

STATES OF JERSEY

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DRAFT SEXUAL OFFENCES (JERSEY) LAW 200-

**Lodged au Greffe on 13th September 2005
by the Home Affairs Committee**

STATES GREFFE



Jersey

DRAFT SEXUAL OFFENCES (JERSEY) LAW 200-

European Convention on Human Rights

The President of the Home Affairs Committee has made the following statement –

In the view of the Home Affairs Committee the provisions of the Draft Sexual Offences (Jersey) Law 200- are compatible with the Convention Rights.

(Signed) **Senator W. Kinnard**

REPORT

This *projet de loi* would replace the Sexual Offences (Jersey) Law 1990, which was registered by the Royal Court on 28th September 1990. The purpose of that Law was to provide that homosexual acts in private between consenting male adults would no longer be punishable as a crime under Jersey law. The Law enabled Jersey at that time to comply with Article 8 of the European Convention on Human Rights and Fundamental Freedoms (“the Convention”), which provides that every person has the right to respect for his or her private and family life, home and correspondence. However, the benefit of that Law did not extend to men below the age of 21.

On 21st April 1995, the Sexual Offences (Amendment) (Jersey) Law 1995 was registered by the Royal Court. It amended the Law of 1990 by reducing the homosexual age of consent from 21 years to 18 years. By the law of Jersey, the age of lawful consent to heterosexual intercourse is 16. Anal intercourse between a male and a female remains a criminal offence in Jersey law.

Thus, the existing position is that –

- (i) vaginal intercourse is lawful between male and female from the age of 16 upwards (if it is consensual);
- (ii) anal intercourse in private between males is lawful from the age of 18 upwards (if it is consensual);
- (iii) anal intercourse at any age between male and female is unlawful (whether consensual or not).

The effect of this Law would be to make consensual anal intercourse lawful, whether between two males or between a male and a female, from the age of 16 upwards, to the same extent that vaginal intercourse (if consensual) is lawful.

The main impetus for this reform has come from several cases heard before the European Court of Human Rights (“ECtHR”) since the Law of 1990 was enacted. The rulings in those cases make it clear that, effectively, the ECtHR now treats *any* law that provides for a different age of lawful consent to homosexual acts compared with heterosexual acts to be a breach of –

- (a) Article 8 (respect for private life); and
- (b) Article 14 (non-discrimination),

of the Convention.

In fact, it is clear that any differential treatment under the criminal law on account only of a person’s sexuality is repugnant to the Convention. This has a bearing on another facet of the Law of 1990. Article 1 of that Law provides that a homosexual act between males cannot be treated as having been done in private when more than 2 persons take part or are present. This restriction does not apply in the case of heterosexual acts in private. The ECtHR has held, in respect of a similar restriction which existed in the law of England and Wales, that such differential treatment constitutes a breach of the Convention. Accordingly, that provision would not be re-enacted in this draft Law.

In bringing this draft Law to the States, the Home Affairs Committee has taken account not only of the judgments of the European Court, but has also noted that equality of treatment in respect of the age of consent is now recognised by the great majority of Member States of the Council of Europe.

The Committee has also noted that the Council of the British Medical Association (“BMA”) observed 11 years ago in 1994 that most researchers believed that sexual orientation was usually established before the age of puberty in both boys and girls and referred to evidence that reducing the age of consent would be unlikely to affect the majority of men engaging in homosexual activity, either in general or within specific age groups. The BMA Council concluded in its Report prior to reform of the legislation in the United Kingdom that the age of consent for homosexual men in that country should be set at 16 since the existing law might inhibit efforts to improve the sexual health of young homosexual and bi-sexual men.

An equal age of consent was also supported by the Royal College of Psychiatrists, the Health Education Authority and the National Association of Probation Officers as well as by other bodies and organisations concerned with health and social welfare.

The above considerations weighed with the European Commission when it made its decision in *Sutherland -v- United Kingdom*^[1]. In this ruling, the Commission afforded victim status (and, therefore, the necessary standing

to take a case to the ECtHR) to a homosexual person who had *not* been convicted under the law which he sought to challenge (namely, section 1 of the Sexual Offences Act 1967 of the United Kingdom, which was subsequently repealed). The Commission found that the very existence of legislation criminalising the applicant's sexual preferences constituted a violation of his right to respect for his private life. In the words of the Commission, this difference of treatment "...impinges on a most intimate aspect of affected individuals' private lives". In this particular case, the Commission considered that –

"...the maintenance in force of the impugned legislation constituted an interference with the applicant's right to respect for his private life (which includes his sexual life) within the meaning of Article 8 para. (Art. 81) of the Convention. Even though the applicant has not in the event been prosecuted or threatened with prosecution, the very existence of the legislation directly affected his private life: either he respected the law and refrained from engaging in any prohibited sexual acts prior to the age of 18 or he committed such acts and thereby became liable to criminal prosecution. The Commission finds no reason to doubt.....the distress he felt in having to choose between engaging in a sexual relationship with a like orientated person of around the same age and breaking the law."

