The Law Society of Jersey

Deputy Sam Mézec
Chairman
Draft Criminal Procedure (Jersey) Law 201- Sub-Panel
Scrutiny Office
States Greffe
Morier House
St Helier
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12 January 2018

Dear Deputy Mézec

DRAFT CRIMINAL PROCEDURE (JERSEY) LAW 201- - SUB PANEL REVIEW

Thank you for your letter dated 18 December 2017, addressed to Advocate John Kelleher in his capacity as President of the Law Society of Jersey. Advocate Kelleher has asked me to respond on the Law Society's behalf.

We greatly appreciate the opportunity to provide further comment in relation to the Draft Law. As you are aware, the Society commented substantively on the draft proposals, highlighting a significant number of concerns and observations, as detailed in our Consultation Response and supporting letter dated 21 September 2017, a copy of which is enclosed for ease of reference.

Other than in relation to one matter*, notwithstanding the extensive nature of the Society's comments and the request that far more time be given to consider the far-reaching nature of the proposed changes, no feedback was forthcoming until 15 December 2017, some ten days after the draft Law was lodged with the States Assembly.

(*It will be noted that the Society had expressed its vociferous opposition to the proposed extension of rights of audience to non-Jersey qualified lawyers in the Royal Court for the purpose of prosecuting cases, under Article 1(2) of the draft Law. We did not object to allowing widening of the category of lawyers able to prosecute matters in the Magistrate's Court. We were notified that, after consideration, the changes in relation to prosecution in the Royal Court were to be withdrawn).

As the Scrutiny Sub-Panel will have noted, with some exceptions, from the formal response received (copy again enclosed) and the Draft Law as lodged, little regard appears to have been taken of the Society's concerns (and in particular those specifically articulated in our supporting letter). We also note that, in some instances, reference is made to provisions being incorporated with the relevant Rules which, at this stage, have not yet been drafted, such that it is not clear whether the concerns expressed will, ultimately, be addressed.

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As the Society noted in its submission, while there is a clear need to update the Law and to bring together the provisions of various Laws in a cohesive and structured manner, we remain to be convinced that many of the proposed changes to existing practice are necessary or appropriate; the existing system and underlying laws may have its faults, but we do not, on balance, consider that it is sufficiently broken, or broken at all, such as to warrant such wholesale and fundamental changes to the criminal justice system. There are, as we see it, few current practical difficulties within the court system that need to be addressed.

Furthermore, these changes appear to be heavily weighted in favour of the prosecution, while adding to the burden of, and onus on, the defence at every turn. We are not convinced, in the interests of natural justice, that this positioning is appropriate or sustainable.

In summary, we consider that further consideration and time is required for the profession, and other key stakeholders, to make informed decisions about the new Law, particularly in ensuring that we have a Law that is fit for the future and that the unintended consequences are considered and mitigated. We remain to be convinced that the draft Law is, as yet, fully fit for purpose but we are happy to play our part in helping to ensure that Jersey's criminal justice system is second to none.

It will be appreciated that limited time has been available to consider this request and to provide a substantive response. However, the Law Society would welcome the opportunity to meet with the Education and Home Affairs Scrutiny Sub-Panel to discuss and explain its concerns in greater detail.

Yours sincerely

Neville Benbow
Chief Executive Officer
The Law Society of Jersey

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The Law Society of Jersey

Dr Helen Miles
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21 September 2017

Dear Dr Miles

DRAFT CRIMINAL PROCEDURE (JERSEY) LAW 201-

Thank you for providing the Law Society of Jersey with the opportunity to comment on the Draft Criminal Procedure (Jersey) Law 201-.

It is clear that a considerable amount of work has taken place, over a period of a number of years, in developing a replacement for the long outdated 1864 Loi Reglant la Procedure Criminelle.

While we support the development of a new law that is fit for purpose and reflects modern criminal justice practice, we are concerned that insufficient time has been allocated for the consultation process, given the magnitude and significance of the changes being proposed.

The Law Society considers that far more time needs to be devoted to gain a proper understanding of what is proposed. The rationale, for instance, for some of the changes is far from clear to us and, by way of example, the notion that two additional reserve jury members should sit with the conventional twelve seems somewhat unnecessary in circumstances, as we understand it, where there has only ever been a problem, concerning the jury being reduced below ten, in one case (Holley).

It is further evident that the Law is a document driven by Prosecution-minded draftsmen and raises significant issues which, in an ideal world, should require the engagement of all lawyers and the public at large. Putting it euphemistically, we are not clear that this has happened, or will.

Notwithstanding these concerns, we are pleased to provide in the attached summary a not insignificant number of comments and observations in relation to the proposals, in addition to which we wish to bring the following general concerns to your attention.

First, it would appear that rights of audience are being extended to non-Jersey qualified lawyers in the Royal Court for the purpose of prosecuting cases (as detailed in Article 1(2) of the draft law), effectively serving to replicate the position that now exists in the Magistrate's Court. If an English QC was deputed to prosecute a case here in Jersey, it is difficult to see, in due course, how an application, on behalf of a Defendant to be similarly represented, could properly be turned down on

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the basis of equality of arms. We would like to receive assurances that it is not intended, now or at any future point, to dilute or dispense with the existing rights of audience of locally-qualified advocates in the Royal Court. The ramifications for the legal profession in Jersey of such a move would be far reaching and would be vociferously opposed by the Law Society.

Second, the new Law provides for hung juries, which is a fundamental shift from the present position whereby the not guilty views of three jury members results in an acquittal. The Law will, instead, give the Prosecution the option for a re-trial. We are not suggesting that this is wrong but, rather, that it is an important constitutional, as it were, change. It will also create difficulties in respect of reporting, we foresee, and is, obviously, a more problematic practical problem on a small Island than it would be on the mainland United Kingdom.

