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for a brighter future”*

<http://politics.progressjersey.com>

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1. Purpose of the submission:

- a) That there are valid and perhaps preferable alternatives to the proposition which would meet the requirements of the Convention of Human Rights. The proposition makes it clear that the Home Affairs Committee limited its consideration to just three.
- b) That there are legislative options which will result in the case, *Small vs. United Kingdom*, automatically being deemed inadmissible at the ECHR without lowering the age of consent for sodomy.
- c) That the circumstances surrounding the case *Sutherland vs. United Kingdom* are sufficiently different to those surrounding *Small vs. United Kingdom* as to cast some doubt on the eventual judgement.

2. Background

Progress Jersey is a group predominantly concerned with the modernisation of the Jersey electoral and political systems and encouraging public participation in the electoral process. Its principles can be summarised as, "Government of the people, by the people, for the people."

3. Personal Background of signatories

Mr Daren O'Toole, is a homosexual male, aged 38 years.

Mr Darius Pearce, is a heterosexual male, aged 34 years.

4. Basis of opposition

- a) Should the proposition be accepted solely on the grounds of coercion from external pressures against the public will it may prejudice future issues which might be of benefit to the same community.
- b) Human rights may be curtailed where it is necessary to protect vulnerable members of society as specified under Article 8.2 of the European Convention of human rights.

Article 8 - Right to respect for private and family life

2 There shall be no interference ... with the exercise of this right except ... 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.

5. Previous evidence presented

We accept all previous evidence offered to the panel, except para 17.8 of the submission of Advocate C Lakeman. There is no contradiction in permitting a challenge before the

European Court of Human Rights. Rather we are to be congratulated for allowing Jersey **citizens** to make such challenges where they feel we contravene their human rights.

All signatories to the convention have at some time or another been challenged in the **court**, a significant proportion of such challenges are either deemed inadmissible or no **violation** of the Convention is found.

6. Of the proposition Draft Sexual Offences Law 200-

6.1 Consideration of Case Law before the ECHR:

a)

22. "The consent of the Director of Public Prosecutions was required for criminal proceedings in relation to homosexual acts "where either of those men was at the time of its commission under the age of 21" (Section 8 of the 1967 Act). In 1990 455 prosecutions gave rise to 342 convictions. In 1991 213 prosecutions gave rise to 169 convictions. The consent of the DPP is now required for prosecutions of males aged 16 and 17."

36. "Even though the applicant has not in the event been prosecuted or threatened with prosecution, the very existence of the legislation directly affected his private life: either he respected the law and refrained from engaging in any prohibited sexual acts prior to the age of 18 or he committed such acts and thereby became liable to criminal prosecution."

"The Commission further finds no reason to doubt the general truth of the applicant's allegations as to the distress he felt in having to choose between engaging in a sexual relationship with a like-orientated person of around the same age and breaking the law."

37. "The Commission accordingly finds that the applicant was until he attained the age of 18 directly affected by the legislation in question and can claim to be a "victim" thereof under Article 25 (Art. 25) of the Convention."

Application: 25186/94 Sutherland vs. United Kingdom (Report 31)

The proposition implies that the above precedent would mean that Jersey would similarly found to be in breach, however it should be noted that to date no prosecution¹ against a minor has been made under the above legislation. That prosecutions had been bought in the United Kingdom was persuasive on the decision of the court in granting Mr. Sutherland the status of 'victim'.

¹ Whilst attempts have been made to verify this, no data has been made available to us, such a claim would require verification. Were any codification of this enacted then Mr. Small would no longer be in a position to claim victim status and the application Small vs. United Kingdom would likely be declared inadmissible as Mr. Small would no longer be directly and personally affected.

Therefore the Court would need to consider whether the applicant could claim to have been distressed at the prospect of refraining or breaking the law and becoming liable to prosecution. He would become the first minor, of any sexuality, ever to be prosecuted under the law.

It should further be borne in mind that at this time clause 28 of the Local Government Act, forbade any public employee, medical or educational, from discussing homosexuality with a minor or presenting homosexuality in a positive light. This provision which, has since been repealed by the incumbent government, clearly demonstrates a predisposed bias against the homosexual minority.

Jersey at no time has made such provision.

b)

52. "To the extent that Article 209 of the Criminal Code embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot of themselves be considered by the Court to amount to sufficient justification for the differential treatment any more than similar negative attitudes towards those of a different race, origin or colour"

Application: 39392/98 & 39829/98 L&V vs. Austria

The proposition further implies that there is a predisposed bias of the heterosexual majority against the homosexual minority.

