CRIMINAL PROCEDURE CONSULTATION RESPONSE

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My submission falls into four parts: responses to the questions set in the Consultation; a proposal on Criminal Appeals, which I submit should be part of the same draft Law; a proposal on protection for jurors; and a proposal on postponing of court reporting.

1.RESPONSES TO CONSULTATION QUESTIONS

JURIES

1. Yes; broadening the pool is desirable on grounds of fairness, equality and human rights.
2. No: very few 75 year olds face criminal trial, so the chances of a representative jury would fall further. There is also the biological evidence that memory tends to deteriorate with age, so increasing the maximum age for jurors requires consideration of how techniques and technology can ensure that this does not impact upon verdicts.
3. Yes.
4. Yes; it would not form a disproportionate burden and could have a dramatic impact upon costs in some trials.
5. These are clearly needed but I would go further and review the scope of all other forms of contempt of court under Jersey law, since there is some lack of clarity and various principles have been imported from English law without supporting legislation or keeping an eye on the bigger picture.
6. Yes; this is a situation with which English law copes well, but similar factors to those applied by the Crown Prosecution Service should also apply, including the public interest and whether there is a realistic prospect of conviction. There should also be a cap at two trials, on human rights grounds.

   DISCLOSURE

   No comments, other than to state that I am in favour of the retention of an absolute right to silence, for the reasons which I have explained in detail elsewhere (for example, Shorts and de Than, *Human Rights Law in the UK*, Sweet and Maxwell; de Than, *Human Rights Law,* Pearson.)

   COMPELLABILITY

I support the proposals in this section.

SPECIAL MEASURES

I support the proposals in this section, although I would suggest the adoption of an approach parallel to that of Munby P from the English family courts and Court of Protection to the holding of hearings in private; even when vulnerability is involved, as much of a hearing should be held in public as possible, in accordance with the requirements of Article 6 ECHR and the approach of relevant persuasive Strasbourg caselaw. There would need to be very strong reasons indeed to justify the holding of even part of a criminal trial in private. Media rights and the public right to receive information about criminal trials and justice must also be preserved .

HEARSAY

No specific comments or responses.

BAD CHARACTER

No specific comments or responses.

CHILDREN AND YOUNG PEOPLE

I would support strongly any future policy development designed to ensure fairness and consistency in the treatment of children and young people in the courts. I have witnessed poignant examples of how some other jurisdictions fail to adapt courtrooms or procedures in line with the human rights of children and the need for a fair trial. Jersey is far ahead of many larger jurisdictions in this respect, but human rights risks remain whenever a child is not dealt with by a specialist court. Hence my responses to c) and d) are yes, and that further research should be done, with reference to specific needs, risks and possibilities within a small island jurisdiction (which may differ from those of laws and procedures aimed at dealing with high levels of offending in populations of the tens of millions.

2.CRIMINAL APPEALS AGAINST CONVICTION

I submit that, in tandem with the Criminal Procedure Law, there should be a reform of the grounds for criminal appeal.

The Jersey Law Commission recently released a Scoping Paper as part of its project on criminal appeals in Jersey. The key issues for discussion and input were whether and how the grounds for

criminal appeal on the facts should be reformed. The relevant provision is the **Court of Appeal (Jersey) Law 1961, Art 26(1):**

'Subject to the following provisions of this Part, on any appeal against conviction, the Court of Appeal shall allow the appeal if it thinks that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that, on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:

Provided that the Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred. '

In England and Wales, it took 60 years and 31 Bills to create a court of criminal appeal with jurisdiction over errors of fact, but Jersey copied the English law at an early stage of its development and has not responded to subsequent developments in England and Wales, or elsewhere. The current Jersey provision is heavily based upon s. 4(1) of the English Criminal Appeals Act 1907, a much-criticised test for criminal appeals in England which led to repeated reforms in that jurisdiction, where it has not applied since 1968. It is even stricter and less clear than the law which led to wrongful convictions being upheld in notorious cases of miscarriages of justice such as the Birmingham Six and the Guildford Four. Further, the House of Commons Justice Committee has recently expressed concerns about the grounds of criminal appeal in England and Wales, recommending that the Law Commission for England and Wales should consider whether the Court of Appeal 'should be able to quash a conviction whenever it has a serious doubt about the verdict, even without fresh evidence or fresh legal argument.' As John Kelleher puts it in an article in the Jersey and Guernsey Law Review, 'A doubt experienced by the appellate court ought to lead to a conclusion that a reasonable jury or bench of Jurats ought also to have experienced that doubt and therefore cannot have been sure as to guilt', but that has not been the case in practice in the application of Jersey's law in the Court of Appeal and Privy Council. Jersey's courts have from time to time noted difficulties in applying Art 26 of the 1961 Law due to its anachronistic nature: '...we consider that it may well be desirable, in an appropriate case, to consider whether, and to what extent, the English authorities relating to the 1907 Act should continue to be applied uncritically in relation to the 1961 Law and to what extent, if at all, it is permissible to apply the approach of modern English Criminal Law...having regard to more modern conditions and thinking on the operation of the criminal justice system.' However, no progress has been made on those issues.

