

Modernizing Government in the Channel Islands: New Political Executives in British Crown Dependencies

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Abstract This article examines recent reforms of internal government arrangements in the Channel Islands jurisdictions of Jersey and Guernsey. These reforms represent the most far-reaching changes in insular government for over half a century in response to concerns over slow and poor-quality decision-making, conflicts of interest, absence of effective accountability mechanisms and external critique of aspects of the Islands' offshore finance sectors, upon which their economies are heavily dependent. The article is structured into three sections. Section I outlines the constitutional position of both jurisdictions, the pressures for reform and the political economy of British offshore finance centres. Section II critically evaluates key features of the new systems and their performances to date. The final part, Section III, highlights key themes including the necessity for external pressure as a trigger for reform, selective/diluted implementation of reform packages and the problem of genuine accountability in small jurisdictions.

Keywords: Jersey, Guernsey, governments, reform, offshore, accountability

I. Background: Constitutional Context and the Political Economy of British Isles Offshore Finance Centres

The Channel Islands of Jersey and Guernsey are distinct jurisdictions which enjoy a constitutional status that can only be characterized as 'unique'.¹ They are neither part of the United Kingdom nor colonies:

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1 Royal Commission on the Constitution 1969–1973, *Report*, Vol. I, Cmnd 5460 (1973) (the Kilbrandon Report) para. 1360.

rather they are Crown Dependencies with sweeping powers of self-government which is *de facto* close to full independence but constrained by the historic fact that the United Kingdom enjoys the ultimate power to legislate for the Islands and retains responsibility for their defence and international relations.² Reflecting insular pressures for greater recognition of their distinctive interests on the international plane, the UK Government and the political executives in Jersey and Guernsey (as well as their counterparts in the Isle of Man) have recently developed this historic position by political agreements which underline the importance of the former engaging in full consultation with the latter prior to international negotiations and recognition in that process of their distinctive economic and political interests which may well differ from those of the UK.³ Perhaps more fundamentally these concordats establish the autonomy of all three governments to develop separate international identities. This development of the formal constitutional position reflects existing insular practice in specific spheres such as the politically charged issues of deferred taxation of savings income and money laundering where the insular authorities have already been engaging in direct negotiation and conclusion of agreements with sovereign states (a technique used to assuage concerns regarding harmful tax competition and use of their offshore finance centre (OFC) facilities by organized crime) which are likely to be the first stage in an emerging corpus of insular-external relations soft law. To view these developments as the first steps on the road to independence is, however, unwarranted: they are better viewed as a grant of limited (and revocable) external autonomy which, linked with new forms of political leadership, enables them to combat international criticisms of their OFC activities more effectively.

This *de facto* self-government and rapidly emerging separate international profile is buttressed by a firm constitutional convention, which has thus far never been infringed, to the effect that Westminster will not legislate in relation to the Islands' domestic affairs without first engaging in consultation with and obtaining the consent of the insular authorities.⁴ That said, there remains no doubt that in strict constitutional terms Westminster is invested with the sovereign power to legislate for the Islands on any matter, if necessary in defiance of the views of the insular administrations. If it ever opted to do

² *Ibid.* at paras. 1360–3.

³ See the key principles articulated in: Secretary of State for Constitutional Affairs/States of Jersey, *Framework for Developing the International Identity of Jersey* (1 May 2007); and Secretary of State for Constitutional Affairs/States of Guernsey, *Framework for Developing the International Identity of Guernsey* (1 May 2007). See also: Secretary of State for Constitutional Affairs/Isle of Man Government, *Framework for Developing the International Identity of the Isle of Man* (1 May 2007). These may over a lengthy time frame crystallize into constitutional conventions.

⁴ See *Report*, n. 1 at paras. 1347 and 1348.

so express language would be necessary to guarantee the effective operation of the legislation in the Islands.⁵

Prior to 2001 formal responsibility for Channel Islands relations was vested in the Home Office which had a long-established Channel Islands desk and Minister of State with a portfolio encompassing Channel Islands (and Isle of Man) affairs. Shortly after the May General Election of that year responsibility for these Crown Dependencies was abruptly transferred to the Lord Chancellor's Department (since June 2007, consequent upon the formation of the new Brown Administration, now essentially retitled as the Ministry of Justice) without apparently prior consultation with the insular authorities, triggering consternation on the Islands and straining further Whitehall–insular relationships⁶ already damaged by a similar unilateral decision to initiate a review of their systems of financial regulation in 1998.⁷ These initiatives and continuing dialogue between the UK Government and senior insular politicians regarding EU efforts to eliminate unfair tax competition⁸ (regarded by the EU and OECD as causing tax leakage in onshore jurisdictions) have contributed to a perception in some quarters on the Islands that successive New Labour Administrations have been less sympathetic to their distinctive concerns than previous UK governments, which have hitherto pursued a policy towards the Crown Dependencies of essentially benign neglect.⁹ This was doubtless a key driving force in the recognition of their unique status and concerns in the political concordats struck with the UK Government.

i. The Political Economy Perspective and External Interfaces: the EU, OECD and City of London

In terms of their relationships with the EU the Islands are not members but Protocol 3 to the UK Act of Accession enables them to benefit from European Community law so far as it pertains to free movement of agricultural and industrial produce.¹⁰ The net effect has been to preserve their competitive edge as dynamic OFCs insulated from the EU's previously long-running (but recently abandoned in favour of

5 *Ibid.* at paras. 1362, 1472 and 1473. The view of the Crown that undiluted Parliamentary sovereignty applies in the Channel Islands is questioned by the insular authorities; see F. de L. Bois, 'Parliamentary Supremacy in the Channel Islands' [1983] *PL* 385.

6 Lord Chancellor's Department, Press Release, 13 June 2001; *Jersey Evening Post*, 13 June 2001; *Guernsey Press*, 13 June 2001.

7 Home Office, *Review of Financial Regulation in the Crown Dependencies—A Report*, Part I, Cm 4109-I (1998) (the Edwards Report).

8 See the discussions referred to with HM Paymaster General, Dawn Primarolo, in: EU Tax Package: Statement by Senator Pierre Horsfall, President of the Policy and Resources Committee to the States Assembly, 17 April 2002.

9 See generally: L. Le Rendu, *Jersey: Independent Dependency?: The Survival Strategies of a Microstate* (Ex Libris Press: Bradford on Avon, 2004).

10 [1972] OJ Spec Ed L 73. The scope of the Protocol is clarified by Case 355/89, *DHSS (Isle of Man) v Barr* [1991] 3 CMLR 325 (ECJ); and Case C171/96, *Rui Roque v The Lieutenant Governor of Jersey* [1998] ECR I-4607 (ECJ).

coordination of tax measures on specific topics¹¹) tax harmonization programme, able to offer an attractive fiscal structure and complementary portfolio of niche special purpose vehicles to managed funds, high net worth individuals and multinational corporations. This privilege combined with near complete domestic self-government, re-scheduling of the Sterling Area in 1973, abolition of UK exchange controls in 1979 and the global growth of mobile finance capital searching for low tax–high secrecy havens has fuelled the rapid growth of Jersey and Guernsey as leading international OFCs heavily reliant in terms of public revenues, employment and economic growth on offshore business.¹² Thus the independent Edwards Review of financial regulation on the Islands reveals that both Jersey and Guernsey receive around 50 per cent of their national income from offshore finance (though informed unofficial estimates put this figure for Jersey as high as 80–90 per cent¹³) and approximately 20 per cent of the working population on each Island are employed in the finance sector and its associated ‘pinstripe infrastructure’ (that is to say the accountancy, legal and corporate services sectors which service offshore finance).¹⁴ Recent international reviews provide robust evidence that this dependence is increasing.¹⁵ Apart from its economic dominance the OFC has spillover effects into the policy-making and external relations domains. It makes great demands on the law/policy-

- 11 European Commission, Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee, *Tax policy in the European Union—Priorities for the years ahead*, COM 260 final (2001) (Brussels, 23.5.2001), a shift in strategic policy which will involve greater reliance on soft law techniques.
- 12 For a comprehensive account of the Islands’ historical development as OFCs, see further R. A. Johns, *Tax Havens and Offshore Finance—A Study of Transnational Economic Development* (Frances Pinter: New York, 1983); R. A. Johns and C. Le Merchant, *Finance Centres: British Isles Offshore Development Since 1979* (Pinter: London, 1993) chs. 4 and 5; M. P. Hampton, *The Offshore Interface—Tax Havens in the Global Economy* (Macmillan: Basingstoke, 1996) ch. 6; R. A. Johns, ‘The British Isles Offshore Finance Centres’ (1982, November) *National Westminster Bank Quarterly Review* 53; R. A. Johns and C. Le Merchant, ‘Offshore Britain: The British Isles Finance Centres Since the Abolition of UK Exchange Controls’ (1993, May) *National Westminster Bank Quarterly Review* 54; and M. P. Hampton, ‘Treasure Island or Fool’s Gold: Can and Should Small Island Economies Copy Jersey?’ (1994) 22 *World Development* 237.
- 13 M. P. Hampton and J. Christensen, ‘Treasure island revisited: Jersey’s offshore finance centre crisis: implications for other small island economies’ (1999) 31 *Environment and Planning* 1619 at 1634; J. Christensen and M. P. Hampton, ‘All good things come to an end’ (1999, August/September) *The World Today* 15.
- 14 See Edwards Report, above n. 7 at paras. 2.9.1 and 2.12.2.
- 15 See further, in the context of its technical assistance programme, for the critical economic importance of the finance sector on each island: International Monetary Fund, *Assessment of the Supervision and Regulation of the Finance Sector*, Vol. I: *Review of Financial Sector Regulation and Supervision: Jersey* (October, 2003) 9, finding that finance accounts for 55 per cent of Jersey’s GDP and 60 per cent of its national income; and see: International Monetary Fund, *Assessment of the Supervision and Regulation of the Financial Sector*, Vol. I: *Review of Financial Sector Regulation and Supervision: Guernsey* (November, 2003) 7, finding that finance and related activities account for 65 per cent of Guernsey’s export economy. Further

making apparatus and is a focal point for external scrutiny. A grasp of the issues in its regulation and external threats to its growth prospects is essential to understand fully the nature of both jurisdictions and the reform agendas they are pursuing.

