

Jersey & Guernsey Law Review – October 2013**SHORTER ARTICLES****COMING UP TO SPEED WITH ROYAL ASSENT****Richard Whitehead and Steven Meiklejohn**

The article explains improvements in both the speed and efficiency of the process of obtaining Royal Assent to Jersey Laws since the report of the House of Commons Justice Select Committee in 2010, and outlines some ways in which the process might be further modified and improved.

1 The process for obtaining Royal Assent to laws adopted by the States Assembly in Jersey has been subject to significant change—with apparently satisfactory results.

2 For some years, prior to 2012, there had been growing concern amongst Jersey politicians, government officials, and some in the finance industry about the length of time it often took to obtain sanction by Her Majesty in Council to Jersey's primary legislation. The competitive edge was being lost. In some instances, the period between the submission of a draft Law to the UK Ministry of Justice (MoJ) and its sanction by the Privy Council was over a year. Sometimes there were special reasons for the delays but, even in relatively straightforward cases, the delay was regularly over six months; over nine months was not uncommon and, occasionally, it was much longer. The Schedule to this article sets out the problem in tabular form.

3 The concerns reached a peak when, in 2011, a simple law concerning the Jersey Law Society failed to return from the Privy Council for many months, and it became known that the draft Law had for some reason been forwarded by the MoJ to the English Law Society and the Department for Business, Innovation and Skills for their comments. Clearly, these sorts of delays were unacceptable, frustrating the will of a democratic legislature, and there was a strong feeling that “something must be done”. The matter was accordingly raised at ministerial level with the MoJ.

4 A brief historical discourse on the reasons for the existence of the system of submitting laws for Royal sanction is probably necessary.

There is evidence to suggest that the process of requiring Royal Assent has existed since time immemorial, and at least as far back as the time when the *Etats de Jersey* evolved from its role as a purely consultative body—consulted by the then law-making Royal Court—to a legislative body in its own right. For example, the Royal Commissioners reporting on the Civil, Municipal and Ecclesiastical laws of the Island in 1861 note that—

“It was not until the latter end of the 16th century that the recent composition of the States as a regularly organized body appears to have been recognized; and for nearly two centuries afterwards, laws were passed sometimes by the Royal Court and sometimes by the States, both kinds being deemed of equal authority, if sanctioned by the Sovereign in Council and duly registered in the Island.”¹

The concept of Royal Assent for primary legislation thus pre-dates 1771 but the exact parameters are not clear. For example, Le Hérissier was of the view that both the Court and the States could enact items of “*minor* legislation” without seeking Crown approval, although no authority is cited for this statement.²

5 In 1771, following fairly turbulent times in the Island, the issues of the competing legislative powers of the Royal Court and the States Assembly (the concept of the separation of powers and the thinking of Baron de Montesquieu having barely taken root elsewhere in Europe) were settled once and for all in favour of the States, by an Order in Council of that year, which also gave Jersey its so-called Code of Laws. The Order in Council provided that—

“... and His Majesty Doth hereby declare that all other Political and written laws heretofore made in the Said Island, and not included in the Said Code, and not having had the Royal Assent and confirmation, Shall be from henceforward of no force and validity . . .”

Therefore, the Order made it clear that any laws purporting to have been made prior to 1771 were of no force or validity unless they had received Royal Assent and were included in the Code, and Bois highlighted instances of where perfection had not been achieved for want of Royal Assent.³ Apart from the laws set out in the Code which

¹ Report of the Royal Commissioners, London, HMSO. 1861 , p vi.

² Le Hérissier “*The Development of the Government of Jersey. 1771–1972*” p 28.

³ Bois “*A Constitutional History of Jersey*” (1972) and in particular ss 11/5, 11/8, and 11/18.

have received Royal Assent, it has since been a requirement for any future laws that—

“... no Laws or Ordinances whatsoever, which may be made provisionally or in view of being afterwards assented to by His Majesty in Council, Shall be passed but by the whole Assembly of the States of the said Island; And with respect to such provisional Laws and Ordinances so passed by them, that none shall be put or remain in force for any time longer than three years, but that the same, upon its being represented by the States to His Majesty, that Such Laws and Ordinances are found by experience to be useful and expedient to be continued, Shall, having first obtained His Majesty’s Royal assent, and not till then, be inserted and become part of the Code of the Political Laws of the Said Island.”⁴

6 Thus, as Professor Sir Jeffrey Jowell notes, “Royal Assent was now formally required for acts that were not provisional”⁵ *i.e.* the Order in Council of 1771 removed any doubt over the requirement that Jersey’s permanent principal legislation is submitted for and receives Royal Assent before becoming enacted (see also the definition of the term “enactment” in the Interpretation (Jersey) Law 1954, art 1)⁶ and the function of advising the sovereign whether to grant assent has been carried out by the Privy Council. A system for submitting the legislation after its adoption by the States was developed and has been in place more or less unchanged ever since.

