

**STATES OF JERSEY**  
**SCRUTINY PANEL MEETING**  
**THURSDAY, 9TH FEBRUARY 2006**

[AGE OF CONSENT]

**PANEL:**

**Deputy P.J.D. Ryan of St Helier (Chairman)**

**Senator J.L. Perchard**

**Connétable D. J. Murphy of Grouville**

**Connétable J.L.S. Gallichan of Trinity**

**WITNESSES:**

**Advocate C.G.P. Lakeman**

**Mr. L. Small (Jersey Youth Reform Team)**

**Deputy J.G. Reed of St. Ouen**

**Deputy P.J. Ryan of St Helier:**

Ladies and gentlemen, members of the public, witnesses, Advocate Lakeman, good morning and welcome. Because this is our first Scrutiny Panel hearing and we are new to this a little bit as well (but we have obviously done a bit of training), for members of the public who have not attended Scrutiny Panel meetings before I should point out that members of the public are here to observe; they are not here to ask questions. Questions will be asked by the Panel Members and answered by witnesses and people that we have called. So, as long as that is clear, it is not a free-for-all. We do need to keep some structure and order about this whole process. I hope that members of the public will appreciate that. If, however, members of the public do have things that they would like to say or put to the Panel there is a process for doing that. I will introduce the Panel Members in a second. Mike Haden and Sam Power, our Scrutiny officers, are there to help members of the public in the process of making submissions to the Panel for the Panel's consideration either in writing or, indeed, if we wish to then call a member of the public, or anybody for that matter, at a future hearing we would do so. So, I hope that is clear. Thank you. To introduce the Panel Members, we have the Constable of Grouville, Dan Murphy, we have the Constable of Trinity, John Gallichan, we have Senator Jim Perchard, myself, Deputy Patrick Ryan, Mike Haden and Sam Power, our scrutiny officers. There is one Panel Member who unfortunately is ill and sends her apologies and that is the Deputy of St. Mary, Juliet Gallichan, who cannot be with us today unfortunately. The first thing I have to do, Advocate, is to read a statement to you: "It is important that you fully understand the conditions under which you are appearing at this hearing." You will find a printed copy of the statement I am about to read to you on the table in front of you: "The Panel has no statutory powers as yet [although this is being addressed, but at this point we have no statutory powers] and the proceedings of public hearings are not covered by parliamentary privilege. This means that anyone participating, whether a Panel Member or a person giving evidence, is not protected from being sued or prosecuted for anything said during hearings. The Panel would like you to bear this in mind when answering questions and to ensure that you fully understand that you are fully responsible for any comments you make. Also, the proceedings are being recorded. Transcriptions will be made available on the scrutiny website for anybody to read." I think also in front of you,

Advocate, you should find a copy of our terms of reference, which I will be adhering to during these Panel hearings because I think it is important that we do that so that we do not step into remits from perhaps other Scrutiny panels or other government bodies. Our terms of reference are there. So, I would just like to start with this question. During the States debate a number of members talked in emotive terms about the Island being bullied by an unelected foreign power, namely the Council of Europe or the European Court of Human Rights. You maintain, however, that the obligations of the ECHR have been assumed voluntarily. Can you explain what you mean by “voluntarily” first, please?

**Advocate C.G.P. Lakeman:**

The Convention, as my paper sets out, was established after the Second World War and the insular authorities, as the Greffe’s files will show, were consulted before the Dependencies - then Jersey, Guernsey and Man - were included within the ambit of the Convention. The purpose of the appendix that I set out from the former Deputy Bailiff’s book, which is appendix 6, was to show that already by the 1950s Jersey was being given a considerable degree of autonomy or latitude or involvement, whatever you want to call it, in international obligations. So, the Island was asked, and the most recent example where there was an ongoing consultation was in relation to education. Again I do not remember the detail, but there are papers on the Legislation Committee file about ongoing commitment. Members of the States will recall that every 6 months we used to get an update on international conventions that were being extended to the Island, RAMSAR and Kyoto, all of the things that grab the headline news, but no obligation in respect of those international agreements was entered into, or would be entered into, by Her Majesty’s Government without the consent of the local authority. So, that is why it is impossible, in my view, to argue that the commitments are anything other than voluntary.

**Deputy P.J. Ryan:**

Thank you for that. You call the Convention “a living document” in your submission. Could you elaborate exactly what you mean?

**Advocate C.G.P. Lakeman:**

Yes, the extract that is in the bundle of papers (and I appreciate that those only arrived very late and were typically voluminous, as if I was trying to almost overwhelm you with paper, which is not my intention) is written by two very able people. Can I just say why I consider them able? Ashworth taught me sentencing at Bar school and Emerson was the advisor to the Home Affairs Committee on the prison rules and visited the Island and had to gain a detailed knowledge of the Island. When he came to the Island his thank you for being looked after by Home Affairs was that the President and I had a copy of his book. That does not mean to say that I cannot apply a fresh mind to the paragraph that begins at 2.1.8, which is in divider 1, and it is his page number 56. The authors say this: “The Convention has been described as a living instrument which must be interpreted in the light of present-day conditions. It calls for an evaluative and dynamic approach to its interpretation rather than a static and historical one. The concepts used in the Convention are, therefore, to be understood in the context of the democratic societies of modern Europe and not according to the conceptions of 50 years ago when the Convention was drafted. As Lord Hope [who is a leading Scottish Law Lord] pointed out in *Public Prosecutions v Keverline*, the Convention should be seen as an expression of fundamental principles rather than a mere set of rules.” In the next following paragraphs, which I will not take you to, they debate the various difficult issues, the harder issues, that have involved the courts, the Commission and, indeed, member states. They talk about the case of Sutherland that we will come to; they talk about birching; they talk about the position of transgender or trans-sexual people. Now, it is very hard if we take that last example in relation to people who believe that they should be able to change their birth registration subsequent to the first act of registration. At the moment it is impossible under English law and under Jersey law. Nevertheless, it is beyond doubt that there are a few cases in this Island where people have been genetically found to be in such a state where they have changed their genetic makeup, their physical appearance, not because of whim but because of medical reason. Now, that is a very hard

philosophical, medical and moral question, and the court has ducked it for the moment on the basis that there is not the certainty that there is on other issues, perhaps on birching, that there should be any grey area. So, birching they regard as an inhuman, degrading punishment; the position in relation to transgender and other issues is still up for debate as science evolves. I do not think many around the Panel are old enough to remember the Second World War in any detail, but the underlying principles and the reasons why mainly British lawyers set about drafting the Convention are there and they are not to be forgotten, in a sense. They were there to try and provide a basic framework to ensure that did not happen.

**Senator J.L. Perchard:**

I have a point of clarification on your first answer. Did I understand you right? You said on international legislation, for example, RAMSARs, Jersey would be obliged to follow?

**Advocate C.G.P. Lakeman:**

No, Jersey is asked whether it wishes to.

**Senator J.L. Perchard:**

And on ECHR legislation specifically?

**Advocate C.G.P. Lakeman:**

Well, the Convention has existed since we were asked and we were signed up to it. There have been one or two minor changes since the 1950s: terrorism, a protocol on education, but minor changes. The Convention, if you looked at it as it is signed and as it is now, there would be minor alterations, few additions.

**Connétable D.J.M. Murphy of Grouville:**

In view of the fact that you say this is a living document so it does change as it goes on, do we have the opportunity to opt out of the change or not?

**Advocate C.G.P. Lakeman:**

No.

**The Connétable of Grouville:**

We do not?

**Advocate C.G.P. Lakeman:**

No.

**The Connétable of Grouville:**

We sign up for what could be a blind alley? I do not know who runs it. Obviously if the Court change their mind and decide that something is going to be completely different from the original intention, then we are obliged to go along with it and not have a say in changing it.

**Advocate C.G.P. Lakeman:**

Well, can I answer your question by putting another point? Until 1980, more than morally it was seen as legally impossible for a man to rape his wife, and the courts then changed that law. Now, the Jersey court has yet - thank God - to have to deal with a case like that. You could take the view that that is England imposing its legal House of Lords decision on Jersey.

**The Connétable of Grouville:**

I think we are straying off the point here. My point is very, very simple. When the law is changed or is

amended, do we have the opportunity to opt out of that amendment or change?

**Advocate C.G.P. Lakeman:**

But when the law is changed presupposes that a legislation body or a council of Europe decides to change that law. The Convention has been set up and the courts interpret it and they interpret it in the light of time, very much in the same way as France, when its constitution was settled in 1780 and then resettled for the 5th Republic, that document has stayed unchanged; the same with the American constitution.

**The Connétable of Grouville:**

I can assume then that when we signed up to ECHR we signed up for amendments and changes notwithstanding the fact that we had absolutely no say in those amendments or changes? I just really want a yes or no on that.

**Advocate C.G.P. Lakeman:**

The answer is yes and there are hundreds of other examples, and I am bound to say at what harm in it, what risk? We signed it.

**The Connétable of Grouville:**

Exactly.

**Advocate C.G.P. Lakeman:**

We as an Island signed it, and that is an inescapable fact so the argument that it is being imposed upon us, I have to say, is just unfair at least.

**Senator J.L. Perchard:**

Just to clarify that, the European Court of Human Rights legislation is not amended, it evolves by judgments?

**Advocate C.G.P. Lakeman:**

Case law.

**Senator J.L. Perchard:**

Case law? That is right.

**Advocate C.G.P. Lakeman:**

That is not alien to Jersey where in some cases the States will intervene or will not intervene and the courts will intervene. There is a close attention here because we have domestic law and a domestic court. This is international law which sets down a very few basic principles, and a court that has not got a massive daily stock.

**Deputy P.J. Ryan:**

I would like to move on to a slightly different tack and our commitments under the European Convention. The issue of non-discrimination is one of the fundamental articles; I think it is Article 14 of the ECHR. I would like to refer to a speech that the Dean of Jersey referred to in his winter speech to the States, and he referred, and I am quoting, to: "Sacrificing our children on the altar of imagined political correctness". A number of States Members referred to the weight of public opinion on this particular issue, so my first question is this: is there a place for local differences or interpretation of ECHR which respects traditional beliefs and traditional moralities and reflects them across different member states who have signed up?

**Advocate C.G.P. Lakeman:**

There are on some Convention rights what is known as “a margin of appreciation” which allows the member states a degree of flexibility in how to ensure observance of that right. You are asking me to comment specifically on that statement from the Dean. I do not think that it was fair. I do not believe it was accurate. I believe that if you are speaking in an Assembly you have a duty to speak fairly and honestly as your conscience dictates, but I do also think that people should have a care to the impact upon people who listen to those speeches. I have to say that the entire debate was possibly the most unpleasant, if not upsetting, debate that I have ever heard. To talk about sacrificing children on an altar is a religious image that we are well aware of. It bears no relation to the law and you have asked me here today to talk about the law, not about the emotion.

**Deputy P.J. Ryan:**

I think the question which you answered to start with was, “Is there a place for local differences in the interpretation?”

**Advocate C.G.P. Lakeman:**

No.

**Deputy P.J. Ryan:**

Which respects traditional beliefs and moralities.

**Advocate C.G.P. Lakeman:**

What are the traditional beliefs and moralities? That is a value-laden statement, Chairman, which on the law it is a luxury I do not have. If I took a personal view about representing somebody charged with distributing heroin to people in the Island, I would never set foot in criminal courts in this Island. So, a luxury that as lawyers we have to set aside.

