

# EXECUTIVE COUNCIL

## CONFIDENTIAL

**Title of Report:** Jury (Amendment) Bill

**Paper No:** 149/11

**Date:** 30 June 2011

**Report of:** Attorney General

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### 1.0 Purpose

The purposes of this paper are:

(1) to put forward legislative amendments to address potential problems that may arise from the current legislative provisions relating to:

- (a) qualification for jury service, and
- (b) the order in which trials are held in certain situations; and

(2) to seek Executive Council's approval for:

- (a) the publication of a Jury (Amendment) Bill; and
- (b) its presentation to the Legislative Assembly in August 2011.

### 2.0 Recommendations

2.1 Executive Council is recommended to approve the publication in *Gazette* of the Jury (Amendment) Bill. The draft Bill is attached to this paper.

2.2 Executive Council is also recommended to approve the presentation of the Bill to Legislative Assembly in August 2011.

### 3.0 Summary of Financial Implications

None

### 4.0 Background

4.1 When a person is charged with a serious crime that is to be heard in the Supreme Court (rather than in the Magistrate's Court), that person has the right to

choose between being tried by a judge sitting alone or by a judge and jury. That right is enshrined in section 6(2)(g) of the Constitution and it is reflected in section 16 of the Jury Ordinance.

4.2 The right to choose to be tried by a judge and jury is one aspect of the wider right to a fair trial which is enshrined in section 6 of the Constitution.

4.3 There is a potential risk that the current provisions relating to jury trials could be found to be deficient:

- First, there is at least a risk that a verdict could be challenged because the pool of potential jurors is not large enough or wide enough.
- Secondly, there is a risk that in some circumstances there could be inconsistent verdicts in separate trials on the same indictment.

#### *Qualification for jury service*

4.4 As the law stands, section 3 of the Jury Ordinance provides that, in order to qualify for jury service, a person must be —

- registered as a voter under the Electoral Ordinance
- not less than eighteen and not more than sixty-five years of age
- ordinarily resident in the Falkland Islands for any period of five years since obtaining thirteen years of age.

4.5 This means that only those with Falkland Islands Status are eligible to serve on a jury. This has the effect of limiting the potential number of people available for jury service to a maximum of 1573.

4.6 However, even that figure overstates the size of the pool of potential jurors, for the following reasons:

- some registered voters are 65 or over (and therefore not qualified for jury service);
- some are ineligible, disqualified or entitled to be excused as of right (eg because of their occupation, religious beliefs, mental disorder or previous imprisonment); and
- people who would otherwise be potential jurors may be excused on other grounds (eg ill health) or might simply just not be available for jury service at a particular time (eg because they are away from the Islands).

4.7 For a trial of a person charged with murder or treason, there must be a jury of 12. For other serious offences, there must be a jury of 7.

4.8 Section 19 of the Ordinance allows for the defendant and the prosecution to challenge a juror on the grounds of prejudice or partiality, whether actual or

presumed. That is consistent with the right to a fair trial under section 6 of the Constitution.

4.9 In practice, where a person is widely known in the community or has had extensive press coverage, or where there is extensive local knowledge in regard to that person's previous conduct or convictions, that could make it very difficult to convene a jury that is as free as possible from prejudice or partiality.

4.10 More to the point, since justice must not just be done but must also be seen to be done, it could make it very difficult to convene a jury that is as free as possible from perceived prejudice or partiality.

4.11 It is recommended to mitigate the risk of challenge as far as possible by extending the qualification for jury service to allow jurors to be drawn from a larger and wider pool of people, as follows;

- (1) those who are registered to vote under the Electoral Ordinance (ie those with Falkland Islands Status);
- (2) those who hold residence permits under section 16 of the Immigration Ordinance;
- (3) those who hold work permits under section 17 of the Immigration Ordinance;
- (4) those who hold permanent residence permits under section 18 or section 18AA of the Immigration Ordinance;
- (5) adult dependents named on residence permits, work permits and permanent residence permits.

4.12 It is proposed that there should no longer be a requirement for 5 years ordinary residence since the age of 13 but simply a requirement to be ordinary resident at the time.

