Direct dial number: +44 (0) (1534) 50223
Fax: +44 (0) (1534) 50229

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25th January, 2006
Corrected version

Deputy F. J. Hill,
Chairman,
Social Affairs Scrutiny Panel,
States Greffe,
Morier House,
St. Helier,
Jersey.

Dear Deputy Hill,

Social Affairs Scrutiny Panel
Sexual Offences (Jersey) Law 200 – Proposed Review
Age of consent for sexual intercourse between males

I write further to my letters of the 23rd and 24th January, 2006, the first of which gave preliminary advice on legal implications if the States did not adopt the legislation, and the second of which gave some fuller advice on the power of the United Kingdom to legislate for Jersey. This letter advises on the reasons why an amendment to the Law is necessary in order to comply with the European Convention on Human Rights and adds some further advice on the legal consequences, including the power of the United Kingdom to legislate for Jersey in these circumstances.

Buggery and sodomy

1. Buggery is -

(a) anal intercourse by a **man** *with a* ***man*** *or a* ***woman*** (known as sodomy); or

(b) intercourse (anal or vaginal) by a **human being** *with an* ***animal*** (known as bestiality).

2. Penetration must be proved, but emission need not.

Historical position in Jersey

3. In Jersey, the English word "buggery" is difficult to translate. There is "*la bougrie*" or "*la bougrerie*", but neither expression has been used, in France or in Jersey, in the context of the criminal law. *Pipon & Durell*[1] refer to sodomy "whether with man or

beast". The *Loi* (1800) on *Sodomie* provided (in translation) that -

> "*Whosoever shall be found guilty . . . of the abominable crime of sodomy or bestiality . . . , according to the customs and usages of this Island, shall be punished with death, and shall suffer the same severe punishment*[2]*, the same confiscations and forfeitures of property, that the law inflicts at the present time on those convicted of a capital crime.*"

4. The harsh penalty stems from the fact that sodomy, along with heresy, ranked as a crime against God[3].

5. In the 13th Century, the punishment for sodomy was to be buried alive deep enough in the ground that the memory of "*la grand abomination*" would be erased[4].

6. The *Loi* of 1800 was replaced by the *Loi* (1938) *modifiant le droit criminel (sodomie et bestialité)* which provided that any person convicted of sodomy or bestiality should be liable to imprisonment for between 2 years and life.

7. The *Loi* of 1938 remains in force to this day subject only to the Sexual Offences (Jersey) Law 1990, as amended in 1995.

The United Kingdom reforms in 1967

8. The Sexual Offences Act 1967 provided so far as it is relevant that a homosexual act [5] in private should not be an offence provided that the parties consented and had reached 21 years of age.

9. A consenting party under 21 continued to be guilty of an offence, but proceedings against him for participating in buggery or gross indecency could not be instituted except with the consent of the Director of Public Prosecutions.

10. It continued to be an offence for a man to sodomise a woman, even if both parties consented, or for a man or a woman to commit buggery with an animal, whether in private or not.

The reforms in Jersey in 1990

11. The Sexual Offences (Jersey) Law 1990 provided that a homosexual act in private should not be punishable as the crime of "*sodomie*" if the parties to the act consented and had attained the age of 21.

12. The 1990 Law specifically mentioned sodomy (unlike the English Act of 1967) because under Jersey law sodomy was the only way a homosexual act in private was unlawful. Gross indecency in private (between consenting adults) was not an offence.

13. Homosexual acts in private were made lawful only if no more than two persons took

part or were present.

14. Anal intercourse between a man and a woman, even if consensual and in private, remained an offence.

Later reforms in England and Wales

15. The Criminal Justice and Public Order Act 1994 provided that buggery of one person by another was not unlawful provided it took place in private and both parties were 18 years of age or over.

16. This not only lowered the age of consent from 21 years to 18 years, but it made lawfu the consensual buggery of a woman by a man. It should be noted, however, that the age of consent was (at that point) *18*, not 16 as with vaginal sexual intercourse.

