

Review of draft legislation on Sexual Offences in Jersey

Summary:

The purpose of the draft Sexual Offences (Jersey) Law 201- (the “draft Law”) is to consolidate most of the sexual offences that fall within various parts of Jersey’s legislation into a single enactment and to address the following deficiencies:

- a) while Jersey’s law provides extensive protection from sexual offending, there are a few types of behaviour that do not amount to an offence that should be criminalised;
- b) certain offences that are in use in Jersey are archaic, in that they are limited to behaviour towards one gender or rely on terminology that it is no longer appropriate to use;
- c) certain offences have inappropriate maximum sentences; and
- d) the definition of ‘consent’ needs to be updated to ensure that it provides appropriate and clear protection for victims, including where they may have consumed alcohol.

The purpose of this consultation is to invite comments on the draft Law before it is submitted to the States of Jersey for debate. The consultation seeks views on particular aspects of the legislation to inform the final stages of the drafting process and ensure that the legislation will provide an appropriate framework for prosecuting sexual offences in the 21st century.

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Date published:
1st September 2017

Closing date:
13th October 2017

Supporting documents attached:
Draft Sexual Offences (Jersey) Law 201-

How we will use your information

The information you provide will be processed by Community and Constitutional Affairs in compliance with the Data Protection (Jersey) Law 2005 for the purposes of this consultation. The States of Jersey may quote or publish responses to this consultation including (*sent to other interested parties on request, sent to the Scrutiny Office, quoted in a published report, reported in the media, published on www.gov.je, listed on a consultation summary etc.*) but will not publish the names and addresses of individuals without consent. Confidential responses will still be included in any summary of statistical information received and views expressed. Under the Freedom of Information (Jersey) Law 2011, information submitted to this consultation may be released if a Freedom of Information request requires it but no personal data may be released. For more information about how we handle data please contact Dr Helen Miles, Director- Community and Constitutional Affairs.

Do you give permission for your comments to be quoted?

1. No
2. Yes, anonymously
3. Yes, attributed

Name to attribute comments to:

Organisation to attribute comments to, if applicable:

Outline of consultation

Sexual offences are a part of our criminal law that deals with the most private and intimate part of life – sexual relationships – when they are non-consensual, inappropriate or wrong. As such it reflects society's view of what is right and wrong in sexual relations.

Although piecemeal change has been made to Jersey's sexual offences law over time, it has not been the subject of an overarching review to ensure that, as a whole, it meets the needs of victims of crime and provides the police and prosecutors with the tools they need to fulfil the expectations of modern Jersey society in relation to such offences.

The draft Law covers the vast range of sexual behaviour that should be criminalised in Jersey. Some matters were left outside the scope of the draft Law, for instance, measures relating to prevention of sexual offending, including safeguarding, notification, restraining, and protection from and travel requirements for sex offenders which have relatively recently been covered by other Jersey laws.

One of the guiding principles was that the criminal law should not intrude unnecessarily into the private life of adults and that most consensual activity between adults in private should be their own affair, and not that of the criminal law. But the

criminal law has a vital role to play where sexual activity is not consensual, or where society decides that children and other very vulnerable people require protection and should not be able to consent.

This new sexual offences law sets out to provide protection to individuals of all genders, and most particularly aims to protect children and vulnerable adults in Jersey from abuse and exploitation, and ensures that abusers can be appropriately punished.

The draft Law circulated for consultation is not the finished article. It is intended that the responses to this consultation will help to ensure that the draft is further developed prior to it being lodged before the States Assembly.

The Minister for Home Affairs intends that the draft Law should be lodged before the Assembly before the end of 2017, with a view to it being debated early in 2018.

We are seeking general comments on the draft Law and particular views on the following four areas of the draft Law:

1. Consent and reasonable belief
2. Offences by adults against children
3. Prostitution
4. Female genital mutilation

Ways to respond

Write to: Sexual Offences Law Consultation
Department for Community and Constitutional Affairs
5th Floor, Cyril Le Marquand House
The Parade, St Helier
Jersey – JE4 8UL

Email: sexualoffenceslaw@gov.je

This consultation paper has been sent to the Public Consultation Register.

Feedback on this consultation

We value your feedback on how well we consult or seek evidence. If you have any comments on the process of this consultation please contact Communications.Unit@gov.je

Department for Community and Constitutional Affairs

Title of Consultation: New Sexual Offences legislation

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The purpose of this consultation is to invite comments on the draft Law before it is submitted to the States of Jersey for debate. The consultation seeks views on particular aspects of the legislation to inform the final stages of the drafting process and ensure that the legislation will provide an appropriate framework for prosecuting sexual offences in the 21st century.

