



House of Commons
Justice Committee

Crown Dependencies

Eighth Report of Session 2009–10

Volume II

Oral and written evidence

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The Justice Committee

The Justice Committee is appointed by the House of Commons to examine the expenditure, administration and policy of the Ministry of Justice and its associated public bodies (including the work of staff provided for the administrative work of courts and tribunals, but excluding consideration of individual cases and appointments, and excluding the work of the Scotland and Wales Offices and of the Advocate General for Scotland); and administration and expenditure of the Attorney General's Office, the Treasury Solicitor's Department, the Crown Prosecution Service and the Serious Fraud Office (but excluding individual cases and appointments and advice given within government by Law Officers).

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Oral evidence

Taken before the Justice Committee on Tuesday 15 December 2009

Members present:

Sir Alan Beith, in the Chair

Mr Douglas Hogg
Alun Michael
Julie Morgan

Mr Andrew Tyrie
Dr Alan Whitehead

Witness: Professor Alastair Sutton, White & Case, gave evidence.

Q1 Chairman: Professor Sutton, welcome. You have an impressive list of university chairs dotted about the world, but we have got you in front of us today because we think you can help us with some of the background to the inquiry we are just beginning on the Crown Dependencies, though I understand that you have an interest which you want to declare before we invite you to give evidence.

Professor Sutton: Yes, indeed. First of all, thank you for inviting me today. It is a subject which I find interesting politically, legally and institutionally, and it gets more interesting, I think, by the day with international developments. I was with the European Commission for 20 years. When I left to practise law, one of my first clients was the States of Jersey, and they were followed later by the States of Guernsey and the Isle of Man. I should make it quite clear, these are not my only clients—I am a partner in the firm of White & Case—but they are a significant part of my work. If I may continue for one minute on that theme, I would say that I think the reason why I was asked to help them back in 1989 had to do with my previous job, which was as a Member of Cabinet for Lord Cockfield when he came to Brussels in 1985 when Jacques Delors launched the single market, quite successfully really. It led to their seeking advice in Brussels. That was the point.

Q2 Chairman: Do we understand that you still have a contractual relationship, because the islands are your clients in respect of their European interests?

Professor Sutton: I do not have a contractual relationship with them. They are clients of White & Case and I am the partner in White & Case responsible for their work in Brussels.

Q3 Chairman: Thank you. The Ministry of Justice has said, and indeed Jack Straw has said as much in evidence directly to us, that the Crown has ultimate responsibility for “good government” of the Crown Dependencies. Do you know what the legal basis is for this responsibility and what does it mean?

Professor Sutton: The legal basis must reside in UK constitutional law. Unlike many Member States of the EU, our constitution is not wholly written. Many of our constitutional concepts are judge-made, many of them, I think, reside in practice, convention. The borderline between convention and

constitutional law is sometimes difficult to draw. Sometimes, I think, judicial clarification is needed to establish where the dividing line comes between convention and law and I think the concept of good government, or good governance, is one such concept; it is an abstract concept. If you were to ask me, “Be more specific, Professor Sutton, and tell me what you think it means”, I think it probably means, not merely effective, efficient government, or governance, as that term is very often used these days at all levels, but in the case of the Crown Dependencies what it has come to mean is that the intervention by the United Kingdom should only be where good governance ceases to exist, and that would be where there is really a breakdown in the system of law and order, or civil governance, to the point where outside intervention becomes necessary.

Q4 Chairman: There would have to be rioting in the streets, do you think, before good governance would be activated?

Professor Sutton: When I have thought about this concept I have come to it, in a sense, from the other end, because I think anything more unlikely than rioting in the streets is hard to imagine in Jersey, Guernsey and the Isle of Man. I am not going to make comparisons with other jurisdictions, but it is absolutely clear that the Crown Dependencies over the last ten years or more have been subjected to independent objective external scrutiny, amongst others, by the OECD, by the IMF and, more recently, in the Foot Report—all those reports, by the way, are this year, but they date back to the Edwards Report in 1998—and, consistently, they have been found to be well governed in the sense that they are well regulated (that is up to international norms in terms of financial regulation), they are transparent (in the sense that their procedures, their practices are open to international scrutiny) and they are co-operative (in the sense that they co-operate with other jurisdictions for exchange of information).

Q5 Chairman: But that is not really the point, is it? Whether or not they are well governed is not the question we are looking at. It is what would constitute an absence of good governance or a

failing in good governance that would appear to trigger what the Secretary of State thinks he has a power to do?

Professor Sutton: I think in one previous hearing—I think it was in the other place, as you say—it was mentioned that this was a hypothetical and wholly unrealistic prospect. I think that is a comment with which I would agree. If you ask me to imagine a situation other than rioting the streets, as you put it, you could imagine in this day and age a collapse of the economy such that the moral responsibility—I do not know about the legal responsibility—of the UK to intervene to bail out one of the Crown Dependencies could arise. Say the economic governance of one of the islands was such that it was irresponsible, it was reckless, it was unduly risky and led to a collapse of the economy. Of course, that has not been the case. That is not the case, I think, in any of the Crown Dependencies. They are, in a sense, almost paragons of virtue in terms of economic management. They do not receive outside subsidies, they finance their own education, their health, their schools, their transport systems, and so on, and even in this crisis they have managed to balance the budget very well and emerged quite strongly from the crisis. So I think that hypothesis has to be put to one side for the moment as well. More than that, you asked me a legal question to begin with, and my view is that under constitutional law the concept of good governance has never been judicially defined. The circumstances under which their autonomy would be limited by UK intervention has never been defined, therefore it does remain hypothetical, and that is as far as I would be prepared to go.

Q6 Alun Michael: Can I approach it from a slightly different point of view? I think you have described almost the principles of subsidiarity in terms of only interfering when it is necessary to interfere, but what mechanisms are there in place for the UK Government to identify if there is an issue where governance in a Crown Dependency is not good enough?

Professor Sutton: I think one of the words which has come to my mind whilst preparing for today is “co-operation”, and we can perhaps come back to this. I think the status of the Crown Dependencies is unusual, if not unique, in international relations and in constitutional relations as well and there is a problem, there is a tension between, on the one side, the constitutional autonomy or self-governance of the islands and, on the other side, the responsibility of the United Kingdom under public international law for the international relations of those islands, and that presents a tension.

Q7 Alun Michael: I understand that, but that is to look at it again in legal terms. I was trying to move away from the legal terms. For instance, there is a responsibility of the UK Government when it comes to institutions within the UK on the mainland. The relationship with local government, central government, can interfere at any point, but it is a rather different point to a responsibility to interfere on how Government satisfies itself on the quality of

governance at a local authority level. It is more in that sort of way. Unlike the situation in Cardiff, for instance, or Southampton, or whatever, there are Members of Parliament who may raise issues with ministers, and so on, so there are mechanisms, but how does any issue get drawn to the attention of the UK Government? How does the UK Government satisfy itself that there is not an issue of governance on which it ought to put its nose in?

Professor Sutton: I do not want to give you another legal reply, but in a sense one answer to your question would be that this is not a devolved situation. This not Scotland, Wales, or Northern Ireland, this is not a local council. The problem, or the issue, or the fact, or the legal situation is that they are autonomous and self-governing. Under UK constitutional law and practice, it is only when it comes to international affairs or defence that the UK can, as it were, intervene. Let us leave aside for a moment good governance.

Q8 Alun Michael: Hang on a minute, because I am only interested in the good governance one at moment. What I am concerned with is not the legal position, because I respect the situation that you have described, it is how does the UK Government know whether or not the governance is good enough? I accept what you say that 99 times out of 100 there is not going to be a problem, but how would they know if there was a problem?

Professor Sutton: The mechanism for co-operation between the United Kingdom and the three Crown Dependencies is through the Ministry of Justice. If you were asking that question about a third country, I would say we must ask the Foreign Office and they must ask their mission in the country in question. But you are not, you are asking about a British Crown Dependency, and the situation is anomalous in the sense that there is no official means for the UK to inform itself. However, there are channels of communication, clearly, which are used every day for the every day running of these islands in co-operation with the UK, as the three Crown Dependencies have made clear in their three submissions to you.

Q9 Alun Michael: Yes, but when issues have arisen, for instance there were issues with the Isle of Man over the problems with Kaupthing Bank which we looked at a few months ago, one of the questions we had to ask was how is the Department for Justice and the ministers in that Department following through their responsibility to the Crown Dependency? It is a similar sort of question here. Is anybody looking at the issues of governance? Is there a mechanism whereby the citizens of one of the Crown Dependencies could, for instance, raise with the UK Government: “Look there is a failure of governance here, somebody ought to do something about it”?

Professor Sutton: I think the answer to your question is probably, no—no officially that is—because of the situation which has existed historically for such a long time. If I may continue to

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develop that thought at the moment, of course, I was going to say that when there is an international overspill, or threat of it—

Q10 Chairman: Shall we leave the international situation to one side for the moment, because we will come back to it.

Professor Sutton: Yes. I was going to ask, Chairman, whether it is possible to leave the international dimension to one side. The point I was going to make to Alun Michael was this. In the modern world that is precisely the problem, I think, with these kind of issues, that the areas for which their self-governance and autonomy has existed over decades, if not centuries, has today become inextricably linked with international affairs. Take taxation: there is nothing closer to national sovereignty than taxation here in this country and so it is in Jersey, Guernsey and the Isle of Man, yet tax has become a matter of international concern. In my lifetime, since I was teaching at University College 35 years ago, the area of domestic concern under international law was immense. Today it is very, very narrow. Almost any issue which arises in any jurisdiction has a potential overspill: elections in Sark; the Human Rights Convention. Does it apply? Yes, it does. Have they respected their obligations? That is a matter of concern to the UK because the UK is responsible for the international relations of Guernsey and Sark.

Alun Michael: So how does the UK Government, how does the Department for Justice, satisfy itself in that regard?

Q11 Chairman: There is one mechanism you have not mentioned actually which relates to legislation. If legislation is proposed in any of the territories, then the Ministry of Justice is informed of the legislation and before Royal Assent is given advice is taken from relevant UK departments as to whether there are any issues in this legislation, and not all of the issues I am aware of that have been brought to bear in considering Royal Assent have been international in character.

Professor Sutton: With respect, when that question was raised just now, when I talked about the daily co-operation between the Ministry of Justice and the islands, I meant in respect of legislation and issues which, whilst not perhaps subject to legislation at the moment, might become so. I think the Ministry of Justice made that clear in their testimony here as well. As we speak, so to speak, there are contacts going on between all three jurisdictions quite separately and Patrick Bourke and Rose Ashley within the Ministry of Justice. Of course, focusing on legislation which has to pass through the Royal Assent process here—it is a slightly different process for the Isle of Man—that involves issues which arise sometimes with great publicity in, say, Jersey or Guernsey and the Isle of Man. There is a channel of communication. I do not think it is defined, I do not think it is formal, but there is clearly a mechanism whereby the Minister of Justice can pick up the phone, call the Chief Executive of Jersey, Guernsey

or the Isle of Man and say, “Could we discuss this? What is going on? How is that working. Let us talk about it.”

Q12 Alun Michael: So it is not terribly transparent then.

Professor Sutton: No, I do not think it is transparent, but may I just say, in historical perspective, if you look back 30 years or 35 years, the islands’ relationship with the EEC at the time was limited to free trade and horticultural products—early season potatoes and spring flowers—and the world has slightly changed. It has changed very quickly actually. In my view, the relationship between the Crown Dependencies and Europe and the world and the UK has changed with increasing rapidity and intensity over the last ten years. If you go back to 2004, that was a watershed in their relations with Europe because of the Tax on Savings Directive, the tax package, the code of conduct, and so on. That was when they first, I think, realised that they had to stand up and be counted in Europe because the European Union turned to the islands and said, “We want to have agreements with you.” Their first reaction was to resist. The UK then, I think, exercised a degree of pressure on them to negotiate with the EU. Since then they have been actually leading the way in the conclusion of tax agreements with the European Union. There is no doubt that the last six years have seen quite an amazing change in their economic situation and their relations with the world as a result of that, and that is going to continue, I think. One of the pieces of advice which I am giving at the moment to the islands is that they must constructively engage with Europe. Why is that? It is because their economies depend on financial services to a very large extent and, in terms of financial services, they need market access in Europe. To have market access, as you know from the measures currently in the pipeline, they are going to need to be recognised by Europe as having equivalent standards of regulation and supervision. The question for me and for them—intellectually for me, practically for them—is how do they meet that challenge under the current constitutional situation. It is not obvious.

Q13 Alun Michael: Can I ask one other thing then, because quite a lot of it is, seemingly, not obvious. I am sure you are reflecting reality. If the Department for Justice identifies a lack of good government through the process of opaque osmosis that you have described, what can it do about it? There is a limit, is there not, because of the independence of those dependencies, and yet there is a responsibility on the sort of thing that you have just described for the UK to make sure that those things happen. What can the Department for Justice do without overstepping the mark?

Professor Sutton: It can give its views, it can advise, it can warn, but I think it cannot intervene in an executive, judicial or legislative sense.

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Q14 Julie Morgan: On the same theme, I think it is quite difficult to get to grips with what can be done. What if the Government fails to address governance problems in the Crown Dependencies? What mechanism is there to address that? Say something is going on that should be addressed and the UK Government fails to do it, is there any consequence to that?

Professor Sutton: Obviously there could be political consequences; obviously there could be economic consequences; obviously there could be social consequences. I do not want always to come back to the legal situation, but the law is important, I think, and the legal situation which has been put in place over a long time by the United Kingdom and endorsed publicly by the United Kingdom Government repeatedly, leaves, I was going to say ultimately, to a very great extent responsibility for governance to the islands. It is not, for example, a question of the UK Government substituting its view for the elected authorities of Jersey or Guernsey or the Isle of Man in how the place should be run any more than it would be in Scotland or Wales in matters which are subject to devolved authority. In Scotland, Wales and Northern Ireland we have statutes. We do not have a statute in the case of the Channel Islands or the Isle of Man. Perhaps there should be. Suggestions have been made that we would benefit from having the relationship more clearly defined. The framework for international identity is the first attempt that I am aware of for a very long time to try to set down in writing some of those concepts. I am not trying to avoid answering your question, it is just that if we leave aside the extreme situation of a breakdown in civil law, and so on, and we are dealing with issues falling short of that—I have already mentioned the possibility of economic collapse where the United Kingdom would obviously have a major interest in intervening to try to resolve such a situation—for the rest that is what the governments are elected in those places to do, to run the place as best they can. It may not be satisfactory, and I can see from the Chairman's face that it may not be satisfactory, but it is the way it is, I think.

Q15 Chairman: I was just reflecting. Have you considered the Turks and Caicos possibility where the Government forms the view that the administration is corrupt and has to take action for that reason? I am not making a comparison as to what is happening in the two places, I am just saying that in those circumstances the UK Government intervened for a different reason from any that you have advanced in relation to the Channel Islands.

Professor Sutton: Absolutely. I did not want to mention that specific case, obviously, but if such a situation arose in one of the Crown Dependencies where, on the basis of reasonable evidence and so on, there was evidence of corruption and bad government in that sense, that would be a new situation which would have to be considered. I think that is absolutely clear.

Q16 Julie Morgan: To go on to the international situation and international treaties, the UK is responsible for seeing that the Crown Dependencies comply to those treaties.

Professor Sutton: Yes.

Q17 Julie Morgan: What sorts of mechanisms are in place to monitor whether they are complying to international treaties, for example?

Professor Sutton: The mechanisms, I think, are for the most part international mechanisms. In other words, the approval which has been given to Jersey, Guernsey and the Isle of Man for their financial regulation, their co-operative approach and their transparent legislation is international. That is, the OECD, in April this year, put Jersey, Guernsey and the Isle of Man on their white list, they put three Member States of the EU on a grey list. So that was international approbation, international recognition of conformity with internationally accepted standards. That was mentioned also, of course, in the Foot Report. The IMF has reviewed Jersey and the Isle of Man this year. They are going to do Guernsey, I think, next year or in the future. The same result has been given: conformity with international standards. If you are asking what mechanisms are in place in this country, then I think that is clearly in the hands of the Ministry of Justice and the Foreign Office—of course, the Ministry of Justice acting as a conduit or a channel between the islands and the different ministries here. I am not aware, over 20 years, of their compliance with international treaties that have been extended to them by the UK being put in question. The issue is rather the other way round. It is the extent to which the United Kingdom has put in place mechanisms to assist the islands and also to discharge its obligation, not to promote necessarily but to protect and defend the interests of the islands internationally because, as the Kilbrandon Report noted in, I think, 1972 or 1973, this is a two-way street: their rights and obligations going both ways. What I notice is that it is quite difficult for the United Kingdom (and I am choosing my words carefully) to assist these small jurisdictions with small administrations. They lack resources; the UK lacks resources; we all lack resources in this crisis. Nonetheless, these islands have no missions or delegations or offices.

Chairman: We are going to come back to the Brussels point. I am going to stop you there, because it is a little later down our agenda this afternoon. I am going to turn to Dr Whitehead, but I promise to return to it.

Q18 Dr Whitehead: A further possibly brain squeezing aspect of constitutional arrangements. If we draw a distinction between the question of good governance, as in a government is not carrying out its own constitution very well, as opposed to the idea that the constitution itself may lack what might be regarded as the wherewithal for good government, and then one looks at the issue of the fact that the three Crown Dependencies are constitutionally autonomous—that is, they are responsible for writing their own laws and hanging those laws into

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the framework of their own constitutions—they presumably, therefore, could, subject to Royal Assent I believe, produce laws which would make constitutional changes to their own system of government. Already you have in Jersey and Guernsey, for example, the multiple role of the bailiffs as arguably a very substantial lack of separation of powers within their constitutional arrangements. How might those considerations be considered in terms of good government, which is how the relationship of the UK to Crown Dependencies has been defined? If the constitutions of those dependencies were, for example, changed to the extent that it might appear that good government was thereby not possible, who would be competent to make an assessment of those systems?

Professor Sutton: I think the answer is that, in the first place, these three Crown Dependencies do not have written constitutions any more than we do, so their legislation is, you can call it, constitutional or ordinary statutory legislation. It is legislation. All legislation has to be submitted to the process under the Privy Council for Royal Assent through Ministry of Justice. So there is a process there which very often, I think, throws up difficulties and questions are raised either by the Ministry of Justice or by other departments. In the case which you specifically mention, I imagine it might be the Ministry of Justice which would say, “Just a minute. If you make that change, for example bringing together two functions where they should be separated under a normal separation of powers regime, there could be a problem here with the European Convention on Human Rights, let us look at that again”, and that could, at the end of the day, delay Royal Assent until such time as it was resolved to mutual satisfaction. I would say that if a constitutional objection was raised to that by one of the Crown Dependencies the answer in the United Kingdom would be to say no. As previous experience has shown, this is a matter which is no longer domestic; this is a matter which falls under the European Convention on Human Rights, therefore we legitimately raise questions, or constitutionally raise questions, over that. So that would be how that would be dealt with, I think.

Q19 Dr Whitehead: Does that purely relate to what might be the case, say, of human rights in Europe, for example? Would there be circumstances, or could there be circumstances under which it might be considered in the UK that, for example, the lack of separation of powers within the role of the bailiffs would not itself be regarded constitutionally as good governance and, therefore, the UK, in a sense, almost operating as a sort of Supreme Court, determining what is constitutional and what is not, might be able to say, “We do not think constitutionally that is good government, therefore you ought to amend your own statutes to bring you into line with what we, the UK, think is good government. For example in terms of a proper separation of powers within the process of government”?

Professor Sutton: I think that the United Kingdom could take such a position. I think that it would inevitably have to base that view on an instrument like the Convention on Human Rights, and, of course, at the end of the day there would be the possibility for judicial review by the Supreme Court, either as such or as the Privy Council, and to take a binding view on that which would bind not only the United Kingdom but also the Crown Dependencies because the Supreme Court or the Privy Council is the ultimate Court of Appeal. So the answer to your question is, yes, the UK position is clear. How far it could go would depend on the specific issue, I think, but, clearly, provided there is that right of judicial resolution of the matter, there is no problem. That is where any gaps, in the absence of a written constitution, can be closed, which is by the judiciary.

Q20 Dr Whitehead: So you might have the curious position of a state which does not have a written constitution, effectively, in principle declaring unconstitutional the constitutions of a Crown Dependency that also does not have a written constitution.

Professor Sutton: I think, again, the word “unconstitutional” can be substituted or you can substitute the word “illegal” for “unconstitutional”. It is just a question of is this or that lawful or not lawful. Constitutional is merely a higher form of law than regular laws.

Q21 Mr Hogg: Can I make an observation? Professor, firstly may I apologise for the fact that I have not heard all your evidence. My observation is this, and I would like your comment on it. When I first came into Parliament we were a very centralised state and, therefore, the kind of questioning, for example, that you have had from Dr Alan Whitehead represents the view that would have been conventionally held, say, 20 or 30 years ago. But now we have the devolved model in the United Kingdom where we do accept that other people go their own way, for example in Scotland and Wales and, indeed, in Northern Ireland. It seems to me that, subject to some overarching considerations, we should really be saying that the nature of the constitution within the islands is very much a matter for them and not so much a matter for us. We may have an overarching responsibility when they go seriously wrong, but, leaving that aside, the consequences of devolution, of which the islands are a part, the Crown Dependencies are part in a sense, means that it is a matter for them and we should be fairly relaxed about it. I would like your comments.

Professor Sutton: I agree with your conclusion, but not with the way you get there.

Q22 Mr Hogg: I am happy with one part of your answer, Professor!

Professor Sutton: Living, as I do, most of my life in Belgium, I am rather familiar with devolution and federal government and regions and the difficulties which can arise. Similarly with Germany, Spain and so on. It is a common issue these days. Our problems are special, if not unique in my view, because of the

absence of a written constitution. Where I would take issue with you is the issue, or the problem, or the fact with the Crown Dependencies is that it is not devolution. Constitutionally their situation has been the way it is for centuries.

Q23 Mr Hogg: I am not sure what difference of principle that makes. It is a fact. I concede the fact, but what is the difference of principle?

Professor Sutton: It is a very interesting question, I think. It reminds me a little bit of the US Constitution and what is devolved to the states, where does residual sovereignty lie.

Q24 Mr Hogg: Sure.

Professor Sutton: It is clear, in my view, that with Scotland and Wales, Acts passed by the Westminster Parliament—

Q25 Mr Hogg: Evolve downwards, yes.

Professor Sutton: ---yes, evolve downwards, and can be changed or repealed. Ultimately sovereignty resides in Parliament, in Westminster.

Q26 Chairman: In quite brutal form.

Professor Sutton: Yes.

Q27 Chairman: The Constitution of Northern Ireland and the Stormont Government and Parliament was abolished in one day by the UK Parliament. Is there any way in which the UK Parliament could do that in respect of Guernsey or Jersey or the Isle of Man by passing an Act saying the existing constitutional arrangements are at an end and, for example, imposing direct rule. Is it constitutionally possible to do that?

Professor Sutton: No.

Q28 Mr Hogg: What about the Royal Prerogative in this context?

Professor Sutton: Politically, militarily, yes, but unless the condition of a breakdown of good government, which I define as a very narrow concept, is fulfilled, the seizure of power, so to speak, in that way, would be unlawful. The separate question is where would such a seizure be challenged? For example, there is no compulsory jurisdiction under the United Nations in terms of self-determination that I am aware of. Which international forum would Jersey, Guernsey or the Isle of Man go to is a separate question, but if you ask the question in that sort of black and white way, I think the answer would have to be that that seizure of power would at least overturn 800 years of consistent constitutional practice, convention and, I would say, law.

Q29 Mr Hogg: Does not the overarching authority of the Crown from which the autonomous situation of fact arises retain to the Crown some form of power of intervention which, if push comes to a shove, could be called in to aid?

Professor Sutton: I think that is right up to a point in the sense of the concept of good government. If the United Kingdom held that good government had

ceased to exist the intervention would be through the Royal Prerogative, but I think the answer to your question is that the scope of the Royal Prerogative over the centuries has diminished extraordinarily and now it is a question of parliamentary sovereignty, not the sovereignty of the Crown as such. I think the answer has to be seen against that background.

Q30 Chairman: Can I turn to the issue you raised earlier, which is the international personality of the territories? Let us start simply. Legally it is the case, is it not, that the islands do not have an international personality?

Professor Sutton: That is correct.

Q31 Chairman: They do not have members of the United Nations. They do not have diplomatic representation of their own.

Professor Sutton: That is correct. International personality, whether it is a state or an entity like the European Union, has to be recognised by the international community. One can remember historical examples in the case of the UK with Rhodesia, UDI, and so on. If, for example, Jersey were to become independent and join the United Nations, I think international recognition is almost concomitant with membership of the UN, so without international recognition, no international personality. What is happening, I think, at the moment (and this rather typically British in a sense) is that the international identity, not personality, of Jersey, Guernsey and Isle of Man is developing in a pragmatic and de facto way, but the fact that every international negotiation which they have formally (and I will come back to the informal later, but the formal international negotiations for tax information, exchange agreements, agreements with Member States of the EU on tax on savings, and so on) is always done under the authority of a letter of entrustment given by the United Kingdom which says to Belgium, or to Australia, or to the United States, "We hereby authorise Jersey, Guernsey and the Isle of Man to conclude this international agreement in this sphere", which is set out in the letter from, I think, the Secretary of State for the Ministry of Justice actually, but it makes it very clear which are the countries with whom the Crown Dependencies may negotiate and what are the subjects which may be covered. That is almost like the instrument that you have as a diplomat, which is full powers, which you have to show to your negotiating opposite party to show that you have been authorised by the sovereign, by the international person which is recognised, the UK, to do those negotiations. So every agreement which has been concluded so far by Jersey, Guernsey and the Isle of Man has been done under the delegated authority of the United Kingdom.

Q32 Chairman: Then, in reality, it becomes more complicated. We looked at the situation when, as Mr Michael mentioned, the Kaupthing Bank failed and the British Government was representing its own interests and the interests of UK depositors in UK

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based banks, but at the same time it had a responsibility to represent the Isle of Man's interests in respect of Kaupthing (Isle of Man) and those people, wherever they were resident, including the UK, who had deposits in it. These two interests were quite clearly materially different, and the action to freeze assets in London would not have taken place in the way that it did had the British Government been acting in the Isle of Man's interests, and the negotiations with Iceland involved somewhat different considerations in respect of the two. How do you think this problem is resolved in practice or should be resolved in practice?

Professor Sutton: It is very difficult, but not without precedent. My first job in the European Commission in 1973 was to negotiate a textiles agreement with Hong Kong. I remember asking my Director General how it was that we were at the EEC were negotiating with a Crown colony of the UK. He, being German, expressed some incredulity at my question and said, "But Hong Kong is fifth biggest economy in the world. We have never even thought about it." Then later, when we were in Geneva, the Director General of the GATT called upon the UK speaking on behalf of Hong Kong to take the floor, and colleagues from Hong Kong sitting in the UK delegation then spoke. This is to answer your question. It is possible legally and, indeed, it is not only possible, it is actually the UK's obligation. In 1994 a judgment of the European Court of Justice—this was on the ratification of the WTO agreement when the United Kingdom was arguing for the right to sign the agreements alongside the EEC—whether or not there is exclusive competence in the EC on WTO matters, a country like the United Kingdom, which has dependent and associated territories, effectively wears two, or three, or four, or ten hats. That may be very inconvenient, it may be very difficult, it may be politically unacceptable or difficult to swallow, but it is a fact. In the Hong Kong case, please remember that Hong Kong's interest was in exporting textiles and clothing; our interest was in restricting imports of textiles. You could not have had a more diametrically opposed economic interest. I would argue that that was a more conflictual situation than the issue of taxation. At the moment the islands are very jealously guarding their own right to set their own taxes, rates and structures, and you may say that to expect the United Kingdom to defend that in Brussels is very difficult but, I am sorry, if you accept the international responsibility of the United Kingdom for the islands, it is their duty to somehow find a way to do that. In Iceland it was doubly difficult because Guernsey, the Isle of Man and Jersey are not in the European Economic Area, so the legal situation of those islands and the banks registered there, the subsidiaries of Kaupthing and Landsbanki, was different from that in the UK. Can you imagine the Foreign Office and the Treasury getting their heads around that and going to Iceland and negotiating, as it were, on one day for the UK depositors and on the next day for Guernsey and the Isle of Man. It is very difficult, but that is the situation. Is there an alternative? Yes, there is, you mandate or you

authorise or you empower the Isle of Man to do the negotiations themselves, and, in my view, that is the way of the future. There is a condition, in my view, also.

Q33 Mr Hogg: If you do that, of course, you deprive yourself of a lever that you currently have over the islands because, taking on Sir Alan's point, if one actually declined to negotiate in respect of some transactions, that is actually a lever which you can either use for a particular purpose or, indeed, for general leverage. If we accede to your suggestion of giving a general mandate, you are actually throwing away a lever which we have over the islands which otherwise we do not have much of.

Professor Sutton: In bald terms that is right. My suggestion was going to be that for the future the way of the future is more intensive co-operation. There have to be mechanisms put in place, and it probably implies greater resources in Guernsey or Jersey and the Isle of Man and in London. There have to be co-operation mechanisms. At the moment, I think the co-operation is not intensive enough, and that perhaps goes back to the Chairman's question and the fact that I have been pressed several times on what would happen if such and such happened. I think there already is, probably more than any of us realise, on a daily basis a very intensive exchange of views and communications on all sorts of matters, not just legislation, with the islands, but in terms of international negotiations, obviously if the United Kingdom is going to entrust Jersey to negotiate mutual recognition agreements on financial services with the EU, there should be a very close system of co-operation or an official from the Treasury should be instructed to be part of the Jersey delegation or the Isle of Man delegation. This is perfectly possible and I do not think it would meet resistance in the islands as far as I know.

Q34 Dr Whitehead: Looking through the other end of the telescope, there may be circumstances under which the Crown Dependencies themselves may consider that the UK Government is not honouring its constitutional obligation to represent those Crown Dependencies internationally. Are there any ways, either in practice or in theory, that those Crown Dependencies, if they consider that, might enhance, as you say, their international identity?

Professor Sutton: We have discussed the fact that international personality and sovereignty and full international identity lies in the formally recognised sovereign, which is the United Kingdom. So the answer to your question is, yes, it can happen, but it must happen by discussion with the United Kingdom and by authorisation of the United Kingdom. Take, for example, the establishment of offices, delegations, missions, call them what you will, in Brussels, or Washington, or any other capital, the OECD, Paris, there is a very important question which would have to be answered. How would those offices in Brussels work with the UK Permanent Representation? If you look at the case of Scotland, Wales and Northern Ireland, there is an

extremely excellent co-operative relationship between the devolved administrations, the Scottish Executive's Office in Brussels, and UKREP, and there is a mutual assistance pact or a system which is mutually beneficial despite their constitutionally different status. I see no reason why that could not operate for Jersey, Guernsey and the Isle of Man. I think it is quite difficult in the modern world to expect a department of the Treasury or the former DTI or any domestic government department to allocate resources to understanding and defending internationally a jurisdiction for which they have no formal responsibility. I think that is very difficult. The way forward in that is to empower and to authorise the jurisdictions to run their own show but in full co-operation, given that ultimately international responsibility does reside with the United Kingdom unless and until they obtain full independence. So that is the way forward: closer co-operation, exchanges of views, exchanges of information, throughout the process, whether it is the daily business of doing work with the European institutions or whether it is negotiating formal agreements. The point here is that when the Channel Islands and the Isle of Man decided on their current relationship with the EU we lived in a different world, as we said earlier on. Now it is quite clear that Protocol 3 has, I do not say outlived its usefulness, but the economic relationship of the Crown Dependencies with the rest of the world today is not covered by Protocol 3. Therefore, they have discovered for a number of years now that many decisions taken in international organisations like the EU, in transport, in financial services, in environmental protection, climate change, maritime environment, all these legally are not directly applicable in the Crown Dependencies but certainly are of enormous political importance in an indirect manner. Therefore, they have to be plugged into the system, and the only way they can do it is through their own initiative, their own offices. Take the case of Gibraltar. It is a contrast, of course. Gibraltar is rather in the EU; the Channel Islands and the Isle of Man are rather out, to put it in a very crude way. The United Kingdom actively takes responsibility for Gibraltar. Why is that? It is because the concept of international responsibility of the UK is very much to the fore in the case of Gibraltar. If Gibraltar does not implement a Telecommunications Directive or the Banking Directive, the United Kingdom will receive a letter of infringement under Article 226 from the Commission.

Q35 Mr Hogg: And from Spain.

Professor Sutton: And there is the Spanish dimension as well, of course. The Crown Dependencies are not in that situation. If you look back at the last 35 years, I think there have been three cases before the Court of Justice involving the Crown Dependencies, and then really in quite marginal issues. They simply have not been an issue in the EU. As I say, until the last ten years the EU has not been an issue for them, but it really is now because of the legislation being passed in financial services and their need not only to conform to it but

actually to maintain market access and secure recognition. So it is in their interests, and I would submit it is in the UK's interest, to assist them in that process of meeting international standards, gaining international recognition, being prosperous, being politically stable. That, I would have thought, is in the interests of everybody.

Q36 Mr Tyrie: Large fiscal regimes—Germany, France, Britain—on the whole, do not like dependencies, which they see as a source of tax leakage, even if officials are busy advising them that the overall net effect is probably positive because of the attraction of inward investment. Let us suppose, whether rational or not, that a putative British Government were to take a set of decisions which would lead, shall we say, Jersey and Guernsey, for the sake of argument, to conclude that they were better off being wholly independent. What cards do Jersey and Guernsey have to play in order to secure that independence? Would they negotiate with another large country for some kind of protection? What legal basis would they have for trying to find such protection, or would they file for independence with the United Nations, if there are such proceedings available to them?

Professor Sutton: I think that within the United Nations there are probably many precedents for—

Q37 Mr Hogg: The Security Council will say no, I can tell you that now.

Professor Sutton: There are many precedents for small jurisdictions being members of the United Nations. I do not express a view on whether Jersey, Guernsey and the Isle of Man would, as it were, qualify for membership of the United Nations, I can just think of a number of island jurisdictions which are smaller and less economically viable than them. If they were to seek independence and if, by a proper democratic means, they were to exercise that right of self-determination, I have heard it said by the United Kingdom officials that the United Kingdom would not stand in their way. To answer your question directly, the only analogy which I can think of is the analogy (and it may not be one which we want to go into in too great detail) between Switzerland and Liechtenstein. Liechtenstein has 35,000 inhabitants. It is an independent sovereign state, a member of the United Nations, a member of the WTO, which incidentally the three Crown Dependencies are not even by affiliation with the UK—that is another issue—and Switzerland looks after Liechtenstein's interests around the world in places where Liechtenstein does not have diplomatic missions. Liechtenstein has eight diplomatic missions including a very effective one in Brussels. I am not passing judgment on Liechtenstein's recent history and its difficulties with Germany on tax evasion and tax avoidance, and so on. All I would say there is that the track record of the three Crown Dependencies is completely different. If you speak to the European Commission about model jurisdictions with which they negotiate, whether sovereign or not, they will tell you, and so will the French Government following the recent

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agreements of tax information exchange agreements, that these are model jurisdictions. They have signed Article 26 OECD agreements. Not only that, but they enforce them. They respond to requests for information. You cannot ask for more than that. By the way, you did not say these words, but I am going to use them. Words such as “tax haven” and “off-shore jurisdiction” are terms of art; they are not terms of law. One needs to be very careful saying that a jurisdiction does not comply with standards, and so on, and it, therefore, is a tax haven. What are we actually talking about? One has to be very clear. Are we talking about tax rates, are we talking about tax structures, are we talking about money laundering activities and the failure to control them, and so on? On all these grounds, of course, the three Crown Dependencies have been found to be exemplary. That is a rather longer answer to your question. I do not think they would need necessarily to have a kind of larger jurisdiction that would take care of them.

Q38 Mr Tyrrie: Although Liechtenstein does, in practice, have Switzerland.

Professor Sutton: Yes, it is not defined, but de facto they have a working arrangement.

Q39 Mr Tyrrie: Monaco has France, and so on.

Professor Sutton: Yet Monaco is nominally a sovereign state, as is San Marino, as is Andorra, and it is interesting that in the tax field these third countries—Switzerland, Monaco, Andorra, San Marino and Liechtenstein—have bilateral agreements with the EU, as does Jersey, Guernsey and the Isle of Man, and, of course, the ones which apply, which work best, are the ones with the British Crown Dependencies.

Q40 Mr Tyrrie: What I am inviting you to do, Professor, is to look beyond the strict legal position that seems to me, the more I look at it, to be elastic and to provide a precedent for almost anything if one looks hard enough, and if there was not a precedent I am sure some reason would be found for creating one, but to look at the tectonic plates of power that operate here to discover where, under pressure, this relationship is likely to go and then to look back, using Alan Whitehead’s phrase, through the other end of the telescope to establish where it might be sensible to take the legal structure because it is the politics that will determine what legal structure is sustainable in the long-run. I hesitate to summarise what you have said, but it sounds to me as if you are saying that the mutual interest for arrangements something like the ones that currently pertain are so strong that they are unlikely fundamentally to be altered and that, therefore, the task of finding the correct legal structure is secondary and readily achievable.

Professor Sutton: I think that the attitude which exists to a very large extent in each of three jurisdictions would be that the present structure is fundamentally sound. I think I understand in all three jurisdictions, which I have visited now for 20-odd years, there is a terrific loyalty to the United

Kingdom and to the Queen, and that link is very strong. What is wrong with the relationship at the moment is not something that cannot be put right, though, as I have said earlier, there are differences in law and policy which flow from the autonomy of those jurisdictions which would pose difficulties, hurdles and obstacles, and which require political will to be overcome, but the present system, if it is improved, can be made to work. I think probably—this is my personal view—all three jurisdictions would prefer that to happen than to have formal sovereignty or formal independence, precisely for the reasons which I think underlie your question, that in Europe, for example, there is a problem, there is an issue, with how to deal with a multiplicity of small jurisdictions in an enlarging European Union. We see that with the Western Balkans. There would be no ready willingness at this moment to enter into negotiations with a number of further small jurisdictions for many reasons, not only because of their viability, their size, voting, members of the European Parliament, and so on, but also for the precedent value which that would have for certain other Member States who may not welcome that. So that is probably not a realistic issue in the short-term. The realistic approach is for both sides to recognise the strength of the current situation and put some effort into actually developing it and making it work.

Q41 Chairman: There is one last point I would like to put to you, which is to clarify the situation in respect of Alderney and Sark. I know we could spend rest of the day on Alderney and Sark, but it has been said to us that there is a federal relationship between Guernsey, Alderney and Sark. I do not notice any federal institutions which would describe such a relationship. How would you characterise it?

Professor Sutton: I have to say on this point that I do not hold myself out as a constitutional lawyer under Guernsey law. My only observation would be that that the relationship between Alderney, Sark and Guernsey complicates the international dimension of the relationship between Guernsey and Europe, or Guernsey and the United Nations, or Guernsey and the European Convention on Human Rights, for example.

Q42 Chairman: I am thinking of a sovereign constitution, for example.

Professor Sutton: Yes. I am afraid I find it difficult to go into details on the constitutional relationship because I simply am not familiar with the details of it. I am the European law adviser to the islands. I am not trying to avoid the question, I just think it is a legacy of history with which the UK is replete, not least in the country in which I had my education, which is Scotland, which is fascinating as well in terms of the divisions between internal and external relations. The situation in Guernsey, I think, works well enough in practice and there have not been any insuperable problems caused by it, though it is certainly difficult to explain it to outsiders.

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Q43 Dr Whitehead: Notwithstanding what you have said, which of course is absolutely accepted, about your position—you are not a constitutional expert on the relationship between Guernsey, Sark and Alderney—would it be possible to characterise to some extent their relationship almost as you described, or it has been described, as the relationship between the UK and the Crown Dependencies? That is, they have independent jurisdictions, they make their own laws and yet they are apparently within a form of federation with Guernsey but that presumably Guernsey could not interfere in their law making processes in roughly the way that you have described the UK as not able to interfere with the law making process of the Crown Dependencies, but, nevertheless, having an influence over their overall outcomes?

Professor Sutton: To be honest, the answer is I do not know. I know that the States of Deliberation in Guernsey have certain legislative powers for Sark and Alderney. I am not quite sure where the dividing line comes to tell the truth. I think the analogy you are trying to draw probably breaks down on the point which we spent some time on an hour ago,

which is the legal autonomy of Jersey, Guernsey and the Isle of Man. For the United Kingdom, the United Kingdom itself has said repeatedly, “We cannot legislate for the islands without their consent”, and then somewhere tucked in the footnote it talks about good government, but that is broadly the principle. They legislate for themselves and, by the way, international conventions are extended with their consent following consultation. I would hesitate to really compare the Sark and Alderney situation with that.

Q44 Chairman: Professor Sutton, thank you very much indeed. Thank you also for, I believe, your willingness to give us a revised version of the article you wrote on Jersey’s changing constitutional relationship with Europe, an updated version of that.

Professor Sutton: Chairman, I will give you an updated version exactly because so much has happened in the last four years and I think that was published in January 2005. So, yes, an update is timely certainly.

Chairman: Thank you very much indeed. You have been very helpful.

Tuesday 2 February 2010

Members present:

Sir Alan Beith, in the Chair

Rosie Cooper
Mr David Heath
Mrs Siân C James
Jessica Morden

Julie Morgan
Mr Andrew Turner
Dr Alan Whitehead

Witnesses: **Patrick Bourke**, Deputy Director of the International Division and **Karl Banister**, Assistant Director, Constitutional Law Team, Ministry of Justice, and **Steven Effingham**, Leader of the International Tax Team, HM Treasury, gave evidence.

Q45 Chairman: Welcome Mr Bourke, Mr Banister, and Mr Effingham. We are very glad to have you with us. The purpose of this session is to help our inquiry into particularly the role the Ministry of Justice plays in its dealings with the Crown Dependencies and in facilitating the relationship between the Dependencies and the UK Government and its departments. Quite genuinely we are seekers after the truth this afternoon because there is a lot that simply is not known about how this process works, and I thought we could start by asking you, particularly the Ministry of Justice representatives, what you do. I am going to concentrate in a moment on the legislative process because that is an on-going process, but if you could give us a slightly broader indication of what you spend your time doing in the Crown Dependencies I think that would be helpful.

Patrick Bourke: Certainly, and can I thank you very much for the opportunity to come and answer some of your questions. As you rightly point out, Chairman, not all of this is very straightforward, not all of this is completely crystal clear, but I hope over the course of the next hour or so we can at least elucidate a little bit. I am Deputy Director for the Crown Dependencies and Europe in the Ministry of Justice. In answer to your question what do we spend our time doing for the Crown Dependencies, the way we would characterise it, as you will have seen from our submissions, is that we, the UK that is, are responsible as a matter of international law for their defence and international relations, and as a matter of constitutional law the Privy Counsellor with this responsibility, who happens at the moment to be Jack Straw, discharges the obligation on the Crown to ensure their good governance, so in a sense the easy answer to your question of what we do in the Ministry of Justice for the Crown Dependencies is we fulfil those obligations, but that does not tell you very much because what you want to get into, I suspect, is the practice. Effectively the best way to go about this is to give you a flavour of what I think our relationship is. That relationship is a mix of two things. Firstly our stance, the UK stance, with Crown Dependencies is one of a good neighbour. We have very deep historical ties, we take those very seriously, they are geographically proximate to the UK, there is a lot of movement historically between the Islands and the mainland and vice versa, so the first thing is a good neighbour. The second element I would touch on is that as good neighbours we are

also critical friends, and what that translates to in a day-to-day sense is, where called upon to do so, we assist them in securing their objectives across a whole range of issues. The number of issues across our desks is really quite astounding: it can go from anything to territorial waters to renewable energy via the space industry, company law—you name it, in any given week all these things come across our desk.

Q46 Chairman: Does that mix include other things than legislation?

Patrick Bourke: Yes, absolutely. We obviously are there to process legislation, and I know you want to touch on this in more detail, but effectively we are there to tell them what is going on, what current UK thinking is and what current international thinking is on particular issues, bring them up to speed with things they are interested in, facilitate where appropriate direct contact between them and other government departments, so if they had a particular question on export licensing, for instance, we might point them to an official in BIS who would be in a position to help them, or indeed on the financial side with HM Treasury, but essentially our function is really to help them shape themselves as sustainable, economically prosperous and sound jurisdictions able to take advantage of the opportunities that the increasing international nature of the world promises. That is a broad brush statement but I am happy to give you specific examples, if that would help.

Q47 Chairman: For all the Dependencies though, there are slight differences at the moment, there is a process by which their legislative proposals are offered to UK government departments for consultation purposes, and the Royal Assent will depend on, and it is Jack Straw in this case, the relevant Privy Counsellor being satisfied that he should advise Royal Assent to be given. Is that a largely informal process which eventually culminates in some pieces of paper moving about, or is it from the beginning a formal process, and does that differ? Are you on the phone saying “We are thinking of putting a clause in to do this, would that cause any problems with the departments?” Or is it very formalised process?

Patrick Bourke: As you say, broadly speaking, the Isle of Man and the Channel Islands do follow the same process; there are differences but they are not really important for these purposes. The system we employ is the same across the board, and it is what you would expect. The legislation comes into the Ministry of Justice, we make an assessment of its complexity, what interests are engaged, which other government departments might be interested. Having made that assessment we then consult with the relevant government departments and give them the inside of three weeks to provide their feedback on that. Our lawyers then go through the draft legislation with a fine toothcomb to ensure they do not engage international obligations or infringe against them, because at the end of the day we are responsible for the international obligations, it will be us in the dock if it goes wrong, so there is a legitimate interest for the Lord Chancellor to assure himself through his own advisers that that situation does not arise, and having made that analysis, if there are points of drafting or more substantial points, typically we would then engage in an informal process of trying to understand what the purpose of this particular clause and that particular clause is, and 9.9 times out of ten I would say that we are satisfied with the answers we have and we are happy to put it forward for Royal Assent. You asked specifically about whether it was a formal or informal process; it is both. It is formal in the sense that we have to adhere to very strict timetables for the Privy Council and there is a whole florid language that goes along with that, but informal in the sense that the relationship between policy officials at the Ministry of Justice and the Crown Dependencies and between lawyers at the Ministry of Justice and the Crown Dependencies is very good, and we speak sensibly to one another about what the objectives are and how we can accommodate them.

Karl Banister: I lead the constitutional law legal team, a team of ten lawyers working across the Government's constitutional law reform programme, including parliamentary standards, Constitutional Reform and Governance Bill, the electoral system, House of Lords reform, and, of course, advice about Crown Dependencies.

Q48 Chairman: This is UK legislation?

Karl Banister: Yes.

Q49 Chairman: Whose relevance to the Dependencies you have to discuss?

Karl Banister: Yes.

Q50 Chairman: As opposed to Dependency legislation, whose conformity to international conventions and so on needs to be discussed?

Karl Banister: That is right. Patrick has covered the process quite well but, if I go through the detail, Channel Islands law is slightly different, there is a variation between the laws, and I will start with Jersey/Guernsey. The laws are passed by the respective Islands' legislatures and then sent to the Ministry of Justice. We allow between 14 and 16 weeks to process a piece of law because there are

several stages to go through before it gets to the Privy Council. That is what we allow but, of course, there are variations depending on the urgency or prioritisation on behalf of the Islands. We can do things very quickly if we really have to but that is the normal timescale. The reason we allow that time is because there is a process we go through. When the law arrives in the Ministry of Justice it is registered in our records; we decide which department or departments need to be consulted, and we allow a bit of time to do that part of the process. We then go ahead and consult whoever the departments are who we think have expertise in the particular policy area addressed in the legislation because we are generalist lawyers, not specialists in, say, maritime law or whatever, and we give them 20 working days to respond. That might sound like a lot but this will be totally new to them and they will have to decide how much work they want to do on it. Again, we will give less time if, in discussion with the Islands, we think that is necessary. The law then comes back to my team and we allow another 20 or so working days to work through ECHR issues and so on and breadth of powers. My team are not interested in the policy at all.

Q51 Chairman: One of our witnesses suggested that some Guernsey legislation had been held up and people did not know why, and it was because of what were thought to be excessive ordinance making powers.

Karl Banister: That is right. That was in 2007, before my time in the team, but what happened was there was a period when a series of measures contained powers the effect of which was to take away the scrutiny function that we have. It was exactly like the discussion that might go on with the Delegated Powers Committee here, so there was a period of negotiation which was resolved and we now have a far better working arrangement. In those cases, when the Islands have got what they think might be a broad power, they will come to us ahead of making the law and talk about that, and in 95% of cases, subject to a conversation, we are happy, so that did happen but it is not a concern at the moment.

Q52 Dr Whitehead: Taking it the other way around, what might be the circumstances where you might consider it appropriate to ask the Crown Dependencies to initiate their own legislation, for example, as far as the UK's responsibility to ensure the compliance of a Crown Dependency with international law and your conclusions on that and therefore, presumably, a machinery of some description whereby you might be able to say to Crown Dependencies: "You really ought to legislate on this"?

Patrick Bourke: That is a very good question, and there is a recent example. In fact, you were taking evidence from my Secretary of State on the day that Sark had its first democratic elections, and this is one of the instances where we might encourage, not to put it too weakly, a Crown Dependency to bring forward alternative legislation. In that case, as you will recall, the Secretary of State was faced with a

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Sark reform law which, in his judgment, did not satisfy our obligations under the European Convention on Human Rights, Article 6 in particular. In those circumstances he refused to recommend the law for Royal Assent. The effect of that was to provoke a period of reflection, I think might be the best way of putting it, on Sark when they could think whether they should go a bit further. In the event a new reform law did emerge and, whilst it still contained, in the Secretary of State's view, subsequently backed in the House of Lords, a minor *de minimis* defect in relation to Article 6, the progress that had been made in terms of securing democratic elections on what had hitherto been the last feudal region in the whole of Europe, outweighed this particular defect. So that is one example of circumstances where we might encourage the Crown Dependency to adopt legislation. I think Karl may have another example where perhaps we see a significant UK interest.

Karl Banister: I was thinking about the evidence given by Professor Alastair Sutton before the Committee, because that is an example where we have dialogue. If the question is are there circumstances where we would lean on the Islands to do something, the only realistic example I can think of is compliance with international obligations, treaties and so on. If the UK is entering into a treaty in respect of the whole of the UK and the Channel Islands it is difficult to be in a position where the Islands have not legislated appropriately but, as I think Professor Sutton said, examples other than that are quite difficult to imagine because they depend on all sorts of things happening on the Islands that are incredibly unlikely to happen.

Q53 Dr Whitehead: I assume there would be a ground for intervention in legislation, presumably through the offices of the Privy Council?

Patrick Bourke: It is commonly understood that the Government, or the Crown acting through the Government, has a residual power to intervene. Now, the circumstances which would give rise to a legitimate exercise of that right have never presented themselves, and the most recent—and I say this with hesitation—example that was given when this was looked at in some detail was in the 1973 Kilbrandon Report, with which I am sure the Committee is familiar, and examples of what might constitute a sufficient reason for the UK to legislate without reference to the Islands, ie without their consent, included, for instance, a complete breakdown of law and order. Now, things are very exciting in the Crown Dependencies but we have some way to go before they reach that sort of level!

Q54 Dr Whitehead: So does this therefore remain a theoretical possibility, or is advice extant to the Privy Council, for example, on circumstances under which such arrangements might be possible or necessary?

Patrick Bourke: I am not sure I have the answer to that question.

Q55 Chairman: May we ask the Minister?

Karl Banister: You can. I am only aware of the Royal Commission Report, the Kilbrandon Report, which sets out what they concluded were the legal parameters, which were that there is a power to legislate for the Islands, but then sets out that conventionally we do not do that unless there are extreme circumstances.

Q56 Dr Whitehead: Perhaps this might be regarded as an aside, particularly relating to the Channel Islands, but where you have what might be regarded as domestic area management arrangements with France, which may relate to a variety of issues on landing management of joint space, et cetera, would the relationship there be between France and UK authorities in terms of how such discussions might proceed, or would they be relations which proceed directly with Jersey, Guernsey and the French authorities, either regional or national?

Patrick Bourke: It would rather depend what the end goal is. If this is a negotiation intended to lead to an international agreement it would have to proceed with our knowledge and acquiescence, because they are not sovereign states and they have no international legal personality, so any such agreement they purported to make would be unenforceable and, therefore, not particularly attractive to the French. That is not to say that we would not encourage the Crown Dependencies to speak to whomsoever they wish, but the difference is that the point at which they engage obligations, or they are purporting to engage obligations, there are obligations and we should have a corresponding right to take a view on whether or not those obligations are ones which we are happy to bear on their behalf.

Q57 Mr Heath: I am not clear but presumably, at least theoretically, the legal position in the Crown Dependencies could be a bar to UK ratification of treaty or protocol. I do not recall a circumstance in which the UK has failed to ratify on the grounds that the legal practice in one of the Crown Dependencies is not in accord with the provisions of a treaty, but presumably, theoretically at least, that is the case. Do people just turn a blind eye to the fact that one or more of the Islands might not have quite done what we promised to do?

Patrick Bourke: Whilst it may be theoretically possible the occasions on which it arises, as you put it, we have never heard of so I do not know how much of a serious problem this is, but it may be a theoretical one.

Karl Banister: I think it is a theoretical problem but the recent activities in relation to the legislature in Sark suggest the way that is dealt with is that if we enter into an obligation or a treaty where there is not compliance individuals can challenge either our decisions or the decisions of the authorities in the Islands through the courts to secure compliance, which is what happened in that case.

Q58 Mr Heath: I think I am hearing a blind eye is turned until somebody points it out, is that right?

Karl Banister: Well, if we do not know about something we do not know about it.

Mr Turner: Do the people here have any status in discussions about what happens even on the external powers? Your own powers? Or is it entirely a matter for the Lord Chancellor?

Q59 Chairman: Is it a prerogative power that he is exercising?

Patrick Bourke: At this point I will look to my learned friend!

Karl Banister: It is the Queen-in-Council legislating for the Islands, so—

Q60 Mr Turner: They are irrelevant?

Karl Banister: I would not use that term—

Q61 Mr Turner: But it is true.

Karl Banister: It is a separate process, I think.

Q62 Chairman: Nobody has suggested that we cannot ask the Lord Chancellor questions either in Parliament or in this Committee of Parliament as to how he is exercising that.

Karl Banister: That is right.

Patrick Bourke: And, as he made clear when he last appeared before you, he said, “Given that I am asked PQs, given I am lobbied by Members of Parliament on behalf of the Crown Dependencies, given that I see the Crown Dependencies and given that I am respondent in litigation involving Crown Dependencies, there must be some sense in which the accountability lies.”

Karl Banister: I should have added that, of course, there are other aspects of our powers in relation to the Islands which are uncontroversially part of Parliament, such as defence and so on. There is a clear interest there.

Q63 Mr Turner: But is there a power?

Karl Banister: The Islands are not responsible legally for their defence so the power to do things in relation to their defence comes from the authority of Parliament.

Q64 Mrs James: Turning to international representation, we have already heard a little bit about Guernsey’s concerns. How do you ascertain the policy priorities of the Crown Dependencies? How do you factor these into your work and represent them across the Government?

Patrick Bourke: This is only international representation insofar as you consider the UK to be separate from the Crown Dependencies, but the important thing to understand is this is a completely dynamic relationship; this is a team of six plus me at the Ministry of Justice talking to people in the Crown Dependencies’, our opposite numbers in the civil services of those Dependencies on a daily basis about a whole range of issues, so we are extremely well-informed about what their priorities are and I can assure you that they are less than shy about coming forward and painting a picture for us. We also visit the Island between us several times a year, and that is not just policy officials but includes

recently Lord Bach in the Isle of Man, and recently Karl with Louise Moreland from his team also took time to go and make their mark with opposite numbers in the legal profession there. We also have a formal meeting every few months where I get together with the Chief Executives, that would be the Permanent Secretary equivalent, in each of the Crown Dependencies, and that is a more formal forum for them to exchange their views and to tell us a bit about their priorities, so we are really plugged into the sorts of things they want and, as I say, it covers a whole range of issues. It can be anything from the nascent space programme of the Isle of Man all the way through to fishing rights and territorial waters. We have a recent example in the case of Alderney which is pioneering a tidal wave renewable energy programme which is generating huge amounts of electricity, and we are opening doors for them in terms of speaking to colleagues in the Department for Energy and Climate Change, and also potentially with the French because they will need to bring that product to market at some point, so to answer your question we are very plugged in. How then do we interact with other people across government? Very straightforwardly, like in any consultation or any business that we conduct. We identify the person with the responsibility for this policy, or the expert who might be available to help, and we facilitate direct contact. Sometimes we choose to be there; sometimes we are asked to be there when that contact takes place; and most of the time we just let them get on with it.

Q65 Mrs James: As a follow-up to that, in international negotiations how do you ensure in practice that, consistent with the framework for developing the international identity of the Crown Dependency, you faithfully represent and take account of the interests of the Islands, which may differ from those of the UK?

Patrick Bourke: This is a tricky area, there is no question about it, but I think it is tricky only on the surface and, once you get down into the nitty-gritty of it, it is more straightforward. There are three instances really to consider on this. One is where, for instance, the Crown Dependencies and the UK have an interest but it is not conflicting, and there obviously it is very easy because we are aiming for the same thing. A good example of that is getting over the bar of the OECD white list and assigning at least 12 TIEAs (Tax Information Exchange Agreements) by the time of the G20 conference in London. There are other occasions, and I have to say they are extremely rare, where we both have interests but they do conflict, and this is where we have to accept that the position is we have responsibilities both to the UK taxpayer to advance UK interests but also to faithfully represent, as you put it, the interests of the Crown Dependencies. Recent examples include relations between Guernsey and Iceland, where clearly they were looking for money to bail out their depositors and we were looking for the £3 billion that we lent them to bail themselves out. We got over that in a very pragmatic way, in a very grown-up way, and we took the view, and

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Treasury and Government accepted that we had to do this, that we had to represent the interests of Guernsey in our negotiation and we did so. That is not to say that you could expect Treasury to go hammer and tongs at privileging the position of Guernsey versus the UK's interest because that would be an absurdity. What we did, though, was take a pragmatic view which is, having discharged our responsibility to faithfully put their view across to Iceland, we said, "Now go and make your case" and we opened the door and facilitated direct contacts between the Guernsey Government and the Icelandic Government.

Steven Effingham: I would add that the example Patrick has used of Iceland is essentially a crisis situation where things are moving very quickly and, as Patrick says, a pragmatic way of representing the interests of Guernsey and the Isle of Man was adopted and representations were made to the Icelandic Government. In the more run-of-the-mill representation in, say, the European Union, again Patrick's summary of it is correct. In principle it seems quite difficult to wear two hats and represent Crown Dependencies and at the same time represent the UK, but in practice it is reasonably straightforward. Partly what is happening there is we are not having a discussion in a vacuum where, for example, if we were negotiating on the European Savings Directive I would be wrestling with myself over which of my two hats I was wearing; we are in the context of a multilateral negotiation with other Member States with institutions such as the Commission, and essentially, to answer the Chairman's opening question "What do you do?", in situations like that we set out the UK position, we also set out the Crown Dependencies' position, we make it clear where they stand and where their interests stand, and we get feedback from our negotiating partners and from the European Commission on essentially how likely it is the support in the negotiation is going to tend towards the Crown Dependencies' view or to the UK's view, so it is an on-going dynamic situation. It is not a case where we would sit silently and say nothing on the position of the Crown Dependencies; that is not our role. We do have a duty to represent, and other participants in the negotiation would expect us to, because I think in most international arenas there is still a slight confusion as to the status of the Crown Dependencies, are they part of the UK or are they independent, what is the story, so there is clearly an expectation that we will cover those issues. In practice, therefore, it is a matter of making sure we understand Crown Dependencies' concerns and positions, which, as Patrick says, we pick up from day-to-day largely informal contact but very frequent contact, I am in contact with tax officials in the Crown Dependencies almost as much as I am with the major European Union countries, so we understand the positions, we discuss, we debate, and then we represent the interests.

Q66 Chairman: When you have a bilateral negotiation, as happened with Iceland, and there are quite clearly strongly conflicting interests between

the UK and the Crown Dependency that is solving the problem of one but not answering the problem of the other, if you are not careful, why not have two teams and have one team advised by Crown Dependency officials? So you are still under the charge of the Treasury official but there is somebody different saying: "Well, I am here today to explain that the Isle of Man government, for example, feels that it should have the money from the Icelandic Government to repay depositors from the Isle of Man, some of whom incidentally were UK citizens"? **Steven Effingham:** I understand the suggestion and I was not personally involved in the detail of what was happening in the Icelandic situation, but my understanding is this was a fairly fast-moving crisis and the opportunity to reflect on what might be the ideal representative model may not have been available. The model which was pursued was that the UK Ministers wrote on behalf of Guernsey and of the Isle of Man setting out their case, but in the end the responsibility of ministers to protect the interests of the UK taxpayer prevailed, as it were.

Q67 Chairman: So it is hard lines for Crown Dependencies, then?

Steven Effingham: I think in this situation ministers did press the case but, as you say, there were conflicting priorities and in a crisis and with the realities of the expense and cost to UK taxpayers, and also the position of the UK investors, the primary responsibility under the obligations as they stood under the Directive lay towards the UK taxpayer. That was the judgment ministers took, but that may be something that when ministers give their evidence you can explore in more detail.

