

Law Officers' Department Memorandum



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From: Acting Attorney General

Date: 17th February, 2006.

Your Ref:

Our Ref: SCN/SB LEGLEGA-025

Sexual Offences : Age of Consent

The Scrutiny Panel is in possession of various pieces of advice which I have given in respect of the above, starting with the letters of advice to Deputy Hill, and continuing with answers given on an ad hoc basis to specific questions as and when they were raised.

It seems to me that it would be more helpful for the Scrutiny Panel if this advice was all summarised in one document. I have accordingly prepared a summary of the advice, which incorporates all the advice given previously and covers any outstanding requests for advice.

It is a matter for the Panel, but if the Chief Minister and the Minister for Home Affairs are to attend upon the Panel, the Panel may think it helpful to supply them with copies of this advice in advance.

W. Nicole

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Sexual Offences : Age of Consent

Summary of Advice to the Scrutiny Panel

Age of Consent for Heterosexual Intercourse : Current Position

1. The **Loi (1895) modifiant le droit criminel** [Law (1895) modifying the criminal law] provides, so far as it is relevant, that any person who has "*rapport charnel illicite*" [unlawful sexual intercourse] with a girl who has attained the age of 13 years but is below the age of 16 years is liable to a term of imprisonment not exceeding 5 years (unlawful sexual intercourse with a girl aged less 13 years is an offence punishable by life imprisonment). Sexual intercourse within the meaning of this Law means penile penetration of the vagina.

2. In other words, a girl who is aged under 16 years cannot give a legally effective consent to sexual intercourse, and any male who has sexual intercourse with such a girl is committing a criminal offence, whether she consents or not.

3. From the age of 16, a girl can give a legally effective consent.

Age of Consent for Homosexual Intercourse : Current Position

4. Sexual intercourse consisting of penile penetration of the anus is a crime at customary law, designated, in the days when charges were framed in French, as *sodomie*, and in indictments framed in English as *sodomy*.

5. The **Sexual Offences (Jersey) Law 1990** provides, so far as it is relevant, that notwithstanding any provision of law, whether enacted or customary, a homosexual act in private is not punishable as sodomy if the parties to the act consent and have attained the age of 18 years. There are some statutory qualifications and exceptions which are of no relevance.

Sexual Activity not involving Penile Penetration : Current Position

6. Physical contact of a sexual nature is an indecent assault if it is done without the consent of the party with, or to whom, it is done.

7. In **Attorney General v. Makarios** (1979) JJ 85 it was held by the Royal Court that a person under the age of 16 cannot give legally valid consent to an act which, without consent, would be an indecent assault. It follows that 16 is the age of consent for any act of physical sexual contact of this nature by any person, of whatever gender, with any other person of whatever gender. This includes lesbian activity.

The Relevant Provisions of the European Convention on Human Rights

8. Paragraph 1 of Article 8 of the **European Convention on Human Rights** ('ECHR') provides, so far as it is relevant, that everyone has the right to respect for his private life. "*Private life*" includes sexual activities and sexual proclivities.

9. Paragraph 2 of Article 8 provides that there shall be no interference by a public authority with the exercise of this right except such as in accordance with the Law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

10. Article 14 of the ECHR provides that the enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

11. The combined effect of Articles 8 and 14 is that a public authority can interfere in the area of sexual activity insofar as it is necessary to do so on one of the grounds specified in paragraph 2 of Article 8, but in its interference must not discriminate between persons on the basis of their sex.

Rulings of the European Court of Human Rights

12. The European Court of Human Rights ('ECtHR') has held in a number of judgments that it is contrary to the Article 14 prohibition on discrimination for a State to fix different ages of consent for heterosexual intercourse and homosexual intercourse. Cases include the following:

(a) Reports of the Commission

(b) Decisions of the ECtHR

L & V v. Austria	Nos. 39392/98 and 39829/98	9 th January, 2003.
SL v. Austria	No: 00045330/99	9 th January, 2003.
RH v. Austria	No: 7336/03	19 th January, 2006.

Jersey's Obligations under the European Convention on Human Rights

13. Because the ECHR has been ratified on Jersey's behalf, the States are under an obligation to comply with its provisions.

14. The **Human Rights (Jersey) Law, 2000** has been adopted by the States, sanctioned by Order of Her Majesty in Council and registered in the Royal Court. When brought into force, it will entitle individuals aggrieved by an alleged infringement of a Convention right to bring proceedings in the Royal Court. However it has not yet been brought into force and the remedy of proceedings in the Royal Court is accordingly not available.

15. Because the Convention has been ratified on Jersey's behalf, a person aggrieved by an alleged interference of a Convention right is entitled to bring

proceedings before the ECtHR. In that case, the Respondent would be the United Kingdom, not Jersey, because it is the United Kingdom which is the State party.

Power of the United Kingdom to legislate for Jersey

16. As a matter of general principle, the existence or otherwise of such a power is the subject of differing views held by experts (and non-experts) in constitutional law. One school of thought holds that the United Kingdom does, in the last resort, have such a power. Another school of thought asserts that it does not.

