

**DRAFT CRIMINAL JUSTICE (EVIDENCE AND PROCEDURE)
(JERSEY) LAW 199**

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Report

The draft Law has been prepared pursuant to the Legislation Committee Act No. 11 of 26th July 1993.

It implements the recommendations of the Working Party on Child Abuse, dated 31st March 1993, which the Education Committee referred to the Legislation Committee by its Act of 9th June 1993. Copies of the report of the Working Party are available on request from the States Greffe Bookshop.

The purpose of the draft Law is to protect children and certain vulnerable witnesses from additional trauma whilst giving evidence in certain court proceedings.

The source of the draft Law is section 32 of the Criminal Justice Act 1988 ("the 1988 Act") of the United Kingdom, as amended by section 54 of the Criminal Justice Act 1991, and it provides that children involved in cases of sex or violence and certain vulnerable witnesses, i.e. those requiring special care within the meaning of the Mental Health (Jersey) Law 1969, may give their evidence through a television link with the court room. Thus all persons concerned in the case can see, hear and communicate with the witness, even though he is not physically present.

Article 2 describes the offences in proceedings for which evidence may be given in this way, provides that it may only be given by child witnesses and by the vulnerable witnesses above described, and requires the leave of the court for it to be given in this way. Article 2 will not admit evidence of a pre-trial interview with a witness. It merely allows the child to testify at trial through a television link, thus sparing him the ordeal of being in court.

When the 1988 Act was amended in 1991, a new section 32A was inserted to permit a video recording of an interview with a child which relates to any matter in issue in the proceedings to be given in evidence with the leave of the court. Article 3 follows this provision and extends it to the type of vulnerable witness already referred to. Paragraph (3) provides that the court shall give leave for this type of evidence to be admitted unless -

- (i) it appears that the child witness will not be available to give evidence;
- (ii) any rules of court requiring disclosure of the circumstances in which the recording was made have not been complied with; or
- (iii) the court is of the opinion that it ought not to be admitted.

Under paragraph (4) it may direct that part be excluded, whilst paragraph (5) requires the court, before excluding a part, to consider whether any prejudice to the accused which might result from admitting that part would be outweighed by the desirability of showing the whole, or substantially the whole, of the interview. This has the effect of discouraging judges from being overzealous in their editorial work on the video, particularly in relation to parts of relatively minor prejudicial effect, in a way which deprives the jury of the full flavour of the child's evidence.

Article 3(3)(a) underlines the fact that the video recording will not of itself include cross examination, and that the witness will be required to attend court for this purpose. Paragraph (6) provides that the witness shall be called by the party who tendered it in evidence and also provides (and here the proposed Law differs from the United Kingdom) that the child may with the leave of the court be examined in chief on any matter which has been dealt with in his recorded testimony. In the United Kingdom, the witness shall not be so examined on matters which have been so dealt with. An amendment to the 1988 Act which would have inserted the word 'adequately' in front of the words 'dealt with' was rejected on the grounds that it is already implicit; but this provision has been the cause of some criticism, and accordingly the draft Law makes this change.

It will be noted that a video recording can be tendered by either party, although it will normally be by the prosecution. The experience of testifying in court will be no less distressing just because it is given on behalf of the defence, and it is right that the procedure should also be available to defence witnesses. Under paragraph (7), a statement made by a witness disclosed by a video recording is treated as though it were oral testimony given by the child. This takes it outside the hearsay rule,

which is what prevents recorded statements being recorded in the first place. It also means, as is specifically pointed out by paragraph (9), that it cannot count as corroboration of other evidence given by the witness.

The meaning of 'child' varies according to the offence to which the evidence relates (paragraph (11)). It is normally under 14, but for sexual offences the relevant age is 17. The date for assessing the child's age is that of the trial, and again the relevant maximum ages are increased by one year to 'under 15' and 'under 18' respectively. The meaning of paragraph (11) is that a child is a person who was under 14 (or 17 for sexual offences) at the time the video was made, and who has still not attained the age of 15 (or 18 for sexual offences).

Paragraph (12) makes it clear that this procedure is without prejudice to any other grounds on which video recorded evidence might be admitted.