Q68 Rosie Cooper: There is a bit of an overlap here in that the question I would like to ask you is whether you believe that there is sufficient awareness across other government departments about the need to take into account the interests of the Crown Dependencies, especially in areas where there may be a conflict of that interest? Do you believe that the departments are aware of that, and that is right across all government departments?

Patrick Bourke: The blunt answer is no, I do not. I do not think everybody is as sensitised to these issues as they would, in an ideal world, be. That is not to say there are not some excellent examples where people really are aware; the Department of Health is an example. In departments where we have a more regular contact, because Crown Dependency issues tend to recur for them, obviously the situation is much better. We are taking some steps to address that. In relation to the more process-driven type of activity we were talking about a second or two ago in terms of the process of legislation we have developed a series of new protocols which document how that process should work and set out the rights and responsibilities of the Crown Dependencies and ourselves in meeting deadlines and what those deadlines are, et cetera, but they also incorporate the responsibilities of OGDs (Other Government Departments) when they are consulted in that process. We are in negotiation with other Crown

Dependencies about the content of those protocols but we are very hopeful we will be able to use them as a tool for raising the profile and the sensitisation to these issues by sending them out to departments with a strong message from our Director General and our Chief Legal Adviser, and I know Karl, through the Government Legal Service network, does all he can—

Q69 Rosie Cooper: But do you think it is right or fair that the people dealing with it are not fully aware that whatever decision they take will impact on the Crown Dependencies?

Karl Banister: I will pick up where Patrick left off and say that it may not be right or fair but it is a bit like painting the Forth Bridge to some extent. As people change in departments there is a continuous need, as in any other area, to maintain awareness. The Government Legal Service has training for lawyers on various issues and we supply one of our team to deliver training at particular events that seem relevant on Crown Dependency issues, so that is part of our contribution to the process of maintaining awareness. At a particular snapshot point awareness could be very good but you have to keep working at that, and that is just a natural organic process.

Q70 Rosie Cooper: Would the ideal situation be them maybe taking their bat and ball home and looking for better representatives?

Patrick Bourke: They are very welcome to.

Q71 Chairman: Can we look at an example of this which is the ending of the reciprocal health agreement. In a report to Tynwald the Isle of Man Department of Social Security said that at a meeting with the UK Department of Health on 1 July 2008 which was to discuss the reciprocal agreement, without any pre-warning the Department was notified that the UK Government intended to end the reciprocal agreement. Were your officials involved in any process prior to that, or is that, do you think, an accurate description of what happened, that basically they went along to a meeting to discuss perhaps some new financing arrangement for it, and they were just told, this is it, it is going to end, and in the case of the Channel Islands it has ended already; the Isle of Man negotiated a later date and it is not ending until this year. Did your processes engage there, or does the Department of Health just bypass the Ministry of Justice?

Patrick Bourke: To be perfectly honest I do not recall, I am not even sure I was around at the time those discussions took place, but by and large we are involved at the outset, certainly by government departments like Health who are more sensitised to these issues. The policy is a matter for the Department of Health, clearly, but I think it is worth knowing, or worth noting, that the ending of reciprocal healthcare agreements in all three jurisdictions was agreed by the States, Tynwald in the case of the Isle of Man, and has only resurfaced very recently in a way that I am not convinced has

been terribly helpful to the Isle of Man because, as far as they were concerned, they accepted the decision and wanted to move on. I do not know whether we were given notice or whether somebody in my team participated in those discussions but, generally speaking, it does work really rather well.

Q72 Chairman: Would you like to write to us about that? It is a factual question. Did the Department of Health simply arrange a meeting and say: “We are ending this agreement” without any involvement of the Ministry of Justice at all, or was the Ministry of Justice involved in the process? It is quite important to the understanding of how these things happen because whatever they had to accept there is no doubt that there are very strong criticisms in certainly the Isle of Man and Guernsey, and probably in Jersey as well, about the implications of this, although conversely the Department of Health took the view that it was costing them a lot of money; that it was costing us a lot more than it was costing the Crown Dependencies.

Patrick Bourke: I am very happy to write. As you say, it is a factual question. I would just add that, by and large, it does work rather well. I would love a perfect system where everybody was immediately thinking “Ministry of Justice” when a Crown Dependency raised its head, but it is just not the real world, I am afraid.

Mr Heath: I wish I was convinced even the Ministry of Justice thought that, but I guess I have been doing Criminal Justice Bills for ten years or thereabouts, either through the Home Office or the Lord Chancellor’s Department or the Ministry of Justice or whoever, and one of my favourite ploys at some stage in the proceedings is to ask, when it refers to anything international, how does this affect the Crown Dependencies, and not once have I had a sensible answer from the Bill team; not once have they known and been able to advise the minister whether it affects the Crown Dependencies or not. So would it be your normal habit when a Bill is introduced—from the sound of it you scrutinise it to see if it has implications—to send a note to the Bill team to say either “This has implications for the Crown Dependencies” or “This does not have implications”, because it certainly has never yet got through to a minister responding to me in Committee.

Q73 Chairman: Is that your job? Is there somebody in your team whose job it is to sit and look at every Bill that comes forward in the UK Parliament and check whether it has implications?

Karl Banister: It is the primary responsibility of the Bill team concerned to do that.

Q74 Mr Heath: If it is any help, they never know how it applies to Courts Martial either!

Karl Banister: It is not only application or not to Crown Dependencies where it falls foul; devolution, too, is another issue where there is not perfect coverage, but it is the responsibility of the Bill team to consider these issues, and although I agree that at the outset it may not be the thing that is highest on

their mind, by the close of the process we will have an agreement as to whether or not it is intended that legislation is extendable to the Channel Islands, and there is a clear formula for doing that. It is not unknown at all for this to happen quite quickly at the last minute, but it is a responsibility. We are there to assist the Bill teams in finding the right formulation, and we do discuss the policy requirement and whether it is objective. There was very a complicated example recently in the Police Act where provisions about the Criminal Record Bureau were to be extended and that was a very difficult process because it was extending a whole series of pieces of legislation that had been amended by the Police Act and so on, and we are involved because we have the expertise on how to do that but we are not the experts on the policy, so they supply the policy expertise to us.

Q75 Jessica Morden: In some of the evidence we have had from the Islands there was sometimes a bit of frustration about the length of time it would take to deal with queries or legislation, or sometimes the short amount of time that the Islands had to respond when the UK was negotiating an international treaty. Do you think that is a fair criticism, and do you think there are enough of you? Are you under-resourced?

Patrick Bourke: The resources we bring to bear are not inconsiderable and I think they are appropriate to the job as it currently stands. I mentioned that I have six full-time officials working on nothing but Crown Dependencies which is quite a significant commitment for a policy team at the best of times, but in this sort of environment it is still fairly remarkable that we have managed to keep it the way it is. It is not just policy officials who are engaged in this, but also the lawyers. You have to think that you have the core team at the Ministry of Justice but then you have potentially hundreds of policy officials and government lawyers who are, at any given moment, working on something Crown Dependency-related. I alluded earlier to the fact that no system is perfect and I am sure there are occasions where matters should have been expedited in a way that just did not happen, for whatever reason, so we can always make improvements and we would be the first to say that. In fact, devising the protocols was not at the behest of the Crown Dependencies; it was an initiative on our part which imposes more stringent timelines on our response than currently exist, so no system is perfect; we do pretty well; and I think the resources are adequate.

Karl Banister: On the legal side, we have four lawyers who spend part of their time considering Crown Dependency-related matters, which gives us quite good flexibility to have someone around at any particular time who might be able to look at something, but I would also say that if the reverse was the case and the situation was that every time there was a Crown Dependency-related matter we were able to deal with it instantly, you might be asking us, "Are you over-resourcing this?" because we have to prioritise and it is the same in relation to any other policy area.

Patrick Bourke: Building on that, that is entirely right. Activity in the Crown Dependencies tends to go in cycles, so in the run-up to the end of the States of Jersey session we get a lot of requests for rapid assistance because they want to tie up the business. Equally, on the Sark front, when we were dealing with that, we were spending inordinate amounts of time on Crown Dependency, and you have to be resourced at the right level to enable you to accommodate the peaks but also deal with the troughs, because you would not want a Crown Dependency team sitting idle for a couple of months. That would be intolerable from the Secretary of State's point of view.

Q76 Chairman: There seems to be a particular Alderney problem which arises primarily from the fact that things have to go through Guernsey for Alderney, but which is exacerbated on their evidence by the fact that as a very small territory they have a cycle of meetings where their part of the decision-making process has to go, which sometimes is impossible to accommodate with the time-scales that result from this three-tier process. Are you conscious of that? This was in their evidence to us.

Karl Banister: I am not conscious of that. You having mentioned it, it is something that I could discuss with my counterparts. We do have regular contact with Guernsey law officers.

Q77 Chairman: In the case of both Alderney and Sark, they are processed through Guernsey, are they not? Guernsey brings their proposals to you?

Karl Banister: That is right. There is an inevitable delay in having a two-tier system, but I know I would be speculating to go further. It is not something I have discussed with anyone before.

Q78 Dr Whitehead: Who is responsible for the seabed around the Crown Dependencies?

Patrick Bourke: Can we take that away and write to you about it?

Q79 Dr Whitehead: As a supplementary to that, following, for example, the passing of the Marine Bill in England and Wales, not Scotland, there are grades of responsibility—inside six miles, six to 12 miles, and then licensing arrangements up to 200 miles—all of which are the responsibility of the Crown Estate, which is not the responsibility of the Parliament but of the Crown Estate, and it would appear in principle, therefore, that since Crown Dependencies are also relating to the Crown and not to Parliament, the two might look they are identical, but I do not think they are.

Patrick Bourke: It is a very interesting question and we shall consult somebody who does know the answer. Could I just add one point on the international relations, because I think it is quite important for the Committee to have a fully-rounded picture? I said there were three situations to consider—mutual interest, conflicting interest and a third category, and this I think is the way forward from now. As you know, on occasion we entrust the Crown Dependencies to go and negotiate on their

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own account with third countries, and that has been the case with tax information exchange agreements, so we are very specific about the scope and it is on an agreement-by-agreement basis, and that has worked really well because as their economies internationalise, like all of us, they are wanting to reach out a bit more and we are very receptive to that, and one of the things we are in the early stages of designing, with their help, is, if you like, a block entrustment which would provide them with greater flexibility both in terms of the scope of the

agreements and the scope of their negotiating partners, but which would provide us with a long-stop guarantee that we are not engaging in obligations that we would not be ready to stand by. As an example of how we are responding to the changing needs of the Crown Dependencies, however, particularly around the international representation side, they want to do more for themselves, and on certain conditions we are happy for them to. We just have to find a mechanism to make it work.

Chairman: Thank you very much indeed, gentlemen.

Tuesday 2 March 2010

Members present

Sir Alan Beith, in the Chair

Rosie Cooper
Mr Douglas Hogg
Mrs Siân C James
Alun Michael

Julie Morgan
Mrs Linda Riordan
Mr Andrew Turner
Dr Alan Whitehead

Witnesses: **Lord Bach, a Member of the House of Lords**, Parliamentary Under-Secretary of State, **Mr Patrick Bourke**, Deputy Director International Division, and **Ms Farida Eden**, Constitutional Law Specialist, Ministry of Justice, gave evidence.

Q80 Chairman: Lord Bach, Mr Bourke, Ms Eden, welcome. Mr Bourke, your job is leading the team on Crown Dependencies. We have seen you before of course and your name is often spoken of in Crown Dependencies.

Mr Bourke: I am delighted to hear it, I think!

Q81 Chairman: Ms Eden, are you in the legal team?

Ms Eden: That is right, I lead the constitutional law team at the Ministry of Justice.

Q82 Chairman: You are not wholly devoted to Crown Dependencies.

Ms Eden: No.

Q83 Chairman: Do you think there is sufficient awareness across Whitehall of the constitutional position of the Crown Dependencies or do departments, other than yourselves, start with a lack of understanding?

Lord Bach: I think there is a pretty good appreciation. I would say that I think it is best in my department of the Ministry of Justice. That is not just pure boasting, it is of course because it is our job; we are the channel really for the Crown Dependencies and other government departments and vice versa. Other government departments have a great deal on their minds and on their plates at particular times, and it may be that sometimes they are not as up to scratch as we are as far as the Crown Dependencies are concerned, but on the whole we think they are aware of problems as they arise.

Q84 Alun Michael: To what extent does it make sense for the Ministry of Justice to be the single point of contact with Crown Dependencies?

Lord Bach: I think it is something that the Crown Dependencies themselves welcome. It ensures, for a start, that they are kept informed of UK and international thinking on a wide range of issues. We provide a first point of contact for UK government departments that want to approach the Crown Dependencies on aspects of their work and similarly for governments of the Crown Dependencies wishing to approach UK departments. It also facilitates direct contact between the Crown Dependencies and other government departments on matters of concern or interest to the Islands where that is appropriate. It is also of course important because we have a duty to process the Crown

Dependencies' legislation to Royal Assent. We are considering at the moment how we can improve the way we exercise this rather special role—peculiar role if you like—and we are currently developing guidance for the benefit of all parties including UK government departments, which goes back to the Chairman's first question, on how we deal with legislation extending to or originating from the Crown Dependencies.

Q85 Alun Michael: Can I put to you something that came up when we were looking, for instance, at the issues over Kaupthing and the Isle of Man which is that whereas I think all that you have said makes excellent sense, and in general may well work, are there not situations where a particular area of policy is so clearly that of another government department and where communication needs to be open and seen to be open when facilitating an open discussion with another department would make sense? On the Kaupthing example, for instance, the answers from the Department for Justice rather suggested that the policy lead lay with the Treasury. I know it was a complex issue so I am not oversimplifying the situation, but it was difficult to get clarity from the Treasury as to what was going on, so it made government as a whole look pretty defensive and was not clear. Certainly in that case people within the Dependency felt that they were out on some sort of loop because they were contacting Justice but the action was with Treasury. Do you see what I mean?

Lord Bach: Yes. I will ask Mr Bourke to comment.

Mr Bourke: I would stress the fact that we are the first point of contact, not the only point of contact. As the Minister made clear just a second or two ago, where it is appropriate we facilitate direct contact between Crown Dependencies and specialist government departments.

Q86 Alun Michael: Do you feel confident to make it clear that is what is happening in a particular set of circumstances?

Mr Bourke: Yes I do. I gave the example of Alderney Energy last time I appeared before this Committee. Clearly the MoJ is not the place to come and have detailed discussions about tidal power energy so the access has gone to Lord Hunt and we are facilitating discussions between Alderney and the relevant department.

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Q87 Alun Michael: Just closing on this point, can I suggest that it would be helpful to be explicit and public when the ball is being passed in that way?

Mr Bourke: I do not see it so much as the ball being passed, it is a shared responsibility the whole of government has towards the Crown Dependencies so it is not a question of passing the ball or the hot potato; it is a question of getting together the best possible advice.

Q88 Alun Michael: It can look a bit muddy from outside.

Mr Bourke: Perhaps it can, but I have to say that nine point nine times out of ten it seems to work to mutual advantage.

Q89 Chairman: We hear about the other one.

Mr Bourke: The point one.

Lord Bach: We hear about the other one too!

Q90 Chairman: The process of getting Royal Assent for legislation technically differs slightly between the different Crown Dependencies but is essentially similar in principle. It provides an opportunity for the UK Government to object to or to delay the legislative process which has been engaged in by the democratic legislatures of the Dependencies. What do you think are the constitutionally legitimate grounds on which the UK Government can do that?

Lord Bach: I think the grounds upon which we can do it constitutionally are limited. In the result it is extremely rare that we do it. Where we can, for example, is where it affects the UK's international relations with third countries because of our responsibility for defence and international relations as far as the Crown Dependencies are concerned. That is one area we can do it and as to the other I think you will remember the Lord Chancellor himself telling you about the decision on Sark because he considered it, after due reflection, to be in breach of the ECHR.

Q91 Chairman: You have since written to me to point out that actually his grounds were primarily arising out of the good governance responsibilities which the UK has towards Sark in the context of modern democracy. I have the letter here.

Lord Bach: It is an example of both the twin paths, good governance, one of our responsibilities, and the other the defence and international obligations of the Crown Dependencies.

Q92 Chairman: Is congruence with the United Kingdom policy, other than covered by those two previous points, a legitimate ground for review?

Ms Eden: The difficulty is that there are not going to be many areas which do not relate to good governance or international obligations which also covers the European Convention on Human Rights. It is very unlikely that you will find a piece of legislation that is not at all about human rights or good governance in some way. We certainly would not expect the Islands to have the same policy aims as ours but I think, if it falls within the ambit of good governance or international relations, that would

open up a dialogue and we might want to talk to them about a piece of legislation. I think it is perhaps a bit of a false distinction to say would we refuse Royal Assent; I do not think that necessarily reflects what happens in practice. What happens is that a piece of legislation comes into us and we think maybe the drafting is not quite tight enough or we think there might be a human rights point, and we will get on the phone to our opposite numbers in one of the Crown Dependencies and talk them through it. It is a sort of partnership rather than us taking a hard line and saying we are going to refuse Royal Assent. Sometimes they will explain something to us and we will say that makes sense or sometimes we might seek assurances as to how a piece of legislation is actually going to be operated in practice. It is perhaps a more fluid process than just simply refusing Royal Assent to a piece of legislation.

Q93 Chairman: That leaves me a bit confused because it is quite clear that if there are issues about international relations for which Britain is responsible and the drafting does not satisfy those obligations you must discuss that with them. If, however, it is simply that the policy they are planning to pursue is in a rather different direction from the policy of the relevant UK department, is that a ground on which you ring up and say, "Well, actually I think you'd better change the drafting here" or "Do you really want to do this?"

Lord Bach: No, I would not, as Minister, think that was ground. Ms Eden mentioned poor drafting, for example, and that would be a ground. If it is drafted too widely, for example, whatever the policy may be, so that it allowed for too much to be put into secondary legislation, then I think we would be absolutely right and the Crown Dependencies would thank us, but not on policy.

Q94 Chairman: Just a minute, there is no other body which picks up our legislation in this Place and says, "You'd better not do this because there's too much going into delegated legislation, it is too framework in character," so why should somebody do it for the Crown Dependencies?

Lord Bach: With the greatest respect, you say in your House, Chairman, but in my House the Delegated Powers Sub-Committee are constantly telling us—

Q95 Chairman: That is in the legislature. They have their own legislature; they draft their legislation. Do you turn round and say to them, "We don't like the way you're drafting this legislation"?

Lord Bach: No. If it is poorly drafted we tell them it is poorly drafted and, again, I do not think that happens very often. Ms Eden will be able to tell you more. If it is too widely drawn—probably more widely drawn than they sometimes intend—then I think they are pleased that we tell them. They may say "No, we want it this widely drawn", in which case we would have to go back, but the same kind of rules that apply to the UK Parliament in terms of what you should put in primary legislation and what you should not put, do apply in the Crown Dependencies.

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Ms Eden: I think there is particular constitutional point about secondary legislation in that the Queen-in-Council retains the power to give or refuse Royal Assent to legislation and some of the powers we have seen have been very broadly drafted to amend any piece of primary legislation or even to amend UK legislation and that circumvents the Queen-in-Council's power to give Royal Assent. It means that basically there is a power to do primary legislation by secondary legislation and it circumvents the scrutiny power. That is a constitutional point and we would see that separately from general drafting where we would just try to be helpful and make sure the legislation did what it was intended to do.

Q96 Mr Hogg: I suspect that your relations with the Dependencies are conducted at a fairly low level within your Department. If I were to pry into the hierarchy I would find that the people who were the desk officers were fairly junior in the hierarchy. Secondly—this is a quite different question—to what extent do you regard yourselves as the trustees of the civil, political and legal rights of those who live in the Dependencies so that you would be able, willing and ready to intervene if you felt that their domestic legislators were trampling on those rights?

Lord Bach: I think there are discussions between the Crown Dependencies and the Ministry of Justice on many levels on a regular basis, ministerial perhaps most infrequent but still quite regular; at Mr Bourke's level I think the discussions are pretty regular.

Q97 Mr Hogg: I am afraid I do not know the level of Mr Bourke.

Mr Bourke: I am Deputy Director so that makes me a senior civil servant.

Lord Bach: Of course many every day conversations will take place at a lower level than Mr Bourke; you are obviously right about that. We do absolutely respect—and I hope the Committee understands this—that the Crown Dependencies are free parliamentary democracies who govern themselves, but we do have some kind of constitutional responsibility, one in terms of good governance and secondly in terms of international obligations. That is the way we prefer to see it and, I have to say, speaking personally, I do not see myself as a trustee for the protection of the rights of the people of the free Crown Dependencies; I think their rights are very well protected by their democratic system.

Q98 Chairman: The Crown Officers—the attorneys and solicitors general of the Dependencies—presumably do have a direct responsibility to the Crown in that respect, do they not?

Lord Bach: That is right.

Ms Eden: It is also worth noting that all of the Crown Dependencies have their own human rights legislation and that protects their human rights on the domestic level and they can always go to the courts in their own jurisdiction if they feel their rights are being infringed.

Q99 Mrs Riordan: The Crown Dependencies express concern about the serious delays sometimes encountered when Island legislation is processed by the UK government. Would the process be streamlined if ministers gave a clear direction to the Ministry of Justice and other UK departmental officials of the limited grounds for review of the Island legislation? Is it strictly necessary for Island legislation to be scrutinised by up to three separate sets of lawyers?

Lord Bach: I will give a general answer and then ask my colleagues to comment. I think officials know that ministers would want this legislation put through as fast as is possible but in accordance with what is accepted on all sides as our duty here. Of course there have been cases where there have been delays and I should imagine a one day delay is too much sometimes if you are in government and you want something to take effect. It normally takes some 14 to 16 weeks to complete the consultation process before a piece of legislation can be submitted for Royal Assent. However, in the nature of things, delays occur, queries arise on the legislation which have to be taken up with the Island concerned and sometimes there is a large amount of legislation arriving at one moment. There is no question of officials delaying legislation unnecessarily. We want to get that legislation through as fast as possible but in accordance with what our duty is.

Ms Eden: Can I just clarify, the three lawyers are the Crown Dependency lawyers, Ministry of Justice lawyers and departmental lawyers. Is that right?

Q100 Mrs Riordan: Yes.

Ms Eden: I think the answer is that it is not always scrutinised by three sets of lawyers. Obviously it will always be scrutinised by Crown Dependency lawyers. So far as the Ministry of Justice is concerned, we have obligations in advising the Committee of the Privy Council which deals with Crown Dependencies matters. Our ministers need to be sure that they are giving Royal Assent on proper advice and we would not want to leave our ministers without advice on that. We feel we do need to scrutinise the legislation so that our ministers can discharge those functions properly. As to the third set of lawyers, I think the answer is that it does not always go to departmental lawyers. If we do not think it is necessary, it will not. To give you an example, there has been a lot of aviation legislation recently which has gone through all three of the Crown Dependencies and a lot of that is to do with international aviation conventions and I certainly would not have had any idea looking at that legislation whether it met the requirements of the various aviation conventions. That is a very technical area and it was far more appropriate to go to my legal colleagues in the Department for Transport who are much better qualified than me to look at that.

Q101 Mrs Riordan: When you had dealt with the various lawyers in the Department for Transport, did it come back to you?

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Ms Eden: We would always do a general health check and look at things like secondary legislation making powers and we would look at general human rights points. In relation to something like aviation we would really rely on our legal colleagues elsewhere to point out where the main human rights areas were. We would always read legislation for sense and for general constitutional good governance and human rights points. We think that is necessary so that our ministers can discharge their functions properly in advising the Queen-in-Council as to whether to give Royal Assent.

Mr Bourke: I think this goes back to the nine point nine versus point one point. There are also a large number of instances where we rush legislation through at break neck speed, particularly because we have been asked to do so by the Crown Dependencies. That may be to meet an IMF inspection. A recent example includes some legislation needed to seize the proceeds of General Abacha's crimes in Nigeria. There are point one times when there is a delay but there are probably point one times when we have accelerated the process massively. I think you have to look at both to form a complete or full picture.

The Committee suspended from 4.49 pm to 5.00 pm for a division in the House

Q102 Chairman: Mr Bourke, I think you were interrupted by the bell.

Mr Bourke: I think the point was heard. At least I hope it was heard!

Q103 Mrs James: In the evidence we have heard to date the Crown Dependencies have expressed some concern that they are sometimes not consulted or informed in good time about policy measures, including things that are related to UK legislation, EU legislation, et cetera and international treaties. They seem to be most concerned about consultation time; there is often no time for consultation and a limited opportunity to take part in the negotiation. How do you think the Ministry of Justice could improve this?

Lord Bach: We do appreciate the difficulties which late consultation causes for the Islands. We are dependent as a Department on colleagues in other UK Government departments letting us know when they are working on a Bill or an international agreement which may have implications of any kind for the Crown Dependencies. It does work well most of the time but there are occasions where the implications for Crown Dependencies may be spotted a little late and, therefore, they are informed at quite a late stage. All I can say is the Department is doing what we can to reduce the number of times it happens by, for example, issuing revised guidance to officials in other government departments. I do not think it is going to be easy to see how it can be eliminated completely but we accept it as a proper criticism and we try to do better.

Q104 Mrs James: Something we have come across, certainly with the LCO process with the Welsh Assembly and the Welsh Affairs Committee, when

we took evidence from Sir Gus O'Donnell in that Committee one of the things he was looking at were more specific measures—review, checklists et cetera—do you think that would help in some ways?

Mr Bourke: As the Minister was saying a second or two ago, we are talking steps to issue this revised guidance and, as I indicated to the Committee last time I appeared, these impose stricter timetable requirements on ourselves and this is not something we have been asked by CDs to do but something we have acknowledged needs revisiting. Some of them will contain a series of checklists to enable other government department officials to understand what they are going to be looking out for and what is required from them in the relatively short time we have available.

Q105 Mrs James: Revisited and reviewed, not put on a dusty shelf.

Mr Bourke: There are no dusty shelves, certainly not where the Crown Dependencies are concerned. Obviously it is a new process and we will have to see how it works in practice. The same was true when we first started the operation of the Freedom of Information Act, where some departments catch onto things more quickly than others, and that was reviewed and particular attention was placed on those departments who perhaps needed greater attention in getting up to speed, and I imagine the same process will occur in this instance.

Ms Eden: It is perhaps worth mentioning the Cabinet Office's *Guide to Legislative Procedures* does now mention the need to consult Crown Dependencies. It is the same as with the devolution example you gave us about working in partnership with the partners to raise awareness. That is definitely what we are trying to do.

Q106 Dr Whitehead: Lord Bach, when we met on 10 December 2008 you said, "We represent the interests of the Isle of Man where it is appropriate to do so. We are part of Her Majesty's Government and of course that is our prime responsibility." Do you see that in terms of the constitution, as it were, the UK government's duty to represent the interests of the Crown Dependencies is exactly that, a duty, and that therefore the UK government essentially decides what is in the Crown Dependencies' best interests where there are discussions on the international stage?

Lord Bach: We consult with the Crown Dependencies first, of course, and get their point of view. Then, of course, if we are representing them—as we are duty bound to constitutionally—we put their point of view as best we can. That is a rather stark theoretical way of putting it. What we are trying to do of course—I think we may come onto this—is advance the Crown Dependencies' status in terms of internationalism, if I can put it like that. We are doing it in various ways, entrustment is one. We do see it as our duty to do that and I think it works and has worked for some time pretty well. However, we are living in a different kind of world now than was there when, for example, Kilbrandon reported. Much more global; movement is much more rapid,

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Crown Dependencies are brought in much more often than perhaps they were in those days in various fields. We need to move with the times too.

Q107 Dr Whitehead: In the context of the Icelandic banking crisis, and we touched on this, the UK quite clearly favoured a position in its discussions with the Icelandic Government which may perhaps have been to the detriment of the Isle of Man's position. Under those circumstances does what we have set out as the rather stark constitutional position prevail or are there other routes—you have alluded to some of them and perhaps we could unfold some of those in a moment—by which that constitutional position may be softened somewhat?

Mr Bourke: Our duty to represent their views does not also imply a duty to privilege their views over that of the UK's. We have come back to this on numerous occasions when we have been talking about the CDs in this context. There are certainly ways in which we are looking at increasing the autonomy of each of the CDs on the international stage precisely because the world—particularly the global financial world—has evolved. If they are to emerge as thriving stable economies, which we all want to see, then they will need to find their place in that context. The tools that were bequeathed to us from 1204 onwards are rather ill-suited to today's context and we accept that. As I said the last time I was here, we are looking at ways of facilitating a greater degree of autonomy. That principle is not in question; it is just how we can make it work to serve both our interests, ie not signing up to something or not allowing the Crown Dependencies to sign up to something which would see us in the dock in breach of our international obligations—they are our international obligations at the end of the day—but give them the measure of autonomy they need to conduct commercial and other negotiations with partner countries.

Q108 Dr Whitehead: It might be suggested that in terms of that area of negotiation a particular official could be designated to negotiate separately on behalf of the Crown Dependencies and could then be supported by Island officials or perhaps those Island officials could form part of the negotiating team so they could put the Island's case directly but within the framework of a UK-led negotiation.

Mr Bourke: It is certainly the case that we have facilitated direct contact between, not least, the Isle of Man and Guernsey with the Icelandic Government as you know, because we were in this relatively unusual situation of having the third of my three categories which was the conflicting interest. That does already happen. If I have understood this correctly, you would be suggesting that a UK government official be employed specifically to champion the interests of one or more of the Crown Dependencies within every department perhaps.

Q109 Dr Whitehead: Either on an event by event basis or on a negotiation by negotiation basis. As Lord Bach has mentioned there is the issue of entrustments where you have a wider delegation.

Are there methods which would perhaps include a combination of the appointment of officials together with entrustments that might blur that line between a very stark constitutional position and the reality that under modern international circumstances there will be conflicts which will not necessarily be resolved simply by the UK saying, "We are negotiating on your behalf and you had better deal with it".

Mr Bourke: If we come to entrust a Crown Dependency to conclude a particular agreement then the question of their being involved in negotiation delegation does not arise alongside their UK officials because we have ceded to them full autonomy at the conclusion of that agreement for the specific purpose and with that partner. We have moved away from that and broadened the range of partners with whom they can do that business and, as I alluded to last time I was here, we are now looking at a sort of standing entrustment for certain whole categories of agreement (for example double taxation agreements, asset sharing agreements, tax information exchange agreements which we have already had for some time) and the hope is that as we get into a course of dealing with the Crown Dependencies in that way the range of agreements and the range of partners will expand with it. We cannot get away from the fact that we are still constitutionally responsible for those obligations. It would be completely inappropriate for us not to have some control over the scope and the content of that agreement because we may be setting ourselves up potentially for a terrible fall. As to your other question about the official, I see the attraction on the face of it; what I am unclear about is how you would actually make it work in practice, particularly when you might have conflicting views, because there is then a question of how integrated can you make this official within the negotiating team of the UK, what access to what information can you facilitate? I think more likely and perhaps more successfully is what the Europeans do in the context of negotiations there. In trade policy the European Commission negotiates on behalf of all 27 Member States but before each one of the meetings they have at the WTO in Geneva they have what is called a coordinating meeting where they take the views of all 27 Member States and build up a good sense of where the centre of gravity is, having taken on board the various interests and very divergent interests that the Members States might have. I think something like that ahead of set piece negotiations of some magnitude is more likely to produce the right results than having an official embedded, if I can put it that way.

Q110 Chairman: The WTO raises a separate problem which is of course that the European Union negotiates on behalf of its Member States; the Crown Dependencies are not members of the European Union. You happen to have mentioned another sore point which is how they represent their interests at WTO when the European Union cannot act on their behalf.

Mr Bourke: I think the question of whether or not they are in fact members of the WTO is still the subject of some legal debate, except perhaps in the case of the Isle of Man, but I cannot claim to be an expert on their precise status at this stage.

Chairman: If you could add anything on the WTO situation that I have just described by way of a note, that would be helpful.

Q111 Dr Whitehead: How does that all then tuck in with the concept of burgeoning international identities as set out in the framework document, particularly the Guernsey framework document but Jersey and the Isle of Man have similar documents in place? Those documents talk, specifically in the Guernsey case, about Guernsey having an international identity which is different from that of the UK but it does not really appear to define what is meant by international identity and how that sits in terms of the constitutional discussion that we have just entered into. What would you say, Lord Bach, would be the central idea of a separate international identity within the framework that we have discussed?

Lord Bach: It is called the International Identity Frameworks and that and the entrustment process are, we would argue, the bedrock of the development for the CD governments to identify ways of helping them meet their ambitions for greater international profile and presence and ambitions that we support. The way in which they display their own identity is something that is going to advance as the years go by and one of the methods of doing it has clearly been in entrustment. As time passes it is quite clear that the Crown Dependencies are getting more expertise and more knowledge in this field where they have been excluded for a very long time indeed. This is a continuing process; I do not think there is one moment where you could say, "They have an international identity whereas ten minutes ago they did not". It is a gradual process and one that we are happy to encourage.

Mr Bourke: The objective behind the identity document was not really to do anything other than clarify in layman's terms what the nature of the relationship between the UK and the Dependencies was for an international audience. To put it bluntly, it was an alternative to putting Kilbrandon on the table when they went to meet colleagues in finance from Washington, New York or Frankfurt. It does nothing to alter the constitutional relationship; it does nothing to give them greater legal international personality. It is simply a re-statement, hopefully in clearer terms, of what the nature of the relationship is in a format that is intelligible to their interlocutors.

Q112 Mr Hogg: I wonder if you could be a little more candid about all of this. I have had no contact or dealings with the Dependencies but I have had an awful lot of dealings over my professional life with district councils and I ask myself whether these relatively small units of government can provide the kind of expertise that one would expect when it comes both to legislation and indeed to defining international obligations. I suspect the answer is no.

I suspect that you are dealing within the Dependencies with a very, very small group of people who are giving professional advice to the local administrations and they are only half competent and that you have to muscle in quite often to give your own professional views and support. I would like your comment on that, Lord Bach, candidly.

Lord Bach: Let me comment on that first as minister and I will be as candid as always I hope. I think you are wrong, Mr Hogg, if I may say so. I, too, have great experience of district councils, big and small, over a number of years, like you. They are small units but the quality of the people who advise in terms of their governance—this is just my judgment, having been around for about 18 months in this field now—is remarkably high.

Q113 Mr Hogg: Let us take an agricultural department, it is just one I am familiar with, how many people within, say, Guernsey, are there advising the administration on those policies which touch on agriculture? If you cannot tell do it with regards to agriculture, do not worry, give us another example.

Lord Bach: I cannot give you an example of how many in any field. In one sense it does not matter how many, it depends what quality they have.

Q114 Mr Hogg: If you have two or three it is a terribly small number.

Mr Bourke: Yes, I accept that, but the point I am making is the quality is pretty good, it seems to me. I am not saying it is universally good, but I am saying it is pretty good. These are competent people with a lot of experience, for example in terms of finance and the financial world, and learning gradually in terms of international work too. I do not think their size—they are very small it is true—really counts against them in this particular field. My own view is that these are well governed states with a lot of expertise for the leadership to be able to rely on.

Q115 Mr Hogg: Do they bring people from outside? Are they relying on their own home grown civil servants or do they take consultants or professionals in from outside the Island's immediate offices?

Lord Bach: I do not know. I suspect the latter.

Ms Eden: Certainly on the legal side there is a reasonable amount of traffic. A lot of the people we deal with have previous government legal service. On the criminal side I know there is consultation with people from the London Bar so they do bring people in from outside. I think it is perhaps worth noting that there are a number of issues—things like financial services, fisheries and aviation—which come up time and time again in the Crown Dependencies, so they do develop an expertise in certain areas.

Q116 Chairman: One of the things which some people say when they make representations to us as Members of Parliament—no doubt also to peers—is that it is inherent in small jurisdictions that some issues are difficult to deal with. One saw this being said in the course of the historic child abuse issues in

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Jersey; one sees it over other issues in other Dependencies. This leads some people in the Dependencies and some of their friends elsewhere to argue that the good governance principle is engaged in a small jurisdiction in ways it might not be in a large one. Do you stand by the view that good governance—or breakdown of good governance—would be measured by really very serious indications like a breakdown in civil order or that it extends into the sort of areas that members get representations about?

Lord Bach: I think I would put it that good governance or good government—our obligation—is fulfilled in a number of ways, including scrutinising the Island laws for Royal Assent and dealing with Crown appointments. Also, that we remain available to assist and advise, if necessary, Island authorities with a wide range of constitutional, social and economic issues, but all exercised in such a way as to support the domestic processes in the Islands. The ultimate responsibility would be if something very serious occurred. A breakdown in civil order is an example that is sometimes given and that, if I may say so, is extremely unlikely to occur in any of the three Crown Dependencies. Good governance is a bit more than just intervening if something terrible happened; it is also in scrutinising legislation and the other things I have mentioned.

Q117 Julie Morgan: Lord Bach, I want to ask you about the Reciprocal Health Agreement and the fact that it was ended. First of all, did you know about it beforehand?

Lord Bach: These Health Agreements were with all three of the Crown Dependencies and the new arrangements have been accepted by all three of them. My officials were aware prior to the Isle of Man government being officially notified of the ending of the agreement that it was the Department of Health policy—they are the lead UK Government department in relation to this issue—to keep the UK Reciprocal Health Agreements under review to ensure that they remained appropriate and represented value for money. To be more specific, we were informed on 4 June 2008 that the future of the Reciprocal Health Agreement was about to be considered by Department of Health ministers. No decision had been made then. We were aware of the outcome by 30 June and that was the day before the Isle of Man representatives were told of it at a face-to-face meeting with Department of Health officials.

Q118 Julie Morgan: You were told before they were told basically.

Lord Bach: Yes, that they were considering it and at least a day before they were told.

Q119 Julie Morgan: The Island administrators have said that the decision to terminate the Agreements was imposed on them in a highhanded fashion and there was no opportunity given for discussion about alternative resolutions or financial packages. As I say, they found it difficult to have the opportunity for

discussion. I wondered what steps you took to assist the Island administration in putting their points of view to the Department of Health.

Lord Bach: I think they put their own point of view to the Department of Health very satisfactorily. It had been decided to terminate the Health Agreement with the Channel Islands and it was made clear during dealings on that Agreement that there was no scope for changing the decision which had been taken by ministers. In the case of the Isle of Man both the UK and the Isle of Man began to focus on making their respective preparations for the future. Our stance was to encourage constructive engagement in that process, but the lead department was the Department of Health. It was their agreement with the Crown Dependencies and I would not agree with the expression “highhanded”.

Q120 Chairman: You told me in a letter that the official dealing with this issue in the Crown Dependencies team was notified but was prevented from attending by other business. That was not very satisfactory, was it? You told me this in a letter.

Lord Bach: I am sure I did; I do not recall.

Mr Bourke: I do not think you did; that is my letter.

Q121 Chairman: It is your letter; I beg your pardon.

Mr Bourke: Is it satisfactory? No. Somebody should have been there. This would not have come as a massive surprise with the Channel Islands Agreements having been terminated six months previously. I think the failure of an official from the MoJ to be at the meeting where the Isle of Man was given that news would not in any way, shape or form, have made any difference to the overall result. As the Minister has said, Department of Health ministers were very clear that as part of an overall review of this type of agreement they were going to come to each of the CDs in turn and, having made their assessment, there was not going to be an opportunity for reconsideration of the fundamental decision. I accept the point that it was regrettable but as to whether or not it made any material difference, I think there has to be a question around that.

Q122 Julie Morgan: In retrospect, do you feel it could have been handled better?

Lord Bach: I am sure that a lot of things that happen could be done better but I do not think we have very much to apologise for here. In all three Islands the decision has now been accepted by the Government. I know the Secretary of State for Health met with the Chief Minister of the Isle of Man. In fact I saw the Chief Minister the day before.

Q123 Chairman: Was that meeting arranged through the good offices of a Member of Parliament rather than through the Ministry of Justice?

Lord Bach: Yes, I believe it was.

Q124 Chairman: Does that not suggest that you should have facilitated a ministerial meeting at a stage when it would have been possible, at least for the case to be put by the Isle of Man, that some

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alternative financial arrangement could have been reached so that the UK Government's objectives were met?

Lord Bach: I believe that the Isle of Man were never under any illusions about the fact that they could discuss these matters both with myself and with senior officials any time that they wanted to. As I understand it, the meeting was arranged because the Secretary of State was invited by the Member of Parliament to meet with the First Minister from the Isle of Man and he agreed to do so, and that meeting took place. The point I am trying to make is that the Isle of Man Government accepted, as I understand it, that the Agreement has ended and accepted it with good grace.

Q125 Chairman: They did not have much choice, did they?

Lord Bach: They could have gone on objecting to it; they could say now that they did not think it should have happened. However, what they are actually saying now, as I understand it—this applies to all three of the Islands—is that while it is probably not something they wanted to happen, it has happened and life goes on. I do not think there is a huge amount of issue around this subject in the Islands now. I have been to the Isle of Man in the same way as I know you and other Members of the Committee have and I have to say the impression I get is that while of course it was absolutely in the Isle of Man's interest for it to continue in the way it had—and I can understand why it was their point of view—the truth is that this has been accepted and all the three states have moved on.

Q126 Rosie Cooper: Lord Bach, it is not just in the Isle of Man's interest; I have constituents who are very badly affected by this decision. A young man from the North West, a GP, went to work in the Isle of Man, he had a dreadful accident in the Isle of Man and he is now a quadriplegic. His parents are over 80 living in my constituency and are also in ill-health. This decision affected them greatly so to hear somebody say that this decision was accepted by the Isle of Man, I think the truth is that they did not get much choice. If you are going to operate in this Crown Dependency role, the conversation I have heard today leading to this point sounds like: if it is in our interests it is okay, if it is not in our interests then it is tough for you and you will get what we tell you you are getting. I have spoken to the Secretary of State for Health as well. The reality of this is that the government of the Isle of Man felt that they were not able to put any alternatives on the table and nobody seems to have been helping them fight their corner, not just for them to benefit from our government and our taxes—I am not saying that at all—but a real conversation does not appear to have taken place. It has been: this is what we are doing. They accepted it but they did not accept it because they thought it was a good deal, they accepted it because they had no choice. I think people are wrapping this up but it does affect people greatly.

Lord Bach: Perhaps I can come back on that. I was making the point that the government of the Isle of Man has accepted it, as have the governments of the other states. I absolutely agree with you; I am sure there are many people who are still upset by it happening and how it happened too. I agree with that and I do not want my remarks to be taken as though I am saying that it is completely forgotten because it is not, and particularly in the part of England which you represent in Lancashire I can imagine that this has more of an effect than in others. However, the Secretary of State, when he saw the Chief Minister, said to the Chief Minister that we, the UK, were committed to working with the Isle of Man government to ensure that the practical effects of the termination were communicated clearly to all those affected and to keep the situation under review with the Isle of Man in case of any unforeseen impacts. You may say it was a bit late, but that was a useful meeting. I think one of the influences we had was that the time for this to come into effect was doubled.

Q127 Chairman: Was that not a contractual obligation under the Agreement itself in the Isle of Man's case?

Lord Bach: I cannot contradict you on that but I understood that we put pressure on and it was doubled. Six months became a year.

Mr Bourke: I thought it was six months extended to a year rather than a requirement of the Agreement but I cannot confirm that.

Q128 Rosie Cooper: The point I am making really is solidly down to the take it or leave it, "now you see it now you don't" approach. If I was in the Isle of Man, or indeed my constituents worried about getting over to see their son or worried about their son ever getting to see them again, it happened so quickly without decent amounts of communication, I was appalled by the whole thing.

Lord Bach: I cannot possibly answer the individual case nor should I try. I have to say the net effect was against the UK taxpayer over a number of years.

Chairman: The point that is often raised with us is that the Islands did not really have the chance to see whether there was a negotiated settlement which would meet the issue about the UK taxpayers' contribution.

Q129 Rosie Cooper: Nobody wants the UK taxpayer to shoulder a burden that they should not.

Lord Bach: The taxpayer was doing that.

Q130 Rosie Cooper: It is that highhanded attitude of just taking it away without a real decent discussion that appals me.

Lord Bach: As I understand it there were discussions that did take place. Obviously I was not present nor were the Ministry of Justice present at the time. This was a decision taken by the Department of Health, as I said, and they saw it through.

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Q131 Mr Turner: What if people from Poland came to this country and benefited from the health service? People do complain but it is legal; it is an agreement and we cannot break it.

Lord Bach: That is true, yes. What is the point you are making, Mr Turner?

Mr Turner: The point is that you are treating citizens from Guernsey, Jersey and the Isle of Man differently.

Q132 Chairman: Less favourably than we treat our EU neighbours.

Mr Bourke: That is not my understanding. I think visitors from Poland and every other member of the EU would benefit in the same way, that is they would have access to emergency services in the same way as citizens from the Isle of Man, Jersey and Guernsey do.

Q133 Mr Turner: Only emergency?

Mr Bourke: Free accident and emergency care.

Q134 Mr Turner: That is still the case, is it not?

Mr Bourke: Yes, that is still the case.

Q135 Mr Turner: I would say if you come to this country for any purpose, not just for emergencies.

Mr Bourke: Then how does it relate to medical healthcare?

Mr Turner: They have benefit from healthcare but not emergencies.

Q136 Chairman: Could I just make another point? Ms Eden, constitutionally did the UK Government have authority to abrogate the Health Agreement on behalf of Scotland, Wales and Northern Ireland? Was there a consultation process to do that?

Ms Eden: I do not know the answer to that but we could come back to you on it.

Chairman: If you would, please. At which point I think we must turn to the other issues which are before us this afternoon. Thank you very much.

Written evidence

Memorandum submitted by Joseph Livio Angela and Micheline Danielle Angela (née Dareau)

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8. Future of Island

1. LACK OF DEMOCRACY, MONOPOLY OF INFORMATION

Jersey does not have a political party system, and any form of political opposition is derided and heavily opposed by the ruling Establishment. This system worked quite well with the old industries, but quickly became an abuse of power once the financial interests were involved. The historic position of the Bailiff as Head of Island Government, as well as head of Judiciary, can cause concern for political influence in the Justice System.

The Island also has only one major newspaper, by consequence there is a strong tendency to offer an establishment point of view. We have noticed, on a few occasions, when the reporting seemed to be quite different to events experienced.

2. ANOMALY IN BRITISH (CROWN) CITIZEN'S RIGHTS

Any holder of a Jersey issued British Passport has stamped on page 5, (observations) : "holder is not entitled to benefit from European Community provisions relating to employment or establishment" accompanied by another official stamp of the Jersey Passport Office.

Although in Notes/2, Citizenship and Nationality Status (inside back cover) quotes: "No rights of abode in the UK derives from the status as British Nationals of British Dependent Territory citizens. . .", it however appears that all British Citizens AND European Community Citizens can freely work and reside in Jersey, are we British Citizens or are we not British Citizens!

3. CHANGES IN ISLAND INDUSTRIES

The development of the Island following the Second World War continued with specialised agriculture produce and cattle, and advanced into family tourism, both successful, compatible with one another, and sustainable for a small island.

The early introduction of financial/fiscal evasion by Accountancy firms took many years to develop. It was encouraged by the Political Establishment as being "more beneficial" to the Island's welfare.

This resulted in many agricultural properties being sold and fractioned as being attractive to newly arrived "Rich Residents". The tourism market, although successful, was considered by many Jersey politicians to be too low market and high volume orientated, also, there arose a need to acquire tourism properties to accommodate the large number of Banking Staff arriving in the Island.

We ran a small, but successful, Family Guest House for 19 years, welcoming mainly French and Scandinavian Guests who greatly appreciated the beauty and charm of the Island.. Our business dropped drastically in the last five years of trading as the Tour Operators found the destination too expensive. This was due to large increases in airport and harbour fees, but also to the fact that tourist facilities received no financial aid from the States of Jersey to improve the infrastructure, thereby any improvements were followed by price increases, making Jersey uncompetitive with all other similar destinations.

4. IMPACT OF CHANGES ON EDUCATION

Naturally with the shift in industry the attitude of the local education authority also changed. We had encouraged two of our Children to attend (the then rather good) catering college. At the time, their secondary school careers officer actually tried to dissuade them, stating that "tourism was already a dead industry".

5. IMPACT OF CHANGES ON CULTURE

Jersey has always had a blend of Norman-French culture, inter wound with English influences. It has given the Island a unique character, and as in general, a local culture helps maintain stability in the local infrastructure. This gentle balanced has been greatly disturbed by a large influx of finance staff, often on time-determined contracts, whose only interest in the Island is to earn as much money as possible and little interest for local traditions. There have been many attempts, even today, to maintain an awareness and participation in events, but St Helier in particular, has developed the same sterility of ambiance as any other large finance centre.

6. IMPACT OF CHANGES ON ECOLOGY

Agriculture has been greatly reduced in these last few years, as mentioned, to allow for development of typical Island farm properties into exclusive residences, whilst this in itself does not harm the environment, the reduction in agriculture disturbs the natural balance of indigenous plants and insects. This combined with a much disputed, policy to allow an increase in Island population, this natural balance and beauty of what is a very small island, is being brutally urbanised, often with speculative development that remains unoccupied.

7. SHOULD FINANCE COLLAPSE

The financial position of the States of Jersey is no longer healthy. The only real income is tax revenue from the Banking sector and local Taxation. The policy of 0% tax for non resident companies is of benefit only to these large fund holders. Following the present world crisis, there is already a reduction of staff in some financial houses in Jersey (HSBC for one example), but it would be the local population who would have to carry the burden of any major collapse in the system, by higher taxation and reduction of social services.

There are no alternative industries to replace a reduction of finance. Even an attempt to rebuild tourism would take many years and a high level of investment. The Island would also have to regain its old privileged and attractive image.

It would be consequential that any large reduction in the finance industry would also lead to a large emigration of local people unable to maintain their living standards, the survival of the Island would be dependant on outside help.

8. FUTURE OF THE ISLAND

It is our opinion that the Island, left to its own devices, without any outside control will reduce itself into ruin. Apart from the consequences on the local population, this would also offer a poor image of a Crown Dependency to the rest of the world.

We feel that it is obvious that the Island Authorities need some guidance, whether from the UK Parliament or the European Union to be able to re—establish an administratively and morally correct governance. But also to counteract the globally unjust tax avoidance circuit.

We are grateful to the Justice Committee of the UK Parliament for this opportunity to express our experiences, and greatly applaud their motivation for this enquiry.

September 2009

Memorandum submitted by A.T.T.A.C France and from Local A.T.T.A.C Saint-Malo Committee

PRESENTED BY:

(c/o Attac France) The Members of the Committee of Attac Pays de Saint-Malo (Association for the Taxation of financial Transactions for the Benefit of the People—In English. Association Loi de 1901) (Attac Jersey with whom we are linked have sent their own Submission.)

1. We are very pleased to know that some Honorable Members of the UK Parliament have expressed the wish to better identify the nature and the development of the relationship between the UK Government and the Crown Dependency of Jersey. This question has also concerned us as neighbours, colleagues and dearest friends of a community that probably deserves much better than being disliked and stigmatized increasingly over the last few years in the rest of the world, notably in our European region, for the role the Finance Industry and the local Establishment have gradually played in transforming this island into what global media call a “tax haven”, with a poor record in terms of real contribution to the world economy. We also have been witnesses of the degradation of the living conditions this recent evolution has had on thousands of its inhabitants, on the dramatic changes it has also had on some of its formerly prosperous activities like tourism and agriculture.

2. We had the opportunity to discuss some of these issues as early as 2001 with Senior Foreign Affairs Minister C Josselin at the Quai d'Orsay (French Foreign Affairs Ministry), in the company of Me G Halimi, a French Lawyer, MEP at the time. We have since that meeting tried to inform a variety of national and international political figures on many aspects and notably what is experienced and seen abroad as obvious citizen discrimination *ie* the *de facto* segregation of Jersey-born citizens.

3. We also had the privilege of being present in the Houses of Parliament in London when some MP's accepted to hear Tax Justice Network's message as it announced its creation. That is why we are very thankful to all those who are prepared to explore these issues and hopefully remedy some of the ills that affect many members of this Jersey Community.

4. We have been particularly sensitive to the words used by Lord William Wallace in the Jersey Evening Post (26 August 2009) and we hope for all Jersey people and their future that these words will not be the end of it all:

“Jersey and Guernsey are dependencies of the British Crown. The British Government represents the Crown. The British Parliament, within a constitutional system which is based on parliamentary sovereignty, holds the government—and through it the Crown—to account. Both Houses of Parliament have neglected this duty, so far as the Crown Dependencies are concerned, for many years. The Justice Committee of the House of Commons is now remedying this neglect by launching an enquiry into how well the British Government manages the relationship with the Crown Dependencies.”

5. Who we are and what we stand for:

A.T.T.A.C, now present in over 40 countries in the world, was founded in 1998 by B Cassen and I Ramonet, two French academics and editors of the well-known monthly magazine *Le Monde Diplomatique*, published in 43 countries. The acronym stands for *Association pour une Taxation sur les Transactions Financières et l'Aide aux Citoyens* (Association for a Tax on Financial Transactions and Assistance to Citizens).

6. Its main *raison d'être* was to raise awareness of the vulnerability of Western economies and currencies resulting from excessive financial speculation as illustrated by the overnight devaluation of the Pound, for instance, resulting from attacks by major funds like that of G Soros, a speculator now turned philanthropist, who has lately recognized how fragile the current economic and financial system was, notably as a result of the massive deregulation process initiated by Prime Minister Thatcher in GB and President R Reagan in the USA. It has taken thousands of job-losses, hundreds of millions of pounds, and the recent crisis for many to realise the systemic risks associated with the “creativity” of the period that unleashed all sorts of more or less sophisticated financial techniques of opacity, in particular. These were found later to have been at the heart of scandals, “symptoms of the disease”, some say, like LMTC, Enron, Parmalat, Credit Lyonnais, etc... It is now well known that in all these cases “tax havens” or “low-tax jurisdictions” were used to conceal profits or losses, for instance, and deprive the honest investor or share-holder of the information they need to make decisions in all fairness.

7. As early as 1972, U.S Nobel Prize winner James Tobin warned that the logic at work in the drift of unleashed finance away from the “real economy” would lead to serious crises if no specific framework was drafted. He suggested a very simple tool that consisted in taxing—at a very low rate—every dollar or pound that got across a national border in order to limit speculation for the sake of speculation (without any social or economic real profit) and ensure the traceability of funds, just like the traceability of meat or eggs, for instance, can be guaranteed to the European consumer... Such a tax, of course, would not be applied to exchanges of funds in relation to commodities or services).

8. Just a few days ago, following many other economists or politicians, German Minister for Finance P Steinbrück and German Foreign Minister F Stenmeier declared in the *Süddeutsche Zeitung* that they were strongly in favour of such a tax. They proposed a tax rate of 0.05%. They even suggested an international financial transaction tax, levied not only on currency transactions, like the Tobin Tax, but on all kinds of financial transactions, including equity, certificates and derivatives. Steinbrück also said, he would bring the issue on the agenda of the Pittsburgh G20 summit. The initiative comes two weeks after the head of the British supervisory authority Lord Turner had proposed to introduce a currency transaction tax. He added that “ordinary people are right to have a suspicion” and that “in many cases the banking industry was socially useless”. ... This, one can guess, could impact financial places like the Crown Possessions and Dependencies.

9. Why we believe our submission may be useful:

What we have tried to indicate in the previous lines clearly means that our intention is not to give lessons, of course, to anyone but to put our present submission in context and in the light of our long advocacy, along with other citizens' groups (like Oxfam, Tax Justice Network, Friends of the Earth, Caritas, Catholic CCFD, etc) in favour of more responsibility and a stronger sense of justice in International politics.

10. We, members of Attac Saint-Malo (linked with Attac Jersey) in particular, like Jersey very much and have given ample evidence of our concern for Jersey people and their community. Some of us have been regular visitors since our childhood and have got personal connections with the Channel Islands. Saint-Malo, Granville, Avranches and many other French towns in the region are twinned with Parishes in Jersey and see Saint-Helier or Saint-Peter as neighbours and, even if a linguistic or a political barrier has been created relatively recently, this has not changed much in terms of our interest and care for these wonderful “flower gardens” Victor Hugo loved so much. On the occasion of our public meetings in France and in the region of Saint-Malo, in particular, it is a surprise for many people to discover that Jersey is neither part of the United Kingdom nor European.

11. We are united with these “ordinary people” mentioned above by Lord Turner and our local Attac Committee in Saint-Malo, in particular, has been in contact with Jersey people for many years. What follows results from observations, contacts, interviews, studies, developed within our association and also from close links with Jersey people some of whom literally took very serious risks to raise questions and suggest alternative scenarios for the future of their Island community.

12. We believe that it is the duty of responsible politicians and policy makers to address the problems that are so specific to these Crown Possessions and Dependencies, most of which have remained hidden for years for particular reasons, often in connection with the hypertrophy of the financial sector that has perhaps used and abused the institutional idiosyncrasies of Jersey, for instance, to get a global capability and a legitimacy it would never have obtained in other, less exceptional, circumstances. To many international observers, the fact Jersey has been recently moved to the OECD “white list” of tax havens does not mean its nuisance capacity has been diminished and the situation of its inhabitants improved as a result. On the contrary international public opinion would not accept things to remain in their present state.

13. The recent cases of the Turks and Caicos, or the Cayman Islands, even suggest having to act in an emergency for any responsible government these days has a more serious cost eventually in comparison with a regular monitoring process from the government which has the ultimate responsibility for such places.

14. Recently, the British government refused a bail-out to Grand Cayman, the world’s biggest hedge-fund venue and fifth biggest bank centre as its government headed for bankruptcy. Despite a population of only 52,000 inhabitants, its GDP officially places it as the world’s 12th richest jurisdiction and it was, following promises of improvement, placed on a “grey list” of harmful tax jurisdictions by the OECD very recently, the very grey list Jersey was part of until recent upgrading.

15. The case of the Turks and Caicos Islands also highlights the risks of letting a jurisdiction “go it alone”. These islands also made commitments with OECD countries to improve the transparency of their tax systems in 2002. On 14 August 2009, British Authorities announced the suspension of the local government and took day-to-day control of the Island Group through direct rule to restore good governance and sound management in the territory as these islands were striving to become a leading offshore financial centre with . . . over 16,000 companies registered for 32,000 inhabitants . . . Just before all this came to light, M Williams, the Chief Minister, the archipelago’s P.M., had pleaded for a free-association with . . . Canada and expressed his wish his Islands might become Canada’s 11th “Province”, no less. Besides, it is interesting to know Canada’s PM, Paul Martin is said to have invited M Williams.

16. The difficulty Prime Minister Gordon Brown recently had in the face of the Granite fund/Northern Rock scandal in Jersey, a symptom of the degradation of the Finance Industry, we believe, may tend to substantiate causes for comparable fears . . . No one would like to see Jersey people experience the same plight as their Cayman or Turks and Caicos cousins.

17. Human Rights, Justice, and political structures: Some strange facts:

The following remarks are mostly observations from outsiders and, we admit, do not result from specific Human Rights expertise. As such however, they probably are emblematic of many questions raised over the last few years by observers and friends of Jersey.

18. The Child Abuse Question has been haunting all those who have tried to understand how such practices may have taken place for so long and traumatised so many vulnerable children in Jersey, which cover-ups and dissimulation have been possibly put in place to by-pass traditionally accepted checks and balances in what claims to be a democracy. No community is immune from such abuse, to be sure, but it seems that a specific local culture of secrecy and a lack of oversight by the Powers-Above, that can be found in other areas of public life, some suggest, has favoured impunity for years for some of the abusers and those who made such abuses possible.

19. Have all the conclusions been drawn in terms of thorough political responsibility from these facts in terms of good enforcement of the Rule of Law as Her Majesty’s subjects might expect? Again, no country or community can claim any superiority in these matters but the standards that Great Britain has amply contributed to create as universal also create a duty to those who today are the standard bearers of these values, notably in the western world.

20. Also in other fields, it is well known that the Jersey authorities have in many cases accepted some of the ECHR (European Convention on Human Rights) requirements only after years of opposition and, sometimes, after a clear ultimatum was presented by London. Homosexuality, for instance, remained criminalised until the late 80’s, we believe, in contradiction to the commitments resulting from the UK’s

signature to the ECHR and this also applies to other fields (See: Memorandum from M Dun, Jersey/House of Commons Select Committee on Foreign Affairs 2002) <http://publications.parliament.uk/pa/cm200203/cmselect/cmfa>

21. It is sometimes ignored that Jersey is a signatory to the ECHR, through the UK. It seems that the States of Jersey sometimes would like to benefit from the advantages of being members of the global village without accepting some of their obligations, but we also know that this point is challenged by many Jersey people as well. Whether their voice can be heard is not certain.

22. Incidentally, the political structure of Jersey sometimes looks enigmatic to us in France, notably what would appear in other places like an obvious conflict of interest.

How come, for instance, the Island's Chief Judge (the Bailiff) may simultaneously be the Speaker of the Parliament, called "the States" in Jersey? Many other confusions can be noted, it seems, and the politicization of many constitutional roles inevitably raises questions in terms of vested interests and ideological orientation in areas where general interest tend to systematically coincide with the narrower interests of private financial companies whose real *raison d'être* in Jersey is not really philanthropic, to say the least.