Despite an official policy of economic diversification the future economic fortunes of both jurisdictions remain closely tied to the offshore finance sector. This sector is itself policed by the insular governments, free-standing Financial Services Commissions (themselves subject to oversight by and accountable to the former) and international standard setters such as the EU, OECD and Financial Action Task Force (a G-8 group of major economies founded independent policy-making body which assumes the lead international role in combating financial crime) which are currently engaged in a long-running bargaining relationship with the governments. The insular governments, by virtue of their control of the legislative and fiscal policy functions, enjoy sufficient autonomy to adopt a *laissez-faire* or discriminatory approach to the influx of offshore finance into their jurisdictions. Likewise their financial regulation regimes may be light touch or rigorous.

This autonomy is being rapidly eroded by external political pressure and the overriding imperative to be perceived as clean and professionally regulated OFCs in order to remain competitive in the global market for offshore business. The official posture of the insular administrations is a 'club of quality' admission criterion and a stringent regulatory philosophy for offshore business in stark contrast to the increasingly perceived 'race to the bottom' policy encountered in more lightly regulated OFCs located in the Caribbean and Pacific Basin. The Channel Islands approach is regarded as more likely to attract and retain quality, long-term offshore business. There is a nexus here between financial regulation reform and the new government systems. The latter have clearly been designed and implemented not simply for defensive reasons (to rebut internal and external critics) but also to drive the further development of the offshore finance sector by speeding up and improving the quality of insular laws and policies (for example on money laundering, special purpose vehicles and investor protection) perceived as enhancing its reputation with supranational regulatory bodies and international finance.

Whilst the Islands' offshore activities have triggered external scrutiny and internal conflict, it is worth noting that the whole notion of 'offshore' is itself deeply problematic: it is not a juridical concept at all and economists are still struggling to formulate a universally accepted definition. A consensus seems to be emerging, however, that to be

IMF reviews of the financial regulation regimes in Jersey, Guernsey and the Isle of Man are scheduled for completion during 2008. In the run-up to these reviews the insular governments are fast-tracking large swathes of legislation through the local legislatures.

characterized as offshore, a jurisdiction needs, as a bare minimum, to subject key activities to low or zero taxation rates; rigidly segregate resident and non-resident business activities; provide a favourable regulatory environment; and possess an economic profile dependent to a significant extent on offshore finance.¹⁶ Jersey, Guernsey and the Isle of Man (and indeed the UK via the activities of the City of London) comfortably fit within this economic and regulatory matrix.¹⁷ Furthermore, the City of London and these Island OFCs enjoy a close and mutually beneficial (critics would argue incestuous) relationship: the OFCs provide gateways for inward flows of fluid international capital into the City, which in turn, via the presence of its banking and finance conglomerates in the Islands, is a substantial source of employment and revenues for the insular economies.

The Crown Dependencies openly acknowledge and actively market their OFC status. They strenuously resist the designation 'tax haven': this is a pejorative label which suggests that OFC activities are based on low-zero taxation alone, which neglects a series of other criteria necessary to host an OFC successfully such as political stability, quality professional services, customized special purpose vehicles, customer confidentiality, rigorous financial regulation and close links with onshore finance centres. Even so their favourable fiscal regime for offshore business, which has been taken a stage further and fuelled by new 'zero-ten' corporate tax policies, means that the label continues to be applied to them internationally with consequent damaging effects on internal political relations and a source of tensions at the external interface. Again there is no doubt that more professional and streamlined government machinery assists in lubricating this intimate link with the City and in mediating external conflict.

The emergence and continued expansion of Jersey and Guernsey as major OFCs has also resulted in a series of concerns and scandals which have served to attract the attention of the UK Government and supranational bodies. There have been concerns in Jersey in particular regarding weaknesses in the system of financial regulation as evidenced by regular exposure of money laundering, the notorious Bank Cantrade collapse and the professionalism of the machinery of government as illustrated by the ill-fated limited liability partnership (LLP) legislative initiative launched following collusion between insular politicians and two international accountancy firms involving the alleged 'purchase' of insular legislation as part of a campaign to persuade the UK Government to introduce auditor negligence liability

16 See A. Zorome, *Concept of Offshore Financial Centres: In Search of an Operational Definition*, IMF Working Paper (April 2007) for a literature review and suggested working definition.

17 *Ibid.* p. 19.

reforms.¹⁸ On the international plane the perceived tax haven status of the Islands has attracted the critical scrutiny of the OECD and the EU. The former has launched an initiative designed to counteract economic distortion and revenue losses experienced by onshore jurisdictions flowing from harmful tax practices typically found in OFCs.¹⁹ This initiative seems to have foundered in the face of fierce resistance from OFCs and hostility by the Bush Administrations. The original focus on dismantling objectionable fiscal structures has been abandoned (although many OFCs, including Jersey, Guernsey and the Isle of Man, did abolish some specific tax avoidance-high secrecy vehicles to stave off mounting international criticism) in favour of transparency and exchange of information,²⁰ which also seems destined to falter given OFCs' insistence on *all* their competitors complying with it, including those not technically covered by it, and their pursuit of a network of ad hoc, international bilateral agreements which will inevitably have limited effects compared with the original initiative and indeed the aspirations implicit in the amended approach.

This external pressure point has not disappeared. It has rather reinvented itself in the form of a permanent Global Forum on Taxation working under the auspices of the OECD and committed to 'a global level playing field [which] is fundamentally about fairness'.²¹ This does not necessarily require harmonized fiscal structures; it mandates effective exchange of information and transparency on a collective basis with external supervision and time-lines. All the Crown Dependencies may find their current unilateral stance on this coming under international pressure for a considerable period, though the newly reworked initiative meets their concerns that *all* OFC competitor jurisdictions are caught by it.²² The risk posed to the Islands' OFCs by the Global Forum is underscored by the active participation of the insular governments in its ongoing activities. This engagement is

18 See generally on these episodes the trenchant critiques in: A. Mitchell, P. Sikka, J. Christensen, P. Morris and S. Filling, *No Accounting for Tax Havens* (AABA: Basildon, 2002); A. Mitchell and P. Sikka, 'Jersey: Auditors' Liabilities versus Peoples' Rights' (1999) 70 *Political Quarterly* 3; and J. Christensen and M. P. Hampton, 'A Legislature for Hire: The Capture of the State in Jersey' in M. P. Hampton and J. Abbott (eds.), *Offshore Finance Centres and Tax Havens—The Rise of Global Capital* (Macmillan: Basingstoke, 1999) ch. 7.

19 OECD, *Harmful Tax Competition: An Emerging Global Issue* (May 1998).

20 Carl Levin, Opening Statement before the Permanent Subcommittee on Investigations Hearing on what is US position on Offshore Tax Havens (18 July 2001); US Treasury, Statement of Paul O'Neill Before the Senate Committee on Governmental Affairs Permanent Subcommittee on Investigations—OECD Harmful Tax Practice Initiative (18 July 2001). For discussion of the initiative generally, the opposition it triggered and its eventual dilution, see J. C. Sharman, *Havens in a Storm: The Struggle for Global Tax Regulation* (Cornell UP: Ithaca, 2006).

21 OECD Global Forum on Taxation, *A Process for Achieving a Level Global Tax Playing Field* (Berlin, 3–4 June 2004) p. 3.

22 *Ibid.* at 3.

scarcely surprising. The OECD, contrary to popular perception, is not a toothless body: it enjoys a measure of high-level political influence with the major economies which enables it to push for tax law reforms, the effect of which is to remove the commercial advantages in routing transactions through OFCs or using special purpose vehicles proffered by them.

A more potent threat to the insular economies is posed by the EU tax package. This reflects the EU's long-standing antagonism towards OFCs and is a policy issue where the UK, by virtue of its international responsibility for the Crown Dependencies, has been and remains in an exposed position in terms of EU policy-making. The package takes the form of a Taxation on Savings Directive²³ and a Code of Conduct on Business Taxation²⁴ which both jurisdictions, although protected via Protocol 3 and established constitutional practice confirmed at UK Cabinet level during pre-Accession negotiations, have pledged to comply with and are currently actively implementing. This is principally due to covert pressure from the UK Government, itself under pressure on this in the European Council of Finance Ministers (ECOFIN), and the allure of accessing, via the technique of 'passporting' Channel Islands special purpose vehicles, lucrative business in the expanded EU and its developing single market in financial services.²⁵ The former is undoubtedly a stronger source of pressure for compliance than the latter. This is an unfolding political story which highlights the point that apparently inviolable guarantees in Treaty provisions and prior high-level political assurances can be effectively overridden by the 'power politics' implicit in international negotiations where the coercive bargaining power wielded by much larger

23 Directive 2003/48/EC [2003] OJ L 157 at 38. This has now been implemented: Council Decision of 19 July 2004 on the date of application of Directive 2003/48/EC on taxation of savings income in the form of investments: 2004/587/EC [2004] OJ L 257/7, operative as from 1 July 2005. As with the Code of Conduct on Business Taxation (see below n. 24) the continuing importance of this as a tax administration measure can be gauged from the expert peer review mechanism created to sharpen its operation at national level: European Commission, Expert Group on Taxation of Savings, *Review of the operation of the Council Directive 2003/48/EC on taxation of savings from income* (Brussels, 14 March 2007). See also: European Commission, Summary Record of the 1st Meeting of the Expert Group on Taxation of Savings (Brussels, 8 May 2007).

