

**HOME DEPARTMENT**  
**SEXUAL OFFENCES LEGISLATION**

The Chief Minister  
Policy Council  
Sir Charles Frossard House  
La Charroterie  
St Peter Port

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Dear Sir

**Executive summary.**

1. It is clear that there is a need to modernise and reform the sexual offences legislation in the Bailiwick. At present, some offences are contained in legislation dating back to 1909, which does not necessarily reflect the patterns of behaviour common in the 21st Century and cannot be readily understood by some members of the community as it is drafted in French. Other offences spring from the common law and have followed the development of their equivalent offences in England and Wales but this cannot continue due to legislative changes in that jurisdiction. Furthermore, inconsistencies (whether based on gender or sexuality) and obsolete terminology are still found in this area of criminal law.
2. In addition to these factors, a clear and coherent framework of offences is required to put in place a robust system for the registration of sex offenders. This system, along with a range of civil orders, would aim to protect members of the public by reducing the risk posed by these offenders and preventing the commission of further sexual offences. This will afford the people of the Bailiwick the same level of protection as exists in other similar jurisdictions allowing the authorities to track and monitor not only residents convicted of sexual offences but also outsiders who enter the Bailiwick.
3. Accordingly, this States Report proposes:
  - (a) new substantive legislation to criminalise inappropriate sexual behaviour which should be sanctioned by the courts,
  - (b) measures to assist and protect complainants or witnesses when attending court, and

- (c) measures to protect the public and reduce the risk posed to vulnerable members of the community, such as a system of registration for sex offenders and a range of preventative civil orders.

#### Background.

4. Sexual offences are, by their very nature, serious offences which can have severe and long-lasting effects on the victim. In conjunction with the common law, both Guernsey and the Bailiwick have introduced legislation over time which has criminalised inappropriate sexual behaviour. Appendix 1 contains a list of the current offences and their sources.
5. As may be gathered by the titles of the *Lois* enacted between 1909 and 1929, the text which creates certain offences is drafted in French. Although that language is spoken to varying degrees by many Islanders, it would be preferable if the offences could be more readily understandable to the majority.
6. In addition, the common law offences of rape, indecent exposure and indecent assault have, in the Guernsey tradition, tended to follow the development of the equivalent offences in England and Wales. However, there was a significant change in the prosecution of sexual offences under English law with the enactment of the Sexual Offences Act 2003 ("the 2003 Act"). By that Act, the equivalent offence was either significantly modified (rape) or replaced (such as indecent assault). Therefore, the incremental development of sexual offences which has served the Bailiwick so well in the past cannot continue and for that reason also new legislation is required.
7. In addition, some inconsistencies based on gender and sexuality exist, for example where the complainant can only be female (e.g. unlawful sexual intercourse) or where an activity is only criminalised on the basis of the sexuality of those involved (e.g. keeping premises for purpose of lewd homosexual practices).
8. Furthermore, due to societal changes and technological advances over the last century, different risks exist and different means of prevention are available and required to ensure that the highest level of protection is achieved for all members of the community, who may have very different lifestyles and expectations.
9. On the basis that the law regarding sexual offences is in need of the reform and modernisation for the reasons mentioned above, the Department selected this as one of its Objectives for the Departmental and Committee Operational Plan Summaries found in Appendix 4 to the States Strategic Plan (Billet d'Etat XIX of 2010). However, as it was clear that the Department would benefit from the input of other relevant States bodies, the Sex Offender Legislation Working Group has met on a regular basis to discuss the proposals set out in this document. Whilst considering the specific requirements of the Bailiwick, the Working Group (which includes Her Majesty's Procureur and representatives of the Health and Social Services Department, the Education Department, the Police and the Probation Service, in addition to those of the Home Department) has considered the relevant provisions elsewhere in the British Islands, particularly the 2003 Act itself.

### The 2003 Act.

10. Based on the recommendations made in *Setting the Boundaries: Reforming the Law on Sexual Offences* prepared by the UK Government Steering Group, this legislation was intended to modernise and strengthen the existing law regarding sexual offences, with an emphasis on protecting children and vulnerable adults. The preferred Home Office policy was to create a wide range of detailed offences rather than more general ones. Notable changes contained in the 2003 Act include the modernisation of the concept of consent, the introduction of discrete offences against children under 13, the criminalisation of sexual activity by children under 16, the increased protection of those suffering from mental disorders and the introduction of breach of trust and grooming offences. The statute reflects the UK policy trend of the last decade by which rules were laid down in the legislation rather than allowing courts to exercise discretion in relevant cases.

