

STATES OF JERSEY

r

DRAFT SEXUAL OFFENCES (JERSEY) LAW 200-

Lodged au Greffe on 23rd May 2006
by the Minister for Home Affairs

STATES GREFFE



Jersey

DRAFT SEXUAL OFFENCES (JERSEY) LAW 200-

European Convention on Human Rights

The Minister for Home Affairs has made the following statement –

In the view of the Minister for Home Affairs the provisions of the Draft Sexual Offences (Jersey) Law 200- are compatible with the Convention Rights.

(Signed) **Senator W. Kinnard**

REPORT

INTRODUCTION

1. When the Draft Sexual Offences (Jersey) Law 200-, which would have the effect of equalising the age of consent to 16, was debated by the States on the 17th/18th January, the debate was adjourned to enable Scrutiny Panels to consider looking into the constitutional and social aspects of the proposed legislation. Members were also uncomfortable with debating the proposition when abuse of trust provisions had not been included. The Corporate Services Scrutiny Panel which agreed to review the Island's obligations under the European Convention on Human Rights, published its report on the 28th March and concluded that the States should approve the Draft Sexual Offences (Jersey) Law 200-, but that the Minister for Home Affairs should present legislation to introduce abuse of position of trust provisions, and that this be debated prior to the Sexual Offences Law.
2. At its meeting of 27th April 2006, the Council of Ministers decided to embrace the recommendations made by the Corporate Services Scrutiny Panel. The previous report and proposition, P.196/2006, was therefore withdrawn on 16th May and is replaced with this new report and a new Draft Sexual Offences (Jersey) Law 200-, covering both the abuse of position of trust and the equalising of the age of consent.
3. This Draft Sexual Offences (Jersey) Law includes measures intended to protect young people of both sexes aged between 16 and 18 from adults who are in a position of trust in relation to them and reintroduces provisions to equalise the age at which people can lawfully consent to homosexual and heterosexual activity. The legislation therefore addresses both the discrimination which wrongly exists in the present law and modernises the law to reflect some changes in society and social attitudes since the legislation covering some of this activity was first introduced.

BACKGROUND

4. The existing law on sexual offences is archaic and discriminatory, much of it originating from the common law of the 1800s. The *Loi* of 1895 was replaced by the *Loi* (1938) *modifiant le droit criminel (sodomie et bestialité)* and remains in force to this day subject only to the Sexual Offences (Jersey) Law 1990, as amended in 1995. The legislation does not reflect the changes in society nor society's attitudes to both the question of protection of young people and homosexual activity. Of course, the relevance of the criminal law in this area needs to be regularly monitored, having regard to social conditions in Jersey and what is happening elsewhere, and this will be done. Modernising and strengthening the law can make a direct contribution to our aim of creating a safe, just and tolerant society. This draft law puts particular emphasis on protecting children and vulnerable people. In doing so, a balance has been sought between the role of Government and of the individual, their right to determine their own behaviour, their responsibility and duty of care. The aim is to change the most outdated aspects of the existing law and make it fit for the 21st century in a way that provides confidence and protection and remains true to the accepted parameters of a free and civilised society.

ABUSE OF POSITIONS OF TRUST

5. The draft Law creates a new offence of abuse of a position of trust where an adult (aged 18 or over) has sexual intercourse or engages in any other sexual activity such as touching in a sexual manner with someone under that age, if the adult is in a position of trust in relation to the younger person in circumstances specified in the law. In particular, the offence of **abuse of position of trust** prohibits sexual activity between those aged 18 or over who are looking after persons under 18 in educational establishments and in various residential settings, or where a young person is particularly vulnerable or the relationship of trust is particularly strong. It prevents the vulnerable person from giving valid consent in such circumstances.
6. For example, a young person aged 18 or over is said to be in a position of trust in relation to a younger

person where the younger person is living away from home in a children's home or institution regulated to provide health and/or social care; or in full-time education, and where the older person is regularly involved in caring for, training, supervising or in sole charge of persons under 18. It is recognised that full-time education is a very wide category but the pupil/teacher relationship is one where the position of trust is particularly strong. Indeed, teachers are in loco parentis even when pupils are 16 or 17. There are provisions covering Personal Advisors (under the Children (Jersey) Law 2002, guardians ad litem, probation officers and those appointed to be a child's guardian or tuteur where a direct relationship of trust or authority exists.

7. There are additional elements of the offence regarding the adult's knowledge that he or she was in a position of trust and regarding knowledge of the age of the child/young person. There is a presumption that the adult knew, or could reasonably have been expected to have known, those circumstances.

Initial Consultation

8. Those States departments which would be most affected have had sight of the draft Law and have provided initial views. The indications are that these provisions are generally welcomed, but that issues such as the position of volunteers as opposed to those performing a statutory function, and also that of young adults supervising children under 16, need to be explored further during the consultation period. These same issues were debated during the development of similar legislation in the United Kingdom. What is clear from an analysis of the development of the offence of abuse of trust is that there must be clarity as to what the offence is and who is capable of breaching it. If there is to be an abuse of trust offence in relation to something that has not already been defined in statute, it will be necessary to include in the legislation some detail about what the relationship is, or must contain, for the offence to be created. The criminal law must be precise. It is not adequate to seek to create a criminal offence, which in this case would be a serious offence, if it is unclear whether a person is, or is not, committing it.

The Crime and Disorder Bill, 1997-98

9. During the debates in both the House of Commons and the House of Lords, on the 'age of consent' amendment of Ms Ann Keen MP, there was a great deal of discussion on the need for protecting vulnerable young people, both boys and girls, from abuse by those in a position of trust or authority in relation to them.
10. Mr. Joe Ashton MP also proposed that it should be an offence for a person to have sexual intercourse with a girl under the age of 18 where that person is in a position of authority, influence or trust in relation to the girl. However, no definition of a 'position of authority, influence or trust' was given. When the debate returned to the Commons on 28th July 1998, the then Home Secretary Jack Straw MP said that although the equalisation of the age of consent was a simple, non-technical issue, abuse of trust was not:

"There are complexities in the definition of abuse of trust, in the behaviour which is dealt with in the interlocking with non-statutory safeguards that are already in place, such as professional codes, and in the relationship with the current criminal law and carries criminal sanctions."

11. At this stage Mr. Ashton also recognised that his amendment would not deal with these difficulties. Mr. Ashton's main amendment was rejected by the House of Commons on a division, by 234 to 194 votes. It is clear from the example of Mr. Ashton's amendment that if there is to be a criminal offence, the ambit of that offence must be clearly defined.

UK's Inter-Departmental Working Group on Abuse of Trust

12. On 4th June 1998, it was announced that the Inter-departmental Working Group of officials would look at further possible measures to protect 16 and 17 year-olds who may be vulnerable to abuse by those in a position of trust such as carers, teachers and leaders of organised residential activities. Following the debate on the age of consent on 22nd June 1998, this matter was described as a 'key issue' for the group which would look at a possible new criminal offence in this area. Issues that were to be considered

included: the definition of a position of trust; the scope of occupations to be covered; the definition of those to be protected; the kind of behaviour to be prohibited; existing safeguards and possible new mechanisms for prohibiting such behaviour, including a possible new criminal offence. Any proposals would relate to the need to protect both boys and girls and would take account of issues such as avoiding the criminalisation of the younger partner in a relationship based on abuse of trust.

13. The Inter-departmental Working Group published its interim report in November 1998. It stated that much of the concern which had been expressed in Parliament and elsewhere stemmed from the need to deal more effectively with abusive behaviour which was already illegal but where the safeguards were felt to be inadequate, or enforcement and prosecution problematic. The large majority of organisations who responded to the consultation exercise carried out by the Group in August and September 1998 believed that conduct amounting to abuse of position of trust in relation to those over the age of consent was better regulated by professional codes than by a criminal offence, but that these codes needed to be made more effective and comprehensive. The kind of concerns expressed by those consulted over the creation of an offence included:

- Its inflexibility
- The potential for malicious accusation.
- Difficulties of proof and definition.
- The damaging effects of a trial on the young person.
- The lack of any widespread evidence of abuse of trust as opposed to abuse against children and young people generally which is already covered by the criminal law.
- The position of a younger party who, if homosexual, would be ‘outed’ by any criminal prosecution.
- The danger that it would lead organisations to think that nothing else need be done by them.

14. The Working Group recommended against any general offence of abuse of trust, but concluded that in certain strictly limited circumstances of particular vulnerability where the position of trust is strong and well established, a new criminal offence would be justified to protect young people from behaviour which would otherwise be lawful.

