

STATES OF JERSEY



DRAFT SEXUAL OFFENCES (JERSEY) LAW 201- (P.18/2018): THIRD AMENDMENT (P.18/2018 Amd.(3)) – COMMENTS

**Presented to the States on 19th March 2018
by the Minister for Home Affairs**

STATES GREFFE

COMMENTS

The amendment

The amendment is intended to clarify that if 2 people are in a relationship there is no presumption of consent between them.

It is understood that this amendment is the surviving part of what the Panel hoped would be a more comprehensive modification to the draft Law to define domestic abuse, including physical and mental abuse. As the Panel's comments on its amendment notes, the Panel was advised that this legislation was not the appropriate vehicle for introducing a definition of, or offences in relation to, non-sexual domestic abuse, and the Panel has decided to proceed on that basis.

The definition of "consent" and domestic abuse of a sexual nature

The definition of consent in the draft Law gives the same protection from non-consensual sexual behaviour to a person in a relationship with a defendant as it does to a stranger.

Article 2(2) of the draft Law provides that "*consent means free agreement*". The draft Law goes on to say in Article 2(7)(a) that "*consent to an act is not to be taken as implied merely by that person's consent to another act*" and in Article 2(8), the draft Law says that "*consent to an act may be taken back at any time before the act, and in the case of a continuing act, may be taken back at any time during the act*".

The language is unequivocal. Regardless of the existence of a relationship between the defendant and the complainant, a person cannot be regarded as consenting to a sexual act merely because the person has consented to an act in the past. Article 2(7)(a) applies regardless of whether it might be said that a 'relationship' exists between the defendant and the complainant; it is therefore broader in its application than the provision inserted by this amendment.

One point to note is that in relation to the offences in Part 2 of the draft Law, it is an element of those offences that the defendant should lack a reasonable belief in the complainant's consent to the sexual act. Paragraphs (2) and (3) of Article 3 to the draft Law make further provision as to how to determine whether a person's belief in consent is reasonable. These provisions might mean that if a person touched another in a sexual manner and this was a regular and affectionate feature of a relationship, it would not be sexual assault, because the instigator truly and reasonably believed that their partner would appreciate the gesture. However, this does not amount to a right to sexually touch a partner. If the circumstances were such that a belief in consent was not reasonable, for instance if the people in question were arguing or had separated, or if the partner had merely consented in the past to an affectionate touch, and was subjected without warning to an intimate act such as penetration, then in the absence of steps being taken to obtain consent, a sexual offence could have occurred.

The concept of the amendment was mentioned during a discussion between the Law Officers and the Panel as part of the Scrutiny process. At that time, the Law Officers saw no intrinsic harm in the change, although we shared the opinion that it did not give rise to any greater protection in law. However, since those discussions, the Law Officers have carried out further research and sought further advice, including from a senior

judge in the UK who has experience in this field. This input has highlighted concerns about the potential unintended consequences of the amendment. In particular, that accepting this amendment might complicate or narrow the interpretation of the provision in Article 2(7)(a), so that the amendment would not achieve or frustrate the Panel's objectives.

For this reason, although the principle pursued by the amendment is accepted, the amendment itself is unnecessary and risks doing more harm than good. Accordingly, Members are asked to reject the amendment.

Statement under Standing Order 37A [Presentation of comment relating to a proposition]

These comments were submitted to the States Greffe after the noon deadline as set out in Standing Order 37A. Considerable research was required following the lodging of the Panel's 3 amendments to this proposition, culminating in consideration by the Council of Ministers on 14th March, and specific consideration of the second amendment by the judiciary on 15th March. This meant that the deadline could not be met.