**Deputy P.J. Ryan:**

Thank you. Is it a valid argument to suggest that the importance of protecting vulnerable young people should override the principle of equal treatment discrimination regardless of sex or sexual orientation? Is there a case for protecting young people that would take precedence?

**Advocate C.G.P. Lakeman:**

This is a public hearing, and in relation to cases of which I have experience relating to abuse of trust it would not be appropriate for me to give evidence, I do not think, in public about that. I can say that the abuse of trust legislation here and the protection for young people is of comparable standards to anywhere else in Europe. It is not tenable to say that the States of Jersey Police, the Child Protection team and the other social agencies do not protect our young people. In my view, whatever the intention, it is an irrelevant consideration for today.

**Deputy P.J. Ryan:**

Thank you. Do you think the draft law that we were debating as it stands (presumably you looked carefully at the record) is a sufficient measure? Should it contain other measures like we just talked about, abuse in positions of trust, sexual grooming? The Isle of Man has recently -- although I think it is held up slightly but nevertheless has been largely passed and includes things to do with abuse of trust and sexual grooming.

**Advocate C.G.P. Lakeman:**

As night follows day the question I just answered which says that the 2 are not linked, then it should not be in this law. The Sexual Offences Act 2003 contains a very narrow definition of abuse of trust, which in my view is entirely laudable. This legislation, the Sexual Offences Act 2003, should be on the local

statute book, but then so should a law about theft. There is no statutory law about rape; there is no statutory law about incest; there is no statutory law about murder. The Island's criminal law is heavy on procedure, light on substantive offences, but the question for the States, in my respectful view, is they have to balance up. Do they wish to face a challenge from the European Court with all that goes with it (and we will come to that in a moment) not to permit a single piece of legislation while also at the same time recognising they have a duty (and a duty to do it quickly) to resolve the entire ambit of sexual offences, not only relating to young people but to adults as well, which is a complete mess.

**Connétable J.L.S. Gallichan of Trinity:**

On the *Sutherland* case, I refer to this case as an authority for admissibility for a challenge to Jersey's current position. The Panel have been given copies of this case. What we would like your opinion on really is as we go through the various arguments in the United Kingdom on this issue of the age of consent because when it was debated in Parliament with a controversial (inaudible). At one stage the Commons decided to maintain the difference between homosexuals and heterosexuals. What do you think caused Westminster to change their mind on this?

**Advocate C.G.P. Lakeman:**

I do not have detailed information about the passage of the Bill and how the voting took place. The *Sutherland* case was withdrawn on the basis of an agreement between the parties to deal with it in another way, and I think that is recorded at the end of the judgment.

**Deputy P.J. Ryan:**

If you are not particularly familiar with that case then do not worry because obviously you cannot answer if you have not done any research on it.

**Advocate C.G.P. Lakeman:**

Well, I am not familiar with what made the House of Commons change its mind on the voting. Hansard will be there to be read but I must admit it is not something that is troubling me at the moment.

**Senator J.L. Perchard:**

Just to confirm that we are all in agreement that the *Sutherland* case is an example of case law now, and this is important with regard to our thinking, is that it is case law, is that right?

**Advocate C.G.P. Lakeman:**

It is, and it was a case that was brought to the attention of the Legislation Committee in 2000 or 2002, I cannot remember which, but it was one of the cases that was brought to the attention in the committee papers that I saw at that time and which you have seen, that case is referred to and was in the Legislation Committee's mind when preparing its projet.

**Deputy P.J. Ryan:**

We have access to that. We wondered whether you had a particular opinion. We will move on.

**The Connétable of Grouville:**

Checking the powers of the UK Government to compel a change in our law, you state the extent to which the power exists is still open to debate?

**Advocate C.G.P. Lakeman:**

Yes.

**The Connétable of Grouville:**

Why is it debatable? What are the areas where it is debatable?

**Advocate C.G.P. Lakeman:**

Well, if I were the Attorney General, which I am not, he would possibly say the only way it would be resolved would be by a court of law or by an arrangement, a concordant, between Jersey and the Crown. The Crown means in England everything, so everyone is employed by the Crown. It has enormous powers at common law but exercise of those powers is tempered by convention and by usage. So, in relation to Jersey it is regarded as convention that she will approve every piece of legislation that the States issues up to her. Now, we know the Public Finance Act 1987, but that was not because of the arguments about the withholding tax and things like that. The Privy Councillors did not approve the law and it is about that time the debate became more focused on exactly what the role of the Crown was in Jersey domestic context. My own personal view is that the Crown would have to see civil war or a corrupt regime, invasion by France, cases of real extremity where significant use of the prerogative power would be involved. Now, that is at the hard end, that is the hard legal position, but as we all know politics is the art of persuasion. There is an element of respect between international organisations and countries, and there is also the public reputation, if you can call it that, of an island and of a country. So, the issue is still debatable. It has been debated on 4 or 5 occasions in the 19<sup>th</sup> century and it leads to tension from time to time. The Edwards report, that was a review announced by the Home Secretary in the House of Commons before the States themselves knew about it, and there are tensions. In the end of my paper I talk of tutelage. That analogy can be stretched a little and say that it is the analogy of a child that is coming of age and the parent sometimes does not like that, or the parent might have money that the child wants or assets that the child wants. That really is a very simplistic way of describing the relationship.

**The Connétable of Grouville:**

That really covers the second part of my question, which was going to be in your opinion or your view does the UK Government regard this issue as so important as to attempt to compel the Island to reform their laws?

**Advocate C.G.P. Lakeman:**

Well, I think in terms of compelling I do not believe that you would find that there would be an Order in Council on this matter. If we were told what to do it would be by Order in Council. I do not believe that the British Government would do that at present, but it has now for over 3 years asked the insular authorities to put our own house in order to conform to the Convention.

**The Connétable of Grouville:**

But is there a precedent for the UK amending our laws, not just here but in any other jurisdiction, where they can override the wishes of the States and amend the law? Is there an actual precedent for that or has it simply been an overhanging threat for ever and ever?

**Advocate C.G.P. Lakeman:**

Well, the precedent in the 19<sup>th</sup> century relating to the Police Court and 3 or 4 other acts, the acts were sent because the Island took so long to do it and then they were withdrawn and there was a compromise and the Islands did pass the legislation. Now, we do not want to get into that situation because if for no other reason the British Government has plenty else on its responsibility internationally without having to worry about what it may or may not regard as serious. We do not know, but we know that the debates of the States are scrutinised by the DCA and they even go to the level of reading the *Jersey Evening Post*. They know what goes on in this jurisdiction.

**The Connétable of Grouville:**

That is fine, but what I was trying to get down to was that you are telling me that there is no actual precedent for this ever happening before?

**Advocate C.G.P. Lakeman:**

There is a precedent.

**The Connétable of Grouville:**

You said that was solved by compromise.

**Advocate C.G.P. Lakeman:**

Well, because the States essentially did the same legislation.

**Deputy P.J. Ryan:**

Does the question of the pirate radio stations in the Isle of Man waters fall into the same category?

**Advocate C.G.P. Lakeman:**

In those circumstances the Broadcasting Act, which covers the whole British territory, was used to do that, but then with consent of the insular authorities to do so. The Nationality Act applies across the whole British territory. We do not have a Nationality Jersey law. So, there are examples where in common areas of concern it is convenient to have one statute that is applied uniformly, but those are truly in a short list and very special on their facts.

**Senator J.L. Perchard:**

Could I just ask a question on that detail about the right of the UK Government to legislate? Professor Jeffrey Jowell QC, you have heard of him?

**Advocate C.G.P. Lakeman:**

I have met him.

**Senator J.L. Perchard:**

You have met him. Is he right when he is talking about international obligations: “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”?

**Advocate C.G.P. Lakeman:**

That is Professor Jowell’s opinion. It is an opinion with which I respectfully agree but that is really talking about commitments that are to come rather than exist now. He is talking about in the future, I think. I do not know what you are quoting from.

**Senator J.L. Perchard:**

Well, he wrote in the Law Review but I do not think I would agree that he is talking about the future. Commitments are: “Limited to matters to which the Islands had agreed to be bound”, for example, ECHR.

**Advocate C.G.P. Lakeman:**

Yes. The fact that we were asked, we did agree to be bound, and whether it is future or not he is describing what I believe to be the correct position.

**Senator J.L. Perchard:**

That is contrary to the opinion that you gave just a minute ago to the Constable.

**Advocate C.G.P. Lakeman:**

In what sense?



**Senator J.L. Perchard:**

Well, if that is the case, if you agree with that, and I will read it again because it is only a few lines: “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”, surely that means if we have agreed to be bound to the ECHR the UK Government could remind of us of that, at least?

**Advocate C.G.P. Lakeman:**

Well, it has reminded us of that, and if it were to issue an Order in Council seeking to require something there would at least be an argument that we should try and resist that so as not to concede the point of their direct involvement. It becomes like a game of chess almost. It is not a strict legal issue where you have got 2 commercial parties or a domestic situation. Where governments seek to sue other governments, as I learnt to my chagrin when I tried to sue the Germans for the deportees, it becomes a completely different set of rules, and the government has indicated to us that we are bound to follow this situation. I consider we are bound to do it. If you say, “No, we’re not, we’re going to do our own thing and we’re safe because Britain can’t tell us what to do” well, I am afraid my firm opinion is that that is irresponsible.

**The Connétable of Grouville:**

Going on to the international front, you have suggested it would be absurd for the Island to be seen to be approving a law in 2000 yet still allowing a challenge to run in ECHR. That, of course, takes us back to my original questioning about whether we have a credible defence against the ECHR in this particular case.

**Advocate C.G.P. Lakeman:**

Well, we do not.

**The Connétable of Grouville:**

We do not? Despite the fact that you are saying that amendments and law changes within the ECHR are binding upon us despite the fact that we have no input into those changes or amendments?

**Advocate C.G.P. Lakeman:**

It is not a question of input or amendments. There is a treaty which is being policed by a court and the court creates a body of case law that is then binding across the territory. That is the same with the ECJ. If a dispute between the European Commission, which is European Union law, decides a case between Britain and France, that will bind the entire however many member states of the EU. That is how it works.

**The Connétable of Grouville:**

I think that answers that one.

**Deputy P.J. Ryan:**

I think just to clarify in my own mind, just returning for a moment back to the previous point, the question of Jersey having had a convention extended to Jersey at our request, by doing that have we then accepted that the United Kingdom would have the power to legislate on our behalf to the extent necessary to protect its own interests? Is it a fait accompli?

**Advocate C.G.P. Lakeman:**

I think it is fair to say that the answer to that question is both yes and no. Yes in the sense that we have allowed the United Kingdom a greater power of influence in this area, which they have sought to use.

There are 3 instances in the last 20 years. One was when birching was removed; secondly was the age of consent the last time; and in the age of consent papers the last time there was a statement to the States from the President of Legislation Committee and nothing has changed since that time, nothing at all. So, on the contrary sense the embarrassment of the United Kingdom on this issue is easy to overstate. It is easy to say that the British Government is going to become so -- and talk about us being hounded out of the Council of Europe, I have to say it is just not going to happen because Britain would do all that it could to seek to persuade us again and would tell its fellow members in the Council of Europe that it was doing that.

**Deputy P.J. Ryan:**

So, this as it has been handed down forms part of the sort of shroud waving that seems to be surrounding this issue?

**Advocate C.G.P. Lakeman:**

Yes, I think that I am bound to just give you the views on the law. It is a remedy that is available but in my opinion it is so remote at present that you can disregard it from your considerations.

**Deputy P.J. Ryan:**

Panel, are you happy with this line of our obligations and (inaudible) the UK's position? Are there any further questions?