Third, the constitution of Juries is open to much wider participation. Whilst we understand the removal of restrictions on persons such as lighthouse keepers who, for good reason in the past, were excluded, we have concerns over the inclusion of Police Officers and certain qualifying lawyers within the Law. One wonders how satisfactory it might be if a former criminal lawyer and a police officer were serving upon a Jury and expressing strong, and perhaps persuasive views, only for them to be removed as the two additional jury members, leaving their expressed views to effect the thinking of the remaining Jury members.

Fourth, it is worth noting that committals are to be abolished. It appears to us that this represents a fundamental right which is being removed at a stroke without the benefit of a full debate.

Fifth, and likewise, the requirement for the provision of Defence statements might be seen to be the starting point for the removal of the right to silence which, we anticipate, will be sought in due course. The present proposal, whereby a Defendant has to indicate what his defence is in a written statement, seems difficult to reconcile with a Defendant's right to say nothing when interviewed by the Police nor even to give evidence and those of a cynical disposition may view the inclusion of this provision, as averted to above, as the precursor to the removal of the right to silence.

The list, as it were, goes on; the loss of peremptory challenges, the pretty much wholesale transposition of English Law on the question of bad character when the Law on this issue may be less well settled than some may think, the removal of the double jeopardy principle and so on.

In addition, we have an overarching concern that the Law is simply adopting, for the most part, English provisions which may be unnecessary here in Jersey. Notwithstanding certain anomalies that do need to be addressed, our overall view is that the administration of criminal justice presently works well and that the Law may, in fact, create problems where none, or fewer, presently exist.

The 1864 Law has been in place for over 150 years, yet we are being asked to comment substantively on far reaching proposals (including elements which are advised by the review team are still work in progress) which have been in the making for almost five years in just six weeks.

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That the Law needs updating is not in dispute. However, it is our view that all of these issues (and many others besides) require further time and thought, in order for it to be possible to make an informed decision about the Law. There are, at present, too many uncertainties that need to be resolved before the Law can, in our view, be properly presented to the States Assembly.

We hope that our comments are helpful. We remain willing to provide further input to the Law in the event that it is agreed, as we suggest, that more time is taken in developing a law that is fit for the future and will, like its predecessor, pass the test of time.

Yours sincerely

[redacted]

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The Law Society of Jersey

Draft Criminal Procedure (Jersey) Law 201-

Consultation Response by The Law Society of Jersey

Introduction

This draft Law is long-overdue. All those involved in the administration of the criminal justice system have been aware that the 1864 Law was outdated and in need of a wholesale review. It has taken a number of years and various working groups to get to the point that a draft Law is available for consideration. Those who have worked on it should be congratulated for their commitment and endeavours.

However, we are concerned with certain aspects of the draft Law in that, without clear explanation and debate, what is proposed will fundamentally alter the criminal justice system in Jersey. Fundamental changes are being proposed and the rationale for many of the changes is not apparent or obvious on the face of the draft Law. Change simply for the sake of change is not commendable. Changes should only be considered if they actual improve the system both in the short and long term.

Ideally the new draft Law should be able to stand the test of time as has the 1864 Law. We should not seek to replicate the English system, which is subject to constant review and amendment.

It is clear that many of the proposed changes have been taken from the English system. The wholesale adoption of procedures from England is open to debate. Such an approach does not reflect that Jersey is a different jurisdiction with its own well-established jurisprudence Provisions which are applicable and workable in England may not, without careful consideration, be appropriate for a small jurisdiction such as Jersey.

At a seminar held for the legal profession on the 6th September 2017, it was confirmed that work was still to be undertaken on the draft Law, particularly in relation to the substantive amendments to rules of evidence relating to Hearsay and Bad Character. These were 2 amendments in particular which had been adopted from England. These are not straight forward areas and require very careful consideration once the final draft is known. It is not accepted that the English law is well settled and established in either of these important areas. With respect, it is somewhat unsatisfactory to put forward a draft Law for consultation when the final draft of the proposal is incomplete or unknown.

Comments

Part 1

1. **Art 1(2)** – Prosecutor – We are not aware that there is a shortage of locally qualified and able prosecutors; indeed the opposite seems to be the case. In the circumstances, we do not see the reasoning behind extending rights of audience to such a variety of "foreign" qualified lawyers as is proposed. There does not appear to be any limitation upon the rights of audience for such "foreign prosecutors". Is there a likelihood of reciprocity? What is the intention behind this change? Is it intended that the Defence Bar be similarly opened to non-Jersey qualified lawyers?

Part 2

2. **Art 2** - The overriding objective is to be welcomed but Art 3(1)(c) "recognizing" ought to be replaced with "promoting and enhancing" the rights guaranteed under Art 6 ECHR.

3. **Art 3(2)(d)** – We are unsure as to the reasoning behind having to take account of the needs of other cases unless it is to do so for the purpose of restricting the time taken to take steps in a case so as not to impact on the listing/hearing of other cases.

Part 3

4. **Art 10(2)** – we do not see why the time period in the Royal Court where someone is not represented should be 60 days rather than the same period in the Magistrate's Court whether or not defendant is represented, which is 30 days. We consider that the needs of an unrepresented defendant in a more serious matter should be subject to more frequent reviews by the Royal Court.

5. **Art 10(3)** – We are not sure why this provision is required.

Part 4

6. **Art 13(4)** – Why is there a provision to allow proceedings to be commenced improperly and rectified later? The burden should be on the Attorney General to get it right from the outset.

