

STATES OF JERSEY

Education and Home Affairs Scrutiny Panel

Draft Sexual Offences Law

Witness: The Minister for Home Affairs

Tuesday, 19th February 2018

Panel:

Deputy J.M. Maçon of St Saviour (Chairman)

Deputy S.Y. Mézec of St. Helier (Vice-Chairman)

Deputy T.A. Vallois of St. John

Witnesses:

Deputy K.L. Moore of St. Peter, The Minister for Home Affairs

Mr. R.J. MacRae, H.M. Attorney General, The Attorney General

Ms. Helen Miles, Director, Criminal Justice

Ms. Gillian Hutchinson, Policy Principal

Mr. Nathan Fox, Assistant Director, Criminal Justice

[17:18]

Deputy J.M. Maçon of St Saviour (Chairman):

Are we ready? Yes, jolly good. Right then, and I am not sure whether we say good afternoon or good evening but welcome to this hearing of the Education and Home Affairs Scrutiny Panel and we have got the Minister for Home Affairs and her team today to talk about the Draft Sexual Offences Law. I am going to just remind people please, can you have your mobile phones switched off in case they are on. For the proceedings of this hearing I would also like to point out of course we do have a hearing aid loop in the room for anyone who is hard of hearing. Just for the record and transcript I will ask everyone to introduce themselves so I will go first. I am Deputy Jeremy Maçon, Chairman of the panel.

Deputy S.Y. Mézec of St. Helier:

Deputy Sam Mézec, Vice-Chair of the panel.

Deputy T.A. Vallois of St. John:

Tracey Vallois, Deputy of St. John, member of the panel.

Scrutiny Officer:

Andy Harris, Scrutiny Officer.

Deputy K.L. Moore of St. Peter (The Minister for Home Affairs):

I am Deputy Christina Moore, Minister for Home Affairs.

The Attorney General:

Robert MacRae, Attorney General.

Director, Criminal Justice:

Helen Miles, Director of Criminal Justice.

Policy Principal:

Gillian Hutchinson, Policy Principal.

Assistant Director, Criminal Justice:

Nathan Fox, Assistant Director.

Deputy J.M. Maçon:

Hello and good afternoon to all of you and just for a clear transcript, I will just ask to make sure that your voices are clear and loud as we proceed. First of all, I would just like to begin, Minister, by thanking your department for their quite comprehensive briefings that they have given to the panel, taking us through the law and all of the intricacies contained within. So we would just like to put that on the record, it does assist the workload of the panel, and also just for the record, for housekeeping, just to confirm that you and your team have read the disclaimer of scrutiny and are all happy to proceed.

The Minister for Home Affairs:

We have, thank you.

Deputy J.M. Maçon:

Jolly good. So then I wonder if we can just kick off then. So looking at the new law, Minister, I wondered if you could explain to the panel how the issues around consent in this new law; how it is addressed.

The Minister for Home Affairs:

Yes. Well, I think the law is quite clear in Article 2, the provision for the interpretation of consent. It is defined as a free agreement and the way in which a person expresses free agreement might not involve an express statement but might be inferred from the context. However, the draft law sets out a list of cases in which agreement cannot be treated as free. Consent is absent if the person is asleep, unconscious, rendered incapable of consenting by alcohol or any other substance. This applies both at the time of when consent is given and at the time of the act for which the consent is given. So if the person gives consent while awake, conscious and capable for an act to take place once that person has become asleep or unconscious or incapable that will not count as consent to that act for these purposes. The rule on alcohol and other substances applies whether or not the person has voluntarily consumed the alcohol or other substance. In situations where it is one person's word against another the investigation would seek to establish the ingredients of the offence before a prosecution is brought. There would need to be sufficient evidence to pass the evidential and public interest tests before proceeding. The absence of consent is often a key element in sexual offences, such as rape and sexual assault. The draft law makes it much clearer what the jury, or in some cases Jurats, will need to determine in these situations based on the evidence, i.e. whether there was free agreement to the sexual acts in question.

Deputy J.M. Maçon:

Thank you. That was quite a robust response. Can I just ask, how does this new law then change kind of the existing law?

The Minister for Home Affairs:

It makes the issue of consent much clearer we hope and much easier for a jury to determine whether consent was given or not to the act.

Deputy J.M. Maçon:

So when forming this law was that a concern? Was there confusion among juries about kind of clarifying this issue?

The Minister for Home Affairs:

I think consent is an issue that has been cloudy in the past and currently as well and it is often a point of debate. The Attorney General, I think, has some specific and practical experience of such cases in a court of law. You will have seen and remember, I am sure, members, the recent publicity

campaign that has been carried out by the police and also Prison! Me! No Way! on the issue of consent because it is deemed to be extremely important.

Deputy J.M. Maçon:

Is there anything you would like to add?

The Attorney General:

Well, just merely to add that as things currently stand the jury must be sure that a complainant does not consent and the defendant either knows that the complainant is not consenting or is reckless as to the question of consent. Ultimately, as things currently stand, the question of whether or not someone does consent is a question of fact for the jury in all cases and it will remain, in many cases, still a question of fact for the jury to determine but these provisions will enable the judge to not merely invite the jury to the view that someone cannot have consented because they were asleep or unconscious or too drunk or violence had been used against them but to be able to direct them that if they find that someone is asleep or unconscious or too drunk then they cannot, in law, have consented. These provisions are based, to a large extent, on the Scottish 2009 Act, which we reviewed when considering what would be appropriate for Jersey in relation to this issue.

Deputy J.M. Maçon:

Anything you would like to add? No. Anything on this point?

The Deputy of St. John:

Can I just ask in terms of when you are looking at the Scottish Act that you referred to just then, in terms of how long it has been in place and how they have used it within their courts have they seen any improvement in terms of that particular legislation with regard to sexual offences and assisting complainants?

The Attorney General:

I do not know whether there has been any empirical study in relation, for example, to the rate of convictions but I know that there was some concern about the terminology used in the England and Wales Act from 2003 and the Scottish Act was thought to be, in this and certain other respects, a product of a learning experience from the 5 or 6 years of prosecuting offences in England and Wales that followed the 2003 Act. There was certainly academic discussion that we considered when suggesting what might be appropriate for Jersey in relation to the issue of consent and indeed the interpretation of reasonable belief in consent in Article 3 of the law.

Deputy S.Y. Mézec:

How does the law attempt to give clarity over the issue of marital rape?

