

Department for Community and Constitutional Affairs

Title of Consultation: New criminal procedure legislation

Summary:

Criminal procedure legislation in Jersey has not kept pace with developments in criminal justice practices here and elsewhere in the British Isles. It is essential that practice in the criminal courts is underpinned by a legal framework that enables the courts, public bodies and the legal profession to deliver just outcomes for defendants and that protects the interests of victims and witnesses.

The purpose of this consultation is to invite comments on the draft Criminal Procedure (Jersey) Law 201- (the “**draft Law**”) before it is submitted to the States of Jersey for debate. The consultation seeks views on particular aspects of the legislation to inform the final stages of the drafting process and ensure that the legislation will provide an appropriate framework for the conduct of criminal proceedings in the 21st Century.

Date published:
24 July 2017

Closing Date:
15 September 2017

Supporting documents attached: Draft Criminal Procedure (Jersey) Law 201-

We aim for a full and open consultation process and aim to publish consultation submissions online. If you do not want your response, including your name and contact details, to be published, please state this clearly in writing when you submit your response together with a brief explanation. We will respect your wish for confidentiality as far as possible, subject to the Freedom of Information law.

Ways to respond

This consultation can be responded to electronically by the following link:

Write to: Criminal Procedure Law Consultation
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Jersey – JE4 8UL

E-Mail: criminalprocedure@gov.je

This consultation paper has been sent to the Public Consultation Register

Introduction

This consultation document will briefly explain the process by which the draft Law has been developed and the objectives and principles that have guided its development. It then highlights aspects of the draft Law that consultees are encouraged to consider and provide written responses to.

This paper is divided into five sections:

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Who should respond?

It is important that any changes to legislation take into account a wide range of views and experience. Therefore, we would like to hear from:

- Members of the public
- Legal Professionals
- Public bodies delivering criminal justice services
- Victim and witness organisations

Background

The criminal justice system (the “CJS”) may affect everyone at some point in their lives, whether as a person suspected of committing an offence or as a victim or witness to a crime or as a member of a jury.

Referring to England and Wales, the Auld Report (2001)¹ highlighted the need to provide a justice system that is, and is seen to be, modern and in touch with local communities, efficient, fair and responsive to all users with modern and effective case management to remove unnecessary delays from the system. Importantly, the report emphasised the need to modernise to ensure cost-effectiveness in difficult financial times.

¹ Auld Report - <http://www.criminal-courts-review.org.uk/>

The modernisation of criminal procedures through ‘invest to save’ programmes in the United Kingdom has resulted in savings and greater satisfaction with the justice system (Leveson, B²). The UK has a cross-department CJS Efficiency Programme established to drive a more efficient, digitally enabled way of working. Most Police forces in the UK now transfer over 90% of case files electronically to the Crown Prosecution Service and all magistrates’ courts are able to receive disclosure and digital case files electronically. This is not the case in Jersey.

In Jersey, the Comprehensive Spending Review³ (the “CSR”) provided a response to the structural deficit forecast from 2011 and the need to match savings in the public sector with any proposals to increase taxation. As part of the CSR, the States commissioned a major review into the criminal justice process and court and case costs. Considerable savings per annum were identified through changes to legal and criminal procedure.

In 2012, the Criminal Justice System Board (the “CJSB”), which is composed of members of the judiciary and stakeholders in the delivery of the CJS determined that a substantial re-write of the law of criminal procedure was required as opposed to a piecemeal approach. Consequently, monies were voted from the Criminal Offences Compensation Fund to be allocated to this important project. The CJSB’s intention was that a new law should be enacted to set out, in one place and in English, the framework of procedures for the conduct of criminal proceedings and provide powers that would enable the criminal courts to deal with cases justly and expeditiously. The intention was also that the new law should contain appropriate powers to enact secondary legislation and rules of court that would supplement the framework and provide flexibility, so that criminal procedures could continue to adapt and take advantage of developments in best practice and new technologies.

