HOUSE OF LORDS

Select Committee on the Constitution

16th Report of Session 2008–09

Policing and Crime Bill

Report

Ordered to be printed 1 July 2009 and published 2 July 2009

Published by the Authority of the House of Lords

London : The Stationery Office Limited
£price

HL Paper 128

Select Committee on the Constitution

The Constitution Committee is appointed by the House of Lords in each session with the following terms of reference:
To examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution.

Current Membership

Lord Goodlad (Chairman)
Lord Lyell of Markyate
Lord Morris of Aberavon
Lord Norton of Louth
Lord Pannick
Lord Peston
Baroness Quin
Lord Rodgers of Quarry Bank
Lord Rowlands
Lord Shaw of Northstead
Lord Wallace of Tankerness
Lord Woolf

Declaration of Interests

A full list of Members' interests can be found in the Register of Lords' Interests:
http://www.publications.parliament.uk/pa/ld/ldreg/reg01.htm

Publications

The reports and evidence of the Committee are published by The Stationery Office by Order of the House. All publications of the Committee are available on the internet at:
http://www.parliament.uk/hlconstitution

Parliament Live

Live coverage of debates and public sessions of the Committee's meetings are available at
www.parliamentlive.tv

General Information

General Information about the House of Lords and its Committees, including guidance to witnesses, details of current inquiries and forthcoming meetings is on the internet at:
http://www.parliament.uk/parliamentary_committees/parliamentary_committees26.cfm

Contact Details

All correspondence should be addressed to the Clerk of the Select Committee on the Constitution, Committee Office, House of Lords, London, SW1A 0PW.
The telephone number for general enquiries is 020 7219 1228/5960
The Committee's email address is: constitution@parliament.uk

Policing and Crime Bill

Introduction

1. The Constitution Committee is appointed "to examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution". In carrying out the former function, we endeavour to identify questions of principle that arise from proposed legislation and which affect a principal part or parts of the constitution. This report draws to the attention of the House clauses in the Policing and Crime Bill.

Preventative injunctions

2. Part 4 of the bill introduces a new regime under which local authorities and the police may seek civil injunctions against individuals in the magistrates' courts in attempt to control gang-related violence. Clauses in Part 2 of the bill modify the civil injunctions regime that already exists enabling magistrates' courts to make foreign travel orders to prevent sex offenders from leaving the United Kingdom. Part 8 of the bill contains measures that will extend the ambit of the banning orders under the Football Spectators Act 1989.

3. In a previous report (on the Serious Crime Bill in the 2006–2007 session), this Committee expressed doubt as to whether the trend towards greater use of preventative civil orders is constitutionally legitimate.[1] **We reiterate our general concern about the trend of addressing problems associated with criminal activity and other anti-social behaviour through preventative injunctions.**

4. In so doing, we do not seek to minimise the impact of criminal activity and wrong-doing on individuals and communities. However, in attempting to tackle crime and anti-social behaviour, it is important not to lose sight of the need for procedural requirements to ensure, so far as possible, that miscarriages of justice do not occur. Traditionally, the criminal law has been the means by which public order is maintained. English criminal law has developed a range of safeguards to minimise the risk that an accused person is wrongly convicted. These include a high standard of proof—the judge or jury must be satisfied beyond reasonable doubt that an accused committed an offence. Hearsay evidence is not generally admissible in criminal proceedings. The target of criminal law is on actions that have been done, things preparatory to a criminal act, and conspiracies to carry out crime.

5. We recognise that there are differences in detail between anti-social behaviour orders (ASBOs), sex offender orders, football banning orders, serious crime prevention orders, foreign travel orders, and the like. Most, however, enable courts to impose restrictions on liberty based on a civil standard of proof (the balance of probabilities), to do so on the basis of hearsay evidence (often from witnesses who are employees of the state), and on the basis of assessment of the risk of future criminality or wrong-doing.

---

1 Serious Crime Bill, 2nd Report of 2006–07, HL 41, paragraph 17.

6. While the aim of these orders is to prevent future actions rather than to punish past behaviour, the impact on the individual is—as in punishment—the restriction of freedom backed by sanctions. There is a danger that the proliferation of civil preventative orders will undermine basic due process safeguards that have traditionally been present in the criminal law. The fashion for preventative orders brings with it a change in the relationship between citizen and state. A citizen who is subject to legal process by the police or local authorities to prevent what he or she *might* do in the future stands in a different relation to the state to a citizen who is subject to punishment for what he or she *has done* in the past.

