Education and Home Affairs Sub-Panel

Draft Criminal Procedures Law

The Minister for Home Affairs

Friday, 23rd February 2018

Panel:

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

Deputy R.J. Renouf of St. Ouen

Witnesses:

Deputy K.L. Moore of St. Peter, The Minister for Home Affairs

Mr. R.J. MacRae, H.M. Attorney General

Ms. H. Miles, Director, Criminal Justice

Mr. N. Fox, Assistant Director, Criminal Justice

Mr. M. Berry, Senior Legal Adviser, Law Officers' Department

[15:01]

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

Thank you for joining us this afternoon. Thank you to members of the public and media who have attended. If I just do the standard reminder to everybody that if you have any sort of device that might emanate a signal or noise just to make sure that it is in "Do not disturb" mode or on silent. We are the subpanel of the Education and Home Affairs Committee, which is put together for the Draft Criminal Procedures Law. Deputy Tracey Vallois sends her apologies. I believe she was not feeling

very well today. So thank you for being here. For the benefit of the tape, we will just go round and explain who we are. So I am Deputy Sam Mézec, chairman of the panel.

Deputy R.J. Renouf of St. Ouen:
Deputy Richard Renouf, member of the subpanel.

Scrutiny Officer:
Andy Harris, Scrutiny Officer.

Senior Legal Adviser, Law Officers' Department:
Matthew Berry, Senior Legal Adviser in the Law Officers' Department.

Mr. R.J. MacRae, H.M. Attorney General:
Robert MacCrae, Attorney General.

The Minister for Home Affairs:
Kristina Moore, Minister for Home Affairs.

Director, Criminal Justice:
Helen Miles, Director of Criminal Justice.

Assistant Director, Criminal Justice
Nathan Fox, Assistant Director of Criminal Justice.

Deputy S.Y. Mézec:
Just as usual can you please confirm that you have read the notice in front and you understand its implications? Excellent. Thank you very much. I think we should crack on then. What we wanted is to start by looking at Article 75, which concerns verdicts, and this also includes the provisions for retrials. Could you just explain what has been the rationale for introducing this concept in this law?

The Minister for Home Affairs:
The concept of a retrial? Yes, we were very grateful for the opportunity to talk to the panel and it has been interesting to see the level of consultation that you have undertaken so far. It has obviously been a big changing point historically. So the concept of retrials, the rationale really, as the subpanel will be aware, is currently that if a jury of 12 cannot reach a majority verdict of 10, then a defendant is acquitted. The question really is whether that is a good administration of justice and whether it would be a better outcome for justice if in that case there was an opportunity to go to a retrial. We

do not feel that it would be a burden on the courts in terms of time because this would be an extraordinary event were it to arise.

Deputy S.Y. Mézec:

How far do the changes that are proposed here follow what happens in other jurisdictions, U.K. (United Kingdom) obviously being the one we are most familiar with?

The Minister for Home Affairs:

It is more common in other places to have such a retrial available and it is rather unusual to see the majority verdict being used in the way it is here. Unless the majority is reached then there is an acquittal.

Deputy S.Y. Mézec:

Has there been any examination of other small jurisdictions that have provisions for retrials and what complications arise from it being a small jurisdiction rather than a large one?

The Attorney General:

We have done some analysis, which was provided to you I think earlier in the week, of all the significant common law jurisdictions over the world, which indicates that in all those jurisdictions the jury is, in the first case, directed to strive to reach the unanimous verdict and then only after a certain amount of time has elapsed, if at all, can a majority verdict be acceptable. It must be a verdict of guilty or not guilty. In none of those jurisdictions do they have the system we have here where after a very short period the disagreement of 3 jurors or more can result in a permanent acquittal. In the United States a unanimous verdict is required of guilty or not guilty in all bar 2 of the 50 states, and in the other 2 states the majority verdicts are permissible. In relation to small jurisdictions, in Guernsey of course there are no jury trials and in relation to the Isle of Man I know that verdicts must either be returned by the entire jury or possibly there is provision for one juror to disagree, but certainly the Isle of Man does have retrials if the jury cannot agree. The most recent example of that was when the last Manx Attorney General was on trial and the jury could not agree. He had to be tried again by another jury.

Deputy S.Y. Mézec:

An interesting example.

The Attorney General:

That is the last Manx case I know where there was a retrial.

The Minister for Home Affairs:

I was going to ask you a question: were you asking that question in relation to the publicity surrounding a retrial?

Deputy S.Y. Mézec:

I think that is something Deputy Renouf will ask in just a moment. There are just a couple of things I wanted to explore before getting to that point. If you have seen any of the submissions that the Scrutiny Panel has had, this has been a controversial provision in here and there are differences of opinion that have been put to us. Could I ask specifically on this section how much consultation did you do with the profession and with the judiciary on this specific proposal and how did you take into consideration some of the concerns that have been raised?

Senior Legal Adviser, Law Officers' Department:

So if I might assist there, if that is helpful. So the consultation has taken place, in a number of phases as the legislation has been developed. So there was initial consultation with the Law Society beginning in September 2014 when an outline of proposals was presented to the Law Society at that stage, including changes to the jury system. In late 2015 and 2016, a policy paper was developed between the Criminal Justice Working Group, which has been the working group on this process. This policy paper was then submitted to the Criminal Justice Systems Board so there was a member of the Law Society on that working group. The policy paper was prepared and submitted to the Criminal Justice Systems Board, which contains not only representatives of Government and Law Officers' Department but also the Bâtonnier and the Bailiff presiding. That policy paper contained these proposals for retrials at that stage, so in February 2016 we then developed the drafting instructions during 2016 and today public consultation in the summer of 2017 on the draft law and the draft law contained these proposals for retrials and majority verdicts, as set out now in the draft that is before you. There have been minor changes. There has been a sort of evolutionary change as we have gone through those different stages of the process but we have had some engagement from the judiciary, other stakeholders, the Law Society, throughout that process.

