

**THE FORMER CHIEF EXECUTIVE - COMPROMISE AGREEMENT**

**REPORT OF THE COMPTROLLER AND AUDITOR GENERAL**

**MARCH 2012**



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## **SECTION ONE – INTRODUCTION**

1. In a paper that is being published at the same time as this report, I have set out the outcome of a review of compromise agreements entered into by the States during the past five years. As I have explained in that report, one of those agreements, that with the former Chief Executive, is exceptional in terms of its provisions and the amount paid. Accordingly it seemed appropriate to set out in detail the circumstances in which the States accepted the obligations which led to the payment for which the compromise agreement provided and the circumstances in which those obligations were triggered. That is the purpose of this report.
2. In Section Three of this report, I will describe the circumstances surrounding the agreement. This description is based solely upon the documents in the possession of the States. I have not attempted to discuss those documents with any of the people who were involved in these matters. In Section Four I will set out a number of observations and recommendations arising from that description.
3. My recommendations are summarised in Section Two.

## SECTION TWO – SUMMARY OF RECOMMENDATIONS

4. My recommendations may be summarised in the following way:

(1) Performance review and appraisal of Chief Officers

The duties of Ministers with regard to performance reviews and appraisals of Chief Officers (and of all senior officers with regard to the review and appraisal of others) should be re-stated and compliance reviewed regularly.

*Comment: it is important that these reviews are carried out and recorded consistently so that good performance is recognised as consistently as bad performance. Failure in this respect can be expected to have an impact on the willingness of the rest of the organisation to take performance reviews seriously.*

(2) Specification of the Chief Executive's position and role

Consideration should be given to ways in which the difficulties surrounding the Chief Executive's position may best be addressed.

*Comment: as a result of changes made as the relevant legislation passed through the States, the authority of the Chief Executive was constrained and the chance of corporate policies being upheld was reduced. The result is a post which attracts expectations which frequently exceed the post holder's powers to ensure delivery.*

*These issues may best be addressed in the review of the Machinery of Government being led by Sir Philip Bailhache.*

(3) Code of Conduct for Ministers

Consideration should be given to the development of the Code of Conduct for Ministers to deal explicitly with the relationship between Ministers and officers, taking appropriate account of the guidance currently available in other jurisdictions.

*Comment: It is unrealistic to expect that a culture based on mutual respect can be created in the States if Ministers believe they are entitled to behave (and are known to behave) without regard to that culture.*

When that guidance is revised, it should make clear how corrective action will be taken in respect of cases of non-compliance by ministers.

*Comment: There is no obvious reason why a Minister's failure to behave appropriately should not be a subject for appropriate disciplinary action.*

(4) Conduct of ministers affecting contractual commitments to officers

Consideration should be given to establishing a protocol for the conduct of Ministers in respect of the States' contractual commitments to staff and to the way in which the importance of proper conduct in this area is made known to Ministers.

*Comment: It is folly for anyone, let alone a Minister, to act in way that affects the States' contractual relationship with a member of staff without understanding that position beforehand and agreeing the course of action with those responsible for managing that relationship.*

(5) Independent oversight

Consideration should be given to establishing arrangements for independent oversight of the relationships between Ministers and officers.

*Comment: It is best to attempt to improve relationships before they have broken down irretrievably. The current arrangement in which there has been no independent source of counsel or guidance has not worked satisfactorily.*

### SECTION THREE – DESCRIPTION OF SURROUNDING CIRCUMSTANCES

#### Introduction

5. In this Section of the report I will describe the circumstances surrounding the States' acceptance of certain contractual obligations in respect of termination of the employment of the former Chief Executive and the circumstances surrounding the actual termination of that employment in 2011.

#### The former Chief Executive's initial contract

##### *Date*

6. The former Chief Executive commenced work for the States under a contract dated 25 January 2003.

##### *Duties*

7. The principal duties of the post were described in that contract in the following way:
  - '- The major duties of the Chief Executive were specified in a job description which specified that the four principal roles of the post-holder were to be:
    - Chief Executive to the Council of Ministers
    - Head of the Island's public service
    - Head of the Chief Minister's department, and, as such, Chief Executive to the Chief Minister
    - In the transitional period Chief Executive of the Policy and Resources Department.'
8. The description of these four principal roles was augmented by a more detailed description of the principal functions of the office which is reproduced in Appendix One.

