

REPORT ON THE DIFFICULTIES OF SELECTING IMPARTIAL JURIES IN CRIMINAL AND CIVIL TRIALS IN THE OVERSEAS TERRITORIES

1. INTRODUCTION

This report has been prepared on the instruction of Susan Dickson, Legal Counsellor, Foreign and Commonwealth Office. Its findings and recommendations will form the basis of discussion at one of the sessions of the 2009 Conference of Attorneys General of the Overseas Territories, to be held in Anguilla between 26th and 28th May .

2. TERMS OF REFERENCE

“(1) To prepare a report identifying the difficulties of jury trials in both civil and criminal cases in small Overseas Territories jurisdictions and suggesting possible solutions, including alternative approaches.

(2) In preparing the report, as necessary to discuss the issue with and seek views from (remotely) Attorneys General, Chief Justices and/or judges and practitioners within a representative selection of Overseas Territories”.

3. BACKGROUND

At the 2008 Conference of Attorneys General a paper was presented by the then Attorney General of Montserrat, Hon. Eugene Otuonye Q.C. which dealt with the issue of jury trials in small jurisdictions. Mr Otuonye Q.C. has been kind enough to supply me with a copy of the paper he presented. He also supplied me with a copy of a paper presented by the Hon. Sir John Spry CJ in August 1985 to a meeting of the Law Officers of small Commonwealth Jurisdictions entitled “The problems of jury trials in small jurisdictions”. I understand that the issues identified by the paper resonated sufficiently with Attorneys General for FCO to consider it worthwhile to commission this report.

4. THE JURY SYSTEM

Given the composition of the delegates to this conference and their professional backgrounds it is not proposed to embark upon a detailed history of the jury system. In jurisdictions whose legal systems have a common law foundation the use of juries in criminal cases is widespread if not universal. Even in jurisdictions whose legal systems are not founded in the common law, the use of “juries “ is by no means uncommon. Thus, for example, in France serious crimes are tried by a court comprising three judges and nine lay members; in Italy by a Court comprising two judges and six lay members; in Germany by a Court comprising three judges and two lay members.

The strengths of the jury system are well documented and understood:

- juries bring their collective common sense to their assessment of the evidence;
- juries are drawn from all walks of life; they have perhaps, therefore, a broader experience when it comes to assessing witnesses than a professional judge or judges;
- juries come fresh, or relatively fresh, to the justice system. They have not heard the same defences advanced in case after case. They might therefore be less cynical in their assessment of the evidence;
- the jury’s lack of familiarity with the legal process means they are less likely to comprehend the nuances which professional lawyers would pick up on. Thus for example the fact that a

jury does not hear positive evidence of good character does not necessarily mean that the jurors will therefore assume that a given defendant has previous convictions.

The above list is not exhaustive. My own experience suggests that the overwhelming majority of judges and lawyers (both prosecution and defence) support the system of trial by jury in criminal cases subject to this one caveat: those empanelled to serve on the jury must be impartial and must be perceived to be impartial. Lack of impartiality, or its perception, fatally undermines the jury system together with the system of justice that it underpins. If impartiality is effectively impossible to achieve then the jury system quite simply is rendered not only worthless but malevolent to the rule of law itself. Whilst the jury system may be revered where it operates by and large successfully, it is not an institution that is, or ought to be regarded as sacrosanct.

Right to trial by jury in criminal cases is not a fundamental human right - witness the establishment of the "Diplock" Courts in Northern Ireland where for certain specified offences the right to trial by jury was abolished in 1972, and was replaced by a system of trial by single judge alone. Diplock Courts were only themselves abolished in 2007. Diplock Courts, of course, were established for the very reason that in a certain class or category of case the impartiality of a jury - whether as a result of intimidation or sectarian allegiance - was difficult if not impossible to guarantee. The question is whether similar considerations apply to all or any of the Overseas Territories here under review, with this one overriding consideration in mind. Whether inherent as part of the common law, whether as an obligation explicitly expressed in a constitution, whether applicable as an obligation derived through the European Convention on Human Rights, the fundamental human right of an accused person is to a fair trial by an independent and impartial Court. As many Courts have now been disposed to point out, the concept of fairness does not impart an obligation unique to an accused. It is a concept which embraces all parties concerned in the process, including of course the victim. Pace some defendants at least, fairness and acquittal do not always go hand in hand.

5. PRESENT SITUATION.

ANGUILLA

- Criminal Trials

Offences tried on indictment are triable by jury (or upon the application of the Crown or the defendant and in the Judge's discretion by special jury). The jury comprises nine jurors. A majority verdict of at least seven jurors is permitted.

- Civil Trials

There is provision for trial by jury in all civil trials upon the application of the parties and at the discretion of the Court. Where the issue is one of fraud, libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage then on the application one of the parties the Court must order trial by jury unless the Court holds otherwise.

- Juror Qualification

All those between the ages of 18 and 60 who are qualified to vote.

- Special Juror Qualifications

As above but with additional annual income qualification of \$240.00

- Disqualifications and Exemptions

The following is a summary of the persons either disqualified or exempted from jury service. The full list is at appendix A.

- The Judiciary
- Others concerned with the administration of justice
- Clergy
- Members of Executive Council or the House of Assembly or the Clerk
- Mentally disordered persons
- Persons imprisoned or otherwise punished by the justice system
- Health professionals
- Illiterate persons
- Permanent Secretaries and Public Servants exempted by the Governor
- Public Utility employees whose duties are critical

- Peremptory challenges

The Prosecution has an unlimited right to require a juror to stand by on the first selection from the panel.

The Defence has the right to three peremptory challenges.

- Response to Questionnaire

In the last five years there have been a total of 19 criminal jury trials. The Attorney General reports no difficulty in the selection of an impartial jury for any of the trials. If any such difficulty arose in the future and an alternative system of trial was available then the Attorney General would favour trial by judge alone.

No response has been received from the local Bar Association.

There have been no civil jury trials in the last five years and no concerns reported over jury selection for civil trials.

BERMUDA

- Criminal Trials

Offences tried on indictment are triable by jury. The jury comprises 12 jurors. A majority verdict of at least nine jurors is permitted.

- Civil Trials

On application of one of parties in cases of defamation, malicious prosecution, false imprisonment.

- Juror Qualifications

All those between the ages of 18 and 65 and registered as a voter. Special juries have been abolished.

- Disqualifications and Exemptions

The following is a summary of the persons either disqualified or exempted from jury service. The full list is at appendix B

- Members of the judiciary and their spouses
- Others concerned with the administration of justice: and spouses of barristers, attorneys and police and prison officers
- Clergy
- JPs
- Ministers and Secretary to the Cabinet, Members of the Senate, of the House of Assembly and their Clerks
- Health professionals and King Edward VII Hospital employees
- Public servants exempted by the Secretary to the Cabinet
- Public utility employees whose duties are deemed critical
- Certain military personnel
- Mariners and aircrew
- Mentally ill
- Illiterates
- Serving prisoners and those convicted of serious criminal offences

- Peremptory Challenges

The Prosecution has an unlimited right to require a juror to stand by on the first selection from the panel.

The Defence has the right to three peremptory challenges.

- Response to Questionnaire

The response to the questionnaire reveals that in the five years between 2004 and 2008 there were a total of 111 criminal jury trials in Bermuda. There were difficulties of jury selection in four of those cases. Of the four cases thus identified one resulted in a possibly perverse outcome. In that case the conviction obtained was overturned on appeal on the basis that one juror ought to have been stood aside in the selection process. There is no suggestion that there was no other person on the jury panel who could have taken this particular juror's place.

The statistics do not suggest therefore that Bermuda has any pressing difficulty in terms of jury selection in criminal cases. The statistics are confirmed by The Hon. Richard Ground CJ. Bermuda has in place a careful jury selection process where all members of the jury panel are asked if they know/are related to the Defendant or any of the witnesses to be called before they are empanelled.

In civil cases no concerns appear to arise. Although civil jury trials are theoretically available in cases of fraud, defamation, malicious prosecution and false imprisonment, in practice there has been no civil jury trials in recent times.