Gang-related violence injunctions

7. Clause 33 of the bill provides that when considering whether to grant a gang-related violence injunction, the court must be "satisfied on the balance of probabilities that the respondent has engaged in, or has encouraged or assisted, gang-related violence".

8. In *R. (on the application of McCann) v Manchester Crown Court* [2002] UKHL 39, the Appellate Committee of the House of Lords considered the standard of proof for ASBOs made under the Crime and Disorder Act 1998. The House held that in applications for ASBOs, given the seriousness of the matters involved, fairness required a "heightened civil standard" of proof; this was "virtually indistinguishable" from the criminal standard and so, for practical purposes, the criminal standard should normally be applied by the courts in relation to ASBOs.

9. **We accept that preventative orders cover a wide range of different situations, some of which have more serious consequences than others. There may be some preventative orders in respect of which the civil standard or a sliding-scale of the standard of proof is appropriate. Gang-related violence injunctions are, however, in the category of preventative orders with the most serious consequences. We are therefore concerned that the bill states expressly that the standard of proof is the civil standard rather than the criminal standard. In our view minimum considerations of due process should require the criminal standard of proof ("beyond reasonable doubt") to be applied in applications for gang-related violence injunctions.**

Retention and destruction of samples

10. Clause 96 proposes to insert new sections into the Police and Criminal Evidence Act 1984 which would enable the Secretary of State to make regulations about the retention, use and destruction of material—including photographs, fingerprints, footwear impressions, DNA samples and information derived from DNA samples.

11. As is well known, this is against the background of the ruling of the European Court of Human Rights in *Marper v United Kingdom* (4 December 2008) in which the court unanimously held:

> "... that the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, as applied in the case of the present applicants, fails to strike a fair balance between the competing public and private interests and that the respondent State has

> overstepped any acceptable margin of appreciation in this regard. Accordingly, the retention at issue constitutes a disproportionate interference with the applicants' right to respect for private life and cannot be regarded as necessary in a democratic society."

12. We considered the question of retention of samples gathered during police investigations in the course of our recent inquiry on the constitutional framework governing surveillance.[2] We concluded that

> "... DNA profiles should only be retained on the National DNA Database (NDNAD) where it can be shown that such retention is justified or deserved. We expect the Government to comply fully, and as soon as possible, with the judgment of the European Court of Human Rights in the case of *S. and Marper v. the United Kingdom*, and to ensure that the DNA profiles of people arrested for, or charged with, a recordable offence but not subsequently convicted are not retained on the NDNAD for an unlimited period of time".[3]

13. We recommended that:

> "... the law enforcement authorities should improve the transparency of consent procedures and forms in respect of the NDNAD. We believe that the DNA profiles of volunteers should as a matter of law be removed from the NDNAD at the close of an inquiry unless the volunteer consents to its retention".[4]

14. We expressed concern:

> "... that the NDNAD is not governed by a single statute. We recommend that the Government introduce a bill to replace the existing regulatory framework, providing an opportunity to reassess the rules on the length of time for which DNA profiles are retained, and to provide regulatory oversight of the NDNAD".[5]

15. **Clause 96 of the bill seeks to amend the Police and Criminal Evidence Act 1984 by inserting new powers for the Secretary of State, by regulations, to "make provision as to the retention, use and destruction of material". It is in our view wholly unacceptable that the important matter of retention of samples is to be dealt with by delegated legislation. The Government's proposals as to how they intend to implement the *Marper* judgment raise important and controversial questions, which the House will want to debate fully. Clause 96, if agreed to, will not allow that debate to happen. The principles governing samples should be set out on the face of primary legislation to enable Parliament to scrutinise them and, if needs be, to seek to amend them. Unamendable delegated legislation will not provide a sufficient opportunity for parliamentary oversight and control over the legal framework for the Government's policy.**

16. **We call on the Government to think again and bring forward proposals in a separate bill to regulate the National DNA Database.**

---

2 Surveillance: Citizens and the State, 2nd Report of 2008–09, HL 18-I.

3 paragraph 197.