**Connétable J.L.S. Gallichan:**

Is there a possibility of alternatives for heterosexuals and homosexuals of the age of 16 on consent? Mr Derek Pearce has suggested that there could be. Are you aware of any jurisdictions which exercise a distinction for these purposes about the age of consent?

**Advocate C.G.P. Lakeman:**

There is no European country that permits that. It is not permitted by the European Convention on its case law and, therefore, that really seems an end of it for Jersey. There are and have been hotly held debates in Canada but then Canada is not party to the ECHR.

**Deputy P.J. Ryan:**

I think the thrust of Mr Pearce's line of questioning or uncertainty is the question of whether to differentiate between the act of procreation and sodomy for the purposes of age of consent. Is there a difference between sex to procreate and other sex and does that provide a reason for some form of difference?

**Advocate C.G.P. Lakeman:**

The distinction is not known to European law and, of course, based on that (if you want me to go back over even older law and go back to canon law) if you are talking about sex to procreate and that person is using contraception, then it is not valid anyway. So, can you see how fraught with difficulty it is muddying the waters by getting involved in that? It really is.

**Deputy P.J. Ryan:**

It brings in the whole question of contraception as well.

**Advocate C.G.P. Lakeman:**

It raises a wider philosophical question that Canada has sought to resolve in that way. Again, from what I see from the Ministry of Justice website in Toronto, designed to protect young people, but the question here on the ECHR is as I have attempted to explain, and the question on abuse of trust I am afraid to say could also be regarded as shroud waving because if there was a dialogue and there had been a dialogue

(and the other Panel is not doing it so I will say it here) between those who are involved in the criminal justice system on this subject, I think a lot of the comments that have been made are extremely unfortunate, apparently ill-informed comments and may not have been made, and it now stands on the record. Your Hansard now, I have to say, I am intensely impressed with. The words of all those people are there to stay for posterity now, including the words of the Chief Minister which are quite clear and for which I offer entire support for on the international obligations of this Island.

**Deputy P.J. Ryan:**

So, to be quite clear you do not know of any legal or constitutional basis for this distinction between procreation?

**Advocate C.G.P. Lakeman:**

No.

**Connétable J.L.S. Gallichan:**

Is it possible to change the age of consent maybe to 17 or 18? Would this provide an acceptable solution?

**Advocate C.G.P. Lakeman:**

No.

**Connétable J.L.S. Gallichan:**

Some people want us to drop it to 16; others raise it to 17 or 18.

**Advocate C.G.P. Lakeman:**

The ECHR jurisprudence takes into account the approaches of all the different jurisdictions, but it does also take into account the social harm and medical evidence that there is, and also the public health impetus that there is to enable people to speak out and to get treatment and to be involved. The position in the 1980s when HIV (Human Immunodeficiency Virus) and AIDS (Acquired Immune Deficiency Syndrome) first hit the public radar and there were those tombstone adverts and there was a whole generation of people brought up with a fear of sexually transmitted disease, but really an awareness, a healthy fear if you would call it that. That has changed, that approach has changed. It is seen perhaps as too harsh to use it as an advertising slogan, but all the different countries (and it is not just the mad Dutch or the Protestant Y or the Catholic X), it is a whole family of European countries that have attempted to address what is inevitably a very difficult issue. But if a legislature was to imagine that any group of young people were going to be able to be kept sexually inactive by criminal law to 18, I think they would lose the respect certainly of their first bunch of voters and certainly even people who still regard themselves as fairly young, like me.

**Connétable J.L.S. Gallichan:**

Well, I think basically the thing is we just passed a law you cannot buy cigarettes until you are 18. This almost seems to some people, well, if you cannot do that until you are 18 --

**Advocate C.G.P. Lakeman:**

Sliding scales on the issue of consent. If you just take medical treatment, for example, there is a law of 1973 which enables a 16 year old to consent to medical treatment. Now, I do not know the impetus behind that law but if it is 1973 you can probably imagine that it was designed to enable the contraceptive pill to be given to young people without there being a breach of confidentiality with the parents. We deal with young people in the criminal justice and in witness and there is a sliding scale. Your Committee Clerk will remember that I am like a Latin tag for things, and at the age of 10 a child was presumed what is known as *doli incapax*; he could not commit a crime. Now, we all know that 10

year olds, you will know those of you in the Honorary Police, that 10 year olds are quite able to commit a crime. Between 10 and 14 we have a sliding scale depending on the malice in the child. Now, the court has taken back those thresholds and in sometimes extremely hard cases where young kids are killing other young children, some people will hold their hands up and say, "Well, that's society completely gone mad" but it is society dealing with the reality that young children, young people, present to them. The 18 argument for smoking is seen as a protection issue. The issue that the court is wrestling with is an equality issue. If you can find a 16 year old to come in here and give evidence they may very well say, "What right have you? What harm are you opposing?" and I am afraid that --

**Deputy P.J. Ryan:**

This leads us to the point because I think it is referred to in ECHR legal terms as a question of proportionality.

**Advocate C.G.P. Lakeman:**

Of balance.

**Deputy P.J. Ryan:**

Of balance, and I think that is where the Constable was coming from. What is your view on this question of proportionality? If we were to go to the 17 or 18 for all ages of consent, would we fall foul in your view?

**Advocate C.G.P. Lakeman:**

You would run a significant risk of laying yourself open to a challenge.

**Deputy P.J. Ryan:**

So, we would be challenged by whom? Presumably a 16-year-old girl that was not homosexual would say, "What right have you got to stop me from enjoying normal sex until I am 18?"

**Advocate C.G.P. Lakeman:**

Yes, and you would find that there is one particular human rights group that I belong to called Justice which is cross party, not left-wing, right-wing, centre, every single party in the English Parliament and lots of lawyers, that they would regard it as appropriate to take the case, because that is what they are there for. They are there to stop prisoners in Guantanamo Bay being treated badly. They are there to take on cases where it might be seen as impossible to get any kind of remedy here.

**Deputy P.J. Ryan:**

So, there are no practical solutions, in your opinion, other than the one that is in the draft Sexual Offences?

**Advocate C.G.P. Lakeman:**

Indeed.

**Senator J.L. Perchard:**

I have to congratulate you on your excellent bundle that you have presented us, albeit as you said it was a bit light, but it has been very useful and kept me up late into the night. I notice that you have a degree in English and French law so it will be ideal to ask you this question. When the P.196 went to the States, we used the French word for sodomy, S-O-D-O-M-I-E. Does it, in your opinion, have exactly the same meaning as the English word?

**Advocate C.G.P. Lakeman:**

The opinion that was given to the Legislation Committee, which should be available to you (it was in the

form of a note that was delivered to Deputy Bridge from the Senior Legal Advisor, Stephen Pallot) addresses that issue. The use of the French term goes back to the old customary law text, the Lieutenant Bailiff's (inaudible), who were writing partly on civil law and partly on criminal law, and it is referred to as a crime. It is then taken up in a law of 1800 where punishment was made, and then there is a trace through of the changes in legislation leading up to the draft law that you referred to. It is not exactly the same offence as it is charged but the physical act is the same.

**Senator J.L. Perchard:**

Well, I have to admit I have learnt a lot about the difference in words in the last week because I have been trying to define the word "sodomy". Am I right or would you prefer to define it? Would you rather me give my definition? Because it is quite hard to pin down because it has a very different meaning to buggery, which I think in the States debate the other day not everybody was aware of the difference. Shall I give you my interpretation of sodomy and you can tell me if you think it is correct? This is just from grazing the internet. The noun "sodomy" means sexual intercourse that is not the union of genital organs of a man and a woman.

**Advocate C.G.P. Lakeman:**

That is one definition.

**Senator J.L. Perchard:**

Have you any others?

**Advocate C.G.P. Lakeman:**

Well, in terms of the crime, the legislation as it currently stands makes the act of sodomy legal where the age threshold and the consent has been obtained. If you contrast it with the heterosexual position, and a prosecution did occur for this some 8 or 9 years ago, it is impossible for a man, or a man and a woman, to consent to an act of anal intercourse. It is impossible. Going back to the Latin, it is *malum in se*.

**Senator J.L. Perchard:**

If this is one interpretation, is oral sex sodomy?

**Advocate C.G.P. Lakeman:**

Oral sex is an act of gross indecency if in public or without the consent of one of the parties.

**Senator J.L. Perchard:**

Maybe this is not complete. Sexual intercourse that is not the union of genital organs of a man and a woman is sodomy.

**Advocate C.G.P. Lakeman:**

Well, in Jersey law it would be punished as an act of gross indecency. If there was a constraint or the person was underage then oral sex would not be charged as sodomy.

**Senator J.L. Perchard:**

That is on case law again?

**Advocate C.G.P. Lakeman:**

Yes.

**Deputy P.J. Ryan:**

We are running out of time. Advocate Lakeman, thank you very much for your time this morning. You have been very helpful and very informative and, once again, thank you.

**Advocate C.G.P. Lakeman:**

Thank you very much.

**The Committee adjourned for a short time**

**Deputy P.J. Ryan:**

Good morning, Mr. Small.

**Mr. L. Small (Jersey Youth Reform Team):**

Good morning.

**Deputy P.J. Ryan:**

You are our second witness. Welcome, nice to see you. Thank you for taking the time to come and talk to us this morning. It is very nice to see you. I have to read out this statement so that you are clear on exactly what is what. It is important that you fully understand the conditions under which you are appearing at this hearing. You will find a printed copy of the statement I am about to read to you on the table in front of you: "The Panel has no statutory powers as yet and the proceedings of public hearings are not covered by parliamentary privilege. This means that anyone participating, whether a Panel Member or a person giving evidence, is not protected from being sued or prosecuted for anything said during hearings. The Panel would like you to bear this in mind when answering questions and to ensure that you fully understand that you are fully responsible for any comments you make. The proceedings are being recorded and transcriptions will be made available on the Scrutiny website." So, I will call you Luke, if that is okay?

**Mr. L. Small:**

Yes, that is fine.

**Deputy P.J. Ryan:**

I think you should also have in front of you a copy of the terms of reference, which if at all possible I will be reasonably lenient, but in the interests of time and efficiency I will try to stick to as closely as possible to.

**Mr. L. Small:**

Chairman, would it be possible for me to first introduce myself just briefly, because I am sure some members of the public will not be aware of who I am.

**Deputy P.J. Ryan:**

Yes, please do. What I would say is this is not the time for presentations as such, but by all means explain to the Panel and to members of the public who you are.

**Mr. L. Small:**

My name is Luke Small. I am 16 years of age and today I speak both on behalf of myself alone and on behalf of the Jersey Youth Reform Team, which has currently launched a campaign for the amendment of the Sexual Offences (Jersey) Law. I am also the ECHR applicant for the age of consent amendment.

**Deputy P.J. Ryan:**

I think one of the first things I would like to do, Luke, if you would not mind, I think it is important to just explain that the Scrutiny Panel hearings we are attending today and at any time in the future should not be used as a vehicle for publicity for particular pressure groups or any associations. We are entitled, if we want, we have every right as a Panel to call pressure groups and representatives of pressure groups

if we so wish, but I think I should make it clear that we have invited you primarily today in your own right as Luke Small and not so much as another group which you might represent. So, I do not really want to go too much into that but if you want to I could ask you what the legal status of that group is, first of all. Could you explain that to us?

**Mr. L. Small:**

That is also demonstrated in the frequently asked questions, which is in the written submission to the Panel. The Jersey Youth Reform Team is not incorporated under any law and is merely a group of young people not bound by any trust deed, although we do hold our own agreement of base, which is the agreement which the team has made where its remit extends to the purpose of the team.