The Minister for Home Affairs:

Well, rape is rape and so there is no particular offence of marital rape because it would be constituted as being rape and ...

Deputy S.Y. Mézec:

I think what I am referring to there is Article 2(7) gives instances where consent cannot be implied and I know historically there have been attempts at making arguments that because 2 people were married that that was implied to be consent when in fact it was not. Is there anything in the law to give clarity to that; to just make it clear that that is not to be used as an argument that consent was implied?

The Minister for Home Affairs:

I think alongside the definition of consent being very clear. I think that is explicit within the intention of the law and also in modern thinking.

The Attorney General:

You are right when you say there is nothing express in the law and the position at common law in England was that you could not be found guilty of raping your wife on account of the view that consent was given on marriage to a variety of acts, including sexual intercourse. That was reversed by the House of Lords in a case ... I do not know how many years ago now but more than 10 years ago and certainly the view that I have expressed when invited to provide an opinion on this issue was that the defence of marriage would not be a defence to a charge of rape under Jersey law and in view of that position we did not think it was necessary to state that in this law. In a way it would be ... 10 or 20 years' time it would look a rather insulting provision in the same way ... remember in the Chamber the other day it was observed, I think by Deputy Tadier, that it is striking now to us in the 1948 law to see a provision saying: "For the avoidance of doubt a jurat can be a woman." It is striking to us now and I think, perhaps, it would be striking, if not now, then in the future, to say for the avoidance of doubt a man can be found guilty if he was raping his wife because I think it is clear that that would be the finding of the Royal Court if asked to consider that issue.

Deputy J.M. Maçon:

Is it the rationing because it is as much as to say that views progress and they change with the society at the same time as to say that views regress and go back? For example, a classic one is looking at Russia and its views on L.G.B.T. (lesbian, gay, bisexual and transgender) rights. So as much as things move forward things do move back as well.

The Attorney General:

Yes, but if I was asked to prosecute a husband for raping his wife in Jersey it would not even go through my mind that the defence would raise an issue about that and suggest that someone could not be prosecuted for rape. The fact, I suppose, as the Minister says, that we are now codifying the customary law in this area and not providing a defence along those lines effectively closes the door on anyone raising that issue.

Deputy S.Y. Mézec:

Moving on to the next area. We received a submission from Jersey Action Against Rape where they explained their concern that rape cases should still take place before ... sorry, I have just mixed this up slightly. They were concerned about rape cases being held in front of juries and the difficulty that there still is in society with prejudice and off-fashioned ways of thinking that they think might be difficult for some victims in that situation to know they are going to have to go before juries. How has that featured in your thinking when putting this law together?

The Minister for Home Affairs:

So firstly I commend J.A.A.R. (Jersey Action Against Rape) and the work that they have done in terms of educating members of the public and improving the debate around the subject of sexual offences in general.

[17:30]

I think mentioned in the debate on the principles of the Criminal Procedure Law that both this law and the Criminal Procedure Law are designed to work together to improve the administration of justice in these areas. It is accepted that the provisions in the Criminal Procedures Law, and if they are accepted by the Assembly, will ensure that juries will have to give longer to consider their verdicts in such cases as these. So to answer your question, this issue has been considered and the option to be heard before a jury is currently a right that is afforded to those who commit Customary Law offences on the Island to include rape and it was considered that this should continue to be the case despite making rape a statutory offence. There has been a level of scepticism as of recently to the ability of a jury to provide a satisfactory verdict therefore there should have been more guilty verdicts given by juries in the recent past. This is not on its own sufficient though to justify removing a defendant's right to the jury trial. That really was the debate that was had internally.

Deputy J.M. Maçon:

Obviously we did speak to J.A.A.R. and again I think the panel would agree with your comments about the wonderful work that they are doing in this particular area but they have presented us with a statistic saying last year, in 2017, there were 12 cases of rape but there were no convictions.

Given that there is such a high threshold anyway before a rape case can be brought is there any comment you would like to make on that?

The Minister for Home Affairs:

Well, obviously it would be difficult to refer to individual cases but I think the statistics speak for themselves but, as I say, I refer back to the intention of both this law and the Criminal Procedure Law that jury trials do operate in a slightly different way and that there would be more time given to the consideration of a verdict. Therefore, one would hope and expect that that would improve the conviction rate potentially but it is an interesting point that they raise, although I go back to the point of statutory offences traditionally offering that right to a jury trial. So perhaps it is a matter for the Assembly to decide what the view is of the day.

The Attorney General:

There was a conviction in one case of rape last year and it is right though to observe, as J.A.A.R. has, that there is a disappointingly high number of acquittals. Obviously, we cannot look into the jury room and ascertain what the reason for the acquittals were. It is right in relation to rape cases as a whole to ensure that the jury focus on the defendant's state of mind, and not the victim's conduct, which is important particularly in the cases of women who have taken drink on a night out with friends and we need to move away from the stereotype of blaming victims and to focus on defendants who target those people, which certainly was the feature of a case I prosecuted recently in front of Jurats who did return a guilty verdict in an attempted rape case because the defendant elected trial by Jurat. In order to have a higher success rate it is important that we educate and train not only police officers, lawyers and judges but the public at large and certainly that would be an easier task if, of course, the tribunal of fact was the Jurats and not a jury and one can easily appreciate that. But if we simply codified the offence of rape, as we have done, and created a number of new offences without more then they would automatically be tried by the inferior number because, as you know, statutory offences are tried by the judge and 2 Jurats and Customary Law offences by the jury unless we have specified to the contrary. The view was that it would not be right simply to dispose of a defendant's right to a jury trial when confronted by an allegation of a serious sexual offence and that is why the draft law preserves the right to jury trial for those offences; the offences which would traditionally be tried by a jury in similar offences. But nonetheless, of course, the point that J.A.A.R. make is a good one in relation to the conviction rate and also the myths surrounding rape, which, obviously, as a society and as prosecutors and as an Assembly, we all want to tackle together.

The Deputy of St. John:

Can I just ask, is there any potential risk there if, just playing devil's advocate in this case, there was a carve-out for them to specifically just have Jurats rather than juries, is there a risk that that could

also be applied in other areas where there are these myths around other crimes that are committed by people? I cannot think of one right off the top of my head now but I am just asking risks around that and how does that affect ... I suppose the generality of having that court case in front of peers, in terms of juries, and the ability to have a fair trial?