##### *Salary*

9. The contract specified a salary which would be reviewed from effect from 1 June 2004 and on the first of June of each year thereafter. Any revision to salary would be subject to satisfactory performance and negotiation between the employer and the Chief Executive.
10. The contract also envisaged that every four years the employer would undertake a general review of the salaries paid to comparable senior management positions in the private sector in Jersey and that relevant comparative data from the United Kingdom would also

be maintained especially in connection with those positions that cannot be compared directly with the positions in the Island's private sector. This information would all be taken into account by the employer when formulating any proposed revision of the Chief Executive's salary for the period commencing 1 June of the year to which the review relates. The next review would be effective from 1 June 2004.

*Performance Review and Appraisal*

11. The contract provided that the Chief Executive would actively participate in processes applied in connection with Chief Officers.

*Disciplinary procedure*

12. The contract provided for a disciplinary procedure which envisaged that the Council of Ministers would raise and attempt to resolve issues concerning the performance, conduct and capability of the Chief Executive. It was envisaged that the prescribed procedure would be used only where such evidence to resolve problems had failed.
13. These procedures also made provision for circumstances in which the employer believed that the special relationship with the Chief Executive was breaking down.

*Grievance procedure*

14. The contract provided for a procedure for the resolution of grievances.

*Termination of service*

15. The contract provided that service would be terminated by written notice of six months on either side except during the probationary period when the period of notice would be one week on either side. The contract specified that the probationary period would last for six months.
16. The contract provided that wherever possible redundancy would be avoided. However, if in the last resort the Chief Executive were to be declared redundant, individual consideration would be given to the terms of the redundancy which would however be no worse than those provided by the employer in connection with the generality of civil servants.

*Transfer to other public service posts*

17. The contract provided that the post had been made available to applicants from the United Kingdom because of the need for skills not readily available in Jersey. It went on to provide that the Chief Executive would not be permitted to transfer to other posts in the Island's public service until such time as the Chief Executive acquired full local residential qualifications under the terms of the States of Jersey Housing (Jersey) 1949 Law as amended.

**Revision of the contract**

*Chief Executive's letter dated 2 March 2005*

18. On 2 March 2005 the Chief Executive wrote to the President of the Policy and Resources Committee expressing concern about the terms of his employment and asking for a consideration of ways in which these concerns might be addressed. The key paragraphs of this letter read as follows:

*“Let me reassure you that I came to Jersey with a deep personal commitment to the States and the Island and that has grown in the time that I have lived here. As an aside my family has settled in Jersey and I abhor the thought of having to leave. I say this as an introduction because the recent exhibitions of political instability and vitriolic attacks on senior officials have forced us to re-examine our options.*

*I have absolutely no qualms about being judged on my performance and achievements but I am worried if the shortcomings in our political system impact negatively on my performance and I were then to be held to account for something outside my control. I have re-read my contract with the knowledge of how things work and see it in a very different light to that which I accepted before my arrival. Over the next year I could do everything possible to deliver on what is expected of me and I could still fail, either because the necessary steadfast political support had disappeared, or because the personal attacks and other blocking tactics had soaked up so much of our time and energy. In that context and depending on who the States determine to be the next Council of Ministers I could face a political executive determined not to work with me. They would have three options:*

- (1) disciplinary action;*
- (2) redundancy;*
- (3) breakdown of normal relationships.*

*Under any of these options I and my family would be forced to leave Jersey and under my contract I would in fact receive a minimal settlement. Clearly if I felt the action to be unjustified then I would fight it as strongly as possible.*

*I cannot believe that it is in either the States or my own interests to countenance such options. From a personal perspective I also have to factor in that there are likely to be only one or two alternative jobs in any one year that I would find attractive. Therefore, having thought long and hard about it, I have decided that I now have two realistic options:*

- (1) *start looking for an alternative job;*
- (2) *negotiate greater security into my contract”.*

19. Accordingly the Chief Executive made a number of proposals for ways in which the difficulty to which he had pointed might be resolved. These proposals contained four elements:

- (1) inclusion in the contract of a provision that it might be terminated by mutual consent with a settlement of 2.5 times annual salary.
- (2) amendment of the existing provision concerning a breakdown of normal relationships to provide that where it was agreed that there had been an irrevocable breakdown in the normal relationship between the Chief executive and the Council of Ministers the contract may be terminated and the chief Executive would receive a payment of 2.5 times annual salary.
- (3) replacement of the normal redundancy payment rules with a provision that there should be a fixed payment of 2.5 times annual salary.
- (4) amendment of the disciplinary procedure to clarify that if poor performance had resulted from political interference or lack of support for delivery of the strategic plan, the disciplinary procedure should not apply and termination could only be by application of the mutual agreement provision.

