

HOUSE OF LORDS

Select Committee on the Constitution

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7th Report of Session 2008–09

**Part 3 of the  
Borders,  
Citizenship and  
Immigration Bill**

Report

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To examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution.

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# Part 3 of the Borders, Citizenship and Immigration Bill

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 regard our main task as being 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 constitutional issues arising from Part 3 of the Borders, Citizenship and Immigration Bill, in particular clause 46 of the bill as introduced to the House of Lords.<sup>1</sup> The bill was amended at Committee stage so that what was clause 46 is now clause 48.

## The Common Travel Area

2. Clause 46 (now clause 48) proposes to introduce changes to the Common Travel Area (CTA). The CTA has been in existence since the 1920s, enabling people to move freely between the United Kingdom, the Republic of Ireland and the Crown dependencies—Guernsey, Jersey and the Isle of Man—without being subject to immigration control. The United Kingdom’s current arrangements for the CTA are set out in section 1(3) of the Immigration Act 1971:

“Arrival in and departure from the United Kingdom on a local journey from or to any of the Islands (that is to say, the Channel Islands and Isle of Man) or the Republic of Ireland shall not be subject to control under this Act, nor shall a person require leave to enter the United Kingdom on so arriving, except in so far as any of those places is for any purpose excluded from this subsection under the powers conferred by this Act; and in this Act the United Kingdom and those places, or such of them as are not so excluded, are collectively referred to as ‘the common travel area’.”

3. Answering a Parliamentary Question in December 2007, Mr Michael Wills MP (Minister of State in the Ministry of Justice) explained the CTA’s application to the Channel Islands (which is similar to that of the Isle of Man):

“Entry to the Channel Islands is governed by UK immigration legislation extended to the Islands. The Border and Immigration Agency does not operate a border control on passengers arriving from the Channel Islands as this falls within the arrangements set out for the common travel area. The objective of the common travel area (the United Kingdom, the Channel Islands, the Isle of Man and the Republic of Ireland) is that all the territories should be treated as a single unit for the purpose of travel within the area. Passengers arriving in the United Kingdom from the Channel Islands are, therefore, not normally subject to examination by an immigration officer. Passengers arriving from

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<sup>1</sup> We have previously made a report on Part 1 of the bill: 5th Report of Session 2008–09 (HL Paper 41).

countries outside the common travel area, including other European Union states, are required to show their passports or identity cards, where appropriate, on each arrival”.<sup>2</sup>

4. Clause 46 of the bill proposes to amend section 1(3) of the 1971 Act to read as follows:

“A person who arrives in the United Kingdom on a local journey from any of the Islands or the Republic of Ireland shall not require leave to enter the United Kingdom on so arriving, except in so far as any of those places is for any purpose excluded from this subsection under the powers conferred by this Act; and in this Act the United Kingdom and those places, or such of them as are not so excluded, are collectively referred to as ‘the common travel area’.”

### **The constitutional principles in issue**

5. In our examination of clause 46 (now clause 48) we have considered three main issues.

- (a) Whether there has been adequate consultation between the United Kingdom Government and the governments of the Crown dependencies before the bill was introduced.
- (b) Whether the wide scope of the proposed power to subject travel to and from the Crown dependencies to control under the Immigration Act 1971 is necessary in the light of the United Kingdom Government’s statements about the proposed limited use of the new power.
- (c) Whether the proposed changes in the CTA would affect the constitutional relationship between the United Kingdom and the Crown dependencies.

6. We wrote to Lord West of Spithead, the minister in charge of the bill, on 5 February 2009 asking for an explanation of the Government’s views on these matters; we are grateful for the minister’s response on 19 February.<sup>3</sup> We subsequently sought the views of the Crown dependencies and we are indebted for their prompt replies to the Hon. J.A. Brown MHK (Chief Minister of the Isle of Man),<sup>4</sup> Senator T.A. Le Sueur (Chief Minister of Jersey),<sup>5</sup> and Deputy L.S. Trott (Chief Minister of Guernsey).<sup>6</sup>

### **The constitutional relationships between the Crown dependencies and the United Kingdom**

7. Before proceeding to examine the detail of the bill, it may be of assistance to the House to summarise the relevant features of the constitutional relationship between the three Crown dependencies and the United Kingdom Government and Parliament.

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<sup>2</sup> HC Debates, 6 December 2007, col 1460W.

<sup>3</sup> Appendix 1.

<sup>4</sup> Appendix 2.

<sup>5</sup> Appendix 3.

<sup>6</sup> Appendix 4.

8. The constitutional status of the Bailiwicks of Jersey and Guernsey was born at the beginning of the 13th century and the disintegration of the Plantagenet Empire. When King John lost the duchy of Normandy to the French in 1204, the Channel Islands—until then an integrated part of the duchy—chose to be loyal to the Plantagenet Crown.<sup>7</sup> The Channel Islands have continued to be loyal to the English Crown during the ensuing 800 years. The constitutional history of the Isle of Man is different: it came under control of the English Crown in the 14th century; and under the Isle of Man Purchase Act 1765, feudal rights in the Island were revested in the Crown.
9. In each of the three Crown dependencies, a resident Lieutenant Governor is Her Majesty's personal representative and is the official channel of communication between the island and the United Kingdom Government. The Lieutenant Governors have executive powers in relation to passports, deportation and nationality. Islanders are entitled to have full British nationality under the British Nationality Act 1981. The United Kingdom is responsible for the defence of the Crown dependencies and for their international relations.
10. Acts of Parliament may be extended to the Islands by Order in Council, with the consent of the Islands. In his letter to us, Lord West explained that “While the main provisions of United Kingdom immigration legislation up to and including the provisions of the 2006 Act have been extended to the Isle of Man, the legislation has not been extended to Guernsey and Jersey since the Immigration and Asylum Act 1999”.<sup>8</sup> Lord West told us that the immigration systems of the Crown dependencies “are in practice closely aligned and operationally integrated with that of the United Kingdom, but that need not always be so”.<sup>9</sup> The Chief Minister of the Isle of Man told us that, in relation to border security, “the Isle of Man has been invited, with the Channel Islands, to join the UK e-Borders programme, thus forming the extent of the UK virtual border; officers in the Island are currently working closely with colleagues from the Borders Agency on the legislative requirements to share data for e-Borders”.<sup>10</sup>
11. In the late 1960s, the Crown dependencies decided not to be included in the United Kingdom's accession to the European Community. Protocol 3 to the 1972 Treaty of Accession put them within the Common Customs Area and the Common External Tariff, but other provisions of European Union law do not apply. The European Convention on Human Rights applies to the Crown dependencies and in recent years each of them has enacted legislation similar to that of the United Kingdom's Human Rights Act 1998.

### **Consultation over the proposed changes to the CTA**

12. Our first line of inquiry was to examine whether adequate consultation had taken place between the United Kingdom Government and insular authorities. In our letter to Lord West, we asked why the Home Office's July 2008 consultation paper on the CTA<sup>11</sup> had not engaged with any discussion

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<sup>7</sup> For a historical account, see J.A. Everard and J.C. Holt, *Jersey 2004: The Forging of an Island Community* (London: Thames and Hudson, 2004).