15. The Working Group suggested a list of situations which would be covered. This included children who are in detention under any enactment; looked after by a local authority; resident in an institution regulated to provide health and/or social care; or in full-time education. It did not cover various other situations suggested by the respondents to its consultation exercise as the Group felt there was not the direct relationship of trust seen as integral to the offence. However, the Group recommended that the Secretary of State be given the power to amend such a list by affirmative resolution. Only adults who are involved in ‘regularly caring for, training, supervising or being in sole charge of persons aged under 18’ in such situations should be caught by the offence.

United Kingdom Sexual Offences Act 2003

16. Section 21(1) of the UK Sexual Offences Act 2003 provides that:

“...a person (A) is in a position of trust in relation to another person (B) if –
(a) any of the following subsections applies, or
(b) any condition specified in an Order made by the Secretary of State is met”.

17. The crucial provisions are therefore subsections (2) to (13) of section 21 with the provisions of any Order made by the Secretary of State under (b) above. The equivalent territory is proposed to be covered in the Draft Sexual Offences (Jersey) Law 200- and includes a power for the Minister to make an Order in similar fashion after consultation with the Attorney General. At the time of writing, no Order has been made by the Secretary of State as mentioned above. These 12 sections represent, at the present time, the exhaustive list of positions of trust for the purposes of the United Kingdom legislation. The 2003 Act did, however, represent an extension of the provisions in the Sexual Offences (Amendment) Act 2000. According to the Home Office leaflet ‘Working within the Sexual Offences Act 2003’:

The Act introduce[d] new occupations to which the positions of trust laws apply in the following ways:

- Looking after them on an individual basis by providing services under the Learning and Skills Act 2000. This includes Connexions Personal Advisors.
- Regularly having unsupervised contact with them as part of local authority provision of accommodation to young people who are in need, under police protection or detention, or remand.
- Having regular unsupervised contact with them as someone who regularly reports to a court on matters of their welfare.
- Looking after them on an individual basis as a Personal Adviser appointed under relevant legislation such as when young people leave authority care. Looking after them in an official capacity on a regular basis when they are subject to a care order, supervision order, or education supervision order.
- Acting as their guardian as set out in the Children Act 1989, the Adoption rules and the Family Proceedings Rules 1991.
- Looking after them on an individual basis after their release from Offending Teams and treatment providers.

18. But even though the list was extended by the 2003 Act, there were still misgivings. The footnote in 'Current Law' is worth quoting in full:

“This is an important section which defines the concept of a position of trust. The first four sections relate to situations in which the child is, for one reason or another, resident, or accommodated at an institution. The term ‘looks after’ is used regularly in the section and is defined at s.22. The list of situations is not exhaustive and may be added to by the Secretary of State. Despite this power, grave concerns have been expressed at the apparent gap in the legislation as no mention is made of ancillary workers such as school caretakers, or those running youth groups in the voluntary sector, or workers such as sports coaches, who often spend significant periods of time away from home with young athletes, but who may not fall within the definition of looking after the child. The balance which was sought to be struck was between the protection of young people and retaining of worthy individuals to work with them, without fear of false allegations. This part of the [UK] Act has caused a groundswell of concern amongst youth workers.”

19. The section also covers trainee teachers and students returning to their former schools to teach on a part-time basis. The provisions apply regardless of the age of the parties, or the teacher’s possible former friendships with the students. It also applies to guardians and Children and Family Court Advisory and Support Service (CAFCASS) officers working within family law proceedings, where they have regular unsupervised contact with the child whether face to face or otherwise.”

20. The balance which the 2003 Act sought to strike between the protection of young people and retaining worthy individuals to work with them without fear of false allegation is emulated in the approach taken by the Draft Sexual Offences (Jersey) Law 200-. In doing so, the draft Law also takes account of the UK Government’s Inter-Departmental Working Group on abuse of trust and the recommendations from the UK Government Sex Offences Review that the scope of this offence should be expanded to include personal advisers and other adults in a direct relationship of trust.

21. In summary, the 4 principles which underpin the proposals on abuse of trust are–

1. Vulnerability of the young person
2. Location
3. Special influence of the adult
4. Lack of access to other adults

22. As guidelines are already in existence in the relevant professions, it is expected that the offence of abuse of trust will act more as a deterrent than to result in a large number of prosecutions.

The Offence of Grooming

23. The offences of sexual grooming are not dependant upon the accused being in a position of trust. Sadly grooming children for sexual abuse is not new. Sex offenders have always found ways of gaining the trust and confidence of children and some have seen the possibilities of misusing the Internet to befriend children for their own purposes. For instance, there have been cases in which sex offenders have deceived children in chatrooms into believing that they are also children or teenagers and share similar interests and have then arranged meetings with them. To tackle grooming both on- and off-line, it is proposed to introduce an offence of meeting a child following sexual grooming. It is designed to catch those aged 18 or over who have previously met or communicated with a child under 16 on at least two occasions with the intention of engaging the child in sexual activity. It is intended to cover situations where an adult establishes contact with a child through, for example, meetings, telephone conversations or communications on the Internet, and gains the child's trust and confidence so as to arrange to meet the child for the purpose of a sex offence against the child. It will enable action to be taken before any sexual activity takes place where it is clear that this is what the offender intends.
24. Although it has been possible to draft a new Law covering abuse of trust and sexual grooming since the Scrutiny Panel made its recommendations 2 months ago, there has been insufficient time to conduct any in-depth consultation prior to lodging the draft Law. However, those States services which would be most affected have had sight of the draft Law and have provided initial views. The Home Affairs Department expects to receive further views during the statutory consultation period.

EQUALISING CONSENT

25. It is the role of the criminal law to establish what is and what is not acceptable behaviour; yet it must also treat everyone in society fairly. Certain existing offences criminalise consensual sexual activity in private between men, which would not be illegal between heterosexuals or between women. The draft Law will remove the discrimination and ensure that the criminal law protects everyone equally from non-consensual sexual activity, but does not criminalise sexual activity that takes place between consenting adults in private. The draft Law also sets the age at which certain sexual acts are lawful. The proposals set an appropriate balance between the protection of the Island's younger persons and the rights of the individual within the context of the European Convention on Human Rights.
26. There may be circumstances where sexual activity takes place with the ostensible consent of both parties but where one of the parties is in such a great position of power over the other that the sexual activity is wrong and should come within the realms of the criminal law. The most obvious cases involve children and vulnerable people with learning disabilities or mental disorders.

The Present Position

27. The purpose of the Sexual Offences (Jersey) Law 1990 was to provide that homosexual acts in private between consenting male adults would no longer be punishable as a crime under Jersey law. The Law enabled Jersey to comply with Article 8 of the European Convention on Human Rights and Fundamental Freedoms ("the Convention"), which provides that everyone has the right to respect with regard to a private and family life, a home and correspondence. However, the benefit of that Law did not extend to men below the age of 21.
28. On 21st April 1995, the Sexual Offences (Amendment) (Jersey) Law 1995 was registered by the Royal Court. It amended the Law of 1990 by reducing the homosexual age of consent from 21 years to 18 years. The law of Jersey provides the age of lawful consent to heterosexual intercourse is 16. Anal intercourse between a male and a female currently remains a criminal offence in Jersey law.

Thus, the existing legal position is that –

- (i) vaginal intercourse is lawful between male and female from the age of 16 upwards (if it is consensual);

- (ii) anal intercourse in private between males is lawful from the age of 18 upwards (if it is consensual);
 - (iii) anal intercourse between male and female is unlawful (whether consensual or not).
29. The effect of this draft is to make consensual anal intercourse lawful, whether between two males or between a male and a female, from the age of 16 upwards, in the same way as vaginal intercourse (if consensual) is lawful.

Why Do We Need To Change The Law?