No feedback has been received from the local Bar Association/Law Society

BRITISH VIRGIN ISLANDS

- Criminal Trials

Offences tried on indictment are tried by jury. The number of jurors comprising a jury is nine. Majority verdicts of at least seven are permitted.

- Civil Trials

Civil trials may be heard by a jury at the Court's discretion.

- Juror Qualifications

Persons aged between 21 and 60 years of age and appearing on the electoral roll.(?)

- Disqualifications and Exemptions

The following is a summary of the persons either disqualified or exempted from jury service. The full list is at appendix C.

- Members of Executive Council and Legislative Council, their Clerks and spouses.
- Those concerned with the administration of justice: Magistrates and their clerks, police officers, prison officers, law officers, barristers and solicitors and their clerks
- Clergy
- Medical practitioners and nurses
- Managers of licensed banks

- Peremptory Challenges

The Prosecution has an unlimited right of peremptory challenge.

The Defence has the right to three peremptory challenges.

- Response to Questionnaire

Between 2004 and 2008 there were 55 jury trials. Jury selection presented difficulties in two of those trials one respectively in each of 2004 and 2008. However, the Attorney General reports that in neither of those cases did the difficulties with jury selection either result in a possibly perverse verdict or cause other problems.

Although the potential difficulties of selecting an impartial jury have not had a bearing on the present Attorney General as to whether to prosecute a lesser, summary only offence, I recall that a predecessor decided to prosecute a prominent member of the community with a summary only offence albeit that the evidence disclosed a much more serious offence directly due to the perceived difficulties of selecting an impartial jury.

The Attorney General indicates that relaxing the current age qualifications for those eligible to sit upon a jury would result in a useful increase in the number of such persons. In addition a limit to or the abolition of the right to peremptory challenges would be favoured resulting in an amelioration of the process of jury selection in some 25% to 50% of cases.

As an alternative to trial by jury the Attorney General indicates that trial by judge sitting with assessors would be the favoured option. It is felt that the assessors ought to be drawn from lay and or legally qualified persons from within the community.

There have been no civil jury trials in the last five years.

No input was received from the local Bar Association.

CAYMAN ISLANDS

- Criminal Trials

Offences tried on indictment are tried by jury. For offences of murder and other complex cases such as money laundering the number of jurors is 12. For all other cases the number of jurors is 7. Majority verdicts are permitted of 10 and 4(?) respectively.

- Civil Trials

Trial by jury is an option on the application of a party to the proceedings. There has, however, been no jury trial in civil proceedings in the last five years.

- Juror Qualifications

A person otherwise eligible ceases to be eligible on attaining 60 years of age.

- Disqualifications and Exemptions

The following is a summary only of the persons exempted from jury service. A full list appears at appendix D

- Judiciary

- Others concerned with the administration of justice
 - Members of the Legislative Assembly
 - JPs
 - Clergy
 - Medical practitioners
 - Constables
- Peremptory Challenges

The Prosecution has five peremptory challenges.

The Defence has five peremptory challenges.

- Response to Questionnaire

Between 2004 and 2008 there were 375 jury trials. Despite the relatively large number of jury trials, no difficulties in the selection of impartial juries are reported. There is apparently a mechanism for trial by judge alone but no further information has been received in this regard.

No feedback has been received either from the Hon. Chief Justice or from the Cayman Island Law Society.

There would appear to be no demand for civil trial by jury.

FALKLAND ISLANDS

- Criminal Trials

On trial on indictment offences are triable by jury or by judge alone at the election of the defendant. A jury is comprised of 12 jurors for offences of murder and treason and seven jurors for all other indictable offences. Majority verdicts of 10 and six respectively are permitted.

- Civil Trials

Trial by jury in any type of civil proceeding was abolished in 1996.

- Juror Qualifications

All persons appearing on the electoral roll between the ages of 18 and 65 years are liable to be summoned for jury service. There are some 1500 people on the electoral role most of whom live in Stanley but some of whom, presumably, will no longer qualify for jury service due to the upper age restriction.

- Disqualifications and Exemptions

The Governor, the judiciary and others concerned with the administration of justice, Members of Legislative Council, the Clergy and the mentally ill are either disqualified or exempted.

- Peremptory Challenges

Neither prosecution or defence have any right of peremptory challenge. Only challenges for cause are permitted.

- Response to Questionnaire

In the last five years there has only been one jury trial which resulted in an acquittal against the weight of the evidence. The charge was one of rape of a child but the verdict may well have been due to the jury's refusal to accept the Chief Justice's direction that consent was no defence rather than to any lack of impartiality.

The paucity of jury trials may also be explained by the fact that in the Falklands the Resident Magistrate has considerably enhanced powers. Only a relatively small number of offences - treason, murder, manslaughter, rape, piracy and serious offences of arson - are triable on indictment.

MONTserrat

- Criminal Trials

Offences tried on indictment must be tried by a jury. Trial by jury in the High Court is a right established under the Constitution. The jury comprises nine jurors. A majority verdict of at least seven jurors is permitted, other than in cases of treason, genocide and murder where a unanimous verdict must be returned.

- Civil Trials

Jury trials are permitted at the discretion of the Court. Cases where the issue is fraud, defamation, libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise must be tried by a jury unless the Court directs otherwise.

- Juror Qualifications

Persons appearing on the electoral role(?) between the ages of 21 and 65 years.

- Disqualifications and Exemptions

The following is a summary only. A full list of the exemptions appears at appendix E

- Members of Executive and Legislative Councils and the Public Service Commission
- Judiciary and others concerned with the administration of justice
- Police and Prison officers and their clerical staff
- Clergy
- Teachers
- Health practitioners
- Permanent Secretaries

- Peremptory Challenges

The prosecution has an unlimited right to stand a juror by first time around.
The defence has the right to three peremptory challenges.

- Response to Questionnaire

Between 2004 and 2008 there were a total of 36 criminal jury trials. For the years 2004-2006 the Attorney General reports that there is no available information as to the difficulties encountered in jury selection for the jury trials in those years (19 in all) but in 2007 (six jury trials) and 2008 (11 jury trials) jury selection presented difficulties in every case. In 50%-75% of those cases the difficulties encountered resulted in perverse verdicts. In other cases the difficulties either resulted in a retrial or in an overly prolonged jury selection process. The difficulties presented by jury selection has influenced the decision as to whether to prosecute for a summary offence rather than an indictable offence even where the latter would have been more appropriate.

The difficulties related by the Attorney General are echoed by the one response had from a member of Montserrat's Bar Association from who reported as follows:

“Broadly, my experience of Montserrat juries (as is probably the case in many small communities) is that they all too often fail to assess the evidence presented to them in court objectively and confine themselves to it. The popularity of the accused in the community can be a decisive factor and sympathy verdicts are commonplace. There are frequently acquittals in the face of overwhelming evidence in favour of a conviction. Jury subornation takes place occasionally and jurors sometimes speak to accuseds while a trial is ongoing. I have done cases in which I knew the real battle was taking place outside of the court room. This has worsened in M'rat since the volcano because of the reduction of the size and quality of the population. There should be more careful vetting of persons placed on the jury list and individuals of better calibre who have persuaded Registrars/Magistrates to remove their names from the list should be restored to it. Too many applications to be exempted from jury service are accepted by the court. There is a genuine concern that it could be difficult to secure convictions against dangerous criminals. A number of such trials are pending and it will be interesting to see what happens.”

The Attorney General indicates that relaxing the qualification criteria for jurors and reducing the number of exemptions (which presently reduces the total pool of available jurors by some 250 people) would ameliorate the situation. As an alternative to trial by jury in appropriate cases the Attorney General would favour trial by judge with assessors drawn from outside the community. The member of the Bar Association was specifically opposed to trial by judge alone as an alternative, suggesting the option of bringing jurors in from other islands.

No civil jury trials have been heard within the last five years.

ST HELENA, ASCENSION ISLAND and TRISTAN DA CUNHA

- Criminal Trials

On indictment the Defendant has the option to elect trial by jury or by Judge alone. If trial by jury the jury comprises of eight jurors. Majority verdicts are expressly forbidden.

- Civil Trials

Whether jury trials are available at all in civil cases is not entirely clear. It is proposed that to achieve clarification trial by jury in civil cases will be expressly excluded in all categories of civil case.

