From:

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Observations on Draft Criminal Procedure (Jersey) Law

Parts 2-3

Articles 2 to 9 strike me as having no place in a statute.

Moreover certain aspects of these Articles are very troubling since they run contrary to quite basic principles.

I have the following observations:

1. 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.

2. Moreover it seems to me surprising that it might be thought appropriate for the legislature to tell a supposedly independent judiciary what its duties are, (see Article 7 for example). Judges surely do not need a statute to tell them that they have a duty to manage the business of their court and that the good administration of justice informs that process.

3. I am also troubled by the suggestion, (Article 7(e)) that it is for the court to decide how evidence should best be presented. That is not the judge's role, it is counsel's role and always has been. Counsel have the task of preparing and presenting their cases and must be trusted to do so in accordance with what in their professional judgment is the most appropriate manner in the interests of their case, (be that prosecution or defence). Of course the judge has a duty to rule on legal questions, forbid improper questions and so forth – in short he has a duty to act as referee, ensure the rules are complied with, ensure the business of the court is conducted appropriately and effectively, and 'hold the ring' between the parties, (which has always been his role), but Article 7(e) appears to go much further than that and empowers the judge effectively to descend into the arena and dictate to counsel how to conduct his case. That seems to me both improper and undesirable, especially where presentation of a case is often so much a matter of the advocate's professional judgment and personal style.

4. Article 4(1) would seem to be wrong when read in conjunction with the overriding principle in Article 3(1)(a) because it appears to suggest that defence counsel's duty is to assist in convicting the guilty. This could not be more ill-conceived. All too frequently defence counsel will know, applying his own common sense and forensic judgment, that his client is either guilty as charged or guilty of something close to it. Nonetheless, if having advised his

client he is instructed that the Defendant is nonetheless not guilty then it his solemn professional duty to strive fairly, fearlessly and within the rules of evidence and the court for an acquittal.

5. Equally it is not the role of the judiciary to deal with a case with a view to convicting the guilty and acquitting the innocent. That again entails the judge descending into the arena. The task of the judiciary is to ensure a fair trial for both prosecution and defence – no more, no less.

6. In so far as advocates demonstrate a lack of understanding of the rules of court, or the rules of evidence, or conduct themselves in a manner inappropriate to the criminal justice system then those are things to be dealt with in the first instance by the judge, and thereafter, if appropriate, by the advocate's professional body. We do not need a statute to achieve that.

7. Article 9 contains provisions which appear to suggest that hearings can effectively take place in private, (by telephone, in writing etc – and the words 'conduct a hearing by such means'). And that a judge can give directions without a hearing at all. There may be occasions when a direction is so uncontentious or trivial, (for example a change in a date), that a hearing is perhaps unnecessary and the matter can properly be dealt with administratively, but such eventualities should be wholly exceptional and then only in the most trivial circumstances. To legislate in this manner, however, takes the matter much further than the trivial and appears to provide for any directions hearing to be conducted in private at the judge's discretion. Whilst one would hope that judicial discretion would operate appropriately it does not seem to me wise to legislate in quite this way.

8. What reasons have arisen in practice which are said to justify Article 9(3) to (7)?

9. In summary for Articles 2 to 9 – they contain nothing that needs enacting, and certain things which positively should not be enacted.

10. What is the point of Article 10? Unless there is a problem in Jersey with criminal courts adjourning matters for overly long periods, (which there is not), then sub-paragraphs (1) and (2) are otiose. Sub-paragraph (3) is sensible. Sub-paragraph (4) is entirely otiose – no one has ever doubted, and it is the case, that a court can grant a defendant bail when his case is adjourned.

Part 5

11. Article 16(2) –why, if the Magistrate imposes a sentence on a defendant who is already serving a sentence imposed for another offence on a previous occasion is her/his power limited in aggregate to 12 months? I can see that such should be the case when sentencing for several offences at the same time, but not in this situation. Take as an example a serving prisoner who commits an assault on a fellow inmate and appears to be sentenced when he has 6 months of the sentence he is then serving still to run. Why should the Magistrate not have power to impose, for example, a 9 month prison sentence for the assault to run either concurrently to the sentence already being served or even consecutively to it? Whether it is

appropriate to do so surely turns on the circumstances of each individual case and ought to be a matter for judicial discretion?

Part 7

12. Article 46(2) – has the time not come to dispense with terms like 'crime' and 'delit' (which no one in practice any longer uses), and use the term 'customary law offence' instead?

13. Article 46(3) – again, no one in practice uses the word 'contravention' – has the time not come to refer to 'statutory offence'? Unless historical expressions aid an understanding in the present age then they serve no helpful purpose.