17. The Sexual Offences (Amendment) Act 2000 further reduced the age of consent to 16.

18. The Act engendered in its passage through Parliament much debate and controversy. The free vote on the homosexual age of consent, which had been promised by the Home Secretary, took place on 22nd June 1998. The Commons passed, by a majority of 207, an amendment to the then Crime and Disorder Bill which would have lowered the age from 18 to 16. On 22nd July 1998, the Lords rejected the amendment by 168 votes. The Government accepted the Lords' rejection but expressed an intention to introduce legislation on the age of consent in the 1998-99 session.

19. The Sexual Offences (Amendment) Bill had been introduced into the House of Commons on 16th December 1998. It had been passed by a large majority in the House of Commons but rejected by the Lords in April 1999, when they voted by 222 to 146 to delay the Second Reading beyond the end of the session. There was further discord between the Commons and the Lords but, eventually, on 30th November 2000, the Parliament Act 1911 was invoked and the Bill received Royal Assent in spite of its rejection (in part) by the Lords.

20. The Act made the age of consent the same for all forms of sexual activity regulated by criminal law, whether the parties were of the same or opposite sexes.

21. Although much of the debate surrounding the Act was concerned with homosexual acts between men, the buggery offence was not limited to same sex acts. The reduction in the relevant age of consent also effected change in relation to heterosexual buggery, which under the 1994 Act was still criminal if either party was below 18 years of age.

22. Buggery was not a separate offence in Scotland, although homosexual anal intercourse was within the definition of "homosexual act", which meant it was criminal unless consensual and carried out in private between men over the relevant age.

23. The law of Northern Ireland was also changed, but the age of heterosexual consent there had always been 17. The amendment was confined to acts between men, which meant that heterosexual buggery remained a criminal offence in Northern Ireland irrespective of age.

24. The Act also provided that, when one party to a homosexual activity was below the age of 16 and the other party was 16 or over, the younger party committed no offence. However, the protection applied only if one of the parties was 16 or more. If both were below 16, both were criminally liable.

25. The Act also introduced a new sexual offence of abuse of a position of trust (applicable throughout the United Kingdom). It became an offence for a person aged 18 or over -

(a) to have sexual intercourse (whether vaginal or anal) with a person under that age; or

(b) to engage in any other sexual activity with or directed towards such a person,

if (in either case) he or she was in a position of trust in relation to that person. It was a defence to prove that, at the time of intercourse or sexual activity, the accused did not know and could not reasonably have been expected to know, that the person involved was under 18 or was a person in relation to whom he/she was in a position of trust.

26. This offence was included in the Bill following the recommendations of an interdepartmental working group set up to identify additional safeguards needed to prevent unsuitable people from working with children. It was also asked to identify measures to protect young people vulnerable to abuse by those in positions of trust.

27. The working group produced an interim report which proposed a new criminal offence directed at sexual abuse by those in positions of trust. It also recommended strengthening codes of conduct to protect those at risk of such abuse. The view of the working group was that sexual activity was inappropriate within relationships of trust, not only because the power differentials made consent problematic, but also because sexual relationships were incompatible with the ethical and moral responsibilities owed by those in positions of trust.

28. The introduction of this offence was strongly opposed by professional bodies representing teachers, who argued that it would render criminal even non exploitative relationships and might lead to a risk of malicious false accusations.

Reform in Jersey after 1990

29. The Sexual Offences (Amendment) (Jersey) Law 1995 reduced the age of consent for sexual intercourse between males from 21 to 18.

30. In this respect it was similar to the Criminal Justice and Public Order Act 1994 of the

United Kingdom. However, unlike that Act, it did not decriminalise heterosexual buggery.

The European Convention on Human Rights – developments in the 1990's

31. In February 1994 the European Commission of Human Rights ruled admissible a complaint by three men[6] that the United Kingdom was in breach of Articles 8 and 14 of the European Convention on Human Rights because of the difference in the age of consent for homosexuals and heterosexuals.

