive Management’s Team, rather than HM Procureur as is the case at present. The Director of Legal Services should also be a member of the Civil Service Leadership Team, along with the Chief Executive Officer, the other functional leads, the Chief Secretaries to the Principal Committees, the Managing Director of the States Trading Supervisory Board, the Greffier and the Director of Transformation.

50. The Director of Legal Services should be the main conduit through which the civil service seeks legal advice through the standardised procedures set out below, and should be the

performing their duties, the States of Guernsey has the means to appeal to the Crown to remove the individual from their post.

57. The Panel understands that the Law Officers have also voluntarily submitted to the disciplinary framework of the Guernsey Bar. Furthermore, the Panel notes that the Law Officers have further strengthened that approach to accountability through SJC moving towards introducing a formal complaints process through their website. As members of the States of Deliberation, the Law Officers are also subject to the Members' code of conduct. This provides a further mechanism of accountability.

Appointment of the Law Officers

58. During the consultation period, some concerns were raised around the process of appointing Law Officers. Clearly it is appropriate for the Bailiff and Judiciary to be primarily consulted. However, political representatives consulted in this process believe there should be more weight given to their contribution to the appointment process. Although political representatives are consulted in the appointment process of the Law Officers, many respondents to this review believed this involvement to be largely academic.

59. The Panel notes that there is a risk associated with excessive political input into the appointment of the Law Officers, as it would be inappropriate to have political influence over their prosecution functions. A major strength of the Law Officers being appointed by the Crown is that the individual is more likely to be completely independent in the role of prosecution, which is a Crown prerogative. The Panel strongly believes that it would be both inappropriate and unconstitutional to have the body politic appointing the head of the prosecution service. The Panel believe that the process needs to balance political input without political interference, and is satisfied that the current practice achieves that balance.

Independence from the States of Guernsey

60. The review process highlighted that many respondents to the review believed that the relationship between SJC and the States of Guernsey reflected that of entirely separate organisations, rather than a relationship between different service areas within the States.

61. However the Panel notes that, like all practising lawyers, who are answerable to the Royal Court, it is necessary for SJC to maintain some level of independence from their clients, in this case the States of Guernsey. In terms of legal advice, greater independence of the adviser from the commissioning body is likely to result in greater impartiality of advice. Furthermore it is important to ensure that there cannot be any level of political influence on the prosecution functions undertaken by the Law Officers from within SJC. To do so requires a certain level of independence from government. **The preservation of that independence does not need to be at the expense of wider accountability in the relationship**, a point acknowledged by HM Procureur and the Chief Executive of the States of Guernsey.

Accountability of lawyers at St James' Chambers

a situation whereby a prosecution needed additional funding, SJC has limited flexibility to reallocate resources from other functions in order to accommodate this. It is recognised that there may be circumstances, as is the case with other functions of government, in which SJC would need to make a formal request to the Policy & Resources Committee for additional funds if needed for significant prosecutions. The Panel suggests that this particular aspect of the funding model is worthy of further review by the Policy & Resources Committee and the Law Officers.

Transparency

69. The consultation period highlighted the apparent lack of insight that the States of Guernsey has into SJC practices. Concerns were raised over the States of Guernsey's lack of understanding of SJC operational, court and case-specific budgets, and a lack of input into SJC recruitment process.

70. The Panel notes and encourages the publication by SJC of the annual review of its services, the introduction of its website including information on its complaints procedure, and the independent scrutiny by the internal audit unit of the States of Guernsey.

Relationship between St James' Chambers and the Chief Executive of the States of Guernsey

71. In order to achieve greater interaction between the States of Guernsey and SJC, HM Procureur is invited to be involved in the Chief Executive's Management Team. However, during the consultation undertaken by the Panel it became apparent that there were legitimate concerns as to the appropriateness of that arrangement given the independence of the office of HM Procureur.

72. The Panel suggests above that it would be more appropriate for the Director of Legal Services, as its senior civil servant, to represent SJC at Chief Executive's Management Team meetings and also at the Civil Service Leadership Team meetings, allowing HM Procureur to attend as and when necessary as an independent legal advisor. The Director of Legal Services is the functional head for legal advice and in that respect his or her attendance would be consistent with the role of others present.

Defining and embedding best practice in the States of Guernsey

73. During the period of consultation a number of suggestions were made to the Panel as to how the States of Guernsey might itself improve the manner in which it engages with SJC. The Panel recognises that the manner of engagement differs significantly with each Committee, reflecting to some extent the different levels of experience of the senior executives within those Committees.

