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Criminal Procedure Law, Sub-Panel

Draft Criminal Procedure Law Review

Witness: Bailiff

TUESDAY, 6th February 2018

Panel:

Deputy S.Y. Mézec of St. Helier (Chairman)

Deputy T.A. Vallois of St. John (Vice-Chairman)

Deputy R.J. Renouf of St. Ouen (Member of Panel)

Witnesses:

Bailiff of Jersey

Deputy S.Y. Mézec of St. Helier (Chairman):

This is a public hearing of the Criminal Procedures Scrutiny Sub-Panel and our job is to scrutinise the draft Criminal Justice Procedure, Jersey Law. So, we are very grateful for you joining us this afternoon, and we are grateful for the submission that you have made in advance. Just the usual procedural stuff we have to deal with at the beginning. There is a notice in front of you, which it will just be good if you could confirm that you have read. That just covers what the rules are to do with parliamentary privilege in these hearings. Just another note to the public gallery, if you could just make sure phones are on silent, if that is okay. For the benefit of the tape, we have to just introduce ourselves. I am Deputy Sam Mezec, Chairman of the Sub-Panel.

Deputy T.A. Vallois of St. John (Vice-Chairman):

Tracey Vallois, Deputy St John's and Vice-Chairman of the Sub-Panel

Deputy R.J. Renouf of St Ouen:
Deputy Richard Renouf, Member of the Panel.

Andy Harris:
I am Andy Harris, Scrutiny Officer.

Deputy S.Y. Mézec:
If you can introduce yourself please?

Bailiff of Jersey:
William Bailhache, Bailiff.

Deputy S.Y. Mézec:
Okay, thank you very much for joining us. As I said, we have received your submission and the legislation in front of us. It is a long time in the making, I think it is safe to say. Would you be able to just go through, perhaps in finer detail, some of the points that you have made in your submission; what you think the most important elements of the law are that we would benefit to consider? That is quite an open question.

Bailiff of Jersey:
I could do that. I was expecting to help you in whatever it was that you wanted to ask me. I think the ... shall we start with the Commission authenticity(?)

Deputy S.Y. Mézec:
Sure.

Bailiff of Jersey:
Because I think that contains some little points and some big points, and working through it, starting with Article 36, paragraph 3, I think that's just a straightforward little point, but it is an important one. That is to say that the court should not impose a sentence which is greater than the maximum a magistrate could impose. I am aware the matter has been remitted by the magistrate for sentence, and that does not seem to be a restriction which exists at the moment, and I think that is summarised. But I think that is probably just a drafting error. Article 50, the communication views to sentencing court, I think Sir Christopher Pitchers had also covered this in his submission to you because he thinks that the drafting does not quite meet the requirements at the moment, this is paragraph 5 Sir Christopher's submission. I would like to say that I do not agree with him, I think he has got it right and that we would be best amending the article, as he suggests. In Article 66, the reserve juries. I must admit that I have been going to and fro on this; I

was not sure that it was something that is appropriate for me, as bailiff, to get to weigh in. I see what Sir Christopher said in his memorandum; it is obvious from what the commissioners have said, and from the discussions that we had, that we do not think it is going to be a practical arrangement for use very often and yet, the 5-day period which is being recommended in the draft law, does seem to be too short, because there will be lots of cases; lots is probably putting it too high, but quite a few cases where there will be juries sitting through the trial wasting their time. I was quite interested again in Sir Christopher's statement that in all his 45 years, or whatever it is, at the English bar and on the High Court Bench, that he had not had a single case where he'd run out of jurors and had to do it again. Certainly, I have not heard that. Sometimes it has got close, and you start worrying about it a little bit, but it seems to me that it should be the exception, rather than the rule. It may be that the right course would be to have a longer period. It may be the right course would be to have a discussion given to the trial judge, obviously before the trial starts, to have a reserve ... one or two reserve jurors. It may be that be that as Sir Christopher says, you just increase the number in particular cases, again at the discretion of the trial judge; to a total of 14 instead of 12. I certainly think what we have got at the moment is cumbersome, and I do not think it is very sensible and it is very expensive, and it will be likely to have the impact that is identified in Sir Christopher's submission, namely that it is going to annoy jurors numbers 13 and 14, just going to be sitting around, taking time up, not able to make a contribution. I think that is not desirable for the jury system.

The Deputy of St. Ouen:
Do you have a view Mr. Bailiff, on whether, if reserved jurors were introduced, they should be discharged before the summing up, or after the summing up but before the jury retires?

Bailiff of Jersey:
Well, I definitely ... they should not be discharged until retirement because you'd feel very silly after a six-month trial if a juror in the course of your 4-day summing up then keels over, and you have got to start all over again. So, I think that is not sensible at all.

The Deputy of St. Ouen:
Indeed. Thank you.

Bailiff of Jersey:
Do you want to have any further questions about reserve jurors?

The Deputy of St. Ouen:
I do not know if question is the right word. We have heard from others who have had experience through the court system, and we have spoken to one person who, in the case they were involved

in, one juror left, for whatever reason, so they were having to make do with 11. That was quite a sensitive case, and it was just something that had made him feel a bit nervous. He was worried that one more going and not being able to reach the number for a conviction, would have been difficult there. That was a case where they had anticipated it would be several weeks but, in actual fact, it only ended up being one week. He just felt nervous, as a result of that, and had considered whether this might assist there. Is that something you might have any thoughts on?