<sup>8</sup> Appendix 1.

<sup>9</sup> Appendix 1.

<sup>10</sup> Appendix 2.

<sup>11</sup> Home Office (UK Border Agency), *Strengthening the Common Travel Area: Consultation Paper* (24 July 2008).

of possible changes to the CTA in relation to the Crown dependencies. Lord West replied that “there has been no specific public consultation on this regarding the Crown dependencies because we do not intend any significant change of practice on these routes”.<sup>12</sup> Lord West said that “there are regular working level contacts with the insular immigration services and they have been involved throughout the policy developmental process”. He added that the “United Kingdom has power to change its arrangements in relation to the Common Travel Area unilaterally but, of course, as a matter of good practice, it consults Common Travel Area partners before doing so”.

13. The Chief Minister of the Isle of Man told us that he did “not believe that the Isle of Man has been properly consulted, in accordance with established protocols, on this proposed amendment” and he drew our attention to a letter from the Ministry of Justice dated 24 June 2008 which led the Isle of Man to understand that “the changes to the existing legislation would be required to clarify powers to introduce controls on journeys between the UK and the Republic of Ireland ... we did not expect, nor were we informed in advance, that the Isle of Man would be legislatively dealt with in the same manner as the Republic of Ireland, which of course is a foreign state”.<sup>13</sup> The Chief Minister also told us that “The Isle of Man was not included within the public consultation process which took place on the CTA, nor when our officers enquired, did the UK Border Agency feel that we needed to formally respond to it”. The Chief Minister drew our attention to a Framework agreed with the Ministry of Justice in May 2007 under which the “The Isle of Man and the UK commit themselves to open, effective and meaningful dialogue with each other on any issue which may come to affect the constitutional relationship”.
14. In his letter, the Chief Minister of Jersey told us that “It is deeply concerning that in bringing forward legislation of such significant ramifications, there was no formal consultation on the Bill with the government of Jersey until the letter from the Ministry of Justice on 18 December 2008”.<sup>14</sup> The bill was introduced on 14 January 2009.
15. The Chief Minister of Guernsey told us that he was “concerned at the short timescale afforded to the Bailiwick authorities for consultation on this bill which potentially has such a significant impact on the people of the Bailiwick”.<sup>15</sup> He added that the “Bailiwick authorities are disappointed that greater effort appears not to have been made to identify an acceptable solution before clause 46 (now clause 48) was included in the Bill as published”.
16. **We draw to the attention of the House our view that there does not appear to have been open, effective and meaningful inter-governmental consultations by the United Kingdom Government with the insular authorities in advance of the introduction of the bill. Such consultation as did take place gives the impression of being muddled and tardy; it demonstrated little appreciation of the constitutional relationship between the United Kingdom and the Crown dependencies.**

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<sup>12</sup> Appendix 1.

<sup>13</sup> Appendix 2.

<sup>14</sup> Appendix 3.

<sup>15</sup> Appendix 4.

### The breadth of the proposed amendment to section 1 of the Immigration Act

17. Our second line of inquiry was to investigate the scope of the proposed amendment to section 1 of the Immigration Act 1971. As we have noted, Lord West's letter states that the Government have "no intention to introduce fixed immigration controls on routes between the Crown dependencies and the UK, or to introduce a requirement for passengers to carry a passport or other document that established their nationality and identity..."<sup>16</sup> We asked Lord West whether the Home Office had considered if their policy objectives in relation to the CTA and the Crown dependencies might be facilitated by a more limited amendment to the Immigration Act 1971 than the one contained in the bill. Lord West replied that the Government "believe that the present approach is the most straightforward way of meeting the policy intention" and that the Government "have not produced any alternative amendments because we do not believe that there is a different way of delivering the policy aims".<sup>17</sup>
18. The Chief Minister of the Isle of Man takes a different view of the scope of the proposed changes to the CTA. He told us that clause 46 (now clause 48) "will introduce a power to establish fixed border controls" and warns that "History has shown that where a power exists in legislation, sooner or later it is always used—whatever the policy intention".<sup>18</sup> As the Chief Minister points out, "any assurances of *policy intentions* of current ministers, to only apply ad-hoc intelligence-led operations, could not commit future ministers to the same policies".<sup>19</sup>
19. The Chief Minister of Jersey told us that "there is a mismatch between the policy intent and the possible effects of the legislative change"; this, he says, "opens the way, at any time of the UK Government's choosing, for the *significant change of practice* that they say they do not presently envisage". The Chief Minister added: "There are absolutely no safeguards to prevent such controls being implemented or to protect the long-standing rights of Channel Islanders to travel freely to the United Kingdom, in accordance with their constitutional relationship as set out in numerous Royal Charters". The Chief Minister agreed "with the view that the proposed powers are excessive in comparison with the policy intent and are therefore inappropriate".<sup>20</sup>
20. **It is in our view difficult to reconcile the modest policy aims stated by the Government (of occasionally, on the basis of intelligence, stopping and questioning people arriving from or departing to the Crown dependencies) with the far-reaching legal powers claimed by the proposed amendment to section 1 of the Immigration Act 1971 (which would enable fixed and routine border controls). This mismatch is in and of itself constitutionally inappropriate: Parliament should not grant to Government wide legal authority in excess of the powers properly needed to implement a proposed policy.**

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<sup>16</sup> Appendix 1.

<sup>17</sup> Appendix 1.

<sup>18</sup> Appendix 2.

<sup>19</sup> Appendix 2.

<sup>20</sup> Appendix 3.

**The impact of the proposed amendment on the constitutional relationship between the United Kingdom and the Crown dependencies**

21. The third aspect of our examination of the bill was to consider the constitutional relationship between the United Kingdom and the Crown dependencies and what changes (intentional or inadvertent) the proposed changes contained in the bill would have on this. We asked Lord West whether he accepted that, if enacted, clause 46 (now clause 48) will bring about a change in the constitutional relationship between the United Kingdom and the Crown dependencies. Lord West's response was: "No".<sup>21</sup>
22. The Chief Ministers all took a different view. The Chief Minister in Guernsey refers to "the ancient entitlement of Channel Islanders to move freely within the British Islands, which forms an important part of the constitutional relationship between Guernsey and the Crown".<sup>22</sup> He told us that "travel between the Crown dependencies and the UK is therefore comparable to travel between the Scottish islands and the mainland". He called for the bill to make a distinction between "such intra-State [travel] and the inter-State travel involved between the UK and the Republic of Ireland".
23. The Chief Minister of Jersey told us that "In effect, British nationals travelling from part of the British Islands are to be treated in the same way as persons travelling from a foreign state. For the first time, there exists the possibility of discriminating between British citizens living in the islands from British citizens living in mainland Great Britain—controls will not be applicable to the passage of a British citizen from Hampshire to Dorset, but they will apply to the passage of a British citizen from Jersey to Hampshire".<sup>23</sup> These changes would, the Chief Minister told us, "be contrary to the historic right of Channel Islanders to travel freely within the British Islands, which underpins the longstanding constitutional relationship between Jersey and the United Kingdom".
24. The Chief Minister of the Isle of Man told us that "clause 46 (now clause 48) undermines the constitutional relationship between the Isle of Man and the United Kingdom, as it takes no account of the historic and present legal, cultural and constitutional ties between us".<sup>24</sup>
25. **It is clear to us that the policy-making process that has led to clause 46 (now clause 48) has not been informed by any real appreciation of the constitutional status of the Crown dependencies or the rights of free movement of Islanders.**

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<sup>21</sup> Appendix 1.

