

**DRAFT LOI (199) (AMENDEMENT) AU SUJET DES
TEMOINS ET INFORMATEURS**

**Logé au Greffe le 2 juin 1998
par le Comité de Législation**



ETATS DE JERSEY

GREFFE DES ETATS

Report

The purpose of this draft Law is to make certain reforms to the rules governing the competence and compellability of witnesses to give evidence in criminal proceedings. This is a complex area of the law of evidence and, in order to understand fully the intended effect of the proposed reforms, it is necessary to explain the existing legal provisions and to touch on the position in England and Wales.

A witness is competent if he may lawfully be called to testify, and is compellable if, being competent, he may lawfully be compelled by the court to testify. The general rule relating to the competence and compellability of witnesses has two limbs -

- (a) the first is that any person is a competent witness in any proceedings. The exceptions to this limb relate to the accused, children and persons of defective intellect;
- (b) the second is that all competent witnesses are compellable. The exceptions to this limb relate to the accused and his or her spouse.

The need for reform in Jersey arises in relation to the admissibility of the evidence of the husband or wife of an accused person. This aspect is governed presently by Article 2 of the *Loi (1908) au sujet des témoins et informateurs*. In certain respects Article 2 is difficult to understand and appears often to be self-contradictory. The effect of the Article can best be summarised as follows -

- A. A spouse is competent and compellable as a defence witness in all cases.
- B. A spouse is probably compellable as a witness for the prosecution when the offence (which appears only to cover customary law offences and not statutory offences) is committed against the spouse. This however is not beyond doubt because of a conflicting provision later in the Article to the effect that a spouse may only be called as a witness at the request of the accused.

- C. It is not clear whether a spouse is a competent witness for the prosecution in any other case. The first part of Article 2 suggests that he or she is, but the later provision just referred to states that a spouse may only be called as a witness at the request of the accused. Hence there is a real doubt as to whether a wife willing to give evidence against her husband who is charged with (say) assaulting their child may do so without his consent. She certainly cannot be compelled to do so.
- D. In any case where a spouse gives evidence, he or she cannot be forced to disclose communications made by the accused. Thus if a husband admits to his wife (say) that he killed or raped a child, his wife cannot be forced to give evidence of this remark.
- E. No adverse comment can be made against the accused about any failure of his wife or her husband to give evidence.

It is clearly unsatisfactory that the Law should be uncertain. It is equally unsatisfactory that (to take an extreme example) a mother could witness her husband battering their infant child and, if she were the only witness, it would be impossible to bring a prosecution because she could not be called by the prosecution as a witness.

The *Loi* of 1908 was based generally on the provisions of the Criminal Evidence Act 1898 (although various changes were made in Jersey which led to the problems already outlined in construing Article 2). In the light of experience, English law was in its turn reformed by the Police and Criminal Evidence Act 1984. In particular section 80 thereof now contains, in summary, the following provisions -

1. A spouse is a competent witness for the prosecution, the accused or a co-accused in all cases.
2. A spouse is a compellable witness for the accused in all cases.
3. A spouse is a compellable witness for the prosecution or for a co-accused if, but only if -

- (a) the offence is one which involves an assault on or injury or threat of injury to the spouse or the accused or to a child under 16; or
 - (b) the offence is a sexual offence against a child under 16. Attempts, aiding and abetting etc. of such offences are also included.
4. Where a husband and wife are jointly charged with an offence, neither is competent or compellable to give evidence in respect of that offence unless he or she is no longer liable to be convicted of that offence (e.g. as a result of having pleaded guilty).
 5. After divorce the ordinary rules of evidence apply even if the events took place at a time when the accused and the witness were married.
 6. The failure of a spouse to give evidence may not be adversely commented on by the prosecution.

The draft Law replaces in its entirety Article 2 of the *Loi* of 1908. In so far as it relates to a spouse giving evidence, the new Article 2 is based upon section 80 of the Police and Criminal Evidence Act 1984, but with one or two adjustments. In particular the Committee wishes to make a spouse compellable in the case of children of 17 years and under rather than (as in England) children aged 15 and under.

