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15 December 2017

Dear Neville,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16. **Art 30 (now Art 32)** – noted.

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

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

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

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

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

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

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

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

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

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

27. **Art 61 (now Art 63)** –

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Yours sincerely,

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