STATES OF JERSEY

DRAFT SEXUAL OFFENCES (JERSEY) LAW 201- (P.18/2018): SECOND AMENDMENT (P.18/2018 Amd.(2)) – COMMENTS

Presented to the States on 20th March 2018
by the Minister for Home Affairs

STATES GREFFE

COMMENTS

The amendment

The Panel's second amendment (P.18/2018 Amd.(2)) would substitute Article 41 of the Draft Sexual Offences (Jersey) Law 201- (P.18/2018) (the "draft Law"). The new Article 41 would omit the provision, found in Article 41(1)(a) of the draft Law, that would confer on a defendant the right to elect to be tried by a jury when charged with any offence in Parts 2, 3 or 4 of the draft Law (i.e. the non-consensual offences and offences by adults against children). If the amendment is accepted, then an offence under those Parts would be tried in the same manner as almost all other statutory offences, namely by the Inferior Number of the Royal Court (i.e. by the Bailiff sitting with 2 Jurats).

The new Article 41 would make essentially the same provision as is made in the draft Law with respect to a 'mixed indictment' containing a new sexual offence (i.e. a case where an indictment contains 2 or more offences, including one provided for in the draft Law and another under customary law). In essence, both the draft Law and the Panel's amendment would provide that the Royal Court will decide whether a case should be tried by the Bailiff sitting with a jury or with 2 Jurats in the event of such a mixed indictment.

Trial by jury or by the Jurats

Like many common and customary law jurisdictions, Jersey retains the right for those people accused of some serious crimes to be tried by a jury of their peers.

Jury trial therefore sits alongside other modes of trial. The Magistrate may summarily try offences that are less serious (in the sense that they are likely to incur a lower penalty).

Pursuant to the *Loi (1864) réglant la Procédure Criminelle* (the "1864 Law"), the defendant has the right to elect for jury trial if a customary offence is to be tried on indictment before the Royal Court. The Inferior Number may try cases where the offence is created by statute or where the defendant does not elect for jury trial. This approach to determining the mode of trial in the Royal Court is long established, and as more substantive offences have been codified, over time it has resulted in a greater range of more serious offences being tried before the Jurats.

The position of the Government and advice of the Law Officers is that the 2 modes of trial for serious offences, jury and Jurats, are both fair and compliant with the European Convention on Human Rights. When preparing the draft Law, considerable thought was given to whether to confer the right to elect for jury trial for sexual offences. The view was reached that the highest priority should be attached to securing the improvements that this legislation will bring to the treatment of sexual offences. There was a concern that omitting provision to confer a right to jury trial for certain sexual offences, that are broadly equivalent to existing customary offences, could jeopardise the passage of the draft Law.

Recent discussions on the Panel's amendment

The Council of Ministers discussed the draft Law and the Panel's amendments at its meeting of 14th March. Following that meeting, the Minister sought the views of the judiciary in a meeting convened on 15th March.

The meeting was attended by the Bailiff, the Lieutenant Bailiff, the Magistrate and H.M. Attorney General, as well as the Minister and officers. Judicial attendees at the meeting did not seek to oppose the amendment, because they accepted that the States are able to legislate as proposed by the Panel in the amendment, but they did have some serious concerns. The following points were made by the representatives of the Court –

(a) There would be an increase in the Jurats' workload. If the 12 jury trials in 2017 were replicated in future, this would amount to 8 to 10 additional sitting days per Jurat. It was said that there did not seem any reason to believe that the number of trials involving allegations of sexual offences would drop in the foreseeable future.

A response to these concerns is that the Jurats' workloads fluctuate over time, and Inferior Number trials are usually slightly shorter than trials by jury, so the actual increase in workload may not be as much as that. It would also be possible to recruit extra Jurats; there are 16 in Guernsey.

(b) The Public expect that certain serious crimes, including sexual offences cases, will be tried by a jury.

A response to these concerns is that many serious crimes may already be tried by the Jurats (including an attempted rape trial in 2015), and the current method of determining the mode of trial is based on historical practice rather a principled approach.

(c) Sexual offence cases raise high emotions for all parties. Juries are anonymous and do not come under public pressure, whereas the Jurats may be criticised for their decisions in sexual offence cases.

A response to that concern is that the Jurats already pass sentence in many sexual offence cases, and try many other cases where emotions run high (e.g. causing death by dangerous driving).

(d) A jury consists of 12 people, who are likely to be a mixture of different ages and genders. They are considering ordinary human relationships, often between young people. A trial before the Inferior Number may result in a tribunal of fact consisting of 2 men or 2 women who are likely to be closer to their sixties than their forties. Both tribunals of fact are capable of considering human relationships.

