

# **EXECUTIVE COUNCIL**

## **CONFIDENTIAL**

**Title of Report:** Jury (Amendment) Bill – proposed Government amendments  
**Paper No:** 188/11  
**Date:** 25 August 2011 (Public Version)  
**Report of:** Legislative Drafter

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### **1.0 Purpose**

The purposes of this paper are:

- (a) to report back to Executive Council on consultation with the judiciary and legal practitioners there has been about the Jury (Amendment) Bill;
- (b) to report to Executive Council in relation to a potential constitutional issue identified in relation to the upper age limit for jury service and to recommend that the upper age limit should be increased from 65 to 70; and
- (c) to submit amendments to the Bill for approval as Government amendments to the Bill to be moved when the Bill comes before the Legislative Assembly.

### **2.0 Recommendations**

2.1 Executive Council is asked to note the comments that were made about the Bill and the response from Attorney General's Chambers to those comments (see section 5 and Annex 1).

2.2 Executive Council is also asked to note the potential constitutional issue identified in relation to the upper age limit for jury service (see section 6 and Annex 2).

2.3 Executive Council is recommended to approve the attached draft amendments as Government amendments to be moved when the Bill comes before the Legislative Assembly (see section 7 and Annex 3).

### **3.0 Summary of Financial Implications**

None

## **4.0 Background**

4.1 At its meeting on 30 June 2011, Executive Council considered ExCo paper 149/11 and approved the publication of the Jury (Amendment) Bill in the *Gazette* for presentation to the Legislative Assembly at its August 2011 session.

4.2 The Bill was published in the *Gazette*. Executive Council did not ask for additional public consultation to be carried out but it was covered in detail in the public briefing on the outcome of the meeting. ExCo paper 149/11 has now been published.

4.3 During the drafting of the Bill, the Senior Magistrate and the Courts Administrator had been consulted directly and the draft Bill had been forwarded to the Chief Justice for his comments. Comments made by the Courts Administrator had been reflected in the draft approved by Executive Council.

4.4 By the time Executive Council considered the draft Bill, neither the Senior Magistrate nor the Chief Justice had commented. However, very soon afterwards, the Chief Justice did comment.

4.5 It had been decided in any event that the legal practitioners should be consulted on the draft Bill. All of the legal practitioners on the Islands (plus another currently instructed in a pending case) were specifically asked if they to comment on the Bill that had been published in the *Gazette*.

4.6 With a view to stimulating informed debate, the Chief Justice was asked to allow his comments to be circulated to the legal practitioners. He agreed but only on the basis that the legal practitioners agreed to treat his comments as confidential and that he could respond further on the basis of their comments. Two legal practitioners accepted those stipulations and saw the Chief Justice's comments.

4.7 One legal practitioner provided detailed comments on the Bill and the Chief Justice's comments. Another indicated that he had nothing further to add.

4.8 One other legal practitioner commented without seeing the Chief Justice's comments.

## **5.0 Issues arising from consultation**

5.1 A detailed analysis of the consultation responses and the issues raised in them is set out in Annex 1.

5.2 To summarise, the following issues emerged:

- (a) reconciling the right to jury trial with the right to a fair trial;
- (b) whether the trial judge should be given the discretion to decide the order in which trials are heard;

- (c) procedural issues;
- (d) whether the amendments should apply to a forthcoming trial and whether that would be retrospective;
- (e) “ordinary residence” as a qualification for potential jurors;
- (f) potential jurors’ understanding of English; and
- (g) specific drafting suggestions.

## **6.0 Potential constitutional issue in relation to upper age limit for jury service**

6.1 A potential constitutional issue was identified in relation to the upper age limit for jury service.

6.2 A detailed analysis of the issue is set out in Annex 2.

6.3 To summarise:

- (a) the age limit for jury service is discriminatory and, for it not to be unconstitutional, it needs to be “reasonably justifiable in a democratic society”;
- (b) the lower age limit of 18 is probably capable of being justified;
- (c) the existing upper age limit of 65 might no longer be capable of being justified but it would be easier to justify an upper age limit of 70;
- (d) there is a risk that, if the existing upper age limit of 65 were ever to be challenged, the challenge might be successful; and
- (e) the risk that a challenge would be successful would be considerably reduced by increasing the upper age to 70.

6.4 Increasing the upper age limit from 65 to 70 would make a further (though probably modest) contribution to expanding and widening the pool of potential jurors.

6.5 Some further consideration has been given to the other grounds on which potential jurors can be ineligible, disqualified or excused. It is proposed to leave these as they are for now.

## **7.0 Proposed amendments**

7.1 It is proposed that Government Amendments should be moved when the Jury (Amendment) Bill comes before the Legislative Assembly. Draft versions of the proposed amendments are attached.