#### *Human Resources Sub-Committee*

20. The former Chief Executive’s letter was considered at a meeting of the Human Resources Sub-Committee of the Policy and Resources Committee on 9 March 2005.<sup>1</sup> The committee

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<sup>1</sup> I am aware of newspaper reports that, in addition to the matters raised in the former Chief Executive’s letter, the committee understood that the former Chief Executive had received an offer of alternative employment on the mainland. The documents available to me do not record this. I have been given to understand that at least one of the former Chief Executive’s colleagues recalls that, at the time, the former Chief Executive did talk to him of an offer that he had received of a Chief Executive’s position with a major mainland authority.

agreed that the former Chief Executive's original contract should be revised in the following ways which reflected the proposals made by the Chief Executive:

- (1) A new clause 27 was inserted in the main contract to provide that: "This contract is subject to termination by mutual agreement in which case the Chief Executive will be entitled to a non pensionable settlement of 2.5 times his annual salary".
- (2) Clause 22 of the original contract was amended by deleting the final two sentences and replacing them with the words: "However, if as a last resort the Chief Executive is to be made redundant he will receive a non pensionable payment of 2.5 times his annual salary".
- (3) The disciplinary code applying to the Chief Executive and attached to the main contract was revised to state that if the Chief Executive were accused of poor performance and that poor performance could reasonably be demonstrated to be the result of political interference with or lack of support for action to deliver the then strategic plan, the disciplinary procedure would not apply and instead termination of employment could only be by application of the mutual agreement provision or the breakdown of normal relationships provision. An appeal procedure was also introduced in the event that the Chief Executive were dissatisfied with the outcome of a disciplinary hearing at which he had alleged political interference or lack of support.
- (4) The disciplinary code was also revised to provide that: "In the event that it is considered by the Council of Ministers that there is an irrevocable breakdown in the relationship that normally exists between the Chief Executive and the Council of Ministers, the contract may be terminated and the Chief Executive would receive a non pensionable payment of 2.5 times his annual salary". An appeal process was also introduced for a situation in which the Chief Executive had suggested that there had been such a breakdown but this had not been accepted by the Council of Ministers.

21. The revised contract of employment was eventually dated 25 July 2005.

### 16 January 2011 letter

22. In January 2011, in accordance with the States' normal procedures, the former Chief Executive prepared a self-assessment of his performance<sup>2</sup> which was then reviewed by the former Chief Minister. The note of this review records that the former Chief Minister agreed that the former Chief Executive had met or exceeded virtually all of his objectives during 2010.

23. The former Chief Executive's self-appraisal ended by raising four issues including:

*"3. My relationship with the Treasury Minister is a source of significant discomfort. I seem to be unable to satisfy his expectations or at times even understand what is expected."*

24. On 16 January 2011 the former Chief Executive sent a 'without prejudice' letter to the Chief Minister. In this letter the former Chief Executive identified certain practical difficulties which arose from the fact that the position to which he was originally recruited in 2003 was different from the pattern of organisation eventually chosen by the States of Jersey. Whereas the job as originally described (as set out above) was that of a Chief Executive within a corporate organisation in which, for example, chief officers had line accountability directly to him, the pattern of organisation chosen by the States of Jersey confused this accountability by providing that each chief officer is also accountable to a minister for policy.<sup>3</sup> On this basis, the letter proposed a process in which consideration could be given to the re-organisation of the Chief Executive's role releasing a saving of one chief officer post and enabling the former Chief Executive to leave his position without public difficulty.

25. It is clear from separate notes made by the Chief Minister and by the Human Resources Director of their separate conversations with the former Chief Executive that the 'without prejudice' letter was accompanied by an oral complaint made by the former Chief Executive about the behaviour of the Treasury and Resources Minister (the Treasury Minister) over an extended period which it was suggested had destroyed the working relationship.

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<sup>2</sup> E-mail dated 14 January 2011.

<sup>3</sup> These and other inconsistencies had been identified by the Public Accounts Committee which had suggested that, as revised, the Chief Executive's role did not justify its current grading (and thus salary): the Public Accounts Committee report 4/2010.

26. This oral complaint was subsequently confirmed in writing by the former Chief Executive in the following way:

*“Over the last two years a sustained period of interference and harassment by the Deputy Chief Minister and Treasury Minister which has made it impossible to do my job to the best of my ability. I have raised each of the issues with the Chief Minister and asked him to intervene.<sup>4</sup> I have suggested numerous options including mediated meetings with the Minister but nothing has been done.*

*This came to a head in December when another Minister told me that the Treasury Minister ‘wanted to get rid of me’. He told me that he was spreading damaging rumours about me in respect of relations with the UK and business tax. I told the Chief Minister and again asked for assistance. He said that he knew I wouldn’t have as ‘cosy’ a relationship with the Treasury Minister if he became CM as I had with the current CM but nothing else was done.*