4 paragraph 208.

5 paragraph 212.

Clause 99: border controls

17. Clause 99 of the bill proposes to amend the Customs and Excise Management Act 1979 to give customs officers power to require any person entering or leaving the United Kingdom "to produce the person's passport or travel documents for examination" or "to answer questions ... about the person's journey". As this provision had not received a great deal of attention during the bill's passage to date, we wrote to Lord West of Spithead to seek a more detailed explanation of the policy reasons for seeking this new power. Our correspondence is reproduced at Appendix 1.

18. **In the light of Lord West's explanation, we are content that the proposal does not infringe constitutional principle. That said, we remind the House that the new powers are part of a package of changes that seek to integrate customs and immigration functions of government. We have expressed some concerns about features of this process in an earlier report (Part 1 of the Borders, Citizenship and Immigration Bill, 5th Report of 2008–09, HL 41). It will be important to monitor these developments to ensure that they do not impinge, whether inadvertently or otherwise, on constitutional principles.**

19. One particular aspect of our scrutiny was to inquire into possible constitutional implications of the new powers in clause 99 on travel to and from the Channel Islands. In our 7th Report of 2008–9,[6] we drew to the attention of the House provisions contained in Part 3 of the Borders, Citizenship and Immigration Bill which sought to amend the operation of the Common Travel Area (consisting of the United Kingdom, the Republic of Ireland and the three Crown Dependencies—the Isle of Man and the Bailiwicks of Jersey and Guernsey). We highlighted concerns about the impact on the rights of people to move between the Crown Dependencies (which are British Islands) and the United Kingdom without being subject to immigration control; we also relayed disquiet from the governments of the Crown Dependencies about the lack of adequate consultation on those provisions. The House voted to remove the provisions from the bill.

20. We wrote to the chief ministers of the Crown Dependencies to seek their views on clause 99 of the present bill. Our correspondence is set out in Appendix 2.

21. The Chief Minister of the Isle of Man confirmed our view that clause 99 would have no direct effect on the Island, as it forms part of the same customs territory as the United Kingdom.

22. The Chief Minister of Guernsey told us that "there does not appear to have been any consultation in relation to clause 99 of the bill. Senior officials of the [Guernsey Customs and Immigration] Service have very recently been told by their UK counterparts that the clause had not been identified as an issue for the Channel Islands, which explains the absence of consultation, for which an apology has been given". The Chief Minister said that, having now considered the clause, the States of Guernsey "do not have any concerns of a constitutional nature" about the proposal.

23. The Chief Minister of Jersey told us:

---

6 Part 3 of the Borders, Citizenship and Immigration Bill, 7th Report of Session 2008–09, HL 54.

> "Consultation on the Bill has been inadequate and we were not aware of the proposals until your letter of 11 June. Home Office officials have apologised for not informing us earlier and officials at the Ministry of Justice intend to remind departments of the need to consult Crown Dependencies at an early stage."

24. As to the substance of the proposal, the Chief Minister added that "given the reassurances received, the Government of Jersey has no concerns regarding clause 99 of the Bill".

25. In our earlier report on the Borders, Citizenship and Immigration Bill we drew to the attention of the House that in relation to Part 3 of that bill, there was an absence of "open, effective and meaningful inter-governmental consultations by the United Kingdom Government with the insular authorities in advance of the introduction of the bill".[7] The limited and late consultation that did take place in relation to that bill "demonstrated little appreciation of the constitutional relationship between the United Kingdom and the Crown dependencies".

26. **It is a matter of concern that there does not appear to be in place a robust system for ensuring that the Crown Dependencies, which are British Islands, are properly consulted by departments of the United Kingdom Government in respect of policy proposals that may have an impact on the rights of British citizens living in those islands or the constitutional relationship with the islands. The Ministry of Justice has overarching responsibility for the Government's relations with the Crown Dependencies. We recommend that the Ministry of Justice carries out a review of the processes across Government for ensuring that the views of the Crown Dependencies are sought during policy-making and legislative drafting on proposals that may affect them.**

---

7 Part 3 of the Borders, Citizenship and Immigration Bill, 7th Report of Session 2008–09, HL 54, paragraph 16.

APPENDIX 1: CORRESPONDENCE WITH LORD WEST OF SPITHEAD

Letter from the Chairman to Lord West, 4 June 2009

The Constitution Committee is carrying out scrutiny of this bill. It would be helpful to have an explanation on the policy background to clause 99, which would give HM Revenue and Customs officers powers to require any person entering or leaving the United Kingdom to produce a passport and answer questions about their journey. In particular, we would be interested to know how this provision relates to the Government's current thinking about the future of the Common Travel Area (especially travel to and from the Crown Dependencies).