7.2 Amendment 1 would recast the new version of section 3 of the Jury Ordinance to make the qualification for jury service clearer and to reflect the proposal to increase the upper age limit for jury service from 65 to 70.

7.3 Amendment 1 would also extend the disqualification for those in custody on remand to cover those on bail as well – this reflects a specific suggestion.

7.4 Amendment 2 would make consequential amendments to the new section 3B to reflect the proposed increase in the upper age limit.

7.5 Amendment 3 would add two new clauses to the Bill.

7.6 The first new clause would amend section 17(1) to pick up something missed in the original Bill: section 17(1) deals with the matters that must be covered by the trial judge in the explanation given to a defendant before the final choice about mode of trial and the amendment about the trial judge's discretion needs to be reflected.

7.7 The second new clause would amend the Schedule to the Jury Ordinance:

- There are stray references to the former Legislative Council and to the Clerk to the Councils in Part 1 – these would now be updated to refer to the Legislative Assembly and the Clerk to the Assembly.
- An entry in Part 3 of the Schedule provides that those aged more than 65 or less than 18 can be excused from jury service as of right – although this duplicates the qualification provisions, it had previously been left alone. However, since it would need to be amended to reflect the increase in the upper age limit, it is now proposed to remove the entry entirely.

## **8.0 Financial Implications**

None

## **9.0 Legal Implications**

The legal implications of this paper are set out in sections 4 to 6.

## **10.0 Human Resources Implications**

None

## **ANNEX 1:**

### **ANALYSIS OF CONSULTATION RESPONSES**

#### *Reconciling the right to jury trial with the right to a fair trial*

1. Although it was noted that section 18(1)(a) of the Jury Ordinance specifically recognises the limitations of jury trial in a small jurisdiction, that cannot override a defendant's right under the Constitution to a fair trial. There must be provision for a jury trial that is fair.
2. The need to reconcile defendants' twin rights to fair trials and (if they want them) jury trials has been the motivation behind the proposals contained in the Jury (Amendment) Bill.
3. It is not sufficient to rely on defendants not choosing the jury trials to which they are entitled. There is a positive duty to provide fair jury trials.

#### *Discretion*

4. It was argued that the trial judge should not have the discretion to decide the order in which trials are held.
5. It was confirmed that the original reasoning behind the requirement for a jury trial to be held first was indeed to prevent the risk of a jury being prejudiced by the outcome of an earlier trial.
6. It was suggested that it would be difficult to envisage a situation in which the trial before the judge would be ordered to take place before the jury trial and that the risk of inconsistent verdicts is simply unavoidable.
7. However, this would have to be the subject of argument before the trial judge. There ought, at least, be the possibility to persuade a trial judge that a case is indeed an appropriate one in which the order of trials does need to be reversed, not simply because of the "normal" risk of inconsistency but, for example, where the outcome of one trial might actually depend on the outcome of another.
8. Although one respondent suggested that the law should remain as it is, he recognised the existence of a scenario in which one defendant is convicted by a jury before another is acquitted by a judge and argued that there would be grounds for rise to appeal in that scenario. That is precisely the scenario that the proposed amendment seeks to address.

#### *Procedural issues*

9. Concern was expressed about the possibility of trials being delayed in the event of a challenge to the order in which the trials are ordered to be held. To reduce that risk, it was suggested that defendants should be asked to choose their method of trial at an earlier stage in the proceedings.

10. Although defendants do give a indication of their likely choices at the committal stage of the proceedings, that is not currently binding and the final choice is not made immediately before the start of the trial after the trial judge has fully explained the options. More importantly, it is only then that defendants have the opportunity to take face to face advice from the counsel who will be defending them at trial.

11. It is not entirely clear how a challenge would be dealt with: there might be an immediate challenge to the Court of Appeal but it is also possible that the trial judge's discretion would be considered as just one aspect of an appeal against conviction, following the trial.

*Retrospectivity/application to forthcoming trial*

12. Concern was expressed that the law should not be amended to suit an individual case. Although there is a case pending before the Supreme Court and it is intended that the amendments should apply for the forthcoming trial or trials in that case, it is not considered that the law is being adapted solely for that case.

13. It was asserted that amendments to legislation are rarely retrospective and that, in the UK, legislation relating to jury trials did not have effect in relation to cases where defendants had already been committed for trial.

14. However, both the Interpretation and General Clauses Ordinance (section 21) and the Constitution (section 6(5)) allow for legislation to be retrospective. The only exceptions to this are that offences cannot be created retrospectively nor can penalties be increased retrospectively. In other words, something that was not an offence at the time cannot be made an offence after the event nor can an offence be punished more heavily than it could have been at the time it was committed.

