

THE STATES OF DELIBERATION
of the
ISLAND OF GUERNSEY

COMMITTEE FOR HOME AFFAIRS

SEXUAL OFFENCES LEGISLATION: SUPPLEMENTARY POLICY MATTERS

The States are asked to decide: -

Whether, after consideration of the Policy Letter entitled "Sexual Offences: Supplementary Policy Matters" dated 6th January 2020, of the Committee for Home Affairs, they are of the opinion to:

1. agree to the inclusion in the projet de loi entitled "the Sexual Offences (Bailiwick of Guernsey) Law, 2020" the offences set out in this Policy Letter including -
 - i. specific offences in relation to complainants under 13, as set out in section 3.3.1 of the report;
 - ii. breach of trust offences to protect 16 or 17 year old complainants, set out in section 3.4.1;
 - iii. an offence of sexual communication with a child, as set out in section 3.5.1;
 - iv. an offence of possession of extreme pornographic images, as set out in section 3.6.1;
 - v. an offence of malicious disclosure of private sexual photographs, as set out in section 3.6.3;
 - vi. specific offences to deal with "upskirting" and voyeurism more generally, as set out in section 3.7;
 - vii. offences in relation to the possession of paedophile materials and child sex dolls as set out in section 3.8.

2. direct the preparation of the necessary legislation to give effect to the foregoing.

The above Propositions have been submitted to Her Majesty's Procureur for advice on any legal or constitutional implications in accordance with Rule 4(1) if the Rules of Procedure of the States of Deliberation and their Committees.

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SEXUAL OFFENCES LEGISLATION: SUPPLEMENTARY POLICY MATTERS

The Presiding Officer
States of Guernsey
Royal Court House
St Peter Port

6th January 2020

Dear Sir

1 Executive Summary

- 1.1 The purpose of this supplementary Policy Letter is to request further policy approval in relation to the draft Sexual Offences (Bailiwick of Guernsey) Law, 2020 (“the draft Law”). During the drafting process, further offences have been proposed and changes have been made from the recommendations which were originally approved on the basis of the then Home Department’s Policy Letter of 10th May 2011 (“the 2011 Policy Letter”)¹.
- 1.2 Whilst the proposals contained within the 2011 Policy Letter primarily considered the UK Sexual Offences Act 2003 (“the 2003 Act”)² the Committee *for* Home Affairs (“The Committee”) has had due regard to relevant legislative developments throughout the British Islands and around the world in the intervening period.

2 Background

- 2.1 The 2011 Policy letter detailed proposals which sought to modernise and reform the sexual offences legislation in the Bailiwick. The recommendations included:
- To modernise and reform sexual offences legislation to provide a clear and coherent framework of offences; and
 - To formalise and extend measures already in place to protect the public and reduce the risk posed to vulnerable members of the community.

¹ [Article IX of Billet D'État XIII of 2011](#)

² [UK Sexual Offences Act 2003](#)

- 2.2 Work initially focused on the second of these two work streams, proposals which would protect the public and reduce the risk posed to vulnerable members of the community. This resulted in the drafting and implementation of the Criminal Justice (Sex Offenders and Miscellaneous Provisions) (Bailiwick of Guernsey) Law, 2013³. The legislation put in place a robust system for the registration of sex offenders and introduced a range of preventative civil orders which would protect the public by reducing the risk posed by those offenders and preventing the commission of further sexual offences. The implementation of this Law in 2015 ensured that the people of the Bailiwick were afforded the same level of protection as exists in other similar jurisdictions providing authorities with the statutory powers to track, manage and monitor those convicted of sexual offences.
- 2.3 The draft Law will provide appropriate modern substantive legislation to criminalise inappropriate sexual behaviour. However, it should be emphasised that, in the meantime, prosecutions have continued to take place under the current provisions as before.
- 2.4 Although the draft Law will introduce more targeted sexual offences legislation, the public should be assured that it is not the case that defendants have been able to escape from prosecution as more general offences have been used to ensure that criminal behaviour has been prosecuted.