Article 209 disallowed homosexual males over the age of 19 from consensual sodomy with homosexual males aged between 14 and 18 years of age. The penalty for such an act was at least six months imprisonment. The legislation was enforced on a number of occasions.

However under Jersey law the act of sodomy is only lawful between consenting male homosexuals. The court would need to consider whether this in fact would not represent a predisposed bias in favour of the homosexual minority.

6.2 Of the social benefits of the legislation

Whilst outside the scope of this panel's investigation there are undoubted social benefits to be gained from an examination of the Draft Sexual Offences Law 200-.

- a) Freedom to discuss sexuality and sexual experiences – It is clear that there is benefit in allowing minors to freely discuss their experiences at medical clinics particularly where the treatment may be dependant on the risks exposed to.

Whilst avoiding any in depth discussion on the ethics of disclosing such information as a potential breach of confidence this would further be of benefit to all under 16's,

irrespective of sexuality, in addition to 16 and 17 year old male homosexuals and as such
was this the aim of the legislation it would fail to meet its aims.

The only conclusion is that the sole aim of the legislation is to comply with the
convention.

7 Extension of convention to Jersey

The coverage of the European Convention of Human Rights over Jersey is covered in
Article 56 of the convention.

Article 56 Territorial application

- 1) Any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the present Convention shall, subject to paragraph 4 of this Article, extend to all or any of the territories for whose international relations it is responsible.
- 2) The Convention shall extend to the territory or territories named in the notification as from the thirtieth day after the receipt of this notification by the Secretary General of the Council of Europe.
- 3) The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements.
- 4) Any State which has made a declaration in accordance with paragraph 1 of this article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided by Article 34 of the Convention.

Jersey to date, has not been challenged before the court, however there has been applications lodged against the Bailiwick of Guernsey. For example, *McGonnell vs. United Kingdom Application no. 28488/95*.

58. As to the independence of the Royal Court, the Commission notes that the Bailiff is appointed by the Sovereign and holds office during Her Majesty's pleasure subject to a retirement age of 70 years. The Bailiff's irremovability does not have "formal" recognition in law but is dependent on direction by Her Majesty. Further, the Bailiff has no role in the IDC, and is not involved in the appointment of the civil servants who make up the IDC. The Jurats are appointed by the States of Election (the electoral college responsible for electing Jurats) and hold office on a permanent basis with a retirement age of 70 years which can be extended to 75 years subject to the agreement of their colleagues. A Jurat may only be dismissed by Her Majesty and not by the executive. There are thus a number of guarantees of structural independence and impartiality.

59. However, these objective guarantees of independence and impartiality do not satisfy the requirements of Article 6 para. 1 taken alone. In addition, the case-law requires the body to present "an appearance of independence", and there must be sufficient guarantees "to exclude any legitimate doubt" as to the impartiality of the judge (see the aforementioned Langborger judgment, p. 16, para. 32). The Commission will consider these issues together (see Eur. Court HR, Incal v. Turkey judgment of 9 June 1998, Reports 1998-..., p. ..., par. 65).

You will note that under this finding the States of Jersey is currently in breach of the Convention in allowing the Bailiff, a judge of the Royal Court to preside over the States of Jersey.

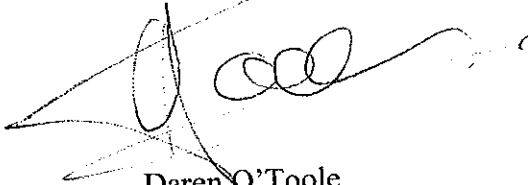
You will note that whilst the above situation was found to be in breach of article 6.1 of the convention the Bailiff continues to preside both over the States of Deliberation and the Royal Court.

"The other key offices held under the Crown are those of the Bailiff and Deputy Bailiff, who preside over the States of Deliberation and the Royal Court, and HM Procureur (Attorney General) and HM Comptroller (Solicitor General), who are the legal advisers to the Crown and the States."


(<http://www.gov.gg/ccm/navigation/about-guernsey/constitution/>)

Whilst unable to suggest the reason for no change being made to the constitution of the Bailiwick of Guernsey, the prospect of future challenges to the ECHR on similar grounds exists.

Signed, on behalf of Progress Jersey,



Daren O'Toole



Darius Pearce