

## CONSULTATION ON THE AGE OF CONSENT

### BACKGROUND

On the 8<sup>th</sup> April 2011 the Supreme Court of Gibraltar made a ruling, following a reference made to it by the then Chief Minister, which had the effect, for all practical purposes, of equalling the age of consent at 16 for heterosexuals and homosexuals.

Prior to the judgment the situation was that-

- (a) pursuant to sections 107 and 108 of the Criminal Offences Act<sup>1</sup> it was an offence for a man to have sexual intercourse with a girl under the age of 16 (subject to certain defences);
- (b) It was not an offence for a woman to have sexual intercourse with a boy under the age of 16 (albeit that the woman would be committing the lesser offence of indecent assault on a man contrary to section 118 of the Act or of indecent conduct towards a child under section 119);
- (c) under section 115 it was an offence to commit buggery with another person (subject to section 116A);
- (d) under section 116 an act of gross indecency between men was an offence (subject to section 116A);
- (e) section 116A decriminalised acts constituting offences under sections 115 and 116 where the act occurred in private between two consenting men over the age of 18. There is excluded from the meaning of "in private" acts which occurred where there are more than two persons present as well as those acts which occurred in lavatories to which the public have access.

In effect the position had been that sexual relations between men under the age of 18 constituted an offence whilst heterosexual and lesbian sexual relations for those over the age of 16 were legal.

The judgment of the Court was that the differential between the ages of consent breached sections 7 (Protection for privacy of home and

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<sup>1</sup> <http://www.gibraltarlaws.gov.gi/articles/1960-17o.pdf>

other property) and 14 (Protection from discrimination on the grounds of race, etc) of the Constitution<sup>2</sup>.

In setting out the effect of its ruling the Court was clear that it was not its place to take a view as to what the age of consent should be (such decision being for Parliament) but that it could not restrict or limit the existing rights of heterosexuals to engage in sexual activity by increasing the age of consent applicable to them.

As such the Court held that the only option available to it in relation to that point was to declare that for the purposes of the criminal provisions found in the Criminal Offences Act the age of consent for homosexual anal sex must be read as being 16 years of age.

The Court also declared that the Act was incompatible with the Constitution in that section 115 criminalised anal sex between consenting adults (regardless of their sex), that sections 115 and 116 when read with section 116A was incompatible with the Constitution in that it criminalises anal sex and other sexual activity between men aged between 16 and 18 and that section 116 of the Act when read with section 116A is incompatible with the Constitution in that it exclusively criminalises homosexual conduct in public lavatories and group sex.

The current situation is therefore that until such time as the legislature amends (or replaces) those provisions no prosecutions which offend the Supreme Court's declarations may be brought. In effect the age of consent is now 16 for all.

#### **WHAT DOES THIS CONSULTATION COVER?**

On 29<sup>th</sup> July 2011 Parliament passed the Crimes Act 2011<sup>3</sup> which in Part 12 inter alia provides for the age of consent for both heterosexual and homosexual sexual activities to be 16.

That Act is not yet in force.

It is Government policy that the age of consent for heterosexuals and homosexuals must be equal but that the age at which equalisation

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<sup>2</sup>[http://www.gibraltarlaws.gov.gi/constitution/Gibraltar\\_Constitution\\_Order\\_2006.pdf](http://www.gibraltarlaws.gov.gi/constitution/Gibraltar_Constitution_Order_2006.pdf)

<sup>3</sup><http://www.gibraltarlaws.gov.gi/articles/2011-23o.pdf>

should occur should be fixed by statute only after consultation with the general public has taken place.

The Government is therefore undertaking this consultation prior to the bringing into force of Part 12 of the Crimes Act in order to ascertain the views of the general public as to what the age of consent for both heterosexual and homosexual behaviour should be.

The precise form of the sections within Part 12 will be determined after this consultation process has taken place and before the provisions are brought into force.

### **POSSIBLE OPTIONS**

In accordance with the Constitution, the judgment of the Supreme Court and Government policy, the age of consent for both heterosexual and homosexual sexual activity must be equal.

