



Ministry of
JUSTICE

Government Response to the Justice Select Committee's report: Crown Dependencies

November 2010



Government Response to the Justice Select Committee's report: Crown Dependencies

Presented to Parliament
by the Lord Chancellor and Secretary of State for Justice
by Command of Her Majesty

November 2010

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This publication is available for download at www.official-documents.gov.uk and on our website at www.justice.gov.uk

ISBN: 9780101796521

Printed in the UK by The Stationery Office Limited
on behalf of the Controller of Her Majesty's Stationery Office
ID P002398013 11/10

Printed on paper containing 75% recycled fibre content minimum.

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Ministerial Foreword

The following statement is intended to set out how the Government believes the relationship between the Crown Dependencies and the United Kingdom should operate to meet current needs, taking into account the growing ability of the Islands to represent their own interests within the UK and abroad. This is at the behest of the Committee. It is not intended to change or challenge the existing constitutional relationship.

The Crown Dependencies (Jersey, Guernsey and the Isle of Man) have their own democratically elected governments responsible for setting policy, passing laws and determining each Island's future. They have an important relationship with the United Kingdom because of their status as dependencies of the British Crown but they are not part of the United Kingdom nor, except to a limited extent, the European Union. They are not represented in the UK parliament and UK laws do not ordinarily extend to them without their consent.

Relationships with the Islands are the responsibility of the United Kingdom Government as a whole. The Ministry of Justice holds the policy responsibility for the constitutional relationship but all departments should be engaging routinely with the Crown Dependencies where appropriate to their policy responsibilities. The UK and the Crown Dependencies have a wide range of common policy interests – for example borders and security, the economy, and the environment – and where UK policy-making is likely to have an impact on the Islands their interests (which may differ from island to island) should be considered.

The United Kingdom Government has a responsibility to ensure that the Crown Dependencies have the advice and assistance necessary to function as socially and economically sound democracies. In turn the Government expects each Crown Dependency to accept the responsibility of being a 'good neighbour' to the UK and to ensure its own policies do not have a significant adverse impact on the UK's interests. The UK Government and the Crown Dependencies can benefit from a close working relationship and both should seek to foster trust and co-operation in all their dealings to enable open and constructive discussions on policy matters across the board to achieve mutually satisfactory results.

The United Kingdom respects each Crown Dependency's laws and policies as the expression of the will of a democratic government with the power of self-determination. The UK government is responsible for the Crown Dependencies' international relations and ultimate good governance and has the commensurate power to ensure these obligations are met. Whilst the UK does not require the Crown Dependencies' policies to closely mirror those of the UK, the UK will look to resolve anything which appears to be fundamentally contrary to current UK principles or interests with the Crown Dependency concerned.

As they are not sovereign States, the Crown Dependencies cannot bind themselves internationally. It should be recognised that the Crown Dependencies do have an international identity which is different from that of the United Kingdom. UK Government Departments should consult the Crown Dependencies in respect of any international instruments that may extend to them, and where practicable consult them when developing a UK position on international matters. The United Kingdom supports the use of entrustments as a way to enable the Crown Dependencies to represent their own interests on the international stage.

Introduction

The Government welcomes the Justice Committee report on the Crown Dependencies and is grateful to the Committee and all who gave evidence in the preparation of the report.

This report is a timely examination of the Government's relationship with the Crown Dependencies. The Committee rightfully focuses on the evolving identity of each island and what this may mean for the way the UK engages with them. The United Kingdom/Crown Dependency relationship is not static and it is the responsibility of the Ministry of Justice to provide clear guidance as to how Government Departments should engage with the Crown Dependencies. The Government's view of the current position is set out in the Ministerial foreword to this document.

The Government accepts the Committee's advice that the Ministry of Justice should restrain itself from engaging in areas of work which do not directly concern its primary constitutional role. This is entirely in line with the way the Crown Dependencies should be viewed – as self-determining jurisdictions with sufficient autonomy and expertise to engage the UK Government as they feel appropriate. This report explicitly recognises this and sets out steps to facilitate the necessary transition in ways of working. The Ministry of Justice believes this change of policy will have the additional benefit of making best use of the resource available.

