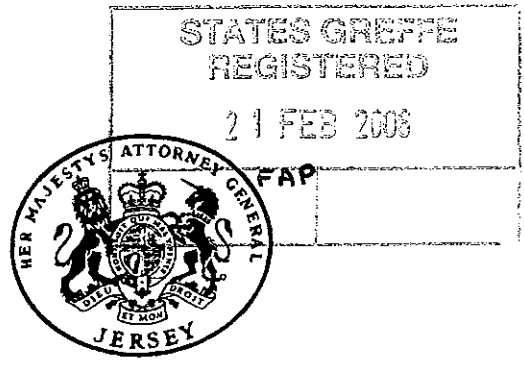


# Law Officers' Department Memorandum

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**To:** Mike Haden  
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**From:** Acting Attorney General

**Date** 21<sup>st</sup> February, 2006.

**Your Ref:**

**Our Ref:** SCN/SB LEGLEGA-025

### Sexual Offences : Age of Consent

I am forwarding herewith the Addendum to the Advice to the Scrutiny Panel. It provides the further advice in respect of the School Curriculum, and comments as requested upon the legal submissions made by Jersey Progress.

*Michelle*

Enc.

# **Sexual Offences : Age of Consent**

## Summary of Advice to the Scrutiny Panel

### **ADDENDUM**

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30. This advice is an addendum to my Summary of Advice to the Scrutiny Panel dated 17<sup>th</sup> February, 2006 (“the original advice”). Paragraph numbers in this Addendum follow consecutively the paragraph numbers in the original advice.

#### **The Jersey Curriculum**

31. In paragraph 28 of the original advice I said that I was seeking to obtain a copy of the Jersey Curriculum, and that if it appeared to me that there was anything relevant in it, I would draw that to the Panel’s attention. I have now obtained a copy of the Jersey Curriculum, and there is nothing in it to which I would draw the Panel’s attention.

#### **Submissions of Progress Jersey**

32. I have been asked to comment upon the legal claims outlined in the submissions of Progress Jersey (undated).

33. In paragraph 4(a) it is said that should the proposition be accepted “*solely on the grounds of coercion from external pressures*” against the public will it may prejudice future issues which might be of benefit to the same community. I do not think that “*on the grounds of coercion*” is the correct categorisation of the legal ground upon which the States are asked to adopt the proposition. The States are being asked to adopt the proposition in order to put an end to a situation in which Jersey is in breach of an obligation accepted by the United Kingdom on Jersey’s behalf at Jersey’s request. Putting it another way, the basis upon which the States have been asked to approve the proposition is that it is necessary to do so if Jersey is to honour obligations which apply to Jersey because Jersey has asked that they should do so.

34. In 4(b) it is said that human rights may be curtailed where it is necessary to protect vulnerable members of society as specified under Article 8.2 of the European Convention on Human Rights. That is correct. However Article 8 must be read in conjunction with Article 14, which prohibits discrimination in the enjoyment of a Convention right. While it is accepted by the European Court of Human Rights that a public authority may, under Article 8(2), fix an age below which minors cannot give a valid consent to sexual intercourse, it is prohibited by Article 14 from discriminating on the ground of sex between such restriction. A discrimination in the age of consent for heterosexual intercourse and homosexual intercourse has been held by the European Court to be discriminatory contrary to Article 14 of the Convention.

35. Paragraph 6.1(a) states that to date no prosecution against a minor has been brought “*under the above legislation*” in Jersey. I take this

mean that no prosecution for sodomy has been brought against a minor, and would comment that a prosecution for sodomy would be brought under customary law, not statute.

36. I do not think that it is possible to say with confidence that there has never been a prosecution in Jersey against a minor for sodomy. To do so it would be necessary to make a comprehensive search of the court books. No such search has been made, and in my opinion no such search is necessary, because, for the reasons given below, I do not think that the bringing or otherwise of a prosecution is of relevance.