7. **Art 14** – The title "Attorney General's functions" is opaque. It should perhaps be "Initiation of proceedings by the Attorney General" or "Indictment direct to the Royal Court".

8. **Art 14(7) and Schedule 1** – This does away with the double jeopardy rule with no restriction upon the type of case covered. Should there not be qualifying offences, which we understand to be the position in England under the CJA 2003 S.62. In our view this power should only be available in limited circumstances.

9. **Schedule 1 Art 5 and 6 re new evidence**. Evidence that was available but not adduced at the original trial can be relied upon as opposed to the ability of a defendant to challenge a conviction on an appeal who cannot do so if evidence existed but was not called for whatever reason. The evidence has to be new evidence to be admitted by the Court of Appeal. The position should be the same under these provisions as for the defence in an appeal. This would be entirely consistent with the in furtherance of the overriding objective of the draft Law.

Part 5

10. **Art 15** – the Martini provision! Why should the Magistrate be permitted to sit anytime, anyplace, anywhere? What defect in the current system is sought to be eradicated by this proposal? Is there an agenda to permit weekend sittings of the Magistrate's Court? If this is the intention then it should be clearly stated as this would have costs and resources implications.

Part 6

11. **Art 19(1)** – The use of the word "approval" seems inappropriate and should perhaps be "authorised".

12. **Art 20(4)** – We think that this power to determine matters should not extend to findings of guilt. This should be limited to case management issues. We are concerned that an innocent error on the part of the authorities or the accused could result in a criminal conviction without more than proof of service on an (incorrect) address.

13. **Art 26** – The entire committal procedure has been removed. Thus, the right to seek an old-style committal has gone without any debate and little notice as there is no mention of this change in the Consultation Paper. The committal procedure both

written/paper and old-style provided a check and balance exercise to ensure that the prosecution could establish a prima facie case against the defendant justifying the case going forward. This is a fundamental right and one which should not be done away with by stealth. Cases with little merit or insufficient evidence may only be challenged at a much later stage in the procedure under the draft Law. It is questionable how this sits with the overriding objective.

14. **Art 26(10)** – following a trial the Magistrate now has the power to consider the gravity of the offence as well as the previous convictions of the defendant in deciding that he/she does not have sufficient sentencing power or it is the interests of justice to send up. This is wider than the present power to commit for sentence based upon previous convictions. We fear that this is an illegitimate erosion of the right to Jury trial. It should be apparent at the outset whether a case should stay or go up. Keeping it down and then sending it up for sentence deprives a defendant of a Jury trial but subjects him to the Royal Court's greater sentencing powers. Provision should be made for a case to be sent up after trial if new matters came to light at trial that were not known at the time that the decision was made to keep it down for trial.

15. **Art 29** – The power to rectify errors. A defendant has to appeal within 7 days of the conviction. We do not understand why the Magistrate should have a further 3 weeks to rectify errors. We suggest that this should be limited to 7 days with the right of appeal following the expiry of that time. We think that it should only cover clerical errors per the slip rule as opposed to errors of substance. Under this proposal what would happen with the costs incurred by a defendant in pursuing an appeal, only for the Magistrate to realise that an error had been made and to rectify it thus making an appeal no longer necessary?

16. **Art 30** – This is positive and long-overdue.

17. **Art 34(2)** – Will the defendant have the right to be heard on such a matter?

18. **Art 35(3)** – Why 8 days when the appeal period is 7 days? The current period is 8 days and the reduction by a day is not explained or justified.

19. **Art 39(3)** – For this provision to be effective, costs must be assessed as a fixed sum.

Part 7

20. **Art 41** - The following points arise:

(a) It is unclear under what circumstances sub-paragraph (1) (b) would arise and what the procedure would be.

The Article refers to cases where the defendant has been sent to the Royal Court for sentencing or trial.

Sub-paragraph (1) (a) covers what is presumed to be the majority of the cases, where the date of first appearance is directed by the Magistrate.

If the date is not directed (presumably only if a date cannot be identified at that stage, it is unclear how the Royal Court will take cognisance of the case and will know when the case is ready for the first appearance. Under the current system the Crown liaises with the Royal Court and informs the defendant/s when a date for indictment is available.

It appears from Article 41 (2) that when 41 (1) (b) applies it is for the Royal Court to give the parties notice. Is it envisaged that the Magistrate's Court Greffe will notify the Judicial Greffe of the case having been sent up?

It is felt that the draft lacks clarity in this regard.

(b) No provision is made in Article 41(3) as to the service of the indictment upon the defendant/s. It is suggested that the words *", serve it on the defendant*" should be added after the words "prescribed form"

(c) It follows from the comment at (b) above that the words "*and served*" should be inserted after the word "lodged" in Article 41 (4). It is also suggested that 48 hours is too short a period of notice for serving the indictment, which may contain different counts to the matters charged in the Court below.

(d) Provision should be made for the defendant/s (as well as the Court) to be notified by the Attorney General that the indictment is not ready for lodging in Article 41(5). It is not clear what minimum period of notice of the first appearance would apply in these circumstances. Article 41 (6) might cover the position but the directions envisaged there appear to be limited to the "purposes of securing the lodging of the indictment"

(e) Generally it is unclear what defect in the current system is being cured by these provisions.

21. **Art 42** - The following points arise:-

(a) The word "*her*" should be inserted in paragraph (1) after the word "or" in the third line.
(b) The word "*her*" should be inserted in paragraph (4) after the word "or" in the second line.
(c) The word "/or" should be inserted in paragraph (7) after the word "and" in the second line.