- Juror Qualifications

Any resident between the ages of 21 and 60.

- Disqualifications and Exemptions

The following is a summary of the persons either disqualified or exempted from jury service. The full list is at Appendix F

- Judiciary
- Other concerned with the administration of justice
- Clergy
- Mentally ill
- Persons convicted of serious offences

Excusable as of right

- Medical professionals
- Members of the armed forces
- Members of Legislative Council

- Peremptory Challenges

The Prosecution has the right to five peremptory challenges.

The Defence has the right to five peremptory challenges.

- Response to Questionnaire

In the last five years, there has been but one jury trial in a criminal case on St Helena and none at all in either Ascension Island or Tristan da Cunha. Although crime is generally low, these figures also reflect the fact that the majority of defendants committed to the Supreme Court for trial elect trial by judge alone. However, the response to the questionnaire suggests that in the one jury trial conducted, the resulting acquittal was against the weight of the evidence and the complainant was subsequently to complain that the verdict was unsurprising given the composition of the jury. There are no figures available for the precise number of potential jurors at the present time but given the overall population levels (St Helena 2270; Ascension Island 550; and Tristan da Cunha 140) the pool must be limited; and in the case of Ascension

Island and Tristan da Cunha it must be doubtful that a truly impartial jury could in reality be empanelled. The Attorney General indicates that there exists a general reluctance, even in St Helena, to sit on a jury which is perhaps unsurprising.

The Attorney General also indicates that he has on occasion elected to charge a Defendant with a summary offence where the facts would also have founded an indictable offence; but only where the summary offence carried with it adequate power of punishment in the circumstances of each given case.

So far as civil cases are concerned and whether or not in theory a civil case could be tried by a jury, no such case has been heard within living memory; and as already observed steps are in hand to provide for the trial of all civil cases by judge alone.

TURKS AND CAICOS ISLANDS

- Criminal Trials

Until recently trial on indictment had to be by jury. A jury comprises of 12 jurors in cases of treason and murder (?). In all other cases a jury comprises of seven jurors. Majority verdicts respectively of 11 and of five are permitted.

- Civil Trials

Trial by jury in civil cases is in effect at the discretion of the Court.

- Juror Qualifications

Belongers, qualified to be registered as voters, aged between 21 and 65.

- Disqualifications and Exemptions

The following is a summary of the persons either disqualified or exempted from jury service. The full list is at appendix G

- The judiciary
- Others concerned with the administration of justice
- Members of Legislative Council
- Clergy
- Health professionals
- Mariners and aircrew

- Peremptory Challenges

The Prosecution has two peremptory challenges.

The Defence has two peremptory challenges.

- Response to Questionnaire

Awaited.

6. ANALYSIS

Within the context of civil trials the use of juries effectively seems to have been abandoned whether or not in theory still available. Certainly their theoretical survival raises no cause for concern in any of the Overseas Territories and the remainder of this report and its recommendations should be read as dealing exclusively with jury trials in criminal cases.

The selection of impartial juries raises difficulties in the following principal scenarios:

- The standing of the defendant
- The number of defendants
- The nature of the offence charged
- The status of the defendant and victim.

In each scenario the difficulty is exacerbated to a greater or lesser extent the smaller the pool of potential jurors; and inevitably to a greater extent where two or more of the scenarios come together in a single case.

- Standing

Where the defendant is a prominent and/or well known member of the community his/her reputation is likely to be a matter with which all members of the pool of jurors are familiar. The knowledge of that reputation might be a factor of prejudice to the defendant. On the other hand if prominence carries with it power or influence then individual jurors, irrespective of the evidence, might well feel disinclined to speak in favour of a conviction in case ultimately in the minority; and in fear of the personal consequences should word of his/her views leak out.

- Number of Defendants

The more defendants there are in a criminal cases the greater the prospect that the pool of jurors will know/be related to one or more of them or will know one or more of their friends or family.

- Nature of Offence

A particularly unpleasant offence, which has caused widespread disgust or excitement could result in prejudice against the Defendant. A complex and lengthy case, involving numerous witnesses will increase the likelihood that the pool of jurors will know one or more of the witnesses concerned.

- Status of the Defendant and Victim

Outwith the scope of the questionnaire but equally significant to the theme of this report is the perhaps uncomfortable issue of the attitudes displayed by juries depending upon the status of any given accused-i.e. whether of belonger or non belonger status, and the status of the victim. It is a widely if not universally held view that where a belonger is charged with an offence allegedly

committed against a non-belonger then the presumption of innocence is almost inevitably translated into a certainty irrespective of the actual evidence; on the other hand, where the accused is a non-belonger and the victim a belonger then despite the best endeavours of judge, prosecution and defence then at best the accused can expect a presumption of guilt on the part of the jury. This would suggest that even assuming that an “impartial” jury-i.e. a jury with no connection to the defendant, victim or witnesses, can be found, the jury will only consider the case in a truly impartial manner where both accused and victim are belongers, or where both are non-belongers.

I am not aware whether any formal research has been undertaken into this phenomenon. From the Turks and Caicos Islands, The Hon Gordon Ward CJ has indicated that in the 16 months he has been Chief Justice he has presided in only one trial where a jury has not followed this pattern. It would certainly be interesting if each of the Overseas Territories concerned by this report were to conduct its own research and were to publish the results on an annual basis; but anecdotally the evidence would seem to be overwhelming. It was a phenomenon remarked upon as long ago as 1985 by Sir John Spry CJ in the paper he then presented to a meeting of Law Officers of Small Commonwealth Jurisdictions in Vanuatu. It was a phenomenon that I encountered as Attorney General, Montserrat between 1998 and 2000, and in 2002; and again as Acting Chief Justice, Turks and Caicos Islands in 2004. It was without doubt one of the factors that prompted Mr Otuonye QC’s paper presented to this conference last year and which he encountered as Attorney General, Montserrat between 2006 and 2008. I anticipate that Attorneys General at this year’s conference will have a wealth of experiences of their own.

It is trite to say that this one aspect of the difficulties in selecting impartial juries is more or less prevalent dependant upon the size of the jury pool available. Indeed, the size of the jury pool lies, to a large extent, at the heart of all difficulties that may be experienced in selecting an impartial jury. This particular phenomenon, however, ought to be regarded as especially insidious. Xenophobia, sadly, is not uncommon in jurisdictions both large and small. If its insidious effects are institutionally entrenched within a criminal justice system as a result of the difficulties in selecting a truly impartial jury then it must seriously be questioned whether trial by jury ought to survive as the only method of trial in criminal cases in the Supreme/High Courts.

7. POSSIBLE SOLUTIONS

Nothing in this report should be taken as indicating a personal dislike for the jury system. On the contrary, where conditions permit I am firmly of the view that the jury system presents the best and fairest method of trying defendants in criminal cases. Where on the other hand conditions do not permit then the system will result in perverse verdicts with the implications such verdicts have for the rule of law and the respect and esteem in which it is held.

The solutions outlined below may not be relevant to all, or indeed any, of the Overseas Territories in respect of which this report has been prepared. In some cases they may be politically unacceptable, in others, impracticable and in others yet too difficult to achieve. I have nevertheless included every measure I can conceive of, if for no other reason to provoke debate.

- **Change of venue**

This would not be a practicable solution for any of the Territories save BVI, Anguilla and

Montserrat. The three latter all fall under the jurisdiction of the Eastern Caribbean Supreme Court (ECSC). The jurisdiction of the ECSC extends also to the independent states of St Kitts and Nevis, Antigua and Barbuda, Dominica, St Lucia, St Vincent and Grenada. Thus, for example a person charged with a crime in Montserrat would still fall under the aegis of the ECSC even if his/her trial was conducted in Antigua and was heard by a jury empanelled in Antigua. The laws of each island will not be identical; but for the overwhelming majority of criminal offences will be very similar. The cultural heritages of each island will also share some similarities. In theory at least there should be no reason why change of venue should not be viable for BVI, Montserrat or Anguilla where selection on home territory of an impartial jury would be impossible.

There are, of course, practical difficulties. In the first place there are the cost implications of relocating defendant, witnesses and advocates for the duration of the trial. More problematic perhaps would be to obtain the political consents necessary.

