

STATES OF JERSEY



DRAFT CRIMINAL PROCEDURE (JERSEY) LAW 201- (P.118/2017): AMENDMENT (P.118/2017 Amd.) – COMMENTS

**Presented to the States on 19th March 2018
by the Minister for Home Affairs**

STATES GREFFE

COMMENTS

Article 75 of the Draft Criminal Procedure (Jersey) Law 201- (the “draft Law”) ([P.118/2017](#)) makes new provision in relation to the delivery of a verdict by a jury.

Under Articles 43 and 46 of the *Loi (1864) réglant la Procédure Criminelle* (the “1864 Law”), where a panel of 12 jurors cannot reach a unanimous or majority verdict of 10 jurors in favour of finding the defendant guilty, then the jury will deliver a verdict of not guilty.

Article 75 of the draft Law changes the position so that a jury of 12 jurors will only be able to deliver a verdict of guilty or of not guilty if the members are unanimous, or if 10 jurors are agreed on that verdict. If the members of the jury are unable to deliver a verdict on which a sufficient number of jurors are agreed, then the jury will be discharged from the proceedings. In the event of a hung jury, then pursuant to paragraph (9) of Article 75 of the draft Law, H.M. Attorney General will have the right to seek a retrial for the offence within 7 days.

The Scrutiny Panel’s amendment ([P.118/2017 Amd.](#)) rightly accepts that juries in Jersey should in future be required to reach a verdict upon which at least 10 of them are agreed. As the Panel’s comments ([P.118/2017 Com.\(2\)](#)) reflect, this will help to ensure that the verdict reached by the jury is one that has been thoroughly deliberated on by its members. As can be seen in the table later in this document, this is also the approach taken in other countries that retain the right to jury trial.

However, the Panel’s amendment would remove H.M. Attorney General’s right to require that a retrial takes place. Where the jury is unable to agree on a verdict, the defendant would be discharged from the proceedings, and could not thereafter be subject to a retrial.

For the reasons set out below, the amendment should be rejected.

The frequency and process of retrials

It is anticipated that a retrial will only be required in exceptional cases. In England and Wales in 2008, which was a year in which there was a high number of juries that were unable to reach a verdict, there were only 116 cases out of a total of 16,718 that came to court where the jury was unable to reach a verdict. This amounted to just 0.7% of cases¹ (the average is closer to 0.6%)². In the Isle of Man, where a unanimous verdict is required from a jury, there were only 3 cases between 2009 and 2016 when a jury was unable to deliver a verdict³.

Further, even in the small minority of cases where the jury is unable to deliver a verdict, a retrial is likely to be the exception rather than the rule. In England and Wales, a retrial is only sought by the Crown after applying the following considerations⁴ –

¹ <http://news.bbc.co.uk/1/hi/uk/7958322.stm>

² <https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/are-juries-fair-research.pdf>

³ Paragraph 58 of the [Report of the Select Committee on the operation of the jury system, PP2016/0100](#)

⁴ <https://www.cps.gov.uk/legal-guidance/re-trials>

- “1. *The merits of the case:*
 - *Is there still a realistic prospect of a conviction?*
 - *Have any material changes occurred during the course of the first trial?*
 - *Are the witnesses willing, and available, to give evidence again?*
2. *Likely reasons for the jury’s failure to reach a verdict:*
 - *Was the failure to reach a verdict perverse? If so, a re-trial is likely to be appropriate.*
 - *Is there a suggestion that the jury was influenced by factors other than the evidence? This might bear investigation for an offence of jury interference.*
3. *The public interest in seeking a verdict. Consider the following factors:*
 - *the seriousness of the offence;*
 - *the length of time since the offence was committed;*
 - *the likely delay until the case can be re-tried;*
 - *whether the defendant is in custody;*
 - *the likely sentence if the defendant is ultimately convicted; and*
 - *the consequences of proceeding or not (for example, any effect on linked or co-defendants).*
4. *The interests and views of the victim(s).*
5. *Any views expressed by the trial judge.*
6. *Prosecuting Advocate’s opinion.*
7. *The views of the police.”*

Similar grounds would be applied when considering whether to bring a retrial in Jersey, so that one would only take place where it was appropriate.

A retrial can be fair in a small jurisdiction

The evidence to the Panel has suggested that a retrial may not be fair to a defendant in a small jurisdiction where the jury may be aware, from media coverage, of the evidence presented by the defendant and the prosecution.

However, it is not clear what, if any, prejudice would in fact be caused to a defendant by a member of the jury being aware in advance of some of the evidence that will be presented at trial. At worst, a jury member might be presented with evidence that they may have heard from an earlier media report. That need not prevent a juror from reaching an impartial view based on the evidence at trial.

Contrary to some of the evidence presented to the Panel, it is not the case that where a retrial takes place in England it will usually be held in a different town, or indeed a different court, and there is no evidence to suggest that prior media reporting of the evidence is prejudicial to the defendant. Of course, retrials can already take place in

Jersey if, for example, the jury size falls below 10⁵, or an appellant succeeds on an appeal to the Court of Appeal, which can order a retrial. This happened in the case of *AG v Holley*, where the defendant was tried twice for murder after his original conviction was quashed by the Court of Appeal. The Jersey courts have accepted that juries can follow directions to ignore the publicity surrounding a case, and that courts can manage their proceedings to ensure that a trial following earlier publicity is fair. This was reflected in the judgement in the case of *AG v Aubin* concerning historic sexual abuse⁶.

Jersey's present jury system is unusual

By not requiring unanimous or majority verdicts of guilt or innocence; and not having a means for the prosecution to require a retrial, Jersey is anomalous when compared with other countries that have retained the right to jury trial.