The Minister for Home Affairs:

I think that historically it was thought that a jury trial offered that right to be judged by your peers, as you say, and so that is why it was deemed to be an important thing but perhaps it is an indicator that we need to do more, generally, to educate society at large about attitudes and I think that is largely being done but obviously with any group of people you receive a variety of different prejudice, backgrounds, ideas and they are all brought to the mix, which is supposed to be really the beauty of a jury trial.

Deputy J.M. Maçon:

I just note from the J.A.A.R. submission again they say where you have got really technical issues you can have a specific like tribunal that will hear the evidence and, forgive me, I do not have it with me at the moment. But what you are telling me is that when considering this law that that was not considered in the formation of it.

The Minister for Home Affairs:

Well, we did not receive that submission from J.A.A.R. unfortunately until last week I think. I mean there was discussion and I think, as the Attorney General has described, it was decided that because under Customary Law rape had the ability to elect a jury trial then it should continue to do so but, as I say, if scrutiny think that that is an issue that should be debated by the Assembly then I welcome that debate.

Deputy J.M. Maçon:

So they pointed to the example of complex fraud prosecutions. They use that as an example.

The Minister for Home Affairs:

Complex fraud?

Deputy J.M. Maçon:

Yes, complex fraud prosecutions which involve a tribunal being tasked to make decisions in relation to the complicated accounting issues.

The Attorney General:

Well, the point that you have made is a good one. In relation to complex fraud, of course, those cases, assuming you charge Common Law fraud, are still tried by a jury in Jersey although there is an argument that has been accepted in some jurisdictions that some cases that are very complicated really should be tried by a different sort of panel, a jury and 2 assessors, so we have that already, a judge and 2 Jurats. On the one hand, it is quite difficult to adopt a principled basis to divide up serious offences between those that warrant a jury trial and those that do not, which is the point that I think you are making, Deputy Vallois. It is difficult to identify, is it not, a principle basis upon which to say that one sort of serious offence warrants a jury trial and another one does not? But, firstly, there is something particular about sexual offences and particularly the reaction of the victims to sexual offences that jurors will not always know about. The fact that it is very common for people to freeze with fear and be unable to cry out. That is the sort of thing that juries do not necessarily know and will be taken by the defence as a point which leans in favour of an acquittal. The problem we have is that generally the courts have set their face against allowing the parties to call expert evidence in relation to those issues, to sort of educate the jury in the course of the trial about people's reactions to rape, because it is thought that that is trespassing on the jury's province in terms of determining who is telling the truth and not by effectively getting an expert to say that this is the sort of way that people react to serious sexual crimes. Of course, that would not arise if you had an experienced tribunal of fact who were used to trying rape cases. On the one hand you have a problem about differentiating one sort of serious offence from the other, but on the other hand one could recognise that there is something special about sex cases and there might be some advantage to having a tribunal of fact, which had some experience of those cases, and was well aware of some of the myths surrounding rape and other serious sexual offences.

The Deputy of St. John:

That probably leads on quite well. Minister, if you could explain how the law ensures that the system would be responsive to the needs of the individual complainant.

The Minister for Home Affairs:

The system?

The Deputy of St. John:

The law.

The Minister for Home Affairs:

In terms of the criminal justice system?

The Deputy of St. John:

Well, this law. How does this law ensure that the system is responsive to the needs of individual complainants?

The Minister for Home Affairs:

Well, I think the law is perhaps more technical, perhaps, than covering that area. It is an interesting question. Sorry. I think that perhaps the law has taken a more technical approach to different offences and that is not explicitly something that is covered in this law but we have, at the same time, been trying to support and advocate a greater joined up victim support service in the Island. Obviously, you have seen the opening of the S.A.R.C (Sexual Assault Referral Centre) and different things that have happened in that area and so I think that the 2 come together really.

The Deputy of St. John:

I have done a little bit of research around these areas in different areas around the world, different jurisdictions and how they deal with Sexual Offences Law or do not deal with Sexual Offences Law. There is this view that maybe the needs of rape survivors are lost among the practical concerns of meeting the legal requirements of the criminal justice system rather than meeting the needs of the complainants. It is whether the law engages with their understanding and their experiences. So how has the engagement process happened to create legislation?

The Minister for Home Affairs:

I think that goes back to the education point and the description that the Attorney General gave of the freeze or flop theory and how well that is communicated to members of a jury and members of society at large to change opinions. So, as I say, this law was constructed to be really quite a ... I do not want to say simplistic but some of the similar laws in other jurisdictions are quite heavy and very detailed and it was felt that this was a good compromise, using the experiences of other jurisdictions and having had time in those jurisdictions to embed their legislation and to see what worked and what did not so that this was an easy to read, understand and use law. As I say, there have been other things going on in terms of victim and witness support.

Director, Criminal Justice:

I think there has been a lot of investment over the years through the Home Affairs Department including the Building a Safer Society strategy that has really tried to put victims and witnesses at the heart of our justice system and certainly not only around sexual assault but by integrating victim and witness services together, making sure that we provide for victim support and witness service. I think in the formulation of this law we have listened to victims and witnesses. We have actively gone out and said: "What is it that you want or what will make it easier for you to come forward and report?" There has been a lot of investment, particularly through States of Jersey Police, and other areas, in terms in sexual offence liaison officers.

[17:45]

Outside of the police you have the independent sexual violence advisers, the co-ordinator of the Sexual Assault Referral Centre. I think probably within the last 3 years we have invested in more support for victims and witnesses in Jersey that we have ever really had before. What I would say as well, again Jersey Action Against Rape invested a lot of money in bringing experts over to Jersey. Some of you may have heard Dr. Zoe Lodrick talking about the effects of rape and talk about the fight or flop. So there has been an awful lot of listening gone on and I think yourselves, you have heard evidence from a victim as well who was required to give evidence under the old system. So I think with anything to do with criminal justice in Jersey we always aim to put the victim and the witness at the heart of the system and sometimes that is difficult but I think that is the direction that we are clearly moving in.

Policy Principal:

Also safeguarding have a particular interest in domestic abuse as well and they have ... a group has been formed under the Safeguarding Partnership Board that is looking at and has brought forward a domestic abuse strategy which has been fully supported by the work that we have done as well, which is tried ... everything that they are doing is trying to put the victim at the heart.