I can see nothing in the laws either of BVI, Anguilla or Montserrat which would per se preclude a trial other than on home territory. The defendant is still receiving a trial by jury, under the jurisdiction of the appropriate court. I see nothing in the laws either which would preclude the empanelling of a jury on e.g. Anguilla, to try an alleged crime committed, e.g. in Montserrat. Although I have not researched the laws of St Kitts and Nevis, Antigua, Dominica, St Lucia, St Vincent or Grenada, I anticipate that they will be similar, if not identical to the relevant laws of BVI, Anguilla and Montserrat. I suspect, therefore, that it would need only the consent/goodwill of the relevant States/Overseas Territories to legitimise the process of change of venue.

I envisage two additional objections to the change of venue solution. In the first place some might argue that the spirit of the right to trial by jury requires the right to trial by a jury selected from the defendant's "fellow citizens". The spirit of that legislation is thus offended if a citizen of the BVI is tried by a jury comprising Anguillans. This seems to me to be an objection more apparent than real.

Secondly, it is of course an important principle of the criminal justice system, that proceedings should be open. A trial conducted on an island other than the island where the crime was allegedly committed is not readily observable by the community affected by the crime. There is some substance to this objection but ultimately there has to be a balancing act; and in weighing the interest of justice the ability to select an impartial jury would seem to outweigh the objection last outlined.

- **Augmenting the pool of jurors**

The greater the number of those eligible to serve on a jury the easier it ought to be to select an impartial jury. Simple measures could be taken to augment the pool.

- i) Age restrictions

Each of the Territories the subject of this report impose an upper age limit on those eligible to serve on juries, invariably either 60 or 65. There would seem to be little rational justification for age limits of this type in this day and age. Providing a person retains his or her intellectual faculties and is capable of following the proceedings in Court there is no good reason why he/she should not be eligible to serve. Indeed, persons no longer pursuing full-time careers are likely

to be less inconvenienced by serving on a jury and therefore less reluctant to do so. If the maintenance of an upper age limit is thought to be desirable then there would seem to be little reason why it should not be set at 70 or even 75.

ii) Exemption through occupation

In England and Wales exemptions from jury service through occupation have largely been swept away. Thus, for example, judges, police officers, lawyers, prison officers are all liable to serve on a jury. In consequence jury selection has become a more careful process than previously. If a police officer is called then he/she will be excused if the case revolves around allegations made against the police; or if he/she is serving at a station proximate to the station where the offence has been investigated. But the wisdom, previously received, that police officers by virtue of their occupation, are inherently incapable of an impartial evaluation of evidence has been discarded. Most of the Overseas Territories here concerned with have long lists of those exempted or disqualified from jury service. There would be merit in reconsidering whether those lists should not now be modified.

iii) Eligibility criteria

Other than age, the other frequent criterion determining eligibility is whether a person appears on the electoral register, for which, it is assumed, citizenship is a pre-requisite. In reality there would seem to be no good reason why a person who has a legitimately established residence but who has not been naturalised should not serve on a jury. Residents have a not dissimilar stake in the community and rendering residents eligible might go some way to neutralising the belonger, non-belonger phenomenon highlighted earlier.

• **Trial by Judge with assessors**

At first blush this option is the option that personally I find the most attractive as an alternative to trial by jury. I have direct experience of sitting as the tribunal of fact both alone and with colleagues. As already indicated the laws of St Helena and Ascension permit a defendant to elect trial in the Supreme Court by judge alone and in the only two trials that have come to the Supreme Court since my appointment in 2007, the Defendants concerned indeed exercised that election. In England conviction appeals from the Magistrates Court to the Crown Court are heard by a judge sitting with (normally) two magistrates. At a wholly personal level it is my view that the decision making process is facilitated by the ability to discuss with colleagues the evidence heard. The more complicated, lengthy and/or difficult the case, the greater the benefits to be derived from the ability to discuss. That said I recognise that magistrates, sitting alone in hundreds of different jurisdictions, decide thousands of difficult cases every day.

A number of problems arise if this option is to be pursued. In the first place perhaps the basis of selection and appointment as an assessor. If assessors are to be selected locally then there can be no guarantee that they will be any more immune to prejudice or bias in any given case than the rest of the population at large. There is then the question of allocation to any given case. Unless allocation is random there may be room for suspicion of manipulation.

A solution to some of these problems at least can perhaps be found in the German model, where trials are heard by lay judges or assessors, sitting with professional judges. In the Regional Courts which deal with the most serious criminal offences two lay judges sit with three professional judges. Lay judges are appointed by a lay judges Election Committee and once appointed serve for a period of four years. Lots are drawn to determine the days on which lay

judges will serve thus ensuring a random allocation.

Within the context of most if not all the Overseas Territories under consideration, if this model were to be pursued, then ideally it seems to me that assessors would have to be appointed from suitable candidates not living in or connected with the Territory concerned. I would see no reason to limit such assessors to people with legal qualifications. The judge would remain the sole authority on questions of law.

A system such as this would certainly have cost implications. It is unlikely that persons suitably qualified to act as assessors would be prepared to do so gratis; and if as suggested, they were appointed from outside the Overseas Territory concerned, they would need to be accommodated whilst actually serving as an assessor. The cost implications alone may make this option unattractive, certainly where it is envisaged that an alternative to trial by jury is likely frequently to be sought.

- **Trial by judge alone**

This would seem to be the most straightforward and practical option; although from the answers received to the questionnaire not universally favoured.

In England and Wales the abolition of the automatic right of a defendant to trial by jury is presaged by the Criminal Justice Act 2003 although the relevant provisions which appear at appendix H have yet to be brought into force. I have reproduced the relevant sections in full to indicate the procedures to be undergone as envisaged by the Act before an order for trial by judge alone can be made. These provisions would seem to me to be a suitable model for all the Overseas Territories with relevant modifications. In particular, the difficulty/impossibility of selecting an impartial jury would need to be added as an additional ground for application. Concomitant to the prosecution's right to apply for trial by judge alone it would seem manifestly sensible to invest the defendant with the absolute right to elect trial by judge alone.

For those inclined to the view that trial by jury is a sacred institution to be retained at all costs, it is interesting to observe that in some of the Overseas Territories the right has already been constrained for certain offences, in practice if not in principle, by the simple expedient of enhancing the Magistrates powers and rendering offences that would formerly have been triable on indictment summary only. Thus in Bermuda for a range of drugs offences the Magistrate has the power to impose sentences of up to 10 years imprisonment although as those offences remain triable either way the defendant retains the right to elect trial by jury albeit at risk of the even longer sentences available in the Supreme Court. It is my recollection that in Cayman Island the Magistrate also has enhanced powers of sentence in certain drugs cases; but that there the offences have been reclassified as summary only thus effectively introducing trial by judge alone for those categories of cases. In Anguilla and although most drugs offences are triable either on indictment or summarily the Attorney General has the right to elect summary trial which overrides the right of the defendant to elect trial venue. In such cases the Magistrate has the power to impose sentences of up to two years imprisonment. The position in the Falkland Islands has already been noted.

8. SUMMARY

As was, perhaps, to be anticipated for the larger jurisdictions such as Bermuda and Cayman Islands the difficulties of selecting an impartial jury are less acute than they are in the smaller jurisdictions. By logical extension there must be a point at which, when the available pool of jurors falls below a critical mass, the selection of a truly impartial jury becomes impossible. Sir John Spry CJ's 1985 paper already referred to itself referred to the cases of *Grant v DPP* (Jamaica) and *R v Stevens* (St Helena). Those were cases where, due to their notoriety, the defence in both cases sought to object to the entirety of the pool of jurors available within the relevant jurisdictions on the grounds that the pool was so relatively small and the allegations so relatively notorious that it would be impossible to select an impartial jury. One cannot help but think that the judicial reasoning in those cases was tailored to overcome what was otherwise unthinkable; namely that under the existing laws of Jamaica and St Helena the Defendants in those cases could not have been tried. In England and Wales applications to change the venue of trials are not infrequently made and granted, precisely to avoid the circumstances pertaining in the cases of *Grant* and *Stevens* and rightly so. The jury system remains valid only for as long as it delivers impartial justice and gives the perception of doing so.