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We aim to conduct a full and open consultation process and to publish all consultation submissions online. If you do not want your response, including your name and contact details, to be published, please state this clearly in writing when you submit your response together with a brief explanation. We will respect your wish for confidentiality as far as possible, subject to the Freedom of Information Law.

Ways to respond

Write to: Sexual Offences Law Consultation
Department for Community and Constitutional Affairs
5th Floor, Cyril Le Marquand House
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E-mail: sexualoffenceslaw@gov.je

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Foreword by the Minister for Home Affairs

Sexual offences are a part of our criminal law that deals with the most private and intimate part of life – sexual relationships – when they are non-consensual, inappropriate or wrong. As such it reflects society's view of what is right and wrong in sexual relations.

One of our guiding principles in developing the draft Law, was that this judgement on what is right and wrong should be based on an assessment of the harm done to the individual (and through the individual to society as a whole).

Globally, the inclusion of a goal on gender equality in the UN Sustainable Development Goals has been a big advance. The goal includes targets to eliminate all forms of violence against women and girls, including trafficking, and to eliminate all harmful practices such as early or forced marriage and female genital mutilation.

One of the priorities for my term in office has been to ensure that we protect our citizens from domestic and sexual violence and abuse. One benchmark we can assess ourselves against to ensure we are doing everything we can to protect citizens from harm is the Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention). Therefore one of my priorities has been to ensure that Jersey can have the effect of the Istanbul Convention extended to it.

Internationally there are a number of conventions, policy instruments and resolutions that guide and complement the Istanbul Convention, and it is my ambition that the island meets these.

Ensuring that our criminal law on sexual offences remains up to date and meets the needs of modern Jersey society is an important aspect of achieving and maintaining compliance with international standards.

The victims of sexual violence are mainly women. The draft Law offers protection and redress, and it also ensures that male victims/survivors are protected too. The draft Law makes special provision for those who are too young or otherwise not able to look after themselves, and offers greater protection to children and vulnerable people. In order to deliver effective protection to all, the law is framed on the basis that offenders and victims can be of any sex. We have recommended that offences are gender neutral in their application, unless there is good reason to do otherwise.

Our other key guiding principle was that the criminal law should not intrude unnecessarily into the private life of adults. Applying the principle of harm means that most consensual activity between adults in private should be their own affair, and not that of the criminal law. But the criminal law has a vital role to play where sexual activity is not consensual, or where society decides that children and other very vulnerable people require protection and should not be able to consent.

The issues that surround the development of this draft Law have therefore been, highly complex. The draft Law itself is concise but the consultation document and explanatory notes have a necessary amount of detail in them in order to clarify some of the more difficult concepts and explain the rationales for the decisions.

This new sexual offences law sets out to provide protection to individuals of all genders, and most particularly aims to protect children and vulnerable adults in Jersey from abuse and exploitation, and ensures that abusers can be appropriately punished.

I would like to thank the members of the team who have undertaken this challenging project.

I welcome any feedback from this consultation and look forward to hearing your thoughts which will all be given due consideration.

Deputy Kristina Moore
Minister for Home Affairs

Introduction

This consultation document will briefly explain the process by which the draft Law has been developed and the objectives and principles that have guided its development. It then highlights aspects of the draft Law that consultees are encouraged to consider and provide written responses to.

This consultation paper is divided into seven sections:

- 1. Background and development process**
- 2. International context**
- 3. Current legislative position**
- 4. Objectives of the draft Law**
- 5. Mode of trial**
- 6. Contents of the draft Law**
- 7. Questions for consultation**

Who should respond?

It is important that any changes to legislation take into account a wide range of views and experience. Therefore, we would like to hear from:

- members of the public;
- legal professionals;
- public bodies delivering criminal justice services;
- victim and witness organisations.

1. Background

The Minister for Home affairs has prioritised the updating of sexual offences legislation in Jersey to address the following four areas:

- a) while Jersey's law provides extensive protection from sexual offending, there are a few types of behaviour that do not amount to an offence that should be criminalised;
- b) certain offences that are in use in Jersey are archaic, in that they are limited to behaviour towards one gender or rely on terminology that it is no longer appropriate to use;
- c) certain offences have inappropriate maximum sentences; and

- d) the definition of ‘consent’ needs to be updated to ensure that it provides appropriate and clear protection for victims, including where they may have consumed alcohol.