Bailiff of Jersey:

We have had cases where it goes down from 12 to 11. Very very rarely it goes down from 11 to 10, and none of those have caused a problem. We really start worrying when it gets down to 10, obviously. What I think you must be careful about is taking single cases and using that as a basis for a structure. The norm, is that you just do not have a problem, and if you create a structure around the exceptions it is likely to be quite expensive. So I think in the general strategy, I would want to avoid doing that.

Deputy S.Y. Mézec:

Okay. Do you have anything else on this? Please continue.

Bailiff of Jersey:

I think, if anything, the present draft of Article 66 is too close to creating a structure around exceptions because it's going to be very expensive. While we are on juries, there is … I included in my note to you my views about the form and I've got nothing really to add to what is set out in the letter. The language of the draft law, suggests that the foreman will be appointed right at the end, which I think is odd, in the sense that somebody ought to be managing such discussions, as there are, during the course of the trial. Judges will always - and all judges do this as far as I am aware - will say to the juries right at the beginning of the trial: "Do not make up your minds quickly. Wait till you have heard the evidence. You will be amazed how often what you hear in the last day affects what you heard earlier and affects the preliminary judgments that you were making in the early days of the trial, so wait till you have heard everything then you have got ... off and have a discussion in the jury." But, juries are human obviously, and it is very natural when you come out and somebody has just given evidence. Obviously, we get that in civil cases in court as well; somebody has just given evidence and you want to talk about the evidence they have given: "Do they seem as though they are telling the truth? Could they be they be mistaken? Are they reliable?" Those are the key questions which tryers of fact have to resolve. So, I am quite sure that juries do talk about, I've never sat on one, but I am sure juries do talk about the evidence as it is given. It does need a foreman then to say: "Hang on, just remember we should not reach any firm conclusions, we have got to let things develop. We have got to hear all the evidence before we make our minds up. We are going to hear some directions at the end of trial. We are going to

hear summing speeches. So, just cool it." But it seems to me you need somebody who is going to do that. Now, it may be that there will be people who are not the foreman who take command of the jury early on; they might do it. But I think it is helpful to have a focus point, and that is why I would appoint – have a foreman appointed at the beginning as to whether the jury do it themselves, or whether the judge does it. I have given you my reasons why I think it's helpful for the judge to do it. Of the four local judges, I think you have probably got two and a half people who think it is a good idea, something like that.

Deputy S.Y. Mézec:
Could I ask you about the proposals to expand who is able to sit on a jury? Obviously, that is to include lawyers, in some instances. Is that something that you think would be helpful?

Bailiff of Jersey:
Yes. You have had a submission from somebody on this that I have read, was it the Law Society perhaps, was it?

The Deputy of St. Ouen:
Yes, they did cover it.

Bailiff of Jersey:
I cannot help thinking that in a small place, you need to look at these things rather differently from a big place. And I can understand about why, in the United Kingdom, they have moved as they have. There is a strong point to be made, is there not, which you want to be sure that your jury has got sensible ... ordinary, sensible people on it, but that includes ordinary, sensible people as well. What one is only just cautious about; what one is nervous about, is where you get special information which is available to jurors, which they are able to share with the other members of the jury, which might affect the trial. Because, then, the prosecution and the defence and the judge are not in control of what the jury are up to now. It sounds like a control freak, but I do not mean it that way, but it is to make sure that there is a ... that the jury perform their functions in accordance with the law. So, the law develops for example, that your ... there are laws about admissibility of evidence, and those are there because judges over decades, maybe centuries, have reached the view that these principles are to apply on what is admissible in the court and what is not. It would seem sort of counter-intuitive to put lawyers on a jury who are able to say to the jury: "Oh, well we have not heard about that area, and it is obvious that that area must have been looked at because the police would not have turned up on the day if they had not had some tip off." So, we can think about what we have not been told, and that is quite sort of unsettling, and I think not a very good thing for the jury process. So, that is what I mean when I say that there are some skills, that in the sense you do not want to import into the jury. United Kingdom (U.K.) judges can sit on juries, and

you would think judges will behave themselves and they will not say to their colleagues on the jury: "Well, the judge has told you this, but, that is not the right for the following reasons." But you would like to think that would not happen. It is just structurally, it seems odd, and that is the first thing. The second is the small jurisdiction point, and that is that in a small place, people tend to know each other better and so, there is a higher probability that particular members of the jury are known to be lawyers, or known to have particular positions, will be more influential than perhaps they should. Because the jury should ... each member of the jury, this is one of the classic of directions, that has been right at the outset is the strength of the jury system lies in you having a collective discussion of the issues which you hear. But then, having had that collective discussion, you make your own minds up and you do not allow anybody else to bully you because if you are taking the oath or affirming as a juror, it is your job to reach your own view, and you do that by having a good discussion with everybody else. But, at the end of the day, it has got to be your view. You can say that, of course you can, but I do not know whether it happens or not, because I've never sat on a jury. But that seems to me we could have done. But I suppose, I am in favour of widening the pool if possible, but nervous about people bringing special skills in.