23. It is surprising for instance to see the Bailiff act as a representative of financial interests in business gatherings staged abroad by local lobbies to attract funds to Jersey's "low-cost" banks and financial institutions. What some observers call a local oligarchy seems to have got most of the power in their hands and create a situation where, in the absence of political parties as in other democracies in the Western world, any dissenting voice or alternative proposal simply has no access to the public arena that has in the modern world defined the democratic ideal.

24. This political endogamy—which, we admit, is a risk in many other countries—has taken a degree of concentration that the dimensions of the Island and the pre-eminence of the finance activities in the local community's orientations have obviously increased. No direct connection, of course, can be suggested from the latter observations to the dramatic child abuse case, but the features we and others have identified as specific to Jersey, *ie* an overall culture of secrecy and a certain political confusion of roles within the establishment, that also has had for long a quasi monopoly of information, may have contributed to a gradual loss of a sense of democracy and responsibility as naturally resulting from transparency, debate, dialectical courteous confrontation and respect. Most observers are puzzled to see that although Jersey looks thoroughly democratic at the level of the parish, it becomes less and less so as one climbs up the rungs of the power structure until it becomes very questionable at the top (Ministerial level) where general interest should prevail.

25. Social Rights, freedom of expression, living conditions, employment:

One of the most surprising revelations when a German or a French employee discusses with a Jersey counterpart is the discrepancy between social laws in Continental Europe, union laws, for instance, and what can be observed in Jersey. Anti-Union laws would be more explicit as a term to describe a situation in which, for instance, it takes 14 days' notice to organise a ballot for industrial action.

26. Trade-Unions and political parties are recognised everywhere else as essential elements of economic and democratic life. This is not certain in Jersey, it seems, where the States of Jersey did not want any discussion with the ILO (International Labor Organisation). One can guess, of course, it was not good publicity to let the latter show very cruel comparisons with most other counties.

27. The recent introduction of a general tax on goods and services (GST) by Chief Minister Le Sueur and the recent announcement by the Chamber of Commerce that this tax could double by 2012 seem to have been the last straw for many within the local population, notably those who have witnessed the degradation of their living conditions in the last few years. Announcing that a pay-freeze in the public sector is envisaged does not bode well for those in Jersey who already see their living standards dropping.

28. Between 8,000 and 9,000 working people out of 52,000, it is reported, are now on Income Support in Jersey, a place that, for instance in its only local paper, claims to be the third wealthiest country in the world . . . What has been, by local standards, a massive protest against the introduction of this GST (a petition with 20,000 names, public meetings and demonstrations) had no political translation in the States that, to many in Jersey and abroad, tends to be seen as a Rump Parliament . . . The political apathy and the low turn-out rate at local elections (around 30%) may indeed result from a sense of helplessness in the face of so little consideration and understanding being given to questions or oppositions.

29. Direct and indirect pressure by the Finance Industry on property values has led to artificially high prices for accommodation and French visitors from Saint-Malo, for instance, are shocked to see the price asked for houses or rents that is sometimes much higher than that of Paris or London when the average income is, of course, far below that of those cities.

30. The impact on the traditionally prosperous farming industry or the tourist industry has been devastating and has reinforced the burden on the most vulnerable but the almighty Finance Industry produces around 60% of GDP!, can—*de facto*—impose its requirements and demands on the Island. A kind of vicious circle has led to a socio-political addiction based on a "too big to fail" principle that has been observed in other larger places with the social disaster we all know.

31. Many inhabitants secretly agree that it is not healthy for Jersey people and their children to have become so dependent on what are now vulnerable finance activities, especially a kind of finance no one seriously informed is proud of, but very few today are able, willing or brave enough to take the risk of saying it openly. A very popular song in France goes: “*Le premier qui dit la vérité, il sera exécuté* . . .” (“He who tells the truth first will be executed”). No one is physically executed in Jersey these days, but very painful symbolic executions take place in the Jersey Evening Post, in the local radio or TV programmes, or in the States, every time an individual or a group (like our extremely courageous friends of Attac Jersey or Tax Justice Network) tries to say in public what in other countries around has been documented, printed and publicised in the mainstream media.

32. We could mention hundreds of articles on the Channel Islands from *Le Monde*, *Le Figaro*, or even regional popular papers like *Ouest-France* that describe local realities or facts in relation to Jersey finance activities in particular that could imply very serious risks indeed for anyone publicising the same items in Jersey! One of our good Jersey friends, for instance, simply could not believe it when he came across an article from *Ouest-France*, not a leftist radical paper, that was about Britline, a subsidiary of Credit Agricole meant to help British purchasers of homes in France. The director of this bank simply made it clear that as he was suspicious of potential money laundering, “*on ne prend rien des Iles Anglo-Normandes*” (“We do not take money from the Channel Islands” . . .).

33. The Passport discrimination:

Lots of observations mentioned above raise immediate concern when they are highlighted in our interviews with journalists or in public meetings in France or in international forums we take part in. But the most shocking information when dealing with Jersey always is the “historical” explanation we give our audiences to account for the specific passport Jersey-born people are given by Jersey authorities and that, inevitably, suggests, with good reasons, that they have become second-class citizens in their own land..

34. The 1973 Protocol 3 of Admission of the UK into the—then—Common Market, the EU today, was agreed on behalf of Jersey by the UK government and the Bailiwick was not a contracting party. The limitations affecting the “natives”, notably on their freedom to work in Europe, constitutes a *de facto* inequality of status and has made these people with historic claims to call themselves “Jersey Folk” a sort of “sacrificial lamb”.

35. The situation is all the more outrageous as these people and their historical singularities have been used to justify a constitutional exception that has become the “legal” basis for Jersey’s OFC (Offshore Financial Centre)’s status, notably with its “trusts” (“*fiducies*“ in Fench) that have been perverted from their original functions to provide anonymity, opacity and tax-evasion practices for rich individuals or highly profitable finance activities for some banks and transnational companies.

36. We now are in a situation where French football stars playing in British soccer clubs, for instance, are paid in Jersey, through artificially Jersey-based companies, to avoid full taxation in France or Britain whereas Jersey-born people are confined to their Island and are not allowed to settle their activities in France . . . The former can enjoy the French or any European Health System or Social Welfare without contributing in due proportion whereas the latter have to pay the full rate if they are taken to a French hospital or clinic unless they have paid for their own private insurance.

37. We know that some Jersey officials have told Jersey-born people: “Don’t worry, if you seek employment in France or Germany noone will notice the Jersey EU-exemption stamp in your “British” passport, none will ask”. Is that acceptable?

“Holder is not entitled to benefit from European Community Provisions relating to employment or establishment”, the stamp says. Is that discrimination acceptable? Much more could be said about this shocking point but let us simply suggest that beyond the individual pain it has caused to thousands of Jersey people, it alone encapsulates the absurd situation Jersey now is.

38. To conclude Jersey is just one instance where the logic resulting from the finance business has now come to dominate all other activities to such an extent that the Island population is wholly addicted economically, politically, intellectually to OFC’s values and demands, and cannot, alone, articulate a vision for its future. How OFC’s like Jersey can be enabled to diminish their unhealthy dependence on the specific vulnerable finance industry that characterises those OFC’s and to find a sound basis for a more secure and dignified role is beyond the scope of this submission.

39. But an exceptional opportunity, we believe, is being offered just now in the light of the geopolitical overhaul that the huge global economic and financial crisis has made inevitable. It would be criminal to let Jersey people believe that in today’s and tomorrow’s world the present institutional, political and financial structure of their Island will be able to guarantee any prosperity. It would also be criminal to let the same people believe that any institutional “independence” could avoid confrontation with the real outside world as it is being redefined today.

40. New modes of relation and new reciprocal rights and obligations might—and perhaps should be—considered between such OFC’s and larger nations like GB or France. ATTAC, our association always has recognized that the massive efforts that have been made to welcome and help former countries from the

“Eastern Bloc” join the EU could and should be replicated to welcome and help offshore jurisdictions like Jersey that for all sorts of historical reasons have “gone astray” and been instrumentalised by outsiders to serve interests that, in fact, did not coincide with the long term survival and prosperity of their community.

September 2009

Memorandum submitted by Members of the Committee of Attac Jersey (Association for the Taxation of financial Transactions for the Benefit of the People—English translation) and the Tax Justice Network

SUMMARY OF CONTENTS:

Paragraphs 1–12 Inefficient Governance, John Heys.

Paragraphs 13–21 Employment Laws Jersey, Rose Pestana.

Paragraphs 22–34 The Jersey Passport Issue, Pat Lucas & Jean Andersson.

This submission takes the form of an appeal to the Justice Committee of the House of Commons to urge the British Government to take responsibility for the good governance of Jersey by intervening at this crucial time when it is perfectly obvious to all who have eyes to see that the Ministerial Government headed by Terry le Sueur is both dictatorial and totally incapable. We need your help and that of the European Community. We’re asking to be full members of the EU.

INEFFICIENT GOVERNANCE

1. The slow but inevitable ruination of this beautiful Island of Jersey by an incapable and dictatorial junta of senior States Members must be exposed to the outside world, and stopped now as the mistakes are getting beyond recovery with no accountability at all.

2. Once very prosperous the Tourism and Agricultural Industries have purposefully been run down in total favour of the so-called Finance Industry. The Chief Minister Le Sueur and his cohorts disregard the writing on the wall and pump millions of pounds into a Tax Haven industry under attack from many sides.

3. Things have slipped downhill to the point where our GDP is Finance 58%, the once mainstay of our income, Tourism, 3%, and Agriculture, famous for the Jersey Royals, tomatoes and flowers about 0.5%, facts which our Ministers ignore, stating how wonderful things are.

4. Le Sueur recently proposed giving £100M in tax relief to the Finance Industry which, of course, a small economy like ours cannot possibly withstand. So, to make up the shortfall he suggested introducing a general tax, this as opposed to many alternatives which he would not contemplate. He insisted that his proposal of a Goods and Services Tax, would be introduced. Incensed, the Jersey people held a Petition to which 20,000 signatures were penned, and when presented Le Sueur’s comment was, “I do not care how many signatures there are, GST will be introduced.” When informed that elderly people on small fixed incomes were finding it even harder to purchase affordable food he said, “They will just have to shop around.” Both comments are an example of the total lack of understanding and the dictatorship under which Jersey suffers.

5. The civil service is totally top heavy, grossly overpaid and unaccountable for huge financial errors. For example it was decided to contract a French firm to build an incinerator costing approximately £107M without taking account of cheaper alternatives or adequate public consultation. Although the exchange rate between the Euro and the Pound was to be accounted for, it was ignored, and we now find that this glaring error could cost the taxpayer two or three million pounds extra. There was an uproar from the public, so an enquiry was held in what Jersey calls “behind closed doors” to enquire into just who was in the wrong. The result was that the matter had been dealt with, no one was sacked or moved, and the matter was now closed!! I cannot imagine any countries except those like Zimbabwe, or Iran perhaps having the sheer audacity to treat the public in such a dictatorial manner.

6. We are constantly spun the line by the Le Sueur junta that we are so lucky to have the Finance Industry paying in so much money making this Island rich. But they never mention that we are so rich that out of the 52,000 working people, 8,500 are on Income Support because they cannot afford to live, or that due to the wonderful Finance Industry the average price of a three bed-roomed house is £470,000, or that Jersey per GDP capita is the third richest country in the world yet its minimum wage is the lowest in all of 27 EU Member States, and that Jersey spends less than 75% of the EU average on social protection.

7. Jersey is a Tax Haven playing to the benefit of the rich financed by the poor, who pay 20% in tax whilst the rich have a nice sliding scale of tax. So, on their first million pounds they pay 20%, on the next half million 10%, and 1% from then on. So, on a DECLARED £10M their tax bill would run at just 3.5%, but of course put into a trust which is totally secret, no tax is paid.

8. A total disgrace is the huge Civil Service pay cheque:

270 get from £70,000 to £ 89,999.

62 get from £90,000 to £109,999.

36 get from £110,000 to £129,999.

19 get from £130,000 to £149,999.

22 get from £150,000 to £169,999.

2 get from £170,000 to £189,999.

1 gets from £ 190,000 to £209,000.

1 gets from £210,000 to £229,999.

5 get from £230,000 to £249,999.

This is an immoral list on an island 9x5 miles with a population of 90,000, whilst thousands are struggling to survive in what is one of the highest cost of living areas in the world.

9. We have been warned that money is scarce and belts will have to be tightened and painful economies made, yet our States Departments have overspent more than £8,520,000 as far as we know, and not one States Member will be held to account.

10. It is painfully obvious that this Island does not have the wherewithal to run itself and is being inexorably driven towards huge rocks with ever-mounting costs due to mistakes. At this time tax havens and tax avoidance are coming under increasing scrutiny. As numerous corrupt practices are being exposed and work in the tax avoidance industry diminishes we will have no industry to fall back on.

11. Unfortunately the blame lies with the apathetic Jersey public. When there is a chance at elections to get rid of all the chaff in our States only 33% of the people bother to vote stating "What is the point? There is no alternative." Or "They are all the same."

12. I feel we are at a point now when we must look either to the UK or the EU to step in and start to provide professional guidance with some form of local party politics to monitor the situation. Twelve good States Members are constantly outvoted by the 41 nodding heads controlled by Chief Minister le Sueur and his cronies.

EMPLOYMENT LAWS JERSEY

Rally in the Royal Square, St. Helier, Jersey 2005

13. On Tuesday 27 September at 12.30 pm a rally was attended by many hundreds of trade unionists. This rally was called to protest against the anti-union laws the Jersey Government was about to vote on. Despite the protest the anti-union laws were passed in their entirety.

14. At the time the rally was the latest step in the long-running campaign by the Transport & General Workers Union. It was addressed by the renowned Employment Law expert John Hendy as well as T&G Regional Secretary Andy Frampton and the Union's local full-time officer Nick Corbel.

15. The T&G's conference in July that year (2005) agreed to back the campaign and an approach to Tony Blair was made. It was especially important as what the Jersey government had proposed contravened the minimum standards laid down by the International Labor Organization.

16. In the emergency motion to the T&G Conference the union explained that the new laws would severely curtail the rights of trade unionists to take lawful industrial action in any trade dispute. The T&G had been involved for many months fighting for union members against a government which had denied the right to collective bargaining, representation at work, trade union recognition and the right to time off for trade union duties.

17. Over the last years trade unions have fought for policies which have given workers rights if they are in a union or place of work is union recognized. Please note these are policies and not legislation here in Jersey.

The following are policies only

18. Maternity and parental leave, anti-bullying, unfair dismissal, overtime payment, meal breaks, shift payment, special leave payment, discrimination policy, disciplinary procedures, inclement weather payment, redundancy packets, pensions' systems and final salaries.

19. What has recognition in the new Employment Law 2006:

Minimum hourly rate, public holidays, annual holiday rest days and minimum period of notice.

20. And many anti-union laws (14 days notice for a ballot for industrial actions ,7 days notice for action and the list goes on). The International Labor Organization said the Jersey laws are one of the worst even including the third world. The ILO offered to work with the Jersey government to change them. However, this offer was declined.

21. To give an example of how this government disregards the wishes of the people and does what it wants anyway—19,000 people of this Island signed up to petition against a Goods and Services Tax . Despite this the people's wishes have been disregarded and GST is in place.

 THE JERSEY PASSPORT ISSUE

22. The cover of a Jersey Passport says: “European Union, British Islands, Bailiwick of Jersey”. An indigenous Jersey person’s passport says: “Holder is not entitled to benefit from European Community provisions relating to employment or establishment”.

23. This message can be found stamped inside the passports of people of “pure” Channel Island descent as well as those born in the Islands to European parents, in other words, people who have a parentage that is not of the United Kingdom.

24. Channel Islanders are not covered by the rights of the freedom of movement of workers and, therefore, have no automatic right to work or start a business within mainland Europe.

25. The stamp first appeared in Islanders’ passports after the Accession of the United Kingdom to the European Community 1973. The UK Government negotiated on behalf of the Islands and the result of these negotiations was Protocol 3. This was done with the full approval of the States of Jersey. It is because of this protocol that the stamp was put in the Islanders’ passports.

26. The human cost of being in the customs territory of the EU benefiting from free movement of provisions is high. Islanders who do not have either parents or grandparents from the UK have no right to live or work in Europe.

27. We see this as a flagrant abuse of human rights where one group of people in Jersey have access to Europe in this respect but others do not. The irony of this situation is that those who do not have access to Europe or, in other words, have a stamp in their passport preventing them from living or working in Europe, often have European parents or grandparents, thus the likelihood of them wanting to live or work in Europe is higher than the former group. Surely it’s all a question of integrity? For years the insular authorities have pointed to the letter of the law. Now is the time for the spirit of the law to override the injustices imposed upon our people. It does not matter if we are talking about only 5,000 Islanders having the stamp in their passports. One would be too many. Jersey Deputy Roy le Hérissier who is a recognized constitutional expert points out in the *Jersey Evening Post* (26.8.2006) that “Europeans from EU countries have more access to the Island than the 5,000 or so Islanders who are forbidden to live or work in the EU”. How shameful is this? Most people outside the Island of Jersey just can’t believe this is true.

28. This short letter from John Heys to the *Jersey Evening Post* (19.1.09) illustrates the schizophrenic nature of the Passport issue:

“My wife purchased a dress in Italy last month, and I enquired that as Jersey was not in the EU, could we claim back tax? The answer was yes and the form was duly filled in, which had to be presented to the Customs Office at Naples Airport, which we duly visited.

It was then pointed out that it was not possible as Jersey was in the EU. I said it was not but emblazoned across both our Jersey passports was “European Union”, and no matter what persuasion nothing would convince them otherwise.

It was suggested we talk to the UK Customs at Gatwick which office once found was closed due to staff shortages, and we were told by phone to put the form into their letter box.

As we are not in the EU why do we have passports that are not correct? It is ridiculous and, as we found out, can cause all sorts of unnecessary problems.”

(NB: to date (5.9.09) nothing more has been done about this.)

29. As an Association we have campaigned on this issue for years. So far no authority in the UK or Jersey will look at the problem. We are constantly referred back to Protocol 3 of the Treaty of Accession to Europe 1973 saying it would have to be re-negotiated and that they are not prepared to do. We are thoroughly familiar with the content of Protocol 3 and the fact that it was agreed between the insular authorities and the UK. The insular authorities have no desire whatsoever to re-visit Protocol 3. This is unacceptable and it is for this reason that we have high expectations that this inquiry by the Justice Committee of the UK Parliament should see that justice is done. We’ve waited far too long already for this!

30. Sending us back on a regular basis to the insular authorities only produces comments like this from The Bailiff of Jersey, Sir Philip Bailhache, The Bailiff’s Chambers, Royal Court House, Jersey JE1 1BA 27.5.2002:

“... It seems to me, with respect, that your letter reveals a misunderstanding of the constitutional position. No discrimination is involved in the special position of Channel Islanders under the Protocol... Jersey is for all purposes save one outside the EU... We are therefore inside the Community for the purpose of freedom of movement of goods... The abolition of the restriction on the freedom of movement of Channel Islanders as defined by the Protocol could only be achieved by the re-negotiation of Jersey’s position vis-a-vis the EU. My understanding is that Jersey’s government has no such intention at the present time, but this is of course a matter for our elected representatives. I am sending a copy of this letter to Senator Horsfall”.

31. However, we contest the justice of this and are asking for it to be re-negotiated so that we can have a full European Passport. We see going into Europe as a distinct advantage Time has moved on; other treaties have been signed with Europe *eg* Maastricht, Lisbon, but along the way “our dear Channel Islands” seem to have been forgotten! Time to put this right.

32. We wrote to the UK government many times on this subject. On one occasion we received a reply from Mr. Richard Miles at the Lord Chancellor’s Department Constitutional Policy Division dated 1 October 2002. He said, “The nature of the relationship between the Crown Dependencies and the European Union is essentially a matter for the insular authorities to determine, not Her Majesty’s Government in the United Kingdom”.

33. There is a discrepancy between Mr. Miles’ understanding of our situation and that outlined by Lord William Wallace when he says in the Jersey Evening Post (26.8.2009):

“Jersey and Guernsey are dependencies of the British Crown. The British Government represents the Crown. The British Parliament, within a constitutional system which is based on parliamentary sovereignty, holds the government—and through it the Crown—to account. Both Houses of Parliament have neglected this duty, so far as the Crown Dependencies are concerned, for many years. The Justice Committee of the House of Commons is now remedying this neglect by launching an enquiry into how well the British Government manages the relationship with the Crown Dependencies”.

34. The UK is happy to maintain the status quo in Jersey as a tax haven for its own purposes. We would like your Commission to look very seriously at our plight which we do not think stands up to scrutiny in respect of human rights.

We wish to thank you for taking the time and trouble to remedy the shortcomings of the relationship between the UK Government and the Crown Dependency of Jersey.

We want you to know that, despite living on this small Island, our windows to both Europe and England are always open. Over the years we have had information, help and encouragement from Attac Saint-Malo (French Liaison Officer Jacques Harel) and the Tax Justice Network (Director John Christensen). Richard Murphy of Tax Research UK and Professor Prem Sikka of the Association for Accountancy and Business Studies have also highlighted the moral and ethical issues involved in finance and good business practice. No wonder we want good governance for a Jersey that can earn its living in an honest and sustainable manner without the tax avoidance industry!

September 2009

Memorandum submitted by Sir David and Sir Frederick Barclay

1. This submission is made on behalf of Sir David and Sir Frederick Barclay, owners of the Island of Brecqhou, Channel Islands. It is made in response to the call for evidence dated 5th August 2009.

Executive Summary

2. The call for evidence assumes the continuing role of the Ministry of Justice. That role should itself be considered given what is arguably a serious democratic deficit in the law-making process of the Channel Islands. To the extent that the role is to continue, it should be performed in a much more open and transparent manner in order that the Islands’ electorates are kept more fully informed. The shared aim should be to promote Channel Island identity, autonomy and democracy whilst respecting the legitimate interests of both the United Kingdom and the Islands on the international stage, acknowledging that, on occasion, those interests may diverge and must be represented.

Background history

3. The Channel Islands comprise two distinct political bodies. The Bailiwick of Jersey and the Bailiwick of Guernsey. The Channel Islands formed a part of the Duchy of Normandy. The Islands’ association with the Crown began when Duke William of Normandy invaded England and was crowned King William I of England in Westminster Abbey on Christmas Day 1066. While Duchy and Kingdom had a single individual at their head, they remained separate political entities. There was no political or institutional union.

4. In 1204 King John forfeited the Duchy of Normandy to the French King. The Channel Islands’ special constitutional position dates from that time. They have remained associated with the Crown ever since. The rights and privileges of the Islands have been enshrined in Royal Charters from an early date. A particularly important charter was that of Queen Elizabeth I dated 15 March 1560.

5. The Islands are entirely outside of the United Kingdom or any of the nations comprising the Union. The terms of their association with the European Union are set out in Protocol 3 to the UK Treaty of Accession to the European Community. Community rules on customs matters and quantitative restrictions apply. Levies and other import measures in respect of agricultural products which are the subject of a special trade regime also apply. The rights enjoyed by Channel Islanders in the United Kingdom were expressly

stated not to be affected by the Act of Accession. The Islands are obliged, however, to apply the same treatment to all natural and legal persons of the community. Subject to the above, Community law has no application in the Islands, save to the extent that it is expressly adopted by the Islands.

6. The Bailiwicks (and each of them) are entirely separate legal jurisdictions with their own laws and customs, their own courts and appellate structures and their own legislative assemblies. They are independent of each other, having no shared institutions. Westminster legislation has no application in the Islands unless expressly extended to the Islands with the consent of the Bailiwicks. It is inconceivable that the Westminster Parliament would legislate for the Islands without their consent. If Westminster legislation is extended to the Islands then this is usually done by Order in Council, with such amendments to the legislation as are appropriate to local conditions. The vast bulk of Channel Island legislation is made by the assemblies of the Bailiwicks. The Bailiwick of Guernsey has three assemblies: the States of Deliberation in the Island of Guernsey, the States of Alderney and the Chief Pleas of Sark. Each has power to make primary legislation, but requiring Royal Sanction to have force of law (ie the equivalent of Royal Assent) given by Order in Council (the equivalent of a Statute, but known in the Islands as a “Law”) and the power to make legislation by ordinance, either pursuant to powers given by primary legislation or pursuant to inherent ordinance-making powers.

7. Such rights and obligations as the United Kingdom may have in respect of the Crown Dependencies is via “the Crown” as opposed to any internal constitutional structure of the United Kingdom itself.

8. Over the centuries the power of the Crown has either been given to, or taken by, Parliament and the executive. What powers remain with the Crown essentially comprise the Royal Prerogative, exercisable on the advice of the relevant committee of the Privy Council. That advice is invariably followed. Those advising comprise the Prime Minister and other senior members of the UK government of the day who become Privy Counsellors for that purpose. It is, in effect, an extension of executive power.

9. The United Kingdom claims responsibility for the international relations of the Islands and their defence.

10. The commitment to defence is, to all intents and purposes, of academic interest only given the unlikelihood of conventional warfare in Western Europe and the inability to defend the Islands during time of war (eg the Islands were occupied by German forces between 30 June 1940 and 9 May 1945).

11. The Bailiwicks of Guernsey and Jersey do not have international personality. They are not states, hence the role of the United Kingdom in international affairs.

12. The historic position of the Islands is more fully addressed in the *Report of the Committee of the Privy Council on Proposed Reforms in the Channel Islands 1947* and *Part XI of Volume 1 of the Report of the Royal Commission on the Constitution, 1969—1973* (The Kilbrandon Report).

13. A more recent and helpful summary is still to be found online at: <http://www.dca.gov.uk/constitution/crown/govguide.htm>. Although this was a document produced some years ago by the Department for Constitutional Affairs, it remains broadly accurate.

The role of the Ministry of Justice

14. The Call for Evidence takes the role of the Ministry of Justice as a given. However that role should itself be examined.

15. The MoJ is the UK government department with responsibility for the Dependencies. It is responsible for the relationship between the Dependencies and the Crown and the United Kingdom Government (essentially one and the same in a political context). The Ministry of Justice is the successor of the Department for Constitutional Affairs, itself the successor of the Lord Chancellor’s Department, itself the successor of the Home Office, which, until 26 November 2001, was responsible for the Dependencies, and had been for a considerable time before that.

16. The MoJ’s role is essentially that of a conduit between “the Crown” and the Dependencies. The core function is the management of the process by which Royal Sanction is given or withheld. Draft legislation goes to the Ministry, where it is vetted. If, as is usually the case, there is no UK objection to the legislation, it goes to the Privy Council Committee for the Affairs of Jersey and Guernsey for approval and then to the Privy Council itself for Sanction. If any given piece of legislation is not placed on the agenda of a Privy Council it does not receive Sanction and vice versa. The merits of any given piece of legislation is not debated in Council.

17. The personal role of the monarch in the government of the Islands has been replaced entirely by members of HMG in effect exercising the Prerogative powers.

18. The Islands have no representation in the Westminster Parliament (nor do they seek any). The politicians responsible for vetting Channel Island legislation are not elected by the Islands’ assemblies and are unaccountable to them. This is a democratic deficit.

19. Over the centuries, the power of the sovereign vested in the democratic institutions of the United Kingdom. However, those institutions are not Channel Island institutions. The Channel Island law-making process is undemocratic to that extent. There is a powerful argument to say that Her Majesty should act on the advice of the democratically elected leaders of the various Island assemblies and not unelected (in

Channel Island terms) members of the UK government of the day. It is, arguably, inappropriate that the final decision-makers as to whether Bailiwick primary legislation is made law or not rests with a small number of politicians unelected by the jurisdiction concerned.

20. On 3 July 2007 the Prime Minister made a statement to Parliament calling for constitutional reform which "... *entrusts more power to Parliament and the British people*". In that statement he proposed "... *changes that will transfer power from the Prime Minister and the executive. For centuries they have exercised authority in the name of the monarchy without the people and their elected representatives being consulted*". He went on to propose change in twelve areas important to the life of the nation where the executive should surrender or limit its powers "... *the exclusive exercise of which by the Government should have no place in a modern democracy*".

21. What is true of the non-democratic exercise of power by an executive at least elected and democratically accountable within the United Kingdom is doubly true of the exercise of authority in the name of the monarch by the unelected in respect of a quite separate jurisdiction.

22. It follows that there is a question mark over whether the MoJ should in fact have any role in respect of the Channel Islands. Such remaining role as may be justifiable could as well be performed by the Foreign and Commonwealth Office as with other British Overseas Territories and/or Caribbean nations. Sir Edward Troup, KCB, KCVO, Permanent Under-Secretary of State in the Home Office, 1908—1922 observed that:

"The Channel Islands—Jersey, and Guernsey with its dependencies Alderney and Sark—and the Isle of Man come within the province of the Home Office: it stands to them in something of the same relation as that of the Colonial Office to the Crown Colonies, modified by the peculiar circumstances of their history and constitution."¹

Indeed the Islands have a much longer history of a distinct constitutional status than any such territory or nation.

23. Assuming a continuing role for the MoJ this submission turns to the focus of the inquiry:

How, in practice, the UK Government represents the Crown Dependencies internationally

24. One of the great difficulties in addressing such questions is the lack of written materials or any single authoritative document setting out the relationship between the UK and the Islands and their respective rights and obligations.

25. As noted already, the Islands are not states and have no international personality. Unless and until they become states they require representation on the international stage. The United Kingdom is, of course, the state with which they are most closely identified, and therefore it is appropriate that they be represented by the UK.

26. The Committee's attention is drawn to paragraphs 33 to 35 of the DCA document referred to above, namely: "*A Guide to Government Business involving the Channel Islands and the Isle of Man*" of August 2002. It is said there as follows:

33. *Article 29 of the Vienna Convention on the Law of Treaties provides that "unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.*

34. *The long-standing practice of the United Kingdom when it ratifies a treaty is to do so on behalf of the United Kingdom of Great Britain and Northern Ireland and such (if any) of its overseas territories as wish the treaty to apply to them. Although in most cases it is not possible to include any overseas territories in the instrument of ratification, the scope of the ratification can be extended later to include them. This practice applies equally to the Crown Dependencies. The practice has been acquiesced in by the other States and is regarded by the UN Secretary General as establishing a "different intention" for purposes of Article 29 of the Vienna Convention.*

35. *Departments and agencies are also requested to inform the Department for Constitutional Affairs of any proposals to make Orders under Section 1(3) of the European Communities Act 1972 specifying Community Treaties where it appears they may apply either wholly or in part to the Islands under Protocol 3 of the Treaty of Accession.*

27. It is submitted that paragraphs 33 and 34 are a correct analysis of how matters stand.

28. The lack of representation of the Islands in the Westminster Parliament and the democratic unaccountability of the UK government in the Islands require, it is suggested, that their consent be obtained for any obligation of international law which it is proposed be extended to the Islands by the United Kingdom.

¹ *The Home Office*, G. P. Putnam's Sons Limited, London & New York 1925 at p231 et seq. Sir Edward also pointed out that "The connection of the Channel Islands with England dates from 1066 and arises from conquest—not the conquest of the Islands by England, but the conquest of England by the Islands, that is, by the Duke of Normandy of whose Duchy they formed part."

29. There is a concern from time to time in the Islands that where a conflict of interests arises between the UK and the Islands then it is inevitable that the UK interest will supervene. There is a particular concern in this context for the financial services industries of both Bailiwicks. What may serve the interests of the UK in, say, the context of a G20 summit may not serve the interests of the economies of the Channel Islands. To date that problem has largely been avoided through the Islands following the advice of the UK government to make tax information exchange agreements with other jurisdictions² thereby enabling them to appear on the so-called OECD “white” list of countries complying with the global standard for tax co-operation and exchange of information.

Framework for developing the international identity of Guernsey

30. In May 2007 Jersey and the Isle of Man each agreed with the UK government via the DCA a framework for developing the international identities of their respective jurisdictions. The document comprises 10 principles intended to clarify the constitutional relationship between the UK and the Crown Dependencies. The following core principles were stated:

- (a) The UK would not act internationally on behalf of the Dependencies without prior consultation;
- (b) The UK would represent any differing interests, particularly in the context of the EU, given the different nature of the relationship between the UK and the EU and the Dependencies and the EU;
- (c) The Dependencies had an international identity which was different from the UK;
- (d) The UK recognised that the Dependencies were long-standing democracies and supported the principle of the further development of their international identities;
- (e) The UK had a role to play in assisting the development of those international identities which was one of support, not interference;
- (f) The UK and the Dependencies would work jointly to promote their legitimate status as responsible, stable and mature democracies with their own broad policy interests.

31. In fact, the UK government would not formally execute the framework agreement with the Bailiwick of Guernsey until some considerable time later than the other Dependencies because of Sark’s initial failure to reform its constitution so as to provide for a fully elected assembly. This was a very public example of how the UK government can exercise power in order to influence the Islands in the way they conduct their affairs.

The role of the Ministry of Justice in managing the United Kingdom’s relationship with the Crown Dependencies including inter-departmental liaison and coordination.

32. This is best set out in the DCA document from 2002, the MoJ being the DCA’s successor department.

33. Whether that role continues to be appropriate when judged against the requirements of modern democracy is another matter.

34. Another very public example of the MoJ exercising power on behalf of the UK government over the Islands came to light in 2009. The MoJ took exception to what it perceived to be excessive ordinance making powers contained within draft primary legislation. A log-jam in Guernsey legislation arose because a large number of Laws were held back from Royal Sanction through the actions of the Ministry. The affair came to light in Guernsey with the publication of the Billet (agenda) for the business of the States of Deliberation for 25 February 2009 and may be found at this website: <http://www.gov.gg/ccm/policy-and-hr/billets--resolutions/2009/february/billet-detat--vii-february.en> The Committee is referred to item 1 of the Billet d’Etat VII of 2009, a pdf copy of which can be downloaded from this page.

35. The report showed that there had been objections to the extent of ordinance-making powers proposed to be taken. In effect a practice had arisen of including standard provisions in each new piece of legislation which would have permitted Guernsey to make legislation in that area in future by ordinance and without reference to the Privy Council, even to the extent of being able to amend the primary legislation itself, by ordinance.

36. Until this report was published there was little, if any, public knowledge as to the true reasons for the delay in Guernsey legislation receiving Royal Sanction. Even when the report emerged it was apparent that the dispute had been dealt with between MoJ civil servants and the Guernsey Law Officers. It was said that “... an understanding between members of the Directorate and the Ministry’s Lawyers upon the precise wording of provisions creating powers to amend by Ordinance, and the circumstances in which powers to amend might be created in future Laws was not reached until July (2008).”

37. It followed that what amounted to a very significant constitutional dispute as to the legislative powers of the States of Deliberation was, effectively, swept under the carpet and presented to that assembly as what amounted to a *fait accompli* resolved by an “understanding” reached between unelected officials as to the extent to which such powers would be taken in the future.

² The very making of such TIEAs has blurred the distinction between Channel Island autonomy in domestic affairs and UK responsibility for international relations. A precedent has been set for the Islands to deal directly with sovereign states.

What, if any, changes are required, in terms of either policy or practice in order to improve the Ministry of Justice's management of the relationship between the United Kingdom and the Crown Dependencies?

38. There is a perception that the MoJ does not attach a great deal of importance to the relationship. It appears to be a relatively low priority and is given very little prominence, eg on its website. Indeed there are very few materials publicly available on the MoJ site concerning the MoJ's role in respect of the Dependencies, by contrast with the old DCA site. The DCA documentation should be brought up to date and re-published.

39. There has often been a lack of common courtesy through failure to consult with, or inform in advance of, decision-making affecting the Islands. For example the announcement in January 1998 by the Home Office of a review of (inter alia) the laws, systems and practices in Guernsey, Jersey and the Isle of Man for regulating banking, insurance and financial services business and deterring, investigating and punishing financial crime, particularly cases with an international dimension; with a view to assessing the contribution which they made to the economic and social well-being of the United Kingdom. The Home Office appointed Andrew Edwards, a former HM Treasury official, to conduct the review. The review led to the publication of a report ("the Edwards Report") on 19 November 1998, which can be found at this address: <http://www.gfsc.gg/content.asp?pageID=207>

40. Likewise the announcement in the Chancellor of Exchequer's pre-Budget report of 24th November 2008 that an independent review of British offshore financial centres would be commissioned by HM Government:

"... to identify current and future opportunities, risks and mitigation strategies, including issues such as:

- financial supervision and transparency;
- fiscal arrangements;
- financial crisis management and resolution arrangements; and
- international cooperation."³

41. Other instances include the changes from the Home Office to the Lord Chancellor's Department, to the DCA to the MoJ. The Dependencies have passed through 4 departments in 8 years.

42. There is a perception that the relationship between the MoJ and the Dependencies is shrouded in secrecy, whether intentionally or through simple omission to make public what it is doing.

43. There should be much greater openness in the conduct of the relationship, particularly given the lack of democratic accountability of the MoJ in the jurisdictions for which it is ultimately responsible.

44. The MoJ and the Dependencies should publish regular statements concerning the business they are conducting and such issues as there are. There should be public consultations where feasible. As matters stand there is a perception of the MoJ having an unknown agenda which is implemented via private meetings with the Crown Dependency Law Officers (whose own allegiances are uncertain) and/or senior politicians of each Dependency. There is very little public knowledge of the relationship or how it is conducted.

45. There is no scrutiny of the relationship or how it is conducted.

46. The lines of communication between the Bailiwicks and the Crown are themselves opaque given the not very well defined roles (at least from the public's viewpoint) of the Lieutenant-Governor, the Bailiff, the Law Officers and the elected politicians.

47. If there is to be a continuing relationship between the MoJ and the Dependencies (as opposed to, say, giving power over Royal Sanction to the Dependencies and transferring responsibility to the FCO) then that relationship should be a great deal more open and transparent. The essential role would be one of mentoring the Dependencies and ensuring that the highest standards of government were met. In particular it would assist if the MoJ could encourage change when, say, the Bailiwick of Guernsey falls behind. For example, it was not until 2001 that the Bailiwick enacted legislation equivalent to the Human Rights Act 1998 and then a further six years before such legislation was actually brought into force after a great deal of lobbying from Sir David and Sir Frederick. There is still no freedom of information legislation in Guernsey notwithstanding requests they have made that such be introduced. There are antiquated laws in a number of fundamental areas.

48. One area where the UK government will continue to have a legitimate area of concern, for as long as the Dependencies do not have statehood, is in the area of international relations. The UK will remain responsible for the compliance, or otherwise, of the Dependencies with international law obligations contracted by the UK on the Dependencies' behalf. For example, should any of the Dependencies fail to comply with the requirements of the European Convention on Human Rights, it is the United Kingdom which is answerable before the European Court of Human Rights. The Secretary of State for Justice and the Privy Council are vulnerable to public law challenges in the event that they recommend for Royal Sanction legislation which is not Convention-compliant, as seen in the English Court of Appeal case of *R (Barclay & Ors) v Lord Chancellor and Secretary of State for Justice & Ors* [2008] EWCA Civ 1319. The Appellants

³ At para 3.56. The full text of the pre-budget report is available here: http://www.hm-treasury.gov.uk/d/pbr08_complereport_1721.pdf

(Sir David and Sir Frederick Barclay) brought judicial review proceedings in the High Court, London challenging the decisions of the Secretary of State for Justice, the Committee for the Affairs of Jersey and Guernsey and the Privy Council to recommend the draft Reform (Sark) Law 2008 for Royal Sanction; seeking declarations of its incompatibility with the European Convention on Human Rights and the quashing of the resulting Order in Council. The application failed at first instance before Wyn Williams J ([2008] 3 WLR 867). The complaints against the Reform Law were principally that (i) the unelected roles of the Seigneur (feudal overlord) and the Seneschal (president of the assembly and judge, appointed by the Seigneur) in the new Chief Pleas violated Article 3 of the First Protocol to the Convention (the obligation to hold free elections under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature) and (ii) the role of the Seneschal violated the requirements of Article 6 of the Convention (entitlement to a fair hearing in the determination of civil rights and obligations or of any criminal charge). The English Court of Appeal allowed the appeal in part and declared that the role of the Seneschal under the Reform (Sark) Law 2008 violated the Article 6 Convention right. The Respondents did not appeal the decision. Meanwhile, the case proceeded to the Judicial Committee of the House of Lords in July 2009 where the Appellants renewed their arguments as to Article 3. Their Lordships report is expected later this month.

49. There is, however, a concern that if the role of the MoJ were removed then some other check and balance might be required given the unicameral nature of the Islands' assemblies.

50. The essential concern therefore is to promote Channel Island identity, autonomy and democracy whilst respecting the legitimate interests of both the United Kingdom and the Islands on the international stage, acknowledging that on occasion those interests may diverge and must be represented.

29 September 2009

Memorandum submitted by Paul Carney

Further to recent coverage within the Jersey Evening Post, the following perspective may be of interest for the current review of the relationship between the UK and the crown dependant territories (notably the Channel islands and the Isle of Man).

At the present time, I have a young family and I've worked within the finance industry for the past 12 years or so (based in Jersey since 2001).

I have professional qualifications in tax and law.

From a "selfish" perspective, the finance industry here in Jersey provides a relatively comfortable living and fosters a sense of wealth and well-being within the local economy generally. Of particular note in this context is the existence of a safe, clean & prosperous environment that would probably not be available if that industry contracted.

Conversely, I recognise that this industry is founded in the attractiveness of the political stability a small island offers combined with a simplistic system of taxation. In particular, these islands either do not apply tax or adopt a zero rate to transactions and income generated through "investment/wealth management" vehicles that are beneficially owned by individuals, families and companies that "live" in other parts of the world.

The size and population of the island and the evolution of political history have produced the crown dependency status which enables the islands to work with the UK in their international affairs in a manner not dissimilar to the devolved nations of the United Kingdom. In addition, the close proximity of these dependencies to the UK and awareness of cordial political relationships obviously attracts wealth from & investment into the UK via these islands.

However, a fair "bargain" for these benefits & the most equitable point of taxation for such activities is certainly a moot point, especially when the crown dependency relationship is a key facilitator of interaction between the islands and third nations, albeit the UK already retains the power to monitor legislative developments (eg the recent Privy Council approval of Jersey's Foundations Law).

Of course, a good proportion of the wealth managed within the crown dependencies does not originate from the UK—notably the middle east and countries within the British Commonwealth. Members of the finance industry (within both the crown dependencies and the UK) occasionally question the "optimum" point/rate of taxation arguing that any measures to increase UK tax revenues from the investment vehicles based in the crown dependencies will direct this wealth to alternative jurisdictions (especially in our global economy) and thus reduce taxable revenue, economic activity and adversely impact jobs and wealth for the population at large in each jurisdiction. For example, a number of AIM listings comprise third country companies using a crown dependency vehicle to raise investment which contributes to the economy of both jurisdictions and might be directed elsewhere in the absence of the current regime.

In my experience, a key factor is the complexity of the UK tax system and its piecemeal development which has produced a range of differing tax rates. Most accountants and many lawyers within the UK have consequently developed differing degrees of tax planning practices to negotiate domestic residents/

businesses and outside investors through this maze —which essentially, utilise opportunities to “exploit” gaps in the legislation &/or double tax treaties to manage and generate wealth —whilst legitimately paying as little tax as necessary.

Specialist trust, company and partnership vehicles in particular can primarily act as a conduit for cash/asset flows and affect the timing of cash being accessed/used by the ultimate owners & indeed, any other party interested in the vehicle. Such practices are prevalent in all economies but the growth of the finance industry within the crown dependencies has certainly been fuelled by this practice.

In many cases, the operation of these products is primarily focused on indicators that management and control/records are held in the dependency rather than true management and control occurring there. For example, most trustees would find it impossible to be skilled in the spectrum of investment classes that they take decisions on and whilst some proportion of investment activity is genuinely out-sourced to professionals specialised in particular investment/business classes many “decisions” result from discussions with clients and their families that verge of direct instructions.

A root cause is greed & regardless of political allegiances, the crown dependencies thrive on income/wealth that would not be channelled into them if non resident clients did not want to avoid/mitigate their tax liabilities (occasionally there are confidentiality concerns around using an entity located in the dependencies but the tax sweetener is always relevant). The pricing of crown dependency financial products (& wealth generated within their finance industries) can reasonably be claimed to be “largesse” & certainly incorporates the very funds that would otherwise be tax revenue for the UK had wealth/investments been generated and managed directly within the UK without involving a crown dependency vehicle.

As with other economies, there is a sense that the upper echelons of society & definitely the finance industry, have secured obscene personal wealth which is not so much sourced from aggressively sold complex financial products as the basic fact that people will pay to route transactions and financial affairs through a zero or low tax jurisdiction. Bonuses for example are often pro-rata'd per position within an organisation (& associated responsibility) , although most financial workers simply receive a relatively small addition to the normal salary unlike the “City” figures bandied about in the media.

Another consideration therefore is the optimum use of the skills and intellectual ability applied by the finance industry.

In one sense, much of this gainful employment basically pushes paper and assets around without generating anything of tangible value to the world at large and yet, the generation of wealth encouraged by this industry provides the very investments desired by tangible industries to utilise the planets resources efficiently and sustain economies around the globe (eg investments in farming, alternative energy sources etc). A recent BBC documentary for example, demonstrated the ability of ex City bankers to work within and assess the operations of differing businesses (a struggling dairy producer and hotel in this instance) and identify opportunities to secure:

- income/efficiency improvements; and
- maintain employment very, very quickly and such skills are certainly encouraged by a buoyant finance industry. As such, a social conundrum exists around whether the wealth/investments generated through & for the crown dependencies by their finance industry would be created at all if they did not offer low tax regimes and associated skills. Equally, the removal of tax advantages could very quickly result in economic disintegration for the islands themselves.

On balance therefore, I would maintain that the UK is perfectly entitled to review and possibly maintain the existing relationship, although logical alternatives (for the UK public) include:

- seeking to ensure that the crown dependencies adhere fully to UK legislation, thus maintaining existing rights as British passport holders etc & securing health care etc at a fair price (ie adopt & pay over UK taxes, NIC's etc); or
- offering full independence to operate on their own in international affairs over and above their existing autonomy.

[Such action could theoretically provoke a rapid rise in their domestic tax obligations with an associated impact on the economy, as well as impacting the relationship between government/states services and their access to UK counterparts (ie health and education infrastructure)—although again, if they're not willing to pay a fair price (tax) for access to UK facilities/expertise why should the UK be expected to provide such services primarily on the basis of an historical association.]

The historical nature of the crown dependency relationships and the evolution of attitudes towards history has seen an increasing propensity (in my experience) for islanders to question the validity of an allegiance with the UK crown, whilst being very happy to accept wealth from UK residents or promote investment into the UK that wouldn't come anywhere near them if the vehicles that the crown dependencies can provide were subject to the same taxes as would occur for direct UK investment.

As such, a review of these relationships appears very well timed and I look forward to seeing the outcome of this process when information from all interested parties has been considered.

August 2009

Memorandum submitted by the Chief Minister, States of Jersey

SUMMARY

1. Jersey and the United Kingdom (UK) share a common history and constitutional relationship that has lasted over 800 years. Jersey has continued its allegiance to the Crown since 1204 and Islanders remain entitled to full British citizenship. Jersey is autonomous in domestic affairs, having its own parliament and administration, along with its own fiscal and legal systems. There is an increasing need for the Island to participate in international affairs, recognised by a framework agreement between Jersey and the UK signed in 2007.

2. Jersey has sound public finances, having put money aside in periods of growth which is now being used to support the economy through the current downturn. Financial services are important to the Island's economy, and Jersey has been found by independent assessments to be a well regulated, transparent and cooperative jurisdiction.

3. The administration of government in Jersey and the UK overlaps when making laws, entering into treaties or making Crown appointments in the Island. There are opportunities to achieve improvements by agreeing how these core constitutional processes, and our international framework, should operate in practice.

BRIEF INTRODUCTION TO JERSEY: GOVERNMENT AND ECONOMY

The Island

4. To set Jersey in context, the Island has a population of around 90,000, is the most southerly island of the British Isles (located 85 miles from the English coast and 14 miles off the north-west coast of France), is the largest of the Channel Islands with an area of 46 sq.miles,⁴ and has an economy with a total Gross Value Added (GVA) of around £4.3 billion.⁵

The Government of Jersey

5. Jersey has its own parliament, the States of Jersey, with 53 elected members. Jersey also has its own system of local administration, fiscal and legal systems, and courts of law. Jersey has recently modernised and improved its machinery of government. The Island's current system of ministerial government was introduced in 2006 to speed up decision making, improve co-ordination between departments and provide the best possible value for money. Jersey is active in shaping its own future, and our Strategic Plan 2009–14⁶ sets the overall direction for the island, focussing on long term policy aims and priorities.

6. Jersey also plays its part within the international community, and the Island is party to the principal international conventions, including the European Convention on Human Rights. Unlike the UK, Jersey is only part of the European Union (EU) with regard to the free movement of goods (as governed by Articles 25-27 of the Act concerning the Conditions of Accession by the UK and by Protocol 3 to the Treaty of Accession), but in other areas of EU competence the Island enacts domestic legislation to reflect EU Directives where it is considered both relevant and appropriate to do so.

The Island's Finances

7. Jersey is self reliant in raising the income needed to fund the Island's public services, and has built up significant financial strength and resilience in the last twenty years, adhering to a strong, prudent fiscal policy. Since the 1980s, the Island has paid budget surpluses into a long-term savings account. This Strategic Reserve currently holds around £500m, which amounts to 12% of the Island's total annual economic activity (Gross Value Added). The Island's government has no public debt. This prudent approach was strengthened in 2006 with an improved fiscal framework which introduced a Stabilisation Fund (effectively a second savings account). This fund is now being used to support the economy through the current downturn. In addition, an independent Fiscal Policy Panel of leading economists was established to publicly advise the Treasury Minister. Prior to the current economic crisis, Jersey modernised and broadened its taxation system, taking account of EU tax initiatives as well as domestic requirements. Public consultation on tax reform began in 2001 and a 3% Goods and Services Tax (GST) and a 10% tax for financial institutions were introduced in 2008.

⁴ <http://www.gov.je/NR/rdonlyres/3BA5C9F6-0B35-4A9D-84A8-FC9E71BEEA0C/0/JIF2008FINAL.pdf>

⁵ <http://www.gov.je/ChiefMinister/Statistics/Business+and+Economy/GVA+and+GNI/>

⁶ <http://www.gov.je/ChiefMinister/Strategic+and+Business+Planning/StrategicPlan.htm>

Our Finance Centre

8. Jersey is a diverse economy with a range of active business sectors, including tourism and agriculture. However, our finance industry is the most significant sector within our economy, and includes banking, trust and company administration, fund management, accountancy and legal activities. Total employment is around 55,000, of which a quarter are employed in the finance industry.⁷ The Island's regulatory and law enforcement regime for financial services has been subject to independent international scrutiny many times during the last decade, each time satisfactorily, as finance centres around the world have become subject to increased scrutiny.

9. The OECD assessed Jersey to have substantially implemented internationally agreed tax standards, and the island was placed on the original 'white list' in April 2009 alongside the UK, United States and other G20 countries.⁸ Jersey is a member of the community of nations committed to the international principles of transparency and information exchange, and has recently accepted an invitation to assume one of the Vice Chair positions for the new Peer Review Group set up by the OECD at its recent Global Forum on Tax Transparency and Exchange of Information.⁹

10. The very high standards maintained by Jersey have been independently verified by the International Monetary Fund (IMF), who recently published their reports on Jersey.¹⁰ With regards to the key areas of anti money laundering and combating the financing of terrorism, the IMF assessed Jersey as complying, or largely complying, with 44 of the 49 recommendations of the Financial Action Task Force (FATF).¹¹ When last assessed, only 3 other jurisdictions scored 40 or more—the US and Singapore scored 43 and Belgium 42. We are not aware of any other jurisdictions that reached 40 or more. This places Jersey among the top jurisdictions for compliance with the FATF recommendations, out of a total of more than 120 jurisdictions that have been assessed. To help set this in context, the UK has been assessed as complying, or largely complying, with 36 of the recommendations.

Commitment to International Standards for Financial Regulation

11. Jersey will continue to comply with international standards for financial regulation, and welcomes work by the G20, Financial Stability Board and OECD to drive up these standards, create a level playing field, and ensure that non-cooperative jurisdictions are tackled robustly. We are also committed to continuous improvement. The IMF assessment of Jersey makes recommendations to further improve our regulations, and the Island's authorities will publish an action plan setting out how we intend to deal with these points. We also welcome the Foot Review of British Offshore Financial Centres commissioned by HM Treasury¹² and await the conclusions in relation to Jersey.

JERSEY AND THE UNITED KINGDOM: OUR CONSTITUTIONAL RELATIONSHIP

The History

12. The intertwined histories of Jersey and the UK stretch far back in time. In 933, the Channel Islands were annexed by the Duke of Normandy. In 1066, William, Duke of Normandy was crowned King of England. From 1066 to 1204, England, Normandy and the Channel Islands were thus united under the rule of the King of England, who was also Duke of Normandy. The Channel Islands continued to be regarded as part of Normandy and so were subject to Norman Customary Law. In 1204, King John lost Normandy to the King of France. The Channel Islands declared their loyalty to King John and later his successor monarchs, who by royal charters over the centuries in turn decreed that the islands should continue to be governed by their own laws. Thus a separate legal system was continued for Jersey, which remains the case to this day. In this way, our constitutional position of self government was created through the loyalty of our predecessors to the Crown and the privileges and liberties conferred by the Crown in recognition of that loyalty.

Today's Relationship

13. Today, the Island continues its allegiance to the Crown, and Islanders are entitled to full British citizenship. Alongside this allegiance, it is recognised that Jersey has autonomous capacity in domestic affairs, and further recognised that there is an increasing need for Jersey to participate in matters of international affairs. The most recent agreed statement of the current constitutional position can be found at the start of the *States of Jersey Law 2005*,¹³ the law establishing our current system of ministerial government, a short extract of which has been supplied at annex 1.

⁷ <http://www.gov.je/NR/rdonlyres/E0C5C2FD-63CF-4102-B57D-257444377751/0/manpower2008dec.pdf>

⁸ <http://www.oecd.org/dataoecd/38/14/42497950.pdf>

⁹ <http://www.oecd.org/dataoecd/44/39/43610626.pdf>

¹⁰ <http://www.imf.org/external/pubs/cat/longres.cfm?sk=23271.0>

¹¹ http://www.fatf-gafi.org/pages/0,3417,en_32250379_32236920_1_1_1_1_1,00.html

¹² http://www.hm-treasury.gov.uk/indreview_brit_offshore_fin_centres.htm

¹³ http://www.jerseylaw.je/Law/lawsinforce/consolidated/16/16.800_StatesofJerseyLaw2005_RevisedEdition_1January2009.pdf

14. As in the UK, laws passed by the States of Jersey require the sanction of Her Majesty (and also as in the UK, there is a large amount of subordinate legislation made that does not need Royal Sanction). This is achieved by the Queen in Council making Orders granting Royal Assent (the Privy Council mechanism having evolved alongside the system of constitutional monarchy). As the people of Jersey elect members to our own States and have no representation in the Westminster Parliament, Acts of that parliament only extend to Jersey if the Island expressly agrees that they should do so.

15. With regards to treaties, Jersey has not until recently become party to treaties in her own right, but this has increasingly become the appropriate mechanism. This is achieved by the Island acting under an Entrustment from the UK, the detail of which is provided to the other contracting state, as has been the case when negotiating Jersey's Tax Information Exchange Agreements.¹⁴ The alternative mechanism is to seek to have treaties extended by the UK to cover the Island, either at the time of the UK's ratification or more usually at some later date. Where the UK is involved in the negotiation or signature of any treaty which could apply to the Island, there is a requirement that Jersey is consulted fully at the earliest stage and allowed a proper length of time to consider the implications.

THE ROLE OF THE MINISTRY OF JUSTICE

Core Constitutional Processes

16. Due to our constitutional position, the Ministry of Justice plays a pivotal role where our systems of government overlap. The Ministry of Justice is the UK government department currently responsible for submitting legislation from Jersey for Royal Assent, for consulting where it is convenient to us to extend UK legislation to the Island and overseeing this procedure, for liaising on our behalf with the Foreign Office on the extension of treaties to the Island and the issuing of Entrustments, and for finalising the process for making Crown appointments in the Island.

Improving Administration

17. There are other roles that may be suggested for the Ministry of Justice in relation to the Island, but in a period when resources in departments of government can only get tighter, we should focus on the narrowest possible definition of scope and how government administration can be continuously improved within defined resource limits. In this way, the Ministry of Justice and our own departments can focus on fulfilling our shared constitutional requirements in a speedy and effective manner within anticipated resource constraints.

18. We understand that the Ministry of Justice is currently considering an update to its procedures for Royal Assent of Jersey laws via the Privy Council. It would seem sensible to take this opportunity to improve the operation of all the core constitutional processes. We would encourage the Ministry of Justice to consult with us and then formalise these procedures in writing, with firm commitments by both governments to agree expected turn around times, progress tracking procedures and an annual review of performance by both administrations.

Maintaining Inter-Government Relations

19. Lastly, to note that we value having a UK minister with responsibility for maintaining good relations between our two governments, and have found our regular meetings to discuss matters of mutual concern to be constructive and useful. We also value the regular dialogue between officials in the Ministry of Justice and our own officials. As is always the case, mutual understanding between us could no doubt be improved by more opportunities to be exposed to each other's workings and by more interchange of personnel. As a simple improvement, we have suggested in our recommendations that there may be an opportunity to implement a programme whereby relevant officials from the UK and Jersey spend one week a year with each other's administrations in order to understand better the other's perspective (a 'week in the Island' for relevant UK civil servants and a 'week in Whitehall' for our own relevant officials).

INTERNATIONAL REPRESENTATION

The Agreed Framework

20. In 2007, Jersey and the UK agreed a *Framework for developing the international identity of Jersey*.¹⁵ The Agreement was signed on behalf of the two Governments by The Lord Chancellor for the UK and the Chief Minister for Jersey. A copy of the framework is included at annex 2. Whilst this Agreement was not intended to be a constitutional statement, it did address the constitutional relationship within an overall framework whereby both governments sought to evolve working methods to recognise that the domestic and international interests of Jersey and the UK may differ.

¹⁴ <http://www.gov.je/TreasuryResources/IncomeTax/TIEA/>

¹⁵ <http://www.gov.je/ChiefMinister/International+Relations/JerseyandUKagreedframeworkfordevelopingJerseysinternationalidentity.htm>

21. Both governments are committed to this Framework and Jersey expects that methods of international representation will continue to evolve to accommodate our mutual needs. The operation of this Framework relies upon good dialogue between our two governments, and we would recommend a mutual commitment between the Foreign Office, Ministry of Justice and ourselves to meet at least annually at both ministerial and senior official level to review progress.

The European Union

22. The Framework identifies the European Union (EU) as an area where the UK may be expected to have differing interests from Jersey, and so the island will be seeking to improve its own representation in Brussels. We expect to continue to work in harmony and close cooperation with the UK Permanent Representation to the EU (UKREP), but need to recognise that our interests may differ and need to be represented separately. We expect this to be similar to the arrangements currently in place for the UK's devolved countries and regions, who maintain their own Brussels representation to supplement the work of UKREP.

RECOMMENDATIONS

23. Whilst the Government of Jersey would not normally presume to make recommendations for neighbouring governments, with regards the UK, our two systems of government are bound together at certain points, and the suggestions below would improve the operation of the machinery of government where these overlaps exist:

- (a) to improve the operation of all core constitutional processes, the Ministry of Justice should seek to agree with the Island proposals to formalise these procedures in writing, with firm commitments by both governments to agree expected turn around times, progress tracking procedures and an annual review of performance by both administrations;
- (b) to ensure methods of international representation evolve as intended, the Foreign Office, Ministry of Justice and the Government of Jersey should review the operation of the *Framework for developing the international identity of Jersey* annually and consider steps for mutual improvement;
- (c) the operation of this *Framework* would also be assisted by annual meetings between Foreign Office and Ministry of Justice ministers and ministers from the Island; with these ministerial meetings underpinned by meetings of senior international officials from both administrations at least once a year;
- (d) to improve policy coordination on financial services and taxation, there should be at least annual meetings between Treasury ministers and ministers from the Island, to supplement the existing good dialogue that exists between senior finance officials;
- (e) to enhance mutual understanding, Whitehall should consider a programme of 'week in the Island' placements for civil servants working on Crown Dependency issues, with the Islands reciprocating with a 'week in Whitehall' for relevant officials.

Senator T A Le Sueur

2 October 2009

Annex 1

STATES OF JERSEY LAW 2005

A LAW regarding the constitution and proceedings of the States, to declare and define the powers, privileges and immunities of the States, and to establish a ministerial system of government.

WHEREAS it is recognized that Jersey has autonomous capacity in domestic affairs;

AND WHEREAS it is further recognized that there is an increasing need for Jersey to participate in matters of international affairs;

AND WHEREAS Jersey wishes to enhance and promote democratic, accountable and responsive governance in the island and implement fair, effective and efficient policies, in accordance with the international principles of human rights—

THE STATES, subject to the sanction of Her Most Excellent Majesty in Council, have adopted the following Law—

FRAMEWORK FOR DEVELOPING THE INTERNATIONAL IDENTITY OF JERSEY

Following the statement of intent agreed on 11 January 2006, the Chief Minister of Jersey and the UK Secretary of State for Constitutional Affairs have agreed the following principles. They establish a framework for the development of the international identity of Jersey. The framework is intended to clarify the constitutional relationship between the UK and Jersey, which works well and within which methods are evolving to help achieve the mutual interests of both the UK and Jersey.

