

STATES OF JERSEY



DRAFT CRIMINAL JUSTICE (MISCELLANEOUS PROVISIONS) (No. 3) (JERSEY) LAW 201-

**Lodged au Greffe on 20th October 2011
by the Chief Minister**

STATES GREFFE



Jersey

DRAFT CRIMINAL JUSTICE (MISCELLANEOUS PROVISIONS) (No. 3) (JERSEY) LAW 201-

European Convention on Human Rights

In accordance with the provisions of Article 16 of the Human Rights (Jersey) Law 2000 the Chief Minister has made the following statement –

In the view of the Chief Minister the provisions of the Draft Criminal Justice (Miscellaneous Provisions) (No. 3) (Jersey) Law 201- are compatible with the Convention Rights.

(Signed) **Senator T.A. Le Sueur**

REPORT

I INTRODUCTORY

This *projet de loi* is concerned with several matters relating to the law of evidence in criminal proceedings before the Jersey courts. The areas covered are –

Corroboration in criminal proceedings

The proposal under this heading is to abolish certain rules (which have long been repealed in England and Wales, and in the other Crown Dependencies – *see further below*) about the evidence of certain categories of witness being corroborated, or ‘backed up’, by other separate evidence. The relevant categories of witnesses are –

- (a) a child;
- (b) an accomplice;
- (c) a person – in practice, more often than not, a woman – alleging that they are the victim of a sexual offence.

The Bailiff or a Commissioner in the Royal Court, in a case where evidence has been given by any of the above, must always, when summing up to a jury¹, warn them that it is dangerous to convict if that evidence has not been corroborated in some way.

The Jersey Law Commission has recommended abolishing this automatic requirement. Instead, in these cases, the position would be as in all other trials, *i.e.* the Bailiff or Commissioner would be required to use his or her discretion, when summing up to the jury, as to whether or not they needed to be warned to treat any particular evidence with caution.

The same reforms were effected in Guernsey –

- (a) in relation to the evidence of children, by the Administration of Justice (Bailiwick of Guernsey) Law 1991;
- (b) in relation to the evidence of accomplices and the evidence of complainants in sexual offence cases, by the Criminal Evidence and Miscellaneous Provisions (Bailiwick of Guernsey) Law, 2002.

The same reforms were effected in the Isle of Man by section 56 of that Island’s Criminal Justice Act 2001. Further detailed guidance about the reforms under this heading is offered at Section **IIA**. *below*.

Indecent photographs of children – evidence of age

Difficulty may sometimes arise in making a positive identification of an unknown person, and hence of his or her age. The amendment in this case is designed to ensure that a prosecution does not fail for the lack of evidence of a child’s age, by enabling the question whether such a person is a child to be one of fact based on inference without any need for formal proof.

How this works in practice will be clear from the further detail contained under this heading in Section **IIB**. *below*.

¹ or to Jurats in a case without a jury

Evidence by live TV links – Magistrate’s Court and Youth Court

The proposal under this heading is to make it clear that evidence can be given in the Magistrate’s Court and Youth Court through a live television link in the same way as it can be in the Royal Court. An ambiguity was identified in the legislation governing live TV links, and this amendment is remedial. Further detail about it is given in Section **II C**, below.

Consequential, etc. amendments

These relate to certain provisions in the *Loi (1895) modifiant le droit criminel*. These are drafting, rather than substantive, adjustments: the detail will be clear from reading Section **II D**, below.

II THE DETAIL OF THE REFORMS

A. Corroboration

A.1 The recommendations of the Jersey Law Commission were published in its Report in May 2009 entitled ‘*Corroboration of Evidence in Criminal Trials*’ [Topic Report No. 2/2009/TR]. The body of the Report consists of no more than 3 pages, and a copy of it is *attached* as an **Appendix** to this Report.