Deputy S.Y. Mézec:

Okay, thank you. That is helpful. Do you have anything to ask on that point?

The Deputy of St. Ouen:

I think I would just like to ask, what would you views on centeniers sitting on the jury?

Bailiff of Jersey:

Well, I think that is not a problem, as far as the centenier is concerned. But, I think it is potentially a problem, as far as the public is concerned. It is a perception point, is it not? Centeniers do have a responsibility to charge. They take that decision on the recommendation of the State's police or sometimes at the direction of the Attorney General. I am not sure what the current practice is, but certainly, in the past ... it used to be the case that centeniers would sometimes call for the prosecution files that they would read it and then they would not just accept a recommendation that was made by the police officer, which I think is a desirable course I think centenier should do that, but I do not know whether they still do, because I am not in touch with that any more. They did, up to the time I stopped (being Attorney General, as far as I was aware). So, I think they are quite capable of being completely independent of the jurors. The question is whether the public would view that as such, because it is important that the public have the perception that the trial is completely fair. I am not sure about that.

The Deputy of St. Ouen:

Thank you.

The Deputy of St. John:

I would just ask, if trying to contextualise everything you have stated about the jury service or the jury system. So, if you had, for example, a lawyer, and you had the position where the judge was no longer appointing the foreman, the potential risks around that could be that you have the lawyer leading a jury, which could skew that individual ability to have that discussion. I mean, behind closed doors, and the ability for those individuals to be able to stand up for themselves, after taking the oath, is difficult in any scenario. But would it be better, in terms of having either you admit and allow lawyers to be on the jury, or you keep the current system where the judge appoints the foreman, or you take both of those away. So, is there a middle ground?

Bailiff of Jersey:

I think they are different. There are lots of lawyers who one could be quite happy to put them on a criminal trial because they are deal with banks and financial paper issues and security things, and so they are not dealing with criminal cases. It is the criminal law is where you start just getting slightly nervous about bringing those special skills in. The foreman point, I think, is just a wider one. Though sometimes, there will be juries who do not have anybody on them who is used to running a meeting, or ... you know, that is not to say there are not adequate jurors, of course they are, but it is just that maybe only one or two of them have been used to being in meeting situations and seen how meetings should be run. Because you do need to run a meeting, as you know. It has to be done. The idea that your jury might contain one or two people who have been to meetings, know how they are run, but may be shy and do not particularly want to put themselves forward and so their skills are wasted; that seems a pity. There will be some people who are very self-confident, and who want to take over a jury probably, and very keen to say what their views are straightaway. It is possible that some members of the jury might say, oh well, he or she seems to know what they are on about, let them run it. I am not sure that is necessarily the right person to run it just because they have the sort of confidence to do it. Certainly, on a couple of occasions where I have had the choice and known people on the jury, not particularly well, but known them, I have had doubts about whether they would be appropriate foreman, even though I know they are very self-confident, I would not chose them for that reason.

The Deputy of St. John:

I am just trying to understand how ... I mean you get away from the potential issue; whether it is the judge that appoints the person as foreman for a jury, or whether it is kind of a peer agreement ... a peer group agreement where they have been able to sit there and understand, or know each other, and then determine between them who they believe is more suitable. It is just trying to understand. There are going to be risks in either one.

Bailiff of Jersey:

Probably. If they get ... have to get to know each other; that means they are not probably going to appoint a foreman till the end, in which case you do not have anybody exercising any form of discipline, up until the time when they appoint one – a foreman right at the end. Myself, I think that somebody who has got a point to make in a jury, who wants to make it, is going to make it. So, even if you appoint, as foreman, somebody who is not the most vociferous or the more thoughtful necessarily, you will still find that the thoughtful and the noisy people are going to ... they are going to speak. So, in a sense, the appointment of the foreman, I think, is not going to make a huge difference. Although I raise it, because I like it; I think it works sometimes. It is not the biggest of them, it just ... it is just I think a shame to lose it because I think it is a useful thing to have.

Deputy S.Y. Mézec:

Okay, thank you for that. Article 75 is referenced in the Commissioner's submission, and they have raised ... quite a few reasons why they would object to this. What do you think generally of the change that is proposed in Article 75, and do you agree that it is potentially not the way forward?

Bailiff of Jersey:

I absolutely agree with the Commissioners, and what they set out at paragraph 4 of their submissions, is ... reflects the views of me and the Deputy Bailiff as well as their own views. I note that Sir Christopher, thinks it is a good idea. He comes from a jurisdiction where that happens. They have a different tradition, different custom. It is a bigger place and frankly, I think that if the Crown cannot prove its case first time around, well then it ought to ... not to face it again. I also think that the provenance of a small jurisdiction on a huge ... if you have re-trials which, on this analysis, will probably take place quite soon after the first trial. So, I am very much against it. I am also against it, in terms of the logistics. The last two years the number of assize trials has gone up very considerably indeed. Just looking at some of these statistics … 2012, 13 precise trials; 2013 = 12. 2014 = 5. 2015 = 1. 2016 = 25. Those are trial processes started, but you have the other statistics that go with it. Trials that were abandoned: 2012 = 1. 2013 = 16. 2014 = 10. 2015 = 14. 2016 = 18. Trials completed: 2012 = 7. 2013 = 4. 2014 = 9. 2015 = 9. 2016 = 10. So, what we are seeing from those statistics, is generally more people have been pleading not guilty, and that has continued through 2017 as well. More people have been pleading not guilty. And, I think the verdicts in 2017 and probably in 2016, included quite a high number of not guilty verdicts. And, if the consequence of that had been a whole set of re-trials, then the whole of the system would have come – would have started creaking. And the reason for that is that the ... we cannot run more than one jury trial at a time at the moment and that is a problem with resources mostly in the viscounts department. To understand that you need to know what happens when you have a jury trial. The jury, once they are in the care of the viscount, once they have been sworn in and