Article 4 provides that at the discretion of the Attorney General, the conduct of proceedings in the Police Court for offences to which the Law applies shall be undertaken by a legally qualified person, which for the purposes of the Article is an advocate or solicitor, or a lawyer qualified in the United Kingdom who is employed in the Law Officers' Department.

Article 5 provides that the evidence of children in all proceedings shall be given unsworn. The present position is that evidence of a child of tender years may be given unsworn if it appears to the court that he is possessed of sufficient intelligence to justify the reception of his evidence, and understands the duty of speaking the truth. Further evidence so given must be corroborated. This was the position in the United Kingdom under the 1933 Children and Young Persons Act, until it was repealed by the 1988 Act. That the child should be asked questions to ascertain whether it understands the nature of the oath might seem oppressive, and the tender years aspect is also unclear. Article 5 therefore follows changes to the United Kingdom provision made in 1991, whereby the necessity to enquire whether or not the child understands the nature of the oath is removed, and the position is made clear that all evidence of children under fourteen is unsworn, whereas evidence of children aged 14 or above will be given on oath. Criticism has been expressed of the way in which the Criminal Justice

Act 1991 achieved this, and changes are contemplated. These changes have been anticipated in this Article.

Article 6 gives effect to the Working Party's recommendation that defendants are to be specifically prohibited from examining witnesses to which this Law applies, in person or through a sound or video link. (This follows the United Kingdom provision, which, in turn, adopted the recommendation contained in paragraph 2.30 of the Pigot report which said -

“Defendants should be specifically prohibited by statute from examining child witnesses in person or through a video link. The limitation which this places upon the defence is, in our view, far less significant than the damage which can be inflicted upon the child and the interests of justice if, in certain circumstances, such an exercise is allowed to take place.”.)

Article 7 provides for Rules of Court to be made, Article 8 repeals those provisions in the Children (Jersey) Law 1969 dealing with unsworn evidence, and Article 9 contains the short title and commencement provisions.

With regard to the costs to be incurred if the proposed legislation is enacted, playback equipment is already installed in the Police Court and the estimated cost of establishing facilities in the Royal Court is £31,000. Funds are available for this purpose and the subsequent set-up and training costs and annual maintenance charges will be paid for from the Court and Case Costs Vote of the Judicial Greffe.

Explanatory Note

The purpose of this Law is to make provision for children and certain vulnerable witnesses to give evidence by means of video recorded interviews in cases involving sexual offences or offences of violence against children and to provide for the giving of evidence by those persons through a live television link.

Article 1 contains interpretation provisions for the purposes of the Law.

Article 2 provides that a child witness and certain vulnerable witnesses may give evidence through a live television link.

Article 3 provides that a video recording of an interview conducted by an adult and a child witness or other specified witnesses may be given in evidence with the leave of the court. The court's leave will not be given unless the witness will be available for cross-examination (although this may take place by live television link by virtue of Article 2), rules of court have been complied with and the court is of the opinion, having regard to the circumstances, that in the interests of justice it ought to be admitted (paragraph (3)) and the court may direct that part of the video recording be excluded (paragraph (4)). A child who gives evidence by video recording may be examined in chief on matters which, in the opinion of the court, have been dealt with in his recorded testimony (paragraph (6)).

Where a video recording is admitted as evidence it is regarded as the witness's evidence in chief (paragraph (6)). Paragraphs (7) to (10) provide that -

- (a) statements made by a witness and disclosed by a video recording which is given in evidence are to be treated as if given in direct oral testimony;
- (b) such statements -
 - (i) are admissible to the extent that testimony from the witness would be admissible; and

- (ii) cannot corroborate any other evidence given by the witness; and
- (c) regard shall be had to all the circumstances in estimating the weight to be attached to such statements.

Article 4 gives the Attorney General a discretion to require the prosecution of offences against certain children to be undertaken by legally qualified persons.

Article 5 provides that the evidence of children under fourteen years of age shall be given unsworn.

Article 6 provides that witnesses to which this Law applies are not to be cross-examined by the accused in person.

Article 7 provides the power for the Superior Number of the Royal Court to make rules for the purposes of the Law.

Article 8 repeals a provision in the Children (Jersey) Law 1969 relating to the giving of evidence by children.

Article 9 contains the short title and commencement provisions.

