STATES OF JERSEY

DRAFT SEXUAL OFFENCES (JERSEY) LAW 201- (P.18/2018): COMMENTS

Presented to the States on 16th March 2018
by the Education and Home Affairs Scrutiny Panel

STATES GREFFE

COMMENTS

Introduction

1. The Education and Home Affairs Scrutiny Panel ("the Panel") has undertaken a review of P.18/2018 – the Draft Sexual Offences (Jersey) Law 201- ("the draft Law") that has been lodged for debate by the States Assembly on 20th March 2018. The draft Law, if adopted by the Assembly, would consolidate most of the sexual offences into a single enactment and address the following deficiencies that have been identified in current law –

    - there are currently a few types of behaviour that do not amount to an offence;
    - certain current offences are archaic and only refer to one gender and inappropriate terminology;
    - certain offences have inappropriate maximum sentences; and
    - the definition of "consent" is not adequately provided in current legislation.

2. The draft Law is intended to meet the needs and expectations of the Police, prosecutors, modern Jersey society and international standards.

3. In order to ensure that the draft Law is fit for purpose, the Panel drew up the following Terms of Reference for its review –

    i. To conduct legislative scrutiny of the Draft Sexual Offences (Jersey) Law 201- to ensure the accuracy and adequacy of the draft Law.

    ii. To assess the consultation process undertaken to inform the draft Law and detail the views of key stakeholders

    iii. To examine the draft Law in relation to that in other jurisdictions

    iv. To examine the consequential amendments to any other Laws.

4. The Panel received a briefing on the draft Law from the Department of Community and Constitutional Affairs, Law Officers' Department and Law Draftsman's Office on Thursday 11th January 2018. In order to inform its work on the draft Law, the Panel has written to a wide range of stakeholder groups and services that may have some connection to the subject of sexual offences. Furthermore, the Panel also wrote to a number of academics specialising in the field of sexual offences law, in order to gather their opinions on the draft Law and its contents. A read-through of the draft Law was also undertaken by the Panel, with questions arising from this being sent to the Department for Community and Constitutional Affairs, the answers to which can be found at the attached **Appendix**. Unless otherwise stated in this report, the answers given to these questions are satisfactory to the Panel.

5. Specific questions have been brought to the attention of the Panel through the submissions it received, and these were followed up with the Minister for Home Affairs during a Public Hearing on Monday 19th February. The areas are as follows –

i. A submission from Jersey Action Against Rape ("JAAR") highlighted concerns about the low number of convictions of rape cases in the Island. It was suggested that the issue of prejudices existing on juries as a result of the 'myths' about rape and sexual assault may be a reason for this. It was therefore proposed that trial by Jurats would be a more appropriate mode of trial to allow resources to be allocated educating about these myths.[1]

ii. The issue of voyeurism was raised by Professor Clare McGlynn of Durham University. It was explained that voyeurism was not always used for the purposes of obtaining sexual gratification as laid out in the draft Law. It was suggested that the Law should be expanded to cover other reasons for voyeuristic behaviour (i.e. financial gain and to cause distress or alarm).[2]

iii. Professor McGlynn noted that abuse of positions of trust is covered by the draft Law; however, it was suggested that further consideration should be given to Canadian Law for a suitable model.[3]

iv. The issue of sexual history evidence being admitted to support belief in consent.[4]

v. The fact that image-based sexual abuse is a sexual offence and therefore should be included in the draft Law.[5]

vi. Dr. Andrea Matolsci of the University of Bristol suggested that changes should be made to the manner in which prostitution is addressed by the draft Law.[6]

vii. The Panel has also questioned the Community and Constitutional Affairs Department on the reasons why male genital mutilation has not been included in the draft Law.[7]

Amendments to the draft Law

6. As Members will be aware, the Panel has brought forward 3 amendments to the draft Law in advance of the debate. In order to allow full debate to take place on each of the issues, and in the interest of making the amendments simple for Members in light of previous concerns raised around amendments proposed to other draft Laws, the Panel has decided to bring forward these amendments separately. The first and third amendments, whilst simple, both add an extra level of detail to the draft Law. The second amendment, however, is a wide-reaching issue, and one that the Panel has brought forward to ensure that a full and considered debate is held on the issue. The amendments are as follows –

[1] Written Submission – Jersey Action Against Rape – 12 January 2018
[2] Written Submission – Professor Clare McGlynn – 12 February 2018
[3] Written Submission – Professor Clare McGlynn – 12 February 2018
[4] Written Submission – Professor Clare McGlynn – 12 February 2018
[5] Written Submission – Professor Clare McGlynn – 12 February 2018
[6] Written Submission – Dr. Andrea Matolsci – 13 February 2018
[7] Written Submission – Director of Criminal Justice – 2 March 2018

i. A drafting change to include the act of defecation within the definition of sexual touching given in Article 1(4)(b).[8]

ii. The second amendment to the draft Law is designed so that all trials for offences under Part 2 (non-consensual offences), Part 3 (offences by an adult against a child aged 12 and under) and Part 4 (offences by an adult against a child aged 13–15) are tried by the Inferior Number of the Royal Court (the Bailiff and 2 Jurats). The Panel has outlined its argument for this change in the report accompanying this amendment; however, as this is an important change, further details will be provided in the comments below.[9]

iii. A new paragraph in Article 2 which provides absolute certainty that consent is not implied by the existence of a relationship between one person and another. The Panel is particularly motivated to address any ambiguity in this respect involving cases of domestic abuse.[10]

Areas examined by the Panel

7. As stated in the introduction to these comments, the Panel identified 7 areas for further examination as a result of the submissions received. These issues were brought up with the Minister for Home Affairs at a Public Hearing on Monday 19th February 2018.