1. The UK has no democratic accountability in and for Jersey which is governed by its own democratically elected assembly. In the context of the UK's responsibility for Jersey's international relations it is understood that—

- The UK will not act internationally on behalf of Jersey without prior consultation.
- The UK recognises that the interests of Jersey may differ from those of the UK, and the UK will seek to represent any differing interests when acting in an international capacity. This is particularly evident in respect of the relationship with the European Union where the UK interests can be expected to be those of an EU member state and the interests of Jersey can be expected to reflect the fact that the UK's membership of the EU only extends to Jersey in certain circumstances as set out in Protocol 3 of the UK's Treaty of Accession.

2. Jersey has an international identity which is different from that of the UK.

3. The UK recognises that Jersey is a long-standing, small democracy and supports the principle of Jersey further developing its international identity.

4. The UK has a role to play in assisting the development of Jersey's international identity. The role is one of support not interference.

5. Jersey and the UK commit themselves to open, effective and meaningful dialogue with each other on any issue that may come to affect the constitutional relationship.

6. International identity is developed effectively through meeting international standards and obligations which are important components of Jersey's international identity.

7. The UK will clearly identify its priorities for delivery of its international obligations and agreements so that these are understood, and can be taken into account, by Jersey in developing its own position.

8. The activities of the UK in the international arena need to have regard to Jersey's international relations, policies and responsibilities.

9. The UK and Jersey will work together to resolve or clarify any differences which may arise between their respective interests.

10. Jersey and the UK will work jointly to promote the legitimate status of Jersey as a responsible, stable and mature democracy with its own broad policy interests and which is willing to engage positively with the international community across a wide range of issues.

Memorandum submitted by the Combined Isle of Man Ex-Service Associations

I am writing at the direction of the combined Isle of Man ex-service associations which are listed below to make representation to the Committee in respect of the arrangements between UK and the Crown Dependencies. In particular, we wish to express the deep concern of our members about the adverse effects on their families and themselves over the forthcoming unilateral ending of the Reciprocal Health Agreement which has existed between our two countries since the introduction here of National Health in 1948.

We would like to underline the anxiety which this has caused to Manx veterans, aggravated by a feeling of rejection by our British brothers with whom we have shared so much not least in war. In this context, it is perhaps appropriate to stress the exceptional contribution by the Isle of Man to the United Kingdom armed forces both now and in the past.

During the course of the First World War, 1,165 Manxmen were killed from a population of 50,000: this is 2.3% of the population which is higher than any other nation in the Empire including the United Kingdom. In the Second World War the roll of honour was again high: the Manx regiment marched with 7th Armoured Division from Alamein to the Baltic through Italy and France and the Isle of Man Steam Packet sent eight ships to Dunkirk losing three of them while carrying 25,000 of the 340,000 rescued back to UK.

From 1940 to 1960, the Isle of Man was subject to conscription into the UK forces which was not the case with any other dependency nor indeed Northern Ireland. Consequentially around one in ten of the population of the Island is a "Veteran" which is probably higher than the UK due to Manx longevity and post war immigration into the United Kingdom. There are 504 War Pensioners and 69 War Widows on the Island.

The youngsters of the Island continue to join the armed forces and we understand that over 200 are currently serving, 12 with one infantry battalion. Three have been killed in Iraq and Afghanistan and a young officer won the Military Cross just before Christmas.

The Isle of Man has won the competition for the highest per capita contribution to the Poppy Appeal every year since 1978.

Approximately 5,000 Manx veterans are Old Age Pensioners. Many have children and grand children in the United Kingdom and naturally visit them from time to time. These are the section of the population least able to afford insurance and in the case of the over 90s often unable to secure it: very few of them are wealthy. Their relatives will of course experience the same problems in visiting the Island.

We understand that the costs to the NHS are in the order of £3 million annually which is almost mirrored by the costs to the DHSS. It seems doubtful that the full amount will be saved by the withdrawal of the agreement and of course UK citizens will also suffer.

The Manx people have always been unequivocally loyal to Her Majesty the Queen, Lord of Man, and to Great Britain. The cessation of the reciprocal health agreement apparently without negotiation has been a traumatic shock to our veterans and their dependants. The feeling that our sacrifices over the year have been ignored is even sharper than the unwelcome costs involved.

The United Kingdom has been pleased to call the Manx people to the colours in war and peace: it is surely inequitable to abandon us in our vulnerable later years.

Brigadier N A Butler CBE
Coordinating Chairman

February 2010

Representing:

The Royal British Legion Isle of Man County Committee
The Isle of Man Joint Ex-Services Association Committee
The Manx Legion Committee
The Isle of Man War Pensions Committee
The Isle of Man Armed Forces Day Committee
The Isle of Man Royal Naval Association Committee
The Isle of Man Royal Air Force Association Committee
The Isle of Man Normandy Veterans Association Committee
The Isle of Man Burma Star Veterans Association Committee
The Isle of Man Korean War veterans Association Committee
The 15th(IOM) LAA Regiment Old Comrades Association Committee
The Isle of Man Royal Artillery Association Committee
The Isle of Man Parachute Regiment Association Committee
The Isle of Man Royal Military Police Association Committee
The Isle of Man Soldiers Sailors and Airmen's Families Association Committee
The Isle of Man Army Benevolent Fund Committee
The Isle of Man Combat Stress Committee
The Isle of Man Merchant Navy Association Committee
The Isle of Man Women's Land Army Association. Committee
The Isle of Man Oddfellows Association Committee

Memorandum submitted by the Crown Appointments in the Bailiwick of Guernsey

1. From both the composition of the Committee and the stated terms of its brief inquiry into the role and performance of the Ministry of Justice in relation to the Crown Dependencies, it is assumed that its primary, if not exclusive, focus is on the parliamentary and executive aspects of government; rather than on the way in which the Ministry of Justice discharges any role with reference to the Crown functions undertaken, insofar as concerns the Bailiwick of Guernsey, by His Excellency the Lieutenant Governor, the Bailiff and Deputy Bailiff, the Law Officers and Her Majesty's Receiver General, each of which is a Crown appointment. The Committee will doubtless be aware that these appointees exercise functions independently of the States of Guernsey (and of the States of Alderney and Chief Pleas of Sark) in that:

- the Lieutenant Governor is the personal representative of the Sovereign throughout the Bailiwick;
- the Bailiff is the senior Judge of the Royal Court of Guernsey, which has original jurisdiction in certain matters, and appellate jurisdiction, throughout the three Islands (and President of the Guernsey Court of Appeal, with Bailiwick-wide jurisdiction); and
- the Law Officers—HM Procureur (Attorney General, who is also HM Receiver General, responsible for Crown property and revenues) and HM Comptroller (Solicitor General, who is also authorised by Warrant to perform the functions of Receiver General)—have powers and duties throughout the Bailiwick.

2. The holders of these offices, save that of HM Comptroller which is currently vacant, have considered whether we would nevertheless wish to contribute anything to the Committee's inquiry insofar as it might tangentially engage our respective relationships with the Ministry of Justice. His Excellency and the Bailiff have both indicated their concurrence with my own opinion that the Ministry's officials are unfailingly courteous, and use their best endeavours to be as helpful as possible; but that there are occasions when the procedures currently followed, together with pressure on their limited resources, appear to inhibit their ability to deal with matters as expeditiously as would ideally be hoped.

H E Roberts QC

HM Procureur (Attorney General) and HM Receiver-General

September 2009

Memorandum submitted by the Deputy of St Martin, States of Jersey, States Assembly

I am a Member of the States of Jersey who earlier this year formed a group of lay people, English lawyers and Members of the States of Jersey who are interested in Human Rights as they relate to Jersey.

Our formation as a group is the direct result of the lack of any proper official initiative in this Island to promote general public knowledge and awareness of human rights and their application in everyday life. It is also directly related to the apparent lack of interest in human rights by Jersey's own legal profession and it is significant that no members of the Society of Jersey Lawyers have joined our group.

I would stress to the Committee that being a small unique jurisdiction would, even in the most favourable circumstances, present problems in the area of human rights compliance. But Jersey is not in any way similar to the Isle of Wight or any other little place in the UK and needs to be considered in the context of obscure local laws and legal traditions, a monopoly legal profession which exhibits very little interest in human rights matters and where discriminatory housing and employment laws and policies are in force and anti-discriminatory legislation virtually non-existent. And, furthermore this is a small community of just 90,000 people of many nationalities, where the Jersey government is largely fixated upon the promotion of an international finance centre industry and devotes very little priority, resources or funding to the aims and objectives of universal human rights.

Against human rights standards such a background, I believe the UK Government needs to take a much more positive and pro-active interest in the promotion and application of human standards in Jersey and I also suggest that the continuing failure so to do causes the UK Government to be in violation of its own international human rights obligations.

1. My submission here is concerned with such matters as the extraordinary failure of the Jersey government to promote ratification of the most basic of international instruments like the UN Convention for the Elimination of Discrimination against Women or the UN Convention on the Rights of the Child. And I couple that concern with the failure of the UK Government to ensure that such international standards might be adhered to here, just as they are in the UK, less than 100 miles away.

2. I consider that the UK governmental failure is probably even greater than that of this small Island's administration because the London government is already geared up to deal with such matters and already undertakes all the necessary research and consultation with bodies like the UN that might be onerous to a small jurisdiction like Jersey—even if it were an enthusiastic one.

3. I note too that the UK government does actively promote human rights adherence in other small British territories all over the world and gives assistance in many ways, both financially and practically, to their governments and inhabitants, but no such assistance is known to be offered here.

4. Beyond the basic issue of ratification of international instruments we are concerned also that locally enacted legislation such as anti-discrimination laws have still not been achieved in Jersey. I note and deplore, for example, that funding, even for the most rudimentary proposals to curtail discrimination by reason of race or gender is yet likely to be further reduced and implementation delayed.

5. I do not consider this to be a purely domestic matter for the Jersey government to determine but is a matter that ultimately demands the intervention of the UK government, in accordance with obligations to British people the world over, besides any arising under the UK's international commitments towards all peoples within its territories.

6. I am also concerned that the Jersey government fails to keep the population adequately informed about human rights matters and that there are no dedicated staff employed to promote knowledge through education, publication or discussion and that even a data base or list of international obligations is not available for public consultation.

7. Ignorance of human rights matters in Jersey it seems is actually encouraged contrary to obligations entered into by the Jersey government or the UK as High Contracting Party for those international agreements that have already been ratified.

8. I note too that there is secrecy and mystery in the process by which reports arising under various international obligations are prepared and submitted to bodies such as the UN and of the total lack of NGO participation in the process.

9. Again, I consider that the UK government is largely blameworthy for these failures as the High Contracting Party and that there is a need for positive intervention by the UK to encourage the formation of NGOs in Jersey, for critical observations to be made on any published reports and assistance offered to enable individuals to attend hearings or make submissions, when these are considered by the UN or other bodies.

10. Since access to reliable legal information and advice lies at the very base of human rights compliance, we, as a group, are very frustrated by the management of Jersey's legal profession which seems to be so diverted into and obsessed with finance industry priorities.

11. I would suggest that the interest of some lawyers in human rights matters in most jurisdictions would be expected and normal. But I would also suggest that the obsession of Jersey lawyers with finance and their neglect of human rights and social law priorities raise a particular and unusual problem that is beyond the abilities of this little community to deal with and that this matter alone warrants the active intervention of the UK government.

12. I note that Jersey's 250 or so lawyers enjoy a total monopoly in the provision of legal services and giving advice on Jersey law and audience in the local courts and charge very high "city" fees.

13. Yet, their obscure legal aid scheme is organised on a semi-charitable basis, with lawyers of less than 15 years experience being required to serve on a next-in-line basis, regardless of competence or speciality, and with clients having virtually no say on who might represent them.

14. This needs to be considered against the background of a unique jurisdiction where laws are often written in French, published commentaries are mostly ancient, rare collectors' items, modern text books are virtually unknown and there are absolutely no books explaining about human rights and their application in Jersey. Even the Jersey Greffe—now called the Government Information Centre—offers virtually no explanatory leaflets on human rights matters and the Complaints Board (the Jersey equivalent of an Ombudsman for Administrative Decisions) has recently declared that it is not empowered to consider human rights based cases.

15. In September 2008, I proposed the creation of an official Jersey Human Rights Committee (P7S/2008 attached) but it was rejected by the States Assembly. I had hoped that the Committee would be enabled to properly scrutinize all proposed legislation for compliance with Jersey's human rights obligations as well as researching and publishing human rights information for general public use.

16. It is noteworthy that Equality and Human Rights Commissions have been established in all the countries of the British Isles (England, Wales, Scotland and Ireland) in addition to separate Commissioners for Children's Rights and for Human Rights in some of these countries.

17. It is significant that no such bodies have been established in Jersey, Guernsey or the Isle of Man and I take this to confirm that without UK Government intervention, this is how matters will remain.

Deputy FJ (Bob) Hill, BEM

28 September 2009

Annex

PROPOSITION

The States are asked to decide whether they are of opinion:

- (a) to agree that a Committee to be called the Committee on Human Rights should be established, consisting of members of the States and persons who are not, with the Committee having responsibility for the oversight of human rights and equality issues;
- (b) to request the Privileges and Procedures Committee to bring forward for approval—
 - (i) the necessary amendments to the Standing Orders of the States to give effect to the proposal, and
 - (ii) funding proposals in the Annual Business Plan to cover the cost of operation of the Committee;
- (c) to agree that Article 16 of the Human Rights (Jersey) Law 2000 should be amended to require Ministers to state what Articles of the European Convention on Human Rights, if any, have been considered in relation to the legislation being brought forward and the grounds on which the Minister considers that the proposed legislation is, or is not, compatible with the Convention rights;
- (d) to request the Chief Minister to bring forward the necessary amendment to Article 16 to give effect to the proposal.

REPORT

The United Kingdom's ratification of the European Convention on Human Rights in 1951 included Jersey. Island residents who felt their rights had been violated were able to take their grievance to the European Court of Human Rights in Strasbourg.

The Human Rights (Jersey) Law 2000 was adopted by the States on 8 February 2000. However it did not take effect until 10 December 2006. The Law should act as a lever to improve public services and although it created no new Rights it enabled residents to have their grievances addressed through our Courts.

Another consequence of the Jersey Human Rights Law is that Article 16 now places a requirement on Ministers when lodging au Greffe a *Projet de Loi*. Before the second reading of the projet they must make a statement to the effect that in his/her view the provisions of the projet are compatible with the Convention rights (a statement of compatibility); or make a statement to the effect that although he/she is unable to make a statement of compatibility, he/she nevertheless wishes the States to proceed with the projet.

The statement must be in writing and be published in such manner as the Minister making it considers appropriate. The statement is usually included in the Proposition.

Two interesting points arising from the provisions of Article 16 is that there is no provision for the Minister to explain what Convention Right is affected and why the proposed Law is Convention Compliant.

Another important point is that at present there is no provision for any States body to scrutinise the Minister's statement for possible violations of the Human Rights Law.

In the United Kingdom on 14 December 1998 the then Leader of the House of Commons, Margaret Beckett, announced the establishment of a Joint Committee on Human Rights to conduct enquiries into "general human rights issues" in the UK (only), scrutinise Remedial Orders, examine draft legislation where there is a doubt about its compatibility with the European Court of Human Rights and examine whether there is a need for a human rights commission to monitor the operation of the Human Rights Act.

Before the establishment of the Joint Committee considerable thought was given as to what would be its purpose and how it would function. There were a number of proposals from esteemed academics and organisations for a parliamentary committee or parliamentary scrutiny of legislation for human rights compliance.

There were a number of competing views on the purpose of a Human Rights Select Committee. However a common theme of the various independent proposals for a committee was the need to assist Parliament in providing independent scrutiny of executive policies and legislation which impact on human rights. Recognising the dominant role of the "executive in parliament" under the constitutional system it was envisaged that a human rights select committee, in particular a joint committee of both Houses would strengthen the independence of the legislature in performing its allotted functions under the Human Rights Law.

Since 1998 events have moved onward and at present there is Joint Committee on Human Rights which is appointed by the House of Lords and the House of Commons. It considers matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders. The Joint Committee has considerable powers akin to select committees or our scrutiny panels.

The Joint Committee scrutinises Government activity across the board and its work can broadly be divided into three distinct categories:

- *Legislative scrutiny*: the scrutiny of Government Bills, in particular, as well as other bills, draft bills, statutory instruments, consultation documents and other legislative proposals;
- *Thematic inquiries*: inquiries into issues relating to human rights in the UK, similar to the inquiries undertaken by departmental select committees except in that it subsequently considers issues which cut across departmental boundaries;
- *Scrutiny of Government*: responses to adverse judgements by the European Court of Human Rights and declarations of incompatibility by the UK courts: it monitors, and periodically report on, the action arising from all relevant court cases, including those which lead to remedial orders, as mentioned above.

The strands of work are closely inter-related. For example, scrutiny of the Government's counter-terrorism proposals had involved both thematic investigation and scrutiny of specific legislative provisions.

Understandably there are a number of major international matters which require the UK's attention but hopefully would not be relevant to Jersey; however it is evident that Human Right matters are an integral part of scrutiny.

It is also evident that scrutiny carried out by the UK Select Committees and our Scrutiny Panels is similar, with the exception of scrutiny of Human Rights issues, which is under the remit of the Joint Committee on Human Rights. However Jersey has no official body with oversight for Human Rights matters from either the Executive or Scrutiny.

At present Jersey has five scrutiny panels with responsibility for scrutinising matters within their remit. There is also the Legislation Advisory Panel and the Law Revision Board; however, like the five Scrutiny Panels, neither has any direct responsibility for Human Rights issues.

It is apparent that when the Jersey Human Rights Law was approved in 2000 and the introduction of Ministerial Government and Scrutiny Panels in 2005 very little consideration was given to the oversight or scrutiny human rights matters.

I have had an interest in the Human Rights Law for some considerable time and have been concerned at how little attention has been given to a number of human rights issues. It is also apparent that should anyone wish to draw attention to possible violations, there is no formal States body to address the matter.

Now that we have our own Human Rights Law I believe we have an obligation to ensure there is some mechanism to scrutinise our legislation to ensure it is Convention compliant. I also believe that should concerns be raised regarding possible convention violations occurring within our public bodies there should be a body with sufficient expertise to address them.

Therefore I believe there are two main issues:

- (1) How the oversight of Human Rights matters should be addressed.
- (2) Amend Article 16 of the Human Rights Law so that Ministers elaborate why they are of the view that the particular Law being lodged is Convention Compliant.

As mentioned above, prior to the introduction of its Human Rights Law and having agreed to the principle that there should oversight of the Law, the UK Parliament then considered a number of options as to how oversight would be carried out.

One option was for it to come within the remit of each of the Select Committees. However that option was rejected on the grounds that the most appropriate way forward was to establish a stand alone Joint Committee.

Prior to lodging this proposition I carried out considerable research, including visiting Westminster and discussing the work of the Joint Committee on Human Rights with its chairman, Andrew Dismore, MP and Commons Clerk, Dr Mark Egan. I also submitted two papers to the Privileges and Procedures Committee, the Chairmen's Scrutiny Committee and the Council of Ministers. I subsequently had meetings with each of the Committees prior to and after my visit to Westminster. I had hoped to discuss my proposals with the Council of Ministers, however it was considered to be more appropriate to meet after I had lodged my Proposition.

The main points arising from my meetings and research are:

- (1) When the States approved the Human Rights law in 2000 (P.197/1999), it was recognised that there were bound to be some manpower and financial implications.
- (2) None or very little consideration was given for the oversight of the Human Rights Law.
- (3) There is no official Executive or Scrutiny body with responsibility for the oversight of the Jersey Human Rights Law.
- (4) There is no independent audit of any of the Ministers' statements of compatibility.
- (5) There is no explanation as to why statements of compatibility are compatible.
- (6) Do all International Human Rights Treaties ratified by the UK apply to Jersey?
- (7) Is Jersey party to all the relevant Treaties and Conventions? For example, why is Jersey not party to the Convention on the Rights of the Child (protecting fundamental rights of the child), ratified in 1991.
- (8) Although there was a six year period between approving the Jersey Human Rights Law and the Appointed Day Act, not all Laws were subjected to a Convention audit.
- (9) If allegations were made about Human Rights violations occurring within any of our public bodies, who would address them?

In the UK there is a Human Rights Minister within the Ministry of Justice. One of his important tasks is to promote Human Rights and ensure there is adequate training for those involved in the public sector.

There is also the Joint Committee on Human Rights to hold the Executive to account.

I am not advocating that we should copy the UK arrangements; however I believe Jersey has an obligation to ensure that we have a statutory body with oversight of our Human Rights Law. I also believe that with the impending Discrimination Law, consideration should be given to establishing a formal body to address Human Rights and Discrimination Issues.

Jersey is now an International Finance Centre with an international presence. As such we are party to a number of international laws and agreements which have implications for our finance industry and also our social structure. To address this issue, I believe we should establish some mechanism for oversight of our Human Rights obligations. Having looked at various options, I believe there are only two which are worthy of consideration.

 OPTION ONE

One option is for Human Rights issues to come within the remit of the existing five scrutiny panels. Whilst this may be the least costly and expedient way, I believe it would be seen that Jersey is paying lip service to our obligations. The Human Rights Law is a complex piece of legislation which cuts across a number of departmental boundaries. This could pose difficulties in identifying which panel would be the most appropriate to deal with any enquiries or conduct any review.

Another very important point is that a degree of expertise is required. Given the existing workload, any additional responsibility for the existing scrutiny panels could become burdensome and because of the Law's complexity, Human Rights matters could be put lower down the pecking order.

It should also be noted that the UK did not choose the above option.

OPTION TWO

During my discussions with Mr Dismore and Dr Egan it became apparent why the UK decided to establish a joint committee on human rights, mainly because of the problems identified in Option One above. The Westminster model involves members from both Houses and all political parties; it appears to function well and many of the initial teething problems have been ironed out.

Clearly if Option Two was approved there would be financial and manpower implications. However "if a job is worth doing, it is worth doing well." Also given concerns raised recently regarding possible Human Rights violations occurring in some of our establishments, doing nothing is not an option. Opting for Option One may be seen as an easy option and quick fix. However, by proposing a standalone Committee I believe we would be sending out a positive message that we are fully prepared to accept our human rights obligations irrespective of cost.

In the Bailiff's Liberation address he said "I do not believe that Jersey is an uncaring society. On the contrary, there is a strong political will to protect the poor and vulnerable in the community and to correct any mistakes of the past". Similar sentiments were expressed by the Chief Minister in his Liberation address.

As it is apparent there is a "political will" we should therefore endorse that "political will" by establishing a formal body with oversight for Human Rights.

There will be manpower requirements, not only to form the Committee but also for officer support. I believe we can use the U.K. model as a template but our joint committee could comprise of States Members and members of the public. Such an arrangement currently exists with the Public Accounts Committee. That Committee has six States Members and five members of the public with an interest in that field.

There are a number of Jersey residents with interest in Human Rights and this would be an ideal opportunity for them to be considered. I would not envisage the committee being as large as the PAC or the UK Joint Committee.

In addition to officer support; if the Committee is to be independent, it must have its own legal advisor. Given the number of Laws lodged each year, the Committee will have to adopt a "sifting" process. Inevitably, whilst some Laws will be uncontroversial and will not require undue attention, others will require closer observation and may require legal opinions and reviews. It is then that cost will be involved, but that is inevitable and was envisaged when the Law was approved in 2000 but not addressed.

I do not believe it will be necessary to appoint a full-time legal advisor, however legal advice can be sought when required and the cost will fluctuate depending on the work required.

In 2006 when the Health, Social Security and Housing Scrutiny Panel was established (P.64/2006), the financial and manpower implications amounted to £188,348. Staff cost was around £98,000 for two staff members with a further running cost of £90,000. Two years on, these costs have increased.

To assist in providing manpower and financial implications, the Scrutiny Manager has helpfully provided an estimate of what the cost of the new Committee/Panel could be if it was to have proper legal support. Three options have been provided and the cost will depend on the balance between having "in house" legal advice as opposed to buying it in.

I am grateful for the information which is as follows—

Costs for standalone scrutiny panel into Human Rights

- Housing new officers would necessitate the loss of the 1st floor meeting room which is regularly used.
- Grading for officers would depend on qualifications needed. Given that the Law Officers' Department has concerns that qualified staff are being lured away by offers of significantly larger salaries [C&AG report on States Spending], it seems unlikely that officers with legal training could be procured on the equivalent grade of Scrutiny Officer or even significantly higher.
- Given that the Deputy of St. Martin has taken soundings from the Joint Select Committee—this is how that is staffed:
 - “One Commons Clerk (team leader)—a fast-stream civil servant;

One Lords Clerk—also at that level—soon to be replaced by a part-time new-ish fast streamer;
 One Legal Adviser—a full-time employee and qualified barrister—in civil service terms, pretty high-powered;
 Two Committee Specialists—both legally qualified;
 One Committee Assistant;
 One Secretary;
 About to get a Chief Office Clerk;
 The assistance of a media officer as well who works for several committees”.

- In view of the fact that scrutiny in Jersey would not undertake as wide a remit as the Select Committee, it could be reasonably expected that staffing would be considerably lower. However, consideration of appointing legally trained support staff needs to be given.

Option 1—£329,772

Two Grade 10 officers	£99,264
Legal advice bought in @£300 per hour for 30 weeks	£180,000
General admin support	£45,438
Accommodation	£3,000
Start-up costs equipment	£2,070
	£329,772

Option 2—£260,142

Two Grade 12 officers	£119,634
Legal advice bought in to lesser extent than option 1 @£300 per hour for 15 weeks	£90,000
General admin support	£45,438
Accommodation	£3,000
Start-up costs equipment	£2,070
	£260,142

Option 3—£286,030

Two Grade 14 officers with some legal knowledge	£145,522
Legal advice bought in @ £300 per hour for 15 weeks	£90,000
General admin support	£45,438
Accommodation	£3,000
Start-up costs equipment	£2,070
	£286,030

The above figures are provided as a guide. However for comparison I believe it is helpful to show the likely cost if the proposed Race Discrimination Law is approved.

In 1999 a Race Relations Working Party was established with the view to paving the way for the introduction of a Discrimination Law. In 2002 the States strongly supported the principle of a Race Discrimination Law (P.32/2002). It was proposed that the legislation would have wide-ranging implications for society in Jersey and for the States, both as an employer and as a provider of services. It would also support (when Regulations are brought into force) Jersey’s commitments to international standards, in particular the United Nations Convention on the Elimination of all forms of Racial Discrimination (CERD).

Six years on, the proposed legislation has not been drafted. However, on 5 February this year, the Minister for Home Affairs lodged R.10/2008: Draft Discrimination (Jersey) Law 200-: consultation report—White Paper. The Report sets out the background to proposals for the introduction of a Discrimination Law in Jersey.

Under Resource Implications it is estimated that the full year cost of the Discrimination (Jersey) Law, if approved, may be in the region of £250,000. In subsequent years it is anticipated that enforcement costs, and therefore annual cost, will increase as each set of Regulations introducing an additional attribute, such as sex or disability, is introduced, up to a maximum cost of £500,000 annually to implement the legislation once all phases are in place.

Funding to implement the Law will be subject to States approval in the 2009 Business Plan.

The manpower implications will include the appointment of a Discrimination Officer and Administrative Assistant. However, members of the Discrimination Panel will not fall to be classified as States employees and therefore will not affect headcount.

I welcome the introduction of Law and the funding being sought; however I submit that funding should be also be found to establish a body for Oversight of the Human Rights Law.

AMENDING ARTICLE 16 OF THE HUMAN RIGHTS (JERSEY) LAW 2000

As mentioned above, Article 16 of the Law places a requirement on Ministers when lodging au Greffe a *Projet de Loi*, and before the second reading of the *projet*, to make a statement to the effect that in their view the provisions of the *projet* are compatible with the Convention rights (a statement of compatibility); or make a statement to the effect that although he/she is unable to make a statement of compatibility, he/she nevertheless wishes the States to proceed with the *projet*.

The statement referred to above must be in writing and be published in such manner as the Minister making it considers appropriate. However, there is no requirement for the Minister to explain what Convention Articles are affected by the Law being proposed, and why in the Minister's view there is no significant risk that Convention rights may be violated. Also, if Ministers are unable to make statements of compatibility, who is responsible for scrutinising the proposed legislation?

I believe the absence of an explanation is unsatisfactory and a more detailed analysis should be provided. The provision of more details should enable Members to be better informed and more aware of the Human Right implications of the legislation being proposed.

The provision of more detailed analysis should not impose too great a burden on the Ministers because they are obligated to make a declaration of compatibility and will be in possession of the necessary information. Therefore there should not be any financial or manpower implications.

Memorandum submitted by Michael Dun, Jersey

I attach my 50 paragraphs memorandum which deals in general terms with the Bailiwicks of Jersey and Guernsey and the Isle of Man.

Since the three Islands are all distinct places with their own governments, systems of laws and peculiarities it is not possible to deal with each in any detail but more specific information is included for Jersey, where I live.

I would claim that the systems of government and administrative practices that have developed over centuries are substantially defective and that root and branch review and reform is necessary.

Apart from concerns about the Islands "tax haven activities" I believe that there are other substantial and wide ranging defects and shortcomings that can only be adequately examined by an outside body established and funded by the UK Government.

I also believe that a more general review is necessary of all the small British territories around the world and that a more coordinated and consistent management of all of these places and their peoples at Westminster is necessary.

The proper and democratic election of representatives from all the small British territories to Westminster and Brussels would seem to be long overdue and now essential in the 21st century. I have previously corresponded with Lord Bach on these and related matters and am disappointed that he has, like his many predecessors, been reluctant to meet with ordinary people in these Islands.

I would draw to the attention of the Committee the lack of enthusiasm by the government of Jersey for this Call for Evidence and that no efforts have been made to make it known to the residents here. I have contacted the Jersey Council of Ministers on this matter and not received even the courtesy of a reply. The Jersey Greffier has responded that "to publicise it on a Jersey Government website would imply that it is somehow being promoted by Jersey which it is not."

"If the UK Committee really wants to engage with the public and others in the Crown Dependencies it really needs to consider itself how best to do that—nothing would stop it advertising locally etc."

I hope that those sentiments, which reveal the true Jersey agenda, will be made known to the Members of the Committee.

1. Ever since the governments of the Channel Islands were separated from that of Normandy in 1204 their relationships with British people and the institutions of Britain have been uncertain.

2. That uncertainty has been exploited during 800 years by governments, merchants, businesses and individuals who have used the Islands in war and peace-time as havens for all manner of nefarious activities such as piracy, smuggling, trading with the enemy, tax or regulation avoidance, money laundering, wealth and asset concealment, or corporate false accounting through complex, artificial financial devices.

3. That this has been allowed to persist and develop over the centuries is not so much the fault of decent Channel Islanders themselves but more the neglect of nearby governments—notably that of Britain—for allowing the constitutional, political and economic ambiguities and anomalies to remain unchecked and reformed. Of course, the ruling elites in the Islands have often been complicit too.

4. There have been plenty of ideal opportunities since 1204 for London to intervene and initiate reforms or for Channel Islanders to request them—but always the resolve to cure the various problems have been overtaken or usurped by partisan interests, self-doubts, lethargy or international events.

5. Meanwhile, whilst the rest of the world has been constantly changing, Channel Islanders have been encouraged to believe that they are locked into an ever-lasting “frozen” relationship with a bogus constitutional order laid down by King John in 1215—a sort of Islands’ own Magna Carta—and that subsequent British history and the wishes of the British people are in some way irrelevant to them.

6. This myth of some substantial constitutional provenance has been compounded in recent years by the practice of referring to the Islands, together with the Isle of Man, as “Crown Dependencies” rather than UK Dependencies—and, thereby reinforcing the mistaken belief that Islanders enjoy a special relationship solely with the British Sovereign—rather than the British people as a whole or the political and governmental or other institutions that have evolved throughout British history.

7. Within the Channel Islands this notion of a unique “Royal” relationship is encouraged through the appointments of HM Lieutenant Governors, Bailiffs and other “Crown Officers” as some sort of elevated local royal squirearchy yet it is all the more laughable since Islanders make no financial contribution towards the upkeep of the very same British Royal Family or institutions from which any “royal” accreditation or status derives.

8. It is also laughable that Islanders are encouraged to place so much reliance upon ancient “Royal Charters” such as were granted in their thousands by perverse monarchs to gullible people in specific places for all sorts of dubious reasons. In most instances these bits of parchment have been consigned to the museums or the fire where they belong and they are not generally regarded now as everlasting, sacred, or legally enforceable texts.

9. Not everybody has been hoodwinked by the dubious charters either. In 1748 Capt Dow, the long suffering Revenue Officer serving in the Isle of Man pleaded to the Treasury in England:

“I humbly hope that now is the time for my honourable masters, and the good of Gt Britain to enquire into the privileges of this Island.”

A similar plea was made in 1770 by Capt James Major, a Channel Islands based Revenue Officer when he repeated the plea to the Treasury Lords:

“To look into the Islands’ Charters.”

More recently Lord Justice Templeman observed in the UK Court of Appeal in 1982 that:

“It also seems to me to be high time that the government looked at the privileges and immunities of the Channel Islands and the Isle of Man, which can be exploited for use as an umbrella for fraud and extensive tax avoidance and evasion.”

Now, in 2009, the call for such examination is a world-wide chorus.

10. The “Royal” branding is just a small part of the subsidy that the people of Britain provide to the often ungrateful Islands’ populations through the supply of many services at reduced, little or no cost.

It’s not just the financial unfairness either because the Royal and British labels afford the Islands an international status and credibility which implies to the unknowing that these little places are part of a “British Islands entity” where similar and consistent British standards might apply. This was noted in the 1973 Kilbrandon Report on the Constitution whose authors concluded that it was essential for institutions and practices to be similar throughout the British Islands—yet the Islands seem to have been allowed to fall ever further behind an acceptable international standard on such matters as Human Rights compliance and non-discrimination legislation or trading standards.

11. At the same time the Islands have been encouraged to tart up the image of their ever expanding “finance centres” as respectable and well regulated to satisfy OECD and IMF inspectors. Yet, whenever shortcomings are made evident (as they frequently are when an Icelandic Bank goes bust or yet another despot’s slush fund is found salted away or a British arms manufacturer’s bribes cache exposed), the defence “that it couldn’t happen now” or “the business will go abroad” is offered (and apparently accepted) to ward off criticism.

William Le Marchant, a convicted smuggler and HM Bailiff of Guernsey for much of the later 18th century made similar claims then. He was a great defender of the supposed “Rights and Immunities” of the Channel Islands—including King John’s bogus Charter.

12. Until the great economic crash of last year, the Islands seem to have been immune to effective scrutiny from Britain (although Britain is ultimately responsible for their good government) or any other external body or organisation. Whether public scrutiny might yet initiate effective governmental action has yet to be seen.

13. It is especially significant that whenever UK examinations have been initiated into the affairs of the Islands that they have traditionally been incompetently managed or left unfinished. Thus the handing of “Revestment” in the Isle of Man in the 18th century to combat that Island’s huge smuggling business was bungled and negotiations dragged on for several decades with the Lords Atholl before they were finally bought out with astronomical sums of British peoples’ money in the 1820’s. Yet, that Island has been allowed to revert to its old fashioned ways with a perverse “tax haven economy” that has been used by crooked financiers world-wide to defeat the proper policies of governments on a global scale since the 1960’s.

14. Other instances like the Jersey Prison Board Case or UK Treasury Inquiries into the Legal systems of Jersey and Guernsey in the 19th century remained inconclusive or uncompleted.

More recent examinations such as the Royal Commission on the Constitution c1973 and the 1998 Edwards Inquiry and Report on the Islands’ Financial Services were similarly defective. In 1973 Lord Crowther Hunt and Prof Peacock’s dissenting minority Report revealed that there never was a proper *examination of the economic effects of the finance industry on the Islands*, as the terms of reference required. Similarly Mr Edwards failed to consider *the economic and social well-being of the Islands themselves* as he was charged and he claimed to have been “*prevailed upon not to dwell upon that part of his terms of reference*” when I asked him.

15. All the Islands are very keen to claim ancient histories and long pedigrees for whatever constitutional arrangements that currently prevail. But, the historical record that has been presented has traditionally been defective and distorted and tailored to support a doubtful and misleading provenance. The records of the English Customs Service to be established in all the Islands from 1660 till 1805 are especially revealing because they expose the falsehoods and deceit that have underwritten the very same dubious constitutional arguments that are presented to this day. They are substantial looking edifices but largely without foundations.

16. The conclusions of Mr Michael Foot’s recent enquiries into aspects of the “off-shore” Finance Services business in British territories including The Channel Islands and the IOM are not yet published but it is significant that he appears to have made no effort to communicate with people in these places (or the overseas territories) who were not actually serving in government or the finance business itself. As is so often the case, he did not attempt to meet with the general public and to receive their observations and certainly his office showed no enthusiasm to communicate with me.

17. The basis of the Channel Islands relationships with the British people or with the peoples of the EU or the Commonwealth and organisations such as the UN and Council of Europe are, at every level uncertain or obscure. For example, the Islands are “deemed” to be members of the Commonwealth by virtue of their “dependency status” on the UK. Why aren’t the Islands members in their own right?

18. The existing Islands’ administrations are very keen to stress their “independent status” but they are not, so it would seem, very keen to contribute to organisations like the UN as others do. And, why should the UK government have to retain liability as “High Contracting Party” for the Islands before international tribunals when the Islands are such unwilling supporters of so many international aims and objectives?

Neither the UK Department of Justice nor the Jersey government can even produce a list of international obligations that currently apply to the Island.

19. The time is long overdue, in the interests of fairness to all parties for all these matters and more to be subjected to proper examination, discussion and reform so that clarity and certainty might be achieved

20. The most recent examination of Guernsey’s form of government, undertaken at the modest cost of just £60,000 by the Welsh Audit Office, has revealed a deplorable level of incompetence and a failure to achieve any of the six principles of corporate governance. If such an audit was carried out in Jersey the defects would probably reveal a level of incompetence similar to or worse than that in the Turks & Caicos Islands. And it is significant of course that these far away Caribbean islands are supposedly supervised by the same London government and it is becoming ever more apparent that long term neglect runs throughout the over-seeing of the small British territories world-wide.

21. That Scotland, Wales and Northern Ireland have all achieved substantially reformed government systems since 1973 whilst the Channel Islands remain preserved in historical aspic is a great cause for concern. All the more so since positive proposals for change—like that for a “Council of the Islands”—have been ignored as have such suggestions as the “Jersey Bill” (both revealed in the 1973 Kilbrandon Report on the Constitution).

22. This also is nothing new because the Channel Islands were invited to send representatives to serve in the London Parliament in the 16th and 17th centuries and these instructions were also ignored. The issue could well have been settled following the 2nd World War by Home Secretary Mr Chuter Ede’s reforming Committee, but as usual, the task was left only superficially considered.

23. The question whether the Islands should now elect representatives to Westminster and the EU deserve to be considered afresh—especially since the people of Gibraltar do participate in European elections (following the ECHR case of *Matthews v UK*) and the residents of other far more remote territories of other countries can participate fully in both their national and EU elections and assemblies.

24. The example of French Mayotte shows that reformed constitutional arrangements can still be made and that there is virtually no limit to the special terms and conditions that might be negotiated to suit all parties.

25. On the other hand, the unseemly recent efforts of (now retired) Jersey's Bailiff Sir Philip Bailhache, to promote Jersey's independence from the UK, is another cause for concern. Not least because his political interference as the Island's senior judge must be viewed as undesirable.

26. Of course, the conflicts inherent in the ancient office of HM Bailiff in both Guernsey and Jersey have been subject to much critical examination in recent years and that for Guernsey was considered by the European Court of Human Rights whilst the States of Jersey is currently charged to look at the roles of several of the Royal appointees. And, even tiny Sark has been obliged to initiate democratic reforms in line with ECHR and UK decisions after a little prompting from the Barclay Brothers.

27. Without attempting to describe the many defects in the system of HM appointments made outside of the Islands and of their various conflicting roles within them, the question of independence from the UK is without doubt one that needs to be considered properly. As does the Islands relationship with the EU, which has changed and grown so much since Protocol 3 under the Treaty of Rome was negotiated.

28. It is of course no coincidence that all the Islands are truly dependencies of the "Finance Industry" and that their exclusive and tiny legal professions are more or less mesmerised by it. It is significant that HM Bailiffs in the Channel Islands dominate the provision of legal services and the effective supervision and control of lawyers and the conduct of the courts. Yet, at the same time such Crown Officers are never shy of expressing their supportive views on the finance industry or on other matters of public interest or controversy needing inappropriate "royal" guidance.

29. In Guernsey it is still obligatory for lawyers to study at Caen University (Normandy) to learn about laws that have ceased to be used in France since before the French Revolution. In both Bailiwicks there has been no means of studying Islands' law within them except from ancient, often hand written texts in French, handed down within lawyers' offices. Modern text books on Channel Islands law (unless related to property or tax) are virtually non-existent. Commentaries on Channel Islands laws are usually antiquarian French volumes of great rarity and value and their contents more akin to rules for an obscure cult than comprehensible legal information. The Islands' lawyers have an exclusive monopoly in the provision of legal services in their respective Islands and legal aid is vaguely dispensed on a charitable basis, by the least experienced practitioners in Jersey. Jersey's CAB is prescribed by law from offering legal advice since this is reserved to Jersey lawyers.

In Guernsey a very basic Green Form legal aid system currently exists but is due to be replaced by a more regulated and certain Statutory system soon.

This autumn a course of study in Jersey law is being offered for the first time in the Islands' known history. It is open to anybody able to pay the fees but does not include a paper on Human Rights etc.

30. Channel Islands lawyers do not devote much time or energy in pursuing social causes or cases that do not lead to a substantial fee note.

31. Sufficient here to state that the entire legal and judicial system in all the Islands needs to be subjected to a thorough and critical examination by an appropriate outside body but the most certain single reform that needs to be made is an end to the monopoly status enjoyed by Islands' lawyers in the provision of legal services and advice.

32. Other offices, notably those of HM Lt Governors in all the Islands should also be consigned to the history books. There is no useful role for pensioned—off, exclusively male, military chiefs in the government or administration of these Islands and their purpose in the 21st century is yet another anachronism.

If a communication route between islanders and London is needed (and it most definitely is) then this can be achieved by much more certain, democratic and accessible means. Ideally, properly elected Westminster and EU Members of Parliament could use the buildings and staff numbers that now serve the arbitrarily appointed Lt Governors.

33. Or, the offices could be re-structured with suitable staff as a proper conduit for information to be transmitted between islanders and the governments at Westminster and Brussels, overseas organisation such as the UN and Council of Europe and somewhere where UK Ministers and others might consult with local residents directly and regularly.

34. In the continuing absence of elected MPs at Westminster, specifically designated Ministers need to be appointed with defined duties and responsibilities for all the Islands, and islanders should be enabled and encouraged to communicate with them.

Such Ministers should not be hidden away in the House of Lords—as is the absurd tradition—but fully answerable to questions before the Commons or directly from islanders.

35. The smallness of the Islands is traditionally offered as a defence of their outdated or quaint practices and it is true that the task of complying with so much EU legislation or international human rights or other standards is burdensome.

Yet, islanders do not want to be left behind larger territories so far as wealth and consumerism is concerned and they can hardly expect to be leading international finance centres whilst providing social and governmental services to residents only appropriate for primitive fishing and farming communities.

36. So, the administrations and governments in the Islands must achieve appropriate standards at local, national and international levels and this they clearly fail to do now. It would seem sensible to share the bureaucratic burden through closer alliances with Westminster and/or Brussels but if Islanders choose otherwise, then they cannot expect dispensations from international obligations that apply elsewhere.

37. The enjoyment of military defence, representation abroad, further education, access to specialist health services and skilled or scientific help have all been provided traditionally at subsidised rates to the Islands by UK taxpayers and there are many more financial imbalances too that need to be examined and addressed.

38. The recent re-adjustment of the reciprocal health service arrangements between the Islands and the UK has revealed the most selfish and unappreciative attitudes of Channel Islanders and their governments towards the benevolent UK taxpayers.

39. Similarly, the massive £multi-billions bail-out of British banking by British taxpayers received no contribution from Islanders. Yet, if the rescue had not been achieved the entire banking and finance system in the Islands would have collapsed. The substantial “Northern Rock” business based in Guernsey would certainly have ceased trading with resultant immense financial implications for that Island.

40. Even the provision of national BBC services is not a realistic reflection of licence fees collected on a per capita basis at rates determined in London. Yet, at the same time, the Corporation fails to provide adequate broadcasting services for three entirely separate jurisdictions with their own distinct systems of law and languages that should be offered. The fact that the Islands only enjoy the status of local regions within England—rather than nation status like Wales or Scotland—shows that the unfairnesses arising from the current constitutional arrangements are not all entirely one-sided.

41. Although the peoples of the UK have contributed an unfairly large financial subsidy to all the Islands for centuries and also provided less obvious support through National Trades Unions and registration, supervision and discipline facilities for many Professional people, all the Islands apply discriminatory housing and employment laws against people from the UK and the rest of the EU.

Such policies are not temporary short term expediences to deal with unforeseen circumstances but are rather deliberate and long term strategies to treat many thousands of working people as second class residents (the Guernsey and Jersey Housing laws have been imposed since 1949) and have served only to make social conditions worse. They are a disgrace and are not just domestic islands’ issues.

42. The lack of anti-discriminatory legislation in the Islands together with an official contemptuous disregard for international human rights standards is a long term scandal and is the direct result of the failure of the UK Government to ensure otherwise.

These are matters that I have complained of to Lord Bach and his predecessors and other office holders in the UK government over decades and in submissions and responses to the Treasury and FCO Human Rights Annual Reports—but I might as well not have bothered.

43. It is made evident time and time again that examination by external bodies is the only reliable means to assess institutions and practices within the Islands.

Interventions by such as the UK Police and Prisons Inspectorates are invaluable and could not be achieved locally but are not guaranteed to protect and maintain the standards of services provided. Substantial defects including potential major human rights violations have been revealed by two recent Prison Service inspections in Jersey and the Chief Officer of the States of Jersey Police is currently suspended from office for reasons that have not been made public. Other important public employees such as the Senior Magistrate designate and Hospital Consultants are also currently suspended from their duties. There are substantial complaints against many aspects of Jersey’s government that are too many and too complex to describe in this Memorandum but the scandal of the long term child abuse allegations at Haut De La Garenne and other Jersey care homes needs to be at least referred to as does the planned NSPCC role.

44. The government and administration of Jersey needs a critical root and branch examination by an appropriate external body as a matter of urgency. The longest serving member of the States of Jersey aka “Father of the House—Senator Stuart Syvret—has described the Assembly as composed of “gangsters and half-wits.”

45. For many people the Channel Islands and the Isle of Man are known mostly for their pretty cows, “Royal” potatoes, tomatoes, cats without tails and kippers. But rather as Switzerland is no longer best known for cuckoo clocks, the Islands should be looked at critically and as part of a wholesale review of all the small British territories around the world as soon as possible.

46. In this Memorandum I have alluded to the need for much improved facilities for dialogue between the government in London and other British territories around the world, including the so called “Crown Dependencies.”

In fact, research through historic records indicates that the dialogue was much better in Colonial times when all communications were carried by sailing ship. Then the London administration was kept much more fully aware of the management of the small territories and now with all the technological wonders that are available, this is not an acceptable regression. There is no reason at all why the residents of the furthest flung islands could not be in direct contact, on a regular basis, with relevant government departments or Ministers or elected representatives in London or Brussels and vice versa—at very minimal cost.

47. There are already many UK All Party Parliamentary Groups that include the Channel Islands, the Isle of Man and other British territories within their remit but apart from providing an opportunity for some MPs to enjoy “overseas” jollies, their useful purpose is not at all clear. They certainly have very little useful purpose so far as I can determine in promoting the needs of residents of Jersey or Guernsey.

There are also organisation at Westminster and Brussels which claim to provide forums for the residents of overseas territories to communicate with one another through their European offices. But it all seems very low key and politically ineffective.

48. It would seem to be wholly desirable to establish, at least a UK Select Committee with specific responsibilities for the Channel Islands and the IOM or a larger Committee with responsibility for all of the Dependencies and Overseas territories together. Since staff are already employed in London to deal with matters arising in the small territories and elected representatives could easily replace imposed island “governors” then any increased costs should be minimal.

49. It is noted that Jersey Finance Ltd has already been encouraged to open overseas “Jersey offices” in such places as Hong Kong and to develop an “international identity”. Since the promotion of the finance industry is inseparable from the political and economic ideology of the current Jersey government this is a part of a very worrying trend which has implications for the relationship with the UK and the declared policies and wishes of British people as a whole. If Jersey is to have its own “foreign policy”—as is now being discussed—then a clear separation from the UK must be inevitable. Urgent clarification of this matter is essential—especially since other small British territories might also seek to promote their own and diverse “foreign” policies in the near future.

50. The final court of appeal for certain matters arising in the small British territories historically lies to the Privy Council or the Court of the Privy Council.

This is an obscure and uncertain process, often cumbersome and likely to be too expensive for many litigants. There is very little published information on this area of specialist law and reforms have recently been introduced which may affect the residents of the small territories.

If an appeal system remote from the small territories is to be continued then it needs to be made much more accessible and understandable, using modern technology and when necessary, travelling judges.

22 September 2009

Memorandum submitted by the Health Food Manufacturers’ Association (HFMA)

1. EXECUTIVE SUMMARY

1.1 The HFMA’s submission focuses on point two of the call for evidence for the Select Committee’s inquiry. This point asked for views on the role of the Ministry of Justice in managing the United Kingdom’s relationship with the Crown Dependencies including inter-departmental liaison and coordination. Our submission illustrates a particular problem that members of the HFMA have faced because of the nature of the UK’s relationship with the Channel Islands. These problems have occurred in large part due to the ambiguity in interpretation of Protocol 3 of the UK’s Accession Treaty to the European Union.

1.2 HFMA Member companies’ trade and UK consumer safety is being undermined by companies based in the Channel Islands that sell health products containing ingredients and/or making claims that would be illegal if the products would be placed on the UK market directly. In addition, the industry in the Channel Islands is able to undercut prices of responsible UK businesses by taking advantage of Low Value Consignment Relief.

1.3 This ongoing illegal and unfair competition would be halted if the Channel Islands would implement the necessary legislation, as this would result in EU standards being applicable on the islands as well. The Ministry of Justice, as the UK department responsible for managing the UK’s relationship with the Crown Dependencies, should take a lead in ensuring that the appropriate steps are taken to ensure legal and fair competition from the islands. This goal could be reached if the Ministry takes the appropriate steps to ensure that the necessary legislation is implemented, and ensures that sufficient resources are allocated for effective enforcement, by way of coordinating UK support from UK regulatory bodies and agencies and continuing pressure on the Channel Island authorities.

2. INTRODUCTION

2.1 The Health Food Manufacturers' Association (HFMA) is the lead trade association in the UK for manufacturers and suppliers of natural health products including food supplements, herbal products and health foods. We work to represent the interests of the UK natural health products industry at all levels of the legislative, regulatory and Parliamentary process. Currently we have around 120 members from across the UK.

2.2 Our submission relates primarily to point two of the call for evidence for this inquiry, which asked for views on the role of the Ministry of Justice in managing the United Kingdom's relationship with the Crown Dependencies including inter-departmental liaison and coordination. The submission illustrates a particular problem that members of the HFMA have faced because of the nature of the UK's relationship with the Channel Islands. These problems have occurred in large part due to the ambiguity in interpretation of Protocol 3 of the UK's Accession Treaty to the European Union.

3. THE CURRENT SITUATION

3.1 In the UK, food supplements, herbal medicines and other health food products are covered by a number of Directives and Regulations stemming from the European Union, including the Food Supplements Directive (FSD), the Nutrition and Health Claims Regulation (NHCR), the Traditional Herbal Medicinal Products Directive (THMPD), and the Medicines Directive. Due to the reasons outlined below, the same rules do not apply to the Channel Islands.

3.2 The Channel Islands are neither fully in the UK, nor fully in the EU. The applicability of certain UK or EU legislation to the Channel Islands is governed by Protocol 3 of the UK Accession Treaty to the European Community, which provides for free movement of goods and trade between the islands and the Member States. Therefore, legislation intended to ensure the smooth running of the internal market, including the legislation mentioned above, should have to be implemented by the Channel Islands. However, there has been disagreement over whether or not Protocol 3 covers legislation such as the FSD and the NHCR, although both the Ministry of Justice and the islands have agreed to take a pragmatic approach and the islands have consequently decided to implement the FSD and NHCR. To date, this implementation has not taken place.

3.3 Additionally, products sold from the Channel Islands are able to benefit from Low Value Consignment Relief (LVCR), which means that VAT is not payable on packages which are less than £18 in value.

3.4 Many companies have now taken advantage of this situation and set up business in the Channel Islands, selling health food products directly to UK consumers via mail order catalogues or the internet. These mail order catalogues are often delivered by Royal Mail, and we have taken steps to engage with them on this issue.

3.5 This ongoing situation has led to a twofold problem:

- (i) Companies based in the Channel Islands are able to market and sell products to UK consumers which contain illegal ingredients, as well as making claims about the products which would be illegal were the products to be directly placed on the market in the UK. These include medicinal claims (such as product X may cure cancer or heart disease) on food supplements and herbal products, which are illegal according to EU medicines legislation, as well as the Medicines (Advertising) Regulations 1994 here in the UK. Examples of the claims used can be found in Appendix 1. The HFMA have also submitted a number of complaints to the Advertising Standards Authority about such adverts. A list of successful adjudications can be found in Appendix 2. However, due to the fact that the companies are based in the Channel Islands, enforcement action is extremely difficult, even if the UK law is being broken.
- (ii) The industry in the Channel Islands, which is currently worth over £70 million per annum, takes advantage of LVCR to avoid paying VAT. Because they are able to undercut responsible UK suppliers, this has seriously undermined the profitability of the UK industry, and diverted substantial revenues from the Treasury. It does not seem fair that companies which are making claims and using ingredients illegal according to UK law are able to benefit from such a situation, which gives them an advantage over responsible UK companies.

4. THE CONSEQUENCES OF THE CURRENT SITUATION

4.1 There are numerous consequences resulting from the current situation.

4.2 The sale of products containing illegal ingredients including melatonin (an unlicensed drug in the UK), DHEA (a class C drug) and kava kava (banned in the UK in 2003 due to fears about liver toxicity) presents a potentially serious risk to consumer safety.

4.3 The fact that companies are able to make misleading, medicinal claims about their products means that vulnerable consumers are being misled, and may even be discouraged from seeking necessary medical attention for ailments ranging from impotence to arthritis, to cancer.

4.4 As well as consumers, this situation also has serious consequences for responsible UK businesses. The products sold by the companies based in the Channel Islands may well be more attractive to consumers due to the claims that companies are able to make about them, the ingredients they are able to use, and that fact that they can be sold at a lower price because they are able to benefit from LVCR. UK businesses cannot compete against such companies. Many have seen falling sales and some even the possibility of going out of business.

5. THE ROLE OF THE MINISTRY OF JUSTICE

5.1 The Ministry of Justice is the main channel of communication between the UK government and the Channel Islands. They process legislation from Jersey, Guernsey and the Isle of Man for royal assent and consult with the islands on extending UK legislation in each jurisdiction.

5.2 In the case of health food products, the Ministry of Justice has acknowledged that the Channel Islands should implement the relevant legislation, in particular the FSD, the NHCR and the Medicines Directive. They have been willing to work with the HFMA on this issue, and have met with us on several occasions to discuss the progress in implementation and other concerns such as enforcement of the legislation once it is implemented, and ways that the problem of unfair competition can be dealt with in the meantime. They have also spoken directly to the authorities in Jersey and Guernsey about this issue and it was raised in meetings when Lord Bach, the responsible Minister, visited the islands in early 2009. Since then Ministry officials have been pressing the islands for updates.

5.3 However, to date, most of the relevant legislation has not been implemented in the Channel Islands. The Guernsey Medicines Law, which implements the Medicines Directive, has achieved Royal Assent, and is expected to come into force in October 2009. The Medicines and Healthcare Products Regulatory Agency (MHRA) have stated that the Medicines Law is not fully consistent with the Medicines Directive; however the MHRA is helping to draft secondary legislation which they hope will fix some of the loopholes.

5.4 Discussions on the implementation of the Medicines Directive in Jersey were opened in February 2009, and are ongoing. There is a medicines law already in place which makes it illegal to make medicinal claims on unauthorised products or distribute unauthorised medicines, but it is difficult to enforce in practice and only targets Jersey based suppliers and advertisers.

5.5 Neither the NHCR nor the FSD have been implemented in either Jersey or Guernsey. In May 2009, after Dr Brian Iddon MP held a debate on this issue in Westminster Hall, Health Minister Phil Hope stated publicly that the Government was asking for a timetable from Jersey on the implementation of these two pieces of legislation, and an update from Guernsey on their intentions.

5.6 Initially, Jersey had pledged to implement both the FSD and the NHCR on the back of a review of their Food Hygiene Law, with drafting due to begin in 2010. However, this target has since been delayed and the implementation work has not yet been included in their work programmes.

5.7 As for Guernsey, it recently confirmed that work has begun on investigating the implementation of the FSD and NHCR, but a clear timetable for implementation has still not been provided.

6. ENFORCEMENT

6.1 There is also a concern that, once this legislation is implemented in the Channel Islands, there will be problems with ensuring that it is properly enforced. This is largely due to a lack of resources within Jersey and Guernsey, which are both small jurisdictions without a great deal of time and staff resource.

6.2 If the Channel Islands are unable to effectively enforce legislation then many companies will be able to continue selling products to UK consumers that would be illegal if sold directly in the UK. If this happens, the unfair and illegal competition will remain a problem, to the detriment of UK consumers and businesses.

6.3 Therefore, the Ministry of Justice, as the UK Government Department with responsibility for managing the UK's relationship with the Channel Islands, should coordinate UK action to assist Jersey and Guernsey in enforcing this legislation effectively. It is likely that bodies including the Food Standards Agency (FSA), the MHRA and Trading Standards will need to provide Jersey and Guernsey with both advice and practical assistance. These bodies are all already in contact with both Jersey and Guernsey, providing input into the process of drafting and implementing legislation, and providing assistance to ensure that what food and medicines legislation already exists is enforced. It will be vital to ensure that this continues once the legislation is in place.

7. FUTURE DEVELOPMENTS

7.1 The problems caused to UK businesses by the lack of implementation of the necessary legislation in Jersey and Guernsey are set to be exacerbated by future developments. In relation to the FSD, the European Commission is preparing to propose, most likely by the end of 2009, maximum permitted levels for vitamins and minerals in food supplements. So far, the indications are that these levels will be set as disproportionately low levels, meaning a number of health food products that are currently very popular will no longer be able

to be sold on the UK market. Additionally, a number of transitional periods allowed for in the NHCR are due to expire in early 2010, which will further reduce the claims that UK suppliers are able to make about their products.

7.2 The net result of these developments is likely to be that the UK health trade will shift increasingly to the Channel Islands, where, due to the fact that neither the FSD nor the NHCR have been implemented, companies will be able to continue to sell higher potency products and make far stronger claims about these products, making them much more attractive to consumers. This will only disadvantage responsible UK manufacturers further, while increasing concerns over consumer protection.

7.3 Therefore, it is becoming increasingly important that both Jersey and Guernsey take steps towards implementing both the NHCR and the FSD sooner rather than later.

8. WHAT SHOULD THE MINISTRY OF JUSTICE BE DOING?

8.1 As noted above, the Ministry of Justice has worked with the HFMA in their efforts to ensure that the problem of unfair competition is effectively dealt with. However, to date progress towards implementation has been very slow, and it is important that work on this problem continues. In particular:

- The Ministry of Justice needs to continue to exert pressure from a high-level on the authorities in Jersey and Guernsey to ensure that the relevant legislation, particularly the FSD and the NHCR, are implemented as soon as is practical.
- Once the implementation is enforced, the Ministry needs to coordinate efforts to ensure that there are sufficient resources so that it can be enforced effectively.
- This will make it necessary for the Ministry of Justice to work effectively with other departments and agencies, such as the Department of Health, the MHRA, the Food Standards Agency, and Royal Mail, to ensure that the legislation is implemented as soon as possible.
- Until legislation is in place in the Channel Islands, the Ministry needs to support other avenues that can be used to deal with the problem, coordinating relevant agencies and departments where necessary.

8.2 Ultimately, the unfair and illegal competition provided by companies based in the Channel Islands is bad for both UK consumers and law-abiding UK businesses. The Ministry of Justice, as the UK Department responsible for managing the UK's relationship with the Crown Dependencies, should take a lead in ensuring that the appropriate steps are taken. Legislation needs to be implemented, sufficient resources for effective enforcement need to be allocated, and, until the necessary legislation is in place, appropriate action needs to be taken to minimise the damage caused to UK consumers and businesses.