74. Furthermore, the Panel notes that SJC do not want to be seen as inhibiting access to legal advice by only allowing certain individuals to contact them.

75. The Panel recommends that steps be taken by the Chief Executive in consultation with SJC to standardise the manner of engagement through the development of a common

82. The Panel also became aware of a lack of understanding within different Committees of the inherent costs associated with taking advice from SJC. Given that the costs associated with SJC are not apportioned across the individual Committee budgets it is very easy for Committees to view the service provided by SJC as “free of charge” (unless they are directly meeting the costs of a seconded lawyer). This attitude may lead to an abuse of that service, or it being used when it does not need to be. Ensuring that the Committees have a greater understanding of the cost implications of their interactions with SJC will promote a more judicious use of SJC’s services.

83. Whilst not advocating the adoption of full transfer pricing, the Panel believes that there would be merit for SJC to maintain some basic time recording process so that each Committee can be made aware at least annually of the approximate costs incurred in taking advice from SJC.

How the States of Guernsey works with SJC

Project boards

84. The Panel notes the introduction by the Chief Executive of a new litigation directive implementing certain of the recommendations made by PwC following its investigation into the circumstances of the PFOS litigation. That directive envisages the use of the equivalent of a Project Board to manage future major litigation matters. The Panel also recognises the value of, and recommends the use of Project Boards in the wider context where complex legal or constitutional issues are under consideration. In such circumstances the **Panel also recommends the early inclusion of representatives of SJC as members of such boards not merely to act as legal advisers but to provide general and ongoing informed advice and input.**

Training

85. It is the view of the Panel that the need for increased training on behalf of both the States of Guernsey and SJC is imperative. **The Panel believes that areas of training could include the following in order to effectively support the guidelines in a memorandum of understanding:**

- **Understanding when it is appropriate to contact SJC**
- **Understanding the correct means of contacting SJC**
- **Understanding the difference between advice on points of law, and other general advice given by a lawyer**
- **Understanding that the advice given by SJC may not necessarily be conclusive, unless stated otherwise**
- **Understanding the cost implications involved in asking for legal advice**
- **Understanding how to commission advice in an effective manner**
- **Understanding the implications of legal privilege**

Cultural reluctance to interrogate advice

91. The Panel found that at this stage there is no strong or clear case for significant change to the structure of the way that SJC works with the States of Guernsey. However it is also of the view that a clear and practical memorandum of understanding is essential to capture and embed good practice on the relationship between SJC and the States of Guernsey. This will provide clarity on that relationship, and on each party's reasonable expectations. It will also provide a set of performance indicators for both parties which can be reviewed by the Policy & Resources Committee, the Chief Executive Officer of the States of Guernsey and the Director of Legal Services. If an effective memorandum of understanding is not put in place, or if one is put in place which does not demonstrate continuing improvement in the relationship, the Panel believes that the case for change should be reconsidered.

92. **The memorandum of understanding should include areas such as:**

- **The process for the commissioning of internal or external legal advice by the States of Guernsey**
- **The process for and presentation of legal advice given by SJC**
- **The process for and presentation of legal advice emanating from external sources**
- **How civil servants and SJC relay that advice to the members of Committees**
- **The commitment by both parties to provide ongoing skills and training to support the relationship**
- **The relationship between SJC and individual members of the States of Deliberation**
- **Shared commitments on financial transparency and performance reporting.**

93. A draft outline of a memorandum for consideration by SJC and the States of Guernsey is attached as an appendix.

- Protocol on the relationship between an individual member of the States of Deliberation and the Law Officers when asking for advice
 - Format in which advice is requested
 - Information to include in the brief
 - Obligations to provide relevant background information
 - How advice and options within that advice can be set out, including format
 - Points to cover in advice – including regulatory implications, legislative implications
 - Guidance on response time targets
- **Shared commitments on financial transparency and performance reporting**
 - Quality assurance processes in place
 - Agreement on areas to covered by performance indicators
 - Agreement of specific performance indicators and how they will be measured
 - Reporting on performance and financial management – frequency, format

Review of the relationship between the SOG and SJC

SJC response

This is our response to the Panel's report to the President of P&R. As asked, we have tried to restrict our comments to factual accuracy, but where the findings reveal factual inaccuracies that may have affected the viability of the conclusions drawn which has in turn necessitated comment on some of the resulting recommendations/findings.

