

# Corporate Services Scrutiny Panel Report

## Age of Consent Review



Presented to the States on 28<sup>th</sup> March 2006

S.R.1/2006

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## **Panel Membership**

The Corporate Services Scrutiny Panel is constituted as follows –

Deputy P. J. D. Ryan, Chairman  
Senator J. L. Perchard, Vice Chairman  
Connétable J. Le Sueur Gallichan  
Connétable D. J. Murphy  
Deputy J. Gallichan

Officer support: Mr M. Haden and Miss S. Power

## **Terms of Reference**

The Scrutiny Panel agreed to review the Law under the following terms of reference –

- To examine the Island's current commitments to the United Kingdom and under the European Convention on Human Rights
- To consider the legal advice from the Law Officers regarding the proposed change to the age of consent
- To review the constitutional position of a decision not to reform the current law; and
- To review previous and current legal challenges in the European Court of Human Rights

## **Acknowledgements**

The Panel would like to thank all the witnesses who contributed to this review, in terms of both the written and the oral evidence provided. The Panel would also like to thank the Solicitor General for her continued prompt and comprehensive advice throughout the duration of the Review.

# 1. Executive Summary

The Draft Sexual Offences (Jersey) Law 200- was brought for debate in the States on the 17<sup>th</sup> January 2006. This proved to be a highly controversial issue amongst States Members. As a result the debate was postponed and the draft Law, following a vote in the States, was referred to the Corporate Services and the Social Affairs Scrutiny Panels.

The Corporate Services Panel agreed to review the Island's obligations under the European Convention on Human Rights (ECHR) with regard to this Law. The Social Affairs Panel did not take on this matter for review, and instead referred it back to the relevant States departments.

Given the Corporate Services Panel's remit, it was not possible to investigate the educational, ethical, health or social aspects involved with the proposed draft Law. However, the Panel recognises that there are considerable concerns surrounding these issues.

The Scrutiny Panel conducted a thorough review of the relevant factors falling within its terms of reference. In terms of the ability of the United Kingdom to legislate on behalf of the Island, the Panel has found that the evidence is clearly divided. However, the Panel feels that this is not the overriding issue, and that the focus should be on the fact that the Island voluntarily signed up to the ECHR and therefore has a responsibility to honour the commitments resulting from this course of action.

The evidence concerning the constitutional implications of a decision not to reform the current law is also mixed, based upon the fact that there is not a definitive response with regard to whether or not the United Kingdom would legislate on the Island's behalf. However, the witnesses were in agreement that should the Island not legislate it may cause constitutional problems in terms of our relationship with the United Kingdom.

The Panel looked at the relevant cases that have passed through the European Court of Human Rights. It was clear that the court 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 articles 8 and 14 of the European Convention on Human Rights.

The Panel has researched the abuse of a position of trust legislation currently in place in other jurisdictions. The United Kingdom and the Isle of Man only lowered the age of consent once abuse of position of trust legislation was introduced. The Panel feels these pieces of legislation are suitable models for the Jersey Law, and has attached them for reference under appendices 4 and 5 of this report.

Ultimately, the Panel recommends that the States approve the Draft Sexual Offences (Jersey) Law 200-, as currently the Island is in violation of the European Convention on Human Rights. During the course of the Review the Minister for Home Affairs has advised the Panel that legislation incorporating abuse of trust provisions is now being drafted. The Panel notes that in the United Kingdom and the Isle of Man the presentation of this legislation in accompaniment with the lowering of the age of consent aided the passing of that legislation. The Panel therefore recommends the States of Jersey follow the same course of action.

## 2. Introduction

The Draft Sexual Offences (Jersey) Law 200- was prepared following a parliamentary question by Dr Evan Harris in 2003, in which he asked the Parliamentary Secretary, Department for Constitutional Affairs (DCA), what action was being taken on the compliance of the Isle of Man, Guernsey and Jersey with recent judgements in the European Court of Human Rights (ECtHR) on criminalisation of sexual activity between men (L and V v. Austria and SL v. Austria).

On 15th July 2003 the DCA wrote to the Lieutenant Governor asking what plans the Island Authorities had for introducing the legislation necessary to allow for compliance with the recent judgments. These rulings, together with the decision of the Commission in an additional case of Sutherland v. the UK, made it clear that the ECtHR now treated any law that provided for a different age of lawful consent to homosexual acts as opposed to heterosexual acts to be a breach of both Article 8 (respect for private life) and Article 14 (non-discrimination) of the European Convention on Human Rights (ECHR).

As a result the Legislation Committee agreed to promote the legislative changes necessary to ensure that the Island would comply with the ECtHR rulings. Given the limited resources of the Committee, the legislative changes appear to have been approached from a narrow legalistic angle. The Committee was not in a position to deal with the broader issues involved. Comments were sought from Health and Social Services and Education Sport and Culture; however these appear to have been given low priority by those Committees.

The effect of implementing the draft Sexual Offences (Jersey) Law 200- would be to make consensual anal intercourse, whether between two males or between a male and a female, from the age of 16 upwards lawful, to the same extent that vaginal intercourse (if consensual) is lawful. The draft law would also remove Article 1 of the Sexual Offences (Jersey) Law 1990, which provides that a homosexual act between males cannot be treated as having been done in private when more than two persons take part or are present. For a copy of the draft Law please see Appendix 1.

In July 2005, as a result of the forthcoming changes to ministerial government, the Home Affairs Committee agreed to take responsibility for the Draft Sexual offences (Jersey) Law 200- , following the invitation from the Legislation Committee on the 15<sup>th</sup> June 2005<sup>[1]</sup>. The Home Affairs Committee therefore took on the draft Law at a late stage but did not appear to undertake any further consultation on the ethical, health education or social dimensions of the issue.

An extract from the Council of Ministers minutes of the 26<sup>th</sup> January 2006 illustrates the deficiencies involved with the presentation of the draft Law -

*“The Council accepted that the presentation of the draft Law had been lacking, particularly in terms of the absence of a written legal opinion. Furthermore, it was felt that insufficient emphasis had been placed upon the fact that there could be constitutional implications if Jersey did not equalise the age of consent for homosexual and heterosexual people, as the United Kingdom would be criticised for Jersey’s non compliance under the European Convention on Human Rights.”*

The Draft Sexual Offences (Jersey) Law 200- was lodged 'au Greffe' on 13<sup>th</sup> September 2005 and brought for debate in the States on the 17<sup>th</sup> January 2006.

This Law proved to be a highly controversial issue among States Members. Apart from strongly held reservations on grounds of morality the principal concern expressed by a number of members during the debate related to potential risks to young men between the ages of 16 and 18 and the desire to see the question of age of consent addressed in the context of a broader review of sexual offences legislation. It was therefore suggested the debate should be suspended and referred to a Scrutiny Panel. It was subsequently accepted by the Corporate Services Panel under clearly defined terms of reference.

Under these terms of reference, the Panel was unable to scrutinise, or accept submissions concerning the ethical, health education or social aspects involved with the proposed draft Law, as its remit only covered the Island's obligations under the European Convention on Human Rights to address areas of discrimination. However, the Panel understands that these matters are being currently reviewed by the Health and Social Services and Education Sport and Culture Departments.

### **3. Method**

#### **a. Call for evidence**

In order to gain as much evidence as possible, the Panel began its initial investigations by placing a 'Call for evidence' advert in the Jersey Evening Post, and in the States Bookshop, Morier House. The advert listed the Panel's terms of reference, and requested for any relevant submissions to be forwarded to the Scrutiny Office by the 9<sup>th</sup> February 2006.

#### **b. Written Submissions**

The Panel received the following written submissions listed in date of receipt order (to view the submissions in full please refer to Appendix 2 of this report which can be found on the Scrutiny Web site at [www.statesassembly.gov.je](http://www.statesassembly.gov.je)). The following is a brief summary of each submission

**18/01/06 Mr J Jones**

This submission was a letter sent to Stonewall from a visitor to the Island, following the States debate into the Draft Law, requesting for *"maximum publicity for the homophobic attitude prevalent in such a large proportion of the newly elected ministerial government members of Jersey as proven by today's debate."*

**20/01/06 Brook Jersey**

This letter to the Panel focused on the difficulty in policing age of consent laws, irrespective of what the age of consent actually is. It also highlighted the importance of expanding services such as Brook to provide the support and testing that these young men would require.

**07/02/06 Jersey Youth Reform Team (JYRT)**

This submission detailed the Islands commitments under the ECHR, and the ECtHR, as well as providing information on a court case pending with the ECtHR against the Island's current position.

**09/02/06 ACET**

This paper summarised the concerns of ACET Jersey, an HIV/AIDS health awareness charity, over the risks associated with unprotected anal intercourse and the possible outcomes of lowering the homosexual age of consent to 16.

**09/02/06 Advocate C Lakeman**

This submission outlined the reasons why Jersey should be concerned with Human Rights. The Island's commitments under the ECHR were also detailed, in addition to information regarding the constitutional position of a decision not to reform the law.

**09/02/06 Deputy B Fox**

This submission provided the Panel with a series of questions, which included the introduction of abuse of position of trust legislation; the situation in France; the possibility of having different ages of consent for differing methods of penetration; and the need for further work to be done to answer some of the questions raised.

**13/02/06 NSPCC**

This letter to Luke Small stated the NSPCC's support for the provisions of the Sexual Offences (Amendment) Act, and stated that they believed sixteen to be an appropriate age at which young people may be considered able to make informed decisions about their private, consensual behaviour. The letter also stated the NSPCC's support of the abuse of position of trust legislation.

**17/02/06 Progress Jersey**

This submission outlined Progress Jersey's reasons for opposing the implementation of the Draft Sexual Offences (Jersey) Law 200-. The submission also suggested that there are alternatives to the proposition, and discussed past and present cases in the ECtHR.

**17/02/06 Jersey Youth Reform Team response to Progress Jersey**

The JYRT provided the Panel with a response to the aforementioned Progress Jersey submission, which set out the team's views on the content of this submission.

**02/03/06 Deputy J Reed**

Deputy Reed provided the Panel with a submission which provided information on the health; legal; and general issues relating to the amendment of the law.