Mode of trial for sexual offences – Article 41

8. The draft Law allows for certain customary and statutory offences to be tried by Jury as opposed to the Inferior Number of the Royal Court (the Bailiff and 2 Jurats). In this instance, all of the offences under Parts 2, 3 and 4 of the draft Law are able to be tried by Jury.

9. As stated in the Panel's proposed amendment to this Article of the draft Law, JAAR has highlighted the potential benefits of trying sexual offences by the Inferior Number, and how this could help to combat perceived prejudices in relation to the myths of rape and sexual assault.[11] The Panel does not wish to duplicate the evidence as laid out in the report accompanying the amendment; however, there are certain points that it believes are important to state for clarity –

i. Educating the Public on the myths of rape and sexual assault in order to address perceived prejudice is, in reality, a difficult and time-consuming task with no guarantee of success.

ii. JAAR has argued that trying sexual offences by Jurat could mitigate many of the issues surrounding prejudices, as training and information could be better targeted.

[8] Draft Sexual Offences (Jersey) 201- (P.18/2018) Amendment - Education and Home Affairs Scrutiny Panel
[9] Draft Sexual Offences (Jersey) 201- (P.18/2018) Second Amendment – Education and Home Affairs Scrutiny Panel
[10] Draft Sexual Offences (Jersey) 201- (P.18/2018) Third Amendment – Education and Home Affairs Scrutiny Panel
[11] Written Submission – JAAR – 12 January 2018

iii. Although the Panel acknowledges the Minister's view that the right to trial by jury is important, it has received the following figures from the Law Officers' Department. For instance, since 2015, 13 cases of rape and one case of attempted rape have been brought to the Royal Court, with only 4 trials resulting in convictions. These statistics highlight the difficulties faced by the prosecution in rape cases.

iv. There are no human rights implications as a result of the Panel's amendment. The Law Officers' Department has confirmed that trial by the Inferior Number of the Royal Court does conform to the relevant human rights legislation.

v. In light of the points above, the Panel believes that its amendment provides the Assembly an opportunity to give greater protection to complainants of sexual offences, as well as providing a fair, human rights compatible, and impartial trial to defendants.

Voyeurism

10. The Panel received a significant submission from Professor Clare McGlynn of Durham University, an expert in the field of sexual offences law. Within her submission to the Panel, the act of voyeurism as defined in the draft Law was addressed as follows –

> *"As currently drafted, the offence of voyeurism requires the perpetrator to act for the purposes of obtaining sexual gratification. This unduly limits the scope of the offence and fails to consider sufficiently the impact of offending on victims. Acts of voyeurism are undertaken for a variety of motives including financial gain, to cause distress or alarm, to gain notoriety or bonding among a group and for a 'laugh', as well as for sexual gratification. In each case, the harm caused to the victim is serious and warrants criminal sanction."*[12]

11. Professor McGlynn then went on to explain the motives for sexual offending in respect of voyeurism:

> *"Research into sexual offending generally has found that motives include humiliation, grievances, and punishment, as well as entertainment and recreation. Sexual offending is driven by the desire for power and control and therefore limiting offences to motives of sexual gratification fails to appreciate the harm and realities of sexual violence."*[13]

12. The Panel questioned the Minister for Home Affairs on this submission at a Public Hearing and was given the following response –

> **Deputy J.M. Maçon of St. Saviour:**
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> *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*

[12] Written Submission – Professor Clare McGlynn – 12 February 2018
[13] Written Submission – Professor Clare McGlynn – 12 February 2018

behaviour other than sexual gratification. I wonder what was considered when compiling this particular section of the Law.

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 of St. Saviour:

So, for example, if the motive behind the voyeurism was for notoriety or to blackmail or for financial gain, you would say that that would then be prosecuted under other laws and that is why it is not brought in this Law?

Minister for Home Affairs

Yes.[14]

13. Another issue raised by Professor McGlynn was whether or not the draft Law covered the non-consensual distribution of images taken and created under Article 36 (Voyeurism). The Panel raised this issue during its Public Hearing with the Minister for Home Affairs –

Deputy J.M. Maçon of St. Saviour:

Can I ask how does this Law cover non-consensual distribution of images taken and created under Article 36?

Minister for Home Affairs:

So that would be a matter for the Telecommunications Law.[15]

14. The Panel is satisfied that the concerns raised by Professor McGlynn are indeed covered within Article 51 of the Telecommunications (Jersey) law 2002, and therefore agree that there is no need for them to be included within the draft Law.

Abuse of Trust

15. A further area discussed in the submission from Professor McGlynn was the inclusion of abuse of trust offences against persons aged 16 or 17 (Part 6 of the draft Law). This particular section creates offences in respect of the abuse of a position of trust (i.e. teacher, care worker, coach, etc.) and defines the position of trust in the draft Law.

16. Professor McGlynn set out the following points in relation to this aspect of the draft Law –

"It is welcome that the provisions on abuse of trust are to be strengthened to include sports coaches. This is a current gap in English Law. However, a better approach is to amend the Law such that all exploitative and harmful

[14] Public Hearing with the Minister for Home Affairs – 19 February 2018 – p.17+18
[15] Public Hearing with the Minister for Home Affairs – 19 February 2018 – p.18

relationships, including coaching, are covered. This would ensure that the whole range of circumstances where young people are sexually exploited is covered. For example, the proposed law may not cover sexual activity between a doctor and a young person"[16]

17. The Panel questioned the Minister for Home Affairs on this aspect of the draft Law during its Public Hearing –

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?