### New legislation.

11. In considering the provisions to be included in the new legislation, it is of course important to consider the requirements of the European Convention on Human Rights. Article 8 of the Convention gives every person the right to a private life. However, this is not simply confined to privacy and also includes the right to establish and develop relationships with other people. Accordingly, the criminal law, which is not an arbiter of morals but declares which activities render a person liable to criminal sanctions, cannot prohibit conduct which some members of the community find unsavoury. In addition, Article 14 protects against discrimination in the exercise of the rights guaranteed by the Convention. In this sphere, there would have to be very powerful justification for the criminal law to continue to discriminate on the grounds of gender or sexual orientation.
12. Therefore, the guiding principles behind an effective sexual offences policy include:
- the law should only intervene in situations and in a manner which is fair, necessary and proportionate,
  - the law should not intrude on consensual sexual behaviour between those over the age of consent without good cause,
  - those who induce or encourage children or other vulnerable people to participate in, or be exposed to, sexual behaviour are criminally culpable, and
  - the law must ensure that people who do not have the mental capacity to give informed consent are protected.
13. Although the 2003 Act is a useful starting point, it was drafted to address the needs and concerns of a jurisdiction which has approximately 55 million inhabitants. So, whilst it is suggested that the general themes of the 2003 Act are followed, it is important that sufficient flexibility is allowed to ensure that the needs of the Bailiwick are also met. Accordingly, it is recommended that:
- where an offence is not required, it should be omitted,

- where any offence is unduly complicated, it should be simplified wherever possible, and
- where the 2003 Act has taken a wrong turning, an offence should be re-cast in order to fulfil meaningful objectives for the Islands.

14. It is recommended that the legislation proposed should as far as possible repeal the current offences so that a single law contains most, if not all of, the relevant provisions in this area of law.

#### PART A: SUBSTANTIVE OFFENCES.

15. Part 1 of the 2003 Act makes provision for the non-consensual offences of rape, assault by penetration, sexual assault and causing a person to engage in sexual activity without consent. In addition, it covers child sex offences, offences involving an abuse of a position of trust towards a child, familial child sex offences and offences involving adult relatives, as well as offences designed to give protection to persons with a mental disorder. This Part also makes provision for offences relating to prostitution, child pornography, and trafficking. Furthermore, it provides for preparatory offences, such as administering a substance with intent to commit a sexual offence, and a number of miscellaneous offences, such as voyeurism and intercourse with an animal. The definition of terms such as "consent" and "sexual" are also laid down, and conclusive and evidential presumptions about consent are set out. For the purposes of the 2003 Act, a "child" is a person under 16 years old (and thus below the age of consent), unless stated to the contrary.

#### Proposals.

16. Although it would be possible to consider each offence in turn and make a recommendation on whether it should be retained, simplified, amended or not included, this would not be straightforward nor would it necessarily assist as this would require the discussion of over 70 offences. In addition, it would be unduly restrictive when drafting the new legislation as it is inevitable that some change will be required as this process takes place. It is therefore proposed to make clear the main themes which have emerged whilst making particular comment on areas which are significant or are likely to be of general interest.

#### Non-consensual offences.

17. The first offences found in the 2003 Act are the non-consensual offences of rape, assault by penetration, sexual assault, and causing a person to engage in sexual activity without consent (ss. 1-4). These are intended to replace previous offences such as rape and indecent assault. The elements in common with all of these offences are that the complainant does not consent to the sexual activity which takes place and the defendant does not reasonably believe that the complainant was consenting to that activity. It is of note that specific reference is made to the

reasonableness of the belief being determined having regard to all the circumstances, including any steps that the defendant has taken to ascertain whether the other consents.

18. For a man to be guilty of rape (s.1), it must be shown that he intentionally penetrated the vagina, anus or mouth of another person with his penis, whilst a person of either gender will be guilty of assault by penetration (s.2) if he/she intentionally penetrates the vagina or anus of another person with a part of his body or anything else and that penetration is sexual. A sexual assault (s.3) will be committed if a defendant intentionally touches another person and that touching is sexual, and if a defendant intentionally causes another person to engage in sexual activity, he/she will be guilty of a s.4 offence.
19. As can be seen from these offences, the essence of the defendant's criminality is the fact that he does not reasonably believe that the other person consents. This is obviously a crucial issue and has led to one of the most discussed changes made by the 2003 Act. This key element has traditionally been controversial and the English common law position was described as a "rapist's charter".
20. Previously a defendant was guilty of rape if, at the time of sexual intercourse, he knew that the other did not consent or was reckless as to whether she did. Prior to the 2003 Act the leading case on consent was *DPP. v. Morgan* [1976] AC 182 in which the House of Lords held that a defendant was not guilty of rape where he has an honest belief that the woman consented to sexual intercourse, even if he was mistaken and she did not, in fact, consent. This in essence meant that if a defendant unreasonably but honestly believed that the complainant consented, he could not be convicted of the offence. This subjective approach can be supported by the arguments that the law should punish people not just for what they did but for what they intended to do, and that a person should not be found guilty simply because he did not apply the same personal standards of reasonableness as the tribunal which tried him.
21. However, it has also been argued that a wholly subjective approach implicitly authorises the assumption of consent, irrespective of the views of victims or whatever they say or do, and affords the defendant a defence which is easy to raise but hard to disprove. In addition, the mistaken belief in consent arises in a situation where the cost to the victim of the forced penetration is very high but it is easy to seek and clarify that consent is being given.
22. The 2003 Act contains an objective approach as stated in these offences: a defendant is guilty if he "does not reasonably believe" that the complainant consents. Section 74 defines "consent" as where a person "agrees by choice" and "has the freedom and capacity to make that choice" (s. 74). In addition, it has set out the situations in which there is an evidential presumption that consent was not given (which the defendant can seek to rebut: s.75) or conclusive presumption that it was not given (which cannot be rebutted: s.76). The evidential presumptions include where a person submits because of violence or fear of immediate violence against