*This all came to a head on 11 January when the Treasury Minister came to see me about the Treasurer’s appointment. In a dismissive and aggressive manner he told me he was not happy she had been sworn in, that it was my fault. I had failed him and the CM in handling the budgets; he does not trust me; I am not a team player, he is; I hide things in order to manipulate him and the CM; I manage by fear and everyone is frightened of me; he wants to create an empowered organisation, I cannot do that; he believes I will fail to deliver CSR for him; he cannot work with me and if he becomes CM he certainly couldn’t work with me.*

*I tried to refute these claims, but he wasn’t interested and asked me what I wanted to do about his statement that he couldn’t work with me. I suggested he needed to talk to the CM and the meeting finished.”*

### **Chief Minister’s reaction to the Chief Executive’s letter**

#### *Introduction*

27. The documents show that following this exchange the Chief Minister took advice from a number of sources. The general outcome of this advice related to a number of questions:

- (1) Would it be possible to terminate the former Chief Executive’s employment on performance grounds?
- (2) If that were not possible, were the terms of the revised contract concerning breakdown of the employment relationship and lack of mutual trust and confidence legally binding?
- (3) If they were legally binding, could it be said that the employment relationship had broken down?

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<sup>4</sup> The former Chief Executive’s personal file contains a number of file notes that record occasions on which such issues were raised.

- (4) In the alternative, would it be possible to approach this matter under the redundancy provisions in the contract?

28. I will summarise the responses to each of these questions below.

*Performance*

29. The Chief Minister was advised that there were a number of issues which could raise questions about the performance of the former Chief Executive. These for example, included concerns over the handling of the suspension of the former Chief of Police and suggestions of poor morale and dissatisfaction of senior levels in the States.
30. Notwithstanding these issues, the Human Resources Director confirmed that there were no current documented issues that warranted negotiating a reduced compensation package on the grounds of contributory fault.
31. The effect of this was that to achieve a negotiating position on grounds of poor performance it would be necessary to seek evidence which would be both time consuming and sensitive: i.e. likely to prove contentious and potentially damaging to the organisation.<sup>5</sup>
32. Further, it seems clear that the considered view of the Chief Minister (and of the members of the Council of Ministers) was that termination on the grounds of poor performance would not be justified.<sup>6</sup>

*Legality of the revised contract*

33. In summary, the advice provided to the Chief Minister was that it would be difficult to contest the legality of the revised contract for example on the grounds that the terms of the revised contract were excessive or irrationally generous.
34. In other words, for practical purposes, the Chief Minister was advised that it would be prudent to assume that the provisions of the revised contract were legally binding.

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<sup>5</sup> I also note that the Chief Executive's personal file includes copies of the reports which he prepared each year for the purpose of the Annual Performance Review and Appraisal. Although these documents were completed and filed, the file does not include copies of the assessment of performance and agreement of new objectives by the person who appraised the Chief Executive's performance in each year. It thus appears likely that any attempt to have acted under the performance provisions of the Chief Executive's contract would have been hampered by a lack of formal notice of dissatisfaction with any unsatisfactory performance.

<sup>6</sup> See the minutes of the States Employment Board; 16 February 2011.

*Breakdown of relationship*

35. The Chief Minister was satisfied that there was evidence of some degree of breakdown in the relationship between the Treasury Minister and the former Chief Executive. This evidence was not regarded as conclusive as there were potential counter arguments:

- (1) The Treasury Minister's words were spoken in the heat of the moment.
- (2) Dealing with political pressure was a normal and expected part of the Chief Executive's function.
- (3) The evidence related to the breakdown of a relationship with an individual minister whereas the contract referred to a breakdown in the relationship with the Council of Ministers.
- (4) There might be some substance in the Treasury Minister's complaints about the Chief Executive even though the manner of expression might have been inappropriate.

36. It was recognised however that these counter arguments would require substantiation and that this would require a detailed investigation. This would take time, would involve a number of people, could be damaging to the States and would inevitably be politically sensitive.

*Redundancy*

37. It was accepted that the former Chief Executive was right to argue that his role as currently defined had changed significantly from the role to which he was originally recruited. It might therefore be possible to reorganise arrangements to save a post elsewhere and at the same time increase commitment to corporate behaviour and collaborative workings. This would allow consideration to be given to the mix of skills and experience needed to give leadership to organisational change to a culture shift across the public sector.

*Summary*

38. It was clear that each of the options for action was to some extent unattractive. The most important consideration was that the matter should be resolved as quickly and confidentially as possible to avoid speculation and damage to the public service at what was already an important and difficult time. Attempts should also be made to limit damage to the former Chief Executive's reputation as this could lead to a further potential claim for damages.