30. The Convention has been ratified on Jersey's behalf at Jersey's request. Thus, Jersey has agreed to be bound by the judgments of the European Court of Human Rights ('ECtHR'). There is now such a body of case law that the judgments which have been given from the ECtHR against other states concerning a different age of consent for homosexuals are now beyond argument. Moreover, those judgments are binding on Jersey (through the United Kingdom) as they are binding on every other state party to the Convention.
31. A major impetus for this reform has come from several cases heard before the ECtHR. The rulings make it clear that the ECtHR now treats *any* law that provides for a different age of lawful consent to homosexual acts compared with heterosexual acts to be a breach of the following articles of the Convention:
- (a) Article 8 (respect for private and family life):
'Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is 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.'
 - (b) Article 14 (prohibition of discrimination):
'The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex ... or other status.'
32. It is clear that any differential treatment under the criminal law on account only of one's sexuality is repugnant to the Convention. This has a bearing on another facet of the Law of 1990. Article 1 of the Law provides that a homosexual act between males cannot be treated as having been done in private when more than two persons take part or are present. This restriction does not apply in the case of heterosexual acts in private. The ECtHR has held, in respect of a similar restriction which existed in the law of England and Wales, that such differential treatment constitutes a breach of the Convention. Accordingly, that provision would not be re-enacted in this draft Law.
33. The above considerations weighed with the European Commission when it made its decision in *Sutherland -v- United Kingdom*^[1] as long ago as 1997. In this ruling, the Commission afforded victim status (and, therefore, the necessary standing to take a case to the ECtHR) to a homosexual person who had *not* been convicted under the law which he sought to challenge (namely, section 1 of the Sexual Offences Act 1967 of the United Kingdom, which was subsequently repealed). The Commission found that the very existence of legislation criminalising the applicant's sexual preferences constituted a violation of his right to respect for his private life. It is clear, therefore, that the legal provisions affecting homosexual people in Jersey are liable to a human rights challenge even if no prosecutions were brought against individuals. Moreover, on commencement of the Human Rights (Jersey) Law 2000, a challenge could be brought directly in the Island and the Jersey courts would be bound to take account of existing ECtHR precedent.
34. More recently, in 2003, Austria's experience in the ECtHR cases L&V -v- Austria and SL -v- Austria, on

the criminalisation of sexual activity between men, further suggest that steps should now be taken towards bringing the law in Jersey into line with the Convention Rights. It is clear from these two judgments that the ECtHR will treat any law which provides for a different age of lawful consent to sexual acts between homosexual men, compared to heterosexual or lesbian acts, to be a breach of Articles 8 and 14 of the Convention.

35. The two Austrian cases involved men who had been convicted under Article 209 of the Austrian Criminal Code which prohibited homosexual acts of adult men with consenting adolescents between 14 and 18 years of age. Conversely under Austrian law, consensual heterosexual or lesbian acts between adults and persons over 14 years of age were not punishable. The ECtHR found the difference in age of consent to be a violation of the applicants' right to respect for their private lives and held that it was discriminatory. The difference in the age of consent was not considered to be capable of objective justification, and Austria was therefore found to be in breach of its obligations under the Convention. As a result of another case, *RH –v– Austria*, in which judgment was given on 19th January 2006, Austria has repealed Article 209 of the Austrian Criminal Code.
36. The United Kingdom had already addressed this problem by enacting the Sexual Offences (Amendment) Act, 2000, which reduced the age of lawful consent for anal intercourse between men in England Wales and Scotland to 16 years of age. The equivalent age in Northern Ireland is 17 in line with their higher age of consent for heterosexuals. 17 has been the age of consent in Northern Ireland since 1885. This action equalised the age of consent for sexual activity so that it is the same for male homosexuals as for heterosexuals and lesbians thus achieving compliance with Articles 8 and 14 of the Convention.
37. Similarly, there is no justification for consensual anal intercourse between a man and a woman remaining unlawful. In England and Wales, anal intercourse between consenting men and women ceased to be a criminal offence in 1994. It was considered that the criminal law had little place in matters relating to the private sexual activity of consenting adults. The same must surely be true in Jersey.
38. The only conclusion to be drawn from the responsibilities we have willingly signed up to in adopting the Convention and European case law is that the relevant Jersey law is incompatible with the Convention rights. It will not be necessary to take a case to the ECtHR, once the Human Rights (Jersey) 2000 is brought into force later this year. Any challenge to the Law could be brought in the Royal Court of Jersey. Part of the aim of this projet de loi, therefore, is to bring the Law in Jersey into line with the Convention Rights.

What Is The Appropriate Age Of Consent?

39. Having accepted that Jersey Law must be rendered consistent with the Convention Rights, it follows that the age of consent must be equalised. This could be achieved in any one of the following ways:
 - (a) to amend the law as was done in England and Wales by reducing the age of consensual homosexual activity to 16 years of age, or;
 - (b) to increase the age of consent for heterosexual consent to 18 years of age, or;
 - (c) to fix the age of consent for both types of sexual activity at some other age, perhaps 17 as in Northern Ireland.
40. Considering the second and third remedies first, neither raising the age of consent for heterosexual intercourse to 18 nor equalising the age of consent at 17 would make the position of those wishing to have homosexual intercourse any worse off. However, raising the age of consent for heterosexual intercourse to 18 would cause other problems and is likely to lead to challenges from persons wishing to have heterosexual intercourse where one partner was over the age of 16 but under the age of 18.
41. The fact is that it has been lawful to have heterosexual intercourse with 16-year old girls for well over a century. It would be difficult in the extreme to make a case that this situation has in any way been detrimental to them, or that it is now necessary to raise the age of consent from 16 to 17 or 18 in order to protect girls from having heterosexual intercourse at too young an age. It would, however, be reasonable to conclude from such a course of action that the age of consent for heterosexual intercourse had only

been raised in order to avoid lowering the age of consent for homosexual intercourse. This could lead to human rights challenges from the perspective of heterosexuals who felt aggrieved. Consider, for example, the position of a 16-year old girl who had now to attain the new age of consent, and who now found that her ability to have heterosexual intercourse had been curtailed because a man could not do so without committing a criminal offence. She could reasonably complain that, under Article 8 of the Convention her private life had been interfered with, and that raising the age of consent was neither proportionate nor necessary for the protection of her health or morals.

42. Raising the age of consent would also give rise to practical problems. It would be difficult to draft transitional legal provisions for heterosexuals who had attained the age of 16 but were below the new, higher age of consent. It would also be necessary to raise the age of consent for marriage. Consider also the bizarre situation that would arise in the case of young married couples and partners coming to Jersey from Great Britain and the majority of European countries. What should we do in the case of couples from other jurisdictions, one of whom was 16 or 17? Require them to refrain from having sexual intercourse whilst in Jersey, or would there be a two-tier system of a different sort whereby they would be exempt from prosecution whilst locals would be liable to prosecution for having sexual intercourse! Clearly, in the process of attempting to solve one injustice, we would create another.

43. Much is made of our responsibilities under the Convention. These are responsibilities which we of course share with the rest of Europe, or at best those countries which are also signatories. Attached at the Appendix to this report is a more detailed table to that attached to P.196/2005, detailing the age of consent under the three relevant categories for those countries who are members of the Council of Europe. The table shows that of the 47 member states, 41 have equalised the age of consent. Of this total, the most common age of consent is 16 followed by 14 and then 15. The proposition before the States seeks, therefore, to achieve parity with the position held within the Council of Europe.

44. In view of the position taken in the majority of member states, together with the legal and practical difficulties of raising the age of consent, the appropriate age of consent for Jersey is 16 years of age.

The Consequences of Unequal Treatment

45. If Jersey does not take steps to equalise the age of consent, it could lead to serious repercussions of a constitutional nature affecting our relationship with the United Kingdom government, and furthermore the Island would continue to be open to challenge by aggrieved individuals.

46. From a constitutional perspective, advice on the relationship between the United Kingdom and the Crown Dependencies has been given to the States by the Attorney General on 14th May 2002 and on the occasion of the Tax Information Exchange Agreement with the United States of America on 22nd October 2002. In particular, consideration was given in that advice to the issue as to whether Parliament had the competence to legislate for Jersey against its consent. This is a difficult and sensitive area, on which more than one view could be expressed. The traditional view is, as expressed in the Kilbrandon Report and previously by Dicey, that Parliament does have that power. The more recent views expressed, both by the Attorney General and by Professor Jeffrey Jowell QC, are to the effect that these traditional views were always incorrect but, in any event, constitutional law does not stand still and the present position is that no such power arises. The absence of any democracy in the proposition that Parliament has such a power is a strong indicator as to why it should not have it.

47. A key difficulty, relevant to this legislation, arises where the United Kingdom is committed to an international treaty on the island's behalf and with its consent. Kilbrandon argued that it would be impossible for the United Kingdom to have the treaty obligation in international law without the domestic power to ensure the obligation was performed. The counter-argument is that it would be equally impossible to suggest that the making of a treaty by a government minister on behalf of the Crown could create a domestic constitutional power to legislate where none existed otherwise, especially as to do so would be in the face of the essential principles of democracy. The case for arguing that the power to legislate does exist becomes stronger where the Island has agreed to be bound by the treaty (as is the case for the ECHR) thus creating the international obligation on account of the island, binding on the United

Kingdom.