**Deputy P.J. Ryan:**

So, what is the driving force behind the establishment of the group and is this a single-issue group, change in sexual offences legislation, or are there other broader concerns?

**Mr. L. Small:**

No, the Jersey Youth Reform Team was set up in June 2005 as an organisation for the carriage of youth views in the States of Jersey and in a sentence, as I said in my introduction, we as an organisation want to work with the States of Jersey in advancing change, particularly on matters which affect young people. This campaign was not initiated by just one person. We carried out youth consultation across the Island to find out what concerns young people had about current legislation that the States of Jersey was implementing.

**Deputy P.J. Ryan:**

All legislation or just this particular issue?

**Mr. L. Small:**

We made a complete open question, "What are your views on current legislation?" and a prominent issue was the Sexual Offences (Jersey) law and, from that, the two boards then voted that we would bring on this campaign.

**Deputy P.J. Ryan:**

Could you give us some idea of what the other concerns were? Just briefly because it is not strictly within our remit, but I want you to give us some idea just to reinforce what you were saying. I am interested in whether this is a single-issue group or not, that is all.

**Mr. L. Small:**

No, the Jersey Youth Reform Team, once this campaign is over, will carry out further youth research again to find more areas which young people are concerned with.

**Deputy P.J. Ryan:**

Have you had contacts, for example, with the Island's youth service and other official youth organisations that do have legal status?

**Mr. L. Small:**

As a team we decided we would stand independent, just as purely the views of young people, and that the organisation would work for and be run by young people purely.

**Deputy P.J. Ryan:**

How many members do you have?

**Mr. L. Small:**

At the moment 32 in the actual organisation working. We do not take people on as supporters. The team is small so it carries out its work efficiently and effectively.

**Deputy P.J. Ryan:**

What kind of reception have you had from official bodies that you have contacted, or perhaps you have not contacted any official bodies?

**Mr. L. Small:**

In dealing with the States we have had quite a positive balance of views of the team. In general we have not made much communication with official bodies as such, although we have communicated with government departments both of Jersey and the UK and, indeed, the ECHR.

**Deputy P.J. Ryan:**

The purpose of my line of questioning here is that it is important that our Scrutiny Panel and the scrutiny process has integrity and credence. Therefore, I want to make sure about that before we go too much further with your role as the Director of the Jersey Youth Reform Team. So, I think it would be fair to say that primarily we have asked you here in your own right, but we were interested in this other side. Thank you.

**Connétable J.L.S. Gallichan:**

As you know, obviously the age of consent is of concern and just really what impact is there in your view on young people by the fact of having a different age of consent? What is your opinion on it?

**Mr. L. Small:**

By having a different age of consent, we think in terms of schools, and we have sex education now which starts towards the end of primary school even in some cases, and then it builds up in secondary school. A group of young people, as a scenario, walk into a classroom and learn about the laws that govern their private lives. They are told that if you are heterosexual you can have sex at 16 years. If you are homosexual you cannot have sex until 18 years. So, my view is that that sends out an implicative message to young people that, as the BBC quoted me, being gay is dangerous and wrong and, in effect, to be avoided. I think that that has an impact on the young people that are sitting in that classroom to have to sit there and see themselves differentiated from the so-called majority.

**Connétable J.L.S. Gallichan:**

Do you think everyone at 16 knows exactly their sexual mind already?

**Mr. L. Small:**

That is not an assumption I can make that every single person of 16 has deciphered their sexuality. However, although this is beyond the terms of reference, the British Medical Association do say that a young person's sexuality has been fully decided by early adolescent years, talking in terms of 12, 13 years old.

**Connétable J.L.S. Gallichan:**

Do you think that the age of consent was really to protect young males and do you think this intention is valid in any way?

**Mr. L. Small:**

I am of the view that the aim of sexual offences law is legitimate and that putting ages of consent into the youth population is an effective way of pursuing that aim. But at the same time I think that when pursuing that aim we have to consider which young people this legislation is going to affect and is that



aim going to be fully met and carried out with the legislation as it currently stands? Is the legislation effective with different ages of consent in pursuing that aim? That is the question.

**Connétable J.L.S. Gallichan:**

Basically this law discriminates against some members of your age group, does it not? That is the problem. So, because of the 16 and 18 that is the discrimination.

**Mr. L. Small:**

Indeed.

**Connétable J.L.S. Gallichan:**

There again, on the other side, a lot of people put it in as a security for the young.

**Mr. L. Small:**

Well, going back to the BMA again, the BMA are of the view that by having different ages of consent we lock a minority group of young people out of mainstream society. If something is criminalized by the law, I am of the view that in many cases young people will fear it. It is very difficult for a young person to come forward with allegations of what this law is standing for, abuse or so forth, because they fear being prosecuted themselves and the law discriminates. So, we are criminalizing homosexual behaviour below the age of 18, but at the same time we are also criminalizing young people, as past cases in the UK have gone forward, that when a complainant contacts the local authorities not only does the older male become prosecuted but in some cases, and in past cases, the younger so-called victim has also been prosecuted. Therefore, the law is ineffectual from that stance.

**Connétable J.L.S. Gallichan:**

Obviously there is a lot of public concern in the Island anyway and I think the poll taken on the JEP said that the majority of people want to keep the age of consent as it is now.

**Mr. L. Small:**

Can I add, that poll was of a total of 100 and something people, so it is not --

**Connétable J.L.S. Gallichan:**

This is just a view. I think if you went out to a wider consensus of people you would find it is a very emotive subject, and we all know that. The thing is, in the current position do you think that the public should have a right to this debate or not? This is all I am going to ask.

**Mr. L. Small:**

I share the concerns that many of the public have, including sexually transmitted infections, the protection of young people primarily, but we are now at a stage where if we start conducting consultations and so forth on this matter, which has not been done, and now we are in a position where Jersey is facing a legal challenge, there is no opportunity for the concerns to be put forward. Because although, as I said, I do on some aspects agree with the concerns, the issue here is our obligations, our international obligations. I am not saying that young people do not deserve that protection; of course they do, that is fundamental to society that young people are protected; but at the same time we have to consider our position as an island and the potential effects not amending this law could have on both our constitution and the United Kingdom.

**Deputy P.J. Ryan:**

These questions that we are on at the moment are not strictly within the very tight terms of our terms of reference. They are probably slightly outside the boundaries. But in the interest of a good debate on this, I am going to ask one slight additional question on these semi-social boundaries of the issue. Sex

education in schools for homosexuals; probably because you are of an age where you are recently familiar with sex education in schools, just simply in your view and the view of the other members of the Jersey Youth Reform Team, which you probably reflect, do you feel that this is adequate? For instance, it is not covered in this law, the question of whether schools should give equal time to homosexual education as heterosexual education, and counselling in a similar way that there is heterosexual counselling. Do you feel that there is an area here that the law does not cover in the same way as abuses of trust and other things?

**Mr. L. Small:**

The question being should we give equal time in sex education on both heterosexuals and homosexuals to make it 50/50, we have to consider there is a 6% to 10% base to the statistic of how many homosexuals there are in the British population. To emphasise homosexuality to an extent where it is 50/50 I think would not be proportionate to how many --

**Deputy P.J. Ryan:**

I was not talking 50/50. What I was trying to reach was just a side issue. Should the law incorporate something to assist the process of homosexual counselling in terms of sex education? There is a thought that teachers are reluctant to talk about homosexuality because of the age of consent. This is where I am coming from.

**Mr. L. Small:**

I do not think that is the purpose of this specific piece of legislation, although I do agree that there should be some consultation on sex education, because of the age of consent, how it is affecting that. I do not think it should be included in this specific piece of legislation, but I do have a belief that there are some policies that do need to change.

**Deputy P.J. Ryan:**

I ask the question purely in the interests of bringing the public debate on in that particular area and it does not fall within our terms of reference. I would like to move on now and come back to our terms of reference.

**The Connétable of Grouville:**

I want to concentrate on the ECHR situation as it is today, and the first question is what stage has your application to the ECHR reached?

**Mr L. Small:**

Because I have identified the application at a point in time when the current law is having an immediate effect on young peoples' lives, the case is prioritised over other cases which are not having an immediate effect. My application is currently awaiting its admissibility hearing, but on the basis of all the past applications and the correspondence I have had with our international and local legal advisors, there is a 99.9 per cent guarantee that the European Court Registry and the judges will declare the application admissible and in due course issue a judgment.

**The Connétable of Grouville:**

So, it has not been admitted yet. You are at that stage where you are waiting for the okay.

**Mr. L. Small:**

No, but it is in the court.

**The Connétable of Grouville:**

Secondly, what made you consider that an application to the ECHR was necessary and that you did not

feel that fighting it locally would be a sufficient argument?

**Mr. L. Small:**

Well, we carried out consultation in June 2005. At the beginning of July we started corresponding with government departments, at the time the Legislation Committee, the Attorney General, and over that period of time we received several promises of legislation being launched, put into the States and being voted on. Three promises we were given, all of which were failed to be kept, and as a result the team have given a deadline; because the law was already in draft form what we believed was sufficient time to create a full proposition for the Home Affairs Minister to bring the proposition to the States. That was the end of November, beginning of December, and that was agreed that there would be valid efforts to meet that deadline. That was then knocked back. We were then told December; that was then knocked back. Then it came to January and there was quite a lot of concern within the team and, as myself and my own views, that this legislation was not going to be passed. Applying to the ECHR I think also gives an element of reality to what the States of Jersey are facing.

**The Connétable of Grouville:**

Well, I am not here to make excuses on behalf of the Legislative Committee, but I will tell you that last year was absolutely fraught with the changeover to ministerial government, so I think that whereas you were not ever put on a back burner I think (overspeaking).

**Deputy P.J. Ryan:**

Can I just ask you, though, just to be quite clear on this as I think it is quite important for the record? You were given three promises. I just want you to repeat them, if you would. You say you were given three promises?

**Mr. L. Small:**

We gave a deadline originally of the end of November.

**Deputy P.J. Ryan:**

It was your deadline?

**Mr. L. Small:**

We submitted a deadline that we would like to see the law launched by. They did not make that deadline. We asked them we would like to see it lodged by that time.

**Deputy P.J. Ryan:**

Do you have correspondence to cover this?

**Mr. L. Small:**

I have correspondence I should think in the emails. All of our communication at that time was being done by email. It would be a case of finding that and substantiating the comment.

**Connétable J.L.S. Gallichan:**

Did they reply to your emails with that deadline?

**Mr. L. Small:**

To be honest with you, it was last year. I cannot go word to word. We did get replies to all emails we sent and in the majority of cases the committees and the Attorney General were co-operative in corresponding with us and to that effect we were satisfied that we would let the States of Jersey make its own movements and in due course vote in Jersey.

**The Connétable of Grouville:**

So, really, your application to ECHR, was that triggered by the fact that you did not think you were getting an adequate response from States of Jersey?

**Mr. L. Small:**

It was triggered by the thought that States of Jersey were not going to pass the legislation.

**The Connétable of Grouville:**

You wanted to give them a shove?

**Mr. L. Small:**

No, not at all. The ECHR is a tool that is open to anyone and I felt that we had come to a point where the ECHR was an appropriate tool to use. In no way was it an opportunity to shellshock the States into voting yes, just do it; it was the view that I took alone that this was the tool I should use.

**Connétable J.L.S. Gallichan:**

So, it was not your reform group that made the decision, it was you alone who made the decision?