39. It was therefore suggested that under either the breakdown of relationships clause in the Chief Executive's contract or the redundancy clause or both, the payment of 2.5 times salary should be accepted as compensation for loss of employment and that a suitable compromise agreement should be drafted.

#### **States Employment Board – 16 February 2011**

40. The States Employment Board considered a report on the position. The minutes read as follows:

*"The Board concluded with regret that the financial terms agreed by the then Human Resources Sub-Committee in 2005 in respect of the inserted mutual termination clause had been too generous. Albeit that the desire to ensure continuity of leadership at a critical stage of machinery of government reform probably had some bearing on the sub-committee's decision. It was therefore reassured to learn that a decision to pursue a mutual termination would not set a precedent, no other States employee had benefited from similar terms within their contracts of employment.*

*Clarification was sought as to the Chairman's view of the performance of the Chief Executive. The Chairman confirmed that the Chief Executive had played a pivotal role in the transition to Ministerial Government and had maintained a good record on achieving his objectives. Although it was apparent the Chief Executive's management style differed somewhat from that which the Chairman preferred to adopt, the Chairman was clear that he would not have been minded to consider termination of the Chief Executive's contract in the absence of such a request from the Chief Executive. Neither was it apparent to the Chairman that the Council of Ministers had lost confidence in the Chief Executive. Nevertheless, and having considered the position in which the Chief Executive found himself, the Chairman had concluded that he would support mutual termination on the basis that the Chief Executive worked a proportionate notice period in order to ensure an orderly transition.*

*The Board, having acknowledged and endorsed the Chairman's view, was given legal advice by the senior legal advisor concerning the various options within the contract of the Chief Executive for termination of employment and of the various factors applicable to, and material implications arising from, the potential exercise of those options. Having considered the advice given, the Board accepted that it would be mutually beneficial to pursue mutual termination of the contract, subject to the conclusion of a satisfactory and confidential compromise agreement. In this regard, the Board noted and endorsed the Chief Minister's intention to find the necessary funding for the agreement from within his departmental budget.*

*The Board delegated the Chief Minister authority under Article 8 (2)(d) of the Employment of States of Jersey Employees (Jersey) Law 2005 to negotiate mutual termination of the Chief Executive's contract of employment and, in particular, the terms of the aforesaid compromise agreement, on the understanding that the total sum payable to the Chief Executive as a consequence of mutual termination would – (a) not exceed the maximum sum specified in his contract of employment, and (b)*

would be inclusive of both the salary for the agreed notice period to be worked and any relocation costs.

*In agreeing to the delegation of authority, Deputy De Sousa insisted that the Minutes record her disapproval of the decision of the Human Resources Sub-Committee 2005 to sanction a mutual termination clause that, in financial terms, was disproportionately beneficial to the Chief Executive.*

*The Board noted that the Chief Minister would continue to receive advice from the senior legal advisor and the Human Resources Department for the duration of the above negotiations.*

*On a related matter, and having noted relevant observations made by the Public Accounts Committee in its report on the accounts for the States of Jersey for the year ended 31 December 2009 (PAC 4/2010 refers), the Board noted that due consideration would be given to the adoption of a revised job description for the next Chief Executive with a view to better reflecting the nature of the role within the variation of the ministerial system as adopted by the States.”*

#### **Compromise agreement**

41. The required negotiations took place and a compromise agreement signed on 18 February 2011 as approved in a ministerial decision dated 18 February 2011. The former Chief Executive’s employment by the States was terminated on 31 May 2011.
42. That agreement provided for a termination payment to the former Chief Executive of £546,337.50.

## **SECTION FOUR - OBSERVATIONS AND RECOMMENDATIONS**

### **Introduction**

43. The circumstances in which the Chief Executive's contract was agreed on his original recruitment was revised in 2005 and then terminated in 2011 are described in Section Three of this report as shown in the documents which I have inspected.
44. My observations on these matters are as follows.

### **Original contract**

45. As far as I have been able to establish, the former Chief Executive's contract was negotiated and approved in an appropriate manner in accordance with the procedures which applied at that time.