**02/03/06 Mr T Bellows**

This submission outlined the reasons behind the introduction of abuse of position of trust legislation in the United Kingdom, and Mr Bellows stated that he would be reassured if the Jersey law was reformed "with safeguards".

**20/03/06 Mr D Pearce**

This submission detailed the points raised by Mr Pearce in correspondence to the cross-party working group on offshore dependencies.

**c. Public Hearings**

Full verbatim transcripts of the public hearings are available on the Scrutiny Website or from

the States Bookshop, Morier House.

The following witnesses attended a public hearing on 9<sup>th</sup> February 2006 –

Advocate C Lakeman  
Mr L Small, Director, Jersey Youth Reform Team  
Deputy J G Reed

The following witnesses attended a public hearing on 16<sup>th</sup> February 2006 –

Senator F H Walker, Chief Minister  
Senator W Kinnard, Home Affairs Minister

The following witnesses attended a public hearing on 2<sup>nd</sup> March 2006 –

Ms S Nicolle, Solicitor General  
Deputy R G Le Hérissier

## 4. Background Research

There are several areas of background research that the Panel carried out to aid the review process and to advance its knowledge of the history surrounding the Island's relationship with the United Kingdom. These are detailed below.

### 4.1 *The Island's commitments under the European Convention on Human Rights*

The Convention was signed for the United Kingdom and Northern Ireland on 4<sup>th</sup> November 1950, and ratified by His Majesty's Government on 22<sup>nd</sup> February 1951.

In a Home Office letter, dated 21<sup>st</sup> May 1951, the Secretary of State asked to be informed whether the Insular Authorities wished the Convention to be extended to Jersey<sup>[2]</sup>.

The Island's affirmative response was confirmed in an Act of the States of Jersey dated the 30<sup>th</sup> October 1951 which detailed the States wishes for the Bailiff to inform the relevant UK Secretary of State that it was the desire of the Assembly that the European Convention of Human Rights should be extended to Jersey.

As a consequence of this ratification of the Convention on behalf of the Island, a person aggrieved by an alleged interference of a Convention right is entitled to bring proceedings before the ECtHR. The Respondent in such a case would however be the United Kingdom, not Jersey, as it is the United Kingdom which is the State party<sup>[3]</sup>.

A highly relevant article with regard to local commitments under the European Convention on Human Rights was written by Richard Whitehead<sup>[4]</sup>, an extract from which is provided below;

*'The Convention is binding on the United Kingdom and on Jersey under international law. If (which has not happened so far) the European Court of Human Rights were to find a violation of the Convention in respect of Jersey, then the United Kingdom must ensure that Jersey takes action to rectify any deficiency in its internal laws or practices so as to bring them into line with the Convention. Of course, if this ever occurred, Jersey would itself take such action without any prompting from the United Kingdom.'*

*Although the Convention is binding under international law, it is not however enforceable in domestic law. The Jersey courts may apply the Convention in limited circumstances: for example, where the courts have a statutory discretion to exercise, they may seek to act in a way which does not violate the Convention and the Convention may be referred to in order to resolve ambiguity in legislation. But the general position is that they are unable either to take account of the Convention in deciding issues before them, or to hear cases based solely on the Convention rights.'*

This position will be altered by the implementation of the Human Rights (Jersey) Law 200-.

### 4.2 *Legalising homosexual acts in Jersey*

Before the Sexual Offences (Jersey) Law 1990 was introduced, homosexual acts were illegal in Jersey. There was considerable resistance at that time to decriminalising homosexuality despite increasing pressure from the UK for the Island to do so. On the 19<sup>th</sup> of April 1990, a delegation, comprising the Bailiff, Sir Peter Crill; HM Attorney-General, Mr Philip Bailhache; the President of the Legislation Committee, Deputy Edgar Becquet; and the vice-president, Senator Reg Jeune, met the Rt. Hon. John Patten, Minister of State at the Home Office. The reason for the delegation was to discuss the implications for Jersey of the judgement of the European Court of Human Rights that a law which makes homosexual practices in private between two consenting adults illegal, was in breach of the European Convention on Human Rights. Following this meeting, on the 24<sup>th</sup> April 1990 Deputy Becquet made a statement to the States, during which the following was said;

*“The Minister explained that that judgement was binding on Her Majesty’s Government in the United Kingdom as a signatory to the Convention and that Her Majesty’s Government had already taken steps to bring the law in Northern Ireland into line with that in the rest of the United Kingdom which was in conformity with the judgement.*

*The Minister reminded the delegation that the Convention had been extended to Jersey at the request of the insular authorities and it was the responsibility of Her Majesty’s Government to fulfil its international obligations by ensuring that Jersey law was not in breach of the Convention. He said that the customary law in Jersey regarding sodomy was in breach of the Convention and that it was therefore imperative that the law was changed and he hoped that the Island would legislate accordingly. He made it clear that, if the Island did not, then in order to fulfil its international obligations, the United Kingdom reluctantly would have no option but to legislate itself in this matter.*

*...The Royal Commission on the Relationships between the United Kingdom and the Channel Islands, which reported in 1973, stated that ‘so long as the United Kingdom remains responsible for the international relations of the Island it must have powers in the last resort to secure compliance in the Island with international agreements.’ That statement was accepted by the States and is incontrovertible”<sup>[5]</sup>.*

Luke Le Rendu in his study of the Island’s relationship with the UK also mentioned the legalising of homosexual acts in his book, where he stated;

*“Bearing in mind the ultimately overwhelming dominance of the United Kingdom, Jersey does not seek to provoke conflict in areas where its metropolitan power is determined to have its way. The island must concentrate on seeking to resolve any conflicts by persuasion. An example of such an issue was the passing of the law legalising homosexuality in 1990. The United Kingdom authorities felt that pressure from lobbyists would result in an appeal to the European Court of Human Rights and therefore, despite the fact the States did not wish to pass this reform, the United Kingdom was prepared to use its dominance to force its issue. In view of this, the island preferred to avoid the damage to the relationship as well as the finance industry which might be caused if a public conflict took place. In the debate itself the President of the Legislation Committee, Deputy Edgar Becquet, justified the actions of the States as Jersey was not a sovereign state and the United Kingdom could impose its will if it wished. The capacity to know which battles to fight and which defeats to accept is fundamental to managing Jersey’s dependency.*

*...The Home Office made clear when the States was resisting pressure to reform the island's laws on homosexuality that "Jersey's stand on the issue is embarrassing the British Government in relations with its European partners, because local laws are viewed as being in contravention of the European Convention on Human Rights"<sup>[6]</sup>.*

### **4.3 Lowering of the age of consent for homosexuals in England and Wales**

The process of debates in Westminster is set out in some detail in the advice, dated 25th January 2006, given to the Panel by the H.M. Solicitor General and also in the Home Office Research Paper 99/4<sup>[7]</sup> which is available on the Scrutiny website. There follows a brief outline.

The issue of an appropriate minimum age of consent for male homosexual relations was debated in Parliament during considerations of the Criminal Justice and Public Order Bill. On the 21<sup>st</sup> February 1994, the House of Commons rejected an amendment to reduce the age of consent from 21 to 16, but accepted an amendment to reduce the minimum age to 18<sup>[8]</sup>. The Lords also accepted the amendment and it came into force on the passing of the Act on 3<sup>rd</sup> November 1994.

The Sexual Offences (Amendment) Act 2000 then further lowered the age of consent for homosexual relations from 18 to 16. The Act engendered in its passage through Parliament much debate and controversy. A free vote on the homosexual age of consent, which had been promised by the Home Secretary, took place on 22<sup>nd</sup> June 1998. The Commons passed, by a majority of 207, an amendment to the then Crime and Disorder Bill which would have lowered the age from 18 to 16. On 22<sup>nd</sup> July 1998, however, the Lords rejected the amendment by 168 votes. The Government accepted the Lords' rejection but expressed an intention to re-introduce legislation on the age of consent in the 1998-99 session.

The Sexual Offences (Amendment) Bill was introduced into the House of Commons on 16<sup>th</sup> December 1998. It was passed by a large majority in the House of Commons but rejected by the Lords in April 1999, when they voted by 222 to 146 to delay the Second Reading beyond the end of the session. There was further discord between the Commons and the Lords but, eventually, on 30<sup>th</sup> November 2000, the Parliament Act 1911 was invoked and the Bill received Royal Assent in spite of its rejection (in part) by the Lords.

The Act made the age of consent the same for all forms of sexual activity regulated by criminal law, whether the parties were of the same or opposite sexes.

### **4.4 The ability of the United Kingdom to legislate for Jersey**

Throughout the review process the Panel was regularly referred to two differing sources of evidence concerning the ability of the UK to legislate on behalf of the Island. One was the

Kilbrandon report<sup>[9]</sup> and the second was an article in the Jersey Law Review by Professor Jeffrey Jowell QC<sup>[10]</sup>. Both sources are outlined below, along with quotes from “Jersey: Independent Dependency?” by Luke Le Rendu, which also provides detailed information on this issue;

## The Kilbrandon Report -

The most recent statement of the relationship between the United Kingdom and Jersey is Part XI of Volume I of the Report of the Royal Commission on the Constitution, 1969-1973 (the Kilbrandon Report). This report aimed to examine the present functions of the central legislature and government in relation to the several countries, nations and regions of the United Kingdom. The report states that the Crown has the ultimate responsibility for the good government of Jersey (para 1361). The report's terms of reference required research to be conducted into whether any changes were desirable in the constitutional and economic relationships between the United Kingdom and the Islands. In attempting to define what these relationships were, the report writers noted that there were areas of uncertainty, and stated that;

*“The authorities in all the Islands, but not some other witnesses, agreed that the United Kingdom Parliament has power to legislate for the Islands, but that the exercise of the power is limited by the convention that Parliament does not legislate without the Islands’ consent in respect of purely domestic matters.” Para 1462.*

The report then goes on to state;

*“All our official witnesses accepted that Parliament has power to legislate for the Islands and that, in some matters at least, the exercise of this power is not dependent upon the Islands’ consent being given. It has, however, been the practice not to legislate for the Islands without their consent on matters which are of purely domestic concern to them. There has been strict adherence to the practice over a very long period, and it is in this sense that it can be said that a constitutional convention has been established whereby Parliament does not legislate for the Islands without their consent on domestic matters.” Para 1469.*

The conclusion that the report draws concerning this ambiguity is that despite the existence of the convention, the United Kingdom Parliament does have the power to legislate for Jersey without the Islands’ consent on any matter in order to give effect to an international agreement. The report also concludes that if the UK have the power to legislate for the Island then there would not be any circumstances in which this power could not be exercised (para 1472).

