Further response to the Education and Home Affairs Scrutiny Sub-Panel on the Criminal Procedure Law 201-

In his letter of 14th December, Deputy Mezec requested that the Minister outline the practical difficulties currently experienced in the criminal justice system, and how the draft Law would ensure flexibility in the future. The Minister has instructed officers to do as below.

1. Outline the practical difficulties currently experienced

The general intention is to create a fairer and more effective and accessible justice system. Fairness and effectiveness are dealt with by the particular changes detailed below, while accessibility is improved by the repeal of existing legislation in French and the development of a single Criminal Procedure Law in English. The draft Law has been deliberately written in such a way as to make it accessible to a lay person, which is essential given the right of a citizen to represent themselves in the process.

The draft Law attempts to remedy deficiencies in many areas of the current system, which are here summarised into three broad themes for clarity.

1.1 Improving outcomes in the interests of justice

The single overriding objective of the draft Law is to ensure that the criminal justice system operates justly. This means acquitting the innocent and convicting the guilty, dealing fairly with both the prosecution and defence, and respecting the interests of witnesses, victims and jurors.

- Many aspects of the treatment of juries do not reflect the modern world. Firstly, the 25 year minimum age of potential jurors does not reflect the modern extension of rights and obligations to younger citizens, so the minimum age is reduced to 18. Likewise, the maximum age of 65 discounts the valuable input of senior citizens, so this has been synchronised with the retirement age for Jurats at 72.

- Secondly, there is no proscription in law against jurors researching the case they are sitting on. Rules around this are urgently required as juror research can be grounds for a mis-trial, and research can now be easily conducted by a juror on line at home or even sitting in the jury room with a mobile device. The effect of a mis-trial is to cause unnecessary cost, delay and distress to the victim, witnesses and the defendant. The draft Law therefore creates an offence of research by a juror, and provides that the Bailiff may order the surrender of communication devices as required. If a juror fails to surrender any devices when the Bailiff has made an order to do so then they will be in contempt of court.

- Thirdly, in a long trial there is always the possibility that a mis-trial may arise from a number of jurors becoming ill (or in practice perhaps claiming to be ill) so that there are no longer the required 10 remaining to continue the proceedings. To alleviate this, reserve jurors may be chosen where a trial is expected to last longer than 5 days. These reservists will be privy to the full jury 'experience' and will be called upon to take over from any jurors who drop out. If not called upon they will be dismissed before the jury retires to reach its verdict.

- If not unanimous, juries can come to a majority decision on guilt or innocence. This requires that 10 jurors agree, if fewer agree then the result is a hung jury. This rule remains even if the number of jurors has fallen, so if two jurors depart then all 10 are required to

agree to avoid being 'hung'. Again to avoid the uncertainty and trauma of a repeated trial, the draft Law will allow a majority verdict of 9 jurors where less than 12 remain.

- Lastly, the current rule is that if a jury is 'hung' and cannot reach a decision then the defendant is acquitted. In conjunction with the current rules on majority verdicts, this means that a defendant may be fully and irrevocably acquitted if 9 jurors out of 10 consider them guilty. This problem is resolved by providing the prosecution with the right, within one week, to request a re-trial where there is a hung jury.

- Currently, if a defendant is acquitted of a crime then they cannot be tried again, even if compelling new evidence of guilt emerges. The draft Law will make provision for an acquittal for certain offences to be quashed by the Court of Appeal (on the application of the Attorney General) and the offence re-tried. This will require evidence that is both new (not previously presented to the court in the original trial or appeal) and compelling (not only reliable but also highly indicative of guilt). It must also be in the interests of justice to hold a re-trial, meaning that a fair trial must be possible, not too much time must have passed, and the acquittal must not have resulted from failings on the part of the prosecution. This is broadly the same rule as is in force in England and Wales, where it has been in place since the Criminal Justice Act 2003 came into force in 2005. The call for this change emerged from the Macpherson report on the murder of Steven Lawrence and the Auld report on criminal justice, both published in 2001.