### **Revision of the contract**

46. As employer, the relevant States committees were obliged to take account of the concerns expressed and the proposals made in the Chief Executive's letter dated 2 March 2005.
47. The approval in 2005 of a mechanism to deal with the Chief Executive's concerns and the inclusion in the contract of such a substantial potential termination payment were obviously exceptional matters.
48. In my view, it was acceptable in principle for the relevant committees to revise the Chief Executive's contract to take account of the concerns expressed in his letter. Not least, it was appropriate for the relevant committees to take account of the importance of retaining the benefit of the Chief Executive's leadership in anticipation of the organisational change which would be caused by the imminent introduction of ministerial government and in view of the need to implement the imminent programme of change in the Island's public sector.<sup>7</sup>
49. The provision for a substantial termination payment to the Chief Executive in such an eventuality was such a mechanism. There were other possible approaches which might have gone some way to meeting the former Chief Executive's concerns. For example, the committee might have proposed the insertion of provisions relating to independent oversight of the relationship with the Chief Executive.

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<sup>7</sup> See Public Sector Re-Organisation: Five Year Vision for the Public Sector: Proposition P58/2004.

50. Whether the mechanism chosen was appropriate was a matter for judgement by the relevant committee at the time. In making that judgement, the committee would have wanted to be clear that the risk to the States of having to make such a payment were properly balanced. In particular, the committee would have wanted to be clear that the agreement as revised did not enable the Chief Executive to argue that *any* criticism of the working relationship, including justified dissatisfaction with the Chief Executive's performance, represented a breakdown in the working relationship which triggered an obligation to make the substantial termination payment.
51. Similarly, even if it were decided to adopt the mechanism proposed by the Chief Executive, the amount of any termination payment was also a matter for judgement by the relevant committee. In reaching its view the relevant committee would have wanted to be sure that the proposal was balanced: i.e. that the importance of retaining the Chief Executive's services outweighed the financial risk of being obliged to make such a large termination payment. This was especially important in view of the very substantial scale of the proposed termination payment.
52. Further, the committee would have wished to make sure that the amount of any termination payment for which the revised contract made provision would be the lowest amount necessary to secure agreement with the Chief Executive.
53. Unfortunately, these issues are not mentioned in the minute of the Human Resources Sub-Committee's decision on 9 March 2005. In other words, it is not possible on the basis of the documents to demonstrate that the risks to the States of accepting the former Chief Executive's proposals were properly assessed and balanced.

#### **Practical consequences**

54. A number of practical consequences appear to me to have followed from the decision to review the Chief Executive's contract.
55. Firstly, the chosen mechanism might have been effective to deter anyone who wished to destroy the working relationship with the Chief Executive if the existence of the mechanism had been known. As far as I can discover, the minutes of the Human Resources Sub-Committee meeting on 9 March 2005 were not reported to the Policy & Resources Committee at the time nor do the documents demonstrate that the decision was made known to others.

56. Secondly, the revision of the contract created the risk that the expression of any doubts about the former Chief Executive's performance could be presented as a breakdown of the working relationship which might trigger the payment of the termination payment. To minimise this risk, it would have been important to ensure that the formal process for review and appraisal of the former Chief Executive's performance was followed scrupulously to ensure that there was evidence of doubts being raised and discussed with the Chief Executive together with agreed approaches to dealing with any weakness on performance.
57. In the event of serious doubts arising over the Chief Executive's performance, the records of such reviews could possibly be used as evidence to support a case for termination of performance on grounds of poor performance.
58. As I will show, the former Chief Executive appears to have assiduously complied with the requirements of the States' Performance Review and Appraisal system, because his personal file contains the annual self-assessment reports which he compiled. The Chief Minister's assessment of the former Chief Executive's performance in the last such review to be carried out (in January 2011) is instructive:

*"This note takes each objective in turn.*

- 1. Ensure that the Council of Ministers receives proper advice and administrative support to fulfil its purpose.*

*[The former Chief Minister] agreed that the objectives had been fully met. A next step was the agreement of a communication plan covering 2011.*

- 2. On behalf of the Chief Minister and the Treasury Minister, lead the implementation of the Comprehensive Spending Review (CSR).*

*[The former Chief Minister] agreed that the target in terms of agreed savings had substantially exceeded the original objective. In terms of progress with the implementation of the CSR, it is too early to judge but progress is very much in the right direction. . ."*<sup>8</sup>

### **Termination of the Chief Executive's employment**

59. I have established that, on notification of the Chief Executive's concerns in January 2011, the Chief Minister took all appropriate advice on the concerns themselves and the possible courses of action.

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<sup>8</sup> Taken from e-mail dated 3 February 2011.

60. In my view, in the light of the evidence that was received by the Chief Minister (in particular on the enforceability of the contract with the former Chief Executive), the decisions to terminate the Chief Executive's employment and to make a termination payment were taken in an appropriate manner, by the appropriate bodies on the basis of appropriate advice and in accordance with the States' contract with the Chief Executive.