It seems clear that there is a nettle to be grasped here. Although the responses to the questionnaires few if any difficulties in the selection of impartial juries arise in Anguilla, Bermuda, BVI or Cayman Islands so far as BVI is concerned there has been at least one case, albeit some time ago when the then Attorney General felt unable to charge any offence other than a summary offence in the knowledge that irrespective of the evidence it was almost certain that any jury empanelled would acquit. In Turks and Caicos Islands, even ignoring the circumstances which prompted the Auld Commission, the jury system appears in some cases, at least, actively to deprive non-belongers of the protection of the law. The same is almost certainly true of Montserrat, and indeed perhaps of others of the Overseas Territories. In St Helena and its dependencies, Montserrat (and perhaps the Falklands) the potential pool of jurors may in any event now have fallen below the critical mass referred to; and where a powerful, prominent or popular Defendant is charged with a criminal offence then it is unlikely that a truly impartial jury could be empanelled in any of the Overseas Territories under consideration, Bermuda and Cayman Islands included, if suddenly, for example, faced with a situation similar to the one that has arisen in TCI.

9. RECOMMENDATIONS

It is with some diffidence that I make the recommendations that follow. The Attorneys General present will each be more familiar with their own jurisdictions than I could possibly be:

- with the difficulties, or lack of them, in selecting impartial juries for whatever reason
- with the political sensitivities that may attach to any given recommendation which renders it difficult/impossible of implementation

I am aware, too, that one or more of the recommendations may already have been the subject of debate and consideration. Nevertheless, I believe that the recommendations, if adopted, would improve the criminal justice systems, both in terms of trial by jury or by alternative methods where appropriate. Whether any of the recommendations are adopted is, of course, entirely a matter for the Governments of the various Overseas Territories.

With that diffidence, therefore, I make the following recommendations:

- 1) Legislation should be enacted enabling defendants in all the Overseas Territories (save St Helena and its Dependencies and Falkland Islands where the right already exists) to elect trial by judge alone. Whether this right would frequently be exercised remains to be seen but it would go some way to addressing the difficulties reported where a non-belonger is charged with a criminal offence committed against a belonger. Even for those Overseas Territories where this phenomenon is not perceived as a problem, if a defendant wishes to be tried by judge alone I see no reason why he/she should not have this right.
- 2) Legislation should be enacted to enable the prosecution to apply, through the Attorney General or the Director of Public Prosecutions, for trial by judge alone. I suggest that the English Criminal Justice Act 2003 could be used as a model with the additional ground that the selection of an impartial jury was likely to be so difficult as to render it in the interests of justice that the case be tried by judge alone. In Bermuda, Cayman Islands and Turks and Caicos those applications I suggest should be made to the Chief Justice. In British Virgin Islands, Anguilla and Montserrat the application I anticipate would be made to the High Court Judge for the time being allocated to the relevant Overseas Territory. In St Helena and Falklands such applications would be made automatically to the Chief Justice. Applications should be made on Notice to the Defendant. Before granting the application the judge would need to be satisfied that the grounds of the application were made out. A right of appeal against the decision of the judge should be enacted but to avoid undue delay limited to the relevant Court of Appeal only.

I anticipate that it may well be argued that if, for example, Bermuda and Cayman Island experience no problem with the selection of impartial juries, then there is no purpose in enacting legislation of this type. The response to that is the TCI experience. If Bermuda and Cayman Islands operate a jury system entirely satisfactorily then no doubt the Attorney General/DPP would be slow to invoke the provisions of the legislation and the judges even slower to grant any applications made under it. The legislation is nevertheless in place should the need to invoke it ever arise. The legal minefield of trying to enact legislation retrospectively is therefore avoided.

- 3) The criteria for qualification to serve as a juror should be less restrictive. Two specific recommendations arise in this regard:
 - i. In principle there would seem to be no reason why all lawful residents of each of the Overseas Territories should not be liable to jury service providing they have an adequate command of the English language. Residents have a stake in the community in which they live and their inclusion in the potential pool of jurors would go some way to addressing the imbalance perceived between belongers and non-belongers
 - ii. The upper age limit for jurors could readily be increased by all the Overseas Territories. In theory, if a person is sound of mind and comfortably able to access the Courthouse there is no particular reason why there should be any upper age limit at all. Jurors over a specific age suffering from a medical condition which made them unable or reluctant to sit could be exempted permanently on the production of a medical certificate to that effect. In practice an upper age limit is perhaps more convenient but the age of 60 or 65 in the modern era is too low and might even be considered an insult by the vigorous sexagenarian fully able and willing to discharge his or her public duty.

- 4) Most if not all the Overseas Territories have long lists of exemptions some or many of which are antiquated. In Bermuda, for example, Justices of the Peace are exempted. I understand that this is a largely honorary title and that JPs discharge no judicial function. As of June 2007 there were 602 JPs in Bermuda, thus exempted from jury service. Although no number has been provided of the total pool of jurors, this one exemption alone must reduce by no insignificant proportion the pool of jurors available.
- 5) For Anguilla, British Virgin Islands and Montserrat it is recommended that the possibility of introducing the mechanism for change of venue be investigated. As I have already said, I can see nothing in the laws of these Overseas Territories to prevent a change of venue in principle. The same may or may not be true of the independent states but defendants would still be tried by a jury under the jurisdiction of the Eastern Caribbean Supreme Court. There would clearly need to be co-operation and reciprocity - for example, defendants remanded in custody would have to be transferred to the new venue's prison for the duration of the trial - and there would be cost implications; but the change of venue option provides an alternative if the recommendations for trial by judge alone are not favoured. As with that recommendation the application for change of venue would be made to the relevant High Court Judge on the same grounds with a similar right of appeal. I would envisage that the ability to make the application would be available both to the Prosecution and the Defence.

The questionnaire sent to Attorneys General elicited that in all the Overseas Territories (save Falkland Islands) a right of peremptory challenge is preserved both for the prosecution and the defence. Peremptory challenges were long ago abolished in England and Wales with no apparent detriment to the system of trial by jury; but in no Territory other than BVI was it felt that the continued right to peremptory challenges contributed to difficulties with the jury selection process; and there was no support for its abolition except by BVI. In those circumstances no recommendations are made in this regard. Equally nowhere was it felt that lowering permissible majority verdicts would be of assistance and again I make no recommendations.

I conclude this report by inviting attention to the relevant observations of Sir Robin Auld in his interim report on the situation that developed in TCI . They are reproduced at appendix I for those who have not read the report. Serious consideration should be given by each of the Overseas Territories as to whether those observations and the circumstances that prompted them could ever be of relevance to their respective jurisdictions.

APPENDIX A

PERSONS EXEMPTED/DISQUALIFIED FROM JURY SERVICE ANGUILLA

SCHEDULE 1

(Section 6)

A person who **PERSONS DISQUALIFIED OR EXEMPT FROM JURY SERVICE**

PART 1

PERSONS DISQUALIFIED

GROUP 1

The Judiciary

Judges

Registrars and assistant registrars of any court

Magistrates including additional Magistrates

Justices of the peace

has at any time been a person falling within any description specified above in this group

GROUP 2

Others Concerned with Administration of Justice

Lawyers, whether or not in actual practice as such

Lawyer's clerks and paralegals

Notaries public

Officers and staff of any court, if their work is wholly or mainly concerned with the day-to-day administration

of the court

Coroners, deputy coroners and assistant coroners

A shorthand writer in any court

The Superintendent of Prisons and officers employed in a prison including any chaplain

Probation supervisors

Extramural prison officers

A member of a police force, a local constable and a person employed in any capacity by virtue of which he has

the powers and privileges of a local constable and any person employed by the police force

A person in charge of, or employed in, any forensic science laboratory

15/12/2006 25

R.S.A. c. J15 *Jury Act* Anguilla

A person who at any time within the last 10 years has been a person falling within any description specified above in this group

GROUP 3

Clergy

A man in holy orders, a regular minister of any religious denomination

A vowed member of any religious order living in a monastery, convent or other religious community

GROUP 4

Members of Executive Council or the House of Assembly or the Clerk

A member of the Executive Council or the House of Assembly or the Clerk of the House of Assembly

GROUP 5

Mentally Disordered Persons

A person who suffers or has suffered from mental illness, psychopathic disorder or mental handicap

GROUP 6

Persons Imprisoned or Otherwise Punished by the Justice System

A person who has at any time been sentenced in Anguilla—

(a) to imprisonment for life or to a term of imprisonment of 5 years or more; or

(b) to be detained during Her Majesty's pleasure

A person who at any time in the last 10 years has in Anguilla—

(a) served any part of a sentence of imprisonment;

(b) had passed on him or made in respect of him a suspended sentence of imprisonment; or

(c) had made in respect of him a community service order

A person who at any time in the last 5 years has in Anguilla been placed on probation

GROUP 7

Health Professionals

A person who is entitled under the law of Anguilla to practice, and is actually practicing, as—

(a) a medical practitioner;

26 15/12/2006

Anguilla *Jury Act* R.S.A. c. J15

(b) a dentist;

(c) a nurse;

(d) a midwife;

(e) a veterinarian; or

(f) a pharmaceutical chemist.