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.[17]

18. Professor McGlynn offered up Section 153(1) of the Canadian Criminal Code as a potential model to address the issue of unforeseen circumstances as raised in her submission –

"Every person commits an offence who is in a position of trust or authority towards a young person, who is a person with whom the young person is in a relationship of dependency or who is in a relationship with the young person that is exploitative of the young person, and who:

a) for a sexual purpose, touches, directly or indirectly, with a part of the body or an object, any part of the body of the young person; or

b) for a sexual purpose, invites, counsels or incites a young person to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the young person.

In considering whether there has been exploitation, the following factors are considered (section 153(2)):

a) The age of the young person

b) The age difference between the person and the young person

c) The evolution of the relationship

d) The degree of control of influence by the person over the young person."

19. The Panel questioned the Minister for Home Affairs on this aspect of the draft Law during its Public Hearing –

[16] Written Submission – Professor Clare McGlynn – 12 February 2018
[17] Public Hearing with the Minister for Home Affairs – 19 February 2018 – p.18

Deputy of St. John:

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.[18]

20. The Attorney General provided further reasoning for the development of the draft Law in the manner it has been done –

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?

H.M. Attorney General:

... 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.[19]

21. The Panel questioned whether or not inappropriate sexual activity with a doctor (specifically a General Practitioner) would be covered by the draft Law. Specific reference is made to nursing homes or a Hospital in the draft Law and, given the prescriptive nature of the position of trust, it was felt this needed further confirmation from the Minister –

[18] Public Hearing with the Minister for Home Affairs – 19 February 2018 – p.19
[19] Public hearing with the Minister for Home Affairs – 19 February 2018 – p.19+20

Deputy of St. John:

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.

H.M. 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.[20]

Sexual History Evidence

22. Professor McGlynn highlighted a concern in her submission in relation to the admissibility of sexual history as evidence in court proceedings. Recent publicity in the Island had acknowledged that sexual offences are under-reported in Jersey,[21] and research in England and Wales has shown that fear of disclosure and cross-examination on sexual history evidence at trial was one of the main reasons that complainants may not report an offence.

23. A further issue was also highlighted by Professor McGlynn as follows –

"The proposed Law (Article 43) will only apply to sexual history evidence with third parties, therefore missing an opportunity to clarify and update the Law in relation to all forms of sexual history evidence. Further, the proposed Law states that sexual history evidence may be admitted with the leave of the court, but fails to set out in statute the conditions and situations under which this is permitted. This provided considerable discretion, and therefore uncertainty, for victims.[22]*"*

24. The Panel put the question to the Minister for Home Affairs as to whether this did indeed provide uncertainty, and the Attorney General provided the following direction which allayed the concerns raised in the submission –

H.M. 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

[20] Public hearing with the Minister for Home Affairs – 19 February 2018 – p.20+21
[21] Jersey Evening Post – 8th February 2018
[22] Written submission – Professor Clare McGlynn – 12 February 2018

placed before the States for them to consider in relation to the scope of questions that may or may not be asked.[23]

25. H.M. Attorney General went on to explain the reasons for adopting this approach –

H.M. Attorney General:

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 two 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.[24]

26. Finally, the Attorney General explained how this would be developed in the future –

H.M. Attorney General:

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.[25]

[23] Public hearing with the Minister for Home Affairs – 19 February 2018 – p.22
[24] Public hearing with the Minister for Home Affairs – 19 February 2018 – p.22
[25] Public hearing with the Minister for Home Affairs – 19 February 2018 – p.22

Image-based sexual abuse

27. Professor McGlynn highlighted the issue of image based sexual abuse ("revenge porn") in her submission, and stated that it was a form of sexual offending that should be included in the draft Law. It was put forward that this should be included in the draft Law for the following reasons –

> "*Including this type of offending within the sexual offences law is important because how laws are framed has serious ramifications in terms of understanding the nature of the offending (its serious harm), and informing educative and preventative responses (focus on issues of sexual consent, sexual double standards). It also means that other protections from sexual offending, such as prevention programmes and reporting/notification requirements cover this form of abuse."*[26]

28. The Panel understands that this particular form of sexual offending will be covered under Article 51 of the Telecommunications (Jersey) Law 2002.[27] The Panel questioned the Minister for Home Affairs on whether or not the issue of sexting would be covered through this draft Law and received the following answer –

> **Deputy J.M. Maçon of St. Saviour:**
>
> *Can I just ask around the area of sexting, whether that is covered within this Law?*
>
> **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.*[28]

29. The Panel is satisfied that this particular issue is addressed elsewhere in Jersey law and therefore does not need to be included in the draft Law at this time. It would be worth, however, maintaining a close watch on the issue of image-based sexual abuse, in order to identify any issues that may not be covered by Laws in the future.

Prostitution

30. In a submission from Dr. Andrea Matolcsi of the University of Bristol, an issue was raised in relation to Article 22 (Paying for a prostitution service by an exploited person) and the similarity it shared with section 53A of the Sexual Offences Act (England and Wales). It was noted in Dr. Matolcsi's submission that her research into this particular area found that it was a difficult offence to bring to prosecution. It was also found amongst participants in the research that a full ban on the purchase of sex would be a more effective option. Dr. Matolcsi therefore proposed amending the draft Law as follows –

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[26] Written submission – Professor Clare McGlynn – 12 February 2018
[27] Telecommunications (Jersey) Law 2002 – Article 51
[28] Public Hearing with the Minister for Home Affairs – 19 February 2018 – p.24

"A full ban on the purchase of sex, while also decriminalising those who sell sex (but not those who profit from those selling sex, such as procurers and brothels), would be a more effective offence than criminalising the purchase of sex only if it can be shown that the person in prostitution has been subject to coercion/exploitation, and would also send a stronger message regarding equality between women and men".[29]

31. The Panel acknowledges that the suggested model is similar to the Nordic model as favoured in Sweden and Norway. The Panel followed up this proposed amendment at the Public Hearing with the Minister for Home Affairs and received the following response –

Deputy of St. John:

... 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 that 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?

