15 January 2007

Channel Islands – Constitution of Sark

APPENDIX TO JOINT OPINION

Some further observations

A. There is concern in Sark that laws arising from external sources should not be brought forward for incorporation into Sark law unless specifically requested by Sark. This concern is affected by the tendency in Westminster to confuse, in relation to Sark, the functions or powers of "the Crown" and those (if any) of the UK government. When the UK government acting in the name of the Crown undertakes international obligations of any kind, it may **for itself** undertake obligations in respect of Sark; but it is not the government of Sark; and such obligations are binding on it and not on Sark. To any extent that they are treated as binding on or in Sark, that must be a matter of subsequent acquiescent recognition in Sark; but without making the Queen **as sovereign of Sark** a contracting party to the international treaty creating the obligations. It would, of course, be more appropriate in terms of international law, to adopt different formal procedures in such a case; for example to ensure that the UK government does not undertake any obligation in respect of Sark without having obtained prior express authority – consent or

approval – of Chief Pleas to the particular UK undertaking in respect of Sark.

B. That sort of formality, as between the UK and Sark, has not been part of what may be described as the anomalous ways of Sark law-making and government: anomalous according to what is generally today regarded as consistent with "democratic" accountability.

C. Even after Chief Pleas in Sark has approved some proposal for Sark legislation, it is the Attorney General of Guernsey who submits the *projet du loi* to the DCA and reports whether he considers it to be Human Rights compatible and appropriate for submission to the Privy Council (i.e. for Royal Assent by the Queen as Sovereign of Sark). **Chief Pleas do not have access to that report**; and in terms of proper constitutional accountability that, in our opinion, is unacceptable.

D. The DCA – department of the UK government, and not part of the government of Sark – considers the proposed law: to see (for example) that the proposed Sark law does not involve any breach of the **UK's** international obligations. For this DCA consideration or review of the proposed law, there is no participation or representation by Sark or the Channel Islands; and in terms of proper constitutional accountability that, in our opinion, is unacceptable.

E. The proposed law is then passed to the Privy Council Committee for the Affairs of Jersey and Guernsey. The Committee comprises the Lord Chancellor, a minister in the DCA (currently Harriet Harman) and the Lord President of the Council (but the Lord Chancellor's letter of 7 May 2006 to the Seigneur is some evidence that the Lord Chancellor assumes personal responsibility for what is treated as the Committee's decision). There is no Sark and no Channel Island representation on the Committee; and, in relation to Sark that, in our opinion, is unacceptable.

F. The process does not involve full and proper participation, by voters or by Chief Pleas, in the legislative process for Sark and is not properly compliant with ECHR rules.

G. Where the DCA or Lord Chancellor refuses to recommend the proposed law to the Queen for Royal Assent, that refusal, in our opinion, is constitutionally unacceptable without the concurrence from Sark, i.e. without the concurrence of Chief Pleas.

H. Although Sark is (to an extent) part of the Bailiwick of Guernsey the role of Guernsey and Guernsey officers in the legislative process described above is potentially inconsistent with Sark's constitutional position. Of course there is a certain economy in being able to rely on the expertise of Guernsey's law officers in respect of, for example, money laundering and financial services; but to the extent that this

reliance undermines or risks undermining the proper accountability (via Chief Pleas) of Sark government to the Sark electorate it is constitutionally unacceptable.

I. We have already in the main part of this Opinion expressed our views about the position of the Lord Chancellor in relation to Sark and the mixing of the Seneschal's role as both Judge in Sark's Court of Justice and Chairman or Speaker at meetings of Chief Pleas. In these matters reconsideration and constitutional change and re-definition are urgently desirable if the government of Sark is to be, in our opinion, properly organised and compliant with modern standards, attitudes and usage.

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