We also note that many of the findings and recommendations are concerned with the Law Officers [ie, HMP and HMC] and their roles/positions. We do not believe some of the findings to have been within the Panel's terms of reference. Nevertheless we have considered, and will respond to, the whole of the review.

Our responses relate to the "findings of the review" that begin on page 18, at paragraphs 14 to 93. Given the time available we have not commented on the "conclusions and recommendations" listed on pages 7 to 11 [ie, preceding the "introduction"], which we could not immediately link with the "findings" that begin on page 18.

We are happy to offer additional comment and explanation on the conclusions and recommendations if further time for comment is permitted.

But before beginning our comments can we thank the members of the panel and Steve Wakelin for the thorough and constructive way they have engaged with us and mastered a considerable brief. This is highly appreciated and has enabled us [without breaching confidentiality in any respect] to allay some of the concerns expressed by members of staff who were worried about the potential consequences of the review for themselves and for chambers as a whole.

1. Introduction – paragraphs 14 to 16.

Paragraph 14 - we note the conclusion. Thank you.

2. Clarification of terms – paragraphs 17 to 20.

- (a) Paragraph 17 [*clarification of terms*] - we agree that there is some confusion over terminology on the part of some of our clients and the public in general, which is a historic matter, although we do not believe it has ever caused any legal or operational difficulties. We hope that with the advent of our dedicated website we will be able to clarify the meanings of many of the terms you refer to. We ourselves tend to use the expression "Law Officers' Chambers" but St James Chambers is of course our postal address and we have never seen any problem, interchangeably, in using the building's name [as the panel have done].

- (c) Paragraph 24 – we note the comment that an argument “in favour of” the alternative legislative drafting model is that it would give greater political and executive control over the drafting process. However, the independence of the drafter from political influence is considered critical throughout many western democracies and most of the Commonwealth. Of course, policy remains the realm of the political and executive arm, as does legislative priority, but we do not believe that political and executive control over the legislative drafting exercise itself would be conducive to the public good or the Bailiwick’s international reputation.. However, this proposal is not backed by the Panel, so the matter is hopefully academic.

We also note the reference to the so-called “conflict” inherent in the drafters’ role; as mentioned to the Panel, we have never identified any conflict ourselves, and suspect this theoretical point may have been triggered by an [inaccurate] article several years ago in the Guernsey Press.

- (d) Paragraph 26 – we note the Panel’s decision not to support the separated legislative drafting model, and agree.
- (e) Paragraph 32 [*potential for appointment of parliamentary clerk to States of Deliberation*] – we note the Panel’s recommendation that the establishment of the role of parliamentary clerk should be assessed. We agree that this idea certainly merits exploration, with the Law Officers of course continuing to remain responsible for the giving of legal advice.
- (f) Paragraph 36 [*potential for creation of separate SOG legal services department*] – we note the Panel’s decision not to support the creation of a separate Legal Services Department. We agree.
- (g) Paragraph 39 [*potential for secondment of lawyers from SJC to executive teams within different States committees*] – we note the Panel’s conclusion as to the benefits of SJC lawyers being seconded to the work of particular committees whilst continuing to be based in and accountable to SJC. Thank you – we are glad that this model is viewed favourably where there are clear benefits to the respective parties.
- (h) Paragraph 41 [*potential for recruitment of general counsel to P&R*] – we do not agree that the Law Officers cannot sit in attendance at Committee meetings without compromising their independence. It is precisely because they are independent that they are able to give objective legal advice and thereby contribute, as a matter of good governance, to the decision-making process. For this reason, as with most developed jurisdictions, including the other Crown Dependencies, the Law Officers are invited to and expected to regularly attend and advise the senior political Committee. This has always been the case in Guernsey until very recently with the establishment of the P & R Committee.

With respect, we therefore believe these comments to be based on factual error. A major part of the role of the Law Officers [ie, HMP and HMC] is to act as legal adviser to the States of Guernsey and their Committees. This important work, which has



As you can see, our immediate reaction is that this would not be a sensible commercial proposition for the taxpayer.



5. Potential enhancement of the role of DoLS within SJC – paragraphs 47 to 53.

- (a) Paragraph 48 – it is stated that the DoLS is effectively “managing partner” of SJC [we agree] but also functional head for legal advice. For the reasons set out at 3(h) above, we believe that this latter comment reflects the factual errors set out in paragraph 41 by attempting to excise a major part of the Law Officers’ role which is to act as legal adviser to the States of Guernsey. The effect would be to create an artificial and wholly theoretical [and inefficient] dividing line between the roles of the LO’s on the one hand and DoLS on the other.