GROUP 8

Illiterate Persons

Any person who cannot read and write English or understand it when it is spoken

PART 2

EXEMPT PERSONS

Persons serving or employed in the following offices—

(a) Permanent secretaries in the Anguilla public service;

(b) any established or non-established officer whose duties are such that, in the opinion of the Governor, he should be exempt from jury service, upon notice being given by the Governor.

Public Utilities

Any person employed in a public utility whose duties are so critical to the efficient functioning of that public

utility and who, in the opinion of the person for the time being in charge of such public utility, should be exempt from jury service, upon notice being given by such person in charge.

(Act 17/2006, s.2)

15/12/2006 27

R.S.A. c. J15 *Jury Act* Anguilla

APPENDIX B

PERSONS EXEMPTED/DISQUALIFIED FROM JURY SERVICE, BERMUDA

FIRST SCHEDULE

Section 3

PERSONS EXEMPTED FROM JURY SERVICE

PART I

Ministers and the Secretary to the Cabinet.

Members of the Senate and the Clerk of the Senate.

Members of the House of Assembly and the Clerk and other officers of the House of Assembly.

Judges and officers of the Supreme Court and former judges and officers of the Supreme Court.

Magistrates, their clerks and other officers of courts of summary jurisdiction, and former magistrates, clerks and officers of courts of summary jurisdiction.

Coroners.

The Mayors of the Corporations of the City of Hamilton and of the Town of St. George.

Chairman and members of the Revising Tribunal.

Members of Her Majesty's Regular Naval, Military and Air Forces.

Members of the Bermuda Police Service, and former members.

Prison officers, former prison officers and persons engaged in the administration of other places in which persons may lawfully be detained.

Pilots holding branch under the Marine Board Act 1962 [*title 22 item 3*].

Consuls and consular agents (excluding honorary consuls and consular agents).

Ministers of religion.

Barristers and attorneys admitted to practise in the Supreme Court and persons employed in an executive capacity in a firm of barristers and attorneys.

Medical, dental and veterinary practitioners, duly registered.

Members of the Treatment of Offenders Commission.

Justices of the Peace.

Spouses of judges and officers of the Supreme Court, Magistrates, Barristers and attorneys admitted to practise in the Supreme Court, Members of the Bermuda Police Service and Prison officers.

Probation Officers.

Members and former members of the Bermuda Reserve Police.

Members of the Special Court Panel.

[Part 1 of the first schedule amended by 1997:37 effective by notice in Official Gazette]

PART II

Any established or non-established officer whose duties are such that, in the opinion of the Secretary to the Cabinet, he should be exempt from jury service, upon notice being given by the Secretary to the Cabinet.

Any person employed in any of Her Majesty's Naval, Military or Air establishments, upon notice being given by the officer for the time being in command of the establishment in question.

Any person employed in the King Edward VII Memorial Hospital, upon notice being given by the Medical Director of the hospital.

Any person employed in Bermuda by a cable or wireless under-taking (other than a local broadcasting undertaking), upon notice being given by the person for the time being in charge of the administration of the undertaking in Bermuda.

Any person employed on a ship or aircraft regularly plying to places outside Bermuda, upon notice being given by the person for the time being in charge of the administration of the shipping or airline undertaking in Bermuda.

Any person employed in a public utility whose duties are such that, in the opinion of the person for the time being in charge of such public utility, he should be exempt from jury service, upon notice being given by such person in charge.

APPENDIX C

PERSONS EXEMPTED/DISQUALIFIED FROM JURY SERVICE, BVI

FIRST SCHEDULE.

S. 6

The Governor and his spouse.

Members of the Executive Council and their spouses.

The Clerk of the Executive Council.

Members of the Legislative Council and their spouses.

The Clerk of the Legislative Council.

Magistrates and their clerks.

Police Officers.

Keepers and other officers of prisons and the masters and officers and nurses of hospitals.

Officers of courts of law, and barristers and solicitors in actual practice and their clerks.

Generally recognised Ministers of religion.

Properly qualified medical practitioners in actual practice.

Managers of licensed banks.

All consular representatives of foreign powers being of foreign nationality, and any such representatives being of British nationality as the Governor in Council may, by notice published in the Gazette, declare to be exempt from service on juries: Provided that any such exemption may be cancelled by the Governor in Council at any time.

APPENDIX D

**PERSONS EXEMPTED/DISQUALIFIED FROM JURY SERVICE,
CAYMAN**

The Governor (1)
Members of Legislative Assembly (15)
Judges (3)
Magistrates (3)
Justices of the Peace (174)
Pastors & Ministers of Religion (38 Churches registered with Cayman Islands Ministers
Association # of Pastors not listed)
Lawyers & Officers of the Courts (489)
Medical Practitioners (225)
Constables (352)
Registrar of Land, births, marriages and deaths (1)

APPENDIX E

PERSONS EXEMPTED/DISQUALIFIED FROM JURY SERVICE, MONTSERRAT

Members of the Executive Council and the Clerk thereof;
Members of the Legislative Council and the Speaker and Clerk thereof;
Members of the Public Service Commission;

The Magistrate and his staff;
Justices of the Peace;

Law officers of the Crown and members of their staff;

Legal practitioners and members of their staff;

Police officers and police clerical staff;

Prison officers and prison clerical staff;

Generally recognized ministers of religion;

Teachers in public and private schools;

Medical officers, registered medical and dental practitioners and druggists in actual practice, and registered nurses;

Permanent secretaries in the public service;

All consular representatives of foreign powers being of foreign nationality and any such representatives being of British nationality as the Governor in Council may, by notice published in the *Gazette*; declare to be exempt from service on juries: Provided that any such exemption may be cancelled by the Governor in Council at any time.

APPENDIX F

PERSONS EXEMPTED/DISQUALIFIED FROM JURY SERVICE, ST HELENA

SCHEDULE

INELIGIBILITY AND DISQUALIFICATION FOR AND EXCUSAL FROM JURY SERVICE

PART I PERSONS INELIGIBLE

Group A *The Judiciary*

Judges.
Registrars, deputy registrars and assistant registrars of any court.
Justices of the peace.
Stipendiary magistrates.
A person who has at any time been a person falling within any description specified above in this group.

Group B *Others concerned with administration of justice*

The Attorney-General.
Barristers and solicitors, whether or not in actual practice as such.
Solicitors' articled clerks.
Barristers' clerks and their assistants.
The Crown Prosecutor.
Officers employed by the Government of St. Helena and concerned wholly or mainly with the day-to-day administration of the legal system or any part of it.
Officers and staff of any court, if their work is wholly or mainly concerned with the day-to-day administration of the court.
Coroners, deputy coroners and assistant coroners.
Justices clerks and their assistants.
A shorthand writer in any court.
Probation officers and persons appointed to assist them.
A member of the St. Helena Police Force, including special constables.
Civilians employed for police purposes by the St. Helena Police Force.
A person who at any time within the last ten years has been a person falling within any description specified above in this group.

Group C

The clergy

A man in holy orders.

A regular minister of any religious denomination.

Group D

The mentally ill

A person who suffers or has suffered from mental illness, subnormality, severe subnormality or psychopathic disorder and on account of that condition either—

(a) is resident in a hospital or other similar institution; or

(b) regularly attends for treatment by a medical practitioner.