The Law Officers’ Department has taken the lead in progressing the objectives identified by the CJSB. Legal Advisers working for that Department undertook detailed research and held discussions with a wide range of stakeholders in the CJS to inform development of the policy reflected in the draft Law. Working closely with the Law Draftsman’s Office and with detailed input from a number of members of the CJSB and the Community and Constitutional Affairs Department, the policy proposals have been developed into the draft Law that is now circulated for consultation.

² Leveson, B. 2015: Modernising Justice Through Technology

³ States of Jersey website, accessed from 20 July 2017

<https://www.gov.je/Government/Pages/StatesReports.aspx?ReportID=397>

The draft Law circulated for consultation is not the finished article. It is intended that the responses to this consultation will help to ensure that the draft is further developed prior to it being lodged before the States Assembly. The Minister for Home Affairs intends that the draft Law should be lodged before the Assembly before the end of 2017, with a view to it being debated early in 2018.

2. Current Legislative Position

The laws that govern procedures in the criminal courts are in need of urgent replacement and modernisation.

The main area of concern is the *Loi (1864) Réglant la Procédure Criminelle* (the “**1864 Law**”). Written in French, this is still the principal piece of legislation governing the conduct of criminal proceedings, but it was written for a different era of criminal justice.

The other legislative provisions setting out criminal procedures have been compiled in a piecemeal way over a considerable period of time and have seen little recent modernisation. These other pieces of legislation include the *Loi (1853) établissant la cour pour la repression des moindres délits* the *Loi (1864) concernant la charge de Juge d’Instruction*, the Magistrate’s Court (Miscellaneous Provisions)(Jersey) Law 1949, the *Loi (1835) sur la procédure devant la Cour Royale*, the *Loi (1862) sur la procédure devant la Cour Royale* and the Honorary Police (Jersey) Law 1974.

Jersey has a unique and effective CJS, supported by able and committed public servants and a legal profession that is passionate about delivering justice for islanders. While there are many criminal procedure practices that are worthy of preservation, the antiquated nature of the existing legislation presents a number of challenges to the delivery of justice in the 21st Century and is a barrier to the modernisation of the CJS as a whole.

3. Objectives of the draft Law

The draft Law would replace the 1864 Law and a number of other 19th and 20th Century enactments that currently regulate criminal proceedings. This will ensure that legislation concerning criminal procedure and evidence in Jersey supports a CJS that is appropriate today and will be fit for the future.

The draft Law provides that the overriding objective of the new legal framework for the conduct of criminal proceedings should be to ensure that cases are dealt with

justly. This means that Jersey's criminal procedures should uphold and respect the rights of defendants, but also safeguard the wellbeing of victims and witnesses.

The draft Law is designed to ensure that all those involved in the CJS can participate effectively in criminal proceedings that are conducted in a way that is, so far as is compatible with this objective, expeditious and efficient.

Unlike in the 19th, or for much of the 20th Century, the majority of offenders are now dealt with by the Magistrate's Court, with fewer defendants facing more serious allegations in the Royal Court. However, where cases pass between the Magistrate's Court and the Royal Court it is vital that both courts have the powers they need to deal with cases justly and expeditiously. The draft Law aims to support a cohesive criminal courts system that ensures that effective case management takes place at an early stage and that proceedings can be managed and transferred to the appropriate court for trial and sentence as efficiently as possible.

The need for expeditious and efficient criminal procedures is underpinned by the contents of Articles 5 and 6 of the European Convention on Human Rights (the "ECHR"). By virtue of the Human Rights (Jersey) Law 2000 (the "HRL") these Articles are enforceable in Jersey and the criminal courts and other public authorities involved in the criminal justice system are required to act compatibly with them.

In particular, Article 5(3) of the ECHR sets out that:

Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

Further, Article 6(1) of the ECHR states:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

4. Summary of contents

The draft Law contains thirteen Parts and six Schedules⁴:

Part 1 contains provisions concerning the interpretation and application of the draft Law.