7 Over many years, the channel for official communications between the government of the Island and the British government was from the Bailiff’s Office to the Lieutenant Governor’s Office and then to the Home Office⁷ (and the same in reverse). Thus, this was also the route for a law adopted by the States Assembly to be submitted for the obtaining of Royal Assent.

⁴ Order in Council of 28 March 1771.

⁵ Jowell (2005) “The UK’s Power over Jersey’s Domestic Affairs”, *A Celebration of Autonomy 1204–2004: 800 Years of Channel Islands’ Law*, p 255.

⁶ A Law is not deemed to have been “passed” until it has been confirmed by Her Majesty in Council and registered by the Royal Court of Jersey.

⁷ The Home Department, as it is still known in Government circles in the United Kingdom, was formed in 1782 from the re-organisation of the then Southern Department and Northern Department; the Southern Department became the Home Office and the Northern Department became the Foreign Office. Nowadays the official link is with the Ministry of Justice.

8 There was a quite complicated process by which the draft law was first sent *via* the official channel, as it was known, by the States Greffe to the Lieutenant Governor's Office which then sent it back to the Law Officers for their opinion, which would be sent to the Lieutenant Governor, and then forwarded by his Office to the Home Office.

9 This procedure has subsequently been somewhat simplified so that the draft law, together with the Law Officers' opinion, are now forwarded by the States Greffe to the Lieutenant Governor's Office, and in turn sent with a covering letter to the MoJ. The MoJ subsequently informs the Privy Council Office when its own checks have been completed and the law has been cleared for Royal Sanction. In order to expedite the process, copies of the draft law and the Law Officers' Royal Assent Memorandum are now sent directly from the Lieutenant Governor's office to the Privy Council Office.

10 Traditionally, the Law Officers have had two roles in the legislative process—to act as the legal advisers to the Crown on matters of Jersey law and as legal advisers to the States (historically, the Attorney General would advise the Crown and the Solicitor General, the States)⁸. Any potential difficulty in this situation could be avoided by the Law Officers first making any adverse views known to the States before the law is lodged *au Greffe*. The Law Officers were, and still are, charged with advising the States on any legal questions about a draft law, and advising the Crown that in their opinion the draft law is one to which Her Majesty might properly give Royal Assent. Indeed, this wording still appears in a formal letter, signed by both Law Officers, and accompanies what is now known as the Royal Assent Memorandum, submitted with each new law requiring assent.

11 Prior to 1997, the relationship between the Channel Islands and the Home Office had been of long standing and there was wide experience of dealing with each other and a great depth of knowledge in the Home Office of the constitutional arrangements existing between the Islands and the Crown. However, fairly shortly after the election of the

⁸ Note that the historical position may have changed in light of the modern position that both Law Officers operate from the same department and are paid out of the general revenues of the States. The Carswell Report commented in 2010 that the Law Officers "ought to act together without any divergence of function or representation" and the suggestion was that the Law Officers would act for the Crown and the States would require independent legal representation. This theory has not been tested in a modern context (*i.e.* a dispute between the Crown and Jersey, as opposed to a dispute between a department of HM Government and Jersey; in the latter case, it is clear from recent examples that the Law Officers' role is to advise the States).

new government in the United Kingdom in 1997, responsibility for Crown Dependencies matters was transferred from the Home Office to the Lord Chancellor's Department, which in 2003 was renamed the Department for Constitutional Affairs, and eventually became the Ministry of Justice in 2007.

12 The fracturing of the long-term relationship with the Home Office and its officials led perhaps to the loss of "inherited" knowledge. The relationship with the successor departments was affected and not enough continuity was maintained; at any rate it seemed that way to those involved in Jersey. Almost inevitably, the relationship became more distant and—it has to be said—less trusting and more cautious, on both sides. A new *modus operandi* had to be established.

