2. Criminal Evidence Bill 2018 –
First Reading approved

HM Attorney General to move:

That the Criminal Evidence Bill 2018 be read a first time.

The President: Please be seated, Hon. Members.

We resume our consideration of the Order Paper at Item 2, Criminal Evidence Bill 2018, and I invite the learned Attorney General to move the First Reading.

The Attorney General: Thank you, Mr President.

Hon. Members, there are many precedents of a Bill starting its legislative journey here in Council and in my time I believe it has always been with good reason. In recent times, Council has dealt with the Police (Detention and Bail) Bill, providing its scrutiny as to its provisions in advance of the other place because of the urgency of that Bill; and because, as Attorney, I was the prime mover seeking to ensure that the urgent legislative fix required was dealt with in the most appropriate and expeditious manner.

In this case, the Council of Ministers have requested that the Bill starts its journey here on the basis of the submission which I made to the Council. The reasoning is twofold: firstly, that because of the legislative pressures on the Department of Home Affairs at present they neither have the time or the resources to deal with the Bill with the urgency, which I explained and which I will come to later. Indeed, the Department of Home Affairs is dealing with some very hefty legislation at the moment: it is dealing with the Communications Bill which started its journey this morning; it is dealing with the Sexual Offences legislation; and major changes to the Criminal Justice system which will be consulted upon during the summer recess. I could add more but their workload is hefty and quite frankly, as I hope I can explain to you, I do not believe that provisions of this Criminal Evidence Bill can await their having the opportunity to deal with it.

So I am, Hon. Members, in the true sense, the prime mover of this Bill and Council has given me its authority and request that I bring it here today for your consideration.

The second reason is that I was hoping at this First Reading the Bill could be, to quote my hon. colleague, Mr Henderson this morning 'on the stocks', so as to ensure both the Police, who are of course responsible for investigating criminal activity here on the Island, and hopefully ensuring successful prosecutions with my Prosecution Team; and secondly to assure the judiciary – and I will come to that in a moment as to why they may be concerned – but perhaps more importantly to ensure the public that steps are being taken to address what I will again explain to you.

So what I would like to say to you is that in my view the Criminal Evidence Bill before you is being moved by today as a matter, as a Bill, of national importance falling into the categories of good governance and public safety. Good governance, as being necessary and advisable so as to ensure the Island maintains its effectiveness in the fight against crime and to reflect the changes in legislation already made in the United Kingdom in this regard – and I say that in regard to the matters which the Bill deals with; and public safety, as the proliferation and use of drugs on the Island is a grave matter of serious concern to public safety generally.

The background is, the difficulties arose in the prosecution of a case named *Attorney General v Frank Thomas* – and I will refer to that as '*AG v Thomas*' – on 9th April 2018, when legal argument regarding the admissibility of hearsay evidence was made to His Honour Deemster Montgomerie. The defendant was suspected of being a cannabis dealer. One piece of evidence relied upon by the Prosecution was an incoming text message that had been forensically downloaded from the defendant's seized mobile phone, which purported to be from one of the defendant's clients asking for 'drugs'.

The Defence asserted that for the Prosecution to adduce this 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 I am sure Hon. Members will appreciate, for obvious reasons, would generally be impossible – the evidence was hearsay and therefore inadmissible.

The Defence relied upon the House of Lords case of *R v Kearley* in 1992. The learned Deemster considered that, in the absence of authority and in the absence of legislation within this jurisdiction, he must follow the House of Lords decision in *Kearley*. As such, it was held that the text message was indeed an implied assertion and was, therefore, inadmissible hearsay evidence.

Before 9th April 2018, such evidence had been adduced and admitted before the Court without any challenge from the Defence, or indeed any challenge from the judiciary, and thus it was commonplace for the Prosecution to rely upon that type of evidence.

Although in the case of *AG v Thomas*, the defendant was ultimately convicted of being a cannabis dealer on other evidence, the difficulty remains following Deemster Montgomerie's decision on 9th April concerning the future admissibility of phone messages. Those difficulties will apply equally to many other types of criminal offences and their successful prosecution – as has been seen, for example, recently in nationally publicised convictions for rape, or in rape cases.

As a result of *Kearley*, the legislation in the United Kingdom was amended and the position was addressed in sections 114 and 115 of the Criminal Justice Act 2003 (of Parliament) from which clauses 16 and 17 of the Bill before you today are derived. Sections 114 and 115 form part of Chapter 2 of Part 11 of the 2003 UK Act.