48. Inevitably, only a court could decide these matters and it is unhelpful to speculate what the results might be. However, it can be asserted that if Jersey did refuse to introduce legislation with the result that the United Kingdom remained in breach of the international obligation, there would be a constitutional crisis with the United Kingdom, which could hardly be expected to sit back and accept that it remained in breach and do nothing about it.
49. That government ratified the Convention on Jersey's behalf and at Jersey's request. By this means, Jersey agreed to be bound by the judgments of the ECtHR. These judgments are binding on Jersey (through the United Kingdom) as they are binding on every other state party to the Convention. Should Jersey choose to remain in contempt of its agreement, it would be inconceivable for the United Kingdom to take no action, as it would expose that government to international criticism or proceedings.
50. The issue goes deeper than this however. Part of the States policy has been to develop the Island's international personality. This requires that the Island is seen in the international community as a serious jurisdiction which accepts the obligations which it assumes. If we do not do so, why should other jurisdictions make agreements with us? Jersey must accept that with international personality goes international responsibility and that includes honouring the commitments that the Island has agreed to be bound by.
51. Quite apart from the constitutional position, with domestic law as it stands, Jersey remains open to challenge from aggrieved individuals. There is currently one case being brought in the ECtHR by an Island resident. Once the Human Rights (Jersey) Law 2000 has been brought into force, such cases will be determined by the Royal Court. The way is open, without this legislation, for claims for declarations and for damages to be made against the States of Jersey for the failure to establish a human rights compliant piece of legislation in this area. This remains the position whether any prosecutions are brought or not. A person would have "victim" status simply by the legislation existing in its present state.
52. Medical opinion is also an important consideration. The Council of the British Medical Association ("BMA") observed in 1994 that most researchers now believed that sexual orientation was usually established before the age of puberty in both boys and girls and referred to evidence that reducing the age of consent would be unlikely to affect the majority of men engaging in homosexual activity, either in general or within specific age groups. The BMA Council concluded in its Report prior to reform of the legislation in the United Kingdom that the age of consent for homosexual men in that country should be set at 16 since the existing law might inhibit efforts to improve the sexual health of young homosexual and bi-sexual men. An equal age of consent was also supported by the Royal College of Psychiatrists, the Health Education Authority and the National Association of Probation Officers as well as by other bodies and organisations concerned with health and social welfare.

Consultation

53. Following the States debate on 18th January, the Chairman of the Social Affairs Scrutiny Panel commented that the Panel had not been provided with evidence of consultation with external organisations or with the general public. He recommended that the Home Affairs Minister carried out wide consultation before drafting the appropriate legislation. In considering the extent and form of any further consultation, it seemed sensible to await the outcome of the review to be carried out by the Corporate Services Scrutiny Panel. This was because the Panel's deliberations over our commitments to the United Kingdom under the European Convention on Human Rights; the constitutional position of a decision not to reform the law; and the legal advice and legal challenges in the ECtHR would be key to indicating the direction that the Island was most likely to take with this issue. That Panel has since recommended that the States approves the Draft Sexual Offences (Jersey) Law 200-.
54. Significantly, the two-month period during which the Panel conducted its review gave rise to extensive media exposure of the issues for and against the lowering of the homosexual age of consent. This prompted many members of the public and organisations to give their views without solicitation. The

submissions received, together with the opinions expressed through the media, serve to show how divided opinion is on the subject and whether much wider, formal consultation would serve any useful purpose. Moreover – and in no way wishing to pre-judge the outcome of the debate – it is arguable how valid further consultation would be given the conclusion reached by the Corporate Services Scrutiny Panel. In consulting widely, people should have a reasonable expectation that their views could help shape the course of action that the States is being asked to take. In this case, given the constitutional and legal position, and the clear division of opinions according to people's beliefs, it was unlikely that the Department's position would change. However, where there appeared to be important omissions in opinions received, the Department has consulted with those key organisations and individuals. Without attributing particular comments to individuals, members may find the following summary useful:

55. Within the public sector, the Health and Social Services Department and the Education, Sport and Culture Department have been consulted again. The Health and Social Services Department's view is that there are no health implications in that the issues of safe sex apply equally to homosexual and heterosexual activity. The Education, Sport and Culture Department has reaffirmed the decision taken by the former Committee on 27th April 2005 which concluded that *".....there are significant moral dimensions connected with this issue. The Committee is, therefore, of the opinion that any amendment to this legislation should be a matter for the conscientious consideration and determination of individual Members of the States."* The Committee's Act went on to outline how the proposed amendment might have implications for the programmes of study for Personal, Social and Health Education.
56. Notable organisations in favour of equalising the age of consent are Brook, the NSPCC and the Community Relations Trust. Brook felt that young people could not be treated fairly when there was an age difference, and that Jersey should follow through on the commitment it made in signing up to the Convention rights. The NSPCC considered that 16 is an appropriate age at which young people may be considered able to make informed decisions about their private, consensual behaviour, and that discriminatory practices in law can lead to sexual abuse, exclusion, secrecy, fear and low self-esteem. The law must provide adequate protection against criminal acts, especially where positions of trust are concerned. The Community Relations Trust's stance is that the law should not be used as a means of discriminating against any group, community or individual. Individuals who were in favour of lowering the age of consent considered that: the predator argument was over-played in the sense that it was difficult to understand why young men should require greater protection than young women; the current inequality forces young gay men into heterosexual relationships; 'gays' should have the same rights as 'straights'; it is unfair and discriminatory for young men to be treated differently to young women; and, in any case, the Island has no option but to honour its international commitments.
57. Some respondents were not against equalising the age of consent, but felt that the age for both men and women should be 18. Those individuals who were against lowering the homosexual age of consent considered that: 16 was too young an age to make a choice about homosexuality; we should not follow slavishly the steps taken in the United Kingdom and Europe; and young men needed protection against predators. AIDS Care Education and Training Jersey (ACET) and the Jersey Evangelical Alliance were against the proposal, the latter having written to all States members with their views.
58. ACET's submission to the Corporate Services Scrutiny Panel draws attention to the risks associated with unprotected anal intercourse and, consequently, possible outcomes of lowering the age of consent to 16 for men who have sex with men. Men who have sex with men remain the group at greatest risk of getting infected with HIV in the United Kingdom. Up until 1998, men who have sex with men formed the main exposure category for new HIV diagnoses. However, in 1999, heterosexually acquired HIV became the largest category, and has continued to be so ever since. As at the end of December 2005, 35,767 men who have sex with men have been diagnosed with HIV in the United Kingdom. However, Health Protection Agency statistics included in ACET's submission show that the number of heterosexually acquired HIV infections diagnosed in the United Kingdom has risen hugely over the last 15 years. In 1999, for the first time, the rate of heterosexually acquired HIV diagnoses overtook the rate of diagnoses in men who have sex with men. During 2005, there were 2,878 reports of heterosexually acquired HIV in the United Kingdom, and a total of 30,381 had been reported by the end of December 2005.^[2]

59. In Jersey, there has been a shift in the main modes of acquisition of HIV between the early 90s and the 2001-2005 period. In the 90s, the main modes of transmission were through men having sex with men – 61% (MSM); through intravenous drug misuse – 30%; and through the heterosexual route – 8%. The respective figures for 2001-2005 were 16% for MSM; 16% for intravenous drug misusers; and 67% through the heterosexual route. HIV prevalence has therefore increased and there has been a marked shift towards more heterosexual spread in absolute terms, but the group most at risk remains MSM. These statistics are broadly in line with United Kingdom trends. However, there appears to be no direct evidence to suggest that HIV prevalence would increase as a result of a lowering in the homosexual age of consent. Overall the UK data suggest that HIV (2000-2005 data) and gonorrhoea (1995-2004 data) disproportionately affect MSM aged over 20 years rather than those under 20 years. As far as we can ascertain there has been no research published on the impact of lowering the age of consent for anal sex from 18 to 16 on HIV and STI transmission.
60. Regarding the possible causes of a rise in acute STI infections, a United Kingdom sexual health survey in the 10 years to 2000 showed: (a) a reduction in age of first intercourse; (b) increased partner numbers especially, but not only, in the young, and an increase in the incidence of simultaneous partners; and (c), increasing population mobility, from holiday/business to immigration and its consequences. Similar trends appear to apply locally.
61. The Dean of Jersey has given a formal response, having been consulted. As he may wish to speak during the debate, his views are not summarised in this report. The Jersey Evangelical Alliance wrote to all States members with their views on the protection and health of the young, and the importance of marriage. Whilst these opinions are respected, the submission contains a statement that ‘Few people realise that the absolute heterosexual age of consent in the United Kingdom (when there is no possible defence for the man) is under thirteen, not sixteen. This also applies in Jersey.’ This statement could lead to a mistaken interpretation of the legal position. The United Kingdom Crown Prosecution Service’s (CPS) guidance note on the Sexual Offences Act 2003 states that the 2003 Act provides that the age of consent is 16 and that any sexual activity involving consenting children under 16 is unlawful. Section 7 of the Act makes it an offence for a person to touch sexually a child under 13, whilst section 8 makes it an offence for a person intentionally to cause or incite a child under the age of 13 to engage in sexual activity. In other words, where the sexual assault of a child under 13 is concerned, the CPS guidance is that consent is not an issue and is irrelevant, and that there is no defence of mistaken belief in age of the complainant. This principle applies to articles 3 to 6 of the Draft Sexual Offences (Jersey) Law 200- in that a person aged 18 or over commits an offence if the other person is under 13. Consent and reasonable belief that a person is older than their actual age do not apply where the complainant is under 13.

