

# Memorandum

**To:** Mike Haden **From:** Acting Attorney General

LEGLEGA-025 SCN/PW **Date:** 14<sup>th</sup> February, 2006

## Sexual Offences: Age of Consent Lesbianism

1. I write further to my email of yesterday's date in which I commented upon the email which the Panel has received from Mr. Pearce in order to give further advice on the subject.
2. Although lesbianism is not, in my opinion, a specific offence, the committing of an indecent assault or an act of indecency by a person of whatever sex with or on a person under the age of sixteen of whatever sex is an indecent assault for which the person under the age of sixteen is not able to give consent. In **AG v Makarios** (1979) JJ 85 the accused was charged with, among other things, the commission of an indecent assault upon a girl below the age of sixteen years. The accused raised the defence that the victim had consented to the indecent acts. At page 88 the Bailiff, Sir Frank Ereaut, said –

“The issue before the Court is whether the consent of the victim is a defence to a charge of indecent assault on a female person under the age of sixteen years, or to put it in another way, whether it is a crime under the Law of Jersey to commit an indecent assault on a female person under that age irrespective of whether she consents. ... the Attorney General argued that a large number of cases going back to 1875 in Jersey show that it was well established that under the common law of Jersey consent was no defence where the victim was under sixteen. He produced a number of cases of indecent assault where the Court records showed that the age of the victim, up to the age of fifteen, was included in the charge. Those cases produced were not only in respect of indecent assault, but also of indecent behaviour. It was not possible to elicit beyond doubt whether in the earlier cases produced there was consent or merely a submission because the details of the conduct which formed the basis of the charges were not available. However, he produced several cases dated between 1955 and 1976 where convictions were recorded, and the facts showed that the victims ranging up to fifteen years of age had clearly consented. Finally, he cited the case of *Blackman*, 1959 (35 P.C. 41, 52.), who was charged with attempting to debauch a boy aged fifteen, and the charge continued “en vue de la commission d’un attentat aux mœurs sur la personne dudit garçon en se rencontrant avec lui sur un rendez-vous clandestine avec l’intention de se livrer à des actes indécents et à des attouchements impudiques et contre nature sur la personne dudit so and so.” The defendant entered a plea to the effect that even if the facts alleged were proved the indictment disclosed no crime punishable by the existing law of Jersey. After argument the Superior Number of the Royal Court judged “qu’une personne qui se livre, soit en public, soit dans le particulier, à des actes indécents ou à des attouchements impudiques sur la personne d’un enfant âgé de moins de seize ans commet un crime punissable par la loi de ce bailliage.” Now the Court is

satisfied, on the details of the charge, that the boy in that case was a consenting party to the offence. The Attorney General, therefore, asks the present Court to declare that the case of Blackman confirmed that the common law of Jersey was well established that consent was no defence to a charge of indecent assault on a person aged under sixteen years.”

The judgment considers the submissions made by the defence before concluding at page 92 –

“...therefore this Court confirms that when an indecent assault is charged, consent is no defence where the alleged victim is under sixteen years of age, and that applies whether the victim is male or female.”

3. It follows from the foregoing that a person who engaged in lesbian sexual activity with a girl below the age of sixteen years would be committing an indecent assault to which the girl, because she was below the age of sixteen years, would not be able to give a consent.

4. In other words, the position with regard to lesbian sexual activity is the same by the customary law as the position with regard to heterosexual intercourse has been made by statute. That means that the potential issue raised by Mr. Pearce cannot arise.