17. In my opinion the general principle is modified in circumstances where the need to legislate arises from a need to comply with the terms of a Convention which the United Kingdom has ratified on Jersey's behalf at Jersey's request, and where the United Kingdom itself has an obligation under the Convention to ensure Convention compliance. When Jersey requests the United Kingdom to ratify a Convention on its behalf, Jersey must have tacitly or implicitly accepted that, if Jersey itself does not legislate so as to ensure that the United Kingdom is not in breach of international obligations which it has taken on by ratifying the Convention on Jersey's behalf, the United Kingdom should have a power to do so.

Raising the Age of Consent for Heterosexual Intercourse

18. It has been suggested that the age of consent for heterosexual intercourse could be raised to 18, or that the age for heterosexual intercourse could be raised to 17 and the age of consent for homosexual intercourse lowered to 17. If that were done, there would be no breach of Article 14 (discrimination in the enjoyment of a Convention right).

19. This does however give rise to the question whether the raising of the age for heterosexual intercourse would be open to challenge on the ground that it is an interference in the private life of those wishing to indulge in heterosexual intercourse which cannot be justified on any of the grounds set out in paragraph 2 of Article 8. It appears to me that this would inevitably raise the question why it is now necessary to raise the age of heterosexual consent to 17 or 18, when the age of heterosexual consent has been 16 since the enactment of the 1895 Law referred to above, and no-one has argued that 16 is too low an age for girls to indulge in heterosexual intercourse.

Discrimination in other State Parties to the European Convention on Human Rights

20. There are some State parties which have different ages of consent for heterosexual and homosexual intercourse. Such State parties are in breach of the Convention and at risk of being taken before the ECtHR by aggrieved citizens.

Uniformity between ECHR Member States

21. The question has been raised whether it is discriminatory, and thus contrary to the ECHR, to have differing ages of consent for sexual intercourse in different Member States. There is no principle or rule of law which requires ECHR States to adopt the same provisions in respect of Convention rights as one another. The anti-discrimination provision in Article 14 of the ECHR means that a State cannot discriminate in the extent to which it interferes in the Convention rights of its citizens.

Canadian Law

22. I have been asked to advise the Panel on an issue raised with it by a member of the public. The issue is stated as follows.

Canadian Law discriminates between the act of sodomy, which is legal for consenting participants at the age of 18, and the act of procreation, which is legal at the age of 14, in the majority of its provinces. The discrimination is not based on sexual preference of the participants as it applies to both heterosexual and homosexual couples alike. As such it is not discriminatory against homosexuals and does not infringe their human rights. It is regarded as legitimate by the International Lesbian and Gay Organisation.

23. I qualify my advice by saying that I am not an expert in Canadian Law, have not researched the position and am not able to advise the Panel as to what the law of Canada is on the point. I do not think that it is necessary to do so. The ultimate authority in this area of law for Jersey is the ECtHR. The ECtHR has repeatedly found that to apply a different age of consent for heterosexual intercourse (“the act of procreation”) and homosexual intercourse (“the act of sodomy”) is discriminatory within the meaning of Article 14 in the interference of the State in the right under Article 8 to respect for one’s private life.

Section 2A of the Local Government Act, 1986 of the United Kingdom

24. I have been asked whether Jersey has an equivalent of the above. Section 2A of the 1986 Act is also referred to as Section 28, because Section 2A was inserted into the **Local Government Act, 1986** by Section 28 of the **Local Government Act, 1988**.

25. Section 2A is entitled "*Prohibition on Promoting Homosexuality by Teaching or by Publishing Material*". In summary, it prohibits a local authority from intentionally promoting homosexuality, publishing material with the intention of promoting homosexuality or promoting the teaching in any maintained school of the acceptability of homosexuality as an intended family relationship. There are certain exemptions in respect of treating, etc., the spread of disease and preventing bullying.

26. There is in Jersey no customary law or statutory equivalent of these provisions.

27. Article 16 of the **Education (Jersey) Law, 1999** empowers the Minister for Education, after consultation with the Jersey Curriculum Council, to establish a Jersey Curriculum. This curriculum must specify different stages in the education of a child of compulsory school age and

the subjects which a child must be taught at any particular stage in his education, and may specify a range or ranges of subjects that a child may elect to be taught in cases in which all or any of its requirements are to be dis-applied or modified. It may also specify the matters, skills and processes which must be taught to children of different abilities and maturities at any particular stage of their education.

28. I am not in a position to say what, if anything, the Jersey Curriculum contains in respect of teaching on the subject of homosexuality. I am seeking to obtain a copy of the Jersey Curriculum. If it appears to me that there is anything relevant in it, I will draw that to the Panel's attention.

Sexual Offences (Amendment) Act, 2000, ss 3 and 4

29. When the age of homosexual consent was lowered in the United Kingdom, the **Sexual Offences (Amendment) Act, 2000** made it an offence for a person aged 18 or over to have sexual intercourse, whether vaginal or anal, with a person under that age, or to engage in any other sexual activity with or directed towards such a person, if (in either case) he is in a position of trust, as defined in the statute, in relation to that

person. There are some statutory defences and the meaning of "*position of trust*" is set out in Section 4. These provisions are not discriminatory.

Her Majesty's Solicitor General
17th February 2006

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