32. Article 8 grants everyone 'the right to respect for his private and family life, his home and his correspondence'.

33. Article 14 states that 'the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'.

34. However, in the light of the intervening vote on the age of consent in the United Kingdom Parliament - which reduced the age of consent for homosexuals to 18 - the case was not referred to the European Court (all three men were over 18 at the time).

35. However, the European Commission of Human Rights later concluded that the United Kingdom also had a case to answer for setting the homosexual age of consent at 18, following a complaint brought by Euan Sutherland in June 1994[7].

36. Again the accepted ground for the complaint was breach of Articles 8 and 14 of the European Convention on Human Rights. The United Kingdom Government was asked to justify the continuing inequality in the treatment of gay men and, in particular, the criminalisation of the young gay men involved.

37. It argued that it was using the discretion allowed to it under the 'margin of appreciation' to allow young men time to consider their sexuality, and to prevent young gay men from setting themselves apart from society at too young an age.

38. After hearing the arguments for both sides, the Commission ruled (by 14 votes to 4) that there had been a violation of Article 8 taken in conjunction with Article 14, and that the case was admissible[8].

39. Following this report, the Government of the United Kingdom announced that it and the applicants had agreed to apply to the Court for the case to be deferred pending a vote in Parliament 'at the earliest opportunity'.

40. Another relevant case, this time before the European Court of Human Rights, was that of *ADT -v- United Kingdom*[9] which concerned that provision of the Sexual Offences

Act 1967 under which it was unlawful for more than two people to participate in or be present at male homosexual acts in private.

41. The Court held that that provision violated Article 8 of the Convention and awarded damages to the applicant.

42. In relation to all of the above cases, the United Kingdom honoured its Convention obligations by enacting the Sexual Offences (Amendment) Act 2000 described above.

Origins of the current projet de loi

43. On 15th July 2003 the Department for Constitutional Affairs wrote to the Lieutenant Governor in the following terms –

> *Your Excellency*
>
> *I have the honour, by direction of the Lord Chancellor and Secretary of State for Constitutional Affairs, to enclose for the information of Your Excellency and the Island Authorities, a copy of a UK Parliamentary Question from Dr Evan Harris MP entitled 'Sexual Activity (Criminalisation)'.*
>
> *I am to draw the attention of the Insular Authorities to the recent ECHR Judgements, L and V v Austria and S L v Austria, on criminalisation of sexual activity between men and ask what plans the Island Authorities have for introducing the legislation necessary to allow compliance with these judgements.*
>
> *I enclose copies of the ECHR Judgements to assist the Island Authorities in their consideration.*
>
> *I have the honour to be,*
>
> *Sir*
>
> *Your Excellency's obedient Servant*
>
> *Jennifer Schofield*

The Parliamentary exchange referred to was the following -

> ***Dr. Evan Harris****: To ask the Parliamentary Secretary, Department for Constitutional Affairs what action the Lord Chancellor will take on the compliance of (a) the Isle of Man, (2) Guernsey and (c) Jersey with the recent judgments of the European Court of Human Rights on*

criminalisation of sexual activity between men. [123499]

***Mr. Lammy**: We have drawn to the attention of the Insular Authorities in Jersey, Guernsey and the Isle of Man the relevant judgments of the European Court of Human Rights on these matters and these will be receiving consideration by them.*

44. On 23rd July 2003 the Bailiff responded to the letter as follows –

Sir,

I have the honour to refer to previous correspondence concerning the recent ECHR judgments L and V v Austria and SL v Austria on the criminalization of sexual activity between men, which rests with a letter from the Department for Constitutional Affairs dated 15th July, 2003.

The Insular Authorities are pleased to confirm that these very recent judgments of the European Court of Human Rights are being considered by the Law Officers' Department in Jersey and will be referred to the Legislation Committee in due course for political consideration.

I have the honour to be,

Sir,

Your Excellency's obedient servant,

Bailiff

The Austrian cases

45. The cases of *L and V -v- Austria* and *SL -v- Austria* to which the attention of the Island Authorities was drawn in 2003 made it clear that the European Court of Human Rights will treat <u>any</u> law that 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 European Convention on Human Rights. Copies of both these cases were sent to the Scrutiny Office on the 23rd January, 2006.

