

STATES OF JERSEY



IMMIGRATION ACTS CONSOLIDATION AND EXTENSION TO JERSEY BY ORDER IN COUNCIL (P.44/2021): COMMENTS

Presented to the States on 25th June 2021
by the Children, Education and Home Affairs Scrutiny Panel
Earliest date for debate: 29th June 2021

STATES GREFFE

COMMENTS

P.44/2021 Immigration Acts Consolidation and Extension to Jersey by Order in Council (hereafter P.44/2021) was lodged by the Chief Minister on 12th May 2021 and is due for debate by the States Assembly on 29th June 2021. It should be noted that the proposition, whilst being lodged by the Chief Minister, relates to the work of the Minister for Home Affairs. Given the complex nature of the proposition, the Children, Education and Home Affairs Scrutiny Panel (hereafter ‘the Panel’) received two briefings in order to understand both the proposed consolidation and the details of any changes that would be implemented, should the States Assembly adopt it.

It is important to note that, following these briefings, the Panel is satisfied with the rationale of P.44/2021. However, given the complexity of the legislation, it was deemed appropriate for comments to be produced to outline the areas of questioning the Panel undertook during the two briefings on the consolidation. As such, the following comments outline the key points discussed by the Panel during the briefings that took place on 28th April and 24th May 2021 for consideration by States Members ahead of the debate.

First Briefing – Wednesday 28th April 2021.

The Panel was provided with an overview of P.44/2021 and it was explained that the draft proposition would replace P.119/2020. This had been lodged on 22nd Sept 2020 and subsequently withdrawn due to feedback from the Panel that consideration of the consolidation would be best addressed without specific changes that were time-bound by Brexit. The Panel notes that P.119/2020 had been replaced with P.140/2020, which had been passed by the States Assembly and had addressed only the urgent immigration reforms that were required by 31 December 2020 as a result of Brexit.

The rationale for P.44/2021 is a result of the continual development and change of the United Kingdom’s (UK) immigration legislation, and the consolidation is intended to provide a solid foundation for future work. It is important to clarify that housing and immigration are two different aspects, and therefore separate policies cover these areas: namely, the housing policy and the migration policy.

Purpose of the proposition

It was explained to the Panel that P.44/2021 is the culmination of several years of work by the Jersey Customs and Immigration Department and the Law Officers’ Department. The consolidation of some of the Immigration Acts has already been achieved in part by a recent Order in Council (approved by the States Assembly under Article 31 of the States of Jersey Law 2005), but that P.44/2021 would bring the consolidation process to completion. It was explained to the Panel that the Order would provide an up-to-date statutory framework, within which the rules for Jersey’s immigration system would be accessible to the public and that the border could be managed effectively with Common Travel Area (CTA) partners.

The Panel asked for an explanation of P.44/2021 in the broader context of Jersey’s legislation, noting that it would require changes to UK legislation that would require Jersey legislation to be suitably amended. It was explained that P.44/2021 would be equivalent to primary legislation when compared to Jersey Laws. It was also explained that, within the modified UK acts, powers existed to make regulations in the States

Assembly. It was also highlighted that, to date, primary legislation was not easily accessible to the public and that the consolidation would enable accessibility.

It was explained during the briefing that the Immigration Act 1971 is the principal UK immigration statute and provides effect to the Common Travel Area (CTA). It is noted that the provisions of the 1971 Act and subsequent UK Acts have effect in Jersey through extension by Order in Council (OiC). Additionally, UK Acts are modified when they are extended and the OiC and must be approved under Article 31 of the States of Jersey Law 2005. It was explained by officers that the 1971 Act was extended by the [Immigration \(Jersey\) Order 1972](#), which was replaced by the [Immigration \(Jersey\) Order 1993m](#) which re-extended the 1971 Act and other Acts. Subsequent OiCs had extended UK Acts individually when required. The UK and Irish governments had signed a [Memorandum of Understanding \(MoU\) in May 2019](#) reaffirming their commitment to the CTA.