Part 2 sets an overriding objective to ensure that cases in criminal proceedings are dealt with justly. This includes acquitting the innocent and convicting the guilty, dealing fairly with both the prosecution and defence and respecting the interests of witnesses, victims and jurors. It obliges participants and the court to further this objective.

Part 3 requires the courts to further the overriding objective by actively managing cases in criminal proceedings. This includes the early identification of witnesses, monitoring the progress of cases, discouraging delay and making use of technology. It provides the courts with wide-ranging powers for this purpose.

Part 4 provides that criminal proceedings may only be brought by, or on behalf of, the Attorney General. Part 4 introduces Schedule 1 to the draft Law, which concerns the role of the Attorney General and the Court of Appeal in the quashing of a person's acquittal and arrangements for retrial. Part Four also introduces the Attorney General's power to initiate proceedings directly in the Royal Court, where the Attorney considers this is justified.

Part 5 specifies the functions and jurisdiction of the Magistrate and details the maximum penalties which may be imposed by the Magistrate.

Part 6 explains how proceedings in the Magistrate's Court should function. This includes new provisions facilitating the transfer of proceedings between the Magistrate's Court and the Royal Court where that is appropriate in view of the gravity of an offence. These provisions are designed to speed up the process of disposing of cases by ensuring they can always be dealt with in the most appropriate venue. This part also gives the Magistrate's Court powers to correct mistakes and make provision in respect of appeals.

Part 7 details how proceedings in the Royal Court should function. Powers are included to amend indictments and send cases back to the Magistrate's Court.

⁴ Schedule 2 has yet to be populated. It is intended to contain a list of offences where, contrary to the general rule, a spouse or civil partner may be compelled to give evidence for the prosecution in criminal proceedings against their spouse or civil partner. The background to this is explained in Part 5 (3) of this document.

Provision is also made as to when a trial will be held in the Royal Court before a judge and jury or before a judge and jurors.

Part 8 makes provision regarding preparatory and pre-trial hearings between indictment and the start of a trial. The Bailiff is able to make rulings on the conduct of the trial which bind the parties until the end of trial. These provisions have been consolidated into the draft Law with few amendments and are taken from the Police Procedures and Criminal Evidence (Jersey) Law 2003.

Part 9 makes new provision in relation to juries and jury selection. This includes the provision that all persons over the age of 18 and under the age of 72, unless exempt or disqualified for a particular reason, are eligible to sit as a member of a jury. The procedures for jury selection are simplified and there are provisions to ensure the good conduct of the jury. These provisions include powers for the court to order the surrender of electronic equipment by jurors while they are sitting as a jury. Later parts of the law protect jurors from intimidation, threats or harm. Schedule 3 of the draft Law prescribes the offences and penalties under this Part.

Part 10 outlines a number of miscellaneous procedures in Magistrate's Court and Royal Court. These include provisions to require and enable the criminal courts to put special measures in place to assist children and vulnerable witnesses to give evidence. This Part also contains a statutory framework for the disclosure of unused material and provision for the filing of defence case statement, which are intended to enable the parties to identify the main issues in proceedings before trial and reduce costs.

Part 10 also contains provision prohibiting a defendant charged with certain offences from cross-examining a witness to those proceedings in certain circumstances. These provisions will protect vulnerable witnesses, including in sexual offence cases.

Part 10 also makes provision for defendants to be heard through television links and so that, where a defendant does not attend for trial, the trial may in some cases take place in a defendant's absence.

Part 10 also sets out the process for discontinuance or withdrawal of proceedings in the Magistrate's Court and Royal Court.

Part 11 makes provisions so that the defence, the prosecution, and in some cases, a third party may be required to pay the costs of another party to proceedings where those costs are incurred as a result of an unnecessary or improper act or omission by that party.