themselves or another, where a person is asleep or otherwise unconscious, and where a person submits because they are being unlawfully detained. The conclusive presumptions are where a person was deceived as to the purpose or nature of the act and where the person was deceived as to the identity of the person.

23. It is recommended that the 2003 Act is followed in respect of the issue of consent as it protects both the rights of the complainant and of the defendant, prevents reliance by defendants on outdated myths about sexual behaviour and encourages respect within sexual relationships.

#### Non-consensual offences against children under 13.

24. Another controversial change brought about by the 2003 Act is the discrete offences which can be committed against children under 13 (ss. 5-8). These consist of the offences outlined in paragraph 17 onwards but on the basis that a child under that age cannot consent to a sexual act, the prosecution does not have to prove that the child did not consent. As proof of the act is sufficient to make out the offence, this effectively makes sexual intercourse with a child under that age an offence of strict liability. This was a departure from the Sexual Offences Act 1956, which contained the offences of having unlawful sexual intercourse with a girl under 16 or under 13.
25. It is argued that this does not constitute fair labelling of the conduct, as the criminality of the offence is not necessarily accurately described. As a lack of consent is the element which is generally key in determining whether an offence has been committed, it might be considered unjust for a boy of a similar age to the girl to be prosecuted for "rape" when he had in fact engaged in consensual sexual intercourse. The task of proving non-consent would be made easier by the evidential and conclusive presumptions outlined in paragraph 22 and the removal of these discrete offences would not necessarily mean that young complainants would therefore be required to give evidence of lack of consent. The position of a complainant under 13 (or indeed under 18) would be ameliorated by the proposal that a video-recording of their interview with the Police could stand as their evidence in chief (see paragraph 45).
26. If it was decided that a boy should be prosecuted for consensual sexual intercourse, he could be charged with an offence under s.13, which is the equivalent for offenders aged under 18 of s.7 of the 2003 Act (which criminalises sexual touching, the definition of which includes the act of intercourse). In reality, it may well be that the reforms brought in by Criminal Justice (Children and Juvenile Court Reform) (Bailiwick of Guernsey) Law, 2008 would lead to an appointment with the Child, Youth and Community Tribunal rather than an appearance before the Juvenile Court.
27. It is therefore proposed that these discrete offences should not be included in any Bailiwick legislation.

#### Child sex offences.

28. The second main category of offences (ss.9-12) includes sexual activity with a child, causing/inciting a child to engage in sexual activity, engaging in sexual activity in the presence of a child, and causing a child to watch sexual activity. These do not require the prosecution to prove a lack of consent as they are aimed at protecting children from harm whether or not they have consented.
29. As these offences form the basis for other offences in the 2003 Act, the offences can be explained in the following way: the offence of sexual activity with a child is committed if the defendant intentionally touches a child and that touching is sexual (s.9), whilst a defendant must intentionally cause or incite a child to engage in sexual activity to be guilty of an offence under s.10. Engaging in sexual activity in the presence of a child (s.11) criminalises a defendant who intentionally engages in sexual activity and, for the purpose of sexual gratification, does so knowing, believing or intending that a child who is present or in a place from which the defendant can be observed is aware of that activity. Finally, a defendant who intentionally, and for the same purpose as above, causes a child to watch a third person engaging in sexual activity or look at any image of any person engaging in sexual activity commits an offence under section 12.
30. These offences address scenarios of child abuse and it is clear that such activities should be criminalised. As the Home Office policy was to seek to draft precise but complex offences, it is suggested that these offences could be simplified whilst retaining the protection required by children in the Bailiwick.
31. It should be noted that the 2003 Act provided that a person could only be guilty of an offence under ss.9 to 12 where he was aged 18 or over. However, it also extended these offences to those under 18 but a lower maximum sentence applied in those cases. For the Bailiwick, it is recommended that the age limit should not be included and the courts should be given the discretion to sentence defendants (whether aged under or over 18 years old) on a case-by-case basis.