Regarding the purpose for the consolidation, the following reasons were provided to the Panel:

- To replace the Immigration (Jersey) Order 1993, and the subsequent OiC extending the Immigration Acts with a single OiC in consolidated form;
- To extend in appropriately modified form such provisions of the Immigration Acts as would require extension to ensure Jersey's legislation was up to date; and
- To change the way in which the Immigration Acts, as extended, were presented in the consolidated OiC so that the content was more accessible to the public.

Regarding the powers that would be exercised under the Immigration Acts, it was explained that in the UK, most powers under the Immigration Acts were exercised by the Home Secretary. In Jersey, the [Immigration \(Jersey\) \(Amendment\) Order 2017](#) transferred most of the powers of the Lieutenant Governor in relation to immigration to the Minister for Home Affairs, who, since November 2017, has exercised broadly the same immigration powers in Jersey as the Secretary of State exercises in the UK. It is noted that the Jersey equivalent of the United Kingdom Immigration Rules are already made by the Minister for Home Affairs, but that the OiC would change the procedure to ensure accountability.

Areas questioned by the Panel

Common Travel Area

Historically, the extension of the Immigration legislation from the UK to Jersey has been as a result of the CTA. If people are able to enter Jersey then they would be able to travel through the CTA and, although Jersey is not obliged to follow each provision, it is required to ensure that the appropriate provisions are in place because entry granted to Jersey would impact the rest of the CTA. It was emphasised to the Panel that a level of commonality needs to exist between the jurisdictions that belong to the CTA, but that provision is not dictated to Jersey. It was explained that a jurisdiction could be removed from the CTA if it was out of kilter with the other jurisdictions. The Panel questioned, as a result, whether the UK had control over Jersey in that regard. It was explained that each jurisdiction could form its own policies, but consideration for the shared CTA is greatly important.

With reference to the Section within the legislation that referred to the ability for the Minister for Home Affairs to make an Order to exclude Guernsey or the Isle of Man from the CTA, the Panel asked why that was required. It was explained that the UK had the ability to exclude jurisdictions, but Jersey did not have that power, and therefore by including that aspect, Jersey would also have the power to exclude jurisdictions from the CTA if deemed appropriate.

Children and Children's Rights

It is noted that the OiC would provide additional protection for children. The extension of Section 54A of the Borders, Citizenship and Immigration Act 2009 would provide the States Assembly with the power to make Regulations providing for an Independent Family Returns Panel to advise on the promotion of the welfare of children where a family may be returned to another jurisdiction. Section 55 of the 2009 Act is extended to impose a duty on the Minister for Home Affairs to ensure that functions in relation to immigration, asylum or nationality are carried out, having regard to the need to safeguard and promote the welfare of children in Jersey. It was emphasised to the Panel that these are important developments to ensure that Jersey provides similar statutory safeguards for the rights of children.

Regarding the parts of the legislation that would impact children, the Panel asked for a comparative explanation, in simple terms, of what the legislation comprised of currently and what the legislation was hoping to achieve through the changes being brought by the draft proposition.

The Legal Adviser explained to the Panel that the current primary legislation does not require the Minister to express obligation to consider the rights of the child. He explained that in some circumstances a parent may come to Jersey on a work permit and if their immigration status had expired whilst living in Jersey, they may be required to return to another country, which could result in the child having to leave Jersey. It was explained that the amendment to the legislation would enable the States Assembly to establish a panel to consider the family's situation in a child-centric approach and that it would allow the decision to be considered in the interest of the child's rights. It is noted that the legislation would provide the Assembly with the ability to take that process forward within secondary regulations. It is also noted that similar panels were already being utilised regarding decisions for children in care.

Noting paragraph 17 in the accompanying report to P.44/2021, the Panel asked if the duty regarding the welfare of children was a result of Jersey's commitment to the United Nations Convention on the Rights of the Child (UNCRC). It was explained that it was and that the UK was also demonstrating this aspect.

