

Sexual Offences (Jersey) Law 200- SCRUTINY REVIEW

Summary

Jersey is a party at its request to the European Convention on Human Rights.

In 2003, the UK Government reminded the Insular authorities of the need for a uniform approach to the age of consent.

Jersey's faces a serious risk of loosing any challenge in the European Court of Human Rights. The consequences for the Island would be easy to over-play but inevitably the contradiction (if not discrimination and absurdity) in approving a Law in 2000, yet still allowing a hopeless case against the Island to run will be made obvious by those with greater influence than me.

The following is intended to be an outline of the points I would wish to address with your panel and to answer your questions.

Introduction

1. In announcing the Review, the following objectives were set out:

The Corporate Services Panel, chaired by Deputy P Ryan has decided to conduct a review into the draft Sexual Offences (Jersey) Law 200- and has agreed the following terms of reference for the Review –

- 1. To examine the Island's current commitments under the European Convention on Human Rights*
- 2. To consider the legal advice from the Law Officers regarding the proposed change to the age of consent*
- 3. To review the constitutional position of a decision not to reform the current law; and*
- 4. To review previous and current legal challenges in the European Court of Human Rights*

2. As my views are informed by my professional qualifications, I should make clear that I speak in a personal capacity and not as member of my firm; nor as Chairman of the Law Society's Human Rights Sub-committee.
3. I have a degree in English and French law from the University of Kent at Canterbury. I also hold a *Diplôme de droit Français* from the *Université de Paris-Sud*. I have studied human rights law in England and France, which have different approaches to international law.

I was called to the Bar of England and Wales in 1991. I was admitted as advocate of the Royal Court in March, 1995.

5. My practice area is now primarily commercial litigation. However, I practiced criminal law extensively, before qualifying here and after. Such practice required (and indeed requires) knowledge of human rights law.
6. I have a strong interest in the constitutional relationship of the island and our relationship with the UK and international bodies. I have given talks and lectures on the subject.
7. I was a Senator in the States of Jersey from 1999 to February 2004. During that time, I was a member of:
 - the Home Affairs Committee: 14th December 1999 to 12th December 2002
 - the Legislation Committee: 17th December 2002 to 3rd February 2004.
 - Privileges & Procedures Committee 17th April 2002 to resignation.

I was also a member of the Human Rights working group for a time

8. At Home Affairs, I was extensively involved in the development of policy on human rights and in relation to the Prison Rules (seeking advice on the HR issues of the current and proposed rules) and the Terrorism law.
9. At the Privileges and Procedures Committee, I took the lead on the new States of Jersey Law, in particular the constitutional issues; the preamble to the Law; the impact of the Law on the developing relationship with the UK.
10. I shall confine myself to detailed comment on two of the terms of reference. In approaching the question, I have attempted to analyse the questions without adopting a partisan approach. The questions for you are legal. I am not advising the Panel but am merely giving my opinion.

As difficult a topic as some panel members may find it, the opinion is given on the law, not based on bias, emotion or prejudice. The considerations for the Panel may be regarded as broadly similar to those which the Legislation Committee faced in 2003 (when I was a member) and thereafter.

11. Before turning to those narrower issues, I hope the Panel will allow me to mention one wider point.
12. Why should Jersey be bothered about Human Rights? It is argued that it has been a licence for those at the margins at society, for a vociferous and “different” minority to gain ground over the majority. Deeply held beliefs and sometimes moral views are apparently disregarded.
13. This line of argument appears attractive. However, in my view, it leaves behind all the reasoning behind the ECHR. The Convention was largely drafted by English lawyers. It sought to give protection from some of the excesses perpetrated in Europe during World War II. What were those excesses? Why would a Convention establish the “right to marry”?
14. In Nazi Germany, there was the systematic abuse of the Jews. Gypsies, Christians and those opposed to fascism all suffered. For my dissertation at University, I studied the compulsory sterilization of those alleged to be suffering from a “disability” in Germany and the occupied territories. Himmler, as Reichsführer SS, held strong views about the eradication of homosexuals as weakening the social stock of the German *volk*.
15. The Convention, written in the 1950s, was a document which reflected the concerns of its time. But it also sought to provide a protection for the basic rights infringed during War. It looked to international law and other treaties for inspiration (eg. the French Constitution and see Simpson *Human Rights and End of Empire*). It has been described as a “living document”. I attach at **Appendix One** an extract from *Human Rights and Criminal Justice* (Emmerson & Ashworth).

Whilst some may argue it is simply *autres temps, autres moeurs*, a book I read recently on Sir Mathew Hale, an eminent jurist from the seventeenth century seemed in point. (**Appendix Two**).

16. I turn now to the specific terms of reference:

16.1 To review previous and current legal challenges in the European Court of Human Rights

I consider that this is best addressed by those advising you.

16.2 To examine the Island's current commitments under the European Convention on Human Rights

16.2.1 The obligations assumed on behalf of the Island are **voluntary**;

16.2.2 They are **clear**: the case law of the ECHR is not open to argument or debate;

16.2.3 The commitments have been incorporated in to local law by the **Human Rights (Jersey) Law. (Appendix Three and a commentary from the Jersey Law Review: Appendix Four).**

16.2.4. The case of *Sutherland* is authority for the admissibility of a case similar to the challenge which has been intimated in the media. (**Appendix Five**). Once the Law is in force in Jersey, such a challenge will be possible in the Royal Court.

17. To review the constitutional position of a decision not to reform the current law.

17.1 The Island is often described as a Crown Dependency. Such a label is not entirely correct.

17.2 The Panel is asked to consider the position as described by *Bois: Constitutional History. (Appendix Six)*. Since the Second World War, the Island has assumed international obligations, albeit through the United Kingdom, with its consent.

17.3 As long ago as the Nineteenth century, there was "serious doubt" that the Monarch in Council could legislate without the island's consent. (eg. *In re the States of Jersey*).

17.4 The extent to which this power exists is still open to some debate. However, the Panel is invited to consider HM Government's own advice to UK departments on this issue (**Appendix Seven**).

17.5 It has been described as a "settled position" that the UK will not legislate for domestic matters. It would require a major crisis for the UK Government to request the Queen in Council to intervene. Since the 1960s, the advice given to the States has reflected the diminishing residuary power of the Monarch.

17.6 But the question may be put another way: does the States consider it can and should ignore the request of HM Government (it is no more at present that that) in the face of the advice of HM Attorney General to the Legislation Committee?

17.7 The Island has claimed – successfully – a right to be regarded as a major responsible financial centre. It is developing an international "personality". Some examples of this include:

- Tax Exchange Agreement;
- FATFF;
- OECD;
- Bay of Grainville Agreement;
- Reforms of the States of Jersey law (the Bailiff's power of veto and the Governor's power of dissent were removed).

A summary of the position can be seen from the conclusion of paper given by Alistair Sutton to the Jersey Law Review Conference in 2004 (**Appendix Eight**).

17.8 The contradiction in approving the Human Rights Law but permitting a challenge before the European Court of HR is likely to figure high on the agenda for those who would criticise Jersey in the international arena.

17.9 In the debate on the (English) Human Rights Act, attention was again focussed on the Islands. I attach extracts from Hansard for the House of Lords debates and from the House of Commons (**Appendix Nine**). Such comments are ill-informed and did not find favour with the majority of Peers and MPs. However, they remain on the record. They represent one view of the relationship between the UK and Jersey, often described as tutelage (that is to say a person in control (the UK) over a child (Jersey)), which the Island should do all in its power to refute.

Christopher Lakeman

February, 2006.