Response from Lord West, 9 June 2009

Thank you for your letter of 4 June asking for additional policy background to clause 99 of the Policing and Crime Bill.

Clause 99 will give officers of Revenue and Customs powers to require anyone entering or leaving the UK to produce their passport or travel documents and question them about their journey.

These powers will supplement existing powers contained in section 78(2) of the Customs and Excise Management Act 1979. Section 78(2) allows officers to ask questions about a person's baggage or anything carried with them and to produce any such thing for examination. These powers were designed to support random checks in the customs green channel. Customs checks are now risk-based and intelligence-led. Customs officers need to establish if the person in front of them is the person they are looking for or, at a busy airport, has arrived on the high risk flight they are targeting. Clause 99 provides an explicit power for customs officers to do this.

Clause 99 will also support the establishment of the single primary checkpoint for both immigration and customs targeting purposes. This was recommended in the O'Donnell report on the UK's border arrangements; Security in a Global Hub, as a key measure to improve border security.

You asked in particular about the application of the provision in clause 99 to the Common Travel Area (CTA) especially to travel to and from the Crown Dependencies. The CTA is concerned with immigration matters only and not with customs or revenue matters. With the exception of the Isle of Man, customs checks apply within the CTA. By virtue of the provisions of Part 1 of the Borders, Citizenship and Immigration Bill officers of the UKBA will in future conduct both customs and immigration work at the border. UKBA officers will therefore be able to exercise the powers in clause 99 along with other customs powers. Despite the fact that UKBA officers may be exercising both customs and immigration functions, customs powers may not be used for immigration purposes or immigration powers for customs purposes. The powers available under clause 99 would not therefore be available to officers for the purpose of checking the immigration status of persons travelling within the CTA. However, having properly exercised a power for a customs purpose a UKBA officer will be able to use the information gained for immigration purposes and vice versa.

It may help also if I explain the customs position regarding travel within the CTA. The Isle of Man and the UK together form a single fiscal and customs area and apply the same taxes on goods. Goods moving to or from the Isle of Man are not

regarded as being imported or exported and no customs functions arise in relation to travel between the UK and the Isle of Man. The powers in clause 99 would not therefore apply.

Travellers arriving from the Channel Islands, on the other hand, are treated as arriving from outside of the UK and EU and are subject to customs checks. The customs allowances apply in respect of goods which may be imported by such travellers tax free. Travellers from the Channel Islands must make a customs declaration, usually by going through the customs red or green channel. The powers in clause 99 would therefore apply.

As regards the Republic of Ireland the CTA arrangements, similarly, do not extend to customs matters. As with other EU countries travellers arriving from the Republic are not required to make a customs declaration and are not subject to customs allowances. But selective customs checks can be conducted on such movements, in particular for drugs and other prohibited goods. The powers in clause 99 could therefore be exercised selectively on movements between the UK and the Republic of Ireland.

I hope this clarifies the position in relation to clause 99. If you have any further queries in relation to any other provisions within the Policing and Crime Bill please do not hesitate to get in touch.

APPENDIX 2: CORRESPONDENCE WITH CHIEF MINISTERS OF GUERNSEY, ISLE OF MAN AND JERSEY

Letter from the Chairman to the Chief Minister of Guernsey, 11 June 2009

The Constitution Committee is scrutinising the Policing and Crime Bill, which received its Second Reading in the House of Lords on 3 June 2009. We are interested in the possible constitutional implications of clause 99, which will provide customs officers with express power to require travellers to and from the United Kingdom to produce a passport and question the person about their journey. We asked Lord West of Spithead, the minister in charge of the bill in the House of Lords, to provide additional policy background to clause 99. Lord West has now done so in a letter dated 9 June 2009, which I enclose for your information.