The report provides details concerning proposals put forward by the States of Jersey stating that there should be an Act of Parliament making a formal division of legislative and executive responsibilities between the UK and the Island. The Bill proposed that the UK Government would have a responsibility for the Island, but would only have the power to legislate on matters considered to affect the vital interests of the UK, or to transcend the Islands’ domestic concerns. However, the Home Office and the Foreign and Commonwealth Office rejected the proposals on the grounds that they would leave the UK Government with responsibility for the good government of the Island, and their external relations, but with the inability to exercise that responsibility (para 1480).

The report suggests that the circumstances in which the United Kingdom should be free in practice to exercise its paramount powers can be considered under five headings (para 1499);

- i. Defence
- ii. Matters of common concern to British people throughout the world
- iii. The interests of the Islands
- iv. The international responsibilities of the United Kingdom
- v. The domestic interests of the United Kingdom

The report found that the States of Jersey and the Home Office had differing perceptions of the position regarding the right of Parliament to legislate. The States of Jersey maintained that this right to legislate for domestic matters without the States consent had ceased to exist, based upon centuries of not being used. In conflict to this, the Home Office stated that this power remained, despite it being unused. This was also the view that the authors of the report upheld (para 1481), and it was stated later in the report that;

*“we must face the fact that cases where there is an irreconcilable conflict of view may still arise. In such cases we are firmly of the opinion that the United Kingdom Government has, and should retain, the right to decide, and that Parliament has, and should retain, the right in the last resort to legislate for the Islands.” Para 1513.*

**Luke Le Rendu** also discussed the Kilbrandon Commission thoroughly in his book, and stated;

*“The core conventions of the relationship are, in the eyes of the United Kingdom, defined in the Kilbrandon report. The report cites the areas in which the United Kingdom would be prepared to override the island’s wishes as defence, matters common to British people throughout the world, good government, international responsibilities and preservation of the United Kingdom’s own external interests. This list seems to be potentially all encompassing while contradicting the convention of non-interference in the island’s domestic and fiscal affairs. This description of the relationship must therefore be regarded as a simplified façade. Instead, each element of the relationship reflects the uncodified and often ad hoc way it has developed”<sup>[11]</sup>.*

In terms of whether there should be a written constitution of the relationship between the Island and the United Kingdom, this book goes on to state;

*“The Kilbrandon Commission reflected United Kingdom policy in strongly resisting codification of the island’s constitution. This was despite submissions from Jersey, Alderney and the Isle of Man proposing codification. Codification would tend to limit the island’s autonomy and Jersey has since reversed its position on this matter. The act of drafting or revising the constitutional elements of the relationship would put the Dependencies at a disadvantage as the far larger United Kingdom civil service could be brought into play for the time necessary to define the relationship. Moreover, at a superficial level it would seem that an uncodified constitution tends to favour the stronger party in a dispute. However, this is not true where the stronger party has less of an interest in the relationship. The United Kingdom may have far more, and even abler, legal minds at its disposal, but, as any potential changes in the relationship would affect the United Kingdom much less than Jersey even in absolute terms, far less effort is put into understanding and managing the island’s relationship. Further, people*

*with constitutional expertise are almost entirely concentrated in the island. Therefore both sides in the relationship now prefer to keep the relationship informal and flexible. It should be noted that a more formal definition of powers could require the United Kingdom to legislate in areas which would be better left to the States, either due to their controversial nature or the fact that the United Kingdom does not have a view on whether legislation is required*<sup>[12]</sup>.

Professor Jeffrey Jowell QC –

Professor Jeffrey Jowell QC commented extensively on the Kilbrandon Report in his article in the Jersey Law Review, in which he stated;

*“Kilbrandon provided a list of matters in which the UK should be free to exercise its “paramount powers” over the Islands. It is strongly arguable that, in so far as these categories are correct, they lie in the realm not of Parliament but the Crown. The broadest of these categories, and the one most likely to permit interference with the Islands’ domestic matters, concerns “the ultimate responsibility of the Crown for the good government of the Islands”. Note that Kilbrandon specifically refers to this as a power of the Crown.*

*Kilbrandon, however, does not define with any accuracy the scope of this power for “good government”, although he warns that the UK government and Parliament ought not lightly to employ that power to “impose their will in the Islands merely on the grounds that they know better than the Islands what is good for them”. It has been too often assumed that that power is equivalent to the power of the UK over conquered or ceded territories “to make such laws as appear necessary for the peace, order or good government of the territory.” That formulation has been held in a number of cases to “connote, in British constitutional language, the widest law-making powers appropriate to a sovereign.”*

*As Young appreciates, and as the UK government now acknowledges, the power for the “good government” of the Islands is one that is narrower than that by far. It is the classic Crown prerogative to maintain the Queen’s peace in times of grave emergency or the breakdown of law and order. Its scope to intervene in matters outside of that extreme situation is therefore strictly limited. If that is the case, as it surely is, it follows that the “strictly legal” powers generally of the UK over the Islands are restricted to those exercised under the diminishing scope of the Royal prerogative alone and do not attach to Parliament more generally.*

*A well known prerogative of the Crown is to make international treaties. In Kilbrandon’s time no prerogative power could be challenged in the courts. That situation has now changed and the prerogative power is challengeable in the same manner and under the same grounds as any other governmental power, if justiciable.*

*The point here is that, for a treaty obligation to prevail over domestic law (or constitutional arrangement), Parliament must transform that treaty into UK law. Even that fact may, however, not permit the statute to run to areas over which the UK has no legitimate control. Surely the UK, in enacting any legislation, whether in response to an international obligation or not, should always be subject to its domestic limitations in constitutional law? It is a well established principle, applied in many jurisdictions throughout the world, that international obligations are, rightly or wrongly, subject to domestic constitutional competence. In that case, the UK’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.”*

The Solicitor General describes Professor Jowell's analysis as *"one of the most sympathetic to the Islands' own perception of their independence, but even his analysis concludes that there would be a power in the United Kingdom to legislate in place of the States in matters to which the Island "had agreed to be bound"*.

**Luke Le Rendu** discussed the "status quo" of the relationship between Jersey and the United Kingdom<sup>[13]</sup>, and stated that whilst this status quo is maintained Jersey is prosperous and politically stable, however Le Rendu then goes on to highlight the implications that would occur should the United Kingdom "absorb" Jersey, or alternatively, if Jersey were to become totally independent. It is suggested that should the United Kingdom wholly absorb Jersey, this would result in the removal of its main industry – finance. This would therefore ultimately result in the United Kingdom inheriting an island with a collapsing economy. In terms of the alternative, should the island become totally independent, Le Rendu stated;

*"It is difficult to see how this option would be of more benefit than the present situation... If Jersey were independent, the United Kingdom would be left in a situation where it would be assumed to have power over the island due to its long historical links, but in fact would lack the power to change insular policy without provoking an international dispute with Jersey. It is likely that the finance industry would decline. Past experience seems to indicate a preference amongst financial institutions to invest in British dependencies rather than in newly independent states"*<sup>[14]</sup>.

Le Rendu then firmly stated his view with regard to the implications of Jersey becoming independent;

*"Independence, therefore, would be potentially disastrous for Jersey and also to the United Kingdom's disadvantage. It is therefore in the United Kingdom's interest to allow a high degree of autonomy in return for the island's acceptance of the United Kingdom as a sovereign power. These statements would seem to reinforce the policy already seen to apply in the field of international relations where the island will be allowed full autonomy except where exercising autonomy runs counter to the United Kingdom's interests. At that stage Jersey will be informed of the conflict and, only if Jersey does not accept the United Kingdom's position, will the United Kingdom intervene. Accordingly, such interventions are rare and not undertaken without informal warnings"*<sup>[15]</sup>.

## **5. Evidence Received**

Both the written and the oral evidence received is presented below under the Panel's **terms of reference** –

### **5.1 To examine the Island's current commitments to the United Kingdom and under the European Convention on Human Rights**

### 5.1.1 The ability of the United Kingdom to legislate for Jersey

To begin its investigations, the Panel considered whether it should contact the United Kingdom Department of Constitutional Affairs (DCA) for an official view of the United Kingdom's position on this matter. However the Panel was advised by the International Relations Officer, Chief Minister's Department, that the DCA would not consider it appropriate to express a view on policy which was within the competence of the Island authorities. He said that the DCA could not give a legal opinion, as that was a matter for the Island's own legal advisers. Furthermore, the UK government's policy on this matter was clear, and they considered that this required no further clarification from the DCA.

In **Advocate Lakeman's** submission to the Panel, when referring to the ability of the United Kingdom to legislate for Jersey, he stated "*the extent to which this power exists is still open to some debate,*" and referred the Panel to a document produced by the Department for Constitutional Affairs (DCA). This document stated that the constitutional relationship of the Islands with the United Kingdom is not enshrined in a formal constitutional document. It is rather the outcome of historical processes and accepted practice<sup>[16]</sup>.

