The Law Society of Jersey

Draft Criminal Procedure (Jersey) Law 201-

Consultation Response by The Law Society of Jersey

Introduction

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 All those involved in the administration of the criminal justice system have been aware that the 1864 Law was outdated and in need of a wholesale review.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

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

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

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

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

Comments

Part 1

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

Part 2

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

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

Part 3

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

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

Part 4

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

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

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

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

Part 5

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

Part 6

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

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

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

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

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

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

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

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

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

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

Part 7

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

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

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

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

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

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

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

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

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

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

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

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

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

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

46 Mode of trial

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

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

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

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

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

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

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

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

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

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

48 Sentencing where facts in dispute

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

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

PART 8

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

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

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

PART 9

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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