

Criminal Procedure Law Sub-Panel

Further questions from the public hearing with the Minister for Home Affairs

The Sub-Panel was unable to ask the following questions during the public hearing with the Minister for Home Affairs on Friday 23rd February. Subsequently, the questions were sent to the relevant department and the following answers were provided:

Article 83 – Duty of prosecution to disclose unused material

1. Article 83, paragraph 3 allows for the prosecution to not disclose unused material if it is in the public interest unless the court orders otherwise. Submissions to the Panel have highlighted that a change should be made whereby the prosecution do not disclose unused material only if the court agrees. Is there any view on this?

It is the Minister's intention to amend this Article in line with the suggestion made by Sir Michael Birt to ensure that it is absolutely clear that the court, on the application of the prosecutor, makes the final public interest decision on disclosure.

- i. What consultation were received on this change to current practices?

The legislation has been developed in co-ordination with the Criminal Justice Working Group, which includes the Bailiff, Magistrate, Viscount and others including a practicing defence advocate nominated to represent the Law Society. Since 2015 Law Society's representative has played a full part in the discussions on the policy reflected in the draft Law, including in relation to defence case statements.

The Law Society has been repeatedly briefed on the legislation. The Criminal Justice Working Group gave presentations to the Law Society on the Criminal Procedure Law in 2015, 2016 and 2017. The requirement to disclose unused material was included in the draft Law for consultation in 2017.

Respondents to the public consultation made some comments of a technical nature in relation to the disclosure of unused material, which have been considered and addressed to the extent necessary. The prosecution requirement to provide disclosure of unused material, together with the defence requirement to provide a DCS is an important part of the package of changes in the draft Law to ensure that the real issues to be determined in a criminal trial are identified at an early stage to ensure the just disposal of the proceedings.

- ii. What is the rationale for this change?

It is important that the prosecution should disclose to the defence that it has material in its possession that it will not use to support the case for the prosecution, but which may assist the defence case or undermine the prosecution case. In many cases more information about the circumstance of the offence will come into the possession of the prosecution, through the police investigation of the case, than may be available to the defendant. A miscarriage of justice could occur if evidence that is relevant is obtained by the prosecution and is not made available to the defendant so that, if appropriate, the defendant can present that evidence to the court.

The purpose of the provision in Article 83 of the draft Law is to codify the existing provision in the Attorney General's guidelines on the disclosure of unused material, so that in future there will be a clear statutory obligation on the prosecution with respect to such disclosure.

2. How does this article impact on the work of informants?

Informants will be protected by the Court's capacity to decide not to release material where that is contrary to the public interest. As indicated already, an amendment is being brought forward to ensure that information will only be withheld where the courts orders that should be the case.

Schedule Three – PPCE Law 2003

3. What is the rationale for widening the evidence of bad character that can be admitted through this law?

The rationale is to achieve more just outcomes. There are numerous examples where jurors who have acquitted a defendant are genuinely shocked to hear of a long list of similar offences which the defendant has committed. This is a particular issue as it gives serial domestic abusers and professional criminals a fresh start with every offence.

4. It has been suggested in submissions to the Panel that the scope of this provision is too wide and could be open to abuse by the prosecution. What consultation was undertaken on this particular matter?
 - i. What was the general consensus from this consultation?

In response to the suggestion that this will be too widely cast, evidence of bad character will be admissible only at the discretion of the Court, and not all previous conduct will be admissible. For instance, if a defendant was charged with indecent assault, and had a history of indecent assaults and other offences such a drink-driving, then the indecent assaults might be seen as relevant but it is unlikely that the drink-driving would be. The objective is to enable the court to be informed if the defendant has a propensity to commit offences of the same nature as those for which the defendant is being tried. The objective is not to provide a full criminal history to sway the court to convict.

This will correct a current unfairness in Jersey law where the defendant's criminal history must remain secret in most cases but the defence can list any offences committed by prosecution witness to raise doubts about their character and likely truthfulness.

In terms of the general consensus, some respondents were supportive, some against and some neutral. On balance the more involved a respondent was with defence work the more suspicious they were of the proposals. The Law Society does not support the change, and its opinion is of interest and is perfectly valid from their own perspective but ultimately it is the voice of one interest group amongst many. In this particular case the Society's advice was not taken, although its position was accepted in a number of other areas.

Again it should be noted that the legislation has been developed in co-ordination with Bailiff, Magistrate, Viscount and others including practicing defence lawyers.

For completeness, it is the Ministers intention to amend Article 82G PPCE as introduced in Schedule 3 to remove the words *'it is evidence that'* from paragraph (1) as per Sir Michael Birt's response to panel.

General Questions

5. Why have committal proceedings in the Magistrate's Court been abolished through the draft law?
 - i. What is the rationale for this decision?

This issue was highlighted by the Law Society which called it a 'fundamental right' in its response to the consultation. Firstly we must recognise that full committal proceedings are not generally understood to be a fundamental right, whether in Jersey or elsewhere.

Committals were introduced in 1864 at a time where cases were brought to the Magistrates Court only by Centeniers who were not legally qualified. The committal process was then intended to weed out any cases that had no merit before a full trial took place. In addition, committals were instituted at a time where there was no provision for bail and there was an incentive to test cases immediately to avoid the accused spending unnecessary time in prison.

Some pre-trial consideration of a criminal case is essential. However, now that the Law Officers Department conducts most prosecutions, the evidence in each case is professionally assessed. Were any cases without merit to proceed the Magistrate and lawyers involved in the case are able to test the evidence appropriately and ask for case to be dismissed or that bail be granted. At present most cases proceed by what is known as a 'paper committal', which involves an exchange of documents between the parties before a decision is made by the Magistrate as to whether to commit the case to the Royal Court for trial.

The new Law builds on this existing practice by making provision so that the venue for trial or sentence is determined by the Magistrate with the assistance of submissions by the parties on the nature and potential penalty that may result from the proceedings. Disclosure will be dealt with under rules of procedure made under the draft Law and by the requirement to disclose unused material and a defence case statement. It is not clear that the new procedure will give rise to any substantial diminution in the defendant's rights.

What is currently known as an 'old-style' committal requires that all evidence that will be submitted by the prosecution be laid out in full in the Magistrate's Court. In the rare cases where the defendant seeks to have such a committal, it could have significant effects on the complainant and witnesses as they may be required to present themselves and give evidence at committal as well as at trial. For this reason the Attorney General will usually consider using his power to initiate proceedings directly in the Royal Court (i.e. without a committal) where the proceedings concern sexual offences and an attempt is made to require an 'old-style' committal.

ii. What consultation was undertaken about this change?

This received the same degree of consultation as the remainder of the Law. The change to the committal process has received little comment as part of the consultation, reflecting perhaps that this is an area where the practice, if not the existing law, has already developed along the lines proposed in the draft Law.