**Mr. L. Small:**

The application is purely from me as an individual.

**The Connétable of Grouville:**

What legal advice have you obtained so far?

**Mr. L. Small:**

We have a Jersey advocate, Advocate Andrew Begg, and we also have a correspondent contact who is also an international lawyer in the Registry. I do not know if I have his name with me.

**The Connétable of Grouville:**

I do not think that is really important. How has this advice been funded? This is a sensitive issue so you may not wish to answer.

**Mr. L. Small:**

That is fine. Advocate Andrew Begg has kindly offered to provide his services for free in this instance, purely on the basis of our application to the European Court of Human Rights, which obviously I am very thankful for. The European Court of Human Rights do not impose any charges for legal advice. They do not of necessity give legal advice; they make statements which are evidence-based only. There is no legal opinion from the Court because they do not represent the state, they do not represent any view or group.

**Deputy P.J. Ryan:**

The international lawyer, you did not mention whether there were challenges.

**Mr. L. Small:**

No. When I was talking there about the evidence-based statements, those are statements we receive from our international lawyer, but the international lawyer is a Registry worker for the ECHR. Anyone who applies to the European Court is assigned an international lawyer who works in the Registry and they look at the case and may be aware if further evidence should be submitted to increase the speed at which the case will be progressed and so forth. But there are no charges for the European Court of Human Rights at all.

**Deputy P.J. Ryan:**

So, you are not incurring costs for the European Court of Human Rights or your international lawyer, and your Jersey advocate has offered to provide ...

**Mr. L. Small:**

At present, yes, but I cannot guarantee that that free legal advice will continue. If Jersey chooses not to amend the legislation, continue to a point where we are in a public hearing at the European Court, however, it is common expectation of the Court to grant an applicant just satisfaction and legal costs, so in that effect it would not be an issue for myself should we have to start paying.

**Deputy P.J. Ryan:**

If you won your case you would get your costs paid and they would go to your legal team?

**Mr. L. Small:**

Yes, the direct object of the application is in 3 points. I quote from my application: "The applicant notes the object of the application, that a judgment is issued against the United Kingdom for breaches of Articles 1, 8 and 14 and States of Jersey and the United Kingdom refund any costs incurred in bringing this case before the European Court of Human Rights and, at the Court's discretion, that the States of Jersey or United Kingdom in conjunction with the judgment issued by the Court are bound to pay just satisfaction to the applicant."

**Deputy P.J. Ryan:**

What is just satisfaction?

**Mr. L. Small:**

Just satisfaction is should the Court feel that the applicant has incurred any distress or so-called damages, compensation for the non-compliance that the Court believes is just.

**Deputy P.J. Ryan:**

Thank you.

**The Connétable of Grouville:**

Moving on and jumping over a lump, are you confident that judgment would be given against the Island?

**Mr. L. Small:**

On the basis of my legal advice and on my own understanding and my own research and case law of the European Court of Human Rights, I am fully confident that Jersey will -- well, the United Kingdom because the application is *Small v UK*, I am fully confident that the European Court of Human Rights will issue a judgment which is binding on the United Kingdom for Jersey to amend its legislation.

**The Connétable of Grouville:**

What in your view would be the impact of a judgment against the Island in this case? I refer that in with another question, which is the potential constitutional crisis if the Island does not comply with the ECHR case. What is your understanding of this crisis?

**Mr. L. Small:**

Should Jersey be taken to the ECHR and a judgment is then issued, in *Sutherland v UK* I think someone noted that the application was struck out from the Court because the UK used acts of Parliament to force the law through the House of Lords to avoid a judgment being issued. I am of the view that should the case come to a public hearing before the European Court that the United Kingdom would request the

application struck out once again and in accordance with the 1990 statement from the Legislation Committee and the Right Honourable Secretary of the Home Office that the UK would legislate for Jersey on that matter. However, obviously there are some concerns there whether or not the UK is in that capacity.

**The Connétable of Grouville:**

I am going to ask you the same question I asked Advocate Lakeman. Do you know of any precedent where this has occurred in the past, where the UK has taken over and legislated in Jersey? I am aware that he has told us that there was one case that was settled by compromise rather than by legislation.

**Mr. L. Small:**

I do not know if that was the birching case. The birching case is the case I am aware of where there was an upcoming debate - I cannot state this on a matter of evidence, this is my understanding solely - that the Island was to bring forward a discussion on birching and Her Majesty's Counsel and at the time either the Privy Council or the DCA directly told Jersey that there was no opportunity for discussion and there was no area on which that could be brought forward. But as I said, that is my sole understanding and I am not able to base that and back that by any evidence.

**The Connétable of Grouville:**

Sorry, that is not a case where they legislated for and on behalf of, that is a case where they negotiated and perhaps arm-twisted, more to the point, for us to legislate.

**Mr. L. Small:**

I am aware, though, of where the UK has made it clear that it would legislate for Jersey and I am of the view that if the UK believe they are in a position to tell Jersey that if you do not amend the criminalisation of homosexual consensual acts on the whole that we will legislate for you. I do not think the United Kingdom would make that threat if they were unsure as to whether or not they could carry out that action.

**The Connétable of Grouville:**

It is a bit like a big poker game.

**Mr. L. Small:**

Yes.

**The Connétable of Grouville:**

And my last question, would the proposed draft law, P.196, which is being debated at the moment, fully satisfy the concerns that you have?

**Mr. L. Small:**

Yes, the law brought before the States by the Home Affairs Minister, I am of the view that that law is appropriate and just and, should the law be kept as it was drafted, that rules out any need for intervention by either the UK or the European Court.

**The Connétable of Grouville:**

Thank you very much for answering those questions.

**Senator J.L. Perchard:**

I would like to go back to your submission, Luke, and congratulate you on it. It is very good.

**Mr. L. Small:**

Thank you.

**Senator J.L. Perchard:**

Did you do that all yourself?

**Mr. L. Small:**

I sort of agreed the structure. It is a joint effort.

**Senator J.L. Perchard:**

Very impressive. Now, the Panel, I think, are familiar with Article 8 and Article 14 of the ECHR. You flag up Article 1 as a violation, in your opinion. Can you explain exactly why?

**Mr. L. Small:**

The Convention for the Protection of Human Rights and Fundamental Freedoms, which is the full title for the European Convention, member states have agreed to all the articles in the Convention, Article 1, which I will quote from the actual Convention itself, is entitled *The Obligation to Respect Human Rights*: "The high contracting parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of the Convention." Articles 8 and 14 are contained in Section 1 and, therefore, I demonstrate in my application that there is a conjunctive breach of 14 and 1 based on the breach of 8. It was very difficult to explain in the report as well, but that is the view we take. However, the ECHR may rule out one of the articles. If one article was declared inadmissible, it would just be crossed off but the other 2 remaining articles would still be carried forward. They would not declare the whole application inadmissible, but that is the view that I take, that there is a breach of Article 1 as well.

**Senator J.L. Perchard:**

Carrying on from that, are you aware of any case law that confirms your position?

**Mr. L. Small:**

No, I am not. Seeing as the application is from me personally, I take my personal view to the Court. My personal view is that Article 1 is in breach. As to whether or not the Court accepts that is obviously their decision but that is the view I take.

**Senator J.L. Perchard:**

You mentioned *Sutherland* before. They did not ...?

**Mr. L. Small:**

*Sutherland* did not highlight Article 1, no.

**Senator J.L. Perchard:**

Just 8 and 14?

**Mr. L. Small:**

Yes.

**Senator J.L. Perchard:**

Thank you for that. Is there anything specifically about Article 1 that applies to young homosexual men?

**Mr. L. Small:**

No, it does not, but in the same view it does apply to the object of the application.

**Senator J.L. Perchard:**

Do you believe that Jersey has an absolute obligation to ensure non-discriminatory legislation?

**Mr. L. Small:**

I am of the view through legal advice and my own view that, yes, Jersey is under full obligation to the United Kingdom and to the ECHR to comply with the European Convention.

**Senator J.L. Perchard:**

Would you accept that a differing age of consent might be considered proportionate in the concerns with regard to protecting young people?

**Mr. L. Small:**

As I highlighted in my report, there are 3 options that the States of Jersey currently have, and that is listed in the legal situation. Option 2 is to amend the age of consent to 18 or 17 for both homosexuals and heterosexuals. As I have made clear, the Solicitor General mentioned in her speech in the States today that by increasing the age of consent for heterosexuals would not be considered proportionate. The team would also condone that a further application would be made on the basis of the concept to increase the age of consent. If we were to increase the age of consent then, therefore, there is a lot of reform that would have to come under as well, because if we are saying that young people cannot have sex until they are 18 years, well, for a start Advocate Lakeman and I have said we can consent to medical treatment, we can drive, we can get married, and so the law is not proportionate.

**Senator J.L. Perchard:**

You could get married but you could not have sex. [Laughter]

**Mr. L. Small:**

The institution of marriage, I think, would come under some ...

**Senator J.L. Perchard:**

There would obviously be some domino legislation as the result of raising the age, that goes without saying, everybody knows that, but do you think it is a realistic option?

**Mr. L. Small:**

No. I think once again it is a case of compliance and, as I respectfully highlight, Advocate Lakeman said increasing the age of consent is not an option. The only way to deal with this matter directly and to remove a threat of application and judgment from the ECHR would be to amend the age of homosexual consent to 16 years.

**Senator J.L. Perchard:**

You are aware that in Northern Ireland the consensual age is 17 and without discrimination?

**Mr. L. Small:**

Yes.

**Senator J.L. Perchard:**

Does it bother you that you cannot buy cigarettes for 2 years?

**Mr. L. Small:**

To be honest with you, the law does not have that much of an impact on young people. You could set the age at 25 and young people would still get their cigarettes.



**Senator J.L. Perchard:**

Thank you. That is excellent, well done.

**The Connétable of Trinity:**

As politicians, of course, we should always listen to what the public say. This is one of these tricky ones that I know that we should drop the age to 16, but if you get a massive amount of public opinion that it should not be dropped to 16 you can see obviously where we sometimes have a problem. Most political decisions now we are getting told continually that we must have public consultation. Now, this is one of the most emotive subjects we could go out to the public on, and I just get the feeling that we are in now basically a position that we have to because of the law, but maybe there is a lot of the population that would like to see the law stay as it is. How do you feel on that one?

**Mr. L. Small:**

It boils down to, once again, although I care for the views of the population of Jersey, that Jersey is in breach of the European Convention on Human Rights. Regardless of youth consultation, public consultation, research into sexual health and so forth, the argument is flawed by those obligations and, therefore, the public view in this case is inapplicable. Although I am fully supportive of the process of scrutiny and public consultation and ensuring that the views of the public are incorporated in decisions made by the States of Jersey, this is not a piece of legislation where any of us really have a say. It is a case where we have agreed to this Convention, we have agreed to abide by the articles in this Convention, and we have to keep to our obligations.

**Deputy P.J. Ryan:**

Thank you for that. I put to Advocate Lakeman this question of whether the act of procreation and the act of “other sex”, whether there was rightly a distinction between the 2. I think you heard me ask that question because it was in public at the time. Could you give me a view on that?

**Mr. L. Small:**

Mr. Pearce, who brought this matter to the attention of the Scrutiny Panels, I have been corresponding with Mr. Pearce on the matter. Advocate Lakeman made a significant point about if we use contraception then you cannot make it an act of procreation because there is no creation as a result of what we are doing. At the same time, I think that it would be easy to argue in the courts that the government are still discriminating on not necessarily the sexuality of people, but they are discriminating on what rights any individual has.

