Draft Criminal Procedure (Jersey) Law 201-

Response to consultation

Introduction

The Criminal Procedure (Jersey) Law consultation ran for a period of eight weeks from 24th July 2017 to 15th September 2017. The Minister was seeking responses on the new law from legal professionals, public bodies, victim and witness organisations and members of the public.

The new law will make very significant changes to the Island's criminal justice system.

Seven areas in particular were highlighted for comment-

1. Changes to the eligibility for jury service, together with new rules for the operation of juries.
2. New rules on what the prosecution and defence must disclose to the court and to each other.
3. Changes to the rules on 'compellability' of spouses and civil partners.
4. Special measures to protect victims and witnesses from fear, distress or harm.
5. New rules on the admissibility of 'hearsay' evidence.
6. New rules on the admissibility of evidence of 'bad character'.
7. The way in which children and young people are tried for offences.

In addition to trying to improve the system, there is a desire to be as transparent and intelligible as possible. To this end the Law has been drafted to make it as easy as possible for someone without legal training to understand it. There is a limit to how far this can be taken, as law must be absolutely clear and precise which inevitably makes it long and complex. However, readability and clarity to the public is increasingly recognised as a fundamental principle of good law making and this is reflected in the approach that the Minister has taken. This is especially important in the criminal justice environment where people have every right to defend themselves without a lawyer, and must therefore be able to understand the laws supporting the court process that they must undergo.

Only five submissions were received in response, although one was from the Law Society of Jersey and one from the States of Jersey Police force, which together represent a significant proportion of the individuals directly involved in criminal justice locally. One local practitioner, one local academic and one member of the public also responded.

In all cases the feedback was very wide-ranging, and together it addressed all of the key areas.

This response addresses the submissions on each of the questions in turn, and looks at the general themes and tone of the responses in the summary. To avoid repetition the response does not reproduce the entire consultation paper. If more detail is required the numbering of the questions in the consultation paper has been retained so they can be read together.

Also, to see the exact technical changes since the consultation, the Law as it was consulted on can be comparted with the Law as it was lodged.

Changes to jury selection and management

The current position and what is changing-

- The Law will change how juries are selected and what rules they must follow.
- The age that jurors can serve will be extended from 25-65 to 18-72.
- The procedures for jury selection will be simplified.
- There are provisions to ensure the good conduct of the jury, including powers for the court to order that jurors give up their phones etc while they are sitting in court as a jury.
- Where a trial is expected to last longer than a week, reserve jurors may be chosen, who may be called to serve on the jury if the original numbers of jurors is reduced.
- A jury which has less than 12 jurors can come to majority verdict if 9 agree, instead of 10 as normally required.
- If a jury can't come to a decision, then the prosecution will be entitled to request a re-trial, otherwise the person is free to go.

Questions and answers-

1. Do you agree that eligibility for jury service should be increased so that a person who is 18 or over but under the age of 72 may serve on a jury?

Amongst those who responded to the question, there was general support for extending the age of service as described. The Police suggested that "*the older population has much to offer and should not be prohibited from serving on a jury",* while Professor de Than *said "broadening the pool is desirable on grounds of fairness, equality and human rights".*

2. Would you be in favour of further increasing the upper age limit for jury service to 75 years of age?

There was no support for making the age 75 at this time. Respondents argue that this is beyond the retirement age for Jurats, States members and members of the judiciary, and that juries are intended to be representative, and few 75 year olds face criminal trial.

3. Do you agree with the list of exemptions and disqualifications from jury service listed in Article 61?

This question was answered by most, with opinion split. The Law Society has expressed concerns that juries might be unfairly swayed by lawyers in their midst, and one respondent considers that the whole jury selection system is inherently flawed and that the parish involvement leads to selectivity and unfairness.

In contrast, the Police consider the exemptions broadly acceptable, and indeed after the consultation serving police offers were also exempted from jury service. Although this is not the case in the UK there must be a concession here to the fact that the small size of the jurisdiction means that police officers will nearly always have more than the appropriate level of knowledge about a defendant, which would not be the case in the UK.

4. Do you agree that reserve jurors should be sworn for all trials?

The response to this question was limited. Of the two respondents, the Law Society was against reserve jurors in general on the grounds of lack of need and the potential that the two additional jurors might influence the others and then not be called to participate. Conversely, Professor de Than notes that *"it would not form a disproportionate burden and could have a dramatic impact upon costs in some trials"*.

After the consultation, the Law was changed to provide for reserve jurors only in cases expected to be longer than 5 days.

5. What are your views on the new powers and offences to restrict a jurors' use of the internet to research a case?

Only Professor de Than responded to this question, to say that these were needed but other offences of contempt of court should also be reviewed.