3 The draft Sexual Offences (Bailiwick of Guernsey) Law, 2020

- 3.1 The subsequent focus has been on the development of the draft Law which updates (and occasionally translates into English) the current Bailiwick sexual offences legislation. Although the 2003 Act was used as a starting place, the equivalent Scottish sexual offences legislation has also been examined to ensure that the most appropriate provisions were included. Further sexual offences have been introduced in England and Wales since the 2011 Policy letter and it has therefore been necessary to examine whether they should also be included in the draft Law.
- 3.2 In preparing the draft Law it has therefore been necessary to be both cognisant of the issues that have arisen as a result of continuing societal changes and look at the amendments made to the 2003 Act since the drafting of the 2011 Policy Letter to ensure that these are appropriately captured in the draft Law.
- 3.3 **Non-consensual offences against children under 13**
- 3.3.1 In the proposals in the 2011 Policy Letter, the then Home Department (“The Department”) carefully considered the approach of the 2003 Act in relation to

³ [Sex Offenders and Miscellaneous Provisions \(Bailiwick of Guernsey\) Law, 2013](#)

non-consensual offences committed against children under 13. As set out at paragraph 24-27 of the 2011 Policy Letter, the Department did not wish to introduce strict liability offences where defendants could be found guilty of rape even where they were a similar age to a complainant under 13 who could not consent in law but did consent in fact. However, the Department wished to alleviate the position of young complainants giving evidence by introducing improved court procedures which would allow e.g. a previously recorded interview to stand as their evidence in chief and a live-link to be used so that the complainant did not have to enter the courtroom, see Part VIII of the Criminal Justice (Sex Offenders and Miscellaneous Provisions) (Bailiwick of Guernsey) Law, 2013⁴. As drafting has continued and after the consultation took place, the Committee has re-considered whether the fair labelling of offences should prevail over concerns for young complainants and now proposes that specific offences should be introduced in relation to complainants under 13. Where one of the non-consensual offences in Chapter IV of the draft Law is alleged to have been committed against a complainant under 13 (e.g. rape, assault by penetration, sexual assault or sexual coercion), lack of consent will not need to be proved before the defendant can be convicted under an offence in Chapter V of the draft Law. Other offences and avenues (such as the Child Youth and Community Tribunal) would still be available to allow the most appropriate response and the Committee is confident that appropriate discretion will be exercised by the Law Officers when prosecuting cases such as these.

3.4 Abuse of position of trust

3.4.1 As set out at paragraph 32-37 of the 2011 Policy Letter, the then Department did not at that time propose that specific offences should be introduced where consensual sexual activity had taken place between an adult and a 16 or 17 year old where that adult was in a position of trust towards the younger complainant. The rationale for this decision was based on the fact that the young person could consent in law and did so in fact, and that the adult who was in breach of trust could be dealt with e.g. by disciplinary or employment procedures. On reflection, the Committee considers that such procedures would be insufficient to adequately protect 16 or 17 year old complainants and therefore proposes that equivalent offences to those found in sections 16-19 of the 2003 Act should be introduced in the Bailiwick. Accordingly, chapter VIII of the draft Law deals with these offences.

3.5 Grooming

3.5.1 Further consideration has been given to acts of grooming, especially after comments made (by the Youth Commission) during the consultation. The so-called “grooming” offence set out in section 15 of the 2003 Act in fact only

⁴ [Sex Offenders and Miscellaneous Provisions \(Bailiwick of Guernsey\) Law, 2013](#)

criminalises meeting a child after the grooming has taken place. A further offence of sexual communication with a child was inserted into the 2003 Act as section 15A, coming into force in England and Wales on 3rd April 2017. The draft Law therefore includes the new offence of sexual communication with a child at section 26. However, it was not felt that this would necessarily deal with all types of grooming and the Committee has therefore considered legislation in other jurisdictions which would prohibit the act of grooming itself, particularly the offence of grooming for sexual conduct with a child under 16 (contrary to section 49B of the Crimes Act 1958⁵ of the Australian State of Victoria, introduced by the Crimes Amendment (Grooming) Act 2014)⁶. Accordingly, section 27 has been included in the draft Law, which criminalises communication by a person over 18 with a child under 16 (or a person with responsibility for that child) with the intention of facilitating the child's engagement in or involvement with a sexual offence.

3.6 Extreme pornography and revenge pornography

3.6.1 Although the 2003 Act included offences in relation to child pornography, it did not make provision regarding adults in pornographic images. Section 63 of the Criminal Justice and Immigration Act 2008⁷ introduced the offence of possession of extreme pornographic images, which portray in an explicit and realistic way acts which threaten a person's life or might result in serious injury to a person's anus, breasts or genitals, acts which include sexual interference with a corpse and acts of sexual intercourse with an animal. This offence was later widened to include so-called "rape porn" showing non-consensual sexual penetration of a person's vagina, anus or mouth by another person's penis or another item.