Part 12 establishes the Criminal Procedure Rules Committee. The new Committee is given the power to make criminal procedure rules that will govern the practices and procedure to be followed in criminal proceedings within the framework of the draft Law. The Committee will be chaired by the Bailiff and include persons involved in a number of aspects of the delivery of the CJS.

Part 13 includes miscellaneous provisions and introduces Schedule 5 of the draft Law, which amends the Police and Criminal Evidence (Jersey) Law 2003. Schedule Five makes provision for the admissibility of statements not made in oral evidence in criminal proceedings. Schedule 5 also makes new provision in relation to the admission of bad character evidence, including where this may show the defendant has a propensity to commit the type of offence the defendant is charged with.

5. Conclusions and questions for consultation

While consultees views are welcome on any aspect of the draft Law, views are sought on six specific areas of the draft Law and on a seventh issue, which is not substantially effected by the draft Law, but where consultees comments may help to inform future policy development. The topics addressed in the consultation are:

1. Juries
2. Disclosure
3. Compellability of spouses and civil partners
4. Special Measures
5. Hearsay
6. Bad character
7. Trials – children and young people

1. Juries (Part 9 of the draft Law)

Age limits and exemptions

Jury service is an important civic duty. It is important that as many people as possible are able to make themselves available for jury duty with as few exceptions to this general rule as possible so that a jury represents a cross section of the community.

Under the 1864 Law, the jury panel is drawn from people registered with the parish to vote who are aged between 25 or over and under 65. In England and Wales, people over the age of 18 and under 70 are eligible for jury service, with consideration being given to extending the upper age limit to 75. The new Law proposes that everyone over the age of 18 and under the age of 72 should be required to undertake jury service if called up to do so, with a limited set of exemptions or disqualifications that reflects the circumstances where it would be inappropriate or impracticable for a person to undertake jury service.

These age limits would reflect changes in the demographics of the community, with more people living longer and more active lives. The proposed upper age limit is in line with that of Honorary Police Officers and Jurats. Research suggests that the pool of jurors currently available to serve at any one time is in the region of 34,000 (approximately 34% of the population). If the age range were to broaden, this figure would increase.

A present, the exemptions from the requirement to serve on a jury are listed in the 1864 Law. This list is broad and contains occupations that are no longer appropriate in Jersey, including railway workers and lighthouse keepers. It is proposed that the new list of exemptions will be narrowed and this is reflected in Article 61 of the draft Law. Increasing the range of people who are eligible for jury service may mean that the membership of each empanelled jury is more representative of the community the members are drawn from.

Notwithstanding the above, Article 63 of the draft Law preserves the Viscount's power to exempt a person who has been summoned from jury service on a case by case basis, including where the requirement to serve would result in undue hardship for the individual.

Reserve Jurors

Articles 64 and 66 of the draft Law introduce new provision for reserve jurors. These Articles propose that, in addition to the twelve jurors selected to form the jury, two further 'reserve jurors' should be called to serve. These reserve jurors will be subject to the same duties and obligations as the initial twelve jurors and can be called on by the Royal Court to replace any juror who is discharged at any time up to the commencement of the Bailiff's summing up of the case. At that point, if not required, any remaining reserve juror would be discharged. The purpose of calling reserve jurors would be to avoid the substantial cost and delay that can result from a retrial in circumstances where the number of jurors fall below 10.

Research

A jury's deliberations should not be influenced by third party comments on social media or other web-based research. Currently, the 1864 Law makes it an offence to communicate with others about the trial, but does not reflect the range of methods by which people communicate and receive information today. By comparison, in England and Wales, there are provisions to restrict jurors' use of mobile phones and the internet to research issues arising in a trial.

The draft Law will help to ensure that the jury remain true to their oaths and affirmations, and decide the case only on the evidence they hear in court. In particular, Article 70 of the draft Law provides that the Bailiff may order that members of the jury surrender their communication devices while they are fulfilling their duties where that is in the interests of justice and proportionate. It would be

an offence for a member of the jury to fail to surrender a device. Further offences that may be committed by jurors are then provided for in Schedule 3 to the draft Law. These include an offence that may be committed where a juror intentionally searches for information that is relevant to the case on-line.