It was mentioned earlier that the *Loi* of 1908 appeared only to cover customary law offences and not statutory offences. This stems from the fact that criminal offences in Jersey law are divided into three categories known as *crimes*, *délits* and *contraventions*. *Crimes* and *délits* are offences which exist at customary law and have not been created by statute. *Crimes* are quite simply the more serious offences, *délits* the less serious. *Contraventions* (no matter how serious or trivial) are offences which have been created by statute (i.e. by Laws, Orders in Council, Regulations or Orders). Reference is made throughout the 1908 Law only to *crimes* and *délits* and not to *contraventions* with the result that proceedings for statutory offences are apparently not governed by the rules of evidence laid down by it.

In order to make it absolutely clear that the provisions of the *Loi* of 1908 apply to proceedings for all criminal offences, customary or statutory, the draft Law makes certain amendments whereby reference is instead made to *infractions* - a term that includes all offences, be they *crimes*, *délits* or *contraventions*. It will thus be put beyond doubt that the rules of evidence apply equally to all offences in all criminal proceedings.

The adoption of provisions similar to section 80 of the Police and Criminal Evidence Act 1984 has required certain consequential amendments to be made which are essentially twofold.

The existing Article 2 of the *Loi* of 1908 contains a provision which in effect repealed an earlier rule of Jersey customary law which placed limitations on the competence and compellability not only of spouses but also of blood relatives or relatives by marriage of the accused to the degree of uncle and nephew. It is necessary in the new Article 2 to restate that provision but, in so doing, to use wording which is consistent with the other provisions of the new Article relating to spouses. The draft Article 2(1) therefore provides (in translation) that “..... in any proceedings, the blood relatives or relatives by marriage of a person accused or prosecuted shall be competent and compellable to be heard as witnesses either for the prosecution or for the defence”.

The Schedule to the draft Law also contains consequential repeals in a number of enactments which made specific provision relating to the competence of a wife or husband to give evidence in proceedings arising under that particular enactment. This piecemeal approach in dealing with questions of competence and compellability of spouses is now unnecessary in view of the provisions of the new Article 2 which will be of general application.

Conclusion

The uncertainties in the Island's existing rules of evidence have the potential to create serious difficulties in the conduct of criminal proceedings. The need to clarify and in certain respects to reform the law is pressing and the amendment contained herein is felt to be long overdue. It has the approval of the Jersey Law Society.

Explanatory Note

The main purpose of this draft Law is to change the provisions in the *Loi (1908) au sujet des témoins et informateurs* (“the principal *Loi*”) relating to the competence and compellability of an accused’s spouse.

Under Article 2 of the principal *Loi* a spouse is only competent to give evidence for the prosecution in certain offences and is generally not compellable to do so.

Article 1 of the draft Law substitutes for Article 2 a new Article 2 which provides that the spouse of an accused person is competent to give evidence for the prosecution, except when husband and wife are jointly charged unless the spouse to give evidence has pleaded guilty or is no longer liable to be convicted. The spouse of an accused person is competent to give evidence for the accused or a person charged in the same proceedings (subject to the same exception). The spouse is also compellable to give evidence for the accused. In addition a spouse is compellable to give evidence for the prosecution (or a person charged in the same proceedings) if and only if the offence is an offence on the spouse giving evidence or a person who appears to the court to have been under 18 at the material time or an attempt or conspiracy to commit or aiding, abetting, counselling, procuring or inciting such offence. The failure of a spouse to give evidence, whether for prosecution or defence, must not be commented upon by the prosecution.

Other provisions in the existing Article 2 relating to the competence and compellability of the accused and of blood relatives or relatives by marriage of the accused are restated in the new Article 2, paragraphs (1) and (2), but rephrased to accord with the new provisions in the new Article relating to spouses.

At the same time the opportunity is taken to amend the principal *Loi* to make it clear that its provisions apply not only to customary law offences but also to statutory offences.

Consequential amendments to the principal *Loi* are effected by *Articles 2 and 3*, and *Article 4* introduces a Schedule into the draft Law to make consequential repeals in a number of enactments.

Article 5 contains the short title.