24 On which see European Council, Conclusions of the ECOFIN Council meeting on 1 December 1997 concerning taxation policy, [1998] OJ C 2/01. The text of the Code is reproduced at Appendix A and essentially establishes standstill and rollback provisions for tax laws and practices deemed harmful according to wide-ranging criteria. There is provision for ongoing and regular review of Member States and their dependent territories' fiscal structures (which includes Jersey, Guernsey and the Isle of Man) for which they bear constitutional responsibility. See, e.g. Code of Conduct Group (Business Taxation), *Report to ECOFIN Council on 29 November 1999 on Code of Conduct (Business Taxation)* (Brussels, SN 4901/99).

25 For discussion see further: A. Sutton, 'Jersey's Changing Constitutional Relationship with Europe' (2005) 9 *Jersey Law Review* 1.

political units, the UK Government and ECOFIN, proves to be overwhelming.²⁶ These EU measures are entrenched in the international taxation regime. They are *de facto* binding on the Crown Dependencies and contain mechanisms for permanent review of selected features of their fiscal structures and tax administration practices.

In addition, both Islands have been compelled radically to reform insular fiscal structures, involving the introduction of goods and services taxes (in Jersey and probably in the near future in Guernsey) and 'zero-ten' low corporate tax regimes, in order to tackle emerging financial 'black holes' in their domestic economies, whereby existing levels of public expenditure can no longer be financed by current revenue streams, and remain internationally competitive as OFCs. The new 'zero-ten' corporate tax regimes in particular pose enormous political and administrative problems. On the one hand they enhance the role of the Islands as magnets for mobile international capital but on the other they may simply exacerbate the financial 'black hole' problem, creating the spectre of successive reductions in public expenditure. Internationally they could be perceived as harmful tax competition, a subjective concept which is still in a state of evolution. The net effect may be to fuel further domestic and international hostility to the new political executives.

These contemporary and continuing international and domestic pressures require sophisticated policy-making, efficient policy co-ordination and decisive political leadership. These qualities have hitherto been conspicuous by their absence in the bloated and cumbersome local authority style, committee-based systems. Even the newly streamlined and more professional systems are likely to be placed under considerable strain flowing from the effects of new fiscal structures, especially the hard political choices these bring in their wake, and continuing scrutiny of their OFC activities in the EU and OECD. The political elite in the Channel Islands confronted by these pressures have had no realistic alternative but to embark on a modernization project which involves not simply refurbished internal government arrangements but also a raft of government-related measures, overhaul of financial regulation, new fiscal policies and UK standards-based social policies.

Insular political anxiety that the EU tax package could damage the attractiveness of the Islands as magnets for footloose international capital has faded now it is clear that compliance involves merely

26 See the frank admission to this effect by a senior Jersey Law Officer: W. Bailhache, 'Jersey's Changing Constitutional Relationship with the United Kingdom' in P. Bailhache (ed.), *A Celebration of Autonomy: 1204–2004: 800 Years of Channel Islands' Law* (Jersey Law Review: Jersey, 2005) 271–84 esp. 276–80. Discussion of the political process in the development, administration and possible future evolution of both measures, including their long-term implications for OFCs, can be found in P. Cattoir, 'A History of the "Tax Package"—The Principles and Issues Underlying the Community Approach', European Commission Working Paper No. 10, December 2006.

information exchange and cooperative tax collection mechanisms with and on behalf of onshore jurisdictions. Hence the exaggerated doomsday option of negotiating independence from the UK mooted by some insular politicians²⁷ is not necessary. This threat nevertheless continues to be aired amongst the Islands' political elite as a last resort option to defend their continued OFC status.²⁸ The very fact that these threats are raised underlines the paramount importance of the OFC to the insular governments and its pervasive (often covert) role in political processes.

ii. The Reform Imperative and Previous Arrangements

What clearly is necessary, however, is radical reform of government and insular administration to manage these pressures and provide speedier, responsive and professional government machinery to tackle a raft of complex and diverse policies requiring modernization. The insular administrations are traditionally imbued by conservatism and a tendency selectively to implement/heavily dilute coherent reform packages. This mentality means that new forms of political executives are better viewed as the start rather than the conclusion of a reform process involving ongoing external critique and increasingly internal pressures for further reforms resulting in more balanced systems as a whole. In short their reform is a *process* not an event.

The long-established machinery of government arrangements in Jersey and Guernsey closely reflected the traditional UK local authority model: committee-based systems of administration embracing virtually all service functions and guaranteeing participation in executive decision-making for the vast majority of members of the local Assemblies. This analogy was never an exact one: UK local authorities' powers are confined by statute to specified, increasingly pared down, activities whereas the insular authorities on Jersey and Guernsey administer monetary and fiscal policy, take responsibility for an extensive range of regulatory functions, administer an offshore finance sector dominated economy²⁹ and are increasingly assuming an independent international representation role. They are *de facto* and now *de jure* the governments of the Channel Islands. While both jurisdictions traditionally declined to acknowledge formally the existence of political executives as such, the administrative reality was that such executives, if only as a matter of administrative and political practice much of which was uncodified, did in fact exist in the form of

27 M. Perl, 'Jersey: tough questions for tranquil island', *Financial Times* (2 October 2000); *Guernsey Press* (19 January 1999); *Jersey Evening Post* (9 June 1999). This option has also been mooted on the Isle of Man: D. Ward, 'Island Haven faces EU tax disaster', *The Guardian* (18 February 1999); and J. Kelly, 'Regulation threat looms', *Financial Times* (15 July 1999).

28 See, e.g. S. Tostevin, 'Support mounts for changes to UK links', *Guernsey Press* (12 February 2007) and *Guernsey Press* (30 May 2006).

29 See *Le Rendu*, above n. 9 at ch. 4. This study is based on Jersey but the general point remains valid for Guernsey.

informal groupings of the presidents of principal committees and senior insular officials.³⁰ Similar arrangements in fact still survive new government structures in Guernsey in the form of steering groups created to deal with cross-departmental strategic policy issues³¹ and in Jersey on a covert basis via informal groupings of the Chief Minister and senior ministerial colleagues.

II. New Forms of Government in Jersey and Guernsey

The original prospectuses³² for the new systems flowed from the deep-seated deficiencies of the committee systems. These were institutionally incapable of delivering efficient policy coordination, clear and decisive political leadership and genuine accountability. They seriously handicapped the development of strategic policy and defence of the Islands' distinctive political and economic interests in external fora. Insular reactions to these blueprints have been narrow. Only new forms of political executives have been implemented.³³ They represent a half-finished modernization project with a plethora of government-related reforms including changes to the composition of the Assemblies, new electoral systems, restructuring of parish-executive relations, citizens' redress (including Ombudsmen) and new forms of public services delivery scarcely touched at all. Moreover, the new systems themselves have been subject to successive dilution exercises. Jersey has an emaciated ministerial system compared with the original vision, and it is not gelled together by a strong doctrine of collective ministerial responsibility: the Assembly possesses key control mechanisms and the Chief Minister and Ministers have delimited powers. Likewise in Guernsey the proposed ministerial scheme was sabotaged³⁴ by political factions keen to preserve their own prerogatives, and replaced by a refurbished committee system handicapped by the lack of a Chief Minister's Department and a clear executive

30 See the Kilbrandon Report, above n. 1 at para. 1354.

31 See the account in M. Oliphant, 'States power now in too few hands', *Guernsey Press* (11 June 2005).

32 States of Jersey, *Report of the Review Panel on the Machinery of Government* (December 2000) (the Clothier Report); States of Guernsey, *Report of the Panel to Review the Machinery of Government*; States of Guernsey, *Statement of the Panel to Review the Machinery of Government in Guernsey* (November 2000; February 2001) (the Harwood Reports).

33 Government-related measures will be considered in due course: States of Jersey, *Machinery of Government: Proposed Reforms: Implementation Plan* (27 November 2001); States of Guernsey, *A Report by the Advisory and Finance Committee on the Future Machinery of Government on Guernsey* (March 2003). This is totally inconsistent with the Clothier Report (above n. 32 at 7) which made clear that the package requires implementation as a whole.

34 See *The Machinery of Government in Guernsey*, Consultation Document by the Joint Committees of the States Advisory and Finance Committee (States of Guernsey, 10 December 2001).

decision-making matrix. The net effect is imbalanced insular government as a whole. New systems have been implemented, but are disjointed and require further development if they are to fulfil the aspirations in the original prospectuses.

At no point were these fundamental constitutional changes approved via referenda³⁵ or popular mandate (a real problem given the lack of organized political parties in both jurisdictions). Although there was and remains extensive political debate involving a measure of public involvement, the new structures lack proper democratic legitimacy. Essentially Jersey enacted the States of Jersey Law 2005 which abolishes its previous 24-strong committee-based system in its entirety, replacing it with a new ministerial system operative as from 1 December 2005.³⁶ Likewise Guernsey, via a new set of administrative regulations, replaced its existing regime of over 50 committees with a contracted and streamlined system of departments and Policy Council operative as from 1 May 2004.³⁷ This section discusses the key substantive features of these new structures. It focuses on the role of the Chief Minister, decision-making in the Council of Ministers/Policy Council and departments, the role of scrutiny and their performances to date, including recent reviews. Key issues in this discussion are the interface with Assemblies, improvements in policy-making processes and ensuring genuine accountability of the new political executives.

i. Ministerial Government in Jersey

The legislation creating this revolutionary constitutional change unashamedly articulates the values underpinning these changes, namely an expression of its right to self-government, its desire to participate independently in international affairs and a commitment to a democratic, accountable and responsive mode of government. Thus notwithstanding the external pressures which have clearly been influential, the architects of the new system depict it as an aspect of its maturing separate international identity and a product of a principled commitment to modernized government which conforms to standards expected in liberal democracies. This does not accurately reflect

35 See Referendum (Jersey) Law 2002 (Revised Ed, 15.640) by which referenda may be held on any matter specified by the Assembly but the outcomes of which are not binding on the government.

