

THE STATES OF DELIBERATION
of the
ISLAND OF GUERNSEY

26th February 2020

Proposition No. P.2020/7

AMENDMENT

Proposed by: Deputy H L de Sausmarez
Seconded by: Deputy R H Tooley

Committee for Home Affairs

Sexual Offences Legislation: Supplementary Policy Matters

To insert a new Proposition 3, as follows:

- “3. To direct the Committee for Home Affairs, as part of its ongoing review of justice policy, to consider how consent might be defined as an affirmative action (not simply a passive belief in the absence of explicit dissent) in the context of a single sexual act and/or a continuous series of sexual activities, and report its findings to the States no later than 28th February 2021.”

Rule 4(3) Information

No additional resources are envisaged to be required to enable this work to be undertaken.

Explanatory Note

It is proposed that consent is defined in our Sexual Offences Legislation as per the UK's Sexual Offences Act 2003. Here is an excerpt from the 2011 policy letter that summarises that definition:

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.

Consent under this definition can therefore depend on a subjective interpretation of what constitutes a 'reasonable belief' on the part of the defendant. This has led to situations, for example, where silence and/or non-resistance on the part of a claimant—both of which are common reactions to rape—have been wrongly construed as consent, distorting the very concept of sexual assault.

Other jurisdictions have moved to a model of affirmative consent, where consent is framed as positive, unambiguous, and voluntary. In Sweden, for example, people need to receive affirmative verbal or physical action demonstrating consent before initiating sexual contact. "Sex should be voluntary," the Swedish Prime Minister explained when the legislation was introduced. "If it is not voluntary, then it is illegal. If you are unsure, then refrain!"

Typically, models of affirmative consent assert that consent should apply at all times and during all phases of any act of sex, especially if different types of sex act are introduced. Consent can be withdrawn at any time, including during a sexual activity. Willingness should be clearly communicated.

The Istanbul Convention defines all non-consensual sex as rape.