panelled(?) they have got to be looked after so nobody can get at them. That requires a number of viscount officers, a number of a men and women obviously. It has an impact on ushers as well, as we only have, as you know, all four covering the State and the courts. So, it is not to say that it is not impossible, but it would ... we would just need to have many more people employed in order to run more trials. And, I think there would therefore be a practical issue, and, the same practical issue goes to the court initiative I suppose, you cannot really have a precise trial at the moment anywhere except in a Law Court. We are in the course of proceeding with some physical alterations to one of the magistrates courts, which will enable us to have jury trials down there, I hope. In principle, it is agreed, but it has not sort of started yet but I hope that's going to happen. But there are some logistical things around, which are relevant. Actually they, to my mind, are less important, but the important thing is making you have a fair trial. And the publicity issues, I think are really quite difficult in a small place and that is where why I'm absolutely full square behind the commissioners in what they say.

Deputy S.Y. Mézec:

Do you think that there is anything that can be done to salvage this position and make it manageable, without necessarily undermining what are the basic principles of justice, in terms of media coverage, and that sort of thing?

Bailiff of Jersey:

Well, chances are you do not know what the result is until you get it, do you. So, you cannot say to the media ... if you are going to say to the media: "You cannot report any criminal trial until you get the result" I think that is going to cause some difficulty. I will not say whether I think it would breach the European Convention, but there is clearly an argument that it would and I have to sign it one day, I will not say that. But then, clearly there is argument that it might, and if it does not, it does not seem to me to be a sensible course to follow. So, if you assume that there is going to be media publicity of the trial, as it goes ahead, then what are your choices if you are going to have a re-trial? You either say: "we rely on the trial judge to have a re-trial" to ensure that the members of the jury do not read the evening post, do not listen to the news; have not been on social media; do not know what happened previously. Which, you know, is a possibility you could grill every member of the jury and find out second time round, find out what they knew or did not know about the case. You could do that, I suppose, the trial judge warning the jury do not do this, do not read anything that has happened before. When I sometimes think, not to think that jurors are like children, but the children, if you say do not do it, the first thing they want to do is go and do it. So, I am not sure it is a good idea to have the trial judge metaphorically wagging his finger at the jury and saying do not do it, because some probably will. So, you either do that, or you put the trial back until such time as people will have forgotten. Well, that is not a good idea, because justice

has got to come forward as quickly as you can. So, I think it is a real problem, and I just would not do it.

The Deputy of St. Ouen:

Sir, we are interested in why this suggested change has come all the way forward into draft legislation and it is lain with you, sir, for many years as Attorney General. So, did you feel, while Attorney General, that there were many cases in which there should have been, or you might have taken advantage of the opportunity for a retrial, because you felt it strongly in the public interest to do so; is that the rationale behind this proposed change?

Bailiff of Jersey:

I cannot give you the rationale, because it does not come from me. So, you would have to ask the Attorney General or the Council of Ministers in the first place.

The Deputy of St. Ouen:

In your time as Attorney General, did you feel, or found, that the public interest had not been served by the results of verdicts that you were involved in?

Bailiff of Jersey:

I am sure there must have been cases where I was disappointed that we did not get a conviction, I am sure there must have been. I am sure there were cases when I was Defence Counsel, when I was surprised there had been an acquittal. I remember some quite well. But, no, I never thought that we ought to be going to have a retrial because, I suppose, I grew up as a lawyer with the arrangements that we previously had. When I started, you needed 16 out of 24 to convict. That of course changed when the jury was skimmed down to 12. But, it was very much that the Crown had to prove its case, and if you did not prove your case, well then you did not and you move on to the next one. That was the view I would have taken at the time, I am quite sure.

The Deputy of St. Ouen:

Thank you.

The Deputy of St. John:

Over the retrial, the Article 75, the one thing that worries me is obviously the Human Rights: “The right to a fair trial", Article 60 of the Human Rights, where: “Innocent until proven guilty". But, if there was a challenge from the defence, for example, who wanted to be able to conduct the retrial in another area, so not in Jersey, and this is the issue with a small jurisdiction, is that we have one court system; whereas like in the U.K., they have got county, they can move to another county.

So, the practicalities, if there was that challenge from the defence to be able to move, there are none, are there?

Bailiff of Jersey:

There is nowhere you can move in Jersey is there. All things, I suppose, are possible. I certainly do not encourage you to think this way, but I suppose you could pass a law and make some arrangement with another jurisdiction to hold trials over there. You could hold them in England or Wales, would be the most obvious jurisdiction. It goes against everything which has been fundamental to Jersey having its own separate jurisdiction. I think there would be some quite difficult issues over who would have the capacity to preside over the trial and which law they would apply, and practical consequences for witnesses who would have to go and live in England for a while why they gave evidence, then come back again. I mean, I just do not think it is feasible.