<sup>22</sup> Appendix 4.

<sup>23</sup> Appendix 3.

<sup>24</sup> Appendix 2.

## APPENDIX 1: CORRESPONDENCE BETWEEN LORD GOODLAD AND LORD WEST OF SPITHEAD ON PART 3 OF THE BORDERS, CITIZENSHIP AND IMMIGRATION BILL

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### Letter from the Chairman to Lord West of Spithead, 5 February 2009

The Constitution Committee is scrutinising the Borders, Citizenship and Immigration Bill. The purpose of this letter is to seek clarification about clause 46 in Part 3 of the bill, which proposes to amend the arrangements for the common travel area that exists between the United Kingdom, the Republic of Ireland, and Jersey, Guernsey, and the Isle of Man. It seeks to amend the Immigration Act 1971 to make travel between the different parts of the common travel area subject to immigration control.

Our initial examination of the bill has raised three areas of concern. One relates to the process by which the policy to subject travellers to and from the Crown Dependencies to the Immigration Act 1971 has been developed. The second relates to the apparent mismatch between the wide breadth of the proposed amendment to the Immigration Act 1971 and the Government's indication of the more limited way in which the new powers would be used in practice. The third relates to the impact that clause 46 would have on the constitutional relationship between the Crown Dependencies and the United Kingdom Government.

#### *Development of the policy*

We are aware that the Home Office published a consultation paper on 24 July 2008 entitled *Strengthening the Common Travel Area: Consultation Paper* and a response to consultation on 15 January 2009. The whole focus of those documents was on the common travel area in relation to the Republic of Ireland. None of the consultation questions were on the Crown Dependencies.

The Crown Dependencies are not, of course, part of the United Kingdom and the people of the Islands are not represented in the United Kingdom Parliament. It is therefore appropriate for the United Kingdom Parliament to be assured that adequate consultation has taken place between the UK Government and the insular authorities before legislating in relation to the Islands.

- (a) Please explain why the July 2008 consultation paper (and, if it is the case, the consultation events held) did not engage with questions relating to the Jersey, Guernsey and the Isle of Man.
- (b) Please explain to what extent the Impact Assessment on the proposals to reform the common travel area considered issues relating specifically to Jersey, Guernsey and the Isle of Man.
- (c) Please explain what consultation has taken place with the Governments of Jersey, Guernsey and the Isle of Man.
- (d) Please explain what public consultation has taken place in relation to the proposal to subject travel to and from Jersey, Guernsey and the Isle of Man to immigration controls under the Immigration Act 1971.

#### *Width of the proposed amendment*

Clause 46 of the bill proposes to remove the following words from section 1(3) of the Immigration Act 1971: 'Arrival in and departure from the United Kingdom on

a local journey from or to any of the Islands (that is to say, the Channel Islands and Isle of Man) or the Republic of Ireland shall not be subject to control under this Act’.

We note that the Impact Assessment states that ‘The proposals do not involve routinely checking traffic from Crown dependencies’ (para 6.2) and the Government’s response to the consultation says the policy will be to ‘conduct intelligence-led enforcement operations ... on passengers arriving from the Crown dependencies’ (p 7). The Impact Assessment states that ‘We are proposing to amend legislation to provide the power to routinely control persons arriving in/departing from the UK from/to another part of the CTA and as a result require passengers to present identity/nationality documents when requested’ (para 6.13).

There appears to be a mismatch between the breadth of the powers sought (subjecting people making local trips within the different parts of the British Islands to the Immigration Act 1971) and the Government’s stated intention as to the use of those powers (intelligence-led operations rather than routine checking).

- (e) What consideration has been given as to whether the Government’s policy objectives in relation to the common travel area as they relates specifically to Jersey, Guernsey and the Isle of Man could be facilitated by an amendment to the Immigration Act 1971 that is more limited than that proposed by clause 46 of the bill?
- (f) What consideration has been given to an amendment to the Immigration Act 1971 that differentiates between Jersey, Guernsey and the Isle of Man on the one hand and the Republic of Ireland on the other?

### *Constitutional relationship between the United Kingdom and the Crown Dependencies*

In law, the United Kingdom, Jersey, Guernsey and the Isle of Man form the “British Islands” (Interpretation Act 1978). It is at first sight surprising that a policy proposal should be brought forward to make local journeys within the British Islands subject to control under the Immigration Act 1971. The Channel Islands have owed their allegiance to the British Crown since 1204, when King John lost the other parts of the Duchy of Normandy. The Isle of Man has had a connection to England since the 14th century. Special provision is made for the Channel Islands and the Isle of Man in the British Nationality Act 1981, as in previous nationality Acts. As we understand the situation, there is very close integration between the immigration laws applicable in the Islands and the United Kingdom.

In order that we can better understand the context in which the Government is bringing forward these proposals we would be grateful for your explanation of the following matters.

- (g) Are we correct in our understanding of the proposed policy that British citizens travelling between the United Kingdom and Jersey, Guernsey, and the Isle of Man will be required always to carry their British passports to ensure that they can prove their identity and nationality?
- (h) What constitutional justification is there for imposing a requirement to carry a passport on such trips compared to (say) a trip between Northern Ireland and England (in respect of which we assume that there are no current plans to require passports to be carried)?

- (i) In what, if any, material respects are the immigration laws applied by the authorities in Jersey, Guernsey and the Isle of Man different from those applicable in the United Kingdom?
- (j) In what, if any, material respects are the arrangements for enforcing the immigration laws in Jersey, Guernsey and the Isle of Man different from the arrangements within the United Kingdom?
- (k) Does the Government take the view that the United Kingdom has power to make changes to the common travel area affecting Jersey, Guernsey and the Isle of Man without the consent of the governments of the Islands?
- (l) Do you accept that, if enacted, clause 46 will bring about a change in the constitutional relationship between the United Kingdom and the Islands?

A copy of this letter has been sent to Lord Bach, the Parliamentary Under Secretary of State in the Ministry of Justice with responsibility for the Crown Dependencies.

### **Response from Lord West of Spithead, 19 February 2009**

Thank you for your letter of 5 February about clause 46 of the Borders, Citizenship and Immigration Bill.

Before turning to the specific questions in your letter, I would first like to assure the Committee that we are committed to retaining the Common Travel Area. We have made clear the value that we attach to the political, economic and social benefits of the Common Travel Area. We have reviewed, and we will keep under review, the practical operation of the common travel area to ensure that we maximise security at the border.

I will now address each of the points you raise in turn.

#### *Development of the policy*

- (a) Please explain why the July 2008 consultation paper (and, if it is the case, the consultation events held) did not engage with questions relating to the Jersey, Guernsey and the Isle of Man.