Government Response to the Committee's Conclusions and Recommendations

We have identified 15 conclusions and recommendations from the Committee's report. The Response follows the structure set out by the Committee in its conclusions and recommendations.

Relationships between the Ministry of Justice and the Crown Dependencies

We believe that, in agreeing to answer Parliamentary Questions on topics which are essentially domestic matters for the Crown Dependencies, the Justice Secretary is clouding the issue of what, constitutionally speaking, is properly the responsibility of the UK Government and what should properly be left to the island governments. The Justice Secretary should make explicit in his answers to Parliamentary Questions whether or not he considers the matter addressed falls within his constitutional responsibilities. (Paragraph 15)

Given that the Crown Dependencies' team at the Ministry of Justice appears to struggle with the resources it has, we suggest that a reappraisal of the constitutional duties of the Ministry of Justice might be a timely step in the right direction. The Ministry of Justice should prioritise those duties and restrain itself from engaging in areas of work which are outwith its constitutional remit. (Paragraph 17)

We recommend that the Ministry of Justice redoubles its efforts to produce a simple account of the constitutional position of the three Crown Dependencies. This should highlight their essential independence from the UK, their independence from each other, and the fact that their interests need to be considered routinely by all UK Government Departments in any area of policy-making likely to impact on them. Those departments should be left in no doubt about the limits of legitimate intervention in island policy and legislation and about their duties in considering their interests. In achieving these aims, we believe that it would be helpful if more use were made of secondments of officials between UK Government Departments and the Crown Dependencies in order to increase mutual understanding. (Paragraph 27)

We believe the lack of consultation, and discussion of possible options, with each Crown Dependency was a failing in the UK Government's approach to its responsibilities in deciding the future of the Reciprocal Health Agreements. The fault appears to lie primarily with the Department for Health but we are left with the clear impression that the Ministry of Justice failed to take responsibility for intervening to ensure that a proper procedure was followed. It is simply unacceptable for the Isle of Man to be told, without warning, at a meeting on 1 July 2008 that the Reciprocal Health Agreement would be terminated; and this in the absence of an official from the Ministry of Justice, the department charged with ensuring representation of the Island interests within the UK Government. Nevertheless, we welcome the extension of the Reciprocal Health Agreement with the Isle of Man for a further six months pending further negotiations. (Paragraph 35)

We agree with the Committee's recommendation that the Ministry of Justice should prioritise its core constitutional duties and should disengage from areas of work which do not directly engage this primary role. There will be several advantages to this change in approach.

Firstly, it will better reflect the constitutional position by reinforcing the important point that relationships with the Crown Dependencies are the responsibility of all Government Departments. Secondly, our continued involvement in a wide range of policy areas, although aimed at facilitating relations between the UK Government and the Crown Dependencies, does mean that other Government Departments have a much reduced opportunity to build an understanding of the UK/Crown Dependencies relationship and to develop the necessary capacity to fulfil their functions in relation to them. Thirdly, it is no longer reflective of the way the Crown Dependencies wish to conduct their relationships, as clearly stated by Guernsey (Paragraph 20) and does not provide them with the opportunity to build up sufficient experience of external engagement.

In the past the Crown Dependencies had much less experience of external and international engagement and the government department charged with their representation took on these duties where resource permitted. Given the changed circumstances, it is right that our resources should focus on our core constitutional duties. We also agree with the Committee's assertion that the lack of HMG understanding about the constitutional position is a major barrier to an effective relationship (paragraph 23) and feel there is a continuing role for the Crown Dependencies Team to address this lack of understanding through increased guidance and training across Whitehall. A reduction in non-core work will free up capacity to take this forward.

This new approach informs our response to the Committee's other recommendations in this area.

