

Jersey & Guernsey Law Review – February 2012**PERMISSIVE EXTENT CLAUSES AND THE
AMENDMENT DIFFICULTY****Jon McLellan**

This short article examines one of the difficulties that can arise on the amending of an Act of Parliament that contains a permissive extent clause in relation to one or both of the Channel Islands.

What is a permissive extent clause?

1 A permissive extent clause is a provision that empowers the Queen in Council to extend some or all of the provisions of an Act of Parliament to one or more Crown Dependencies or Overseas Territories, normally subject to such modifications as may be specified. Section 384(1) of the Armed Forces Act 2006 is a typical example—

“Her Majesty may by Order in Council provide for all or any of the provisions of this Act to extend to any of the Channel Islands with such modifications as may be specified in the Order.”

2 The advantages of such a clause are obvious. It provides for the reasonably straightforward extension of such provisions of the Act of Parliament, subject to such modifications, and at such time, as may be desired. At the same time it respects the constitutional relationship of the Channel Islands and the United Kingdom, so long as the extending Order in Council is not made without close consultation with the authorities of the island concerned, as is now (almost) invariably the case.

The amendment difficulty

3 Say Act A is made and comes into force in 2012. It comprises ten sections, the tenth of which is a permissive extent clause in respect of the Bailiwick of Guernsey.

4 An Order in Council is made in 2013 under s 10, extending the whole Act, with certain modifications, to the Bailiwick.

5 Act B is then made and comes into force in 2014. Amongst other provisions, it amends Act A by amending s 1, repealing s 2, and inserting a new s 3A.

6 Unless Act B extends directly to the Bailiwick, which is extremely unlikely to be the case now, none of the changes made by Act B to Act A will extend to the Bailiwick. That is because what is extended to the Bailiwick is not Act A *per se* but only those provisions of Act A, with the various modifications, set out in the Order in Council made in 2013, and the extended and modified text has not been amended by the passing of Act B. So in the Bailiwick in 2015, in our example, the original version of s 1 and s 2 of Act A will continue to have effect (as modified by the Order in Council), while there will be no s 3A.

7 This means there is a potential double discrepancy between the Act as it applies in the UK and in the Bailiwick: first from differences between what is extended in the Order in Council made under the permissive extent clause and the Act, and second from later amendments made to the UK Act that are not extended. This can be confusing, especially to lawyers moving to the Channel Islands who have practised in another jurisdiction, and it can catch people out; but it is both logical and uncontroversial, and respects the constitutional relationship whereby Parliament should not legislate for the Bailiwick—even by means of an Act amending an Act which has been formally extended—without the consent of the Bailiwick authorities.

8 The more difficult question is this: if Act B does not contain a permissive extent clause, can the amendments made by it to Act A be extended to the Bailiwick in reliance on the permissive extent clause in Act A?

9 The position taken by both Jersey and Guernsey, certainly in recent years, has been no. As Act A, as it applies in the United Kingdom after the commencement of Act B, contains both the amendments made by Act B and the original permissive extent clause at s 10, this requires some explanation.

10 The argument as normally presented is that as a matter both of statutory construction and constitutional propriety, the power to extend the provisions in the amending Act must be in the amending Act; it is not sufficient to say that in the absence of an express contrary intention on the face of the legislation, the permissive extent clause in the original Act is effective in respect of future amendments. This is because of the absence of express *legislative intent*. Without any specific provision, one cannot properly infer an intent on the part of the draftsman and of Parliament¹ that the permissive extent clause

¹ It would be interesting if this issue ever arose in respect of a piece of legislation during the course of whose passage through Parliament this point was raised; where assurances were given by the Minister that Parliamentary

should operate not only in respect of that Act, but also in respect of all and any future amendments. In constitutional terms, this can be cast in terms of an example of the axiom that Parliament cannot bind its successors.

11 Moreover, if the relevant department of HM Government and Parliamentary Counsel had not had the foresight to consider the inclusion of a permissive extent clause when future amending legislation was being prepared and debated, then the position and interests of the Channel Islands would be at grave risk of being overlooked. The principle is thus an indirect reflection of the nature of the constitutional relationship between the Channel Islands and the Crown, which has long required consultation before the provisions of any Act are extended or made susceptible of extension. Article 31 of the States of Jersey Law 2005, which requires the extension of specific legislative provisions by way of Order in Council to be approved by the States before that Order can be registered in the Royal Court, is also of relevance in this context.²

12 There have, not unnaturally, been differences of view in the past on this issue between the United Kingdom authorities and those of both Bailiwicks, but the Channel Islands position is now normally accepted. It is a minor but interesting example (with, on occasion, potentially important consequences) of the special complexities in statutory construction thrown up by the nature of our Islands' relationship with the United Kingdom.

13 This does not mean of course that in the normal course of events an Act such as Act B would never be capable of extension to the Bailiwick; the practice has been that the Bailiwick authorities would usually be asked at an early stage whether or not they wished Act B to include a permissive extent clause or whether the permissive extent clause in Act A should be amended to include the provisions of Act B. But if those simple expedients are overlooked, then the position may indeed be that the Act B amendments would be incapable of extension to the Bailiwick until a further Act of Parliament were enacted to remedy the position.

Counsel had advised that the permissive extent clause would operate in respect of all future amendments; and where on the basis of those assurances, the legislation was passed. Whether what was said in Parliament could ever comprise what the Channel Islands authorities would accept as the requisite legislative intent is a moot point.

² For an interesting discussion of that provision and related constitutional issues, see "Miscellany: Terrorist asset freezing and the evolving constitutional relationship", [2011] J&GLR 125.

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PERMISSIVE EXTENT CLAUSES

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