A response to this concern is evidenced by the work of the Youth Court, which tries young defendants with a Panel that is similarly constituted to the Inferior Number, save that one member of the Panel must be a woman. Now that there is an equal number of female Jurats, a similar provision could be made by way of practice.

(e) A trial before the Jurats may be less traumatic for the victim, as there would be 2 Jurats listening to details of the offence, rather than 12 jurors.

(f) Further, an observation in response to the courts' concerns is that a trial before the Jurats might be convened in a smaller courtroom, which is less intimidating for the witnesses, though special measures can be put in place to mitigate these potential disadvantages of a jury trial.

Members will see that the points above are nuanced. Judicial attendees at the meeting said that it would not be appropriate to proceed with a change if the sole objective was to secure more convictions. It was agreed by all attendees that both modes of trial are fair and just ways of determining guilt or innocence.

There is, however, a very real question about how society sees sexual offences, which must be addressed in detail.

Myths about sexual offences

As identified in the report to this amendment, the concern about jury trials in sexual offence cases is that as the jury members are drawn from the general population, they will bring with them the preconceptions at large in society about rape, sexual assault and other offences. These preconceptions are referred to in the submission from Jersey Action Against Rape ("JAAR") (quoted in that report) as 'rape myths'. There is good evidence that such myths do in fact exist, and are reasonably prevalent.

This is not a criticism of individuals who hold these beliefs, but it reflects a lack of understanding of sexual offences in our society. There is a reluctance in society to discuss rape, child abuse, incest, and sexual assault, and the unwarranted shame and embarrassment often felt by victims of such devastating and life-changing abuse means that only the exceptionally brave and determined speak out about their experiences. In these circumstances, it is not surprising that misunderstandings persist. To help Members understand the issue, some research has been undertaken jointly between CCA officers and the Law Officers' Department.

In 2015, a report was produced in New Zealand, 'The Justice Response to Victims of Sexual Violence, Criminal Trials and Alternative Processes'[1] which summarises the concept of 'rape myths' succinctly –

> *Sexual violence is frequently associated with beliefs and ideas that are based either in moral judgements about how people (especially women) should and should not behave or that are based in ideas about the perpetration of sexual violence that do not reflect reality. Globally, these are sometimes referred to as "rape myths". Kelly, Lovett and Regan in their 2005 study of attrition in rape cases describe these as "powerful stereotypes that function to limit the definition of what counts as 'real rape', in terms of the contexts and relationships within which sex without consent takes place".*

A 'rape myth' is an inaccurate assumption about rape. For example, a commonly held rape myth is that most victims of rape will try to fight off their attacker, whereas in reality we know that most victims show little physical resistance to the attack. A number of commonly held rape myths have been summarised in the following table.

[1] http://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC-R136-The-Justice-Response-to-Victims-of-Sexual-Violence.pdf

Commonly held rape myths	Alternative narratives
Rape occurs between strangers in dark alleys.	- The majority of rapes (72%) are committed by persons known to the victim. - Victims are often raped in their homes.[2]
People provoke rape by the way they dress or act.[3]	- Dressing attractively and flirting can be an invitation for attention, admiration, or consensual sex. It is not an invitation for rape.
People who drink alcohol or use drugs are asking to be raped.[4]	- Being vulnerable does not imply consent. - If a person is unable to give consent because they are drunk, drugged or unconscious, it is rape.
Rape is a crime of passion.	- Forcing someone to have sex against their will is about power, control, and violence – not sexual desire, romance, or passion. - Many rapes are premeditated and planned. - Many rapists fail to get an erection or ejaculate.
If she didn't scream, fight or get injured, it wasn't rape.	- Victims in rape situations are often legitimately afraid of being killed or seriously injured, and so co-operate with the rapist to save their lives. - The victim's perception of threat influences their behaviour, often leading them to freeze or go limp. - Rapists use many manipulative techniques to intimidate and coerce their victims. - Non-consensual intercourse doesn't always leave visible signs on the body or the genitals.
You can tell if she's 'really' been raped by how she acts.	- Reactions to rape are highly varied and individual. - Many women experience a form of shock after a rape that leaves them emotionally numb or flat – and apparently calm.
Women cry rape when they regret having sex or want revenge.[5]	- Data from 2,643 cases suggests that the level of false reporting is somewhere between 8% (a case recorded as a false allegation by the police) and 0.2% (cases where an individual is arrested for a false allegation) (Kelly, Lovett, & Regan, 2005).

[2] 74% take place indoors, such as the victim or attacker's home, and nearly half involve no additional physical injury beyond the rape itself (Muir, 2003).

[3] The Office for National Statistics (ONS) published research which also showed more than a third of interviewees insisted sex attack victims bore partial responsibility if they had been "flirting heavily" beforehand.

