

CONTENTS

| | Page No. |
|--|----------|
| Background | 2 |
| Criminal Evidence Bill | 2 |
| Comments | 3 |
| Responding to the consultation | 4 |
| What happens next? | 4 |
| Bodies to be consulted | 5 |
| Consultation criteria | 5 |
| Appendix 1 – draft Criminal Evidence Bill | |
| Appendix 2 – Explanatory Notes on the draft Criminal Evidence Bill | |

Introduction

This consultation aims to collect views on proposed new legislation which aims to improve and clarify the position in relation to certain evidence in criminal cases.

In the fight against drugs crime and, equally, in relation to other crimes, perpetrators are increasingly making use of electronic communications and technology and often the interception of communications, such as phone messages, has been and will continue to be of assistance in achieving successful outcomes.

An issue has arisen in relation to a recent case which this Bill aims to address.

Background

A criminal case concerning drug related offences was recently heard in the Manx courts. During the course of that case the Prosecution sought to adduce a text message that had been forensically downloaded and which was purportedly from "a client". The message included a request for the supply of drugs.

The Defence asserted that for the Prosecution to adduce the message created an 'implied assertion' that the defendant was a drug dealer and that, in the absence of calling the sender of the message (which, for obvious reasons would generally be impossible) the evidence was hearsay and, therefore, inadmissible.

The Defence relied upon R –v- KEARLEY (No. 1) [1992] 2 AC 228 ("*Kearley*").

The court followed the House of Lords decision in *Kearley*. Accordingly it held the text message was indeed an implied assertion and was, therefore, inadmissible hearsay evidence.

The future inadmissibility of phone messages would cause serious evidential difficulties in the prosecution of drug offences and many other types of criminal offences

As a result of the decision in *Kearley*, the legislation in England and Wales was amended and the position was addressed in sections 114 and 115 of the Criminal Justice Act 2003 (of Parliament) ("the 2003 Act") which form part of Chapter 2 of Part 11 of the 2003 Act.

The Criminal Evidence Bill

Clauses 17 and 18 of the Bill are derived from sections 114 and 115 of the 2003 Act and are intended to address the particular issue of the admissibility of hearsay evidence

However, whilst the primary impetus for the Bill is the need to address the current inadmissibility of such hearsay evidence, it is felt to be prudent and proportionate also to adapt and apply (with appropriate modifications) the majority of the other provisions of Part 11 of the 2003 Act.

Clause 18(3) of the Bill, if enacted, will bring the law in the Island into line with that of England and Wales in this regard, so that the 'matter stated' that the defendant is a drug dealer, would not be one to which the hearsay rule applies, unless 'the person making the request had a purpose to either cause another to believe the matter or cause another to act as though the matter is as stated'.

Had the provisions of the Bill been enacted, such a message or statement would have been admissible despite being hearsay, the only test in respect of its admissibility being whether the evidence was cogent and relevant.

In future hearsay will, subject to relevance, be admissible. If enacted the Bill would override the effect of the decision in *Kearley*.

Bad Character Provisions

Division 1 of Part 2 of the Bill completes the picture and introduces a more realistic approach when dealing with evidence of bad character, in relation to defendants (clause 7) and also to non-defendants (clause 6). The Division is modelled on Chapter 1 of Part 11 of the 2003 Act.

The relevant provisions of the Bill in relation to bad character are thought to provide a more balanced approach than the present procedure, provided for in paragraph (f) of the proviso to section 1 of the Criminal Evidence Act 1946.

The bad character provisions in the Bill, would result in a move away from technical rules of inadmissibility, instead allowing judicial and lay factfinders to give relevant evidence the weight it deserves. This improvement is one of the reasons for the proposed implementation of a new inclusive framework within the Bill.

In relation to the admissibility of bad character evidence, the framework would provide —

- a) an automatic inclusion rule in respect of evidence of bad character connected with the alleged facts of the offence (clause 3(a)(b)); and
- b) where evidence of bad character is not connected to the central set of facts, such evidence would be *prima facie* excluded, unless it came within the statutory exceptions, and only then with the leave of the Court, subject always to the interest of justice test.

The main advantage of basing the provisions in the Bill on those in the 2003 Act is that that Act of Parliament has already been subject to debate within the Houses of Parliament and in academic circles and judicial scrutiny in the Courts. In addition, by adopting the same concepts and terminology as England and Wales, the Island should find it easier to keep in step with that jurisdiction in this area and the case-law from England and Wales in this area can be relied upon in construing and applying the Manx provisions.

Views on the draft Bill which is attached to this document are now sought. To assist readers of the Bill, Explanatory Notes have been prepared and these are provided with this document.

The Bill is not expected to have any human resource or financial implications.

Comments

General comments on the Bill and related matters are welcome although, as referred to above, it should be borne in mind that until such time as, in particular clauses 16 and 17 are made law in the Island, the prosecution of offences for which hearsay evidence is currently inadmissible, could be severely prejudiced.

Responding to the consultation

When submitting your comments please indicate whether you are responding on behalf of an organisation (and if so which organisation) or on your own behalf. Anonymous responses will not be accepted.

Please let us know whether we can publish your comments.

Any comments or questions should be submitted in writing please (unless unable to do so by reason of a disability) to:

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Attorney General's Chambers
Belgravia House
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Douglas
IM1 1AE

Or by email to: jayne.hubble@gov.im

The closing date for the receipt of comments is 1 June 2018.

Paper copies of this document can be provided upon request.

What happens next?

After this consultation closes a summary of matters raised in the consultation, with responses where appropriate, will be published and the draft Bill will be finalised with a view to it being introduced into Legislature at the earliest practical opportunity.

Bodies to be consulted directly

- Tynwald Members
- Isle of Man Chamber of Commerce
- Isle of Man Law Society
- Isle of Man Trade Unions
- Isle of Man Constabulary
- Government Departments, Statutory Boards and Offices
- General Registry

Consultation Criteria

The Council of Ministers' "Public engagement and consultation principles" were laid before the November 2017 sitting of Tynwald. In summary, the consultation principles are as follows:

1. Consultations have a purpose and offer genuine opportunities to make a difference
 2. Consultations follow a clear and open process
 3. Consultations are well planned and delivered in a reasonable timescale
 4. We encourage and enable everyone affected to get involved, if they wish to
 5. We provide jargon free and understandable information
 6. Use suitable methods to deliver the consultation
 7. We learn and share lessons to improve future consultations
 8. We tell people the impact of their contribution
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Appendix 1 – draft Criminal Evidence Bill

Appendix 2 – Explanatory Notes on the draft Criminal Evidence Bill