46. The two cases involved men who had been convicted under Article 209 of the Austrian Criminal Code which prohibited homosexual acts between adult men and consenting adolescents between 14 and 18 years of age. By contrast, under Austrian law, consensual heterosexual or lesbian acts between adults and persons over fourteen years of age were not punishable.

47. The Court found the difference in the age of consent to be a violation of the applicants' right to respect for their private lives and held that it was discriminatory.

48. The difference in the age of consent was not considered to be capable of objective justification within the meaning of Article 8(2) of the Convention.

49. Austria was therefore found to be in breach of its obligations under the Convention.

Jersey's current position

50. The existing position in Jersey law is similar to the position in Austrian law (which breached the Convention).

51. Article 1(1) of the Sexual Offences (Jersey) Law 1990 (the "1990 Law") provides that –

> ". . . *a homosexual act in private shall not be punishable as the crime of . . . sodomy if the parties to the act consent and have attained the age of [eighteen years.]*"

This contrasts with the position under Article 4(1) of the *Loi (1895) modifiant le droit criminel*, which establishes that the relevant age of lawful consent to heterosexual acts is sixteen years of age.

52. As explained above, the United Kingdom enacted the Sexual Offences (Amendment) Act 2000 in order to meet its Convention obligations in this respect, but Jersey law remains incompatible with the Convention.

53. The issue is all the more pressing in the light of the Commission's decision in *Sutherland v UK* (already referred to above) in which the Commission afforded victim status (and therefore, the necessary standing to take a case to the European Court of Human Rights) to a homosexual who had <u>not</u> been convicted under the law which he sought to challenge (namely, section 1 of the Sexual Offences Act 1967, which was subsequently repealed).

54. 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.

55. Therefore, the legal provisions affecting homosexuals in Jersey are liable to come under scrutiny even in the absence of any prosecution being brought.

56. Moreover, on commencement of the Human Rights (Jersey) Law 2002, a challenge to the existing law could be brought in the Royal Court.

57. Indeed, were the States of Jersey to fail to honour the Island's Convention obligations in respect of the rights of homosexual people, it is difficult to see how they could at the same time make an Appointed Day Act to bring the Human Rights (Jersey) Law 2002 into force.

The options for Jersey

58. The following possibilities would put an end to the breach stemming from discrimination in the enjoyment of the Article 8 right to respect for one's private life –

- the law could be brought into line with that in England, Scotland and Wales, by reducing the age of consensual homosexual activity to 16 years of age;

- the age of consent for heterosexual intercourse could be increased to 18 years of age; or

- the age of consent for both types of sexual activity could be made 17 years of age, as in Northern Ireland.

Increasing the age of consent

59. The second and third options would mean raising by one or two years the age of consent for heterosexual intercourse and would therefore involve legislating to render unlawful existing heterosexual relationships that have been lawful under Jersey law since at least 1895. When heterosexual intercourse takes place, and the female partner is below the age of consent, the female does not commit a criminal offence herself. The offence is committed by the male who has intercourse with her. That said, the criminality of the act and the threat of prosecution is intended to, and for the majority of men does, act as a deterrent. Thus even though raising the age of consent for females would not make it a criminal offence on the part of a female who had intercourse between the ages of 16 and the new age of consent, it would greatly restrict the number of males who were prepared to have sexual intercourse with her, and indeed the only men who would be prepared to do so would be either those who were deceived as to her age or those who were prepared to commit criminal offences. It would thus inhibit, if not put an end to, sexual intercourse for girls in this age range, and would thus in my opinion be an interference in the private life of a girl in the relevant age range, even though it did not criminalise the behaviour on her part.

60. In Ireland (including Northern Ireland for this purpose) the age of consent for heterosexuals has always been 17 so that there was no question there of raising the age of consent for heterosexual intercourse.

