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Sexual Offences : Age of Consent

**Summary of Advice to the
Scrutiny Panel**

THIRD ADDENDUM

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51. I have been asked to advise upon an email dated the 23rd February, 2006, from Mr. Darius Pearce.

52. Mr. Pearce begins by saying that sodomy and homosexual sex are not interchangeable terms. In the course of the email, he uses various expressions, such as male homosexual sex, vaginal sex, oral male homosexual sex and the like. In this advice, I use the term “intercourse” to mean a sexual act in involving penile penetration, “homosexual intercourse” to mean penile penetration by one male of the anus of another male and “heterosexual intercourse” to mean penile penetration of the vagina.

53. Mr. Pearce states that he cannot see how the States of Jersey can be held responsible for the inability of homosexual male couples to partake of vaginal sex. That does not reflect the approach of the European Court of Human Rights. The approach of the European Court of Human Rights is that the preferred form of sexual intercourse for homosexuals is homosexual intercourse. If there is a different age of consent for homosexual intercourse from that specified by law for heterosexual intercourse, homosexuals who do not wish to participate in heterosexual intercourse are discriminated against, because heterosexuals can indulge in intercourse from the age of 16 but homosexuals cannot practice their preferred form of sexual intercourse, namely homosexual intercourse, until both partners have attained the age of 18. This is discrimination based on sex, and thus contrary to Article 14 of the European Convention on Human Rights.

54. Mr. Pearce states that “even the solicitor general cannot recall a case where the

law was actually enforced.” I have looked back through my previous advices and cannot find any statement to the effect that I cannot recall a case where the law has been enforced. I can certainly recall cases where adult males have been prosecuted for committing sodomy with male juveniles. In paragraph 36 of my first addendum, I said that I did not think that it was possible to say with confidence that there has never been a prosecution in Jersey against a minor for sodomy, but that is a very different thing from saying that I cannot recall a prosecution against an adult for sodomy with a minor. (As it happens, I can recall one case where a 15 or so year old was prosecuted for sodomy. I have not referred to this in previous advice, because I did not think that it was in point, inasmuch as the 15 or so year old was not the younger partner in an act of sodomy committed by an adult male, but had committed sodomy upon a 7 or so year old boy.)

55. Mr. Pearce goes on to say that Progress Jersey does not accept my argument, as in Austria elder parties were actually imprisoned for a term not less than six months on a number of occasions, and thus it was demonstrated that the younger party had good cause to fear for the consequences of the elder party. He said that Progress Jersey could find no evidence of a case where an elder party was prosecuted for sodomy with a 16 or 17 year old boy, and that it is “as the Solicitor General points out” incredibly difficult to get access to this information.

56. I would start by saying that I have not said that it is “incredibly difficult” to get access to the information. What I said was that it would be necessary to make a comprehensive search of the Court books, that no such search has been made, and that in my opinion no such search is necessary because I do not think that the bringing or otherwise of a prosecution is of relevance. I remain of that view.

57. The position put quite simply is that an adult male who commits the act of sodomy with a boy who is over the age of 16 but under the age of 18 is as at much of risk of being prosecuted as an adult male who has sexual intercourse with a girl who is under the age of 16, regardless in both cases of how willing the underage partner is, but an adult male who has sexual intercourse with a girl who is over the age of 16 is not. This is, in terms of the European Convention on Human Rights as applied by the European Court of Human Rights, a discriminatory interference in the rights of homosexuals under Article 8 of the Convention to respect for their private life.

58. Mr. Pearce states that there is still no clear precedent before the European Court of Human Rights where the law as it stands in Jersey has been tested, and (by implication) that Canada can provide guidance. I disagree on both points. In my opinion, the case law of the European Court on Human Rights has made it quite clear

that the mere existence of the risk of prosecution is sufficient to constitute interference, and if the risk of prosecution applies at a different age for heterosexual intercourse and homosexual intercourse, there is discrimination based on sex which is contrary to Article 14 of the Convention. Any decisions of the Canadian courts which run counter to this are irrelevant. It is the European Court of Human Rights which decides cases brought under the European Convention on Human Rights, and not the courts of Canada.

59. Mr. Pearce states that Jersey law breaches the European Convention on Human Rights in a number of areas and refers to Progress Jersey's scrutiny topic proposal on the Legitimacy (Jersey) Law 1973. I have not seen the scrutiny topic proposal and cannot comment upon it. What I can say is that this is not a point of relevance. The existence of one breach (if there is one) cannot legitimate another breach.

60. Mr. Pearce refers to the case of *Small v United Kingdom* and makes some points about it. I know nothing of this case and do not consider that it can be in any way relevant. If Mr. Small is able to show that he falls within the principles already laid down in previous case law, he will succeed. If he cannot he will not, unless he can persuade the Court to extend its previous rulings. The decision will turn upon facts peculiar to Mr. Small, and not upon the law, which is settled on the discrimination issue.

61. Mr. Pearce says that ultimately neither the European Court of Human Rights nor the Council of Europe has power to overwrite national law. I have advised in my original advice to the Scrutiny Panel on my views as to the possibility that the United Kingdom may legislate if Jersey does not.

62. Mr. Pearce then refers to the case of *McGonnall v the United Kingdom*, commenting that this is going off the point. With that comment I agree.

63. Mr. Pearce closes by referring to the possibility of denouncing the European Convention on Human Rights "(as allowed under Article 56)". Article 56 is the Article which deals with territorial application. Denunciation is dealt with in Article 58. In summary, that article provides that a High Contracting Party can denounce the Convention once five years have expired from the date upon which it became a party and after giving six months' notice to the Secretary General of the Council of Europe; that the denunciation does not release the party from obligations in respect of possible breaches which took place before the date at which denunciation became effective; and that the Convention may be denounced in the same way (i.e. by the High Contracting Party) in respect of any territory to which it has been declared to extend

under the terms of Article 56.

64. In the instant case, the High Contracting Party is the United Kingdom and the territory to which the Convention has been declared to extend is Jersey.

Solicitor General
24th February, 2006

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