Immigration controls on routes between the Crown dependencies and the United Kingdom were not included in the 24 July consultation paper or the accompanying partial impact assessment, and there has been no specific public consultation on this regarding the Crown dependencies because we do not intend any significant change of practice on these routes. There was no intention to introduce fixed immigration controls on routes between the Crown dependencies and the UK, or to introduce a requirement for passengers to carry a passport or other document that establishes their nationality and identity and that remains the case.

This was clarified in the events that took place during the consultation period.

- (b) Please explain to what extent the Impact Assessment on the proposals to reform the common travel area considered issues relating specifically to Jersey, Guernsey and the Isle of Man.

The Government response to the consultation focused on the main development since July: our plans to introduce phased intelligence led controls on Republic of Ireland—United Kingdom routes rather than fixed immigration controls as

initially proposed. This clearly remains the most significant change from current practice. The full impact assessment covered a range of costs and benefits associated with the implementation of this policy and it is considered that any costs and benefits arising from some increase in checks on journeys between the Crown dependencies and the United Kingdom would be financed within the published ranges. Nothing in our current plans would require anything new—by way of infrastructure or process—for ports handling traffic from the Crown dependencies.

We are aware that any change in United Kingdom policy relating to the Common Travel Area would have an impact on the Crown dependencies but the impact assessment purely focuses on the impact to the United Kingdom.

- (c) Please explain what consultation has taken place with the Governments of Jersey, Guernsey and the Isle of Man.

There are regular working level contacts with the insular immigration services and they have been involved throughout the policy developmental process. The draft legislation was passed to the Crown dependencies more formally, through the Ministry of Justice, in December 2008. The Crown dependencies have made clear that they would prefer the legislation to differentiate between their position and that of the Republic of Ireland. We have explained the rationale for taking the same approach. Discussions will continue.

- (d) Please explain what public consultation has taken place in relation to the proposal to subject travel to and from Jersey, Guernsey and the Isle of Man to immigration controls under the Immigration Act 1971.

See the responses to questions a) and b) above: this was not specifically addressed in the July 2008 consultation paper and there has been no separate consultation on these issues. I can confirm that there is no intention to introduce fixed controls on routes to and from the Crown dependencies.

*Width of the proposed amendment*

- (e) What consideration has been given as to whether the Government's policy objectives in relation to the common travel area as they relates specifically to Jersey, Guernsey and the Isle of Man could be facilitated by an amendment to the Immigration Act 1971 that is more limited than that proposed by clause 46 of the bill?

We believe that the present approach is the most straightforward way of meeting the policy intention. We want to continue to treat the Common Travel Area as a single entity and we want to ensure we maintain a secure platform for the range of intelligence-led activities which will be necessary within it. We do not think we can readily differentiate provision for the Crown dependencies without prejudicing those aims. Clause 46 leaves intact the broad framework for the Common Travel Area that is contained in the Immigration Act 1971, including the general provision that those arriving on local journeys do not require leave to enter. We have not produced any alternative amendments because we do not believe there is a different way of delivering the policy aims.

- (f) What consideration has been given to an amendment to the Immigration Act 1971 that differentiates between Jersey, Guernsey and the Isle of Man on the one hand and the Republic of Ireland on the other?

See response to question e).

*Constitutional relationship between the United Kingdom and the Crown Dependencies*

- (g) Are we correct in our understanding of the proposed policy that British citizens travelling between the United Kingdom and Jersey, Guernsey, and the Isle of Man will be required always to carry their British passports to ensure that they can prove their identity and nationality?

No, although the legislation requires a person on examination to show that they are British or entitled to enter without leave (as will be the case for the majority of passengers travelling from the Crown dependencies), as a matter of policy persons travelling between Jersey, Guernsey, the Isle of Man and the United Kingdom will not be required to carry a passport or national identity card for immigration purposes. However, a person may be questioned on an intelligence-led basis by an immigration officer to establish that they are entitled to enter the United Kingdom.

- (h) What constitutional justification is there for imposing a requirement to carry a passport on such trips compared to (say) a trip between Northern Ireland and England (in respect of which we assume that there are no current plans to require passports to be carried)?

As mentioned above, there will not be such a requirement. But the Islands can readily be distinguished from Northern Ireland by the fact that they are not part of the United Kingdom and operate their own separate immigration control systems. They are in practice closely aligned and operationally integrated with that of the United Kingdom, but that need not always be so.

- (i) In what, if any, material respects are the immigration laws applied by the authorities in Jersey, Guernsey and the Isle of Man different from those applicable in the United Kingdom?

United Kingdom immigration legislation is often extended to the Islands by Order in Council (subject to exceptions and adaptations) following consultation with the Islands and with the Islands consent. While the main provisions of United Kingdom immigration legislation up to and including provisions of the 2006 Act have been extended to the Isle of Man; the legislation has not been extended to Guernsey and Jersey since the Immigration and Asylum Act 1999.

Some specific differences between the United Kingdom immigration legislation and the legislation of the Islands are:

- the Islands do not apply the Point Based System, or provisions relating to exchange of information and e-Borders;
- the islands count time spent in any of the islands and/or the United Kingdom towards the five year requirement for indefinite leave to remain whilst the United Kingdom does not count time spent in any of the islands towards indefinite leave to remain;

- (j) In what, if any, material respects are the arrangements for enforcing the immigration laws in Jersey, Guernsey and the Isle of Man different from the arrangements within the United Kingdom?

See response to question i). The Islands immigration legislation allows action to be taken against immigration offenders in the same way as in the United Kingdom.

- (k) Does the Government take the view that the United Kingdom has power to make changes to the common travel area affecting Jersey, Guernsey and the Isle of Man without the consent of the governments of the Islands?

The Common Travel Area has no formal legal status as a multilateral agreement. It is a shared understanding between the United Kingdom, the Republic of Ireland and the insular authorities which they reflect separately for themselves in their separate immigration laws. The United Kingdom has power to change its arrangements in relation to the Common Travel Area unilaterally but, of course, as a matter of good practice, it consults Common Travel Area partners before doing so.

- (l) Do you accept that, if enacted, clause 46 will bring about a change in the constitutional relationship between the United Kingdom and the Islands?

No, we do not believe that clause 46 will change the constitutional relationship between the Islands and the United Kingdom, for the reasons set out above.

## **APPENDIX 2: CORRESPONDENCE BETWEEN LORD GOODLAD AND THE CHIEF MINISTER OF THE ISLE OF MAN**

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### **Letter from the Chairman to the Chief Minister, 25 February 2009**

The Constitution Committee of which I am Chairman 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 connection with the first of these tasks, the Committee has been engaged in correspondence with the Government on the Borders, Citizenship and Immigration Bill which is currently under consideration in the House of Lords.

The Committee would like to seek your views on Clause 46 in Part 3 of the bill which proposes to amend the arrangements for the common travel area that exists between the United Kingdom, the Republic of Ireland, and Jersey, Guernsey, and the Isle of Man. It seeks to amend the Immigration Act 1971 to make travel between the different parts of the common travel area subject to immigration control. I have enclosed a copy of the Committee’s correspondence with the Government on this issue.

As the Bill is currently under consideration in the House of Lords we would appreciate as early a reply as possible to allow the Committee to make its report to the House.

