

## **Council of Ministers (Amendment) Bill**

### INDEPENDENCE OF THE JUDICIARY

The constitution of the Isle of Man, the Island's legal system and the system of courts has evolved over many years<sup>1</sup>. As the autonomy of the Island, and with it its constitution, has developed it has increasingly been accepted that the roles of the executive and legislature<sup>2</sup> and of the judiciary are separate and yet integral to the functioning of a democratic state and the preservation of our special way of life on the Island.

Whilst the Island has no written constitution, like many other jurisdictions, certain things have been accepted as real and important and these become, over time, accepted conventions by which those in public life govern themselves. It is important to all of us, for example, that the Constabulary and the Attorney General's Chambers carry out their respective roles subject<sup>3</sup> to the laws as enacted from time to time by the Branches of Tynwald.

In the context of wider criminal justice reform, which is addressing a number of aspects of our criminal justice system, it is considered appropriate, at this time, to place the convention of the independence of the judiciary (from influence by the executive) on a statutory footing.

This Bill places a duty on individual Ministers and on the Council of Ministers collectively to uphold the rule of law and defend the independence of the judiciary. In the following paragraphs the duties as set out in the Bill are explained in a little more detail.

Clauses 1 and 2 deal with the short title of the Bill and provide that the Act will come into operation on the first of the month after the sitting of Tynwald at which Royal Assent to the Bill is announced.

Clause 3 contains the amendments to be inserted after section 6 into the Council of Ministers Act 1990, which have the effect of placing a statutory responsibility on the Council of Ministers, and individual members of Council, to uphold and support the constitutional principle of the rule of law [new section 6A] and guarantee continued judicial independence [new section 2B].

Ministers are in positions of responsibility and are able and indeed expected to contribute to debates and discussions about various matters. Where the dignity etc of the judicial office is called into question or members of the judiciary are criticised for the decisions they make in the performance of their judicial functions, it is important Ministers ensure the independence of the judiciary is defended, respected and considered both in the public arena and in any decision making process with civil and public servants.

Paragraph (b) of the new section 6B(4) affirms that the Council of Ministers must bear in mind ("have regard to") the need for the judiciary to have the support necessary for them to perform their functions. Equally all services provided, including functions essential to the well-being of our community, such as justice, must be funded with regard to efficiency, effectiveness and the reality of the current financial climate. Funding of court and judicial services already forms part of the annual governmental budgeting process. This provision merely states in law what has been done for years by way of convention.

The need for the public interest to be properly represented in decisions affecting the administration of justice or otherwise relating to the judiciary is important. It is in the public

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<sup>1</sup>Government and Law in the Isle of Man by Mark Solly, Parallel Books, 1994 is a useful resource in terms of general background. Chapter XVII describes the Island's legal system.

<sup>2</sup>The executive (Council of Ministers) and the legislature are, in effect, fused in that the executive is drawn from the legislature within which its Members sit.

<sup>3</sup>Whilst the Police Act 1993 places certain duties on the Department of Home Affairs in relation to the Isle of Man Constabulary, section 3 of the Act gives to the Chief Constable the functions of directing and controlling the police force. In this manner the police are operationally independent of the Department.

interest for the needs and concerns of the judiciary to be taken into account when making decisions that affect, or that might have the potential to affect, them. This is particularly so when making changes to legislation dealing with criminal law or civil matters as they relate to functions the courts are directly involved in to ensure the interests of justice are always preserved. This is a complex area as whilst it is important for everyone to be clear so there is no question of the judiciary being influenced in their judicial decision-making there must also be avenues for dialogue. If there were not, or are not, avenues for dialogue how might it be possible otherwise for legislative changes or administrative matters that affect the judiciary to be correctly framed and the views of the judiciary given due weight?