6. Do you agree that the prosecution should have the right to commence a retrial where there is a hung jury?

Opinion was again split. The Law Society has some unspecified concerns about the principle, and it also feels that the Attorney General should have to decide immediately after the verdict if the State will make another attempt to try the offence, to avoid the defendant being kept incarcerated for up to 7 days while a decision is made.

Professor de Than was supportive, but highlighted potential Human Rights considerations in trying an offence more than twice.

Other comments on juries

The jury is a central aspect of the criminal justice process and any proposed changes to its operation raises strong opinions. While few responses addressed the questions directly several additional points were made about juries generally.

Firstly, the division between crimes and délits, triable by the Magistrate, Jurats or jury (at the choice of the defendant) and contraventions, triable only by the Magistrate or Jurats, is seen as arbitrary and dated. This has been changed in the final version of the Law to 'customary law' offences, which provide for jury trials, and offences under 'enactments' (against codified law) which will not. This does not represent any change to the right to trial by jury but it makes the arrangements simpler and easier to understand.

The question has been asked as to why the distinction between statutory and non-statutory offences has continued, and why trial by jury should not be extended to at least some of the most serious statutory offences.

Other issues raised were the fairness and enforceability of the retention of permanent disqualification for jurors who have ever served one month or more in prison (in any

jurisdictions) and the wisdom of maintaining the right of parishes to vet lists of potential jurors before submission to the Viscounts.

Disclosure of evidence

The current position and what is changing-

- The prosecution will be required to by law disclose any material that it holds, even where this may undermine the prosecution case or assist the defence. Currently this is the case but only because of the Attorney General's guidelines.

- There will be an exemption to disclosure where it would not be in the public interest to disclose material, and the court will be able to overturn that decision if it sees fit.

- In return, the defence will have to submit a 'defence case statement' before the trial, which will outline the defence position and identify if the defendant has an alibi and what witnesses they will call.

- If a defendant does not submit a statement, it may be held against them by the court unless they are not legally represented and the circumstances are exceptional.

- Both sides will be under a 'continuing duty to disclose' to each other if new material comes to light or material changes occur in respect of the prosecution or defence position.

Questions and answers-

7. Do you agree with the balance of obligations between the prosecution and defence with respect to disclosure set out in draft Law?

This provision raised concerns. The Law Society considers that the requirement for the defence to provide a case statement represents a *'fundamental inroad into the right to silence'*, as it would penalise a person who wanted to remain completely 'silent' for the entire process, i.e. not to engage in any way with the criminal justice process. Advocate Jowitt was also concerned, not so much with the requirement itself but with the broader effects on the right to silence and the perceived lack of a wider debate on the issue.

The Police were supportive of the proposition as a balance of rights between the defence and prosecution.

8. The purpose of the new provisions on disclosure is to ensure that the issues in dispute in criminal proceedings are identified as soon as possible. While a defendant should be able to amend a defence case statement, including to take account of information disclosed by the prosecution in response to the statement, do you think there should there be a deadline following which a defence case statement may not be amended before trial?

There was only one response to this question. The Police thought that the defence case statement should be submitted no later than 28 days after the prosecution disclosure, which itself follows a not guilty plea. In addition the Police recommend that there be a further limitation on amending the statement, otherwise *'it is foreseeable that trials may be delayed for tactical reasons'*. The Law allows for Rules to be made that will manage the treatment of such amendments, including the permitted timing.

Compelling spouses and civil partners to give evidence

The current position and what is changing-

- Currently, a spouse or civil partner cannot be forced (compelled) to give evidence for the prosecution against their spouse or civil partner.

- However, there are exceptions to this rule, including when the offence involves an assault or is of a sexual nature.

- The draft Law made very similar provisions, but consideration was being given to expanding it to include a wider range offences. That expansion could mean that a spouse or civil partner was compelled to give evidence in relation to domestic abuse, and perhaps even some serious road traffic offences where it might otherwise be unclear who was driving a vehicle.

Questions and answers-

9. Do you agree with the proposal to increase the range of offences where a spouse or civil partner may be forced to give evidence for the prosecution against his or her spouse or civil partner so as to include all offences that might be used to tackle domestic violence?

This is supported by two of the three respondents who answered the question, although the Police would like to see the decision to compel witnesses taken at a high level. The Law Society objects on principle.

10. Do you agree with the proposal to increase the range of offences where a spouse or civil partner may be forced to give evidence for the prosecution to include some serious road traffic offences?

The responses were the same as above – respondents made no distinction between questions 9 and 10.

Protection for victims and witnesses

The current position and what is changing-

- There are existing provisions in place to make special arrangements for children and vulnerable adults when they are giving evidence in court in cases concerning certain offences. Elderly or nervous people will not fit the description.

- The court can put in place special measures for witnesses if it sees fit, but because this is up to the court at the time, no witness can be assured that they will receive any special arrangements when they agree to give evidence. This may put some people off giving evidence altogether.