The Deputy of St. John:

That is useful, thank you.

The Deputy of St. Ouen:

There is one more question in that, of course, many of our trials take place before a jurat, and I do not think there is a similar provision being sought in the case of trials before jurats. So, is there a danger that here you would, if enacted, the prosecution would have an option of a second run in the case of customary law offences, but not in the case of statutory law offences; is that the case, and would that cause any concern to you?

Bailiff of Jersey:

How interesting. Well, it looks odd. I think you are right in the construction of the article, because this only applies to jurat trials. So, you would need to have an express provision to allow for a retrial with jurat trials, I cannot quite see how that would work in practice, because if both jurats thought that the defendant was innocent, they would come back and say: “Innocent, not guilty". So, you are then left with the position where one jurat thought he was guilty and the other one thought he was not guilty, then the trial judge has the casting vote on whether he is guilty or not. But, I mean, what you are really suggesting, I think, is that you would have to introduce a system of: “Not proven", the Scottish system, so you have: “Not guilty", or: “Guilty", or "Not proven".

The Deputy of St. Ouen:

Yes, I do not know much about that at all.

Bailiff of Jersey:

We have never had that. So, I am not sure how this would work with jurats. I think it is pitifully straightforward either that with the jurat trials, they will either ... the defendant will either be guilty or not guilty, and I cannot quite see what scope there would be for a retrial. I mean, it is difficult to see how the Attorney is possibly going to know what the balance of the jury's minds were, because they are given ... the verdicts are given privately, so you will not know what the majority was, you will not know whether it was 7-5 or 6 all, or 9-3, or whatever. So, I think you will probably get quite a few retrials where the last jury was very much in a hung place. I honestly do not see that there is much merit in this.

The Deputy of St. Ouen:
Anything else on this point?

The Deputy of St. John:
No.

Deputy S.Y. Mézec:
Okay. Could we move on then? The next article that is examined in that submission is Article 75 4B, which it says that, in most cases, what is being asked to do by this would be nonsensical.

Bailiff of Jersey:
Yes.

Deputy S.Y. Mézec:
Does this look like an oversight to you in terms of the law drafting, then?

Bailiff of Jersey:
I think just it is gone wrong.

Deputy S.Y. Mézec:
Okay. That is helpful. Is there anything else on that one? No, okay, thank you. Article 81 ... well, Articles 81 4-6, which is said to firstly, it seems on the face of it a strange right to offer, but also it is proposed to only apply to magistrates' courts and not the rule courts. Can you see any arguments as to why it is proposed that this changes?

Bailiff of Jersey:

No. When the discussion which we, as judges, had over this, we thought that we did not understand what the purpose of these provisions was, did not look right, looked slightly odd. Frankly, I think you have to ask the Minister or the Attorney what is the purpose of this.

Deputy S.Y. Mézec:

Yes, I think that is something we have got to do some digging on? Anything to ask at this point?

The Deputy of St. Ouen:

No.

The Deputy of St. John:

No.

(Panel conferring)

Deputy S.Y. Mézec:

There is Article 83 about unused material. How do you think this is going to affect how far to run and when material is disclosed and when it is not?

Bailiff of Jersey:

Unused material is a very important part of the Criminal Justice System. I do not know if you have looked, or have been shown, the Attorney General, I think, has provided some guidelines about the disclosure of material. If you have not had those, you ought to ask for them, if I could suggest that. I did a draft on the way I see it, and potential guidelines, when I was Attorney General. I think the current Attorney has amended them in some small respects, but the essence of it is that one must remember the Crown is not there to make innocent people guilty, the Crown is there to ensure that justice is done. Therefore, the way in which material is dealt with is important. The Crown reaches a view as to whether somebody is or is not guilty of an offence, decides that he is, or she, and then will make available all the material, written and other material, which is relevant to prove its case. But, it is also the Crown's duty, because it has a duty to look for justice and not just to get conviction, to ensure that any material which is capable of supporting the defence case, or capable of undermining the prosecution case, is also provided to the defendant so they can look at it. That leaves you with a whole lot of unused material. You have got the material you know has got to be disclosed, but there will be some stuff which the Crown thinks is not relevant either way. That is not at all surprising. When the police carry out an investigation, they do not necessarily know where they are going to end up. So, you investigate like this and slowly it comes in until you fix on where you are going to end up. So you do collect on the way a whole lot of material. Some of that, although you do not know it, may well be relevant to the defence. So, the requirement is