[TRANSLATION]

**LAW (199) (AMENDMENT) ON THE SUBJECT OF
WITNESSES AND INFORMANTS**

A LAW to amend the Law (1908) on the subject of witnesses and informants and to repeal certain statutory provisions relative thereto, sanctioned by Order of Her Most Excellent Majesty in Council of the

(Registered on the day of 199)

STATES OF JERSEY

The day of 199

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

ARTICLE 1

For Article 2 of the Law (1908) on the subject of witnesses and informants (hereinafter referred to as "the principal Law") there shall be substituted the following Article -

"ARTICLE 2

(1) Subject to the provisions of this Article, in any proceedings, the blood relatives or relatives by marriage of a person accused or prosecuted shall be competent and compellable to be heard as witnesses either for the prosecution or for the defence.

(2) The accused himself shall be competent to give evidence for the defence:

Provided that -

- (a) an accused shall not be called as a witness except upon his own application;
 - (b) an accused called as a witness may be questioned notwithstanding that the answers to the questions posed might tend to incriminate him as to the offence charged;
 - (c) an accused called as a witness shall not be required to answer a question tending to show that he has committed or been charged with, or that he has been convicted of, an offence other than that with which he is then charged, or that he is of bad character, unless -
 - (i) evidence that he has committed or been convicted of such other offence is admissible to show that he is guilty of the offence wherewith he is then charged; or
 - (ii) he has personally or through his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the defence is of such nature as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or
 - (iii) he has given evidence against another person charged in the same proceedings.
- (3) In any proceedings, the wife or husband of the accused shall be competent -

- (a) subject to the provisions of paragraph (6) of this Article, to give evidence for the prosecution; and
- (b) to give evidence for the defence, or on behalf of any other person charged in the same proceedings.

(4) In any proceedings, the wife or husband of the accused shall, subject to the provisions of paragraph (6) of this Article, be compellable to give evidence for the defence.

(5) In any proceedings, the wife or husband of the accused shall, subject to the provisions of paragraph (6) of this Article, be compellable to give evidence for the prosecution or on behalf of any other person charged in the same proceedings on condition that the charge involves -

- (a) an assault on, or an injury done to, or threat of the same made towards, either -
 - (i) the wife or husband of the accused; or
 - (ii) a person aged at the material time under eighteen years;
- (b) an offence of a sexual nature against a person who was at the material time under that age;
- (c) an attempt or a conspiracy to commit, or encouraging, assisting, inciting, counselling or procuring an offence referred to in sub-paragraph (a) or sub-paragraph (b) of this paragraph.

(6) Where a husband and wife are jointly charged with an offence, neither spouse shall at the trial be competent or compellable by virtue of sub-paragraph (3)(a) or paragraph (4) or (5) of this Article to give evidence in respect of that charge unless that spouse is not, or is no longer, liable to be convicted of the said offence at the trial as a result of pleading guilty or for any other reason.

(7) In any proceedings, a person who has been but who is no longer married to the accused shall be competent and compellable to give evidence as if that person and the accused had never been married.

(8) Where in any proceedings the age of a person at any time is material for the purposes of paragraph (5) of this Article, his age at the material time shall be deemed for the purposes of the said paragraph to be the age which the court believes he was at that time.

(9) For the purposes of sub-paragraph (5)(b) of this Article, an offence of a sexual nature includes any indecent assault or act offending against public decency whether the offence be customary or statutory and, for the avoidance of doubt, includes any offence under the Protection of Children (Jersey) Law 1994, as amended.

(10) The failure of the accused or of the wife or husband of the accused to give evidence shall not be made the subject of any adverse comment by the prosecution.”.

ARTICLE 2

In Article 3 of the principal Law, for the words “a crime or délit” there shall be substituted the words “an offence”.

ARTICLE 3

In Article 8 of the principal Law -

- (a) the word “instituted” shall be deleted;
- (b) for the words “dealt with after the day of its promulgation” there shall be substituted the words “whether for crime, délit or contravention”.

ARTICLE 4

The Laws mentioned in the first column of the Schedule to this Law are repealed to the extent of the provisions thereof indicated in the second column of the said Schedule.

ARTICLE 5

(1) This Law may be cited as the Law (199) (Amendment) on the subject of witnesses and informants.

(2) The amendments to the principal Law effected by this Law shall not have any effect in relation to a prosecution instituted before the coming into force of this Law.