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.[30]

32. The Panel found that the draft Law offers up a solution which is unique to the Island and is also an issue which is difficult to legislate –

Minister for Home Affairs:

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.

Deputy of St. John:

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

[29] Written Submission – Dr Andrea Matolcsi – 13 February 2018
[30] Public hearing with the Minister for Home Affairs – 19 February 2018 – p.28

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.

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.[31]

33. The Panel acknowledges the risks associated with adopting a full ban on the purchase of sex, and is satisfied that the draft Law does indeed provide an adequate balance in terms of protecting those selling sex, but also allows for the conviction of those exploiting that service.

Female and Male genital mutilation

34. The issue of Female Genital Mutilation ("FGM") is covered extensively in the draft Law and is completely criminalised as a result. The Panel questioned the Minister for Home Affairs on whether there was a suitable defence for medical professionals undertaking necessary procedures and on the rationale for including FGM in the draft Law –

Deputy J.M. Maçon of St. Saviour:

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

Minister for Home Affairs:

It is, yes.

Deputy J.M. Maçon of St. Saviour:

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

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 of St. Saviour:

So there is a defence for medical practitioners?

[31] Public hearing with the Minister for Home Affairs – 19 February 2018 – p.28+29

Minister for Home Affairs:

Yes.[32]

35. The Panel questioned the Minister as to whether or not FGM was an issue in Jersey, and received the following rationale for its inclusion in the draft Law –

Deputy J.M. Maçon of St. Saviour:

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

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 of St. Saviour:

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

Minister for Home Affairs:

Yes, it does.[33]

36. The issue of male genital mutilation was also highlighted to the Panel during the course of its review. The Director of Criminal Justice gave the following answer in response to why this was not included in the draft Law –

"FGM will apply to females of any age. We did have a discussion about male circumcision but didn't seek to include it in the draft Law. This topic is gaining prominence at the moment because Iceland is about to propose a ban. This move is highly controversial and religious leaders have described the move as an attack on religious freedom. Some critics, predominantly Jews and Muslims fear the issue may become a proxy for antisemitism and Islamophobia. On the other side of the argument, the Icelandic view is that circumcision violates the rights of young boys and is incompatible with UNCRC. The conclusion that we came to is to 'watch and wait' to see how this pans out across Europe and the UK and for future governments to make amendments."[34]

Conclusion

37. In conclusion, the Panel is generally supportive of the draft Law. The Panel has, however, brought forward amendments based on the evidence it has received, which it believes adds weight to an otherwise positive piece of legislation.

[32] Public hearing with the Minister for Home Affairs – 19 February 2018 – p.15+16
[33] Public hearing with the Minister for Home Affairs – 19 February 2018 – p.15+16
[34] Written submission – Director of Criminal Justice – 2 March 2018

38. The Panel would like to place on record its thanks to the Minister and her Officers, the Attorney General and the Law Officers' Department, and the Law Draftsman for the information and co-operation that they have provided during the course of the review. It is the opinion of the Panel that this review has been a positive example of the good work that can be accomplished when Scrutiny and the Departments work co-operatively.

39. The Panel therefore supports the Proposition, and would urge Members to consider and support the amendments it has brought to the draft Law.

APPENDIX

Questions from Scrutiny on Draft Sexual Offences (Jersey) Law 201-

ARTICLE 1

Article 1 contains general interpretation provisions.

Paragraph 1 – Payment definition is Article 21(3):

> *21(3) In this Law "payment" means the giving of a financial advantage, including the discharge of an obligation to pay or the provision of any goods or of a service (including a sexual service) gratuitously or at a discount.*

Q: Would this include someone paying for accommodation/holidays, etc.?

- Yes, this would be included. Payment is defined broadly to mean giving a financial advantage, including providing goods or services. Giving gifts in the form of a holiday or free accommodation would be covered. It's important to remember that a "prostitution service" is defined as a sexual act that is performed by one person for another in return for a payment. Some relationship between the sexual service and the payment or the expectation of payment is required.

Paragraph 4 – makes provision for 'touching':

> *(4) For the purpose of this Law, touching another person includes –*
>
> *(a) ejaculating semen onto the other person; and*
>
> *(b) emitting urine or saliva onto the other person.*

Q: What about the inclusion of defecation?

- Touching includes acts normally treated as touching, but also the acts of ejaculating semen, or emitting urine or saliva onto another person. The definition of touching is deliberately not exhaustive. Whilst defecation isn't included in this list, it is possible that in specific circumstances it could be treated as touching a person, though in those circumstances it is likely the person who is defecating would be touching the other person in another way. In any event, non-consensual defecation on a person will be captured by the offence of indecent assault.

ARTICLE 2 – CONSENT

Consent has to be given by the person concerned to the act concerned.

Q: What about consent through silence?

- Article 2 makes special provision for the interpretation of "consent". Consent is defined as free agreement. 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 when consent is given and at the time of the act for which the consent is given. So if a person gives consent, while awake, conscious and capable, for an act to take place once that person has become asleep, 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.