37. In *S.L v. Austria*, Application No: 00045330/99, 9<sup>th</sup> January, 2003, the applicant, by the age of 15, was sure of his homosexuality. His claim was based, not upon the fact that a prosecution had taken place, but upon the fact that until he reached the age of 18, he had not been able to enter into any fulfilling sexual relationship with an adult partner because of the risk of prosecution of the adult partner. At paragraph 40, the judgment reads:

*"Furthermore, the Court considers that the difference between the Sutherland case and the present case, namely that the adolescent partner participating in the proscribed homosexual acts was not punishable, is not decisive. This element was only a secondary consideration in the Commission's Report (Ibid., (s) 64)."*

[The *Ibid* refers to *Sutherland v. United Kingdom* Commission's Report, No. 25186/94, 27<sup>th</sup> March, 2001.]

It follows from the foregoing that whether the underage partner is punishable or not is only a secondary consideration and would not be a ground for distinguishing the position in Jersey from the position elsewhere and, even if it were the case that no prosecution of a minor for sodomy has ever been brought in Jersey, that would not be a ground for distinguishing the position in Jersey from the cases which have been decided by the ECtHR.

38. The submissions follow the assertion that the fact that prosecutions had been brought in the United Kingdom was persuasive in the decision of the Court (sic: the finding was a report of the Commission, not a judgment of the Court) in granting Mr. Sutherland the status of victim by stating that the Court (in any theoretical case brought before the ECtHR by a resident of Jersey) would need to consider whether the applicant could claim to have been distressed at the prospect of refraining or breaking the law and becoming liable to prosecution. As the judgment in *S.L. v. Austria* shows, it is sufficient to show that the applicant felt inhibited in forming relationships with adult males by fear of the fact that the adult male might be prosecuted, and that he (the applicant) might be called as a witness in such a prosecution and be questioned about intimate details of his private life.

39. Section 6.1(b) of the submissions states that the proposition implies that there is a predisposed bias of the heterosexual majority against the homosexual minority. This section concludes by stating that under Jersey law the act of sodomy is only lawful between consenting male homosexuals and asked whether the Court will need to consider whether this in fact would not represent predisposed bias in favour of the homosexual minority.

40. In the case of *S.L. v. Austria*, the fact that Article 209 of the Austrian Criminal Code provided for a higher age of consent for homosexual acts than for heterosexual or lesbian acts was regarded by the Court as being of itself indicative of a predisposed bias on the part of a heterosexual majority against a homosexual minority, see paragraph 44 of the judgment, which reads, so far as it is relevant:

*“To the extent that Article 209 of the Criminal Code embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot of themselves be considered by the Court to amount to sufficient justification for the differential treatment anymore than similar negative attitudes towards those of a different race, origin or colour ...”*

41. I do not think that a Court could reasonably find that the fact that Jersey law makes the act of sodomy only lawful between consenting male homosexuals can be taken to represent a predisposed bias in favour of the homosexual minority, if one takes into account the fact that it makes such actions lawful if both parties are over the age of 18, whereas heterosexual intercourse and sexual activity between lesbians is lawful from the age of 16.

42. In Section 7 it is stated that Jersey has to date not been challenged before the ECtHR. Jersey has in fact been challenged before the ECtHR by individuals who have alleged that the operation of the Housing (Jersey) Law, 1949 and subordinate legislation represents a breach of their Article 8 rights.

43. The submissions quote from the judgment in *McGonnell v. United Kingdom*, and go on to say that under this finding Jersey is currently in breach of the Convention in allowing the Bailiff, a Judge of the Royal Court, to preside over the States. In the *McGonnell* case, the Deputy Bailiff, who had presided over the States when Detailed Development Plan No.6 was adopted, subsequently determined the Appellant's Planning Appeal against a refusal, based in part at least upon the provisions of the Detailed Development Plan. It is settled practice in Jersey that neither the Bailiff nor the Deputy Bailiff will sit to preside over any case if they were present in the States when some matter material to the case was debated.

44. The submissions close by saying that the Bailiff continues to preside over the States of Deliberation and the Royal Court in Guernsey, and that the prospect of future challenges to the ECtHR on similar grounds exists. It is possible that Guernsey has, since the *McGonnell* case, adopted the same practice as Jersey. Be that as it may, the possibility or otherwise of a challenge being made in respect of the functions of the Bailiff in Guernsey and/or in Jersey, and the probable success or lack of it of any such challenge if made, does not appear to me to have any legal relevance to the issue with which the Scrutiny Panel is concerned.

Solicitor General

21<sup>st</sup> February, 2006.

SCN/SB LEGLEGA-025