The following options are available (though this list should not be seen as being complete)-

1. Commence the provisions of Part 12 of the Crimes Act 2011 without amendment. This would mean that the current situation will continue and the age of consent for heterosexual and homosexual sexual activity will stay at 16. Sexual activity with a person under this age is an offence (subject to certain specific defences) and where an offender is under the age of 18 he may receive a lesser punishment.
2. Increase the age of consent from 16 to a higher age for both heterosexual and homosexual sexual activity. The Annex to this paper contains a list of the ages of consent in certain European countries. It will be seen that the age of consent in Cyprus and Ireland is 17 whereas in Malta, Switzerland and Turkey it is 18. Raising the age of consent for both heterosexual and homosexual sexual activity would in effect criminalise sexual activity which is currently legal.
3. Increase the age of consent from 16 to a higher age for both heterosexual and homosexual sexual activity but also permit a "near age exemption". This would mean that consenting sexual activity between persons of a certain age below the set age of consent and a person aged within a certain number of years of that person would not be a criminal

offence. This is the situation in certain jurisdictions such as Canada. This could, for example, involve setting the age of consent at 18, but permitting a 16 or 17 year old to have consensual sexual activity with a partner as long as the partner is less than 5 years older.

It should be noted that although lowering the age of consent is in theory also an option, it is Government's policy not to lower the age of consent below 16 or to permit consensual sexual activity below the age of 16 under the "near age exemption".

#### **WHAT ARE THE NEXT STEPS?**

The consultation is open until 9<sup>th</sup> May 2012.

Responses should be addressed to-

Age of Consent Consultation  
Ministry of Education, Financial Services, Gaming,  
Telecommunications & Justice  
Suite 771 Europort  
Gibraltar

Or sent by email to [ageofconsentconsultation@gibraltar.gov.gi](mailto:ageofconsentconsultation@gibraltar.gov.gi)

Representations should make clear which, if any, of the options proposed above they support and, if the option they support involves a change in the age of consent, the age at which they believe the age of consent should be set. If the respondent supports an option not set out above details of that option should be set out.

It would assist the Government if reasons for the taking of a particular view are set out together with any empirical evidence on which the respondent relies.

The responses received will be analysed and a feedback statement summarising the results will be published by the Government.

Ministry of Justice

11 April 2012

## ANNEX

### AGE OF CONSENT – EUROPE

COUNTRY	AGE	COMMENTS
Albania	14	
Andorra	16	
Austria	14	Previously 18 for homosexual sex European Court of Human Rights ruled that the difference violated Articles 8 and 14 of the European Convention of Human Rights
Azerbaijan	16	
Belarus	16	
Belgium	16	Previously 18 for homosexuals till 1985
Bosnia	14	
Bulgaria	14	
Croatia	14	
Cyprus	17	Previously 16 for heterosexuals and 18 for homosexuals. Changed under pressure from EU to equalise both at 17
Czech Republic	15	18 for homosexuals till 1990
Denmark	16	18 for homosexuals till 1976
Faroe Islands	15	
Estonia	14	16 for homosexuals till 2001
Finland	16	18 for homosexuals till 1999
France	15	18 for homosexuals till 1981
Georgia	16	
Germany	14	
Greece	15	
Hungary	14	18 for homosexuals till 2002
Iceland	15	
Ireland	17	
Italy	14	
Latvia	16	18 for homosexuals till 2001
Lichtenstein	14	
Lithuania	16	
Luxembourg	16	
Macedonia	14	
Malta	18	
Moldova	16	
Monaco	16	

Montenegro	14	Homosexual sex legalised in 1977 with equal age at 14
Netherlands	16	Consensual sexual relations between adolescents who are close in age are not punished
Norway	16	
Poland	15	
Portugal	14	
Romania	15	
Russia	16	
San Marino	14	
Serbia	14	
Slovakia	15	18 for homosexuals till 1990
Slovenia	15	
Spain	13	
Sweden	15	18 for homosexuals till 1978
Switzerland	18	
Turkey	18	
Ukraine	16	
Vatican City	14	The Vatican City State applies Italian law in all matters other than in Ecclesiastical Law
England, Wales, Scotland, Northern Ireland, Guernsey, Jersey and Isle of Man	16	Irrespective of sexual orientation and/or gender. Used to be 21 for homosexuals in most areas of the UK but was gradually reduced, first to 18 and then to 16