The Attorney General:

So this has been a feature of the proposals for over 2 years and all the proposals in the law were fully agreed to and supported by the Law Society's representative on the steering group, an experienced criminal lawyer. As long ago as 2 years ago this and the other proposals we are discussing today were considered by the Systems Board, which included the Bâtonnier and the Bailiff. There have been presentations given to the Law Society by me - you will have the date, I think it was 2016 - in which all the proposals there were about 50 or 60 people present. We hired a room at the museum and talked the Law Society through the proposals. Then there was a similar presentation given to Members by you and the Magistrate during the consultation process. So all these proposals have been the subject of extensive consultation. It may be late in the day but people

have responded to them. But certainly from my perspective, there could not have been much more consultation than there has been about these proposals.

Senior Legal Adviser, Law Officers' Department:
If it would assist, after the session I can provide a breakdown of the date of particular parts of the engagement process, if that will help.

Deputy S.Y. Mézec:
One of the points of principle that has been raised by some who are uncomfortable with this clause is the idea that because the standard of proof in a criminal case is for it to be beyond reasonable doubt, that if you cannot convince 10 out of 12 people why should you get the second go then anyway if the case was not strong enough to convince such a large proportion of the jury? Then you obviously did not have the correct amount of evidence there or a good enough argument, why should that be grounds for them having another go afterwards? That was one point that was made to us. How would you respond to that?

The Attorney General:
That is obviously a valid argument. In response, one would say all these other jurisdictions in the first instance do require juries to come together and form a verdict upon which they are all agreed. I was look at looking at Archbold *(Archbold Criminal Pleading, Evidence and Practice, Sweet and Maxwell)* again today in relation to England and Wales. In England and Wales a jury must spend at least 2 hours, sometimes it can be days, trying to reach a verdict upon which they are all agreed and only after that time, when they are given a subsequent direction, can they return a verdict of guilty or not guilty upon which 10 of them are agreed. We know from the statistics that the number of cases in which there is a hung jury in England never exceeds 1 per cent. In fact it is usually rather less than that. We also know from our own experience in Jersey that it is quite common for jurors to be divided. I have known of at least 3 trials that have been divided 9:3. Jury trials are expensive to put on. They involve a lot of investigation. In the cases that I am thinking of, victims needed to give evidence.

[15:15]

There is a good argument that it is right and proper for jurors to be required to spend a significant amount of time, particularly with the distractions that we have in this day and age, to come together and form a collective view. That is the point of the jury system. Indeed, it is why there are big countries like Canada that do not even allow anything other than a unanimous verdict because those countries that have chosen to retain the jury system, which is a minority of those countries in the world, have put great store by juries being given sufficient time to consider and discuss a case so

as to come to a common agreement at the end of it, be it in favour of a conviction or an acquittal. There is a good argument, and certainly I support it, to the effect that our system does not do that at the moment. I do not think it will be doing great violence to our system to change it so that it does.

The Deputy of St. Ouen:

Minister, I do not know if you have had the chance of looking at submissions made to the subpanel by members of the judiciary. Even in the cases like the Attorney General has just put forward, if those merits were accepted, there is in Jersey the particular risk of a jury having heard media reports of the first case and being empanelled as a jury in a retrial and their view of the evidence perhaps being coloured or affected in any way by the media reporting of the first trial, which resulted in a hung jury. So is that a factor that has been considered in bringing forward these proposals?

The Minister for Home Affairs:

Yes, I think it has. Myself, as a former journalist, had experience of reporting on a trial that was rather lengthy and very high profile at the time, it was a murder trial back ... a long time ago now. So I reported on that extensively and towards the very end the process was halted and a retrial did occur at a later stage. The Attorney General probably recalls better than I do the details around that but if the media are doing their job properly they should be at that point in the trial reporting the facts. So I do not really see that that would in any way taint anybody's perspective on a case that would make it so that they were not able to assist as members of a jury if there was a retrial. I think as the Attorney General said, that it is unlikely that there will be a great number of retrials if this were to occur, and I have helpfully been provided with a figure here, but in 2008 at a peak of recent years for retrials only 0.7 per cent of cases in England and Wales required a retrial. So we are talking about a very small number of cases here.

The Deputy of St. Ouen:

Would the fear be though that the Attorney General might seek a retrial in the case which is substantially in the public interest, so would have generated a lot of media publicity and the media might not have got things wrong in their reporting but it is just that people's memories might seize upon a particular memorable allegation made by the prosecution or shocking piece of evidence and they would be bringing that memory to a second trial. That has been the concern expressed. Whereas in larger jurisdictions a trial can be moved away from the original place.

The Minister for Home Affairs:

But if it is a particularly high-profile trial it would have exactly the same risk, whatever size of the community really. That is part of the questioning process I believe that any member of the jury would undergo before their selection for that trial. I do hear what the writer of the submission is saying and it is absolutely right and proper to raise that concern. However, I think in practice, and of course

people who were involved in the legal system or have a much greater interest than some members of the community might do in following the ins and outs of certain trials were maybe surprised by how little some people are aware of particular cases.

The Attorney General:

I would like to add in a practical sense, of course we have had experience of this in Jersey in the Holley case, which was a murder where the weapon used was an axe and the conviction was quashed on appeal and there was a retrial by a jury in Jersey not long after the first trial. So we have experience of fair retrials in this jurisdiction. The other point I was going to make, which is not something we have really focused on hitherto, is of course you see reference in the draft law to the rules of court that are going to be made under the law in due course, to deal with the nuts and bolts as to how these things work on a day-to-day basis. One of the sources that we will be looking at is the English Criminal Procedure Rules and Practice Directions that have been made under similar legislation. In relation to jurors, I just note that it is now common, pursuant to a Practice Direction, for there to be consultation between the judge and the prosecution and the defence about any questions it might be appropriate to ask potential jurors. One topic to be considered - this is in accordance with the Practice Direction - are the availability of jurors for the duration of the trial that is likely to run beyond the usual period for which jurors are summonsed. That is a sensible question you might ask in a case that is going to be a long fraud. "You might be here for 2 months can you do that?" Whether any juror knows the defendant or parties to the case; that is a standard question of course we now have. It is not in law but it is a question that the jurors are asked before they are sworn in Jersey. Whether the potential jurors are so familiar with any locations that feature in the case that they may have or come to have access to information not in the evidence. That is not a question we do ask but we could ask obviously. In cases where there has been any significant local or national publicity, whether any questions should be asked potential jurors. There being no difficulty in principle with the prosecution or the defence agreeing with the judge in an appropriate case, the question along the lines of: "Do any of the jurors in waiting know of any facts in relation to this allegation of murder against this defendant arising from a previous trial that would make it difficult for you to approach this case fairly?" If one was to put their hand up and say: "Yes" then they would be discharged. But these are the sort of questions that can be asked. The point I am making is that these mechanisms exist to prevent unfairness, in addition to the general approach, which I think you can see from a case that I think Sir Michael Birt drew to your attention, which is that it is the experience of the courts up and down Great Britain, but also in Jersey, that jurors are well able to focus on the evidence they hear in court. A distinction I think has to be drawn between a case where there are 2 trials against the same defendant in relation to completely separate allegations where it is quite common to say there will be no publicity about trial A until the end of trial B, and this scenario where all the jury would be hearing live is the same evidence as another jury heard some time before. So the risk of prejudice, having regard to the directions the judge will give about focusing

on the evidence in this case and not what they may have heard or read, and the sort of questions that could be asked, in my view, make the risk of prejudice arising from a second trial something that could be easily managed with current processes and the new rules we are going to have under the new law.

The Deputy of St. Ouen:

I would just like to ask a straightforward question, I think. Would it ever be possible to hold a Royal Court trial out of the Island to avoid that possible risk of prejudice?

The Attorney General:

I do not think it would. Certainly I remember of my own experience having retrials when the jury were discharged and right at the end of the case in Truro, shortly after the first trial, and there was no difficulty at all. Truro is a city not much bigger than St. Helier, but, no, I do not think there is any way of having trials outside Jersey. Royal Court trials must be here.

Deputy S.Y. Mézec:

The point has been made a couple of times now about how in the U.K. the actual number of retrials is not particularly significant in the grand scheme of things, which I suppose raises 2 potential points. The first is that if you anticipate it not being commonly used here, the question is then: what is the point in the change at all, if it is not going to be used possibly at all? But if they are going to be used what consideration have you given to making sure that the court does have the resources to be able to cope with this, and one of the points that has been brought to us is what venues can be used to hold a jury trial at the moment and would it be able to cope with more jury trials if retrials are allowed?

The Minister for Home Affairs:

It depends whether more jury trials do occur, but also I think the Bailiff said to yourselves, during his hearing, that the Magistrates' Court was being modified and would be able to conduct a trial in future. So that does allow a certain element of flexibility to the courts and additional space, which is to be welcomed.

The Deputy of St. Ouen:

Except it is not quite additional space because it means the Magistrates' Court is down by one court for what are year-long trials. So have we got issues around capacity for the whole court service?

The Minister for Home Affairs:

That does not fall into my remit, however my understanding is that there is space within the Magistrates' Court precincts to enable different trials to occur.

Senior Legal Adviser, Law Officers' Department:

One point to bear in mind is that this is part of an overall package of measures. In the U.K. in an exceptional year the number of hung juries was 0.7 per cent of cases. The number of retrials would have been an even smaller number than that. But in the case where a retrial is required it would be vital to securing a just outcome in the case that a retrial can take place. A jury might not be able to reach a decision for a number of reasons that may not necessarily relate to the facts in the case. It might relate to their own personal views or prejudices, so that it would be quite unfair for it not to be possible in those cases for a retrial to take place. While due to this part of the package of measures there is potential for a very small increase in the number of jury trials, but the operation of other parts of this law might potentially reduce the number of trials. The introduction of defence case statements, coupled with the prosecution's duties in respect of disclosure, and reflect Attorney General's guidelines but a package there, that might, together with potentially the change in relation to bad character, may reduce the number of trials that come to court. Because, with it being much clearer what the issues are in a trial at an earlier stage and what evidence is relevant to those issues, more trials might conclude either with proceedings being withdrawn or with decisions to plead guilty. So the number of trials overall might decrease.

The Attorney General:

Certainly the intention is for the overall number of trials to be reduced because the parties will know the issues before trial, the defence case statement will inform the prosecution if their case is hopeless before trial. The case would be dropped then. All sorts of provisions will hopefully allow the defendant to better understand the strength of the case against him and sometimes plead guilty. But I think the point you make by inference, Deputy Mézec, is a good one. The purpose of the retrial provision is not to encourage more retrials, it is to encourage more juries to reach the verdict upon which at least 10 of them are agreed. It is to encourage jurors to reach verdicts and a corollary of that is that very occasionally there will be a retrial.

Deputy S.Y. Mézec:

A further question to ask of that is about the resource implications you would see being put on the Prison Service and the Viscounts Department. But given what you have said, not much.

The Attorney General:

Yes.

Deputy S.Y. Mézec:

Is that a discussion that has happened at all?

The Attorney General:

Yes, absolutely. The Viscount has been involved at every stage of this project and indeed the provisions in relation to jurors have been modified, particularly reserve jurors, because of concerns of the Viscount that they should be occasional and not frequent.

The Minister for Home Affairs:
The Viscount, if I may interrupt, is also a member of the Criminal Justice Systems Board so has also been involved in this consultation right from the very outset.

The Attorney General:
I think the chief officer at the prison, the Prison Governor, he is also on the working group.

[15:30]

It is the working group that has received the detail of these proposals and he has been present when they have been discussed.

Senior Legal Adviser, Law Officers' Department:
I do not know whether Helen and Nathan would like to point out anything about the funding that has been allocated through the implementation and the plans for implementation.