36 Revised Ed as at 1 January 2007; States Greffe 16.800, Parts 4 and 7; and see Standing Orders of the States of Jersey (Revised Ed, 1 January 2007), Parts 6–8, sch. 3; and States of Jersey (Transfer of Functions from Committees to Ministers) (Jersey) Regulations 2005 (Revised Ed as at 1 January 2006, States Greffe, 16.800.30). The following account in the text of this article is based on provisions found in these constitutional-type instruments which both found the new structure and prescribe detailed rules for its operation.

37 This account is based on detailed provisions located in the Constitution and Operation of the States Departments and Committees (Prescribed by Resolutions of the States of 30 October 2003, 30 March 2005, 29 June 2005, 27 April 2006 and 28 September 2006); and Rules of Procedure of the States of Deliberation (made on 30 October 2003; amended 30 March 2005, 27 April 2006 and 28 September 2006).

the twin forces in practice driving these reforms: the need for improved internal policy-making processes and effective external defence of the Islands' distinctive political and economic interests.

ii. Selected Key Features of the New System

(a) The Roles of the Chief Minister and Council of Ministers

The following represents a thumbnail sketch of the new system. First, the entire structure is headed by a Chief Minister with his own department. The Chief Minister is directly elected by the Assembly from amongst their number following presentation of a personal manifesto and a short questions and answers session. There is no explicit limit to his term of office but he can be removed on a number of grounds including ceasing to be a member of the Assembly and a simple majority expressing a vote of no confidence in him. In terms of his key powers and responsibilities, these may be summarized as follows:

- to nominate on a coordinate basis with the States individuals to serve as Ministers with specified portfolios in the Council of Ministers, with the States having the final say on those elected;
- a sole power to appoint and dismiss a Deputy Chief Minister;
- a power to appoint on a coordinate basis with departmental Ministers up to two Assistant Ministers in each department;
- on a *de facto* basis to serve as Jersey's political leader in external relationships with the UK Government, the EU, sovereign states and supranational bodies, albeit a role often shared with selected senior colleagues;
- chair and coordinate discussion in the Council of Ministers.

A couple of points are worth making about the Chief Minister. In the first place, although he can to some extent stamp his personality and policy preferences on government by virtue of his nomination powers and the 'ticket' on which he is elected to office, he is severely constrained by the Assembly in formation of a government and by Ministers' (increasingly theoretical) autonomy in policy development. Secondly, whilst his role on paper appears to be titular (indeed the legislation expressly precludes him performing the dual capacity role of holding ministerial office in addition to his role as Chief Minister), the political reality remains that he may forge working alliances on strategic issues with ministerial colleagues where this is felt to be necessary to steer policy in a preferred direction³⁸ and he can use the specific functions listed above to build policy influence. His Manx counterpart enjoys Cabinet-building powers and direct policy influence. Substantial barriers exist to transplanting this experience into

³⁸ This in fact is already occurring and represents a *de facto* continuation of the informal policy groupings which were highly influential under the previous committee-based system. For confirmation of this informal policy-making role, see the interview with Chief Minister Walker in B. Queree, 'Yes, Chief Minister', *Jersey Evening Post* (29 October 2005).

Jersey in the form of hostility in the Assembly to further concentrations of political power and the limited scope for new policy initiatives or radical policy change given the prescriptive nature of States' strategic and business policies.

Secondly, the Council of Ministers is composed of the Chief Minister and ten other Ministers with separate portfolios encompassing: Economic Development; Education; Sport and Culture; Health and Social Services; Home Affairs; Housing; Planning and Environment; Social Security; Transport and Technical Services; and Treasury and Resources. Power of initial nomination to these offices is conferred on the Chief Minister but it is a coordinate power shared with the Assembly as a whole. Elections for the Council are normally held after every ordinary election for Assembly Deputies (namely every three years) or upon certain other specified events such as the resignation of the Chief Minister. Individuals are elected by a simple majority after presentation of a personal manifesto and a short question and answer session. Nominations include the portfolio to be held, which is automatically the one to be held upon election.

There is thus minimal scope for Cabinet building by the Chief Minister and his political allies: the composition of the Council is determined by the Assembly, whose assent is also required for ministerial reshuffles whereby a Minister is moved between departments. Furthermore, while the Chief Minister is invested with the sole power to lodge a proposition with the States for the dismissal of a Minister, the final decision rests with the Assembly. Review of the new system notes the limited nature of the Chief Minister's powers over Ministers regarding serious delinquent conduct such as breach of the Ministerial Code, observing that 'there is no sanction between doing nothing and the more radical option of seeking the dismissal of the Minister'.³⁹ Accordingly it proposes conferring new powers on the Chief Minister, provided he can obtain the support of the majority of the Council of Ministers, both to reprimand Ministers publicly for breaches of the Code and to suspend a Minister pending a motion for his dismissal.⁴⁰ Both the Chief Minister and the Council will, however, remain permanently constrained by the Assembly in terms of the initial selection, changes in the composition of and disciplining of errant Ministers.

Key functions of the Council are articulated as follows:

- policy coordination and administration for which they are responsible as Ministers;
- discussing and agreeing policy proposals which affect two or more departments and cross-departmental policy;

39 States of Jersey, *Machinery of Government Review* (States Greffe, Presented to the States on 9 November 2007 by the Privileges and Procedures Committee) para. 4.1.5.

40 *Ibid.* at Recommendations 4 and 5.

- discussing and agreeing their common policy as regards external relations;
- prioritizing executive and legislative proposals;
- agreeing, and within four months of their appointment lodging for approval with one or more scrutiny panels, a statement of their common strategic policy;
- dealing with such other matters as the Council of Ministers may determine.

The Council is not bound by a strong doctrine of collective ministerial responsibility.⁴¹ Normal decision-making is by consensus, with Ministers retaining the power to circumvent the Council by presenting their policy independently to the Assembly for approval. All Ministers are, however, required to ensure that their public statements are consistent with policies of the Council and, when making media statements, to make it clear whether they are expressing a personal opinion or speaking on behalf of the Council. The Council appears to be operating in an efficient manner. There is little evidence of open ministerial conflict or Ministers exercising the right to bypass it. This is probably due to a combination of an explicit statutory duty to respect single departmental policy initiative autonomy and an implicit ‘hands off’ culture whereby policy proposals, provided they are not patently unreasonable or inconsistent with established States policy, are seen as the prerogative of the departments and hence ought normally to proceed through the Council without the need for debate or amendment. This of course makes for smooth policy transmission and implementation, with the Council of Ministers at first glance a cohesive body. There is no guarantee that this will continue: the Manx experience of strong collective responsibility with binding majority voting still results in regular instances of open ministerial dissent.⁴²

Portrayal of the doctrine as constituting the Council a united and efficient body is deceptive. It only applies to policy initiatives emanating from one department consistent with agreed States strategic policy. The weak nature of the Council’s authority and absence of party political discipline means that cross-cutting policy issues which generate political conflict are fertile territory for blockages in policy development and interdepartmental disputes which may prove damaging to the Council and to the new system. There are no strong formal or informal mechanisms within the Council for tackling these.

41 See generally the States of Jersey, *Code of Conduct for Ministers* (presented to the States on 10 February 2006 by the Council of Ministers) from which the following points in the text of the article are drawn. See also for further official confirmation: *States of Jersey Hansard, Official Report*, Monday 5 December 2005, Appendix Two, Statement by Chief Minister Walker. Later subsequently confirmed as agreed by the Council of Ministers: *States of Jersey Hansard, Official Report*, Tuesday 17 January 2006, para. 5.3.

42 D. G. Kermode, *Offshore Island Politics: The Constitutional and Political Development of the Isle of Man in the Twentieth Century* (Liverpool University Press: Liverpool, 2001) 299.

The assumption seems to be that efforts should be made between disputing Ministers to reach agreement, and if this is not possible the matter should be discussed by the Council.⁴³ Where agreement is still not possible the ultimate power of arbitration rests with the Assembly, which represents an abdication of political responsibility. Resolution of this requires development of a stronger notion of ministerial responsibility, providing formal majority voting and a range of sanctions in the event of non-compliance. This should be codified and subject to regular review. This would cement the executive together, minimize public ministerial conflict and enhance the policy-making and coordination roles of the Council.

Review of the new system concludes that it has generated tensions between the Council and the Assembly. While it is clear that major new policies are being brought to the Assembly for debate and approval,⁴⁴ there remains a distinct feeling of marginalization on the part of those Assembly members not involved in executive functions. These tensions pose a threat to the Island's tradition of consensual government.⁴⁵ They require clearer communication of ministerial policies and more active involvement of all Assembly members in States strategic policy documents such as the Annual Business Plan.⁴⁶ This is a criticism not of the functioning of the Council but of a felt need for it to interface with the Assembly in a more sensitive and transparent manner.

(b) Ministers and their Powers

At first glance the circumscribed role of the Council appears to confer key responsibility for policy development on departmental Ministers. This is inaccurate: Ministers' autonomy is severely constrained in practice by States strategic policy and cross-cutting policy development in ad hoc informal groupings operating outwith formal structures. The range of portfolios guarantees similar coverage as under the previous system. Ministers hold office normally for a fixed term of three years but may be dismissed on a resolution of the Assembly or by a vote of no confidence. The Chief Minister alone in the government machine may lodge a proposition with the Assembly for the dismissal of a Minister. Where this is done the Minister is invested with a trio of protections: he must be given the opportunity to be heard by other Ministers; the majority of these Ministers must agree to the proposition for his dismissal; and the proposition is required to state the reasons for his dismissal. These powers have yet to be exercised. Ministers accused of incompetence or lack of judgment will normally resign and, having done so, explain their position. This occurred toward the end of 2007 when Health and Social Services

43 Above n. 41.

44 See Review, above n. 39 at para. 8.4.7.

45 *Ibid.* at para. 11.2.

46 *Ibid.* at para. 8.4.7.