Regarding the aspects in the legislation for improving the safeguards for children's rights, the Panel asked how the legislation would impact a family entering the Island with children. The Panel was informed that a response plan existed should a situation materialise, and that the appropriate services would be involved to safeguard the children and the situation would be carefully handled. It was highlighted that the aim would be to keep the family as a unit and to not separate the children from the parents. However, it would need to be ascertained that the family was actually a family unit in order to do so. It was explained that Jersey would look to return the whole family to the safety of the country that it had arrived from.

The Panel asked what approach would be taken to establish whether the children were actually part of the family unit that arrived in Jersey. It was noted that the migrant response plan would be followed, and the appropriate agencies, such as Children's Services, would be involved. It was highlighted that the individuals would not be incarcerated, however, Jersey would look to establish the identity of the individuals with the assistance from the UK. and would take advice from Children's Services regarding what would be best for the children.

The Panel asked whether Jersey would be entitled to obtain DNA samples from the family members to establish their identities. It was explained that, although there would be a possibility to obtain DNA or evidence on landing, that legal advice would be sought regarding this aspect should a situation materialise.

Asylum and Refugees

It is noted that the OiC would provide protection for refugees and warrants. The Asylum and Immigration Appeals Act 1993 as extended would provide that nothing in the Immigration Rules made by the Minister for Home Affairs could lay down any practice that would be contrary to the Refugee Convention. In addition, the 1971 Act, s.28AA, s.28B, s.28C and s.28D, enable the Bailiff to grant arrest and search warrants for various specific purposes. The Bailiff may similarly grant warrants for specific purposes under other provisions of those Acts in their draft extended form. It was explained that Section 33 of the 1971 Act clarified that a Jurat may also issue any of the warrants under the Immigration Acts, as extended.

As a result of Brexit, the Panel asked what the process would be for returning people who attempted to seek political asylum in Jersey to their country of origin, and asked whether a person would be granted asylum in Jersey if Jersey was the first country in which entry was gained. The Panel was informed that the arrangement to date had been for Jersey to collaborate with France, and that collaborations had been quick and informal. However, as a result of Brexit, it is not clear whether that position would remain and whether France would be inclined to continue that approach. It is noted that if a person landed illegally in Jersey, Jersey would pursue the option of returning the person to France, and that Jersey could also liaise with the UK Asylums Unit to facilitate the return. The Panel was informed that the UK approach would take much longer to facilitate than the alternative of collaboration with France.

Newly extended provisions within the OiC

The Panel was informed during the briefing of other amended or newly extended provisions of the UK acts. It was noted that the 1971 Act is mostly re-extended by the OiC, but subject to additional provisions that include those relating to interpretation, the issue of work permits, deprivation of the right of abode, and the content of offences for assisting illegal entry or falsifying documents. It is noted that, to make Immigration Rules in Section 3 of the 1971 Act, the Minister is required to present the Rules, or amendments to the Rules, to the States Assembly by way of a statement, and if the Assembly rejects the amendments, then the Minister would be required to make the changes required and provide a statement of those changes to the Assembly. The Panel was informed that the Immigration and Asylum Act 1999 was mostly re-extended, but was subject to additional provisions relating to the following:

- Section 10 of the Act which is extended as substituted by the Immigration Act 2014 introduces a single power to remove a person who required leave to enter or remain but does not have it.
- The extension of Section 24 and 24A would require the Superintendent Registrar to report to the Minister where there are grounds for suspecting that an intended marriage or civil partnership would be a sham.
- Impose new safeguards on powers to impose financial penalties on persons who carry clandestine entrants to Jersey.
- Additional charges could be imposed on carriers who brought a person to Jersey without the proper identity and travel documents.

Children's Rights Impact Assessments

The Panel questioned whether a Children Rights Impact Assessment (CRIA) had been undertaken as part of the drafting process of the draft proposition. The Legal Adviser advised that a CRIA had not been undertaken initially and the Panel highlighted that undertaking a CRIA would be beneficial to the process as it would consider the impact of the legislation on children. The Legal Adviser noted that the Law Officers' Department would liaise with the Children's Commissioner in that regard and would consider how a CRIA could be undertaken. It is noted that the Panel's comments regarding CRIAs that had been made at this briefing had been taken on board by the Law Officers' Department and that the intention is for a CRIA to be undertaken prior to the debate of the proposition.