15. The proposals to amend the Jury Ordinance do not fall foul of either of these exceptions. Indeed, it is questionable whether or not the amendments would be retrospective at all, since they would only affect procedural matters for the future – in the case pending before the Supreme Court, no final choices about mode of trial have been made nor has a jury been selected yet (and it is not certain whether one is going to be required).

16. Although the Domestic Violence, Crime and Victims Act 2004 was cited as an example of legislation that was held not to be retrospective, that example actually supports the view that the changes would not be retrospective if applied to pending cases. The commencement order for the relevant provisions in the 2004 Act specifically stated that they would not apply to cases where committal had already taken place – had that specific provision not been made, the default position would seem to have been that the new arrangements would have applied, even in pending cases.

17. Consideration was given to whether there should be a specific provision making it clear that the amendments applied to cases already pending in the Supreme Court. However, the view has been taken that this would be inappropriate as well as being unnecessary.

### *Ordinary residence*

18. It would still be a requirement to be ordinarily resident in the Falkland Islands to qualify for jury service.

19. It was suggested that this might require definition. A detailed analysis of the expression was provided, along with a suggestion for a specific definition. That definition would have required a minimum period of residence that would have narrowed the pool of potential jurors to such an extent that it would largely have defeated the object of expanding that pool.

20. It is considered that it is likely to be fairly clear in most cases whether someone is ordinarily resident here or not and that a prescriptive definition would simply complicate matters. Consideration was given to removing the requirement entirely but it is still thought important that potential jurors should have at least a basic connection with the Falkland Islands.

### *Understanding of English*

21. It was suggested that there should be specific provision for assessing potential jurors' understanding of the English language and that section 13 of the Jury Ordinance should be strengthened. To some extent, this amplifies views previously expressed when the Bill originally came before Executive Council.

22. As well as the ability for both the prosecution and the defence to challenge jurors for cause, sections 12 and 13 of the Jury Ordinance already allow court officials to deal with situations in which there is doubt about a potential juror's suitability (either because of physical disability, such as deafness, or lack of facility in English). It is still considered that these are sufficient safeguards.

### *Drafting suggestions*

23. A number of drafting suggestions were made to make the wording of the provision relation to qualification for jury service clearer. Although the specific suggestions have not been adopted, the provision has been re-worded to make it clearer.

## **ANNEX 2:**

### **ANALYSIS OF POTENTIAL CONSTITUTIONAL ISSUE IN RELATION TO UPPER AGE LIMIT FOR POTENTIAL JURORS**

1. When the Jury (Amendment) Bill was being drafted, only brief consideration was given at the time to the age limits for jury service.
2. However, prompted by a query from HR during clearance of the draft paper, it was decided that a risk assessment needed to be carried out in relation to the constitutionality of the age limits.
3. If age is an “other status” for the purposes of section 16(3) of the Constitution, the age limits are discriminatory and would need to be “reasonably justified in a democratic society”.
4. Although age is not listed in section 16(3) (unlike the equivalent provisions in other Overseas Territories’ Constitutions), section 16(3) is based on article 14 of the European Convention of Human Rights.
5. UK case law on article 14 indicates that age-related provisions are capable of being discriminatory but it also seems to indicate that they are relatively easy to justify – although the situation is complicated by the separate EU legislation that prohibits age discrimination (a recent high-profile challenge to the UK’s compulsory retirement age was based on the EU legislation rather than article 14).
6. It seems sensible to assume that the position is that age is an “other status” for the purposes of section 16(3) and that, to avoid being struck down as unconstitutional under section 16(1), provisions that discriminate on the basis of age have to be “reasonably justifiable in a democratic society”.

#### *Lower age limit*

7. The pragmatic justification for the lower age limit of 18 would presumably have been that qualification for jury service was previously tied to a large degree to entitlement to vote and 18 is the voting age.
8. Even though the link to voting entitlement would be broken by the extension of jury service to non-voters, it still seems justifiable to leave the lower age limit at 18 as being the currently recognised age for a person to assume civic responsibilities.

#### *Upper age limit*

9. The justification for the age limit would presumably have been that those over 65 are somehow less capable of performing jury service than those who have not yet reached that age. There may also be an element of recognition that jury service is a duty as well as a right or privilege and that those over 65 should be excused that duty.
11. When provisions are assessed on human rights grounds, a doctrine known as the “margin of appreciation” is often applied: there is an acceptance that human rights issues are rarely absolute and that there is a range of acceptable provisions that can be

adopted. Practice in other countries is often used to determine the breadth of the margin.

14. Although section 16(3) is based on article 14(3) of the ECHR, the UK and Ireland are the only European countries where juries (to the extent they exist at all) have the same role in the criminal justice system as here:

- Throughout the UK, the upper age limit has been increased from 65 to 70: in England & Wales, this happened in 1991; in Northern Ireland, in 1996; but, in Scotland, only from earlier this year.
- Ireland abolished its upper age limit entirely in 2008 – although anyone over 65 can excuse themselves as of right.