61. Increasing the present age of consent would also involve either –

(a) restricting the ability of girls who had already attained the age of 16 (and who might already have married) and who would thus find it difficult if not impossible to find partners prepared to have heterosexual intercourse with them, which would undoubtedly be an unwarranted interference in the private lives of the persons affected; or

(b) creating a two-tier discriminatory system whereby persons who had sexual intercourse with girls who had attained the age of 16 years before the Law came

into force did not commit a criminal offence, so that such girls had no obstacles thrown in their way if they wished to have heterosexual intercourse, but persons who had sexual intercourse with girls who attained the age of 16 years after the Law came into force and who had not yet attained the new age of consent would commit a criminal offence, so that such girls would find it difficult if not impossible to find willing partners.

It seems clear that (a) would be a breach of human rights and, ironically, (b) above would result in homosexual men whose birthdays were on the earlier date being able to engage in sexual intercourse at a younger age than would ben the case for heterosexual persons whose birthdays were on the later date.

62. But, at all events, either option would involve a degree of interference with the private lives of the persons concerned and any such interference with private life would have to have been proportionate.

63. No ground has been advanced for arguing that it is necessary to raise the age of consent from 16 to 17 or 18 in order to protect heterosexual people from engaging in intercourse at too young an age. It would be patently clear that the age of consent for heterosexual intercourse had only been raised in order to avoid lowering the age of consent for homosexual intercourse. An aggrieved 16 year old who wished to have heterosexual intercourse might argue that the raising of the age of consent was thus not necessary or proportionate, and therefore not a justifiable interference.

64. Even if none of the above difficulties arose, the legislative drafting of transitional provisions for heterosexuals who had attained the age of 16, but were below the new age, be it 17 or 18, would be difficult (and the age of consent for marriage would have to be raised as well).

65. A further problem would arise in the case of young married persons or partners coming to the Jersey from Great Britain. Would couples - one of whom was 16 or 17 years of age - arriving from England or Scotland be required under either of these options to refrain from having sexual intercourse whilst in Jersey? Or would there again be a two-tier system under which such persons would be exempt from prosecution whilst 'locals' in the same category would be liable to prosecution for having intercourse?

The legal implications of failing to legislate at all

66. If the States do not adopt this legislation, the legal implications will include the following –

(i) Jersey will be in breach of the European Convention on Human Rights, which has been extended to the Island.

(ii) It will raise difficulties in respect of the bringing into force of the Human Rights (Jersey) Law 2000, because the domestic legislation will not be Convention compliant, inasmuch as there will be a breach of the Convention in this area of the law.

(iii) A person between the ages of 16 and 18 who wishes to have homosexua intercourse but is unable to do so will be able to bring proceedings before the European Court of Human Rights alleging a breach of his rights under the Convention. The complaint will be upheld by the European Court of Humar Rights in accordance with the judgements referred to above. The Court has a power to award an aggrieved complainant damages for a breach of his humar rights.

Can the United Kingdom legislate for Jersey?

67. As Professor Jeffrey Jowell Q.C. observed in his article in the Jersey Law Review, the Royal Commission on the Constitution which was established in 1969 and reported in 1973 ("Kilbrandon") provided a list of matters in which the United Kingdom should be free to exercise its "paramount powers" over the Islands. He went on to say in the article that –

> *"It is strongly arguable that, in so far as these categories are correct, they lie in the realm not of Parliament but the Crown. The broadest of these categories, and the one most likely to permit interference with the Islands' domestic matters, concerns 'the ultimate responsibility of the Crown for the good government of the Islands'. Note that Kilbrandon specifically refers to this as a power of the Crown.*
>
> *Kilbrandon, however, does not define with any accuracy the scope of this power for 'good government', although he warns that the United Kingdom government and Parliament ought not lightly to employ that power to 'impose their will in the Islands merely on the grounds that they know better then the Islands what is good for them'. It has been too often assumed that that power is equivalent to the power of the United Kingdom over conquered or ceded territories 'to make such laws as appear necessary for the peace, order or good government of the territory'. That formulation has been held in a number of cases to 'connote, in British constitutional language, the widest law-making powers appropriate to a sovereign'.*
>
> *. . . as the United Kingdom government now acknowledges, the power for the 'good government' of the Islands is one that is narrower than that by far. It is the classic Crown prerogative to maintain the Queen's peace in times of grave emergency or the breakdown of law and order. Its scope to intervene in matters outside of that extreme situation is therefore strictly limited. If that is the case, as it surely is, it follows that the 'strictly legal' powers generally of the United Kingdom over the Islands are restricted to those exercised under the diminishing scope of the Royal prerogative alone and do not attach to Parliament more generally."*