22. **Art 46** - the current wording of paragraphs (3) and (4) can usefully be simplified. The following wording is suggested:

46 Mode of trial

(1) Subject to the provisions of this Article, a defendant may be tried either by the Royal Court sitting with a jury, or by the Inferior Number of the Royal Court sitting without a jury.

(2) A defendant whose indictment only charges an offence which is a crime or délit may elect to be tried –

(a) by the Royal Court sitting with a jury; or

(b) by the Inferior Number of the Royal Court sitting without a jury.

(3) ~~This paragraph applies w~~W~~here –

(a) no election is made under paragraph (2); or

(b) a defendant's indictment charges 2 or more offences at least one of which must be a crime or délit and the other a contravention~~.~~.

~~(4) Where paragraph (3) applies,~~ the Royal Court shall decide, having regard to the nature and gravity of the offence and after hearing any submissions from the defence and the prosecution, the method by which the defendant shall be tried.

~~(5)~~ (4) Unless an enactment expressly provides otherwise, a defendant whose indictment only charges an offence which is a contravention shall be tried by the Inferior Number of the Royal Court sitting without a jury.

23. **Art 48** - a similar point arises. The following wording is suggested:

48 Sentencing where facts in dispute

(1) ~~This Article applies w~~W~~here~~ a defendant found guilty is to be sentenced, and the defence or prosecution dispute the facts upon which the defendant was found guilty~~.~~.

~~(2) Where this Article applies,~~ the trial court may, at the invitation of the defence or prosecution, communicate its view of the facts to the sentencing court.

PART 8

24. **Art 53** - In sub-paragraph (4) (d) delete the word “defence” and replace it with “case”.

25. **Art 57** - It is noted that it is based on the current wording of Article 93 of the Police Procedures and Criminal Evidence (Jersey) Law 2003 but references to “fitness to plead” have been omitted in sub- paragraphs (2) (a) and (b), so that it is not clear when a trial to determine fitness to plead would begin.

26. **Art 59 -** Dealing with restrictions on reporting preparatory hearings, paragraph 10 deals with matters that can in any event be reported. Amongst those is (at sub-paragraph (10) (g)) whether the defendant has been granted legal aid. It is not clear why this is relevant and/or worthy of note. It is considered that this sub-paragraph should be deleted.

PART 9

27. **Art 61** - The following matters arise:

(a) the provision in sub-paragraph (20 (i) to allow advocates, solicitors and prosecutors to sit on juries in some circumstances is not necessary and is objectionable on three main grounds:

i. There is a clear risk that the opinion of a lawyer will hold undue sway with other members of the jury, given the actual or presumed knowledge that the lawyer will have about relevant legal matters in the case; and

ii. There is an equally clear risk that the lawyer will have some knowledge about the background of the case, directly or from discussions with other members of the profession, which will means that he or she will be

deciding not solely, as the law requires, on the basis of the evidence adduced at trial.

iii. There will be at least the appearance of bias if a lawyer who did mainly defence work or a prosecutor sits on a jury.

This, combined with the disappearance (with which we also disagree - see below) of the right to make peremptory challenges, is and has the potential to cause injustice.

We are not aware of any shortage of people to sit on Juries, so the purpose of this provision is questionable.

(b) Sub-paragraph (3) (d) disqualifies any person who "at any time" has been sentenced to imprisonment for no less than one month. This appears to be unduly restrictive. A 20 year old might be sentenced to 5 weeks and then never be allowed to sit. This is not the position in England where only certain offences disqualify a person forever (Juries Act 1974 Schedule 1). The words "at any time" should be replaced with "within 10 years immediately before being summoned".

(c) Generally, the fact that there is no restriction on police/immigration officers sitting on a jury is felt to be objectionable and likely to leave any convicted person who knows or subsequently learns that law enforcement officers took part in the decision to convict with a justified sense of grievance.

28. **Art 64** - We cannot see the need for reserve jurors in every case. There has been to our knowledge, no more than one trial lost as a result of a Jury falling below the required numbers. That is not sufficient to justify having 14 members contributing to discussions and potentially influencing their colleagues but then 2 falling out of the process at the summing up stage, having had their say in the decision. The change appears unjustified and unnecessary.

29. **Art 66** - As mentioned above, the removal of the peremptory challenges is unjustified as well as being unexplained. Peremptory challenges have never to our knowledge caused any problems in jury selection and they are an important safeguard in our system when there are no jury selection hearings

30. **Art 67** - The fact that reserve juries are full members of the Jury until the beginning of the summing up causes the problems set out above (as to Article 64).

31. **Art 71** - The possibility of conviction by 9 jurors other than when the numbers have been reduced to 10 (the current position under the 1864 Law) is a retrograde step (sub-paragraph (3) (b)). It is suggested that the longstanding position remain unaltered.

32. **Art 71(8)** – Hung juries. There is concern over retrial in such a small jurisdiction. Also the fact that an acquitted D could be kept inside for 7+ days whilst the AG decides whether to apply for a retrial. He should have to decide immediately.

33. **Art 71(9)** – notify D and Court

34. **Art 74(4)** – why define here? Should this not be in Art 1?

35. **Art 76(4)** – is it envisaged that all Newton Hearings will be heard by the Inferior Number? Clarify (4) to include "evidence and representations".

36. **Art 77(1)** – should this refer to "authorized" as prosecutor is defined?

37. **Art 77(5)** – why 35 days? Why have this right at all but if it is necessary, why not have it in the Royal Court too?

38. **Art 77(7)(b)(ii)** – why is this a ground? It should be incumbent on the AG to get it right in the first place.

39. **Art 78** – why should the AG have the ability to discontinue without leave but withdraw with leave? Should the Court not be engaged in both cases?