A.2 The proposed reform is brought against this background. Existing customary law requires the presiding judge in the Royal Court in relation to evidence –

- (a) of children and
- (b) of accomplices, and
- (c) of complainants in cases involving sexual offences,

to warn the jury that it is dangerous to convict the accused if the evidence of the child, the accomplice, or the complainant (as the case may be) has not been corroborated in some way. This has a peculiar result as demonstrated by the following examples:

Example 1: A man is charged in the Royal Court with breaking and entering. The owner was on the premises when they were broken into and she has identified the accused as the man who forced his way into the premises. In his summing up to the jury, the Bailiff must decide, on his assessment of the evidence as a whole, whether or not to warn the jury to treat the owner’s evidence with caution.

Example 2: A man is charged in the Royal Court with breaking and entering and indecently assaulting the owner. The owner was on the premises when they were broken into and she has identified the accused as the man who forced his way into the premises and as the man who carried out the assault on her. The Bailiff *must* warn the jury in his summing up to treat the owner’s evidence – insofar as it alleges indecent assault – with caution.

A.3 The standard direction² on corroboration evidence in cases of sexual offences, with appropriate adaptations to suit the circumstances of each case, would be on the lines of: “*Experience has shown that people who say that sexual offences have been committed against them sometimes, and for a variety of reasons, tell lies. Such false allegations are easy to make and frequently very difficult to challenge, even by an entirely innocent person. So it is dangerous to convict on the evidence of the*

² see **Ferreira v Att. Gen. | 17 Jan 2003 | 2003 JLR Note 3**

complainant alone unless it is corroborated, that is independently confirmed, by other evidence . . .”

A.4 Thus the present position is that if the evidence is that of a child or an accomplice, or of a complainant in a sexual offence case, the law deems it *automatically* dangerous for a jury to convict without corroboration, no matter how convincing the evidence and how strong the overall case for the prosecution may be. This does not mean that the jury cannot still convict, but it does mean that they must be told that it is dangerous to convict in such cases if they have not found corroboration.

A.5 In the Magistrate’s Court, where the Judge alone sits, he or she must keep in mind – effectively must direct himself or herself – in weighing the evidence that it is dangerous to convict on the evidence of the complainant, accomplice or child alone unless that evidence is independently confirmed by other evidence.

A.6 In the courts in England and Wales corroboration warnings are no longer mandatory in relation to any particular evidence, and are a matter in respect of which the trial judge must exercise discretion in his or her summing up. Amongst the statutory provisions that brought about the reform in that country were –

- section 34 of the Criminal Justice Act 1988 (abolishing the requirement of corroboration for unsworn evidence of children); and
- sections 32 and 33 of the Criminal Justice and Public Order Act 1994 (abolishing corroboration rules and corroboration requirements under the Sexual Offences Act 1956).

A.7 The present position in Jersey in this respect is much the same as that which prevailed in England and Wales before each of the above provisions was enacted. Taking the 1994 Act, it removed the requirement for juries to be given a corroboration warning in relation to the evidence of accomplices and also in cases of alleged sexual offences. It provided that:

“Any requirement whereby at a trial on indictment it is obligatory for the court to give the jury a warning about convicting the accused on the uncorroborated evidence of a person merely because that person is –

- (a) an alleged accomplice of the accused, or*
- (b) where the offence charged is a sexual offence, the person in respect of whom it is alleged to have been committed,*

is hereby abrogated.”

A.8 In terms of what was required for magistrates’ courts, provision was made as follows:

“Any requirement that –

- (a) is applicable at the summary trial of a person for an offence, and*
- (b) corresponds to the requirement mentioned in subsection (1) above . . . ,*

is hereby abrogated.”

A.9 The draft Law (see *Article 3* – inserted draft *Article 14B*) would similarly abrogate both the requirement to give corroboration warnings in the Royal Court and the corresponding requirement that governs the Magistrate’s Court. This would result in the matter being left to the discretion of the trial judge. It would no longer be deemed *automatically* dangerous to convict someone –

- on the evidence of the complainant alone in a case involving a sexual offence, or
- on the evidence only of an accomplice for any sort of offence, or
- on the evidence only of a child for any sort of offence.