January 2010

APPENDIX 1

SOME RECENT EXAMPLES OF UNFAIR AND ILLEGAL CLAIMS

<i>Product/Claim</i>	<i>Source</i>
Prostboost “a very effective ally in the fight against prostate cancer, by inhibiting tumour formation and, where already present, slow spreading”	Living and Loving mailing, September 2008 (ASA adjudication received in March 2009)
Hi Strength Lycopene “can help a range of conditions such as heart disease, prostate cancer, other cancers, and some other serious diseases”	Wellform Direct Mailing, September 2008 (ASA adjudication received in January 2009)
Ginkgo Biloba “A preliminary study . . . suggests leaf extracts of the Ginkgo Biloba tree may help prevent Alzheimer’s disease”	Simply Supplements catalogue, Summer 2008 (ASA adjudication received in January 2009)
Rosehip “offers great relief from the pain caused by arthritis and osteoarthritis—without the side effects of anti-inflammatory drugs”	Prime Health Direct mailing, June 2008 (ASA adjudication received in January 2009)

COMMENTS

EU/UK legislation defines a “medicinal product” as:

“Any substance or combination of substances presented as having properties for treating or preventing disease in human beings;

Any substance or combination of substances which may be used in or administered to human beings either with a view to restoring, correcting or modifying physiological functions by exerting a pharmacological, immunological or metabolic action, or to making a medical diagnosis”

Food supplements, containing such familiar substances as vitamins, amino acids or minerals, are generally subject to food safety and food labelling legislation rather than medicines control unless they contain a pharmacologically active substance or make medicinal claims (eg claims to treat or prevent disease, or to interfere with the normal operation of a physiological function of the human body).

The ultimate decision of what is a medicinal product rests with the MHRA: hence the borderline for food supplements is, in practice, “policed” by the MHRA rather than food law enforcement agencies. In making a decision, the MHRA considers each individual product on its merits and any information which may have a bearing on the product’s status, for example, the claims made for the product, the pharmacological properties of the ingredients, whether there are any similar licensed products on the market, and how it is presented to the public through labelling, packaging, promotional literature and advertisements.

The example claims shown above are clearly (and grossly) medicinal.

Examples of the sorts of claims used on food supplements which are accepted as not being medicinal are:

“Omega-3 fatty acids may help maintain a healthy heart”

“Antioxidant nutrients help protect the tissues against the damaging effects of excess free radicals”

“Calcium is essential for helping maintain strong bones”

“Vitamin C helps support a healthy immune system”

“B vitamins are involved in the release of energy from foods”

“X and Y may help maintain hormone balance”

New EU legislation—the Nutritional and Health Claims Regulation which entered into force in January 2007—requires all health claims to have prior approval from the EU authorities.

EXAMPLES OF ILLEGAL PRODUCTS

<i>Product/Claim</i>	<i>Source</i>
Melatonin “anti-ageing hormone”	Prime Health Direct brochure, October 2008
Kava Kava “anxiety, nerves, insomnia, depression”	Wellform Direct mailing, September 2008

COMMENTS

In 2002–03, the MHRA & Food Standards Agency created parallel medicines and food legislation to prohibit the sale of and import from outside the UK of the herb Kava kava following concerns about liver toxicity.

Melatonin is classified as an unlicensed medicine.

APPENDIX 2

LIST OF SUCCESSFUL ADVERTISING STANDARDS AUTHORITIES ADJUDICATIONS

<i>Name of the Company</i>	<i>Company Address</i>	<i>Delivered by</i>	<i>ASA correspondence</i>
Simply Supplements, Guernsey	PO Box 204, Guernsey, GY1 3NB	Royal Mail	Adjudication published on 16 January 2008 http://www.asa.org.uk/asa/adjudications/Public/TF_ADJ_43828.htm
(Also known as Pinnacle Health Ltd)	PO Box 204, Guernsey, GY1 3NB	Royal Mail	Adjudication published on 7 January 2009. http://www.asa.org.uk/asa/adjudications/Public/TF_ADJ_45545.htm
Healthy for Life, Jersey	PO Box 216, Jersey, JE4 9SE	Royal Mail	Adjudication published on 2 July 2008 http://www.asa.org.uk/asa/adjudications/Public/TF_ADJ_44611.htm
	PO Box 216, Jersey, JE4 9SE	Royal Mail	Adjudication published 10 September 2008 http://www.asa.org.uk/asa/adjudications/Public/TF_ADJ_44969.htm
Life Healthcare, Jersey	Freepost JE723 St Helier Jersey JE1 1AF	TNT	Adjudication published on 4 June 2008 http://www.asa.org.uk/asa/adjudications/Public/TF_ADJ_44498.htm
	Freepost JE723 St Helier Jersey JE1 1AF	TNT	Adjudication published on 4 June 2008 http://www.asa.org.uk/asa/adjudications/Public/TF_ADJ_44498.htm
ZipVit, UK	ZipVit, The Towers Business Park, Rugeley, Staffordshire, WS15 1UX	Royal Mail	13 June—Complaint was informally resolved, with ZipVit promising not to repeat the claims.

<i>Name of the Company</i>	<i>Company Address</i>	<i>Delivered by</i>	<i>ASA correspondence</i>
Healthspan Ltd, Guernsey	Healthspan, PO BOX 425, The Grange, The Peter Port, GY1 3BT	Royal Mail	Adjudication published 12 November 2008 http://www.asa.org.uk/asa/adjudications/Public/TF_ADJ_45305.htm
Woods Supplements, Guernsey/ Healthy Marketing Ltd	Woods Supplements, PO BOX 9600, Guernsey, Channel Islands, GY9 3LY	Royal Mail	Adjudication published 15 October 2008 http://www.asa.org.uk/asa/adjudications/Public/TF_ADJ_45163.htm
Prime Health Direct	Prime Health Direct Limited, FREEPOST, Guernsey, GY1 5SS, Channel Islands UK	Royal Mail	Adjudication published 14 January 2009 http://www.asa.org.uk/asa/adjudications/Public/TF_ADJ_45587.htm
Stirling Health	Stirling Health Ltd, PO Box 622 St Peter Port Guernsey GY1 4PZ Or Stirling Health Ltd, FREEPOST JE759, St Helier, Jersey, JE1 1AF	Guernsey Post, 2nd Class ?	ASA adjudication published 10 December 2008 http://www.asa.org.uk/asa/adjudications/Public/TF_ADJ_45450.htm
Living and Loving	Living and Loving, PO Box 634, Jersey, JE4 8YP	Royal Mail	Adjudication published on 25 March 2009. http://www.asa.org.uk/asa/adjudications/Public/TF_ADJ_45979.htm
Wellform Direct	Wellform, PO Box 134, Jersey, JE4 9QY	Royal Mail	Adjudication published on 14 January 2009. http://www.asa.org.uk/asa/adjudications/Public/TF_ADJ_45616.htm

Annex

The Channel Islands: Illegal and Unfair Competition

A BRIEFING NOTE FOR POLICY MAKERS FROM THE HEALTH FOOD MANUFACTURERS' ASSOCIATION

The Problem

The UK specialist health food industry is being undermined by illegal and unfair competition from businesses based in the Channel Islands.

The problem is twofold:

- (i) Companies based in the Channel Islands market and sell products that contain illegal ingredients and/or make illegal claims, including medicinal claims (eg product X may cure cancer or heart disease), which are illegal according to EU medicines legislation, as well as the Medicines (Advertising) Regulations (1994) here in the UK, and thus potentially jeopardise consumer safety.
- (ii) This industry in the Channel Islands, currently worth over £70million per annum, uses the low value consignment relief (LVCR) to avoid paying VAT seriously undermining the profitability of responsible UK suppliers (both retail and mail order) and diverting substantial revenues from the Treasury.

The Background

The Channel Islands' (CIs) unusual status of crown dependencies means that they are not fully in the UK, nor are they in the EU. The applicability of certain UK or EU legislation to the Islands is governed by the Protocol 3 of the UK's treaty of accession to the European Community, which provides for free movement of goods and trade between the islands and the member states.

Illegal claims and ingredients

In recent years, a number of operators, whilst targeting the UK market, have located in CI jurisdictions to take advantage of the obscure legal status that these territories have. Virtually all CI operators make medicinal claims for (unlicensed) food supplements and herbal products; some make wildly exaggerated claims for “miracle cures” for serious conditions; and some offer substances ostensibly as food supplements that are classified as medicinal in the UK, or containing other illegal ingredients. One effect is that members of the public who are ill, risk being deflected from seeking appropriate medical advice. Furthermore, CI operators escape the need for compliance with standards similar to those contained within UK food safety or pharmaceutical legislation.

Only recently the CIs adopted the necessary legislation to deal with illegal medicinal claims. However, it remains to be seen how effective enforcement will be not least because of the lack of resources. The Medicines and Healthcare products Regulatory Agency (MHRA) and Trading Standards Officers have power to take steps against UK operators contravening the rules on “promotional health claims” but they have no immediate jurisdiction in the Channel Islands.

Tax avoidance

There is already widespread concern about the inequities of low value consignment relief (LVCR) for Channel Island companies to avoid paying VAT on deliveries valued at less than £18. This is sometimes compounded by operators splitting parcels for orders in excess of £18. Many CI businesses also contravene the “contract for purchase” requirements for purchases from an off-shore vendor. The rapid growth and predicted future growth of trade from the CI in relevant sectors will exacerbate the loss of VAT revenue to the Treasury (official estimates predict a rise in lost revenue to £200 million pa).

The freedom to make illegal medicinal claims with impunity combined with the price advantage generated by the LVCR has led to CI operators capturing a substantial share of the UK food supplements market (audited value £362 million in 2005). There are no significant barriers to further growth and without effective intervention it is inevitable that the CI share of the market will continue to increase, with responsible EU and UK operators unable to compete on a level playing field.

Recent developments

The European Union has recently introduced a raft of directives and regulations imposing further restrictions on the sector, including the Food Supplements Directive and the Regulation on Nutrition and Health Claims made on foods, which the responsible UK operators have complied with.

The UK Government’s view has previously been that the CIs are responsible for their own regulation of activities relating to medicinal products. However, in the course of the HFMA campaign to highlight the problem with illegal and unfair competition, the Government has changed their view. In May 2007, a Minister acknowledged that:

“The United Kingdom view is that the Nutrition and Health Claims Regulation, the Food Supplements Directive and the Medicines Directive remove barriers to the free movement of goods with the European Union... [I]t is our view that the directives should apply to the Channel Islands under Protocol 3.” [House of Lords, 23 May 2007.]

The UK Government must now do everything in its powers to encourage the authorities in the CIs to recognise their obligations and effectively implement the above regulations without further delay.

The UK Government and officials in the relevant institutions should also work with other UK authorities and businesses including the postal authorities, advertising regulators, periodical publishers, Her Majesty’s Revenue and Customs and others to ensure that every avenue is explored to protect UK consumers and the responsible UK health food trade.

Current status of legislation in Guernsey

Guernsey recently adopted a Commencement and Amendment Ordinance that intends to implement the Medicines Directive 2001/83/EC, through their primary legislation, Medicines (Human and Veterinary) (Bailiwick of Guernsey) Law (2008). By adopting the Commencement act, large parts of the Medicines Law have become applicable since 1 October 2009.

So far, Guernsey has not made a great deal of progress in implementing the Food Supplements Directive or the Nutrition and Health Claims Regulation, as they were concentrating on the Medicines Law. Guernsey did recently confirm that the Board of the Health and Social Services Department have directed their officials to investigate the implementation of this legislation, which is a positive step forward, although so far no firm commitments towards an actual timetable for drafting the legislation have been made. Now that the requirements of the EC Medicines Law have been enacted, Guernsey will be able to focus fully on the implementation of these essential pieces of law.

Current status of legislation in Jersey

Originally, both the Food Supplements Directive and the Nutrition and Health Claims Regulation were meant to be implemented in Jersey on the back of the implementation of the Food Safety Law in 2010. However, Jersey has informed us that they have delayed that target and that they have not included the Food Supplements Directive and the Nutrition and Health Claims Regulation in the work programme for the implementation of the Food Safety Law.

This delay is highly frustrating, especially as implementation of this legislation by both Jersey and Guernsey Islands is becoming even more pressing due to the forthcoming proposal for Maximum Permitted Levels for vitamins and minerals allowed in food, as set under Article 5 of the Food Supplements Directive. In addition, the expiration of some transition periods in the Nutrition and Health Claims Regulation puts additional pressure on UK companies who, unlike their CI counterparts, will no longer be able to make certain claims.

The fact that Europe is making further progress with the Food Supplements Directive and the Nutrition and Health Claims Regulation makes it even more important that Jersey and Guernsey make progress with implementing this legislation and do not allow it to fall off the agenda.

The UK Government must now ensure that it receives a timetable from Jersey on the implementation of the Food Supplements Directive and the Nutrition and Health Claims Regulation, as well as an update from Guernsey with regards to their intentions to implement this legislation, as soon as possible.

The HFMA

The HFMA (Health Food Manufacturers' Association) is a non-profit organisation that was founded in 1965 to represent manufacturers and suppliers of specialist health products in the UK. Our c120 member companies include many suppliers of specialist food supplements and health foods. The HFMA operates long-standing codes of practice, including a Code of Advertising Practice that is recognised by the MHRA, to ensure that member companies adhere to high standards and offer good quality, safe products supported by responsible, lawful information, to UK consumers.

The issue of unfair and illegal competition from the Channel Islands is identified by our members as one of the most important issues impacting adversely upon their businesses.

January 2010

Memorandum submitted by the Isle of Man Government

EXECUTIVE SUMMARY

1. The Isle of Man is a Dependency of the British Crown. Its formal constitutional/legal relationship with the United Kingdom is administered, on behalf of the Crown, by the Ministry of Justice (MoJ).

2. Relations between the Isle of Man and the UK are generally good, and a practical and positive working relationship is maintained with the MoJ on a wide range of issues, which can differ significantly in their complexity and importance.

3. The main points of this submission are:

- The Isle of Man favours the retention of the MoJ as the point of contact in the UK Government because it is involved with the constitutional development of the UK, has an effective overview of all other UK Government Departments and is responsible for many of the functions that are relevant to the Isle of Man
- The Isle of Man would welcome a closer working relationship with the UK, based on the existing constitutional relationship, and building on the framework for developing the international identity of the Isle of Man, and makes a number of recommendations as to how this might be achieved.
- The Isle of Man wishes to enhance its international profile, to develop further opportunities for it to represent itself, or alternatively, to provide expert support for the UK when it is representing the Island internationally.

INTRODUCTION*Political and Legal Background*

4. The Isle of Man (IOM) is a self-governing British Crown Dependency with the Queen as Head of State. It has its own government and laws, and its ancient parliament, Tynwald, is recognised as the oldest continuous parliament in the world. The UK Government, on behalf of the Crown, is ultimately responsible for the Island's defence and international relations. In recent years, reflecting significant differences in UK and Manx law and policies, the Isle of Man has—in agreement with the UK and its international

partners¹⁶—represented its own interests internationally, notably by concluding a significant number of bilateral tax agreements. The Isle of Man is financially autonomous and receives no financial assistance from either the UK or the EU. The Isle of Man is not represented in the UK or European Parliaments.

5. The Island’s relationship with the EU is set out in Protocol 3 to the UK’s Act of Accession (1972), and allows for free trade in agricultural and manufactured products between the IOM and EU. In essence, the Isle of Man is outside the EU except for EC law and policy on customs matters and the free movement of goods. In all other matters, including tax and financial services, the Isle of Man is in the position of a “third country” or non-Member State.

Economy

6. With only a limited range of economic levers at its disposal, the IOM has fought against the natural economic disadvantages associated with its small size, geographical location and lack of natural resources. Using its legislative and fiscal autonomy the IOM has built a strong, stable economy and political system for the benefit of the Manx people. Traditional industries of farming, fishing and tourism have been joined by dynamic new sectors such as financial services, e-commerce, film, shipping, aviation, high-tech manufacturing (especially in aerospace) and space commerce to create a diverse economy with an international base.

7. Key factors in the IOM’s economic development include the Island’s political stability combined with a commitment to growth, its physical ability to accommodate more people, the availability of a wide range of professional skills, a legal system based on English common law, cost advantages, extensive transport links and first class telecommunications systems—all set within a community which provides an excellent quality of life in terms of education, social care, short commuting distances, housing and recreation facilities.

8. Given their geographical and historical proximity, a strong business culture is shared between the Island and UK businesses. As a result, the Island has succeeded over recent years in becoming a gateway to the City of London in ways which are highly beneficial both to the Island and the UK. There is a high degree of economic inter-dependence between the Isle of Man and the United Kingdom. For example:

- The majority of goods purchased in the Isle of Man are manufactured and supplied by off-Island (usually UK-based) companies.
- As with individuals and companies, Isle of Man Government purchases goods and services from the UK.
- Many businesses in the Isle of Man—including major retailers, construction companies and providers of financial services—are (profitable parts) of larger UK companies.

International standards

9. The Isle of Man is committed to delivering effective regulation and it complies fully with international standards. The Island has established a reputation for being internationally responsible and economically competitive. That the Isle of Man holds AAA accreditation from Moody’s and Standard & Poor’s is testimony to this fact. Under the auspices of the Organisation for Economic Co-operation and Development (“OECD”), it is at the forefront of the development by small jurisdictions of a network of Tax Information Exchange Agreements (“TIEAs”). It has a transparent tax code, and does not have banking secrecy laws. It has consistently shown itself to be a co-operative jurisdiction in terms of the international fight against criminal activity.

Constitutional development

10. Tynwald has stated that it would not wish to alter the constitutional status of the Island; rather that it would wish to develop the Island’s autonomy within this framework.

11. The signing of an international identity framework between the UK and Isle of Man Governments in May 2007 was an important step forward in pursuit of this aim. This recognised that “*the Isle of Man has an international identity which is different from that of the UK*”, and that “*the UK recognises that the Isle of Man is a long-standing, small democracy and supports the principle of the Isle of Man further developing its international identity*”. This framework, reinforcing the Isle of Man’s separate status within the context of its constitutional relationship with the UK, is a cornerstone of the Island’s strategy to continue to develop its national identity.

12. The IOM’s determination to promote its identity and protect its reputation has led it to adopt policies and priorities which do not always mirror those of the UK. Improving the management of this position is the basis of this submission.

¹⁶ The Isle of Man has, for example, signed agreements giving effect to the EC’s Taxation of Savings Interests Directive with all 27 Member States. Likewise, it has—so far—negotiated and signed 15 TIEAs with partner countries inside and outside the EU.

 RESPONSES TO THE COMMITTEE'S QUESTIONS
(i) *How, in practice, the UK Government represents the Crown Dependencies internationally*

13. The UK's international representation of the Isle of Man is not, generally, differentiated from its own. Indeed it is only when there is a divergence of interests, or there is a specific requirement of the Island, that the nature of that representation is brought into focus. It is at this point—when it is most needed—that in practice support from the UK might not be as robust as it should be, and the Isle of Man finds itself in the intractable position of not being able to represent itself, but also not being able to gain the full support of its “representative”.

The key elements of the UK's international representation on behalf of the IOM are—

Diplomatic/Political relations with other countries

14. As a non-sovereign dependency of the Crown, the Isle of Man is without an international legal personality and so must rely on the UK to represent and defend its interests and reputation internationally. It is crucial to the Island that this representation is meaningful and that the issues being presented on its behalf, and frequently without the IOM's presence, are fully understood, so that the IOM's position can be fairly and accurately conveyed to key policy makers, such as those on the G20, OECD or EU Member States.

15. Under the international identity framework, the Isle of Man is being increasingly entrusted to represent and defend its own laws and policies internationally, in full consultation and cooperation with the UK.¹⁷

16. In the absence of a formal diplomatic status, it is extremely uncommon for disputes or problems to arise between the Isle of Man and third countries. However, one recent and high-profile example involves the collapse of the Icelandic bank, Kaupthing hf, and the subsequent failures of its subsidiaries in the UK and Isle of Man. At the time, the Isle of Man wished to make representations to the Icelandic Government on behalf of its own depositors, but also had concerns about the manner in which the issue had been handled in the UK. The Isle of Man expressed those concerns about HM Treasury's representation of the Island's interests in respect of Kaupthing to the House of Commons' Treasury Committee.

17. Whilst the MoJ arranged for HM Treasury to keep the Isle of Man informed it was clear that the Isle of Man was not a priority to HM Treasury.

18. The issue became highly politicised and the Chancellor of the Exchequer (whilst under attack himself) openly, and most unfairly, attacked the Isle of Man as “*a tax haven in the middle of the Irish Sea.*”

19. The MoJ was supportive of the Isle of Man, and meetings were quickly arranged with the Lord Chancellor and Lord Bach. Whilst the MoJ is well aware of the Isle of Man's constitutional position, it is clear to the Isle of Man authorities that other UK Government Departments, which must act internationally on behalf of the Isle of Man, neither fully understand nor value this position.

20. The Isle of Man frequently undertakes diplomatic, political or cultural missions in order to further commercial or economic ties with other countries. However, it is often the case that the nature and level of advice and assistance that the Isle of Man receives in support of these missions, varies substantially between British embassies.

21. With regard to relations with the EU, it can sometimes be difficult to impress upon UK officials that whilst the UK, as a member of the EU, has ceded responsibility for certain areas of policy, the Isle of Man (and by extension, the UK, in respect of the Isle of Man) as a non-member, has not. This would include such areas as World Trade Organisation membership and trade in matters not covered by Protocol 3.

International bodies/international law

22. The constitution of the majority of international bodies including the European Union and United Nations will only permit independent sovereign states to become full members. Furthermore, the Island cannot become a party to multilateral conventions or agreements, as it is not an independent state.

23. The UK is required, therefore, to represent the interests of the Isle of Man in international forums, and to sign, ratify, and report on international obligations e.g conventions and treaties, on behalf of the Isle of Man. In practice, no international agreement entered into by the UK (“Bevin Memorandum”¹⁸) should apply to the Isle of Man unless the agreement explicitly states that to be the case. The UK, via the MoJ, should consult the Isle of Man whenever ratification of an international treaty, convention or agreement is being considered. Although this process generally works well, on occasion the Island has not been consulted adequately and has been given insufficient time to give appropriate consideration to such matters.

¹⁷ <http://www.gov.im/lib/docs/cso/iominternationalidentityframework.pdf>

¹⁸ Foreign Office Circular No 0118, 16th October 1950.

Consular services and defence

24. Manx people are British Citizens under the British Nationality Act 1981 and British/EU style passports are issued in the Isle of Man under the authority of the Lieutenant Governor. Manx people are therefore entitled to consular support when abroad, in the same way as other British citizens.

25. The UK is also responsible for the defence of the Isle of Man, which makes an annual voluntary contribution towards the cost of its defence and international representation by the UK ("Contribution Agreement 1994). In 2008–09 this figure was £2,559,278.55.

(ii) *The role of the Ministry of Justice in managing the United Kingdom's relationship with the Crown Dependencies including inter-departmental liaison and coordination*

26. Whilst its interaction with international bodies is becoming more frequent, it is still the case that the Isle of Man's most important external relationship is with the United Kingdom itself.

27. Having the key role in managing the UK's relationship with the IOM, the Ministry of Justice:

- manages relations between the UK and IOM when differences arise on policies or legislation, and facilitates solutions
- co-ordinates all formal communication between UK Government Departments and the Isle of Man Government on such issues as notification of compliance with international standards and UN/ILO periodic reports for onward transmission to international bodies via UK Departments; consultation on UK and IOM legislation and policy on such issues as terrorism, shipping, immigration, space, derogations, financial services and fisheries which have trans-boundary implications
- processes legislative matters including granting of Royal Assent, Orders in Council and other issues. This includes both Isle of Man primary legislation and also UK legislation which may impact upon the Isle of Man. The Crown acts on the advice of the Lord Chancellor (in his capacity as Privy Counsellor) in respect of Isle of Man issues. This advice is provided by the MoJ.
- is responsible for Crown appointments and liaison with the Lieutenant Governor in the Isle of Man

28. There are also numerous informal contacts made between Isle of Man and UK Government Departments on a daily basis, on matters of mutual interest which fall outside the scope of this enquiry.

(iii) *What, if any, changes are required in terms of either policy or practice in order to improve the Ministry of Justice's management of the relationship between the United Kingdom and the Crown Dependencies?*

29. Relations between the UK and the Isle of Man are generally good, and the management of that relationship is reasonably sound but very much dependent on the resources and competing demands within the MoJ. On a practical level, it is undoubtedly beneficial to have a single point of contact on both sides, and it is difficult to identify a UK Government Department which would be a more suitable point of contact. Whilst the Foreign and Commonwealth Office (FCO), is largely externally focused, the Overseas Territories (OTs), for which it is responsible have a very different relationship with the UK than that of the CDs and so the IOM considers that its link to the Crown should not be through the FCO, in recognition of this difference.

30. The IOM would offer the following recommendations to improve current management of the relationship between the Isle of Man and UK:

- A strategic understanding of international policies and aims would assist the IOM in positioning itself in terms of global economic and regulatory environment. This broader strategic insight, which would include UK international policy and aims, possibly in dialogue with the FCO, would enhance the IOM's relationship with the UK and provide more focussed consideration at strategic rather than operational level.
- It is recognised that the allocation of resources within the MoJ is a matter for the UK to determine. However, the complexity and diversity of IOM issues and the impact of these issues on the UK, along with the contribution the IOM makes to the UK economy, underlines the importance of making full and effective use of available resources and the benefit of the IOM representing itself whenever possible.
- Experience shows that where key officers in UK Departments understand the constitutional relationship and the IOM perspective on policy issues there is less friction as a result. MoJ has a role to play in facilitating this understanding and driving forward the relationship in key areas. While this has been achieved in some areas, certain key relationships (particularly with HMT) require further development.
- Consideration should be given to developing further the provisions of the international identity framework, and monitoring and reviewing progress to ensure the Island's international identity is supported in its development as set out in the terms of the framework.
- The MoJ should continue to raise awareness of the IOM across the UK Government, and in particular the need for the IOM to be consulted, through the MoJ, on any issue that may affect or

- be of interest to the Island. Increased awareness and meaningful understanding of the terms of the International Identity Framework Agreement should be promoted widely and clearly across UK Government Departments. This would be helpful in averting unexpected difficulties that arise from a lack of understanding about the impact of policies or legislative proposals on the IOM.
- Inter-Governmental relations could be facilitated through (bi) annual meetings or conferences for officials in the Isle of Man and the MoJ, which might focus on a particular theme or issue and include briefings from officers from other UK Government Departments.
 - The ability for the Isle of Man to attend meetings/assemblies as part of a UK delegation, in an advisory capacity, where issues impacting the Island are on the agenda, would allow the IOM to ensure a much earlier and fuller understanding of high level policy proposals. This is particularly relevant to financial services initiatives.
 - The ability to gain the support of the UK for associate membership of certain bodies, where their constitution would allow for that, would be useful, eg Shipping and Associate membership of the International Maritime Organisation.
 - When a difference in policy/opinion arises between the Isle of Man and the UK in instances where relations need to be entered into with other countries, every effort should be made to include an Isle of Man and MoJ representative in those talks.
 - Key administrative processes and procedures, such as the granting of Royal Assent, could be formalised in writing between the IOM and UK and include defined timescales and completion targets to our mutual agreement.

October 2009

Memorandum submitted by the Isle of Man Pensioners Association (IOMPA)

RELEVANT TERMS OF REFERENCE

- (i) The role of the Ministry of Justice in managing the UK's relationship with the Crown Dependencies including inter-departmental liaison and co-ordination.
 - (ii) Recommendations to improve the Ministry of Justice's management of the relationship between the UK and the Crown Dependencies.
1. This is an organisation, which campaigns for all pensioners who have been resident on the Isle of Man for 10 years to be paid the Isle of Man Pension Supplement as recommended by the Chislett Report (1992).
 2. At that time the Isle of Man's National Insurance Fund had a significant surplus owing to a large input from the United Kingdom.
 3. Among other things the intention of the Supplement was to compensate for losing the link between earnings and pensions at that time.
 4. At present the Pension Supplement, which amounts to an extra 50% of the State Retirement Pension, is only given to those who have paid National Insurance contributions for 10 full tax years into the Isle of Man National Insurance Fund.
 5. In the course of getting information and pursuing our campaign we have been in contact with the Ministry of Justice over the past eight years.
 6. The Isle of Man does not have a Freedom of Information Act. Where information has not been forthcoming here we have turned to the UK to obtain it. Thus the UK authorities have dealt with reasonable requests that have been refused by Isle of Man bureaucrats. We consider this to be a vital role for the Ministry of Justice to oversee.
 7. In dealing with the Ministry our experience has been that we are basically a political football and neither the United Kingdom nor the Isle of Man will accept responsibility for us.
 8. Our recommendations for action by the Government to improve the Ministry of Justice's management of the relationship between the UK and the Crown Dependencies are:
 - (a) Regular visits to the island with opportunities to explain the role of the Ministry of Justice to the general public.
 - (b) Provision for British Nationals who are resident on the Isle of Man to meet with members of the Ministry of Justice during these visits.
 - (c) Acceptance that for some residents, the Ministry of Justice will be the source of some information that cannot be obtained on the Island because of lack of a Freedom of Information Act on the Isle of Man.
 - (d) Our experience through correspondence with the United Kingdom Government via the Ministry of Justice and also the Isle of Man Government has clearly indicated that they are not prepared to

acknowledge responsibility for the people represented by IOMPA. We feel that there must be closer contact between the Ministry of Justice, the Isle of Man Government including the relevant departments and the residents affected by their respective decisions.

IOMPA would like the committee to consider our recommendations in Paragraph 8 for inclusion in its Report to the House.

**Memorandum submitted by Kaupthing Singer & Friedlander Isle of Man (KSFIOM)
Depositors Action Group**

SUBMISSION REMIT

The Justice Committee has requested submission of evidence in relation to the role and performance of the Ministry of Justice in respect of the Crown Dependencies.

The Justice Committee inquiry will focus on:

- i. How, in practice, the UK Government represents the Crown Dependencies internationally;
- ii. The role of the Ministry of Justice in managing the United Kingdom's relationship with the Crown Dependencies including inter-departmental liaison and co-ordination; and,
- iii. What, if any, changes are required, in terms of either policy or practice in order to improve the Ministry of Justice's management of the relationship between the United Kingdom and the Crown Dependencies?

EXECUTIVE SUMMARY

1. The Kaupthing Singer & Friedlander Depositors Action Group ("KSFIOM DAG") welcomes the Justice Committee's ("JC") ongoing Inquiry into the UK Government's ("HMG") and in particular the Ministry of Justice's ("MoJ") relationship with the Crown Dependencies and hopes its submission will be taken into consideration.

2. KSFIOM DAG's objective is to ensure that all individuals who held deposits with Kaupthing Singer & Friedlander IoM Ltd ("KSFIOM") or were invested through Life Companies at the time of its collapse, are immediately reunited with 100% of their funds.

3. It is the contention of KSFIOM DAG that both the MoJ and Her Majesty's Treasury ("HMT") have failed to fulfil their constitutional duties to the Isle of Man ("IoM") appropriately in HMG's negotiations with Iceland in relation to KSFIOM.

4. It is a further contention of KSFIOM DAG that the MoJ has not only abdicated its responsibilities to the IoM but that there is a clear conflict of interest in HMT representing the IoM's interests, despite Lord Bach's assertions to the contrary. It is therefore imperative that HMG reviews its policies to ensure that the interests of both the IoM and KSFIOM depositors are thoroughly and fairly represented, regardless of the UK's political agenda.

5. Finally KSFIOM DAG believes the MoJ has either failed to inspect the efficacy of the IoM's financial regulatory system thoroughly or does not have sufficient powers to do so, despite the IoM being a Crown Dependency.

INTRODUCTION

6. KSFIOM DAG was formed following KSFIOM's collapse on 8 October 2008. It is the registered body responsible for representing the interests of those 11,500 individuals adversely affected by KSFIOM's demise.

7. Many of the individuals KSFIOM DAG represents have suffered extreme hardship and misery, including the loss of homes, businesses, the breakdown of marriages and serious ill health, due to the ramifications the collapse of KSFIOM has had on their lives.

8. KSFIOM DAG's members include over 2,500 retail depositors, afforded full or partial protection (up to £50,000) by the IoM Depositors' Compensation Scheme ("DCS"), as well as trustees, unprotected Life Company bondholders and holders of business accounts who were afforded low or no protection. According to KSFIOM DAG's internal polls, some 87% of its members are UK citizens, with 30% residing in the UK. These individuals remit tax to the UK directly or via income declaration or withholding tax and are therefore deserving of an appropriate level of support from HMG.

9. Furthermore, a substantial proportion of KSFIOM DAG's members (4,500) had originally opened accounts with The Derbyshire Building Society (IoM) ("DBSIoM") which was acquired by KSFIOM in September 2007 with the IoM financial regulator's approval. According to John Aspden, CEO of the IoM financial regulator, the FSC, and Aidan Doherty, Managing Director of KSFIOM, the FSA was also kept informed about the the Derbyshire Building Society's disposal of DBSIoM to KSFIOM and raised no objections.

10. Upon completion of the transaction, DBSIoM depositors were dependent on Khf's Parental Guarantee ("PG") and had no option to switch or withdraw accounts which hadn't matured without incurring large financial penalties. This was despite the Khf PG offering substantially less financial reassurance than that provided by the previous parent.

11. On 22 January 2010 the Icelandic Winding Up Committee for Khf ("WUC") rejected the PG on the grounds that it was a flawed, non-binding agreement. As a result, the PG which KSFIOM depositors were lead to believe would offer 100% protection in the event that KSFIOM was unable to discharge its liabilities, was rendered worthless.

12. In Autumn 2009 KSFIOM depositors received a maximum of £50,000 under the IoM's DCS, however 15 months on from the bank's demise and over 4,000 depositors and bondholders have been told by KSFIOM's administrators, PricewaterhouseCoopers, that they may have to wait until the end of 2017 to recover whatever percentage of their funds remains after liquidation. Based on current projections, this will be circa 80% of their money. Polls undertaken by KSFIOM suggest that 75% of its members are over the aged of 50 and 17% are over the age of 65 (with many much older), meaning that some are unlikely to live to see their funds returned or have settled lives in their retirement.

Failure of MoJ and HMT to appropriately represent KSFIOM's interests with Iceland:

13. The Isle of Man Government ("IoMG") makes an annual voluntary contribution towards the cost of its defence and international representation by the UK. In 2008–09 this amounted to £2,559,278.55. The IoM therefore has the right to expect fair representation from HMG on its behalf.

14. It is KSFIOM DAG's contention that both the MoJ and HMT, to whom the MoJ delegated its consitutional duties, have failed to ensure robust and fair representation of the IoM's interests in negotiations with Iceland.

15. In a letter from the MoJ to KSFIOM DAG dated 27 April 2009, the department stated that "The UK Government will continue to work with the Icelandic authorities and through the International Monetary Fund to ensure fair treatment for all depositors and other creditors".

16. Despite this promise, there has been nothing on record since October 2008 to suggest any meaningful dialogue with the Icelandic Government in order to secure their commitment to underwriting the Khf Parental Guarantee, on which both the IoM and KSFIOM depositors were dependent.

17. This is evidenced in letters received by KSFIOM DAG from HMT under the Freedom of Information Act 2000.

18. Since late October 2008, no delegations to Iceland have been undertaken on the IoM's behalf, despite evidence that suggests HMT has held several follow up meetings with the Icelandic Government to secure the reimbursement of Icesave funds to the UK:

i. Extract from letter written by Paul Morran, Information Rights Unit, HMT, dated 8 January 2009:

(a) "Two Treasury officials attended meetings on both the 11 October and 21 to 23 October 2008. The lead official was Gary Roberts, head of Financial Services strategy at the Treasury. A junior Treasury official accompanied him."

ii. Extract from letter written by Kate Jenkins, Information Rights Unit, HMT, dated 9 June 2009:

(b) "You asked: what other visits have been made to Iceland since the two mentioned in the attachment (our response to your earlier request on 13 December 2008) and in particular can you identify those, where the Treasury officials have acted for and discussed the problem of the Isle of Man subsidiary of Kaupthing Singer & Friedlander.

...I can confirm that no treasury officials have attended meetings in Iceland between 13 December 2008 and 12 May 2009 (the date of your request) to discuss Kaupthing Singer & Friedlander (Isle of Man)."

iii. Extract from the Independent on 5 January 2010:

(c) Alistair Darling, Chancellor of the Exchequer: "We have spent many months in very productive meetings with Icelandic authorities and the Icelandic government to enter an agreement to make sure that the money was reimbursed to us."

19. Additionally, Lord Bach's submission to the JC on 26 February 2009 implied that HMT intended to write to the Permanent Secretary of the Icelandic Ministry of Finance in order to draw his attention to the attempts made by the IoM and Guernsey to clarify with the relevant Resolution Committees the position over the discharge of their obligations in relation to the Parental Guarantees given by Kaupthing and Landsbanki. As of 29 January 2009, KSFIOM DAG had seen nothing to suggest that a response was ever received or that HMT followed up on this commitment.

20. It is therefore KSFIOM DAG's belief that Lord Bach's assertions at the 10 December 2008 JC hearing that HMT was in "ongoing negotiations" to secure conditions on the IoM's behalf in relation to the IMF loan were probably, at best, overstated.

21. Given HMG's apparent inertia, KSFIOM DAG would question the purpose of the various meetings and weekly videoconferences held between the IoMG and HMT as referenced in evidence provided by Patrick Bourke, Head of the MoJ's European and International Division, at the December 2008 JC hearing. It would also question whether they have been the most effective use of UK taxpayers' (who include the majority of KSFIOM DAG's depositors) money.

Abdication of MoJ responsibilities and conflict of interest in HMT representing the IoM in relation to KSFIOM:

22. It is a further contention of KSFIOM DAG that the MoJ has not only abdicated its responsibilities to the IoM but that there is a clear conflict of interest in HMT representing the IoM's interests in relation to KSFIOM in Iceland, despite Lord Bach's suggestions to the contrary.

23. KSFIOM DAG believes that the interests of the IoM and HMT are at a clear juxtaposition, not least because the actions taken by the UK authorities in relation to KSFUK, where some £532m or over 50% of KSFIOM's assets were held, ultimately precipitated KSFIOM's collapse. Deprived of access to its funds, KSFIOM was forced to call upon Khf to provide liquidity and when it was advised the Icelandic Parent would be unable to meet its PG, KSFIOM was placed into administration.

24. HMG has and continues to put the interests of the UK public purse and its political stance towards Iceland first and foremost, despite its supposed commitment to ensuring fair treatment for all depositors and creditors.

25. It is interesting to note that at the December 2008 JC hearing Lord Bach stated that he did "not think that it has been suggested by the Crown Dependencies that there is somehow a conflict".

26. This was at clear odds with the IoMG's written submission in which it made its concerns about HMT representing the IoM's interests abundantly clear.

27. Additionally, Patrick Bourke suggested at the same hearing that he did not believe the IoM would thank the MoJ if "he personally was negotiating with Iceland on matters beyond his ability".

28. Once again this contradicts the IoMG's written evidence which suggests that "when a difference in policy/opinion arises between the Isle of Man and the UK in instances where relations need to be entered into with other countries' it would like 'every effort made to include an Isle of Man and MoJ representative in those talks."

29. KSFIOM DAG believes that these contradictory submissions demonstrate that the MoJ has either chosen to ignore the IoMG's concerns in favour of the UK's political agenda or was not cognizant of them. If the latter is the case, KSFIOM DAG would call into question the strength of the MoJ/IoMG relationship.

Management of the UK's relationship with the Crown Dependencies including inter-departmental liaison and coordination

30. At the December 2008 JC hearing, Lord Bach stated: "We represent the interests of the Isle of Man where it is appropriate to do so but we are part of Her Majesty's Government, and of course that is our prime responsibility".

31. This comment implies that HMG's interests will always supersede those of the Crown Dependencies, despite their reliance upon the UK to represent them internationally.

32. In light of this remark, KSFIOM DAG believes there are two options open to HMG to rectify this conflict of interests: Either granting IoM full autonomy or exerting its "residual responsibilities and powers" so that the UK and IoM's interests are fully aligned and British citizens with deposits in the Crown Dependencies are protected.

33. It is KSFIOM DAG's firm opinion that the latter is preferable. According to Tony Brown, Chief Minister of the IoM, the island "channels" circa £50 billion from its deposit taking businesses and funds under management to the UK annually. This "high degree of economic inter-dependence between the Isle of Man and the United Kingdom" has been highlighted elsewhere by the IoMG and also Lord Bach. KSFIOM DAG therefore believes it is imperative that HMG ensures the IoM's financial sector falls under FSA regulation.

34. Additionally, KSFIOM DAG believes that the IoM is incapable of shouldering systemic risk effectively. The WUC's rejection of the PG is a clear example of the FSC's serious regulatory failure as it is now apparent that the regulator did not undertake appropriate due diligence before accepting the PG. It also allowed KSFIOM to use the PG as a core marketing and retention tool, as late as October 2008. As a result, KSFIOM depositors have been exposed to the full financial risks associated with the bank's failure.

35. By their own admission at recent Tynwald hearings, the IoM authorities have neither the human or financial resource to cope with financial disasters similar to the collapse of KSFIOM, nor the necessary powers to ensure depositors within its financial institutions are afforded appropriate protection. There is no bank or government of last resort and the DCS, only increased after KSFIOM's collapse, has taken a year to pay out. Additionally, the island's prevailing financial model is based on upstreaming deposits either to London or Parent Companies in other jurisdictions.

HMG inter-departmental coordination:

36. Better inter-departmental liaison is required between the MoJ and other HMG departments, in particular HMT, in order to improve understanding of the IoM and how best to represent its interests. The IoMG itself has suggested that “whilst the MoJ is well aware of the Isle of Man’s constitutional position, it is clear to the Isle of Man authorities that other UK Government departments, which must act internationally on behalf of the Isle of Man, neither fully understand nor value this position.”

37. A subsequent note submitted by Lord Bach to the JC in which he was forced to clarify that he was “satisfied by the steps taken by the UK Government in the interests of the people whose deposits the UK regulatory authorities are responsible for”, as opposed to those who deposited monies with banks in the Isle of Man and Guernsey, supports the argument that an improvement in coordination is required if HMG is to present a uniform, cross-departmental view.

38. The same can be said of Lord Bach’s admission that it wouldn’t have come as a surprise if the MoJ hadn’t been made aware of HMT’s intentions to freeze KSFUK’s assets before the action took place.

REQUIRED CHANGES TO POLICY AND PRACTICE

39. KSFIOM DAG would recommend a review of the following:

- i. The constitutional responsibility of the UK to the Crown Dependencies so that the IoM always receive fair representation by the UK, regardless of HMG’s separate political agenda.
- ii. The processes that led the MoJ to delegate its responsibility for the IoM in relation to KSFIOM to HMT, despite the obvious conflict of interest.
- iii. UK departmental responsibility for informing UK citizens of the risks associated with banking in the IoM and other Crown Dependencies.
- iv. Whether the IoM has the necessary skills, experience or processes in place to ensure effective self-regulation, as well as the conflicts of interest of those holding positions in the IoM’s political, judicial, regulatory bodies and financial services industry.
- v. Coordination between HMG’s inter-governmental departments so all are fully cognizant of the UK’s constitutional relationship with the IoM.

QUESTIONS TO BE PRESENTED BY THE JUSTICE COMMITTEE

40. KSFIOM DAG proposes that the following questions be posed to MoJ representatives participating in the JC Inquiry:

- i. Can the MOJ provide clear evidence that HMG, via HMT, is continuing to press the Icelandic Government for full compensation of KSFIOM depositors?
- ii. What detail was discussed by HMT and the Icelandic authorities at 11 October and 21 to 23 October 2008 meetings in relation to KSFIOM?
- iii. Why have no further meetings relating to KSFIOM taken place between HMT and the Icelandic authorities since 23 October 2008?
- iv. Did HMT ever request that the Khf PG be honoured as a necessary pre-requisite to Iceland securing IMF funding? If not, why not?
- v. Did HMT follow through on its commitment to writing to the Icelandic Ministry of Finance? If not, why not?
- vi. Was a response from the Icelandic Ministry of Finance received and if so, what did it say? If no response was received, did HMT follow up on this?
- vii. Have the IoMG consistently pressed the MoJ for full and fair representation in Iceland and if so, why has this request apparently been ignored?
- viii. Did HMG agree with the IoM’s decision not to follow the UK’s lead in relation to KSFUK and compensate KSFIOM depositors in full? If not, why didn’t HMG exert stronger pressure on the IoMG to fully compensate depositors?
- ix. What role can the MoJ play in ensuring robust financial regulation on the IoM and are any steps currently being taken to protect British depositors in the Crown Dependencies going forward? If not, why not?

REQUEST FOR DISCLOSURE

41. KSFIOM DAG would request the release of the following information for the sake of transparency:

- i. Minutes from the meetings HMT held with the Icelandic authorities on 11 October 2008 and 21 to 23 October 2008;
- ii. Minutes of any further meetings held with Iceland specifically relating to KSFIOM since the 23 October 2008;

- iii. All correspondence and minutes of meetings between the IoMG, the MoJ and HMT/FSA in relation to Khf, KSFUK and/or KSFIOM;
- iv. An overview of the MoJ's internal process and policy in relation to the Crown Dependencies, in particular, that which lead them to abdicate their responsibilities to HMT in relation to KSFIOM;
- v. The letter written by HMT to the Permanent Secretary of the Icelandic Ministry of Finance and any response received.

CONCLUSION

42. The MoJ operates at a substantial cost to the UK tax payer. Many British tax payers who live or work outside the UK have had to resort to banking in the Crown Dependencies given the limited UK banking facilities available to expats.

43. It is therefore imperative that HMG reviews its policies to ensure that the interests of the IoM and KSFIOM depositors are thoroughly and fairly represented.

44. The MoJ must also give full consideration to whether the IoM's financial regulatory system is robust enough to shoulder future systemic risk, particularly if British citizens are to be protected and the UK's reputation for sound regulation is to remain untarnished.

APPENDIX

OF SUPPORTING EVIDENCE RELEVANT LINKS

<i>No.</i>	<i>Evidence</i>	<i>Links to Evidence</i>
1.	About KSFIOM DAG.	—KSFIOM DAG website http://79.170.44.113/ksfiomdag.com/
2.	KSFIOM DAG Depositor polls.	— KSFIOM DAG website http://chat.ksfiomdepositors.org/poll/distribution-depositors-citizenship-and-residency
3.	Evidence suggesting the FSA were kept fully informed about the disposal of Derbyshire Building Society (IoM) and raised no objections.	— 13 November 2009—Select Committee of Tynwald on Kaupthing Singer and Friedlander and the Depositors' Compensation Scheme (<i>Response to question 259</i>) http://www.tynwald.org.im/papers/early/committee/eptksf131109.pdf — 28 October 2009—Select Committee of Tynwald on Kaupthing Singer and Friedlander and the Depositors' Compensation Scheme (<i>Response to question 52</i>) http://www.tynwald.org.im/papers/early/committee/eptksf281009.pdf
4.	Khf Parental Guarantee.	— KSFIOM DAG website http://www.ksfiomdag.com/index.php?option=com_kb&task=file&file=90&Itemid=106
5.	Derbyshire Building Society Parental Guarantee.	— Taxnews.com (It should be noted that the IOM FSC will not permit the public disclosure of the DBS guarantee. As such the associated link above just alludes to the document.) http://www.tax-news.com/archive/story/Acquisition_Of_Derbyshire_Offshore_Announced_xxxx29089.html — Letter from Paul Morran, Information Rights Unit, HMT, dated 19th December 2008 re DBS IoM: http://www.whatdotheyknow.com/request/4468/response/10796/attach/2/foi%20smi%203.pdf
6.	WUC rejection of PG and KSFIOM DAG open letter in response to announcement.	— KaupthingSingers.co.uk http://www.kaupthingsingers.co.uk/Pages/4174 — KSFIOM DAG— open letter following rejection of Khf PG by WUC http://www.ksfiomdag.com/index.php?option=com_kb&task=file&file=195&Itemid=106

<i>No.</i>	<i>Evidence</i>	<i>Links to Evidence</i>
7.	PwC's predictions of likely recoveries for depositors in KSFIOM.	— KaupthingSingers.co.uk http://www.kaupthingsingers.co.uk/lisalib/getfile.aspx?itemid=20835
8.	IoMG annual contribution towards the cost of its defence and international representation by the UK.	— House of Commons Justice Committee Inquiry: The United Kingdom and the Crown Dependencies — Evidence from the Isle of Man Government (<i>Paragraph 25</i>) http://www.gov.im/lib/docs/cso/justicecommitteesubmission.pdf
9.	Letter to KSFIOM DAG from the MoJ dated 27 April 2008 promising that "The UK Government will continue to work with the Icelandic authorities and through the International Monetary Fund to ensure fair treatment for <i>all</i> depositors and other creditors".	— KSFIOM DAG website http://www.ksfiomdag.com/index.php?option=com_kb&task=file&file=192&Itemid=106
10.	Further follow up from HMT stating that HMG "continues to work closely with the Icelandic authorities to ensure fair treatment for depositors and creditors of the failed Icelandic banks, including KSF IoM."	— Whatdotheyknow.com (<i>Paragraph 7</i>) http://www.whatdotheyknow.com/request/10387/response/27207/attach/2/9%20332%20reply.pdf
11.	Letter to KSFIOM DAG from Paul Morran, Information Rights Unit, HMT, dated 8 January 2009.	— KSFIOM DAG website http://www.ksfiomdag.com/index.php?option=com_kb&task=article&article=133&Itemid=106
12.	Letter to KSFIOM DAG from Kate Jenkins, Information Rights Unit, HMT, dated 9 June 2009.	— HMT http://www.ksfiomdag.com/index.php?option=com_kb&task=file&file=189&Itemid=106
13.	Independent article dated 5 January 2010.	— The Independent http://news.independentminds.livejournal.com/5434299.html
14.	Submission made by Lord Bach, dated 26th February 2009, to the JC's Second Special Report.	— House of Commons Justice Committee—Crown Dependencies: Evidence taken: Government Response to the Committee's First Report of Session 2008–09 http://www.publications.parliament.uk/pa/cm200809/cmselect/cmjust/323/9780215529091.pdf
15.	Evidence from Lord Bach suggesting HMT was in "ongoing negotiations" to secure conditions on the IoM's behalf in relation to the IMF loan.	— House of Commons Justice Committee—Crown Dependencies: Evidence taken—First Report of Session 2008–09 (<i>Response to question 15</i>) http://www.publications.parliament.uk/pa/cm200809/cmselect/cmjust/67/67.pdf
16.	Quote from Patrick Bourke re meetings and video conferences taking place between HMT and IoMG.	House of Commons Justice Committee—Crown Dependencies: Evidence taken—First Report of Session 2008–09 (<i>Response to question 9</i>) http://www.publications.parliament.uk/pa/cm200809/cmselect/cmjust/67/67.pdf
17.	Lord Bach's assertions that there are no conflicts of interest in HMT representing the interests of IoMG in relation to KSFIOM in Iceland and that he does not believe the IoMG would perceive there to be any conflicts.	— House of Commons Justice Committee—Crown Dependencies: Evidence taken—First Report of Session 2008–09 (<i>Response to question 3</i>) http://www.publications.parliament.uk/pa/cm200809/cmselect/cmjust/67/67.pdf

No.	Evidence	Links to Evidence
18.	IoMG's written submission which highlights concerns with HMT representing IoMG's interests with Iceland.	— House of Commons Justice Committee Inquiry: The United Kingdom and the Crown Dependencies — Evidence from the Isle of Man Government (<i>Paragraph 13, 16 and 19</i>) http://www.gov.im/lib/docs/cso/justicecommitteesubmission.pdf
19.	Patrick Bourke's suggestion at the JC December 2008 hearing that he did not believe the IoM would thank the MoJ if he personally was negotiating with Iceland on matters beyond his ability.	— House of Commons Justice Committee—Crown Dependencies: Evidence taken—First Report of Session 2008–09 (<i>Response to question 14</i>) http://www.publications.parliament.uk/pa/cm200809/cmselect/cmjust/67/67.pdf
20.	IoMG written evidence to the JC suggesting that “when a difference in policy/opinion arises between the IoM and the UK in instances where relations need to be entered into with other countries, they would like every effort made to include an IoM and MoJ representative in those talks.”	—House of Commons Justice Committee Inquiry: The United Kingdom and the Crown Dependencies— Evidence from the Isle of Man Government (<i>Paragraph 30.9</i>) http://www.gov.im/lib/docs/cso/justicecommitteesubmission.pdf
21.	Statement from Lord Bach claiming: “We represent the interests of the Isle of Man where it is appropriate to do so but we are part of Her Majesty's Government, and of course that is our prime responsibility.”	— House of Commons Justice Committee—Crown Dependencies: Evidence taken—First Report of Session 2008–09 (<i>Response to question 7</i>) http://www.publications.parliament.uk/pa/cm200809/cmselect/cmjust/67/67.pdf
22.	£50bn Funds upstreamed annually to UK from IoM's deposit-taking businesses and funds under management.	— Iomtoday.co.im http://www.iomtoday.co.im/news/Chief-minister-wants-Isle-of-4284265.jp
23.	IoMG and Lord Bach comments relating to the “high degree of economic inter-dependence between the Isle of Man and the United Kingdom.”	— House of Commons Justice Committee Inquiry: The United Kingdom and the Crown Dependencies— Evidence from the Isle of Man Government (<i>Paragraph 8</i>) http://www.gov.im/lib/docs/cso/justicecommitteesubmission.pdf — 20 November 2009—Isle of Man Government—Website Press Release http://www.gov.im/lib/news/cso/ukbenefitsfromis.xml
24.	Use of PG by KSFIOM for marketing and reassurance of customers.	— KSFIOM DAG website (<i>Response to Q3</i>) http://www.ksfiomdepositors.org/sites/www.ksfiomdepositors.org/files/derbyshirebrochure_0.pdf — KSFIOM DAG website http://www.ksfiomdag.com/index.php?option=com_kb&task=article&article=99 — It should be noted that KSFIOM DAG has lodged with its solicitors a great range of email letters received by depositors from the bank directors and managers promoting/reassuring them about the PG. These letters go up to 8th October 2008. They have not been redacted but could be made available should the JC wish to see them.
25.	Evidence suggesting that the IoMG has neither the resource, systems or structures in place to remain independent and also highlighting the various conflicts of interest within the IoM's political, financial and judiciary	— KSFIOM DAG—Foot Report Submission http://www.ksfiomdag.com/index.php?option=com_kb&task=file&file=129 — KSFIOM DAG—IoM Tynwald Select Committee Submission <i>Main Submission:</i> http://www.ksfiomdag.com/

No.	Evidence	Links to Evidence
	bodies.	<p>index.php?option=com_kb&task=file&file=106&Itemid=106</p> <p><i>Appendix of Evidence:</i> http://www.ksfiomdag.com/index.php?option=com_kb&task=file&file=108&Itemid=106</p> <p>— 13 November 2009—Select Committee of Tynwald on Kaupthing Singer and Friedlander and the Depositors' Compensation Scheme <i>(Responses to questions 224, 244, 245, 246, 247, 248, 249, 250, 254, 255, 256, 257, 462, 463, 464, 465, 466)</i> http://www.tynwald.org.im/papers/early/committee/eptksf131109.pdf</p> <p>— 28 October 2009—Select Committee of Tynwald on Kaupthing Singer and Friedlander and the Depositors' Compensation Scheme <i>4(Responses to questions 8, 9,10, 18, 20, 72, 73, 157, 188, 20)</i> http://www.tynwald.org.im/papers/early/committee/eptksf281009.pdf</p>
26.	Evidence submitted by the IoMG to the JC suggesting better inter-departmental liaison is required the MoJ and other HMG departments.	<p>— House of Commons Justice Committee Inquiry: The United Kingdom and the Crown Dependencies — Evidence from the Isle of Man Government <i>(Paragraph 19)</i> http://www.gov.im/lib/docs/cso/justicecommitteesubmission.pdf</p>
27.	Note submitted by Lord Bach to the JC in which he was forced to clarify that he was “satisfied by the steps taken by the UK Government in the interests of the people whose deposits the UK regulatory authorities are responsible for”, as opposed to also those who deposited monies with banks in the IoM and Guernsey.	<p>— House of Commons Justice Committee—Crown Dependencies: Evidence taken—First Report of Session 2008–09 <i>(Footnote to answer to question 21)</i> http://www.publications.parliament.uk/pa/cm200809/cmselect/cmjust/67/67.pdf</p>
28.	Lord Bach’s admission that it wouldn’t have come as a surprise if the MoJ had not been made aware of HMT’s intentions to freeze KSFUK’s assets before the action took place.	<p>— House of Commons Justice Committee—Crown Dependencies: Evidence taken—First Report of Session 2008–09 <i>(Answer to question 5)</i> http://www.publications.parliament.uk/pa/cm200809/cmselect/cmjust/67/67.pdf</p>

APPENDIX OF SUPPORTING EVIDENCE

Letter sent to depositors of the Derbyshire Offshore in November 2007, announcing the sale of DBSioM to Kaupthing

Point ii refers to Khf having given an “irrevocable and binding undertaking to ensure that, while KSFIOM remains its subsidiary, it will at all times be able to discharge its financial obligations as they fall due.”

IMPORTANT CUSTOMER ANNOUNCEMENT

DERBYSHIRE BS TO SELL DERBYSHIRE OFFSHORE TO KAUPTHING

Derbyshire Building Society has decided to sell its offshore subsidiary, Derbyshire Offshore to Kaupthing Bank hf. The transfer of ownership has received regulatory approval and is expected to take place in late December but no later than 28 December 2007. Following completion of the transaction, Derbyshire Offshore will be integrated into Kaupthing’s existing Isle of Man operation, Kaupthing Singer & Friedlander (Isle of Man) Limited.

We refer to each of your accounts with The Derbyshire (Isle of Man) Limited. In accordance with our terms and conditions (the “Terms & Conditions”) of business with you in relation thereto, we hereby give you notice that with effect from the completion, which will be no earlier 21 December 2007 (“Transfer Date”) your account(s) will be transferred to Kaupthing Singer & Friedlander (Isle of Man) Limited of Samuel Harris House, 5-11 George’s Street, Douglas, Isle of Man which will be liable to repay such funds to you in our place.

Kaupthing Singer & Friedlander (Isle of Man) Limited agrees to operate your account with it in accordance with the Terms and Conditions, save that with effect from the Transfer Date in the Terms and Conditions:

- (i) each reference to “The Derbyshire (Isle of Man) Limited” will be replaced by a reference to “Kaupthing Singer & Friedlander (Isle of Man) Limited; and
- (ii) the reference to the Derbyshire Building Society having given an irrevocable and binding undertaking to ensure that, while Derbyshire Offshore remains in subsidiary, it will at all times be able to discharge its financial obligations as they fall due will no longer apply but will be replaced by reference to Kaupthing Bank hf having given an irrevocable and binding undertaking to ensure that, while Kaupthing Singer & Friedlander (Isle of Man) Limited remains its subsidiary, it will at all times be able to discharge its financial obligations as they fall due.

20 November 2007

Memorandum submitted by the Landsbanki Guernsey Depositors Action Group (The Association)

1. How, in practice, the UK Government represents the Crown Dependencies internationally;
2. The role of the Ministry of Justice in managing the United Kingdom’s relationship with the Crown Dependencies including inter-departmental liaison and coordination; and,
3. What, if any, changes are required, in terms of either policy or practice in order to improve the Ministry of Justice’s management of the relationship between the United Kingdom and the Crown Dependencies?

THE ASSOCIATION

The Landsbanki Guernsey Depositors Action group is an association of depositors in the Guernsey branch of Icesave-Landsbanki.

Guernsey depositors are almost 100% British Citizens with equal numbers of Channel Island residents and British expatriates. (Both groups are effectively excluded by deliberate interpretation of policy developed between the banks and the Government from maintaining bank accounts on the UK mainland)

THE ROLE OF THE MINISTRY

The Ministry of Justice is the successor Department to the Home Office, Lord Chancellor’s Department, and Department of Constitutional Affairs in managing the relationship of the Crown Dependencies with the Crown, and in fulfilling the Crown’s obligations towards its Dependencies.

The Crown Dependencies, consisting of the four Channel Islands and the Isle of Man, have no international personality. Although the modern constitutional position has evolved over time, from different historical routes (and, according to the Kilbrandon Report in the 1970s the relationship has many unclarities) it is submitted that the most accurate statement of the position is that contained within Protocol 3 to the Treaty of Rome, in that they are considered as “territories for which the Member State is responsible internationally”.

British Citizens of Channel Islands, particularly by virtue of the historic constitutional position have the right to look to the Crown not only to represent, but to protect. This solemn obligation which the Crown has by virtue of its position as successor to the Duchy of Normandy pre-dates the Conquest and has evolved into the Crown’s (and in this case, its Ministers) role in matters of Defence and Foreign Affairs.

CONFLICTS OF INTEREST

Conflicts of interest have arisen in the past, whereby Her Majesty’s Foreign Service has been presented with the difficult job of representing abroad, the interests of the Channel Islands, which have on occasion diverged. This same difficulty appears to have confronted the Ministry of Justice when the events of October 2008 occurred.