*SCHEDULE***(Article 4)****Provisions repealed**

<i>1st column</i>	<i>2nd column</i>
Law (1884) on explosive substances	Article 5
Health Insurance (Jersey) Law 1967	Article 45(3)
Family Allowances (Jersey) Law 1972	Article 23(3)
Attendance Allowances (Jersey) Law 1973	Article 11(3)
Social Security (Jersey) Law 1974	Article 37(3)
Invalid Care and Disability Allowances (Jersey) Law 1978	Article 14(3)
Protection of Children (Jersey) Law 1994, as amended	Article 3
Disability Transport Allowance (Jersey) Law 1997	Article 12(3)

**LOI (199) (AMENDEMENT) AU SUJET DES TEMOINS ET
INFORMATEURS**

LOI pour modifier la Loi (1908) au sujet des témoins et informateurs et pour abroger certaines dispositions des Lois y relatives, confirmée par Ordre de Sa Majesté en Conseil en date du

(Enregistré le _____ jour de _____ 199)

AUX ETATS DE L'ILE DE JERSEY

L'An 199 , le _____ jour de _____

LES ETATS, moyennant la sanction de Sa Très Excellente Majesté en Conseil, ont adopté la Loi suivante -

ARTICLE 1

A l'Article 2 de la Loi (1908) au sujet des témoins et informateurs¹ (ci-après désignée "la Loi principale") sera substitué l'Article suivant -

"ARTICLE 2

(1) Sous réserve des dispositions du présent Article, dans tout procès, les parents ou alliés d'une personne accusée ou poursuivie seront idoines et contraignables à être entendus comme témoins soit à charge ou à décharge.

¹ Tomes IV-VI, page 276.

Loi (199) (Amendement) au sujet des témoins et informateurs

(2) Le prévenu lui-même sera idoine à être entendu comme témoin à décharge:

Étant entendu -

- (a) qu'un prévenu ne pourra être appelé comme témoin qu'à sa requête;
- (b) qu'un prévenu appelé comme témoin pourra être questionné quoique les réponses aux questions posées puissent être de nature à l'incriminer dans l'infraction dont il est accusé;
- (c) qu'un prévenu appelé comme témoin ne pourra être appelé à répondre à une question tendant à démontrer qu'il a commis ou qu'il a été accusé d'avoir commis, ou qu'il a subi une condamnation pour, une infraction autre que celle dont il se trouve présentement accusé, ou qu'il jouit d'une mauvaise réputation, à moins -
 - (i) que la preuve qu'il a commis ou subi une condamnation pour telle autre infraction ne soit admissible comme preuve qu'il est coupable de l'infraction dont il est actuellement accusé; ou
 - (ii) qu'il n'ait personnellement ou par l'entremise de son avocat posé des questions aux témoins à charge tendant à démontrer qu'il jouit d'une bonne réputation, ou qu'il n'ait déposé à cet effet, ou que la défense ne soit de nature à révoquer en doute la bonne réputation du plaignant ou des témoins à charge; ou
 - (iii) qu'il n'ait déposé contre une autre personne accusée dans le même procès.

Loi (199) (Amendement) au sujet des témoins et informateurs

(3) Dans tout procès, la femme ou le mari du prévenu sera idoine -

- (a) sous réserve des dispositions de l'alinéa (6) de cet Article, à être entendu comme témoin à charge; et
- (b) à être entendu comme témoin à décharge ou sur l'instance d'aucune autre personne accusée dans le même procès.

(4) Dans tout procès, la femme ou le mari du prévenu sera, sous réserve des dispositions de l'alinéa (6) de cet Article, contraignable à être entendu comme témoin à décharge.

(5) Dans tout procès, la femme ou le mari du prévenu sera, sous réserve des dispositions de l'alinéa (6) de cet Article, contraignable à être entendu comme témoin à charge ou sur l'instance d'aucune autre personne accusée dans le même procès à condition que l'accusation s'agit -

- (a) d'un assaut sur, ou d'une blessure faite, ou d'un menace d'icelle porté, soit -
 - (i) à la femme ou mari du prévenu; soit
 - (ii) à une personne âgée au temps matériel de moins de dix-huit ans;
- (b) d'une infraction à caractère sexuel vers une personne âgée au temps matériel du moins dudit âge;
- (c) d'un attentat ou d'un complot de commettre ou de l'encouragement, de l'assistance, de l'incitation, ou du conseil à, ou de l'occasionnement, d'une infraction visée au

Loi (199) (Amendement) au sujet des témoins et informateurs

sous-alinéa (a) ou au sous alinéa (b) de cet alinéa.