Director, Criminal Justice:
The Public Sector Reform was allocated significant funding to the implementation of the Criminal Procedure Law including the Criminal Procedure (Bail) Law, so any of these issues will be ironed out and some funding will be available if the necessary changes were to be made. I wanted to say something else about the position of the court. The Magistrates' Court has been used for jury trials before. One of the drivers for moving some of the trials were court trials into the Magistrates' Court is for safety reasons as well because the Royal Court here is a ceremonial building, and it is extremely difficult for the police to control the security whereas the Magistrates' Court was designed as a secure court. So from the police perspective it would be more desirable to have trials, particularly for high risk offenders, dealt within a secure environment.

The Deputy of St. Ouen:
We have had some submissions around - same Article, Article 75 - paragraph 4 to the question of not guilty to a more serious offence but perhaps guilty to a lesser offence. I know that a draft amendment has been produced but we have not had the chance to look at that yet, Minister. Perhaps you could or one of your officers could confirm exactly how that is going to be dealt with.

Senior Legal Adviser, Law Officers' Department:

It was Article 75, was it not? Yes, so you are quite right. The submission from Sir Michael Birt highlighted an issue with Article 75(4)(b), which made provision requiring the Judicial Greffier to enquire of the jury whether they had a vote in relation to an alternative or lesser offence in every case. Sir Michael Birt was quite right, that was not our intention. It would only be in particular cases where it would be appropriate to ask for the verdicts in relation to an alternative or lesser offence. So the proposed amendment that you will see resolves this. We appreciate the Panel will not have had any time to absorb the detail of these amendments and we circulated it so you could just see that progress was being made. Please do not take that as a sound bite. So all we have provided for here now is that, if the Bailiff has invited the Judicial Greffier to do so, then the Judicial Greffier would ask the jury for a verdict in relation to an alternative of lesser offence. The Bailiff's discretion as to whether or not to ask the Judicial Greffier to make that enquiry is sufficient to avoid the issue.

The Minister for Home Affairs:

In fairness to the Law Officers, we circulated these to you almost as soon as we received them, within minutes of our receiving them, because we were aware of the time constraints.

The Deputy of St. Ouen:

Yes, thank you, we are grateful. So we will consider that, taking on board submissions. Just returning to something Dr Miles began to speak of, the resources available, Minister or Dr Miles, can you tell us something about the timeline for introducing regulations and then for the whole new scheme to come into force and the resource implications?

Director, Criminal Justice:

The aim of the project is to be able to have done a full implementation of the procedure by the end of 2019 and certain resources have been given towards that. It may slip forward slightly to 2020 but we would aim to have that done by 2019.

The Deputy of St. Ouen:

What are the resources that are needed to get to that stage and thereafter?

Director, Criminal Justice:

The resource implication that we have at the moment is solely around the posts, particularly Nathan Fox to be working closely with the Law Officers' Department on the Regulations and some of the drafting and assisting with the Procedure Rules. The other element is somebody who is going to be responsible for the digital delivery of this so that we want to streamline the processes; we want to use them to deliver efficiencies and effectiveness. Now, what we have not been able to do is immediately jump to solutions, there is quite a lot of work to do on our mapping system around looking at where we might drive out some of the costs associated with Justice. So we have not had

anything in that budget for particular projects, but we will be using the next 2-year period to identify where, for example, we might need additional resources and also to identify where those additional resources might come from in order to make more efficiencies. That is specifically around the digital delivery piece. So we have not put in a sum of money and said, okay, we need that because we want to deliver a core platform, we will decide whether we need a core platform and then we will be saying we would need the resources to do that. Also, incorporated into the next M.T.F.P. (Medium-Term Financial Plan), some of those existing resources that we know we will always need in order to deliver Justice effectively.

The Deputy of St. Ouen:

So when you talk about digital resources, is this the concept of a paperless court where everyone has screens in front of them?

Director, Criminal Justice:

Potentially again that is jumping to conclusions; we are looking at solutions. We know that we have some very good I.T. (information technology) systems across the criminal justice system here, but we also know that they are not terribly well joined up. So the first part of this project is going to be a dot-joining exercise and making sure that systems are talking to each other so that we are reducing duplication of entering different information and looking at a common platform, a common library source for things like transcripts, charge-sheets.

The Attorney General:

But in England and Wales now many courts are effectively paperless, the prosecution will serve its papers electronically into a workspace, which the defence and the judge will have access to, so if the defence say in court: "We have not had that material" the prosecution will say: "Yes, we served it on that date" and they will have the date. Judges now regularly deal with a list of sentencing cases without any paper at all because everything is on the screen in front of them. There has been a real revolution in the last 2 years and one of our new criminal directors in our department has been in post for just under a year, he used to work for the Crown Prosecution Service and has experienced all these systems and they will be systems, which hopefully in the next few years, with Dr. Miles's help, we will be able to roll out in Jersey. It will be a big change for all of us but there should be a significant cost saving at the end of it and this is part of that process.

Director, Criminal Justice:

What this law does is it enables us, in fact it encourages us, to look at technological solutions to justice in a way that the 1864 Law never did, because it has driven us down certain paths that we have had to take because we are talking about documents signed by the person who purports to

make it, the issue of summonsing, summonsing in person, there have been certain things that we have not been able to address before because of the antiquity of the law.

The Minister for Home Affairs:
I was just going to add, you could go on *ad infinitum* I guess, but as we are talking about the impact on resources as well, items such as some of the special measures allowing a video-link to the prison so that a prisoner does not have to be brought from prison to the court for a minor hearing will also be more expedient and less of an impact.

Director, Criminal Justice:
One of the issues that we have at the moment you cannot be tried in your absence so if you absolutely do not want to attend you need to be forcibly brought before the court and that is not always the best picture.

Deputy S.Y. Mézec:
Could we move on to Article 66 concerning persons selected for jury service. So one of the new provisions in this is the concept of reserve jurors. Could you, just for the record, let us know how many trials that have had to be aborted as a result of the numbers of jurors falling below what is required?

The Minister for Home Affairs:
I do not have the exact figure to hand but I know that it is a small number, although I am told by members of the legal services that sometimes there is, and you can see that in the submissions I think that have been referred to yourselves that sometimes there is an element of concern in the mind of the judge when they see that numbers have declined and they have that doubt in their mind.