I have written in similar terms to Terry Le Sueur, Chief Minister of Jersey and Lyndon Trott, Chief Minister of Guernsey.

### **Response from the Chief Minister, 2 March 2009**

Thank you for your letter of 25 February 2009, seeking the views of the Isle of Man Government on Clause 46 in Part 3 of the Borders, Citizenship and Immigration Bill, which proposes amendments to the Common Travel Area (CTA).

The Isle of Man Government is extremely concerned about the extent of Clause 46 of this Bill, which will introduce the power to establish fixed border controls between the Republic of Ireland, the Crown Dependencies and the United Kingdom and therefore welcomes the opportunity given by the House of Lords Select Committee on the Constitution.

I do not believe that the Isle of Man has been properly consulted, in accordance with established protocols, on this proposed amendment, nor does the Island consider that the proposals, as drafted, are appropriate to the stated policy intention of the legislation. Moreover the Isle of Man believes that Clause 46 undermines the constitutional relationship between the Isle of Man and the United Kingdom, as it takes no account of the historic and present legal, cultural and constitutional ties between us.

Turning first to the matter of consultation between the Isle of Man and the UK regarding reform of the CTA; although there has been ongoing officer level contact between the UK Borders Agency and the Chief Secretary’s Office in the Isle of Man, at no time did the UK indicate that it intended to seek legislative changes to the operation of the CTA that would directly impact upon the Isle of Man. Indeed a letter from the Ministry of Justice, dated 24 June 2008 (attached), highlighted the intention to introduce immigration controls for non-CTA nationals

by 2014 on sea and air borders between the UK and the Republic of Ireland, and stated that;

“The necessary changes to primary legislation will be made in the forthcoming Immigration Bill to clarify the UK Border Agency’s powers to control passengers arriving from the Republic of Ireland”.

Therefore whilst the Isle of Man understood that changes to existing legislation would be required to clarify powers to introduce controls on journeys between the UK and the Republic of Ireland, we did not expect, nor were we informed in advance, that the Isle of Man would be legislatively dealt with in the same manner as the Republic of Ireland, which is of course a foreign state.

The Isle of Man was not included within the public consultation process which took place on the CTA, nor when our officers enquired, did the UK Border Agency feel that we needed to formally respond to it. The consultation as published dealt specifically with journeys between the United Kingdom and Ireland. Journeys to and from the Islands were not included, nor did we expect them to be, as we understood that there was no intention to change the legislation in this respect. The response from Admiral, the Lord West of Spithead, in his letter to the Select Committee, concerning the development of this policy, states that the Crown Dependencies were not included in the public consultation, because no “significant change of practice on these routes” was intended. Whilst we had been led to believe this to be the case, nevertheless it is now clear that Clause 46, as drafted, permits a fundamental change of practice and therefore the Isle of Man should have been formally consulted.

In the event, the Isle of Man only received the draft Bill on 18 December. The Christmas break and that fact that the Bill was due for its first reading on 14 January, gave little opportunity to consider and respond to the full implications of the proposals.

It is important to note that there is a well established protocol in relation to consultation between the UK and the Isle of Man on matters which may affect the Island, or on which the Island may have a view. The Ministry of Justice provides the formal link between the Isle of Man and the UK Departments of Government for this purpose. Furthermore, in May 2007, the Lord Chancellor and I signed a ‘Framework for developing the international identity of the Isle of Man’, point 5 of which states that;

‘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’.

We would respectfully suggest that the proposed amendment clearly has very real consequences in respect of the constitutional relationship and that therefore, by the terms of the framework agreement, this proposal should have been subject to dialogue between the Isle of Man and the UK.

In relation to the drafting of Clause 46, the Isle of Man has been assured throughout that the policy intention is to have fixed/more regular controls on passengers travelling by air and sea between the UK and the Republic of 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. Nevertheless this policy intention is not reflected in the Border, Citizenship and Immigration Bill, as introduced into Parliament.

The effect of the amendment will be the introduction of a power to establish permanent border controls between the UK and the Isle of Man at any time, whether or not it is intended to use that power. History has shown that where a power exists in legislation, sooner or later it is almost always used—whatever the policy intention. The Isle of Man is fully supportive of measures to prevent abuse of the CTA and it is not opposed to the principle of clarifying the power to undertake ad hoc intelligence-led operations, if deemed necessary. However we believe that this should be specified within the legislation rather than dealt with as a matter of policy. In a recent telephone conference between officers from the Isle of Man and UK Border and Visa policy representatives and legal advisors, the UK confirmed that any assurances on the policy intentions of current Ministers, to only apply ad-hoc intelligence-led operations, could not commit future Ministers to the same policies.

I would like to reiterate our concerns regarding the constitutional issues engaged by Clause 46 and related matters. We do not believe that it is appropriate that the proposed legislative amendments to the CTA as drafted, fail to recognise that the Republic of Ireland's relationship to the UK, is very different from that of the Isle of Man, or that the immigration legislation of the Isle of Man is UK legislation extended by Order in Council, the effect of which is to establish a general principle of integration. The Isle of Man has extended all relevant UK Immigration Acts up to and including the Immigration, Asylum and Nationality Act 2006; we will continue to extend immigration legislation to ensure that the Island remains current with the UK position; for example, we are currently planning the introduction of the Points Based System. The integration of the immigration law of the UK, the Channel Islands and the Isle of Man is fully set out in Schedule 4 of the Immigration Act 1971, as extended.

In relation to border security, the Select Committee may wish to know that the Isle of Man has been invited, with the Channel Islands, to join the UK e-Borders programme, thus forming the extent of the UK virtual border; officers in the Island are currently working closely with colleagues from the Borders Agency on the legislative requirements to share data for e-Borders.

It may also be helpful in assessing the extent and potential impact of Clause 46, to consider the position of the Isle of Man in determining insular border and immigration legislation and in particular the point made by Admiral the Lord West of Spithead, in his letter to the Select Committee, that whilst immigration control systems in the Islands “are in practice closely aligned and operationally integrated with that of the United Kingdom, but that need not always be so.”

In 1996, the Chief Secretary's Office wrote to the Home Office, seeking;

“to explore the possibility of the Isle of Man passing its own Immigration Law with an agreement to keep the legislation broadly in line with the United Kingdom Immigration Law with responsibility for Immigration being transferred from the Governor to a Minister of the Isle of Man Government, with a fallback position of continuing with UK legislation but transferring the Governor's functions under that legislation to a Minister of the Isle of Man Government by order in Council.”

This approach from the Isle of Man Government arose out of an objective determined by Tynwald in 1981, to promote and continue the evolution of the constitutional relationship between the Isle of Man and the UK towards more complete self Government. As part of this process the potential to transfer the functions of the Lieutenant Governor, as Crown representative, under UK Statutes to the Isle of Man Government was explored. Substantial functions

retained by the Governor under UK Acts at that time were the Immigration Acts 1971 and 1988 and the British Nationality Act 1981.

Correspondence between the Chief Secretary's Office and the UK continued for eighteen months. Whilst the proposals were given full consideration by the UK the final decision was that the Secretary of State could not agree to the delegation of the functions requested.