**Advocate Lakeman** further stated in his submission;

*"It has been described as a "settled position" that the UK will not legislate for domestic matters. It would require a major crisis for the UK Government to request the Queen in Council to intervene. Since the 1960s, the advice given to the States has reflected the diminishing residuary power of the Monarch. But the question may be put another way: does the States consider it can and should ignore the request of HM Government (it is no more at present than that) in the face of the advice of HM Attorney General to the Legislation Committee?"*

During a public hearing, **Advocate Lakeman** was asked questions concerning the ability of the United Kingdom to legislate for Jersey, and stated;

*"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."*

**Advocate Lakeman** was then asked whether in his opinion, the UK Government regarded this issue as so important as to attempt to compel the Island to reform their laws, to which he replied;

*"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 **Solicitor General**, in advice provided to the Panel, stated;

*"In my opinion the general principle is modified in circumstances where the need to legislate arises from a need to comply with the terms of a Convention which the United Kingdom has*

*ratified on Jersey's behalf at Jersey's request, and where the United Kingdom itself has an obligation under the Convention to ensure Convention compliance. When Jersey requests the United Kingdom to ratify a Convention on its behalf, Jersey must have tacitly or implicitly accepted that, if Jersey itself does not legislate so as to ensure that the United Kingdom is not in breach of international obligations which it has taken on by ratifying the Convention on Jersey's behalf, the United Kingdom should have a power to do so*<sup>[17]</sup>.

When the **Solicitor General** was asked her opinion about whether the United Kingdom would use punitive measures in order to persuade the Island to legislate, or whether they would simply legislate on our behalf, she stated;

*"Obviously it is speculation because I am talking now about what somebody else might do, but I would have thought that legislating would have been the more obvious and the more appropriate answer because if the legislation is not brought in by Jersey then there is a breach of the Convention and that makes the United Kingdom answerable. It makes the United Kingdom vicariously, as it were, in breach and answerable before the European court. Putting yourself in the shoes of the United Kingdom, what you want to do if you are in breach is get yourself out of breach, not use some kind of lever to try and get the third party to get themselves out of breach or to get you out of breach."*

The Panel asked the **Chief Minister** questions concerning the ability of the United Kingdom to legislate for Jersey, to which he responded;

*"The UK theoretically here has three options. It could withdraw from the European Convention itself, because Jersey, which is part of the UK's obligations, has breached the position, to effectively denounce the Convention. That is absolutely inconceivable and there is no way the UK Government is going to withdraw from the Convention. The second option open to the UK, theoretically, is that they might be compelled by order of council to legislate for Jersey. There is a huge question then about whether they can, and that is a legal argument that the lawyers should put to you, rather than me. There is a huge issue about whether they can. Frankly, it is one that Jersey does not want to see tested too deeply, because the very uncertainty of the constitutional agreement between Jersey and the UK is one of its greatest strengths. What we do not want to do is use an issue such as this to go down a road that tests the legal opinion, and there are differing legal opinions. So, theoretically they may feel compelled to try to legislate for Jersey. Whether they would be successful or not is another matter, but if we get to the stage where the UK Government feels that they are compelled to try and legislate for Jersey, then we would put Jersey in considerable danger in any number of ways: constitutionally, economically and, as I said before, ultimately socially. We are putting our whole constitutional position potentially at risk...."*

*This is option 3. "You have breached your commitments to us, you have breached your commitments to the European Court, you have breached your commitments under the Convention. We are sorry, we are just not tolerating that position..." The most likely scenario would be that they would, as threatened in the not-too-distant past, they would bring huge pressure to bear on us politically and economically."*

In agreement with this view, when **Deputy Le Hérissier** provided evidence to the Scrutiny Panel he stated;

*"If the UK is determined to get its way it will not get its way by, for example, asking Parliament*

*to legislate for the Island because that has become a bit of an off-bounds area, so to speak. It generally gets its way obviously through a process, I imagine, of political pressure behind the scenes.”*

**Deputy Le Hérisssier** expressed the opinion that when the two converging views as to whether the United Kingdom can legislate on behalf of the Island are considered;

*“The balance is in favour of Parliament not legislating unless something inconceivable or at the moment improbable happened; Jersey collapsed and there were riots in the streets or something.”*

## 5.1.2 The Islands' commitments under the European Convention on Human Rights

In **Advocate Lakeman's** submission to the Panel he stated;

*"The case of Sutherland is authority for the admissibility of a case similar to the challenge which has been intimated in the media. Once the Law is in force in Jersey, such a challenge will be possible in the Royal Court."*

During a Public Hearing **Advocate Lakeman** was questioned regarding the Islands' commitments under the ECHR, to which he responded;

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

The **Chief Minister** was similarly asked why Jersey should take account of the ECHR in deciding certain legislation, and he provided the following response;

*"It was an entirely voluntary act. The Island authorities of the day said: "We want you, the UK, to sign us up to the Convention on our behalf." Entirely voluntary. Now, having done that, we entered into commitments. We said we want to be a part of this and so we took on the requirements of the Convention. We committed ourselves to implementing those requirements to the best of our ability within our domestic competence, so we have a real commitment in that respect. A direct signatory on our behalf was the UK and they have the obligations in international law. The accepted constitutional practice is that we honour those obligations in our own domestic policy and our own legislation... So having committed ourselves voluntarily, we also committed ourselves to the jurisprudence of the European Court. That is the position. We have committed ourselves. In my view, there is no going back. In my view, there are no half measures. Having committed ourselves totally to the Convention, Jersey cannot pick and choose which parts of the Convention it is happy with and which parts it is unhappy with. In my view, we have an absolute binding commitment."*

When **Deputy Le Hérissier** was asked about the Island's commitments under the ECHR he stated;

*"We have signed up to the Convention... my understanding is once you have signed up to it, you have signed up to what flows from it. I think we would be in big trouble but if you look going back to a bit of the history, part of the problem is the Jersey Constitution and the Jersey relationship with the United Kingdom, of course, is not written down. It has never gone for a final clear judicial judgement so we operate in a bit of a dark area and an area where maybe there is a bit of ambiguity."*

The **Solicitor General** was asked whether it would be possible for Jersey, through the United Kingdom, to opt out of any part of the ECHR, to which she responded;

*"No. You can make reservations, but those have to be made at the time of joining up, or derogations, but derogations have to be in time of war and they are for things like terrorism. If you have a state of national emergency you can suspend, for example, some of the provisions about arresting people and holding them for trial and so on. But you cannot suddenly*

*backtrack and say: "Please disapply this Article."*

A small number of witnesses and correspondents have suggested the Island could withdraw from the ECHR. In advice provided to the Panel the **Solicitor General** explains how even if this was a valid option, any actions in respect of current breaches could still be brought before the ECtHR;

*"The European Court of Human Rights, when determining an application made to it, has regard to the law of the respondent state party as it was at the date when the breach of the Convention is alleged to have taken place"<sup>[18]</sup>.*

The **Solicitor General** was also asked the following question;

*"One of the things that has come out of this Scrutiny process...is that Jersey has in the past signed up or been extended to certain international treaties and conventions without fully realising the extent or the implications on the Island. First of all, would you agree with that?"*

To which the following response was received;

*"Well, if we take this one as an example, it was extended to Jersey a very long time ago at a stage when there was not much developed case law. I do not think anyone would have foreseen the implications of the case law developments because I think that some of the judgements given by the European Court of Human Rights (and I am not particularly talking about this area even) would have surprised the original drafters of the Convention.*

*...So it has developed in a way that I do not think anybody would have predicted."*

#### **Comment**

During the review, it became apparent to the Panel that the Island is bound by a Convention made many years ago, the current implications of which could not have been foreseen in the social and moral climate prevailing at that time. The Panel acknowledges that it is impossible to accurately predict every future aspect of individual national or international agreements, especially when new legislation and evolving case law will necessarily influence these over time. However, the Panel recognises that great attention is now being paid to determining and considering the potential long-term implications and the consequences of international conventions and agreements, prior to entering into them.

A further potential implication of the current situation is the delay in the implementation of the Human Rights (Jersey) Law 200-.

The **Chief Minister** was asked whether a decision by the States not to lower the age of consent would prevent the implementation of this Law, to which he replied that it would not. When asked what the result would be of bringing the Law in when the Island was still in breach of the ECHR he responded;

*"I think first of all we would look very stupid as a government, and that is not something I would be very happy about. Then we would be back to the position I outlined earlier, that is, our position with the UK Government would be called into very serious question. Our position*

*under the convention would be untenable, basically, so it does not actually change that situation at all. Jersey has said we want to be bound by the convention. Jersey has said we want to and we need to introduce the human rights law. We need to be consistent here. There is absolute inconsistency in seeking to introduce human rights law, while we know we are in breach of these two provisions.”*

In terms of the delay in the introduction of this Law, the **Solicitor General** was asked the following question;

*“If we were to delay for any reason the implementation of this legislation (and one of the reasons could be that we wanted to bring Sexual Offenders legislation in tandem with the draft of the Sexual Offences legislation), would it delay the implementation of the Human Rights (Jersey) Law?”*

To which she responded:

*“Yes. What the Human Rights (Jersey) Law does is give a right to inhabitants of the Island to enforce Convention rights in the domestic courts, i.e. in the Royal Court. In practice it would delay it. In theory it would not need to. It could be brought into force, but all that would mean would be that everybody could then go along to the Royal Court who felt aggrieved and start bringing actions for breaches of such perceived human rights as they wished to complain of.*

*...In practical terms it will delay it because I cannot see it being brought in while there are known breaches.”*

## ***5.2 To consider the legal advice from the Law Officers regarding the proposed change to the age of consent***

The Solicitor General has provided the Panel with extensive legal advice on the issues considered in the draft Sexual Offences (Jersey) Law 200- commencing with a response to a request for advice from the Chairman of the Social Affairs Panel and continuing with a response to a number of ad hoc questions raised in various submissions to the Panel.

The written legal advice is provided in a series of documents which can be accessed in full in Appendix 3. This section outlines the key issues covered in the legal advice received from the Solicitor General and refers to specific paragraphs where the advice can be read in full.

The Panel wishes to record its appreciation of the prompt and comprehensive advice it has received.

Note: the 'Convention' refers to the European Convention on Human Rights;  
The 'Court' refers to the European Court of Human Rights

### *Letter dated 23rd January 2006*

- Legal implications if the States did not adopt the draft Sexual Offences (Jersey) Law 200- (paragraph 6)

### *Letter dated 24th January 2006*

Differing views on the power of United Kingdom to legislate for Jersey (paragraphs 2 - 4);  
Derogation from the obligations under the Convention is not possible with regard to the issue of age of consent (paragraphs 5).