You will recall that we exchanged correspondence earlier this year about the constitutional implications of Part 3 of the Borders, Citizenship and Immigration Bill. The Committee was interested in what appeared to be a failure on the part of the Government properly to consult the Crown Dependencies on the proposed changes to the Common Travel Area (CTA). We were also concerned about the wide powers being taken, which seemed to us to be out of proportion with the more modest policy aims of the Government (to have occasional, intelligence-led border controls on travel between the different parts of the CTA). You drew to the Committee's attention to the ancient rights of free movement between the Channel Islands and England.

You may have noticed that the Committee also made a report on Part 1 of the Borders, Citizenship and Immigration Bill on 26 February 2009 (5th Report of 2008–09, HL Paper 41), a copy of which I enclose. We considered the constitutional implications of the closer working between officers of HM Revenue and Customs and immigration officers of the UK Borders Agency.

It is against this background that I write on behalf of the Committee to inquire whether you have any comments on the proposal contained in clause 99 of the Policing and Crime Bill. In particular, we would be interested to know whether the Insular Authorities are content that they have been adequately consulted about clause 99 by the Government. We would also be interested to know whether the Insular Authorities have any concerns about the scope or practical implementation of clause 99 in the regulation of travel between the Channel Islands and the United Kingdom.

Response from the Chief Minister of Guernsey, 19 June 2009

Thank you for your letter of 11 June 2009, as well as the enclosures, and for drawing the attention of the States of Guernsey to the Constitution Committee's interest in any constitutional implications arising from clause 99 of the Bill.

Having referred the issues you raise to Guernsey's Customs and Immigration Service, I have been informed that there does not appear to have been any consultation in relation to clause 99 of the Bill. Senior officials of the Service have very recently been told by their UK counterparts that the clause had not been regarded as an issue for the Channel Islands, which explains the absence of consultation, for which an apology has been given.

The proposal to insert a new section 157A into the Customs and Excise Management Act 1979 is understood by us to supplement and clarify existing powers set out in section 78 of that Act, and in particular subsection (2) of that provision. Consequently, clause 99 is being proposed as a customs legislation matter and does not affect the provisions in immigration legislation relating to the Common Travel Area, granting leave to enter or immigration controls. This is consistent with the policy explanation contained in Lord West's letter to you of 9 June 2009.

The interpretation placed on the power to be conferred by the provision to be inserted is that this will enable a requirement to be made for production of the traveller's passport or travel documents. Accordingly, we do not envisage that enactment of clause 99 would lead to there being any requirement for a person to carry a passport on a route where a passport is currently not a requirement. Naturally, if the traveller was using a passport for the purposes of airline identification checks, that is the document that may well be produced following the making of the requirement. However, if the traveller was using some other form of identification, production of such an item would satisfy the requirement.

Such information-gathering powers are regarded as operationally useful to enable a judgment to be formed as to whether a customs examination or further search is needed. Lord West's letter explains that the policy of UKBA will continue to be that customs checks are intelligence-led and selective rather than routine. In the light of our interpretation of the effect of clause 99 and those explanations, in relation to travel between Guernsey and the United Kingdom, the States of Guernsey do not have any concerns of a constitutional nature about the scope of clause 99 or the practical consequences of implementation should it be enacted.

Although it is not strictly relevant to your inquiry, I can add that, as a result of having this clause drawn to its attention, the Customs and Immigration Service is proposing to ask the Home Department of the States of Guernsey to consider whether introducing a comparable provision into the Customs and Excise (General Provisions) (Bailiwick of Guernsey) Law, 1972, section 32 of which contains an equivalent provision to section 78 of the 1979 Act, is desirable, if not necessary so as to support operational practices domestically, which replicate those at UK borders.

Letter from the Chairman to the Chief Minister of the Isle of Man, 11 June 2009

The Constitution Committee is scrutinising the Policing and Crime Bill, which received its Second Reading in the House of Lords on 3 June 2009. We are interested in the possible constitutional implications of clause 99, which will provide customs officers with express power to require travellers to and from the United Kingdom to produce a passport and question the person about their journey. We asked Lord West of Spithead, the minister in charge of the bill in the House of Lords, to provide additional policy background to clause 99. Lord West has now done so in a letter dated 9 June 2009, which I enclose for your information.