40. **Art 79(1)(a)** – "which has not previously been disclosed" seems otiose. When is the Crown obliged to provide disclosure – before first appearance?

41. **Art 79(4)** – there should be a continuing duty on the AG to investigate and disclose documents.

42. **Art 80(5)(a)** – why is the lawyer at risk? This may serve to drive a wedge between lawyer and client/impinge on matters of privilege. Drawing an adverse inference is one thing but why should there be an interlocutory costs penalty? Will there be a like

risk for a prosecutor who fails in disclosure? Will that be a personal risk or will it be defrayed from public funds?

43. **Art 80(5)** – should refer to 2(d) not 2(c).

44. **Art 52 -** Defence case statements amount to a significant inroad into the fundamental right to silence. That right does not only exist at the police station, as suggested in the Consultation Paper, but throughout a criminal case. This is a fundamental right and requires debate at the very least.

45. **Art 82** – this is not finalised. When is it proposed that it will be available for comment? When is it intended that the D must notify on witnesses? Is there a like obligation on the Crown?

46. **Art 84** – we have concerns about forcing people to give evidence against their will. This requires further consideration.

47. **Art 88(6)(c)(i)-(iii)** – why is ethnicity or religious belief relevant?

48. **Art 89** – why have 88 then if the Court can order special measures anyway? The fundamental point is that a witness should give live evidence unless there is good reason. This seems to anticipate a catch-all and a different approach, i.e. a change of a fundamental nature needs further consideration.

49. **Art 90** – this seems to prevent an unrepresented person from cross-examining anyone. We see that the aim of preventing an alleged assailant from cross-examining a complainant as laudable but this seems to go too far and to include all cases of violence. It is possibly aimed at sexual offences and domestic cases but covers all assaults as drafted. 90(1) should be limited to the complainant as it would cover all witnesses.

50. **Art 93** – the Jurats in an IN case should also be warned.

51. **Art 94(9)** – why is the relevant period after the delivery of the verdict for jurors? For witnesses, why is there any defined period? It should always be an offence.

52. **Art 95(1)** – need to notify the D too.

53. **Art 98(2)(a)** – insert his or "her" right.

54. **Art 99** – given the proposed re-trial provisions, it would seem incumbent upon the Court to order in all cases that there should be no coverage of any trial until conviction or, in the case of an acquittal, the AG's decision not to seek re-trial. If he does then the press ban would extend until the case is at an end. Otherwise, the potential second or third jury would be prejudiced. This is important in such a small jurisdiction. The press will no doubt wish to print and report as they do now unless otherwise ordered. Further, the risk of a member of the public sitting in Court and then using social media to communicate what is happening in a trial is not considered and is likely to be as widely read as the printed media.

55. **Art 101** – why should the prosecutor not be at risk as to personal costs orders as opposed to costs from public funds?

56. **Art 101(3)(a)** – why not include those employed by the prosecution too?

57. **Art 103(4)** – the defence voice will be somewhat outnumbered in the proposed make up of the Committee. Is that fair? Why refer to the délégué? Surely this is a vestige of the Law being related to French terms that can be avoided.

58. **Art 105** – the Rules Committee should be consulted with regard to Practice Directions.

The Law Society of Jersey

September 2017

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15 December 2017

Dear Neville,

You will have seen that the draft Criminal Procedure (Jersey) Law 201- (the "**draft Law**") (P.118/2017) was lodged *au Greffe* on 5 December 2017.

This Department is in the process of preparing a response to the public consultation that opened on 24 July 2017. However, in view of the time that the Law Society and your members have devoted to the process of preparing the draft Law and to further scrutinising its contents, we thought it might assist to provide you with a response to points raised by the Law Society in your consultation response of 21 September 2017.

Before turning to your specific points I wish to briefly address your concerns with regard to the time that the Law Society has had to consider the draft Law. I think it is important to highlight that the most recent public consultation is recognised as just one part of a collaborative process by which the draft Law was developed. As outlined below, the Law Society has been actively and fully engaged in that process at every stage.

To explain, I understand that the first presentation to the Law Society in respect of the draft Law was delivered by Ann Reddrop from the Law Officers' Department on 30 September 2014. At that time, a synopsis of the objectives for the project was provided and members of the Law Society were asked to contribute their views in respect of those objectives. I believe the Law Society newsletter subsequently invited contributions from members of the Society on the objectives of the project by 1 December 2014. A number of your members contributed their views at that stage.

You will no doubt be aware that work on the draft Law and the Criminal Procedure (Bail) Law 2017 (the "**Bail Law**") has been overseen by the Criminal Procedure System Board of which the Bâtonnier is a member. The work on developing the draft Law has then been carried out by the Legislation sub-group of the Criminal Justice Working Group of which Advocate Deborah Corbel is a member, nominated by the Law Society, to represent the views of the defence bar. Both the Bâtonnier and Advocate Corbel, but particularly the later, have been included in all stages of the decision making process leading to the development of the draft Law.

Notwithstanding the above, and mindful that the profession may have different views on the best way to proceed with the draft Law, the Law Officers' Department and members of the Legislation sub-group have delivered two further specific presentations to the Law Society on the draft Law, on 1 March 2016 and on 6 September 2017 to raise awareness and encourage participation in the

public consultation respectively. A separate presentation was also provided on the draft Bail Law by Matthew Berry on 25 April 2017.

Your consultation response acknowledges that the draft Law is long overdue. The collaborative process of development of the draft Law has, in our view, helped to ensure that it will deliver an efficient and effective justice system, but also one that is tailored specifically to Jersey's needs. There are elements of the draft Law that draw on legislation and experience in England and Wales. However, I can assure you that in each case careful consideration has been given, with the benefit of input from a variety of stakeholders and your members, to ensuring that the draft Law follows precedent only to the extent that it is expedient, in the interests of Jersey's criminal justice system, to do so.