Jersey's courts have generally followed the same approach to interpreting the 1961 Law as English

courts did to their equivalent provision under the 1907 Act; however from the outset the English courts took a more restrictive approach to their role in deciding criminal appeals than Parliament had intended, leading to criticism from both the JUSTICE Committee in 1964 and the Donovan Committee in 1965. The latter Committee expressed a particular concern that the test left virtually no protection for an innocent person who had been wrongly identified where the identification evidence was, on the face of it, credible. The statutory wording was also regarded as confusing and overlapping by the Royal Commission on Criminal Justice in 1993, who recommended that it should be replaced with a simpler test. Parliament's response to such criticism was major statutory reform: s.2 of the Criminal Appeal Act introduced a test based on whether the conviction was 'unsafe and unsatisfactory' with the aim of encouraging judges to take a more liberal approach to their task in considering appeals; and the 1995 Criminal Appeal Act replaced that wording with simply whether the conviction is 'unsafe'. English judges have also created a test based on 'lurking doubt' which has not been adopted in Jersey, but which enables English judges to allow an appeal if there is some lurking doubt which makes them think that an injustice has been done.

The Jersey Law Commission Scoping Paper and associated publications in 2016 examined whether reform is also necessary in Jersey and sought views and evidence on this matter from interested parties. Not one of the responses received spoke in favour of retaining the existing law; both the wording of the legislation and judicial reluctance to overturn jury verdicts were flagged for necessary change in order to prevent miscarriages of justice.

The current law and a proposal

Jersey currently has four grounds for appeal against conviction under the 1961 Law. An appeal court may allow an appeal if they think that the verdict of the jury should be set aside on the grounds that it is

(i) unreasonable or (ii) cannot be supported having regard to the evidence; or (iii) that the judgment of the court by whom the appellant was convicted should be set aside on the ground of any wrong decision of any question of law; or (iv) that on any ground there was a miscarriage of justice. These grounds were originally designed to give courts very wide powers to overturn convictions, but both the Jersey Law and its English predecessor have been interpreted in a narrow way: i.e. that the Court of Appeal's role is to review the decision of the trial court, and that it cannot allow an appeal simply because it would have reached a different verdict on the evidence.

The current English equivalent law has a single ground of appeal: under s.2(1) of the Criminal Appeal Act 1968 as amended, '...the Court of Appeal....shall allow an appeal against conviction if they think that the conviction is unsafe...'

The test in England and Wales since 1968 is perceived as setting a lower threshold than that in Jersey: the Court of Appeal in *Barette v Att Gen* said that the Jersey law is "more robust in regard

to the upholding of a jury's verdict than the law which now exists on the mainland'. Further, judicial developments in England and Wales have not been applied in Jersey cases. Judges applying the English 1907 Act's identical test developed a further approach known as the 'lurking doubt' test. According to Lord Widgery in *R v Cooper* "the Court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the Court experiences it." Judges applying the 1961 Law have not adopted this test, with a direct impact on individual cases. In the Guernsey case of *Law Officers v Guest* the Court of Appeal stated that it did have a 'lurking doubt' about the conviction, and that they would have overturned it if the English test had applied, but they were unable to do so under Guernsey law [Guernsey's law being identical to Jersey's in this respect]. Hence the conviction was upheld in spite of the doubt, and the result would be viewed as a miscarriage of justice in most jurisdictions. Jersey should not show less willingness to overturn convictions than do other jurisdictions where there is serious doubt about their safety. According to Scoping Paper responses, there is little difference in interpretation of the relevant laws when the issue with a conviction is a defect in the summing up or in the evidence heard by a jury, but a significant difference where the jury's verdict was not supported by the evidence. All consultees displayed concern that the result was a risk of miscarriages of justice.

John Kelleher has suggested in the Jersey and Guernsey Law Review that the current Jersey law in this area is unsatisfactory because of a lack of clarity in three respects: that it is unclear 'as to- (a) the threshold that must be achieved for the ground(s) [for appeal] to be made out; (b) the nature of the examination to be undertaken by the Court; and (c) the factors the Court will take into account in that examination.' Dr Stephanie Roberts has noted in the Journal of the Institute of Law and in a paper commissioned for the Jersey Law Commission Scoping Project that judges have failed to fix these problems through taking a restrictive approach to interpreting the Law. Consultees agreed with both Kelleher and Roberts. There was also universal agreement that the proviso relating to 'no substantial miscarriage of justice', long since abolished in England and Wales, should be removed in Jersey. A group of expert responses further highlighted that the deference shown in particular to jury verdicts by Jersey's existing approach to criminal appeals was in contradiction to detailed scientific and academic research on jury fallibility, and on their reliance on irrelevant factors. Jersey's current judicial approach uses the fact that a jury has seen and heard the witnesses but the judges on appeal have not done so as a reason against disturbing jury verdicts, assuming that a jury is hence in a better position to judge who is being truthful; the evidence is that such assumptions are highly questionable. Some responses also thought the same likely of jurats.