Q: How can it be determined that consent is given when it is one 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 for 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 the 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).

Paragraph 3 –

Q: Should they include manipulation?

- In some circumstances, manipulation would be covered by Article 2(3)(c) or (d) of the draft Law.

Q: Why have they specified these areas in particular?

- This has been informed by experience elsewhere – particularly the English and Scottish Laws and by recommendations made by Dame Angiolini in a recent 2015 report (The Independent Review of the Investigation and Prosecution of Rape). Given the conclusions in that report, it seemed appropriate that 'consent' in the draft Law should be defined in a similar way to the Scottish Act.

ARTICLE 3 – INTERPRETATION: DEFENCES AND REASONABLE BELIEF IN CONSENT, AGE OR ABSENCE OF EXPLOITATION

Paragraph (1):

(1) For the purpose of any provision of this Law under which a defendant is required to show a fact to establish a defence, the defendant is to be taken to have shown the fact if –

(a) sufficient evidence of the fact is adduced to raise an issue with respect to it; and

(b) the contrary is not proved beyond reasonable doubt.

Q: Paragraph (1)(a) – doesn't make sense, could we get a plain English explanation please?

- The purpose of this provision is to make it clear where the evidential burden of proving a defence rests.

  This provision, together with the provisions setting out defences elsewhere in the draft Law, makes it clear that where a defendant wishes to rely on a defence, he or she need only raise sufficient evidence that there is a factual basis for the defence. The burden of proving that the defence does not apply beyond a reasonable doubt then rests with the prosecution.

Q: Paragraphs (3) and (5) – How would this work practically in court? Especially when in cases of no other witnesses.

- The prosecution will be required to prove the ingredients of the offence and that any defence raised by the defendant does not apply beyond a reasonable doubt.

ARTICLE 4 – ACCESSORIES AND CHILDREN

Paragraph (1):

(1) A child aged 15 or younger is not guilty, whether under customary law or Article 1 of the Criminal Offences (Jersey) Law 2009, of an offence of aiding, abetting, counselling, procuring or inciting the commission by an adult of an offence under this Law against that child.

Q: Does this mean child 15 or younger cannot be criminalised for being forced to carry out acts encouraged by adult?

- Yes, if the question refers to acts involving the child alone or that child and the adult. But in the event that an adult forces/encourages the child to sexually assault someone else, this does not provide a defence.

  Jersey has defences for children/adults who are forced into committing offences against other people, and but prosecution policy will always give due consideration to the circumstances of the offence.

Paragraph (3):

(3) A person is not guilty of the offence if the person –

(a) acts for the purpose of –

(i) protecting the child from sexually transmitted infection,

(ii) protecting the physical safety of the child,

(iii) preventing the child from becoming pregnant, or

(iv) promoting the child's emotional well-being by the giving of advice; and

(b) does not act for the purpose of –

(i) obtaining sexual gratification for that person or for any other person,

(ii) causing humiliation, distress or alarm to any person, or

(iii) causing or encouraging the act that constitutes the offence against the child, or the involvement of the child in that act.

Q: Could this potentially be used against the so-called vigilante, in particular (3)(b)(ii)?

- It's not clear entirely what this question means. The purpose of this provision is to ensure that a person who provides services to children to safeguard their wellbeing, including providing them with sexual health advice or contraception, does not thereby commit an offence under the draft Law. Those circumstances are quite different to those of the vigilante, who does not provide services to children.

Q: Why these particular carve-outs?

- This is to protect the professional people whose role it is to protect children (Brook Advisory Service, social workers, nurses, etc.).

Q: Paragraph (5) – Catch-all clause? Why bother with the others?

(5) Paragraphs (1) to (3) do not affect any other enactment or any rule of law restricting the circumstances in which a person is guilty of aiding, abetting, counselling, procuring or inciting the commission of an offence under this Law.

- Paragraph (5) ensures that paragraphs (1) to (3) are additional protections for defendants, and do not undermine any other ways in which a defendant can be not guilty of aiding an offence.

PART 2 – NON-CONSENSUAL OFFENCES (ARTICLES 5–8)

Part 2 details non-consensual offences, consent being defined previously in Part 1, i.e. where one of the parties to a sexual act has not freely agreed to being a part of the sexual act, and the other party does not reasonably believe that the non-consenting party has in fact provided consent. Each of these offences can be committed by an adult or by a child of any age. The offences can also be committed against an adult or a child.

Q: What is imprisonment for life?

- When a Court passes a life sentence, it means that the defendant will be liable to detention for life. However, this does not mean that a defendant will spend his or her whole life in prison. In practice, the court will specify the minimum term that an offender must spend in prison before becoming eligible for release. Whether a person is released will depend on the extent of the risk that a person poses.

Q: What is the difference between rape, sexual penetration and sexual act?

- RAPE – rape is the non-consensual penetration of the vagina, anus or mouth of a person with a penis. The offence of assault by sexual penetration may be committed where a person's vagina or anus is penetrated without consent by a part of a person's body or an object.

- PENETRATION – A reference in this Law to "penetration" is to a continuing act from entry to withdrawal.

- SEXUAL – For the purpose of this Law an act (including penetration, touching or communication) is sexual if a reasonable person would, in all the circumstances of the case, consider it to be sexual.

Q: How do you determine the difference?

- The difference has been defined in the draft Law. It would be for the prosecution to prove the ingredients of the offence.