Minister Syvret resigned following his revelations of (alleged) long-term mistreatment of minors in a States children's home. There was invocation of the early stages of the dismissal procedure which was pre-empted by his resignation and announcement of an independent inquiry into the long-term management of the facility. While there is no evidence of ministerial wrongdoing in this affair, the very fact that it resulted in a resignation so soon in the life of the new system underlines the point that there is a learning process involved here, that Ministers need to acclimatize themselves to the nature of ministerial office and ensure its proper absorption into insular political culture.

Each Minister may select up to two Assistant Ministers to work as a part of their team and possesses powers of their dismissal subject to the prior consent of the Chief Minister. Departmental Ministers thus determine their own ministerial team subject to oversight by the Chief Minister. In terms of internal decision-making, Ministers enjoy unfettered autonomy to delegate sub-portfolios or specific projects to Assistant Ministers. Their policy freedom is constrained by the clear framework furnished by States strategic and business policies⁴⁷ as well as being subject to rigorous review by scrutiny apparatus and debate in the Assembly. So, within the context of this departmental structure, the precise nature of decision-making depends to a large extent on a Minister's personal predilections, in particular whether to adopt an individualistic or inclusive approach to policy formulation and decision-making. Thus the extent to which the executive model is carried forward will depend on the department and which Minister is heading it. There are no signs at this juncture of any attempt to impose uniformity by means of guidance emanating from the Council or the Assembly.

In terms of the government as a whole the new structure incorporates the policy but not the letter of Clothier's 10 per cent buffer. This means the total number of individuals serving as Chief Minister, Ministers and Assistant Ministers is subject to an overall ceiling of 23 individuals (subject to increase or decrease by means of Regulations issued by the Assembly). The purpose of this is to bolster the separation of powers doctrine and safeguard the credibility of scrutiny, by ensuring a wide safety margin between the number of independent Assembly members and those holding office in the government machine. This is designed to prevent government dominance of the Assembly.

Review hints in favour of a more inclusive approach involving greater use of the specialist expertise of Assistant Ministers by permitting them to serve in more than one department and delegation of

⁴⁷ Which represent a clear and fairly tight framework for policy development: States of Jersey, *Strategic Plan 2006–2011*; and States of Jersey, *Business Plan 2008* (as amended 21 September 2007). There remains, however, room for policy initiative within these parameters which is articulated in departments' Annual Plans.

specific portfolios to them including regulation-making powers.⁴⁸ There are two important legal constraints on ministerial decision-making, sufficiently serious breach of which may justify dismissal. First, the Ministerial Code imposes a firm obligation to ‘scrupulously avoid any danger of actual or apparent conflict of interest between their ministerial position and their private financial interests’.⁴⁹ Details of the latter are required to be disclosed and kept updated, and Ministers are generally required to abstain from all decision-making where there is a conflict of interest between States business and their private interests.⁵⁰ Secondly, all ministerial decisions⁵¹ are required to be recorded on a standard template setting out in full the reasons for and background to the decision. This is necessary as an aid to scrutiny and to provide a point of reference in the event of a legal challenge. In addition, Ministers should only take decisions following receipt of civil service advice which is required to be ‘complete and balanced and reflect the officer’s best professional advice’ but which is not binding on the Minister. Civil servants may draw their Chief Officer’s attention to ministerial decisions on narrow grounds such as that the decision is illegal or contrary to financial directions. Ministers should never implement their own decisions. In short the insular civil service is placed in a firmly subordinate position to Ministers and ministerial responsibilities are clearly segregated from those of civil servants. Both mechanisms deal with endemic problems of unethical conduct and sharpen ministerial lines of legal and political accountability.

(c) The Role of Scrutiny

Finally, powerful scrutiny machinery has been established in the form of five Scrutiny Panels encompassing: corporate services; economic affairs; education and home affairs; environment; health, social security and housing.⁵² It is this counterbalance to the greater concentration of political power inherent in ministerial government which enabled the reforms to be successfully ‘sold’ to Assembly members. These arrangements are seen as conferring political legitimacy on ministerial government by permitting those Assembly members not exercising executive functions an indirect role in policy development, sharpening accountability and improving policy by means of detailed reviews of its development and operation. Financial accountability for

48 See Review, above n. 39 at Recommendations 6 and 8–11.

49 See Code, above n. 41 at Rule 4.

50 *Ibid.* See further on recent problems regarding this the publications cited above at n. 18.

51 The following details in the text of the article are contained in: States of Jersey, *Recording of Ministerial Decisions* (States Greffe, RC 80/2005, presented to the States on 18 October 2005 by the Policy and Resources Committee). See also the further details added to this in: States of Jersey, *Ministerial Decisions: Supplementary Guidelines* (presented to the States on 4 December 2006 by the Council of Ministers).

52 The work of Scrutiny Panels and their contribution to policy processes are fully documented on their dedicated website accessible at: www.scrutiny.gov.je/.

the efficient, economic and effective use of States resources is entrusted to the Public Accounts Committee (PAC) which receives reports from Jersey's Comptroller and Auditor General as well as carrying out its own investigations. There is clearly an overlap between the jurisdictions of these two bodies in that while the focal point of the PAC is cost-effective use of States resources, the evaluation by Scrutiny Panels of policy, legislation and Ministers' determinations will inevitably on occasions require an assessment of the proper use of States funds. Guidelines have been developed to demarcate more clearly both bodies' roles and avoid politically embarrassing turf wars.⁵³ Panels possess the power to compel the attendance of witnesses before them and production of documents; non-compliance incurring the sanction of criminal penalties,⁵⁴ which serves as a potent deterrent to those inclined to be uncooperative with Panels.

The modus operandi of Panels has been to audit selectively established and emerging policy via reviews which may be relatively concise or long-running depending on the subject matter and issues at stake. There remain problems of closer integration of the work of the Council and Scrutiny Panels and enhancing their strategic role by exposing the States Annual Business Plan and the Budget to scrutiny input.⁵⁵ The work of Panels is performed by means of public and private meetings, close questioning of Ministers, use of independent expert advisers, lodging of reports for debate in the Assembly and determined efforts to improve the quality and clarity of policy by their own persuasive input. Perhaps the best way to illustrate their work is by means of an 'audit trail' illustrating the influence a Panel may have on substantive policy. This will now be done by focusing on the controversial issue of the proposed privatization of Jersey Telecom, the Island's publicly owned telecommunications provider which also has a substantial business presence in Guernsey. Briefly recounting this still unfolding story, which seems destined to result in Jersey Telecom's wholesale privatization, provides valuable insights into the contribution of scrutiny to policy formation and its limitations as a tool of political accountability.

The starting point for the privatization proposal was the Minister for Treasury and Resources Discussion Paper.⁵⁶ This opened the debate by making the point that Jersey Telecom is already an incorporated company operating as a normal business enterprise albeit

53 See States of Jersey Public Accounts Committee, *Guidelines and Protocol: Appendix, The Role of Scrutiny Panels vs The Public Accounts Committee* (not dated).

54 States of Jersey (Powers, Privileges and Immunities) (Scrutiny Panels, PAC and PPC) (Jersey) Regulations 2006 (Revised Ed as at 1 January 2007, States Greffe 16.800).

55 See Review, above n. 39 at Recommendations 37-43.

56 States of Jersey, *Discussion Paper* issued by the Minister for Treasury and Resources on the Proposed Sale of Jersey Telecom (2006).

100 per cent States owned. It is held purely as an investment with consumer, employment and social issues of limited importance. Given the risk of a significant diminution in the value of this investment in the event of an economic downturn, the optimal solution in terms of current investment strategy, the Minister asserts, is wholesale privatization with the proceeds held in off-Island assets (mainly equities and bonds) as part of the States Strategic Fund. The whole paper by virtue of its philosophical starting point strives to preclude further debate or analysis which incorporates non-financial interests such as employee interests, consumer protection and the role of Jersey Telecom as a vital platform for parts of the Island economy, in particular the finance sector. The document is remarkable for its terseness, absence of convincing supporting empirical evidence, lack of proper public consultation and inadequate attention given to the needs and expectations of key stakeholders.

Fortunately the whole privatization issue was selected for a Scrutiny Review performed by the Economic Affairs Sub Panel (EASP). The EASP conducted a searching review of the proposal with a series of meetings where the Minister was 'grilled' by key stakeholders including Jersey Telecom employees, trade union officials, independent Assembly members, consumers and the media. It also commissioned its own economic advice which casts doubts on assumptions made by the Minister. In its report⁵⁷ EASP excoriates the proposal on the following (process and substance) grounds: flawed and superficial consultation which fails to meet Jersey's standards of good practice; undue weight placed on the financial grounds for the sale at the expense of the full range of strategic, social and competition issues affecting Island residents and businesses; failure to carry out a full cost-benefit analysis of the sale; lack of attention to other modes of disposition, including a partial privatization; remaining doubts as to whether Jersey's competition regulatory authority is equipped to perform the tasks necessary for a successful privatization; undue emphasis placed by the Minister's Economic Adviser on the benefits of privatization per se with insufficient weight placed on the fact that competition and effective regulation are the key drivers of improvements to services and economic efficiency; and the Minister not being in a position following privatization to guarantee the continuation of employees' terms and conditions.

In response to this devastating critique and criticism by independent members in the Assembly, the Minister commissioned further wide-ranging economic analysis.⁵⁸ This is much more broadly based, analytical, firmly grounded in high-level empirical studies, comparative experiences of telecoms privatizations in small jurisdictions and

57 States of Jersey, Economic Affairs Scrutiny Panel, *Jersey Telecom—Privatization* (presented to the States on 6 March 2007, SR5/2007).