- These measures may include pre-recording video evidence, giving evidence via a television link or giving evidence from behind a screen, holding all or part of the proceedings in private, or the use of an intermediary to support the witnesses.

- To allow witnesses more certainty, the Law contains clear provisions for the use of special measures. It is not specific about the types of special measures that may be put in place, which may change over time.

Questions and answers-

11. The views of consultees are sought on the availability and nature of special measures that may be available under Articles 88 and 89 of the draft Law.

The Police were supportive, but gave no details. Professor de Than was also supportive, although she noted that as much of a criminal trial as possible should be held in public for openness and transparency and on Human Rights grounds.

The Law Society queried why the religious beliefs or political opinions of the witness was relevant to the question of whether they received special measure and also queried why, if the court can order special measures on its own initiative, any rules about who might receive them are required.

Rules on hearsay evidence

The current position and what is changing-

- 'Hearsay' means evidence given about statements made out of court. It is normally inadmissible in criminal proceedings in Jersey, but there are a number of exceptions to this general rule.

- The rules are found in in Part 8 of, and Schedule 4 to, the Police Procedures and Criminal Evidence (Jersey) Law 2003.

- Although Jersey has some provision for the admission of hearsay evidence, the rules are much less detailed than those in the UK and contain a number of deficiencies and omissions.

- The draft Law will provide more comprehensive guidance to the courts and participants in criminal proceedings on when hearsay evidence should be admitted. At the time of consultation these rules were still being developed, but the core elements were in the consultation.

Questions and answers-

12. The views of consultees are sought on the new provisions with regard to the admission of hearsay evidence.

The Police were broadly supportive but queried why more of the UK provisions had not been adopted. Advocate Jowitt responded on the topic. His position was that the current, simpler rules of evidence in Jersey were satisfactory and adopting this measure (together with the 'bad character' issue below) was unnecessary and potentially problematic.

Rules of evidence of bad character

The current position and what is changing-

- In criminal proceedings bad character evidence is evidence of a person's misconduct, or low character but is not directly related to the alleged facts of the current offence.

- Currently, a defendant is not required to answer a question that is related to charges or prosecutions for other offences or that would show they were of bad character.

- There are a few exceptions from this general rule, including where the defendant seeks to rely on his or her own good character in court.

- By amending the Police Procedures and Criminal Evidence (Jersey) Law 2003, the new law would allow for more evidence of this sort to be admitted. In particular, evidence could be heard that demonstrates a person's tendency to commit the kind of offence in question.

- The provisions are deliberately much like the UK's Criminal Justice Act 2003, so the principles UK courts have developed about the use of such evidence can apply here.

Questions and answers-

13. The views of consultees are sought on the new provisions with respect to the admissibility of bad character evidence.

The Police were supportive of the proposals. Advocate Jowitt considered them to be unnecessary and unwise, in connection with his position of hearsay as above.

Trials of children and young people

- In Jersey, children are tried in the Youth Court, where cases are heard by a Magistrate and two Youth Court Panel Members. The setting is much less formal and children sit close to their parents or guardians during hearings.

- By working in this way the Youth Court meets the spirit and requirements of the United Nations Convention on the Rights of the Child and the European Convention on Human Rights.

- Currently, the general rule is that the case must be tried in one court, so where a child is jointly charged with an offence alongside an adult the case must usually be heard in an adult court. A child might also find themselves in the Royal Court for an offence so serious that the Magistrate's Court could not deal with it (a sentence of 14 years in prison or 12 months for a driving offence if it had been committed by an adult).

- The draft Law would allow a child who is charged jointly with an adult be tried in the Youth Court, if it would not be in the interests of justice to send the child to be tried in the Royal Court and if the penalty for the offence would not exceed the Magistrate's jurisdiction.

- This situation is very rare but if it occurs then Jersey may not comply with the two treaties above. The draft Law will not change this, but it may need to be changed in future.

<u>Questions and answers-</u>

14. Whilst the new Law does not substantially change the mode of trial for children and young people provided for in the Criminal Justice (Young Offenders) (Jersey) Law 2014, to inform future policy development, consultees view are sought on whether:

    a) In order to ensure that more cases involving children are heard in the Youth Court its sentencing powers should be increased. This could include allowing the Youth Court to order longer periods of youth detention where those would be permissible for very serious crimes, such as murder.

    and

    b) The Royal Court should adapt its procedures to follow those in the Youth Court when a child is appearing on their own or jointly charged with an adult. For example, children could be presented in Royal Court number 2; Judges and advocates could remain ungowned; the Court could be closed to those not directly involved in the case; other steps taken to ensure that the child understands and can participate fully in proceedings.