ARTICLE 8 – CAUSING SEXUAL ACT WITHOUT CONSENT

Paragraph (3):

(3) For the purpose of paragraph (1), and without limiting that paragraph, it is irrelevant whether any other person or persons (whether or not including D) also engage in the act.

Q: Paragraph 3 – What does this mean? Is this a case of someone else is involved?

- This makes it clear that the offence of causing a sexual act without consent may be committed regardless of whether there is another person involved in performing the act in question. For example, if D causes C to masturbate, the offence may be committed even though no other person comes into contact with C.

Q: Surely if that is the case, they should be included and if not, how can they be recognised as a party to the act?

- Where another person engages in the non-consensual sexual act, the other party may be guilty of another offence outlined in the draft Law. For example, the offences in Article 5 (rape), Article 6 (sexual penetration without consent), or Article 7 (sexual touching without consent).

PART 3 – OFFENCES BY ADULTS AGAINST CHILDREN AGED 12 OR YOUNGER (ARTICLES 9–10)

Part 3 provides for sexual offences by adults against young children (aged 12 or younger). The child's consent is irrelevant to guilt, as would be any belief by the adult that the child was older.

ARTICLES 9 AND 10

Q: Makes it explicit that it is an offence for 12 and under. Why 12? Why should offenders have a defence mechanism for 13, 14 or 15 year-olds?

- The Law makes special provision for children ages 12 and under, so that consent is irrelevant to the offence and reasonable belief in the age of the child is also not relevant. It is considered that there are circumstances where teenage

children could be reasonably believed to be aged 16 or older. In any case, it would be for the defendant to raise sufficient evidence that they reasonably believed the child to be over the age of 16 before they could rely on this defence.

PART 4 – OFFENCES BY ADULTS AGAINST CHILDREN AGED 13 TO 15 (ARTICLES 11–12)

Part 4 provides for sexual offences by adults against older children (aged 13, 14 or 15). The child's consent is again irrelevant to guilt.

Q: "Unlawful sexual intercourse": why is this needed? It is not referred to anywhere else, only for 13, 14 and 15 year-olds.

- Part 4 provides for those offences which are offences due to the age of one of the parties being aged 13 to 15, and the other is an adult. While a lack of reasonable belief in consent is not required to commit the offences in Part 4, it is important to recognise that there is an interplay with the other offences in the draft Law – particularly those in Part 2.

  When a child aged 13, 14 or 15 does not, in fact, consent to a sexual act with an adult (and the defendant does not reasonably believe the child consents), the act will amount to an offence under an Article in Part 2, as well as amounting to a second offence under the equivalent provision in Part 4. As set out in Article 42 of the draft Law, the prosecution can choose the appropriate charge in a case when an act constitutes more than one offence.

  In such cases, the prosecution will need to consider the facts and whether in the circumstances the defendant may have reasonably believed that the child both consented and was over the age of 16. Where consent is accepted, but it is not accepted that that the defendant reasonably believed that the child was 16, the prosecution may think it more appropriate to pursue a prosecution for the Part 4 offence rather than the Part 2 offence.

  This interaction enables the draft Law to appropriately manage certain relationships which can occur consensually, but which should still be managed by statute, so as to prevent abuse. For instance, a child aged 15 who has sex with an adult aged 18, but where an 18 year-old met the 15 year-old in a nightclub and had a reasonable belief that the child was in fact aged 16 or older.

Paragraph (4):

(4) It is a defence, in relation to each of the offences under this Article, for the defendant to show that the defendant reasonably believed that the other person was aged 16 or older.

Q: Paragraph (4) – includes a defence mechanism for reasonably believing a person was aged 16 or over, is this right?

- Yes, it is considered that there are circumstances where teenaged children could be believed to be aged 16 or older.

Q: Paragraph (5) – why is the sentence for a 13, 14, or 15 year-old less than that of a 12 year-old? (14 years vs life)

- This reflects the inter-relationship between different provisions of the draft Law as set out above. Arguably, the circumstances that would in practice be prosecuted under Part 4 (involving consensual sexual acts) are less serious than the offences in Part 2 where the victim does not consent.

PART 5 – OTHER OFFENCES AGAINST CHILDREN AGED 15 OR YOUNGER (ARTICLES 13–17)

Part 5 provides for other sexual offences against children aged 15 or younger. Some, but not all, can be committed by children, some only by adults, and some by either.

ARTICLE 13

13 Unlawful sexual act between children

(1) A child commits an offence, and is liable to imprisonment for 5 years and to a fine, if –

(a) that child intentionally –

(i) touches another person,

(ii) engages in any other act with another person,

(iii) causes another person to engage in an act, or

(iv) incites another person to engage in an act;

(b) the touching or the act is sexual; and

(c) the other person is aged 15 or younger.

(2) For the purpose of paragraph (1)(a), it is irrelevant whether the touching or the act also forms part of an offence committed by the other person.

(3) It is a defence for the defendant to show that –

(a) the other person was aged 13 or older; and

(b) the defendant reasonably believed that the other person was aged 16 or older.

Q: Criminalises a child – paragraph (1)(a)(ii) – any other act – is this far-reaching?

- The approach adopted deals with the difficulty of children under the age of sexual consent having consensual sex with each other, as well as children at very similar ages. The difficulty arises because this offence needs to not only address the above relations which are consensual between the parties and probably not in the public interest to prosecute, and those instances where children closer to the age of 18 have sexual relations with children aged 13 or 14, perhaps in circumstances that are exploitative, which may need to addressed through the criminal justice system. It is clear that the latter requires sufficient statutory regulation to prevent sexual exploitation of children, but needs to be framed and penalised in such a way so as not to deter children from seeking guidance about sexual health and relationships.