- There are current difficulties in the use of hearsay evidence in Jersey, and other jurisdictions have adopted improvements. 'Hearsay evidence' is evidence given by Person A about something that Person B is supposed to have said. It is currently not admissible except in very specific circumstances (such as where the defendant has confessed to another person), and this creates special difficulties in prosecutions for domestic violence. Because domestic violence victims are often not willing to repeat in court what they may have told police officers, doctors or family earlier, out-of-court statements become very significant evidence. The draft Law will broaden the scope of admissible hearsay evidence in line with the current position in England and Wales, with the goal of conducting evidence-based prosecutions.

- There are similar difficulties in the use of evidence of bad character. 'Bad character' means 'evidence of or a disposition towards misconduct', which can include evidence of previous offences, and (where relevant) other behaviour that is not criminal but is 'reprehensible', including racism, bullying, a bad disciplinary record at work etc, but not ever consensual sexual activity. This applies to both defendants and witnesses. There is a strong suspicion amongst the law enforcement and legal authorities that at least one recent local trial ending with an acquittal would have resulted in a conviction if the jury had been made aware of the behaviour and history of the defendant. As with hearsay, the draft Law will adopt broadly the current position in England and Wales.

- The current arrangements for disclosure mean that the prosecution is vulnerable to what is known as the 'ambush defence', where a defendant introduces a fact or witness about which the prosecution had no previous knowledge. This creates confusion, uses valuable court time and generates cost. It also risks an unjust outcome where the prosecution is unable to challenge facts or assertions that it could otherwise have prepared for.

  The draft Law will requiring the filing of a 'defence case statement' before trial, which will outline the defence case and list the witnesses to be called. Conversely, it will provide a statutory framework for disclosure of the prosecution case, including rules that material collected by the prosecution must be disclosed even if it is unused in the trial and

especially if it harms the prosecution case or assist the defence. This disclosure rule is currently in place but only in procedural guidelines, not law.

1.2 Technical changes to improve efficiency

The draft Law is very clear that the efficiency of the system is always secondary to achieving a just outcome. However, justice does not simply require that a case be judged fairly, but that cases should be started and concluded in a reasonable time. This will mean that victims, witnesses and defendants are not stuck in limbo for long periods while cases are decided.

- In the event that the prosecution wishes to end proceedings, it must formally ask the court to discontinue, which requires a specific hearing for the purpose. The draft Law will provide for new provisions in respect of discontinuance and withdrawal of prosecutions to simplify the process and save court time and associated costs to all parties.

- Currently it is possible for a defendant to ask for a full 'old-style' committal process to be undertaken to progress a case from the initial hearing in the Magistrate's Court to trial in the Royal Court. This can be extremely time-consuming as it requires the case to be laid out in full, and it has a significant effect on witnesses as it requires them all to present themselves at this point as well as giving evidence in the trial itself. The draft Law will improve the situation by allowing for easier transfer of cases between Courts, including from the Magistrate's Court to the Royal Court to speed up the process and save costs. It will also allow the Magistrate to send the defendant to the Royal Court for sentencing after trial, where the trial has revealed that the offence is so serious it is beyond the Magistrate's sentencing powers.

- Currently, if a genuine mistake (such as a misunderstanding or even a typographical error) appears in a sentence or an order made by the Magistrate, the defendant needs to make a formal appeal to Royal Court to have it corrected. The new Law will allow for such mistakes to be rectified within 28 days of a sentence being passed, if it would further the ends of justice to do so.

1.3 Greater consideration for victims and witnesses

The overriding objective of the criminal justice system is not to support the victim but to achieve a just outcome in criminal trials, even where this is in favour of the defendant. That being said, a modern system must recognise the rights of victims, who are often vulnerable and in need of assistance, and should prioritise their needs wherever this can be achieved without risking injustice. Very often the crime against them will trigger the victim's first experience of the criminal justice system, and it is essential that they are treated with respect and dignity and that they receive appropriate support throughout the process. It is also essential that they are protected from further victimisation and intimidation and that any distress that they may suffer from being part of the proceedings is minimised. To these ends, the draft Law contains the following provisions:

- The current mix of statutory and customary law underpinning the criminal justice system does not contain an overarching statement of intent about the purpose and role of that system in our society. The draft Law outlines its intentions in the second article, saying that "*The overriding objective of this Law is to ensure that cases in criminal proceedings are dealt with justly".* As described in the response to consultation, the remainder of the first part of the draft Law is primarily dedicated to describing what that means in a manner that, it is hoped, will be clear and intelligible to a layperson. The description of justice as the overriding objective is not simply decorative, it has a very real meaning in law and the courts will be required to apply the legislation in a way that gives effect to that intention.