13 It became clear to those involved at the Jersey end of the Royal Assent process that delays were occurring which would not have been expected when dealing with the Home Office under the old régime. The situation gradually worsened, and it became obvious that for the staff at the London end of the process, dealing with draft laws approved by the States of Jersey was only a minor part of their duties and not always one that was at, or close to, the top of their list of priorities. This was perhaps not surprising as the department had many demands on its time and fewer resources to devote to them.

14 There were also real concerns that some of the UK civil servants did not fully understand the nature of the United Kingdom government's rôle in dealing with the Crown Dependencies; and, without a clear explanation of the position by the Island's officials and politicians, this sometimes diverted the process inappropriately, as the instance of the amendment to the Law Society Law illustrates. An increasing number of queries were often raised with the Law Officers, *via* other government departments, from officials who were evidently unfamiliar with the precise nature of the constitutional relationship and the limited rôle of MoJ in the royal assent process.

15 It also became clear, especially after the financial crisis in 2008 and another change of government in the United Kingdom, that spending cuts there would mean that the meagre resources given to the MoJ, particularly in respect of the Crown Dependencies work, were unlikely to be supplemented and, indeed, would most likely be reduced even further. These difficulties were sometimes made worse by the frequent changes in personnel, especially in the legal advisers' branch, of the MoJ. Fortunately, in recent times, we have seen more stability in this respect.

16 Against this background, the decision of the Justice Committee of the House of Commons in 2009 to investigate the rôle of the MoJ in administering the relationship between the United Kingdom and the

Crown Dependencies was widely welcomed. For Jersey at any rate, the recommendations of the Committee have led, along with certain changes outlined below, to a considerable improvement in the way that the royal assent process is handled.

17 Though it is not perhaps the most significant of its findings, the Committee could see that there was often both unnecessary delay and duplication of effort in the scrutiny of legislation sent for Royal Assent. The Committee set out some findings briefly, in the introduction of its Report⁹ on this process—

“We found that there was duplication of effort in the processes relating to the scrutiny of insular legislation prior to Royal Assent, with several sets of lawyers sometimes reviewing legislation for the same purposes. In addition, we found that Ministry of Justice and other UK government lawyers were not necessarily confining themselves to the constitutional grounds for review and were questioning the form and policy content of insular legislation on other grounds. This is inappropriate, both in terms of a non-essential use of scarce resources and in terms of the constitutional autonomy of the insular legislatures in relation to domestic matters.”

18 The Committee’s detailed conclusions¹⁰ included one recommendation that the Insular Law Officers’ judgment on a new piece of legislation should normally be relied upon by the MoJ, and in relation to complex legislation, scrutiny of the legislation should be carried out expeditiously so as not to frustrate the will of a democratically elected parliament.

19 This was coupled with a call to produce revised protocols for the scrutiny of insular legislation, setting out with clarity, *inter alia*, the constitutional grounds on which insular legislation might be challenged; the responsibilities of ministers and officials at each stage of the scrutiny process, and the appropriate time limits for processing legislation prior to Royal Assent.

20 The UK government’s response¹¹ to this part of the Report was to accept that there could be duplication of effort and to suggest that, if the Island’s Law Officers were to provide a detailed report of their analysis of a draft law and how it might touch upon international or constitutional issues, then the need for such questioning from the MoJ

⁹ HC 56-1, 23 March 2010, p 4.

¹⁰ *Ibid*, p 45, paras 7–11.

¹¹ Government Response to the Justice Select Committee’s Report, Crown Dependencies, November 2010, pp 10–11.

would be substantially reduced. Such questioning could therefore be restricted to specific topics; for example, any laws which are concerned with the constitutional relationship, or which had significant risks of challenge, for instance under human rights legislation (the ECHR), EU law or other international obligations.

21 It was noted that this may require the Law Officers to commit more resources to this process and the MoJ undertook to work with the Crown Dependencies' Law Officers to put an appropriate procedure in place.

22 One of the effects of the recommendations and the UK government's response to those recommendations was, therefore, to increase the significance of the Law Officers' report on a draft law. It was quickly realised in Jersey that this presented the Law Officers with both a challenge and an opportunity. Work began, therefore, soon afterwards, on proposals for a new system for dealing with major items of new legislation, to reduce delays in the process, both in Jersey and with the MoJ, to a minimum.