It is far-reaching in the sense of covering any kind of act, but it is limited by 13(1)(b), so it only applies if the act was sexual (e.g. not all forms of kissing are automatically sexual – only "*if a reasonable person would, in all the circumstances of the case, consider it to be sexual"*).

ARTICLE 14

14 Causing a child to watch or be present during a sexual act

(1) An adult commits an offence if –

(a) the adult intentionally engages in an act;

(b) the act is sexual;

(c) for the purpose of obtaining sexual gratification or of causing humiliation, distress or alarm, the adult engages in the act when another person is present or is in a place from which the adult can be observed; and

(d) the other person is aged 15 or younger.

Q: Paragraph (1) – refers to adult then paragraph (3) creates a defence for 13–15 year -olds that look 16+. Surely this should be wrong in any circumstance?

- There is a defence in law if a child is aged 13, 14, or 15, but the adult reasonably believed the child was 16 or older.

Q: How do you show you reasonably believe a 13 year-old is 16+?

- The Court shall have regard to whether the defendant took steps to ascertain the age and what those steps were.

ARTICLE 15 – SEXUAL GROOMING OF A CHILD

This is the Article under which prosecutions under vigilante acts can be prosecuted.

Q: Paragraph (3)(f) – surely if someone on a sex offenders' register has broken their order, the offence should be considered more severely than that of a first time, no? Should they have a defence?

- In other jurisdictions, a defence is available and we have taken a similar approach. In sentencing, the Judge will take into account all the relevant circumstances.

ARTICLES 16 AND 17

ARTICLE 16 – PAYING FOR SEXUAL SERVICE BY A CHILD

Q: Basically exploitation. Sentence of paying for sexual service by a child should surely be a higher sentence as it is beyond reproach and considered equally as bad as the sexual assault itself.

- If the incident also amounts to rape or another non-consensual offence, listed in Part 2, it will be charged as such. This offence is committed if the person promises to pay or knows or believes that another person has paid.

Q: We need to check the Protection of Children (Jersey) law 1994 for the definitions of indecent photograph, indecent pseudo-photograph and prohibited image to ensure it is up-to-scratch for what is expected in the modern age.

- It is considered that the draft Law is sufficient in this regard.

PART 6 – ABUSE OF TRUST OFFENCES

Part 6 – Abuse of trust offences against persons aged 16 or 17 (Articles 18–20) makes provision for those offences which arise due to the presence of a defined relationship between an adult and a child which creates a position of trust on the part of the adult towards a particular child. These offences do not apply where the child is aged 15 or younger. That is because the relevant acts will be child sex offences in their own right at that age, and the breach of trust will then be an aggravating factor that the court can take into account on sentencing.

ARTICLE 18

Q: Paragraph (2)(b) goes further in defence than other defence Articles, why?

- This list of defined relationships has been brought forward from the Sexual Offences (Jersey) Law 2007, with the addition of a 'coach', in light of the deficiency in the Law as brought to the attention of the Public on the exposure by global media of a number of high-level coaches abusing their positions of trust.

ARTICLE 19

Q: Defines positions of trust. It seems narrow and surely this should consider all public officials?

- To be in a position of trust, a number of conditions need to be satisfied. Not all public officials will meet those conditions which is why specific classifications have been prescribed.

Q: Does this include the youth service?

- Yes, if the circumstances of their relationship with a child fall within one of the 5 conditions.

Q: Paragraph (4) – does not include Education Law, surely this should be a given with sixth form? Why has it not been included when other legislation has been?

- This paragraph addresses a particular set of functions that only apply if adult regularly has unsupervised contact with a particular child. This is more limited than the provision elsewhere which include the functions under the Education Law in general. Any person who looks after children at a school are captured by Article 19(2).

Q: Paragraph (5) – Why not education?

- As above

ARTICLE 20

Q: Paragraph (2)(b) refers to Education Law but it is not mentioned in Article 19.

- There is no difficulty with the operation of Article 19 as presently drafted, as the definitions of "School" and "education supervision order" make use of the definition of "Education Law" in Article 20. The inclusion of Education Law as a defined term that is only used in Article 20 might be said to be a drafting error that was not picked up on checking, but it is not significant and can readily be fixed by amendment or in the Revised Edition by removing the "Education Law" definition and spelling out the name of the Law in full in the definitions of "education supervision order" and "school".

PART 7 – PROSTITUTION OFFENCES (ARTICLES 21–27)

Part 7 details those offences that relate to prostitution, replacing some old legislation and adding new provisions. Prostitution itself is not illegal; it is the conduct of both the prostitute and the person to whom the prostitution service is provided which can constitute an offence under the draft Law. An offence can also be committed by a person who controls prostitution, or a person who lets property knowing that it will be used for the purposes of committing prostitution offences under the draft Law.

ARTICLE 21

(1) In this Law "payment" means the giving of a financial advantage, including the discharge of an obligation to pay or the provision of any goods or of a service (including a sexual service) gratuitously or at a discount.

Q: Does this include paying rent/holiday, etc.?

- Yes.

(4) In this Law "gain" means the obtaining of –

(a) a payment; or

(b) the goodwill of another person, if that goodwill is or appears likely (whether immediately or in time) to lead to a payment.

Q: In (b) what is the definition of goodwill?

- Fundamentally, this is assumed to have the ordinary meaning of benevolence or kindness, although goodwill can also be used to something of value to a business in addition to its physical assets, i.e. customer loyalty. The point is that it must be something that can be obtained and it must at least appear to be likely to lead to unforced payment. Therefore it covers 'weaker' attitudes than positive benevolence and kindness, all the way down to just looking favourably on whether to pay in future.

