

STATES OF JERSEY



DRAFT SEX OFFENDERS (AMENDMENT) (JERSEY) LAW 201-

Lodged au Greffe on 26th April 2011
by the Minister for Home Affairs

STATES GREFFE



Jersey

DRAFT SEX OFFENDERS (AMENDMENT) (JERSEY) LAW 201-

European Convention on Human Rights

In accordance with the provisions of Article 16 of the Human Rights (Jersey) Law 2000 the Minister for Home Affairs has made the following statement –

In the view of the Minister for Home Affairs the provisions of the Draft Sex Offenders (Amendment) (Jersey) Law 201- are compatible with the Convention Rights.

(Signed) **Senator B.I. Le Marquand**

REPORT

Background

The Sex Offenders (Jersey) Law 2010 was adopted by the States of Jersey on 8th October 2009. In common with all local Laws adopted by the States, it was then sent to the Ministry of Justice for confirmation by Her Majesty in Council. It received Royal Assent on 21st July 2010, and subsequently came into force on 1st January 2011.

When the Ministry of Justice wrote to His Excellency the Lieutenant Governor in July 2010 to confirm that the Law had received Royal Assent, they raised a number of issues. Whilst opining that the Sex Offenders (Jersey) Law 2010 could be operated compatibly with the ECHR in accordance with the Human Rights (Jersey) Law 2000, they identified a number of points which they felt could reasonably be subject to an ECHR challenge.

The Sex Offenders (Amendment) (Jersey) Law 201- addresses the issues raised by the Ministry of Justice. It also expands upon the information that a person, who is subject to notification requirements, may be asked to provide upon their return from travel outside Jersey and makes some minor ‘housekeeping’ amendments.

Article 2

This article removes the reference in Article 2(1)(c) of the principal Law to ‘customary law offence’ in relation to *‘the crime of sodomie’*, as it serves no practical purpose.

Article 3

Article 3 amends Articles 5(4), (5) and (6) of the principal Law.

Article 5 of the principal Law currently stipulates that a person who has been convicted of a ‘relevant offence’ must be subject to notification requirements for a period ordered by the court, which must be at least 5 years, unless there is an “*exceptional reason*”:

Article 5(4), as enacted, reads:

Unless the court is satisfied that there is an exceptional reason why a shorter period would be appropriate, the period specified under paragraph (1), (2) or (3) must be a period of at least 5 years, being a period that the court is satisfied takes into account –

- (a) the likelihood of the person re-offending; and*
- (b) the seriousness of the offence committed by the person.*

It is accepted that notification requirements do amount to an interference with the right to family life (Article 8 of the ECHR). Therefore, the period for which a person is so subject must be necessary and proportionate.

Article 4(1) of the Human Rights (Jersey) Law 2000, states that:

“So far as it is possible to do so, principal legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights”

The Ministry of Justice felt that by using the phrase “exceptional reason” in paragraph (4) of Article 5 of the Sex Offenders Law, there was a risk that the “exceptional reason” test may suggest that there was a higher threshold which should apply; and they were concerned that this may not be ECHR compliant. The word ‘exceptional’ has therefore been removed and the wording in Article 5(4) altered to read: “... *there is a reason...*”.

In deciding the period for which a person should be subject to notification requirements, Article 5(4)(b) states that the court should take into consideration the seriousness of the offence committed by the person. The Ministry of Justice was concerned that this suggests that the scheme is punitive, rather than preventative; and because under the Law the court is able to apply the scheme retrospectively to those who committed relevant offences before the Law came into force, this would be in breach of Article 7 of the ECHR (No punishment without law).

The terms of the test that should apply have therefore been amended in Article 5(4) by removing the present reference to the seriousness of the past offence, but adding a reference to the risk of sexual harm to the public, or persons, that the relevant person poses by virtue of the likelihood of reoffending.

A person who is subject to notification requirements may apply to the court after the relevant time period to be removed from notification requirements (Article 5(5)). Article 5(6) sets out that:

“The court must not make the order applied for under paragraph (5) unless it is satisfied that the applicant no longer poses a risk of sexual harm to the public or any particular person or persons”.