CONCLUSION

62. The period since the original debate on 17th January 2006 has provided time for the Draft Sexual Offences (Jersey) Law 200- to be reviewed by the Corporate Services Scrutiny Panel; organisations and the public to give their views on the issues emanating from the debate which have received wide publicity; some additional consultation to take place; a law covering both abuse of positions of trust and the age of consent to be drafted; and for members to formulate their own views assisted by the additional information that has been made available in the intervening period. It is apparent that equalising the age of consent is a socio-political decision and not a medical one. From a social point of view, the Island must adopt the standards of modern society and most other European countries by equalising the age of consent and cease the current discrimination against a particular section of society. Politically, the Island has made a commitment to comply with Articles 8 and 14 of the European Convention on Human Rights to end the differential treatment under the criminal law on account of one’s sexuality. Not to honour this commitment creates difficulties in our constitutional relationship with the United Kingdom. Consequently, the Department remains of the view that the age of consent must be equalised in accordance with the Draft Sexual Offences (Jersey) Law 200-.
63. This Draft Sexual Offences (Jersey) Law 200- includes measures intended to protect young people of both sexes aged between 16 and 18 from adults who are in a position of trust in relation to them and

reintroduces provisions to equalise the ages at which people can lawfully consent to homosexual and heterosexual activity. It takes account of the recommendations of the Corporate Services scrutiny Panel, the Island's obligations under the European Convention on Human Rights, and modernises and strengthens the Law in such a way that it makes a direct contribution to the aim of making Jersey a safe, just and tolerant society.

FINANCIAL AND MANPOWER IMPLICATIONS

64. There are no financial or manpower implications arising from this draft Law.

European Convention on Human Rights

Article 16 of the Human Rights (Jersey) Law 2000 will, when brought into force by Act of the States, require the Minister in charge of a Projet de Loi to make a statement about the compatibility of the provisions of the Projet with the Convention rights (as defined by Article 1 of the Law). Although the Human Rights (Jersey) Law 2000 is not yet in force, on 23rd May 2006 the Minister for Home Affairs made the following statement before Second Reading of this Projet in the States Assembly –

In the view of the Minister for Home Affairs the provisions of the Draft Sexual Offences (Jersey) Law 200- are compatible with the Convention Rights.

COUNCIL OF EUROPEAGES OF CONSENT IN MEMBER STATES (AS AT 11/4/2006)

	<i>Male/Female</i>	<i>Male/Male</i>	<i>Female/ Female</i>	<i>Year Equalised</i>	<i>Notes</i>
Albania	14	14/18	14		(1)
Andorra	16	16	16	2001?	
Armenia	16	Unknown	Unknown	2003	
Austria	14	14	14	2003	(2)
Azerbaijan	16	16	16	2000	
Belarus	16	16	16		
Belgium	16	16	16	1985	(3)
Bosnia- Herzegovina	16	16	16	1998/2000	(4)
Bulgaria	14/15	14/18	14/18	2002	(5)
Croatia	14	14	14	1998	
Cyprus	17	17	No set age in law	2002	(6)
Czech Republic	15	15	15	1990	
Denmark	15	15	15	1976	
Estonia	14	14	14	2002	
Finland	16	16	16	1998	(7)
France	15	15	15	1982	
Georgia	Unknown	Illegal	Unknown	2002	
Germany	14/16	14/16	14/16	1994	(8)
Greece	15/17	17	15/17	1987	(9)
Hungary	14	14	14	2002	
Iceland	14	14	14	1992	
Ireland	17	17	17		
Italy	14	14	14	1996?	(10)
Latvia	16	Unknown	Unknown	1998	
Liechtenstein	14	14/18	14/18		
Lithuania	16	18	16	2004	
Luxembourg	16	16	16	1992	
Macedonia	16	16	16	1996	
Malta	12/18	12/18	12/18	?	(11)
Moldova	16	16	16	2003	
Monaco	15	15	15	?	(12)
Netherlands	16	16	16	1971	(13)
Norway	16	16	16	1972	
Poland	15	15	15	1934	
Portugal	16	16	16		(14)
Romania	15	15	15	2002	
Russia	14/16	14/16	14/16	1997	(15)
San Marino	14/16	14/16	14/16	1864?	
Serbia-Montenegro	14	18	14	1994	
Slovakia	15	15	15	1990	
Slovenia	14	14	14	1995	
Spain	13	13	13	?	(16)
Sweden	15	15	15	1978	(17)
Switzerland	16	16	16	1992	
Turkey	18	18	18	?	

Ukraine		18	16	16	1991	
United Kingdom (ESW)		16	16	16	2001	(18)
United Kingdom (NI)		17	17	17		(19)

- #1 – Albania ratified Protocol 12 to the European Convention on Human Rights in 26th November 2004. This Protocol, which came into force on 1st April 2005, provides for a general prohibition on discrimination. *‘The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religious, political or other opinion, national or social origin, association which a national minority, property, other or other status.’*
It would appear that Albania has very recently amended its law to equalise age of consent.
- #2 – It is illegal for a male over 19 to commit homosexual acts with a male between 14 and 18.
- #3 – Heavier penalties are levied against those in authority.
- #4 – In the Republika Srpska age of consent was equalised in 2000 at the lower age than the rest of Bosnia & Herzegovina of 14 years.
- #5 – Prior to the amendment of Bulgaria’s Penal Code in September 2002 the age of consent for heterosexual activity was 14 and for homosexual relations it was 18.
- #6 – Cyprus lowered the age from male homosexual activity from 18 and raised the age for heterosexual activity from 16.
- #7 – The Finnish parliament is considering lowering the common age of consent to 15
- #8 – Intercourse is legal from 14 provided both parties are under 18 (or 21 in some circumstances)
- #9 – Although the age of consent may be equal at 15, it appears that the age for anal intercourse (with a man or woman) may still be 17, and therefore Greece may not be in compliance with the Human Rights Convention.
- #10 – If one of the participants is an older family member or guardian, the age of consent is 16.
- #11 – Unusually in Malta the age of consent for civil marriage appears to be lower at 16 than the age of consent for sexual relations.
- #12 – Monaco was only admitted to the Council of Europe in 2004 and has not yet ratified the European Convention on Human Rights.
- #13 – If a person between the ages of 12 and 16 commits a sexual act with another person between those ages, they will not be prosecuted unless there is a complaint from the other participant, a parent or guardian. However, if a person over 16 commits a sexual act with a person under 16, they will be liable for prosecution regardless of whether or not a complaint has been made.
- #14 – It is illegal for a person aged 18 or over to commit sexual acts with a person under 18.
- #15 – In Russia it is illegal for any person aged over 18 to have a sexual relationship with a person under 16 years of age.
- #16 – If a person between the ages of 12 and 16 has committed a sexual act with a person over 16, the older person may be liable to prosecution if the younger person’s parents complained.
- #17 – There is no statutory age of consent. In general, consensual sexual relations are not penalised from the age of 12, although a person aged over 16 who has sex with a person aged between 12 and 16 may be liable to prosecution.
- #18 – Although the UK complies with the European Convention on Human Rights in respect of age of consent for itself, as long as any of the Crown Dependencies or Overseas Territories do not comply, the UK (as the State Party to the Convention) would not be recognised as fully compliant.
In relation to Guernsey and Jersey the current position is the same as in the Isle of Man.
However, the Islands are aware that their law does not comply with the European Convention and the Jersey Evening Post reported in July 2004 that Jersey’s Legislative Committee was developing legislation to bring the Island’s law into compliance.
- #19 – The age of consent is 16 in England, Scotland and Wales but it is 17 in Northern Ireland, where the age of consent for heterosexual activity has historically been this age.

age/age usually means that where intercourse takes place between consenting parties between these ages, prosecution would not follow unless a complaint is made.

The world average age profile, excluding countries where certain types of sexual relationships are illegal, is

16/16/16.

Source: AVERT.ORG, as international Aids charity
Age of Consent.com

Explanatory Note

Article 1 contains interpretative material. In particular, paragraphs (2) to (4) are relevant to the offences in Articles 3 to 6.