I will now move on to address the specific points made in your letter of 21 September 2017. In each case I will address these by reference to the paragraph numbers in the comments section of your consultation response.

1. **Art 1(2)** – as you will be aware, Article 14 of the Magistrate's Court (Miscellaneous Provisions) (Jersey) Law 1949 currently allows some 'foreign' qualified lawyers, employed in the Law Officers' Department to prosecute cases in the Magistrate's Court. We agree that it is not necessary in the draft Law to expand this approach to cover the Royal Court, though we do think it is appropriate to maintain the approach and to permit lawyers qualified in Scotland, Northern Ireland and Guernsey to prosecute cases in the Magistrate's Court as well.

2. **Art 2** (and 3(1)(c)) – this suggested amendment has not been taken up. The defendant has rights, particularly those guaranteed by the European Convention on Human Rights ("**ECHR**"). We think it is right in the draft Law recognises those rights, but the court is already under an obligation, pursuant to Article 7 of the Human Rights (Jersey) Law 2000, to act compatibly with the ECHR. We do not think it would be right to create a separate and different duty to promote or enhance those rights.

3. **Art 3(2)(d)** – the requirement to take account of the needs of other cases stems from the underlying principle that the justice system should be as swift and effective as it can be while remaining just and fair. In some circumstances the needs of other cases, (for example where proceedings against different defendants are linked) may be a germane consideration and the law is intended to allow the court the necessary flexibility to react should that be the case.

4. **Art 10(2)** – this has been reduced, where a defendant is held in custody, to 42 days. It must be recognised that the adjournment period is a maximum time, rather than a target. It may very well also be that Rules later clarify the position on such adjournments.

5. **Art 10(3)** – this provision has been amended to make it clear that this applies subject to the provision later in the law concerning the right of the defendant to be present at trial. In that context the provision is included to ensure that case management hearings can take place in the absence of the defendant where that would not conflict with the overriding objective.

6. **Art 13(4) (now 13(3))** – Article 12 of the draft Law makes it clear that proceedings will be conducted by or on behalf of the Attorney General. However, this provision applies subject to the provisions of the Honorary Police (Jersey) Law 1974, which reserves the power to initiate criminal proceed by charge to the Honorary Police. It is conceivable that an offence might, on the facts, be rightly charged by a member of the Honorary Police, but where there

is insufficient opportunity to obtain the Attorney General's consent before the first appearance. Where such circumstances arise, it would not be in the interests of justice to allow this to cause a breakdown of proceedings and the provision ensures that the position will be swiftly resolved.

7. **Art 14** – the title of this article has been amended to read '*Attorney General's power to initiate proceedings directly in the Royal Court*'.

8. **Art 14(7) and Schedule 1 (now Schedule 2)** – you will see that pursuant to paragraph 2(1) of Schedule 2 to the draft Law that it is only a conviction for a "qualifying offence" that can be quashed by the Court of Appeal. The States Assembly will need to prescribe the qualifying offences in Regulations pursuant to paragraph 2(8) of Schedule 2. It is anticipated that only very serious offences will be prescribed for these purposes.

9. **Schedule 1 Art 5 and 6 (now Schedule 2 Arts 5 and 6)** – at this point it has not been considered appropriate to take forward any wider reform of the Court of Appeal (Jersey) Law 1961. We recognise that the Jersey Law Commission has published a consultation paper on potential reform to the 1961 Law and further consideration may be given to this issue in due course. In the meantime, the improved case management and enhanced disclosure procedures set out in Part 10 of the draft Law should help to ensure that all relevant evidence is presented at trial

10. **Art 15** – the provision maintains the status quo as provision is already made to this effect in Art 1 of the *Loi* (1853) *établissant la Cour pour la répression des moindres délits*, which provides that *'Le Juge de la Cour pour le Recouvrement de Petites Dettes, siégera en tous temps en tous lieux nécessaires afin d'entendre et juger les Causes de Police qui peuvent être traitées et jugées sommairement.'*

11. **Art 19(1)** – 'approval' is part of the standard lexicon and we think it is appropriately used in this instance.

12. **Art 20(4)** - this Article provides the court with the capacity to better manage deliberate non-attendance, and the exercise of this article will be tempered not only by its exercise by a professional judge but also by the overriding objective.

13. **Art 26 (now Arts 25, 26 and 27) –** the proposal to remove the committal procedure and improve the process of determining where proceedings are to be heard has been an essential part of this reform project. The Law Society representatives on the Criminal Procedure Working Group and System Board will have been well aware of this proposal, which will not only improve efficiency but also ensure that victims and witnesses cannot be required to give evidence twice. At the venue determination stage the Magistrate must still apply her mind to the evidence and gravity of the offence in order to determine the appropriate venue for the trial of an offence or sentencing in case of a guilty plea.

14. **Art 26(10) (now Art 25 to 27) –** the provisions set out in these Articles achieve an appropriate balance between ensuring that offences that are within the Magistrate's sentencing jurisdiction remain in the Magistrate's Court for trial. In answer to your point, provision has been made in Article 27 to enable a case to be sent to the Royal Court for sentencing after trial, which can be used where new facts come to light during the trial that indicate a case should have been sent up for trial.

15. **Art 29 (now Art 31)** – as argued elsewhere, the alternative to ability to correct a mistake is that the defendant might need to appeal the Magistrate's decision, which may result in greater inconvenience to the defendant and cost to the taxpayer to correct the mistake. We would not expect this power to be used frequently, but where it is it will help ensure the expedient resolution of an issue without undue difficulty.