Whilst the Bill is designed to address the difficulties associated with *Kearley* it was considered prudent and proportionate to adapt and apply the majority of the other provisions of Part 1 of the 2003 Act. Those provisions, modified as appropriate to our jurisdiction, form Division 2 of Part 2 of the Bill.

Clause 17(3) of the Criminal Evidence Bill 2018, if enacted, will bring the law in the Island into line with the United Kingdom, 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 stated'.

In the case which was recently brought before the learned Deemster, the sender of the message clearly thought that they were communicating with the defendant asking for drugs and they were not seeking to induce a state of belief or to act as though the matter is as stated. If the Bill is enacted, such a message or statement would, in future, not be hearsay and, subject to relevance, would be admissible. The Bill would override the decision in *Kearley*.

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

Division 1 of Part 2 of the Bill completes the picture and introduces a more sensible approach when dealing with evidence of bad character, in relation to defendants – and that is in clause 6 – and also to non-defendants, in clause 5. The Division is modelled on Chapter 1 of Part 11 of the UK 2003 Act.

The present procedure under paragraphs (f) and (h) in section 1 of the Criminal Evidence Act 1946 has an exclusionary approach to bad character. The relevant provisions of the Bill in relation to bad character are, however, more balanced. The bad character provisions of 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 firstly, an automatic inclusion rule in respect of evidence of bad character connected with the

alleged facts of the offence, which is in clause 3(a)(b); and secondly, 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 exemptions, and only then with the leave of the Court, subject always to the Interests of Justice test.

The shortcomings of the Island's existing law have now been referred to in a recent court judgment and so are well known to the Island's legal profession. *Kearley* has been adopted as a good precedent into this jurisdiction as a result of Deemster Montgomerie's decision. This is of huge concern to both the Police and the Prosecution, as drug-related offending is increasing and on many occasions the phones, or other devices, of suspects are seized so that they can be forensically downloaded with a view to obtaining such evidence.

Future prosecution cases could be significantly undermined if any incoming messages on such phones or devices could not be used as part of the case against the suspect. Presently, by reference to *Kearley*, any such evidence will be inadmissible hearsay.

The Bill, if enacted, will remedy the position and such evidence will be admissible, thereby allowing the judiciary/the jury/a Lay Bench to hear the entirety of the evidence against the defendant, attaching whatever weight they feel is appropriate to that evidence.

There has, Mr President and hon. colleagues, been public consultation on the Bill and so far there has only been one response received which was somewhat surprising. However, it is a response from the courts which raised some technical issues and the points which they raise have been incorporated in the provisions of the Bill before you.

In the circumstances, as this is a technical Bill, as I am sure quite possibly Hon. Members appreciate from what I have been saying, what I would have asked and do ask is that a presentation to Members be arranged in advance of the Second Reading.

Mr President, I move that the Bill we read a first time. Thank you.

Mr Henderson: I beg to second, sir.

The President: Mrs Poole-Wilson.

Mrs Poole-Wilson: Thank you, Mr President; and thank you to the learned Attorney for his remarks.

Yes, I did have a question about the consultation period which I had realised had closed I think on 1st June, but no comments have been published so far so I thank the learned Attorney for confirming there has only been one response, which I agree with him is surprising given the nature of this Bill. I am thankful we are going to have a presentation as well to assist in thorough understanding of this Bill and also perhaps to ensure that any defence practitioners, criminal defence practitioners in the Isle of Man who might have remarks about this Bill are again given an opportunity to raise any questions they may have on the contents of the Bill.

One question I do have for the learned Attorney – and it is reminiscent to some extent of the position we were in with the Police (Detention and Bail) Bill which was last year now – and that is that I understand the decision in *Kearney* in England and Wales has only now become precedent in the Manx courts in April due to the Deemster's ruling. However, it does make me ask the question about whether we as a jurisdiction should do more to track the key decisions that are made in the courts of England and Wales, given they do have persuasive authority in the Isle of Man. I understand that up until April this year no challenge has been made by the defence or by the judiciary to our laws and it was only the defence in that case that the Attorney quoted the *Attorney General v Thomas* that has now brought this provision into our local precedent. But it makes me wonder whether we should perhaps track decisions and consequential amendments that are made by the House of Commons in the UK to address judgments perhaps sooner than we do in order that should a challenge be brought in the Isle of Man courts, our laws are perhaps moving a little more quickly to address any of these issues that come up. I would be interested to hear the learned Attorney's comments.

The President: Mr Henderson.

Mr Henderson: Gura mie eu, Eaghtyrane.

I am quite happy with the principle of this Bill and if it assists in bringing perpetrators of whatever crime to justice, that is all good. What I want to ask specifically is on the consultation and who the consultees were? That would be my question.