23 There were considerable resource implications in this new system for the Law Officers' Department, for much of the burden of undertaking the responsibilities of the UK government was being transferred to Jersey. A case was made for the necessary extra manpower to enable the new style of Privy Council Report to be prepared, as well as dealing with some of the structural problems in the legislation process at the Jersey end. The Island's government was receptive and the necessary resources were made available.

24 After discussions with the MoJ on the development of the proposal for a more detailed report by the Law Officers, it was agreed that the "old" Privy Council Report would be replaced by a new Royal Assent Memorandum (RAM). This would give much more detail about the background to new legislation and would give a fuller explanation of the workings of the new law. Most significantly, it would deal specifically and at length with the important questions of ECHR compliance and other international obligations, including any impact on EU law or the constitutional relationship.

25 One by-product of the extra resources and the work required to produce the new style RAM was that it became possible for a much more detailed analysis of the human rights aspects of a draft law to be prepared in a form which could be annexed to a proposition for a draft law (*Projet de Loi*) for the information of States Members. This is something which had been called for by a number of States Members in 2011. A similar practice has been followed with government bills in the United Kingdom Parliament, following a recommendation of the Parliamentary Joint Committee on Human Rights. This new practice

was approved by the Council of Ministers at the end of 2012, introduced for the draft Discrimination (Jersey) Law 201-, and adopted for all *Projets de Loi* lodged since the beginning of 2013.

26 The new process for RAMs has been in place since the end of September 2012 and while relatively few laws of any great length or complexity have since been adopted by the States, the tables in the Schedule illustrate a dramatic difference in the situation before and after the new system. The tables focus on when a law has been adopted and when it has received royal assent but arguably the crucial hurdle for a draft law is when it is cleared by the MoJ legal advisers. The law must then be formally signed off by the Secretary of State or a Junior Minister, and then submitted to the Privy Council Office to be put on the agenda for a forthcoming Privy Council meeting, and this is subject to strict deadlines.

27 Taking the Debt Relief (Developing Countries) (Jersey) Law 2013 as an example, this draft law was given clearance by the MoJ legal advisers a mere nine days after having been adopted by the States, but it was too late for it to proceed to the December Privy Council meeting given the deadlines for submission to the Minister and the Privy Council Office. As there is no Privy Council meeting in January, it had to wait until February to be put on the agenda and ultimately receive royal assent. So whilst for that particular draft law the gap between adoption and sanction was three months, the fact that the MoJ were able to clear it in just over a week was nothing short of remarkable, especially in light of the significant delays for legislation in the past, even if one takes into account the fact that the Debt Relief Law is modelled closely on the United Kingdom's own Debt Relief (Developing Countries) Act 2010.

28 Some of the credit for this reduction in the times for processing laws for Royal Assent must undoubtedly go to the MoJ legal advisers. Following a tremendous effort on the part of the MoJ to clear all the draft laws awaiting Royal Assent by October 2012, the average time for a law to be sanctioned has more than halved to an average of three months and, at the time of writing, for the first time in many years there are currently no Jersey Laws awaiting Privy Council sanction.

29 Within the limitations of the present system, therefore, much has already been achieved to reduce the time it takes to get a Jersey law on to the statute book. But on both sides of the Channel, and in consultation with opposite numbers in the other Crown Dependencies, the search continues for changes and improvements which might reduce yet further the delays in the sanction process or, in some instances, remove the need for Royal Assent altogether.

30 Pressure for such changes is coming from both sides: for Jersey it is mostly driven by the need to be able to enact legislation of all types within the shortest possible delay in order to satisfy the demands of government and the public, and on the MoJ side, it is to find ways to reduce still more the burden of Crown Dependencies' work on an ever decreasing number of personnel.

31 Clearly, there are limits to what can be done within the present system and under the existing constitutional position of dependency. Some aspects of the royal assent process have inherent delays: the Privy Council does not meet during August and September each year, nor in January. Thus, a draft law adopted by the States in late June or July cannot be sanctioned in any event for at least three or four months.