**CRIMINAL JUSTICE (EVIDENCE AND PROCEDURE)
(JERSEY) LAW 199**

A LAW to provide for the giving of evidence by means of video recording; for the giving of unsworn evidence by certain children; for the conduct of proceedings where the victim is a child; and for connected purposes, sanctioned by Order of Her 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

Interpretation

(1) In this Law -

“child witness” means a child who is not the accused or one of the accused in criminal proceedings;

“statement” includes any representation of fact, whether made in words or otherwise;

“video recording” means any recording, on any medium, from which a moving image may by any means be produced and includes the accompanying sound-track;

“witness” means a person who is not the accused or one of the accused in criminal proceedings.

(2) A reference in this Law to an Article by number only, and without further identification, is a reference to the Article of that number in this Law.

(3) A reference in an Article of this Law to a paragraph, sub-paragraph or clause by number or letter only, and without further identification, is a reference to the paragraph, sub-paragraph or clause of that number or letter contained in the Article of this Law in which that reference occurs.

(4) Unless the context otherwise requires, where this Law refers to an enactment, the reference is to that enactment as amended from time to time, and includes a reference to that enactment as extended or applied by or under another enactment, including any other provision of that enactment.

ARTICLE 2.

Evidence through television links

(1) A person to whom this Article applies may, with the leave of the court, give evidence through a live television link in any criminal proceedings if the offence charged is an offence -

- (a) which involves an assault on, or injury or a threat of injury to, a person;
- (b) under -
 - (i) Article 9 of the Children (Jersey) Law 1969¹;
 - (ii) Article 1, 2, 4, 5 or 6 of the “Loi (1895) modifiant le droit criminel²”;

¹ Volume 1968-1969, page 258.

² Tomes IV-VI, pages 132-136.

(iii) Article 44 or 45 of the Mental Health (Jersey) Law 1969³;

(iv) the Protection of Children (Jersey) Law 1994⁴;

(c) of rape, buggery, bestiality, incest, gross indecency, procuring an act of gross indecency, or indecent assault;

(d) which consists of attempting or conspiring to commit, or of aiding, abetting, counselling, procuring or inciting the commission of, an offence falling within subparagraphs (a) to (c).

(2) This Article applies to a -

(a) child witness; and

(b) witness who is a patient or person requiring special care within the meaning of the Mental Health (Jersey) Law 1969,⁵ being a patient or person who is competent to give evidence.

(3) Paragraph (1) of Article 3 shall apply for the purposes of this Article as it applies for the purposes of that Article but, with the omission of the references to a person being, in the cases there mentioned, under fifteen years of age or under eighteen years of age.

ARTICLE 3

Video recordings of testimony from child witnesses and other witnesses

(1) This Article applies to proceedings in connexion with an offence referred to in paragraph (1) of Article 2.

3 Volume 1968-1969, page 394.

4 Volume 1994-1995, page 75.

5 Volume 1968-1969, page 345, Volume 1970-1972, page 549, Volume 1994-1995, pages 119 and 120, and R & O 5838.

(2) In any such proceedings a video recording of an interview which -

- (a) is conducted between an adult and a -
 - (i) child witness; or
 - (ii) witness referred to in sub-paragraph (b) of paragraph (2) of Article 2; and
- (b) relates to any matter in issue in the proceedings,

may, with the leave of the court, be given in evidence in so far as it is not excluded by the court under paragraph (3).

- (3) Where a video recording is tendered in evidence under this Article, the court, subject to the exercise of any power of the court to exclude evidence which is otherwise admissible, shall give leave under paragraph (2) unless -
- (a) it appears that the child witness or witness, as the case may be, will not be available for cross-examination;
 - (b) any rules of court requiring disclosure of the circumstances in which the recording was made have not been complied with to the satisfaction of the court; or
 - (c) the court is of the opinion, having regard to all the circumstances of the case, that in the interests of justice the recording ought not to be admitted.

(4) Where the court gives leave under paragraph (3), it may, if it is of the opinion that in the interests of justice any part of a recording ought not to be admitted, direct that that part shall be excluded.

(5) In considering whether any part of a recording ought to be excluded under paragraph (4), the court shall consider whether any prejudice to the accused, or one of the accused, which might result from

the admission of that part is outweighed by the desirability of showing the whole, or substantially the whole, of the recorded interview.