It is felt that the threshold is too high. There are likely to be very few risk assessment tools that a convicted offender can use to prove that he/she no longer poses any risk of re-offending. To comply with the ECHR it was felt that offenders should be removed from notification requirements where the risk of re-offending that they pose does not justify them being subject to notification requirements (although it is acknowledged that this does not mean the same as posing no risk at all).

The Amendment achieves this by the rewording of Article 5(6) such that an offender can be removed from the notification requirements if the risk of sexual harm to the public by virtue of the likelihood of re-offending would not justify the person being subject to the notification requirements.

Furthermore, Article 5(5) of the Law currently relies upon the offender to apply to be removed from the notification requirements. It was felt, however, that where the requirements are no longer justified under Article 8 of the ECHR (interference with the right to family life), the State should act proactively to remove the person from the requirements. Therefore, the Amendment allows the Attorney General also to make the application to the court under Article 5(5A).

Article 4

Article 4 amends Article 7(9) of the principal Law, which, as enacted, reads:

“This Article does not affect a power to supply information that exists apart from this Article.”

The amendment makes it clear that it is not the information that exists apart from the Article, but the power (to supply the information).

Article 5

Article 5 makes various amendments to Article 8 of the principal Law. Article 8 provides that the Minister for Home Affairs may make Orders requiring people subject to notification requirements, and who leave Jersey, to do various things.

Article 8(3) expands upon the range of information that a person who is subject to notification requirements, and who leaves Jersey, may be asked to disclose upon their return. Article 8(2) relates to notification before travel:

“A notification under this paragraph must disclose –

- (a) the date on which the person will leave Jersey;*
- (b) the place (or, if there is more than one, the first place) to which the person will travel and the person’s point of arrival (determined in accordance with the Order) in the country where the place is situated;*
- (c) any other information prescribed by the Order that the person holds about the person’s departure from Jersey or the person’s movements while outside Jersey.*

However, this only applies to notification upon departure, i.e. the person’s intentions upon leaving the Island; and doesn’t deal with what the person actually did. This is addressed by the amendment to Article 8(3) such that details of the places visited and other information about the person’s movements are required.

Article 8(5) of the Law, as enacted, sets out the offence in relation to failure to comply with various paragraphs of Article 8, but does not refer to the Order made by the Minister. The amendment addresses that issue by making it clear that it is an Order made under Article 8 that imposes the requirements, and not Article 8 itself.

Article 6

Article 6 amends Article 9(7) of the principal Law, which states that:

“A person who intentionally obstructs or hinders a police officer in the exercise of the officer’s powers or duty is guilty of an offence and is liable to imprisonment for a term of one year and to a fine of level 4 on the standard scale.”

The offence specifically relates to the obstruction or hindrance of a police officer who is carrying out their powers or duties under this Article of the Law. The amendment makes it clear that the obstruction relates to the context of the execution of a warrant.

Article 7

Article 7 amends Article 10(10) of the principal Law and removes the word ‘particular’ from the Article. This links to the amendment to Article 5(4), the rationale for which is set out earlier in the report, whereby “exceptional reason” became “reason”.

Article 8

Article 18 of the principal Law currently reads:

Appeals – general provisions

- (1) *An appeal under this Part shall be by way of a review.*
- (2) *On an appeal under this Part, the Royal Court or the Court of Appeal, as the case may be –*
 - (a) *may make any order it considers necessary to give effect to its determination of the appeal; and*
 - (b) *may also make any incidental or consequential order as appears to it to be just.*
- (3) *An appeal under Article 19, 20, 21, 22, 24, 25 or 26 shall be taken to be an appeal in criminal proceedings while an appeal under Article 23 shall be taken to be an appeal in civil proceedings.*

As can be seen in paragraph (3), appeals under Articles 20, 21, 22 and 24, inter alia, are explicitly provided as being dealt with by way of criminal, rather than civil, proceedings. Article 20 relates to Appeals against length of notification period; Article 21 to Appeals against orders in respect of notification requirements; Article 22 to restraining orders and Article 24 to travel orders.