[4] More than a quarter of the Public believe drunk victims of rape or sexual assault are at least partly responsible for what has happened to them – https://www.telegraph.co.uk/news/uknews/crime/11409210/Drunk-or-flirty-rape-victims-often-to-blame-says-survey.html

[5] British Psychological Society, 2009, Brownmiller, 1975; Ward, 1995.

A poll, 'Sexual Assault Research', published 21st November 2005 as part of Amnesty International's Women's Rights campaign, shows that around one in 12 people (8%) believed that a woman was totally responsible for being raped if she had had many sexual partners[6].

Research carried out by Psychologists Dominic Willmott and Professor Daniel Boduszek at the University of Huddersfield, and underpinned by legal guidance from criminal barrister Nigel Booth at St. John's Buildings in Manchester, sought to answer whether verdicts in rape trials were arrived at after a balanced appraisal of the evidence, and to what extent if at all, did existing and identified attitudes play a part[7]:

> *There was substantial evidence found of high levels of rape bias, strongly suggesting that preconceived prejudices surrounding the issue of rape tend to have a significantly greater influence on the fairness of the trial than had previously been thought. […]*
>
> *Before deliberation, individual jurors with personal experience of sexual victimisation were four times more likely to convict. Other experiences were also shown to have a significant impact on an individual's decision. […]*
>
> *The research project found that among all those individuals with the identified existing biases, 13% of them changed their mind after deliberation.*
>
> *With deliberation having been shown to change the minds of little more than one in 10 jurors, the impact of these preconceptions is especially significant. […]*
>
> *For years Judges in the UK have been warning juries in rape cases against stereotyped thinking, but these directions appear to be having limited if any real effect.*

Taken all together, it can be seen from the evidence above that there are preconceptions about sexual offences, particularly around the behaviour of the victim. It is no indictment of the jury system generally to say that such preconceptions are not left at the door of the jury room.

Consideration has been given to the treatment of rape and sexual offences more widely in other jurisdictions.

Alternatives to jury trial

There are a number of criminal justice systems where sexual offences are tried by judges sitting alongside or with some other form of lay participation, other than a jury (i.e. analogous to a Jurat trial in Jersey) –

(a) Guernsey operates a criminal justice system that does not rely on juries, relying instead on Jurats (either no fewer than 7, or a minimum of 2, depending on the severity and kind of matter). Jurats operate on a very similar basis to that in Jersey.

[6] https://www.amnesty.org.uk/press-releases/uk-new-poll-finds-third-people-believe-women-who-flirt-partially-responsible-being

[7] https://www.criminallawandjustice.co.uk/features/Juries-Rape-Trials

(b) In Austria, most rape cases are heard by a judge sitting with 2 lay jurors.

(c) In Germany, relatively minor cases are heard by either a single judge, or a single judge and 2 lay jurors, whilst serious cases are heard by 2 judges sitting with 2 lay jurors. Lay assessors are different from jurors in our system. The way in which they are selected differs from one state to another. It is common for them to be selected by a committee upon application for 5-year terms and to sit about 10 times a year. They play a limited role in the trial itself. For example, they rarely ask questions of a witness, and if they wish to do so, some presiding judges will expect that the questions are directed to the witness through them. However, judges and lawyers agree that the lay assessors play a significant role in decision-making and are not unduly dominated by the professional judges.

(d) In Denmark, where the prosecution is not seeking a sentence of 4 years' imprisonment or more, or the defence waives the right to a jury trial, the trial is held before a judge and 2 lay jurors; more serious cases where the defence does not waive the right to a jury trial are heard by 3 judges and 6 jurors in the District Court.

It is clear from the above that other democratic western societies do not feel bound to the concept of jury trials in sexual offence cases.

Conclusion

At the time the daft Law was developed, it seemed prudent to retain the current arrangements for trials of sexual offences. However, following the excellent work of the Panel and the additional research and discussion that this amendment has provoked, the Minister for Home Affairs has decided to support the amendment, and would encourage all Members to consider doing so on the following grounds –

- Rape myths are still prevalent in our society, and there are legitimate grounds to believe that Jurats, as dedicated judges of fact, would be less swayed by those myths.

- Although it is possible for the judge to direct the jury in a way that addresses the rape myths, it is potentially much more effective to educate 12 Jurats about the real facts around rape and consent once, than to direct 12 different individuals at the end of every trial when the directions may have a limited effect.

- The court process and infrastructure can support this change.

- Victims would have a less distressing experience in court, and are thus likely to give better evidence.

- Jurat trials are already taking place for serious offences, including in some cases rape and murder where the defendant elects for Jurat trial.

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. Considerable research was required following the lodging of the Panel's 3 amendments to this proposition, culminating in consideration by the Council of Ministers on 14th March, and specific consideration of the second amendment by the judiciary on 15th March. This meant that the deadline could not be met.