In relation to proposed new section 6A the “constitutional principle of the rule of law”<sup>4</sup> is not defined by the United Kingdom through its Constitutional Reform Act 2005 (2005 Act). Instead, in the absence of a written constitution setting out the principle, the 2005 Act is framed on the basis of established convention and has the effect of placing that convention in statute. New section 6A places the responsibility on the Council of Ministers. The new section has been drafted in such a manner as to make it clear the Council of Ministers has a pivotal role in upholding and supporting the constitutional principle of the rule of law, which is to be taken as always having been one of its functions notwithstanding the lack of a previous legal requirement. Clearly, individual Ministers will be expected to continue to observe that principle in the exercise of their functions as Ministers with responsibility for particular Departments and as members of sub-committees of Council.

Proposed new section 6B places specific responsibility on Council to uphold the continued independence<sup>5</sup> of the judiciary. The title of the new subsection indicates that the independence of the judiciary is not only a continuing principle but is one to be guaranteed with statutory duties placed upon the executive.

Whilst neither this Bill nor any other piece of legislation defines what “independence” means, subsections (3) and (4) set out duties that are imposed in order to uphold that independence.

Firstly, the Chief Minister and other Ministers are prohibited from seeking to influence judicial decisions through any special access to the judiciary. This applies not only individually whether acting on their own or on behalf of their Department but also when meeting collectively as the Council of Ministers. Of course, this is not to say that the Chief Minister and/or members of the Council of Ministers may not meet, speak, or correspond with members of the judiciary (or vice versa) as we are all part of one community. It is just that contact must be done in an environment of respect for each other’s different roles and is clear at all times that specific judicial cases or decisions may not and must not be discussed.

Secondly, as brought out in subsection (4), every Minister must defend that independence; ensure the judiciary have sufficient support to enable them to carry out their functions, and consider the public interest when decisions are being made that affect either the administration of justice in general or the judiciary in particular.

Lastly, subsection (5) defines what is meant by “the judiciary” so it not only includes the criminal and civil courts and courts of appeal but also members of the various tribunals established under the Tribunals Act 2006 and any other court or tribunal established under the law of the Island (e.g. Independent Adjudicators established through custody rules made

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<sup>4</sup>For summaries on the principle of the rule of law, see Chapter 3 and particularly pages 61 to 64 (Dicey and the Rule of Law) and 67 and 68 (Bingham and the Rule of Law) Constitutional and Administrative law, Eleventh Edition, by Hilaire Barnett [2016].

<sup>5</sup><https://academic.oup.com/icon/article/5/1/153/722475> (c) Diana Woodhouse, 'The Constitutional Reform Act 2005—defending judicial independence the English way', 5 International Journal of Constitutional Law (2007) 153–165. The Department is grateful to Diana Woodhouse, Emeritus Professor, Oxford Brookes University, for permission to publish her article. Whilst the article is discussing the matter in relation to the Constitutional Reform Act 2005 (of Parliament) the principles of judicial independence in a democratic country with an unwritten constitution apply equally in the context of the Isle of Man.

under the Custody Act 1995). This definition ensures that a wide range of matters are covered by the statutory guarantee of continued independence from the executive and appropriate support to enable them to carry out their functions.

#### **QUESTION 1**

Do you wish to make any comment on the proposal to enshrine the principle of independence of the judiciary into statute?

#### **QUESTION 2**

The draft legislation is based on the UK Constitutional Reform Act 2005, and the Department considers it to be important to retain the principles set out in new sections 6A and 6B. Nevertheless your views would be appreciated as to the definition of “the judiciary” in subsection (5) of proposed new section 6B.

Paragraph (a) specifies the High Court and covers all the persons one would expect such as Deemsters, the High Bailiff and Deputy High Bailiff and Justices of the Peace.

Paragraph (b) covers those persons appointed to various tribunals or other adjudicating bodies under the Tribunals Act 2006 or other legislation (such as Independent Adjudicators through Custody Rules made under the Custody Act 1995).

Do you think these definitions cover all those persons or bodies whose work is of a judicial character? If not, how do you think the definition should be amended or expanded?