(6) Where a video recording is admitted under this Article the child witness or witness, as the case may be -

- (a) shall be called by the party who tendered it in evidence;
- (b) may, with the leave of the court, be examined in chief on any matter which, in the opinion of the court, has been dealt with in his recorded testimony.

(7) Any statement made by the child witness or witness, as the case may be, which is disclosed by a video recording given in evidence under this Article shall be treated as if given by that witness in direct oral testimony.

(8) Any statement referred to in paragraph (7) shall be admissible evidence of any fact of which such testimony from the child witness or witness, as the case may be, would be admissible.

(9) No statement referred to in paragraph (7) shall be capable of corroborating any other evidence given by the child witness or witness, as the case may be.

(10) In estimating the weight, if any, to be attached to a statement referred to in paragraph (7), regard shall be had to all the circumstances from which any inference as to its accuracy or otherwise can reasonably be drawn.

(11) In this Article and in Article 4 "child" means a person who -

- (a) in the case of proceedings specified in sub-paragraph (a) of paragraph (1) of Article 2, or sub-paragraph (d) of that paragraph and Article where the principal offence is one specified in the said sub-paragraph (a), is under fourteen years of age or, if he was under that age when the video recording was made, is under fifteen years of age; or

- (b) in the case of proceedings specified in sub-paragraph (b) or (c) of paragraph (1) of Article 2 or sub-paragraph (d) of that paragraph and Article where the principal offence is one specified in the said sub-paragraphs (b) or (c), is under seventeen years of age or, if he was under that age when the video recording was made, is under eighteen years of age.

(12) Nothing in this Article shall prejudice the admissibility of any video recording which would be admissible apart from this Article.

ARTICLE 4

Requirement for a legally qualified prosecutor

The conduct of proceedings in the Magistrate's Court in connexion with an offence referred to in paragraph (1) of Article 2 where the victim is a child may, at the discretion of the Attorney General, be undertaken by -

- (a) an advocate or solicitor of the Royal Court; or
- (b) a person who -
 - (i) has been admitted to the degree of the Utter Bar of one of the Inns of Court of England and Wales; or
 - (ii) is a solicitor of the Supreme Court of Judicature of England and Wales; and

is employed in the Law Officers' Department.

ARTICLE 5

Evidence given by children

(1) Evidence of a child in proceedings against any person for any offence shall be given unsworn.

(2) A statement of unsworn evidence of a child may be taken for the purposes of proceedings against any person for any offence as if that evidence had been given on oath.

(3) Evidence of a child shall be received unless it appears to the court that the child is incapable of giving intelligible testimony.

(4) If any child whose evidence is received unsworn in accordance with paragraph (1) wilfully gives false evidence in such circumstances that he would, if the evidence had been given on oath, have been guilty of perjury, he shall be liable to be dealt with as if he had been convicted of an offence punishable in the case of an adult with imprisonment.

(5) In this Article, 'child' means a person under fourteen years of age."

ARTICLE 6

Cross-examination of alleged victims

(1) No person who is charged with an offence referred to in paragraph (1) of Article 2 shall cross-examine in person any witness who is -

(a) alleged to -

(i) be a person against whom the offence was committed; or

(ii) have witnessed the commission of the offence; and

(b) a person to whom Article 2 applies, or is to be cross-examined following the admission under Article 3 of a video recording of testimony from him.

(2) Paragraph (1) of Article 3 shall apply for the purposes of this Article as it applies for the purposes of that Article, but with the omission of the references to a person being, in the cases there mentioned, under fifteen years of age or under eighteen years of age.

ARTICLE 7

Power to make Rules

Rules may be made in the manner prescribed by the Royal Court (Jersey) Law 1948⁶ to make such provision as appears to the Superior Number of the Royal Court to be necessary or expedient for the purposes of this Law.

ARTICLE 8

Repeal

Article 100D of the Children (Jersey) Law 1969⁷ is repealed.

ARTICLE 9

Short title and commencement

This Law may be cited as the Criminal Justice (Evidence and Procedure) (Jersey) Law 199 and shall come into force on such day as the States may by Act appoint.

6 Tome VII, page 502, Volume 1979-1981, page 195, Volume 1984-1985, pages 175 and 178,
Volume 1990-1991, page 113, and Volume 1992-1993, page 461.

7 Volume 1968-1969, page 334.