16. **Art 30 (now Art 32)** – noted.

17. **Art 34(2) (now Art 36(4))** – rules for the conduct of appeals brought pursuant to Article 33 may be made pursuant to Article 113(1)(i) of the draft Law. The appropriate procedure will be a matter for further consideration by the Rules Committee established under Article 112.

18. **Art 35(3) (now Art 37(3))** – this has been changed to 7 days. All references to periods of 8 days have now been changed to 7 days, reflected changes in the drafting of enactments more generally.

19. **Art 39(3) (now Art 41(3))** – noted.

20. **Art 41 (now Art 43)**
    (a) – we think that the issues raised are best addressed in rules adopted pursuant to Article 113 (formerly Art 104) of the draft Law than in the draft Law itself.
    (b) – further to this comment the provision has been changed
    (c) - further to this comment the provision has been changed
    (d) – while the power to make rules in (new) Art 113 was understood to be sufficiently broad to cover timing issues in respect of the service and lodging of documents, for the avoidance of doubt Art 113(1)(c) has been changed to explicitly reference timing.
    (e) –the purpose of these provisions is to provide a clear framework for the process commencement or continuation of proceedings in the Royal Court. These provisions may naturally be supplemented by rules of procedure to clarify what is required of the parties in each case.

21. **Art 42 (now Art 44)**
    (a) – changed
    (b) – changed
    (c) – not changed –there is a liability for both a term of imprisonment and a fine, albeit that one or the other may not materialise. The way in which this is expressed in the draft Law is the normal approach taken in criminal procedure legislation.

22. **Art 46 (now Art 48)** – the content of Article 48 has been revised to simplify the wording in some respects. We trust it will fulfil the spirit of the comments even it does not implement them specifically.

23. **Art 48 (now Art 50)** – as above.

24. **Art 53 (now Art 55)** – thank you for your comment, this has been changed.

25. **Art 57 (now Art 59)** – new provision is made in part 8 of the Mental Health (Jersey) Law 2016 with respect to determining whether a defendant has capacity to participate in criminal proceedings. The content of those provisions, which will be in force before the draft Law, reflects that questions of capacity can arise before or after the trial commences and so it will not be appropriate to treat the proceedings to determine capacity as the beginning of a trial in all cases. Therefore it is not appropriate to make specific provision for this purpose in Article 59.

26. **Art 59 (now Art 61)** – we recognise both sides of the argument, but on balance we have applied the principle that transparency in the use of public funds is a matter of public interest. Art 91 (8) of the Police Procedures and Criminal Evidence (Jersey) Law 2003 provides that this is already a reportable subject.

27. **Art 61 (now Art 63)** –

    (a) - we do not feel that it is appropriate to forbid lawyers from partaking in the rites of civilised society by simple virtue of their chosen profession (i.e. what they are), but that selective restriction may be based on a consideration of any particular involvement as protagonists within the criminal justice system (i.e. what they do). In terms of knowledge and background, there is a general expectation of confidence and impartiality on the part of lawyers, and it seems reasonable to expect that this would apply as much in their role as a juror.
    (b) – this has been retained as it was drafted and is based on the current position in Art 10 of the Loi (1864) Réglant la Procédure Criminelle.
    (c) – again, the general principle is that there should be the minimum restrictions placed on civic rights. However, given the small size of the jurisdiction, police officers in the States of Jersey Police Force have been exempted. This is based on the principle in point (a) above, as it is not realistic to assume that any police officer will be fully remote from the criminal justice system.

28. **Art 64 (now Art 66)** – this has been changed to allow for reserve jurors only where a case is anticipated to last for more than 5 days.

29. **Art 66 (now Art 69) –** in our view there should be not difficulty with the removal of peremptory challenges, since legitimate grounds for challenging a jurors selection can still be deployed where that is appropriate.

30. **Art 67 (now Art 70) –** in order for the reserve jurors to fulfil the function that they are required to serve they must be privy to the full jury deliberations and the court 'experience' in its totality. This requires they be treated as members of the jury until it is no longer possible that they will be required. The logistics of this have been discussed with the Viscount who considers that they are manageable.

31. **Art 71 (now Art 75) –** we think the change proposed will help ensure that a jury can deliver a verdict in cases where the number of jurors is depleted.

32. **Art 71(8) (now Art 75(8)) –** the Attorney General may need time to consider the matter. A snap decision taken if a jury is hung is may not be in the interests of the defendant. The defendant will be eligible to bail during this period.

33. **Art 71(9) (now Art 75(9))** – changed.

34. **Art 74(4) (now Art 77(2))** – the definitions are specific to Part 10.

35. **Art 76(4) (now Art 79(4) –** yes, all 'Newton hearings' will be heard by the Inferior Number and the change has been made as suggested.

36. **Art 77(1) (now Art 81(1)) –** we were not clear as to the intention behind this comment. The reference in the consultation draft is to 'authorised prosecutor' as the prosecutor has here been authorised for this purpose.

37. **Art 77(5) (now Art 81(5))** – we think it is appropriate to afford the defendant the ability to require that proceedings that have been discontinued in the Magistrate's Court be recommenced. This provision will enable to defendant to have a criminal charge finally determined without disproportionate public expense. The time limit of 35 days ensures that this right is exercised in good time and while evidence relating to the offence is still relatively fresh. This time limit should allow the defendant sufficient time to seek advice and consider whether, in all the circumstances, it is appropriate to exercise this right.