The draft Law circulated for consultation is not the finished article. The responses to this consultation will help to ensure that the draft is further developed prior to it being lodged before the States Assembly. The Minister for Home Affairs intends that the draft Law should be lodged before the Assembly before the end of 2017, with a view to a debate early in 2018.

2. International context

There are a number of international conventions and standards that require jurisdictions to have appropriate sexual offences legislation and take action to enforce that legislation and protect people from harm. These include the following International Instruments:

- a) United Nations Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography¹ (“**UNCRC-OP**”);
- b) United Nations Convention on the Elimination of All Forms of Discrimination against Women² (“**UNCEDAW**”); and premise
- c) Council of Europe Convention on Preventing and Combatting Violence against Women and Domestic Violence³ (“**Istanbul Convention**”).

In most respects, Jersey’s existing criminal law complies with all relevant international standards, the principle requirements of which are summarised below for ease of reference.

a) **UNCRC-OP**

UNCRC-OP was extended to Jersey in April 2014. Compliance with UNCRC-OP requires Jersey’s sexual offences law to, amongst other things, prohibit child prostitution and child pornography⁴ including, criminalising with appropriate penalties:

¹ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx>

² <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>

³ <https://rm.coe.int/168046031c>

⁴ Article 1 UNCRC-OP

- offering, delivering or accepting, by whatever means, a child for the purpose of sexual exploitation of the child;
- offering, obtaining, procuring or providing a child for child prostitution;
- producing, distributing, procuring, disseminating, importing, exporting, offering, selling or possessing child pornography⁵.

b) UNCEDAW

UNCEDAW has not yet been extended to Jersey but achieving extension is a policy objective of the Government of Jersey.

Compliance with UNCEDAW requires Jersey's sexual offences law to, amongst other things, include appropriate measures to suppress all forms of traffic in women and exploitation and prostitution of women⁶.

c) Istanbul Convention

The Istanbul Convention has not yet been extended to Jersey, but such extension is a policy objective of the Minister for Home Affairs. Compliance with the Istanbul Convention requires Jersey's criminal law to, amongst other things:

- a) Criminalise:
 - i. engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object;
 - ii. engaging in other non-consensual acts of a sexual nature with a person;
 - iii. causing another person to engage in non-consensual acts of a sexual nature with a third person.
- b) Ensure that consent is given voluntarily as a result of the person's free will assessed in the context of the surrounding circumstances.
- c) Ensure that such acts may also be considered criminal when committed against former or current spouses⁷.
- d) Criminalise any form of unwanted verbal, non-verbal, or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment⁸.

⁵ Article 3 UNCRC-OP

⁶ Article 6 UNCEDAW

⁷ Article 36 Istanbul Convention

⁸ Article 40 Istanbul Convention

- e) Criminalise the intentional:
 - i. excising, infibulating or performing any other mutilation to the whole or any part of a woman’s labia majora, labia minora or clitoris;
 - ii. coercing or procuring a woman to undergo any of those acts;
 - iii. inciting, coercing or procuring a girl to undergo any of those acts⁹.

As noted above, in most respects, Jersey’s criminal laws are already compliant with UNCRC-OP, UNCEDAW and the Istanbul Convention. However, there are some areas, for example, ‘female genital mutilation’, where additional offences or the modification of existing offences is necessary or appropriate in order to ensure full compliance.

3. Current legislative position

Jersey’s sexual offences law currently consists of a mixture of:

- a) customary law offences which have been developed by Jersey’s courts, for example, the offences of:
 - i. rape;
 - ii. indecent assault;
 - iii. sodomy;
 - iv. gross indecency;
 - v. outraging public decency;
 - vi. conduct which is likely to result in a breach of the peace¹⁰;
 - vii. incest; and
 - viii. obscene publications¹¹.

- b) offences created by legislation that has been enacted by the States Assembly, including most recently the Protection of Children (Jersey) Law 1994¹² and Sexual Offences (Jersey) Law 2007¹³ (“**SOJL07**”).

Although piecemeal change has been made to Jersey’s sexual offences law over time, it has not been the subject of an overarching review to ensure that, as a whole, it meets the needs of victims of crime and provides the police and prosecutors with

⁹ Article 38 Istanbul Convention

¹⁰ In some cases this is referred to as a possible alternative offence to that of outraging public decency and as a means of dealing with acts of voyeurism or sex in a public lavatory.

¹¹ The law regarding the customary offence of obscene publications is set out in *Carpenter v Constable of St Clement* [1972 J.J. 2107] <https://www.jerseylaw.je/judgments/jlr/reports/Pages/JLR1972/JLR722107.aspx>. Although it does not appear to have been used for some time, it appears that it might be used at present were a person to show a pornographic film to a vulnerable adult or child.

