

The Criminal Justice (Defence Case Statements) (Bailiwick of Guernsey) Ordinance, 2023

THE STATES, in pursuance of their Resolution of the 30th September, 2022^a, and in exercise of the powers conferred on them by sections 85 and 93 of the Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law, 2003^b and all other powers enabling them in that behalf, hereby order:-

Application.

1. (1) The provisions of this Ordinance apply to all criminal proceedings commenced after this Ordinance comes into force, before any court in the Bailiwick in which a not guilty plea is entered, unless (for any reason) that not guilty plea is not going to be the subject of a contested trial.

(2) Where there is more than one defendant in any proceedings, the provisions of this Ordinance apply separately in relation to each defendant who has entered a plea as described in subsection (1).

Duty of the prosecution to furnish a written statement concerning unused material.

2. (1) Subject to subsection (3), the prosecution must -
- (a) continue to disclose to the defendant, in accordance with existing custom and practice, any unused prosecution material which has not previously been disclosed to the defendant and which might reasonably

^a Article X of Billet d'Etat No. XVII of 2022.

^b Order in Council No. XXIII of 2003; this enactment has been amended.

be considered capable of undermining or weakening the case for the prosecution or of assisting the case for the defendant ("**the disclosure test**"), and

- (b) give to the defendant a written statement confirming -
 - (i) that all unused prosecution material of a description mentioned in subsection (1)(a) has been disclosed to the defendant, or
 - (ii) that the prosecution holds no material of such a description.

(2) The prosecution must carry out the steps described in subsection (1) after the defendant has formally entered a not guilty plea and in accordance with any directions given by the court as to the service of that material.

- (3) For the avoidance of doubt, nothing in subsection (1) affects -
 - (a) the existing right of the prosecution to apply to the court for an order that it is not in the public interest to disclose certain unused prosecution material,
 - (b) any prohibition on disclosure in criminal proceedings imposed by any other enactment, or
 - (c) the prosecution's continuing duty under existing custom and practice to disclose any unused prosecution material, including material relevant to

any matters set out in the defendant's defence case statement, until the defendant's case is concluded.

(4) The prosecution's duty referred to in subsection (3)(c) includes a duty to consider whether a defence case statement received by one defendant satisfies the disclosure test in respect of a co-defendant, and so should be disclosed to that co-defendant.

Duty to give a defence case statement.

3. (1) Where -

- (a) the prosecution has served on the defendant a copy of the set of documents containing the evidence which is the basis of the charge,
- (b) the prosecution have complied with, or have purported to comply with, their obligation to disclose unused prosecution material, and
- (c) the written statement referred to in section 2(1)(b) has been given to the defendant,

the defendant must, subject to subsection (8), give a defence case statement to the court and the prosecution.

(2) The defence case statement must be served within 21 days of receipt of the statement referred to in section 2(1)(b), unless the court extends this period on application by the defendant, in which case the court will specify the number of days this period is extended by.

(3) Where the court grants an extension under subsection (2), it may further extend that period upon further application by the defendant, and there is no limit on the number of times that the defendant can make such an application for a further extension.

(4) An application for an extension under subsection (2) or further extension under subsection (3) must -

(a) be made before the period for providing a defence case statement expires, unless the court permits an application to be made to it after that period on the grounds that there is a good reason for -

(i) the failure to apply before the expiry of that period, and

(ii) any delay since then in applying for an extension,

(b) specify the grounds on which it is made, and

(c) state the number of days by which the defendant wishes the relevant period to be extended.

(5) The court will only grant an extension under subsection (2) or further extension under subsection (3) if it would be unreasonable to require the defendant to give a defence case statement within the period that would be applicable but for that extension or further extension, as the case may be.

(6) The defence case statement must -

- (a) if a form is prescribed, be in that form,
- (b) contain the particulars set out in section 5,
- (c) if a manner of service is prescribed, be served in that manner.

(7) Unless for exceptional reasons (such as due to a defendant's ill health or disability) a court directs otherwise, a defence case statement must be signed by the defendant personally, whether or not it is also signed by their legal representative, and that signature must be accompanied by a statement that the defendant either -

- (a) authored the document, or
- (b) has read through the document, or has had the document read to them, and agrees with its content.

(8) If the defendant has no legal representative the court may, on application by the defendant or of the court's own motion, dispense with the requirement to give a defence case statement.

(9) In any case where -

- (a) the court has dispensed with the requirement to give a defence case statement under subsection (8), and
- (b) the defendant subsequently instructs a legal representative in connection with those criminal proceedings,

either the defendant or that legal representative must, within seven days or prior the start of the defendant's trial (whichever is sooner), notify the court of that instruction.

(10) Should the defence fail to comply with subsection (9), the court may disregard any dispensation under subsection (8) when assessing, for the purpose of section 9, the defendant's compliance with the duties imposed under this Ordinance.

