

Submission from Darius Pearce – 20th March 2006

The specific points raised with London included:

- 1) That a case had indeed been filed and that they were aware of the proceedings.
- 2) The contradictory nature of the case for change as presented by the government.
 - a) The failure to address the wider 'human rights' issues surrounding the age of consent instead choosing just to work on the 'gay' right.
 - b) The failure to reflect the 'reality of the situation' which I was informed was the primary reason for the change.
 - c) The unwillingness of the government to carry through the public will to oppose the change
 - d) The illogical nature of the decision to make a change in advance of the receipt of a judgement which irrespective of any change will still be made (as there is no guarantee that Mr Small will drop his case as he will still be entitled to a hearing on the basis of the legislation at the time of application).
 - e) If there is a guarantee that Mr Small will not seek damages then it merely adds weight to the argument (and my personal belief) that for him it is simply a matter of principal and that he is not really directly and personally affected and that any case to the ECHR is spurious and should be rejected. Having visited many gay websites including uk.gay.com and rainbow.net it is clear that he has been making the most of the opportunity for self aggrandizement.
 - f) The illogical nature of bringing in the change in advance of the 'abuse of trust' provisions.
- 3) The inconsistency in policy approach between various issues of the Jersey Government.
 - a) That I was irresistibly drawn to trying to make sense of it all even though the more I looked at it the more it appeared the government had simply made a bad case (which coincidentally was the reason for the 'probably since both the UK and Jersey governments are incompetent and never lose faith in that fact' response on this particular issue.)
- 4) The legal process involved in defending a case at the ECHR
 - a) Forming the best defense by differentiating this case from previous cases and the ease with which this can be achieved. Which we asked a lawyer to do for us and on his advice we supported the view that we do not discriminate on sexuality (except in favour of male homosexuals on sodomy) merely on activity (vaginal, oral or anal irrespective of the sexuality of the participants) and that this point had never been tested before the ECHR.
 - b) Is Mr. Small personally and directly affected in the absence of any prosecution of a 16 year old for breaking this law, or for a more senior partner for sodomising a sixteen or seventeen year old child?
 - c) Since Jersey sets the age of adulthood (full financial responsibility) at 20 (rather than 18) does this make a difference to whether 16 is a must have age?
- 5) What the likely outcome of any unfavourable judgement in the ECHR would be.
 - a) The inability of either the ECHR or the Council of Europe to enforce changes in national law, **contrary to numerous reports in the local press**. Though I am aware that they were merely reporting what Mr Small had stated. <<(I would be intrigued to see the press release to see if the BBC got it wrong and called it the Youth Reform Trust instead of team or he merely changed the name once someone asked to see the trust deed)>>.
 - b) The disagreement between Jersey and the UK as to whether the UK could actually overwrite legislation.
 - c) Would the council of Europe decide to 'encourage' Jersey to change its law following an unfavourable judgement? History tends to suggest not as per the case of the Bailiff and special care has been given to allow Guernsey (and by extension Jersey) to breach the

ECHR (on immigration through housing regs).

6) The position of the Bailiff within the legislature (representing the only time which the Channel Islands was previously found to be in breach)

a) The difference of opinion between Jersey and the UK as to whether it would be acceptable for him to remain both in the States and in the Royal Court. (Ref JEP Feb 2000 for Jersey's position on this). **The view from London was most unequivocal that the Bailiff as the senior judge should not be allowed to preside over States debates.** This is only common sense though as the separation of Legislature and Judiciary is a fundamental platform of British Liberal Democracy.

7) The likely economic effects of being held to be in breach of the convention

a) All signatory states have in recent years been found to be in breach of something and it often takes several years for the changes to be brought about subsequent to the judgement.

8) Denunciation of our obligations to the treaty is possible under Article 56 (and not Article 58 as per the SG's response as we are not a full member but a territory over which a full member has responsibility for international relations and as such all our duties are dealt with under Article 56). However under article 58 we would still have to pay any damages awarded to Mr Small should a judgement fall in his favour. That is all a judgement would mean... that Mr. Small would be entitled to some damages.

9) Desired outcomes:

I have no particular objection to members of the States voting for this but I do object to the attempt to imply to the public that voting for this proposition was due to anything but a personal decision to support the proposal or not as their conscience decided. Even the members of the Houses of Parliament had a free (un-whipped) vote on this same issue.

I would prefer to see the 'human rights' (as opposed to 'gay rights') surrounding the age of consent examined further as this does not prevent the criminalization of under 16's, nor does it address the issue of married couples (for example from Portugal) aged under 16 nor does it address the issue of ensuring the health of young people by allowing them to freely discuss with their doctor the issues which may be affecting them. It does no social good or make any actual change to the lives of the people of Jersey.

I realise that this would likely have been the remit of the social affairs scrutiny panel but they chose not to take up the issue so send it back to the Home Affairs Department to look at properly.

I make no disguise of the fact that I believe that Canada has the best solution to this problem in allowing the 'Defence of Consent'. The government on the other hand has simply chosen to copy the UK but without the safeguards. I would set the age of consent to 18 or 20 and allow the defence of consent for 13- whatever year olds. To me as a 35 year old male the idea of having sexual intercourse let alone sodomy with a 16 year old girl (child) is reprehensible. That is my personal belief and I am not ashamed of it and I state it for the purpose of clarity. On the other hand for an 18 year old male its not so bad.

What is the human right? How does it apply now? How will it apply?

For adults, heterosexuals are currently discriminated against. Sodomy and homosexual sex are not interchangeable terms as they do not exclusively relate to the same activities or nature of participants.

For children (those under 20) well there is a lot of outdated law including have a minimum age of marriage at 16 which is far too low in an age where education to 21 is the norm but dates back to the old days when people used to leave school at 11 to work on the farm. This makes no sense.

Before we go down the full ECHR path the people should be made aware of what exactly it is they are signing up to, in essence it calls for an end to anything which mentions hetero or homo sexuality so, for example, marriage would be the right of one person to make a lifetime commitment to another person without reference to the gender of the participants.

This is not a bad thing to my mind, but it means an awful lot of change to Jersey's laws is required

In addition the following areas are indicative of Jersey's laws which will have to change: inheritance, legitimacy, naming of children, employment practices, paternity leave (no different to maternity). Most of these areas do need looking at.

Finally, there seems very little point in making a change at this time as once lodged the case can run to its natural conclusion irrespective of any changes that Jersey makes to its law in the interim. Waiting to see how we breach the ECHR, if at all, and responding to the judgement makes far more sense.