The UK stated that its EC obligations required the UK to be in a position to guarantee that the Crown Dependencies would follow the same immigration practices as the United Kingdom in relation to third country nationals. This could not be guaranteed if the ultimate authority rested not with the Crown representative, but with the Isle of Man Government. Despite an undertaking given by the Isle of Man to keep such legislation in line with UK Law and International Agreements, the UK was very concerned that whatever undertakings may be giving about parallel legislation and practices, the Isle of Man Government could not give undertakings about policies and practices on behalf of its successors.

In addition the UK advised that, if the Isle of Man's objective in seeking to transfer the Lieutenant Governor's functions in relation to immigration was to promote, 'more complete self Government' for the Island, it was difficult to see how this could be achieved when, post transfer, the Isle of Man would need to consult HM Government constantly in order to ensure that its policy was entirely consistent with the United Kingdom. Moreover the UK commented that immigration matters did not fall within the concept of 'self determination' or 'autonomy in respect of the Island's internal affairs' as they involved the responsibilities of the United Kingdom Government and the question of entering into the British Isles as a whole. This correspondence was concluded in April 1998 and as far as the Isle of Man is the UK stance in this matter has not changed.

In recent years of course, increased immigration, heightened global security and terrorism risks have highlighted the need for countries that share the same commitment to freedom and security to work closely together to uphold those values; we believe that it is incumbent on the Isle of Man and the UK, with our historic and current constitutional, democratic ties, to work closely together and as I have highlighted previously, we are committed to doing so. Therefore, taking these matters into account, I am sure that you will understand that the introduction of powers for permanent border controls between the UK and the Isle of Man, a British Island with a predominantly British population and a long, shared history with the UK represents a highly sensitive matter.

We have responded positively to date on all the initiatives to strengthen the Common Travel Area, 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 permanent controls to be established between the Isle of Man and the UK. It is helpful to see that the Select Committee on the Constitution share many of our concerns regarding Clause 46 and we are grateful for the opportunity to explain these in detail. The Isle of Man will continue to work constructively with CTA partners to ensure the security of the border, but we feel that it is imperative that Clause 46 accurately reflects the stated policy intention of the UK Government, which we fully support.

## Letter from the Ministry of Justice to the Chief Secretary, Isle of Man, 24 June 2008

I am writing to inform you that, subject to clearance by the UK Ministerial Committee on Domestic Affairs (Border and Migration), it is planned to make a number of significant changes to the operation of the Common Travel Area.

The UK Border Agency has been working in partnership with officials from the Governments of the Republic of Ireland, Jersey, Guernsey and the Isle of Man, as well as the Devolved Administrations, and local police forces where appropriate, to review the rules and operation of the CTA and explore how border security can be strengthened in the future. This flows from commitments made to reassess the arrangements of the CTA in the 2007 'Securing the UK Border' strategy, the Cabinet Office 'Security in a Global Hub' report and the Lord West review of crowded places and infrastructure.

From the outset, the review recognised that the ability of CTA nationals to travel freely within the CTA is an important component of the special relationship which exists between the peoples of these islands, and provides long established political, economic and social benefits. However, it is clear that the current operation of the CTA, based on the principle of movement without control regardless of nationality, presents risks in terms of illegal immigration and the smuggling of goods and lost revenue.

In considering how best to achieve the UK's objective to strengthen its borders, a number of significant immigration reforms are being introduced, such as biometric visas and the e-Borders system. However, it is recognised that as the external border is strengthened, the risk of exploitation and abuse of the CTA will grow.

While the UK has been exposed to risks and benefits of large scale movement and migration over many years, the Republic of Ireland has only faced these challenges over the last decade. In this context, the Crown Dependencies have also seen an increase in migration. We now have the opportunity to deepen our migration and control partnership with the Republic of Ireland and other authorities in the British Isles to general benefit.

It is clear from consultation that there is no single solution to mitigate the immigration risks presented by current operation of the CTA and that a broader approach is required. This will be based on strong partnership working to strengthen UK and Irish borders; jointly strengthen the CTA external border; reduce the risks associated with the land border between Northern Ireland and the Republic of Ireland; and facilitate legitimate travel across the CTA.

It is proposed to introduce controls at UK ports for passengers arriving from the Republic of Ireland by air and sea. The objective is to introduce immigration controls for non-CTA nationals by 2014 on sea and air borders between the UK and the Republic of Ireland, and to put in place checks to verify the identities of British and Irish nationals by the same date. The UK Border Agency will consult on the documents CTA nationals will be required to provide in order to prove their identity and nationality satisfactorily.

Fixed immigration controls will not be introduced on the land border between Northern Ireland and the Republic of Ireland or on traffic from the Crown Dependencies. However, mirroring activity in the Republic of Ireland, we will consider increasing ad hoc immigration checks on vehicles targeting non-CTA nationals on the Northern Ireland side of the land border to mitigate the displacement of abuse and consult further as needed. We also expect the Crown

Dependencies to mirror the checks to be introduced on passengers travelling between the United Kingdom and the Republic of Ireland. In keeping with current arrangements, occasional risk-based police, customs and immigration enforcement activity will also take place as required, in co-operation with the appropriate authorities, on routes between the Crown Dependencies and the UK, the Republic of Ireland and Northern Ireland.

The necessary changes to primary legislation will be made in the forthcoming Immigration Bill to clarify the UK Border Agency's powers to control passengers arriving from the Republic of Ireland.

Separately, the UK's e-Borders programme will apply to all scheduled air travel between between the UK and the Republic of Ireland by 2009 and sea travel by 2010. The document requirements will be determined following consultation. We propose a change to current practice where minimal ID is required to travel, although our research suggests that passport use, for example, is already very widespread. We will also consult carriers on applying carrier liability legislation to CTA routes.

In addition, although not part of the CTA Review, we will shortly begin a public consultation on bringing into force a new police power to request passenger, crew and service data on air and sea journeys between Northern Ireland and Great Britain. This power would enable the police to request data from carriers operating these routes to reduce the risk of individuals seeking to avoid the new CTA controls and improve the overall security of the UK.

As a further measure, the UK Government is considering the introduction of a fully integrated common (short stay visit) visa with the Republic of Ireland. This could be either a common visa issued by a single organisation, or as in the Schengen border zone, mutual recognition of two national visas operating to the same framework and standards. Alternatively, it could involve a combination of the two options. In addition, from an economic angle both of these initiatives would incentivise commerce and tourism and politically, they would represent a step forward in co-operation between the UK and the Republic of Ireland.

A consultation group, involving both UK and Irish officials, has been set up to explore in more depth the risks and benefits associated with the development of a common visa and the practical measures that can be taken to enhance co-operation and mutual control in the short-term.

The wider package of CTA reform includes a proposal to increase the number of intelligence-led operations within the CTA to focus on reducing the harm caused by abuse of the arrangement; an additional UK CTA Liaison Officer in Dublin; more joint training programmes and secondments between CTA authorities; and further co-operation on data sharing to protect the integrity of our border controls. Significantly, the reform plan will make a difference to the travelling public, promoting legitimate travel by improving communication on the CTA with the public and other measures, including improving information at ports.