### *Letter dated 25th January 2006*

This letter advises on the reasons why an amendment to the Law is necessary in order to comply with the Convention and adds some further advice on the legal consequences, including the power of the United Kingdom to legislate for Jersey in these circumstances.

The key issues covered in the advice are as follows -

Definition of buggery and sodomy (paragraphs 1 - 2) and the historical position in Jersey (paragraphs 3 - 7)  
The United Kingdom reforms in 1967 - decriminalising homosexuality (paragraphs 8 - 10)  
The reforms in Jersey in 1990 (paragraphs 11 - 14) and 1995 (paragraphs 29 - 30)  
Later reforms in England and Wales - lowering the age of consent and the introduction of a new sexual offence of abuse of trust (paragraphs 15 - 21)  
Developments regarding the Convention in the 1990s - Court rulings in 1994 that the United Kingdom was in breach of Articles 8 and 14 of the Convention because of the difference in age of consent for homosexuals and heterosexuals, which led to the

passing of the Sexual Offences (Amendment) Act 2000 in which the age of consent for homosexual activity was reduced to 16. (paragraphs 31 - 42)

The origins of the current projet de loi - exchange of correspondence in 2003 with the Department of Constitutional Affairs (paragraphs 43 - 44)

Court judgments (L and V -v - Austria and SL -v - cases) which found that the difference in age of consent was a violation of the applicants' right to respect for their private lives (Article 8) (paragraphs 45 -49)

Jersey's current position, which remains incompatible with the Convention (paragraphs 50 - 55) would make it difficult to see how the Human Rights (Jersey) Law 2000 could be brought into force (paragraphs 56 -57)

Three options for Jersey (paragraph 58)

Increasing the age of consent for heterosexual intercourse - possible argument that this would involve an unwarranted interference with the private lives of 16 -17 year old heterosexuals. (paragraphs 59 - 66)

Legal implications of failing to legislate at all (paragraph 67)

The United Kingdom's power to legislate in matters to which the Island had agreed to be bound (paragraphs 68 to 73)

Jersey's international reputation - respect for the international rule of law. (paragraphs 74 - 79).

*E-mail dated 13th February and Memorandum dated 14th February 2006*

H.M. Solicitor General was asked to comment on a question raised by Mr. D. Pearce regarding the age of consent for lesbian activity.

*Memorandum of 17th February 2006 - Summary of advice to Scrutiny Panel*

This memorandum provides a summary of previous advice and covers further questions raised in submissions to the Panel.

Age of consent for heterosexual and homosexual intercourse and sexual activity not involving penile penetration: the current position (paragraphs 1 - 6).

Relevant provisions of the Convention - Articles 8 and 14 - and the rulings of the Court (paragraphs 7 - 12)

Jersey's obligations under the Convention and the Human Rights (Jersey) Law 2000 (paragraphs 13 -15)

Power of the United Kingdom to legislate for Jersey (paragraphs 16 - 17)

Raising the age of consent for heterosexual intercourse (paragraphs 18 - 19)

Discrimination in age of consent in some European States - such States are at risk of being taken before the Court by aggrieved citizens (paragraph 20)

Differing ages of consent in different member States - there is no principle or rule of law which requires member states to adopt the same provisions in respect of Convention rights as one another (paragraph 20)

The relevance of Canadian Law to the question of discrimination under the European Convention (paragraphs 22 -23)

No equivalence in Jersey to Section 28 of the Local Government Act 1988 on the promotion of homosexuality by teaching or publishing material (paragraphs 24 - 28)

Sexual Offences (Amendment) Act 2000 - inclusion of offence relating to abuse of trust (paragraph 29)

*Addendum, dated 21st February 2006*

This provides further advice in respect of the Jersey School Curriculum (paragraph 31) in reference to Section 28 of the Local Government Act, 1986 of the United Kingdom and comments on legal claims outlined in the submission of Progress Jersey. The following statements in the submission are addressed and reference is made to the comment in the legal advice-

- In paragraph 4(a) of the submission - *'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'*. (paragraph 33 of the legal advice)
- In paragraph 4(b) of the submission *'Human rights may be curtailed where it is necessary to protect vulnerable members of society as specified under Article 8.2 of the Convention'*. (paragraph 34 of the legal advice)
- In paragraph 6.1(a) of the submission *'To date no prosecution against a minor has been made under the above legislation in Jersey'*. (i.e. no prosecution for sodomy against a minor) (paragraphs 35 - 38 of the legal advice).
- In paragraph 6.1(b) of the submission *'Under Jersey Law the act of sodomy is only lawful between consenting male homosexuals. The court would need to consider whether this fact would not represent a predisposed bias in favour of the homosexual minority'*. (paragraphs 39 -41);
- Challenge before the Court against Jersey regarding the operation of the Housing (Jersey) Law 1949 (paragraph 42);
- Application before the Court against the Bailiwick of Jersey in the case McGonnell -v- UK. (paragraphs 43 -44).

*Second Addendum, dated 22nd February 2006*

H.M. Solicitor General was asked to comment upon the Act of the States of the 30th October 1951 recording the agreement of the States to inform the Secretary of State that it was the desire of the Assembly that the Convention should be extended to Jersey. (paragraphs 45 - 50)

*Third Addendum, dated 24th February 2006*

This contains advice on further comments from Mr. D. Pearce and addresses the following points -

- The terms sodomy and homosexual sex (paragraphs 52)
- Application of Article 14 of the Convention (paragraphs 53 and 58)
- Prosecutions in Jersey for sodomy with a minor (paragraphs 54 -57)
- Risk of prosecution constitutes interference (paragraph 58)
- Relevance of judgments in Canadian Courts (paragraph 58)
- Application of Small -v- UK. (paragraph 60)
- Possibility of denouncing the Convention (paragraphs 63 -64)

*Fourth Addendum, dated 6th March 2006*

This contains advice on the legal claims in the submission of Deputy J.G. Reed and the application of Small -v- UK.

- Age of consent for sexual intercourse with a girl (paragraphs 65 -69)
- Age of consent for sexual intercourse with a boy (paragraphs 70 - 72)
- Question whether legalising anal intercourse is contrary to the principle of Article 8 of the Convention on the grounds of associated health risks (paragraph 73)
- Comment on the fact that in the past the European Commission had found that discriminatory legislation in Austria was compatible with Article 8 of the Convention whereas the Commission has subsequently reconsidered case law in the light of modern developments. (paragraphs 74 - 78)
- Application of Small -v- UK. (paragraphs 79 - 82)
- Relevance of draft Sexual offences (Jersey) Law 200- to other '*unnatural*' sexual acts. (paragraphs 83 - 84)
- Relevance of Article 1 of the Convention to Application of Small -v- UK. (paragraphs 85 - 90).

*Memorandum of 20<sup>th</sup> March 2006 – Confidential: This refers to information provided to the Panel in confidence*

H.M. Solicitor General was asked to comment on the effect the addition of an appointed day act provision to the Draft Sexual Offences (Jersey) Law 200- would have on Mr Small's case with the European Court of Human Rights.

### **5.3 To review the constitutional position of a decision not to reform the current law**

During the States Debate on the draft law, **Senator Syvret** posed the following question to the **Solicitor General**;

*“Could I ask the Solicitor General to expand upon this? Suppose that the UK Government did feel obliged due to their commitment to the European Convention for Human Rights to intervene in the Island’s affairs and legislate for the Island, that would precipitate something of a constitutional crisis.”*

To which the **Solicitor General** responded;

*“Well, as to whether it is a crisis I would not like to say. It would certainly give rise to a constitutional test case of very significant proportions.”*

Also during the States Debate the **Chief Minister** stated;

*“If we reject this proposition there will be a very, very serious issue between us and the UK Government and I have no doubt at all that all the progress that we have made in recent months and years would be reversed. I do not say that in any threatening position at all. If we do not adopt this proposition, the UK themselves, who have signed up to it on our behalf in this instance, would be in serious difficulty with their EU partners. Embarrassed goes nothing like describing the difficulties they would be in and, ultimately, because of us they could be kicked out of the whole structure.”*

The submission from the **Jersey Youth Reform Team** stated that if Jersey makes no amendment to the current legislation, the States of Jersey place the Island, its government and its relationships under a great deal of strain. The report went on to say;

*“The Jersey Youth Reform Team would progress its case in the European Court of Human Rights and in conclusion, receive a binding judgement against the United Kingdom. Because of a judgement like this being issued, the States of Jersey may face difficulties in it’s [sic] relationship with the United Kingdom, the Council of Europe, other European Member States and ultimately the States of Jersey could be responsible for a potential constitutional crisis.”*

The **Chief Minister** was asked what the impact on the Island’s international reputation would be if such a challenge were successful, to which he responded;

*“Incalculable. Incalculable. The ultimate cost to the Island (not just financially, but the cost to us reputationally and socially) would be potentially immense. It would, as Senator Kinnard said just now, be a constitutional disaster, I would say. It would also be an economic and social disaster, as well.”*

In support of this view, **Advocate Lakeman’s** submission to the Panel stated;

*“The contradiction in approving the Human Rights Law but permitting a challenge before the European Court of HR is likely to figure high on the agenda for those who would criticise*

*Jersey in the international arena.”*

**Comment**

The Island's independence has developed over the centuries without recourse to a written constitution. The longer that the position exists whereby the UK does not legislate, the stronger in legal terms through convention our independence becomes. In practice the blurred nature of the constitutional relationship has the effect that the UK Government could be less likely to try and impose its will on the Island "legally" for fear of either "failing" to do so or of being perceived by others (particularly within the Commonwealth) as "bullying" a smaller democracy. Our long term allegiance to the Crown in this context is particularly important as this is ultimately the "Higher Authority" we could turn to for protection (even theoretically from the UK Government).

This independence in domestic matters is now increasingly being extended to international relationships and in turn by developing an international presence and identity in our own right. This has the potential in the medium term to open up commercial markets to our exporting industries (tourism and others as well as financial services) and to widen our customer base, therefore making us less dependent on the UK for our ongoing prosperity.

## **5.4 To review previous and current legal challenges in the European Court of Human Rights**

### **5.4.1 The Relevant Provisions of the European Convention on Human Rights**

#### **Article 8 – Right to respect for private and family life**

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

#### **Article 14 – Prohibition of discrimination**

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status<sup>[19]</sup>.

