

# STATES OF JERSEY



## **DRAFT SEXUAL OFFENCES (JERSEY) LAW 200- (P.63/2006): AMENDMENTS (P.63/2006 AMD.) – COMMENTS**

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**Presented to the States on 30th June 2006  
by H.M. Attorney General**

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**STATES GREFFE**

## COMMENTS

1. The proposed amendments lodged by the Deputy of St. Ouen to P.63/2006 have been referred to me for a Report.
2. The amendments fall into two classes –
  - (i) substituting the age of 15 for the age of 13 in different Articles in the draft Law.
  - (ii) substituting a new Article 12 for the proposed Articles 12 and 13.
3. There are no human rights implications in relation to the amendments falling within class (i). It is a matter for members as to whether they think that there should be no defence for a person in a position of trust where he or she reasonably believes that a young person of 13 or 14 is over the age of 18. Essentially the issue lies in finding the right balance between the protection of young people and the fairness of condemning a person who is found by the Court or jury to have had a reasonable belief that a particular person had in fact reached the age where engaging in sexual activity with a person who would otherwise be in a position of trust, was lawful.
4. If the amendment in class (ii) is accepted by the States, the relevant provisions of the Sexual Offences (Jersey) Law 1990 (the “1990 Law”) would read as follows –
  - “1.
    - (1) Notwithstanding any provision of law, whether enacted or customary but, subject to Article 2, a homosexual act in private shall not be punishable as the *crime of sodomie* (hereinafter referred to as “sodomy”) if the parties to the act consent and have attained the age of 16 years.
    - (2) An act which would otherwise be treated for the purposes of this Law as being done in private shall not be so treated if done –
      - (a) when more than 2 persons take part or are present; or
      - (b) in a lavatory to which the public have or are permitted to have access, whether on payment or otherwise.
    - (2A) Notwithstanding any provision of law, whether enacted or customary, a person who has not attained the age of 16 years shall not be guilty of the *crime of sodomie* if the other party to the act has attained that age.”
5. Article 8 of the European Convention on Human Rights (the “Convention”) is in these terms –
  - “1. Every one has the right to respect for his private and family life, his home and his correspondence.
  2. There shall be no interference by a public authority with the exercise of this right except such as 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.”
6. Article 14 of the Convention is in these terms –

“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.”

7. The Human Rights (Jersey) Law 2000, when it comes into force, will incorporate these rights in domestic law.
8. It is clear from the jurisprudence of the European Court of Human Rights that –
  - (i) Sexual activity falls within the ambit of Article 8 of the Convention, concerning as it does a most intimate aspect of a person’s private life (see, for example, Dudgeon v. United Kingdom, 22nd October 1981, Smith and Grady v. United Kingdom 90 ECHR 1999-VI and L & V v. Austria 2003 ECHR 20).
  - (ii) Any interference with a person’s sexual life and any difference in treatment based on sex or sexual orientation would require particularly weighty reasons (see Smith and Grady, op cit, ADT v. United Kingdom 36 ECHR 2000-IX, L & V v. Austria op cit).
  - (iii) This was all the more so where a European consensus existed to reduce the age of consent for homosexual relations (see L & V v. Austria op cit and S.L. v. Austria, judgment – 9th January, 2003).
  - (iv) Any differences in treatment based on sexual orientation would require particularly serious reasons by way of justification (see Smith and Grady op cit, L & V v. Austria op cit).
  - (v) In the absence of any objective and reasonable justification, the maintenance of a higher age of consent for homosexual acts than heterosexual ones violated Article 14 taken in conjunction with Article 8 (see Sutherland v. United Kingdom No. 25186/94 Commission Report of 1st July, 1997, L & V v. Austria op cit).
9. The effects of the class (ii) amendment are that –
  - (i) The act of consensual sodomy in private between heterosexuals aged 16 and over would be criminal but between homosexuals would not. This would be a breach of Article 14 of the Convention, when linked with Article 8.
  - (ii) The act of consensual vaginal intercourse in private between adults over 16 with more than two people present would be lawful (subject to the abuse of trust provisions) but the act of consensual anal intercourse in similar circumstances would not. It is hard to see how this would also not be in breach of Articles 8 and 14 of the Convention.
10. The Deputy of St. Ouen says by implication in his Report that the interference with the Article 8 rights as described in paragraph 9 above is legitimate on the ground of health risks associated with the act of sodomy. The extent of those risks is a matter for medical experts in the first instance, and the assessment of them is a matter for lawyers in the application of the Convention rights.
11. I have not seen – nor have members been presented with – any evidence of the extent of those health risks. Nonetheless, it seems fair to make these points –
  - (i) If there were serious risks to health from the act of sodomy, it is surprising that, as far as one can tell, there is no European Court case law which documents the risks and assesses the proportionality of the interference with Convention rights against those risks.
  - (ii) Similarly, it is surprising that the 1990 Law which was passed against the background of what Convention rights then required, was passed at all.

- (iii) It is hard to see how the health risks can be increased by having more than one person present when, by the ordinary laws of physics and biology, it would seem unlikely that anal intercourse can take place between more than two people at the same time.
  - (iv) The most obvious health risks would seem to be associated with unprotected intercourse whether anal or vaginal. It is hard to see how the presence of more than two persons whilst intercourse takes place has any necessary impact on whether the intercourse is protected or not.
  - (v) The burden of proof in maintaining legislation which applies a discrimination between the sexes in the interference in the Article 8 Convention right lies with the States which satisfy a Court that it is necessary and proportionate to maintain it. In my opinion, the class (ii) amendment falls far short of this.
12. The Law Officers have a duty to report to the Crown on projets de loi adopted by the States in order to obtain Royal Assent. In the performance of that duty, I pay the highest regard to the expression by members of the democratic will of the people of Jersey. Nonetheless, I would be duty bound to draw attention to the fact that the adoption of the class (ii) amendment of the Deputy of St. Ouen would be very likely to leave the United Kingdom in breach of its international obligations on account of Jersey insofar as the Sexual Offences (Jersey) Law 1990, as amended, was concerned. I would thus be unable to advise Her Majesty that such an Act of the States was one to which Royal Assent might properly be given.

H.M. Attorney General

27th June 2006.