Verdicts

The 1864 Law provides for two methods by which the Jury may deliver a verdict. If it is unanimous verdict it is delivered by the foreman. If not, each juror is required to approach the Bailiff and the Judicial Greffier in turn to give his or her individual decision. The latter approach is time consuming in cases where there are several charges on the indictment as the jurors each approach the Bailiff with their decision on each charge one at a time. It also means that the jurors themselves may not know whether they will deliver a majority verdict on each charge, in particular because a juror may change their mind between the retiring room and reaching the Court.

The 1864 Law requires that a verdict, whether of guilty or not guilty, should be agreed by a consensus of ten jurors, unless there are only ten on the jury when the required number is nine. Where the required number of jurors cannot agree on a verdict of guilt or innocence, this might be described as a 'hung jury'. Under the current law, a hung jury results in an acquittal, because there is no provision for the prosecutor to require a retrial. This means that a defendant is irrevocably acquitted where a jury is split 9-3 or 9-2 in favour of conviction.

Article 71 of the draft Law makes new provision with regard to the delivery of verdicts. In particular, it includes a new provision regarding hung juries. Under Article 71, where neither a unanimous nor majority verdict can be agreed by the required number of jurors, the prosecution will be entitled to commence a re-trial in respect of the offence. If the prosecution does not wish to bring a re-trial, the defendant would be discharged from the proceedings. Under the draft Law, a

majority verdict may now also be delivered by nine jurors where there are either 10 or 11 jurors remaining.

Questions on Juries

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?
2. Would you be in favour of further increasing the upper age limit for jury service to 75 years of age?
3. Do you agree with the list of exemptions and disqualifications from jury service listed in Article 61?
4. Do you agree that reserve jurors should be sworn for all trials?
5. What are your views on the new powers and offences to restrict a jurors' use of the internet to research a case?
6. Do you agree that the prosecution should have the right to commence a retrial where there is a hung jury?

2. Disclosure (Part 10 – Articles 78-83)

At present the requirement for the prosecution to disclose material to the defence is not governed by statute. In 2006, the Attorney General published guidelines for prosecutors and the police on the approach to unused material (the “**2006 Guidelines**”). The 2006 Guidelines are on the Law Officers' Department's website⁵. Under the 2006 Guidelines, material needs to be divided between:

- a. used material – evidence which is likely to assist in proving or supporting the prosecution case;
- b. unused material divided into two categories:

⁵ Attorney General's [Case Management and Disclosure Guidelines](#) - August 2006

- i. material which tends or may tend to undermine the prosecution case or be relevant to the defence, which needs to be disclosed to the defence; and
 - ii. material which is irrelevant;
- c. sensitive material which could fall into any of the previous three categories but is operationally so sensitive that it may be necessary for it to be withheld from the defence (with the sanction of the court if it is relevant).

Current practice in Jersey is for the prosecution to list the relevant material in schedules and serve the schedules on the defence, so that the defence can see what is potentially available. The defence may then request access to listed items.

However, at present, a defendant facing a criminal charge has an absolute right to silence. A defendant may choose to explain their actions, or give their version of events, but they cannot be compelled to do so. This can mean that the prosecution will not know what defence, if any, is to be put forward by a defendant until a trial commences. In some cases this wastes the prosecution's resources, because they are forced to prepare to address issues that may not be in dispute and defences that might not be put forward at trial.

In England and Wales the position concerning disclosure by the prosecution and the defence is governed by Part 1 of the Criminal Procedure and Investigation Act 1996 (the "**CPIA**") (see particularly section 3 to 5). The CPIA makes specific statutory provision about the extent of the disclosure obligations on the prosecution and on the defence, including a requirement that a defendant who pleads not guilty serve a defence case statement. Under the CPIA, the initial disclosure of unused material by the prosecution is a pre-requisite for a defendant being obliged to serve a defence case statement. The CPIA then includes a continuing obligation on the

prosecution to disclose relevant material after the defence case statement is served, which means the disclosure decision may need to be revisited and refined in light of any defence case statement, resulting in some cases in further disclosure.