In the past we have tried to answer a wide range of PQs on the basis that we have always sought to be as helpful as possible to Parliament. However, we accept that where we answer questions about issues which are properly matters for the administrations of the Crown Dependencies this has the potential to cause confusion and perpetuate misconceptions about the role of the Ministry of Justice and the UK Government in relation to the Crown Dependencies. In light of the Committee's recommendation the Ministry of Justice will restrict its responses to those questions which relate to the Ministry of Justice's constitutional responsibilities in respect of the Crown Dependencies. For domestic matters that are the responsibility of the governments of the Crown Dependencies, the Ministry of Justice will now simply state the matters are outside the Department's remit. This approach will provide clearer definition of the constitutional position and the boundaries of the Ministry of Justice's areas of responsibility. The Ministry of Justice expects other Government Departments' ministers to continue to answer questions that are for the UK but not directly related to the Ministry of Justice's constitutional responsibilities, for example matters relating to international relations and defence.

The constitutional position of the Crown Dependencies is a complex one and the last full examination of it in Kilbrandon only provides a partial guide in the context of modern day relationships. The Ministry of Justice agrees some clarification on the practical application of this relationship would be helpful. The Ministerial foreword to this response answers the Committee's recommendation that we produce a simple account of the constitutional position. We intend it to provide a blueprint for UK engagement with the Crown Dependencies and to bolster the recognition of their separate identities. We agree that secondments by Crown Dependencies staff to central Government Departments could bring benefits in terms of increased mutual understanding and would be happy to help facilitate these.

As the Committee recognises, the decision to terminate the Reciprocal Healthcare Agreements was one for the Department of Health, who as a matter of policy chose to exercise the termination clause contained in the Agreements. The Department of Health had consistently indicated that there was no scope for reconsidering the decision, and the governments of the Crown Dependencies appeared to accept this. It may be that on this occasion, and given the way in which we generally carried out our responsibilities in respect of the Crown Dependencies at the time, greater initiative could have been demonstrated by the Ministry of Justice in helping to put an alternative arrangement into place. As the Ministry of Justice is now prioritising its constitutional duties and restraining itself from engaging in areas of work which do not directly engage the core constitutional remit, we would not in future generally expect to be involved in dealings of this kind between a UK Government Department and a Crown Dependency government. However, it is to be hoped that increased opportunity for the Crown Dependencies to build relationships across Whitehall will raise the capacity of both Government Departments and the Crown Dependencies to engage effectively on issues like this. The Department of Health now deals directly with the Crown Dependencies on this matter. To date a new agreement has been concluded with the Isle of Man and discussions are ongoing with the Channel Islands.

The Ministry of Justice envisages a period of transition from the current way of working to the new which will involve both awareness raising in other Government Departments and supporting the Crown Dependencies in developing an engagement strategy. Lord McNally will be writing to all Government Departments to draw their attention to this response and remind them of their responsibilities regarding the Crown Dependencies. The Ministry of Justice will also be exploring a range of ways to disseminate this information at official level.

Good Government

We note the depth of feeling of some witnesses to this inquiry who have indicated serious grievances with various aspects of the governance of the Crown Dependencies and their desire for the UK Government to step in to address their concerns. However, the Crown Dependencies are democratic, self-governing communities with free media and open debate. The independence and powers of self-determination of the Crown Dependencies are, in our view, only to be set aside in the most serious circumstances. We note that the restrictive formulation of the power of the UK Government to intervene in insular affairs on the ground of good government is accepted by both the UK and the Crown Dependency governments: namely, that it should be used only in the event of a fundamental breakdown in public order or of the rule of law, endemic corruption in the government or the judiciary or other extreme circumstance, and we see no reason or constitutional basis for changing that formulation. (Paragraph 41)

As a matter of general principle, we note that, in a very small jurisdiction, there must always be the possibility that individuals wielding very significant economic, legal and political power may skew the operation of democratic government there. Just as the establishment of democratic government in Sark was a matter of good government, any threat to the ability of that system to operate fairly and robustly has the potential to raise good government issues which might require UK Government intervention. This is a matter on which the Ministry of Justice needs to keep a watching brief. (Paragraph 49)

