

Department for Community and  
Constitutional Affairs

***Sexual Offences (Jersey) Law 201-***

Response to Consultation

## **Introduction**

The Sexual Offences (Jersey) Law 201- was published for public consultation on 1<sup>st</sup> September 2017 which ran for an eight week period until 13<sup>th</sup> October 2017.

The purpose of 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 the consultation was to invite comments on the draft Law before it is submitted to the States of Jersey for debate. The consultation sought 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 21<sup>st</sup> century.

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

- a)** Consent and reasonable belief – Article 2 and 3 of the draft Law
- b)** Offences by adults against children – Article 9 to 21 of the draft Law
- c)** Prostitution – Article 22 to 28 of the draft Law
- d)** Female Genital Mutilation – Article 29 – 34 of the draft Law

A total of 12 individual responses were received for the public consultation and these commented on the topics highlighted as well as other areas of the draft Law. Views were sought from the States of Jersey Police, the Bailiff, the Attorney General and law officers department and magistrates during the drafting of the Law.

Other interested parties including charities and those working within the field of sexual health who were given the opportunity to comment on proposed changes and identify any particular concerns with the proposals.

The report is structured in the following way:

Responses to:

1. Consent and reasonable belief – Article 2 and 3 of the draft Law
2. Offences by adults against children – Article 9 to 21 of the draft Law
3. Prostitution – Article 22 to 28 of the draft Law
4. Female Genital Mutilation – Article 29 – 34 of the draft Law
5. Any other comments

Overall the twelve responses gave thirty-nine comments on various articles. Twenty -seven concerning the articles highlighted, five concerning other articles and seven making other miscellaneous comments.

NOTE: The final draft of the Sexual Offences (Jersey) Law 201- has been altered in response to the consultation and further discussions. Therefore the article numbers have been changed. This document makes reference to the articles as they appeared in the consultation draft of the Law.

## 1. Consent and reasonable belief – Article 2 and 3 of the draft Law

### The current position and what is changing-

- Special provision is made for the interpretation of consent and a definition of “free agreement” is defined.
- Agreement cannot be treated as free in cases of violence (or the threat of violence), unlawful detention, deception (as to the nature or purpose of the act), and impersonation.
- Consent is absent if a person is asleep, unconscious, rendered incapable of consenting by alcohol or any other substance or otherwise lacks capacity to consent (under the Capacity and Self-Determination (Jersey) Law 2016)
- Consent has to be specific for the act concerned.
- Consent can be taken back at any time.
- There are provisions for the interpretation of “reasonable belief” in relation to consent, age or the absence of exploitation including, in particular, whether the accused had taken any steps to ascertain the position, and what those were.

### Responses

There were a total of 8 responses to these articles.

There was broad agreement that the draft Law “*has a relatively simple and clear approach to the definition of consent based on the notion of “free agreement..... the draft Law clearly sets out the circumstances where free agreement is absent. The current draft also takes ..... a reasonable approach to the voluntary consumption of drink or drugs and capability to consent.”*”

The Safeguarding Partnership Board felt strongly that “*no child can consent to their own abuse*” and asked for the inclusion of further articles to clarify that “*agreement to an act by a child is not free agreement*”. The relevant articles were examined and it was agreed that it was sufficiently clear in the present articles that consent by a child was not a defence to the act.

A question about the difference between consent and submission was dealt with by the definition of free agreement, and the specifics around non-consensual acts taking place within any specific relationship were examined and it was felt the draft Law dealt with non-consensual acts regardless of the relationship. Specifics around marriage have not been addressed. (Apart from repealing Article 2(2) of the Marriage and Civil Status (Jersey) Law 2001, which allows a person who is married to someone under 16 (whose marriage is void on the ground that the other party is under the age of 16) not to be guilty of the offence of indecent assault if the offence was carried out when they were married)

Concern was expressed that “*although the proposed definitions of consent and reasonable belief may lead to increased consistency in jury directions*”

*recent experience of rape trials in Jersey and experience in the UK, including Scotland tells us that this does not necessarily translate into consistency in jury decision-making. Jurors' perceptions and personal convictions about complainants and defendants are more relevant to their decision to convict or acquit in rape cases than legal instruction"* The draft Law makes provision for jury trials in article 42, including in cases involving both statutory and customary offences. Paragraph (1) provides for the offences in Parts 2, 3 and 4 to be triable by jury, if the defendant chooses. Otherwise, as statutory offences rather than customary law offences, they would not be triable by jury. Paragraph (2) provides for the Royal Court to decide whether cases should be treated as eligible for jury trial when an indictment contains both sorts of offences

## **2. Offences by adults against children – Article 9 to 21 of the draft Law**

### The current position and what is changing-

- In sexual offences by adults against young children (aged 12 or younger), the child's consent is irrelevant to guilt, as would be any belief by the adult that the child was older.
- In sexual offences by adults against older children (aged 13, 14 or 15), the child's consent is again irrelevant to guilt (and again Article 43 provides for alternative charges), but in each Article there is a defence of reasonable belief that the child was aged 16 or older.
- New offences include:
  - Unlawful sexual acts between children.
  - Causing or inciting a sexual act with a young child and an older child.
  - An adult causing a child aged 15 or younger to watch a sexual act, or be present during a sexual act.
  - An adult sexually grooming a child aged 15 or younger.
  - A person (of any age) paying for the performance of a sexual service by a child.
  - A person (of any age) causing, inciting, controlling, arranging or facilitating prostitution or pornography involving a child anywhere in the world.
- Sexual offences against children aged 16 or 17, where the defendant is abusing a position of trust.