Articles 79 to 83 of the draft Law put the prosecution's disclosure obligations on a statutory footing, with the extent of the obligation on the prosecution remaining similar to that set out in the 2006 Guidelines and the CPIA. However, Article 80 of the draft Law introduces a new obligation for the defence to give a defence case statement setting out the particulars of the defendant's defence if he or she has entered a plea of not guilty. The requirement to submit a defence case statement will reduce unnecessary pre-trial burdens on the prosecution preparing to address issues that are not in dispute and allows the courts to concentrate time and effort on the real issues in the proceedings.

It is important to note that the prosecution's fulfilment of its initial duty to disclose unused material under Article 79 of the draft Law is a pre-requisite for the defence obligation to provide a defence case statement. There is also a specific continuing duty in Article 79(4) of the draft Law on the prosecution to give further disclosure of relevant information until the proceedings are concluded. This duty would apply where it becomes clear that additional information is relevant having regard to the content of the defence case statement.

The defence case statement will not interfere with the right to silence at the police station. Further, if a defendant is un-represented, the court may dispense with the requirement to provide a defence case statement altogether. A defence case statement may be amended before trial. However, where a defendant has legal representation and enters a not guilty plea, there may be consequences for the defendant if they fail to serve a defence case statement or depart from the contents of the statement at trial. In particular, such inferences may be drawn by the court, as appear proper in deciding whether a defendant is guilty of the offence concerned.

The provisions described above are underpinned by the provisions in Parts 2 and 3 of the draft Law concerning the overriding objective and active case management, which are also intended to support the just and expeditious resolution of criminal proceedings.

Questions on disclosure

7. Do you agree with the balance of obligations between the prosecution and defence with respect to disclosure set out in draft Law?
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 be a deadline following which a defence case statement may not be amended before trial?

3. Compellability of spouses and civil partners (Part 10 – Article 84)

Currently, the *Loi 1908 au Sujet des Temoins et Informateurs* (the “**1908 Law**”) contains provisions relating to the competence and compellability of witnesses in criminal proceedings as well as in other types of proceedings.

The 1908 Law provides that, in most cases, a spouse or civil partner cannot be forced to give evidence for the prosecution against his or her spouse or civil partner who is a defendant in criminal proceedings. However, there are some exceptions to this rule, including when the offence involves an assault or is of a sexual nature. It is important that exceptions should exist, particularly in cases of domestic violence where a victim might be unwilling to give evidence without being compelled to do so.

The draft Law would replace the 1908 Law in respect of criminal proceedings. Article 84 of the draft Law currently makes very similar provision with respect to the compellability of a spouse or civil partner to that found in the 1908 Law. However,

consideration is being given to developing the draft Law to include a wider range of offences that would give rise to an exemption from the general rule that spouses and civil partners cannot be forced to give evidence. The wider range of offences would be drawn from the Attorney General's Code of Practice on the decision to prosecute, and in particular from the Appendix to the Supplementary Guidance on the decision to prosecute domestic abuse⁶. It is intended that an expanded list of offences would be added as Schedule 2 to the draft Law, which is currently left blank in the consultation draft. The purpose of extending the list would be to ensure that it will be possible to compel a spouse or civil partner to give evidence in relation to the prosecution of any offence that may be used to tackle domestic abuse.

Consideration could also be given to expanding the exemption to cover some serious road traffic offences, where it might otherwise be unclear who was driving a vehicle at the time it is alleged that an offence took place.

Question on compellability

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?
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?

4. Special measures (Part 10 – Articles 88 – 89)

The draft Law provides the courts with express powers to permit special measures to be put in place to enable witnesses to participate effectively in criminal proceedings.