We agree with the Committee's assessment of these issues. We respect the right of the Crown Dependencies to self-determination and agree that it would take a very serious circumstance indeed for the UK government to contemplate overriding these powers. With regard to the Committee's comments about some of the risks inherent in the governance of small jurisdictions, we are grateful to the Committee for highlighting this important issue. The Ministry of Justice recognises its responsibility, on behalf of the Crown, to ensure good governance in all the Crown Dependencies. We will continue to keep a watching brief on all relevant matters and maintain our strong relationships with the Islands that will help enable us to resolve any problems which may arise in a collaborative way. We will provide advice and support to the government and Chief Pleas of Sark as the new democratic government matures. The Minister responsible for the Crown Dependencies, Lord McNally, visited Sark at the end of September to meet with residents and listen to a range of views about the situation there.

Legislation and Treaties

The Islands are more than adequately advised by their own Law Officers and parliamentary counsel. It seems a strange use of Ministry of Justice resources which, we are told, are stretched, to engage in a kind of legislative oversight which does not restrict itself to the constitutional grounds for scrutiny. (Paragraph 63)

We do not see the need for multiple levels of intense scrutiny of insular legislation, prior to Royal Assent, for laws which are obviously of domestic application only. In such cases, the judgement of the insular Law Officers should normally be relied upon, with a reduced level of scrutiny by Ministry of Justice lawyers. (Paragraph 65)

For more complex legislation where it is desirable to have further scrutiny by the Ministry of Justice and other Whitehall departments, such scrutiny should be carried out expeditiously, so as not to frustrate the will of a democratically elected parliament. To this end, the Ministry of Justice should endeavour to educate the relevant officials in other departments in relation to their precise responsibilities and, importantly, the constitutional limits on any intervention they may feel inclined to make. (Paragraph 66)

We urge the Ministry of Justice and the governments of the Crown Dependencies to redouble their efforts to agree a revised set of protocols for the scrutiny of insular legislation. We consider that this is an ideal opportunity to set out with clarity the means by which the UK's responsibilities for insular legislation may be discharged; the constitutional grounds on which insular legislation may be challenged; the responsibilities of ministers and officials at each stage of the scrutiny process; and appropriate time limits for processing legislation prior to Royal Assent. In streamlining the system, best use can be made of the limited resources available within the UK Government in general and the Ministry of Justice in particular. (Paragraph 67)

We recommend that the protocols currently being developed by the Ministry of Justice set out clear guidelines for consultation with the Crown Dependencies on UK legislation, EU measures and international treaties affecting them. Reasonable time limits should be built into the system so that the Island governments do not find themselves rushed into important decisions without an appropriate amount of time for reflection, discussion and negotiation. It may be helpful to include the category of Crown Dependencies more prominently on the legislative checklists consulted by UK Government Departments when drawing up proposals for new legislation. (Paragraph 73)

The Government notes the Committee's concerns that the United Kingdom is influencing Island legislation at the policy level which 'may be motivated by wider political concerns, even though it is not legitimate on constitutional grounds' (paragraph 60). In completing the scrutiny process, the Ministry of Justice does not generally check for congruence with UK policy unless divergence would demonstrate risk of breaches of the ECHR or breaches of EU or international law, and we would not accept that we carry out scrutiny beyond what is constitutionally legitimate. Although we do not generally seek to do so, in addition to strict questions of lawfulness, in limited occasions we may consider it appropriate to intervene in policy matters where there may be the potential for a direct and adverse impact on UK interests (for example in relation to changes to drug or immigration law in the Islands). Equally, if an Island Law sought to do something fundamentally contrary to current UK principle, or which may be fundamentally damaging to UK interests, we would not consider it constitutionally illegitimate to refuse to recommend the Law for Royal Assent. However, those are rare (and in large part theoretical) circumstances and the precise scope of such powers is untested.

