



The Law Society of Jersey

Dr Helen Miles
Criminal Procedure Law Consultation
Department for Community and Constitutional Affairs
Cyril le Marquand House
The Parade
St Helier
Jersey JE4 8UL

21 September 2017

Dear Dr Miles

DRAFT CRIMINAL PROCEDURE (JERSEY) LAW 201-

Thank you for providing the Law Society of Jersey with the opportunity to comment on the Draft Criminal Procedure (Jersey) Law 201-.

It is clear that a considerable amount of work has taken place, over a period of a number of years, in developing a replacement for the long outdated 1864 Loi Reglant la Procedure Criminelle.

While we support the development of a new law that is fit for purpose and reflects modern criminal justice practice, we are concerned that insufficient time has been allocated for the consultation process, given the magnitude and significance of the changes being proposed.

The Law Society considers that far more time needs to be devoted to gain a proper understanding of what is proposed. The rationale, for instance, for some of the changes is far from clear to us and, by way of example, the notion that two additional reserve jury members should sit with the conventional twelve seems somewhat unnecessary in circumstances, as we understand it, where there has only ever been a problem, concerning the jury being reduced below ten, in one case (Holley).

It is further evident that the Law is a document driven by Prosecution-minded draftsmen and raises significant issues which, in an ideal world, should require the engagement of all lawyers and the public at large. Putting it euphemistically, we are not clear that this has happened, or will.

Notwithstanding these concerns, we are pleased to provide in the attached summary a not insignificant number of comments and observations in relation to the proposals, in addition to which we wish to bring the following general concerns to your attention.

First, it would appear that rights of audience are being extended to non-Jersey qualified lawyers in the Royal Court for the purpose of prosecuting cases (as detailed in Article 1(2) of the draft law), effectively serving to replicate the position that now exists in the Magistrate's Court. If an English QC was deputed to prosecute a case here in Jersey, it is difficult to see, in due course, how an application, on behalf of a Defendant to be similarly represented, could properly be turned down on

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the basis of equality of arms. We would like to receive assurances that it is not intended, now or at any future point, to dilute or dispense with the existing rights of audience of locally-qualified advocates in the Royal Court. The ramifications for the legal profession in Jersey of such a move would be far reaching and would be vociferously opposed by the Law Society.

Second, the new Law provides for hung juries, which is a fundamental shift from the present position whereby the not guilty views of three jury members results in an acquittal. The Law will, instead, give the Prosecution the option for a re-trial. We are not suggesting that this is wrong but, rather, that it is an important constitutional, as it were, change. It will also create difficulties in respect of reporting, we foresee, and is, obviously, a more problematic practical problem on a small Island than it would be on the mainland United Kingdom.

Third, the constitution of Juries is open to much wider participation. Whilst we understand the removal of restrictions on persons such as lighthouse keepers who, for good reason in the past, were excluded, we have concerns over the inclusion of Police Officers and certain qualifying lawyers within the Law. One wonders how satisfactory it might be if a former criminal lawyer and a police officer were serving upon a Jury and expressing strong, and perhaps persuasive views, only for them to be removed as the two additional jury members, leaving their expressed views to effect the thinking of the remaining Jury members.

Fourth, it is worth noting that committals are to be abolished. It appears to us that this represents a fundamental right which is being removed at a stroke without the benefit of a full debate.

Fifth, and likewise, the requirement for the provision of Defence statements might be seen to be the starting point for the removal of the right to silence which, we anticipate, will be sought in due course. The present proposal, whereby a Defendant has to indicate what his defence is in a written statement, seems difficult to reconcile with a Defendant's right to say nothing when interviewed by the Police nor even to give evidence and those of a cynical disposition may view the inclusion of this provision, as averted to above, as the precursor to the removal of the right to silence.

The list, as it were, goes on; the loss of peremptory challenges, the pretty much wholesale transposition of English Law on the question of bad character when the Law on this issue may be less well settled than some may think, the removal of the double jeopardy principle and so on.

In addition, we have an overarching concern that the Law is simply adopting, for the most part, English provisions which may be unnecessary here in Jersey. Notwithstanding certain anomalies that do need to be addressed, our overall view is that the administration of criminal justice presently works well and that the Law may, in fact, create problems where none, or fewer, presently exist.

The 1864 Law has been in place for over 150 years, yet we are being asked to comment substantively on far reaching proposals (including elements which are advised by the review team are still work in progress) which have been in the making for almost five years in just six weeks.

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That the Law needs updating is not in dispute. However, it is our view that all of these issues (and many others besides) require further time and thought, in order for it to be possible to make an informed decision about the Law. There are, at present, too many uncertainties that need to be resolved before the Law can, in our view, be properly presented to the States Assembly.

We hope that our comments are helpful. We remain willing to provide further input to the Law in the event that it is agreed, as we suggest, that more time is taken in developing a law that is fit for the future and will, like its predecessor, pass the test of time.

Yours sincerely

A handwritten signature in black ink that reads "Neville Benbow". The signature is written in a cursive style with a small horizontal line under the "w".

Neville Benbow
Chief Executive Officer
The Law Society of Jersey

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