A person who under the Mental Health Ordinance has been determined to be a person of unsound mind.

PART II

PERSONS DISQUALIFIED

A person who has at any time been sentenced in the Supreme Court of St. Helena—

(a) to imprisonment for life or for a term of five years or more; or

(b) to be detained during the Governor's pleasure.

A person who at any time in the last ten years has, in St. Helena or Ascension—

(i) served any part of a sentence of imprisonment or detention, being a sentence for a term of three months or more; or

(ii) been detained in a remand home.

PART III

PERSONS EXCUSABLE AS OF RIGHT

Medical and other similar professions

The following, if actually practising their profession and registered (including provisionally or temporarily registered), enrolled or certified under the written law relating to that profession—

medical practitioners,

veterinary surgeons and

dentists,

veterinary practitioners,

nurses,

pharmaceutical chemists.

midwives,

The Forces

Full time serving members of any of Her Majesty's naval, military or air forces.

Legislative Council

Members of Legislative Council, including *ex officio* members.

APPENDIX G

PERSONS EXEMPTED DISQUALIFIED FROM JURY SERVICE, TCI

Exemptions

4. (1) The Governor, Chief Secretary, the Clerk to the Governor, Judges, Magistrates, the Clerk to the Magistrate, District Commissioners, police officers, members of the public service of the Islands employed in the Prison Department, barristers, solicitors and attorneys in actual practice, the manager and staff (not being domiciled in the Islands) of Cable and Wireless (West Indies) Limited, or any other cable company, while actually employed as such in the Islands, shall be exempted from serving as jurors, and their names shall not be inserted in the annual jury lists or in the jurors' book to be prepared under this Ordinance, and, if so inserted, such persons may claim exemption.

(2) Members of the Legislative Council, ministers of religion following no secular occupation, physicians and surgeons in actual practice, dentists in actual practice, licensed marine and commercial aviation pilots actually serving as such, consuls, vice-consuls, and consular agents of any foreign power, the Treasurer, the Assistant Treasurer, the Treasury Cashier, and the Harbour Master (being officers of the Treasury and Customs Department of the public service of the Islands), and lighthouse keepers shall be exempted from serving on common juries, but shall be liable to serve as special jurors; and the name of every such person shall be included in the annual jury lists made up according to law.

Persons disqualified to serve on juries

5. No person not being a British Dependent Territories Citizen with a right of abode in the Turks and Caicos Islands, nor any person who has been, or shall be, convicted of any treason, arrestable offence, or perjury, or of any infamous crime, unless he shall have obtained a free pardon thereof, is or shall be qualified to serve as a juror.

Incompetency of illiterate person

6. No person who is unable to read readily a sentence taken casually from this or some other Ordinance of the Islands, and to reduce the same into writing in a legible manner, shall be eligible to serve as a juror.

Incompetency from physical or mental infirmity

7. No person shall be placed or allowed to remain on the annual jury lists who, in the judgment of the persons lawfully preparing, revising or correcting the same, shall be incapable, from deafness or blindness, or any other physical or mental infirmity, from serving as a juror.

APPENDIX H

CRIMINAL JUSTICE ACT 2003

Part 7 Trials on indictment without a jury

43 Applications by prosecution for certain fraud cases to be conducted

without a jury

(1) This section applies where—

(a) one or more defendants are to be tried on indictment for one or more offences, and
(b) notice has been given under section 51B of the Crime and Disorder Act [1998 \(c. 37\)](#) (notices in serious or complex fraud cases) in respect of that offence or those offences.

(2) The prosecution may apply to a judge of the Crown Court for the trial to be conducted without a jury.

(3) If an application under subsection (2) is made and the judge is satisfied that the condition in subsection (5) is fulfilled, he may make an order that the trial is to be conducted without a jury; but if he is not so satisfied he must refuse the application.

(4) The judge may not make such an order without the approval of the Lord Chief Justice or a judge nominated by him.

(5) The condition is that the complexity of the trial or the length of the trial (or both) is likely to make the trial so burdensome to the members of a jury hearing the trial that the interests of justice require that serious consideration should be given to the question of whether the trial should be conducted without a jury.

(6) In deciding whether or not he is satisfied that that condition is fulfilled, the judge must have regard to any steps which might reasonably be taken to reduce the complexity or length of the trial.

(7) But a step is not to be regarded as reasonable if it would significantly disadvantage the prosecution.

44 Application by prosecution for trial to be conducted without a jury where danger of jury tampering

(1) This section applies where one or more defendants are to be tried on indictment for one or more offences.

(2) The prosecution may apply to a judge of the Crown Court for the trial to be conducted without a jury.

(3) If an application under subsection (2) is made and the judge is satisfied that both of the following two conditions are fulfilled, he must make an order that the trial is to be conducted without a jury; but if he is not so satisfied he must refuse the application.

(4) The first condition is that there is evidence of a real and present danger that jury tampering would take place.

(5) The second condition is that, notwithstanding any steps (including the provision of police protection) which might reasonably be taken to prevent jury tampering, the likelihood that it would take place would be so substantial as to make it necessary in the interests of justice for the trial to be conducted without a jury.

(6) The following are examples of cases where there may be evidence of a real and present danger that jury tampering would take place—

(a) a case where the trial is a retrial and the jury in the previous trial was discharged because jury tampering had taken place,

(b) a case where jury tampering has taken place in previous criminal proceedings involving the defendant or any of the defendants,

(c) a case where there has been intimidation, or attempted intimidation, of any person who is likely to be a witness in the trial.

45 Procedure for applications under sections 43 and 44

(1) This section applies—

(a) to an application under section 43, and

(b) to an application under section 44.

(2) An application to which this section applies must be determined at a preparatory hearing (within the meaning of the 1987 Act or Part 3 of the 1996 Act).

(3) The parties to a preparatory hearing at which an application to which this section applies is to be determined must be given an opportunity to make representations with respect to the application.

(4) In section 7(1) of the 1987 Act (which sets out the purposes of preparatory hearings) for paragraphs (a) to (c) there is substituted—

“(a) identifying issues which are likely to be material to the determinations and findings which are likely to be required during the trial,

(b) if there is to be a jury, assisting their comprehension of those issues and expediting the proceedings before them,

(c) determining an application to which section 45 of the Criminal Justice Act 2003 applies.”.

(5) In section 9(11) of that Act (appeal to Court of Appeal) after “above,” there is inserted “from the refusal by a judge of an application to which section 45 of the Criminal Justice Act 2003 applies or from an order of a judge under section 43 or 44 of that Act which is made on the determination of such an application.”.

(6) In section 29 of the 1996 Act (power to order preparatory hearing) after subsection (1) there is inserted—

“(1A) A judge of the Crown Court may also order that a preparatory hearing shall be held if an application to which section 45 of the Criminal Justice Act 2003 applies (application for trial without jury) is made.”

(7) In subsection (2) of that section (which sets out the purposes of preparatory hearings) for paragraphs (a) to (c) there is substituted—

“(a) identifying issues which are likely to be material to the determinations and findings which are likely to be required during the trial,

(b) if there is to be a jury, assisting their comprehension of those issues and expediting the proceedings before them,

(c) determining an application to which section 45 of the Criminal Justice Act 2003 applies.”.

(8) In subsections (3) and (4) of that section for “subsection (1)” there is substituted “this section”.

(9) In section 35(1) of that Act (appeal to Court of Appeal) after “31(3),” there is inserted “from the refusal by a judge of an application to which section 45 of the Criminal Justice Act 2003 applies or from an order of a judge under section 43 or 44 of that Act which is made on the determination of such an application.”.

(10) In this section—

- “the 1987 Act” means the Criminal Justice Act 1987 (c. 38),
- “the 1996 Act” means the Criminal Procedure and Investigations Act [1996 \(c. 25\)](#).