A.10 Whether it would be dangerous to do so would be weighed against all the circumstances. To return to the examples in **A.2** above, the outcome would be as follows:

Example 1: A man is charged in the Royal Court with breaking and entering. The owner was on the premises when they were broken into and she has identified the accused as the man who forced his way into the premises. In his summing up to the jury, the Bailiff must decide, on his assessment of the evidence as a whole, whether or not to warn the jury to treat the owner’s evidence with caution.

Example 2: A man is charged in the Royal Court with breaking and entering and indecently assaulting the owner. The owner was on the premises when they were broken into and she has identified the accused as the man who forced his way into the premises and as the man who carried out the assault on her. In his summing up to the jury, the Bailiff must decide, on his assessment of the evidence as a whole, whether or not to warn the jury to treat the owner’s evidence with caution.

A.11 The reform would be effective only in relation to trials or committal proceedings that begin after the amending Law comes into force. A trial or committal proceedings that had already begun when the Law came into force would continue to be governed by the existing law.³

B. *Indecent photographs of children – evidence of age*

B.1 The draft Law (see *Article 2*) amends the Protection of Children (Jersey) Law 1994 by inserting a new *Article 2A* to read as follows:

‘In proceedings under this Law relating to any indecent photograph of a child a person is to be taken as having been a child at any material time if it appears from the evidence as a whole that he or she was then under the age of 16 years.’

B.2 Provision to this effect was made in the principal Law as enacted, but was inadvertently repealed by an amendment in 1998. It is the same as section 2(3) of the Protection of Children Act 1978 of the United Kingdom, which provides that:

‘In proceedings under this Act relating to indecent photographs of children a person is to be taken as having been a child at any material time if it appears from the evidence as a whole that he was then under the age of 16.’

³ See *Article 1(3)* and, in *Article 3(2)* – inserted *Article 14B(4)*

B.3 Section 2(3) addressed the difficulty of making any positive identification of an unknown person whose image may appear in a photograph, and hence of his or her age. It enabled the question whether such a person was a child for the purposes of the 1978 Act to be one of fact based on inference without any need for formal proof. This obviated the need for the prosecution to call expert evidence to establish age.

B.4 Here are examples of how this problem can arise in practice, and how the provision made by the draft *Article 2A* is able to address it:

Example 1: A man is charged with possession of indecent photographs of children. The photographs have been downloaded from various websites the names of which are indicative that they contain child pornography. The subjects of the photographs in question cannot be individually identified.

Example 2: A man is charged with making an indecent image of a child. He has posed as a teenage boy and has contacted a young female via a chat room. He has then persuaded the female to pose naked in front of a webcam. It is clear from the recovered text that the female was under 16. The image is no longer in existence.

B.5 In the above examples there is no direct evidence of the age of the subject of the photographs and therefore the age of the child would need to be ascertained from the evidence as a whole. *Article 2A* enables that to be done.

C. Evidence by live TV links – Magistrate’s Court and Youth Court

C.1 Under this head, the draft Law seeks to remedy a difficulty identified by the Royal Court with Part 10 of the Police Procedures and Criminal Evidence (Jersey) Law 2003, in particular Article 98(1).

C.2 With the leave of the court under Article 98(1), evidence of witnesses (other than the accused) may be given through a live television link in certain proceedings if the witness is outside Jersey. Article 83(1) of the 2003 Law provides that Part 10 ‘applies in relation to an offence if... the accused is committed for trial, or proceedings are instituted before the Royal Court for the offence concerned’. This appears to exclude the Magistrate’s Court from the benefit of Article 98(1) which was not the intention when the Law was enacted.

C.3 The draft Law would repeal Article 98(1) and re-enact it – see draft *Article 3* – as *Article 14A* of the Criminal Justice (Evidence and Procedure) (Jersey) Law 1998; and in so doing make it clear that the *Article* applied with equal force to proceedings before the Magistrate’s Court (including the Youth Court).

D. Minor and consequential amendments

D.1 By way of incidental amendments, 2 short provisions in the *Loi* (1895) *modifiant le droit criminel* are repealed (see draft *Article 1(1)* and (2)).

D.2 The *Loi* of 1895 was concerned principally with combating prostitution and associated offences against young women and girls. Article 2 of the *Loi* contains the statutory offence of unlawful sexual intercourse with a girl under the age of 13. That Article goes on – in its second paragraph – to enable the court to receive the evidence of a child even if the child does not understand the nature of an oath, provided that the child understands the requirement to tell the truth.