#### Breach of trust offences.

32. These offences divide into two categories: offences where the breach of trust is committed against children (ss. 16-22) and where it is committed against people with mental health issues (ss. 30-44).
33. The 2003 Act makes an offence for a person aged 18 or over and in a position of trust to commit one of the child sex offences (see paragraph 28) against a person who is under 18 years old. Due to the existence of the offences under sections 9-12, the intention is to provide protection for those aged 16 or 17, who are of course over the age of consent. In general terms, the 2003 Act defines those in a position of trust as professionals who are employed to care for or look after children, for example, nurses, teachers and prison officers (see s. 21). Putting aside the intervention of the criminal law, professionals can be disciplined both by their employer and professional body for any misbehaviour. If a 16 or 17 year old cannot in fact consent, the professional would have committed a non-consensual offence. For the

reasons above it is considered that offences are not required where the breach of trust involves a person employed to care for or look after 16 or 17 year olds. It is proposed that guidelines should be prepared for employers in relation to Breach of Trust.

34. Due to the definition of positions of trust found in the 2003 Act, people who are not paid to care for or look after children such as members of the clergy, scout leaders and school caretakers are not covered by the offence. Some of these people could be disciplined by their employers in any event but given that the typical scenario involving non-professionals has tended to involve abuse of younger children, other offences would be available to prosecute them in that situation. It is therefore proposed that an offence is not required at all where the breach of trust involves a 16 or 17 year old.
35. Various offences were enacted by the 2003 Act to deal with the situation of people with a mental disorder which include (a) offences regarding such people where the disorder impedes their choice, (b) offences regarding such people whereby agreement to sexual activity has been secured by inducement, deception or threat, and (c) offences regarding such people by a care worker. It should be noted that mental disorder is defined by cross-reference to the Mental Health Act 1983 as including mental illness, a state of arrested or incomplete development of mind, and any other disability of the mind.
36. It is clear that protection is required for vulnerable members of the community who cannot consent or cannot make an informed choice due to the circumstances pertaining to a situation. However, at the same time it is accepted that the right to a private life is important in this respect and that healthy and appropriate relationships can be formed in these situations. Practical ways can be found to allow such relationships to take place, for example a carer who might otherwise be guilty of an offence might have to request that their duties be carried out at another location. It is argued that the crop of offences contained in the 2003 Act is unduly complex and could be simplified to assist understanding. As the Mental Health (Bailiwick of Guernsey) Law, 2010 has recently been approved by the States, the new offences would have to interact with that Law. For the avoidance of doubt, and in line with the 2003 Act, it is not intended that any person with learning difficulties could be a complainant for the purposes of these offences, solely because of those difficulties. It is therefore recommended that the new legislation should include offences to protect those with mental health issues from abusive or inappropriate sexual activity.
37. It should be noted that under the 2003 Act (ss.43-44) no offence is committed in respect of care workers where both parties were lawfully married at the time or where a lawful sexual relationship pre-dated the position of trust. This position should also be adopted in the new legislation.

#### Grooming.



38. An area of considerable concern to parents has been the possibility for a paedophile, frequently posing as a young person of similar age and interests, to make contact with their child through the internet and then seek to meet them in order to commit a sexual offence. The offence of grooming under section 15 is largely a preventative one which criminalises meeting or travelling to meet a child under 16, thereby allowing the Police to intervene before any other offence is actually committed.

#### Family members.

39. An offence of incest is a common feature in the sexual offences legislation of many jurisdictions and it was re-enacted in the 2003 Act as penetrating a family member or consenting to penetration (ss.64 & 65). As it is necessary to continue the prohibition contained in the *Loi pour la punition d'inceste, 1909*, it is proposed that these offences should be replicated in general terms. In so doing, it is not intended to extend the classes of relationship covered in the offence so that relationships which are not currently the subject of criminal sanctions would in future be criminalised.

#### Trafficking.

40. As a member of the international community, the Bailiwick must play its part in preventing the trafficking of persons for sexual exploitation. The *Loi relative à la protection des femmes & filles mineures, 1914* criminalised the procuring of a girl or woman to leave the Bailiwick to become a prostitute. Although this is not necessarily a pressing problem in the Islands, it is recommended that offences similar to ss.57 and 59 of the 2003 Act (prohibitions on trafficking persons in and out of the UK) are enacted to ensure that the international sex trade cannot operate here or from here.

#### Prostitution.

41. Current Bailiwick legislation makes it an offence to control, be in charge of or live off the earnings of prostitutes (the *Loi* of 1914, the *Loi ayant rapport à la Protection des Enfants et des Jeunes personnes 1917* and the Sexual Offences (Bailiwick of Guernsey) Law, 1983). The 2003 Act has introduced a variety of offences to protect children from being abused through prostitution (ss. 47-51) and to prevent a defendant from causing or inciting prostitution, controlling prostitution or keeping a brothel (ss.52-54). Despite the complexity of the offences, it is evident that modern legislation is required in these areas, and the new Law should continue these offences.

#### Child Pornography.

42. Although this type of pornography is currently criminalised by the Protection of Children (Bailiwick of Guernsey) Law, 1985, it is recommended that the opportunity is taken to include these offences in a coherent framework, in conjunction with the other exploitative offences of child prostitution.