¹² <https://www.jerseylaw.je/laws/revised/Pages/08.790.aspx>

¹³ <https://www.jerseylaw.je/laws/revised/PDFs/08.860.pdf>

the tools they need to fulfil the expectations of modern Jersey society in relation to such offences.

Elsewhere in the British Isles, there has been reform that is more comprehensive. In England and Wales and in Scotland the law on sexual offences has relatively recently been the subject of comprehensive review, amendment and consolidation, leading to the enactment of:

- a) the Sexual Offences Act 2003¹⁴ (“**the SOA03**”) in England and Wales; and
- b) the Sexual Offences (Scotland) Act 2009¹⁵ (the “**SOSA09**”) in Scotland.

The English and Scottish approach to the codification of sexual offences has also been adopted in Northern Ireland¹⁶, Gibraltar¹⁷, and the Isle of Man¹⁸, and is likely to be adopted in Guernsey¹⁹. As such, the SOA03 and the SOSA09 provided a useful starting point from which the comprehensiveness of Jersey’s legislation has been assessed and developed.

4. Objectives of the draft Law

The objective of the draft Law is to adequately meet the needs and expectations of the police, prosecutors, modern Jersey society and international standards.

The draft Law covers the vast range of sexual behaviour that should be criminalised in Jersey. Some matters were left outside the scope of the draft Law, for instance, measures relating to prevention of sexual offending, including safeguarding, notification, restraining, and protection from and travel requirements for sex offenders which have relatively recently been covered by:

- the Sex Offenders (Jersey) Law 2010²⁰;
- the Sex Offenders (Magistrate’s Court Appeals) Rules 2010²¹;
- the Sex Offenders (Prescribed Jurisdictions) (Jersey) Order 2011²²; and
- the Sex Offenders (Travel Notification Requirements) (Jersey) Order 2011²³.

¹⁴ <http://www.legislation.gov.uk/ukpga/2003/42/contents>

¹⁵ <http://www.legislation.gov.uk/asp/2009/9/contents>

¹⁶ Sexual Offences (Northern Ireland) Order 2008

¹⁷ The Crimes Act 2011

¹⁸ The Sexual Offences Act 1992 and Sexual Offences (Amendment) Act 2006

¹⁹ The 2011 States Report on sexual offences reflects this approach, albeit with some reservations. The LOD has been in touch with the LOD in Guernsey that has confirmed that, subject to consideration by the legislature, the prescriptive approach is likely to be adopted and that draft legislation is likely to be lodged in the near future.

²⁰ <https://www.jerseylaw.je/laws/revised/Pages/23.815.aspx>

²¹ <https://www.jerseylaw.je/laws/revised/Pages/23.815.50.aspx>

²² <https://www.jerseylaw.je/laws/revised/Pages/23.815.60.aspx>

²³ <https://www.jerseylaw.je/laws/revised/Pages/23.815.70.aspx>

These measures will be subject, in due course, to separate consideration.

Structure

There are advantages in taking a similar approach to that taken in the other jurisdictions in the British Isles that have, or are expected to, enact similar sexual offences legislation.

This may enable the courts in Jersey to develop the law of Jersey with the benefit of a body of case law that has been established elsewhere in the British Isles. Secondly, while all sexual offending is very serious, all other British jurisdictions that have enacted modern sexual offences laws have distinguished sexual offences against children or people who lack mental capacity from other sexual offending. This ensures that the gravity of sexual offences committed against a vulnerable member of the community is reflected in the nature of the conviction received.

Some existing sexual offences legislation does already provide specific offences in relation to vulnerable children and adults. For example, abuse of trust provisions in the Sexual Offences (Jersey) Law 2007 and sexual offences against a person with a mental disorder which are contained within the Mental Health (Jersey) Law 2016, which will be brought into force in 2018. It is not proposed that the offences in the 2016 Law should be consolidated into the draft Law.

The draft Law takes a similar approach by organising similar core sexual offences to those codified in other British jurisdictions and distinguishing those where the offences, when committed against children, recognise where the nature of the harm may be different or more serious.

The draft Law has not proposed any new offences without carefully considering whether they are required or whether there are respects in which they might be simplified and improved on. To this end, in a number of respects the draft Law departs from the approach set out in the English and Wales Law and draws on the much simplified and improved provisions of the later Scottish legislation.

For the most part, the draft Law will replace many pre-existing 19th century statutory provisions and some customary offences so that in future most of Jersey's sexual offences will be organised in a single place to ensure that a clear and comprehensive statement of the law will be accessible to members of the public.