D.3 That test was, however, superseded by Article 8 of the Criminal Justice (Evidence of Children) (Jersey) Law 2002 which now requires the evidence of a child under 14 to be given unsworn, and to be received by the court unless “*it appears to the*

court that the child is incapable of giving intelligible testimony". The provision in Article 2 (2nd paragraph) of the *Loi* should really have been repealed consequentially when this was enacted. The draft Law would therefore remedy what appears to have been an oversight when the 2002 Law was passed.

D.4 Article 3 of the 1895 *Loi* requires corroboration of the testimony of a single witness for a conviction of certain of the offences under the *Loi*. This requirement would be repealed consequentially upon the reform outlined under **IA1.** to **IA11.** above of the Law relating to corroboration.

III CONCLUSION

The proposed reforms in this draft Law are not thought to be controversial. The reform regarding the Law of corroboration would implement a recommendation of the Jersey Law Commission, and is generally accepted by the courts and the legal profession as consistent with the norms of other similar legal jurisdictions.

The amendment regarding evidence in cases of indecent photographs of children is important for the prosecution of such cases, and is an essentially remedial provision in any event. Similarly in relation to clarifying the position as regards television links in the lower courts, this is essentially a corrective provision.

The amendments taken as a whole will be beneficial to the administration of justice in Jersey's criminal courts.

Financial and manpower implications

There are no financial or manpower implications for the States arising from the adoption of this draft Law.

European Convention on Human Rights

Article 16 of the Human Rights (Jersey) Law 2000 requires the Minister in charge of a *Projet de Loi* to make a statement about the compatibility of the provisions of the *Projet* with the Convention rights (as defined by Article 1 of the Law). On 18th October 2011 the Chief Minister made the following statement before Second Reading of this *Projet* in the States Assembly –

In the view of the Chief Minister the provisions of the Draft Criminal Justice (Miscellaneous Provisions) (No. 3) (Jersey) Law 201- are compatible with the Convention Rights.

**THE JERSEY LAW COMMISSION
REPORT
CORROBORATION OF EVIDENCE IN CRIMINAL TRIALS**

To the Chief Minister of the States of Jersey

PART I: Background

1. The Jersey Law Commission was asked by the Chief Minister at the end of 2008 to consider whether or not the current practice of requiring the trial judge to warn the jury, in cases involving sexual offences, of the need to look for corroboration of the evidence of the complainant should be abolished or altered.

2. In our Consultation Paper of December 2008 we provisionally concluded that the mandatory requirement for the corroboration warning in relation to offences of a sexual nature and the rules of practice that have been adopted in conjunction with it should be abolished. We considered whether or not to recommend that the judge is instead given discretion to issue a corroboration warning in cases where he feels it is appropriate to do so. However we noted that experience in Australia suggested that if such a recommendation were to be implemented the existing practice in terms of the form of direction to the jury would in all probability be maintained, with the consequent detrimental consequences to which we referred in our consultation paper. We suggested that this could be remedied by appropriate legislation and we expressed the view that the recommendation of the State of Victoria Law Commission, referred to in the consultation paper, had much to commend it. This was to the effect that the trial judge should be prohibited from giving a corroboration warning unless he was satisfied that: (i) there was evidence that the accused had in fact suffered some specific forensic disadvantage due to a substantial delay in reporting; or (ii) there was evidence that the accused had in fact been prejudiced as a result of other circumstances in the particular case.

3. Six responses were received to our consultation paper, the respondents being listed at the end of this report. Somewhat to our surprise, given the political interest expressed at the time that this issue was raised in the States in October 2008, we received only one submission from an elected member of the States.

4. The respondents were all broadly supportive of our proposal that the requirement for a corroboration warning be abolished. A number of the respondents disagreed with the suggestion that we follow the State of Victoria Law Commission recommendation, pointing out that the trial judge should be left with some discretion to give a warning in circumstances where he felt that the interests of justice required it. Given the difficulty of trying to envisage all the different circumstances that could arise in criminal cases we have some sympathy with that view. It is supported by the fact that there does not appear to be any dissatisfaction with the present position in England and Wales, where the matter is left to the discretion of the trial judge.