Deputy S.Y. Mézec:
I do not know necessarily. From what we have been told some have found this a quite surprising addition on the basis that they do not think this happens very often at all, even in long trials. Do you know of any numbers of trials where they have come close, so where they have gone down to 10 jurors?

The Attorney General:
Can I assist on this one? I do not think we can put before you a case where the jury has fallen to 9 jurors and the trial has had to be abandoned, but certainly the last significant case we had, last fraud case, the number of jurors I think did reduce to 10 and it is common for the jury number to fall to 11 and occasionally to 10. The concern is that we will end up with a long case, where through sickness or other reasons we will have insufficient jurors to complete the trial with significant cost implications

and inconvenience for the witnesses and of course the huge expense in terms of legal fees and court time of another trial. Since we last addressed that issue we have done a little more research in relation to additional and reserve jurors and I do not think we were as aware as we were when we last ventilated this issue of the extent to which they have been found to be useful in other jurisdictions in precisely the sort of scenario that I have discussed. Particularly because there is a general recognition or view that it is right, if at all possible, to ensure that there are 12 jurors at the end of a trial and I have found an interesting piece of research, which I can provide to you, from the Victorian Law Commission, which indicates that all Australian jurisdictions, and of course there are 6 or 7, make provision for either additional or reserve jurors for criminal trials and generally it is 2 or 3 additional jurors. Where the court makes a decision to empanel additional jurors, the Juries Commissioners Office advise that it generally encourages courts to consider empanelling additional jurors for trials expected to last more than 3 weeks. We suggested 5 days and I know the judges suggested 10 days and that may be a matter upon which you would wish to express your own opinion. Apparently in most states in the United States and Canada there is provision for additional reserve jurors and I was not aware they were that extensive. The purpose of empanelling jurors is to safeguard against juror attrition, which is how they describe it, in long trials, due to illness or of course finding out they know a defendant or a witness in the trial. It is interesting; the Australian case law indicates a clear preference for a trial with 12 jurors. The stated rationale for this reference is the long historical tradition of a jury being constituted by 12 jurors, a tradition that should not be lightly displaced, as well as the reduction in representativeness that occurs when a jury of 12 is reduced. So that is the purpose of it and I had not appreciated, although we had done lots of research in many areas in relation to this law, I think I mentioned bad character before and hearsay, but I was not aware until recently that the use of additional or reserve jurors was in fact quite so widespread across the common law world, for reasons that we have articulated.

[15:45]

Deputy S.Y. Mézec:

A concern that has been put to us by some who are not comfortable with this is that the amount of times that these reserve jurors will be called upon will be a very small amount of times and these are people who are essentially being taken out of their jobs, got important jobs out there, and they are being taken out of their usual routine to essentially end up doing nothing and being sent away at the last minute when it is realised that they are not necessary and is that the right balance in our jury system to be calling upon people, taking them out of their jobs and their routines, to end up doing nothing when predominantly that is likely what will happen.

The Minister for Home Affairs:

It is an important part of civic duty, is it not, to present oneself for jury service if requested? I think also one of the things that this new law will do is it will also open up the number of people who are eligible for jury service quite considerably and so that also shares the burden among different sectors of the community.

Deputy S.Y. Mézec:

You mentioned the debate over what the estimated length of the trial should be to have this provision be used and there have been different suggestions to us on that. We have spoken to some who think it should be more than 5 days, but likewise we have heard from somebody who was aware of a case that was only meant to be 5 days where they went down to 10 and had one person gone and that person ended up being convicted, so that would have been somebody who would have walked free otherwise. Has there been any sort of consultation on that point specifically with those who serve in the judiciary to say what is the right balance here, if this is the road we are going to go down?

The Attorney General:

The main consultation was the consultation you have had I think in the sense that we did not have any expressions of views prior to you receiving the views you received from the judiciary. The principal source of views as far as we were concerned, in addition to of course the Bailiff saw the draft law, was the Viscount, she expressed various concerns about administrative consequence of adding additional jurors in every case and it was a consequence of her concerns that led us to put in the 5-day minimum. That was the origin of that for the 5 days because initially we were suggesting that they would be present in every case, 5 days is what the Viscount suggested and the judiciary have suggested a longer period, but the key thing is that they are available to safeguard the risk I have mentioned in very long cases.

Senior Legal Adviser, Law Officers' Department:

If I might add on to that, the Viscount expressed her views on the 5-day period, but when we went for the public consultation exercise on the draft law last year we did not have the 5-day period in at that point. I think the Law Society also expressed a view that having reserve jurors in every case might be too much. They did not specify a particular period but they suggested that it should not be every case.

The Attorney General:

The over-10-days would certainly affect, on past figures, only one trial a year, 5 days it would be between one and 2 trials a year.

Deputy S.Y. Mézec:

A point I was going to raise was on section 66(8), which says that: "A reserve juror may be called to serve on the jury if, before the commencement of the Bailiff's summing-up of that case, the numbers as reduced and they can be discharged", but of course it is pointed out that sometimes a summing-up can take a significant period of time. What consideration has been given to whether this requires any sort of changes to address that particular element?

The Minister for Home Affairs:

This is one of the amendments that have been proposed in response to Sir Michael's comments and so, if the amendment were to be accepted, it would mean that a reserve juror could remain until the conclusion of the Bailiff's summing-up of the case.

Deputy S.Y. Mézec:

Deputy, I think it makes sense for me to go to Article 63 at this point. Just on Article 63, Minister, you referenced that the eligibility for jury service is going to be widened as a result of this and that widening is to include advocates, solicitors, prosecutors and Centeniers, although there are caveats in terms of when they were most recently involved directly in the criminal process. There has been some discomfort about this expressed by the profession who are concerned that lawyers who inevitably are going to understand the system and the nuances and some of the tricks, and I do not use that in a pejorative sense, but tricks that can be used in a court to get around a particular point, they may recognise them where ordinary members of the public without such direct experience of the system will not recognise it. That could add an element of thinking into how a jury works that may or may not be useful and some of them have suggested to us that, to be on the safer side, it is better to exclude those people. Is that something you have considered?