14. Article 46(4) – I would suggest that the phrase 'nature and gravity of the offence' should read "nature and gravity of the alleged offending," and I do so because an indictment may contain both statutory and common law offences, and thus the judge should be able to consider the totality of the conduct alleged in assessing the appropriate trial forum. This Article might also usefully include a consideration not only of the nature and gravity of the offending but of the "interests of justice" – thus it might read, disjunctively: "(a) the nature and gravity of the alleged offending; (b) the interests of justice." This allows a rather wider exercise of discretion and would for example permit a judge to direct a jurat trial where the defendant's record, conduct, or the risk he is able to pose to a jury might serve to de-rail a jury trial or render it inherently unsafe or unmanageable from a security viewpoint, (eg Curtis Warren).

Part 10

15. Article 77 – this represents a new departure for Jersey criminal law, and has been lifted from English procedural law. What is said to be the justification for introducing it here? The system is open to abuse by the prosecution because it is easier to discontinue than it is properly to address the evidence and accept that the decision to charge was the wrong one. The temptation to discontinue rather than take the bull by the horns and offer no evidence is obvious, as is the temptation to discontinue rather than tell a disappointed victim of crime that the case is hopeless. It introduces into the criminal justice system a degree of uncertainty for defendants and a lack of closure. The defendant's right to insist that proceedings continue – presumably with a view to securing an acquittal - is hardly an adequate safeguard against that. Not all developments in English criminal procedure are good ones – this is one of them. Police and prosecutors should be expected to do their jobs properly, only charge if and once they have sufficient evidence to do so, and if, having charged and put the matter in the court system, they realise the case is unsustainable they should offer no evidence.

16. Article 79(4) – as matters presently stand at customary law I think it is right to say that the Crown's duty of disclosure continues until the exhaustion of any final right of appeal – this provision limits that existing duty to the end of the trial. I doubt that can be correct when I consider both Jersey and English cases in which material disclosed after conviction has led to the quashing of convictions on a subsequent appeal.

17. Article 80 – I personally am uncomfortable with the concept defence disclosure, (which is not to say it isn't a good idea), notwithstanding that most of my criminal work in Jersey has been prosecuting. Defence case statements are another novelty from England where their introduction followed on from the initial decision to qualify the right to silence from the moment of arrest. The Jersey right to silence on arrest remains unqualified, although the PPCE Preparatory Hearing procedure, (preserved in this draft law), did introduce defence case statements and adverse inferences - it would seem by the back door and without any obvious debate on the principle. It seems to me that there has been no proper debate in Jersey at any stage about the right to silence and whether it is appropriate to qualify it at any stage in the criminal procedure process. That is a discussion which ought to be had, given how fundamental the right to silence has always been in our criminal justice system. We need to consider for what reason are we doing this, and what is the public interest which will be served and how?

18. Article 82 – I think this is a step far too far. I can see no justification for the defence having to tell the Crown in advance what witnesses of fact they will call. What is said to be the justification for this provision and what public interest or interest of justice is it said to serve?

Part 12

19. Article 104(1)(f) – I assume this provision deals only with logistical issues about how in practical / physical terms things are proved, and does not purport to invest a committee with power to change the law of evidence?

Schedule 5 – amendments to PPCE 2003

My general observations are these: in a small jurisdiction like Jersey where experience and expertise in criminal law and procedure is necessarily limited, and where knowledge of the laws of evidence amongst advocates is in any event often poor if not missing altogether, maintaining the existing laws of evidence, in their relative simplicity, has much to recommend it. Thus hearsay save for the existing limited exceptions in the PPCE is inadmissible, as is evidence of non-expert opinion, as is evidence of previous bad character save where the defendant has put his character in issue. Previous inconsistent statements, unless adopted as true by the witness, go only to credit. Memory refreshing documents are just that – their content does not become evidence of fact because used to refresh the witness's memory.

If we are to start over-complicating our evidence laws by introducing novelties which came into English procedural law as part – I rather think - of a continuing political drive to increase conviction rates, then we are only likely to render our criminal proceedings more time consuming, more fraught with potential for error, more prone therefore to appeals, and thus more costly and burdensome on the court system. Unless there is some clearly established, and compelling public policy reason for adopting these English measures then not only do we have no need to do so, but we risk creating unnecessary difficulties for ourselves.

In the years that I have practised criminal law in Jersey, (14 years, and a Crown Advocate since 2006 – 10 years an English criminal barrister prior to that), I have seen no need whatsoever to introduce these things to Jersey any more than I saw a need to introduce them in England.

It follows therefore that my thoughts are these:

20. Save for Articles 65 and 66 which preserve the existing PPCE provisions on absent witnesses and business documents I do not think anything positive is to be served by any of the other proposals in Schedule 5 to change Jersey's law of evidence and I am from my own experience not aware of any need, or interest of justice, or wider public interest which justifies the wholesale importation into our law or these English provisions. I urge against adopting them.