that there should be disclosure of a list of unused material. What is the position in relation to some public interest material is that the Crown will get information that it does not want to disclose to the defence, because first of all, it takes the view that this is not material on which it will rely; and secondly that it does not help the defence; but importantly, thirdly, there might be some public interest reason why they do not want to use it. Let me give you an example. Let us suppose that there is a drugs' importation by boat from France. Let us suppose that. There is quite a lot of evidence the crown can rely on to prove its case over here. But, among the information which they have got, the Crown have got, is some intelligence from some French customs officers to the Jersey customs officers, that this importation was going to take place, because there was in informant in France who had given that information to the France, who then shared it with us, who had then enabled the Jersey customs or police to turn up at the right place, at the right time, to pick the boat with the drugs in it. Now, the French would say, we do not want you to give that information to the defendant, because he will be able to identify who the informant is and then follow it up. It is information which the Crown are not going to rely on, because they have got the boat with the drugs in it, so they are not going to want to give it over. It is not going to help the defence, because they have still got the boat with the drugs in it which they have got to explain, and so the fact that the police happened to turn up because they were given that information is not helpful to the defence. So, that is a case where, if you like, there is a public interest to keep the flow of information going between the customs authorities, which one needs to keep going, which they might be worried about if you disclose the information. So, it is ... this question of public interest and disclosure is important. What the point, as is being made here, about Article 83.3, is that the court is not going to know about unused prosecution material. So, it is not appropriate to say, unless the court orders otherwise, because the court will never know what is the unused material. That is the point that is being made. The obligation ought to be on the Crown to say, we have got this unused material, we do not want to show it to the defence for good public interest reasons, please tell us not to. But, that is not what Article 83.3 says. What it says is: “Unless the court orders otherwise, the prosecution has no duty to disclose it if they think it is in the public interest", it will be the court that has to make the decision and not the prosecution, because that is what holds the balance of fairness in dealing with a disclosure of public interest material. Are you with me, have I explained that properly?

Deputy S.Y. Mézec:

I think so. The example was helpful. Is there anything you would like to ask at this point?

The Deputy of St. John:

No.

The Deputy of St. Ouen:

No questions about it.

Deputy S.Y. Mézec:

That was helpful and then moving on to Article 98. There was a submission, Article 98, is on the warning of witnesses as to attendance at court. The submission we have received very specifically says that you would like the article to be amended to preserve the current power of arrest, and could be expanded to replicate the current position and enable witnesses for the defence, whose names are given to the Attorney General, to be warned under Article 98. Could you just explain how that would improve things?

Bailiff of Jersey:

Well, broadly speaking, what we think we have at the moment. So, this Article 98 is a change from what there is at the moment. At the moment, if a witness fails to turn up, we can order arrest and they can be fined for an unlimited sum. If you have the arrangement which is envisaged by Article 98, there will be delays, because you then have to start this new process and it will be a bad thing.

Deputy S.Y. Mézec:

Yes, okay.

Bailiff of Jersey:

When somebody does not turn up because they just choose not to, you want to have the ability in court to say to the police or to viscount, go on to Boots where he is working and pick him up and bring him here, and then nothing is delayed.

Deputy S.Y. Mézec:

Okay, that is helpful. I am just looking at the last one on the submission. I think that is more to do with the wording, is it not?

Bailiff of Jersey:

Yes.

Deputy S.Y. Mézec:

Okay, yes. That is fairly self-explanatory. Moving on to your supplementary letter that you have done on top of this, a large proportion of this I think we have already been through; the issue of the foreman. Is there any points that you have raised in here that you would like to draw our attention to that you think would help us?

Bailiff of Jersey:

Article 89.1 I think is probably a drafting point. Have I made myself clear in that paragraph?

Deputy S.Y. Mézec:

89.1?

Bailiff of Jersey:

It is the distinction between being required to be present and not to exercise his right to be present. If you are required to be there, you have got to be there. If you have a right to be there, you can choose whether or not you want to be there. I was not entirely sure that it was clear which was which. They are not necessarily completely compatible. At the moment, we have a situation that requires that he is to be present *tous les debats(?)*, and it is understood that the court has a discretion to forgive an absence if there is some reason for it, such as he is undergoing some psychiatric treatment, for example, is the most common one, where he is getting some psychiatric treatment in the U.K. This is not just a trial, this could be at all preliminary things as well. So, to give an example, someone is unfortunately mentally not well and is alleged to have committed criminal offences. The process is that he will enter a plea and there will be direction hearings to make sure that when it comes to trial, everything is in the right place. So, when he is charged and he pleads not guilty, that process starts, but he may be in need of psychiatric assistance, and it may be that is not easily available here, so he is sent away to get it. In the meantime, some of the preliminary bits would normally be expected to be deferred, but you cannot even have a deferral unless he is present, because that is part of the *debat*, well you cannot bring him back from the psychiatric hospital in which he is getting treatment in order to adjourn the case, so we would just adjourn it, even though the law strictly says he should be there, because it is not sensible. I just think there is a need to clarify.

Deputy S.Y. Mézec:

Is this the right time for that, do you think?

The Deputy of St. Ouen:

When the Bailiff has concluded with his letter, I suppose.

Deputy S.Y. Mézec:

Okay, yes. We have just thought of another issue we would like to ask, but it is probably more sensible to look at the rest of this before getting to that. Article 90 was the next session you raised.

Bailiff of Jersey:

Yes, the question of sexual cases. I think that is probably outside the scope of your present enquiry, but I wanted to mention it, because I think it requires to be looked at.

The Deputy of St. John:

I think it is very relevant, because I think there is a test – there is an issue here over you have got the Human Rights, where there is a right to a fair trial, and there is also the issue of innocent until proven guilty. In the eyes of some of the public, a lot of the public sometimes, is that once somebody has been charged, they are automatically guilty. But, they may be proven not guilty, and will carry round that ...