The Minister for Home Affairs:

It is obviously a point of consideration but I think the legal community is much bigger than it was in 1864; they perhaps had fewer than 10 lawyers in that time and now we have more than 400 and many of them are not at all involved in criminal proceedings and therefore may not even be that familiar with the court settings because they are largely in a transactional context most of the time in the course of their duties. It is clearly prescribed the incidence that would preclude somebody, a member of the legal community, from being on a jury.

Deputy S.Y. Mézec:

I think the worry that has been expressed is that all lawyers will have at least some understanding of the criminal law system on the basis of them getting qualified and there will be instances potentially in a trial where either the defence or prosecution alludes to something or says something and the advocate on the other side then asks for the judge's permission for the jury to be removed from the court temporarily while they deal with a procedural matter; that the jury will be none the

wiser as to what was said that may have alluded to something, whereas the lawyer in the jury, as they are leaving the court, may say: “I think it might have been they were alluding to this” or somebody said something they should not have that gave the game away on something that they jury should not know, so it could be referring to a previous conviction or something like that that really should not have been allowed but could inadvertently cause prejudice in the jury’s mind if they knew that is why they were being taken out of the room while that is being discussed. So I do not know if you understand the point I am making there, some lawyers, by virtue of their training, will be able to pick up on that stuff, whereas somebody without legal training would not, and we do not know what gets said when the jury are alone and that could be something that ends up being influential.

The Minister for Home Affairs:

Also an important part of a lawyer’s training is that of impartiality and so one would reasonably expect them to discharge that duty as they would any other really and observe that need in a professional way.

Deputy S.Y. Mézec:

Another element that is connected to this is the change that will allow the jury to choose their own foreman, which I think most of the judges are happy with, one is not, but that point aside, the point that I have put to those who have made submissions on this is, if a jury is put together and one of them happens to be a lawyer, I would suspect that many members of the public would automatically defer to the lawyer and say: “You know the system, therefore we automatically want you to be the foreman”, and just whether that has been considered as something that juries may end up doing if they know one of them is a lawyer and if that is desirable. I would anticipate that would probably happen quite a lot. If somebody identifies themselves as a lawyer most jury people, I think, would probably say that: “You can be the foreman.”

The Minister for Home Affairs:

As a layperson I read the Bailiff’s thoughts that he shared with you with great interest and I completely understand the point that he is making, however I am aware that it is quite commonplace, in other jurisdictions, for the jury to select their own foreman because they are taking this duty as a civic duty and a role and therefore they should be a unit that are working together.

Deputy S.Y. Mézec:

That was not the point I was contesting there, the point I am still on is lawyers being eligible and that if you are also including the provision for the jury to select their own foreman and lawyers are to be serving on juries that it may well be the case that they end up predominantly being chosen to be the foreman by the laypeople who make up the jury and, irrespective of how the foreman will be chosen,

it could end up being lawyers serving in that particular position where their greater understanding or experience within the criminal justice system from other members of the public who are doing their civic duty, is that something that has been considered and is that something that you would see as desirable?

The Minister for Home Affairs:

I will allow the law officers to give their practical view from their own experiences because I am sure that will be helpful, but there would also be a Rules Committee that would be able to look at issues like that that arose over time, but I do not know if there are any practical examples that law officers have.

The Attorney General:

I think that it is obviously a significant point that has been identified and there are arguments both ways as you have set out. You are right to say that there must be a risk that jurors might wish to see a lawyer as their foreman; it would be a consideration, would it not, if someone was to reveal they were a lawyer. Conversely most lawyers do not do criminal work but it is obviously an issue upon which a proposal has been made but it is not something that would undermine; a change of this nature would not undermine the objectives of the law. One can understand the reasons that people might argue for it.

The Deputy of St. Ouen:

We would like to move on to discuss defence case statements and this is an entirely new procedure required, we understand, and a failure by a defendant to produce a defence case statement could lead to an adverse inference being taken by the court and communicated to the jury. In other words: "Why has the defendant not taken the trouble to explain their defence beforehand?" Can you tell us the reasons for making that change in the law?

The Minister for Home Affairs:

So the intention of introducing a defence case statement is in order to expedite the process of the court so that the so-called killer point is not saved until quite a way into the court proceedings and that causes difficulties for the other side. It avoids the potential for people to restrict their main point and prevent it from being properly argued in the court case, and so it has really been included to smooth the proceedings. But I think if you were referring to somebody who is representing themselves then there is a special case for that person not having quite the same imposition.

The Deputy of St. Ouen:

The Magistrate would have a discretion, or the judge.

The Minister for Home Affairs:

Yes, indeed.

The Deputy of St. Ouen:

Yes. But the criticism might be that it removes from a defendant the right to put the prosecution to proof and is that fair?

The Minister for Home Affairs:

In terms of if they wish to remain silent you mean?

The Deputy of St. Ouen:

Yes, they may wish to remain silent.

The Minister for Home Affairs:

Yes, and there should be no adverse inference, it has been made very clear.

The Deputy of St. Ouen:

Is that the case?

The Minister for Home Affairs:

Yes.

The Deputy of St. Ouen:

They would still have the right to remain silent?

The Minister for Home Affairs:

There would be no adverse inference, and I think in England and Wales the right to remain silent without adverse inference has been removed and so there can be an adverse inference placed on the right to remain silent in other jurisdictions, but it has been decided to leave that in, in this law.

The Deputy of St. Ouen:

For myself, I am not sure it works as I read it, but perhaps we could have that more-detailed discussion with Advocate Berry at a later stage.

[16:00]

But your confirmation is that a defendant may still exercise his right to silence and require the prosecution to prove its case, so all he would have to say is: "Not guilty" and the fact he says nothing more would not result in an adverse inference?

The Minister for Home Affairs:
That would be the direction that the judge would give the court.