(6) En cas d'une accusation d'une infraction portée conjointement contre un mari et une femme, ni l'un ni l'autre des époux ne sera dans le procès ni idoine ni contraignable en vertu du sous-alinéa (3)(a) ou de l'alinéa (4) ou (5) de cet Article à être entendu comme témoin à l'égard de ladite accusation à moins que cet époux ne soit pas ou ne soit plus, susceptible d'être convaincu de ladite infraction dans le procès par suite d'avoir plaidé coupable ou pour toute autre raison.

(7) Dans tout procès, une personne qui a été mais qui n'est plus mariée au prévenu sera idoine et contraignable à être entendu comme témoin comme si cette personne et le prévenu n'ont jamais été mariés.

(8) Si, dans un procès, l'âge d'une personne en aucun temps est pertinent aux besoins de l'alinéa (5) de cet Article, son âge au temps matériel sera censé aux fins dudit alinéa être l'âge que la cour croit qu'il avait en ce temps là.

(9) Aux fins du sous-alinéa (5)(b) de cet Article, une infraction à caractère sexuel comprend tout attentat ou outrage à la pudeur ou aux moeurs que l'infraction soit établie ou par la Coûtume ou par une Loi et, afin d'éviter l'incertitude, s'étend à une infraction contre la Loi dite 'Protection of Children (Jersey) Law 1994', telle que ladite Loi a été modifiée.

(10) Le défaut du prévenu ou de la femme ou du mari du prévenu de témoigner ne sera rendu susceptible d'aucun commentaire adverse par la Partie Publique.”.

Loi (199) (Amendement) au sujet des témoins et informateurs

ARTICLE 2

Dans l'Article 3 de la Loi principale,² aux mots "un crime ou délit" seront substitués les mots "une infraction".

ARTICLE 3

Dans l'Article 8 de la Loi principale³ -

- (a) le mot "instituées" sera supprimé;
- (b) aux mots "traitée après le jour de sa promulgation" seront substitués les mots "soit pour crime, délit ou contravention".

ARTICLE 4

Les Lois mentionnées dans la première colonne de la Cédule de la présente Loi sont rappelées jusqu'à concurrence des dispositions d'icelles indiquées dans la deuxième colonne de ladite Cédule.

ARTICLE 5

(1) La présente Loi pourra être citée sous le titre de "Loi (199) (Amendement) au sujet des témoins et informateurs".

(2) Les amendements à la Loi principale effectués par la présente Loi n'auront aucun effet en ce qui concerne un procès institué avant l'entrée en vigueur de la présente Loi.

² Tomes IV-VI, page 277.

³ Tomes IV-VI, page 278.

*Loi (199) (Amendement) au sujet des témoins et informateurs**CEDULE***(Article 4)****Dispositions rappelées**

<i>1ere colonne</i>	<i>2e colonne</i>
Loi (1884) sur les matières explosives ⁴	Article 5
Health Insurance (Jersey) Law 1967 ⁵	Article 45(3)
Family Allowances (Jersey) Law 1972 ⁶	Article 23(3)
Attendance Allowances (Jersey) Law 1973 ⁷	Article 11(3)
Social Security (Jersey) Law 1974 ⁸	Article 37(3)
Invalid Care and Disability Allowances (Jersey) Law 1978 ⁹	Article 14(3)
Protection of Children (Jersey) Law 1994, ¹⁰ as amended ¹¹	Article 3
Disability Transport Allowance (Jersey) Law 1997 ¹²	Article 12(3)

⁴ Tomes IV-VI, page 51.

⁵ Volume 1966-1967, page 578.

⁶ Volume 1970-1972, page 428.

⁷ Volume 1973-1974, page 54.

⁸ Volume 1973-1974, page 350.

⁹ Volume 1975-1978, page 444.

¹⁰ Volume 1994-1995, page 78.

¹¹ Volume 1996-1997, page 1061.

¹² Volume 1996-1997, page 498.