In practice we have had very few concerns about Island legislation in recent years. Legal analysis is generally undertaken by the Ministry of Justice for each law to determine that there are no such concerns and if any are potentially identified the Ministry of Justice will attempt to resolve them with the Crown Dependency concerned. In practice this is usually a request for clarification about the precise scope or application of the law in question. Questions of ECHR or EU compliance, as the Committee will be aware, often rest on questions of justification and proportionality. In seeking to clarify the practical application or operation of a provision in the way we have previously described, we are seeking not to question the policy, but to test the legality. This process can be time consuming. We accept the Committee's view that this can, on occasion, amount to a duplication of effort with both the Islands' Law Officers and UK Officials undertaking a similar analysis. We consider that if the Islands' Law Officers provided a detailed report of their analysis of a Law and how it might touch upon international or constitutional issues then the need for such questioning from the Ministry of Justice would be substantially reduced and could be restricted to specific triggers, for example any Laws concerned with the constitutional relationship, or which had significant international considerations – for example significant risks of challenge under the ECHR, EU law or other international obligations. It should be noted that this change, whilst generally more efficient for both the UK and the Islands, may require the Island's Law Officers to commit more resource to this process, although we would expect that the analysis which would go to such a report is already carried out by the Islands' Law Officers. We will work with the Crown Dependencies Law Officers to put an appropriate procedure in place.

While the Ministry of Justice would expect to be in a position to submit for approval for Royal Assent any Law which received a satisfactory report from the Islands' Law Officers, the Ministry of Justice wishes to make it clear that changes to this process would not affect the constitutional right of the UK to refuse to recommend for Royal Assent a Law which the UK considered should not be so approved.

We understand the difficulty for the Crown Dependencies when told late in the day of UK legislation about which they should be aware. The Ministry of Justice does depend on other Government Departments telling us when they are working on, say, a Bill or an international agreement which may have implications of any kind for the Crown Dependencies. Unfortunately it can often be the case that Government Departments are not aware of the implications for the Crown Dependencies, or of the requirement to consult, in good time.

The Ministry of Justice will ensure that the relevant government lawyers and officials are reminded of their responsibilities when considering legislation from the Crown Dependencies. We will ensure that additional guidance on the Crown Dependencies is available via the Government Legal Service. The Ministry of Justice will write to other Government Departments reinforcing the previous encouragement given to officials across government to familiarise themselves with best practice for handling Crown Dependency legislation and UK legislation with an impact on the Crown Dependencies.

We will make every effort to ensure that the Crown Dependencies feature more prominently on the legislative checklists consulted by UK Government Departments when drawing up proposals for new legislation. In general this works well, but on occasion the implications for the Crown Dependencies may only be spotted, and the Crown Dependencies informed, at quite a late stage.

We fully appreciate the difficulties which late consultation causes for the Islands, and we are doing what we can to reduce the number of times it happens – for example by issuing revised guidance to officials in other Government Departments. That said, it must be recognised by the Crown Dependencies that UK officials themselves are very frequently working to extremely tight deadlines, for example in the context of primary legislation or litigation, or international negotiations or in response to international organisations. Along with a desire for increased autonomous engagement with the UK and beyond the Crown Dependencies need to accept that the demands they are faced with are those frequently faced by all governments. While the Ministry of Justice and other Government Departments will seek to ensure that such urgent demands are minimised, it is difficult to see how they can be eliminated completely.

We are confident that the guidance currently being developed between the Crown Dependency Law Officers and the Ministry of Justice will clarify and improve arrangements for handling Crown Dependency legislation. We are grateful for the constructive engagement by the Attorneys General of the Crown Dependencies in the next drafting stage of a revised set of guidance for the scrutiny of insular legislation. The new guidance should, as the Committee suggests, set out with clarity the means by which the UK's responsibilities for insular legislation may be discharged; the constitutional grounds on which insular legislation may be challenged; the responsibilities of ministers and officials at each stage of the scrutiny process; and appropriate time limits for processing legislation prior to Royal Assent.