15. Further comparisons can usefully be made with other Commonwealth jurisdictions. Although practice in Canada and Australia varies from province to province and state to state, there is a trend towards increasing or abolishing upper age limits. Some but by no means all jurisdictions allow those over a certain age to claim exemption from jury service as of right.

16. The UK Ministry of Justice did carry out a consultation on abolishing the upper age limit in England & Wales but it was opposed by the judiciary and does not seem to be going any further for now.

17. The Scottish Government carried out a consultation in 2008 before increasing the age limit from 65 to 70 but that consultation did not contemplate abolishing the upper age limit entirely or increasing it beyond 70.

18. In the UK, the compulsory retirement age for the judiciary has been reduced (except for those with grandfather rights) to 70, with only limited scope for temporary extensions beyond that age.

19. The equivalent provisions on judicial tenure in our Constitution do not provide for a compulsory retirement age for professional judges. However, justices of the peace are “demoted” to the supplemental list at the age of 70 and can only exercise very limited functions after reaching that age.

20. In conclusion (in relation to the upper age limit):

- Based on practice elsewhere, it would seem that the principle of an upper age limit for jurors would still fall within a margin of appreciation for the purposes of section 16 of the Constitution.
- However, an upper age limit of 65 must now be at the very edge of that margin and, given that people are living longer and ageing later, it would seem increasingly difficult to justify an upper age limit of 65.
- An upper age limit of 70 would be much easier to justify as being within the margin of appreciation.

21. Although an “opt-out” could be given to those over 65 (allowing them to be excused from jury service as of right), it is not proposed to provide for this. The court would still have the discretion to excuse jurors in the case of hardship or discharge those who are not capable of acting as jurors.

*Other grounds of ineligibility, disqualification and excusability*

22. The other grounds for potential jurors to be ineligible, excused or disqualified were briefly reconsidered.

23. It was concluded that, although there has been a move in England and Wales to reducing the grounds on which potential jurors are automatically excused, most of the existing grounds seem both defensible and sensible.

24. Most of those who are ineligible are those connected in some way with the justice system and should not be jurors, notwithstanding the approach taken in England & Wales.

25. There has been a campaign in the UK against the blanket exclusion for those being treated for mental illness as it is based on treatment rather than capacity and excludes those being treated for depression, schizophrenia and bipolar disorder. A similar provision applies here but it is suggested that this is left alone at this time.

26. The ineligibility of clergy and the ability of medical and similar professionals to excuse themselves as of right are not clear cut cases but, again, it is suggested that these are left alone at this time.

27. There could questions about whether the disqualification for those who have been imprisoned is appropriate:

Should any prison sentence (however short) result in a 10 year disqualification?

Should other offences not attract some disqualification even if only a fine or community sentence was imposed?

Although those questions are valid, the current provisions seem to strike a justifiable balance on the whole and it is considered that they too should be left alone at this time.

**ANNEX 3:  
PROPOSED GOVERNMENT AMENDMENTS**

1. That clause 5 be omitted and the following clause substituted —

**“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 each of the following conditions is satisfied in relation to that person —

(a) the person has reached the age of 18 but has not yet reached the age of 70;

(b) one of the following applies in relation to the person —

(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;

(c) the person is ordinarily resident in the Falkland Islands;

(d) the person is not disqualified from jury service under either —

(i) Part 1 of the Schedule; or

(ii) subsection (2); and

(e) the person is not ineligible for jury service under Part 2 of the Schedule.

(2) A person is temporarily disqualified from jury service if the person is either —

(a) on bail in criminal proceedings (which has the same meaning as it does under section 139 of the Criminal Justice Ordinance (Title 24.1)); or

(b) remanded in custody in criminal proceedings.”

2. That clause 6 be amended by omitting “65” and substituting “70” in both places in which it appears in the new section 3B to be inserted by that clause.

3. That the following clauses be added:

**“11. Section 17 amended – Supplementary to section 16**

Section 17(1)(e) is amended by omitting “section 16(3)” and substituting “sections 16(3) and 16(3A)

**12. Schedule amended – Ineligibility and disqualification for and excusal from jury service**

- (1) This section amends the Schedule.
- (2) The heading to Group A is amended by omitting “Council” and substituting “Assembly”.
- (3) The item relating to Members of the Legislative Assembly is amended by omitting “Council” and substituting “Assembly”.
- (4) The item relating to the Clerk to the Councils is amended by omitting “Councils” and substituting “Assembly”.
- (5) The following are omitted —
  - (a) the item relating to persons more than 65 years of age or less than 18 years of age; and
  - (b) the heading above that item.”.”