⁶ Appendix accessible from the Law Officers' Department [website](#), accessed 21.07.17

There are already provisions in the Criminal Justice (Evidence of Children) (Jersey) Law 2002, that enable the courts to put special measures in place to enable children and vulnerable adults to give evidence in criminal proceedings. These measures may include pre-recording video evidence and giving live evidence via a television link. In addition, the Royal Court has used its inherent jurisdiction to put special measures in places to assist people to give their best evidence in criminal proceedings, including allowing a victim or witness to give evidence from behind a screen so as not to be able to see the defendant.

Notwithstanding that the courts already have the ability to put some special measures in place, it is important that the draft Law contains clear statutory provisions facilitating the use of special measures so as to provide greater certainty for the participants in proceedings about when special measures will be made available.

Articles 88 and 89 of the draft Law provide that where a witness is a child, disabled or vulnerable due to fear or distress then the courts must determine whether any special measures that are available would be likely to improve the quality of the witness's evidence. Where a measure (or more than one) is available and would in the court's opinion be likely to improve the quality of the witness's evidence then the court must order that the measure, or a combination of measures, is put in place. The draft Law is not specific about the types of special measures that may be put in place, which may change over time. However, special measures might include holding all, or part of the proceedings in private and the use of an intermediary to support the witnesses with understanding the process and with communicating.

Question on special measures

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.

5. Hearsay (Schedule 5)

In Jersey, as in many common law jurisdictions, hearsay evidence (i.e. evidence about statements made out of court by a person that might be relied on to prove a matter) is normally inadmissible in criminal proceedings. However, there are a number of exceptions to this general rule.

Statutory provision is currently made for the admission of hearsay evidence in criminal proceedings in Part 8 of, and Schedule 4 to, the Police Procedures and Criminal Evidence (Jersey) Law 2003 (“PPCE”).

Although some provision is made in Part 8 of PPCE, those provisions contain a number of deficiencies and omissions, which are evident when compared with the detailed rules for the admission of such evidence provided in Chapter 2 of Part 11 of the UK’s Criminal Justice Act 2003. For this reason, paragraphs 3 and 4 of Schedule 5 to the draft Law introduce a number of additions and amendments to Part 8 of PPCE. The relevant provisions in the draft Law for consultation, which are still being developed, provide more comprehensive guidance to the courts and participants in criminal proceedings on when hearsay evidence should be admitted.

Question on hearsay

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

6. Bad character (Schedule 5)

The law concerning the admission of bad character evidence is currently set out in the 1908 Law. In criminal proceedings bad character evidence is evidence of a person’s misconduct, or low character other than evidence that has to do with the alleged facts of the offence upon which the defendant is charged, or misconduct in connection with the investigation or prosecution for that offence.

Article 2(2)(c) of the 1908 Law provides that if called as a witness, the defendant shall not be required to answer a question tending to show that he has committed or been charged with, or that he has been convicted of, an offence other than that with which he is then charged, or that he is of bad character. There are limited exceptions from this general rule, including where the defendant seeks to rely on his or her own good character in proceedings.

The interpretation of these exceptions has been considered in a number of cases and by reference to English precedent or guidance where that is available. Pursuant to Jersey case-law, it is not currently possible to admit evidence of a defendant's previous similar, but on the facts unrelated, convictions as evidence of the defendant's propensity to commit offences of the nature of which they are accused.

In England and Wales, the enactment that makes provision in respect of the admission of bad character evidence is the 2003 Act. Like the 1908 Law, the 2003 Act limits the admission of evidence in relation to the defendant's bad character. However, the circumstances in which evidence of bad character can be introduced under the 2003 Act are broader than those applying under the 1908 Law. In particular, under the 2003 Act evidence of a defendant's previous convictions can, in certain circumstances, be introduced to demonstrate a propensity to commit the offence in question. While the extent to which such evidence may be admitted is a matter of judicial discretion, the English courts have developed principles about the use of that discretion that could be employed here.