58 See the work by economics consultancy agency, Oxera: *Possible Sale of Jersey Telecom: additional analysis*, prepared for the States of Jersey (20 July 2007).

coverage of all possible options. It supports privatization as in the best financial interests of the Island but pays much fuller attention to employee and consumer interests and how these should be protected. To enhance further the quality and legitimacy of policy, input was provided by an independent Steering Group⁵⁹ which essentially endorsed this further analysis whilst stressing that financial returns alone are not determinative of the matter: enhanced powers for the Island's Competition Regulatory Authority ought to safeguard consumer interests, and conditions attached to the sale ought to ensure continued employment of local people.

The beneficial input of the EASP report and its high profile activity fed through into the Minister's final proposition to the Assembly. Broadly speaking the report,⁶⁰ which is permeated by high-level economic analysis from at least four sources and comparative perspectives furnished by telecoms privatizations experiences in small jurisdictions, reaffirms the Minister's commitment to wholesale privatization and the original rationale for doing so: to realize the best price for Jersey Telecom which is held as an asset and to place the proceeds in the States Strategic Fund which represents its optimal role as a hedge against future economic recessions. The report continues to be heavily influenced by economic factors but the influence of EASP input can be gauged from the fact that the Minister and his advisers have been compelled to consider a broader range of interests including consumer protection, the future development of the company and safeguarding employee terms which were originally accorded minimal weight. Even so the faith placed in the Island's Competition Authority to promote effective competition and existing insular law (in the absence of transfer of undertakings, protection of employment (TUPE) style provisions) to protect employees' continuing terms of employment may prove to be over-optimistic. A more substantial guarantee of these and other non-financial factors is provided by the requirement for the Assembly to approve the principle of privatization and its material terms including the prospective purchaser's investment and employee commitments.⁶¹

What then are the lessons to be learned from this episode? The process is characterized at least in its latter stages by evidence-based policy development, though one suspects this has been used to legitimize a pre-determined position rather than out of a principled commitment to improve policy by means of forensic analysis. The Minister nevertheless concludes it is 'unlikely that there has been such extensive research and analysis by a small jurisdiction in advance of a decision to proceed with the sale of a telecom company'.⁶² The EASP

59 B. Ogley *et al.*, *Agreed conclusions of the JT Review Steering Group* (9 July 2007).

60 States of Jersey, *JT Group ('Jersey Telecom'): Proposed Sale* (States Greffe, Lodged au Greffe on 9 October 2007 by the Minister for Treasury and Resources).

61 *Ibid.* at 46 and 48.

62 *Ibid.* at 6.

critique has obviously played a role in this: the report is more balanced, rigorous and professionally informed than the original proposal. In particular EASP analysis has compelled it to recognize a broader range of factors than financial criteria. The EASP has not blocked the privatization proposal. It has, however, played a key role in injecting clarity and rigour into the proposal and in doing so conferred upon it a measure of political legitimacy which may facilitate its passage through the Assembly.

This goes to the heart of what scrutiny is about. There remains a lack of consensus as to its purpose other than in broad terms to engage in constructive criticism of government policy. This fundamental ambiguity is to be addressed in a separate review of its role.⁶³ The Jersey Telecom affair underlines the limited nature of the scrutiny function. The EASP has intervened vigorously to improve the clarity, evidential basis and selected aspects of policy. It has not, however, successfully changed the key planks of the proposal and its financial *raison d'être* which remain as originally articulated by the Minister. Maybe this expects too much of scrutiny. Its role is not to assume the mantle of unofficial opposition or junior policy-making partner by blocking or radically changing ministerial policy; rather it is strategically well placed to stimulate improvements in its clarity, presentation, evidential basis and critical self-appraisal by Ministers and their advisers. In short scrutiny ought to be rigidly confined to the role of critical friend of government. The EASP input into the proposed privatization of Jersey Telecom is an exemplary illustration of the benefits this can bring to decision-making in ministerial government. A final point is that it is misconceived to conceptualize its role as ad hoc: there is a commitment to aligning the work streams of the Council and Panels. Its influence on policy will thus continue to be exercised at the strategic level.

iii. Streamlined Committee/Semi-Executive Government in Guernsey

Despite the official posture of the insular authorities that the Island does not have ministerial government,⁶⁴ it clearly has a system qualitatively different from a committee-based system; in particular the coordinating and selected executive roles of the Council, use of ad hoc pan-departmental steering groups, streamlined decision-making within departments, an emerging separate international profile, and the role of scrutiny as an accountability mechanism are suggestive of a formal (reduced and refurbished) committee system but with key

⁶³ See Review, above n. 39 at Recommendations 27 and 38.

⁶⁴ States of Guernsey Policy Council, *Twelve months review of the new system of government*, Consultation Paper (June 2005) 6. See also N. Mann, 'Illogical and doubtful but it's yes Minister', *Guernsey Press* (28 April 2006), reporting the views of a senior insular politician denying that Guernsey has ministerial government and that the term 'Minister' is largely titular.

elements characteristically found in executive forms of government in small jurisdictions. In short it does not have ministerial government of the type operative in Jersey and the Isle of Man but it clearly has a form of semi-executive government. Moreover, the clear and flexible framework for the new structure in the form of resolutions of the Assembly and its internal administrative regulations (in contradistinction to the primary and secondary legislation constituting ministerial government in Jersey and the Isle of Man) opens up the prospect of a possible longer-term shift towards pure executive government provided the political hostility to this in the Assembly can be overcome. This is founded on the excessive concentration of political power it brings in its wake. While the legal process for such a development would be fairly straightforward, the new system is very much on trial; any transition to a stronger form of executive government will only occur, if at all, if concerns regarding the marginalization of Assembly members and higher quality policy programmes are effectively addressed.

(a) Fundamental Values and Key Features of the New (Hybrid) System

At the outset the architects of the new system have articulated a series of fundamental principles which underpin the entire structure. These represent desiderata for an informed and ongoing evaluation of its performance. Some of them pull in opposite directions and hence there will need to be trade-offs in any future reforms. These are as follows:⁶⁵ clearer leadership within the States; a political leader to speak with authority for the Island, especially in regard to external relations; streamlined government which focuses on core issues at policy level; greater accountability in relation to the exercise of government responsibilities; a strengthened system of scrutiny via internal checks and balances and external oversight; the need to avoid excessive concentration of power amongst a small number of Assembly members; retention of the system of politicians' individual independence; and recognition of the valuable role played by parishes in the government of the Island.

These values have recently been reaffirmed in a review which broadly endorses the status quo, expressing no desire for radical shift towards a more executive-oriented model.⁶⁶ The traditional weight attached to distributed departmental decision-making and Assembly members' political independence probably precludes a wholesale transition to Jersey-style executive government for the foreseeable future. There remains, however, within the Council and departments sufficient autonomy for the phased development of more executive

65 *States of Guernsey, A Report by the Finance and Advisory Committee on the Future Machinery of Government in Guernsey* (March, 2003) 6.

66 See Consultation Paper, above n. 64.

decision-making, with the result that selected parts of the Guernsey architecture may over a long time frame, via a combination of administrative stealth and political acquiescence in the Assembly, drift into closer alignment with the Jersey system.

(b) The Chief Minister and Policy Council

The Chief Minister is directly elected by the Assembly for a fixed period of five years. There is no prescribed qualification for office other than that he must have held the office of People's Deputy in the Assembly for at least four years during an eight-year period immediately prior to the date of election as Chief Minister. He is invested with a power to nominate a Deputy Chief Minister and Ministers, but this is a coordinate power shared with all Assembly members. The elections are conducted on the basis of a simple majority in a secret ballot following the presentation of short manifestos by the candidates. The Chief Minister may be removed from office by a vote of no confidence (tabled by at least seven or more members) passed by a simple majority of the Assembly.

As with his Jersey counterpart his team-building role is strictly limited, and his internal political role is further delimited by a bar on holding a separate ministerial portfolio. Even so he is far from a titular figure. The following key political responsibilities have been allocated to him which in practice confer upon him significant political influence as well as an increasingly important external political role:

- to chair and coordinate discussions in the Council;
- to take responsibility for the preparation and presentation of corporate policy to the Assembly;
- to identify and lead the development of strategic policies spanning different departments via the creation of sub-groups of the Council;
- to oversee and coordinate the policy and resource planning process; and
- to speak politically for the Island with the authority of the Council.

Thus while the Chief Minister does not possess a discrete policy portfolio and continues to be handicapped by the lack of his own department, with a corresponding absence of dedicated administrative muscle and specialist advice, he remains a key political player by virtue of his role in leading the creation of States strategic policy and his task in steering this through the Assembly. Externally his role as the Island's political leader in negotiations with the UK Government, the EU, sovereign states and supranational bodies is now crucial in terms of defending its OFC and future economic security. These major powers in practice are shared with selected senior ministerial colleagues, most notably the Treasury and Resources Minister, which together with the use of ad hoc steering groups on cross-

departmental policy constitute a platform for the Chief Minister to build political alliances in government which could serve as a basis for the office to evolve into a more influential political entity. Given that this may occur gradually as a political fact within the Council and outside formal governmental structures, it is difficult to see how the Assembly could intervene to block such a fluid development (which is already under way) other than by a formal motion of no confidence.

So far as the Council is concerned this is composed of the Chief Minister as chair and ten departmental Ministers with portfolios encompassing: Commerce and Employment; Culture and Leisure; Education; Environment; Health and Social Services; Home; Housing; Public Services; Social Security; and Treasury and Resources, subject-matter which spans the bulk of the previous system.⁶⁷ Normal practice is to operate on the basis of consensus or as a default position by majority voting. Since it is not a thoroughgoing executive body and, in official terms at least, Guernsey continues to have a streamlined committee-based system of government, there is no doctrine of collective responsibility whatsoever. It does, however, pursue a collegiate approach to decision-making, with the Chief Minister encouraging both within the Council and departments a more corporate approach to the work of the States. In broad terms the ethos of the Council is to serve as a focal point for 'a more corporate approach to the business of government within a stronger, more focused policy based system'.⁶⁸ Within this framework the Council coordinates States strategic policy across the broad range of economic, fiscal, social and environmental policy. Both it and the departments function within the continuing constraints of the increasingly influential States Business Plan.⁶⁹ This is a multi-layered, constantly evolving and highly influential document into which they have input and which articulates not merely wide-ranging strategic policy but also a level of prescriptive detail that severely curtails Ministers' freedom to engage in policy innovation. Ministers are required to present policy initiatives to the Council which may reject or delay them. Ministers retain the right to bypass the Council and present policies directly to the Assembly for its approval. Thus far there is scant evidence of Ministers opting to circumvent the Council in this way. Regular recourse to this power would undermine its political authority and generate tensions between it and the Assembly.