Article 2 creates a new offence by an adult (a person aged 18 or more) who has previously met or communicated with a child under the age 16 on at least 2 occasions. The offence is committed where the adult then intentionally meets, or travels to meet, the child with the intention of doing anything to or in respect of the child that would involve the adult committing a relevant offence. Relevant offences are listed in the *Schedule*. It is immaterial whether the adult has communicated with or met, or intends to meet, the child in Jersey or elsewhere. The maximum penalty for the offence is 10 years' imprisonment and an unlimited fine.

Article 3 creates a new offence by an adult who is in a position of trust in relation to a child under the age of 18 where the adult intentionally touches the child in a sexual manner.

There are additional elements of the offence regarding the adult's knowledge that he or she was in a position of trust and regarding his or her knowledge of the child's age which apply in certain circumstances.

If the adult was in a position of trust in relation to the child by reason that he or she looked after the child in residential accommodation or in a school, the prosecution must establish that the adult knew, or can be reasonably expected to have known, of the circumstances by which he or she was in that position of trust. However, there is a presumption that the adult knew or could reasonably be expected to have known, of those circumstances. The burden is then shifted to the defence to adduce sufficient evidence to raise an issue as to whether the adult knew or could reasonably be expected to have known of his or her position in relation to the child.

If the adult was in a position of trust by reason that he or she was in an advisory role in the relation to the child, pursuant to a court order or enactment, or in circumstances where he or she was caring for the child on an individual basis or having unsupervised contact with the child, the prosecution does not have to prove that he or she knew or could reasonably have known that he or she was in that position of trust.

If the child was aged 13 or more, the prosecution must prove that the adult did not reasonably believe the child to be aged 18 or more. However, there is a presumption that the adult did not so believe, and the burden then shifts to the defence to adduce sufficient evidence to raise an issue whether the adult reasonably believed the child to be 18 or more.

If the child was aged under 13, the adult's knowledge or beliefs regarding the child's age are immaterial.

The maximum penalty for the offence is 5 years' imprisonment and an unlimited fine.

Article 4 creates a new offence by an adult who is in a position of trust in relation to a child under the age of 18 where the adult intentionally causes or incites the child to engage in a sexual activity. *Article 1(4)* defines what constitutes sexual activity.

The additional elements of the offence regarding the adult's knowledge of his or her position and of the child's age, and the provisions regarding the burden of proof, that apply to *Article 3* are also applied to the offence in *Article 4*.

The maximum penalty for the offence is 5 years' imprisonment and an unlimited fine.

Article 5 creates a new offence by an adult who is in a position of trust in relation to a child under the age of 18 where, for his or her own sexual gratification, the adult intentionally engages in a sexual activity, either when the child is present or when the child is in a place from which he or she can see the adult, and the adult knows, intends or believes that the child is aware that he or she is engaging in the sexual activity.

As before, the additional elements of the offence in *Article 3*, regarding the burden of proof and regarding the adult's knowledge of his or her position and of the child's age, also apply to this offence.

The maximum penalty for the offence is 5 years' imprisonment and an unlimited fine.

Article 6 creates a new offence by an adult who is in a position of trust in relation to a child under the age of 18 when the adult, for his or her own sexual gratification, intentionally causes the child to watch another person engaging in a sexual activity, or to look at an image of a person engaging in a sexual activity.

Again, the additional elements of the offence in *Article 3* regarding the adult's knowledge of his or her position

and of the child's age and regarding the burden of proof, apply.

The maximum penalty for the offence is 5 years' imprisonment and an unlimited fine.

Article 7 sets out circumstances in which a person is in a position of trust in relation to another person, and empowers the Minister for Home Affairs to make an Order specifying further circumstances. It must be read in conjunction with *Article 8* which defines what is meant by the references in *Article 7* to one person looking after another person. Persons who are in a position of trust are –

- A person who looks after a child who is detained in an institution by order of a court (for example, on remand or on a sentence of youth detention or custody for life) or pursuant to an enactment (for example, the Mental Health (Jersey) Law 1969)
- A person who looks after a child who resides in a children's home, voluntary home or a private home, pursuant to arrangements made by the Minister for Health and Social Services under the Children (Jersey) Law 2002
- A person who looks after a child who is accommodated and cared for in a hospital or in a residential care home, a nursing home or a maternity home
- A person who looks after a student or pupil in any school or college or a child who attends registered day care premises. A person who is also enrolled at or a pupil in the school or college is not in a position of trust (for example, a senior pupil who temporarily is left in charge of younger pupils)
- A person who is appointed as a child's guardian or tuteur
- A person who, as part of the provision of educational or training services by the Minister for Education, Sport and Culture, looks after a child on an individual basis (for example, a tutor engaged to teach the child outside of the school environment)
- A person who has regular unsupervised contact with a child in the discharge of the Minister for Health and Social Services' obligation to provide accommodation for children and to provide protection for children who require it, or in the provision of accommodation for a child detained by the police
- A person who has regular unsupervised contact with a child for the purpose of preparing a report for a court upon the child
- A person who, as the delegate of the Minister for Health and Social Services, advises and befriends a child, on an individual basis, pursuant to Article 21 of the Children (Jersey) Law 2002
- A person who, as the delegate of the Minister for Health and Social Services, discharges the functions of the Minister as the person having parental responsibility for a child, by virtue of an order of the court freeing the child for adoption
- A person who looks after or supervises a child, on an individual basis, pursuant to the requirements of a care order, supervision order or education supervision order
- A person who is appointed by a court as the guardian ad litem of a child and has regular, unsupervised contact with the child
- A person who, pursuant to a court order made in criminal proceedings or pursuant to an enactment, looks after a child, on an individual basis (for example, where the child is on probation or released from detention subject to supervision).

Article 9 creates an exception to the offences in *Articles 3 to 6* where the child is aged 16 or more and lawfully married to the adult.

Article 10 creates an exception to the offences in *Articles 3 to 6* if the adult and the child were in a sexual relationship before the position of trust arose and sexual intercourse between them would have been lawful.

Article 11 makes it an offence to aid, abet, counsel or procure the commission of an offence under any of *Articles 3 to 6*.

Article 12 has the effect that it shall not be an offence at customary law for 2 consenting persons who are both aged 16 or more to commit an act of *sodomie* in private. It further has the effect that no offence is committed by a person under the age of 16 if the other person is aged 16 or more. An act committed in a public lavatory is treated as having been committed in public. In any proceedings, the burden lies on the prosecution to establish that an act took place in public or that one of the parties was under the age of 16. A person who, within the meaning of the Mental Health (Jersey) Law 1969, is a person requiring special care, cannot give effective consent to the act.

Article 13 repeals the Sexual Offences (Jersey) Law 1990.

Article 14 is the citation and commencement provision.

The *Schedule* sets out what are relevant offences for the purposes of Article 2.



Jersey

DRAFT SEXUAL OFFENCES (JERSEY) LAW 200-

Arrangement

Article

- 1 [Interpretation](#)
- 2 [Meeting a child following sexual grooming etc.](#)
- 3 [Abuse of position of trust: sexual activity with a child](#)
- 4 [Abuse of position of trust: causing or inciting a child to engage in sexual activity](#)
- 5 [Abuse of position of trust: sexual activity in the presence of a child](#)
- 6 [Abuse of position of trust: causing a child to watch a sexual act](#)
- 7 [Positions of trust](#)
- 8 [Positions of trust: interpretation of Article 7](#)
- 9 [Articles 3 to 6: marriage exception](#)
- 10 [Articles 3 to 6: sexual relationships which pre-date position of trust](#)
- 11 [Articles 3 to 6: aiders, abettors, etc.](#)
- 12 [Amendment of law relating to *sodomie*](#)
- 13 [Repeals](#)
- 14 [Citation and commencement](#)

SCHEDULE

RELEVANT OFFENCES



Jersey

DRAFT SEXUAL OFFENCES (JERSEY) LAW 200-

A LAW to make certain sexual acts offences, to amend the law relating certain sexual acts and for connected purposes

Adopted by the States [date to be inserted]

Sanctioned by Order of Her Majesty in Council [date to be inserted]

Registered by the Royal Court [date to be inserted]

THE STATES, subject to the sanction of Her Most Excellent Majesty in Council, have adopted the following Law –

1 Interpretation

(1) In this Law –

“1999 Law” means the Education (Jersey) Law 1999^[1];

“2002 Law” means the Children (Jersey) Law 2002^[2];

“image” means a moving or still image and includes an image produced by any means and, where the context permits, a three-dimensional image;

“Minister” means the Minister for Home Affairs.