Settled Status Scheme

In respect of the Settled Status Scheme, the Panel raised concern regarding the documentation that would be required to demonstrate a legal right to enter Jersey. It was explained that the consolidation would not impact the Settled Status Scheme, and that the carrier liability referenced within the legislation already existed in several countries. It was explained that it aimed to ensure that carriers made the necessary checks when people travelled with them.

The Panel asked whether people who had acquired settled status in Jersey would need to carry proof of that when they travelled. The Head of Service for Customs and Immigration explained that, in terms of the carrier liability, historically there had been a negligent approach in relation to the checking of documents at departure. He explained that the legislation would address areas where it was demonstrated that the necessary checks and processes had not been undertaken appropriately. Regarding settled status, he explained that each case would be considered on its own merits and that the compliance mechanism regarding settled status would be undertaken on arrival at Jersey and not at departure from another country. The Legal Adviser highlighted that as long as an application for settled status had been made, regardless of whether it had been processed, individuals should not have any issues.

The Panel questioned how the settled status scheme would fit into the aspect of proper documentation that was referenced within the legislation. It was explained that the compliance obligation remained Jersey's responsibility and not that of the carrier.

The Panel also asked whether a settled status document would need to be checked by the carrier. It was noted that it would not, and that Jersey's Customs and Immigration Department would be responsible for that process. The Head of Service for Customs

and Immigration highlighted that its department had a good relationship with the carrier and anticipated that any potential issues would be quickly resolved, should they arise.

Work Permits

The Panel questioned whether the legislation would make a difference in a situation where a family relied upon one of the parent's work permit to live in Jersey and the family were to break down. It noted that in such a situation, the children and parent without the licence could be required to leave Jersey. It was explained that the decision in such a case would be made under the Control of Housing and Work Law as the permission to remain in Jersey would be attached to a person's work. It was noted that when families break down this is an issue as the licence is relied upon. It was highlighted that a welfare-based decision could be made in such cases, but that would be separate from the immigration legislation. Having coordination between the two systems was highlighted as important to achieve this.

It is noted that under work permit controls women would not be discriminated against if they were being subjected to domestic violence.

Regarding work permits under s.1(5), the Panel notes that the wording has been changed to include the word Order instead of the word Rules and questioned why a change in language had been required. It was explained that the wording had been altered to create a stronger control through creating a work permit Order. It is noted that an Order could be subject to annulment and that an additional change has been made that would require the Minister for Home Affairs to consult with the Chief Minister when an Order is made. It was explained that an overlap exists between the immigration system and the control of housing and work system, and that this change is therefore required.

Concern over changes

The Panel raised concern that the consolidation of the legislation would remove a level of flexibility that was available within the current system. The Legal Advisor did not believe this would be a risk and explained that the consolidation would provide new ways of working.

It is noted that, although Jersey adheres to the principles of the CTA, it has autonomy and control regarding who lives and works in Jersey.

Controversial aspects to consider

The Panel asked whether any controversial aspects were included within the legislation. It was explained that people may raise concern regarding the warrants and changes in powers to make warrants. It is noted that the UK has created a hostile environment when including powers to search for evidence to determine whether a person is legally residing within the country. However, it was highlighted that the hostile environment aspect is not being extended to Jersey's legislation. It is noted that the Minister for Home Affairs had made a deliberate decision not to extend those parts of the UK legislation to the OiC.

The Panel asked whether a Minister, who wanted to create a hostile environment, would be able to under the legislation. It was explained that this would not be possible and

that it could only be achieved through the States Assembly approving domestic legislation.

Second Briefing – 24th May 2021

Visa Requirements

The Panel raised concern regarding Jersey's position once the UK Acts were extended to Jersey and, also, questioned how the British visa requirements would align with Jersey's Laws and the impact thereof.