International Relations

We support the desire of the Island governments to set up representative offices in Brussels. We consider that such a step would be valuable, both in terms of acquiring better access to information about EU measures which might affect them and in terms of raising their own international profiles. (Paragraph 78)

The representation of the interests of the Crown Dependencies on the international stage by the UK Government is not optional, according to whether or not the interests of the Islands are congruent with those of the UK: it is the UK Government's duty. In cases of conflict, the Ministry of Justice must endeavour to find a mechanism for representation which will faithfully present and serve the interests of both parties. (Paragraph 89)

We recommend that the Ministry of Justice considers alternative models for the representation of the interests of the Crown Dependencies internationally. It is imperative that a means is found by which the Islands are represented effectively and we strongly recommend that certain officials, either from the UK or from the Islands, be specifically designated as representing the Islands in international negotiations. Clear and unambiguous representation of the Crown Dependencies' interests on the international stage will assist them in building their relationships with third countries and international organisations and, consequently, help them to develop their international identities, as envisaged in the Framework document agreed with the UK. (Paragraph 92)

For the same reasons, in cases where international activity leads to the creation of legal relations, we strongly support the increased use of Letters of Entrustment in appropriate circumstances, allowing the Crown Dependencies to enter into binding agreements themselves without the need for direct ratification from the UK. (Paragraph 93)

The Government is grateful for the Committee's views on this subject. The Crown Dependencies are not sovereign States and cannot represent themselves; the UK represents the Crown Dependencies internationally. Whilst the Government respects the Crown Dependencies as having an international identity which is different from that of the United Kingdom's it is difficult to envisage how equal billing could be given to the interests of a Crown Dependency if they are incongruent with those of the UK. We do not think that it would be appropriate for the Crown Dependencies' position to be separately represented in international negotiations. It would be unrealistic to expect a UK official to put the interest of a Crown Dependency above that of the UK and in extreme circumstances this may hamper the ability of the UK to operate effectively on the international stage. Where international issues do engage the Crown Dependencies' interests their views can be taken on board

as the UK line is developed (which may involve a similar process to the one undertaken with the devolved administrations where devolved matters are the subject of international negotiation), and we will encourage Government Departments to seek to identify matters which engage such interests, and to consult with the Crown Dependencies, at an early stage.

The Government agrees with the Committee's views on the increased use of entrustment. We consider the system of entrustment to have worked well so far. It has enabled the Crown Dependencies to negotiate and conclude numerous tax agreements with OECD, EU and G20 countries. They have been able to build important bilateral and multi lateral international relationships and to develop reputation, profile and credibility with international partners and overarching sovereign bodies. Over the years the scope of the terms of entrustment has been broadened to equip the Crown Dependencies for their rising international profile and need to match prevailing international standards. We see no reason why the Crown Dependencies should not expect that scope to continue to evolve to reflect their needs and achievements. Where a Crown Dependency concludes an agreement under entrustment, the UK remains responsible under international law for ensuring that the Crown Dependency implements the agreement fully and complies with obligations under it. The UK's entrustment of the Crown Dependencies is based on the UK's status as the sovereign body and for as long as that constitutional dependency remains the UK will reserve the right to ratify agreements negotiated by the Crown Dependencies.

The use of entrustment could be widened so as to permit the Crown Dependencies to represent themselves where the UK and the other State or States concerned are content for them to do so. This could help mitigate the potential difficulties on occasions where the Crown Dependencies need to pursue interests which are separate from those of the UK. We are happy for the Crown Dependencies to come forward with ideas as to how they wish to expand the use of entrustments.

The wish of the Islands' governments to set up representative offices in Brussels is one the Ministry of Justice would support and we are open to any requests for assistance in achieving this sensible objective.



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ISBN 978-0-10-179652-1



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