In particular, the UK government’s apparent position, in the Winding-Up of Landsbanki Islands h.f. (“the parent company”), seems to have placed it (the Government) as a preferential creditor over and above the rights of individual British citizens in Guernsey (most of them pensioners whose life savings their deposit represents). This seems to present the Ministry of Justice in an irreconcilable conflict of interest.

INTERDEPARTMENTAL LIAISON AND CO-ORDINATION

It is a clear perception among the members of the Association that the Ministry failed signally to coordinate properly with the Insular Authorities, the Treasury, and the Foreign Office, and as a result the interests of Guernsey savers have been prejudiced. Put simply, this has resulted in savers in the Crown Dependencies being the only retail savers anywhere not to have been protected by their Governmental authorities and this has resulted in a deep level of dissatisfaction among many Guernsey people with the Ministry as well as with the Insular Authorities at Guernsey.

REQUIRED CHANGES

What is required is a thorough examination of those areas identified by the Kilbrandon Report in the 1970s as unclear, and a clear statement of the responsibilities of the Crown (and its Ministers) in respect of the interests of its citizens in the Crown Dependencies within the British Islands.

October 2009

Memorandum submitted by Ministry of Justice

When colleagues and I gave evidence to the Committee on Tuesday 2 February I undertook to look into two questions raised by Members of the Committee upon which I was unable to provide a complete answer at the time. I am now able to provide the further information which was requested in respect of Ministry of Justice involvement in the termination of the reciprocal health agreement between the United Kingdom and the Isle of Man, and about responsibility for the sea-bed around the Crown Dependencies. The question numbers referred to below are those in the uncorrected transcript.

Q71 Whether Ministry of Justice officials were involved in any process prior to the decision being taken to end the UK's reciprocal health agreement with the Isle of Man; whether representatives of the Isle of Man Government were told at a meeting, and without prior notice, that the agreement was to be ended; whether our processes engaged there, or whether the Department of Health simply bypassed the Ministry of Justice.

There is well-established liaison between Ministry of Justice officials and our counterparts at the Department of Health about the operation of the reciprocal health agreements with the Crown Dependencies. Consequently, we were already aware prior to the Isle of Man Government being formally notified of the ending of the agreement that it was Department of Health policy to keep the UK's reciprocal health agreements under review to ensure that they remained appropriate and represented value for money for the UK taxpayer. We were also aware—as were officials in the Isle of Man Government, for some weeks at least—that notice had already been given to the governments of the Channel Islands that their own reciprocal health agreement with the UK was to be ended.

As a result of its review, the Department of Health then decided that the agreement with the Isle of Man—under which the UK provided an allocation of approximately £2.8 million per year—did not offer value for money to the taxpayer, and that it was out of place given the wider availability of travel insurance. In that light, Department of Health Ministers decided to give notice to terminate the agreement.

The meeting to which you referred in your question took place on 1 July 2008, when Department of Health officials met Isle of Man officials to discuss the UK's proposals to withdraw from the agreement. The official dealing with this issue in the Crown Dependencies team was notified of the meeting in advance but was prevented from attending by other business. At the meeting the Department of Health gave a presentation on the rationale for the decision and explained that a notice period and final allocation were still to be agreed. It was made clear that this was a decision made by the UK Government as a whole and there had been close liaison with the Ministry of Justice. There was no question of the Department of Health having simply bypassed the Ministry of Justice, and we have remained in close contact with officials of both the Isle of Man Government and the Department of Health as plans for the termination of the agreement have progressed.

Q78 Who is responsible for the sea-bed around the Crown Dependencies.

Dr Whitehead asked who is responsible for the seabed around the Crown Dependencies and about the licensing arrangements which exist in relation to the sea and seabed around the Crown Dependencies.

Under the UN Convention on the Law of the Sea (UNCLOS), the sovereignty of a coastal State extends beyond its land territory and internal waters to an adjacent belt of sea, described as the territorial sea. This extends to its seabed and subsoil. The United Kingdom's rights and obligations under UNCLOS extend to the territorial sea adjacent to the Crown Dependencies, including in respect of the seabed.

There are then a range of licensing regimes which apply in relation to the sea and seabed around the Crown Dependencies.

In respect to general marine licensing, the established general regime under the Food and Environment Protection Act 1985 (“FEPA”) extends to Jersey and Guernsey. In general, a licence under that Act is required for the deposit of substances in the sea or under the seabed. The FEPA licensing regime was previously extended to the Isle of Man but was subsequently superseded by provisions made in Part 2 of the Water Pollution Act 1993 (an Act of Tynwald).

Parliament has recently passed the Marine and Coastal Access Act 2009 (“the 2009 Act”). Part 4 of that Act contains reforms to the marine licensing regime. When fully in force, it will establish a new regime controlling a wide range of activities taking place at sea, or on or under the seabed. These include activities such as deposits, construction of works, use of vessels etc to remove substances or objects from the seabed and dredging. The licensing authority for these activities differs for inshore regions (0–12 nm—broadly, the territorial sea) and offshore regions (12 up to 200 nm) in respect to different parts of the UK. For example, under current rules, the Secretary of State is the licensing authority for the English inshore and offshore regions. The Crown Estate is not the statutory licensing authority in relation to any region.

The 2009 Act as a whole does not extend to the Crown Dependencies. In particular, while Part 4 will replace the FEPA and other regimes, the 2009 Act expressly provides that the amendments and repeals made to the FEPA do not extend to any of the Channel Islands. There is however a power to extend Part 4 of the Act to Jersey by Order in Council. This power has not yet been exercised. The Crown Dependencies were consulted before the 2009 Act was passed and were content with the arrangements in respect of Part 4.

In respect to fisheries licensing, the Crown Dependencies licence commercial sea fishing in their territorial waters. Those waters extend to 12 nautical miles (“nm”) from baselines, subject to the median line, for Jersey and the Isle of Man and to 3nm from baselines for Guernsey. The Crown Dependencies have their own legislation dealing with such licensing.

There are other licensing regimes that may be relevant to the seabed around the Crown Dependencies, for example, licensing in relation to shellfish fisheries.

I hope that this provides the Committee with the further information it requires. There is however one further point in my evidence upon which I should like to offer some clarification. In response to Question 52, I said that the Secretary of State’s view in relation to the Sark Reform Law was that “in his judgement, [it] did not satisfy our obligations under the European Convention on Human Rights” and that in those circumstances he refused to recommend the law for Royal Assent. I should say that although there were concerns about the ECHR compatibility of aspects of the law, the Secretary of State’s decision to remit the law to Sark was based on the wider ground of the Crown’s responsibility for the good governance of the island, including appropriate arrangements for a 21st century democracy.

February 2010

Supplementary memorandum submitted by the Ministry of Justice

Thank you for your letter of 17 June 2009, in which you raise a number of questions about the role played by the Ministry of Justice in representing the Crown Dependencies’ interests in the Common Travel Area (CTA) provisions of the Borders, Citizenship and Immigration Bill.

The proposed clause 50 (previously Clause 48) of the Bill would provide the unequivocal legal basis to control, for immigration purposes, intra-CTA routes.

However, I would explain at the outset that we—and the governments of the Crown Dependencies—have repeatedly been assured by the Home Office and by the UK Border Agency (UKBA) that traditional fixed controls will not be introduced on any CTA route. Instead the power will be used flexibly to control entry proportionate to the level of risk.

The UKBA propose very modest use of this power on routes between the Crown dependencies and the UK because the risk here is much lower. There will be no requirement to carry a passport or national identity card and e-Borders data will not be collected on these routes for immigration purposes.

The background to this issue lies in the Home Office’s and UKBA’s consideration as to how the CTA might be reformed so as better to protect the UK border and national interests. Officials from the governments of the Crown Dependencies were involved in the resulting discussions, as were officials of this Department. The Home Office had made it clear that such potential problems as existed within the CTA related largely to Republic of Ireland rather than Crown Dependency routes, there were no plans at any stage to impose fixed controls on routes between the Crown Dependencies and the UK and the Home Office did not propose any significant change in practice on these routes. In his foreword to the consultation paper *Strengthening the Common Travel Area*, published in July 2008, Liam Byrne MP stated that “We are clear that we will not introduce fixed immigration controls ... on traffic from the Crown dependencies to the UK”.

When we received the Bill on 17 December last year for onward transmission to the Crown Dependencies it was clear that the clause as drafted provided the power to impose controls on any CTA routes. In respect of the CTA clause the covering e-mail from the Home Office said that “The amendments to section 1(3) of

the Immigration Act 1971—clarifying powers to conduct immigration controls on CTA routes to the UK—apply to both the Republic of Ireland and CD routes automatically. However, the policy intention is only to have fixed/more regular controls on passengers travelling by air and sea between the UK and Ireland and to conduct solely ad hoc intelligence-led operations to check those crossing the land border in Northern Ireland and those arriving from the Crown dependencies. The policy leads have already discussed the implications of the amendment with the CDs and we understand they are content”.

The Crown Dependencies were very concerned at the drafting of the clause, and each of them wrote to us to express their concerns. Their respective arguments are summarised below, which I hope will meet your request for a memorandum of the representations received by us from the Crown Dependencies. (Each of the Crown Dependencies also provided some more general comments on other, less controversial, aspects of the Bill, either in the same letter or separately.) The Home Office has made it clear that it is not possible to legislate in a way that provides the power to achieve the policy aim but at the same time limits or restricts the frequency with which it will be used.

The Chief Secretary to the Isle of Man, Mrs Mary Williams, was the first to write, on 9 January. She said that the Isle of Man had responded positively to the Home Office’s previous proposals to strengthen the CTA, including an undertaking to mirror checks on passengers travelling between the Republic of Ireland and the Isle of Man, precisely to avoid the need for controls to be established between the Isle of Man and the UK. While the Isle of Man had always understood that changes to the legislation would be required to clarify powers to introduce controls on journeys between the UK and the Republic of Ireland, they were unclear as to why and for what purpose it was felt that such clarification was required between the Islands and the UK. She referred to the assurances previously given that there was no intention to introduce permanent immigration controls between the Island and the UK and said that this now seemed contrary to what was now in the Bill. The Isle of Man was not opposed to the principle of clarifying the power to undertake ad hoc intelligence-led operations if that was deemed necessary; however, they believed that this should be specified within the legislation rather than dealt with as a matter of policy, given the speed with which policies can and do change.

Mrs Williams added that there was nothing within the proposed legislative amendments to the CTA as drafted which recognised that in respect of the UK the position of the Republic of Ireland was very different from that of the Isle of Man, or that the immigration legislation of the Isle of Man was UK legislation extended by Order in Council, establishing a general principle of integration. Given the proximity of the Isle of Man to the UK, the long-standing constitutional relationship and predominantly British population, this was a highly sensitive matter. She also commented that the requirement for an intelligence-led physical immigration control was unclear, given the fact that the UK’s invitation to the Isle of Man to participate in the e-Borders programme. She asked that we advise the Home Office of the Isle of Man’s reservations about the CTA clause and explain the Island’s concerns.

Guernsey replied by means of a letter from the Chief Minister, Deputy Lyndon Trott, to the Bailiff of Guernsey dated 14 January, which was forwarded to us through the official channel of communication. The Chief Minister said that the Bailiwick recognised the benefits derived from the CTA, which operated on the basis of very close harmony between the immigration laws of the UK and Islands. The CTA had always been based on the principle that, subject to certain exceptions, travel to and from the UK, the Crown Dependencies and Ireland did not require going through a physical immigration control point. Guernsey was aware of UKBA’s review aimed at strengthening border security, and in discussions with UKBA it had been made clear by those representing the Crown Dependencies that movement without immigration controls for all nationals of the CTA was an important component of the special relationship that existed between the peoples of the islands of the CTA and provided long established political, economic and social benefits.

In respect of the CTA clause itself, the Chief Minister referred to the assurances that irrespective of what was in the Bill the policy intention was only to have fixed, or more regular, controls on passengers travelling by air or sea between the UK and the Republic of Ireland and to conduct solely intelligence-led operations to check those crossing the land border with Northern Ireland and those arriving from the Crown Dependencies. He questioned why, in that event, it was considered necessary to enact primary legislation that potentially permitted the same treatment to all routes.

The Chief Minister made clear that in raising that question, Guernsey recognised and supported the UK’s objective to strengthen its borders and, by association, the Bailiwick’s borders. There remained a concern, however, that the inclusion of the relevant provisions contained in the Bill failed to recognise the close integration of the laws of the Bailiwick (and the other Crown Dependencies) with those of the UK. If the Home Office accepted that there was a distinction in this respect between the Crown Dependencies and the Republic of Ireland, it would be preferable for it to be reflected on the face of the Bill. He asked that HM Government address the questions he had raised as soon as possible.

Jersey replied by means of a letter from the Bailiff to the Lieutenant Governor of Jersey on 28 January. In respect of the Common Travel Area clause, the letter said that “It is considered that people in British territory ought to have free movement around the British Isles without any form of passport control, and the erection of a potential passport control between Jersey and the United Kingdom introduces discrimination that cannot be justified. Following careful consideration of this matter, the Government of Jersey is opposed to the proposed amendments to the Immigration Act 1971 that could lead to a significant

change in the status of Jersey within the Common Travel Area and in respect of movement of people between Jersey and the UK". The letter added that the Government of Jersey would respond further on the specific matter of the CTA.

All three letters were passed to the Bill team as the Islands had requested.

The Chief Minister of Jersey, Senator Le Sueur, followed up Jersey's first reply with a letter to me dated 24 February, by which time the Bill was progressing through the House of Lords. He made the point that there was no speech representing the concerns of the Crown Dependencies through the Ministry of Justice. (Your Committee will, I am sure, understand why a Ministry of Justice Minister could not have spoken against a Government Bill in the House.) Senator Le Sueur did however refer to a speech by Lord Glentoran in which he remarked that "It seems to me that those Crown dependencies are being smashed by the same sledgehammer being used to crack the nut of the UK-Ireland border".

Senator Le Sueur continued: "My concern is that, whilst Lord West has stated that there is no intention *currently* to introduce fixed border controls between the UK and the Crown Dependencies, the fact is that the Bill as presently drafted *does* enable such controls to be introduced in future at will, merely as a matter of policy. There are absolutely no safeguards to prevent such controls being implemented or to protect the longstanding rights of Channel Islanders to travel freely to the United Kingdom, in accordance with their constitutional relationship". He also took issue with the lack of formal consultation with the government of Jersey prior to the Bill being referred to the Island in December, continuing: "The argument of the UK officials appears to be that no consultation was necessary since there would be no significant change. But if no significant change is intended, why are British nationals resident in the Crown Dependencies to be included in the same statutory regime that would apply to Irish citizens? As far as I can see, there has been no attempt to draft legislation which would appropriately differentiate between the Crown Dependencies and the Republic of Ireland." He asked me to consider giving my support by expressing to Home Office Ministers the concerns of the Jersey Government on the CTA provisions of the Bill.

Consequently—and with reference now to the third paragraph of your letter—I wrote to Lord West on 11 March, explaining Jersey's concerns and adding that I knew the other Crown Dependencies to share the tenor of the views expressed by Senator Le Sueur. (This reflected the fact in particular that my Department had received a second letter from Mrs Williams of 4 February in which she said that while Home Office officials had undertaken to consider the clause again, they had indicated that reflecting the UK policy in relation to the Isle of Man within the legislation would be difficult. She had asked, similarly to Senator Le Sueur, that we "ensure that their Lordships are immediately and fully appraised" of the Island's reservations.) I added that I had considerable sympathy with the Crown Dependencies' point of view on the issue, but that I also recognised the difficulties and limitations of legislative drafting. I said that if there was still any possibility of reconsidering the clause so that as to go at least some way towards addressing and alleviating the Islands' concerns, I was sure that would be warmly welcomed.

By this time Lord West had offered to meet representatives of the Crown Dependencies on 16 March. I understand that at the meeting there was complete agreement on the commitment to maintain the CTA and preserve the benefits it provides. It was also agreed that the security of the border was paramount. Lord West understood the Crown Dependencies' concerns about the wording of the CTA clause and its failure appropriately to differentiate between the Crown Dependencies and the Republic of Ireland. Nevertheless, he said that the Home Office did not believe it possible to legislate in a way that provided the power to achieve the policy aim but at the same time limit or restrict the frequency with which it was used. Similarly, the Home Office wanted to maintain the CTA as a single entity and did not consider it possible readily to differentiate provision for the Crown Dependencies without prejudicing the Government's aim of maintaining a secure platform for the range of intelligence-led activities which will be necessary, at different times and on different routes, across the CTA.

At the meeting it was suggested that the Crown Dependencies might support clause 48 if they were to receive public reassurance of the policy intention regarding immigration controls on routes between the Crown Dependencies and the UK and formal recognition of the constitutional relationship that exists between the Crown Dependencies and the UK. It was proposed that a Memorandum of Understanding be developed between each of the Crown Dependencies and the UK, in partnership with the Crown Dependency governments to affirm the policy intention. Guernsey and the Isle of Man have agreed to this, and a Memorandum of Understanding with each is currently being developed. Jersey is however not content with this approach. UKBA and my department continue to work with all of the Crown Dependencies to seek the best possible solution to these difficult issues. We have recently received a further letter from Mrs Williams in which she reiterates the support of the Government of the Isle of Man for the UK's policy aims but considers that the clause as drafted does not reflect that policy intention and should not be reinserted in the Bill following its removal by the House of Lords. She goes on to say however that, anticipating that the clause may be supported in the Commons, the Isle of Man will continue to work with the UK in respect of the Memorandum of Understanding.

In the third paragraph of your letter you refer to "proposed requirements for notice of travel in advance". It may be that this, and perhaps also the reference to data protection, relates to aspects of the e-Borders programme rather than to what is now clause 50 of the Bill. All of the Crown Dependencies have expressed their willingness to participate in e-Borders; the Home Office has confirmed that journeys between the Crown Dependencies and the UK will be regarded as domestic for e-Borders purposes. Data will instead be

collected and shared on passengers entering the Crown dependencies from outside of the UK so that the Islands are included within the e-Borders ring of security. We are aware of concerns expressed by owners of private pleasure craft about the requirement under e-Borders to provide passenger and crew information in advance for travel outside the external border (for example, in the case of the Channel Islands, to locations on the French coast). We are assured however that this requirement will apply to journeys to and from locations outside of the CTA, not journeys within the CTA, and that it will apply also to UK craft and is not in any way unique to the Crown Dependencies. UKBA makes it clear on its website that it is continuing to liaise with the Royal Yachting Association to ensure that the general boating community is represented in the e-Borders process.

I trust this letter provides the information required by the Committee.

Lord Bach

Parliamentary Under-Secretary of State

16 July 2009

Memorandum submitted by the Ministry of Justice

EXECUTIVE SUMMARY

Current Relationships

- The Islands are not and never have been part of the UK but have their own systems of government. Each Island has different systems, concerns and policies.
- The Crown has ultimate responsibility for the Islands' good governance and the UK is responsible for their defence, representation and performance of international obligations.
- The relationship between the UK and the Crown Dependencies has evolved over time; the modern relationship is reflective of the confidence of the islands to determine their own direction of travel and their readiness to engage directly with the international community.

Role of the Ministry of Justice

- There is a dedicated policy team responsible for the Crown Dependencies. Three operational staff deal with, processing Island legislation, crown appointments and honours. There are also three policy officials who deal with a wide range of policy issues and provide practical advice and support to the Islands when required. The team is also supported by four lawyers.
- Responsibility for the CDs is a shared government responsibility and the Ministry of Justice is reliant on access to policy expertise across government. This ensures that the CDs have access to the best policy advice and that the CDs' issues are fully considered in the light of UK policy. It is the role of the Ministry of Justice to ensure that the UK's responsibilities towards the CDs are understood across Whitehall.

International Representation

- The UK recognises that the CDs have international identities which are different from that of the UK. As with all aspects of the CD relationship this is a shared government responsibility and the department which holds the policy on the particular issues involved is responsible for their international representation in that area.

Future Work

- The Ministry of Justice takes a risk-based approach to the management of the CDs. Our priorities are to maintain good relationships and work with them to ensure their future as well-governed, economically stable democracies.

INTRODUCTION

1. This Memorandum is submitted in response to the Justice Committee's inquiry into the role of the Ministry of Justice in relation to the Crown Dependencies. It takes account of the committee's wish to focus particularly on the role of the Ministry of Justice in managing the United Kingdom's relationship with the Crown Dependencies and how in practice the UK Government represents the Crown Dependencies internationally.

2. The purpose of this document is to provide information on the work of the Crown Dependencies team in the Ministry of Justice and the UK Government's policy in respect of its relationship with the Crown Dependencies (CDs).

CURRENT RELATIONSHIPS

3. The relationship between the UK and the CDs has evolved as a result of historical processes leading to a body of accepted practice. The CDs are not part of the UK and they have never been considered as such. They have their own directly elected legislative assemblies, administrative, fiscal and legal systems and courts of law. They are not represented in the UK parliament and in the ordinary course Parliament does not legislate for them without their consent. In addition to the elected government, each Island has a Lieutenant-Governor who is Her Majesty's representative. The role of the Bailiff is also prominent in the Channel Islands as the civic head of the Island, the speaker of the legislative assembly and the chief judge. Systems of governance, financial interests and policy positions vary from Island to Island and they can never be treated as a single entity.

4. The UK and the Islands have not only rights but also obligations towards each other. The Crown has ultimate responsibility for the Islands' 'good governance'. The UK is responsible for the CDs' defence and international representation. As they are not sovereign states, the UK is responsible for the performance of their international obligations such as those contained in the European Convention on Human Rights. It should be noted that it is the practice for the CDs to be consulted before an international agreement is reached which would apply to them.

5. The most recent statement of the constitutional relationship between the CDs and the UK can be found in the 1973 Kilbrandon report, although this did not purport to be an authoritative statement of the relationship. At the time of this report a key concern was the UK's imminent signature of the Treaty of Rome. The outcome of that issue was that the CDs now have a special relationship with the EU under Protocol 3 of the UK's Treaty of Accession to the European Community. Since that point the relationship with the UK has continued to evolve, especially to reflect an increasing international dimension, in part because of the economic output of the CDs and their focus on providing international financial services.

6. The modern UK/CD relationship also reflects the changing constitutions of the CDs and the emergence of systems of governance in the Islands which increasingly focus on the democratically elected government. The Islands' stated wish to clarify how the modern relationship works and their desire to engage internationally on a more independent basis led to the agreement of a Framework for Developing International Identity (Framework Agreement) which was drawn up in 2006. This was intended to clarify (but not vary) existing constitutional relationships. In these each Island was recognized as "A responsible stable and mature democracy with its own broad policy interests and which is willing to engage positively with the international community on a wide range of interests." All the Framework Agreements follow the same wording—a sample one is attached for your information.

7. The Framework Agreement is indicative of the trend towards the increased desire and willingness on the part of the Islands to engage directly internationally. The Ministry of Justice is supportive of this wish, within the parameters of the constitutional relationship, and sees it as indicative of a positive trend towards the Islands taking control of their own identity and long-term goals. The team of Officials responsible for the CDs within the Ministry of Justice very much operate on the basis that the CDs are confident in the desired direction of travel for each Island and have a clear idea of how they wish to engage with relevant bodies both in the UK and internationally.

8. To enable the CDs to play a more direct role in the conduct of their international relations a system has developed whereby the Islands have been entrusted to negotiate specified agreements (Tax Information Exchange Agreements) directly with certain other states. As the UK remains responsible for the Islands' international relations, the entrustment is subject to the condition that the proposed final text of the agreement is submitted to the Ministry of Justice for approval before signature. This represents an important way in which the Ministry has supported the CDs in developing their own international identities. The process has been working well and the MOJ see entrustments as very much as part of way forward in terms of the Island's international aspirations.

ROLE OF THE MINISTRY OF JUSTICE AND UK GOVERNMENT GENERALLY

9. There is a dedicated policy team responsible for the CDs. Three officials are involved in the operational aspects of the work, processing Island laws for royal assent, crown appointments, and honours. There are also three policy officials working exclusively on CD issues with line management support as appropriate. They deal with live policy issues ensuring the concerns of the CDs are taken into account as UK policy develops and working with the CDs on the development of their own policies especially where these have a UK or international dimension. There are also four departmental lawyers involved in providing advice to the policy team and other government departments in respect of the CDs. Lawyers also work directly with lawyers in the CDs, where appropriate, for example when working on the extension of UK enactments to the Islands by Orders-in-Council or in order to resolve queries in respect of Island laws submitted for royal assent.

10. The Crown Dependencies Branch within the International Directorate has a number of roles:
- Holding the policy responsibility for the UK/CD relationship
 - Providing the main channel of communication between the CDs and the UK government on a full range of policy concerns and issues raised by both the CDs and the UK

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- Ensuring development of UK policy takes the CDs into account where appropriate
 - Processing legislation from Jersey, Guernsey and the Isle of Man which is submitted for Royal Assent or for agreement that the Lieutenant-Governor of the Isle of Man may exercise his delegated power to grant Royal Assent
 - Consulting with the Islands on extending international instruments and UK legislation to them where appropriate.
 - Recommending crown appointments in the Islands.

11. The Crown has ultimate responsibility for the good governance of the Islands which means that, in addition to the above duties, the Ministry of Justice takes an active interest in a wide range of issues, especially anything that could have potential ramifications for the current and future governance of the Islands and their long-term sustainability. The term “good governance” is not one we have defined in this context and, in respect of our day-to-day discussions with the Islands, we consider it proper to assist the Islands in dealing with a broad range of constitutional, social and economic issues. We are available to actively assist the Island authorities, providing practical help to deal with these important issues and ensure that when needed the authorities are able to access appropriate UK advice and support. For example, we have provided assistance to Alderney to allow them to further develop their tidal power scheme which has the potential to generate significant income for the Island. We have also been recently contacted by the Government of Sark who are seeking our support as they undertake long-term population, resource and infrastructure planning.

12. A crucial aspect of the team’s work is to maintain and build excellent relationships with officials and governments in each of the CDs. This is vital to be able to ensure open and honest dialogue on a multitude of issues. The CDs recognise this need as well and together we have been able to develop very helpful, mutually beneficial relationships. We have had to discuss a variety of difficult issues over the years such as the import of “tasers” which is discussed below; it is the nature of our overall relationships which allow us to discuss these issues frankly and reach mutually acceptable ways forward.

13. It is important to emphasise that overall responsibility for the CDs is a shared government responsibility. We frequently rely on other government departments to either provide advice and assistance to the CDs or represent them internationally. The team deals with an enormous variety of live policy issues. A sample of live issues includes finance and tax, entrustments, crime and policing, environmental issues, human rights, constitutional reform, shipping and space. The team is small and it would clearly not be possible for the team to hold in-depth policy expertise on such a wide range of issues.

14. Relying on policy expertise across government ensures that the Crown Dependencies have access to the best expertise available and that the UK can ensure that the Crown Dependencies issues in this area are handled appropriately in the context of the UK’s policy concerns. While not every other government department has prior experience of the UK’s constitutional relationship with the CDs, it is part of the role of the CD team at MOJ to provide advice and information to other UK government departments to ensure that both the UK’s and CDs’ policy concerns are appropriately taken into account. We take a proactive approach to this, engaging key stakeholders across government on issues concerning the CDs and using opportunities such as the recent seminars organised by DEFRA to explain the constitutional position of the CDs.

15. Both we and our colleagues across Whitehall have to take into account the CD’s policy interests and those of the UK when reaching a decision. This can be a difficult and involved process in which the CDs concerns cannot always take priority. An illustrative example of this was the supply of “tasers” to the Channel Islands, where their wish to have “taser” equipment for their police forces had to be balanced against the UK’s concern about maintaining a consistent approach to the application of EC Council Regulation 1236/2005 concerning the trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment. This regulation covers the export of portable electric shock devices, more commonly known as “tasers”.

16. HM Inspectorate of Constabulary Assessment of the States of Guernsey Police had expressed concern at the force’s lack of “less lethal” firearms. The Channel Islands therefore applied for export licences so that they could import “tasers”. These were refused. The decision to refuse the licences was based on the application of the ban. FCO Ministers felt that an exception could not be made to the export prohibition. The Channel Islands pressed for the prohibition to be lifted. FCO, MOJ and BERR met with the Island authorities to discuss how the Islands could express their concerns on this issue.

17. Discussions across Whitehall went on for some time afterwards and resulted in a Ministerial approach from Lord Bach, the Minister with responsibility for the CDs, to the FCO Minister responsible for licensing policy. The Islands with the help of MOJ had prepared a detailed case for the FCO to consider, including their compliance with human rights obligations and controls on re-export. However FCO Ministers did not feel it would be right to allow an exception to the ban, on the grounds that the consistent application of the ban outweighed the case for making an exception.

INTERNATIONAL REPRESENTATION

18. The Framework Agreements recognise that the CDs have international identities which are different from that of the UK. As stated the constitutional obligations of the UK towards the CDs are a collective government responsibility. In terms of international representation the policy-holding department is best equipped to take forward negotiations which the Ministry of Justice would have neither the expertise nor access to the correct channels to carry out. The Ministry of Justice supports this process by providing a channel of communication between the Islands and the appropriate government department and ensuring that the constitutional position is fully understood.

19. The issues which arose over the collapse of the Icelandic banks illustrates this point. HM Treasury has the requisite policy expertise and access to appropriate channels to represent the international interests of the Crown Dependencies in this matter. Treasury had to represent the interests of both the UK and the CDs on this matter although the position of banks in the CDs differed significantly from those in the UK. The Treasury represented the differing concerns of the CDs to the Icelandic authorities, and in some circumstances assisted the CDs in making contact with the Icelandic authorities to discuss these issues in more detail. The Ministry of Justice maintains an active role in this process as liaison between the CDs and the Treasury to assist in the discharge of these duties.

Future Work

20. One of our main priorities is to ensure that the core work the team undertakes is structured in the best possible way to allow us to provide an excellent service to both the CDs and other departments alike. The work the team undertakes is very resource intensive and involves a great deal of consultation with both the CDs and other government departments, who must in turn balance the CDs requirements with their own priorities and resources, so processes need to be as efficient as possible. In the field of Island legislation for example we processed over 100 Island laws to royal assent stage last year. This required consultation with the policy holding department on the content of the law, consideration of the implications of the law by MOJ lawyers and policy officials and, in some cases detailed discussion with the Islands about this legislation. This process relies on all involved understanding clearly the objective of this work and their role in it. As we are frequently reliant on the support and advice of colleagues in other government departments we recognise that finding pro-active ways to improve the knowledge and understanding of our relationship with the CDs amongst other government departments is an important part of our work and one where we can improve and build upon work already underway.

21. As part of this process of clarification the MOJ is currently revising existing protocols and drafting new ones to ensure that there is a clear understanding of the process of extending international instruments and for processing Island legislation. These are intended to streamline the current processes and ensure they are carried out in the most efficient way. The promotion of these new protocols will be a key element in informing other government departments about the CDs.

22. The CDs' team's approach is to concentrate on defining core processes and taking a risk-based approach to the management of issues which arise. Issues are dealt with in the context of our priorities which are to maintain good relationships with the CDs and work with them to ensure their future as well-governed, economically stable democracies.

October 2009

Annex

**FRAMEWORK FOR DEVELOPING THE INTERNATIONAL IDENTITY
OF THE ISLE OF MAN**

Following the statement of intent agreed on 11 January 2006, the Chief Minister of the Isle of Man and the UK Secretary of State for Constitutional Affairs have agreed the following principles. They establish a framework for the development of the international identity of the Isle of Man. The framework is intended to clarify the constitutional relationship between the UK and the Isle of Man, which works well and within which methods of evolving to help achieve the mutual interests of both the UK and the Isle of Man.

1. The UK has no democratic accountability in and for the Isle of Man which is governed by its own democratically elected assembly. In the context of the UK's responsibility for the Isle of Man' international relations it is understood that:

- The UK will not act internationally on behalf of the Isle of Man without prior consultation.
- The UK recognises that the interests of the Isle of Man may differ from those of the UK, and the UK will seek to represent any differing interests when acting in an international capacity. This is particularly evident in respect of the relationship with the European Union where the UK interests can be expected to be those of an EU member state and the interests of the Isle of Man can be expected to reflect the fact that the UK's membership of the EU only extends to the Isle of Man in certain circumstances as set out in Protocol 3 of the UK's Treaty of Accession.

2. The Isle of Man has an international identity which is different from that of the UK.

3. The UK recognises that the Isle of Man is a long-standing, small democracy and supports the principle of the Isle of Man further developing its international identity.

4. The UK has a role to play in assisting the development of the Isle of Man's international identity. The role is one of support not interference.

5. The Isle of Man and the UK commit themselves to open, effective and meaningful dialogue with each other on any issue that may come to affect the constitutional relationship.

6. International identity is developed effectively through meeting international standards and obligations which are important components of the Isle of Man's international identity.

7. The UK will clearly identify its priorities for delivery of its international obligations and agreements so that these are understood, and can be taken into account, by the Isle of Man in developing its own position.

8. The activities of the UK in the international arena need to have regard to the Isle of Man's international relations, policies and responsibilities.

9. The UK and the Isle of Man will work together to resolve or clarify any differences which may arise between their respective interests.

10. The Isle of Man and the UK will work jointly to promote the legitimate status of the Isle of Man as a responsible, stable and mature democracy with its own broad policy interest and which is willing to engage positively with the international community across a wide range of issues.

The Rt Hon Lord Falconer of Thoroton QC
Secretary of State

Hon J a Brown MHK
Chief Minister

1 May 2007

Memorandum submitted by the National Association of Health Stores (NAHS)

1. EXECUTIVE SUMMARY

1.1 The NAHS submission is primarily aimed at answering point two of the call for evidence for the Select Committee's inquiry, which asked for views on *the role of the Ministry of Justice in managing the United Kingdom's relationship with the Crown Dependencies including inter-departmental liaison and coordination.*

1.2 Our members have been experiencing problems with unfair and illegal competition from the health food industry based in the Channel Islands. Due the fact that the Channel Islands are not part of the EU, and have not implemented the relevant European legislation which regulates food supplements and the health claims that can be made about food, such companies are able to sell products containing ingredients that would be illegal if placed directly on the UK market. In addition, some Channel Islands operators make claims about these products which would also be illegal if the products were placed directly on the UK market. They can also benefit from Low Value Consignment Relief (LVCR), meaning that their products can be sold more cheaply.

1.3 The fact that companies based in the Channel Islands are able to sell a wider range of products than UK companies, make exaggerated claims about their products, and under-cut the prices of UK companies, means that law-abiding and responsible UK companies are severely disadvantaged. This situation also has the potential to put consumers at risk.

1.4 As it is the role of the Ministry of Justice to manage the UK's relationship with the Crown Dependencies, we would like to see them coordinate effective action to support UK businesses and protect UK consumers. In particular, we would like them to ensure the implementation of the Nutrition and Health Claims Regulation, the Food Supplements Directive and the Medicines Directive in both Jersey and Guernsey.

2. INTRODUCTION

2.1 The NAHS (National Association of Health Stores) is a non-profit organisation founded in 1931 which represents independent health stores in the UK. We have 160 of the most progressive independent retailers as members.

The independent retail sector is the most important channel in the UK for the sale of the very specialist nutritional and herbal supplement market in the UK. Being UK based we are fully compliant with all medicines and food law and perceive an injustice when other competitors are not.

2.2 We are responding to this inquiry into the Ministry of Justice in relation to the Crown Dependencies, due to a specific problem influenced by that particular relationship. The Ministry of Justice has a role to play in dealing with this problem of unfair and illegal competition from the Channel Islands. Therefore, this

submission primarily addresses point two of the call for evidence, which asks specifically about the *role of the Ministry of Justice in managing the United Kingdom's relationship with the Crown Dependencies including inter-departmental liaison and coordination.*

3. THE PROBLEM

3.1 The UK specialist health food industry is being undermined by illegal and unfair competition from businesses based in the Channel Islands. Personal imports of specialist supplements, currently worth over £70 million per annum, are seriously undermining the profitability of responsible UK suppliers and retailers, at times jeopardising consumer safety, and diverting substantial revenues from the Treasury.

3.2 This is possible because the Channel Islands' (CI) unusual status of crown dependencies means that they are not fully in the UK, nor are they in the EU. Therefore, they are not subject to either the UK or EU regulatory regimes covering medicinal claims, product quality and safety. These include the Food Supplements Directive (FSD), Nutrition and Health Claims Regulation (NHCR) and the Medicines Directive. In recent years, a number of operators have located in CI jurisdictions to take advantage of the more relaxed regulatory situation whilst targeting the UK market. The Ministry of Justice and the Channel Islands have now agreed that the relevant legislation should be implemented, but to date this has not happened.

3.3 Virtually all CI operators make medicinal claims for (unlicensed) food supplements and herbal products and some make wildly exaggerated claims for 'miracle cures' for serious conditions. In the UK, such claims are banned by the Advertising Standards Agency (ASA) code. While it is possible to obtain ASA adjudications against such advertising, in practice they pose little threat to companies based in the Channel Islands. Some CI operators offer substances ostensibly as food supplements that are classified as medicinal in the UK. One potential effect is that those who are ill risk deciding not to seek appropriate medical advice. Furthermore, CI operators escape the need for compliance with UK food safety (or pharmaceutical) legislation.

3.3 There is already debate about the inequities of LVCR for Channel Island companies to avoid paying VAT on deliveries valued less than £18. This is sometimes compounded by operators splitting parcels for orders in excess of £18. Also, technically, most if not all CI businesses operate in contravention of the 'contract for purchase' requirements for purchases from an off-shore vendor. The rapid growth and predicted future growth of trade from the CI in relevant sectors will exacerbate the loss of VAT revenue to the Treasury (official estimates predict a rise in lost revenue resulting from LVCR across all product categories to £200m pa). The fact that unscrupulous operators making illegal and exaggerated health claims from the CI also enjoy the LVCR benefit gives them a double advantage over responsible EU and UK businesses.

3.4 The freedom to make health claims that are illegal in the UK with impunity (it is self-evident in this sector that claims sell products) and the price advantage generated by the LVCR has led to CI operators capturing a substantial share of the UK food supplements market (audited value £362m in 2005) from a very low base 10 years ago. There are no significant barriers to further growth and without effective intervention it is inevitable that the CI share of market will continue to increase, with responsible EU and UK operators unable to compete on either cost or claims on a level playing field. Responsible operators have also had a raft of recent EU Directives and Regulations imposing further restrictions on the sector and the gap between what a CI operator will say in making health claims and what an EU operator can say will grow.

4. REGULATION AND LEGISLATION

4.1 The Medicines and Healthcare products Regulatory Agency (MHRA) and Trading Standards Officers have power to take steps against UK operators contravening the rules on 'promotional health claims' but they have no jurisdiction in the Channel Islands. They do where appropriate forward complaints to the relevant foreign regulating body. Informally they comment that where a complaint is forwarded to a member state, the practice complained of normally ceases but that this is not the case with the Channel Islands in the majority of complaints.

4.2 We do not wish to suggest that the CI authorities are anything other than well-meaning and we do recognise that enforcement is always going to be a problem within such a small jurisdiction which, in some ways, has the responsibilities of a nation state. Nevertheless, the end result is an ever-increasing flow of inappropriately marketed and sometimes illegal items being sold to vulnerable UK consumers, who find the Channel Islands address reassuringly British.

4.3 Jersey and Guernsey legislate separately. The Guernsey Medicines Law, which implements the Medicines Directive, received Royal Assent in December 2008, and should come into force in October 2009. The MHRA have stated that the Medicines Law is not fully consistent with the Medicines Directive; but it is hoped that some of the loopholes can be closed with secondary legislation.

4.4 Guernsey has not implemented either the NHCR or the FSD. However, it was recently confirmed that work has begun on investigating the implementation of the FSD and NHCR, but a clear timetable for implementation has still not been provided.

4.5 Jersey already has a medicines law already in place which makes it illegal to make medicinal claims on unauthorised products or distribute unauthorised medicines, but it is difficult to enforce in practice and only targets Jersey based suppliers and advertisers.

4.6 Initially, Jersey had pledged to implement both the FSD and the NHCR on the back of a review of their Food Hygiene Law, with drafting due to begin in 2010. However, this target has since been delayed and the implementation work has not yet been included in their work programmes.

4.7 Guernsey and Jersey also have the power to adopt UK law as their own. It will be necessary for them to take this step, or to model their new legislation very closely upon it, if they wish to avoid the accusation that they are actively encouraging unscrupulous operators in their jurisdiction to exploit potentially vulnerable UK consumers.

5. THE SOLUTION

5.1 It is essential that the Ministry of Justice, as the point of liaison between the UK and the Channel Islands, continues to put pressure on both Jersey and Guernsey to implement the necessary legislation, including the FSD, the NHCR and the Medicines Directive as soon as possible, as well as to offer help with the implementation where needed.

5.2 Once this legislation does come into force, attention will shift to enforcement. Both Jersey and Guernsey are likely to require the assistance of several UK agencies to achieve effective enforcement, including the MHRA, the FSA and Trading Standards. The Ministry of Justice needs to actively coordinate this assistance, to ensure that the legislation is adhered to, and UK retailers and consumers are protected.

5.3 Until the legislation has been implemented, the Ministry of Justice also needs to support efforts to deal with the problem through other channels, including through Royal Mail (who deliver the majority of the catalogues advertising products of concern) and supporting cooperation between Trading Standards officers based in the UK and the Channel Islands.

5.4 It is important that the Ministry of Justice is fully behind any efforts to tackle this problem. As well as undermining responsible UK businesses, it misleads UK consumers and is a potential threat to their health and wellbeing. The Ministry needs to effectively manage the relationship between the UK and the Channel Islands, and as well as facilitating cooperation between other UK departments and agencies to ensure that the health food businesses based in the Channel Islands cause as little damage as possible in the short term, while working towards the long term solution to the problem: implementation and effective enforcement of the FSD, the NHCR and the Medicines Law in both Jersey and Guernsey. Only this long term solution ensures that any competition coming from the Channel Islands is fair and legal, and it ensures a long awaited level playing field for UK businesses.

October 2009

Memorandum submitted by the Policy Council of the States of Guernsey

1. EXECUTIVE SUMMARY

1.1 Guernsey and Her Majesty's Government, principally through the medium of the Ministry of Justice ("MoJ"), have a relationship founded on mutual respect and support. The day-to-day relationship generally operates satisfactorily. Conventional practices of consultation through meaningful dialogue relating to policy development and international action have recently been clarified in a statement of principles establishing a framework for the development of the international identity of Guernsey.

1.2 The essential process of consultation, however, does not always run smoothly. Deadlines fixed for responses are sometimes completely unfeasible. The reason underlying the short deadlines can appear to be attributable to officials elsewhere overlooking the need to engage with Guernsey or might arise from the reduction in staff numbers of those charged with handling Crown Dependencies business. Either way, increasing awareness throughout the UK Government of when consideration of Crown Dependency interests is necessary would enhance the coordination role undertaken by the MoJ, thereby improving the overall management of the relationship with Guernsey.

1.3 UK representation of Guernsey internationally is about striking the right balance. In order to be effective, Guernsey must be afforded an adequate opportunity to influence the position to be taken on its behalf. Guernsey's authorities should not be presented with a *fait accompli* and left with a choice as to whether to accept or reject the position negotiated by the UK. However, the States of Guernsey also wishes to play a more prominent role internationally on its own behalf. Accordingly, the evolving relationship with the UK entails the MoJ being prepared, as appropriate, to facilitate that approach. This is particularly important where the interests of Guernsey are different from those of the UK. One consequence of increasing direct international engagement by Guernsey's authorities would be a reduction in the burden placed on the MoJ and other parts of the UK Government.

2. CONTEXT

2.1 The structure of Guernsey's administration was briefly described in the submission of the States of Guernsey to the Treasury Select Committee's Inquiry into the Banking Crisis.¹⁹ The Policy Council of the States of Guernsey ("the States") is mandated to perform the function of conducting Guernsey's external relations.²⁰ This submission is made only in respect of the experiences of the Policy Council's political members and officials supporting them and is not made on behalf of other entities within the Bailiwick of Guernsey, including the administrations in Alderney and Sark and Crown appointees.

2.2 Historically, Guernsey's relationship with the Crown was managed within Her Majesty's Government through the Home Office. In 2001, responsibility was transferred to the Lord Chancellor's Department. Its more overt constitutional remit and overall size fitted better with the status of the Crown Dependencies, being outside the metropolitan territory of the UK. That Department was merged into the Department for Constitutional Affairs in 2003, which in turn was merged into the MoJ in 2007. On each occasion, there was a degree of continuity in handling Guernsey's business because the team of officials within those Departments was similarly transferred.

2.3 The States recognises that the relationship with the United Kingdom is one of mutual respect and support, ie, a partnership, as was explained on the last occasion on which the constitutional position was reviewed by the Royal Commission on the Constitution 1969–73.²¹ This was re-affirmed in the *Framework for developing the international identity of Guernsey*, signed in December 2008²² (the "*Framework*"). The *Framework*'s principles support Guernsey's stated priority of asserting its independent identity.²³ The relationship depends heavily on there being open, effective and meaningful engagement on both sides.

2.4 The States believes that HM Government under-resources the personnel within the MoJ charged with handling Crown Dependency matters. The Kilbrandon Report records "*a staff of fifteen engaged almost entirely on work relating to the Islands*".²⁴ The amount and potential complexity of business to be conducted today is certainly not less, and may be more, than it was, but the number of staff involved is noticeably fewer. This necessarily impacts on their capacity for being anything but reactive.

3. THE ROLE OF THE MINISTRY OF JUSTICE IN MANAGING THE UNITED KINGDOM'S RELATIONSHIP WITH GUERNSEY

Inter-departmental liaison and coordination

3.1 For matters that originate elsewhere within HM Government, the MoJ acts as the conduit to relay them to the States. The channel of communication utilised results in correspondence being sent to the Office of HE the Lieutenant-Governor, transmitted to the Bailiff (as Presiding Officer of the States of Deliberation) and then forwarded to the States. Responses, and matters originating within the States for consideration by HM Government, are sent in reverse. The process of effective consultation is the essence of the relationship and requires acceptable management.

3.2 Modern methods of communication, both within HM Government and between the UK and Guernsey, mean that deadlines for responses are sometimes unrealistically short, particularly given Guernsey's form of government by multi-member Departmental decision-makers. For example, on 17 July 2009, there was informal consultation about the UK's intended ratification of the UN Convention on the Suppression of Nuclear Terrorism with a request for a response by 23 July, with the explanation that the relevant Home Office team needed to confirm the position in advance of the September 2009 annual Treaty event.

3.3 On occasions, it appears that other UK Departments overlook seeking input from Guernsey until comparatively late in the formulation of their positions, meaning that the consultation process is not as effective as it should be. For example, a clause was introduced into the Home Office's Borders, Citizenship and Immigration Bill (originally as cl. 46) affecting immigration controls within the Common Travel Area without proper consultation. This was acknowledged in a letter from Lord West to the States dated 19 March 2009. Other exchanges between officials in respect of the parliamentary stages of that Bill were often handled within short timeframes, the shortest involving a request for comments on the Government's proposed lines

¹⁹ See Banking Crisis: The impact of the failure of Icelandic banks: <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmtreasy/144/144ii.pdf>, Ev 146, section 2.

²⁰ See page 29 of download from <http://www.gov.gg/ccm/navigation/government/states-members-and-committees/mandates-and-memberships/>. The relevant functions are delegated to the Council's External Relations Group [comprising the Chief Minister, Deputy Chief Minister and three other Ministers].

²¹ See *Report of the Royal Commission on the Constitution 1969–73* (Cmnd 5460: the "Kilbrandon Report"), especially paragraph 1498: "... both the United Kingdom and the Islands have not only rights but also obligations towards each other. The Islands have a right to respect for their autonomy in domestic affairs and to the observance by Parliament of the convention that it does not in the ordinary course legislate for the Islands without their consent on such matters. But coupled with this is an obligation to give all reasonable assistance and co-operation to the United Kingdom authorities in the exercise of their domestic and international responsibilities. The United Kingdom authorities, for their part, have a right to expect this co-operation and in the last resort to intervene if it is not given and intervention is necessary to safeguard their own essential interests. In turn they have the obligation to give all reasonable assistance to the Islands, to respect their autonomy and to work for its preservation."

²² See document appended to Report at page 10 of download from <http://www.gov.gg/ccm/policy-and-hr/billets--resolutions/2008/-billet-dtat--xv-2008-november.en>.

²³ See page 13 of download from <http://www.gov.gg/ccm/policy-and-hr/billets--resolutions/2007/billet-dtat--xviii-2007-july.en>.

²⁴ See paragraph 1435.

within 70 minutes. Another example was a letter sent by the MoJ on 26 February 2009 seeking a response by the next day in respect of work being undertaken by Defra on a recast EU Regulation on substances that deplete the ozone layer.

3.4 In other instances, the MoJ itself seems to be creating the “bottleneck” in transmitting material. For example, the draft Iran (United Nations Sanctions) Order 2009, to be made on 8 April 2009, was only forwarded on 1 April 2009, accompanied by the comment that “*the opportunity to feed into this order has now passed*” and the explanation that there perhaps should have been firmer chasing of the FCO for the relevant explanatory attachments. Another example was a letter sent on 15 June 2009 consulting about the content of the draft Bribery Bill, which had been published by the MoJ itself on 25 March 2009. The States is therefore concerned that it can be inferred from this pattern that there are other relevant matters that are never drawn to its attention, implying that the consultation obligation is not being met.

3.5 The States relies on the MoJ providing briefings about matters of concern to the rest of HM Government. The States generally supplies material to the MoJ to assist in this process, but is not then usually invited to comment on the final content of resulting briefing documents or the development of lines to be taken. The States wonders whether this results in the key messages it wishes to relay in respect of such matters being misunderstood or misinterpreted to the extent that it impairs the ability of those representing Guernsey to be able to articulate Guernsey’s position accurately and completely. For example, the States has made a number of specific points about the proposal to amend Directive 2003/48/EC on taxation of savings income in the form of interest payments both to the MoJ and to HM Treasury for use in the negotiations within the EU institutions. The States has also aired these concerns directly, but informally, to Commission officials. Informally, it has heard from a number of different sources that the particular issues the States has sought to highlight have not been addressed by the UK delegation at relevant meetings in Brussels.

3.6 In some instances, the MoJ proceeds to act on behalf of the States in discussions with other Departments (ie, a “traditional” approach) rather than adopting a practice of always considering facilitating an invitation to meetings for representatives of the States. A consequence of this is that the States do not know precisely how its position has been portrayed. For example, the States had formally sought a change of FCO policy in relation to the export from the UK of Taser guns and cartridges. The States was informed on 30 July 2009 that, after the discussions had escalated to Ministerial level, the FCO policy position would remain unchanged. The States would have welcomed the opportunity to engage directly with the FCO and has since requested such a meeting.

Parliamentary questions

3.7 The States recognises that responses to questions have to be prepared quickly and that questions concerning Guernsey are not always posed directly to the MoJ. Where input into drafting responses is sought from and provided by the States, the States would hope that the answer given would, where appropriate, reflect relevant facts applicable to Guernsey. For example, the answer given on 14 July 2009 to a question about the UK’s aid expenditure volunteers information about the UK’s annual expenditure but did not mention that the Guernsey Overseas Aid Commission independently makes its own aid contributions, which in 2008 were £2.33 million.²⁵

Insular legislation

3.8 A core function of the MoJ is to scrutinise Projets de Loi approved by the States of Deliberation prior to submission to the Privy Council for Royal Sanction. Where the subject-matter of that legislation affects the responsibilities of other UK Departments, officials at the MoJ consult in accordance with an informal timetable, permitting four weeks for comments unless the Department concerned seeks an extension of time. The expected timescale from submission to Royal Sanction is understood to be 16-20 weeks. When the process of obtaining Royal Sanction takes longer than expected, at times without there being adequate communication explaining the reasons, it frustrates the will of Guernsey’s democratically-elected legislature. For example, having taken exceptional steps in February and March 2008 to compress the usual timetable for securing approval of the Medicines (Human and Veterinary) (Bailiwick of Guernsey) Law, 2008 by the insular parliaments, the Projet did not obtain Royal Sanction until December 2008, largely, it is understood, arising from the slowness of responses from the MHRA.

Raising awareness

3.9 The effectiveness of the MoJ liaising on behalf of the States depends on an adequate level of awareness within the rest of HM Government about the occasions on which there is a need to think about and engage the Crown Dependencies. The States understand that a document providing a *Background briefing on the Crown Dependencies* dating from 2006 (though currently being updated) is posted on the UK Government intranet. However, officials elsewhere in HM Government need to know of the existence of the document,

²⁵ See http://www.publications.parliament.uk/cgi-bin/newhtml_hl?DB=simple&STEMMER=en&WORDS=lord%20wallace%20of%20saltair&ALL=&ANY=&PHRASE=&CATEGORIES=&SIMPLE=&SPEAKER=lord%20wallace%20of%20saltaire&COLOUR=red&STYLE=s&ANCHOR=90714w0001.htm_spnew11&URL=/pa/ld200809/ldhansrd/text/90714w0001.htm#90714w0001.htm_spnew11.

or actively search it out, before being in a position to consult it. The document is clearly no substitute for personal contact between MoJ officials and their colleagues, but staff numbers are such that embarking on a “roadshow” of awareness-raising, ideally in collaboration with officials from the States, appears impractical.

Announcements

3.10 The handling by HM Government of important announcements concerning the Crown Dependencies has, however, improved. In 1998, the Review of Financial Regulation in the Crown Dependencies,²⁶ to be conducted by Andrew Edwards, was sprung upon the States. By comparison, in 2008, when the Chancellor announced the Review of British Offshore Centres,²⁷ being conducted by Michael Foot, the States were alerted beforehand and liaised with the MoJ and HM Treasury in relation to its terms and the handling of its announcement.

4. HOW, IN PRACTICE, THE UK GOVERNMENT REPRESENTS GUERNSEY INTERNATIONALLY

4.1 The conventional approach, since even before the 1950s when the automatic application of international instruments to Guernsey ceased, has been for consultation to occur before the UK represents the position of Guernsey internationally.²⁸ The *Framework* highlights the importance of prior consultation. Because so much more takes place internationally than even in 1973, when the Royal Commission reported, the States is more dependent than ever on timely and effective consultation. The *Framework* crystallises long-standing practice by confirming that Guernsey can reasonably expect to be informed of how the UK envisages acting internationally so that that position can be taken into account by the States in developing its own position, to which the UK will then have regard. There is explicit recognition that the interests of Guernsey and the UK may differ, particularly in relation to the EU, and that “*the UK will seek to represent any differing interests when acting in an international capacity*”.

4.2 Despite the terms of the *Framework*, it is apparent that HM Government will prioritise UK interests over those of the States. The negotiations in relation to the amendment to Directive 2003/48/EC²⁹ are a case in point. Similarly, in the discussions between HM Government, conducted by HM Treasury, and the Icelandic authorities following the collapse of that country’s banking sector, with consequences for Landsbanki Guernsey Limited, it became clear by July 2009 that the States needed to take steps to advance its own position directly. Consequently, the States commented that month on a draft letter that HM Treasury would send to the Icelandic authorities intimating the States’ desire to raise their concerns directly, requesting Iceland’s assistance in progressing the matter. Representatives of the States visited Iceland in August 2009. It transpired that HM Treasury’s letter was only sent on 23 September 2009.

4.3 The practical consequences of such incomplete representation are not always known to the States at the time. The MoJ (and its predecessors) tend to inform the States of the outcome of negotiations rather than there being a blow-by-blow account of how the result was achieved. This occurs most frequently in relation to EU developments. For example, there was no consultation with the States during the development of Directive 2006/66/EC concerning batteries. Instead, contact was first made by the MoJ on 18 March 2008, at a time when BERR (as it then was) had concluded its first public consultation in the UK about transposing the Directive, informing the States that HM Government took the view that some provisions of the Directive were required to be implemented in Guernsey law.

4.4 However, it is also important to remember the evolutionary approach to international representation that has been developing. Historically, the States was passive in the process, relying fully on UK Government representation, usually without knowing precisely how that was being effected. There were, and still are, few opportunities to participate as an integral part of a UK delegation, eg, very occasional invitations to participate in UN periodic reviews and the meetings of Commonwealth Finance Ministers. Increasingly, the States wishes to act internationally directly. This aspiration is now explicitly underpinned by the *Framework* and developing practice.³⁰ Accordingly, the States’ reliance on UK Government international representation is no longer as absolute as it was previously. Instead, the States looks to the MoJ not only as the representative of Guernsey internationally, or, more often, to engage another UK Department in its performance of that role, but also as a facilitator to support the States’ own international participation.

4.5 In some instances, it has been made clear to the States that differing domestic policy positions make it impossible for HM Government to represent Guernsey internationally. For example, when the OECD commenced its Harmful Tax Practices Project, the States’ only option was to become engaged directly rather than relying on HM Treasury to represent it. When the States has its own seat in international discussions, including on the British-Irish Council, the role of “intermediary” usually performed by the MoJ becomes redundant, enabling the States to rely on the effectiveness of its own representation

²⁶ See <http://www.archive.official-documents.co.uk/document/cm41/4109/4109-i.htm> for the Report (Cm 4109).

²⁷ See http://www.hm-treasury.gov.uk/indreview_brit_offshore_fin_centres.htm.

²⁸ See the Kilbrandon Report, especially paragraphs 1363, 1401-3 and 1435.

²⁹ See paragraph 3.5 *supra*.

³⁰ HM Government has expressly “entrusted” the States to conclude in its own right various international law taxation agreement, eg, tax information exchange agreements with EU and OECD member states.

5. SUGGESTIONS FOR CHANGES

5.1 The following suggestions are not simply about allocating more resources within the MoJ to Crown Dependencies business, although that would inevitably assist. Indeed, the States has increased its own external relations resources recently in order to reflect its priorities and to meet the growing demands of that aspect of its governmental business.

5.2 Ensuring that all relevant UK Departments and their agencies understand the importance of early consultation with the States through the MoJ would provide greater comfort that the consultation obligation is being properly adhered to. The better the comprehension within HM Government of the status of Guernsey, the more effective the relationship can be through meaningful exchanges, both when the UK establishes the position it wishes to adopt and subsequently. More proactive dialogue would be welcomed to foster constructive engagement, consistent with the *Framework's* principles.

5.3 Consideration might also be given to encouraging the States and other UK Departments to engage directly on issues of mutual concern more frequently. The MoJ can properly be kept informed of those discussions but without the need to be perceived to be actively participating as intermediary. There is scope for broadening the ambit of the areas where HM Government "entrusts" the States to act internationally, under which the MoJ, and relevant Departments, continue to supervise but are relieved from the burden of international representation.

October 2009

Memorandum submitted by the Policy and Finance Committee of the States of Alderney

1. Alderney is part of the Bailiwick of Guernsey but it has a legislature and executive (referred to together as "the States of Alderney") separate from those of Guernsey. The islands are however in association, notably in that Guernsey provides Alderney with what are termed "the transferred services"³¹ in return for payment of income and other taxes to Guernsey. The States of Guernsey has the right to legislate for Alderney in relation to the transferred services and generally in criminal matters. The States of Alderney legislates in other areas under the authority of the Government of Alderney Law, 2004³² and a variety of other laws approved and ratified by Her Majesty in Council. It follows that when Alderney seeks fresh law making powers it does so by way of a *Projet de Loi*. The process for this is set out later.

2. Alderney is also a separate jurisdiction for purposes of international obligation. The States of Alderney reaches its own decision as to whether to request extension of international instruments. Issues arising from this are addressed through the Ministry of Justice. Alderney enacts its own Ordinances giving effect to EC provisions that it is obliged to implement in accordance with Protocol 3 to the United Kingdom's Act of Accession, and may choose to implement other provisions by which it is not bound if it so wishes.

3. It follows from the above that for many purposes Alderney is a separate jurisdiction from Guernsey and it needs and expects a chain of communication that reflects this. Not all business affecting Alderney should be dealt with through Guernsey although there has been a perception at times that this is regarded by some as the only proper route.

4. Alderney has no full time politicians and only a small civil/public service. The States of Alderney consists of a President and ten Elected Members. There are four senior officers in the civil service: the Chief Executive, States Treasurer, States Engineer and Greffier. The last of these is the servant of the Court of Alderney and of the States when it sits as a legislature. The States generally sits as a legislature once a month (but often omitting meetings in February and August) and conducts the bulk of its business through three committees, the Policy and Finance Committee,³³ the General Services Committee and the Building and Development Control Committee. These also generally meet on a monthly basis.

5. Contact with the Ministry of Justice at officer level is relatively informal, usually between the Chief Executive and the Head of Policy at the Ministry. This works well for most day to day purposes. We have, for example, received considerable assistance and support from the Head of Policy in relation to issues connected with our renewable energy project.

6. It is important in maintaining the independence of the Court of Alderney that the Greffier is also able to communicate directly at this level. The Chairman and other members of the Court of Alderney ("the Jurats") are appointed by the Secretary of State (sections 5 and 6 of the Government of Alderney Law, 2004).

7. There is a greater degree of formality at other levels, with communication being via the President and Lieutenant Governor. In the case of legislation, a *Projet de Loi* approved by the States goes from the President to the Bailiff (who obtains an explanatory note from the Law Officers) to the Lieutenant Governor

³¹ Primarily, the Airport, Education, Health, Immigration, Police and Social Services.