The Deputy of St. John:

Can I just ask on that basis ... I mean it is great that all these things are happening and there is more support for complainants and witnesses and all those types of things but in terms of how this progresses; so should the legislation go through as it stands or with amendments, whatever it may look like, in terms of feeding back, because it is quite a difficult area for people to respond to, maybe even authority, with issues that they have had, whether it is with a criminal justice system or Sexual Offences Law. How would we ensure that they are continued to be listened to and that the concerns around cases and such alike are dealt with and addressed, if it is a legislative issue, or other areas?

Director, Criminal Justice:

One of the things that we have in progress at the moment is the Criminal Procedure and Sexual Offences Laws which are kind of the start of the journey and what we have funded out of public sector reform is a project to transform criminal justice and kind of the internal motto is making justice work. The Attorney General chairs the Criminal Justice Working Group and one of the main themes around that Criminal Justice Working Group is victims and witnesses and integrated witness care. So there is going to be a lot of resource put in to making sure that we get the absolute best out of these pieces of legislation and that we can implement them to their full effect.

The Attorney General:

I think one can ... the best approach to this, and I hope this answers your question to some extent, by looking at the experience of a victim in a rape case, as it would have been 10 or 20 years ago, and how it will be once this law and the Procedure Law have been enacted. Ten or 20 years ago a rape victim was confronted in court by her attacker, who could see her throughout her evidence, could, if unrepresented, cross-examine her for days about every aspect of her character, including her sexual history, and she would be called in to court by an advocate she had never met before and the experience would have been ... well, some people have said that the trial process for a victim can be as abusive as the original abuse. When this law, the Procedure Law, and recent training of advocates and judges, which have taken place, are implemented, with the directions I gave in 2016 to prosecutors; every victim will have met the prosecuting advocate at least once before trial. Special measures to assist them will have been discussed and granted, including giving evidence behind a screen so that they do not have to be eyeballed by the person who they say raped them or assaulted them. No longer, when the Procedure Law is passed, will they run any risk of being cross-examined personally by their abuser. No longer, when this law is passed, will they be asked about their sexual history in most circumstances, and they will know that the jury will receive directions in relation to consent, which are different from the directions they are given now, and they know that the jury will be given directions about the defendant's reasonable belief in consent, which will include the judge directing the jury to consider what steps the defendant had taken to ascertain whether or not they had consented to those acts, and also the modern judge will control defence questioning to ensure that it is relevant and kept within reasonable bounds. So the whole landscape for a victim of sexual offending will have changed; and that is designed to ensure that victims firstly have the courage to come forward and secondly, when they come forward they are treated with respect and enter an environment in which they can feel comfortable about giving evidence and this is part of that process, as I think my colleague has said.

Deputy J.M. Maçon:

You touched on it previously and I wonder if I could just ask how the understanding and knowledge, the experience of victims and survivors of sexual offence have helped inform the law.

The Minister for Home Affairs:

I think the director of criminal justice is best placed but there, obviously, was a consultation period and we heard from people who came forward and also directly approached some groups and the criminal justice team also passed on some interesting experiences.

Director, Criminal Justice:

Yes, we consulted quite widely and not only for the consultation period and the preparation of the law but we have got a lot of experience in criminal justice in Jersey in dealing with victim and witness

organisations. Certainly we were involved in the setting up of the Witness Care Unit and the States of Jersey Police establishing specialist help. So the team have got some understanding of victim and witness issues.

Deputy J.M. Maçon:

So are there any particular changes that you can pick out and say, these particular areas have been influenced by people you approached?

Director, Criminal Justice:

I think one of the areas that the Attorney really mentioned before, you know, safe in the knowledge that they were not cross-examined, safe in the knowledge that they will be provided with special measures and that gives the police officers the ability to assure people that special measures will be available as the moment they can just say: "They might be, but we cannot guarantee it." So we have listened and we have heard and, as the Minister says, we have taken, you know, the chance to look at what works well in other jurisdictions and make sure that it fits for Jersey.

Deputy J.M. Maçon:

Is there anything which, perhaps, was brought to you by victims and survivors which did not make the cut for whatever reason?

Director, Criminal Justice:

I mean we carefully looked and listened to all the submissions and think on balance in the round came up with what we have. I cannot think of anything specific. Perhaps the J.A.A.R. submission over the jury trials.

Policy Principal:

We did send out to all of the stakeholders including J.A.A.R., at the very beginning of the consultation, and asked for a submission. We spoke to people, from sexual health nurses to various voluntary and community agencies asking for submissions around this law, what did they feel about it. Did they feel that it was representing what they felt sufficiently and, as Helen has said, around the response to the consultation, we had long meetings to discuss the submissions that people had taken the time to give us and looked at how that would be effective within the law, yes. So I think we did give an awful lot of time and consideration to the voice of people, not only people who are dealing with people who have felt this but also the submissions of people who have gone through those things themselves. So, yes, we did. We did give a great deal of consideration.

Deputy S.Y. Mézec:

What parts of the law do you think are most likely to restore confidence in the criminal justice system for victims who might otherwise look at the current situations and not feel like they would get justice if they engaged with the system?

The Minister for Home Affairs:

Well, I think the Attorney General highlighted the areas in his previous answer and, as I said earlier, this law, working in tandem with the Criminal Procedures Law, if we can achieve both of those then that will lead to really a wholesale difference in the way a victim will go through the justice process and that very much has their interests at heart.

Deputy S.Y. Mézec:

Do you think the changes proposed here will result in a higher conviction rate than there currently is?

The Minister for Home Affairs:

Well, as you referred to the conviction rates from last year in terms of rape cases and so I would hope that that would certainly improve.

The Deputy of St. John:

It follows on quite nicely. Are there are other ways that a complainant can pursue justice other than through the criminal justice system?

The Attorney General:

Shall I deal with this unless you would like the Minister to give an answer?

The Deputy of St. John:

No.

The Attorney General:

Well, yes, civil proceedings can be issued and I think we are all aware that that is how J.A.A.R. was funded. It was the damages obtained by a plaintiff. I know a lot about it because I was in private practice at the time and I was the advocate who represented the plaintiff and it was a civil action in effect for rape in the tort of assault under Jersey law. People are entitled to pursue civil claims. The disadvantage, of course, of the civil route is that there is a time limit to pursue those claims of 3 years and many of these cases that we prosecute, and I should say with substantial success in relation to historic sexual abuse, many successful prosecutions after trial, and they can be pursued, of course, decades later because sometimes it takes a very long time for someone to have the courage to come forward, but by that time it will be too late to pursue a civil remedy in most cases.