Subject to Whitehall clearance, UK Home Secretary and the Irish Minister of Justice, Equality and Law Reform plan to make a joint statement on the CTA. At the same time, the UK Border Agency will publish a 12 week online public consultation on the CTA reform plan.

I am writing in similar terms to the Lieutenant Governors of Jersey and Guernsey.

### **APPENDIX 3: CORRESPONDENCE BETWEEN LORD GOODLAD AND THE CHIEF MINISTER OF JERSEY**

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#### **Letter from the Chairman to the Chief Minister, 25 February 2009**

The Constitution Committee of which I am Chairman 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 connection with the first of these tasks, the Committee has been engaged in correspondence with the Government on the Borders, Citizenship and Immigration Bill which is currently under consideration in the House of Lords.

The Committee would like to seek your views on Clause 46 in Part 3 of the bill which proposes to amend the arrangements for the common travel area that exists between the United Kingdom, the Republic of Ireland, and Jersey, Guernsey, and the Isle of Man. It seeks to amend the Immigration Act 1971 to make travel between the different parts of the common travel area subject to immigration control. I have enclosed a copy of the Committee’s correspondence with the Government on this issue.

As the Bill is currently under consideration in the House of Lords we would appreciate as early a reply as possible to allow the Committee to make its report to the House.

I have written in similar terms to Lyndon Trott, Chief Minister of Guernsey and Tony Brown, Chief Minister of the Isle of Man.

#### **Response from the Chief Minister, 3 March 2009**

Thank you for your letter of 25 February 2009, regarding the Constitution Committee’s consideration of the Borders, Citizenship and Immigration Bill. I am most grateful for your Committee’s interest in this matter, in particular clause 46 in part 3 of the Bill which proposes to amend arrangements for the Common Travel Area. As you anticipate, this is a source of great concern to the Government of Jersey.

The proposed changes would result in potentially substantive changes to the Common Travel Area; there is a mismatch between the policy intent and the possible effects of the legislative change; and there is a failure to differentiate between travel from the British Islands and from the Republic of Ireland. Furthermore there has been a failure to respect the longstanding constitutional relationship between the Channel Islands and the UK. These points are set out below in more detail.

1. The proposed changes resulting from the amendment would make a fundamental change to the statutory framework of the Common Travel Area which significantly affects the Crown Dependencies. It is deeply concerning that in bringing forward legislation with such significant ramifications, there was no formal consultation on the Bill with the government of Jersey until the letter from the Ministry of Justice of 18 December 2008.

The effect of the proposal under clause 46 of the Bill, to amend section 1(3) of the Immigration Act 1971, would be to remove the current exemption for British citizens in the Crown Dependencies from provisions in sections 3 and 4 of the Act in particular. This opens the way, at any time of the UK Government’s choosing, for the *significant change of practice* that they say they do not presently envisage.

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 as set out in numerous Royal Charters.

Lord West has stated that it will not be a requirement for British citizens travelling between the United Kingdom and Jersey, Guernsey, and the Isle of Man always to carry their British passports to ensure that they can prove their identity and nationality.

It is clear that, if these legislative changes are implemented, then at any time ‘*a person may be questioned on an intelligence-led basis by an immigration officer to establish they are entitled to enter the United Kingdom.*’ I believe it would be very difficult to prove British citizenship satisfactorily without carrying a passport, and this will therefore bring about in practice a requirement for every person travelling between Jersey, Guernsey or the Isle of Man and the United Kingdom to carry a passport.

2. The Select Committee has, I believe, rightly identified “*the apparent mismatch between the wide breadth of the proposed amendment to the Immigration Act 1971 and the Government’s indication of the more limited way in which the new powers would be used in practice*”. I agree with the view that the proposed powers are excessive in comparison with the policy intent and are therefore inappropriate.

The responses from Lord West rely on the position that the UK Government does ‘*not intend any significant change of practice.*’ This is put forward as the reason behind there having been ‘*no specific public consultation on this regarding the Crown dependencies.*’ The view would seem to be that the Crown dependencies do not have to worry, but accept the limited intent behind the legislative proposals and therefore should ignore the powers that the amended statutory provisions will confer to impose immigration controls at will.

Lord Glentoran has already commented during the second reading of the Bill:

*“Given that the Isle of Man, Jersey and Guernsey are dependent territories of the United Kingdom, which holds ultimate responsibility for their relations with third countries and for their defence, I find it astonishing that the Minister claims that the security of the United Kingdom’s borders will be enhanced by putting up an internal barrier. 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.”*

I agree with this view that the proposed effects of the Bill would be disproportionate to the policy objectives in respect of the Crown Dependencies. The Government of Jersey understands, of course, the desire of the UK government to strengthen vigilance in respect of potential cross-border crime or terrorism, but surely more appropriate measures might be implemented through the existing close collaboration between police, customs and immigration services in the respective administrations? It remains the fact that we in Jersey apply substantially the same controls as are applied in the United Kingdom, unsurprisingly, because we are working to the same 1971 Act. The “border” commences at the most southerly part of the British Isles with Jersey.

Instead, rather than work through the statutory detail with the Crown dependencies, the Home Office officials now propose simply taking a *carte blanche*

approach—to provide powers to choose whatever action they wish. There appears to be no attempt to draft amendments to rectify the mismatch between the wide statutory powers on the one hand and, on the other, the much more limited use of those powers intended in practice.

3. In the correspondence you have attached, Lord West recognises that the statutory régime for the Crown dependencies would not differ from that for the Republic of Ireland. At question (c)—*what consultation has taken place with the Governments of Jersey, Guernsey and the Isle of Man*—it is stated that the Crown dependencies “*would prefer the legislation to differentiate between their position and that of the Republic of Ireland*” and that “*discussions will continue*”.

In effect, British nationals travelling from part of the British Islands are to be treated in the same way as persons travelling from a foreign state. For the first time, there exists the possibility of discriminating between British citizens living in the islands from British citizens living in mainland Great Britain—controls will not be applicable to the passage of a British citizen from Hampshire to Dorset, but they will apply to the passage of a British citizen from Jersey to Hampshire. This is no more acceptable for Jersey than it would be, for example, for those travelling between Wales or Scotland and England. I confirm our view that, if the proposed changes are to be made in respect of journeys from the Republic of Ireland, then it is essential to differentiate between those and journeys within the British Islands including Jersey, Guernsey and the Isle of Man.

In Lord West’s response under (e): *We believe that the present approach is the most straightforward way of meeting the policy intention. We want the law to continue to treat the Common Travel Area as a single entity and we want to ensure we maintain a secure platform for the range of intelligence-led activities which will be necessary within it. We do not think we can readily differentiate provision for the Crown dependencies without prejudicing those aims. Clause 46 leaves intact the broad framework for the CTA that is contained in the Immigration Act 1971, including the general provision that those arriving on local journeys do not require leave to enter. We have not produced any alternative drafting approaches.*

This response illuminates my concerns that alternative drafting approaches which could differentiate appropriately between persons travelling from a separate independent state and those British citizens who are travelling within the British Isles have not been explored.