³² This Law is, in effect, the Island's constitution and may be found at: <http://www.guernseylegalresources.gg/ccm/legal-resources/laws/government-constitution-and-elections/government-of-alderney-law-2004-consolidated-text.en>.

³³ The mandate of the Policy and Finance gives it general responsibility for all constitutional and legislative matters and: "all matters relating to International Conventions, Treaties, Agreements, EU Directives and extended legislation from the United Kingdom."

and then to the Ministry for submission to the Privy Council. At this level communication has proved problematic. Projets de Loi have, for example, been delayed for considerable periods and Alderney has been left unaware of what the problems might be. A particular instance of this was the Smoking (Prohibition in Public Places and Workplaces) (Alderney) Law.

8. In the same way as the independence of the Court of Alderney requires that contact at officer level should be directly with the Greffier contact with the Ministry at a higher level should, unless the issue involves the legislature or the executive, be directly with the Chairman of the Court.

9. Communication and the timely despatch of business are the main issues as far as Alderney is concerned. This is more of a problem in the case of Alderney when business with the Ministry is transacted through Guernsey. If Guernsey is informed at a late stage of business affecting Alderney it has then to inform and consult Alderney, with consequent further delay, particularly bearing in mind the monthly cycle of Alderney States/Committee Meetings. Where a response is required from Alderney it is essential that we are aware of it at an early enough stage for that response to be full and effective.

10. The Committee is aware that the Ministry does receive communications from or on behalf of private individuals about matters arising in or in connection with Alderney. Enquiries about these are generally dealt with at officer level but the Committee is unaware of any formal procedure under which the Ministry handles such matters. Perhaps this should be clarified.

11. The Committee, while recognising the value of Alderney's association with Guernsey, feels that this sometimes obscures (particularly when viewed from London) the separate interests of Alderney in certain areas such as the extension of the territorial sea and seabed rights impacting on the development of tidal energy. There has, in the Committee's view, been greater recognition of this by the Ministry in recent months, which is valued and appreciated, but there is a clear need for greater familiarity with the Island and its affairs—including through more visits to Alderney.

October 2009

Memorandum submitted by the Positive Action Group, Isle of Man

INTRODUCTION

1. The Positive Action Group (PAG) is a political lobby group in the Isle of Man which encourages people to have an interest and involvement in Isle of Man politics. The group is active, as our website's⁽¹⁾ "previous events" page shows. Our Charter lists specific areas we lobby our government over including an Ombudsman, Freedom of Information and Conflicts of Interest.

2. I am a member of this group and I lobby the Isle of Man Government against the introduction of the e-Borders scheme and proposed reform of the Common Travel Area (CTA). I individually responded⁽²⁾ to the "Strengthening the Common Travel Area—Consultation Paper"⁽³⁾ and correspond with my Member of the House of Keys (MHK) and the Isle of Man Chief Secretary's Office (CSO) about the local impact of these schemes. I have submitted Freedom of Information Requests (FOI) to the UK Border Agency and the Ministry of Justice. I raise awareness of these issues in the local press and give interviews on local Manx Radio. Recently I was invited to submit written evidence to the Tynwald Standing Committee on Constitutional Matters and will give oral evidence to the Committee on 2 November 2009.

EXECUTIVE SUMMARY

3. The issues I raise arise as a consequence of the Isle of Man's external relationship with the United Kingdom. These issues highlight aspects of the relationship that, arising from my lobbying, do concern me. Some aspects of the Ministry of Justice's policy and practice, relating to your Inquiries focus, relate to issues of Good Governance. This memorandum follows the principle that the Ministry of Justice wishes to set the example in establishing open and accountable relationships between the UK and the Crown Dependencies.

4. Specific areas of concern arising from my lobbying are a potential conflict of interest arising from the establishment of the Chief Secretary's Office, Freedom of Information requests concerning relations between officials of the UK Government and their Isle of Man Government counterparts, record keeping by UK Government Departments, and the role of the Parliamentary and Health Service Ombudsman in handling local residents complaints.

THE CHIEF SECRETARY'S OFFICE

5. The Crown's relationship with the Isle of Man is described in a "Background briefing on the Crown Dependencies"⁽⁴⁾ where it is stated that "*The Crown is ultimately responsible for the good government of each Island*" and reference is made to the Kilbrandon Report which stated "*that there were areas of uncertainty in the existing relationship and that the relationship was complex.*" As a member of the public I confirm the relationship seems opaque. It is unclear who makes the decision as to whether a specific piece of UK legislation is appropriate for the Isle of Man. The Isle of Man Chief Secretary's Office website⁽⁵⁾ states that: "*The Office supports the good government of the Isle of Man by providing professional advice and services to*

the political leaders of the Government, the Chief Minister and Council of Ministers, and to the Lieutenant Governor.“ This statement is particularly interesting because it confirms that the Chief Secretary’s Office is positioned between two jurisdictions that are politically different but constitutionally united.

6. Chief Officer Group meetings are chaired by the Chief Secretary and the minutes are published on that offices website.⁽⁶⁾ As of 30 September the latest available minutes are for May 2009. The minutes of the Summary of Proceedings of the Council of Ministers are published on the Isle of Man Government website⁽⁷⁾ and as of 30 September the latest available minutes are for June 2009. These minutes often state that “*Council considered a paper submitted by the Chief Secretary*”—a standard phrase used to describe matters arising in Westminster for consideration by the Isle of Man authorities.

7. My concern about the Chief Secretary’s role relates to the political independence and autonomy of the post. The minutes of Council of Ministers meetings indicate that the Chief Secretary’s Office processes matters arising in Westminster as a result of UK political action. The minutes seem to indicate that the Chief Secretary acts as the conduit for matters arising in Westminster which the UK Government wishes to see progressed locally. A grey area potentially exists where the Chief Secretary exercises political discretion as to whether a matter arising in Westminster is appropriate for the Isle of Man.

8. For example, in April 2009 the UK Home Office launched a public consultation “Protecting the Public in a changing Communications Environment”.⁽⁷⁾ This UK project proposes that Communications Services Providers (CSPs) collect personal communications data for further processing and analysis. Human rights, privacy and data protection issues arise from the proposal which, although primarily related to possible legislation in the UK, potentially will affect local residents. For example, the Isle of Man fixed telephone network exists as part of the main UK network. Therefore, UK collection of data on that network means that local residents’ communications may be monitored by the UK authorities even though primary legislation to allow this may not exist locally.

9. Being concerned about these UK Home Office proposals I wrote, on 15 May 2009, to the Chief Secretary’s Office asking if the Public Consultation would be progressed in the Isle of Man. On 8 June the Chief Secretary’s Office wrote to me indicating they had not previously been aware of this issue and that they would consider the implications for the Isle of Man. The Public Consultation was not extended to the Isle of Man and, as such, local communications providers were denied the opportunity to comment on potential legislative matters which may directly affect local residents.

10. The question arising from this situation is who made the political decision not to extend the Public Consultation to the Isle of Man, and where was the democratic scrutiny of that decision? Reference is not made to this issue in either the Chief Officer’s or Council of Minister’s Minutes to date. No public record exists to suggest that the Chief Secretary’s Office did other than make a political decision about whether local residents should be consulted about an issue, arising in the UK, that may directly affect them.

11. I also question how, with a combined post of Chief Secretary and Secretary to the Lieutenant Governor, the post holder can avoid bias towards UK Government policy. The January 2008 Summary of the Proceedings in the Council of Ministers⁽⁸⁾ states that:

“Council considered a paper submitted by the Chief Secretary updating Council on the current position in relation to both e-Borders and the Common Travel Area (which are inter-related) and seeking Council’s further agreement on how to proceed”.

I have two main concerns about these programmes. Firstly that the Chief Secretary’s Office is not taking into account the data protection concerns about e-Borders expressed by the UK Information Commissioner⁽⁹⁾ and secondly that the Chief Secretary’s Office seemed unaware of the constitutional implications, subsequently raised by the House of Lords Select committee on the Constitution,⁽¹⁰⁾ of the possible requirement for passengers to carry passports between the Isle of Man and the UK.

12. In April 2008 I started corresponding with the Chief Secretary’s Office, via my MHK, to raise these concerns. I became aware of a pattern in the responses from them. All the replies were informative but failed to take account of any balanced local arguments that need to be represented in a democratic society. What seemed to be continually stated were the prevailing views of the UK Border Agency. The balanced argument, typically found in a Westminster committee, was not evident. This position only changed when Lord Goodlad, Chairman of the Constitution Committee, wrote⁽¹⁰⁾ to the Isle of Man Chief Minister asking for his views on Clause 46 of the Borders, Immigration and Citizenship Bill. The Chief Minister’s response dated 2 March 2009, some 13 months after the Chief Secretary’s paper, is the first indication of political oversight of issues which clearly had the potential to affect local residents. Had the Chief Secretary’s Office been tasked with fully reflecting local residents’ concerns then this position might have been arrived at some time earlier.

13. I am concerned that a conflict of interest arises from the Chief Secretary’s dual role and that this may adversely affect local residents if there is inappropriate political interference from the UK Government. In order that the Chief Secretary can fully represent the political interests of the Isle of Man Government it might be more appropriate if the Lieutenant Governor’s Secretary was a UK appointment only and not combined with a local Isle of Man Chief Secretary’s position.

FREEDOM OF INFORMATION AND RECORD KEEPING

14. Arising from my concern about the implications of the e-Borders programme on local residents I submitted a Freedom of Information request to the Ministry of Justice asking for information relating to a meeting held on 5 December 2007 between the Isle of Man Chief Minister and Michael Wills MP. The request was poorly handled. I received several holding replies and a final refusal⁽¹¹⁾ under Section 27(1) (International Relations) of the Freedom of Information Act 2000. The Isle of Man is not a sovereign State but belongs to the Crown and shares common constitutional relations. How then, can we have an international relationship with the UK? The letter stated that:

“Disclosure would be likely to undermine the relationships the UK Government” has with the Crown Dependencies’ and “disclosure would be likely to result in officials being less willing to provide free and frank advice to Ministers”.

British Citizens resident in the Isle of Man are effectively prevented from scrutinising what now presents as a key component of our Government—the relationship between the Chief Secretary’s Office and the Ministry of Justice.

15. The paucity of information regarding relations between UK Government Departments and the Isle of Man is also concerning. On 4 March 2008 Michael Wills MP made the following statement in a written answer:⁽¹²⁾

“There are regular meetings between officials in the Ministry of Justice and their counterparts in the Isle of Man and it would not be possible to list each one. Some of these meetings have taken place in the Isle of Man, some in the Ministry of Justice and some in other Government Departments. In general no formal or permanent record of these meetings is kept and most often action points are agreed between the respective officials.”

“Michael Wills MP then goes on to describe a range of meetings at which many issues affecting the Isle of Man were discussed. All of these would be of interest to both local residents and locally elected politicians. However, such information is seemingly only accessible to the Ministry of Justice, the Chief Secretary’s Office and the Isle of Man Council of Ministers.”

16. An issue of poor record keeping was also noted by the Treasury Committee⁽¹³⁾ reporting on the failure of the Icelandic banks. They commented:

“We note with concern the suggestion that the paucity of information provided by the Financial Services Authority may have impeded the ability of the regulators in the Crown dependencies to safeguard their own financial systems. This is a particular concern given the close working relationship that appears to have existed between the Financial Services Authority and the Financial Services Commission of the Isle of Man in relation to previous situations such as that surrounding the failure of Bradford & Bingley just days earlier. We recommend that the Financial Services Authority review its existing powers and strategy for dealing with other jurisdictions, and reports on its efforts in this respect”.

Keeping records of meetings is basic good practice. The Ministry of Justice surely has a role to play in setting best practice across Whitehall so that meetings between UK Government Departments and their Isle of Man Counterparts are properly documented.

17. The Ministry of Justice oversees the good governance of the Isle of Man. Modern, open, transparent and accountable government surely requires that local residents and their elected politicians are fully informed about legislative matters that may affect them. The Isle of Man currently has a non statutory Code of Access to Government Information⁽¹⁴⁾ but necessarily this excludes matters arising in the UK. The only potential channel for such information is the UK Freedom of Information Act which, of course, specifically excludes this type of information too. As an issue of good governance there is a need for the Ministry of Justice to address this situation. The Isle of Man is constitutionally united with the UK but politically different. This means that UK legislation may be inappropriate for our smaller jurisdiction. Proposed UK legislation needs proper local scrutiny with the opportunity for local debate. The lack of access to information about relations between UK Government departments and the Isle of Man counterparts is concerning.

THE ROLE OF THE OMBUDSMAN

18. Local residents do not yet have recourse to a parliamentary ombudsman. On 6 August the Council of Ministers launched a public consultation¹⁵ on a proposed Tynwald Commissioner for Administration who would be the local ombudsman. The following exclusions are proposed:

- (a) matters certified by the Chief Minister to affect relations or dealings between the Government and any other government or international organisation; and
- (b) action taken in any country or territory outside the Island by or on behalf of a listed authority.

19. I contacted the UK Parliamentary and Health Service Ombudsman to establish if they can process a complaint from an Isle of Man resident who is directly affected by the conduct of a UK Government Department. In an email dated 29 September they confirmed:

“in order for the Parliamentary Ombudsman to consider a complaint about a UK Government department, it would need to be referred to us by a Member of Parliament (MP).”

Westminster MPs do not represent local residents so any decision by an MP to process a local resident's complaint would be at that politician's discretion. This situation is highly unsatisfactory as a number of contentious UK policy initiatives may affect local residents. These include the e-Borders programme, Reform of the Common Travel Area,⁽³⁾ cancellation by the UK of the Reciprocal Health Agreement⁽¹⁶⁾ between the two jurisdictions and the proposed Interception Modernisation Programme.⁽⁷⁾ British Citizens who are adversely affected by actions taken by UK Government departments should surely have equal right of access to the services of the UK Parliamentary Ombudsman wherever they reside.

CONCLUSIONS

20. I conclude that the management of the UK's relationship with the Crown Dependencies by the Ministry of Justice creates a democratic deficit as regards open, transparent and accountable Government. British Citizens resident in the Isle of Man, and local politicians outside the Isle of Man Council of Ministers, are denied the opportunity to properly scrutinise legislative matters arising in the UK because:

- (a) No formal or permanent records of meetings between the officials of the Ministry of Justice and the officials of the Isle of Man Government are kept.
- (b) The Freedom of Information Act Section 27 (1) (a) excludes information relating to relations between the United Kingdom and any other State even though the Isle of Man is not a Sovereign State but a jurisdiction of the British Crown.
- (c) British Citizens resident in the Isle of Man have no recourse to the UK Parliamentary Ombudsman regarding complaints about UK Government Departments.
- (d) The Isle of Man's Chief Secretary's Office is potentially politically autonomous as the post is also that of Secretary to the Lieutenant Governor who represents a different jurisdiction.

RECOMMENDATIONS

21. I ask the Justice Committee to consider the following changes to the Ministry of Justice's management of its relationship with the Crown Dependencies:

- (a) Instructing officials of the Ministry of Justice to make formal, permanent minuted records of meetings with the Crown Dependencies Governments and their officials.
- (b) Establishing best practice for record keeping for all Government departments that deal with the Crown Dependencies.
- (c) Amending the Freedom of Information Act to allow access to minutes, briefings and any other records of meetings arising from the relationship between UK Government departments and the Crown Dependencies.
- (d) Amending the Parliamentary Commissioner Act 1967 so that British Citizens in the Crown Dependencies can use the UK Parliamentary Ombudsman to resolve a complaint against a UK government Department.
- (e) Review the role of the Secretary to the Lieutenant Governor to establish whether a conflict of interest arises from the holder of that office also being the Isle of Man Chief Secretary.

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Tristram C Llewellyn Jones
Member

October 2009

Memorandum submitted by Edward John Power

Ladies and Gentlemen as this is the first time I have given evidence to any parliamentary committee I hope you will accept my apologies if I give any irrelevant details or reports, all I will attempt to do is put things as I have observed them as a member of the Isle of Man public.

Firstly on the history of the Cancellation of the Reciprocal Health Agreement, here after referred to as the RHA. I had been aware of the cancellation in early 2009 via the media, I accepted as we had been told that this would be dealt with by our Health Department in discussions with the UK health Department through the UK Justice Department. In October/November 2009, I noted via the internet a question being asked in the Commons by Andrew Mackinlay MP, I contacted him and was informed of his disagreement at this cancellation, which was also my feelings, I then took up a personal campaign to get my views and those of people who I talked to who held the same opinion. I emailed some 200 plus MPs of all persuasions, those close to or members of both the UK Justice Department and the UK Health Department made it abundantly clear that they had no intention of discussing this subject as there was no intention of the UK Government to change this decision which had been agreed by the Isle of Man Government.

At this I decided to look a little deeper via media reports, Isle of Man Hansard reports etc. It came to my notice that the Manx Health Department had had to go through the process of going to the Justice Department to communicate their views etc and did not go direct to the UK Health Department, this was because that is the correct procedure, and whether I am right or wrong in assuming that this was the only way it was done I do not know, but it appeared to me that contrary to being a middle man in the system the Justice Department just continually repeated back the view of the UK Health Department. Any request for Ministerial meetings between the Isle of Man and the UK were denied, and met with the continual mantra “we are not minded to change our decision” this I personally received in the form of emails from the UK Health Department and repeated to me in emails from the Justice Department. During this time I was still receiving emails and letters of support from MPs in the Commons and Lords from the House of Lords.

The concern of the Manx people was rapidly building and questions were being asked about how strongly the Manx Government were fighting to try and change the decision, our Chief Minister was silent on the subject and our Health Minister was just repeating the UK Health Departments mantra “not minded to change the decision”.

After a number of questions by UK MPs most significantly Andrew Mackinlay and a personal meeting between Andy Burnham Health Minister and Andrew Mackinlay, a meeting was arranged to be held in London in January 2010 between Our Chief Minister Tony Brown and our Health Minister Eddie Teare and Andy Burnham, which I am informed by Andrew Mackinlay was against the advice Mr Burnham received from the UK Health Department. Prior to the leaving for London the Isle of Man were treated to a very negative interview via radio by Chief Minister Tony Brown, basically saying nothing will change get use to it. The meeting in London lasted 45 minutes and brought about very little, and no change what so ever in the decision to cancel the RHA as from 31 March 2010.

The people of the Isle of Man are still very angry at the decision, their Governments handling of the negotiations, or lack of, and the UK Justices Departments lack of help or support and the UK Health Departments general attitude to all members of the Manx society and UK society in particular the elderly, sick and former members of his/her Majesties forces.

What we would like to of seen was more determination by our Government not to accept this lying down and more support by the Justice Department in helping the Islands representatives to at least to get open and meaningful negotiations, were as all here who communicated with the UK Health Department and the Justice Department where met with a stone wall.

In conclusion I repeat the people of this Island which has strong historical, family and economical links with the United Kingdom feel let down and angry with their Government and the UK Government and in particular the UK Justice Department and the UK Health Department, all we wished is that we are given the respect of negotiations and the opportunity to put our views.

On three final points can this farcical situation that stops an Isle of Man Department talking direct to UK Department at Ministerial level, be stopped and remove the log jam of having to go through the Justice Department who after all, and has been proved by this RHA situation, is a government department who must support another departments policy, and if possible might I ask that this Committee request that the Cancellation be deferred until proper discussions be held bring together all views and opinions including all parties involved and the devolved governments of Scotland, Northern Ireland and Assembly of Wales who were never informed or invited to put opinions on the decision as it affects all their residents as well, and may be a debate within the Commons as was proved by the short debate in the Lords there are many views on this subject.

On the Cancellation of the RHA the people of the Isle of Man are going to continue to fight and will continue after 31 March 2010, we have been told by our Chief Minister that we give false hope, and some MHKs (Members of Tynwald) have been accused of doing the same, our fight is with injustice this decision is wrong.

On a personal note I have been informed that no one in the Justice Department are allowed to comment on the RHA cancellation and under no circumstances are they to communicate with me.

18 February 2010

Memorandum submitted by the Seneschal of Sark

I would start by saying that it is my general experience and perception that the lines of communication with the Ministry of Justice (MoJ) work well on a bilateral Sark to MoJ matter. I can certainly pick up the phone and talk or email a member of the Crown Dependency unit, my main points of contact being Rose Ashley/Mark Hughes or Janet Tweedale.

Having said that I am left with some concerns and I would take those concerns in turn:

1. I consider that there is a problem when the interests of Sark are not the same as the UK Governments and as an example I would use the Dual Role of the Seneschal which combines judicial functions as well as non judicial functions (as do the Bailiff's of Guernsey and Jersey). It became very apparent towards the end of the journey to Royal Assent for the 2008 Sark Reform Law that the new Lord Chancellor and Minister for Justice, Jack Straw, objected to the Dual Role even though his legal advisors advised him that it was ECHR compliant and on that basis he recommended to Her Majesty in Council that the law should be ratified. However, after the Appeal Court overturned the Judicial Review judgement, which found for the Dual Role, the Lord Chancellor was minded not to cross appeal to the House of Lords on this issue when the applicants Sir David Barclay and others did so, on the grounds which the Barclays had lost at the Appeal Court. I submit that it was in Sark's interest for this cross appeal to be instituted but despite representations to the UK, the UK did not put Sark's interest first. The Dual Role of the Seneschal should have been tested in the highest Court of the land and I believe that Jack Straw used his personal political beliefs to deny Sark's legitimate interest.

2. In the recent past there has been I believe undue political leverage (some may call it "raw power") used on the Islands of the Bailiwick either as a group or individually in regard to the holding up of legislation and other matters and I will give some examples:

- (a) Sark legislation was held up by the MoJ due to their dispute with Guernsey over granting themselves extensive Ordinance making powers in *Projets de Loi* submitted by Guernsey (known as Henry VIII's clauses). The two Sark laws held up were the *Projet de Loi* entitled "The Sark Hall Trust (Dissolution) Law, 2007" and "The Development Control (Sark) (Amendment) Law, 2008" with the first law being approved by Chief Pleas on 5 July 2007 and the second on 17 January 2008, both were held up and not granted Royal Assent until 18th March 2009. These laws had no international dimension and were very parochial but were subjected to delay until the dispute with Guernsey was resolved.
- (b) Guernsey was also told that they should bring pressure to bear on Sark over the apparent lack of progress on the replacement Reform Law. Actually I believe we have been quite quick as the UK is still struggling to reform the House of Lords after more than 100 years. However, Guernsey has no right or power to interfere with Sark's legislature, processes or constitution but the issue of hold up for Guernsey was the signing of a framework document between the UK and Guernsey (excluding Alderney and Sark) as had already happened with an identical document between the UK and Jersey and the Isle of Man; I believe I am right in saying that the document was not signed until Sark's Chief Pleas had approved its final version of the 2008 Reform Law. We took exception to the attempt to get Guernsey to interfere in our affairs and felt it most unfair to Guernsey and showed a singular lack of respect and lack of understanding by the MoJ of the constitutional relationships between the Islands individually as autonomous Crown Dependencies.

3. Having talked about holdups I must also commend the MoJ for several occasions when really important Sark legislation has been fast-tracked to Royal Assent, there was "The Reform (Sark) Law, 2008" but then the UK also had a vested interest, an Amendment to that Law which needed to be in place ahead

of the General Election in December 2008 and “The Real Property (Transfer Tax, Charging and Related Provisions) (Sark) Law, 2007” which was of real financial interest to Sark but not of any interest to the UK. I am waiting to see how expeditiously that “The Reform (Sark) (Amendment) Law, 2010” is acted upon from approval at Chief Pleas on 20 January, as this is important to Sark but of no consequence to the UK as it does not affect its international obligations, at that same Meeting the *Projet de Loi* entitled “The Charities and Non Profit Organisations (Registration) (Sark) Law, 2010” was also approved; both have been sent by me with a Humble Petition to Her Majesty for Her Royal Assent, the Charities Law is an issue around terrorism funding but is less important to Sark and I will be interested in the progress of Royal Assent for these two pieces of legislation (Guernsey is really interested in the Charities Law due to the IMF visit in April).

4. I watched your Committee’s discussions with Patrick Bourke and others from the MoJ and noted that a question was put to them on the issue of who owned the seabed around the Bailiwick islands, which they could not answer; may I ask if you have had a written answer from them in the meantime? If not inform the JSC that the seabed around Sark belongs to the Crown, as it is for Guernsey but that Alderney, through a quirk when setting up a Government there after WW2, owns its seabed. It is time maybe that Guernsey & Sark also owned theirs especially in the light of tidal energy investigations.

5. My final point would be the status of the Privy Council in relation to the Crown Dependencies. There was much concern expressed locally when the Privy Council was taken under the wing of the MoJ for Secretariat support and other aspects transferred to the Cabinet Office in a recent (March 2007) UK governmental reorganisation and it was perceived in the Bailiwick as a loss of independence by the Privy Council and consequently may be of significant effect on the conduit between the Crown Dependencies and Her Majesty in Council in the future, despite assurances that “The Privy Council and its functions will remain unchanged”, time will tell, so far so good.

10 February 2010

AFTER NOTE

One area that was not covered in any detail during the formal session of question and answer between the JSC and the Seigneur, Seneschal and members of the General Purposes and Advisory Committee (GP&A) of Chief Pleas was that of the relationship between Guernsey and Sark. Whilst Sark has its own legislature (the Chief Pleas) it is limited in that it cannot make criminal legislation as that is an area reserved for the States of Guernsey and it is they who make criminal legislation for operation throughout the Bailiwick (Guernsey, Alderney & Sark). In all other aspects Sark is master of its own destiny and makes primary (*Projet de Loi* (or Bill)) and secondary legislation (Ordinance) for the control of all other aspects of life in its jurisdiction. There is on occasions tension between Guernsey and Sark when the interests of the two islands do not coincide and Sark will not sign up to Bailiwick Laws which are developed for civil matters and which may be of importance for Guernsey but of little or no interest to Sark.

One current source of tension is the striving for international recognition by Guernsey and its dealings with the UK. Guernsey in striving to develop an international identity and have the UK cede further powers to them, see my reference above to Henry VIII clauses, has at the same time been trying to limit the say that Sark (and Alderney) has over the approval of Bailiwick secondary legislation being made by the States of Guernsey. In the past where a Bailiwick *Projet de Loi* needed to be amended it was usual for an amending *Projet de Loi* to be developed and that amendment would need to be approved by all three legislatures prior to be sent for Royal Assent. What is happening more frequently now is that Bailiwick secondary legislation is approved by the States who have given themselves powers to do so under the primary law and the applicable Ordinance is not being approved by Alderney and Sark but that primary legislation contains a clause whereby if Alderney and Sark have not disapplied it within a certain timeframe it automatically remains in force for all three island, the Ordinance having been made and brought into effect in Guernsey usually effective from the day of approval. However, it is a live issue for the GP&A Committee acting on behalf of Chief Pleas who remain unhappy about having to disapprove rather than approve a Bailiwick Ordinance.

12 February 2010

Memorandum submitted by the Sark General Purposes and Advisory Committee

1. There has generally been a lack of direct contact between the MoJ and Sark’s General Purposes & Advisory (GP&A) committee. Usually, contact comes via Guernsey; sometimes this is appropriate, sometimes not. In particular, where an issue is one that can only be dealt with by a decision of Sark’s Chief Pleas (such as changes to our constitution) it is appropriate that enquiries be first addressed to the GP&A Committee of Chief Pleas, on whom the task of handling the issue will fall.

2. Sark and Guernsey do not have identical legislation on all issues. Wherever possible, Sark ensures that its legislation is as close to Guernsey’s as possible and certainly that there is no contradiction, and the two islands work closely together to achieve this. Thus it would be helpful if the MoJ could recognise that these adjustments have sometimes to be made; it appears to Sark that the MoJ does not differentiate between the separate legislatures and assumes that one piece of legislation will suffice for the Bailiwick. As a result the

amount of time allowed for response, often already very short even for Guernsey's reply, become shorter yet for Sark, especially with no civil service to expedite the paperwork. Sometimes it is literally impossible to respond in the time allowed. As a result either the legislation has to be delayed or Sark has no opportunity to express a view at all.

3. Recent contact with the MoJ has encouraged Sark to see an improvement in contact and mutual understanding. Offers of help and advice from the MoJ will certainly be taken up and we look forward to working more closely together. Sark's newly-elected fully democratic government is reviewing much of its legislation and will be seeking advice and support from the MoJ in developing it and bringing it through to Royal Assent in timely fashion.

Conseiller Charles Maitland
Chairman

1 October 2009

Memorandum submitted by Tomaž Slivnik

SUMMARY

1. The way the United Kingdom represents Sark internationally, and the role it assumes in the approval of Sark legislation, is not compatible with 21st century democratic principles and principles of self determination, nor is it compatible with Article 3 of the First Protocol of the European Convention on Human Rights, nor with Article 25 of the International Covenant on Civil and Political Rights.

2. It is not appropriate in this day and age for unelected by, and unaccountable to, the people of Sark, United Kingdom persons to remain as involved in the Sark legislative process as they are.

3. International treaties are becoming increasingly detailed and leave little scope for variation in the way they are implemented in domestic legislation. They increasingly provide a back door for the United Kingdom to legislate undemocratically for the Crown Dependencies.

INTRODUCING THE AUTHOR

1. I was born in Yugoslavia (in a town which is now in Slovenia) in 1969. I studied at Trinity College, Cambridge, where I obtained a BA (and later MA), Certificate of Advanced Study in Mathematics and PhD in mathematics. I was either employed or an academic visitor at Louisiana State University in Baton Rouge, USA, Griffith University, Brisbane, Australia, National University of Singapore, University of Reading, Reading, UK and University of Ljubljana, Ljubljana, Slovenia. All the while I was commercially active, and subsequently became a full time high technology entrepreneur, investor and business angel. I have established a number of successful high technology enterprises, and helped fund a number of other people's startup companies, including recently a company in which the National Endowment for Science, Technology and the Arts has also invested in the same funding round.

2. I have lived in a number of countries but settled on the Island of Sark in 2006.

3. I have taken an active interest in Sark's constitutional reform and was one of the plaintiffs in the case of Barclay (and ors) v. The Secretary of State for Justice (and ors) in the matter of the Reform (Sark) Law 2008, and am now an appellant in the House of Lords in an appeal from that case, the outcome of which is not yet known.

RECOMMENDATIONS

1. That the United Kingdom Government and the United Kingdom Parliament relinquish their claims to be able to legislate for Sark without Sark's consent, and thus acknowledge the right of the people of Sark to have a democratically accountable legislature as is normal in the 21st century, and as is necessary if the United Kingdom is to comply with its ECHR and ICCPR obligations.

2. That Sark's legislative process be reformed so as to be transparent and fully democratically accountable to the people of Sark, specifically, to reform or abolish the undemocratic legislative roles and powers of Her Majesty's Procureur, unelected Ministry of Justice officials, and the Minister of Justice in the legislative process of Sark, as is necessary if the United Kingdom is to comply with its ECHR and ICCPR obligations.

3. That the Sark legislative process either be changed so that the relationship between Her Majesty and Chief Pleas is the same as that between Her Majesty and the Parliament of the United Kingdom (namely, that Her Majesty grants Royal Assent to Sark legislation upon recommendation of the Chief Pleas rather than upon the recommendation of Her Majesty's Privy Council), or, alternatively, that Sark have its own Privy Councillors owing allegiance and duty of care to no Government other than the Government of Sark (and who in particular are independent from the Government of the United Kingdom), who shall constitute the majority of Privy Councillors advising Her Majesty on the legislation of Sark.

4. That no international treaties be entered into by the United Kingdom which create obligations for the Island of Sark without the consent of Sark's elected government or the people of Sark.

5. That when negotiating international treaties with the Crown Dependencies, the United Kingdom acknowledges Sark and Alderney as jurisdictions on par with Guernsey, Jersey and the Isle of Man that they are, and seeks their consent, and not merely assume that the consent of Guernsey also applies to them.

EXECUTIVE SUMMARY

The way the United Kingdom represents Sark internationally, and the role it assumes in the approval of Sark legislation, is not compatible with 21st century democratic principles and principles of self determination, nor is it compatible with Article 3 of the First Protocol of the European Convention on Human Rights, nor with Article 25 of the International Covenant on Civil and Political Rights.

It is not appropriate in this day and age for unelected by, and unaccountable to, the people of Sark, United Kingdom persons to remain as involved in the Sark legislative process as they are.

International treaties are becoming increasingly detailed and leave little scope for variation in the way they are implemented in domestic legislation. They increasingly provide a back door to legislate undemocratically for the Crown Dependencies.

INTRODUCTION

4. I regret that I was not made aware of this call for evidence until 8pm today, 2 October 2009. I therefore had less than four hours to prepare this submission. It would appear that, regrettably, this call has not been widely publicized on the Island of Sark and that a number of others, including current Chief Pleas members and former Constitutional Committee members with a great interest in this topic were likewise not aware of this call. I apologize therefore that the quality of this document is not what it ought to be and what I would wish it to be.

5. The recent constitutional reform process on Sark has brought to light a certain friction between Sark and the United Kingdom authorities (particularly the Ministry of Justice) and anomalies in the constitutional relationship between Sark and the United Kingdom.

6. Before England became a constitutional monarchy, both the England and Sark were effectively absolute monarchies. Following the change, England became increasingly democratic. But the change to the people of Sark looked instead more like a change of their absolute monarch, with the Minister of Justice (as an appointee of the Parliament) today possessing some remarkable powers over Sark. This is improper and requires reform.

7. The way the United Kingdom represents Sark internationally, and approves Sark legislation, is not compatible with 21st century democratic principles and principles of self determination.

LEGISLATION

8. Sark legislation, once approved by Chief Pleas, is sent to Her Majesty's Procureur in Guernsey. He writes a report and forwards both the law and his report to the Ministry of Justice. Officials there write their own report and present it all to the Minister of Justice. Sark is in no way involved in this process nor is it informed of the content of any of the reports or recommendations. The Minister of Justice then either rejects the law or passes it on to the Privy Council Committee for the Affairs of Jersey and Guernsey for consideration. If the latter approves it, it is presented to the full Privy Council and receives Royal Assent.

9. Although in theory, considerations involved in such advice are intended to be limited to matters of international obligations of the United Kingdom and the good governance of Sark, in practice, decisions made seem often difficult rationally to reconcile with such objectives and appear more easily to be explained by a political agenda. If decisions made in this approval chain go against Sark, few effective remedies are available to the people of Sark. Likewise, pressure is brought to bear on Sark from time to time to legislate a certain way and again, effective remedies against improper pressure are scarce.

10. It is not appropriate in this day and age for unelected and unaccountable (to the people of Sark) United Kingdom persons to remain involved in the Sark legislative process in this way. It is not compatible with modern democratic principles, nor is it compatible with the United Kingdom's international obligations, in particular with Article 3 of the First Protocol of the European Convention of Human Rights and with Article 25 of the International Covenant on Civil and Political Rights.

11. The United Kingdom Parliament (and possibly the United Kingdom Government) today claim the right to be able to legislate for Sark without Sark's consent, although Sark has always formed a part of Her Majesty's dominions separate from the United Kingdom and has always only been in personal union with the United Kingdom. Whether or not such claims are correct within the British constitution, it is not appropriate in this day and age for unelected and unaccountable (to the people of Sark) United Kingdom persons to retain the right, or to claim to retain the right, to be able to legislate for the Island of Sark without Sark's consent. Nor are such powers compatible with the United Kingdom's international obligations, in particular with Article 3 of the First Protocol of the European Convention of Human Rights and Article 25 of the International Covenant on Civil and Political Rights.

PRIVY COUNCIL

12. The Privy Council advises Her Majesty on whether or not to grant Royal Assent to Sark legislation. In doing so, the Privy Council is principally concerned with two issues: (1) the interests of the good governance of Sark, and (2) in the compliance of such legislation with the international obligations of the United Kingdom.

13. It is arguably correct for members of the Privy Council responsible for advice belonging to category (2), which is rendered in right of the United Kingdom, to be members of the United Kingdom Government. However, it seems more appropriate for members of the Privy Council rendering advice belonging to category (1), which is rendered in right of Sark, to be persons with a duty of care only to Sark and the government of Sark and not to any other government (including the Government of the United Kingdom) which might create for them a conflict of interest.

14. I submit therefore that the Privy Councillors (or the majority of them) serving on the Privy Council Committee responsible for considering whether or not to recommend Sark legislation to Her Majesty for Royal Assent, ought properly to be persons owing a duty of care only to the government of Sark and be independent of the Government of the United Kingdom, or alternatively that legislation approved by Chief Pleas ought properly to be sent directly to Her Majesty for Royal Assent in the same way that legislation approved by the Houses of Parliament in the United Kingdom is. Otherwise, it is difficult to see how this process can be compatible with the United Kingdom's obligations under Article 3 of the First Protocol of the ECHR or Article 25 of the International Covenant on Civil and Political Rights.

INTERNATIONAL TREATIES

15. When negotiating international treaties intended to apply to Crown Dependencies, the United Kingdom is meant to seek their consent, or at least consult with them (it is not entirely clear which of the two it is intended to be, although I submit that properly it should clearly be the former), although both of these appear to be qualified by political and diplomatic expediency considerations. A number of international treaties which create obligations for Crown Dependencies have been entered into without them ever having been consulted, supposedly due to an omission (see the Kilbrandon Report for details). Sark appears to get a particularly raw deal, it would seem. It would appear that the United Kingdom considers the consent of, or the consultation with, Guernsey, also to dispense their duties to Sark. Whether Sark then indeed gets asked or consulted seems questionable. The European Convention on Human Rights, for example, appears to have been extended to Sark without any reference to it.

16. It is not right, particularly in the modern day and age when international treaties are increasingly more detailed and leave little room for manoeuvre in the way they can be implemented in domestic legislation, for international treaties to be entered into in this way. In effect, this creates undemocratic and non-ECHR compatible powers for the United Kingdom Government to legislate for Sark by the back door.

GENERAL

17. It transpired during Sark's constitutional reform process that the United Kingdom Ministry of Justice does not understand Sark, how it works, how it does not work, and how it cannot work. Ministry of Justice officials did not appear very interested in learning how Sark worked in practice. Visits to the Island were infrequent and brief and appeared to involve more telling of what must be done than listening. Yet, Ministry of Justice officials felt competent to dictate to the local people, who do have local knowledge and knowledge of local history, how they should be governed.

18. It seems clear that reform is necessary. The Island needs to be governed by the local people with local knowledge who have to, or choose to, live on the Island.

EUROPEAN UNION

19. The above concerns become particularly acute as the United Kingdom continues to surrender more and more of its sovereignty to the European Union. If the United Kingdom continues to retain, or claim, its non-democratic powers over Sark and if the United Kingdom cannot guarantee its own sovereignty, the European Union could increasingly acquire ability to exercise such powers over Sark, or even to alter unilaterally the constitutional relationship between Sark and the United Kingdom, or Sark and the European Union.

20. This is unacceptable to the people of Sark and is unacceptable in the modern 21st century democratic world.

21. Sark is not a part of the European Union, and there is no appetite on Sark to ever be a part of the European Union or to be controlled by the European Union. Sark does not influence the composition of the European Union legislature, nor will the people of Sark ever be able to do so, even were appropriate electoral mechanisms to be provided, due to the very small size of its population.

KILBRANDON

22. A number of issues raised in these submissions were raised to the Kilbrandon Commission and discussed in the Kilbrandon Report, however that report did not look at them at all in the light of the European Convention on Human Rights, which has important implications.

2 October 2009

Memorandum submitted by the Tax Justice Network

PURPOSE OF THIS PAPER

The Mapping the Faultlines project is based on the contention that the mechanisms that allow illicit financial flows to occur result from the synergistic relationship between the world's secrecy jurisdictions and the secrecy providers (bankers, lawyers and accountants) who provide services from them.

As part of the project it was felt important to review in detail the operation of some secrecy jurisdictions in order to highlight features of their behaviour. Jersey has been chosen as the subject of one such case study for two reasons. Firstly, Jersey is a significant secrecy jurisdiction. It is a UK Crown Dependency, and its secrecy providers³⁴ are highly active in marketing their services. Secondly, unlike many secrecy jurisdictions that we reviewed, in the case of Jersey there was sufficient information available to build a case study without local cooperation.

JERSEY—STILL A TAX HAVEN

This case study is based in part upon an analysis of the claims made by Senator Frank Walker, Chief Minister of Jersey, to the US Senate Finance Committee Hearing entitled "Offshore Tax Evasion: Stashing Cash Overseas" on 17 May 2007. The evidence has, however, taken into account issues arising after that date.

In this paper the claims made by that minister with regard to Jersey are refuted. Instead evidence is provided that shows that far from being compliant with the requirements of international taxation and other regulatory authorities to prevent the abuse of that territory for the purposes of tax evasion and other criminal activities Jersey is in fact actively promulgating innovations that facilitate those activities.

In his submission of evidence to the US Committee Senator Frank Walker, Chief Minister of Jersey said:³⁵

Jersey is a long standing international finance centre providing a wide range of financial and professional services and in compliance with international standards. It is no part of Jersey's policy to assist directly or indirectly the evasion of taxes properly payable in other jurisdictions. Such business is actively discouraged. (Emphasis in the original).

In addition Senator Walker said that Jersey should not be considered a tax haven under the draft US legislation, including the Stop Tax Haven Abuse Act introduced into the US Senate in 2007, because:

1. Jersey had obtained international recognition of its compliance with international standards, and of its cooperation in the pursuit of those engaged in financial crime, including fiscal crime.
 2. Jersey was applying standards on a par and in some areas ahead of those in place in major OECD countries.
 3. Jersey had entered into a tax information exchange agreement (TIEA) with the United States which is in accord with the OECD's model agreement on tax information exchange, which agreement was being effectively implemented.
 4. The Jersey authorities had developed good relationships with the US administration; not just on tax matters, but on financial crime matters generally.
 5. It was important that the action taken by jurisdictions such as Jersey to comply with international standards and to engage in international cooperation should be recognised, and the good relationship that existed between Jersey and the United States should not be damaged by unfair discriminatory legislation.
 6. Jersey was keen to maintain and enhance the good relationship it has with the United States and will be pleased to extend that relationship to the Senate Committee if invited to do so.
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³⁴ The term refers to the lawyers, accountants, bankers, trust companies and others who provide the services needed to manage transactions in the secrecy space. These organisations, working together, congregate in a secrecy jurisdiction for the purpose of providing these services.

³⁵ <http://www.gov.je/NR/rdonlyres/9265D0B9-7217-4C05-8052-642B5237E896/0/WrittenTestimonyoftheChiefMinister.pdf> accessed 2-10-09

THE COUNTER-CLAIM

In contrast to this view this paper contends that:

1. Jersey remains committed to conventional tax haven practices, with all that implies;
2. Jersey's compliance is with the form of international standards but not with the substance of the conduct that such standards expect;
3. Jersey's co-operation with the USA is not representative of its general approach to international issues;
4. Jersey is purposefully creating structures and procedures for use by its financial services industry that will result in information not being available for exchange under internationally agreed arrangements, so nullifying their effect.
5. Jersey's recent commitments to new Tax Information Exchange Agreements and to joining the European Union Savings Tax Directive as a full member do not change this in any material way.

THE EVIDENCE

The evidence presented here is not meant to be comprehensive. What is offered is indicative of patterns of behaviour that support our view that Jersey and secrecy jurisdictions like it remain committed to the maintenance of the secrecy which maintain them as jurisdictions offering not just low or no-tax regimes, but systematic opportunities for regulatory abuse for the primary benefit of non-residents, namely:³⁶

1. No or nominal taxation is charged on relevant income.
2. There is a lack of effective exchange of information for tax purposes.
3. There is a lack of transparency of the tax or regulatory regime (eg excessive secrecy; inadequate access to beneficial ownership information, etc.) which may limit the availability of, or the access to, information when it is needed for tax examinations or investigations.
4. There is little or no requirement that activities recorded as taking place in the Island have economic substance either there or elsewhere (eg the existence of shell companies).

The evidence in this paper is organised around these themes.

It is the commitment to abuse that they incorporate that is inherent in the definition we offer of a secrecy jurisdiction: that they are places that intentionally create regulation for the primary benefit and use of those not resident in their geographical domain. That regulation is designed to undermine the legislation or regulation of another jurisdiction. To facilitate its use secrecy jurisdictions also create a deliberate, legally backed veil of secrecy that ensures that those from outside the jurisdiction making use of its regulation cannot be identified to be doing so.

NO OR NOMINAL TAXATION

Traditionally Jersey charged no tax at all on companies registered or trading in that Island if those companies were considered not resident there or were not owned by Jersey resident persons. The rules used to determine residence did not comply with international norms and were biased towards treating companies as not resident even if their sole place of activity was Jersey.

This was considered an artificial "ring fence" under the terms of the EU Code of Conduct on Business Taxation published in 1998³⁷ and as such the UK required Jersey to change these laws.

After several false starts, one of which was highlighted by an author of this paper³⁸ Jersey has now introducing new tax laws that it claims comply with the requirements of the EU although it is still not clear that the EU has in fact agreed that this is the case since clearance is only given after the laws become fully operational and in the case of Jersey this did not happen until 1 January 2009. These laws do the following and have these consequences:

1. Jersey now has a notional zero per cent tax rate for all corporations incorporated or resident in the Island irrespective of ownership by a Jersey resident person or not, with the sole exception of a special rate of tax of 10% for specified financial services companies including banking, trust company services and some fund functionary activities.³⁹

Jersey has recently suggested⁴⁰ this will result in a loss of tax revenue of about £100 million to the Island per annum. This sum is the same as the forecast made by an author of this report in 2007⁴¹

³⁶ Based on the testimony of Jeffrey Owens of the OECD on 3 May 2007 <http://www.senate.gov/~finance/hearings/testimony/2007test/050307testjo.pdf> accessed 6-6-07

³⁷ http://ec.europa.eu/taxation_customs/taxation/company_tax/harmful_tax_practices/index_en.htm accessed 6-6-07

³⁸ <http://www.richard.murphy.dial.pipex.com/4180-12935-2962005.pdf#search=%22states%20of%20jersey%20shadow%20scrutiny%20committee%20richard%20murphy%22> accessed 2-10-09

³⁹ <http://www.gov.je/NR/rdonlyres/37E79D78-637F-4C8E-A0CE-06DEF0B117B4/0/IncomeTaxAmendment28.pdf> accessed 2-10-09

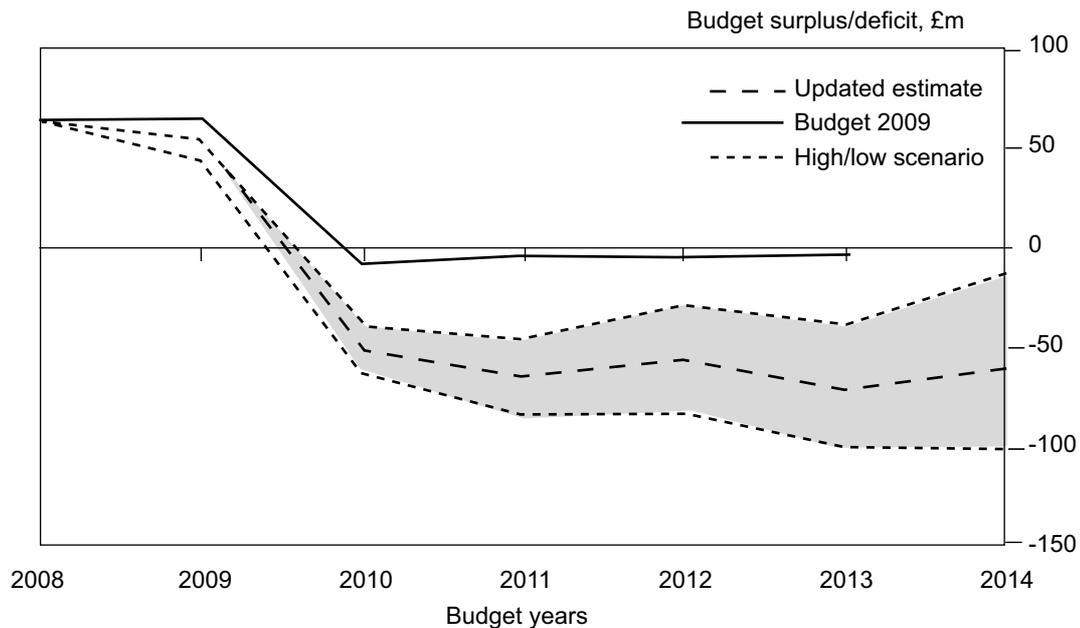
⁴⁰ <http://www.gov.je/NR/rdonlyres/19EA3036-0629-40EB-9794-75C8183CF0D4/0/CompleteDraftBusinessPlan.pdf> accessed 2-10-09

⁴¹ <http://www.taxresearch.org.uk/Blog/2006/10/10/jersey-gets-it-rong-again/> accessed 2-10-09

but vehemently denied by Jersey at the time. This loss is significant. Jersey's annual budget for spending in 2009 is £490 million.⁴² It has traditionally run a balanced budget. The reason for the loss is that almost half of Jersey's tax revenues have come from taxes on corporations, charged in large part on the financial services sector. Up to half this income will be lost under the zero—ten tax arrangement it has now adopted but such is its commitment to no or nominal taxation that it will do this rather than charge tax on companies using the Island for tax haven purposes.

With Jersey's cash reserves amounting to little more than £500 million this level of deficit is clearly unsustainable and unlike a major state it has no control over its currency, interest rates or other economic factors to help it balance its books. As such its capacity to borrow is akin to that of a company, not a state, and few companies can borrow when suffering regular and heavy losses as Jersey is now forecasting, as indicated by the following graph from the current Jersey government business plan shows:⁴³

Figure 3.2 The graph shows a comparison with the forecast financial position for the Budget 2009



The States of Jersey summarised their reaction to this forecast in the following paragraph:

With this level of uncertainty and the advice of the Fiscal Policy Panel that risks remain on the downside then the States must continue to work within the existing financial framework agreed in the Strategic Plan. This will involve constraining spending to the level of the current proposals and beginning work now to prepare a strategy to address the potential challenge of a structural deficit in the medium-term. It is unrealistic to think that spending measures alone would address the level of structural deficit predicted so the strategy must include the consideration of new or increased taxes and charges in the medium-term if we are to return to balanced budgets.

The commitment to new or increased tax charges is welcome, but not if they are all on the local population and the zero per cent tax charge on corporations using the Island for the purposes of tax and regulatory abuse is maintained.

2. The claim that all companies will pay tax at zero per cent from 2009 is, unfortunately, not true. Companies owned by Jersey residents are still subject to a tax charge on their profits. This will be charged in one of two ways. If the company distributes at least 60% of its taxable (not accounting) profits in a year to its Jersey resident owners then the tax they pay on that income will be deemed sufficient to settle the tax liability of the company, meaning that these corporations will now enjoy an effective tax rate of 12% as opposed to the normal income tax rate in the Island of 20%. This is bound to increase the tax losses Jersey will suffer.

If the companies Jersey resident's own do not distribute the required 60% of their taxable profits then the shareholder is required to declare the difference between the dividend they actually receive

⁴² <http://www.gov.je/NR/rdonlyres/19EA3036-0629-40EB-9794-75C8183CF0D4/0/CompleteDraftBusinessPlan.pdf> accessed 2-10-09

⁴³ *Ibid*

and 60% of taxable profits as a deemed distribution to them on which deemed distribution they are then taxed at 20%. If however the shareholder says they cannot pay this tax as they have not received the income to which it relates then the company can be assessed and is required to pay for the shareholder.

It is interesting to note that in the Guide to this tax charge published by Jersey they say:

“It is critical for the administration of the deemed dividends, loans and full attribution provisions that it can be determined explicitly who is the owner of the shares in a company. Article 82A has been inserted to make this explicit. An individual is deemed to own shares in a Jersey company if he has any interest in them, whether equitable, legal or contractual, other than an interest as a bare nominee or bare trustee. Such ownership will be deemed to exist even if the individual owns the shares even if the interest is through one, or a series of, bodies corporates or trusts. These provisions are also crucially important for the information an individual is required to declare on his personal Income Tax Return.

Specifically, an individual will be deemed to own shares if:

- he has any right to acquire or dispose of the shares;
- he has any right to vote in respect of the shares;
- he has any right to acquire, to receive, or participate in distributions of the company; or,
- he has to give his consent for the exercise of any right of any other person interested in the shares, or if other persons interested in the shares can be required, or are accustomed to exercise their rights in accordance with the individual’s instructions.

These provisions will ensure that the Jersey tax base is protected and that Jersey residents with interests in Jersey resident companies are assessable on the proper amounts applicable to them, whether their interests are held directly or indirectly.

It is important to note that these provisions apply, and consequently the deemed dividend provisions, to all unlisted and listed companies, where the Jersey resident individual has an interest of more than 2% in such a company, whether directly or indirectly.”

Jersey notes as a consequence that it is vital that the beneficial ownership of shares in companies can be properly determined and has put into place arrangements to make sure it can do this to charge tax on its own resident population. However, as is noted below, it refuses to maintain a register to achieve the same effect on behalf of other tax administrations.

What the new tax rules also clearly create is a distinction between companies owned by Jersey resident people, which remain taxable in Jersey, and those owned by non-residents, which are not taxable. Thus the ring fence that is designed to ensure only Jersey residents pay tax on corporate profits remains in the Jersey tax system. This means that the system is prima facie not compliant with basic requirement of the EU Code of Conduct on Business Taxation. That demanded that such ring fences be removed. As such the claim made by Senator Walker to the US Senate dated 17 May 2007 that “All these changes are compliant with the EU Code of Conduct Group on Business Taxation requirements in respect of the removal of harmful tax practices” cannot have been true. What is true is that Jersey has tried very hard to get round the requirements of the Code in the true spirit of the tax avoider but the whole abusive structure that the Code was meant to challenge remains in force nonetheless. This is clear evidence that the contention of this paper that Jersey complies with the form but not the spirit of the demands made of it is true. Accordingly the claimed compliance with international standards in this area does not exist.

3. In an attempt to recover tax lost as a result of introducing a 0% on corporate profits Jersey has introduced a broad-based (GST) Goods and Services Tax at a rate of 3%.⁴⁴ This was expected to raise approximately £40–£45 million⁴⁵ from the local population per annum when announced; a figure that has not increased slightly to approximately £50 million per annum.⁴⁶ This will not by any means close the “tax gap” that Jersey will suffer. The tax is so broad based that many items not usually charged to such taxes are liable in Jersey eg medicines.

This tax contains a curious provision with regard to the financial services sector, to which the term “broad base” does not seem to apply. In particular, GST will not be charged on services provided to “international services entities”.⁴⁷ This term will include the majority of companies, trusts and partnerships that form the international client base of the Island’s finance industry. This will be the case even though these special purpose vehicles are unlikely to have a place of residence anywhere else in the world and would otherwise be considered to be located in Jersey for GST

⁴⁴ <http://www.gov.je/NR/rdonlyres/19A91841-E843-4B5A-A2F1-E03228420499/0/JMattachment110507GoodsandServicesTaxJerseyLaw200.pdf> accessed 2-10-09

⁴⁵ <http://www.crownagents.co.uk/projects.asp?step=2&contentID=279§orID=10&serviceID=10®ionID=1> accessed 2-10-09

⁴⁶ <http://www.gov.je/NR/rdonlyres/19EA3036-0629-40EB-9794-75C8183CF0D4/0/CompleteDraftBusinessPlan.pdf> accessed 2-10-09

⁴⁷ <http://www.gov.je/NR/rdonlyres/19A91841-E843-4B5A-A2F1-E03228420499/0/JMattachment110507GoodsandServicesTaxJerseyLaw200.pdf> Part 12 accessed 8-6-07

purposes. The administrators of these entities may pay a modest sum per entity pre annum to be given the status of “international services” clients.⁴⁸ This creates a “ring fence” from GST for these entities and perpetuates the myth that these entities that only have existence in Jersey are in fact stateless and exist “elsewhere” without question arising as to where that other place might be. Jersey law is, in this sense, a work of fiction and is far from compliant with international norms where it is entirely normal that GST or VAT be charged to such entities from within their host community and such tax is irrecoverable by them.

This deliberate “ring fence” for offshore financial services represents a bias to no or nominal rates of tax for non-residents, which local residents will pay increased taxation to support. This re-enforces the contention that Jersey is a secrecy jurisdiction offering services primarily for the benefit of non-residents: in this case, favourable tax treatment in the form of no or nominal tax rates. As a result the abuse that the EU Code of Conduct sought to address has not been removed, it has simply been moved from direct taxation, that the Code addressed, to indirect taxation, which it did not address. This also shows, as this paper contends is normal in Jersey, a state of what might be called “constructive non-compliance” ie apparent compliance with the opposite actually happening.

4. In January 2006 Jersey introduced a new law that effectively capped the tax paid by its tax exile residents. Section 135a of the Income Tax (Jersey) Law 1961 (as amended) provided that persons granted what is called 1(1)(k) housing consent (which basically means they can live in Jersey without having to work there provided that they buy a house worth at least £1 million and make a local tax payment) are offered special exemption from Jersey’s tax law that requires a resident person to pay tax on their world wide income.⁴⁹ This concession, about which there appears to be a conspiracy of silence on the States of Jersey web site and amongst the professional advisers on the Island, provides that a person enjoying such status has a limit on their tax liability calculated by reducing the tax rate to 1% on non-Jersey income that exceeds a statutory limit. As a result all Jersey source income is taxed at 20%. The first £1 million of foreign source income is taxed at 20%. The next £500,000 of foreign source income is taxed at 10% and all foreign source income over £1.5 million is taxed at 1%.⁵⁰ Since it is easy to arrange that almost any financial income be foreign sourced it is unlikely that a person enjoying this concession will have much if any Jersey income (not least because by definition they will not work in Jersey). As such this little known piece of legislation means that wealthy residents not of Jersey origin have an effective tax cap in Jersey of little more than £250,000. Admittedly, this is not “no taxation” but if the individual had an income of, say, £10 million in a year from non-Jersey sources then the tax due would be £335,000, an effective tax rate of just 3.35%, and that can fairly be called nominal.

In combination it is clear that, except with regard to its own resident population, Jersey has a very clear policy of charging no or nominal taxation. Its new taxes have not yet been internationally approved: they use means of calculation and assessment that do not correspond with international norms, and they maintain the fiction that special purpose entities created by the Jersey financial services industry are not resident in the Island even though they are registered, managed and controlled and can only undertake their transactions within the Island’s domain. Ring fences, which are widely seen as a harmful tax practice, remain in Jersey’s taxation legislation for companies, individuals and sales taxes.

In summary, Jersey remains committed to offering taxation provisions that are clearly and unambiguously for the primary benefit of non-residents—a key component and indicator of secrecy jurisdiction activity and status. Furthermore, any cooperation it has offered in this respect to international agencies and authorities is notional at best, demonstrating a resistance to financial transparency that is again indicative of secrecy jurisdiction activity, in this case the systematic provision of financial secrecy for the primary benefit of non-residents.

LACK OF TRANSPARENCY OF THE TAX OR REGULATORY REGIME

This issue is considered next, although out of order according to the indicative characteristics of a secrecy jurisdiction as noted above. This is in order to facilitate better understanding of the issues at stake.

Jersey is not, and has never been, committed to transparency in its taxation and regulatory regimes. The following facts are indicative of this:

1. Jersey companies have to reveal the names of their shareholders, but these can be nominees.⁵¹
2. Jersey companies have to disclose their registered office, but in the case of any company that is likely to be of any interest to tax authorities it will be that of a lawyer, accountant or trust company.
3. No other information need be filed on record by a Jersey company.

⁴⁸ <http://www.volaw.com/pg470.htm> accessed 8-6-07

⁴⁹ [http://www.gov.je/TreasuryResources/IncomeTax/IncomeTaxLegislation/Income+Tax+\(Jersey\)+Law+1961/accessed+8-6-07](http://www.gov.je/TreasuryResources/IncomeTax/IncomeTaxLegislation/Income+Tax+(Jersey)+Law+1961/accessed+8-6-07)

⁵⁰ <http://www.gov.im/lib/docs/treasury/incometax/taxcap.pdf> accessed 8-6-07

⁵¹ When undertaking research on the ownership of a major UK group an author of this paper discovered it was owned by two Jersey nominee companies. Upon investigation it was discovered that these two companies owned each other. There was, therefore, no apparent beneficial owner.

4. Jersey requires that the accounts of companies registered on the Island be audited, but there is no way of knowing if this requirement is complied with since the accounts are not on public record.
5. There is no register of trusts in Jersey. No one has any idea how many trusts there are.

All of this is typical of a secrecy jurisdiction. In effect no public information of any sort at all is available with regard to the entities registered in the Island. Secrecy remains a hallmark of Jersey's financial services industry, it is geared for the primary benefit of non-residents, and there appears no prospect that this will ever change.

Information exchange does, however, reply upon the use of different data. That data is the information that government and regulated parties operating in the financial services sector collect. A review of this whole sector would be lengthy and unproductive. The report of the Bureau of International Narcotics and Law Enforcement Affairs of the US State Department published March 2007⁵² said:

Jersey's main anti-money laundering laws are the Drug Trafficking Offences (Jersey) Law of 1988, which criminalizes money laundering related to narcotics trafficking, and the Proceeds of Crime (Jersey) Law, 1999, which broadens the predicate offences for money laundering to all offences punishable by at least one year in prison. The Prevention of Terrorism (Jersey) Law 1996, which criminalizes money laundering related to terrorist activity, was replaced by the Terrorism (Jersey) Law 2002 that came into force in January 2003. The Terrorism (Jersey) Law 2002 is a response to the events of September 11, 2001, and enhances the powers of BOJ authorities to investigate terrorist offences, to cooperate with law enforcement agencies in other jurisdictions, and to seize assets. Jersey passed the Corruption Law 2005 in alignment with the Council of Europe Criminal Law Convention on Corruption. Although the law was registered in May 2006, by the end of 2006 it had not yet come into force.