The Deputy of St. John:

In terms of justice in the whole, I mean you have spoken to people who have had the awful experience of these types of situations but have you got an idea of what justice means to them in terms of getting through a particularly difficult ordeal that will stay with them but have they ever turned around and said: "This is what justice means to me" or is it just purely through a criminal justice system or ...

The Minister for Home Affairs:

We would all like, I think, not to have to have ...

The Deputy of St. John:

No, I completely agree.

The Minister for Home Affairs:

... the process because people do have to experience these awful and distressing circumstances in their life because ... it is a really thought provoking question because ... and I think refer back to the man who had experienced abuse and been cross-examined who came forward and I think spoke to yourselves as well as to us. I think the fact that people are feeling able now to come forward and communicate with the States of Jersey and to become involved I think that is a really good and hopeful sign that we are making progress in this area and we are moving away following the learning of the Care Inquiry into a very different place. But when you look at domestic abuse cases and perhaps the remaining concern that not everybody who sustains domestic abuse comes forward to bring charges against their abuser then there is still a long way to go, is there not? So we have to be realists and understand that abuse and assaults will continue to occur probably, as much as we would like them not to, so we, have to make sure that people feel empowered and able to come forward and seek help in the criminal justice system and then; what is justice? The traditionally held view of justice is that somebody receives an appropriate sentence for their crime.

[18:00]

That is what we have to aim for.

Deputy J.M. Maçon:

So looking now at part 8 of the law. We are looking at female genital mutilation. I wonder, from my understanding, F.G.M. (female genital mutilation) then is completely criminalised through this law, is that correct?

The Minister for Home Affairs:

It is, yes.

Deputy J.M. Maçon:

I notice that there are a few exceptions under 3, which is looking at medical procedures. I wonder if you could just clarify that.

The Minister for Home Affairs:

So it is operations that are necessary for patient's physical or mental health are conducted by a medical practitioner. I think it is defined.

Deputy J.M. Maçon:

So there is a defence for medical practitioners?

The Minister for Home Affairs:

Yes.

Deputy J.M. Maçon:

Thank you. I wonder if you could just give a comment about whether the Minister feels that this is an issue in Jersey.

The Minister for Home Affairs:

No. We have no evidence that there is such an issue in Jersey. However, it is important obviously to make sure that the legislation is in place if the issue were to arise and also it was particularly important in our desire to sign up to the Istanbul Convention on protecting women and girls from violence.

Deputy J.M. Maçon:

Thank you. Can I just ask then, does this law go far enough in reaching that aspiration to meet the Istanbul Convention?

The Minister for Home Affairs:

Yes, it does. It is an important ...

The Deputy of St. John:

This question really follows on from what we were talking about before in terms of ... because understanding things like domestic abuse and how it can lead up to a position of rape, sexual assault and those types of things. In Jersey law the offences for things like stalking, forced abortion, forced

marriage and psychological or physical violence; how does that work in tandem with what is proposed in terms of the Sexual Offences Law if at all? Sorry, if it is too big I can put it in an email. It is easier to ask.

The Minister for Home Affairs:

It is quite a complex question I think and I do not know whether the Attorney has a view.

The Attorney General:

Well, yes, and obviously stalking is something which will be dealt with under the Harassment Law and there will sometimes be an overlap between offences under this law and that law. For example, some of the voyeurism offences, if repeated, could amount to an offence under the Harassment Law in certain circumstances and, of course, there is the offence ... effectively, our revenge pornography legislation is under the Telecommunications Law and some of the offences that you mentioned would amount to grave and criminal assault under the Criminal Law. One important element of the Criminal Procedure Law is that it will be now possible to try all those offences together because currently it is not possible to try a statutory offence and a Customary Law offence together on the same indictment. So to take a good example, an offence of voyeurism under this law, which is a statutory offence triable by the inferior number or an under the Harassment Law currently could not be tried alongside a grave and criminal assault, but they will be able to be in the future, which is very important for victims and indeed defendants who do not want to face a number of trials for similar things.

The Deputy of St. John:

They could have the whole thing in one trial rather than come back.

The Attorney General:

Absolutely, yes.

Deputy J.M. Maçon:

We had a submission from Professor Clare McGlynn of Durham University looking at the draft law and what is reflected from her submission. Looking at the aspects covering voyeurism, I think it is Article 36 onwards, when this particular aspect looks at issues around sexual gratification but what has been put to us is for acts of voyeurism there might be other reasons to engage in that behaviour other than sexual gratification. I wonder what was considered when compiling this particular section of the law.

The Minister for Home Affairs:

Firstly, it is a Sexual Offences Law and therefore voyeurism was included if it was deemed that the voyeurism was for the purpose of sexual gratification. However, there would be other laws, such as the Harassment Law, where a voyeurism offence may be applicable.

Deputy J.M. Maçon:

Okay. So, for example, if the motive behind the voyeurism was for notoriety or to blackmail or for financial gain, for example, you would say that that would then be prosecuted under other laws and that is why it brought in this law?

The Minister for Home Affairs:

Yes.

Deputy J.M. Maçon:

Okay, thank you. Can I ask how does this law cover non-consensual distribution of images taken and created under Article 36?

The Minister for Home Affairs:

So that would be a matter for the Telecommunications Law.

Deputy J.M. Maçon:

The submission from the consultation the States of Jersey highlighted concerns about the act of upskirting; is this an offence covered by this draft law?

The Minister for Home Affairs:

It is, yes.

The Deputy of St. John:

Articles 18 to 20, regarding the abuse of trust, is there scope to futureproof the law and therefore protect against as yet unforeseen circumstances by widening the definition of a position of trust?

The Minister for Home Affairs:

It is an interesting question, this. We have extended the list of defined relationships in the previous law to include that the coach, the position of a coach, a sporting coach, but with regard to futureproofing it the list is quite extensive as it is and I think really it is difficult to foresee every situation that might arise in the future and that is, perhaps, a matter for future legislature.

The Deputy of St. John:

Okay. Well, there was a submission provided to us by Professor Clare McGlynn who asked: "What consideration, if any, had been given to the Canadian model for defining abusive positions of trust?"