Review of the proposed draft Law has raised difficult questions that arise from the proposal to replace existing customary offences with statutory ones, particularly

with regard to the potential for this to change the mode of trial and reduce the maximum sentence.

5. Mode of trial

The current position in Jersey law is that the mode of trial (the method by which a case is heard) in the Royal Court is determined in part by whether the offence arises from customary law or statute:

- a) customary law offences are triable by the inferior number of the Royal Court composed of the Bailiff and two Jurats (a “**Jurat Trial**”) or by a jury (an “**Assize Trial**”) (the defendant has the right to elect for jury trial for customary offences and if he fails to do so, the court will decide the mode of trial)²⁴; and
- b) statutory offences²⁵ are triable by a Jurat Trial only.

At present, where a case comprises a mixture of customary and statutory offences (e.g. indecent assault and an offence of administering a substance with intent to commit a sexual offence under the 1895 Law), those offences must be tried separately, unless the defendant does not elect for a jury trial and the Bailiff determines that the whole of the indictment should be tried at a Jurat Trial. An indictment including a mixture of statutory and customary offences (a “**mixed indictment**”) can pose significant challenges, in particular in relation to sexual offences, as it may in some circumstances lead to certain offences not being pursued or to a victim or witness needing to give evidence twice.

The draft Criminal Procedure (Jersey) Law 201-(which has recently been published for consultation)²⁶ proposes that the trial of all the offences on a mixed indictment should take place together, with the mode of trial being determined by the Royal Court. If the draft Criminal Procedure Law is enacted and brought into force, a mixed indictment would no longer pose the same difficulties as at present. In the meantime, the draft Law makes provision so that, as would be the case under the draft Criminal Procedure Law, the Royal Court may determine the mode of trial for a mixed indictment involving an offence created by the draft Law.

The consequence of enacting a consolidated sexual offences law that replaces customary law offences with statutory offences is that, without further action, the

²⁴ Article 1 of the *Loi (1864) Régplant la Procédure Criminelle*

²⁵ An offence created by statute and not customary law

²⁶ <https://www.gov.je/government/consultations/pages/criminalprocedure.aspx>

defendant would lose the right to elect for trial by jury. However, it has been possible to provide within the Draft Law²⁷ for certain offences to be treated *as if* they are customary offences and thereby preserve the right for the defendant to elect for a jury trial in respect of those offences.

The draft Law has sought to preserve the right to elect for a jury trial, where a statutory offence is either a direct replacement for a specific customary offence (i.e. rape) or where the statutory offence addresses conduct that would be prosecuted as a customary offence at present (i.e. assault by penetration).

We have not drawn a distinction regarding the mode of trial for offences either based on the vulnerability of the victim or means of achieving best evidence. The law already makes separate provision to support vulnerable witnesses and victims and further, enhanced provision will be made in the draft Criminal Procedure (Jersey) Law 201-.

For the avoidance of doubt, all other new offences will be tried by the Jurats. Similarly, the mode of trial for all sexual offences that are heard in the Magistrate's Court or Youth Court will remain, as now, by a judge of the Magistrate's Court sitting alone or with two members of the Youth Court Panel.

6. Contents of the draft Law

The draft Law comprises ten parts. This section of the consultation document details each part:

Part 1 – Interpretation (Articles 1-4) contains provisions concerning the interpretation and application of the draft Law. Some important interpretive points that have been considered are:

- a) consent and reasonable belief;
- b) sexual; and
- c) touching and penetration

a) Consent and reasonable belief (Articles 2 and 3)

These concepts are explained in detail below:

²⁷ Article 4 of the Draft Law

Consent

In most cases, sexual acts between two consenting adults are not offences; whereas carrying out a sexual act without the consent of one of the parties²⁸ will be. The absence of consent is a key element in sexual offences such as rape and sexual assault. Questions about the absence or presence of consent are often the main area of dispute between the prosecution and defence in rape trials.

Therefore, in respect of such offences, a jury will need to decide whether the complainant consented to the particular sexual act in question in order to determine whether an offence has been committed. Accordingly, it is important that there is a common understanding of what “consent” in this context means.

In Jersey, there is currently no statutory definition of “consent”; instead the test as to whether somebody has consented has been set out in case law. The current position in Jersey is that the jury must give “consent” its ordinary meaning. If further clarification is required, the jury can be invited to consider the difference between consent on the one hand, and mere submission on the other. Where such a line is to be drawn should be decided based on the facts of the case²⁹.