3.6.2 The Committee has closely monitored the proposals in the British Islands in relation to extreme pornography (including "rape porn") and proposes that the possession of such materials should be prohibited at section 59.

3.6.3 Further conduct which has been featured in the media has been revenge pornography where a person maliciously discloses private sexual photographs of an ex-partner without their consent and with intent to cause them distress. Section 33 of the Criminal Justice and Courts Act 2015 criminalises this behaviour in England and Wales, and the Committee proposes that the draft Law should also include an equivalent offence at section 65.

3.7 Voyeurism and upskirting

3.7.1 Section 67 of the 2003 Act prohibits voyeuristic behaviour in relation to private

⁵ [Crimes Act 1958](#)

⁶ [Crimes Amendment \(Grooming\) Act 2014](#)

⁷ [Criminal Justice and Immigration Act 2008](#)

acts i.e. observing, operating equipment in order to observe or recording images of another person's genitals, buttocks or underwear whilst that person is carrying out certain activities in private e.g. using a lavatory or a changing room. The Sexual Offences (Scotland) Act 2009⁸ also criminalised this behaviour but additionally included specific offences in relation to children which did not require lack of knowledge to be proved.

3.7.2 In line with the introduction of non-consensual offences committed against children under 13, the Committee proposes to introduce distinct offences of voyeurism in relation to children under 13 (for which the child's lack of knowledge does not need to be proved) and in relation to other complainants (for which lack of knowledge must still be proved). These offences are found at sections 94 and 95.

3.7.3 In addition to the more general offences set out above, the issue of upskirting has also been considered by the Committee, given the passing of the Voyeurism (Offences) Act 2019⁹ in the UK. This Act introduced specific offences to the 2003 Act to criminalise the practice of upskirting, i.e. using equipment to see, or record images of, another person's genitals, buttocks or underwear under that person's clothing without consent.

3.7.4 Although this behaviour can be prosecuted under other offences, the Committee proposes that similar offences are introduced to deal with this conduct, which are found at sections 94 and 95.

3.8 Possession of paedophile materials and child sex dolls

3.8.1 The Serious Crime Act 2015¹⁰ introduced a new offence of possession of a paedophile manual, which is defined to include any item that contains advice or guidance about abusing children sexually. In order to prevent such items from being lawfully possessed in the Bailiwick, the Committee proposes to include this offence as section 72 of the draft Law.

3.8.2 In addition, so-called child sex dolls, which are realistic dolls of babies and children manufactured or modified to allow others to simulate sex acts on them, have reportedly been brought into the British Islands. The Committee is concerned that such dolls do not satisfy the sexual desire of those who use them (as is sometimes claimed), but instead stimulate it. There is no specific offence in England and Wales but, whilst importation legislation prohibits the entry of these dolls into the Bailiwick, the Committee considers that the draft Law should include a simple possession offence at section 73 to remove the need to identify

⁸ [Sexual Offences \(Scotland\) Act 2009](#)

⁹ [Voyeurism \(Offences\) Act 2019](#)

¹⁰ [Serious Crime Act 2015](#)

how they arrived in the Islands.

4 Compliance with Rule 4

- 4.1 Rule 4 of the Rules of Procedure of the States of Deliberation and their Committees sets out the information which must be included in, or appended to, motions laid before the States.
- 4.2 In accordance with Rule 4(1), the Propositions have been submitted to Her Majesty's Procureur for advice on any legal or constitutional implications. She has advised that there is no reason in law why the Propositions should not to be put into effect / other.
- 4.3 In accordance with Rule 4(4) of the Rules of Procedure of the States of Deliberation and their Committees, it is confirmed that the propositions above have the unanimous support of the Committee.
- 4.4 In accordance with Rule 4(5), the Propositions relate to the duties of the Committee relating to crime prevention and law enforcement.
- 4.5 Also in accordance with Rule 4(5), the Committee consulted with Guernsey Police, Probation Service, the Bailiff's Office, the Committee *for* Health & Social Care, the Committee *for* Education, Sport and Culture, the Children's Convenor, the Criminal Bar, the Guernsey Bar, the Guernsey Association of Charities, the States of Alderney and Sark Chief Plea.

Yours faithfully

M M Lowe
President

M P Leadbeater
Vice-President

V S Oliver
P R Le Pelley
J C S F Smithies