As stated by the **Solicitor General**;

*“The combined effect of Articles 8 and 14 is that a public authority can interfere in the area of sexual activity insofar as it is necessary to do so on one of the grounds specified in paragraph 2 of Article 8, but in its interference must not discriminate between persons on the basis of their sex.”*<sup>[20]</sup>

### **5.4.2 Cases in the European Court**

The following cases highlight the fact that 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 the above articles.

#### Sutherland v. United Kingdom

The following is from the Solicitor General’s advice to the Scrutiny Panel, dated the 25<sup>th</sup> January 2006.

A complaint against the United Kingdom was taken to the ECtHR by Euan Sutherland in June 1994<sup>[21]</sup>. The European Commission of Human Rights concluded that the United Kingdom had a case to answer for setting the age of consent at 18, following this complaint. The accepted ground for the complaint was breach of Articles 8 and 14 of the ECHR. The United Kingdom Government was asked to justify the inequality in the treatment of gay men and, in particular, the criminalisation of the young gay men involved.

It argued that it was using the discretion allowed to it under the 'margin of appreciation' to allow young men time to consider their sexuality, and to prevent young gay men from setting themselves apart from society at too young an age.

After hearing the arguments for both sides, the Commission ruled (by 14 votes to 4) that there had been a violation of Article 8 taken in conjunction with Article 14, and that the case was admissible.

Following this report, the Government of the United Kingdom announced that it and the applicants had agreed to apply to the Court for the case to be deferred pending a vote in Parliament 'at the earliest opportunity'.

L and V v. Austria<sup>[22]</sup> and SL v. Austria<sup>[23]</sup>

The applicants in L and V v. Austria had been convicted under Article 209 of the Austrian Criminal Code which prohibited homosexual acts between adult men and consenting adolescents between 14 and 18 years of age. By contrast, under Austrian law, consensual heterosexual or lesbian acts between adults and persons over fourteen years of age were not punishable.

The applicant in SL v. Austria submitted that he suffered from the fact that he could not live his homosexuality openly and – until he reached the age of eighteen – could not enter into any fulfilling sexual relationship with an adult partner for fear of exposing that person to criminal prosecution under Article 209 of the Criminal Code, of being obliged to testify as a witness on the most intimate aspects of his private life and of being stigmatised by society should his sexual orientation be known.

In both cases the Court found the difference in the age of consent to be a violation of the applicants' right to respect for their private lives and held that it was discriminatory.

The difference in the age of consent was not considered to be capable of objective justification within the meaning of Article 8(2) of the Convention.

Austria was therefore found to be in breach of its obligations under the Convention.

R H v. Austria<sup>[24]</sup>

This case once again involved the conviction of a man on several counts under Section 209 of the Penal Code. On 21<sup>st</sup> June 2002, upon a request for review made by the Innsbruck Regional Court, the Constitutional Court found that Article 209 of the Criminal Code was unconstitutional. On 10<sup>th</sup> July 2002 Parliament decided to repeal Article 209. That amendment came into force on 14<sup>th</sup> August 2002. The Court held unanimously that there had been a violation of Article 14 taken in conjunction with Article 8 of the Convention.

### **5.4.3 Mr Small's case**

Mr Small has prepared a fully documented case and has presented it before the European Court of Human Rights in preparation for the State's decision. The Panel has been informed that the case Small v. the United Kingdom is now in the Fourth Section of the ECtHR and is being dealt with awaiting an admissibility hearing.

Mr Small's case is based on three violations, which are stated as follows;

#### Article 1

The States of Jersey, by maintaining its current stance on the Sexual offences Jersey Law 1990, is not meeting its local, national and international obligations 'to respect human rights'. Therefore the Jersey Youth Reform Team have included this article.

#### Article 8

The States of Jersey, are in accordance with International Law, failing to respect the private lives of young homosexual men across the island and therefore, a clear justification is presented for the use of this article.

#### Article 14

The States of Jersey are using discrimination to justify discrimination, which is in breach of the convention. Article 14 is broad; therefore it can be cross-applied to Article 8 and 1 as a sub-breach. In effect, Article 1 and 8 are in breach, but are also supported by a breach of Article 14.

Mr Small claims that it is a certainty that the application will be declared admissible and in due course, if no action is taken on the government's part, that a judgement will be issued, alongside just satisfaction.

## 6. Other issues raised in submissions to the Panel

The Panel received a number of submissions that emphasised the health and educational aspects of the issue. Submissions falling into this category were received from; Brook; ACET; NSPCC, and Deputy J Reed. A summary of each submission can be found in section 3b of this report.

The Panel was unable to explore these in any depth, given that they were beyond the terms of reference. However, it is clear that the constitutional and anti-discrimination issues cannot be dealt with in isolation from these concerns.

Details of additional submissions and queries the Panel received are summarised below:

### Deputy Duhamel

In a note to the Panel Deputy Duhamel raised three questions which are presented below;

- i. The position of other countries within Europe where discrepancies in age are still present (Portugal etc) and the timetable to produce uniformity in all countries.

The draft Sexual Offences (Jersey) Law 200- stated that the age of consent in Portugal is 14 for heterosexuals and 16 for homosexuals. The Panel conducted its own research into this area, and was informed by the Legislative and Parliamentary Information Division of the Assembleia da República that the age of consent in Portugal is in fact 16 for both homosexuals and heterosexuals. Additionally, the Panel was informed that Articles 174 and 175 of the Portuguese Criminal Code establish that sexual acts (either heterosexual or homosexual) are punished when practiced by adults (aged 18 or more) with persons younger than sixteen.

The Panel also asked the Solicitor General's advice in terms of countries in Europe with unequal ages of consent, and received the following response;

*"There are some State parties which have different ages of consent for heterosexual and homosexual intercourse. Such State parties are in breach of the Convention and at risk of being taken before the ECtHR by aggrieved citizens"*<sup>[25]</sup>.

- ii. The basis for different ages of consent in different countries – for example; Belgium 17; France 15; Spain 13 – is such a basis tenable long term?

The Panel received advice from the Solicitor General on this matter, which stated;

*"The question has been raised whether it is discriminatory, and thus contrary to the ECHR, to have differing ages of consent for sexual intercourse in different Member States. There is no principle or rule of law which requires ECHR States to adopt the same provisions in respect of Convention rights as one another. The anti-discrimination provision in Article 14 of the ECHR means that a State cannot discriminate in the extent to which it interferes in the Convention rights of its citizens"*<sup>[26]</sup>.

- iii. The current move by France to raise the minimum age of consent for marriage from 15-18 for girls – the same as for males, and the possibility of Jersey deciding to do the same thing rather than lowering the age of consent to 16.

The Panel was provided with an article by Deputy Fox from “The Connexion”<sup>[27]</sup> – a French newspaper in English, which stated that this move was being supported by the French government in a bid to clamp down on forced weddings. During the Public Hearing the Solicitor General was asked about the situation in France, to which she responded;

*“If the concern of the French Government is that there is a proportion of the population where girls of the age of 16 are being coerced into sexual relationships or marriages that they do not want, then that would be a proper ground because you would be doing it for the protection of the girls.”*

The Solicitor General was also asked during the Public Hearing about the possibility of raising the age of consent for heterosexual intercourse rather than lowering the age for homosexual intercourse, to which she responded;

*“The point I am making there is that it would not be something which could be safely done unless the legislature was quite confident that they had decided that 16 was too low for girls. I do not think that it would be a sufficient answer to say: “We are raising the age for heterosexual intercourse because we do not want to lower the age for homosexual intercourse.” The hypothetical situation you have to think ahead to is the age has been raised, a 16-year-old girl or somebody who is possibly already enjoying some kind of sexual relationship with a 16-year-old girl comes along and complains and says: “You have interfered with the private life of this 16-year-old girl.” To justify the interference it would be necessary to say: “Well, it was necessary and proportionate for the protection of 16-year-old girls.”*

#### Mr Pearce

Mr Pearce sent a letter to the Jersey Evening Post, on the subject of the draft Law. This was published on the 10<sup>th</sup> February 2006. The letter focused upon a perceived distinction between the act of sodomy and the act of procreation, and stated that based upon this distinction;

*“I can see no good reason these acts should necessarily be treated as being one and the same under the law.”*

The letter then stated that; *“Canadian Law discriminates between the act of sodomy, which is legal for consenting participants at the age of 18, and the act of procreation, which is legal at the age of 14, in the majority of its provinces. This discrimination is not based on the sexual preference of the participants as it applies to both heterosexual and homosexual couples alike. As such it is not discriminatory against homosexuals and does not infringe their human rights. It is recognised as legitimate by the International Lesbian and Gay Organisation.”*

The Panel researched the position in Canada, and established that although there is a differential age of consent for heterosexual (14 years) and homosexual sex (18 years), in the Criminal Code this provision has been found to be unconstitutional by three provincial Courts of Appeal<sup>[28]</sup>.

Additionally, the Panel sought the Solicitor General's advice on this point, and the response stated;

*"I qualify my advice by saying that I am not an expert in Canadian Law, have not researched the position and am not able to advise the Panel as to what the law of Canada is on the point. I do not think that it is necessary to do so. The ultimate authority in this area of law for Jersey is the ECtHR. The ECtHR has repeatedly found that to apply a different age of consent for heterosexual intercourse ("the act of procreation") and homosexual intercourse ("the act of sodomy") is discriminatory within the meaning of Article 14 in the interference of the State in the right under Article 8 to respect for one's private life"<sup>[29]</sup>.*

During the Public Hearing the Solicitor General was once again asked about the relevance of the situation in Canada, to which she stated;

*"Yes. I do not think that it can be. If it is the same as the European Court of Human Rights, then it is superfluous. If it is different, it is irrelevant."*

The Panel also contacted the International Lesbian and Gay Organisation who categorically denied making the aforementioned statement.