A new statutory definition of consent has therefore been provided for within the draft Law. As other jurisdictions in the British Isles have already provided a statutory definition of consent, the development of the statutory definition in the draft Law has been informed by experience from elsewhere (SOA03 and SOSA09)

Recently, these approaches to ‘consent’ have helpfully been described, reviewed and considered by Rt Hon Dame Elish Angiolini DBE QC as part of the Report of the Independent Review into the Investigation and Prosecution of Rape in London³⁰ (the “**Angiolini Report**”).

²⁸ There are sexual offences where consent is not an issue, for example, when certain persons cannot, in law, give consent (for example, children who are deemed unable to provide consent) and certain acts which are considered in and of themselves to be deserving of criminalisation notwithstanding that they were performed by consenting adults (for example, incest).

²⁹ *R v Olugboja* [1981] sets out that the jury, “should be directed that consent, or the absence of it, is to be given its ordinary meaning and if need be, by way of example, that there is a difference between consent and submission; every consent involves a submission, but it by no means follows that a mere submission involves consent... the jury will probably be helped in such cases by being reminded that in this context consent does comprehend the wide spectrum of states of mind to which we earlier referred, and that the dividing line in such circumstances between real consent on the one hand and mere submission on the other may not be easy to draw. Where it is to be drawn in a given case is for the jury to decide, applying their combined good sense, experience and knowledge of human nature and modern behaviour to all the relevant facts of that case.”

³⁰ ‘Report of the Independent Review into the Investigation and Prosecution of Rape in London’, Rt Hon Dame Elish Angiolini DBE QC, 15th April 2015, para 88.

https://www.cps.gov.uk/Publications/equality/vaw/dame_elish_angiolini_rape_review_2015.pdf

The Angiolini Report highlights the criticism of the approach adopted in the SOA03 to the definition of consent. In particular, the content of sections of SOA03 which provides for evidentiary and conclusive presumptions in relation to consent, have been difficult to interpret and fail to provide specific guidance on the application of the law to complainants who have voluntarily consumed alcohol or drugs and who are incapable of consenting as a result. This has led to difficulties in pursuing successful prosecutions because there is uncertainty as to whether the evidential test is met.

The Angiolini Report notes that the SOSA09 had the benefit of learning from the operation of the SOA03 and had sought to address these problems. Therefore, the SOSA09 is cast in simpler and clearer terms, providing that consent means “free agreement” and setting out circumstances where free agreement is absent. Importantly, there is a specific provision concerning a complainant who has consumed alcohol or drugs. The Angiolini Report essentially endorses the SOSA09 approach to defining consent, which makes it clear that the prosecution must prove that the complainant was ‘incapable’ of making a decision to consent to sexual intercourse through the voluntary consumption of drink or drugs and that the defendant did not reasonably believe that the complainant was both capable and consenting.

Given the benefit of the experience in England and Wales and in Scotland, and in particular in light of the recommendations made by Dame Angiolini, it seemed appropriate that ‘consent’ in the draft Law should be defined in a similar way to the SOSA09.

Reasonable belief

An honest and genuine belief by a defendant that the complainant consented (irrespective of whether or not the alleged victim in fact, consented or whether the belief was reasonable) will provide a defence.

This definition gives rise to a number of difficulties:

- a) it permits the subjective views of an alleged perpetrator of a sexual offence to be determinative of whether or not an offence has been committed, irrespective of how unreasonable or irrational their views may have been. This is considered unjust and unfair to the complainant;
- b) due to the subjective element inherent in the honest and genuine belief test, it is questionable whether Jersey is compliant with the Istanbul Convention in this area, which requires that consent, “must be given voluntarily as the

result of the person's free will assessed in the context of the surrounding circumstances"; and

- c) the directions that a judge is able to provide in relation to this definition give little assistance in relation to difficult issues that may arise. In particular, no definitive guidance is available on how to deal with situations where a complainant may have been intoxicated.

As a further point, as highlighted by the Angiolini Report, both the SOA03 and the SOSA09 make it clear that when deciding upon the 'reasonableness' of the defendant's belief in consent, the jury is to have regard to *all* the circumstances at the time, including any steps that the defendant may have taken to establish that the complainant consented.

Similar provision has been made in the draft Law to ensure the question is assessed objectively, and that individuals check that a potential sexual partner is both capable and consenting before engaging in sexual activity.

b) Sexual (Article 1)

Another important definition for the purposes of the draft Law is that used to establish whether an action is "sexual". This definition is relevant to many of the offences within the draft Law, for example, the offence of assault by penetration refers to penetration, which is sexual, and sexual assault refers to touching which is sexual. The importance of this concept is that it distinguishes activity that will be criminal under the new law from other activity that may either be criminal under other enactments or customary law, or indeed lawful.