**Deputy P.J. Ryan:**

What forms of sexual activity?

**Mr. L. Small:**

Yes. You have to consider that people will, regardless of the law, have underage sexual intercourse. That is a commonly known fact. But to bring in the use of different ages for procreation and intercourse *per anum* is a very controversial issue and I think it is, as Advocate Lakeman said, shrouding the issue that is underlying here. Mr. Pearce’s argument is flawed again. Canada are not affected by the European Court. Canada are not signed up to the European Convention. Canada do not have to comply with that Convention and they can maintain any law which they see fit to its purpose. But in Jersey we do not have that decision. We are in a position now where we are coming to the end of the line, to the European Court of Human Rights.

**Deputy P.J. Ryan:**

Thank you. I think I have already asked you this a little bit earlier on, but I will just explore it finally before we close. Your position on the question of whether there should be other parts in the proposed

law, for example, grooming of younger people, positions of trust, underage (inaudible) and the age of consent in that respect; have you a view on those issues?

**Mr. L. Small:**

In particular I have looked into the idea that an article should be incorporated in the law regarding a position of trust, but if we are to bring forward an article in that law, I think that you have difficulty in defining what is a position of trust. Can a 17-year-old student be in a relationship with one of her ex-teachers who is still a teacher? Is there a breach there in a position of trust? Does it apply to politicians? Who does the position of trust apply to? It is difficult to define and I think it is a matter of law which could be advanced, but I am not sure where the ECHR would stand on that. I myself believe that we do, we must primarily safeguard our young people, but I am not sure if bringing in an article of position of trust adds any more protection to young people than the law would alone. It is also important to highlight that ...

**Deputy P.J. Ryan:**

It is outside our terms of reference but it has come up in other places.

**Senator J.L. Perchard:**

Your submission, Luke, as I have already said, is quite comprehensive and very informative. We have asked you questions about the angles that we wanted to explore. Have we missed anything that you really wanted us to consider in your evidence, anything outside this submission or anything that you want to reiterate?

**Mr. L. Small:**

The main points of what the Scrutiny Panel must take into account are in the recommendations on the last page: the obligation the Island is under as demonstrated by the Solicitor General, the Reform Team, Advocate Lakeman. It is unarguable. We are obliged to comply with this legislation; that the Island will be taken to the European Court of Human Rights should it choose not to amend the legislation, and in addition there is a likelihood that an application would be made should Jersey choose to increase the age of consent on the basis of that not being proportional; that the Island could face, as Connétable Murphy highlighted, a constitutional crisis if Jersey receives a binding judgment from the Council of Europe and the European Court and still refuses to amend its age of consent. Indeed, the UK may find maybe they are not in a position where they can amend Jersey's law for it. We put our Crown dependency on the line here as well, and obviously that is something Jersey cannot afford to risk. That challenges in the ECHR have proven that the Articles are in breach; that we believe that the States of Jersey should take great notice of the Chief Minister's comments; that the States of Jersey, the Scrutiny Panel in particular, take note of the views of the Jersey Youth Reform Team; and that the debate is resumed as soon as possible and that a vote is made on the legislation so that relevant parties may launch responses to such a decision.

**Deputy P.J. Ryan:**

Mr. Small, thank you very much for taking the time. That is very brave, might I say, and may I commend you for your bravery at your particular age, well ahead of your years, I might add, and congratulations. Thank you very much for your time this morning.

**Mr. L. Small:**

Thank you.

**Deputy P.J. Ryan:**

I think our next witness, Deputy Reed, is due. So, good morning once again, ladies and gentlemen, members of the public, and good morning to the Deputy of St. Ouen, if we are going to be strictly

correct. I am not going to be strictly correct. I hope you do not mind me referring to you as Deputy Reed.

**Deputy J.G. Reed of St Ouen:**

Thank you.

**Deputy P.J. Ryan:**

Is it okay if I call you James?

**The Deputy of St. Ouen:**

Certainly, yes, please.

**Deputy P.J. Ryan:**

We are used to calling you that. James, I need to read to you the statement, and it is important that you fully understand the conditions under which you are appearing at this hearing. You will find a copy of the statement I am about to read to you on the table in front of you: "The panel has no statutory powers as yet and the proceedings of public hearings are not covered by parliamentary privilege. This means that anyone participating, whether a Panel Member or a person giving evidence, is not protected from being sued or prosecuted for anything said during the hearings. The Panel would like you to bear this in mind when answering questions and to ensure that you understand that you are fully responsible for any comments you make. The proceedings are being recorded and transcriptions will be made available on the Scrutiny website." There is also in front of you a copy of our terms of reference and I would ask you to be aware of those. Although, as I have already done this morning, I will allow some strain in the terms of reference, in the interests of efficiency and form I will not allow us to go too far. I would ask you to bear that in mind and to respect that if I do ask you to come back to my terms of reference I would ask you to adhere to that. I think I would like to start by asking my Vice-Chairman, Senator Perchard, to open the questioning.

**Senator J.L. Perchard:**

Thank you, Chairman. Deputy Reed, I think you spoke twice during the States today for unusual reasons on this subject, and I am just trying to think which of the 2 speeches was your sort of *pièce de résistance*. You spoke very eloquently and you were very well researched and I would like to personally congratulate you on that. In one of those speeches you drew a distinction between vaginal and anal intercourse. The former you linked to procreation and the latter unnatural. Am I right?

**The Deputy of St. Ouen:**

You are.

**Senator J.L. Perchard:**

You seemed to be saying that equality attributed was not necessarily appropriate as they were 2 distinctly different acts.

**Deputy J. Reed:**

I did, yes.

**Senator J.L. Perchard:**

Do you know of any legal or constitutional basis for this distinction?

**The Deputy of St. Ouen:**

Yes, all our existing laws up to date.

**Senator J.L. Perchard:**

Can you expand on that?

**The Deputy of St. Ouen:**

Yes, throughout history, there has always been a distinction made between the 2 acts right up to the present day and reflected in current law.

**Deputy P.J. Ryan:**

Can I just come in there for a second? That is Jersey law?

**The Deputy of St. Ouen:**

No, that is UK law as well. If you look at the research that was provided by our Home Affairs Minister recently and circulated to States Ministers, it clearly showed in the debate that was held in Westminster regarding the changes of ages of consent there was a definite difference throughout history and it is quite clear.

**Deputy P.J. Ryan:**

You have cited examples of differentials in law and it still exists, for example, in Portugal. It still exists currently in Jersey, but the question was quite subtly different. Do you know of any legal or constitutional basis for this differential?

**The Deputy of St. Ouen:**

I refer to all previous and past laws that have always identified a difference and always specified different ages and different forms of protection for the individuals engaged in those acts. Equally, even in jurisdictions currently who have areas of inequality, such as Isle of Man, they equally are recognising the difference in respect that they are ensuring that there are specific areas of protection for the individuals that they are including in reducing that age.

**Deputy P.J. Ryan:**

Notwithstanding that these differentials have existed in the past, which is I think where you are coming from, do you accept that many, if not the vast majority (I am searching for the right words here) almost without exception have now changed that form of law which has different ages or differentiates between the 2 kinds of sex, if I can put it that way? They have now changed and some would use the term modernised. I do not particularly want to use that word. Would you accept that that has happened, generally speaking, throughout certainly Western Europe?

**The Deputy of St. Ouen:**

I acknowledge that within Western Europe generally there is an equitable age of consent. However, all the laws are either reflecting that age of consent, the equal age of consent, recognise differences and ensure that there are conditions attached and included in those laws to protect individuals, specific individuals.

**Deputy P.J. Ryan:**

Do you have an opinion that our proposed amendments to the Sexual Offences (Jersey) Law which we have seen drafts of and we were debating is deficient? Is your point that our law is deficient in that respect?

**The Deputy of St. Ouen:**

I believe I would cite a comment made during a debate that we had on 17 January 2006 by Senator Wendy Kinnard. This was her second speech on the reference back and she was speaking about issues around exploitation and sexual abuse and she was suggesting in her comments that in this context she is

claiming that they are different issues for another day. She suggests those issues, which are inextricably linked to many people's views, should not ride on the back of simple reform about equalising the age of consent. She goes on to say then that this simple amendment - and we can question whether it is simple - is not the right vehicle. She then goes on to say: "These issues are complex and distressing matters and issues such as sexual exploitation and abuse deserve stand-alone consideration. Indeed, many of the issues concerned will be covered in the new Sexual Offenders Law to be lodged later on in the year." So, even the Senator is recognising that with changes to our existing laws we need new and improved forms of protection.

**Deputy P.J. Ryan:**

Thank you. Jim, can I go back to you because I think there was a series of questions.

**Senator J.L. Perchard:**

Yes, to try and keep a train of thought, I want to know, Deputy, where you come from on this issue. I will remind you of what you said in the States and ask you again if you stand by this one line. In your speech you drew a distinction between vaginal and anal intercourse, the former natural, leads to procreation, the latter unnatural. Now, is this the basis for you wanting to make a discrimination in the age of consent?

**The Deputy of St. Ouen:**

Not at all, but I think that we all are aware that, for argument's sake, HIV, one of the most common forms and easiest ways of contracting HIV is through anal intercourse, and it is highly infectious and it is highly probable that individuals using unprotected sex are able to and expose to themselves to the ability to --

**Senator J.L. Perchard:**

Sorry, the issue here is, is it the basis for you wanting to make a discriminatory act?

**The Deputy of St. Ouen:**

Not at all.

**Senator J.L. Perchard:**

It is not of interest to the Panel if you were, in fact, maybe even right, the fact that at 18 it is okay and at 16 it is not to spread all these horrible diseases. Even if that was to be the case, it makes no logic.

**The Deputy of St. Ouen:**

That certainly was not the basis of my argument because I think if you read the transcripts of this, which quite clearly spell out my concerns over this law, it highlighted the lack of information and evidence that was provided to make a proper judgment. I commend this panel for agreeing to look at the issues or some of the issues that were raised in that debate. As I said, it was not just on the issue whether or not anal intercourse or vaginal intercourse -- all I was trying to do was to highlight the fact that they are different acts and, therefore, could be classed separately as, indeed, I think we heard this morning Canada has chosen to consider.

**Deputy P.J. Ryan:**

I think we are going to come back. I have some questions later on which are going to come back to the social side of things which I want to explore with you. If we can for the moment try and concentrate and keep within our terms of reference as far as possible. You will have an opportunity to talk about some of these other issues in a little while.

**Senator J.L. Perchard:**

You asked a question I think during one of your speeches. Which was the longer of the 2, the first or the second one? Because you spoke either side of the reference back, did you not?

**The Deputy of St. Ouen:**

I certainly spoke twice, I believe. The first one, the whole purpose and the reasoning behind why I spoke --

**Senator J.L. Perchard:**

I think we are all aware of the --

**Deputy P.J. Ryan:**

Ask the question.

**Senator J.L. Perchard:**

“Are we really expected to legitimise what is regarded by many as a totally unnatural and unacceptable act?” That is a quote from you. “Are we really expected to legitimise what is regarded by many as a totally unnatural and unacceptable act? Is it not the case however that homosexual” -- I beg your pardon, it is not a quote.

**Deputy P.J. Ryan:**

I think your question, if I can help you ...

**Senator J.L. Perchard:**

No, I do not need help, Mr. Chairman, I am quite capable. You have asked the question, James, are we really expected to legitimise what is regarded by many as a totally unnatural and unacceptable act? Is it not the case, however, that homosexuality has been legitimised in the Island for some years and that this proposition is not about changing that fact of legitimacy but simply changing the age of consent?