4.13 If section 3 of the Jury Ordinance is amended to change the qualification for jury service, there will need to be consequential amendments to the provisions for summoning jurors and also to ensure that the Registrar of the Supreme Court is able to obtain details of everyone who is eligible for jury service.

4.14 An additional proposal relates to those who are excused from further jury service for a period of 2 years. At the moment, this applies not just to those who actually serve on a jury but also to those who attend for jury service but are not required to serve on a jury. It is proposed to reduce the number of those removed from the jury pool by limiting excusal to those who actually serve on a jury.

#### ***Order of trials***

4.15 When more than one person is being charged on the same indictment (ie charged at the same time with the same offence or connected offences), each has

the separate right to choose between being tried by a judge and jury and being tried by a judge sitting alone.

4.16 Section 16(3) of the Jury Ordinance deals with the situation when different modes of trial are chosen and there have to be two separate trials (one before a judge and jury and the other before a judge sitting alone) for the same offence or connected offences. It provides that the jury trial must be held first and that it must be completed before the trial before a judge sitting alone can start.

4.17 Although the rationale behind that would seem to be to protect the jury from the risk of being prejudiced by the verdict of the judge in an earlier case, that order might not be appropriate in all circumstances.

4.18 Although having two separate trials carries with it the inherent potential for there to be different verdicts, it is possible to conceive of situations in which different verdicts might actually be inconsistent with one another. It is also possible that choice of trial could be misused for tactical purposes between co-defendants.

4.19 The recommended solution is to allow instead for the trial judge to have the discretion over what is the most appropriate order in which to conduct the trials. The trial judge would be able to decide what would be the most appropriate order for the trials to be conducted according to the circumstances of the particular case.

### ***Jury (Amendment) Bill***

4.20 A short Bill has been drafted to implement both of these recommendations proposal. The draft Bill is attached to this paper.

4.21 The Bill deals with the consequential provisions that are required as well as the two main recommendations themselves.

### ***Human Rights issues***

4.22 Section 6 of the Constitution enshrines the right to a fair hearing within a reasonable time by an independent and impartial court. Section 6(2)(g) provides, for a specific right in serious cases to choose between trial by jury and trial before a judge sitting alone.

4.23 It is considered that this Bill would enhance those rights (rather than infringing those rights).

4.24 If the existing provisions dealing with qualification for jury service are left as they are, there is a serious risk of challenge on the basis that the right to a fair trial has been infringed. The expansion of the pool of potential jurors would reduce the risk of challenge on that basis.

4.25 As to the provisions relating to the order of trials, it is considered that leaving this to the discretion of a judge protects the right to a fair trial and, indeed,

by reducing the risk of inconsistent verdicts, tactical misuse or arbitrary outcomes, that right is enhanced.

### **5.0 Financial Implications**

None

### **6.0 Legal Implications**

The legal implications of this paper are set out in section 4.

### **7.0 Human Resources Implications**

None

**DRAFT: 16.6.2011 (RMB)**

**Jury (Amendment) Bill 2011**

(No:    of 2011)

**ARRANGEMENT OF PROVISIONS**

Clause

1. Title
2. Commencement
3. Amendment of the Jury Ordinance
4. Section 2 amended – Interpretation
5. Section 3 substituted
6. New sections 3A and 3B
7. Section 4 amended – Summoning
8. Section 5 repealed
9. Section 10 amended – Excusal for previous jury service
10. Section 16 amended – Right to choose trial by jury or by judge in respect of indictable offences

# JURY (AMENDMENT) BILL 2011

(No: of 2011)

(assented to: 2011)  
(commencement: on publication)  
(published: 2011)

A BILL

for

AN ORDINANCE

To amend the Jury Ordinance (Title 22.5).

BE IT ENACTED by the Legislature of the Falkland Islands —

## **1. Title**

This Ordinance is the Jury (Amendment) Ordinance 2011.

## **2. Commencement**

This Ordinance comes into force on publication in the *Gazette*.

## **3. Amendment of the Jury Ordinance**

This Ordinance amends the Jury Ordinance.