In a subsequent email Mr Pearce posed the following questions -

*"Currently we have no age of consent for same sex females. Therefore has due consideration been given to whether there would be grounds for a heterosexual female to bring a case before the ECHR on the grounds of discrimination over sexuality?"*

*Should a fourteen or fifteen year old girl take such a case and succeed would we not then be forced to lower the age of consent for heterosexual males and homosexual males to match?"*

The Panel once again sought the Solicitor General's advice on this issue, and received a response which stated<sup>[30]</sup>;

*"Although lesbianism is not, in my opinion, a specific offence, the committing of an indecent assault or an act of indecency by a person of whatever sex with or on a person under the age of sixteen of whatever sex is an indecent assault for which the person under the age of sixteen is not able to give consent.*

*In other words, the position with regard to lesbian sexual activity is the same by the customary law as the position with regard to heterosexual intercourse has been made by statute. That means that the potential issue raised by Mr Pearce cannot arise."*

The Panel received a further email from Mr Pearce stating that he had made enquiries to the head of a cross-party working group on offshore dependencies. However, Mr Pearce was not willing to make this information available to the Panel, and so the Panel was unable to respond to these enquiries.

#### Deputy Reed

Deputy Reed's submission covered a number of legal issues which are covered by the

Solicitor General's Fourth Addendum to the Scrutiny Panel (see section 5.2).

In relation to the health issues raised by Deputy Reed, the Panel's view was that these matters were outside its remit except in so far as medical evidence had been used by the ECHR in its consideration of previous cases on the issue of age of consent (Sutherland -v- United Kingdom and the Austrian cases - see section 5.4). These cases showed that, whilst in the past, up to the mid 1990s, governments accepted the position that medical evidence supported a differing age of consent, the Court no longer accepted that this argument for discrimination was valid.

Deputy Reed suggested that the most recent medical evidence had changed the situation and maintained that medical evidence supporting the change in the law was at least 8 years old. This statement appears to be related to the fact that the main source of such evidence is the Sutherland case and the debates in Westminster in 1998/99. The Panel is not aware of evidence that medical opinion in this respect has changed since that time and, indeed, it was not within its terms of reference to carry out research into this area. However, it should be pointed out that the latest case considered by the Court was dated 2006 and the Panel was not aware of any evidence that the view of the Court regarding discrimination on the grounds of age of consent has changed.

Deputy Reed referred to concerns expressed by the NSPCC over the implementation of the United Kingdom Sexual Offences Law in a statement dated June 2004. The Panel noted that these comments were in relation to the issue of child protection following the Bichard enquiry into the Soham murders. The statement called for further protective measures to deal with adult sex with teenagers under the age of 16 and was not related to the issue of age of consent for homosexuality. Therefore the inclusion of this statement in Deputy Reed's submission must be set alongside the NSPCC statement included in the submissions to the Panel expressing support for equalising the age of consent, together with the establishment of 'abuse of trust' legislation.

Deputy Reed referred, under the heading Legal Issues, to an article from the Interpol website under the heading Sexual Abuse. The Panel noted that this article is about predatory child sex offenders, including sexual grooming by paedophiles. The article makes no specific reference to homosexuals. Although the article supports the case for abuse of trust legislation, it has no direct relevance to the age of consent issue.

In his summary Deputy Reed refers to the lack of consultation on the question of age of consent:

*What hasn't been proven is that the preferred option as promoted by the Minister is the right one.*

*No consultation has taken place including Parents and children alike including our own Youth Council.*

*No report has been provided from our own Medical Health department or indeed our local General Practitioners.*

*Agencies such as Brook and ACET, haven't been consulted.*

*No comments or supporting evidence have been provided by the Child protection Unit.*

*Furthermore no covering papers have been provided on the implications of any of the proposed changes to the Law.*

*No comments have been provided from Education explaining what effect a change in the law will mean and the implications regarding sex education in schools.*

*And finally, no information has been provided on current and future funding and resource*

*requirements relating to the existing Sexual Offences Law and the proposed changes.*

The Panel reiterates that it was not in a position to call the Medical Officer of Health, Brook, ACET or the Child protection team as these bodies are outside the remit of the enquiry. The Social Affairs Scrutiny Panel took the view that it was for the Home Affairs Minister to make any relevant consultation and enquiries.

Similarly, the Panel believes that questions regarding funding and resource requirements should properly be put to the Minister.

## **7. Abuse of a position of trust legislation**

The United Kingdom incorporated provisions of abuse of a position of trust legislation into the Sexual Offences Act 2003 (sections 16-24). These provisions were incorporated following the introduction of an inter-departmental working group, led by the Home Office, in order to look at further possible measures to protect 16 and 17 year olds who may be vulnerable to abuse by those in a position of trust such as carers, teachers and leaders of organised residential activities<sup>[31]</sup>. Please see Appendix 4 or the Scrutiny Web site for a copy of the United Kingdom's Sexual Offences Act 2003 (sections 16-24).

The working group produced an interim report which proposed a new criminal offence directed at sexual abuse by those in positions of trust. It also recommended strengthening codes of conduct to protect those at risk of such abuse. The view of the working group was that sexual activity was inappropriate within relationships of trust, not only because the power differentials made consent problematic, but also because sexual relationships were incompatible with the ethical and moral responsibilities owed by those in positions of trust.

The introduction of these provisions made it an offence for a person aged 18 or over -

- (a) to have sexual intercourse (whether vaginal or anal) with a person under that age; or
- (b) to engage in any other sexual activity with or directed towards such a person,

if (in either case) he or she was in a position of trust in relation to that person. It was a defence to prove that, at the time of intercourse or sexual activity, the accused did not know and could not reasonably have been expected to know, that the person involved was under 18 or was a person in relation to whom he/she was in a position of trust<sup>[32]</sup>.

The Scrutiny Department received an email on the 27<sup>th</sup> January 2006, from **Senator Kinnard**, Minister for Home Affairs, stating that;

*"I put forward the proposals that the better way of taking account of the genuine concerns of*

*States Members in respect of the abuse of trust was to incorporate the provisions of Sections 16-24 of the United Kingdom's Sexual Offences Act 2003 into the Sex Offenders Law."*

Following this correspondence, an extract from **Council of Ministers** minutes of the 9<sup>th</sup> February 2006 stated the following;

*"The Council was advised that Senator W. Kinnard, the Minister for Home Affairs was seeking a definitive legal opinion regarding whether it would be possible to include provisions relating to the abuse of trust within the draft Law, or to bring forward separate legislation to address the issue, and she agreed to keep the Council apprised of any developments."*

During the Public Hearing, **Senator Kinnard** was asked questions concerning the introduction of abuse of position of trust legislation, and stated;

*"I do not think that this is a difficult job. I think that it is fairly straightforward and that is why I am more than happy to undertake to bring something back to the House this year. In fact, because I consider this to be such an important issue in terms of reassuring Members, I would be prepared to put it to the top of my law drafting agenda and other things may have to slip if necessary."*

When **Senator Kinnard** was asked if she thought the Sexual Offences (Jersey) Law 200- and the Sexual Offenders (Jersey) Law 200- could go through the House at the same time, she stated;

*"I do not and I tell you why: because although I think it is a fairly simple matter, as you say, people wish to comment and that will all take time. There is time pressure on living up to our international commitments in terms of the amendment, in terms of lowering the age of consent."*

During the Public Hearing, the **Solicitor General** was asked the following question;

*"The Minister for Home Affairs at a hearing just a week ago said the Abuse of Trust legislation would not be complicated to draft because there are some very good models. Would you agree with that?"*

To which she provided the following response;

*"Yes. Obviously I am not a law draftsman and perhaps I should not be answering questions for the law draftsmen. I would have thought it would not have been complicated or not excessively complicated."*

A submission to the Panel from **Deputy Fox** stated;

*The UK legislation provides additional safeguards to protect young people from older predatory males. Although it is the intention of the Home Affairs Minister to introduce such legislation to the States, why has such legislation not been brought forward to be in place prior to the States being asked to ratify this Sexual Offences legislation? I believe that the States should defer bringing this Sexual Offences (Jersey) Law legislation until such safeguards have been brought into place before any further considerations are made."*

The Scrutiny Panel received a submission from **Mr Bellows** on the 2<sup>nd</sup> March 2006,

supporting the introduction of abuse of position of trust legislation into the Draft Sexual Offenders (Jersey) Law 200-. The submission outlined the relevant provisions in the United Kingdom law, and went on to say;

*“I would be re-assured by changes to the Jersey Law if it ensured that – like the UK Law went for a complete package of reform **with safeguards** rather than relying on segments of antecedent laws which may or may not prove adequate to fit with the piecemeal approach, and may in fact leave some people in society more vulnerable than they need be.”*

#### The provision of abuse of position of trust legislation in other jurisdictions

As part of the Review process, the Scrutiny Panel contacted other nearby jurisdictions to establish whether they were including abuse of position of trust legislation into the reform of their age of consent laws.

#### **Guernsey**

At the time of writing the report, Guernsey was in the process of carrying out a comprehensive review of sexual offences legislation and one issue which was being addressed was the age of consent for homosexual acts. The current age of homosexual consent in Guernsey is 18.