You will recall that we exchanged correspondence earlier this year about the constitutional implications of Part 3 of the Borders, Citizenship and Immigration Bill. The Committee was interested in what appeared to be a failure on the part of the Government properly to consult the Crown Dependencies on the proposed changes to the Common Travel Area (CTA). We were also concerned about the wide powers being taken, which seemed to us to be out of proportion with the

more modest policy aims of the Government (to have occasional, intelligence-led border controls on travel between the different parts of the CTA).

You may have noticed that the Committee also made a report on Part 1 of the Borders, Citizenship and Immigration Bill on 26 February 2009 (5th Report of 2008–09, HL Paper 41), a copy of which I enclose. We considered the constitutional implications of the closer working between officers of HM Revenue and Customs and immigration officers of the UK Borders Agency.

It is against this background that I write on behalf of the Committee to inquire whether you have any comments on the proposal contained in clause 99 of the Policing and Crime Bill. Our understanding is that this clause is not of direct relevance to the Isle of Man but we would be interested to receive any comment that you might have. In particular, we would be interested to know whether the Insular Authorities are content that they have been adequately consulted about clause 99 by the Government. We would also be interested to know whether the Insular Authorities have any concerns about the scope or practical implementation of clause 99 in the regulation of travel between the Channel Islands and the United Kingdom.

Response from the Chief Minister of Isle of Man, 19 June 2009

Thank you for your letter of 11 June 2009, seeking the views of the Isle of Man on clause 99 of the Policing and Crime Bill, which is currently being scrutinised by the Constitution Committee. I understand that the Committee is interested in the possible constitutional implications of clause 99, which will provide customs officers with express power to require travellers to and from the United Kingdom to produce a passport and question the person about their journey.

The IOM Customs Division had identified the Policing and Crime Bill in March of this year through its regular scanning of new legislation, Clause 99 (clause 73, as it was then), was scrutinised by the Customs Division as it was likely that amendments would need to be made to the Isle of Man Customs and Excise Management Act 1979 (CEMA)—and the Isle of Man Proceeds of Crime Act 2002. The Isle of Man was not, however, formally consulted on the Policing and Crime Bill at any time, nor was clause 99 of the Bill drawn to our attention by HMRC.

However the Isle of Man has been advised that clause 99 inserts a new section 157(a) in the UK Customs and Excise Management Act 1979 and gives an explicit right for customs officers to require the production for examination of travel documents, such as passports and tickets, a practice which has in fact been taking place, for the past 30 years or more, under the more general provisions of the UK Customs and Excise Management Act 1979 section 78 (2). The clause does not, it would appear, 'require' an individual to specifically carry a passport, but to produce for a customs officer the documents that have been used for travel. The Isle of Man understands that this power is intended mainly as an aid to customs targeting and selection at busy international airports.

As the Constitution Committee will be aware, the Isle of Man forms part of the same customs territory as the UK and so there are no customs barriers between the Island and the UK. For customs purposes, movements of *goods* between the UK and the Island are not normally regarded (with certain specific exceptions) as imports or exports and therefore IOM Customs do not anticipate any change of powers or practice with the introduction of clause 99.

This position was confirmed at a meeting in Croydon on 15 June, when a representative from HMRC, Customs Law and Policy indicated that the Island had not been alerted to this clause because HMRC did not see this as an issue affecting Isle of Man traffic and that the co-incidental timing with proposals in the Borders, Citizenship and Immigration Bill to reform the Common Travel Area arrangements was unfortunate. HMRC later reiterated its position to Isle of Man in writing, stating that, "Isle of Man traffic is in any event not subject to customs controls or checks and this will not change".

The letter of 9 June 2009 from Lord West to the Constitution Committee reflects the situation as the Isle of Man understands it. The Isle of Man is therefore content that clause 99 will not impose new, more restrictive requirements on travellers between the Island and the UK; the clause cannot require travellers to carry passports on routes where they are not now required and in any event, journeys between the Isle of Man and the UK are not subject to customs controls.