46 Discharge of jury because of jury tampering

- (1) This section applies where—
 - (a) a judge is minded during a trial on indictment to discharge the jury, and
 - (b) he is so minded because jury tampering appears to have taken place.
- (2) Before taking any steps to discharge the jury, the judge must—
 - (a) inform the parties that he is minded to discharge the jury,
 - (b) inform the parties of the grounds on which he is so minded, and
 - (c) allow the parties an opportunity to make representations.
- (3) Where the judge, after considering any such representations, discharges the jury, he may make an order that the trial is to continue without a jury if, but only if, he is satisfied—
 - (a) that jury tampering has taken place, and
 - (b) that to continue the trial without a jury would be fair to the defendant or defendants; but this is subject to subsection (4).
- (4) If the judge considers that it is necessary in the interests of justice for the trial to be terminated, he must terminate the trial.
- (5) Where the judge terminates the trial under subsection (4), he may make an order that any new trial which is to take place must be conducted without a jury if he is satisfied in respect of the new trial that both of the conditions set out in section 44 are likely to be fulfilled.
- (6) Subsection (5) is without prejudice to any other power that the judge may have on terminating the trial.
- (7) Subject to subsection (5), nothing in this section affects the application of section 43 or 44 in relation to any new trial which takes place following the termination of the trial.

47 Appeals

- (1) An appeal shall lie to the Court of Appeal from an order under section 46(3) or (5).
- (2) Such an appeal may be brought only with the leave of the judge or the Court of Appeal.
- (3) An order from which an appeal under this section lies is not to take effect—
 - (a) before the expiration of the period for bringing an appeal under this section, or
 - (b) if such an appeal is brought, before the appeal is finally disposed of or abandoned.
- (4) On the termination of the hearing of an appeal under this section, the Court of Appeal may confirm or revoke the order.
- (5) Subject to rules of court made under section 53(1) of the Supreme Court Act 1981 (c. 54) (power by rules to distribute business of Court of Appeal between its civil and criminal divisions)—
 - (a) the jurisdiction of the Court of Appeal under this section is to be exercised by the criminal division of that court, and
 - (b) references in this section to the Court of Appeal are to be construed as references to that division.
- (6) In section 33(1) of the Criminal Appeal Act 1968 (c. 19) (right of appeal to House of Lords) after “1996” there is inserted “or section 47 of the Criminal Justice Act 2003”.
- (7) In section 36 of that Act (bail on appeal by defendant) after “hearings” there is inserted “or section 47 of the Criminal Justice Act 2003”.

(8) The Secretary of State may make an order containing provision, in relation to proceedings before the Court of Appeal under this section, which corresponds to any provision, in relation to appeals or other proceedings before that court, which is contained in the Criminal Appeal Act 1968 (subject to any specified modifications).

48 Further provision about trials without a jury

(1) The effect of an order under section 43, 44 or 46(5) is that the trial to which the order relates is to be conducted without a jury.

(2) The effect of an order under section 46(3) is that the trial to which the order relates is to be continued without a jury.

(3) Where a trial is conducted or continued without a jury, the court is to have all the powers, authorities and jurisdiction which the court would have had if the trial had been conducted or continued with a jury (including power to determine any question and to make any finding which would be required to be determined or made by a jury).

(4) Except where the context otherwise requires, any reference in an enactment to a jury, the verdict of a jury or the finding of a jury is to be read, in relation to a trial conducted or continued without a jury, as a reference to the court, the verdict of the court or the finding of the court.

(5) Where a trial is conducted or continued without a jury and the court convicts a defendant—

(a) the court must give a judgment which states the reasons for the conviction at, or as soon as reasonably practicable after, the time of the conviction, and

(b) the reference in section 18(2) of the Criminal Appeal Act 1968 (c. 19) (notice of appeal or of application for leave to appeal to be given within 28 days from date of conviction etc) to the date of the conviction is to be read as a reference to the date of the judgment mentioned in paragraph (a).

(6) Nothing in this Part affects—

(a) the requirement under section 4 of the Criminal Procedure (Insanity) Act 1964 (c. 84) that a question of fitness to be tried be determined by a jury, or

(b) the requirement under section 4A of that Act that any question, finding or verdict mentioned in that section be determined, made or returned by a jury.

49 Rules of court

(1) Rules of court may make such provision as appears to the authority making them to be necessary or expedient for the purposes of this Part.

(2) Without limiting subsection (1), rules of court may in particular make provision for time limits within which applications under this Part must be made or within which other things in connection with this Part must be done.

(3) Nothing in this section is to be taken as affecting the generality of any enactment conferring powers to make rules of court.

APPENDIX I

EXTRACT SIR ROBIN AULD'S INTERIM REPORT

(16) Criminal Trial by Judge alone:

Criminal Trial by Judge alone - The Governor should, if so advised, consider seeking the inclusion by the Privy Council in any Order in Council suspending the present Constitution, of a provision for the introduction of a special court or courts and/or special procedure of trial by judge alone for cases where trial with a jury would risk impairment of the administration of justice.

See, for example, the provisions in England & Wales under sections 43 and 44 of *Criminal Justice Act 2003* for trial by judge alone in cases respectively of serious and complex fraud and where there is a danger of jury tampering; also, in Northern Ireland under the *Justice and Security (Northern Ireland) Act 2007*,

sections 1 - 9. See also the wide-spread use of "bench" trials (i. e. trial without

jury at the option of the defendant) in common law jurisdictions, for example, in

many of the States of the United States, the Commonwealth, including Canada,

Australia and New Zealand, the Falkland Islands and St Helena.

Such a course would involve the removal of the present right to trial by jury contained in section 6(g) of the present TCI Constitution. But trial by jury is not a pre-condition of the “fair trial” requirement of Article 6 of the ECHR, of which this provision is an elaboration. Trial without jury is also a feature of a number of jurisdictions throughout the World, including India and Holland. If, as is clearly the case, it is Article 6 compliant in the many jurisdictions that permit trial of even the most serious offence without jury, it is not such a big step to take where national and “cultural” conditions are such, as here, that no fair or effective trial of such matters considered in this Inquiry could take place with a jury. There are at least seven reasons here why such a step should be taken:

1) the stance taken by all attorneys acting for Ministers and/or other Members of the House of Assembly and others in the Inquiry was that their respective clients could not possibly be given a fair hearing by a jury, given the wide adverse publicity to allegations against them before, during and as a result of the work of the Commission; all or most of the attorneys, expressed with some cogency, in my view, the high likelihood that any trial judge, faced with an application for a stay of the prosecution on account of such prejudice, would stay it;

2) the contrary consideration, if any prosecution were to survive such a stay application, is that in this highly political context it would, in the event be well nigh impossible to secure convictions of politicians by jury trial in the TCI, where the panel is of only seven jurors entitled to bring in majority verdicts by as few as five (see TCI *Jury Ordinance*, ss. 23 and 36) and where, for so many potential jurors in this jurisdiction, much turns on commitment to party politics and local and family allegiances;

- 3) the clear risk, in such circumstances, of jury-tampering;
- 4) the potential complexity of allegations of corruption or other serious dishonesty of the sort canvassed in the Inquiry - taxing for any jury panel, whether in the TCI or any jurisdiction - a strong contributor to the reasoning of Lord Roskill's Committee on Fraud Trials recommending trial of serious and complex fraud without juries;
- 5) the length and cost of any likely prosecutions if tried with a jury; - in some cases of some months - the public and private cost of jury trial, and the concomitant intrusion, burden on the lives and distress, to all trial participants;
- 6) the fragility of long and complex jury trials - see e.g. the collapse of the *Jubilee Line* trial at the Central Criminal Court after many months at a reported cost to the public purse of some £60 million; and
- 7) the strong public interest in what has become a state of national emergency for those responsible to be brought swiftly to justice and, if found guilty, made to expiate their crimes - an outcome, which, in my view, will be impossible if it is attempted in the Territory by way of trial by jury.

(17) Appointment of a Special Prosecutor:

If, and only if, provision is made for trial by judge alone, the Governor should appoint a Special Prosecutor for any prosecutions resulting from police investigations engendered by the Commission's Final Report. He or she should be supported by a specialist team of corruption/fraud prosecutors and experienced fraud and forensic accounting investigators, drawn wholly or in the main from outside the TCI. Their task should be to investigate and prosecute those who, after investigation, the Special Prosecutor considers should be prosecuted for involvement in corruption in relation to past and/or present

elected Members of the House of Assembly and/or other serious dishonesty.