### Miscellaneous Offences.

43. The 2003 Act also contains provisions dealing with issues including as exposure, voyeurism & intercourse with animals, as well as preparatory offences (e.g. administering a substance with intent). The offence of voyeurism in particular has received academic criticism due to its drafting but it is suggested that these other offences should be replicated in a way that is of benefit to the particular needs of the Bailiwick.

### Sentencing and the discretion for courts.

44. Although the Home Office policy at the time that the 2003 Act was drafted was in many cases to direct or encourage the court sentencing a defendant to pass a certain length of sentence, it is proposed that reasonable maximum sentences should be set which would allow Bailiwick courts to decide on the most appropriate punishment in the light of the facts on a case-by-case basis. For information, the maximum sentences proposed in relation to selected offences discussed above are included in the table in Appendix 2.

## PART B. MEASURES TO ASSIST THOSE INVOLVED IN TRIALS OF SEXUAL OFFENCES.

### Evidence in chief by way of a video recording

45. Since 2008, it has been possible for a court to direct that witnesses are permitted to give their evidence in chief and be cross-examined by way of a video-link on condition that it would be in the interests of justice for the court to so direct (the Live-Link Evidence (Bailiwick of Guernsey) Ordinance, 2008). However, at present it is not possible to play to the court a video recording of the interview of a child complainant given to the trained Police interviewers nearer in time to an alleged sexual offence. It is therefore proposed that where there is an allegation that a sexual offence has been committed, any video recording of the interview of a child complainant should be allowed to stand as their evidence in chief. The benefits of this reform would be twofold:
- it would be likely to reduce the strain felt by the child complainant as it would shorten the amount of time that he or she would be asked questions in court, and
  - the quality of evidence given might well be better as it would have been given to the interviewer in more informal surroundings and would be based on the complainant's recollection of events closer to the time of the alleged offence.
46. In order for such interviews to be admissible, it would be necessary to ensure that Police interviewers were sufficiently trained so as to avoid eliciting unfairly prejudicial material or asking leading questions of the child complainant.

Anonymity of complainants.

47. To ensure that complainants are prepared to come forward and report sexual allegations to the Police, it is recommended that the complainant is given anonymity throughout the court proceedings. This reflects the situation in English law (the Youth Justice and Criminal Evidence Act 1999) and although this rule has been criticised in some quarters, it is contended that the lack of such protection for vulnerable complainants may have a significant effect on the likelihood that the allegation will be reported and that less than the best quality of evidence would be given at trial. This restriction on reporting would prohibit the disclosure of any information which could be used to identify the complainant.

Removal of tocques and gowns where a child is a witness.

48. Giving evidence in court can be a difficult process for many witnesses, especially if a case is heard in the Royal Court where they are surrounded by people wearing formal court dress. Therefore, it is recommended that during proceedings for a sexual offence, the Court should consider, where the interests of justice so require, directing that tocques and gowns should not be worn by any person in court. This again reflects best practice as understood in the Youth Justice and Criminal Evidence Act 1999.

PART C. NOTIFICATION REQUIREMENTS AND CIVIL ORDERS IN RELATION TO SEX OFFENDERS.

49. There has been concern in the Bailiwick for some time that the absence of requirements for sex offenders to register with the Police may make the Islands less secure against sexually inappropriate behaviour. This concern applies to residents convicted of sexual offences as well as outsiders who enter the Bailiwick.
50. The serious effects of sexual offences on victims coupled with evidence that sexually deviant behaviour tends to continue over time have led to the development in other jurisdictions of schemes of registration and monitoring of known offenders. Part 2 of the 2003 Act contains measures for protecting the public from sexual harm.

Background.

51. There is nothing to indicate that the trends of sexual offences committed in Guernsey are substantially different from anywhere else. The type of offence which causes the greatest concern within the wider community is an attack on an unsuspecting person by a stranger. In reality, such incidents are rare and statistics show that most sexual offences are committed by a person known to the victim. Sex offenders display distorted patterns of thinking which allow them to rationalise their behaviour, which include the belief that children can consent to sex with an adult and that victims are responsible for being sexually assaulted. It is these distorted views that can make them an ongoing risk to the

community, and justifies the notification and monitoring requirements which do not apply to other offenders.

The need for local legislation.

52. It is therefore proposed that legislation should be enacted to permit:

- the introduction of a notification requirement for every offender who has been convicted of or cautioned for a relevant sexual offence in the Bailiwick, or is subject to equivalent requirements imposed by another jurisdiction, to provide relevant information to the Police whilst that offender is present in the Bailiwick,
- the introduction of civil orders which would restrict the activities of any person who displays a risk of sexually exploiting children or vulnerable adults, and
- the formalisation of arrangements to assess and manage any person who poses a risk of sexual harm.

53. Any legislation with regard to notification requirements must be compatible with other jurisdictions to allow reciprocal sharing of information and thus the recommendations set out are broadly compatible with the relevant parts of the 2003 Act.

Notification requirements.