**The Deputy of St. Ouen:**

I would agree. However, the debate was based on changing the age of consent from a point of 18 years to 16. Therefore, one could argue that the result of changing that age meant that you would legitimise the act at 16 rather than 18. That was the point I was trying to make.

**Senator J.L. Perchard:**

That is perfectly legitimate to do that? It is acceptable to do that?

**The Deputy of St. Ouen:**

No, that was the point I was making, that trying to make people aware that obviously it was not simply the age of consent but what it could mean and what would be required.

**The Connétable of Trinity:**

It does not mean it is required. It means if you drop the age to 16 then you are decriminalising it.

**The Deputy of St. Ouen:**

I am sorry, in simple terms, what I meant by legitimising is that currently our law says under the age of 18 it is illegal. And there are other issues that were in that amendment about privacy and so on and so forth. By amending the law from 18 to 16 we include by doing so and legitimise the 16 and above group of people who currently would fall in the illegal category, for want of a better term.

**Deputy P.J. Ryan:**

So you are linking legitimacy with age?

**The Deputy of St. Ouen:**

Well, that is the whole point of the amendment.

**Deputy P.J. Ryan:**

At 18 it is legitimate; at 16 it is not, in your view?

**The Deputy of St. Ouen:**

That is based on current law.

**Deputy P.J. Ryan:**

We know the current law.

**The Deputy of St. Ouen:**

Well, I am sorry, I do not know how else I can answer the question.

**Senator J.L. Perchard:**

How can you justify the discrimination that you are suggesting? How can you justify it?

**The Deputy of St. Ouen:**

I was not attempting to justify the discrimination. If you carefully read my speech, I was attempting to draw out the issues surrounding and the effects that the change of the law would make.

**Senator J.L. Perchard:**

Can I perhaps ask this question now then? Do you feel you can justify discrimination for the sexual age of consent between male and female?

**The Deputy of St. Ouen:**

Certainly as a parent who has 3 children, now grown up, I am well aware that many children mature at different ages. I am equally aware that there are certain individuals with very strong-held beliefs who equally, as this Panel is doing, deserve to be heard.

**Senator J.L. Perchard:**

You are clutching at straws a little bit. I think probably you would say you would try and attempt to justify the age of consent because they are different acts. We are all parents and we are all concerned. There has to be a reason for you to try and justify the different age of consent. We are not here to judge the emotional side of the issue.

**The Deputy of St. Ouen:**

I would suggest that you go and speak to authorities such as Brook Centre and others.

**Senator J.L. Perchard:**

They will not be able to advise us on the law. That is what we are here to look at.

**The Deputy of St. Ouen:**

No, but they would certainly highlight the differences between the 2 acts and what is required to support the individuals who take part in those acts.

**Senator J.L. Perchard:**

I have asked a question. I would like you to answer it, really. How can you justify discrimination? On legal grounds, how can you justify it?

**The Deputy of St. Ouen:**

Can I put it to you, Senator, I use the example of being able to drive. At 14 I am entitled to get on a tractor and drive down the road, quite legitimately. At 16 the law tells me that I am able to ride a motorbike. However, at 17 I am able to drive a car. Now, I could suggest that one is exactly the same as the other. It is a method of transport and so on and so forth. However, the law determines that although they are all vehicles that I am able to drive and use on a public highway, they have different effects. The suggestion, whether you like it or not, and the comment that I was making was simply that it is wrong and too simplistic to look at the 2 different acts and class them as totally identical.

**Senator J.L. Perchard:**

The law does not discriminate against drivers on sexuality.

**The Deputy of St. Ouen:**

No, it discriminates on age.

**Senator J.L. Perchard:**

Everybody is treated equally on age. If you go to buy a packet of cigarettes at 18, it does not discriminate on sexuality or any other reason.

**Deputy P.J. Ryan:**

Can I stop this form of questioning at the moment because I think it is going nowhere? I think that Deputy Reed has given us his reasons and his evidence, as he sees it. It is up to the Panel to decide whether we believe that that evidence is correct or admissible or not. I would like to move on, if you do not mind, Senator.

**Senator J.L. Perchard:**

Of course, that is fine.

**Deputy P.J. Ryan:**

I think we have heard what Deputy Reed has to say. He has a point of view. He is not going to be shaken from it and we need to respect that point of view as everybody needs to be respected for their points of view, but we do need to move on. I would like to ask Connétable Gallichan, I believe you have a question.

**The Connétable of Trinity:**

Let us get back to our remit here. This is what we should be doing. European Convention on Human Rights. Now, you used emotive terms like being bullied or threatened by the ECHR. Is this really the case, do you think, or has not the Island committed itself to this Convention already? Are we being bullied into it, is that your opinion?

**The Deputy of St. Ouen:**

I am certainly of the belief that we have a government that has developed over hundreds of years and we are told that we have authority and sovereignty. However, on the other we are told that obviously we are obligated by Convention and human rights laws, which I am not against. I believe there is a proportionate aspect to human rights and I fully recognise the rights of minority groups. However, I am equally concerned, as we all should be, that human rights have a number of implications, not just perhaps with regards this law, but other laws on this Island. If, as suggested during the debate, we are bound by human rights laws and conventions to do with the individual, then I think it raises a whole series of questions which links our housing laws, our social security laws and the way we treat individuals coming into the Island. We also have had discussions recently about known criminals being



on the Island and what we may or may not do relative to protecting the Island and the population. The Chief Minister has said he is very sympathetic to that and looking into that side of it. I am not trying to minimise this; I am not trying to draw your attention away from obviously the current law. However, it is very important that we all of us, whether it is States Member or individual, fully understand the implications that will come about by and are already perhaps there linked to our human rights laws.

**The Connétable of Trinity:**

We have committed ourselves voluntarily to this Convention. Do you think we have any alternative - to ask my next question - to then not passing this?

**The Deputy of St. Ouen:**

Well, all I can say is, on the small amount of knowledge that I have gained within government over the last 3 years, I am aware that although it could be viewed that our housing laws could be in contravention to human rights conventions, I do believe that the advice has been given that they are not. Now, it is proportional again.

**Deputy P.J. Ryan:**

I would like to bring us back. I do not want to talk about housing laws. There may be human rights implications there, but that is not our concern or of this Panel. That will come at another time, another place, when we debate in the States housing laws and whether they are ECHR compliant and all of those other issues. I would not want that to cloud what we are talking about here. I think the thrust of the question was do you agree that the Island has committed itself voluntarily to the European Convention on Human Rights? It was a question in which almost the subtext was, "Do you feel it is right or acceptable if that is the case that we cherry pick the parts that we like and not the ones that we do not?" What is your view?

**The Deputy of St. Ouen:**

To be honest I have yet to see evidence that that is the case.

**The Connétable of Trinity:**

A minority of these member countries in the Council of Europe do maintain the distinction of age of consent. Jurisdictions such as Guernsey and the Isle of Man are moving towards that direction. The Isle of Man is on the verge of also going to that distinction. I think what we have really got to point out is does the Island have any choice of not complying with these things. I think the majority are. I know that we consider ourselves apart, but constitutionally would it really affect us also if we did not comply?

**The Deputy of St. Ouen:**

I do not think it is for me to say. The only thing that I will say is obviously, as you rightly point out, Guernsey, Sark, Alderney, sister islands in other words, have similar laws to ourselves which discriminate or identify different ages. Isle of Man equally has an issue, and perhaps this is one of the areas that needs to be addressed. I would just like to say that in the proposition presented to us, the Home Affairs Minister clearly said there were 3 options. Now, in my view, if you say there are 3 options, there are 3 options. If you say there is only one option, then it is only one option. That information, those options, were not properly explored, the evidence was not provided to guide us as to understanding why Home Affairs had chosen a specific route.

**The Connétable of Trinity:**

Yes, but the SG (Solicitor General) did point out that those options may not have been put in the projet, but those options, the other 2, were mostly more of a minefield than the actual --

**The Deputy of St. Ouen:**

It might be the case. To be honest, the thrust of my argument and my comments made in the States was more about the issues surrounding the effectiveness of the law and how we protect the vulnerable.

**The Connétable of Trinity:**

Which is not our remit, really.

**Deputy P.J. Ryan:**

I think we should move on.

**The Connétable of Grouville:**

Yes, we have obviously covered the first part of the questions I was going to ask. Do you think Jersey could choose an option which would make it different from England and Wales? This is really following on from the --

**The Deputy of St. Ouen:**

I am interested in your question because obviously you have recognised, as I have in the small amount of research that I have carried out, that Ireland obviously has chosen a different route to England and other countries and seemingly it is compliant with the Human Rights Convention. Interestingly enough, I have also noticed a number of interesting words that are used in various laws relating to sexual offences acts which are linked to the idea of marriage at 16, for argument's sake. Now, in Northern Ireland I understand that they have acknowledged the ability for a marriage within their Act. Equally, most of the sexual offences acts go to some lengths to recognise what age of consent means and what ages mean. In other words, they make actual specific offences for activities that are below that age. I am not convinced that we have properly addressed that in our existing legislation.

**The Connétable of Trinity:**

That is also a type of discrimination, is it not? If you say you can get married at 16 and you can have heterosexual sex, but then because you are not married you cannot have it. That is the way I read that. Is that the way you read it? If you get married at 16 they have made a law that you can have --

**The Deputy of St. Ouen:**

I would suggest obviously it is an act that you need to look into and understand and, as much as there have been conversations had with the UK, it would be worth having a conversation with Northern Ireland to see whether their system is better or worse.

**Senator J.L. Perchard:**

In your view, would that Northern Ireland scenario as you have just painted it be human rights compliant?

**The Deputy of St. Ouen:**

I believe it must be, as I understand it, but perhaps --

**Senator J.L. Perchard:**

There is no way it will be human rights compliant. It is just waiting to be tested, as is Portugal.

**The Deputy of St. Ouen:**

Interestingly enough, Northern Ireland is basically treating all individuals as having a single age of consent. Obviously that is one of the issues raised in Articles 8 or 14. I am not to judge whether it is human rights compliant or not. Obviously there are lawyers, and the Northern Ireland government I presume, that would be able to tell you whether it is or not.

**Deputy P.J. Ryan:**

There is no discrimination on the grounds of sexual orientation in Northern Ireland; it is the same age of consent. So, therefore, it is compliant with 14. A number of different countries have different ages of consent across Europe, but again they do not discriminate on grounds of sexual orientation. This is the issue which is at the heart of this, is this discrimination on the question of sexual orientation. Do you have a comment on that? It appears that you are saying - correct me if I am wrong - that we can continue to discriminate on the grounds of sexual orientation.

**The Deputy of St. Ouen:**

I am not promoting necessarily different ages and discriminating by different individuals. It saddens me if this Panel believed that I was. My whole argument and comments that I made in the States debate was aiming specifically to raise issues relating to the effects that a change of law could have on certain groups of individuals based on facts again from Brook Centre and others. I noticed that statistics were used by Senator Wendy Kinnard of average ages, 15 and 3 months and 15 and 7 months, but the facts are that 12 and 13-year-old children are involved in sexual activity.

**Deputy P.J. Ryan:**

This is the point, James, if you do not mind me saying, where I am going to bring you back within our terms of reference. These are the social issues that fall outside, very definitely outside, of our terms of reference. We are not here to discuss the rights and wrongs of sex at whatever age. We are only here to talk about discrimination and European Human Rights Convention obligations. If you would not mind, I would like to just bring us back within our terms of reference.