Only Professor de Than commented on this matter, and she was supportive, saying that *"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 … hence my responses to a) and b) are yes".* She added that *"further research should be done, with reference to specific needs, risks and possibilities within a small island jurisdiction".*

Overall summary

The response to the consultation was limited, with only five respondents. While this is a technical issue it does affect everybody who will come into contact with the criminal justice system and it is unfortunate that more comments were not received. That being said, the responses that were received contained considerable analysis and detail.

The consultation deliberately addressed the most sensitive elements of the new law, as these were the areas that would benefit most from a diverse range of views.

Notes on the submissions

As the most challenging areas were highlighted for review it is not surprising that the comments from practitioners in law were not as supportive as they could have been, although it has been difficult to properly reference them as they mostly took the form of suggested amendments to the Law and queries on the drafting of individual articles rather than answers to the questions that were asked. These points are reflected in the responses to the consultation and a detailed point-by-point response to the Law Society is appended to this consultation response.

Balancing the points that the practitioners have made is the input into the development of the law outside of the consultation from the Attorney General and legal advisors, together with policy officers, a defence representative and local judges. Their support for the changes is based on their opinion that the criminal justice system needs to keep pace with other jurisdictions in both effectiveness and its support for victims and witnesses.

The suggestion has been made by the Law Society that this is *'a document driven by Prosecution-minded draftsmen'*, and in the same vein Advocate Jowitt considers that the Law introduces elements from English Law that were adopted there *'as part … of a continuing political drive to increase conviction rates'.*

This is not the case. While the Attorney General and the Law Officers have been involved in the development of the Law as part of the 'Criminal Justice System Board', that Board also has representation from legal practitioners who act as the defence in criminal cases, as well as judges, who have no interest in increased convictions rates, save to avoid hopeless cases taking valuable court time.

The Law outlines its intentions in the second article, "*The overriding objective of this Law is to ensure that cases in criminal proceedings are dealt with justly"*. The remainder of the first part of the Law is primarily dedicated to describing what that means in a manner that, it is hoped, will be clear and intelligible to a layman. The description of justice as the overriding objective is not simply decorative, it has a very real meaning in law and the courts will be required to apply the legislation in a way that gives effect to that intention.

Finally, it is worth noting that the Human Rights of the defendant have been considered by the Law Officers in detail and the Law has been found to give them sufficient consideration. Beyond the issues raised in the questions and above, Advocate Jowitt objected to the inclusion of Articles 2 to 9, which outline the objective of the Law and the duties of participants in the process as they struck him *'as having no place in statute',* and he goes on to say that *"It is or should be obvious to everyone what the purposes of the criminal justice system are, what the role of counsel is, and what the role of the judiciary is and we do not need a statute to state the long-established obvious".*

These matters are certainly obvious to legal practitioners, as they are to the Board that conceived the legislation. However, the roles of the parties and the interaction between them might not be so obvious to the victims and witnesses, nor, more importantly, to the defendants in criminal cases, who as noted above have every right to defend themselves. The public also has a right to know, broadly speaking, what a Law made in their name is intended to do, and there is a general principle of accessibility and readability in modern law drafting where this does not conflict with the primary requirement to be clear and precise. Much modern legislation now includes 'descriptive' elements, both to explain the meaning to lay people and to indicate to a court what the legislation is fundamentally intended to achieve.

The submission from Mr Gosselin concerns only the management and selection of juries, and it is critical that the consultation does not devote more time to recognising the importance of the jury trial in Jersey's constitutional history. Most of his concerns are outside of the scope of the consultation, although his concern about the retention of what he sees as the arbitrary division between offences triable by jury and those triable by the Bailiff and Jurats has been noted and is being given consideration.

Professor de Than's contribution is lengthy and valuable, although it must be noted that it ranges outside of the scope of the consultation itself. The points she raises in respect of witness and jury protection, appeals and reporting are being considered but, as she acknowledges, could not be included in the Law itself at this point.

The submission from the Police is useful and supportive of many of the elements addressed, which reflects their input in the development phase. Where queries are raised these tend to be about why the Law has not gone further in some areas. It is obvious that Police process will be directly affected by the new Law, and so their opinion is given considerable weight. However, this is not a Law intended to facilitate prosecutions but to achieve the aims of justice, and so the contrary opinions must also be considered, and a compromise has been sought.

Changes in the Law before completion

The Law has now been lodged and is scheduled for debate on 16th January 2016.

The Law has been amended following the consultation as part of the normal development process, and a number of changes have been made, partly in reference to the comments made by consultees and partly in response to further work and developments.

The changes have primarily sought to expand and clarify areas of the Law, as well as to re-order paragraphs within Articles and reorder the Articles themselves to give a more natural flow and to allow a lay reader to read clearly in each section from the general principle, to detailed rules, to sanctions for not complying.

As noted in the introduction, for a technical analysis it is possible to compare the Law as it was consulted on with the Law as it was lodged.