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28<sup>th</sup> October 2010

### **Consultation on the European Union (Amendment) Bill**

Dear Ms Shimmin,

I am not opposed to the present Protocol 3 agreement that the Isle of Man has with the European Union (EU). However, I would be opposed to any move towards a closer relationship with the EU and do not believe that the consultation has provided a compelling case for this legislation.

I understand that what this proposed legislation principally wants to achieve is a streamlining of the process of Ambulatory References particularly where they are required to amend existing EU legislation. However, the principal inconvenience of the present arrangements that is cited is that *'every time there was even a small amendment a new order would have to be made by the Council of Ministers and submitted to Tynwald for approval.'*

It does not seem to me that the processing of Orders amending EU legislation is a legislative burden for Tynwald. Furthermore, it does afford the public the opportunity to closely monitor EU legislation in fine detail.

Additionally it is stated that *'It is considered to be desirable to amend Manx primary legislation so as to be able to continue to use ambulatory references and also to confirm the legal validity of existing public documents that contain ambulatory references, which might otherwise be open to challenge.'* That in itself, is a very vague justification for introducing new legislation. If it is actually the case that existing ambulatory references are not legally valid then I would have expected the consultation to specifically prove that point with reference to actual legislation. What is being offered as justification appears as an unsubstantiated point of view.

I am concerned that formalising Ambulatory References comes with the risk of the unintended consequence that the EU or the UK might use this constitutional device to pressure the Isle of Man into accepting legislation that extends beyond the Protocol 3 agreement.

The consultation states that:

#### **"Ambulatory references"**

*1.5 In addition to purely implementing the Island's obligations under Protocol 3, the 1973 Act allows the Council of Ministers to make an order, with the approval of Tynwald, to implement EU legislation which may not be applicable under Protocol 3 in the Island. **This is done where it is considered to be beneficial for the Island to do so, for example to allow the Island to comply with EU sanctions measures.***

*1.6 When an order is made to apply an EU Directive, Regulation or Decision, the order may set out such exceptions, adaptations and modifications to the EU instrument as are considered to be*

*necessary or appropriate. One such modification that has often been used has been to refer to the EU legislation, or part of it, as amended from time to time. In legal terms this is known as an "ambulatory reference". This type of modification is particularly useful where, for example, an annex to an EU sanctions Regulation listing persons or bodies which are subject to sanctions measures is amended on a frequent basis.*

I note that the UK power to use Ambulatory References was derived from the Legislative and Regulatory Reform Act 2006. Liberty <sup>(1)</sup> described the original legislative proposal for this Bill as having 'a sweeping' power to use fast track order making powers to amend, repeal or replace any legislation for any purpose'. Although this Act was amended to make it more palatable it's original remit was the widespread amendment of legislation with reduced Parliamentary scrutiny.

I am therefore concerned that this original remit of fast tracking legislation is, in part, being imported into the Isle of Man. Specifically it is stated that the new powers for 'Ambulatory References' will be used when it is 'considered to be beneficial for the Island to do so' by the Council of Ministers. It is considered, incorrectly in my view, that 'the provisions of the Bill are compatible with the Convention rights within the meaning of the Human Rights Act 2001'. This is because the Council of Ministers are seeking an unlimited power to implement EU legislation. The phrase 'considered to be beneficial' allows the Council of Ministers to use Ambulatory References other than for legislation applicable the Protocol 3 agreement. As such, there is no protection for the public from the introduction of EU laws that might be inappropriate locally and might contravene the Human Rights Act and would more normally require the legislative scrutiny of local primary and secondary legislation.

In 2008 the Chief Minister told Tynwald that 'the formal legal and direct relationship would remain unchanged if the Lisbon Treaty is ratified.' and in 2009 the Attorney General <sup>(3)</sup> told Tynwald that: 'the Isle of Man is not part of the European Union and there are no plans for that status to change' and 'The relationship which the Isle of Man has with what is, in essence, an international treaty, is that the Isle of Man would be consulted very carefully, I am quite certain, by the United Kingdom if there were to be a proposed change in the status of the Isle of Man vis-à-vis the EU'.