The President: I will ask the Attorney General to respond.

The Attorney General: Thank you, Mr President.

Firstly, dealing with my learned colleague, Mrs Poole-Wilson, I thank her very much for her contribution. Like her, as I have already said, I am rather surprised that we did not receive any other responses to the consultation and I would have expected to hear perhaps from members of the Defence Bar; but all I can say is as we sit here today nothing has been received.

I entirely agree with what Mrs Poole-Wilson has said with reference to keeping a better track of changes in legislation in the UK. We were, quite frankly, caught out with reference to the Bail legislation which we had to introduce quickly. We could potentially be caught out in the fight against crime with reference to the *Kearley* decision and the proper conclusion which Deemster Montgomerie reached when he considered the persuasive authority of that House of Lords decision.

Mrs Poole-Wilson, Hon. Members, may not be surprised I went in search to see if I could find out why potentially this had happened. All I can say is that it was brought to the attention of the then Department Members with reference to the fact that the decision had been made and the legislation introduced in 2003 in the UK and it was just simply – as far I am concerned, and I am being quite frank here – not necessarily put on the backburner, but put in the pile of things that had to be addressed when they got around to it. And, Hon. Members, we potentially may be called out because of that.

So I entirely agree. I cannot be any more frank than that. When it was brought to my attention, as I have explained to Hon. Members, I did consider that this was such a matter of national importance that I ought to be the prime mover to ensure that because the Department of Home Affairs clearly has difficulties that this was brought hopefully into legislation at the earliest opportunity.

So I thank you, Mrs Poole-Wilson.

To my hon. colleague, Mr. Henderson: I cannot be exact. What I do know, which is really the key that I asked this morning, is that the Isle of Man Law Society were *specifically* given notice of this Bill and so were *specifically* consulted. And I can say, as a member of the Manx Bar, that the membership of the Manx Bar were circulated with the Bill in good order and in good time to enable them to have commented if they had so wished. I do not know specifically where else it went but that was key when I looked at this this morning to ensure that they had adequate opportunity of ensuring the membership were able to comment.

Mr Henderson: Could I ask a further question, Eaghtyrane?

The President: Yes, Mr Henderson.

Mr Henderson: Just to make that point for the record quite clear, that at least one consultee was the Manx Bar. There could be other consultees –

The Attorney General: Yes – sorry, my learned colleague Mrs Poole-Wilson has helped me. The bodies consulted directly were Tynwald Members, the Isle of Man Chamber of Commerce, the Isle of Man Law Society, the Isle of Man Trade Unions, clearly the Isle of Man Constabulary, Government Departments, Statutory Boards and Officers, and the General Registry.

Mr Henderson: Okay, thank you for that.

Then I would ask, just to clarify that point or make it for the record, that through the Law Society all members of the Bar received a copy of the draft Bill basically in the consultation document?

The Attorney General: The circular from the Law Society brought it specifically to members' attention with a link to the consultation paper.

The President: Does any other Member wish to make comment at this stage?

Mr Crookall.

Mr Crookall: Mr President, can I just check: the consultation period would have been six weeks?

The Attorney General: It was actually in this case four weeks.

Mr Crookall: Four weeks? Okay.

The Attorney General: Yes.

The President: Miss August-Hanson.

Miss August-Hanson: Thank you.

Is there anything that you feel perhaps could have been done better in terms of creating or generating a larger reach in terms of getting more responses back from the consultation?

The Attorney General: Mr President, I do not know.

It is obviously published on the Government's website and these are the specific people who were given specific and direct notice of this. It is part of the consultation. I could not really comment, Mr President, as to whether or not there is any opportunity to make it a broader or wider invitation to consult. I think it is pretty broad.

The President: Thank you, Mr Attorney.

Mrs Lord-Brennan.

Mrs Lord-Brennan: Thank you, Mr President.

If I could just ask the learned Attorney – I am sorry if I missed it – if the sole response we have had to the consultation has come from the Law Society or somebody within the Law Society?

The Attorney General: Sorry, Mr President, the sole response came from the courts through the General Registry.

Mrs Lord-Brennan: Oh sorry, yes, you did say that.

Thank you.

The President: Mr Attorney, did you wish to make any closing remarks?

The Attorney General: No, just to thank Hon. Members for their interest and their support and I move the First Reading.

Thank you.

255 **The President:** Hon. Members, the motion before Council is that the Criminal Evidence Bill be read for the first time. Those in favour, say aye; against, no. The ayes have it. The ayes have it.