(11) Upon receipt of a notification under subsection (9), the court must reassess whether the dispensation should continue and, if it determines it should not continue, must set a date for the service of a defence case statement, which shall be treated as an extension under subsection (2).

(12) Where a period stipulated in subsections (2) or (3) would end on a day that is not a business day, it will instead end on the next business day.

(13) The Committee may, by regulations, amend the period stipulated in subsection (2).

Duty to update a defence case statement.

4. (1) Until the defendant's case is concluded, the defendant must give an updated defence case statement to the court and the prosecution whenever the defendant, or their legal representative, becomes aware of a material change in respect of any matter that must be disclosed in a defence case statement.

(2) Without prejudice to the generality of subsection (1), a material change includes -

- (a) where a defendant, or their legal representative, is made aware that the content of the defence case statement is no longer accurate in any respect,
- (b) where a defendant, or their legal representative, has discovered information that the defendant would have had to include in the defence case statement, including the witness notice, if the defendant had been aware of that information when giving the defence case statement,
- (c) a decision by the defendant to call a person (other than themselves) who is not included in the witness notice as a proposed witness, or a decision not to call a person who is so included.

(3) An updated defence case statement given in accordance with subsection (1) is subject to the provisions of sections 3(6), 3(7), 5 and 6 as though any reference in those sections to a defence case statement is instead a reference to an updated defence case statement under this section.

(4) Where an updated defence case statement is required under subsection (1), it must be given by the defendant to the court and the prosecution as soon as possible and in any event within seven days of the defendant or their legal representative, as the case may be, becoming aware of the material change, unless the court extends this period on application by the defendant, in which case the court will specify the number of days this period is extended by.

(5) An application for an extension under subsection (4) must -

- (a) be made as soon as reasonably practicable after it becomes apparent to the defendant, or their legal representative, that the defendant will be unable to file the updated defence case statement within seven days,
- (b) specify the grounds on which it is made, and
- (c) state the number of days by which the defendant wishes the relevant period to be extended.

(6) Where the court grants an extension under subsection (4), it may further extend that period upon further application by the defendant, and there is no limit on the number of times that the defendant can make such an application for a further extension.

(7) An application for a further extension under subsection (6) must -

- (a) be made before the period for providing an updated defence case statement would otherwise expire, unless the court permits an application to be made to it after that period on the grounds that there is a good reason for –
 - (i) the failure to apply before the expiry of that period, and
 - (ii) any delay since then in applying for an extension,

- (b) specify the grounds on which it is made, and
- (c) state the number of days by which the defendant wishes the relevant period to be extended.

(8) The court will only grant an extension under subsection (4) or further extension under subsection (6) if it would be unreasonable to require the defendant to give an updated defence case statement within the period that would be applicable but for that extension or further extension, as the case may be.

(9) Where a period stipulated in subsection (4) or (6) would end on a day that is not a business day, it will instead end on the next business day.

(10) The Committee may, by regulations, amend the period stipulated in subsection (4).

Content of a defence case statement.

5. (1) A defence case statement is a written statement which -
- (a) sets out the nature of the defence, including any particular defences on which the defendant intends to rely,
 - (b) indicates the matters of fact on which the defendant takes issue with the prosecution,
 - (c) sets out, in the case of each such matter of fact, why the defendant takes issue with the prosecution,

- (d) sets out particulars of the matters of fact on which the defendant intends to rely for the purposes of their defence,
- (e) indicates any point of law (including any point as to the admissibility of evidence or an abuse of process) which the defendant wishes to take, and any authority on which the defendant intends to rely for that purpose, and
- (f) contains a witness notice that complies with section 6.

(2) A defence case statement that discloses an alibi must give particulars of that alibi, including -

- (a) the name, address and date of birth of any witness the defendant believes is able to give evidence in support of the alibi, or as many of those details as are known to the defendant when the defence case statement is given, and
- (b) any information in the defendant's possession which might be of material assistance in identifying or finding any such witness in whose case any of the details mentioned in paragraph (a) are not known to the defendant when the defence case statement is given.

Witness notice forming part of a defence case statement.

6. (1) The defence case statement must include a notice indicating whether the defendant intends to call any person (other than themselves), including a

person mentioned in section 5(2), as a witness at the defendant's trial and, if so, such a notice ("**witness notice**") must include the following particulars -

- (a) the name, address and date of birth of each such proposed witness, or as many of those details as are known to the defendant when the witness notice is given, and
- (b) any information in the defendant's possession which might be of material assistance in identifying or finding any such proposed witness in whose case any of the details mentioned in paragraph (a) are not known to the defendant when the notice is given.

(2) The particulars mentioned in subsection (1) do not have to be given under this section to the extent that they have already been given under section 5(2).

Provision of the defence case statement to the finder of fact.

7. (1) The presiding judge in a trial may direct that the finder of fact be given a copy of the defence case statement and, if they do so, may direct that it be edited so as not to include references to matters evidence of which would be inadmissible.