Professor Jowell went on to observe that it was a well known prerogative of the Crown is to make international treaties but, he argued, the fact that the United Kingdom had

entered into an international agreement (e.g. a tax treaty), the territorial scope of which was intended to extend to the Islands, might not of itself confer upon the United Kingdom a competence to impose obligations upon the Islands, contrary to the UK-Islands' constitutional arrangements.

He went on -

> *The point here is that, for a treaty obligation to prevail over domestic law (or constitutional arrangement), Parliament must transform that treaty into United Kingdom law. Even that fact may, however, not permit the statute to run to areas over which the United Kingdom has no legitimate control. Surely the United Kingdom, in enacting any legislation, whether in response to an international obligation or not, should always be subject to its domestic limitations in constitutional law? It is a well established principle, applied in many jurisdictions throughout the world, that international obligations are, rightly or wrongly, subject to domestic constitutional competence. In that case, the United Kingdom's power to bind the Islands to international obligations in the areas of their exclusive constitutional competence would be limited to matters to which the Islands had agreed to be bound.* [emphasis added]

68. Professor Jowell's analysis is one of the most sympathetic to the Islands' own perception of their independence, but even his analysis concludes that there would be a power in the United Kingdom to legislate in place of the States in matters to which the Island "*had agreed to be bound*". This is the view which I expressed in my letter of the 24th January, 2006.

69. It is axiomatic to state that Jersey has agreed to be bound by judgments of the European Court of Human Rights.

70. That being the case, there is no argument to be had about the merits of those judgements: they are binding on Jersey (through the United Kingdom) as they are binding on every other State party to the Convention.

71. It would be difficult to sustain the argument that, after the United Kingdom had signed up to the Convention on Jersey's behalf, it was powerless to honour Convention commitments that it had undertaken on Jersey's behalf.

72. That would be tantamount to arguing that a State should be liable for a continuing contempt to which it is powerless to put a stop.

Jersey's international reputation

73. This debate is not about the merits of the judgements of the European Court of Human Rights: it is about respect for the international rule of law.

74. The Austrian Parliament on 10th July 2002 decided to repeal Article 209 of the

Austrian Criminal Code (see *para* 47 above).

75. By all accounts, it did so, not because of widespread agreement in the country with the judgements of the European Court of Human Rights, but because Austria respects the international rule of law.

76. Jersey is in exactly the same position as Austria against whom there is still a residue of judgments such as the case of *R. H.* -v- *Austria* (Application no. 7336/03). The case relates to the time before Article 209 was repealed and the judgement, dated only 19th January 2006, is attached.

77. Judgements of this sort against the United Kingdom in respect of Jersey are liable to become commonplace if the States do not comply with the Convention.

78. A failure by the States to act will be seen not only by the United Kingdom, but by the wider civilized world, as an abdication of governmental responsibility and, in some quarters, the governmental competence of the Island will be called into question.

Yours sincerely,

Acting Attorney General

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[1] [1789] at page 15

[2] '*supplice*'

[3] *Pesché de Majesty vers le Roy de Ciel*

[4] This is according to *André Hornes* writing at the end of the 13th Century in 'The Myrror of Justice' which, despite its title and despite being published in England, was written in the legal French of the time and, according to *Hoüard*, represented the position as much in mainland Normandy as in England.

[5] *i.e.* buggery or gross indecency

[6] Ralph Wilde, Hugo Greenhalgh and William Parry

[7] Application No 25186/94. A copy of this case was sent to the Scrutiny Office on the 23rd January, 2006.

[8] adopted on 1st July 1997

[9] Application No 00035765/97