The table below sets out the main Commonwealth countries in which juries are used, and shows where unanimity or a majority verdict is required for guilt or innocence; and whether there is a right to a retrial in the event of a hung jury.

Jurisdiction	Unanimity required?	Majority verdicts available for guilty and not guilty?	Will a hung jury result in an automatic acquittal?	Retrials available?
England and Wales	Yes, unless a majority verdict direction given https://www.legislation.gov.uk/ukpga/1974/23/section/17	Yes, after two hours the Judge can direct a majority verdict – 10–2 https://www.legislation.gov.uk/ukpga/1974/23/section/17 at 17(4)	No http://www.justice.gov.uk/courts/procedure-rules/criminal/practice-direction/part4#id6178156 at IV.46.7 – it does not provide specifically for what will occur subsequently, but notes that a discharge occurs	Yes – CPS decide
Australia	Yes, although some States do allow majority verdicts after a number of hours have elapsed Unanimity is always required in some States	Yes (see below)	No	Tasmania – Yes Victoria – Yes, the Crown decides Northern Territory – Yes South Australia – Yes

⁵ Article 56 of *Loi (1864) réglant la procédure criminelle*

⁶ See in particular: *Attorney General v Michael Aubin* [2009] JRC035A

Jurisdiction	Unanimity required?	Majority verdicts available for guilty and not guilty?	Will a hung jury result in an automatic acquittal?	Retrials available?
				Western Australia – Yes New South Wales – Yes, the Crown decides
Majority verdicts in Australia				
<p>In Tasmania, except for murder and treason, majority verdict is possible after 2 hours: http://classic.austlii.edu.au/au/legis/tas/consol_act/ja200397/s43.html</p> <p>In Victoria, majority verdicts can be returned after 6 hours – need all but one jury member: http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/vic/consol_act/ja200097/s46.html</p> <p>In the Northern Territory, majority verdicts of 10–2 can be returned after 6 hours: https://legislation.nt.gov.au/Legislation/CRIMINAL-CODE-ACT – s. 368</p> <p>In South Australia, majority verdicts (e.g. 10–1) can be returned if a unanimous verdict cannot be reached in 4 hours: https://www.legislation.sa.gov.au/LZ/C/A/JURIES%20ACT%201927.aspx – s. 57</p> <p>In Western Australia a majority verdict of 10-2 accepted: https://www.slp.wa.gov.au/legislation/statutes.nsf/main_mrtitle_229_homepage.html – s. 114</p> <p>In New South Wales, majority verdicts can be returned after deliberation of a minimum of 8 hours and after examination of one or more jurors on oath. A unanimous verdict will not be reached if further deliberation is to occur: http://classic.austlii.edu.au/au/legis/nsw/consol_act/ja197791/s55f.html – s. 55F</p>				
Jurisdiction	Unanimity required?	Majority verdicts available for guilty and not guilty?	Will a hung jury result in an automatic acquittal?	Retrials available?
Canada	Yes	No	No	Yes – judge decides
Ireland	Yes, unless a majority verdict direction given http://www.iris.hstatutebook.ie/eli/1984/act/22/section/25/enacted/en/html	Yes, a majority verdict of 10–2 possible after cases have been considered for a reasonable time	No	Yes – Public Prosecution Service (CPS equivalent)
Jersey	No	No – only guilty verdicts	Yes	No

Jurisdiction	Unanimity required?	Majority verdicts available for guilty and not guilty?	Will a hung jury result in an automatic acquittal?	Retrials available?
Isle of Man	Yes	No	No	Yes – prosecution decides
New Zealand	Yes, unless a majority verdict direction given http://www.legislation.govt.nz/act/public/1981/0023/latest/whole.html#DLM2191701 – s. 29C	Yes – now majority verdicts possible of one less than the full jury under certain circumstances	No	Yes – Crown solicitor or Solicitor-General after 2 trials
Scotland	No http://eprints.gla.ac.uk/99086/1/99086.pdf There appears to be a lack of legislation providing for the Scottish jury system, but the link provides a helpful discussion	Yes – jury of 15 – simple majority (8) to convict	Not possible for there to be a hung jury, but the jury can have a verdict of ‘not proven’ where there is insufficient evidence to convict, and applies similar to a not guilty verdict	Not possible as simple majority prevents, need for retrials, and ‘not proven’ verdict applies as not guilty
United States of America	Yes; however, in <i>Apdoaca v Oregon</i> , the Supreme Court held that jury unanimity is not constitutionally required, and that verdicts of 11–1 or 10–2 were constitutionally valid – but see next column	In most cases in most States, unanimity is required for any verdict Only 2 States do not require a unanimous verdict – Oregon and Louisiana	No	Yes, the State decides

It is clear that retrials are available in every instance except Jersey. Members may wish to be aware that Guernsey does not have jury trials.

In summary

- The amendment would remove the possibility of a retrial in the rare event that a jury could not agree a verdict. This may lead to an anomalous outcome, whereby the proceedings conclude without a verdict being reached.
- The number of retrials is likely to be very limited.
- Retrials are not inherently unfair in small jurisdictions or elsewhere.
- The vast majority of common law jurisdictions permit retrials as an intrinsic part of the operation of their jury system.

Members will be aware that the Minister for Home Affairs has worked closely with the Scrutiny Sub-Panel to enhance and improve this legislation, and has agreed a significant number of amendments to the draft Law (collectively lodged as [P.118/2017 Amd.\(2\)](#)). For that, the Minister is very grateful to the Scrutiny Panel.

However, for the reasons given above, the Council of Ministers asks the Assembly to reject the amendment.

Statement under Standing Order 37A [Presentation of comment relating to a proposition]

These comments were submitted to the States Greffe after the noon deadline as set out in Standing Order 37A, because internal review delays meant that the deadline could not be met.