The Legal Advisor recalled that Jersey had two separate systems in respect of immigration, namely, Immigration Legislation and the Control of Housing and Work Regulations. It was emphasised that P.44/2021 would consider whether a person was lawfully residing in Jersey. It is noted that this would be brought into effect by extending the UKs legislation by OiC. Moreover, in doing so, Jersey would be able to consolidate the various Immigration Acts that would extend the UK legislation to Jersey, and it provided an opportunity for Jersey to ensure that its legislation was more transparent and easier to understand.

Impact of Brexit on P.44/2021

The Panel noted that the extension of the UK Immigration Acts to Jersey had not been undertaken in the context of Brexit previously, and raised concern that Jersey could potentially extend additional UK legislation as a result of that. The Panel asked whether extending the UK legislation to Jersey presently would be different as a result of Brexit, and, if so, how that would impact Jersey.

It was explained that it would not be different as a result of Brexit and that Jersey, prior to Brexit, had already been closely aligned to the UK and that aspect remains unchanged. Although the right to freedom of movement has been removed as a consequence of Brexit, Jersey has a choice regarding how it would extend the UKs Immigration legislation. It was explained that Jersey has adapted the extension of the OiC according to what is appropriate for Jersey. It was emphasised that certain provisions have not been extended to Jersey including the provision which created the hostile environment rules as it was the then Minister for Home Affairs' view that the provision was not required by Jersey. However, if in the future, that view would change, such provision could be brought domestically by Jersey. It was emphasised that, as a result of the proposition, Jersey will not be more rigidly aligned with the UK because it already has the ability to deviate from the UK in accordance with its own requirements.

The Panel asked what impact the OiC would have regarding people travelling between Jersey and France. The Legal Advisor explained that the changes resultant from Brexit had already come into force the year prior and that the OiC would not change that position regarding EU Nationals. He emphasised that the position of EU Nationals would be unaffected by the OiC and explained that, as a result of Brexit, EU citizens are required to apply to the settled status scheme to acquire indefinite leave to remain in Jersey after 1st January 2021. Those without indefinite leave to remain would require a work visa, but that the OiC would not impact that.

The Head of Service for the Department for Customs and Immigration explained that the department is in regular correspondence with the policy team in the UK's Home

Office regarding the CTA and provided the Panel with some examples of how Jersey would do things differently to the UK, such as Jersey's work permit system that accommodated frameworks to meet Jersey's industry requirements, including for the Agricultural and Hospitality sectors. He emphasised that Jersey would not want to pose any threat to the UK because it was aligned with the UK and shared the CTA. It is important to note that, with regard to travel between Jersey and France, only a passport would be required and that the position would remain unchanged.

The Panel asked how the British visa regulations would work with regards to Jersey in respect of a person coming to work in Jersey but travelling through the UK. The Head of Service for the Customs and Immigration Service explained that the department would liaise with the person, and if the visa was granted it would be granted by Jersey. However, he noted that the first point of entry would be the UK. The Panel questioned whether that process had always been the case or if the OiC had brought any changes in that regard. It was noted that nothing would change regarding that process as a result of the OiC.

Transfer of immigration powers from Lieutenant Governor to Minister for Home Affairs

The Panel asked what the impact would be as a result of the powers in all immigration matters being transferred from the Lieutenant-Governor to the Minister for Home Affairs as outlined in the proposition. The Senior Legal Advisor explained that the changes in that regard had been made in 2017 and through the consolidation the changes would be transferred to statute. It is noted that it would not result in any additional or new changes.

UK Crime and Justice Bill

The Panel asked how the UK Crime and Justice Bill fitted into the consolidation. The Legal Advisor noted that it was a technical point and that some Acts of Parliament are consequential to UK Immigration Acts. It was explained that, on occasion, Jersey reextended existing Acts and noted that Jersey has a choice as to which Acts it extended. The Panel asked what parts of the Crime and Justice Bill would be extended to Jersey, if any. It was explained that the objective of report accompanying the proposition was to demonstrate new changes (newly extended) and their impacts and not to outline the Acts that had been reextended. It was explained that Jersey was technically extending the UK's Immigrations Act 1971 in its current form. The Panel notes that, from page 21 of the report attached to the Proposition, all the newly extended Acts are listed and this is not intended as one of them.