### Responses

There were 8 responses to these articles.

All of the responses agreed that there should be no defence available in respect of offences by adults against children aged 12 or younger "*The age span covers children up to and including primary school age and therefore the cut off at age 12 years reflects society's view that this age group requires special protection.*"

The defence of “reasonable belief” for offences by adults against older children was also broadly accepted as it was felt “*the reasonable belief defence will now need to overcome an objective test.*” In that there is a duty to check a potential sexual partner is both capable and consenting.

There were however some objections to Article 13 which deals with unlawful sexual acts between children. The police felt that a proximity of age defence should be introduced whilst other responses included “*what purpose is served by specifically criminalising and potentially imprisoning teenagers of similar ages for consensual sexual behaviour in private?*” and “*state intervention should be via education and support, not measures which could have extremely negative impact on the lives of the young people concerned.*”

Alternatively another comment felt that the right balance had been struck “*between not unnecessarily penalising young people where they are of a similar age and consenting while recognising that where there is a greater disparity in age the relationship may be exploitative*”

Following a submission from the police, Article 16 has a provision to cover an adult sexually grooming a child that covers on-line communication.

Finally comments were received concerning the abuse of trust articles (Part 6 articles 19-21). Most comments were favourable and pleased that the draft Law included a “coach” as a person in a position of trust. The articles also address the issue of whether the coach is supervised or unsupervised and whether they coach individual children or groups of children.

### **3. Prostitution – Article 22 to 28 of the draft Law**

#### The current position and what is changing-

- Prostitution itself is not made criminal, but particular aspects of it are.
- A prostitution service is defined as a sexual act that is performed by one person for another in return for a payment.
- An offence of paying for a prostitution service performed by another person. Exploitative conduct is defined as deception or coercion (which may include violence or threats).
- An offence of offering or seeking a prostitution service in a road or public place.
- An offence of advertising prostitution services on (or in the immediate vicinity of) a public structure.
- An offence of causing, inciting or controlling prostitution services, in the expectation of gain for anyone.
- An offence of controlling or facilitating entry to premises, knowing (or intending) that the person is entering to receive or perform a prostitution service.
- An offence of letting premises for use for prostitution services, or failing to prevent that use

## Responses

There were 5 responses to these articles.

The views were varied and some were strong but mostly agreeing that criminalising individuals acting as prostitutes was the wrong approach to take. Many favoured less regulation and some favoured criminalising the buying of sex ( sometimes called the Nordic model) although there is evidence that this sometimes drives the whole transaction underground and makes the lives of those selling sex less safe.

### **4. Female Genital Mutilation – Article 29 – 34 of the draft Law**

#### The current position and what is changing-

There is no current position on Female Genital Mutilation (FGM) so all the articles are new and prohibit FGM.

- They create offences,
- require some professionals to report apparent FGM,
- and allow orders to be made by a court to protect persons from FGM.

## Responses

There were 6 responses to these articles.

All were pleased that FGM was being included in the draft Law. Furthermore it was felt that the list of persons who must report suspicion of FGM was suitably comprehensive. One submission asked that we made sure the legislation was in line with the UK law and this has been clarified as the inclusion of FGM in the Law is a requirement by the UK government for ratification of the Istanbul Convention (Council of Europe convention on preventing and combating violence against women and domestic violence).

Some concern was expressed that the law allowed medical practitioners to carry out FGM so the wording of this article has been changed to ensure there is no confusion, while not criminalising legitimate medical procedures.

### **5. Other comments:**

**Article 4 Jury Trials** - Responses were made concerning the extent to which value judgements relating to male and female sexuality still pervade the criminal justice system especially with regard to adult victims of non-consensual sex. Attention was also drawn to provisions for adults with disabilities, the consequences of sex education especially for adults with complex disabilities.

**Articles 5-8 Non-consensual offences** – responses concerning creating an offence of rape, keeping the offence of indecent assault and the relationship that this law will have with the Council of Europe’s Istanbul Convention were all noted. This law will help to provide justice to adult victims of non-consensual sex including against current and former spouses/partners.

### **Conclusion**

The twelve responses received were extremely useful in providing an incentive for a review of the thinking behind the articles in the Law and ensuring the wording was clear and concise.

The final Law will be lodged in January 2018 for debate in the States chamber in March 2018

The Sexual Offences (Jersey) Law team would like to thank everyone who sent in responses to the consultation.