The Deputy of St. Ouen:
So the mischief that it sought to prevent is the defendant coming forward with an express defence, his own story, whether or not he gives evidence, in the course of the trial. Is that a fair balance of the rights of the defence and prosecution, bearing in mind the prosecution authorities are often the more empowered in that they have police resources and law officer resources?

The Minister for Home Affairs:
Some legal defences, I am sure, the teams would be quite sizable as well, but I appreciate that is not always the case. But I think in my mind it certainly seems right and proper that people have to declare their hand at the outset and then there is a level playing field and everybody knows what points they are arguing and it is clear and that to me seems an expeditious way to proceed really because you are cutting out some time-wasting that could potentially be found in lack of clarity over what issues are being argued or not.

The Deputy of St. Ouen:
Are you satisfied, Minister, this was the subject of full consultation, because, as you know, some of the submissions made to us are still objecting to that point?

The Minister for Home Affairs:
I can only hark back to what we have previously said, that a member of the Law Society has been fully involved in the consultation process over a 2-year period and senior members of the legal system have been on the Criminal Justice Systems Board and also in the working group, so they have been involved and that information should have been filtered throughout the community for discussion.

The Deputy of St. Ouen:
There is a small issue in Article 84(5), which we may not have had an opportunity to raise with your officers earlier, but I wonder if you are able to, perhaps the Attorney, if you are able to give us a response immediately or, if not, later. So, in Article 84(5), if it appears to a judge that the defendant has not served a defence case statement, which complies with various requirements, including as to what is in the statement, then the judge could order that the defence pay the prosecution's costs

to date. That appears to read that this is an additional measure to enforce the filing of a defence case statement because if one is not filed the defence is exposed to a risk of having to pay the prosecution's costs. Indeed that may be whether or not the defendant is acquitted or not at the end of the trial. There might still be that exposure to costs. So is it trying to force the defendant's hand?

The Minister for Home Affairs:

It is trying to encourage people to be open and accountable.

Senior Legal Adviser, Law Officers' Department:

If it helps just to say a couple of words on this, these provisions, as you say, are trying to ensure that the defence case statement is served and the defence case statement in this context fits within a wider context of ensuring that criminal cases are progressed in accordance with the overriding objective, which is set out earlier in the law. This facilitates the active management of cases, which is provided for in the draft law as well. The submission of a defence case statement is preceded by the giving of the disclosure of unused material as well. So it ensures that each side is giving each other the full picture as to the issues that going to be live at trial so that you ensure that the case can come to a just outcome. Within that framework one thing we have considered is whether - and we have discussed this - it would be appropriate to remove the words in Article 84(3)which currently states: "If the defendant has no legal representative, the court may in exceptional circumstances, on application of the defendant or the court's own motion, dispense with the requirement to give a defence case statement." The words "in exceptional circumstances" could perhaps be removed to allow the court greater discretion to decide when it is appropriate to dispose of that requirement having considered all of the circumstances of the particular defendant in the case. Obviously, the panel will form a view on whether that is the appropriate thing and then perhaps consideration can be giving to bringing an amendment forward to achieve that. I would imagine that Article 84(5) fits in the same framework so the Magistrate or the Bailiff or Court will have to consider in all the circumstances whether it is appropriate to require a defence case statement to be served. Potentially there is a costs risk there as well for some other enforcement mechanism. If one party has frustrated the swift and appropriate disposal of the court case then arguably perhaps they should be required to pay the costs of the other party. That is all in the interests of ensuring an expeditious resolution of the case.

The Deputy of St. Ouen:

So if a defendant does not want to disclose his defence, it is understood he would run the risk of adverse comments, but he might also run the risk of having to pay prosecution costs. Minister, do you think that is fair?

The Minister for Home Affairs:

I do, yes.

The Deputy of St. Ouen:

Very well.

Deputy S.Y. Mézec:

Can I just use an example? So somebody has been accused and that defendant believes that the case that has been put against them is not worthy of a case being put against it because it is self-evident that they are innocent and they do not feel there is any response so they chose to use their rights to silence and say: "The prosecution who are making that case clearly will not be able to prove this beyond reasonable doubt" so they just say: "No, we are not going to entertain this." The prosecution then puts forward their case and upon reading it they still believe that, yes, there is no point in addressing this, it is self-evidently not a good case. Then when the prosecution makes their case in court, having heard it with their ears rather than read it with their eyes see that they were coming from an angle that probably does deserve a response, they are then forced to respond to that and their response is a good one and they are found innocent at the end of it, the fact that they then came forward with a defence case to a point the prosecution had made, when at the start they had refused to do that, it was only halfway through the case upon hearing it that they thought: "Actually, no we do need to respond to this." They are still found innocent, are they still then potentially liable to pay the costs for that when they entered the process in good faith, genuinely believed that there was no good case against them but it was only halfway through the trial, upon hearing it, they suddenly realised: "Well, actually I see they are coming from that angle and I probably should respond to that."

The Minister for Home Affairs:

I see where you are coming from. I would imagine that the practical solution in that instance would be to apply to the court to make a ruling. There would potentially be some time allowed for delay so that they could present a defence case statement if they changed the minds and wished to do so. It is quite hypothetical.

Director, Criminal Justice:

The prosecution have a duty to disclose the evidence upon which they are relying to prove the case. So it would be unlikely the prosecution would introduce any new evidence.

Deputy S.Y. Mézec:

I am not talking about new evidence. I am talking about an argument that when you see it on paper you believe you understand it but it is only when they speak it and they might choose to use different words, you hear and you go: "I did not quite understand the nuance when I read the case and I have

now changed my mind and believe I do need to present a defence to that argument." It is not a change of the case, it is a changing of the defence's understanding of the case having heard it in a different forum to what they had heard it initially.