Whilst HMRC did not feel it was necessary to consult with the Isle of Man on this matter because they did not believe it was relevant to us, consultation and dialogue is always helpful, especially given ongoing concerns over protecting freedom of travel between the Isle of Man and the UK. In this respect, the Isle of Man considers that closer working between HMRC and the Borders Agency on policy and legislative matters would have been helpful and particularly so if this had been shared with the Isle of Man.

HMRC have now met with a representative from the Isle of Man concerning clause 99 and the Policing and Crime Bill, they have further informed us in writing of their intention to review UK customs law and have also committed to keeping the Isle of Man fully informed and consulted in the future. We are grateful to the Committee both for the opportunity to comment on the consultation process and the scope of clause 99 and for the Committee's proactive identification of this matter and its ongoing work in recognising and supporting the protection of our constitutional relationship.

Letter from the Chairman to the Chief Minister of Jersey, 11 June 2009

The Constitution Committee is scrutinising the Policing and Crime Bill, which received its Second Reading in the House of Lords on 3 June 2009. We are interested in the possible constitutional implications of clause 99, which will provide customs officers with express power to require travellers to and from the United Kingdom to produce a passport and question the person about their journey. We asked Lord West of Spithead, the minister in charge of the bill in the House of Lords, to provide additional policy background to clause 99. Lord West has now done so in a letter dated 9 June 2009, which I enclose for your information.

You will recall that we exchanged correspondence earlier this year about the constitutional implications of Part 3 of the Borders, Citizenship and Immigration Bill. The Committee was interested in what appeared to be a failure on the part of the Government properly to consult the Crown Dependencies on the proposed changes to the Common Travel Area (CTA). We were also concerned about the wide powers being taken, which seemed to us to be out of proportion with the more modest policy aims of the Government (to have occasional, intelligence-led border controls on travel between the different parts of the CTA). You drew to the Committee's attention to the ancient rights of free movement between the Channel Islands and England.

You may have noticed that the Committee also made a report on Part 1 of the Borders, Citizenship and Immigration Bill on 26 February 2009 (5th Report of 2008–09, HL Paper 41), a copy of which I enclose. We considered the constitutional implications of the closer working between officers of HM Revenue and Customs and immigration officers of the UK Borders Agency.

It is against this background that I write on behalf of the Committee to inquire whether you have any comments on the proposal contained in clause 99 of the Policing and Crime Bill. In particular, we would be interested to know whether the Insular Authorities are content that they have been adequately consulted about clause 99 by the Government. We would also be interested to know whether the Insular Authorities have any concerns about the scope or practical implementation of clause 99 in the regulation of travel between the Channel Islands and the United Kingdom.

Response from the Chief Minister of Jersey, 22 June 2009

Thank you for your letter of 11 June regarding the Select Committee's scrutiny of the Policing and Crime Bill. I am also grateful for a copy of the correspondence from Lord West of Spithead, which sets out the Home Office position, in particular regarding clause 99.

Consultation on the Bill has been inadequate and we were not aware of the proposals until your letter of 11 June. Home Office officials have apologised for not informing us earlier and officials at the Ministry of Justice intend to remind departments of the need to consult Crown Dependencies at an early stage.

We have sought further clarification from HM Revenue and Customs on the policy intention and the implications for Jersey. HMRC officials have explained that the Bill is intended to clarify existing practice and would not change the current arrangements for travel between Jersey and the United Kingdom. The powers of customs officers in clause 99 to see travel documents refers to whatever document the person may be carrying in relation to their journey, for example a ticket or boarding card, and does not require a person to carry any particular document or any document that they would not otherwise have (such as a passport).

We have also been advised that it is intended that in future Border Agency officials will conduct both customs and immigration work at the borders and will therefore be able to exercise clause 99 powers along with other customs and immigration powers. While it might be thought that this might be capable of causing confusion amongst Border Agency staff, our understanding is that the consequences will be that officials can legally use the customs powers to obtain information only for customs purposes, but having obtained information which can properly be obtained for those purposes, can then use it for immigration purposes.

Officials have also confirmed that clause 99 does not create any new offence in relation to failure to carry travel documents, but that officers would ask to see travel documents only as an aid to intelligence led customs targeting.

While we see the scope for confusion on occasion, I can advise you that, given the reassurance received, the Government of Jersey has no concerns regarding clause 99 of the Bill.