It is clear, therefore, that the legal provisions affecting homosexual people in Jersey would have to be scrutinised even if no prosecutions were brought. Moreover, on commencement of the Human Rights (Jersey) Law 2000, a challenge would be able to be brought directly in the Jersey courts.

Apart from the considerations above, the Home Affairs Committee has taken note of the fact that the law of Jersey, as it exists today, is comparable with that which prevailed in Austria when the case of *L and V -v- Austria* [2] was heard by the ECtHR. The Court, amongst other things, held that Austrian law –

"...embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority..."

and that –

"... these negative attitudes cannot, of themselves, amount to sufficient justification for ... different treatment any more than similar negative attitudes towards those of a different race, origin or colour".

There can be little doubt that, were the European Court to scrutinise the existing law of Jersey in this respect, it would hold that it embodied just such a predisposed bias.

There can thus be no question but that the law has to be reformed.

In the light of all the above, the Committee considered how the law might be rendered consistent with the Convention rights. The options appeared to be –

- (a) to amend the law, as was done in England and Wales, by reducing the age of consensual homosexual activity to 16 years of age;
- (b) to increase the age of consent for heterosexual consent to 18 years of age; or
- (c) to fix the age of consent for both types of sexual activity at some other age, perhaps 17 years.

The Committee concluded that the first of these was the only feasible option.

The Committee went on also to conclude that no good reason existed why consensual anal intercourse between a man and a woman should remain unlawful. In England and Wales, buggery between consenting men and women ceased to be a criminal offence in 1994. It was considered that the criminal law had little place in matters relating to the private sexual activity of consenting adults. The Committee believes that the same is true in Jersey. If there are health issues of concern in relation to this, the Committee feels they would more appropriately be addressed by health education in the usual way.

This draft Law has no implications for the financial or manpower resources of the States.

European Convention on Human Rights

Article 16 of the Human Rights (Jersey) Law 2000 will, when brought into force by Act of the States, require the Committee in charge of a Projet de Loi to make a statement about the compatibility of the provisions of the Projet with the Convention rights (as defined by Article 1 of the Law). Although the Human Rights (Jersey) Law 2000 is not yet in force, on 8th September 2005 the Home Affairs Committee made the following statement before Second Reading of this projet in the States Assembly –

In the view of the Home Affairs Committee the provisions of the Draft Sexual Offences (Jersey) Law 200- are compatible with the Convention Rights.

APPENDIX

The following is a list of countries with an indication in respect of each country of the minimum age at which both heterosexual and homosexual sex may be lawful (with an indication in brackets of the extent to which there is still a bias against homosexuality)

Algeria: 16 (same sex relationships illegal)

Madagascar: 21

Morocco: 15 (homosexual sex illegal)

South Africa: 16 (19 homosexual)

Tanzania: 18 (homosexual sex illegal)

Tunisia: 20 (anal intercourse between men illegal)

Antigua: 16 (18 homosexual males)

Argentina: 15

Brazil: 14

Canada: 14 (18 for anal sex in all provinces except Ontario and Quebec)

Chile: 14

Colombia: 12 (females) 14 (males)

Mexico: 12

Peru: 18

United States: (some states formerly forbade homosexual acts entirely, however such laws were declared unconstitutional in 2003)

Puerto Rico: 16

Alabama, Alaska, Arkansas, Connecticut, District of Columbia, Delaware, Florida, Georgia, Hawaii, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Vermont, Washington, West Virginia, Wyoming: 16

Colorado, Idaho, Illinois, Louisiana, Nebraska, New York, Texas: 17

Arizona, California, North Dakota, Oregon, Tennessee, Utah, Virginia, Wisconsin: 18

Missouri: 14

Nevada: 16 (heterosexual), 21 (homosexual)

China: 14

Hong Kong: 21 (male homosexuals) 16 (heterosexual females) 18 (heterosexual males)