38. **Art 77(7)(b)(ii) (now Art 81(7)(b)(ii))** – while it is clearly incumbent upon the Attorney General to minimise errors it would not be in the interests of justice to prevent fresh proceedings from being initiated where the decision to discontinue was incorrect on the basis of the evidence in a particular case.

39. **Art 78 (now Art 82)** – the power to discontinue proceedings can only be exercised at a "preliminary stage" of the proceedings (i.e. before the court has begun to hear evidence in the case). In our view it is right that this power may be exercised without the permission of the court, since the prosecution is best placed to decide whether this is the appropriate course during the early stages of proceedings. The power to withdraw criminal proceedings might be exercised during the later stages of a criminal trial and after the court has begun to hear evidence. For that reason, we think it is appropriate this this power only be used with leave of the court.

40. **Art 79(1)(a) (now Art 83(1)(a)** – In light of the consultation responses we have made provision in Article 113(1)(h) of the draft Law to enable the Criminal Procedure Rules to make further provision in respect of the service of details of the prosecution case on the defendant. This power may be used to provide further clarity and certainty in this area if that is required.

41. **Art 79(4) (now Art 83(4)** - a continuing duty to disclose unused material is provided for in the draft Law. We have not gone further and made provision for a prosecution duty to investigate. The extent of the prosecution duty to pursue reasonable lines of inquiry in relation to the material held by third parties was considered in the case of AG –v- H [2012]JRC175. The draft Law makes not contrary provision and so the extent of any such duty arising from case law will remain the same.

42. **Art 80(5)(a) (now Art 84(5)(a)) –** We think it is appropriate to provide a specific financial enforcement mechanism for the requirement to serve a DCS that does not rely on the drawing of adverse inferences, since that may not always be appropriate in the circumstances. With regard to the disclosure of unused material, it is important to recognise that compliance by the prosecution with the duty to disclose unused material is a pre-requisite before the defendant will be required to serve a DCS. Hence an express financial sanction is not required, though there is provision in Part 12 with respect to wasted costs orders, which applies to both the prosecution and defence.

43. **Art 80(5) (now Art 85)** – this Article has been revised and the issue no longer arises.

44. **Art 81[1] (now Art 85)** – the defence case statement does not erode the right to silence, because the defendant is still able to provide no evidence before or at trial without any adverse inference being drawn by the court. It is only where the defendant provides a DCS containing details of their defence and then departs from the contents of the DCS at trial that the court may draw inferences pursuant to Article 87(2).

45. **Art 82 (now Art 86)** – This provision is now finalised in the draft Law. Further provision may be made in the rules with respect to prosecution disclosure of the nature of its case and witnesses it intends to call.

46. **Art 84 (now Art 95)** – The provisions in respect of the competence and compellability of witnesses have been further developed in the draft Law to provide additional clarity. We recognise that there may be difficult issues that arise in any case where it is proposed that a spouse or civil partner be compelled to give evidence to a court. However, we think the prosecution and courts, guided by the overriding objective, will be able to balance the interests of justice and the needs of individual witnesses in particular cases where these issues arise.

47. **Art 88(6)(c)(i)-(iii) (now Art 100(6)(c)(i)-(iii)**) - these are simply factors that should be taken into account in determining whether fear or distress might diminish the quality of a witnesses testimony. They are not exhaustive and a person's ethnicity or religion may not be relevant in many cases. However, these factors may be relevant, for example, where the defendant in the proceedings in a position of authority in the church that the victim attends.

48. **Art 89 (now Art 102)** – It is appropriate to provide some certainty to eligible witnesses that the courts must consider which special measures to put in place. However, it is right that the courts should then have the discretion to order that special measures be put in place in other cases where the eligibility threshold is not met. As elsewhere in the draft Law, the courts will need to have regard to the overriding objective in making any decision on special measures.

49. **Art 90 (now Art 104)** – the scope of this provision has been limited to preclude only the cross-examination of the victim and vulnerable people.

[1] The reference here is to 'Art 52', we assume from context that this refers to former Article 81.

50. **Art 93 (now Art 107)** – the Article now provides for all Jurats however sitting to be so warned.

51. **Art 94(9) (now Art 108(9))** – the intention is to avoid any interaction between parties being forever affected by a connection that could be decades old. One year seems like a reasonable timeframe.

52. **Art 95(1) (now Art 98(1))** – not changed.

53. **Art 98(2)(a) – (now Art 89)** – the Article has been rewritten.

54. **Art 99 (now Art 90)** – The restrictions on reporting are intended to be no more than is necessary to balance the rights of a defendant to receive a fair trial under Article 6(1) of the ECHR and the rights of journalists to report on proceedings under Article 10 of the ECHR.

55. **Art 101 (now Art 110)** – The provision has been amended so that wasted costs may be awarded against either the defence or prosecution to the same extent.

56. **Art 101(3)(a) (now Art 110(3)(a)** – changed.

57. **Art 103(4) (now Art 112(4)** – The Committee contains representatives from across the criminal justice systems. It is important that the Criminal Bar is represented on the Committee and we do not think that the presence of other judicial and public sector representatives necessarily means the 'defence voice' will be outnumbered. It should be noted that the only 'prosecution voices' on the Committee will be those of the Attorney General and the Chief Officer of the States of Jersey Police.

58. **Art 105 (now Art 114)** – this may be something that occurs in practice, but we think it is important that the courts continue to have the ability to manage their own proceedings within the bounds of the draft Law and the Rules that will be made pursuant to it.

I hope that you find the above helpful. The full response to the consultation will be published on Monday 18 December and a copy of this letter together with all consultation responses will be appended to it for full transparency.

Yours sincerely,

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Community and Constitutional Affairs