Director, Criminal Justice:

We considered briefly the Canadian model but I think we felt that the proposals that are put forward already strike the right balance between protecting children and also the human rights of children and other relationships.

The Deputy of St. John:

Okay. How did you come to that view in terms of looking at ... the Canadian law can be quite extensive, particularly on the sexual offences but how did you come to that view looking at the Canadian law and then looking at, for example, what we have now got in front of us? Why was that the right balance? Why did it hit the right balance?

The Attorney General:

Well, I note that one of the comments that Professor McGlynn makes is that the proposed law does not cover sexual activity between doctor and a young person and in fact we can see that children are protected from abuse at a hospital under Article 19(2)(b)(iii). We need to stand back a bit from this maybe. All persons under 16, of course, have the general protection from any sexual touching as they cannot consent in law, so they are protected in all circumstances from all people from any sexual contact. They are even protected from each other but of course we would not always prosecute a 15 year-old for indecency involving another 15 year-old. So they are all protected. But the abuse of trust legislation is specific legislation. I think England and Wales was the first jurisdiction to introduce it. Extending that protection from people under 16 to people under 18 in defined circumstances, it is important to be careful about those defined circumstances because generally children are brought up to know at the age of 16 they can make their own sexual choices. What we have done is we have looked at the legislation in England and Wales and Scotland and we have defined, but in quite broad terms, relationships where, if an adult is involved sexually with a person aged 16 or 17, in addition to the general protection, they are also committing an offence. We can see that, can we not, in very broad terms, for example, at 19(2) and it is a person engaged on a professional basis, in coaching, motivating, guiding or training for a sport, hobby, career or competitive event, a person involved in providing education services and so on. So we have been broad in the scope that has been proposed for this, and much broader than the provisions in England and Wales, which do not extend to coaching. At the same time the Criminal Law needs to be certain to the extent that adults and young people aged 16 and 17 need to know what the law is. To put forward a general offence in relation to all sorts of relationships, if you look at the Canadian definition, which might be uncertain in scope, is slightly unsatisfactory. It is helpful to futureproof for legislation in terms of protecting witnesses, which we have done in the Criminal Procedure Law, to ensure that

any developments in technology in the future, which might assist witnesses giving evidence, are provided for. But to create criminal offences, the scope of which might be uncertain, is, maybe, undesirable and what we have adopted is the approach in England and Wales. I think we have gone further than England and Wales, as I have said, in defining the relationships that 16 and 17 year-olds might otherwise be entitled to enter into quite carefully so that everyone knows where they stand.

The Deputy of St. John:

Can I just check? She mentioned about the doctors not being covered and you referred to the fact that it would be under (2)(b)(iii) but that does not cover general practitioners, does it?

The Attorney General:

Well, no, it does not and that is ...

The Deputy of St. John:

I think I am looking at it from that ...

The Attorney General:

Well, I follow that and there is something which we discussed earlier today in the context of the questions that you raised. Of course, any child under 16 who was touched inappropriately by a doctor could not consent and if it is the G.P. (general practitioner) context, any G.P. who goes outside the normal scope of an examination for sexual purposes, whatever the age of the person they are examining, is committing a criminal offence. We are looking at the coaching, the teaching. We are looking at relationships, guiding or training where people see people on a frequent basis and a sexual relationship develops which society thinks is wrong and inappropriate. I do not think that sort of relationship will develop in a G.P.'s surgery and that is really going there for a consultation, are you not? If a doctor were to behave inappropriately in that context it would, in any event, be a criminal offence because it would have been an offence against someone who simply had not consented, whatever their age. I think that is the way that we looked at it anyway.

The Deputy of St. John:

Okay. Just to try to understand it a little bit better maybe; it refers to a nursing home or a hospital, if the child is accommodated in that nursing home or a hospital or any other nursing home or a hospital in Jersey. So why specify a hospital or nursing home but not specify a general practitioner's office? Sorry, I may be pushing it a bit far but I am just trying to understand why one and not the other.

The Attorney General:

I think the thinking would be under 19(2)(b)(iii) that that is a place where a child is living for a long period and maybe an inappropriate relationship might develop. The people working in those institutions need to know that they cannot start to have a relationship with someone who is 16 or 17.

Deputy J.M. Maçon:

Do you want to ask your question about the Education Law at this stage?

[18:15]

The Deputy of St. John:

Just briefly. I mean this is more technical than anything else. Under Article 20 it talks about the interpretation and amendment of Article 19 and it refers to ... I think it is Article 20 paragraph 2(b) which refers to the Education Law but then the Education Law is not mentioned in Article 19.

Director, Criminal Justice:

We picked this up with the law draftsman and it is a drafting error and it will be rectified.

The Deputy of St. John:

I did not know whether I was reading it wrong or what.

Director, Criminal Justice:

Thank you for pointing that out and that will be rectified in the revised edition.

The Deputy of St. John:

Okay, thank you.

Deputy S.Y. Mézec:

Moving on to Article 43 about evidence as to sexual history. It does say in this first Article: "Except with the leave of the court." So under what circumstances would evidence as to the complainant's sexual history be allowed? Is there a process by which the court can say it is relevant in certain circumstances?

The Minister for Home Affairs:

Well, it would be a matter for the court. The prosecution and defence would have to submit their requests to the judge and there would have to be a good reason and I think you have drawn us to the Attorney General's v Correia, as an example. Although I think, Attorney, you had something to say about that use of the example which would be best coming from you.

The Attorney General:

Well, Article 43 provides that, you know, except with leave of the court no evidence may be adduced and no questions may be asked in cross-examination by or on behalf of a defendant about the sexual history of a complainant and sexual history is defined as the fact that the complainant has engaged in a sexual act with a person other than the relevant defendant. Now, it is for the States by regulations, under Article 43(3) to provide that paragraph 1 does or does not apply to evidence adduced and to a question asked for the purpose prescribed by the regulations. So, in due course, further regulations will be placed before the States for them to consider in relation to the scope of questions that may or may not be asked. Now, why have we adopted that approach? Well, perhaps in the meantime, it is helpful for everyone to know that as things currently stand, owing to the case of *Correia* (AG V *Correia* 2015, [2015] JRC061A), complainants do enjoy a protection. *Correia* was a case of attempted rape where the defendant learned when the unused material was disclosed to him that the complainant had had various previous relationships. The defendant attempted to seek leave to cross-examine the victim on those relationships and the Royal Court rejected that application, because the application was really no more and no less than an attempt to further 2 of the main rape myths. One, that simply because a complainant has consented to sex with other men that she is more likely than not to have consented to sex with this defendant, which is wrong. Secondly, that because she has had sex with other individuals that in some way affects her credibility as a witness, which is also wrong. The Royal Court did go on to say, having regard to various other authorities, particularly a Canadian case, and having regard to the legislation from England, Wales and Scotland in this area, there may be certain circumstances when a complainant's sexual history may be relevant in the case, particularly, this is one of your questions, I think, later on, where it was something that was known to the defendant at the time of the sexual act, as opposed to something he has just discovered later on and is using to attack her credibility as a witness in the way that I have described. So witnesses, victims, do enjoy a wide and general protection now. As to the future scope of that protection, in due course the States will be invited to consider regulations. The reason that we have adopted that approach is the England and Wales Statute, Article 41 of the relevant Act, has caused all sorts of problems. It has not been a great piece of drafting. The case has been before the Courts of Appeal on several occasions. The provisions have been attacked by women's groups and others. We thought it was important to spend a lot of time thinking and consulting about the regulations that would be placed before the Assembly in due course, in relation to the scope of what will and will not be permitted in terms of questions being put to victims about their sexual history. But currently the position is that victims are protected. The function of 43(1) is to give guidance to any court faced with an application now and indeed the Assembly in due course that the starting point is that no evidence can be given of the victim's sexual history without the consent of the court. So the starting point is that that material will be irrelevant and will not be admissible. I hope that answers your question.

Deputy S.Y. Mézec:

To be honest, I am still struggling to envisage a situation where it would be admissible. It does not seem overly clear to me.

Attorney General:

I can give you an example of a recent English Court of Appeal case involving a footballer, which received some publicity. In that case, the Court of Appeal, and again the decision was criticised by various parties, quashed the conviction of the defendant on the footing that he was not allowed to adduce evidence of sexual encounters between the complainant and 2 other men very close in time to his sexual encounter with the complainant. One was, I think, 2 weeks before and one within 2 weeks after the incident, both of which the Court of Appeal accepted were strikingly similar in detail to his description of the sexual acts that he and the complainant underwent together. In that case the Court of Appeal felt that it was unfair of the trial judge to exclude the jury from hearing about those 2 incidents and a fresh jury was empanelled. They heard all that evidence and they found the defendant not guilty, having had that evidence. I am not saying that was right or wrong. I am not commenting at all. I am just saying that that is an example of the court holding that it was fair for the jury to hear about certain sexually experiences of the victim. There will or may be a small reservoir of cases when it might be appropriate. The other view, of course, is the view expressed by the professor where she says that it is wrong for the jury ever to hear about any sexual experience a victim has had, even experience with the defendant who is on trial. If you think about that, that would mean that in a relationship that was going on for some years a jury would be faced with an allegation of rape or indecent assault and would not be allowed to hear that these 2 people, the victim and the defendant, had a relationship together and what it was like. That is what is suggested, but I think there is a European Human Rights authority to the effect that that approach would be wrong, because it would be unfair on the defendant not to be able to say about the person accusing him of rape that they had had a previous sexual relationship. It is really a question of striking a balance somewhere between the jury hearing nothing about a complainant's sexual history and the old approach where you discredit , of a complainant being torn apart by reference to that. The approach that the Jersey Courts have adopted to date, which is reflected by this law, is that generally a complainant's sexual history is not something that is relevant at all for the jury to hear about.

Deputy S.Y. Mézec:

Okay. That is helpful.

Deputy J.M. Maçon:

I think we have covered this, but just for the record. Imaged based sexual abuse, revenge porn, for example, I think you said that that is to be addressed under the Telecommunications Law and that

is why it is not going to be in this law. Can I just ask, though, when you did do your consultation was this an issue that was raised during the consultation?

The Minister for Home Affairs:

Not for the sexual cases ...

Deputy J.M. Maçon:

No, okay, thank you. Can I just ask around the area of sexting, whether that is covered within this law?

The Minister for Home Affairs:

That is under the Protection of Children (Jersey) Law 1994. So, like any case before the courts, it must be satisfied that it would be in the public interest to convict such a crime. This consideration was equally given, Article 13, of the Unlawful Sexual Acts Between Children. If it is not in the public interest, for instance, where sex occurs between 2 consenting 15 year-olds, it is unlikely that such acts will be prosecuted, as I think was mentioned.

Deputy J.M. Maçon:

Can I just ask, how young people and children are protected in the draft law if they engage in sexting? Is the defence the public interest test?

Attorney General:

Well, it is not a defence as such. It is under the Protection of Children Law, which deals with photographs and also the passing of photographs of one child to another, indecent photographs, would prima facie be an offence under the Telecommunications Law; that is what it, prima facie, would be an offence under. Then it is a question of prosecutorial discretion in relation to whether or not it is in the public interest to prosecute a child. There is some useful guidance issued by the A.C.P.O in relation to prosecution decisions in those circumstances. Generally, in the absence of aggravating features, which would normally be repeat offending or evidence of exploitation or coercion, that would generally be a sort of matter that we would expect to be dealt with at a Parish Hall and not by way of prosecution.

Deputy J.M. Maçon:

Can I just ask, you described there the law being around images, what happens in the case of text?

Attorney General:

Again, Telecommunications Law, the same principles would apply.

Deputy J.M. Maçon:

Thank you.

The Deputy of St. John:

Can I just ask a follow-up on that, the Protection of Children (Jersey) Law 1994 is the law that you referred to, in terms of the definitions for indecent photograph and indecent pseudo-photograph and prohibited image, is it sufficient for 2018?

Attorney General:

We have amended it in this law to some extent. The key change, there are other changes, but the key change is to raise the age from 16 to 18 in relation to the photographs or images of children. That is the most significant change that this law has made. It was reviewed for the purpose of this law to make sure it was up to date.

The Deputy of St. John:

Okay. Thank you. The last part, prostitution, part 7 of the legislation. Particularly with regards to this question is Article 22, which is paying for a prostitution service by an exploitive person. Is this being brought forward to mirror section 53(a) of the Sexual Offences Act in England and Wales?

The Minister for Home Affairs:

We thought this was rather an example of an exam question. So, we think it differs. It broadly does, but there is a difference.