54. The collection of the information provided in response to these requirements is popularly known as the "Sex Offenders' Register". The notification requirements oblige any person convicted of or cautioned for a relevant sexual offence ("a relevant offender") to notify the Police of the following personal details:

- date of birth,
- social insurance number,
- name on the date of conviction or caution, and other names used on that date,
- name on the date of notification and any other names used,
- home address on the date of notification,
- the address of any other premises in the Bailiwick at which he/she regularly resides or stays, and
- the address of any premises in the Bailiwick at which he/she has stayed for a period of at least 7 days, or for two or more periods within 12 months which amount to at least 7 days.

55. The legislation will list the relevant sex offences for this purpose and the notification requirements will apply whether the individual has been convicted

or cautioned in respect of such an offence in the Bailiwick, or in any other jurisdiction where reciprocal arrangements are in place.

56. The notification requirements will affect a relevant offender who:

- commits an offence after the commencement of the new legislation, or
- has committed an offence before the commencement of the new legislation and
  - (a) has not yet been dealt with for a relevant sexual offence at the time that the legislation comes into force,
  - (b) is serving a sentence of imprisonment or is otherwise detained, or is subject to a suspended sentence, community sentence or bind over in respect of a relevant sexual offence, or
  - (c) is subject to post-custodial supervision for a relevant sexual offence.

57. It is proposed that a court which convicts a person of a relevant offence will specify the period of notification required of that offender. Unless the court is satisfied that there is an exceptional reason why a shorter period would be appropriate, the period of notification will be at least 5 years. The period of required notification will take into account the likelihood of the person reoffending, and the seriousness of any relevant sexual offence committed. Where a person has been cautioned for a relevant sexual offence, the period of required notification will be 2 years.

58. It is sadly the case that a person under 18 can also pose a risk of sexual harm to others in the community. In the system currently in force in England and Wales, the notification period for any person of that age is automatically reduced to half that of the relevant period for an adult. As the sentencing court will have the discretion to set the notification period where a person is convicted, it is recommended that this ability should not be fettered by the new legislation so that the most appropriate period can be set on a case-by-case basis.

59. It is recommended that it should be an offence to fail to comply with the requirements of notification or to knowingly supply incorrect information, which would be punishable on summary conviction with a term of imprisonment not exceeding 12 months and/or a fine not exceeding level 5 on the uniform scale, or on conviction on indictment with to a term of imprisonment not exceeding 5 years and/or an unlimited fine.

60. The Police would have the power to verify the information that the relevant offender provides on notification by comparing it against information provided to other States Departments such as the Social Security Department, the Health and Social Services Department, the Housing Department and the Environment Department. This information could be retained by the Police but only for the

purposes of prevention, detection, investigation or prosecution of offences to ensure data protection compliance.

61. A relevant offender must notify the Police within 3 days of his conviction or caution (disregarding any period of time when the offender has been remanded or committed to custody, imprisoned or detained). An offender will then be required to notify the Police of the above information on an annual basis. When an offender attends the Police station for notification requirements, a Police officer may photograph the offender and/or take fingerprints. Where the offender is aged under 18, the court may direct that the person with parental responsibility for the offender must comply with the notification requirements in place of the offender.
62. In addition to the information above, an offender will be under obligation to tell the Police of any intention to travel, the details of his destination and accommodation, and his intended date of return to the Island.
63. It is proposed that the new legislation would include provision for appropriate requirements to be made by Ordinance requiring the Prison Governor to notify the relevant agencies, such as Police, Probation, and child protection agencies, when the release of a relevant offender is imminent or when responsibility for the relevant offender is transferred to another party.
64. Responsibility for registering, monitoring, and deregistering offenders will fall to the Police and Probation Service. Based on figures from the past 5 years, there are likely to be between 10 to 16 persons made subject to notification requirements each year. Some will require more monitoring and management than others. As relevant offenders will remain registered for several years it is estimated that the average number being managed at any one time will rise to between 40 and 50.

Persons convicted of sex offences outside the jurisdiction of the Bailiwick of Guernsey.

65. It is proposed that when a person enters the Bailiwick while he is subject to the equivalent of the notification requirements in another jurisdiction, he will commit an offence if he does not notify the Police of the information set out above. It is intended that a Memoranda of Understanding will be entered into with other jurisdictions to ensure exchange of information about sex offenders travelling to and from the Bailiwick. The person will only be required to notify the Police of the relevant information until the expiry of the period for which he must notify in the other jurisdiction.

Sexually aggravated offences.

66. Where an offender has been convicted of an offence, such as burglary or murder, and the court is satisfied that:
  - there was a sexual element to the offence, and
  - the offender poses a risk of sexual harm to the public or any particular person,

the court may designate the offence as "sexually aggravated", which would make the offender subject to notification requirements.