(2) In this Law references to an image of a person include references to an image of an imaginary person.

(3) For the purposes of this Law, touching includes touching –

(a) with any part of the body;

(b) with anything else;

(c) through anything.

(4) For the purposes of this Law, touching or any other activity is sexual if a reasonable person would consider that –

(a) whatever its circumstances or any person’s purpose in relation to it, it is because of its nature sexual; or

(b) because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) it is sexual.

2 Meeting a child following sexual grooming etc.

(1) A person aged 18 or over (A) commits an offence if –

(a) having met or communicated with another person (B) on at least 2 earlier occasions, A –

- (i) intentionally meets B, or
 - (ii) travels with the intention of meeting B in any part of the world;
 - (b) at the time, A intends to do anything to or in respect of B, during or after the meeting and in any part of the world, which if done will involve the commission by A of a relevant offence;
 - (c) B is under 16; and
 - (d) A does not reasonably believe that B is 16 or over.
- (2) In paragraph (1), the reference to A having met or communicated with B is a reference to A having met B in any part of the world or having communicated with B by any means from, to or in any part of the world.
 - (3) The Schedule shall have effect to specify what is a relevant offence for the purposes of paragraph (1) (b).
 - (4) A person guilty of an offence under this Article shall be liable to imprisonment for a term of 10 years and to a fine.

3 Abuse of position of trust: sexual activity with a child

- (1) A person aged 18 or over (A) commits an offence if –
 - (a) A intentionally touches another person (B);
 - (b) the touching is sexual;
 - (c) A is in a position of trust in relation to B;
 - (d) where paragraph (2) applies, A knows or could reasonably be expected to know of the circumstances by virtue of which he or she is in a position of trust in relation to B; and
 - (e) either –
 - (i) B is under 18 and A does not reasonably believe that B is 18 or over, or
 - (ii) B is under 13.
- (2) This paragraph applies where A –
 - (a) is in a position of trust in relation to B by virtue of circumstances within Article 7(2), (3), (4) or (5), and
 - (b) is not in such a position of trust by virtue of other circumstances.
- (3) Where in proceedings for an offence under this Article it is proved that the other person was under 18, the defendant is to be taken not to have reasonably believed that that person was 18 or over unless sufficient evidence is adduced to raise an issue as to whether the defendant reasonably believed it.
- (4) Where in proceedings for an offence under this Article –
 - (a) it is proved that the defendant was in a position of trust in relation to the other person by virtue of circumstances within Article 7(2), (3), (4) or (5), and
 - (b) it is not proved that the defendant was in such a position of trust by virtue of other circumstances,

it is to be taken that the defendant knew or could reasonably have been expected to know of the circumstances by virtue of which he or she was in such a position of trust unless sufficient evidence is adduced to raise an issue as to whether the defendant knew or could reasonably have been expected to know of those circumstances.
- (5) A person guilty of an offence under this Article shall be liable to imprisonment for a term of 5 years and to a fine.

4 Abuse of position of trust: causing or inciting a child to engage in sexual activity

- (1) A person aged 18 or over (A) commits an offence if –
 - (a) A intentionally causes or incites another person (B) to engage in an activity;
 - (b) the activity is sexual;
 - (c) A is in a position of trust in relation to B;
 - (d) where paragraph (2) applies, A knows or could reasonably be expected to know of the circumstances by virtue of which A is in a position of trust in relation to B; and
 - (e) either –
 - (i) B is under 18 and A does not reasonably believe that B is 18 or over, or
 - (ii) B is under 13.
- (2) This paragraph applies where A –
 - (a) is in a position of trust in relation to B by virtue of circumstances within Article 7(2), (3), (4) or (5); and
 - (b) is not in such a position of trust by virtue of other circumstances.
- (3) Where in proceedings for an offence under this Article it is proved that the other person was under 18, the defendant is to be taken not to have reasonably believed that that person was 18 or over unless sufficient evidence is adduced to raise an issue as to whether the defendant reasonably believed it.
- (4) Where in proceedings for an offence under this Article –
 - (a) it is proved that the defendant was in a position of trust in relation to the other person by virtue of circumstances within Article 7(2), (3), (4) or (5), and
 - (b) it is not proved that the defendant was in such a position of trust by virtue of other circumstances,

it is to be taken that the defendant knew or could reasonably have been expected to know of the circumstances by virtue of which he or she was in such a position of trust unless sufficient evidence is adduced to raise an issue as to whether the defendant knew or could reasonably have been expected to know of those circumstances.
- (5) A person guilty of an offence under this Article shall be liable to imprisonment for a term of 5 years and to a fine.

5 Abuse of position of trust: sexual activity in the presence of a child

- (1) A person aged 18 or over (A) commits an offence if –
 - (a) A intentionally engages in an activity;
 - (b) the activity is sexual;
 - (c) for the purpose of obtaining sexual gratification, A engages in it –
 - (i) when another person (B) is present or is in a place from which A can be observed, and
 - (ii) knowing or believing that B is aware, or intending that B should be aware, that A is engaging in it;
 - (d) A is in a position of trust in relation to B;
 - (e) where paragraph (2) applies, A knows or could reasonably be expected to know of the circumstances by virtue of which A is in a position of trust in relation to B; and
 - (f) either –
 - (i) B is under 18 and A does not reasonably believe that B is 18 or over, or

- (ii) B is under 13.
- (2) This paragraph applies where A –
 - (a) is in a position of trust in relation to B by virtue of circumstances within Article 7(2), (3), (4) or (5); and
 - (b) is not in such a position of trust by virtue of other circumstances.
- (3) Where in proceedings for an offence under this Article it is proved that the other person was under 18, the defendant is to be taken not to have reasonably believed that that person was 18 or over unless sufficient evidence is adduced to raise an issue as to whether the defendant reasonably believed it.
- (4) Where in proceedings for an offence under this Article –
 - (a) it is proved that the defendant was in a position of trust in relation to the other person by virtue of circumstances within Article 7(2), (3), (4) or (5); and
 - (b) it is not proved that the defendant was in such a position of trust by virtue of other circumstances,

it is to be taken that the defendant knew or could reasonably have been expected to know of the circumstances by virtue of which he or she was in such a position of trust unless sufficient evidence is adduced to raise an issue as to whether the defendant knew or could reasonably have been expected to know of those circumstances.
- (5) A person guilty of an offence under this Article shall be liable to imprisonment for a term of 5 years and to a fine.

6 Abuse of position of trust: causing a child to watch a sexual act

- (1) A person aged 18 or over (A) commits an offence if –
 - (a) for the purpose of obtaining sexual gratification, A intentionally causes another person (B) to watch a third person engaging in an activity, or to look at an image of any person engaging in an activity;
 - (b) the activity is sexual;
 - (c) A is in a position of trust in relation to B;
 - (d) where paragraph (2) applies, A knows or could reasonably be expected to know of the circumstances by virtue of which A is in a position of trust in relation to B; and
 - (e) either –
 - (i) B is under 18 and A does not reasonably believe that B is 18 or over, or
 - (ii) B is under 13.
- (2) This paragraph applies where A –
 - (a) is in a position of trust in relation to B by virtue of circumstances within Article 7(2), (3), (4) or (5); and
 - (b) is not in such a position of trust by virtue of other circumstances.
- (3) Where in proceedings for an offence under this Article it is proved that the other person was under 18, the defendant is to be taken not to have reasonably believed that that person was 18 or over unless sufficient evidence is adduced to raise an issue as to whether the person reasonably believed it.
- (4) Where in proceedings for an offence under this Article –
 - (a) it is proved that the defendant was in a position of trust in relation to the other person by virtue of circumstances within Article 7(2), (3), (4) or (5); and
 - (b) it is not proved that the defendant was in such a position of trust by virtue of other

circumstances,

it is to be taken that the defendant knew or could reasonably have been expected to know of the circumstances by virtue of which he or she was in such a position of trust unless sufficient evidence is adduced to raise an issue as to whether the defendant knew or could reasonably have been expected to know of those circumstances.

- (5) A person guilty of an offence under this Article shall be liable to imprisonment for a term of 5 years and to a fine.