The Attorney General was clearly indicating that any proposed change to the Isle of Man's EU status would only happen after consultation with the UK. However, as regards this proposed EU Amendment Bill it is merely stated that 'the power to use ambulatory references without a specific enabling power in the primary legislation has been questioned by the Attorney General's Chambers, which advised that their use should be placed on a formal statutory footing'. No evidence from the UK has been offered in the consultation to justify this legislation. This seems to indicate that the required level of consultation with the UK has not in fact taken place.

Allowing the Council of Ministers to introduce any EU legislation when they consider it 'beneficial for the Island' would effectively create a direct path to EU legislation. This might actually create a situation where the EU, or the UK acting on behalf of the EU, uses this conduit to pressure the Isle of Man to introduce legislation to satisfy the requirements of other jurisdictions. It is becoming well understood, for example, that the the offshore finance sector is under increasing pressure internationally.

The Attorney General previously told Tynwald <sup>(3)</sup> that:

*'there has been no suggestion, either at United Kingdom or European level, that our ability to fix our own laws in relation to taxation and rates of taxation will be prejudiced in any way. That is an area which is reserved to us as a matter of internal, domestic law and if that were to be altered or an attempt were made to alter it against our will, then of course that would produce a very real constitutional issue.'*

However I would like to draw attention to these comments in the 'International Adviser' <sup>(4)</sup> about the Alternative Investment Fund Managers (AIFM) directive 'which would establish how funds based outside of the EU may be marketed to investors within it – and under what circumstances investors inside the bloc may buy funds domiciled outside it.'

Please note these concerns expressed in the article:

*'The UK, which is home to around 8 in 10 of Europe's hedge funds, has consistently expressed concerns about the AIFM directive, in part because the third country rules could affect the large percentage of these which make use of non-EU jurisdictions, such as the Cayman Islands, Jersey, Guernsey and the Isle of Man.'*

These types of financial regulations are precisely those which the Isle of Man's financial sector might find itself under pressure from if the situation is not watched very carefully indeed. I would not be certain that this EU Amendment Bill would not enable the EU or UK authorities to pressure the Isle of Man to adopt financial legislation that would incrementally harm our core industry sector.

The consultation outlines three options for this legislation. I offer the following comments:

#### Option 1.

I consider that the threat to the Isle of Man from Ambulatory References possibly not being legally valid is probably not that great. As has been indicated the impetus for this Bill comes from the Attorney General and was not supported by consultation with the UK. The absence of any supporting documentary evidence of UK concerns suggests that the UK is not overly concerned about Ambulatory References.

#### Option 2

No evidence is offered to state why the Isle of Man needs to formalise its EU relationship as a result of the Lisbon Treaty and no evidence has been offered to suggest that the Protocol 3 agreement is under threat. I would not, therefore, consider that this option is necessary.

#### Option 3

I think this option definitely carries the risk of function creep regarding powers from Brussels. The Isle of Man should look to protect its offshore finance industry at all costs. No other industry sector has emerged that may offer the Island any form of financial security. At all costs the Island's offshore regulation must be ring-fenced from any encroachment of EU regulation.

Whichever option is decided upon I would argue that, to protect the Isle of Man from harmful EU legislation, the proposed scope of Ambulatory References is clearly stated in the legislation. I.e. they should only be used for introducing Protocol 3 legislation and EU sanctions and no more than that. If the scope of Ambulatory References is not amended then I do not see how creating an unlimited power can be considered as being compatible with the Human Rights Act.

Yours sincerely,

Tristram C. Llewellyn Jones

#### References:

- (1) Legislative and Regulatory Reform Act 2006, Briefing for the second reading in the House of Lords, Liberty, 2006
- (2) Tynwald Proceedings, 16 July 2008, 1230 T125
- (3) Tynwald Proceedings, 14 July 2009, Line 2005
- (4) 'AIFM directive now gets nod from EU finance ministers', International Adviser, Helen Burggraf, 18 May 2010  
<http://www.international-adviser.com/article/aifm-directive-now-gets-nod-from-eu-finance-ministers>