- While the courts have some capacity to direct how cases should be heard through their inherent jurisdiction, this must be done without the benefit of clear and effective provisions in legislation. The new Law will require courts to undertake active 'case management', and empower them to do so.

- Currently, special arrangements can be made in court to allow vulnerable witnesses to give evidence in the least distressing way possible. However, in the absence of clear rules as to who is and is not vulnerable, the police or other agencies can never say with certainty to any witness that they will receive particular support. This is understood to have a real effect on some witnesses, who withdraw from the process and do not give evidence. Clearly this is not in the interests of justice. The draft Law specifically defines a 'vulnerable witness', and thus greatly increases certainty throughout the process by allowing vulnerable witnesses to be told clearly that if they engage with the process they will be able to, for instance, give evidence in court behind a screen, or by video link.

- There is not at this time an offence of interfering with witnesses or members of a jury. The draft Law includes rules protecting witnesses and jurors from outside influence, and creates an offence of intimidation which includes causing physical harm, financial harm or harm to a persons' property, as well as intimidation and threats. The penalty is up to ten years in prison and an unlimited fine.

- There is currently nothing restricting a defendant who is representing themselves from cross-examining a victim who they are accused of harming or even sexually assaulting. In those circumstances the draft Law will require a defendant to appoint someone to cross-examine instead of doing it themselves, and if they refuse to do so the court will appoint someone on their behalf.

2. Outline how this draft Law would ensure flexibility in the future

Part 1 above demonstrates how flexibility will be improved in terms of the direct effects on the criminal justice system. More broadly, the draft Law contains provisions to ensure that it can be modified as necessary in the future to keep pace with changes in technology, evolving understanding of best practice and international obligations (such as human rights considerations).

The draft Law will allow the government to be more flexible in terms of future modifications to the criminal justice system. This will be achieved by allowing Regulations to amend sections of the Law, which will retain the domestic capacity to:

- amend the maximum penalties available to the Magistrate;
- amend the 'qualifying offences' in respect of which the Court of Appeal may consider quashing an acquittal;
- amend the duties of participants and the courts;
- amend the provision for active management of court cases;
- create supplementary provisions around the special measures taken to protect witnesses;
- amend the treatment of the application of costs by the courts, including the provision to allow third parties to bear costs where it is reasonable to do so; and
- create supplementary provisions around the management of summons, arrest orders, determination or the granting of bail.

In addition, the provision for the creation of both Rules of Court and Practice Directions mean that criminal justice processes can be kept up to date without recourse to legislation.

The Rules of Court will set the procedure for the courts to follow in criminal proceedings. Currently those rules are devised by the Superior Number of the Royal Court, but under the draft Law they will be developed by a 'Criminal Procedure Rules Committee', which will comprise 10 members. The members will be the Bailiff or Deputy Bailiff (both members) as Chair, the Attorney General, the Chief Officer of the States of Jersey Police Force, the Judicial Greffier, the Magistrate, the senior délégué and the Viscount (or their nominees), together with an advocate nominated by the Bâtonnier who has particular experience of practice in criminal proceedings and a person nominated by the Chief Minister.

The Rules will be developed with a view to ensuring that the criminal justice system is accessible, fair and efficient, and will be as simple and clearly expressed as possible.

The Practice Directions are more concerned with the expectations on the participants in criminal proceedings, and will be issued by the Bailiff or Magistrate as required. These will take effect in areas where no provision is made in the Criminal Procedure Rules, or to complement the Rules.

I hope that you will find this helpful. The Minister and CCA officers are happy to provide any further information that you might require.