32 Ways are being examined, therefore, to reduce or even eliminate these problems. One of these might be to confer a power to give Royal Assent on the Lieutenant Governor, at least in the case of draft laws which do not touch on the United Kingdom's international responsibilities or affect the constitutional arrangements, although care would be needed to avoid compromising the Governor's political impartiality. A similar system has been used in the Isle of Man since about 1981. Indeed, as regards the aforementioned example of the Debt Relief Law, the Isle of Man's equivalent Act was cleared by the MoJ legal advisers at the same time as the draft Jersey law, and the Isle of Man's Lieutenant Governor was able to assent to the Act almost immediately, whereas Jersey had to wait some three months until the Law received Royal Assent. Other possible changes, such as enabling the States to make purely local or municipal laws without the need for Royal Assent or to expand upon existing powers to make subordinate legislation, which does not require royal assent, are also under examination.¹²

33 The Justice Committee has recently announced that it intends to review progress with implementing its recommendations and it will be receiving submissions from the Crown Dependencies this year as a follow up to the Report in 2010. In the context of Royal Assent, Jersey (and this may be true also of Guernsey and the Isle of Man) will be reporting favourably on this front to the Committee *i.e.* that Her Majesty's inbox is no longer clogged up with a significant backlog of laws relating to such things as the Jersey Football Association, the Law Society of Jersey or "*l'atténuation des peines et . . . la mise en liberté surveillée*"

¹² *E.g.* triennial regulations enacted pursuant to the Code of 1771 and an Order-in-Council of 1889

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SCHEDULE

Laws adopted under the “Old System” and registered in 2012

Law	Adopted by States	Sanctioned by HMiC	Gap
Employment (Amendment No 6) (Jersey) Law 2012	18 January 2011	14 December 2011	11 months
Employment (Amendment No 7) (Jersey) Law 2012	9 June 2011	14 December 2011	6 months
Social Security (Amendment No 20) (Jersey) Law 2012	9 June 2011	14 December 2011	6 months
Repatriation of Prisoners (Jersey) Law 2012	9 June 2011	15 February 2012	8 months
Sex Offenders (Amendment) (Jersey) Law 2012	9 June 2011	30 May 2012	11 months
Control of Housing and Work (Jersey) Law 2012	6 July 2011	17 October 2012	15 months
Register of Names and Addresses (Jersey) Law 2012	6 July 2011	17 October 2012	15 months
Civil Partnership (Jersey) Law 2012	12 July 2011	14 December 2011	5 months
Security Interests (Jersey) Law 2012	19 July 2011	10 July 2012	12 months
Gambling (Jersey) Law 2012	20 July 2011	30 May 2012	10 months
Long-Term Care (Jersey) Law 2012	21 July 2011	10 July 2012	12 months
Sea Fisheries (Amendment No 2) (Jersey) Law 2012	15 September 2011	17 October 2012	13 months
Motor Traffic (Third Party Insurance) (Amendment No 12) (Jersey) Law 2012	2 September 2011	11 April 2012	7 months
The Law Society of Jersey (Amendment No 3) Law 2012	15 September 2011	11 April 2012	7 months
Money Laundering and Weapons Development (Directions) (Jersey) Law 2012	1 November 2011	14 December 2011	1 month
Health Insurance (Amendment No 14) (Jersey) Law 2012	2 November 2011	11 April 2012	5 months

Laws adopted under the “New System”

Law	Adopted by States	Sanctioned by HMiC	Gap
Residential Tenancy (Amendment) (Jersey) Law 2012	11 September 2012	7 November 2012	2 months
Bankruptcy (Amendment) (Jersey) Law 2012 (<i>Désastre</i> No 6)	25 September 2012	21 December 2012	3 months
Banking (Amendment No 8) (Jersey) Law 2012	25 September 2012	21 December 2012	3 months
Health Insurance Fund (Miscellaneous Provisions) (Jersey) Law 2013	8 November 2012	12 February 2013	3 months
Royal Court (Amendment No 13) (Jersey) Law 2012	20 November 2012	21 December 2012	1 month
Debt Relief (Developing Countries) (Jersey) Law 2013	20 November 2012	12 February 2013	3 months
Finance (2013 Budget) (Jersey) Law 2013	5 December 2012	12 February 2013	3 months
Income Tax (Amendment No 41) (Jersey) Law 2013	5 December 2012	12 February 2013	3 months
Goods and Services Tax (Amendment No 4) (Jersey) Law 2013	5 December 2012	12 February 2013	3 months
Income Tax (Amendment No 42) (Jersey) Law 2013	16 January 2013	13 March 2013	2 months
Restriction on Smoking (Amendment No.3) (Jersey) Law 2013	30 April 2013	13 June 2013	1.5 months
<i>Procureurs du Bien Public</i> (Terms of Office) (Jersey) Law 2013	14 May 2013	10 July 2013	2 months
Education (Amendment No.2) (Jersey) Law 2013	4 June 2013	10 July 2013	1 month