5. One of the respondents suggested that abolition of the requirement may lead to cases being prosecuted which might not have been prosecuted were the requirement to be retained and that there could as a result be some resource implications for the police and prosecuting authorities. However, it was suggested that the number of cases was likely to be fairly low and whilst we accept that there may be some resource implications, in particular for the States of Jersey Police, we do not feel that they will be significant.

6. Although we were only asked to consider the corroboration warning in the context of cases involving sexual offences a number of the respondents suggested that the requirement for a warning should also be abolished in the other cases to which it applies, namely accomplice evidence and the evidence of children. Although it was not part of our remit we see no logical reason to retain it for those cases. In the words of one of the respondents “the view that children are largely incapable of giving reliable evidence is as outdated as the view that women are prone to lie about sexual offences”. It seems to us that the reasoning that led to our recommendation applies with equal force to other cases in which a corroboration warning is currently required.

PART II: Conclusion

7. We have noted that the respondents to our Consultation Paper were unanimous in their support of our recommendation that the requirement for a corroboration warning in cases involving sexual offences should be abolished. Although, as we have stated above, it was not part of our remit to look at the impact of the corroboration requirement in other cases, namely cases involving evidence from children and accomplices, we note that there is support for a similar removal of the requirement for a warning in these cases. We can see no good reason not to extend our recommendation to these cases and accordingly we recommend that the present obligation to give a corroboration warning should be abolished in all cases.

8. Although we have considered whether to recommend introducing rules as to when a corroboration may be given we are persuaded that this is a matter best left to the trial judge who can take into account all the circumstances of the case.

Explanatory Note

This Law amends the *Loi (1895) modifiant le droit criminel*, the Protection of Children (Jersey) Law 1994, the Criminal Justice (Evidence and Procedure) (Jersey) Law 1998 and the Police Procedures and Criminal Evidence (Jersey) Law 2003.

Article 1 of the amendment Law repeals the second paragraph of Article 2 of the *Loi (1895) modifiant le droit criminel*. The latter Article allows a child's evidence to be given without oath in a prosecution of a person for having sexual relations with a female under 13 years of age if the court is satisfied that the child has sufficient understanding and understands the requirement to tell the truth. This provision has been replaced by Article 8(3) of the Criminal Justice (Evidence of Children) (Jersey) Law 2002 (which requires a child's evidence to be received unless the court considers that the "child is incapable of giving intelligible testimony").

Article 1 of the amendment Law also repeals Article 3 of the *Loi (1895) modifiant le droit criminel*. The latter Article requires corroboration (at least in relation to an essential part) of a sole witness's evidence before a conviction for an offence can be based on that evidence, where the offence is one of procuring a female for prostitution, or intimidating, tricking or drugging a female for sexual relations, or having sexual relations with a female under 13 years of age.

Article 2 of the amendment Law inserts an evidentiary provision in the Protection of Children (Jersey) Law 1994 relating to the proof of the age of a person in proceedings concerning an indecent photograph of a child.

Article 3 of the amendment Law amends the Criminal Justice (Evidence and Procedure) (Jersey) Law 1998 –

- (a) to enable certain evidence in criminal cases to be given by live television links;
- (b) to abrogate a general law requirement that the Bailiff, in a criminal case before the Royal Court, always warn the jury or Jurats about the risks of convicting a defendant on the uncorroborated evidence of the victim of a sexual offence or the uncorroborated evidence of an accomplice or of a child;
- (c) to abrogate any similar requirement applying in the Magistrate's Court.

Article 4 of the amendment Law repeals Article 98 (Evidence through television links) of the Police Procedures and Criminal Evidence (Jersey) Law 2003 as this provision has now been replaced by the provision (made by *Article 3* of the amendment Law) in the Criminal Justice (Evidence and Procedure) (Jersey) Law 1998.