ARTICLES 22 AND 23

ARTICLE 22 – PAYING FOR A PROSTITUTION SERVICE BY AN EXPLOITED PERSON

ARTICLE 23 – OFFERING OR SEEKING PROSTITUTION SERVICE IN ROAD OR PUBLIC PLACE

Q: What is level 3 on the standard scale?

- A fine of £10,000.

ARTICLE 25 – CAUSING, INCITING OR CONTROLLING PROSTITUTION FOR GAIN

Q: Basically this is for what is commonly known as 'pimps'. Is 7 years an appropriate sentence?

- This penalty is in line with other jurisdictions.

PART 8 – FEMALE GENITAL MUTILATION OFFENCES AND ORDERS (ARTICLES 28–33)

Part 8 prohibits female genital mutilation ("FGM"). It creates offences, requires certain professionals to report apparent FGM, and allows orders to be made by a court to protect persons from FGM.

Q: FGM – are there any instances of this in Jersey?

- To the best of our knowledge none have been reported. The inclusion of these Articles will ensure that Jersey has the legislation in place to sign up to the Istanbul Convention.

ARTICLE 29 – ASSISTING FEMALE GENITAL MUTILATION

Q: Paragraphs (2) and (3) counteract each other as definition of a person habitually and not habitually resident in Jersey.

- The paragraphs do not counteract each other but are framed in this way to ensure that residence is not a factor in the commission of the offence.

Q: What is the training for regulated professionals? How is this kept up-to-date?

- Training issues are a matter for the Safeguarding Partnership Board. Also, there will be profession-specific training and CPD delivered by regulatory bodies (NMC, GMC, etc.).

ARTICLE 31 – DUTY TO NOTIFY POLICE OF APPARENT FEMALE GENITAL MUTILATION OF CHILD

Q: Paragraph (4)(e) – orally or written – surely it should be written at all times?

- In practice, the notification is likely to be made orally. A practitioner noticing physical signs of FGM would need to report the matter urgently. The notification would likely be followed up with a written referral to a specialist service.

Paragraph (5) –

(5) A regulated professional who contravenes paragraph (1) commits an offence and is liable to a fine of level 3 on the standard scale.

Q: Paragraph 5 – level 3 on standard scale, is this proportionate? Puts on the same level as someone prostituting in a public place.

- A level 3 fine is set at £10,000. Any professional who fails to notify the Police would also face sanction from their professional body.

ARTICLE 33 – BREACHING FGM PROTECTION ORDER

Q: How can someone breach an FGM order?

- An FGM Order can be breached by contravening any of the prohibitions, restrictions or requirements placed on the recipient of the Order by the Royal Court. This could include arranging travel to a country where FGM is prevalent.

PART 9 – MISCELLANEOUS SEXUAL OFFENCES (ARTICLES 34–40)

Part 9 provides for miscellaneous sexual offences to include – incest; exposure; voyeurism; bestiality; administering a substance to commit a sexual offence; committing an offence in order to commit a sexual offence. Article 41 also provides that certain persons who commit certain sexual offences outside Jersey will be guilty of those offences as if they were committed in Jersey.

ARTICLE 35 – EXPOSURE

Q: Why aren't breasts included?

- Breasts are not considered genitalia and therefore not captured by the offence. If there was an intent to shock by exposing one's breasts, it might be covered by the customary offence of indecent exposure, which is retained by the draft Law.

ARTICLE 36

36 Voyeurism

(1) For the purposes of paragraphs (2) and (3) a person is doing a private act if the person is in a place which, in the circumstances, would reasonably be expected to provide privacy, and –

(a) the person's penis, scrotum, vagina, buttocks or breasts are exposed or covered only with underwear;

(b) the person is using a lavatory; or

(c) the person is doing a sexual act that is not of a kind ordinarily done in public.

Q: Aren't sexual acts banned in public? Can this be construed as kissing?

- Kissing is not captured by this Article. Kissing is an act that is regularly performed in public.

Q: Paragraph (4) – is this 'upskirting'?

- Yes, this covers the offence of 'upskirting' whereby a person uses a device to record an image under the clothing of another person.

Q: This Article refers to breasts even in underwear but yet it is not referred to in exposure – why?

- Because this is a voyeurism offence. It is the act of someone else watching another person for the purpose of sexual gratification.

Q: How has the Minster determined what is appropriate to be amended by Order or Regulations?

- Whether something can be amended by an Order or Regulations is a question of how much scrutiny the Assembly needs to give to particular pieces of secondary legislation. The decision in this case was taken in conjunction with the Law Draftsman and Law Officers.

PART 10 – MISCELLANEOUS PROVISIONS, REPEALS AND AMENDMENTS

ARTICLE 41 – JURY TRIALS AND MIXED INDICTMENTS

Q: How will this change when the Criminal Procedure Law comes in?

- This Law will be consequentially amended once the commencement dates of it and the Criminal Procedure Law are settled.

ARTICLE 43 – EVIDENCE AS TO SEXUAL HISTORY

Q: What if the defendant is the husband/partner of complainant: does their sexual history get spelt out in court?

- Any admission of evidence as to sexual history needs to be made with the leave of the court. It is irrelevant that the complainant/defendant is a spouse.

SCHEDULE (Protection of Children (Jersey) Law 1994)

Q: Is there potential for parents' or grandparents' family photos being construed as indecent images?

- That is not the intention of this amendment.