India: 16 (homosexual illegal)

Indonesia: 17 (homosexual legal status unsure)

Iran: extramarital sex illegal (homosexual sex illegal)

Israel: 14

Japan: 16

Kazakhstan: 18

Malaysia: 16 (homosexual sex illegal)

South Korea: 13

Philippines: 18

Saudi Arabia: heterosexual must be married (homosexual sex illegal)

Singapore: 16 (homosexual sex illegal)

Thailand: 15

Albania: 14

Andorra: 16
Austria: 14
Belgium: 16
Bulgaria: 14
Channel Islands
 Jersey and Guernsey: 16 (18 homosexual)
 Alderney and Sark: 16 (21 homosexual)
Croatia: 14
Czech Republic: 15
Denmark: 15
Estonia: 14
Finland: 16
France: 15
Germany: 14
Greece: 15
Hungary: 14
Iceland: 14
Ireland, Republic of: 17
Isle of Man: 16 (18 homosexual)
Italy: 14
Latvia: 16
Lithuania: 14
Netherlands: 16
Norway: 16
Poland: 15
Portugal: 14 (16 homosexual)
Romania: 15
Russia: 14
Slovakia: 15
Slovenia: 15
Spain: 13
Sweden: 15
Switzerland: 16
Turkey: 18
United Kingdom:
 England and Wales: 16
 Scotland: 16
 Northern Ireland: 17
Australia
 Victoria: 17
 Australian Capital Territory: 16
 South Australia: 17

Tasmania: 17

New South Wales: 16

Western Australia: 16

Queensland: 16

Northern Territory: 16

New Zealand: 16

Explanatory Note

This Law replaces the Sexual Offences (Jersey) Law 1990.

Article 1 has the effect that it shall not be an offence at customary law for 2 consenting persons who are both aged 16 or more to commit an act of *sodomie* in private. An act committed in a public lavatory is treated as having been committed in public. In any proceedings, the burden lies on the prosecution to establish that an act took place in public or that one of the parties was under the age of 16. A person who, within the meaning of the Mental Health (Jersey) Law 1969, is a person requiring special care, cannot give effective consent to the act.

Article 2 repeals the Sexual Offences (Jersey) Law 1990.

Article 3 cites the short title of the Law and provides for its commencement.



Jersey

DRAFT SEXUAL OFFENCES (JERSEY) LAW 200-

A LAW to amend the law relating to sexual acts and for connected purposes.

Adopted by the States [date to be inserted]

Sanctioned by Order of Her Majesty in Council [date to be inserted]

Registered by the Royal Court [date to be inserted]

THE STATES, subject to the sanction of Her Most Excellent Majesty in Council, have adopted the following Law –

1 Amendment of law relating to *sodomie*

- (1) Notwithstanding any rule of customary law or any other enactment, a person shall not be guilty of the *crime of sodomie* if –
 - (a) the act is committed in private; and
 - (b) each of the parties to the act consents and has attained the age of 16.
- (2) An act of *sodomie* shall not be treated as taking place in private if it takes place in a lavatory to which the public have, or are permitted to have, access, whether on payment or otherwise.
- (3) In any proceedings for the *crime of sodomie*, it shall be for the prosecution to prove that the act of *sodomie* took place otherwise than in private or that one of the parties had not attained the age of 16.
- (4) A person requiring special care cannot give any consent which, by virtue of paragraph (1), would prevent an act of *sodomie* from being a *crime*.
- (5) Notwithstanding paragraph (4), a person shall not be convicted, on account of the incapacity of a person requiring special care to consent, of a *crime of sodomie* if the first-mentioned person proves that he or she did not know, and had no reason to suspect, that the other person was a person requiring special care.
- (6) In this Article “person requiring special care” has the same meaning as in the Mental Health (Jersey) Law 1969.^[1]

2 Repeals

The Sexual Offences (Jersey) Law 1990^[2] and the Sexual Offences (Amendment) (Jersey) Law 1995^[3] shall be repealed.

3 Citation and commencement

This Law may be cited as the Sexual Offences (Jersey) Law 200- and shall come into force on the seventh

day following its registration.

[1] *Application No. 25186/94, 1st July 1997: 24 EHRR CD 22.*

[2] *Applications numbers 39392/98 and 398209/98, 9th January 2003.*

[1] *Chapter 20.650.*

[2] *Chapter 08.860 (L.15/1990).*

[3] *Chapter 08.860 (L.15/1995).*