Article 5 of the amendment Law sets out the short title of the amendment Law and specifies that the amendment Law will come into force a week after it is registered in the Royal Court.



Jersey

DRAFT CRIMINAL JUSTICE (MISCELLANEOUS PROVISIONS) (No. 3) (JERSEY) LAW 201-

Arrangement

Article

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Jersey

DRAFT CRIMINAL JUSTICE (MISCELLANEOUS PROVISIONS) (No. 3) (JERSEY) LAW 201-

A LAW to amend the Loi (1895) modifiant le droit criminel, the Protection of Children (Jersey) Law 1994, the Criminal Justice (Evidence and Procedure) (Jersey) Law 1998 and the Police Procedures and Criminal Evidence (Jersey) Law 2003; and for other purposes

Adopted by the States [date to be inserted]

Sanctioned by Order of Her Majesty in Council [date to be inserted]

Registered by the Royal Court [date to be inserted]

THE STATES, subject to the sanction of Her Most Excellent Majesty in Council, have adopted the following Law –

1 Amendment of Loi (1895) modifiant le droit criminel

- (1) The second paragraph of Article 2 of the Loi (1895) modifiant le droit criminel¹ is repealed.
- (2) Article 3 of that Law is repealed.
- (3) The repeal of Article 3 of that Law by paragraph (2) shall not have effect in relation to any trial that began before that paragraph came into force.

2 Amendment of Protection of Children (Jersey) Law 1994

After Article 2 of the Protection of Children (Jersey) Law 1994² the following Article shall be inserted –

“2A Evidence of age

In proceedings under this Law relating to any indecent photograph of a child a person is to be taken as having been a child at any material time if it appears from the evidence as a whole that he or she was then under the age of 16 years.”.

**3 Amendment of Criminal Justice (Evidence and Procedure) (Jersey)
Law 1998**

- (1) In the long title to the Criminal Justice (Evidence and Procedure) (Jersey) Law 1998³ for the words “and for connected purposes” the words “and for other purposes” shall be substituted.
- (2) In Part 6 of that Law before Article 15 the following Articles shall be inserted –

“14A Evidence through television links

- (1) A witness other than the accused may, with the leave of the court, give evidence through a live television link in any proceedings for an offence, or in any proceedings on an appeal arising from such proceedings, if the witness is outside Jersey.
- (2) A statement made on oath by a witness outside Jersey and given in evidence through a link by virtue of this Article shall be treated for the purposes of the law relating to perjury as having been made in the proceedings in which it is given in evidence.

14B Abolition of requirement for warning about uncorroborated evidence

- (1) Any requirement that the Bailiff, in a trial before the Royal Court for an offence, give, merely for the reason set out in paragraph (2), a warning to the jury or the Jurats about convicting the accused on the uncorroborated evidence of a person is hereby abrogated.
- (2) The reason is that the person is –
 - (a) an alleged accomplice of the accused;
 - (b) a child; or
 - (c) in a case where the offence charged is a sexual offence, the person in respect of whom the accused is alleged to have committed the offence.
- (3) Any requirement that –
 - (a) is applicable at the trial of a person before the Magistrate; and
 - (b) corresponds to the requirement mentioned in paragraph (1),is hereby abrogated.
- (4) An abrogation by paragraph (1) or (3) shall not have effect in relation to –
 - (a) any trial before the Royal Court or the Magistrate; or
 - (b) any proceedings before the Magistrate under Article 19 of the Loi (1864) réglant la procédure criminelle⁴,being a trial or proceedings that began before this Article came into force.”.

**4 Amendment of Police Procedures and Criminal Evidence (Jersey)
Law 2003**

Article 98 of the Police Procedures and Criminal Evidence (Jersey) Law 2003⁵ is repealed.

5 Citation and commencement

- (1) This Law may be cited as the Criminal Justice (Miscellaneous Provisions) (No. 3) (Jersey) Law 201-.
- (2) This Law shall come into force on the seventh day after registration.

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- ¹ *chapter 08.540*
 - ² *chapter 08.790*
 - ³ *chapter 08.240*
 - ⁴ *chapter 08.740*
 - ⁵ *chapter 23.750*