In broad terms, the Proceeds of Crime (Jersey) Law, 1999 implemented the FATF's first 40 recommendations⁵³ and the Terrorism (Jersey) Law 2002 its later nine recommendations.⁵⁴ In effect, Jersey put into place the legislation required of it, although it has yet to implement the changes required by the EU's Third Money Laundering Directive or the FATF recommendations on which it is based, but is now consulting on how to do so.

This combination of arrangements gave rise to this comment from the Bureau of International Narcotics and Law Enforcement Affairs:

The International Monetary Fund (IMF) conducted an assessment of the anti-money laundering regime of Jersey in October 2003. The IMF team found Jersey's Financial Services Commission (JFSC), the financial services regulator, to be in compliance with international standards, but provided recommendations for improvement.

These concerns are reflected in this summary to their report:

The Bailiwick of Jersey has established an anti-money laundering program that in some instances exceeds international standards, and addresses its particular vulnerabilities to money laundering. However, Jersey should establish reporting requirements for the cross-border transportation of currency and monetary instruments, and set penalties for violations. Jersey should also take steps to force its obligated entities to obtain verification documents for customers preceding the 1999 requirements. The BOJ should introduce civil asset forfeiture, and implement its new corruption law. Jersey should also ensure that supervisory authorities exist to apply standards and regulations to its port activity and "exempt companies" that are identical to those used in the rest of the jurisdiction. Jersey should take steps toward a more proactive role in fighting terrorism financing by circulating the UNSCR 1267 list as well as other lists, instead of relying on the entities to research names through online public sources. Jersey should continue to demonstrate its commitment to fighting financial crime by enhancing its anti-money laundering/counterterrorist financing regime in these areas of vulnerability.

Jersey uses the IMF report to justify the claim that it is well regulated. There are, however serious doubts about whether that is actually the case. In addition, it would appear that Jersey is going out of its way to reduce the quality of the regulation it imposes upon the financial services sector in the Island. These issues will be dealt with in turn.

The 2009 version of this report noted:⁵⁵

In October 2008, the International Monetary Fund (IMF) assessed Jersey's anti-money laundering/counterterrorist financing (AML/CTF) regime as well as the banking, insurance and securities sectors; the results are expected to be published in 2009. In anticipation of the assessment, Jersey took numerous steps to enhance its AML/CTF regime to bring it into greater compliance

⁵² <http://www.state.gov/p/inl/rls/nrcrpt/2007/vol2/html/80887.htm> accessed 6-10-09

⁵³ http://www.fatf-gafi.org/document/28/0,2340,en_32250379_32236930_33658140_1_1_1_1,00.html accessed 6-10-09

⁵⁴ http://www.fatf-gafi.org/document/9/0,3343,en_32250379_32236920_34032073_1_1_1_1,00.html accessed 6-10-09

⁵⁵ <http://www.state.gov/p/inl/rls/nrcrpt/2009/vol2/116555.htm> accessed 6-10-09

with the Financial Action Task Force (FATF) standards through issuance of consultation and position papers; enactment of new primary and secondary legislation, key amendments, orders, and regulations; and outreach to regulated entities.

The need for this work proved the conclusions drawn in 2007 and despite this work the Agency noted in its conclusions in 2009 that:

The Bailiwick of Jersey should continue to enhance compliance with international standards. The FSC should ensure the AML Unit has enough resources to function effectively, and to provide outreach and guidance to the sectors it regulates, especially the newest entities required to file reports. The FSC should distribute the UN lists of designated terrorists and terrorist organizations to the obliged entities and not expect the entities to stay current through their own Internet research.

This message, which is one Jersey does not repeat often, gives a much better indication of what is really happening in the Island than the subsequent IMF report, which it must in fairness be noted did suggest Jersey was as compliant with Financial Action Task Force requirements as any state in the world, saying:⁵⁶

Jersey has a high level of compliance with the FATF Recommendations on preventive measures, with most deficiencies noted being technical in nature.

However, and the following is telling:

The level of resources allocated to AML/CFT matters appeared generally adequate, taking into account the decision by the authorities to approve additional resources for the JFCU. The AG and JFSC are in a position to acquire additional legal expertise on contract to handle increases in caseload.

The resources of the JFSC may need to be increased somewhat to adequately cover its expanded areas of AML/CFT responsibility, while maintaining the level of AML/CFT supervision of financial institutions and TCBs.

This is heavily conditional: the resources have been allocated, but may not be sufficient and it is not even clear they have actually been expended.

The same conditionality is also noted with regard to anti-money laundering provisions where the IMF said:

While the volume of Suspicious Activity Reports reported to the Jersey Financial Crimes Unit appeared satisfactory, there is some scope to improve the timeliness of reporting. Banks and TCBs accounted for the bulk of the reported SARs, although efforts were being made to encourage other reporting entities to increase filing rates. The legal protection for those filing should be limited to those acting in good faith and the tipping-off offence needs to be broadened to comply with the international standard. There was no requirement for financial institutions to have an independent audit function to test for AML/CFT compliance.

The latter point is especially telling: having all the rules in the world in place is meaningless if no one reports suspected money laundering. It was only in 2006 that not a single report was made in Jersey in a whole year of suspected criminal money laundering—the category that would include tax evasion.⁵⁷ And Jersey is still not checking reports are being made. This is especially relevant when it was noted by the IMF that:

Lawyers and (to a lesser extent) accountants in Jersey are heavily engaged in providing trust, investment, and wealth-management services, mainly to nonresident clients and have been subject to prudential oversight in respect of these activities for some time. However, as they (in respect of auditing, accounting, and legal services) and other Designated Non-Financial Businesses and Professions (DNFBP) (estate agents, high value dealers) have only recently become subject to AML/CFT oversight in respect of DNFBP activities, the effectiveness of implementation could not be fully tested at the time of the assessment.

It was also noted that:

A . . . material issue relates to the extent of the concessions allowed to financial institutions and certain DNFBPs to rely on intermediaries and introducers in conducting Client Due Diligence; while valid in principle, the concessions are an overly-generous interpretation of the international standard and may increase the risk of abuse in some respects.

In each case it is clear that recent, and urgent changes to pass necessary reviews have taken place; laws have been passed in haste, resources to enforce them are in doubt and major loopholes, especially for favoured professions remain. This is not indication of a place seeking the highest standards; it is indication of a place seeking to offer superficial compliance with minimal impact on actual activity.

⁵⁶ http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/15_09_09jersey_imf.pdf accessedn 6-1-0-09

⁵⁷ <http://www.taxresearch.org.uk/Blog/2007/03/02/jersey-officially-a-money-laundering-free-zone/accessed> 6-10-09

DEVELOPING ISSUES

There is in addition a developing agenda that must be explored. This is the deliberate policy of the States of Jersey to reduce transparency within its regulatory environment and hence to reduce the information it holds that might be exchanged with those making enquiry of it. At the same time, it appears to be creating opportunities for abuse within its financial services sector. These issues are explored in turn:

(a) *The EU Savings Directive*

Jersey has to date refused to follow the UK and the vast majority of European Union states in applying the provisions of the European Union Savings Directive by disclosing information on interest paid to persons not resident in Jersey to tax authorities in the EU countries in which they are resident (this arrangement does not apply outside the EU and certain dependent territories, including the Channel Islands). In making this choice Jersey opted to facilitate continuing tax evasion by large numbers of people who had placed their funds in the Island precisely because they did not want information on the existence of their bank accounts or the interest paid on them to be disclosed to their domestic tax authority.

If Jersey really meant, as Senator Walker claimed in his evidence submitted to the United States Senate Committee, that “it is no part of Jersey’s policy to assist directly or indirectly the evasion of taxes properly payable in other jurisdictions” and that “such business is actively discouraged” then the EU Savings Directive provided a perfect opportunity to demonstrate that fact. If Jersey had opted for disclosure to be made in respect of all relevant accounts maintained with Island banks there would have been no doubt that all those evading tax would have moved their funds elsewhere, straight away. The business Jersey did not want would then have gone. But that option was not chosen. The only apparent explanation is that Jersey does want this business.

Since adoption of the EU Savings Directive the UK’s HM Revenue & Customs has succeeded in securing information on bank accounts maintained by the five leading UK high street banks through their Jersey, Guernsey, Isle of Man and Irish branches on behalf of persons resident in the UK. This was not done with the cooperation of the authorities in those tax havens. It was secured because the banks in question processed the data relating to those branches in the UK and HM Revenue & Customs exploited this fact to secure the information.

The result is that more than 400,000 letters have been sent to persons who have such accounts.⁵⁸ 42,000 actually paid tax as a result. More than £400 million has been settled. This is not small scale activity. This is systemic use of offshore banking by UK based people. That can only have happened if the activity was encouraged, as indeed it is, by the banks in question. This has been noticed by the Permanent Secretary for HM Revenue & Customs in the UK, who has suggested he may wish to question the bank’s conduct in doing so.⁵⁹

What all the evidence suggests is that Jersey knew it had good reason not to disclose details of the bank accounts held by UK resident persons to UK tax authorities, and its action in doing so was one of purposeful non-cooperation. Furthermore, this purposeful non-cooperation is again indicative, and constitutive, of secrecy jurisdiction activity: the provision of facilities—in this case, secrecy regarding bank account ownership—provided for the primary benefit of non-residents; in this case UK tax cheats.

It is accepted in saying all this that Jersey has announced that when the withholding rate on the European Union Savings Tax Directive increase to 35% in 2011 Jersey will withdraw the withholding option and will become a full member of the EUSTD, exchanging information on all interest paid. However, as recent reports have shown,⁶⁰ major banks have put arrangements in place to get round this and avoid the resulting disclosure and as such this would appear to be another case of window-dressed compliance when significant pressure—in this case a high rate of withholding tax—is brought to bear on Jersey.

(b) *Tax reforms*

There is a curious by-product of Jersey’s tax reforms with regard to companies. If a company has no tax liability it need not submit a tax return. In practice “exempt” Jersey companies have enjoyed this facility for many years, and nor do they have to file accounts with the States of Jersey.⁶¹ Since Jersey clearly wants its new arrangements to replicate the old as far as possible Malcolm Campbell, Comptroller of Income Tax on the Island, has said that under the new regime zero per cent companies will only be required to submit a simplified tax return.⁶² In practice “simplified” is thought to mean little more than filing confirmation that the company exists, does not undertake a chargeable trade and confirmation of whether or not it has Jersey resident tax payers. This will, technically, be all that is required to ensure that the Comptroller can collect the information needed to ensure Jersey resident taxpayers do declare their “personal” tax liabilities due from the company. The company itself will no longer need to file its accounts with the Comptroller, and nor will it need to file tax return data. The data on its affairs will be submitted, if necessary, by its Jersey resident shareholders.

⁵⁸ <http://business.timesonline.co.uk/tol/business/money/tax/article1875552.ece> accessed 8-6-07

⁵⁹ *ibid*

⁶⁰ <http://www.guardian.co.uk/business/2009/sep/21/lloyds-panorama-tax-avoidance-allegations> accessed 6-10-09

⁶¹ http://www.offshore-formations.co.uk/offshore_company_formation/offshore_formation_jersey.htm accessed 8-6-07

⁶² <http://www.thisisjersey.com/finance2006/showfir.pl?ArticleID=000017> accessed 8-6-07

This might seem an innocuous development. The practical consequence is, however, significant. Jersey will no longer receive any accounting or tax information from most companies incorporated in the island. This will mean that it will not have that information to exchange.

Further alterations to the law will facilitate this change. First will be a change in the law that will allow a Jersey company to be more easily considered resident in a territory other than Jersey.⁶³ If approved this law will mean that these companies will not have to supply information to the Jersey Comptroller of Income Taxes.

Second, under changes in money laundering regulations now proposed the disclosure of the beneficial ownership of a new Jersey company to the Island's authorities (at one time the Comptroller of Income Taxes, subsequently the Jersey Financial Services Commission) before the company can be incorporated (an arrangement which received strong approval in the Edward's Report)⁶⁴ is to be scrapped. The States of Jersey will no longer require this information, relying solely on the financial services sector's assurance that they "know their client". This is a marked retrograde step with regard to regulation of companies in the Island.

In combination these changes mean that the information available for exchange about corporations registered in the Island held by the States of Jersey will be markedly reduced in future and as such it is likely that whatever information exchange arrangements might be in place the actual information for exchange is much less likely to be available.

(c) *Trust reforms*

Jersey trust law was substantially revised in 2006.⁶⁵ The principle change was the introduction of statutory provisions for reserved powers for trust settlors. This change means that a settlor of a Jersey trust may now reserve certain powers for themselves that are specified in the law, including the grant of a beneficial interest in the trust property without affecting the validity of the trust. Included amongst the powers that a settlor may reserve are:

- The power to amend or revoke the trust;
- To appoint new trustees and to remove trustees;
- To appoint or remove an investment manager or investment adviser;
- To give directions to the trustee in connection with the purchase, retention or sale of trust property;
- To give directions to the trustee for the distribution of trust property; and
- To restrict the exercise by the trustee of some of its powers or discretions.

As a Jersey trust company has said:⁶⁶

In a nutshell, these provisions allow the settlor of a trust to direct the trustee in the exercise of a range of powers

As the same firms says:⁶⁷

In summary, these wide-ranging changes to the Trusts (Jersey) Law are expected to maintain Jersey's pre-eminent position as a most desirable jurisdiction in which to establish a trust.

The importance of these changes is hard to understate. In common law (which originated in England) a trust usually requires four participants or it fails:

1. A settlor who irrevocably gifts the asset into trust;
2. A trustee who legally owns the trust property but does not have beneficial entitlement to it, although they may be paid a fee for their services; and
3. At least two beneficiaries with differing claims on the assets held by the trust. These persons need not be named in which case the trust is considered discretionary. Only one beneficiary is needed if the asset is held for a minor.

What is also necessary is that:

1. The trust cannot be revoked. If it can be there is no gift of the trust property, it is merely loaned;
2. The settlor cannot be the trustee. If the settlor is the trustee they have not put the asset into trust;
3. The trustee cannot benefit from the trust or the trust property was gifted to them, and not for the benefit of others; and
4. The beneficiaries cannot include the settlor or the settlor has not gifted the asset as they retain the benefit of owning it.

⁶³ <http://www.gov.je/NR/rdonlyres/7A8C11C5-F9F4-48AC-9BF3-FB8699D7DCD8/0/IncomeTaxAmendment27.pdf> accessed 8-6-07

⁶⁴ Para 10.6.2 <http://www.archive.official-documents.co.uk/document/cm41/4109/a-chap10.htm> accessed 8-6-07

⁶⁵ <http://www.gov.je/StatesGrefe/MinisterialDecision/EconomicDevelopment/2006/Trusts+Amendment+no+4+law.htm> accessed 18-6-07

⁶⁶ <http://www.volaw.com/pg605.htm> accessed 8-6-7

⁶⁷ *ibid*

If these conditions fail, so does the trust (minor points excepted that do not need consideration here). In Jersey all these conditions can now fail:

1. The trust can now be revoked;
2. The settlor can order the trustee what to do: as such the settlor is in effect the trustee, the latter acting as mere nominee for the settlor;
3. The settlor can order the distribution of the trust person to someone of their choosing. That could be themselves. They are, therefore, always potential beneficiaries of the trust; and
4. Whatever the trust deeds now say application can be made to the Royal Court in Jersey to invoke these powers.

The consequences are obvious. There is now no such thing as a Jersey trust. There are only sham trusts in Jersey. A sham trust has been defined by Lord Justice Diplock as:

“if it has any meaning in law, it means acts done or documents executed by the parties to the “sham” which are intended by them to give to third parties or to the Court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create.”⁶⁸

Admittedly, it has been argued that:⁶⁹

An intention only on behalf of the settlor to deceive third parties, a trustee who is found to have exercised its discretion but virtually always done as the settlor/beneficiary asks, or a settlor who has reserved a number of powers in the trust deed for himself in the hope of controlling the trustee, will not be enough to satisfy the current sham threshold.

For a sham trust claim to succeed there must be a common intention of both the settlor and the trustees that the trust assets should be held otherwise than as set out in the trust deed which they both executed and that both the settlor and the trustee had a common intention to mislead third parties by giving a false impression of the position. A trustee will have the necessary intention if he goes along with the settlor “neither knowing or caring what he is signing (ie who is reckless)”. The time for ascertaining such intention is at the time of the creation of the trust, or, if assets are subsequently added, at the time the assets are added. Conduct of the trustees subsequent to the creation of the trust is however admissible in evidence, from which inferences can be drawn as to intention.

This argument has been recognised in Jersey law.⁷⁰

In the USA a sham trust has been more succinctly defined by the IRS as:

Generally used by the courts to describe an abusive trust that serves no legitimate purpose and lacks economic substance. The trust is disregarded for tax purposes, and all income and expenses are assigned to the true owner of the activity.⁷¹

This is important in the context of the correspondence relating to the creation of Jersey’s new trust laws that was sent, apparently in error, to the Observer newspaper in the UK who then supplied it to an author of this paper. That correspondence was between senior ministers and civil servants in Jersey, including its Comptroller of Income Tax, and the full text is now available online.⁷² One participant (who helped design the change in the trust law) said:

The changes to the Trusts Law are intended to give statutory certainty to a practice that is already widely carried out. Currently, it is common for assets such as shares in a family company to be placed in trust, but for the settlor to wish to retain control over how the company is operated. Or an investment portfolio may be placed in trust, but the settlor may wish to manage the investments. In such circumstances, the settlor has two choices.

The first is to use a Jersey trust and through very careful drafting, define precisely the limitations of the trustees’ responsibilities. The power of the trustees to replace a director or investment advisor could be limited, for example. The problem with this is that it requires careful drafting and it is uncertain whether the trustee has an overriding duty to protect trust assets. In other words, if the company or assets start performing badly, is the trustee bound to apply to court for an Order to preserve trust assets? Also, if the discretion of the trustee is fettered, there is a risk that the trust could subsequently be attacked as a sham. For an international client, these are reasons to not use a Jersey trust.

⁶⁸ Snook v London and West Riding Investments Limited [1967] 2 QB 786 at 802. quoted at <http://www.mondaq.com/article.asp?articleid=43332> accessed 8-6-07

⁶⁹ <http://www.mondaq.com/article.asp?articleid=43332> accessed 8-6-07

⁷⁰ See http://www.jerseylegalinfo.je/Publications/jerseylawreview/feb04/JLR0402_Hayton.aspx accessed 8-6-07

⁷¹ <http://www.irs.gov/businesses/small/article/0,,id=106554,00.html> accessed 8-6-07

⁷² See <http://www.taxresearch.org.uk/Documents/JerseyMail0906.pdf> accessed 8-6-07

The second alternative is to simply establish a trust in one of the many jurisdictions that allow a settlor to retain stated powers. To use your example, if a Jersey person wishes to retain significant control of his assets, he could simply place them in a Cayman or BVI law governed trust. This need not have Cayman or BVI trustees—a Guernsey trustee could easily do the job.

I imagine that a large number of wealthy people all over the world (including Jersey) do just the thing you fear in your e-mail—place assets in trusts in another jurisdiction, define themselves as excluded persons for the time they are resident in a specific jurisdiction, have assets returned to them when they cease to be resident in that jurisdiction, and then receive all the gains/rolled up income tax free. If 0/10 is implemented with look-through provisions, for example, I would expect many wealthy people who might own a private Jersey investment company to simply move the assets to a company in another jurisdiction, place the shares of that company in a trust, and let the assets roll up.

So practically, the changes will not make it any easier to avoid tax. What they will do is allow Jersey to compete more effectively for international work, where wealthy families will often wish to place assets in a trust structure and yet retain certain control over the management of the trust assets. The driving reason for doing this will not usually be tax planning: a settlor may live in a jurisdiction that is politically unstable, or where there are forced heirship restrictions, or may simply wish to place his or her assets in a vehicle that would benefit his or her family in the event of any subsequent personal bankruptcy. Most often, it will be because the settlor is self-made and thinks he can manage his assets better than any professional.

The key issue remains, as always, that while it is easy to tax people when they spend, and fairly straightforward to tax people on what they earn, any attempt to tax people on unearned income or capital gains is likely to lead to those who can afford it seeking expert advice on how to structure their wealth in order to minimise their tax liability. The tax burden, as with inheritance tax in the UK, will be borne by those who are moderately wealthy but not so wealthy as to be able to afford to place significant assets out of reach for a reasonable period of time: if you have £10 million you can afford to lock £9 million away for a rainy day, whereas if you have £1 million you can't.

As Jersey is squarely pitching itself at the expert/sophisticated/ultra-high net worth end of the market, we need settlor reserved powers in order to offer an attractive product to international clients. However, other jurisdictions have been offering this product for years and I imagine that any wealthy Jersey resident minded to do so has been taking advantage of these products for years.

Hope that assists.

Paul

It is fascinating to note that the Comptroller of Income Tax was alarmed at this legislative change, saying in two separate parts of the correspondence:

On the Trusts Law change I would not want the AG to be blamed for this at all. . .he just brought it to my attention . . . and on the face of it, if the settlor has a new power to instruct the trustees of a trust he has settled—rather than having a “letter of wishes” as in the past—on the assets/property (sic) in the trust, then, is it not possible for a Jersey resident to settle assets/property in such a Jersey trust then appoint, say, Guernsey resident trustees, thereby achieving a “no tax” situation in both jurisdictions and, after several years, he—the settlor—becomes non resident in Jersey and then instructs the Guernsey trustees as he wishes re the disposition of the assets in the trust, ie, he gets the assets and income diverted for his own use? Or some similar structure? Or am I worrying without cause about this?

And:

Thanks . . . you have confirmed my fears! . . . and I am concerned about your view in para. 4 re 0/10 implementation . . . as it need not necessarily be wealthy people who might do this but also the middle classes . . . because if this does happen there could be significant tax leakage.

It is very rare to get such an insight into the real thinking of those who run tax haven administrations and several points should be noted:

1. It was recognised that current practice amongst Jersey professional people did not match the requirements of the law. In practice the discretion of trustees was being fettered, and this might be seen as a sham. Rather than attack the malpractice, Jersey officials seem to have taken the view that since the abuse was commonplace they should legitimise it. In other words, they knowingly created what are in effect sham trusts.
2. They did this because they know that “a large number of wealthy people all over the world . . . place assets in trusts in another jurisdiction, define themselves as excluded persons for the time they are resident in a specific jurisdiction, have assets returned to them when they cease to be resident in that jurisdiction, and then receive all the gains/rolled up income tax free”. In other words it seems that those writing these e-mails:

- (a) Acknowledged that this is the intention of the parties to some trusts at the outset and that there is connivance in this respect between settlors and trustees. As the legal decisions noted above make clear, this is a necessary condition for a sham trust to exist;
- (b) Knew that this action is fraudulent ie that the statements the “settlor” makes are untrue and therefore constitute tax evasion because they recognise that it is always the intention of the parties to eventually unwind the trust and have the trust property returned to the settlor tax free;
- (c) Knew that they were creating an arrangement to facilitate this activity none the less;
- (d) Did so whilst acknowledging that this might harm the tax base of Jersey. They appeared quite indifferent to the fate of other countries in this respect;
- (e) Knew that this would be exploited by the rich alone. As they say, “The tax burden . . . will be borne by those who are moderately wealthy but not so wealthy as to be able to afford to place significant assets out of reach for a reasonable period of time: if you have £10 million you can afford to lock £9 million away for a rainy day, whereas if you have £1 million you can’t”. This market they clearly designate as being for the “expert/sophisticated/ultra-high net worth end of the market”.
- (f) Think that this market requires such services. As they say “we need settlor reserved powers in order to offer an attractive product to international clients”.

That “product” is, in effect, tax evasion. As another participant in the correspondence noted:

Finally I am very concerned by the apparent retrospective attack—inspired it seems by the A[torney] G[eneral]—on a major feature of the recent trust law change on the ground that it ostensibly facilitates greater tax avoidance.

This correspondent, unlike all others, does not see the problem to which Jersey’s own Attorney General had drawn attention when using the local euphemism of tax avoidance to embrace tax evasion. But tax evasion is precisely what the law encouraged, and the Attorney General’s concern was well placed, if understated. The result is that:

1. On application to the Royal Court in Jersey all Jersey trust are now revocable;
2. In that case they should in every case be identified as being the property of the settlor;
3. In that case the EU Savings Directive should be applied to all Jersey trusts as if the settlor is the owner of the property with deduction of tax being made if appropriate and information exchange being required to take place; and
4. Trusts used for inheritance and estate planning purposes almost certainly now fail in to comply with the requirements of other legislatures.

It is only a lack of knowledge—and Jersey’s own cloak of secrecy that has been drawn over the consequences of these provisions—that has prevented this legislation being reviewed in this way. It is high time, however, that it is: Jersey’s trusts and those of the many other jurisdictions that allow similar arrangements are mere shams used for the purpose of the evasion of tax and other regulatory requirements and as the correspondence quoted shows, those running these administrations appear to know this is true. Those trying to tackle the tax haven problem should also be aware of this fact.

(d) *The International Cell Company*

Protected Cell Companies (PCC) were first provided by Guernsey in 1997.⁷³ That territory has a specialisation in the provision of offshore re-insurance arrangements. In effect a PCC operates as if it were a group of separate companies except all are part of the same legal entity. There is, therefore a “parent level” which provides management services for the company but in addition there are a number of further segregated parts called cells. Each cell is legally independent and separate from the others, as well as from the “parent level” of the company.

As has been noted:⁷⁴

The undertakings of one cell have no bearing on the other cells. Each cell is identified by a unique name, and the assets, liabilities and activities of each cell are ring-fenced from the others.

If one cell becomes insolvent, creditors only have recourse to the assets of that particular cell and not to any other.

This use in insurance terms is worrying. Anyone insuring with such an entity cannot be sure what assets might be used to cover their risk. No doubt that is the intent of those using them. More worrying though is their further possible use, of which some are now becoming aware:⁷⁵

⁷³ http://www.legalinfo-panama.com/articulos/articulos_41a.htm accessed 31-1-07

⁷⁴ http://www.offshore-fox.com/offshore-corporations/offshore_corporations_030404.html accessed 31-1-07

⁷⁵ *ibid*

The astute offshore practitioner can employ an offshore protected cell company as an effective asset protector and privacy enhancer.

With an offshore insurance corporation, it is market practice that provides tangible benefits; with the protected cell company, it is the structure of the entity itself—think of a house with a locked front door, and rooms inside, each with a separate lock and key.

Protected Cell companies have—in concert with other entities—been used to construct what has been called “an impenetrable wall” against creditors and prying eyes. Whilst these claims can only be tested by time, this novel use of a PCC for asset protection and financial privacy is an interesting approach and a valuable piece of intellectual property.

This is the logic of secrecy jurisdictions: professional people use legislatures to create structures that they can sell to those from outside the jurisdiction wishing for secrecy, the only realistic use for which is the evasion of obligations arising under the laws of other countries.

Guernsey is no longer alone in supplying these companies. Jersey has offered them since 2005. As is typical in this market, each territory seeks to innovate and develop such a product to out-compete other tax havens in the legal structures they have to offer. Jersey’s innovation has been to offer an “incorporated cell company”, the difference from a protected cell company being that each cell has its own, notional, legal identity so that recognition in countries that will have nothing to do with the “protected cell” concept is easier to achieve.

Superficially the resulting structure looks like a group of companies. Indeed, as leading Jersey lawyers Carey Olson say:⁷⁶

Indeed, at first glance, an ICC structure resembles a group structure, with a company at the top—the ICC or parent—and other companies below—the cells or subsidiaries. There is, however, a crucial difference between an ICC and a standard group structure: while the ICC has significant control over the cells it creates, it is unlikely to own the cells. The cells may be owned by investors, whereas the ICC might be owned by the financial institution structuring the investment product or by a charitable trust so that it is an “orphan” ICC.

This is actually far removed from a group structure. What it does instead provide is a new means for undertaking disguised transactions at low cost. As the same firm says of the use of a Jersey ICC:

The purpose of a cell company—whether an ICC or a PCC—is to provide a vehicle which can create cells, separate parts within which assets and liabilities can be segregated. This concept of “ring-fencing” is fundamental to cell companies. The key principle is that the assets of a cell should only be available to the creditors and shareholders of that cell.

The administrative benefits of a cell company are significant. Once a cell company structure is in place, repeat transactions can be established in a much reduced timescale. This is particularly attractive in projects such as collective investment funds and securitisations, where negotiating transaction documents can be a complex and lengthy process, and where a successful initial structure will often lead to a demand for further, similar structures using the same key participants.

A framework can be established which includes all of the participants in the structure—such as administrators, managers, investment managers and custodians—and model agreements entered into governing the contractual roles of those participants. Regulatory consents can be obtained in advance for the structure, and then, as new cells are added, the level of regulatory scrutiny that will be required is much reduced, as the fundamental structure has already been agreed.

When particular transactions are envisaged—for example, adding a fund to invest in a specific country or sector, or a new vehicle to acquire receivables in the course of a securitisation—a cell can be created specifically to act in that defined role.

As the functionary agreements and regulatory consents have already been agreed with respect to the form of the transaction, a new cell can be added at a fraction of the cost and time that would be required were the structure to be established from scratch.

This may be true, but by adopting the logic of this argument, it is equally easy to see how this structure could be used for a variety of abusive purposes. In addition, since such structures are at present virtually unknown in populous states, their role has not been taken into consideration in information exchange agreements as yet. Another barrier to securing data has been established as a result.

(e) *Redomiciliation*

Since the Competition (Jersey) Law 2005 came into full force on 1 November 2005 it has been possible to redomicile a Jersey company. Redomiciliation allows a company registered in one place to apply to be removed from registration in that location and to be re-registered in another country or territory. The company is not dissolved in the process. What happens is that, for example XYZ Limited of Malta with

⁷⁶ <http://www.mondaq.com/article.asp?articleid=44136> accessed 18-6-07

company number 444555 in that location becomes XYZ Limited of Jersey with company number 777888 in that new location. The company carries on trading without change, it has simply shifted the country to which it owes legal duty by way of registration. As one Jersey lawyer⁷⁷ has reported since then they have:

advised a number of clients in relation to moving companies from Jersey to other jurisdictions, including Delaware, Spain, Liechtenstein, Switzerland, Portugal and Malta.

This trend is worrying. Information exchange has no doubt motivated interest in companies being able to relocate themselves. Most territories take time to reply to enquiries on information exchange. Corporate relocation often takes less time than it takes an offshore tax authority to deal with an information request. As such relocation is an obvious flight strategy in the event of enquiry talking place. Jersey's participation in this activity is not a sign that it is committed to the highest standards: it is instead a sign that it is willing to allow companies to flee in the face of a challenge being made to them.

The danger is obvious. Capital flight could easily become a simple matter of corporate flight with the world populated by roving, unaccountable companies whilst the secrecy jurisdictions are held hostage to lowest common denominator practices for fear that those located there will leave. This effectively means that realistic attacks on offshore have now to be focused on the suppliers of offshore services and the facilities that these companies use as much as on the companies themselves.

(f) *Money laundering reforms*

Jersey is revising its money laundering regulations to bring them into line with latest FATF requirements which would also bring it into line with the EU's Third Money Laundering Directive.⁷⁸ However opportunity is being taken to revise the Jersey Financial services Commission's Handbook for the Prevention and Detection of Money Laundering and The Financing of Terrorism⁷⁹ at the same time.

Some aspects of this are welcome. For example, section 2.8.5 on fraud related offences says:

Fraud, including fiscal offences (such as tax evasion) and exchange control violations, are commonly and mistakenly regarded as distinct from other types of crime for money laundering purposes. They are not. Any fraud related offence is capable of predicating an offence of money laundering in Jersey where it satisfies the requirements of the definition of criminal conduct within the Proceeds of Crime Law.

The clear statement that tax evasion is a money laundering offence is obviously correct, but It makes the fact that not a single Suspicious Activity Report was filed with the Jersey Police in 2006 even more surprising. This is especially so as the EU Savings Directive was in full operation for the first time during that year. At least 70% of all those asked in Jersey if they wanted interest paid on their accounts to be declared to their home government under the terms of this Directive declined the offer.⁸⁰ Any bank receiving such a request should have suspected that tax evasion was a possible explanation for this reluctance and accordingly filed a suspicious activity report with regard to that account. As is apparent, this cannot have happened. This Handbook may exist but it is obvious that it is ignored by Jersey's financial institutions when it suits them to do so.

The new handbook also contains a number of worrying developments:

1. New clients can be assessed as being of lower, standard and higher risk.⁸¹
2. Once assessed as being "lower risk" a customer of a financial services company is only required to disclose their name, residential address and date of birth⁸² when opening an account. However, proof is only required of the first and one of the last two.⁸³ In other words, a low risk client can give a false address and this will not be detected if a single document eg their passport (which shows their identity and date of birth) has been offered as evidence of identity to the financial services provider;
3. One Jersey financial services provider can now rely on the customer checking procedures of another Jersey financial services provider and does not have to replicate the 'know your client checks' that the first has done.

The implications of these changes are obvious. In an environment such as Jersey's where there is little evidence of compliance with the requirements of money laundering rules, as the absence of Suspicious Activity Reports with regard to money laundering proves, there will be a tendency for financial services providers to rank their customers as having low risk, so avoiding the need for property proof of identity to be given before a bank account of other facility is opened. There may be merits in this onshore (or even for Jersey passport holders in Jersey) but in money laundering terms anyone wishing to open an account in an offshore financial services centre has to represent a risk with regard to money laundering, if only in the form of tax evasion. Accordingly the availability of this category of risk and the lax approach to client

⁷⁷ <http://www.mourant.com/section/132/index.html> accessed 18-6-07

⁷⁸ http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/oj/2005/l_309/l_30920051125en00150036.pdf accessed 18-6-07

⁷⁹ See http://www.jerseyfsc.org/the_commission/general_information/press_releases/release169.asp accessed 12-6-07

⁸⁰ See <http://www.gov.je/TreasuryResources/IncomeTax/Bulletin+Board/EuropeanUnionSavingsDirective/EUSDPressRelease120606.htm> accessed 12-6-07

⁸¹ http://www.jerseyfsc.org/the_commission/general_information/press_releases/release169.asp Section 3.3.5

⁸² *ibid* Section 4.3.1

⁸³ *ibid* Section 4.3.2

identification that it allows is a major cause of concern and is bound to facilitate offshore abuse. Abuse of the EU Savings Directive is the most obvious example: this Directive only applies to persons resident in the EU. If a false address is given outside the EU it need not be checked and the requirements of the EU Savings Directive will be fraudulently avoided. The likelihood of this happening is high and an immediate review of the standards and codes in operation in Jersey and elsewhere is needed to prevent this abuse becoming commonplace.

(g) *Foundations*

Jersey did, until 2009, not offer Foundations as a form of offshore structure. Foundations, which were at the heart of the abuse perpetrated in Liechtenstein, are, however now available in Jersey as a result of new legislation passed in 2008 and enacted in 2009. As a local lawyer says of this new legislation:⁸⁴

Foundations are neither a company nor a trust but have some similarities to both. Foundations also provide certain advantages over companies and trusts. They are useful to act as a holding vehicle and to provide an orphan or independent structure. They also assist private individuals with global asset management, by dealing with succession and inheritance planning, wealth preservation, ensuring assets are located in a tax neutral jurisdiction to avoid tax legitimately and to avoid probate requirements in various countries.

Foundations are a distinct and independent legal entity created for a particular purpose. They are, in effect, a purpose entity without shareholders and with or without beneficiaries. Having a distinct legal personality, they hold assets in their own name like a company holds assets and they can contract with others. Just as it is possible to have purpose trusts or trusts with beneficiaries so too it is possible to have foundations set up solely for a purpose or set up for beneficiaries. There will be no Jersey income or capital taxes for non resident taxpayers.

Every characteristic that defines Jersey as a secrecy jurisdiction is highlighted in this summary. Secrecy jurisdictions are defined as places that intentionally create regulation for the primary benefit and use of those not resident in their geographical domain. That regulation is designed to undermine the legislation or regulation of another jurisdiction. To facilitate its use secrecy jurisdictions also create a deliberate, legally backed veil of secrecy that ensures that those from outside the jurisdiction making use of its regulation cannot be identified to be doing so. The lawyers who notes the favourable (in his sight) qualities of the foundation law highlights that:

1. It is aimed at non-residents—for it is for global wealth management;
2. Non one need own or benefit from it, on paper—the ultimate in secrecy;
3. It undermines probate, tax, inheritance and other laws of other states;
4. It also may well not pay tax.

Whilst Jersey continues to promote abusive structures of this sort its commitment to transparency has to be considered token at best.

LACK OF EFFECTIVE EXCHANGE OF INFORMATION FOR TAX PURPOSES

In the face of international pressure to exchange information, Jersey has signed a Tax information Exchange Agreement with the USA.⁸⁵ It also has double taxation agreements with the UK, France and Guernsey (but no other location).⁸⁶ However, as LowTax.Net⁸⁷ said in 2007:

As a matter of policy Jersey does not normally enter tax treaties. However, double taxation agreements exist with the United Kingdom and Guernsey, and a limited agreement with France exempting a resident of either country from tax in the other country on profits from shipping and air transport.

They go on to say:

The UK and Guernsey treaties do not conform to the OECD standard model treaty. The agreement with the United Kingdom specifically excludes dividends and debenture interest from its provisions.

In addition, the French agreement is:

limited to exempting a resident of either country from tax in the other country on profits from shipping and air transport.

This was hardly evidence of a commitment to effective information exchange. This lack of willing on its part is obvious from its reaction to the UK imposed requirement that it participate in the European information sharing agreement that forms the basis of the EU Savings Tax Directive.⁸⁸ It agreed to this obligation only after considerable pressure from the UK had been applied. When doing so it opted for the

⁸⁴ <http://www.bedellcristin.com/NewsPagetitle/JerseyFoundationsLaw>

⁸⁵ <http://www.gov.je/TreasuryResources/IncomeTax/TIEA/TaxationUSAJersey2006.htm> accessed 18-6-07

⁸⁶ <http://www.gov.je/TreasuryResources/IncomeTax/IncomeTaxLegislation/accessed> 18-6-07

⁸⁷ <http://www.lowtax.net/lowtax/html/jje2tax.html> accessed 8-6-07

⁸⁸ http://ec.europa.eu/taxation_customs/taxation/personal_tax/savings_tax/index_en.htm accessed 8-6-07

deduction of a withholding tax from account holders by default rather than exchange information. This minimised information exchanged and provided continuing shelter for those using its banks from within the EU for the purposes of tax evasion.

Jersey only appears willing to engage in international agreements relating to financial services when they suit its purposes. As such in October 2003 Jersey signed a Memorandum of Understanding with the International Organisation of Securities Commissions designed to combat securities and derivatives violations.⁸⁹ Twenty four countries are party to this. It has similar agreements with Bahrain, Dubai, Cayman and Qatar to promote offshore finance arrangements. These do not constitute information sharing agreements.

That process of change only under pressure of threat of considerable duress if compliance at a nominal level is offered is apparent from the reaction of Jersey to pressure arising before the G20 meeting in London in April 2009 when it was announced that any secrecy jurisdiction that had not entered into at least twelve OECD style Tax Information Exchange Agreements would be subject to black or grey listing by the OECD and possible sanctions in due course. Jersey signed (but has yet in most cases to bring into effect) agreements with twelve jurisdictions just before the Summit made this announcement—so just avoiding the grey list process. Some of the agreements in question must, however, be considered nominal. Those with Greenland, the Faroe Islands and Iceland or not, for example, likely to be used much. This is typical of token compliance by Jersey. So too is the fact that having initialed the requisite twelve agreements⁹⁰ (in addition the existing US arrangement) prior to the G20 meeting (11 in the period October 2008 to March 2009) it has signed just two more since ie its rate of progress towards transparency has slowed dramatically now it can claim to be compliant. Full transparency with all 200 or more jurisdictions in the world may take many decades at this rate of progress

CONCLUSIONS

This paper has shown that:

1. Jersey remains committed to conventional secrecy jurisdiction practices, with all that implies;
2. Jersey's compliance is with the form of international standards but not with the substance of the conduct that they expect;
3. Jersey's co-operation with the USA is not indicative of its general approach to international issues;
4. Jersey is purposefully creating structures and procedures for use by its financial services industry that will result in information not being available for exchange under internationally agreed arrangements, so nullifying their effect;

The evidence supports these conclusions. Jersey is offering no or nominal taxation to those using its legislation and secrecy space, whilst increasing the tax burden on its local population to pay for this. This is indicative and constitutive of secrecy jurisdiction status and behaviour.

The new laws it is introducing on corporate tax, the taxation of high net worth individuals and GST do not comply with international norms. Jersey's new money laundering arrangements will allow abuse not possible at present. At a time when increased standards are expected internationally Jersey is finding ways to lower those it operates whilst offering only apparent compliance with internationally imposed obligations. Its new laws on trusts, incorporated cell companies and redomiciliation are all an indication of this. At the very least each makes information exchange harder: in the worst possible case each could be of benefit to those undertaking fraudulent transactions, and in the case of the trust laws correspondence that has been seen shows that the government in Jersey knew this to be the case. In all cases, the clear aim of providing benefits to non-residents through the use of secrecy structures is both indicative and constitutive of secrecy jurisdiction status and behaviour.

It is apparent that in the light of this extremely limited range of tax agreements into which it has entered that the cooperation that Senator Walker claimed Jersey is providing to the USA in his submission to the US Senate dated 17 May 2007 is illusory. Even if some cooperation is being offered to the USA, it is unusual for secrecy jurisdiction activity to exist on a pure bilateral basis. As such if a US transaction is routed to Jersey via another location it is highly unlikely that effective information exchange arrangements will be in place to track it, so nullifying many of the benefits of the US (or any other) TIEA.

So what is happening? The best explanation appears to be the simplest one. As pressure mounts for secrecy jurisdictions to exchange information, so they are reacting by ensuring that they either do not have that information, or by providing mechanisms that make it both harder to secure, and easier for it to flee. The result is that corruption in places like Jersey can no longer be tackled at the transaction level. Put simply, transaction data will soon be unavailable or in perpetual transit between secrecy jurisdiction locations. As such offshore corruption can now only be tackled at the systemic level. This requires a changed approach. The corrupt user of secrecy jurisdiction services is no longer the problem; the corruption of the secrecy jurisdictions themselves is the problem now.

⁸⁹ <http://www.lowtax.net/lowtax/html/jje2tax.html> accessed 18-6-07

⁹⁰ http://www.oecd.org/document/7/0,3343,en_2649_33767_38312839_1_1_1_1,00.html accessed 6-10-09

It is time to tackle the suppliers of corruption services if the integrity of the world's economy, taxation systems and democracies is to remain intact. Secrecy jurisdictions are at the heart of this challenge to the way we live. And tackling them systemically is the solution to this problem. We have really not begun that process as yet despite all the recent changes in this area, and Jersey remains at the forefront of abuse.

Richard Murphy and John Christensen

Jersey

October 2009

Annex

THE ISLE OF MAN—COSTING THE UK £1.5 BILLION A YEAR

PURPOSE OF THIS PAPER

This paper is based on a blog by Richard Murphy and shows that, contrary to local press reports, the Isle of Man must cost the UK not less than £1.5 billion a year in tax subsidies and revenue lost.

THE EVIDENCE⁹¹

IoMtoday, published by the Isle of Man press carries the following story:

Customs and Excise bosses have rejected claims that the UK Government is “subsidising” the Isle of Man.

Critics argue that the Isle of Man receives more back from the VAT sharing arrangement it has with the UK than it puts in—effectively providing a subsidy from the UK government.

The Tax Justice Network, which has spearheaded the campaign to close tax havens and reform offshore jurisdictions, claims this so-called “subsidy” amounted to some £221 million last year.

But figures produced by Customs and Excise show this not to be the case—and that in fact the Isle of Man has made a net contribution in each of the last two years. In 2007–08 the Island's share of VAT receipts was about £339m but the Island collected and so contributed some £420 million to the pool.

I am, of course, the author of this criticism of the Isle of Man. Reproduced below is the blog posts from February 2009 that made the accusation that the Isle of Man receives significant subsidies from the UK.

But now we there is new data which suggests that in fact the IoM collects more VAT than it receives back from the Common Purse agreement (again, follow above link for explanation). We do at least agree on the figure of £339 million—but it is now claimed that this is an underestimate of VAT collections on the Isle of Man.

Let's consider this for a minute. Do so remembering these facts (updated since I last wrote): that the Gross Domestic Product of the Isle of Man is now £1.8 billion according to the latest data I can find from the IoM government. Even the CIA do not seem to have more up to date data than that. That for the UK is £1,460 billion, in contrast (computed for March 2009, from data here).

In 2008–09 the Isle of Man expects to collect £339 million in VAT—59% of its total government income of £574 million. This is 18.8% of IoM GDP.

In the UK the identical VAT system (for all practical purposes) collects £83 billion a year—or 5.6% of GDP.

That means the IoM, which has reason to have a much lower VAT collection rate because of the very large size of its exempt VAT outputs in the financial services sector collects 13.2% more of its GDP in VAT than the UK does using an identical (indeed, shared) system.

From that I impute that over £230 million of the VAT receipt in the Isle of Man is subsidy and not derived from real economic activity. The Isle of Man press quote a lower slightly earlier estimate. The ball park remains the same.

Note also that the population of the Isle of Man is 76,500. That of the UK is 61.1 million. That makes IoM GDP per head about £23,529. That in the UK is, by chance, £23,701. According to the CIA this is about right. They say Isle of Man GDP per head is \$35,000 pa and that in the UK is \$36,600. This indicates remarkable consistency.

But, apparently each of those people in the Isle of Man pays net £5,490 of VAT according to the latest Isle of Man data that claims £420 million a year of VAT is collected. That requires them at 15% VAT rate to spend £36,600 a year each on VAT chargeable goods (priced net of VAT, or £42,090 in total). In contrast in the UK each person pays net £1,347 each—requiring spending of £8,982 a head each (£10,329 gross) on VAT chargeable items.

Now I have to say that the UK data appears entirely plausible; take food, taxes, rents and mortgages and so on out of account and I think that level of spend per head looks plausible. There is a sanity check inherent in this data.

⁹¹ Based on <http://www.taxresearch.org.uk/Blog/2009/05/18/isle-of-man-costs-uk-at-least-15-billion-a-year/> accessed 6-10-09.

And I have to say this: to suggest that each person in the Isle of Man spends 178% of their annual income on VAT chargeable items a year is just plain straightforwardly utterly implausible. I hate to say this: but at face value the IoM data is simply wrong. How can people spend 178% of their income on VAT chargeable goods in the IoM? They can't: that is obvious

So what are the explanations. They appear to be:

1. The IoM data is wrong. It doesn't appear to be far out on GDP: there's a sanity check on that. So it must be the VAT data that is wrong. I find it incredible that the £420 million figure is right. I have a strong suspicion that is gross for a start ie before claims for repayment from traders for input tax.
2. I'm right: easily the most plausible explanation. It is well known that the Common Purse was meant to subsidise the IoM. Why is it still not doing so?
3. The IoM has attracted a massively artificial tax base and these activities are not in any event taking place in the island, the VAT supplies are simply being "booked" from there in classic tax haven fashion. They are actually, in that case, made in the UK but the profits are artificially booked in the IoM. In that case it remains the case that the UK is still subsidising the IoM with VAT because this would mean the VAT was always due in the UK in the first place and would have been collected here if, for example, the IoM operated VAT as does any other distance seller.
4. If option three is right there is another factor to consider: not only is there a VAT subsidy there is a corporation tax loss too. Let's assume, generously, that the VAT profile of the IoM is the same as the UK, when we know it should actually collect less because of the profile of the financial services sector. And let's assume the £420 million figure is right for a minute. In that case the implied VAT to GDP ratio is 23.3%. It should be 5.6%. That implies an excess rate of 17.7%. In this case that means about £320 million of excess VAT is collected. This is net, I'll assume, of trader claims for input so a good approximation to profit—which is not being earned by staff in the IoM as we have already allowed for their normal rate of return in the calculation and so must not do so again. That means at a 15% VAT rate some £2.1 billion of excess profit must be declared in the IoM to justify this level of VAT on turnover that is not actually located there in reality. Let's reasonably assume that this should be subject to 28% tax in the UK where the supplies must be taking place for the charge to arise. This sum of £2.1 billion is probably not taxed at all in the IoM. That's a tax loss to the UK of £588 million.

So now we can say that the new data revealed by the Isle of Man proves first of all that the VAT subsidy of over £230 million from the UK government to the Isle of Man is undoubtedly real—because the VAT claimed to arise there cannot possibly relate to economic activity really located in the island, and that the corporation tax loss arising from the artificial relocation of that VAT turnover to the Isle of Man is costing the UK not less than £588 million a year.

In other words in the case of just two UK taxes VAT and corporation tax—abuse promoted by the government of the Isle of Man costs the people of the UK a combined minimum of about £820 million a year.

But then we must add on the cost from the Isle of Man refusing to exchange data as it should under the European Union Savings Tax Directive. Directly this refusal costs at least £27 billion a year. Extrapolated, quite reasonably, using the methodology in the link, and the loss to the UK from income tax abuse through Isle of Man based structures is likely to be not less than £700 million a year.

Add this together and the total loss to the UK from allowing the Isle of Man to operate as a tax haven—an activity we directly subsidise—is not less than £1.5 billion a year.

So much for the Isle of Man's government claim that it pays its way. Anything further from the truth is very hard to imagine.

THE 2009 VAT ANALYSIS⁹²

I last reviewed the Isle of Man's subsidy from the UK as a tax haven in tax year 2004–05. Then I estimated it to be as high as £270 million a year. The VAT subsidy alone was some £233 million a year.

I have recently been challenged on this issue—some people saying that the subsidy has been eliminated as a result of the revision of this VAT sharing agreement in 2007. Others have questioned the data used because of the range of years involved. I have recalculated the data to deal with this issue.

The Gross Domestic Product of the Isle of Man is now £1.8 billion according to the latest data I can find from the IoM government. That for the UK is £1,275 billion, in contrast.

In 2008–09 the Isle of Man expects to collect £339 million in VAT—59% of its total government income of £574 million. This is 18.8% of IoM GDP—which leapt in the meantime, including by an improbable 11.2% in 2006–07.

In the UK the identical VAT system (for all practical purposes) collects £83 billion a year—or 6.5% of GDP.

⁹² Originally published at <http://www.taxresearch.org.uk/Blog/2009/02/10/the-isle-of-man-still-subsidised-by-the-uk-to-be-a-tax-haven/> accessed 6-10-09.

That means the IoM, which has reason to have a much lower VAT collection rate because of the very large size of its exempt VAT outputs in the financial services sector collects 12.3% more of its GDP in VAT than the UK does using an identical (indeed, shared) system.

This is, obviously, impossible. Just as it is also impossible for a country to collect more in VAT than its GDP multiplied by the VAT rate (17.5% when the IoM budget was set). As such it is glaringly obvious there is still a subsidy. I now suggest that the VAT subsidy is 12.3% of its GDP—or £221 million a year. There are other subsidies on health and defence over and above that. I have not revisited those issues.

In other words, for all practical purposes the revised Common Purse Agreement of 2007 has left the Isle of Man enjoying exactly the same subsidy as it did before the change. And they use this to do three things:

- (a) Force down tax rates in all the Crown Dependencies, so undermining their financial stability—a process the Isle of Man started when it announced 0% tax rates on companies in 2000—a move it could only afford because of the UK subsidy, and which Jersey and Guernsey had to copy despite not having a similar subsidy; and
- (b) It undermines tax revenue in the UK. For example, it refuses to automatically share data with the UK under the EU Savings Tax Directive, and so hides UK tax evaders in its banks. £400 million was recovered from such evaders as a result of a UK tax amnesty covering the Isle of Man in 2007.

The obvious question is this: when UK government revenue is so tight, why are we spending more than £200 million year to subsidise a tax haven to steal our tax revenues? Surely this is a question the Treasury has to answer.

Memorandum submitted by Lord Wallace of Saltaire

I have followed the relationship between the Crown Dependencies and the UK since, as an academic then working on European international politics at the University of Manchester, I was asked to provide a memorandum for the Kilbrandon Commission on the Constitution on the subject of the constitutional implications of the UK joining the European Community. I read with interest the parallel submission on the Crown Dependencies, and the lack of clarity governing their relations with the UK. I then followed the negotiations over their relations with the EC/EU, in which the Crown Dependencies chose to remain formally outside, while Gibraltar as a European overseas territory chose formal association with UK membership. Since then I have visited the Dependencies, have held discussions with officials from the Dependencies both there and in London, have asked a number of parliamentary questions, and recently have challenged the “Extent” clause of several bills with reference to them.

Many of the issues which relate to management of relations with the Crown Dependencies also relate to management of relations with the Overseas Territories. The Foot Review of offshore financial centres under UK sovereignty, for example, which is due to report this autumn, covers both. It is anomalous in a number of ways that the FCO is responsible for managing relations with Gibraltar, an Overseas Territory within Europe that shares with the Crown Dependencies a complex dependent relationship with the European Union (although with a different pattern of opt-outs and opt-ins). A staff member of *The Guernsey Press* told me some months ago that there are some within Guernsey who think it would be more rational for the FCO to be their first point of contact within Whitehall, given the importance of external interests and representation for them, than the historical anomaly which has made this the MoJ. I hope that the Committee will press the MoJ and the FCO in particular on how actively and carefully they coordinate UK policy on Crown Dependencies and Overseas Territories, since so many issues of governance and international obligations apply to both categories.

I would like to note three aspects of the relationship which would benefit from your scrutiny:

- (1) the application to the Crown Dependencies—and the implementation by the Crown Dependencies—of international treaties and conventions which HMG has signed;
- (2) the appropriate level of reimbursement for the services the UK provides to the Crown dependencies, in terms of international representation, defence, assistance to citizens abroad, etc; and
- (3) the issue of external audit of the quality of governance in the Crown Dependencies.

1. Implementation of international agreements signed by HMG and their application to the Crown Dependencies

The 1973 Kilbrandon Commission on the Constitution noted the ambiguity as to how far the Crown Dependencies were bound by international agreements signed and ratified by the UK government. In the 35 years since then the progress of globalization has led to a remarkable expansion of multilateral conventions, covering environmental protection, climate change, immigration, policing, and human rights as well as issues such as financial regulation and taxation which are central concerns for the Crown Dependencies as financial centres. I moved amendments to the “Extent” clause at committee stage on two bills during this session—the Borders Bill and the Marine and Coastal Access Bill—and received only very limited answers from ministers as to why their reach did not extend to all three of the Crown Dependencies.

Indeed, I was informally told during discussions on the amendments I had tabled that “there is a settled reluctance in Whitehall to address this question.” The Extent clause is almost the last clause in most bills presented to Parliament. It is reached only at the end of the committee stage in either house, when most of those involved are anxious to conclude, and the criteria for the inclusion of some Crown Dependencies and Overseas Territories and the exclusion of others is rarely challenged.

Under international law, the UK Government signs treaties and conventions on behalf of *all* UK territories. For some international obligations—for example, the maritime and coastal conservation issues covered in the Marine and Coastal Access Bill—the Crown Dependencies and Overseas Territories are responsible for a large proportion of the coast, sea, birdlife and fisheries concerns to which HMG has signed up. One early paper on the Marine and Coastal Access Bill illustrated responsibilities for marine conservation around the British Isles with a map which had a large white space in the middle of the Irish Sea, surrounding the Isle of Man. The UK Government consults with the Crown Dependencies on how far they wish international obligations to extend to them. The criteria on which these consultations take place, however, are not clear; nor is it clear whether consultations include any assessment of the resources available to the Dependencies to implement obligations agreed, or any subsequent monitoring of how effectively they have been implemented. On the Borders Bill, ministers made a number of strong interventions on the need to tighten controls on the land border with Ireland, as a weak point in the UK’s external borders; but were unable to answer how the Channel Islands, potentially weak access points to the UK in a period when illegal migrants in northern France are testing alternative channels of entry to the UK, were linked in to the Border Agency.

Bills implementing European and international obligations are presented to Parliament by most Departments across Whitehall. The question of their extension to Dependencies and Territories is, for other Departments, at best a secondary issue. The Ministry of Justice, and perhaps also the Legal Advisers to the FCO, should play a monitoring role in such legislation, in considering what implications there may be for the UK’s international obligations of non-implementation in some UK Dependencies and Territories, and from time to time in initiating checks on how well such obligations have been implemented by Dependencies (and Territories) that have agreed to accept them.

The Crown Dependencies are very active in monitoring and promoting their interests in relation to the European Union. The Committee may wish to ask how far representations from the Channel Islands and the Isle of Man in Brussels are coordinated with the policies that HMG are pursuing, and what consultations take place with the relevant Whitehall Departments when UK and Crown Dependency interest in EU proposals do not coincide.

2. Appropriate reimbursement by the Crown Dependencies for services provided by the UK

The UK is constitutionally responsible for defence and international representation of the Crown Dependencies, including consular assistance to their residents in third countries. The Isle of Man negotiated a Contribution Agreement with the UK in 1994, under which it contributed £2,559,278 in 2008. Jersey and Guernsey have no such agreements. Both claim that transfer to the UK of revenue received from the issue of passports constitutes an appropriate contribution for consular assistance and international representation. Jersey supports a territorial army unit, 29 members of which have served with UK forces in the past ten years, as its contribution to UK defence. Guernsey has claimed in official documents for many years that the cost (currently around £500,000 per year) of its maintenance of the Alderney breakwater—a breakwater constructed in the 1840s to provide safe anchorage for the British fleet in the event of a French naval threat—is its contribution to UK defence; but in answer to a Parliamentary Question in June 2009 the Ministry of Defence replied that it had ceased to have any interest in the Alderney breakwater in 1950.

Lord Myners in a Written Answer in July 2009 (HL4714 and 4764) stated that “in accordance of the provisions of the Jersey and Guernsey (Financial Provisions) Act 1947, the Bailiwicks of Jersey and Guernsey occasionally surrender hereditary revenues of the Crown to the Consolidate Fund. Each payment must then be returned to Jersey and Guernsey within ten working days.” The last of these apparently circular transactions with Guernsey took place in 2003; that with Jersey was in 2008. He did not answer the additional question as to when the Treasury had last assessed the cost of services provided to the Crown Dependencies.

In the management of relations with the Crown Dependencies, this is an issue on which the Treasury is the lead department and the Ministry of Justice plays a monitoring and coordinating role. The sums involved are small, and therefore easily left unaddressed. There are, however, questions, at a time of financial stringency for the UK, of the appropriateness of providing services to these Dependencies on a different basis for each of them, at what appears for all of them to be a very modest contribution—and for which Guernsey contributes significantly less than the other two. Their low levels of taxation partly reflect the absence of contributions to international public goods such as defence and subscriptions to international organizations—though there are some voluntary contributions to overseas development.

Payment is made for the provision of health and higher education services, at agreed tariffs. Higher education fees are currently charged at an agreed intermediate rate between home and overseas fees, for example; as non-members of the EU and non-resident within the UK, students from these Dependencies would otherwise be liable to pay full overseas fees. I am unaware of the current arrangements for

reimbursing the costs of support to the island authorities from UK police forces. Does the Ministry of Justice as coordinating department monitor the overall pattern of services provided and fees charged across Whitehall for these three (affluent) Dependencies?

3. *External audit of the quality of governance*

Recent reports on UK Overseas Territories—most strikingly, the Auld Report on the Turks and Caicos Islands—have drawn attention to the problems of maintaining good governance within small communities, where social, economic and political networks are small and closely intertwined and where challenges to established practices are therefore particularly difficult. Within the UK, the minimum population size that the Department of Communities and Local Government considers appropriate for effective local government units is significantly larger than that of any of the Crown Dependencies.

There is, in effect, a pattern of external audit of some aspects of the governance of the Crown Dependencies, primarily in financial regulation—the Edwards report of 1998, for example, and the current Foot review. It is in no way a reflection on the current good governance of the Dependencies to argue that public confidence, both within the Dependencies and outside, would benefit from a more regular and more transparent pattern of external audit in other areas. Levels of mistrust within Jersey over the handling of child abuse allegations, for example, stretching back over many years, investigated by local police and law officers unavoidably close to some of those under investigation, suggest that a more formal pattern of external inspection might be preferable to ad hoc requests for assistance from UK bodies.

The relationship between the Crown Dependencies and the UK rests upon mutual trust, and on understandings which are partly unwritten and largely ambiguous. Like the British Constitution, which has similarly rested on unwritten conventions and on the expectation that ministers, officials and MPs would follow the code of gentlemen, this relationship has been strained by social change, globalization, financial affluence and the weakening of traditional codes of behaviour. Is it the responsibility of the Ministry of Justice to decide when external investigation or audit is desirable, or is this left to particular Departments—such as the Treasury—to decide? What are the mechanisms through which the police or legal authorities in the UK respond to requests for assistance from the Crown Dependencies, and do they report back to the Ministry of Justice on the assistance given and lessons learned?

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