Presentation of Immigration Rules to the States Assembly

The Panel asked what the process entailed for presenting the Immigration Rules to the States Assembly by way of a Statement. The Senior Legal Advisor explained that the rules were policy and that previously the Lieutenant-Governor would make the rules, prior to the power being passed to the Minister for Home Affairs in 2017. He explained that the rules are not an enactment and that the Statement would be brought by the Minister for Home Affairs. He informed the Panel that the OiC, if adopted by the States Assembly contains reference to a 'resolution' that the Assembly could use to request the Minister to reconsider the rules. It is noted, however, that this is not something that currently exists within the Standing Orders of the States Assembly.

The process, should the resolution mechanic be in place, was further explained as follows: The Minister would present the rules to the States Assembly and would invite the Members to provide a resolution so that changes could be made to the rules. It was noted that the resolution was the underlying mechanic for the rules and related to making changes to policy. As stated previously, no opportunity currently exists for States Members to provide a resolution so that changes to the rules could be made. However, it is noted that the presentation of the rules at present does offer the States Assembly the opportunity to examine the changes more so than the previous arrangement with the Lieutenant Governor,

The Panel asked, given that the resolution process by which Immigration Rules were presented to the States Assembly did not currently exist, whether a new Standing Order would be required to set out the procedure for States Members and, if so, whether it would be brought as a separate proposition. It was explained that a Standing Order may not be necessary, and that this would require consultation with the Greffier of the States. However, it should be noted that the Minister would be required to issue a commencement order for the OiC prior to this process being implemented, and any changes to Standing Orders could be made prior to this taking place.

Transit Passengers

The Panel requested clarity regarding the visa for transit passengers as referenced in the proposition. It was explained that a transit visa would not impose a new requirement, and was being brought forward in anticipation of a position where Jersey would have more passengers transiting through it to other jurisdictions. It is noted that Jersey is usually the last destination within the CTA route for travellers. The Panel requested an example for when a transit visa could be required, and it was explained that an instance whereby a third country national was travelling on a private aircraft landing in Jersey en route to the United States could be an example of when a transit visa would be required.

Tertiary Education

The Panel asked for clarity on the Memorandum of Understanding (MOU) between the UK and Ireland in relation to tertiary education. It was explained that Jersey's education laws regarding the ability to receive education were not based on a person's nationality, and that in order to receive education the person would need to be residing lawfully in Jersey.

Trafficking

The Panel questioned whether the trafficking offences referenced in the legislation linked to the Jersey's Sexual Offences Law. It was noted that the Sexual Offences Law 2018 had been updated to include offences regarding prostitution, however, it had not included offences regarding trafficking in prostitution. It was explained that the legislation had addressed that aspect and would complement offences that had already been addressed within other legislation.

The Panel asked how the penalty (imprisonment and fines) for traffic in prostitution linked with domestic trafficking. It was explained that, in relation to prostitution, the focus would be on the people operating the service (those living off the proceeds without

being involved in the act) and not the men and women carrying out the service. It is noted that the penalty aligned with human trafficking legislation.

The Panel asked for confirmation that people providing consensual services would not face any additional offences as a result of the legislation. It was confirmed that they would not, and it was emphasised that the legislation was targeted at the traffickers to prevent the exploitation of people and that those providing the service would not be criminalised as a result of the legislation.

Law Commission Involvement

The Panel notes that the Law Commission in England are involved in Immigration Legislation and asked whether the Jersey Law Commission had been consulted regarding the legislation. The Panel was informed that the Jersey Law Commission was currently in a transitional phase and that the UK Law Commission had made recommendations on clarity of Immigration Laws which was used by the UK's Home Office. It was noted that the role of the Jersey Law Commission is not currently the same as the UK Law Commission's is for the UK.

Conclusion

The Panel would like to place on record its thanks to Officers for providing a thorough briefing on a particularly complex piece of legislation. The Panel is satisfied with the rationale for the Order in Council and hopes these comments provide members with further clarity on their purpose ahead of the debate.