#### Civil Preventative Orders.

67. In most jurisdictions, Police powers have traditionally been reactive to offences which have already been committed but, in the field of sexual offences, crime prevention by active management of offenders in the community is crucial. The existing powers available to the Police are not considered to be adequate to achieve this objective.
68. It is therefore proposed to introduce three civil orders which are preventative in character, constraining the actions of both convicted sex offenders and those who present a risk of sexual harm to others. If a civil order is breached, an offence would be committed and a criminal sanction can be imposed. These three civil orders would only be made where there was an identified risk of serious sexual harm. The orders would be made by a court on the application of the Law Officers of the Crown. Failure to comply with a civil order would be a criminal offence punishable by imprisonment and/or a fine.
69. Furthermore, each person subject to a civil preventative order would be subject to notification requirements for the duration of the civil order, or until it is deemed that the person no longer requires monitoring. Therefore, if an offender was not caught by the new notification requirements and was no longer subject to statutory oversight by Probation or any other related agency but was still assessed as a significant risk, an appropriate civil order could be made and they would therefore be made subject to the notification requirements.
70. The three civil preventative orders, based on those existing in the UK are:

#### A. Sexual Offences Prevention Order.

A Sexual Offences Prevention Order allows a court to restrict the activities of convicted sex offenders who pose an ongoing risk of serious sexual harm to others. It would prohibit the offender from doing anything that the order specifies such as working with or near children, living by a school or visiting children's play areas, or specified use of computer equipment.

#### B. Risk of Sexual Harm Order.

A Risk of Sexual Harm Order can be made in respect of a person over the age of 18, if that person has on previous occasions engaged in sexually explicit conduct or communication with a child and there is reasonable cause to believe that the order is necessary to protect a child from harm. The child must be under 16 and harm includes physical and psychological harm. For this purpose, "sexually explicit conduct" might include making a child watch sexually explicit activity either in person or electronically, and communicating with a child where any part of the communication is sexual. The person concerned need not have a conviction for an offence and thus the behaviour on which the application for a Risk of Sexual Harm Order is based does not itself need to amount to a criminal offence.

The rationale for this order originally arose out of the Home Office Task Force on Child Protection on the Internet, which identified a gap in the law concerning the grooming of children by paedophiles. This civil order can prohibit the person from doing any act, where it was felt necessary to protect a child, a group of children, or children in general. It is suggested that the order should last for a fixed period of at least 2 years or until further notice.

**C. Foreign Travel Order.**

A Foreign Travel Order would enable a court to prohibit a convicted sex offender who has offended against children from travelling abroad if such an order is considered necessary to protect children from serious sexual harm.

**Monitoring and Management of Relevant Offenders.**

71. Provision should also be made in the new legislation so that ongoing assessment and management of all relevant offenders subject to notification requirements is placed on a statutory footing.
72. Multi Agency Public Protection Arrangements (MAPPA) have been in place in Guernsey for over 10 years. Agencies share information about high-risk offenders and devise robust defensible plans to manage the level of risk posed by each individual. The significance of the MAPPA process to the proposed sex offender legislation is that it provides the process by which all relevant offenders are managed.
73. It is proposed that in Guernsey the Home Department is made responsible in law for making arrangements for the assessment and management of the risks posed by sexual, violent and other offenders who may cause significant harm to the public. The key responsible agencies will be the Police and Probation Service in conjunction with the Prison Service where an offender is being released from custody. Responsibilities of other departments such as Health and Social Services, Housing and Social Security who are all crucial to the process will be put on a statutory footing. The Health and Social Services have raised the possibility of potential future resource implications for their Department in this area.

**Data Protection.**

74. The Data Protection (Bailiwick of Guernsey) Law, 2001, contains an exemption which allows the disclosure of personal information for the purposes of prevention, detection, investigation or prosecution of crime under certain circumstances. Introducing notification requirements will create a new statutory body of personal data relating to sex offenders which will in many cases require disclosure to other agencies so that fully informed risk management plans can be put in place. The new legislation will therefore give the Police a positive power to disclose where necessary, rather than relying on the exemption clauses in the Data Protection Law.

**Public disclosure of information regarding persons required to notify.**



75. Some individuals and organisations have argued for public disclosure of the identity and whereabouts of known sex offenders living in the Bailiwick on the lines of 'Megan's Law' in the United States of America. However, it is argued that disclosure takes place only in exceptional cases on a 'need to know' basis in the light of on-going assessment of the risk posed by the registered person. The decision to release information would rest with the Chief Officer of Police or an officer acting under delegated authority.
76. Current Home Office guidelines stipulate that:
- Decisions should be made on the basis of 'an assessment of the seriousness of the risk, of displacing the offending, and of the continuing visibility of the offender and any other operational considerations in respect of the management of the risk posed by the offender';
  - Housing arrangements may be an important factor in assessing and managing the risk, particularly when disclosure might render the offender homeless and potentially increase the risk to the public; and
  - Where disclosure takes place it should usually be to those with responsibility for the protection of others (e.g. head teachers) or to an identified individual or individuals directly affected by the risk of harm, and 'disclosure to a member of the general public will be very much an exception to the rule'.
77. This sparing approach to disclosure aims to strike the appropriate balance to allow the Police to exercise surveillance and for the Probation Service to supervise offenders, or to involve them in treatment programmes which can control their deviant sexual tendencies.