Our advice is that measures such as these should be civil, preventative measures, rather than criminal measures. The reasoning is that this is important in terms of Article 6 rights (right to a fair trial), which will apply; it impacts on the admissibility of hearsay evidence, for example; and whether the measures can be applied retrospectively to those who were convicted before the Law came into force.

This has been remedied by the repeal of Article 18(3) of the Law.

Article 9

Article 27(5) of the Law, as enacted, relates to the supply of information by the Chief Police Officer and reads:

This Article does not affect a power to supply information that exists apart from this Article.

The amendment makes it clear that it is not the information but the power that exists apart from the Article.

Article 10

This addresses a minor change in Article 28(1) of the principal Law, and changes 'outwith' to the more commonly used 'outside'.

Financial and manpower implications

There are no financial or manpower implications for the States arising from the adoption of this Draft Law.

European Convention on Human Rights

Article 16 of the Human Rights (Jersey) Law 2000 requires the Minister 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). On 20th April 2011 the Minister for Home Affairs made the following statement before Second Reading of this Projet in the States Assembly –

In the view of the Minister for Home Affairs the provisions of the Draft Sex Offenders (Amendment) (Jersey) Law 201- are compatible with the Convention Rights.

Explanatory Note

This amendment Law would make a number of changes to the Sex Offenders (Jersey) Law 2010.

Article 1 enables the Sex Offenders (Jersey) Law 2010 to be referred to as the “principal Law” in the amendment Law.

Article 2 removes the otiose words “the customary law offences of” in the expression “the customary law offences of the *crime of sodomie*” in Article 2(1)(c) of the principal Law.

Article 5(5) of the principal Law allows applications to be made to a court by persons subject to the notification requirements under the Law. The applications are to the effect that the persons be no longer so subject. However, a court will in a number of cases normally specify that such an application cannot be made before 5 years have elapsed, unless there is an exceptional reason.

Article 3 amends Article 5 of the principal Law –

- (a) to change “exceptional reason” to “reason” in Article 5(4), that is, reason for the court to set a shorter-than-usual period during which a person cannot apply for the notification requirements that apply to the person to be lifted;
- (b) in general, to bring the terms of the test set out in Article 5(4) closer to the terms of the test to be set out in the amended Article 5(6), by removing the present reference to the seriousness of the past offence, but adding a reference to the risk of sexual harm to the public, or persons, that the relevant person poses by virtue of the likelihood of re-offending;
- (c) to add the Attorney General as a party who may make application under Article 5(5); and
- (d) to change the test applied by the court under Article 5(6) when it decides whether or not to lift a notification requirement that applies to a person, so that the court will now consider whether the risk of sexual harm to the public, or persons, that the person poses by virtue of the likelihood of re-offending does not justify continuation of the notification requirement (rather than whether the person no longer poses a risk of sexual harm to the public or a particular person).

Article 4 makes it clear that in Article 7(9) of the principal Law it is not the information “that exists apart from this Article” but the power (to supply the information) that exists apart from the Article.

Article 5 expands the power, under Article 8 of the principal Law, to make Orders about the information that may be required from a person who is subject to the notification requirements of the principal Law. Under the amended Article 8(3), an Order will be able to specify that if the person has travelled outside Jersey the person must give details of the places visited and other information about the person’s movements outside Jersey.

Article 5 also recasts the offence under Article 8 of the principal Law so that the offence is constituted by conduct in breach of a requirement set out in the Order made under that Article.

Article 9 of the principal Law sets out powers to search premises. *Article 6* of the amendment Law makes it clear that the offence (set out in Article 9(7)) of obstructing a police officer relates to the context of the execution of a warrant under that Article.

Article 7 ensures that the changes to Article 5(4) of the principal Law (by which “exceptional reason” becomes “reason”) are echoed in Article 10(10) of the principal Law (“particular reason” becomes “reason”). Article 10 deals with the making of restraining orders and their duration.

Article 8 repeals Article 18(3) of the principal Law, with the effect that all appeals under the principal Law become the subject of civil proceedings, instead of only some.

Article 9 makes it clear that in Article 27(5) of the principal Law it is not the information “that exists apart from this Article” but the power (to supply the information) that exists apart from the Article.