It is in the interests of justice to enable relevant evidence of a defendant's propensity to commit a type of offence to be admitted in *some* cases. Whether such evidence should be admitted in any particular case should be a matter for the court, which will be best placed to weigh the risks that this might result in a miscarriage of justice in any particular case.

Paragraph 5 of Schedule 5 to the draft Law inserts a new Part 9A into PPCE, concerning evidence of bad character. This new provision would replace the existing provisions of the 1908 Law in relation to criminal proceedings with new provisions.

In order to enable the courts here to draw on case law from England and Wales, these new provisions are closely modelled on those in the 2003 Act.

Question on bad character

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

7. Trials – children and young persons

The Youth Court has been developed to ensure children understand and can engage in the Court process fully. Cases are heard by a Magistrate and two Youth Court Panel Members who are not legally trained judges, but have experience of raising or working with children. Robes and gowns are not worn by the Magistrate or Advocates. The Panel do not sit on a raised court bench, but on the same level as other participants, including children.

The Youth Court ensures that only those directly involved in the case are present during proceedings. Accredited media representatives can be present but cannot report the identity of those appearing.

Children accused of offences sit close to their parents or guardians during hearings. The Youth Panel meet regularly for training and to consider matters relevant to Youth Justice and child welfare.

By working in this way the Youth Court is compliant with the spirit and requirements of Article 40 of the United Nations Convention on the Rights of the Child (“**UNCRC**”) and Article 6 of the ECHR which lay out the special considerations jurisdictions must make when children are in the CJS and to ensure they receive a fair trial.

Where a child is jointly charged with an offence and the other person charged is an adult, at present, the case must usually be heard by an adult court, the rationale being that the case must be tried in one court. Article 28(4) and (5) of the draft Law

would affect that position, in that it would allow the Magistrate to direct that a defendant who is charged jointly with an adult be tried in the Youth Court, where it would not be in the interests to send the child to be tried in the Royal Court and where the penalty for the offence would not exceed the Magistrate's jurisdiction.

It should be noted that it is rare for children to appear in the Jersey Royal Court or Magistrate's Court and the vast majority of children who appear in court facing criminal charges do so in the Youth Court. The reasons for this are that the sentencing powers of the Youth Court cover the maximum sentence which can be imposed on a child under the Criminal Justice (Young Offenders) (Jersey) Law 2014 in the majority of cases. It is only where the child is jointly charged with an adult (rare) or where a child is charged with an offence which if an adult would result in a sentence of 14 years or more or life imprisonment; or where the child is 17 years old and convicted of motoring offences where an adult would be imprisoned for more than 12 months that the Youth Court's sentencing powers would be insufficient to deal with a matter.

It might be argued that to protect the rights of the defendant under the ECHR and UNCRC, the Youth Court should be able to try all cases where a child is charged, regardless of the gravity of the offence.

Question on the trial of children and young people

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 all 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.

(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.

Summary of Consultation Questions

Questions on Juries

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?
2. Would you be in favour of further increasing the upper age limit for jury service to 75 years of age?
3. Do you agree with the list of exemptions and disqualifications from jury service listed in Article 61?
4. Do you agree that reserve jurors should be sworn for all trials?
5. What are your views on the new powers and offences to restrict a jurors' use of the internet to research a case?
6. Do you agree that the prosecution should have the right to commence a retrial where there is a hung jury?

Questions on disclosure

7. Do you agree with the balance of obligations between the prosecution and defence with respect to disclosure set out in draft Law?
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 be a deadline following which a defence case statement may not be amended before trial?

Question on compellability

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?

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?

Question on special measures

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.

Question on hearsay

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

Question on bad character

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

Question on the trial of children and young people

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 views are sought on whether:

- (c) In order to ensure that all 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.
- (d) 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.

Feedback on this consultation

We value your feedback on how well we consult or seek evidence. If you have any comments on the process of this consultation (as opposed to the issues raised) please contact Communications.Unit@gov.je