#### Resources.

78. The main resource requirements for implementation of the new legislation will be within the Guernsey Police Force and the Probation Service. These two agencies will work together when planning and providing the new services in order to ensure a common approach to assessments, monitoring, risk management, civil court orders and breaches of notification requirements. It is envisaged that joint protocols, policies and procedures will be developed to ensure complementary and effective practices.
79. The two relevant major new developments in the new legislation are:-
- the requirement to set up a system enabling robust and efficient notification systems and the subsequent monitoring of the registered individuals, and

- the apportionment of statutory responsibilities for the management of risk through Multi Agency Public Protection Arrangements ("MAPPA").

80. The first will require resources provided by the Police and second will require resources from the Probation Service.

#### Police Requirements

##### 81. Notification System – ViSOR (Violent Offender and Sex Offender Register)

ViSOR is the UK national database of all offenders who have sex offender registration conditions imposed upon them following criminal conviction and information on all violent and potentially dangerous people. It is used by Police as an offender management system but also enables access to a wide range of information and intelligence, e.g. to identify potential suspects of violent or sexual offences. Detailed risk assessments are stored on the system and updated regularly, thereby maintaining a history of changes.

The system links 43 UK Police Forces and 42 Probation Services.

The acquisition of this system which will be utilised by both Police and Probation is vital in the successful management of those persons posing a risk to the public.

#### New Requirements – Police Staff Resources

82. One additional Detective Constable will be required to be responsible for managing those individuals who are subject to notification requirements, including home visits and liaison with other forces, carrying out and reviewing risk assessments and risk management plans, ensuring that ViSOR is updated with appropriate information, attending and providing input to MAPPA meetings and applications for civil orders.

#### The Probation Service and MAPPA.

83. Probation Managers have historically chaired all MAPPA meetings on Sex Offenders, having the seniority within the Probation Service to commit resources and sanction decisions. The Police are generally represented by the Public Protection Unit manager and partner agencies are asked to provide a representative of sufficient seniority to make decisions on resources. The Health and Social Services (both Children's Services and Mental Health), Social Security and Housing departments have generally provided senior managers to MAPP meetings when requested to do so.

#### New Requirements – Probation Staff Resources

84. It is considered that an additional post of MAPPA Coordinator is needed to ensure that the MAPP process is efficiently and effectively managed for all sex offenders subject to notification under the new legislation. The role of this new post will be to

ensure that the Home Department responsibility *"to make arrangements for the assessment and management of the risks posed by sexual, violent and other offenders who may cause significant harm to the public"* is fulfilled. The post holder would be responsible for new work generated by the new legislation and the skills required for this post would be those of an experienced Probation Officer operating in close liaison with the Police Public Protection Unit.

In addition an Administrative Officer who would be a shared resource with the Police will also be required to ensure that the notification system is properly managed on a day to day basis.

**85. Total resources that would be required are:**

- One Probation Officer/MAPPA Coordinator.
- One Detective Constable.
- One Administrator for MAPPA.
- ViSOR I.T. installation, hardware and maintenance costs.
- It is intended that the Home Department will include the additional resource requirements as a New Service Development Bid in the States Strategic Plan for 2013.

The total cost of the above resources is £15,000 I.T. set up cost, £15,000 ongoing I.T. revenue cost and £124,000 annual staff cost. A breakdown of these costs is included at Appendix 3.

It is possible that the Department may be required to seek employment related licenses to fill the role of Probation Officer and Detective Constable, or in order to back fill any vacancies created by appointing to these roles.

**Consultation.**

86. The relevant States Departments, the Social Policy Group, Members of the Islands Child Protection Committee and other interested parties have been consulted and their views taken into account, all were supportive of the recommendations.

**Consultation with Alderney & Sark**

87. The States of Alderney and Sark Chief Pleas have been consulted and their views taken into consideration in the drafting of the Report.

**Consultation with the Law Officers of the Crown.**

88. The contents of this report have been discussed and agreed with the Law Officers of the Crown.

**Principles of Good Governance**

89. The proposals made in this States Report are in accordance with the Principles of Good Governance as outlined in Billet D'Etat IV 2011, particularly Principle 1 "focusing on the organisation's purpose and on outcomes for citizens and service users" and Principle 4 "taking informed, transparent decisions and managing risk."

**Recommendation.**

90. The Home Department recommends that the States approve the proposals set out in this Report to:
- a. introduce measures to assist and protect complainants or witnesses when attending court;
  - b. give effect to the introduction of new substantive legislation to criminalise inappropriate sexual behaviour;
  - c. protect the public and reduce the risk posed to vulnerable members of the community, with a system of registration for sex offenders and a range of preventative civil orders;
  - d. direct the preparation of such legislation as may be necessary to give effect to the forgoing; and
  - e. note that the additional funding requirements arising from the proposals set out in this Report will be subject to prioritisation as part of the States Strategic Plan.

**Yours faithfully**

**GH Mahy  
Minister**