Senior Legal Adviser, Law Officers' Department:

I think it is important to keep in mind what is required in the context of the defence case statement because the information that is required - and you will be able to see in Article 85(1) that there is a list of things that are required from the defendant if they are required to serve the defence case statement, because that obligation has not been disposed of by the court. It sounds as if it could be quite minimal. Essentially you need to set out the nature of any defence you wish to rely on, indicate matters of fact where you take issue with the prosecution on, set out particulars of fact on which you intend to rely. These might not necessarily always be very substantial matters, so it might be that the defendant needs only to say … so the prosecution in relation to a fight might say the defendant is a person who threw a punch at somebody else and the defendant in the defence case statement might need to say little more than: "I was not the person who threw the punch so I take issue with that matter of fact as alleged by the prosecution as I was not there." Those are the sorts of things that will … just making it clear what it is about the prosecution case that is not accepted might make it much clearer what the issues are at trial. I think one of the points that has been made about the way this all fits together is that there are benefits to being clear about what the nature of their defence is from the outset. There is a continuing duty under Article 83 to disclose unused prosecution material. The prosecution will disclose material that it is aware will assist the defence case or undermine the case. If they do not know what the defence is the prosecution might not be aware that some of the material is relevant to the defendant's defence. That might be a bit of a complicated way of putting it.

The Attorney General:

I agree with what Advocate Berry just said. The defence case statement is one of the things that is very much at the heart of this law, and it is not overstating it to say that it is one of the things the law does not work very well without. Let me explain. Firstly, the courts overriding objective is to actively manage cases and this includes, in Article 7 the early identification of key issues, the needs of witnesses and so on. The court fails at the first hurdle if it does not know what the defence is. It simply cannot identify the key issues in the case. It cannot properly estimate how long the trial will last. But it cannot - in relation to witnesses who needs special assistance, an intermediary or screens if the defence are calling a child witness or a vulnerable witness - make arrangements for them unless it knows who they are. I will develop this if you want but the court cannot do its job which is to ensure that there is a just trial in a reasonable time that is fair to both parties. It gets much worse than that in a complicated case because the prosecution simply cannot do its job in terms of disclosing unused material unless it knows what the defence is. Article 83(5) says: "The

prosecution are under a continuing duty to disclose any unused prosecution material, including any material relevant to any matters set out in the defendant's defence case statement." The problem is if we do not have defence case statements the prosecution simply cannot do its job in a complex case properly because you have literally rooms full of material in a complex fraud or a case going back several years, or even a sex case where the victims have had social service involvement throughout their lives or counselling or medical issues. It is impossible to do the job without a defence case statement. You end up with problems like in Archbold. In Archbold, this is the most recent edition: "Illustration of a wider importance of a detailed defence statement in alerting the police to the need to make enquiries which may support the defendant's account. See Brian [2010] in which the conviction was quashed on the basis of fresh evidence obtained instead of the Criminal Cases Review Commission." That is someone who went to trial, did not produce a proper defence case statement, was convicted, went to prison and only years later when there was a proper investigation of the material the prosecution ought to have disclosed, which would have been triggered by a defence case statement, was he released.

[16:15]

The Deputy of St. Ouen:

I think we can all understand those principles but is it not the case that they must be held in contention with the principle that the prosecution … the onus is on the prosecution to prove its case and side by side is the corollary that the defence need not say anything. It does not have to assist the prosecution in any way, does it?

The Attorney General:

As the Minister said, the right to silence in the trial process remains. The defendant is not obliged to give an account at interview. There is no risk of an adverse inference, that has changed in England and Wales; he is not obliged to give evidence, that has changed in England and Wales; he is entitled throughout the trial process to maintain, if he wants, a wall of silence but that does not escape him from the obligation to produce a defence case statement to ensure that there is a fair trial. That is the awful consequence of not having a defence case statement that you might not get the disclosure that justifies … that leads to acquittal. To take your point that you made about the wording in Article 84(5) in relation to prosecution costs: "It is to pay such of the prosecution costs that have been incurred at the date of the court's direction given." If the inference that you draw from that, which I understand, is that there is a risk of the defendant having to pay all the costs incurred at that date then maybe the solution is for that wording to change so it is costs incurred as a consequence of a failure to comply with Article 84(2) so the cost order would be very much restricted to effectively the costs of the hearing which arose out of it. If someone's prepared to file

against a case that was too broad then I am sure we could amend Article 84(5) to restrict its ambit. I see the point that you have identified there.

The Minister for Home Affairs:
Chairman, I am very sorry but this was put in my diary starting from 2.30 p.m. and I had asked that it was made clear that I had to leave at 4.00 p.m. I am sorry if you have not received that notice.

Deputy S.Y. Mézec:
No, I have not, no. Okay. I presume that means we have to finish then because …

The Minister for Home Affairs:
You cannot continue without me being present? Because I imagine you have bad character and …

Deputy S.Y. Mézec:
Yes, we did have other things to ask you. It was down as a hearing with yourself so I presume without you here it is not a hearing with you. Okay. I did not know that, but I take your word for it. I understand. It may well be the case that we will want to follow up then on the subsequent points.

The Minister for Home Affairs:
Yes, I am very sorry to do that to you and I appreciate that the time was rather short but …

Deputy S.Y. Mézec:
Okay, if you have to go, you have to go, I understand fully. We need to decide what we do then.

The Minister for Home Affairs:
It is somewhat of a whirlwind I am afraid. Yes, it has really put me in a very difficult position.

Deputy S.Y. Mézec:
Yes, okay.

The Minister for Home Affairs:
I am sorry. What would be the best way to proceed? If we answer some questions in writing or …

Deputy S.Y. Mézec:
Potentially I think we will have to discuss what we think is the best way forward. Okay.

The Minister for Home Affairs:
I really have to apologise.

Deputy S.Y. Mézec:

These things happen. In which case I have to call the hearing to a close then. Thank you for the answers you have given so far, though, that has been helpful and a final point to make is that I personally feel like the communication we have had on this has been very constructive to this point. I know some amendments are being considered. Those who have submitted to us, I think, have been helpful not just to us but to you. So thank you for everything you have helped us with along the way up until this point.

The Minister for Home Affairs:

Thank you, and also your approach has been extremely helpful and I think a very good demonstration of how Scrutiny can be done. It can be extremely helpful.

Deputy S.Y. Mézec:

Okay, thank you very much. Thank you to members of the public for attending as well.

[16:19]