In terms of the incorporation of abuse of trust legislation into the reform of their law, the Panel was informed by the Law Officers chambers, on behalf of the States of Guernsey that;

*“There are no offences referring to the term ‘positions of trust’ expressly but I anticipate this has been asked because in the Sexual Offences Act 2003 a new set of offences by persons in a position of trust have been created and indeed we are looking at whether to introduce such offences.”*

#### **Isle of Man**

At the time of writing the report the Isle of Man was similarly in the process of amending its Sexual Offences legislation. In addition to equalising the age of consent for homosexuals and heterosexuals, the Sexual Offences (Amendment) Bill included two new offences<sup>[33]</sup> (a copy of this Bill can be found at Appendix 5):

- i. Abuse of a position of trust; and
- ii. Meeting a person under 16 following sexual grooming

The Panel received an email confirming the situation in the Isle of Man, which stated;

*“The only measure in this Bill that has proved to be at all contentious is the repeal of section 38 of the Sexual Offences Act 1992. This is our equivalent to the UK’s controversial, and now repealed, “Section 28”. Although repeal of section 38 was not included in the Bill as promoted by Government, it was brought forward as an amendment by a backbench Member and was supported by 12 votes to 9 at Clauses Stage.”*

The reference in this correspondence was to Section 28 of the Local Government Act, 1986 of the United Kingdom which states –

1. A local authority shall not:
  - a. intentionally promote homosexuality or publish material with the intention of promoting homosexuality
  - b. promote the teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship
2. Nothing in subsection (1) above shall be taken to prohibit the doing of anything for the purpose of treating or preventing the spread of disease

The Panel asked the **Solicitor General** whether Jersey had an equivalent to the above, and the following response was received;

*“There is in Jersey no customary law or statutory equivalent of these provisions.*

*Article 16 of the **Education (Jersey) Law, 1999** empowers the Minister for Education, after consultation with the Jersey Curriculum Council, to establish a Jersey Curriculum. This curriculum must specify different stages in the education of a child of compulsory school age and the subjects which a child must be taught at any particular stage in his education, and may specify a range or ranges of subjects that a child may elect to be taught in cases in which all or any of its requirements are to be dis-applied or modified. It may also specify the matters, skills and processes which must be taught to children of different abilities and maturities at any particular stage of their education.*

*I am not in a position to say what, if anything, the Jersey Curriculum contains in respect of teaching on the subject of homosexuality. I am seeking to obtain a copy of the Jersey Curriculum. If it appears to me that there is anything relevant in it, I will draw that to the Panel’s attention.”*

In an addendum to this advice, the **Solicitor General** stated;

*“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.”*

Similarly, the **Solicitor General** was asked at the Public Hearing if she considered there to be anything relevant in the Curriculum, and she stated that there was not.

#### **Comment**

The Panel believes that there is no alternative but to approve the Draft Sexual Offences (Jersey) Law 200-. However, in the United Kingdom the age of consent was only reduced after position of trust legislation was presented at the same time and in light of evidence received during the scrutiny process, the Panel considers that a similar approach should be taken in Jersey. The Panel is of the opinion that a delay in the passing of the Draft Sexual Offences (Jersey) Law 200- would be justifiable and would in any event be minimal as there

is legislation already in place in the United Kingdom and the Isle of Man which could be used as a suitable model for the Jersey Law (see Appendices 4 and 5). Furthermore, the delay cannot be justified on the grounds of the fact that there is a case against Jersey pending in the ECtHR as this case will still be actionable. (Section 5.1.2)

## 8. Conclusions

- The Minister for Home Affairs was unprepared, at the time of the States debate, for the level of unease and concern held by many States Members over the proposed implementation of the Sexual Offences (Jersey) Law 200-, particularly with regards to the age of consent for young homosexual males. (Section 2)
- The Law was presented for debate by the Minister for Home Affairs without the necessary broad consideration of issues involving health, education and the protection of a group of potentially vulnerable young people. (Section 2)
- The Home Affairs Committee inherited the draft Sexual Offences (Jersey) Law 200- in July 2005, from the Legislation Committee, who had approached the request to amend the Island's legislation from a purely legal point of view. This was understandable due to the limited resources at their disposal. (Section 2)
- Submissions to this review have shown that there are many interested parties, such as Brook, ACET and the NSPCC who could have had a relevant input prior to the debate. (Section 3b and 6)
- The European Convention on Human Rights is binding in the United Kingdom and Jersey under international law. If the European Court of Human Rights were to find Jersey in breach of the ECHR, then the United Kingdom must ensure that Jersey takes action to rectify any deficiency in internal laws or practices so as to bring them in line with the Convention. (Sections 4.1; 4.4; and 5.1)
- As Jersey law currently provides for a different age of lawful consent for homosexual acts compared to heterosexual acts Jersey is currently in violation of the European Convention on Human Rights and is in breach of Article 8 (respect for private life) and Article 14 (non-discrimination). (Section 5.2 - Memorandum of 17<sup>th</sup> February, paragraphs 7-12 and 5.4.1)
- In the event of the Island's non-compliance and this issue becoming a source of embarrassment to the UK in terms of its relationship with its European partners, the evidence as to whether the United Kingdom would in fact or could in fact legislate on the Islands' behalf is clearly divided. (Section 4.4 and 5.1.1)
- A small number of correspondents and witnesses have suggested that the Island could consider denouncing from the ECHR. Evidence shows that taking such steps is not a valid option, nor is it desirable. In any event, this could not be achieved retrospectively and any actions in respect of the current breaches could still be brought before the ECtHR. (Section 5.1.2)
- The Panel considers that having voluntarily asked the UK to sign up to the ECHR on its behalf, the Island has a responsibility to honour its resultant commitments and obligations. (Section 4.1 and 5.1.2)
- The Panel recognises the urgency to comply with ECHR, but on balance this urgency

does not override valid ethical and social concerns which appear to have been superseded in pursuit of the aim of satisfying the principles of non discrimination. (Section 3b and 6)

## **9. Recommendations**

The Panel recommends that;

1. The States approve the Draft Sexual Offences (Jersey) Law 200-.
2. The Minister for Home Affairs presents appropriate legislation to introduce abuse of position of trust provisions, and that this is debated prior to the Sexual Offences (Jersey) Law 200-.
3. In future if a Minister inherits draft legislation from outside their Department they should ensure it is reviewed appropriately before being brought before the States for debate.

## 10. Appendices

All the items in the appendices are available on the Scrutiny Web site  
[www.statesassembly.gov.je](http://www.statesassembly.gov.je)

or may be obtained in hard copy from the Scrutiny Office, Morier House,  
upon request (Tel: 502080)

1. Draft Sexual Offences (Jersey) Law 200- (P196/2005)
2. Written submissions received -
  - a. Mr J Jones
  - b. Brook Jersey
  - c. Jersey Youth Reform Team
  - d. ACET
  - e. Advocate Lakeman
  - f. Deputy Fox
  - g. NSPCC
  - h. Progress Jersey
  - i. Jersey Youth Reform Team response to Progress Jersey
  - j. Deputy Reed
  - k. Mr T Bellows
  - l. Mr D Pearce
3. Advice from the Solicitor General -
  - a. Letter of 23<sup>rd</sup> January 2006
  - b. Letter of 24<sup>th</sup> January 2006
  - c. Letter of 25<sup>th</sup> January 2006

- d. E-mail of 13<sup>th</sup> February and Memorandum of 14<sup>th</sup> February 2006
  - e. Memorandum of 17<sup>th</sup> February 2006
  - f. Addendum of 21<sup>st</sup> February 2006
  - g. Second Addendum of 22<sup>nd</sup> February 2006
  - h. Third Addendum of 24<sup>th</sup> February 2006
  - i. Fourth Addendum of 6<sup>th</sup> March 2006
- 4. United Kingdom's Sexual Offences Act 2003 (Sections 16-24)
  - 5. Isle of Man's Sexual Offences (Amendment) Bill, Protection and Rights, Information Paper (2005)

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[1] Legislation Committee Minutes, Act A1, 15/06/05.

[2] Act of the States of Jersey, 30/10/51.

[3] Solicitor General, Summary of Advice to the Scrutiny Panel, 17/02/06.

[4] Whitehead, R. (2000). Human Rights: Coming Home to Jersey? *Jersey Law Review*, 4, 13.

[5] Minutes of the States of Jersey, Sodomy Legislation Statement, 24/04/90.

[6] Le Rendu, L. (2004). *Jersey: Independent Dependency? The Survival Strategies of a Microstate*, Trowbridge: ELSP, 69.

[7] Thorp, A. (1999). *The Sexual Offences (Amendment) Bill: 'Age of consent' and abuse of a position of trust*, House of Commons Research Paper 99/4, 1-57.

[8] Thorp, A. (1998). 'Age of Consent' for Male Homosexual Acts, *House of Commons Research Paper 98/68*, 15.

[9] The Royal Commission on the Constitution. (1973). *HMSO*, Cmnd. 5460, HMSO: London.

[10] Jowell, J. (2001). The Scope of Guernsey's Autonomy – A Brief Rejoinder, *Jersey Law Review*, 5, 271.

[11] *op. cit.*, Le Rendu, 91.

[12] *op. cit.*, Le Rendu, 91.

[13] *op. cit.*, Le Rendu, 61.

[14] *ibid.*, 61.

[15] *ibid.*, 63.

[16] Department for Constitutional Affairs. (2002). Retrieved March 1, 2006, from <http://www.dca.gov.uk/constitution/crown/govguide.htm>

[17] Solicitor General, Summary of Advice to the Scrutiny Panel, 17/02/06.

- [18] Solicitor General, Memorandum, 20/03/06
- [19] Human Rights (Jersey) Law 2000.
- [20] Solicitor General, Summary of Advice to the Scrutiny Panel, 17/02/06.
- [21] Case of Sutherland v. United Kingdom, Application No. 25186/94.
- [22] Case of L and V v. Austria, Applications No's. 39392/98 and 39829/98.
- [23] Case of SL v. Austria, Application No. 45330/99.
- [24] Case of RH v. Austria, Application No. 7336/03.
- [25] Solicitor General, Summary of Advice to the Scrutiny Panel, 17/02/06.
- [26] Solicitor General, Advice to the Scrutiny Panel, 17/02/06.
- [27] The Connexion, April 2005, Issue 30.
- [28] Canadian Heritage Human Rights Program: Legal Framework Question 14. Retrieved February 10, 2006, from [http://www.canadianheritage.gc.ca/progs/pdp-hrp/docs/vac-vce/1\\_e.cfm](http://www.canadianheritage.gc.ca/progs/pdp-hrp/docs/vac-vce/1_e.cfm)
- [29] Solicitor General, Summary of Advice to the Scrutiny Panel, 17/02/06.
- [30] Solicitor General, Sexual Offences: Age of Consent Lesbianism, 14/02/06.
- [31] Thorp, A. (1999). *The Sexual Offences (Amendment) Bill: 'Age of consent' and abuse of a position of trust*, House of Commons Research Paper 99/4.
- [32] Solicitor General, Advice to Scrutiny Panel, 25/01/06.
- [33] Sexual Offences (Amendment) Bill Protection and Rights. (2005). *Isle of Man Government*.