### **Performance management**

61. Although the Chief Executive's personal file includes the Chief Minister's assessment of his performance for 2010 (the last review to be undertaken), some assessment for earlier years have not so far been traced.

62. It is however important that the documents record that the considered view of the Chief Minister was that any weaknesses in the Chief Executive's performance in most instances met or exceeded expectations and did not justify termination on such grounds.

#### *Recommendation*

*The duties of Ministers with regard to performance reviews and appraisals of Chief Officers (and of all senior officers with regard to the review and appraisal of others) should be re-stated and compliance reviewed regularly.*

### **The role of the Chief Executive**

63. As far as I have been able to establish, the problems surrounding the definition of the Chief Executive's role which were identified by the former Chief Executive (and raised by the Public Accounts Committee<sup>9</sup>) have not been resolved.

64. When the Chief Executive was recruited, it was expected that the framework for the role would be as follows:

- (1) the Council of Ministers would operate in a collegial style, through collective responsibility for decisions.
- (2) implementation of decisions of the Council of Ministers would be the responsibility of the Chief Executive acting through the Corporate Management Board which would consist of the Chief Officers of principal departments.
- (3) the Chief Executive would be the chair and leader of the Corporate Management Board whose members would be accountable to him/her.

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<sup>9</sup> Public Accounts Committee Report 4/2010.

65. After changes which were made as the legislative framework for ministerial government passed through the States, the framework for the role was changed so that:

- (1) the Council of Ministers is not obliged to operate in a collegial style, through collegiate responsibility. A minister is a corporation sole with individual responsibility for a department's actions.
- (2) a Chief Officer is accountable to an individual minister for policy matters.
- (3) the Chief Executive remains as chair of the Corporate Management Board but is *primus inter pares* rather than leader.

66. The effect is that the Chief Executive's authority has been constrained and he/she is unlikely to be able to uphold a corporate policy or initiative against the policy or direction of an individual minister. Thus it is easily possible for expectations of the Chief Executive's performance to exceed his/her capacity to deliver and for there to be a corresponding reduction in the ability to uphold corporate strategy and programmes.

*Recommendation*

*Consideration should be given to ways in which the difficulties surrounding the Chief Executive's position may best be addressed.*

**Ministerial conduct: relationship with officers**

67. In the course of this work, questions have arisen concerning the way in which ministers should conduct themselves in their relationships with senior officers. As far as I have been able to establish, the Island has no guidance on this matter.<sup>10</sup> Some other jurisdictions have such guidance which, for example, would expect that ministers would conduct themselves in the manner expected of a good employer.<sup>11</sup>

68. The manner in which ministers conduct their relationships with senior officers has a broad effect on the States' organisation. A member of staff who is aware that a Chief Officer is harassed by a minister may feel entitled to assume that ministers approve such behaviour

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<sup>10</sup> The most recent guidance takes the form of a Briefing Paper on the Functions and Responsibilities of Ministers and Chief Officers which was submitted to the Council of Ministers on 24 November 2011. This document is silent on the question of ministerial conduct towards officers.

<sup>11</sup> See for example: 'The Government Code' published by the Isle of Man Government: 'Ministers have a duty to give fair consideration and due weight to informed and impartial advice from civil servants, as well as to other considerations and advice, in reaching policy decisions; a duty to uphold the political impartiality of the Civil Services, and not to ask civil servants to act in any way which would conflict with the Civil Service Code; a duty to ensure that influence over other appointments is not abused for partisan purposes; and a duty to observe the obligations of a good employer with regard to the terms and conditions of those who serve them.' Paragraph 4.10; page 32.

wherever it is displayed in the organisation. The effect may be to encourage such behaviour.

69. It may have another effect. If a minister regularly harasses officers for failures to perform, other members of staff may decide to limit their exposure to harassment by seeking to limit expectations of what they can do. Staff will tend to avoid the risks associated with attempting to over-perform. In other words, the organisation may tend to under-promise and then under-perform.
70. To build a self-confident, highly performing organisation requires the development of a culture based on mutual respect and shared values. Ministers must be seen to be a part of that culture.
71. During this review, I enquired into the disciplinary arrangements for ministers who offend against guidance on proper ministerial conduct. If such arrangements exist, they appear vague and uncertain in effect. I infer that this state of affairs is likely to be regarded cynically by the States' staff who are, after all, subject to disciplinary procedures. Cynicism is the enemy of an open, constructive culture.