Bailiff of Jersey:

The stigma.

The Deputy of St. John:

... stigma. It can have effect on family. Of course, going back to living in a small jurisdiction, I would like to understand, from your point of view, whether in court proceedings, whether as a judge, or whether you have seen in your experience, is there a balance that can be struck with these particular issues? Because, I have tried ... I have had conversations with my colleagues here, and it is a very difficult situation because also, there is a right to a trial in public as well. How do we ... well, how should we balance those issues and do you have a view?

Bailiff of Jersey:

Well, I think it is very important to maintain the trials in public, I think it is very important that criminal justice is done in public. There are some terrorist trials that are now capable of being conducted behind closed doors, but there are lots of protections that are put in place there. Those are a special case, I think. But, the general approach is you do all criminal justice in public. (Inaudible) the rule of keeping the complainant's name out of the public gaze in order to ensure that complainants were not frightened to come forward and make their complaints. I personally think that is absolutely the right thing to do. But, it has had the impact that where the defendant is named, which it is possible to do, and subsequently acquitted, he, because it is usually a he, carries the, as you say, the stigma thereafter. I have always thought that there is not really much reason why you should not wait to see whether he's convicted or not before you publish the name. If he is not convicted, then you have still conducted the trial in public, but you have not published the name of the defendant. If he is convicted, then that is fine, you publish it, people are entitled to know. What are they entitled to know if he is acquitted? Well, that he has been wrongly charged; maybe not wrongly charged, that he has been properly charged, but he is not guilty. I am not sure that the public has a right to know those things, it is a balance. When I was Attorney, I thought this needed to be looked at. It was raised, the police expressed the view that ... very strong view that it

was a good thing to be able to publish the name of the defendant because it encouraged other complainants to come forward. I understand that. Sometimes, it may be very helpful and I think probably, in the time of the child abuse enquiry which was after I had made the suggestion that we look at it, that it was a helpful thing that names of defendants could be published, because we did have further complaints coming out in relation to particular defendants. But, the question that is lurking, I suppose, is whether or not there are other ways for the police to get to that point and I think it is a difficult question, and I think it is one that is worthy of being looked at, because I think it is a problem as things are at the moment. It is probably outside the scope of what you are doing immediately, but I just had the opportunity of raising it, and I think it would be something that you ought to look at and raise at some point.

Deputy S.Y. Mézec:

Thank you for that, that is helpful. I am just slightly conscious of time at the moment. Is there anything you wanted to further add under Article 75.8? We have already spoken about retrials, it is just if there is anything else you would like to add on that?

Bailiff of Jersey:

Oh, no. That is just flagging up if there is an amendment on retrials, then you need to amend 75.8, do not worry about it.

Deputy S.Y. Mézec:

Sure, okay. There was one point I wanted to raise as a result of something you have said, and as a result of another submission we have had. You mention, towards the end of your letter, that you are pleased to see Part 2 included in this draft law about the overriding objective. I simply raise this because we have had it put to us by one person who has submitted to us that they thought this was strange and thought that it could either go without being said, or that it was a bit strange for a legislator to sort of impose this on a court. I just wondered if this being the law, is that a standard thing that you are aware of for courts to have their overriding objective clearly put out in statutes, or is it better for it to be something that is more just naturally occurred over the years as what the court sees its duty to do?

Bailiff of Jersey:

Well, I certainly do see it as the court's duty to do, and I am sympathetic of the view that it is not generally a good thing for the legislator to go around telling courts how to go about their business, because generally courts have done that over quite a long period, and I think fairly. I think this particular Part 2 is relevant because we need to get to the point where the defendant can be required to say what his case is. The defendant, and his lawyers, will complain about trial by ambush, and rightly. You should never get into court and find that you are being tried for

something and you do not quite know what the evidence is against you, that is just not just, it is not fair. But equally, fairness requires fairness to the public as well, that guilty people are convicted. What you do not want to do is have a position where the defendant metaphorically folds his arms and does not say what his position is until you get halfway through the trial, and then suddenly he goes into the witness box and comes out with an explanation, which nobody was expecting, which could have been rebutted, had we known it was coming. But, as it is, prosecution are not ready, the jury hear it, they think oh, it might be true. So, he gets off. That is, in its crudest way, that is quite an affront to justice. Some people say that it follows from the obligation of the State to prove its case and the starting point that every defendant is innocent until proven guilty. But, it is not what we are all – one is not saying that the State does not have to prove its case, not saying that he is not innocent until proven guilty; all I am saying is he is got to say what his defence it. There are certainly some defence counsel who will take the view, I have had it as a judge occasionally, when I listened to the statement of what the Crown case is and said, well, what is the defence. They look at me and say, well, I am not required to tell you what the defence is, I will tell you later on. I usually find a way round that, but it is not an appropriate way if you are looking at delivering justice, because justice requires not just that the innocent are acquitted, but that the guilty are convicted. So, I think one ought to be in a position of being able to press a defendant as to what his defence is. Really, that is what the overriding objective is about, at its heart.

Deputy S.Y. Mézec:

Okay, thank you. Do either of you want to ask anything on that point? If not, we can ask your question about committal proceedings.