**The Deputy of St. Ouen:**

Could I just make one point?

**Deputy P.J. Ryan:**

As long as it is within our terms of reference.

**The Deputy of St. Ouen:**

It is, because obviously you are considering the law and what we can and cannot do. The law is just not, I would suggest, on ages of consent. It includes a number of other things, as in every other country.

**Deputy P.J. Ryan:**

But the amendment to the law is about the age of consent.

**The Deputy of St. Ouen:**

It is still the law. Whether you class it as an amendment or the law, it is part of the law which will be underlined and enforced and included within our current system.

**Deputy P.J. Ryan:**

The proper place for a debate on the content of that law is the States Chamber. This is not the proper place to start talking about or debating the rights and wrongs of different parts of the Sexual Offences (Jersey) Law, other than simply whether it is right or wrong to amend that law as far as equalising the ages of consent between homosexual and heterosexual sexual acts. That is what we are here to discuss.

**The Deputy of St. Ouen:**

Then I would suggest that you will be negligent in your duty because the Sexual Offences (Jersey) Law is a complete document. It is not just based on age of consent, and equally that amendment also includes the privacy aspects.

**Deputy P.J. Ryan:**

Surely your concerns would be addressed through a different law, which is this new Sexual Offenders law that Senator Kinnard referred to in the debate.

**The Deputy of St. Ouen:**

Not at all because currently we have no Sexual Offenders law. All we have is our Sexual Offences (Jersey) Law, which is the law being proposed to be amended.

**Deputy P.J. Ryan:**

I think again the Panel will have to take a view on that. I think we have finished that particular line of questioning. I would like to move on to a new issue. You were strongly opposed, James, to another change in the draft law which would remove the current definition for homosexual acts in private, which is stipulated as involving just 2 people whatever their age, whereas this restriction does not apply to heterosexuals. The ECHR judgments we have seen make it clear that maintaining differential treatment can only be justified for what they term “weighty reasons”. So, my question to you is this: what purpose is served by maintaining the specific distinction on homosexual acts in private and differentiating between heterosexual and homosexual in this context, in your view?

**The Deputy of St. Ouen:**

Sorry, could you repeat the question?

**Deputy P.J. Ryan:**

You were opposed to another change in the law. The current law defines homosexual acts “in private” and that is stipulated as involving 2 people whatever their age. But that only applies to homosexuals; it does not apply to heterosexuals. Now, from what we have seen from judgments in the past from the European Court of Human Rights, they make it clear that maintaining this difference between homosexual acts not in private or in private as opposed to heterosexual can only be justified if there are what they term “weighty reasons”. Do you have an opinion that there are “weighty reasons”? Or, if you do not, what purpose is served by maintaining this distinction between homosexual acts with more than 2 people as being illegal, whereas heterosexual acts involving more than 2 people are legal? Do you have an opinion on that? Can you expand? Because you were very strongly opposed to this change in the law.

**The Deputy of St. Ouen:**

I opposed it, I believe, for a number of reasons. I think this is a difficulty that this Panel is facing in looking at this particular law. There is a legal view and then there is the public/moral view.

**Deputy P.J. Ryan:**

I just want to talk about the legal.

**The Deputy of St. Ouen:**

I am not a lawyer, so I am unable to argue that point. I do believe that --

**Deputy P.J. Ryan:**

Do you have any evidence than you can give us that would substantiate your position?

**The Deputy of St. Ouen:**

The only view I would have would be on moral grounds, believing in the sanctity of a union with 2 people. Now, that could equally be 2 individuals of any sex.

**Deputy P.J. Ryan:**

That is fine. What that tells me is you have your own opinions and one respects them. I personally make no opinion, but you are the witness, I am not, so what I am saying is that your objections are on morality grounds and that falls outside of our terms of reference. I just want to be clear on that.

**The Deputy of St. Ouen:**

I would like to underline the fact, I suppose, because as a States Member and a member of government it is our responsibility to consider social views and set moral and ethical standards.

**Deputy P.J. Ryan:**

Absolutely right. It is a question of whether it falls within our remit and whether it falls within our terms of reference. I just wanted to be clear that your objections fall outside of our terms of reference in this particular area, and I was asking in case there was any evidence that you could provide us with on that. That is fine. Can I just move onto the next question? This is to do with the protection of young people. You said in the States debate that the purpose of your speech was: "To highlight the problems that we as an Island are facing when it comes to the implementation of the existing law and the concerns that I had regarding the changes." I think you asked the Council of Ministers to: "Collectively look at the whole range of issues that relate to the sexual practices of young people on the Island."

**The Deputy of St. Ouen:**

I did.

**Deputy P.J. Ryan:**

I think you highlighted the incidence of underage pregnancies and the work done by the Brook Clinic, excellent work done by the Brook Clinic, with under-16s, and although there are no statistics for homosexual activity under the age of 16 in the Island it is highly likely that this already occurs. You seem to be saying that reducing the age of consent would encourage young people to experiment at a young age. I think that is the point you were making. Do you have any evidence for this contention that reducing the age of consent would increase the incidence of homosexual activity in young people as young as 12 and 13? Do you have any evidence to support that? If you do, we as a Panel would like to see that evidence.

**The Deputy of St. Ouen:**

That is one of the areas that I do believe you do require evidence. We have been presented with much evidence from the British Medical Association as cited in the debate supporting an equalisation and a lowering of consent, which is based on information that was 8 years ago or more. There must be up-to-date information subsequent to that law being changed as to what those results may or may not be. It would certainly be very worthwhile for this Panel to look at that information. Evidence on Ireland is equally limited. However, I would and I have encouraged agencies involved in the areas involving young people specifically to contact the Panel and who are also prepared to comment and make available facts and figures to the Panel.

**Deputy P.J. Ryan:**

Thank you. Could you let us know who those agencies are, perhaps later, and we will search this evidence.

**The Deputy of St. Ouen:**

Certainly. I would also ask --

**Senator J.L. Perchard:**

Is this legal evidence? I am a bit lost here. What sort of evidence would this be?

**Deputy P.J. Ryan:**

We do not know until we get it.

**Senator J.L. Perchard:**

You are talking about legal evidence?

**The Deputy of St. Ouen:**

No, you were just asking about evidence for --

**Senator J.L. Perchard:**

We are off again.

**Deputy P.J. Ryan:**

Yes, we are slightly going outside, but I am trying to be fair to the Deputy.

**The Deputy of St. Ouen:**

It is evidence that may or may not support the decision to change the law. If you are looking for evidence regarding changing the law, because we are behind England we already have the opportunity to ask the British Medical Association and whoever else in the UK, "Subsequent to you changing the law, have you noticed what benefits and negatives aspects have there been?" Surely that is the advice and information that you properly require to really with the benefit of hindsight when changes --

**Senator J.L. Perchard:**

Does Deputy Reed recognise our obligations under ECHR to comply? You do, you just do not recognise them.

**The Deputy of St. Ouen:**

I have not seen any information currently that demonstrates that (overspeaking).

**Deputy P.J. Ryan:**

We have already said that we will try and find that evidence.

**The Deputy of St. Ouen:**

Thank you.

**Deputy P.J. Ryan:**

Thank you, we will do that. But linked to that a similar thing, same vein if you like, have you any evidence to show that raising the age of consent to 18 for all forms of sex would help to reduce the incidence of sexual activity in the young? Do you have any evidence to support that? Again, it is a similar kind of question.

**The Deputy of St. Ouen:**

There is certain evidence available that I am sure would help in your deliberations.

**Deputy P.J. Ryan:**

Whatever you have there would be useful to us, if we can have it in the form of a written submission either from the agencies concerned or yourself.

**The Connétable of Grouville:**

Chairman, can I come in here because we seem to be straying into the realms of the social side of things. I know for a fact that ACET definitely wanted to give evidence, and which would have backed

up the Deputy, but unfortunately, because our remit is not to include this type of discussion they obviously cannot appear here. I think we are straying now way off the mark and I think we really should come back to reality of exactly what we are supposed to do here.

**Deputy P.J. Ryan:**

Very quickly, bearing in mind our terms of reference, I want to give you the opportunity to say a few more things, but very quickly. Do you have anything to add on the implementation of the existing laws, for example?

**The Deputy of St. Ouen:**

Again, the only comment I would make is that confidential information provided to me has led me to believe that although there are incidences of sexual activity below the age of consent which cause concern, they are referred to our child protection unit. I think that would be an area that needs to be looked at.

**Deputy P.J. Ryan:**

We are looking for more than hearsay; we are looking for evidence.

**The Deputy of St. Ouen:**

Obviously again I can provide you confidential evidence, and I repeat, it would have to be absolutely confidential evidence.

**Deputy P.J. Ryan:**

The Panel is quite capable of looking at confidential information.

**The Connétable of Grouville:**

I am sorry, I still think that we are way off our remit. We should not be taking evidence of this kind at all.

**Deputy P.J. Ryan:**

I think we need to move on unless there is anything else that is strictly within our terms of reference that you think that we have missed. Is there anything that we have missed there that you would like to give your views on?

**The Deputy of St. Ouen:**

Well, yes, there is. The Panel makes the comment and emphasises the fact what its remit is, and then goes on to say that the other issues, which are inextricably linked to your terms of reference, are being reviewed by certain departments. You mentioned Health, Social Services, Education, Sport and Culture. Could you confirm that that is the case?

**Deputy P.J. Ryan:**

I cannot speak on behalf categorically, but we understand from our conversations with these departments that they are being currently reviewed. To get an unequivocal answer to that question you would have to speak to those departments directly.

**Senator J.L. Perchard:**

Having said that, the Chief Minister in correspondence, Chairman, by email, did give us that understanding, but we do not know for certain.

**Deputy P.J. Ryan:**

I cannot be more specific than that.

**The Connétable of Grouville:**

Can I come in with hopefully a last one? To stay strictly within our remit, do you have a view on what the constitutional position would be if we did not ratify this law vis-à-vis the ECHR, European Union and the UK?

**The Deputy of St. Ouen:**

No, I do not.

**Deputy P.J. Ryan:**

Panel, any further questions?

**Senator J.L. Perchard:**

Yes. I want to say something. I have been a bit sharp with you this morning because I am a little bit frustrated in the sense that we have deviated from the terms of reference. I respect you completely and your opinion and your will to do what you think is best, and of that I want you to be clear. But, Deputy, what purpose do you see there could possibly be in criminalising a 17 or 16- year-old young man? What purpose will we be serving? What will we be achieving?

**The Deputy of St. Ouen:**

Well, presumably the same as our forefathers believed when they introduced the law in 1956, was it?

**Senator J.L. Perchard:**

Do you think the law will make a difference?

**The Deputy of St. Ouen:**

I think the law is there for a purpose, as all laws are, otherwise we would not have a law or any laws. I think that it is there for reasons of protection as much as prohibition.

**Deputy P.J. Ryan:**

I think I am going to call a halt there, Jim.

**Senator J.L. Perchard:**

That is fine.

**Deputy P.J. Ryan:**

But I would thank publicly Deputy Reed for joining us this morning. He has very sincerely held views which I am sure everybody respects. It is not easy to sometimes stick to your guns when others are firing at you from all directions and that is a brave thing to do. So, thank you for coming this morning and we will take note of the comments you made.

**The Deputy of St. Ouen:**

Can I also thank the Panel for giving me the opportunity to come in front of them and express some of my views?

**Deputy P.J. Ryan:**

Thank you very much, Deputy. Members of the public and the Panel, we are now going to break. Thank you very much.