(2) A direction under subsection (1) -

- (a) may be made either of the presiding judge's own motion or on the application of any party, and

- (b) may be made only if the judge is of the opinion that seeing a copy of the defence case statement would help the finder of fact to understand the case or to resolve any issue in the case.

Warning at a pre-trial hearing.

8. (1) If, at any hearing that takes place between the service of a defence case statement and the start of the trial, it appears to a presiding judge that the defendant has failed to comply fully with this Ordinance, so that there is a possibility of comment being made or inferences drawn under section 9(2), the judge must warn the defendant accordingly.

(2) A failure to provide a warning under subsection (1) does not of itself prohibit comment from being made or inferences from being drawn under section 9(2).

(3) The giving of a warning under subsection (1), or a failure to give such a warning, may be taken into account by the court in doing anything under section 9(2) or in deciding whether to do anything under it, or in deciding whether to grant leave under section 9(3).

Non-compliant defence case statements.

9. (1) This section applies where a defendant -

- (a) fails to give an initial defence case statement containing the particulars required under section 5,
- (b) provides the defence case statement beyond any applicable time periods under sections 3(2), 3(3), 4(4) or 4(6).

- (c) fails to give an updated defence case statement in circumstances where one is required by section 4(1), or gives one that does not cover every material change,
- (d) sets out inconsistent defences in the defence case statement,
- (e) at the defendant's trial -
 - (i) puts forward a defence which was not mentioned in the defence case statement or is different from any defence set out in that statement,
 - (ii) relies on a matter or any particular of any matter of fact which, in contravention of section 5, was not mentioned in the defence case statement,
 - (iii) adduces evidence in support of an alibi without having given particulars of the alibi in the defence case statement,
 - (iv) calls a witness to give evidence in support of an alibi without having complied with section 5(2) as regards the witness in the defence case statement, or

- (v) calls a witness (other than themselves) not included, or not adequately identified, in a witness notice.

(2) Where this section applies -

- (a) the court or, subject to subsections (3) and (4), any other party, may make such comment as appears appropriate, and
- (b) the finder of fact may draw such inferences as appear proper in deciding whether the defendant is guilty of the offence concerned.

(3) Where -

- (a) this section applies by virtue of subsection (1)(e)(ii) and the matter that was not mentioned is a point of law (including any point as to the admissibility of evidence or an abuse of process) or an authority, or
- (b) this section applies by virtue of subsection (1)(b) or (1)(e)(v),

comment by another party under subsection (2)(a) may only be made with the leave of the court.

(4) Where the defendant puts forward a defence which is different from any defence set out in the defence case statement, in doing anything under

subsection (2) or in deciding whether to do anything under it, the court must have regard to -

- (a) the extent of the difference in the defences, and
- (b) whether there is any justification for it.

(5) Where the defendant calls a witness whom the defendant has failed to include, or to identify adequately, in a witness notice, in doing anything under subsection (2) or in deciding whether to do anything under it, or in deciding whether to grant leave under subsection (3), the court must have regard as to whether there is any justification for the failure.

(6) A defendant must not be convicted of an offence solely on an inference drawn under subsection (2)(b).

Subordinate Legislation.

10. (1) In addition to the powers expressed in sections 3(13) and 4(10), the Committee may by regulation provide for -

- (a) the form of defence case statements, and
- (b) the method of service to be used for giving defence case statements.

(2) Regulations under this section -

- (a) may be amended or repealed by subsequent regulations hereunder,

- (b) may contain such consequential, incidental, supplemental and transitional provision as may appear to the Committee to be necessary or expedient, and
- (c) must be laid before a meeting of the States as soon as possible and must, if at that or at the next meeting the States resolve to annul them, cease to have effect, but without prejudice to anything done under them or to the making of new regulations.

Interpretation.

11. In this Ordinance -

"**the Committee**" means the States Committee for Home Affairs,

a reference simply to a "**defence case statement**" is a reference -

- (a) where the defendant has given only an initial defence case statement, to that statement,
- (b) where the defendant has given both an initial and an updated defence case statement, to the updated defence case statement,

with the exception of section 3, in which "**defence case statement**" always means an initial defence case statement,

"**evidence in support of an alibi**" is evidence tending to show that by reason of the presence of the defendant at a particular place or in a particular

area at a particular time the defendant was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission,

"**finder of fact**" means a judge or panel of jurors (as the case may be) tasked with determining whether facts have been proven to the requisite standard in a criminal trial and, for the avoidance of doubt, the presiding judge and the finder of fact can be the same person,

"**initial defence case statement**" means the first defence case statement given by the defendant under section 3(1),

"**prescribed**" means prescribed by regulations,

"**updated defence case statement**" means a defence case statement given by the defendant under section 4(1), and

"**witness notice**" means that part of a defence case statement referred to in section 6.

Citation.

12. This Ordinance may be cited as the Criminal Justice (Defence Case Statements) (Bailiwick of Guernsey) Ordinance, 2023.

Commencement.

13. This Ordinance shall come into force on the 26th May, 2023.