7 Positions of trust

- (1) For the purposes of Articles 3 to 6, a person (A) is in a position of trust in relation to another person (B) if –
- (a) any of the following paragraphs applies; or
 - (b) any condition specified in an Order made by the Minister is met.
- (2) This paragraph applies if A looks after persons under 18 who are detained in an institution by virtue of a court order or under an enactment, and B is so detained in that institution.
- (3) This paragraph applies if A looks after persons under 18 who are resident in –
- (a) a home or other place in which accommodation and maintenance are provided by the Minister for Health and Social Services under Article 20(1) of the 2002 Law; or
 - (b) a voluntary home, within the meaning of the 2002 Law,
- and B is resident, and is so provided with accommodation and maintenance, or accommodated, in that place.
- (4) This paragraph applies if A looks after persons under 18 who are accommodated and cared for in one of the following institutions –
- (a) a hospital within the meaning of the 2002 Law; or
 - (b) a home to which the Nursing and Residential Homes (Jersey) Law 1994^[3] applies;
- and B is accommodated and cared for in that institution.
- (5) This paragraph applies if A looks after persons under 18 –
- (a) who are receiving education at a school, within the meaning of the 1999 Law and B is receiving, and A is not receiving, education at that school; or
 - (b) who are cared for at registered day care premises, within the meaning of the Day Care of Children (Jersey) Law 2002^[4], and B is cared for at those premises.
- (6) This paragraph applies if A is appointed as –
- (a) the guardian of B, under Article 7 of the 2002 Law; or
 - (b) B's *tuteur*;
- (7) This paragraph applies if A is engaged in the provision of services provided by the Minister for Education, Sport and Culture to enable or assist participation by persons under the age of 16 in education or training and, in that capacity, looks after B on an individual basis.
- (8) This paragraph applies if A regularly has unsupervised contact with B (whether face to face or by any other means) –
- (a) in the exercise of functions of the Minister for Health and Social Services under Article 17 or 18 of the 2002 Law;
 - (b) in the exercise of functions for the provision of publicly provided accommodation for the purposes of Article 36 of the Police Procedures and Criminal Evidence (Jersey) Law 2003^[5].

- (9) This paragraph applies if A, who is to report to the court under Article 9 of the 2002 Law on matters relating to the welfare of B, regularly has unsupervised contact with B (whether face to face or by any other means).
- (10) This paragraph applies if A is an officer in an administration of the States for which the Minister for Health and Social Services is assigned responsibility, the Minister delegates to A the Minister's functions under Article 21 of the 2002 Law and A, in the discharge of those functions, advises and assists B and looks after B on an individual basis.
- (11) This paragraph applies if A is an officer in an administration of the States for which the Minister for Health and Social Services is assigned responsibility to whom the Minister delegates the discharge of the functions imposed on the Minister in relation to B by an order made under Article 12 of the Adoption (Jersey) Law 1961^[6].
- (12) This paragraph applies if –
 - (a) B is subject to a care order or supervision order, within the meaning of the 2002 Law, or an education supervision order within the meaning of the 1999 Law; and
 - (b) in the exercise of functions conferred by virtue of the order on an authorized person or the authority designated by the order, A looks after or supervises B on an individual basis.
- (13) This paragraph applies if A –
 - (a) is a person appointed for B under Article 75(1)(b) or (2)(b) of the 2002 Law;
 - (b) is appointed to be the guardian ad litem of B under Article 18(6) of the Adoption (Jersey) Law 1961; or
 - (c) is appointed to be the guardian ad litem of B under rule 51 of the Matrimonial Causes Rules 2005^[7],
 and, in that capacity, regularly has unsupervised contact with B (whether face to face or by any other means).
- (14) This paragraph applies if –
 - (a) B is subject to requirements imposed by or under an enactment on his or her release from detention for a criminal offence, or is subject to requirements imposed by a court order made in criminal proceedings; and
 - (b) A looks after B on an individual basis in pursuance of the requirements.

8 Positions of trust: interpretation of Article 7

- (1) The following provisions apply for the purposes of Article 7.
- (2) Subject to paragraph (3), a person looks after persons under 18 if he or she is regularly involved in caring for, training, supervising or being in sole charge of such persons.
- (3) A person (A) looks after another person (B) on an individual basis if –
 - (a) A is regularly involved in caring for, training or supervising B; and
 - (b) in the course of A's involvement, A regularly has unsupervised contact with B (whether face to face or by any other means).
- (4) A person receives education at a school, within the meaning of the 1999 Law, if –
 - (a) the person is registered or otherwise enrolled as a pupil or student at the school, or
 - (b) the person receives education at the school under arrangements with another school at which he or she is so registered or otherwise enrolled.

9 Articles 3 to 6: marriage exception

- (1) Conduct by a person (A) which would otherwise be an offence under any of Articles 3 to 6 against another person (B) is not an offence under that Article if at the time –
 - (a) B is 16 or over; and
 - (b) A and B are lawfully married.
- (2) In proceedings for such an offence it is for the defendant to prove that A and B were lawfully married at the time.

10 Articles 3 to 6: sexual relationships which pre-date position of trust

- (1) Conduct by a person (A) which would otherwise be an offence under any of Articles 3 to 6 against another person (B) is not an offence under that Article if, immediately before the position of trust arose, a sexual relationship existed between A and B.
- (2) Paragraph (1) does not apply if at that time sexual intercourse between A and B would have been unlawful.
- (3) In proceedings for an offence under any of Articles 3 to 6 it is for the defendant to prove that such a relationship existed at that time.

11 Articles 3 to 6: aiders, abettors, etc.

A person who aids, abets, counsels or procures the commission of an offence under any of Articles 3 to 6 shall also be guilty of the offence and liable in the same manner as a principal offender to the penalty provided for that offence.

12 Amendment of law relating to *sodomie*

- (1) Notwithstanding any rule of customary law or any other enactment, a person shall not be guilty of the *crime of sodomie* if –
 - (a) the act is committed in private; and
 - (b) each of the parties to the act consents and is 16 or over.
- (2) Notwithstanding any rule of customary law or any other enactment, a person under 16 shall not be guilty of the *crime of sodomie* if the other party to the act is 16 or over.
- (3) An act of *sodomie* shall not be treated as taking place in private if it takes place in a lavatory to which the public have, or are permitted to have, access, whether on payment or otherwise.
- (4) In any proceedings for the *crime of sodomie*, it shall be for the prosecution to prove that the act of *sodomie* took place otherwise than in private or that one of the parties is under 16.
- (5) A person requiring special care cannot give any consent which, by virtue of paragraph (1), would prevent an act of *sodomie* from being a *crime*.
- (6) Notwithstanding paragraph (5), a person shall not be convicted, on account of the incapacity of a person requiring special care to consent, of a *crime of sodomie* if the first-mentioned person proves that he or she did not know, and had no reason to suspect, that the other person was a person requiring special care.
- (7) In this Article, “person requiring special care” has the same meaning as in the Mental Health (Jersey) Law 1969^[8].

13 Repeals

The Sexual Offences (Jersey) Law 1990^[9] and the Sexual Offences (Amendment) (Jersey) Law 1995^[10]

shall be repealed.

14 Citation and commencement

This Law may be cited as the Sexual Offences (Jersey) Law 200- and shall come into force 7 days after it is registered.

SCHEDULE

(Article 2(3))

RELEVANT OFFENCES

1. Any offence under this Law.
2. Rape.
3. Incest.
4. Sodomy.
5. Bestiality.
6. Indecent assault.
7. Gross indecency.
8. Indecent exposure.
9. Any offence under the Loi (1895) modifiant le droit criminel^[11], other than an offence under Article 7.
10. Any offence under Article 38 of the Mental Health (Jersey) Law 1969^[12].
11. The offence in Article 2 of the Protection of Children (Jersey) Law 1994^[13].
12. The offence created under Article 61 of the Customs and Excise (Jersey) Law 1999^[14] or the offence created under Article 3 of the Import and Export (Control) (Jersey) Law 1946^[15] in so far as the offence relates to goods prohibited to be imported under paragraph 2 of the Import and Export (Control) (Jersey) Order 1992^[16] that are indecent photographs of persons who are or appear to be aged under 16 years.
13. Any offence of attempting or conspiring to commit, or of aiding, abetting, counselling, procuring or inciting the commission of, any of the foregoing offences.
14. Anything done outside Jersey which, if done in Jersey, would be one of the foregoing offences.

[1] *Application No. 25186/94, 1st July 1997: 24 EHRR CD 22.*

[2] *AVERY International Aids Charity, UK statistics.*

[1] *chapter 10.800*

[2] *chapter 12.200*

[3] *chapter 20.725*

[4] *chapter 10.700*

[5] *chapter 23.750*

[6] *chapter 12.050*

[7] *chapter 12.650.50*

[8] *chapter 20.650*

[9] *chapter 08.860 (L.15/990)*

[10] *chapter 08.860 (L.15/1995)*

[11] *chapter 08.540*

[12] *chapter 20.650*

[13] *chapter 08.790*

[14] *chapter 24.660*

[15] *chapter 05.350*

[16] *chapter 05.350.50*