67 See the updated list in: *List of Members of the States of Deliberation, Mandates and Membership of the Policy Council, Departments and Committees* (not dated) which lists the full memberships and policy profiles of departments.

68 See Report, above n. 65 at 16.

69 For the latest version of arguably the most important policy document in government, see: Policy Council, *Government Business Plan 2007*, Billet d'Etat, Vol. XVII, Wednesday 25 July 2007. See also the closely related and now integrated Fiscal and Economic Policy Steering Group, *Strategic Economic Plan* (2007).

The Council is not simply an advisory and debating body. It possesses the following executive functions⁷⁰ which invest it with significant political and policy influence:

- political leadership in international and constitutional affairs;
- the preparation of States corporate policy on social, economic, fiscal and environmental issues within the context of States policy, planning and resource frameworks for presentation to the Assembly;
- coordination of the policies and functions of departments;
- resolution of cross-departmental issues;
- prioritizing the legislative programme; and
- responsibility for States corporate human resources.

The Chief Minister will usually take the lead on *prima facie* formulation of these, their presentation and ensuring their proper implementation, but he is in the main a spokesperson. Political responsibility is located in the Council as a collective body.

(c) The Falla Affair and its Lessons

Higher quality policy programmes and ministerial decision-making does not flow simply from streamlined structures and improved remuneration, it also requires higher calibre individuals with a good sense of judgment and a supportive administrative framework for the exercise of discretion. This is highlighted by the Falla Affair which triggered the resignation of the entire government of Guernsey in 2006. In brief, a local construction company partly owned and managed by a Minister in the Policy Council withdrew its tender for the construction of a new hospital block, which had been designated as having preferred tender status. This resulted in the selection of a new tender at an additional net cost to the States of £2.4 million. The Minister was found to have satisfactorily handled a conflict of interest situation and there is no suggestion that the new system of government was a systemic cause of the failings identified in the independent inquiry performed by the Wales Audit Office.

The report⁷¹ does, however, catalogue a series of shortcomings in the decision-making process by the Chief Minister, the Council and the insular civil service. In specific terms these are:

1. States procurement procedures were not always followed and reasons for decisions were often unclear, incomplete and inadequate;

⁷⁰ See Report, above n. 65 at 12–13.

⁷¹ Wales Audit Office, *The Princess Elizabeth Hospital Clinical Block: Consideration of the circumstances which led to the withdrawal of the preferred tender in August 2006* (25 January 2007).

2. there was a lack of clarity by the Treasury and Resources Minister and a failure by the Council collectively to provide proper guidance to the Chief Minister;
3. key sessions of the Council were ineffectually chaired by the Chief Minister;
4. the Chief Minister failed to obtain clarity from the Council as to the scope of his remit in discussions with the Minister alleged to be in a conflict of interest position; and
5. there was maladministration by officers in the insular civil service entrusted with administration of the procurement process and Council discussion.

Collectively these failings resulted in withdrawal of the preferred tender and with it £2.4 million of unnecessary expenditure by the States.

There are three points worth making about the Falla Affair and its aftermath. First, the very fact that the inquiry was contracted out to the Wales Audit Office rather than being dealt with internally via the Public Accounts Committee (though admittedly external review may have been unavoidable in order to shore up public confidence in insular government) shows that internal scrutiny arrangements in small jurisdictions are simply inadequate when confronted with issues of big government involving high-level decisions. They lack the weight, technical expertise and credibility provided by a major UK audit agency. Secondly, although some of the failings are due to procurement processes which had not been updated to take account of the new system of government, the report highlights serious flaws in interaction between the Chief Minister and Ministers and apparently ad hoc, unstructured advice and decision-making outside the confines of the Council itself. This suggests not merely individual flaws but also the pressing need for a more structured and prescriptive framework to govern the functioning of the Council, which operates largely in a legal and administrative vacuum. Thirdly, while the aftermath of the Falla Affair signalled the premature end of the Chief Minister's political career and the smooth formation of a new Administration, the limits of this should be noted. In new elections in the Assembly the Chief Minister was replaced by his Deputy (who in turn was replaced by the Minister whose family company's withdrawn tender lay at the heart of the Falla Affair) and only two members of the original Council failed to be re-elected.⁷² This highlights the flexibility and resilience of the new system in a political crisis. On the other hand it suggests an enduring problem of genuine political accountability and substantial change in a small jurisdiction where there is a strictly limited pool of individuals available for government service.

72 J. Falla, 'A case of out with the old and in with the old', *Guernsey Press* (12 March 2007).

(d) The New Departmental Structure

Ten departmental Ministers are elected for and normally expected to serve fixed periods of five years. They may be removed from office by a resolution of the Assembly (their successor being confined to serving the unexpired period of the five-year fixed term) and are not permitted to hold more than one ministerial portfolio. They exercise their functions via departmental boards composed of four Assembly members and a further three optional non-Assembly members which reflects a continuation of the Island tradition of external involvement in government. There is an established practice of designating one of the Assembly members as Deputy Minister. The entire membership of departments may be dismissed en bloc by a vote of no confidence in the Assembly. The title of Minister is arguably misleading given the collective decision-making matrix in departments which is in sharp contrast with the Jersey system where decision-making powers are conferred mainly on the Minister alone.

There is no barrier to Ministers, on an agreed basis with the board, making full use of their autonomy in working methods to inject a stronger executive ethos into departments by delegating specific sub-portfolios to groups as small as two or three individuals or even to the Deputy Minister alone. This possible longer-term evolution if it occurs will be bottom up (that is to say, evolve gradually from departments) rather than being a top down initiative directed by the Council. Any such systematic shift will almost certainly trigger a political backlash from the Assembly which regards the imperative to avoid excessive concentration of political power in small cadres as a fundamental tenet of the new structure and a part of the political bargain struck in debates prior to its introduction. For the foreseeable future therefore Ministers will continue to operate via boards on which they wield a single vote with the permanent risk of being outvoted on policy issues. Outwith departments Ministers are exposed to lines of political accountability via the right of Assembly members to table written and oral questions and the power of the Scrutiny Committee to expose their policy to critical oversight.

It is misleading, however, to portray Ministers as simply departmental board members. Their internal status, accumulated specialist expertise gained in ministerial office, membership of the Council and participation in cross-cutting policy groups confers on them substantial political and policy responsibilities which constitutes them as key actors in the identifiable government of the Island. While Guernsey does not have a separate ministerial code, Ministers are subject to stringent ethical standards in their capacity as Assembly members. This requires observance of the fundamental principles of selflessness, integrity, objectivity, accountability, openness, honesty and leadership supplemented by specific obligations to ensure that the public interest prevails over their private interests in the event of conflict, and the full disclosure of all interests relevant to the conduct of States

business.⁷³ Furthermore, as departmental board members Ministers are required to disclose all relevant interests and abstain from voting on any matter in conflict with them.⁷⁴

(e) The Importance of Scrutiny

The Falla Affair demonstrates the need for effective accountability mechanisms as a means of bolstering public confidence internally and shoring up the credibility of insular government externally. Despite the absence of classic executive government, Guernsey has developed scrutiny as a mechanism for holding government to account and a means of enhancing policy quality. The two committees entrusted with this responsibility are the Scrutiny Committee and the Public Accounts Committee. Whereas the former is focused on the quality of policy and service delivery, the latter is concerned with value for money. The two in practice can become inextricably intertwined, resulting in jurisdictional overlaps which are addressed in a Memorandum of Understanding between the two bodies.⁷⁵

The Scrutiny Committee regards its role as a diverse one.⁷⁶ Scrutiny is fundamentally about promoting accountability and boosting the quality of policy programmes. This may require a full-scale review of strategic policy involving key stakeholders, external experts and active public participation. But it may also involve shorter, focused studies which draw heavily on expert policy advice, or it may simply involve little more than asking a series of probing questions on specific policy or service delivery. The focus may be on established policy or policy which is evolving or the administration of policy in departments.

A useful illustration of the impact of scrutiny is its recent review of internal complaints procedures and appeals provision in departments.⁷⁷ This was selected as a subject for review by the Scrutiny Committee since it goes to the heart of departments' relationships with the public, in particular public perceptions of the quality of service delivery and how States bodies react when public expectations are not met.⁷⁸ The report is heavily influenced by the underlying philosophy of its UK equivalent.⁷⁹ It castigates States departments for their

73 See generally: States of Guernsey, *Code of Conduct for Members of the States of Deliberation* (approved by a Resolution of the States on 26 September 2006).

74 See Rules of Procedure, above n. 37 at r. 15.

75 Public Accounts Committee/Scrutiny Committee, *Memorandum of Understanding on the differing roles of the Public Accounts Committee and the Scrutiny Committee* (20 September 2004).

76 Fully discussed in: States of Guernsey Scrutiny Committee, 'Scrutinising Scrutiny': *Performance Report 2004–2006* (January 2007).

77 The States of Guernsey, Scrutiny Committee, *Scrutiny Review: Complaints Policies and Appeals Procedures: Report of the Scrutiny Panel* (August 2005).

78 *Ibid.* at 5.