## **4. Section 2 amended – Interpretation**

(1) This section amends section 2.

(2) The following definition is inserted after the definition of “civil proceedings” —

“immigration permit” means —

(a) a permanent residence permit issued under section 18 or section 18AA of the Immigration Ordinance (Title 52.2);

(b) a residence permit issued under section 16 of the Immigration Ordinance (Title 52.2);  
or

(c) a work permit issued under section 17 of the Immigration Ordinance.”

(3) The following definition is inserted after the definition of “judge” —

““partner” means one of a married couple, one of an unmarried couple, or one of a civil partnership;

(4) The definition of “Registrar” is amended by adding “;and”.

(5) The following definition is added —

““unmarried couple” means two persons who habitually live together in a relationship with some or all of the characteristics of a marriage or a civil partnership;”

## **5. Section 3 substituted**

Section 3 is repealed and the following section substituted —

### **“3. Qualification for jury service**

(1) A person is qualified to serve as a juror in the Supreme Court if —

(a) that person —

(i) has reached the age of 18 but has not yet reached the age of 65; and

(ii) is ordinarily resident in the Falkland Islands;

(b) one of the following applies —

(i) the person is registered as a voter under the Electoral Ordinance (Title 30.1); or

(ii) the person holds an immigration permit; or

(iii) the person is named as a dependent on an immigration permit; and

(c) that person is not —

(i) disqualified from jury service under —

(aa) Part 1 of the Schedule; or

(bb) subsection (2); or

(ii) ineligible for jury service under Part 2 of the Schedule.

(2) While a person is on bail in criminal proceedings (which has the same meaning as it does in the Criminal Justice Ordinance), that person is disqualified from jury service.”

## **6. New sections 3A and 3B**

The following sections are inserted after section 3 —

### **“3A. Liability to be summoned for jury service**

A person who is qualified for jury service under section 3 is liable to be summoned for jury service.

### **3B. Provision of information to Registrar**

- (1) The Registrar may request information for the purpose of summoning jurors —
  - (a) under subsection (2), from a person who is a registration officer under the Electoral Ordinance; and
  - (b) under subsection (3), from the Principal Immigration Officer.
- (2) When requested by the Registrar, a registration officer must arrange for —
  - (a) the Registrar to be provided as soon as possible with as many copies as the Registrar requires of the register of electors maintained by that registration officer; and
  - (b) the copies to be marked to indicate those persons on the register who, as far as can be ascertained, are (on a date as close as possible to when the copies are provided) either —
    - (i) under 18; or
    - (ii) 65 or over.
- (3) When requested by the Registrar, the Principal Immigration Officer must arrange for —
  - (a) the Registrar to be provided as soon as possible with as many copies as the Registrar requires of a list of —
    - (i) all those holding immigration permits; and
    - (ii) all those named as dependents on immigration permits;
  - (b) the copies to be marked to indicate those persons on the list who, as far as can be ascertained, are (on a date as close as possible to when the copies are provided) either —
    - (i) under 18; or
    - (ii) 65 or over.”

### **7. Section 4 amended – Summoning**

- (1) This section amends section 4.
- (2) Subsection (4) is repealed.
- (3) Subsection (5) is amended by —
  - (a) omitting “subsection (4)” in the first place where it appears and substituting “subsection (3)”; and

(b) omitting “subsection (4)” in the second place where it appears and substituting “this section”.

(4) Subsection (6) is repealed and the following subsection substituted —

“(6) A notice will be treated as having been sent by post to a juror if —

(a) it is addressed to the juror at either —

(i) in the case of a juror who is registered as a voter under the Electoral Ordinance, the address at which that juror is registered; or

(ii) in the case of a juror who holds a residence permit, work permit or permanent residence permit, the address held for that person by the Immigration Office of the Falkland Islands Government;

(b) it is delivered to the post office in Stanley; and

(c) either —

(i) postage is prepaid on it; or

(ii) it is exempt from prepayment of postage.