Section 1(1) of the Immigration Act 1971 provides that:

*All those who are in this Act expressed to have the right of abode in the United Kingdom shall be free to live in, and to come and go into and from, the United Kingdom without let or hindrance except such as may be required under and in accordance with this Act to enable their right to be established or as may be otherwise lawfully imposed on any person.* (Emphasis added)

By introducing the proposed amendments to the Act which remove the exemptions from controls on those who have the right to abode in the UK, the exception cited above becomes a significant derogation from the right of a person ‘*to come and go into and from, the United Kingdom without let or hindrance*’. This change would be contrary to the historic right of Channel Islanders to travel freely within the British Islands, which underpins the longstanding constitutional relationship between Jersey and the United Kingdom.

4. There is not the time nor the space to specify in any detail the historic rights set out in the Royal Charters. I will give one example from the Charter of Queen

Elizabeth 1 (Patent Roll 4 Eliz. Part 3 mem.11 (37)). The Preamble to the Charter states (in translation from the Latin), and before confirming a number of rights, “*The Queen to all to whom etc. greeting. Whereas our beloved and faithful subjects the bailiff and jurates of our island of Jersey and other dwellers and inhabitants of the same island ... have freely quietly and inviolably used relied upon and enjoyed very many rights ... liberties and franchises as well within our realm of England as elsewhere within the dominions ... subject to our rule ...*”. It is difficult to see how rights may be enjoyed “within our realm of England” if the people of Jersey can be prohibited from travelling to that realm.

In conclusion, I believe the changes proposed in clause 46 of the Borders, Citizenship and Immigration Bill would introduce the potential for substantive changes to the Common Travel Area; would result in a mismatch between the policy intent and the potentially far-reaching effects of the legislative change; fail to differentiate between the historic rights of those who live in the British Islands in comparison with the Republic of Ireland, and breach fundamental constitutional rights of the inhabitants of the Bailiwick. It is disappointing that such changes should be promoted without the consultation that the Island has been accustomed to receive.

## **APPENDIX 4: CORRESPONDENCE BETWEEN LORD GOODLAD AND THE CHIEF MINISTER OF GUERNSEY**

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### **Letter from the Chairman to the Chief Minister, 25 February 2009**

The Constitution Committee of which I am Chairman 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 connection with the first of these tasks, the Committee has been engaged in correspondence with the Government on the Borders, Citizenship and Immigration Bill which is currently under consideration in the House of Lords.

The Committee would like to seek your views on Clause 46 in Part 3 of the bill which proposes to amend the arrangements for the common travel area that exists between the United Kingdom, the Republic of Ireland, and Jersey, Guernsey, and the Isle of Man. It seeks to amend the Immigration Act 1971 to make travel between the different parts of the common travel area subject to immigration control. I have enclosed a copy of the Committee’s correspondence with the Government on this issue.

As the Bill is currently under consideration in the House of Lords we would appreciate as early a reply as possible to allow the Committee to make its report to the House.

I have written in similar terms to Terry Le Sueur, Chief Minister of Jersey and Tony Brown, Chief Minister of the Isle of Man.

### **Response from the Chief Minister, March 2009**

Thank you for your letter dated 25<sup>th</sup> February 2009 regarding this Bill and for your Committee’s interest in this matter.

The Ministry of Justice first referred the full Bill for our consideration and comment on 18<sup>th</sup> December 2008. Clause 46 in Part 3 of the Bill, which proposes to amend section 1(3) of the Immigration Act 1971, is a particular point of concern for the Bailiwick authorities. There appears to have been little or no attempt by HM Government to reflect the different policy intentions distinguishing between the nature of controls envisaged between the Republic of Ireland and the UK on the one hand, and between the Crown Dependencies and the UK on the other, when drafting clause 46.

By way of background, the Bailiwick authorities recognise and appreciate the benefits derived from the Common Travel Area (CTA), which operates on the basis of very close correlation between the immigration laws of the UK and the Islands. The CTA has always been based on the principle that, subject to certain exceptions, travel between the UK, the Crown Dependencies and the Republic of Ireland does not require travellers going through a physical immigration control point. Whilst there has been no suggestion that the CTA regime should be ended, we are aware that the UK Border Agency has been reviewing the rules and operation of it to explore how border security can be strengthened in the future. The Customs and Immigration Service in Guernsey has held discussions with the United Kingdom Border Agency at an operational level. , It has been made clear by those representing all of the Crown Dependencies that the movement without immigration controls for all nationals of the CTA, is an important component of

the special relationship which exists between the peoples of the islands of the CTA and provides long-established political, economic and social benefits.

We note that the Bill will amend section 1(3) of the Immigration Act 1971 in such a way as to provide for a wide-ranging power to introduce immigration controls on traffic between the UK and inter alia the Bailiwick. This is a significant departure from the existing regime, which provides that arrivals in and departures from the United Kingdom on a local journey from or to any of the Islands (or the Republic of Ireland) shall not be subject to control under the Act. That principle applies equally as a matter of Bailiwick law under the Act as it has been extended.

Correspondence received from the Ministry of Justice repeats earlier assurances about how the proposed new regime will be targeted, making it clear that the policy intention is only to have fixed, or more regular, controls on passengers travelling by air and sea between the UK and the Republic of Ireland. In addition to this the policy intention is to conduct solely ad hoc intelligence-led operations to check those crossing the land border with Northern Ireland and (of most relevance to Guernsey) those arriving from the Crown Dependencies. In the light of those assurances, clarifying current policy intentions, the Bailiwick authorities have questioned why it is considered necessary to enact primary legislation that potentially permits the same treatment to all such routes. To date, no answer has been forthcoming.

As a matter of general principle, where there are different policy considerations, as there clearly are here, in relation to the Republic of Ireland and the Crown Dependencies, we firmly believe that those different policies should be reflected on the face of the primary legislation. Although the assurances to which I have referred provide some comfort, there is a stark difference between that position and the certainty provided by appropriate wording in an Act of Parliament. The Bailiwick authorities are disappointed that greater effort appears not to have been made to identify an acceptable solution before clause 46 was included in the Bill as published.

Whilst the Bailiwick maintains immigration legislation comparable to that of the UK and nationality issues are dealt with uniformly under the British Nationality Act 1981, as amended, the Bailiwick authorities consider that the change to section 1(3) to be made by clause 46 of the Bill can be regarded as undermining the ancient entitlement of Channel Islanders to move freely within the British Islands, which forms an important part of the constitutional relationship between Guernsey and the Crown. It should be accepted that border controls in the Crown Dependencies match those of the UK because this principle lies at the heart of the CTA regime. Travel between the Crown Dependencies and UK is therefore comparable to travel between the Scottish islands and the mainland. In the opinion of the Bailiwick authorities, the distinction between such intra-State and the inter-State travel involved between the UK and the Republic of Ireland should properly be recognised in the amendments proposed to be made by the Bill in order to reflect the different constitutional positions.

In summary, the proposed amendment to section 1(3) of the Immigration Act 1971, making travel between all the different parts of the Common Travel Area subject to immigration control, would have a significant negative impact on the Bailiwick, potentially affecting its economy and there would inevitably be constitutional ramifications. I am also concerned at the short timescale afforded to the Bailiwick authorities for consultation on this Bill which potentially has such a significant impact on the people of the Bailiwick.