

Privy Council and why did reason for the legal logjam?

■ Who devised and sanctioned the policy leading to the forms of legislative drafting complained of and, in particular, the inclusion of extended ordinance-making power clauses?

■ When was that policy brought to the attention of the States of Deliberation, debated and adopted by that body?

It would be mischievous to wonder whether such a policy had been mentioned at the notorious 'secret States meeting' or rather 'seminar' which took place on 20 April 2007 at La Trelade Hotel, which expressly included (we know only because the agenda was leaked) a presentation by HM Procureur on aspects of the Bailiwick's constitutional position.

As matters stand there is a gross and obvious democratic deficit.

When legislation goes for Royal Assent it goes to the Ministry of Justice where it is vetted by or on behalf of UK ministers who are unelected by, and unaccountable to, the electorate of Guernsey.

If it passes that stage it goes on to a committee of the Privy Council responsible for Guernsey affairs, in reality headed by the same individual who heads the Ministry of Justice, Jack Straw.

Assuming all is again well from a UK perspective it then goes to Her Majesty for Royal Assent, but Her Majesty is doing nothing more than rubber-stamping what is put before her, however regally.

She acts, and can only act, on the advice of the committee for the affairs of Jersey and Guernsey, itself acting according to the advice or instruction of the Ministry of Justice.

Her Majesty has no personal say in the matter at all. It is so cynical a process that the real decision-making revolves around whether an item is placed on the agenda for the relevant Privy Council meeting.

If it reaches the agenda it gets Royal Assent and vice versa.

Of course, the really objectionable part is that Her Majesty is not acting on the advice of her Guernsey ministers (or equivalent leaders in the other jurisdictions of Alderney and Sark).

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their borders and via a Governor-General acting on the advice of the prime minister of those jurisdictions, the Channel Islands do not have ultimate control of their own legislation.

Yes, there are conventions, but the limits of those conventions are quickly reached, as HM Procureur has found out.

While nobody would sensibly push for full independence in the sense of seeking sovereignty for the islands (at least not as matters stand), there is no good reason why the islands should not have complete control over their legislation, save in those very limited areas where there is a genuine UK sovereign interest, i.e. where the international law obligations of the UK are engaged or where there is a serious concern (as in the case of Sark's reform legislation) that the legislation breaches the European Human Rights Convention on Human Rights, for which the UK would be answerable in Strasbourg.

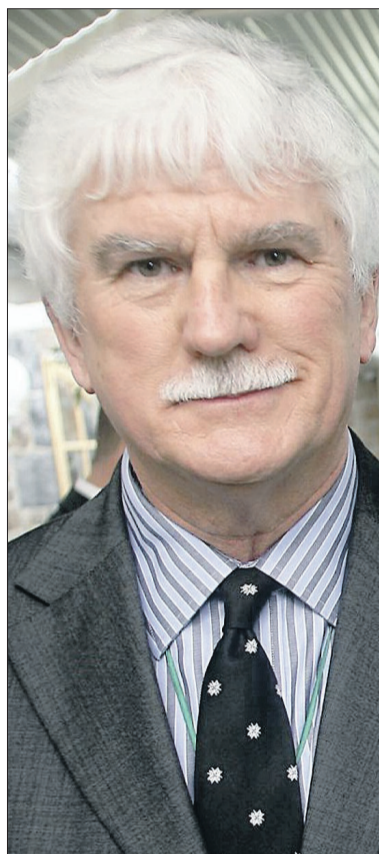
There is also the concern that some sort of constitutional check and balance is required in case any island legislature attempts to pass legislation which is plainly outside the generous bounds of what could be regarded as good government; but that could be supplied by Bailiwick courts, although that again begs the question of who should have the ultimate power of appointment to judicial office, another issue that has never been addressed satisfactorily.

For now it is enough that the States should tomorrow be alert to the following:

■ The United Kingdom has challenged the law-making powers of the States of Deliberation.

■ This has arisen only because the Law Officers appear to have adopted a policy of drafting legislation in a way which the UK has found unacceptable.

■ That policy never appears to



At least two vital questions should be put to HM Procureur Nik van Leuven at tomorrow's States meeting. (Picture by Peter Frankland, 0565576)

have been debated let alone approved by the States.

■ This raises many issues as to the role and accountability of the Law Officers.

■ It also begs the question of what powers the States should assert and whether it should be content for unpublicised 'understandings' between lawyers in St James' Chambers and the Ministry of Justice to determine the constitutional powers of the Bailiwick assemblies (whether Alderney or Sark have been consulted at all about these matters is not known);

■ The States of Deliberation should take control of its legislative process and work towards its executive taking control of the Royal Assent process itself, assuming sufficient safeguards can be put in place to ensure good government and respect for those areas where the UK has a genuine international law interest;

■ It is long overdue that the role of the Law Officers was considered and defined. There is much too great a scope for conflict of interest as matters stand as well as considerable and unaccountable power.

Jersey has just begun its own inquiry into the role of its Law Officers in its States.

Any Guernsey inquiry should go much further, given that Jersey already separates the legal drafting function at the heart of the mischief in this case.

As to the smaller Bailiwick jurisdictions, it became apparent from looking closely at Sark law that a tandem policy was in place to give the States of Guernsey the power to legislate by ordinance for the whole of the Bailiwick in Bailiwick-wide legislation.

This led to the rejection by Sark of legislation such as the Civil Evidence law, although ironically, and even scandalously, that legislation was not actually sent for Royal Assent at all, again without the knowledge of the deputy members of the States of Deliberation or the public.

There is at least one very substantial pending case in Guernsey, which will now be made considerably more difficult to manage because of the extraordinary failure to get this long overdue legislation into Guernsey law.

Ironically no one has mentioned the very substantially enhanced customary law or inherent ordinance-making power enjoyed by the States of

Deliberation.

On 2 May 2007 those powers were found by the Privy Council to be considerably greater than previously thought in the Jersey Fishermen's Association case, when it was held that the States had unlawfully used the European Communities (Implementation) (Bailiwick of Guernsey) Law 1994 to introduce a licensing scheme by ordinance for the 12-mile fishing limits around Guernsey by purporting to implement European law when it was doing nothing of the sort. (Again it would be mischievous to draw attention to the source of the advice upon which the States acted.)

The resulting ordinance was only saved up to the three-mile limit by the inherent ordinance-making powers of the States. That same ordinance-making power could be relied upon now to make a great deal more legislation than is presently the case, the only limitation being the inability to amend laws by such ordinances, but a policy of repealing laws and replacing them with inherent power ordinances is a route which appears not to have been considered; although bringing the Royal Assent process home to Guernsey with the Lt-Governor acting on the advice of the chief minister and his opposite numbers in Alderney and Sark would remain the first choice for a mature democracy, retaining the Queen as head of state.

Too much of Guernsey's government and, in particular, its relationship with London and the management of that relationship, is too secretive. While it is sometimes in the interests of the Bailiwick to leave matters undefined, the present circumstances no longer allow that luxury. The legislative cat is out of the bag and now has to be examined and defined properly, and not behind closed doors.

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Profile

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