*Recommendation*

*Consideration should be given to the development of the Code of Conduct for Ministers to deal with the relationship between Ministers and officers, taking appropriate account of the guidance currently available in other jurisdictions.*

*When that guidance is revised, it should make clear how corrective action will be taken in respect of cases of non-compliance by ministers.*

**Ministerial conduct: employment related matters**

72. If nothing else, this case demonstrates the folly of anyone, let alone a minister, acting to affect an employee's continued employment by the States without proper briefing on the contractual relationship with that employee. As far as I have been able to establish, the States have no guidance on this particular matter, although, in my view, it would be best practice for anyone in a position to affect an employee's continued employment to take advice on this point. It should be understood that it is unacceptable to act without agreement on whether action is appropriate, how that action should be taken and by whom.

73. This should be regarded as a justification for avoiding action. The point is to achieve the desired outcome, to avoid unintended consequences and to avoid incurring unintended financial liabilities.

*Recommendation*

*Consideration should be given to establishing a protocol for the conduct of Ministers in respect of the States' contractual commitments to staff and to the way in which the importance of proper conduct in this area is made known to Ministers.*

**Mediation and oversight**

74. As far as I have been able to establish, there is no provision in the Island for independent oversight of the relationships between ministers and officers, providing, for example, a means by which attempts could be made to resolve issues before relationships have broken down irretrievably.

*Recommendation*

*Consideration should be given to establishing arrangements for independent oversight of the relationships between ministers and officers.*

## **APPENDIX ONE – DETAILED DESCRIPTION OF DUTIES IN ORIGINAL CONTRACT**

App - 1 Provide and ensure the provision of all necessary support to the Chief Minister and the Council of Ministers so that the machinery of government in the Island operates smoothly and effectively based on well founded decision making.

App - 2 Act as the principal adviser and ensure the provision of co-ordinated advice to the Chief Minister and Council of Ministers.

App - 3 Having regard to the needs of the Island's Government and to the strategies, policies and decisions of the Council of Ministers, prepare the Strategic Policy Programme and annual States-wide business plans, oversee the co-ordination and review of all departmental business plans and lead and direct the development of corporate strategy and policy.

App - 4 Ensure that there are satisfactory and sufficient resources and arrangements in place to enable the Chief Minister and Council of Ministers to communicate with and seek views from Members of the States, the public, the Corporate Management Board, staff and staff representative bodies on major issues as and when required and to enable all sections of the public service to communicate effectively with each other.

App - 5 As head of the public service and with the support of the Director of Human Resources and as appropriate, the Corporate Management Board, ensure the provision of all relevant leadership and management functions and responsibilities and that sufficient and appropriate human, intellectual, information and financial resources are in place to enable proper and effective conduct of government, and good management of the public service as a whole.

App - 6 As head of the Chief Minister's Department ensure that all departmental duties, responsibilities and delegated powers are discharged effectively and appropriately and that the functions and services provided by the department continue to meet the needs of the Chief Minister, the Council of Ministers and Government as a whole.

App - 7 As Chair of, and through, the Corporate Management Board, to ensure that the strategies, policies and decisions of the Council of Ministers are implemented, and that

Government business, public services and the Council's decisions are discharged and delivered across the States effectively and efficiently, taking into account available resources.

App - 8 Lead and direct the work of, the Corporate Management Board, with responsibility for its procedures, agendas and business, and direct and co-ordinate the work of senior colleagues, exercising authority over them, and holding them to account where necessary, to ensure good corporate policy making and the efficient management and execution of Government business in line with the Council of Ministers' functions, responsibilities and decisions; and the good management of the public service.

App - 9 Ensure effective working relationships are maintained and developed on all relevant matters with and between the Council of Ministers, the Chief Minister and his or her department, the Bailiff and Law Officers, the Lieutenant Governor, the States Assembly, the States Committees (including Scrutiny Committees), the States Greffe and other non executive departments and bodies, the Comité des Connétables and the Parishes.

App – 9 Oversee and take the lead as necessary on the Island's international relations and policy relating thereto, and in particular the management of its relations with the Lord Chancellors Department and the United Kingdom generally and, to the extent necessary with, and in relation to the European Union; and in the British Irish Council.

App – 10 Oversee and direct the planning for and implementation of effective processes and systems to ensure that the performance of all departments can be monitored and any necessary changes made in order to ensure that performance criteria are met.

App -11 Ensure effective risk management systems for all departments are in place so as to enable the consistent and uninterrupted delivery of services at all times and to ensure that all departments comply with all relevant statutory, legal and international provisions, and during the transitional period, to serve as Chief Executive of the Policy and Resources Department, with the addition of specific responsibility to plan and prepare for the new structure and organisation of Government and, once the new heads of departments have been appointed in 2003 to lead and work with them, and to chair a 'shadow' Corporate Management Board for the purposes of preparing for the new Ministerial system of Government.