(5) The following subsections are added —

“(7) A notice will be treated as having been delivered by hand to a juror if —

(a) it is addressed to the juror at either —

(i) in the case of a juror who is registered as a voter under the Electoral Ordinance, the address at which that juror is registered; or

(ii) in the case of a juror who holds a residence permit, work permit or permanent residence permit, the address held for that person by the Immigration Office of the Falkland Islands Government; and

(b) it is delivered by hand to that address.

(8) Subsection (9) applies to a certificate signed by the Registrar or any other public officer employed in the office of the court that the conditions of subsection (6) or subsection (7) were met in relation to a notice.

(9) A certificate to which this subsection applies is admissible as evidence in proceedings (without the signature having to be proved).”

## **8. Section 5 repealed**

Section 5 is repealed.

## **9. Section 10 amended – Excusal for previous jury service**

Section 10(1)(a) is amended by omitting “, or duly attended to serve on a jury,”.

## **10. Section 16 amended – Right to choose trial by jury or by judge in respect of indictable offences**

(1) This section amends section 16.

(2) Subsection (3) is repealed and the following subsection substituted —

“(3) Subsection (3A) applies when —

- (a) more than one person is being tried on the same indictment;
- (b) both of the following choices are made by those persons —
  - (i) at least one of them chooses to be tried before a judge and jury; and
  - (ii) at least one of them chooses to be tried by a judge alone.”

(3) The following subsection is inserted after subsection (3) —

“(3A) If this subsection applies, the trial judge must decide the order in which the trials are to be conducted.”

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## OBJECTS AND REASONS

This Bill would amend the Jury Ordinance (Title 22.5) to deal with two issues:

- first, it would expand the pool of potential jurors for Supreme Court trials; and
- secondly, it would give the trial judge discretion over the order in which trials are heard where defendants charged on the same indictment make different choices about whether to be tried by a judge and jury or a judge sitting alone.

### ***Qualification for jury service, etc***

Section 3 of the Jury Ordinance deals with qualification for jury service.

Currently, only those who are registered to vote, who are ordinarily resident in the Falkland Islands and who have been ordinarily resident in the Falkland Islands for at least 5 years since the age of 13 are qualified to serve on a jury. This means that only those who hold Falkland Islands Status may serve on a jury.

*Clause 4* would insert new definitions into the Jury Ordinance of terms that are used in connection with the remaining changes.

*Clause 5* would replace the existing section 3 with a new section providing for an expanded pool of potential jurors. Anyone who is registered to vote (on the basis of Falkland Islands Status) and who is ordinarily resident in the Islands would remain eligible to serve on a jury. In addition, the holders of permanent residence permit, residence permit and work permits (and their dependants named on permits) would be eligible to serve on a jury if they are ordinarily resident.

*Clauses 6 to 8* would make consequential amendments.

Currently, the provision that anyone qualified for jury service is potentially liable for it is contained in section 3. *Clause 6* would move that to a new section 3A.

Section 5 currently provides for marked copies of the electoral registers to be provided to the Registrar of the Supreme Court to be used as the basis for summoning jurors. The combined effect of *clauses 6 and 8* would be to move that to a new section 3B and allow the Registrar to obtain information from both registration officers (about those registered to vote) and the Principal Immigration Officer (about those holding permits).

*Clause 7* would amend section 4 (which deals with the summoning of jurors) to provide for the arrangements for summoning those holding permits as well as those on the electoral registers.

*Clause 9* would make a connected change by limiting the excusal from further jury service from those who actually serve on a jury and no longer granting excusal to those who attend to perform jury service but who do not actually serve on a jury.

### ***Order of trials***

Section 16 deals with the right of a defendant being charged with an indictable offence to choose between being tried by a judge and a jury or being tried by a judge sitting alone.

Section 16(3) currently deals with the situation in which more than one person is being tried on the same indictment and one or more of them chooses to be tried before a judge and jury but one or more them chooses to be tried by a judge sitting alone instead.

It provides that the jury trial must always be held first and that the trial before the judge sitting alone cannot start until the jury trial has been completed.

*Clause 10* would amend section 16 so that, instead, the trial judge would have discretion to decide (according to the circumstances of the case) which trial should be held first.