Jersey has the opportunity here to learn from over 100 years of experience in the law of criminal appeals in England and Wales, and the opportunity to lead in reform rather than simply updating as far as the 1968 English law. The following is hence **proposed**:

- Article 26(1) of the Court of Appeal (Jersey) Law 1961 should be replaced by a single and

simpler ground of appeal, allowing the Court of Appeal to quash a conviction when it 'has a serious doubt about the verdict'.

-Guidance should explain that the legislative intention is to give a broad ground for allowing an appeal, even where there is no fresh evidence or fresh legal argument, and that there are many factors which can lead to a serious doubt about a conviction. Such factors include, but are not limited to, procedural irregularity, fresh evidence, error of law and 'lurking doubt' about whether a trial verdict is wrong. The aim of such Guidance is to prevent a recurrence of an overly restrictive approach being taken by judges in appeals, since there is strong evidence of this having occurred repeatedly in relation to criminal appeals provisions in both England and Wales and Jersey. The power to order a retrial should remain.

3. PROTECTION OF JURIES AND WITNESSES

I support the draft Articles on intimidation of witnesses, jurors and others, which almost completely replicate in the 1994 English law as amended, but I would suggest that different and possibly greater protection is needed for jurors in small jurisdictions than in larger and more anonymous communities, and research should be undertaken on the prevalence, forms and risks of juror and witness intimidation in Jersey in the 21st century, since I have received untraceable anecdotal reports of intimidating tactics in or near courts in relation to trials for serious crimes. Regardless of such research, there is a case for such specific legislative provisions; perverting the course of justice and contempt of court are blunt tools which struggle to meet the ingenuities in the 21st century, and equally struggle to meet legal clarity and certainty requirements. Indeed, a review of the scope, clarity and fitness for purpose of all forms of contempt of court is warranted. There has been attention to special measures for vulnerable witnesses and vulnerable defendants, including Bridget Shaw's article in the Jersey and Guernsey Law Review, but there are unique factors about jury trials in small jurisdictions which merit specific attention. But a new statutory crime is not enough: procedures and practices which make witness or jury intimidation or tampering more likely should also be reconsidered; as just one example, jurors' personal details are still given in court, which could lead to very real risks, particularly in such a small community.

CONTEMPORARY REPORTS OF CRIMINAL PROCEEDINGS

Finally, I have some comments and suggestions in relation to the draft provision on Contemporary reports of criminal proceedings, which is modelled upon s.4(2) of the English Contempt of Court Act 1981[1]. There are three linked issues with the relevant draft provision. Firstly, it would appear to impose absolute liability, going further than even the strictest of the various interpretations of the similar English law, and without the benefit of the defence which applies under English law. There is a dispute as to whether the mental element required under English law is intention or

[1] Some similar issues apply regarding the draft offence in connection with reporting preparatory hearings or rulings, and so these comments should where relevant be taken also as referring to that offence.

recklessness as to the existence of the order. To go further than that would place Jersey at risk of human rights violations. At a minimum, there should be a requirement of knowledge of the existence of the postponing order or a due diligence defence, on fairness grounds and to ensure compliance with the requirements of Article 6 ECHR in multiple ways. Secondly, a mens rea requirement would not reduce the possibility of convictions for breach of such postponing orders if the media had a workable system for finding out that such orders have been made. The current English practice has obvious deficiencies- printed orders are placed on doors or noticeboards at courts, and often very difficult to spot even for people who are physically at the court at the relevant time. There is a simple and efficient solution. I served as an Expert for the Law Commission of England and Wales for its report on that specific provision, Law Com No. 344 [2014]. The recommendation was for a database of reporting restrictions so that the media could avoid liability. Jersey could implement such a database for an extremely minimal cost, both financially and in terms of workload, and it is another opportunity to lead on reforms which would impose greater challenges and demands on larger jurisdictions. Thirdly, the world has changed a great deal since the 1981 Act, and print newspapers are no longer most people's primary source of news and information. Hence the wording 'written report' might have practical limitations; surely a report in a vlog should be covered? In any case, the wording does not appear to work, since a 'programme for reception in Jersey' would not normally contain a 'written report'. Ideally, this draft provision would form part of a full review of Jersey's contempt of court laws, since there are significant risks in reforming part of a field of law without looking at the fuller context.

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