

Can Westminster Parliament legislate for Jersey without its consent?

UPDATE

Update prepared by Mathew Cook (Counsel, Jersey)

It is clear that there are strict limits on Westminster's ability to legislate for Jersey without the consent of the Island, in particular in relation to domestic matters (such as tax and financial services regulation). The precise nature of those limits has never been fully tested and determined, and involves over eight-hundred years of constitutional history. However, if the Westminster Parliament sought to legislate for Jersey, Jersey would have strong grounds to challenge such action and any such legislation would be very unlikely to withstand legal scrutiny, as follows.

The History

Jersey is a Crown Dependency and swears allegiance to the British Crown, but it is not part of the United Kingdom and does not have any representation in the British Parliament. Jersey was originally part of the Duchy of Normandy, but in 1204 King John lost Normandy to the French King. The Channel Islands elected to remain loyal to the English Crown, and in return the King confirmed that the Islands could continue to be governed by their own laws and would have separate administration.

This was subsequently confirmed and enhanced in a succession of Royal Charters, which confirmed the chief privileges granted to the Channel Islands as being (a) establishment of a local judicature; (b) exemption of the Islanders to taxation without their consent; and (c) the right of importing into England duty free all articles of the growth, produce and manufacture of the Islands.

As a result, the Island has its own elected legislative assembly, the States of Jersey, which approves legislation framed locally and any adoption of legislation framed international (eg by the United Kingdom or the European Union).

Whilst the question of the right of Westminster Parliament to legislate for Jersey without its consent has never been finally determined, the issue has arisen on past occasions and been written about extensively.

In particular, in the 19th Century, the United Kingdom made a number of attempts to legislate for Jersey without its consent and on each occasion Jersey resisted the legislation on the grounds such action breached Jersey's constitutional rights. On each occasion, a political compromise was reached and so the matter never reached a Court. The Jersey Court has never had to consider the point fully, but in 2011, the Court took the opportunity to note that multiple challenges could be made to an attempt by the United Kingdom to legislate for Jersey without its consent (the point was not fully argued as the States of Jersey consented to the relevant legislation).

The strongest support for the view that the Westminster Parliament has unlimited power to legislate for Jersey regardless of consent comes from the 1973 Royal Commission on the Constitution (the **Kilbrandon Commission**). The Kilbrandon Commission noted that by convention the Westminster Parliament had not legislated for Jersey in domestic matters without consent, but that nevertheless it retained paramount power to do so. This conclusion was cited with approval by the United Kingdom Supreme Court in a 2014 case, albeit in passing only and, for reasons set out below, on a flawed basis.

In practice, the Westminster Parliament has only ever legislated for Jersey (most commonly by Order in Council giving effect to an Act of Parliament extending to Jersey) only with the consent of the States of Jersey.

The Arguments

If the Westminster Parliament sought to legislate for Jersey without consent, Jersey would have a number of arguments to deploy, including:

- (a) The conclusion of the Kilbrandon Commission is fundamentally flawed. It is based largely on a case concerning Southern Rhodesia, which was annexed to the United Kingdom and a Crown Colony. Jersey is neither annexed nor a colony, so its constitutional position is very different;
- (b) Jersey has its own elected legislative assembly, and no representation in Westminster. The passing of legislation by Westminster without the consent of the States of Jersey would therefore be undemocratic;
- (c) In addition to being undemocratic, such action would breach Article 3 of Protocol 1 of the European Convention of Human Rights, namely the right to free expression of the people in the choice of legislature;
- (d) There is a long-standing constitutional convention between the United Kingdom and Jersey whereby Westminster does not legislate for Jersey without its consent, and that convention has arguably crystallised into law;
- (e) Such action would be contrary to Jersey legislation, which requires registration of any act of Westminster Parliament in the Island. The States of Jersey Law 2005 includes this provision and received Royal Assent in the United Kingdom – and so any attempt to legislate directly would clearly be inconsistent.

The View

In recent times the United Kingdom has increased the territorial scope of its legislative powers, in particular in the field of financial crime and harmful tax practices. However, it is clear that there is a limit on its power to do so. When the Westminster Parliament recently sought to introduce public registers of beneficial owners on the British Overseas Territories, it dropped at the last minute equivalent provisions in relation to the Crown Dependencies. It may be the case that Westminster Parliament received advice that it could not pass such legislation for Jersey without its consent. In our view, such advice would clearly be correct. In the past, political solutions have been found to avoid a constitutional crisis, whilst preserving the best interests of the Island, and that modus operandi is most likely to continue.

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