[18:30]

That is the English offence is a strict liability offence. So, if you commit an offence you make or promise payment of a sexual service; the third party is exploiting that party. In the U.K. (United Kingdom) you do not have to know that a person is exploited. We have added a defence that if they can show that no third party is engaged in exploitative conduct. So there is more of a burden on the purchaser, essentially, to ensure that the prostitute is not being exploited. The maximum fine here would be £10,000 as opposed to the maximum fine in the U.K. of £1,000.

The Deputy of St. John:

The person who purchases the services has to prove ... that is their defence; they have to prove that they did not know that that person was being exploited. Is that right?

Attorney General:

That is right, yes.

The Deputy of St. John:

Right. Okay. Can I ask, just in particular, it refers to the offence, Article 22, paragraph 1, where it is liable to a fine of level 3 on a standard scale? Can you just explain what level 3 is?

Director, Criminal Justice:

£10,000.

The Deputy of St. John:

£10,000. In terms of exploiting other people, is that a right offence amount? Does it give enough punishment, I suppose, is the argument?

The Minister for Home Affairs:

We do also have another law, the name of which escapes me at the moment.

The Deputy of St. John:

Too many pieces of legislation going around in your head at present.

Deputy J.M. Maçon:

You could get back to us with specifics.

The Minister for Home Affairs:

Can I confirm that to you?

Deputy J.M. Maçon:

Yes.

The Minister for Home Affairs:

It is one of those that says what it does on the tin, but I cannot pluck the right piece of information out at the moment. So there would be another legal avenue to follow. Yes. It has to be said, also, that this is a significant step forward from the current position. I think you will all remember a particular case a couple of years ago when an individual who had brought 2 women here was bound over to leave the Island and charged £50, if I remember correctly. So when you put it in that context it is a considerable step up; also if you compare it to the U.K. fine of £1,000.

Deputy J.M. Maçon:

We are almost at the end, but we are at the time ... I wonder, can you spare another 5 minutes for us to complete? Thank you.

The Deputy of St. John:

I will not be long. I will try and get through these very quickly. So, in terms of the 7 years, I think it has asked for 26 in terms of controlling ... no it is not. This one is with regard to causing, inciting or controlling prostitution services; 7 years inappropriate sentence for such a situation.

The Minister for Home Affairs:

This is, again, somebody who is, as it says, causing, inciting or controlling people, so there is an element of forcing somebody. Obviously the courts, when they impose their sentence, would have an ability to find a place in that area that they felt was suitable, given the evidence that they would hear at the time. Personally, I think that is quite reasonable. Do you consider that it is not high enough?

The Deputy of St. John:

I am just wondering, where you are talking in cases where sexual abuse, domestic abuse and all those types of things and then you have a situation where somebody is causing, inciting or controlling prostitution services; the control side of the element for me is the issue here. It is like the consent issue. The control issue; it might be somebody that is forcibly ... I understand your argument about; it depends on the specific case. But, what I am saying is it will be up to a 7 year sentence, would it not?

The Minister for Home Affairs:

Yes.

The Deputy of St. John:

I am just thinking of more extreme circumstances, for example, would it be appropriate for a higher sentence?

The Minister for Home Affairs:

If it was felt by the courts that it did not give them enough, would it be something that could be consulted upon in the future and brought back to the Criminal Justice Systems Board?

Attorney General:

It could. Obviously, if it involves a child, it is a maximum of 14 years under Article 17. But, you are right, with the 7 years. In relation to this, this is one area ... the prostitution offences are bespoke drafting for Jersey. The draftsman, I think, has done a good job of producing a suite of offences quite simply in a handful of Articles. In terms of these sentencing levels, they are, I am 99 per cent sure, borrowed from the equivalents in England and Wales. That is their origin, where they have

worked for obviously some time, because they have had legislation in this area for decades. That is not to say, of course, that we are bound by it in any way, because we are not. The origin of the 7 year sentence is England and Wales.

The Deputy of St. John:

Right. Thank you. Last question; it has been suggested in a submission to the panel that a full ban on the purchase of sex, while decriminalising those who sell sex, but not those who profit from those selling sex, would be a more effective offence than criminalising the purchase of sex can only, if it can be shown that the person in prostitution has been subject to coercion or exploitation. What is the Minister's view on this?

The Minister for Home Affairs:

I think that we have found here a good balance in this area because it could be said, and I think many academics argue, that the Nordic model, where you criminalise the purchaser, heightens the risk to the prostitute, because of the danger that the purchaser is taking in potentially criminalising themselves in that way. Therefore, we have considered this and taken it also to what is now the Community Policy Group to seek their views on the position as well. It was decided that what we have done ... and I think the director of criminal justice went to a conference where ...

Director, Criminal Justice:

Where the Nordic model was talked about. Certainly, speaking to the English Collective of Prostitutes, they are not pro the Nordic model in any shape.

The Minister for Home Affairs:

No. But, also, one thing we have done, which the conference was quite interested to hear about was there is a clause which allows people to work together, so they are not working in an exploitative way, but they are there to cover each other's backs, as it were, and ensure that they are comfortable and protected from abuse from their potential punters, which is slightly unusual. As the Attorney General says, it is a bespoke solution for Jersey, but one that we thought was helpful in terms of providing protection to women. They say it is the oldest profession, so it is something that is almost impossible to completely legislate out of society.

The Deputy of St. John:

There are risks with legislating it out as well, is there not?

The Minister for Home Affairs:

Yes.

The Deputy of St. John:

In terms of the black market and therefore the higher risks of the prostitutions themselves.

The Minister for Home Affairs:

Yes, very much so. So we wanted to strike a balance that offered some elements of protection, obviously seeking to criminalise those people who did seek to exploit people for money in these circumstances. So offered some protection to those who wished to undertake these services. Also the loitering and advertising and soliciting, yes, are offences under this Act.

The Deputy of St. John:

Yes.

Deputy J.M. Maçon:

Are there any further questions from the panel? No. Right, as we wrap then, as usual, I would like to give you the opportunity if there anything which you think we have missed, anything where perhaps we got the wrong end of the stick, just a chance to give you an opportunity to address the panel if there is anything else which you or your officers would like to say.

The Minister for Home Affairs:

I would more like to congratulate you all for conducting your research in such a thorough manner and asking us some interesting and challenging questions as ever. It has been very interesting and helpful. Thank you.

Deputy J.M. Maçon:

Brilliant. In that case, can I thank you and bring the hearing to a close.

[18:41]