Article 10 makes a minor change in vocabulary to a definition in Article 28(1) of the principal Law.

Article 11 sets out the name of the amendment Law and provides for it to enter into force seven days after it is registered in the Royal Court after Privy Council approval.



Jersey

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Arrangement

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Jersey

DRAFT SEX OFFENDERS (AMENDMENT) (JERSEY) LAW 201-

A LAW to amend the Sex Offenders (Jersey) Law 2010

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 Interpretation

In this Law, the “principal Law” means the Sex Offenders (Jersey) Law 2010¹.

2 Article 2 amended

For Article 2(1)(c) of the principal Law the following sub-paragraph shall be substituted –

“(c) except as provided by the Sexual Offences (Jersey) Law 2007² and paragraph (3), the *crime of sodomie*”.

3 Article 5 amended

For Article 5(4), (5) and (6) of the principal Law the following paragraphs shall be substituted –

“(4) Unless the court is satisfied that there is a reason why a shorter period would be appropriate, the period specified under paragraph (1), (2) or (3) must be a period of at least 5 years, being a period that the court is satisfied takes into account the risk of sexual harm to the public, or to any particular person or persons, that the person subject to the notification requirements of this Law poses by virtue of the likelihood of re-offending.

- (5) The court may, on application, make an order in respect of a person (not being a person to whom Article 3(2) applies, but being a person who is subject to the notification requirements of this Law), at any time after the expiration of the period specified in respect of the person under paragraph (1), (2), (3) or (7), being an order to the effect that the person should no longer be subject to those requirements.
- (5A) An application under paragraph (5) may be made by the person concerned or by the Attorney General.
- (6) The court must not make the order applied for under paragraph (5) unless it is satisfied that the risk of sexual harm to the public, or to any particular person or persons, that the person subject to the notification requirements of this Law poses by virtue of the likelihood of re-offending does not justify the person's being subject to those requirements."

4 Article 7 amended

For Article 7(9) of the principal Law the following paragraph shall be substituted –

- "(9) This Article does not affect a power to supply information, being a power that exists apart from this Article."

5 Article 8 amended

In Article 8 of the principal Law –

- (a) for paragraph (3) the following paragraph shall be substituted –

- "(3) A notification under this paragraph must disclose such information as the Order prescribes, and such information may include the following –

- (a) the place, or places, to which the person travelled while outside Jersey;
- (b) any other information prescribed by the Order that the person holds about the person's movements while outside Jersey or about the person's return to Jersey."

- (b) for paragraph (5) the following paragraph shall be substituted –

- "(5) A person who –

- (a) fails, without reasonable excuse, to give notification in accordance with an Order under paragraph (1) when required to do so by the Order; or
- (b) in purported compliance with an Order under paragraph (1), provides information that the person knows to be false or misleading,

is guilty of an offence and is liable to imprisonment for a term of 5 years and to a fine."

6 Article 9 amended

For Article 9(7) of the principal Law the following paragraph shall be substituted –

“(7) A person who intentionally obstructs or hinders a police officer in the execution of a warrant under this Article is guilty of an offence and is liable to imprisonment for a term of one year and to a fine of level 4 on the standard scale.”.

7 Article 10 amended

For Article 10(10) of the principal Law the following paragraph shall be substituted –

“(10) Unless the court is satisfied that there is a reason why a shorter period would be appropriate, the first period mentioned in paragraph (9) in respect of an order made under paragraph (4) must be a period of at least 5 years.”.

8 Article 18 amended

Article 18(3) of the principal Law shall be repealed.

9 Article 27 amended

For Article 27(5) of the principal Law the following paragraph shall be substituted –

“(5) This Article does not affect a power to supply information, being a power that exists apart from this Article.”.

10 Article 28 amended

In Article 28(1) of the principal Law, in the definition of “interested parties”, for the word “outwith” the word “outside” shall be substituted.

11 Citation and commencement

This Law may be cited as the Sex Offenders (Amendment) (Jersey) Law 201- and shall come into force 7 days after it is registered.

¹ *chapter 23.815*
² *chapter 08.860*