The Law Officers are ultimately responsible for the professional work of SJC, including legal advice to the SOG. DoLS cannot therefore be accountable to the Chief Executive in this role. He [or she] has to be accountable to the Law Officers as heads of profession. Of course, it would be completely acceptable for DoLS [and other directors] to *report* to the CE and P&R if they so wished on whatever SJC issues they saw fit. But professional accountability has to be to the LO’s.

- (b) Paragraph 49 – for this reason we think it is technically wrong to say that DoLS should join the other functional leads in the CEMT, rather than HMP. So far as the function of providing legal advice is concerned, the functional lead is actually HMP [which could properly extend to HMC]. We would have no issue at all with DoLS attending CEMT if that is what CEMT wanted. But equally we can see no reason why HMP should not attend if and when invited. It is entirely a matter for CEMT, and we do not support the drawing of an artificial demarcation between the roles of HMP and DoLS so far as giving legal advice is concerned. We also note that the other invitees to CEMT are effectively heads of profession, so the invitation to the Law Officers is consistent with that. We are all legal colleagues and it serves the States best if they are able to call upon the widest range of expertise as the Chief Executive thinks fit.

- (f) Paragraph 53 – for the reasons set out above and at 3(h) we do not believe the description of the DoLS role as the functional head of legal advice to the SOG is accurate, but we are perfectly happy to explore the panel’s recommendations with the senior civil service and institute whatever formal channels [including an MOU] they believe could improve the service we collectively provide.

6. **Non-structural issues – paragraphs 54 to 92.**

- (a) Paragraph 55 [*role and independence of the LO’s*] – we note that the panel is concerned that there is a perception amongst politicians and members of the civil service that SJC appears to operate as an autonomous unit. But this is surely correct, and desirable – if SJC is to function by giving impartial and objective legal advice then surely it must continue to have that very professional and operational autonomy to which reference is made. We fully accept that the majority of our lawyers are civil servants and, since our facilities and budget are provided by the States, we remain subject to the same constraints as the rest of the organisation. We have nothing to hide and believe in absolute transparency. Our independence should be welcomed given its importance to the international reputation of the Bailiwick.
- (b) Paragraph 57 [*accountability of Law Officers*] – it is factually incorrect to suggest that the LO’s have “voluntarily submitted to the disciplinary framework of the Guernsey Bar”. They are subject to it as Advocates in accordance with the provisions of the Guernsey Bar (Bailiwick of Guernsey) Law 2007, as amended.
- (c) Paragraph 58 [*appointment of Law Officers*] – we note that political representatives believe more weight should be given to their contribution to the appointment process. We do not believe that the politicisation of the appointment process would be beneficial to the rule of law but would reiterate that two senior politicians [following long established practice] were present on the interview panel that made recommendations as to the appointment of both LO’s.
- (d) Paragraph 62 [*accountability of lawyers in SJC*] – it is stated that the DoLS as a civil servant is accountable to the Chief Executive. However, the terms of his appointment make it clear that he is accountable to and line managed by the LO’s. However, we emphasise that we have no issue at all in his providing reports to the CE on any SJC related matter or with complete transparency in respect of the SOG/SJC relationship. Indeed, we welcome it. And of course the DoLS remains subject to all civil service terms and conditions of service, modified of course in accordance with his particular line management arrangements.
- (e) Paragraph 67 [*closer relationship between SJC and Treasury*] – can we emphasise as a matter of factual accuracy that we are fully transparent in our relations with the Treasury. Our Development and Administration Manager communicates with them regularly and our books are of course fully open to their scrutiny. We do not understand the reference to “greater financial management” given that our free-standing budget [ie, the non-salary element that we control] is so small. We would also wish to consider the recommendation to implement a finance business partner model.

or is a matter suitable for inclusion in an MOU governing relations between the SOG and SJC.

This issue was not explored by the Panel with the Law Officers in any detail but it should be noted that the Law Officers receive many requests for legal advice less than 24 hours prior to and also during States debates. Drafting a protocol for formatting and replying to such requests may prove counterproductive. That said, if States members wish to be subject to a formal written protocol before seeking any legal advice, that is certainly something the Law Officers would be willing to explore separately.

Law Officers and Director of Legal Services.

1st August 2017.

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