Looking comparatively at other jurisdictions in the British Isles, in England and Wales, Northern Ireland and Scotland, new sexual offences avoid reference to "indecent" or "indecent", except in relation to offences arising from the making or sharing of pornographic images. For example, each of those jurisdictions now uses "sexual" rather than "indecent" to distinguish assaults of a sexual nature from other assaults. In each of the UK jurisdictions mentioned above the test for whether a particular activity is "sexual" is an objective test of whether a reasonable person would consider the activity to be sexual.

The test in Scotland is simpler than in England and Wales. It simply says that:

"For the purposes of this Act—

(a) penetration, touching, or any other activity,

*(b) a communication,
(c) a manner of exposure, or
(d) a relationship,*

is sexual if a reasonable person would, in all the circumstances of the case, consider it to be sexual.”

Having considered alternatives, the draft Law has taken a similar approach to the SOA09 to defining what is “sexual”.

It is recognised that taking this approach means that the offence of sexual assault will probably be narrower in scope than the existing customary law offence of indecent assault. To take an example, slapping a person’s bottom without consent might be considered indecent, but not sexual in some circumstances by reasonable members of the public.

As indecent assault would have a potentially broader application than sexual assault, the offence of indecent assault has not been abolished. Prosecutors are therefore able to consider when best to use indecent assault or assault instead of sexual assault in relation to particular behaviour depending on the facts of any given case.

c) Touching and penetration (Article 1)

The “touching” of one person by another is an element of several of the offences within the draft Law, as it is in equivalent offences in a number of other British jurisdictions. In the SOA03, the word touching is given a particular non-exhaustive definition, to include touching—

*“(a) with any part of the body,
(b) with anything else,
(c) through anything,
and in particular includes touching amounting to penetration.”*

The SOA03 also specifically provides that references to a part of the body includes reference to a part surgically constructed (including through gender reassignment surgery).

The provision in the SOA03 that provides that touching a person indirectly with an object or through clothing, or with a part of the body that has been surgically constructed appears unnecessary. In particular, it is difficult to see how a court could come to an alternative view, when a narrower interpretation of touching that only

encompassed direct touching of one person's body with a part of another person's (that is not surgically constructed) would lead to absurd results (eg a man who wore gloves or used an implement while assaulting women could not be guilty of sexual assault).

The drafters of the SOSA09 appear to have wanted a more concise definition, though they have then included more detailed provision in each offence where touching is a constituent element to state that touching a person with an implement or through clothing is covered by the offence³¹.

The draft Law does not define "touching" in any broader sense to include touching a person with something (or with a surgically constructed body part) or through clothing as this would fall within the natural meaning of the term 'touching'.

Further, the draft Law does not define touching to include penetration. It is clear that penetration of a person with an object or body part amounts to touching that person for the purposes of the offence of sexual assault, so that that offence can be used in cases where there is doubt regarding the nature of the touching that took place and whether it involved penetration. However we have defined touching (Part 1 Art 1(4)) to include ejaculating semen onto a person and emitting urine or saliva onto a person. We have done this to ensure that those acts can be treated as touching even though they do not involve direct physical contact.

Part 2 – Non-consensual offences (Articles 5-8) details non-consensual offences, consent being defined previously in Part 1, i.e. where one of the parties to a sexual act has not freely agreed to being a part of the sexual act, and the other party does not reasonably believe that the non-consenting party has in fact provided consent.

Part 3 – Offences by adults against Children aged 12 or younger (Articles 9-10) states those offences which are offences due to the age of one of the parties to a sexual act being aged 12 or younger, and the other is an adult. No defence is available even if the offending party is mistaken as to the true age of the child. This provides a safeguard to young children who are regarded as being too young to consent to a sexual act.

Part 4 – Offences by adults against children aged 13 to 15 (Articles 11-12) provides for those offences which are offences due to the age of one of the parties being aged 13 to 15, and the other is an adult. It is a defence to an offence under this Part if the offending party can show that they reasonably believed the child to be 16 years of

³¹ See for instance section 3(2)(c), (d) and (e) of the SOSA09.

age or older. The existence of these offences and the reasonable belief defence, strikes an important balance between protecting children from abuse and ensuring that an adult is not unfairly penalised, particularly where the adult engaged in consensual sexual activity with a person the adult reasonably believes to be aged 16 or older.