The Deputy of St. Ouen:

Yes, Mr. Bailiff, I would like to ask about committal proceedings, because the Law Society tells us that they consider that a fundamental right and it was not in earlier drafts, so they do not feel it has been consulted upon. But, I understand that the Magistrate's Court would no longer hold committal proceedings under the suggested procedure, and wondered if you had a view?

Bailiff of Jersey:

Well, the Attorney has always had the right to indict directly into the Royal Court if he wants to. When I was Attorney, it was a right that I exercised sometimes, particularly where you had a child witness, or a vulnerable witness, and you wanted to avoid acquittal process, which would be damaging to that witness. You are aware, are you not, that there are two sorts of committal, what are called Committal on Papers, or sometimes called an All Star Committal, where the magistrate hears the evidence and decides whether there is enough on the evidence which he or she hears to send the case up for trial in the Royal Court. There have been defendants who have insisted on ... particularly in sexual cases, insisted on the complainant giving evidence before the magistrate to

prove the prima facie case that it is worth them being sent up to the Royal Court. I think that is a sort of double violation. If he is guilty, that is an absolutely terrible thing, it sometimes puts people off giving evidence and therefore means the prosecution cannot come forward. Certainly, on one or two occasions, as Attorney, I indicted directly into the Royal Court to avoid that problem. The other time that it is useful to be able to indict directly in the Royal Court is in cases where you have some of your key witnesses not living here, and not only not living here but being quite reluctant witnesses. It is one thing to have them ... get them to come to court to give evidence at trial, but to get them to come twice and get grilled by advocates twice is more difficult. In the case involving Peter Michel(?) for example, some of the witnesses there were not prepared to come twice. So, he was indicted directly into the Royal Court. I think it was this case, pretty sure it was. The last times you do it is where somebody has been arrested on a warrant in the United Kingdom and then brought back over here and indicted, and the nature of the process is simply that it is difficult to have committal proceedings, because the Royal Court has made the order of his arrest, and so he is picked up and presented to the Royal Court once he is there, he is indicted. So, those are the three things which we have at the moment, and each of them need to be retained. It is important that you can indict directly in those circumstances. The magistrate has nearly all committals that are done on the papers and I must say that for my part, I think you have to ask why is it a right to a committal process? The answer is you are going to get tried anyway. Why is it a right to require somebody to give ... the prosecution witnesses to give evidence twice; once before a magistrate to establish a prima facie case, and you know that if it is established, the magistrate is just going to wing it up to the Royal Court. Why does the defendant have the right to have that evidence called twice? It is just expensive and ...

The Deputy of St. Ouen:

We will have the opportunity to ask the Law Society.

Bailiff of Jersey:

Sorry?

The Deputy of St. Ouen:

We will have an opportunity to ask the Law Society.

Bailiff of Jersey:

Well that, to me, is a good question to ask.

The Deputy of St. Ouen:

Thank you. Anything you would like to ask?

Deputy S.Y. Mézec:

Just a final opportunity, if there is anything that you are astounded we have not ask you that you think ought to be brought to our attention, we would be grateful just if you have any further thoughts that have occurred to you?

Bailiff of Jersey:

I thought the Institute of Law submission was interesting and I do not agree with it, and I just wanted to say that I do not think that it falls within your parameters, because what it is concerned with is a reform of the grounds of appeal in criminal cases, and not the procedure before the Royal Court. I think there are quite a lot of reasons why one can defend what we have at the moment. If you want to look into it, I will give you chapter and verse on it, but I do not think it falls within your parameters, but I would not want it to go by the by and not touched on. I was not sure that JAR were correct that the instance of sexual offences being tried by jurats will increase, but it is not clear from their submissions whether that is what they are saying. I think, in relation to the submissions of the Independent Prison Monitoring Board, I mean I do not disagree at all about the need to be careful with locking people up when they might end up being not guilty, innocent of the things of which they are charged. There are quite a lot of safeguards which are not touched upon here. So, if that is something which you are interested in again, I think you need to ask a few more questions and I will try and help you, but probably not convenient to deal with it now, but there are quite a lot of safeguards on that. Otherwise, no.

Deputy S.Y. Mézec:

Okay. Otherwise, and just very lastly, the process of getting to this point, have you felt that the consultation has covered all of the things that it should have done and have you felt that those with something positive to contribute have been consulted with, to get those points across?

Bailiff of Jersey:

I think that is probably not a question for me.

Deputy S.Y. Mézec:

Okay.

Bailiff of Jersey:

But, I do think that the Attorney and ministers do need to be congratulated. It is probably mostly the Attorney and the magistrates who have done quite a lot of the work on this. They do need to be congratulated on getting something moving which has needed to be moved, despite I saw the Law Society saying there is not any real problem, well I do not think there is a real problem. But, even so, it is not very satisfactory have the law ... procedure law passed in 1864, so it is time it

was done and I was unsuccessful as Attorney; I tried and I did not get it done. So, I am very pleased to see it coming forward now.

Deputy S.Y. Mézec:

Okay. Thank you very much for all of your comments, it has been very helpful and certainly given us food for thought for what we need to think about and next steps. It has been very helpful so thank you very much.

Bailiff of Jersey:

Not at all.

The Deputy of St. Ouen:

Yes, thank you.