79 National Audit Office, *Citizens' Redress: what citizens can do if things go wrong with public services* (HC 21 Session 2004–2005, 9 March 2006).

object failure to develop, publicize and use creatively as a management tool internal complaints procedures and the rich feedback these provide. It casts on the Council responsibility for developing a corporate policy on complaints including a uniform definition of complaints and the use of feedback from complaints. Departments themselves are also recommended to produce concise statements of complaints policies and to make specific provision for appeals. This should include formal written complaints procedures and how they are to be used as a management tool. Two years later the Scrutiny Committee carried out a follow-up review⁸⁰ in which it lambasts the Council for its failure to take the lead on internal complaints policy, but finds that seven out of ten departments have reacted positively by putting into place formal complaints mechanisms. Only three of them have established a procedure for learning from customer feedback.

This highlights the potential of scrutiny as an engine for improvement in policy and promoting accountability. Policy on this key issue in public administration was virtually non-existent. Scrutiny via a principally documents-based, speedy, low-cost and vigorous inquiry has prompted substantial change and squarely located responsibility for continuing deficiencies with the Council. The flexible nature of Guernsey-style scrutiny enables it not merely to improve policy but to serve as a catalyst for the rapid development of policy on a topic where insular practice has lagged behind UK standards.⁸¹

Scrutiny may well assume key importance in the future evolution of the Guernsey system. The post-Harwood experience shows how influential political and business interests can sabotage a compelling blueprint for reform. If this continuing hostility towards executive government is to be overcome, scrutiny will have to build a track record of reviews which demonstrably hold government to account and stimulate higher quality policy across the entire range of public services. This is a vital aspect of building confidence in the new system so that it can naturally develop with broad-based political support into fully fledged ministerial government counterbalanced by effective scrutiny.

80 The States of Guernsey Scrutiny Committee, *Complaints Policies and Appeals Procedures Update: Monitoring Report* (November 2007) which is suggestive of a determination by the committee to ensure that its work has real impact.

81 States of Guernsey, Billet d'Etat, Vol. XV 2005 (Wednesday 20 October 2005) Requête: *Review of Administrative Decisions and Creation of Office of Ombudsman*, where a number of Assembly members lodged a resolution in the Assembly calling for the creation of an Ombudsman based on UK standards. This was based on the inaccessibility of judicial review and the problem of effective redress via Assembly members flowing from conflicts of interests generated by their greater participation in executive decision-making in the new system of government. Policy Council rejected the resolution though not unreservedly. It took the position that any such initiative is better postponed until States departments have had sufficient time to implement fully the recommendations of the Scrutiny Review. It seems therefore that an Ombudsman has not been ruled out and that the work of the Scrutiny Committee has been instrumental in placing it on the political agenda.

III. Conclusions

Jersey and Guernsey have introduced the most far-reaching changes in their systems of domestic government for over 50 years. This change is long overdue but it is naïve to believe that it would have occurred without the pressure exerted by external scrutiny (via the UK Government, EU and OECD) of their OFC activities and internal unrest flowing from inadequate accountability, poor quality policy-making and lack of democratic responsiveness. Externally the need for persuasive political leadership by Chief Ministers remains vital given continuing exposés of their OFC activities, one recent example being the use of Jersey by multinational corporations engaged in transfer pricing as part of complex tax avoidance schemes resulting in onshore revenue losses.⁸² As a broad political issue (and threat to the insular economies) harmful tax competition remains on the UK and international agenda.⁸³ The OECD Forum on Global Taxation in particular may develop into a permanent review mechanism for taxation perceived as 'harmful'. The notion of 'harmful' is largely subjective and potentially an elastic one which may drift over a lengthy time frame from issues of process into the substance and levels of fiscal structures. Given their OFC practices, the recent shift toward 'zero-ten' corporate tax regimes and their economic dependence on offshore finance, Jersey and Guernsey are in a distinctly vulnerable position on this. The dismantling of selected special purpose vehicles in the aftermath of the original OECD initiative and the successful covert pressure exerted by the UK Government and ECOFIN to subscribe to the EU tax package, despite the protections against this enshrined in Protocol 3 and settled constitutional practice, has exposed both jurisdictions' lack of effective external sovereignty. This together with their minimal political and economic influence in the international arena, exacerbated by ongoing strained relationships with the UK Government, leaves them vulnerable to future initiatives aimed at eradicating the fiscal policies which represent *the* key pillar for their OFC activities.

It is at this international interface that the new government systems may, in the medium term, prove their real value. Prior to the reforms both jurisdictions, in contrast with the Isle of Man, lacked an identifiable government. The insular political executives are now clearly constituted as recognizable governments with recently granted external

82 For full discussion see: I. Griffith and F. Lawrence, 'Bananas to UK via the Channel Islands? It pays for tax reasons', *The Guardian* (6 November 2007) 6-7 (Special Report).

83 For recent discussion highlighting its contemporary political and regulatory relevance, including the often overlooked point that the issues are as pertinent to developed onshore jurisdictions as they are to small jurisdictions hosting OFCs, see: R. S. Avi-Yonah, *Tax Competition, Tax Arbitrage and the International Legal Regime* (Oxford University Centre for Business Taxation, WP 07/09); and M. Devereux, 'Where will tax competition end?' *The Banker*, April 2007, 1.

autonomy to enter into international negotiations on an independent basis. This constitutional fact, combined with stronger political leadership, equips them to defend their distinctive interests more effectively and compels the EU and OECD to redesign their relationships with them so as to reflect accurately their separate domestic and international personality.

Despite these continuing external threats and with the UK Government transformed from its historic role of supportive interlocutor to impatient critic, itself part of a wider cooling in Whitehall-insular relationships, the insular authorities' reactions may still be characterized as limited. The reforms, though radical in insular terms, remain fairly narrow and large tracts of urgently required reforms identified in the original reform blueprints remain stalled in political debate or not on the reform agenda at all. The only substantial change has been removal of Douzaine (parish) representatives from the Assembly in Guernsey and transfer of social security functions from the parishes to the central executive in Jersey. These aside, the only pending constitutional change is probable new electoral systems in Jersey. At the moment, fine-tuning of the new systems, rolling modernization of public services and emergence of new fiscal policies has pushed these closely related but equally important reforms down the political and law reform agenda. Efficient policy coordination, speedier decision-making, strong scrutiny mechanisms, evidence-based policy formation, greater use of specialist advisers and stronger political leadership, all of which are early benefits of the new systems, are no substitute for *comprehensive* reforms which produce more democratic, transparent and accountable insular government.

There remains a risk here of efficient executives, particularly in Jersey, drifting into technocratic-style government but with key features of the overall reform architecture not locked into place. Selective implementation along these lines may solve the problem of cumbersome and low quality law/policy-making. It may, however, generate legitimacy problems of its own, in particular popular disillusionment with political structures, insular administrations seen as remote and unrepresentative, and policies too closely tied to the interests of the offshore finance sector. Coherent and comprehensive reform is an essential ingredient of the new political settlement implicit in the original reform prospectuses, the political debates they triggered and the continuing modernization project. Furthermore, the drive for refurbished structures may obscure an easily overlooked but fundamental point: that it is equally important to staff such structures with high calibre politicians and officials. Achieving this is particularly difficult in small jurisdictions where the pool of such individuals is strictly limited and combining onerous government service with employment/business activity may be problematic.

Nevertheless there is no doubt that the new systems represent a quantum leap forward compared with their predecessors. The quality

of decision-making and policy development in both jurisdictions is already speedier, more transparent and of a higher quality than under the previous semi-sclerotic machinery. Scrutiny arrangements in particular are perhaps the most impressive aspects of the reform packages. They are powerful engines for political accountability, transparency and enhancement of policy quality by providing a searching 'second look' at government proposals and existing programmes. The Falla and Syvret Affairs prove that Ministers and indeed the entire Administration failing to observe the highest standards of competence, judgment and probity can find themselves swiftly demitting office. Moreover, new forms of political leadership combined with greater external autonomy have facilitated the efforts of both jurisdictions to counter perceived unfair criticism of harmful tax competition in external fora such as the EU and OECD. This enhanced political representation is vital in view of the serious threat posed to the economic fabric of both jurisdictions by these initiatives. Given the retention of committees as a core feature and the absence of a distinct Chief Minister's Department, Guernsey remains handicapped compared with Jersey and the Isle of Man (which phased in a highly centralized ministerial system during 1986–90) when confronted with external pressures requiring rapid, highly sophisticated policy change and decisive political leadership.

The link between economic interests and modes of government does not exist simply on the international plane. It also has an internal dimension. It is here that the Manx experience of ministerial government may be instructive. The Manx economy generally, but in particular its offshore finance sector, has experienced rapid growth and diversification since the new system became embedded.⁸⁴ Whilst the bulk of this is clearly driven by macro-economic factors such as the world-wide growth in offshore finance business, fiscal incentives and their greater attractiveness to new business than the long overheated Jersey and Guernsey economies, in particular lower labour, housing, land and commercial premises costs, more professional government machinery may have been a contributory factor in this 'dash for growth', with offshore finance in the vanguard,⁸⁵ to the extent it has produced speedier decision-making, transparent government and policies closely aligned to the needs of offshore business.⁸⁶ In the context of domestic economies and public services heavily dependent on this source of income and increasingly fierce competition amongst OFCs for such business, the Manx experience simply underlines the vital importance of the effective operation of the new systems. Equally fundamentally, however, if both Islands are to complete successfully their modernization of public services projects and associated fiscal

84 See Kermode, above n. 42 at ch. 9.

85 *Ibid.* at 344–61.

86 *Ibid.* See also: S. Austin, 'Yes minister: Interview with Miles Walker, Chief Minister of the Isle of Man', *Jersey Evening Post* (27 March 2002).

reforms, the new political executives will have to accomplish the demanding task of speedy decision-making and high quality policy programmes on the one hand, counterbalanced by critical scrutiny and democratic responsiveness on the other. A shift towards executive forms of government heralds the improved management of these external and internal governance problems in small jurisdictions grappling with complex and interrelated problems of public services reforms/economic restructuring in the context of the globalized world of offshore finance.