Part 5 – Other offences against children aged 15 or younger (Articles 13-18) specifies other offences against children where one or both of the parties are aged 15 or younger. Part 5 also handles the specific scenario of both parties being children (under 18), but one or both of the parties being under the age of sexual consent (16).

The approach adopted deals with the challenges of balancing the need to protect children under the age of 16 from sexual exploitation with the need to ensure that the criminal law does not unnecessarily penalise children or prevent them from seeking guidance about sexual health and relationships. Some of these challenges arise because the criminal law needs to address relations which are consensual between parties of the same or very similar ages, and where the age of one or both of the children concerned (e.g. a 17 year old having sexual relations with a 13 or 14 year old) might suggest there is a higher risk the relationship is exploitative.

Part 6- Abuse of Trust Offences against persons aged 16 or 17 (Articles 19-21) makes provision for those offences which arise due to the presence of a defined relationship between an adult and a child which creates a position of trust on the part of the adult towards a particular child. This list of defined relationships has been brought forward from **SOJL07**, with the addition of a ‘coach’ in light of the clear deficiency in the law as brought to the attention of the public on the exposure by global media of a number of high level coaches abusing their positions of trust.

This area may be subject to development in due course in line with a number of developments which Jersey, and possibly England and Wales, are in the process of undertaking. Jersey is currently in the process of introducing a Safeguarding Vulnerable Groups Law and Regulations, which, for the purposes of the draft Law, will clearly define which occupations are deemed to be ‘regulated activity’. Adopting provisions from the new Safeguarding Vulnerable Groups Law will allow for a simpler definition for the purposes of defining which roles fall under a ‘positions of trust’. Also, the NSPCC has argued for an updated statutory definition for a ‘position of trust’ which is much wider and broader than the current definition, and which seeks to go much further than was originally envisaged for this offence. It is therefore appropriate at this point for Jersey to adopt the approach from the **SOJ07**, with the addition of ‘coaches’. The draft Law has been drafted so that if deemed necessary, it can be updated in accordance with the new provisions within the Safeguarding

Vulnerable Groups Law and Regulations, and should England and Wales adopt a new approach, then consideration of their new approach can also be reviewed and applied as appropriate to the draft Law.

Part 7 – Prostitution Offences (Articles 22-28) details those offences that relate to prostitution. Prostitution itself is not illegal; it is the conduct of both the prostitute and the person to whom the prostitution service is provided which can constitute an offence under the draft Law.

Laws in England and Wales as well as Scotland still provide for laws in relation to 'brothels'. The issue with legislation concerning itself with the concept of brothels is that the concept is largely outdated. Continuing with such an approach is not in the best interests of the needs of 21st century Jersey. As such, those aspects of what can traditionally be considered a brothel, which need to be managed by law, have been carefully crafted into the provisions under Part 7, without importing the unnecessary and potentially confusing element of maintaining the old concept of a 'brothel'.

Part 8- Female Genital Mutilation Offences and Orders (Articles 29-34) provides for those offences related to female genital mutilation ("**FGM**"), introduced so as to comply with the Istanbul Convention.

Part 9 – Miscellaneous Sexual Offences (Articles 35-41) Provides for miscellaneous sexual offences to include: incest; exposure; voyeurism; bestiality; administering a substance to commit a sexual offence; committing an offence in order to commit a sexual offence; and sexual offences committed outside of Jersey.

Part 10 – Repeals, Amendments and Final Provisions (Articles 42-47) sets out the repeals and amendments to existing legislation in light of the contents of the draft Law.

Consultation Questions

While consultees' views are welcome on any aspect of the draft Law, views are sought on the following topics:

1. Consent and reasonable belief

The views of consultees are sought on the interpretation of 'consent' and 'reasonable belief' outlined in Article 2 and 3 of the draft Law.

2. Offences by adults against children

- a) where an offence is committed under Parts 4, 5 and 6, is the defence of 'reasonable belief' an appropriate recourse or would a proximity defence be preferred whereby the offender has to be within a specified age range of the child?
- b) unlawful sexual activity between children is noted as a particularly difficult issue to tackle via statute. Is it felt that the approach within the draft Law deals with this issue adequately? If not, what suggestions might you have as an alternative approach?

3. Prostitution

The views of consultees are sought on the extent of prostitution offences detailed in Part 7 of the Law.

4. Female Genital Mutilation

Does the list provided under Article 32 in Part 8 of the Law in relation to those persons who must report suspected FGM on children, seem appropriate, or should certain persons be added or removed from this list?

Feedback on this consultation

We value your feedback on how well we consult or seek evidence. If you have any comments on the process of this consultation (as opposed to the issues raised) please contact Communications.Unit@gov.je