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Isle of Man
Government

Reiltys Ellan Vannin

Council of Ministers

Response to the Report of the Select Committee on the Operation of Jury System 2015-2016

November 2016

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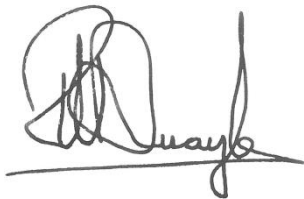
To the Hon Stephen Rodan MLC, President of Tynwald and the Hon Council and Keys Assembled

Forward by the Chief Minister, Minister for the Cabinet Office

The Council of Ministers thanks the Tynwald Select Committee for its report on the Operation of the Jury System, and welcomes the evidence and recommendations contained therein.

The Cabinet Office, having reviewed the Select Committee Report, has prepared this response to the report with valuable assistance from The Chief Registrar and the Departments of Economic Development and Home Affairs.

The Council of Ministers is in broad agreement with the majority of recommendations, and notes that further consideration will need to be given as to the wider legislative and practical implications of changes to the jury system on the Isle of Man.

A handwritten signature in black ink, appearing to read 'R H Quayle', written over a horizontal line.

**Hon R H Quayle MHK
Chief Minister**

General Response to the Tynwald Select Committee Report

The Tynwald Select Committee ("the Committee") was appointed at the October 2015 sitting of Tynwald to consider the operation of the jury system on the Isle of Man and to report by the June 2016 sitting.

The Council of Ministers ("Council") welcomes the Report of the Select Committee on the Operation of the Jury System ("the Report").

Council notes the wide remit of the inquiry which looked at how the criminal justice system works for unusually difficult cases, the composition of the jury, any guidance or training provided to the jury, and the summoning of juries.

The Committee reviewed judge only trials, the use of specialist jurors, the impact of long trials, such as for fraud cases or cases involving sexual or other difficult issues. Council notes the Committee's conclusion that the criminal justice system needs to be robust and sufficiently flexible to adapt to fast changing circumstances.

The Committee reviewed the composition and function of the jury, including size, majority verdicts and the use of peremptory challenges (i.e. the right of rejection of a proposed juror without reason). Council notes the Committee's conclusions, that the number of jurors should be changed for a wider range of cases; that within a small jury size there is the potential risk of influence by a number of means such as social media, forceful character or external coercion; and that there was no justification for retaining the right to peremptory challenges.

Council considers that a jury is a fundamental part of the criminal and tribunal justice system and welcomes the view of the Committee that it supports the central role of the jury in criminal cases. Its independence and impartiality upholds the European Convention of Human Rights Article 6 – the right to a fair trial.

The Committee reviewed the guidance provided for juries, in particular in relation to the impact of social media and the internet, and the care and training for jurors. Council notes the Committee's conclusions, that the guidance and training video for jurors be updated; that guidance is created in relation to the use of the internet particularly social media; and the need to create a statutory exemption for jurors to be able to seek counselling following difficult, distressing cases.

The Committee reviewed the selection and summoning of jurors, through the use of the electoral roll, the exemptions and deferrals from service, and the provision of expenses or remuneration. Council notes the Committee's concern that the total estimated population does not correlate with the numbers registered on the electoral roll from which jurors are drawn. Council notes the Committee's conclusions that jury lists and the electoral roll could be replaced by a single central citizen database, enabling juror recruitment to be streamlined; that the maximum age for service should be raised to 75 years; that the criteria for exemption should be revised; and that legislation could be amended to improve remuneration and expenses for jurors.

The Committee reviewed the application of the Criminal Code 1872 ("the Code") particularly in relation to interfering with a jury. Council notes the Committee's conclusion that the Code does not reflect modern conditions and situations and that primary legislation should be updated.

Response to the Committee's Recommendations

Recommendation 1

We recommend that the option of a judge-only trial on information be allowed to defendants as a right.

Recommendation 2

We recommend that the option of a judge-only trial be available where, in the opinion of the court, it is not practicable to empanel a jury.

Commentary/Response:

The Chief Registrar provided the following comments:

These recommendations would require further investigatory, potentially legislative, work around the provision of the right of a party to choose a judge-only trial on information, and also to be able to appeal against a judge-only trial decision, noting that such appeals could result in delays in progressing trials.

Council accepts Recommendations 1 and 2 noting that in practise it is unlikely that a defendant would choose a judge-only trial on information, and also noting the need for further consideration as to the provision of an adequate and relevant appeal structure.

Recommendation 3

The number of those serving on juries should be increased to 12 for all cases involving a maximum sentence of over ten years.

Recommendation 4

In cases where a twelve-member jury sits, a majority verdict of ten members should be allowed on the same basis as in England and Wales.

Commentary/Response:

The Chief Registrar provided the following comments:

Recommendation 3 has the potential to increase the number of trials which would require a jury of 12, which may have implications in respect of suitable court facilities for such matters to be heard, as noted by the Committee [paragraph 42] with the layout and design of rooms within the Courts building.

It is unlikely that the General Registry would be able to coordinate trials in such a way that a 7 person jury could sit at the same time as a 12 person jury, however there is the potential to have two 12 person jury trials sitting at the same time.

Section 24 [Number of persons on jury in criminal matters] of the Jury Act 1980 states the following:

- The offence of treason or the offence of murder shall be tried by a jury of twelve persons. All other offences triable on information shall be tried by a jury of seven persons:
- Provided that a Deemster may in the case of the trial of any person for any offence, by reason of the gravity of the matters in issue, direct that the offender shall be tried by a jury of twelve persons.

It may be considered that this clause already provides flexibility to appoint a jury of 12 people.

It should also be noted that where an offence has a maximum sentence in excess of 10 years, in the event of a conviction the sentence imposed may not attract that level of custodial sentence due to a number of circumstances.

As an example, Schedule 4 of the Misuse of Drugs Act 1976 sets out the prosecution and punishment against offences where the maximum sentence is in excess of 10 years. When the case of [*Hamblett v HMAG 2DS 2012/16*](#) was considered the Court noted legislation from neighbouring jurisdictions in relation to sentencing guidelines that were appropriate in respect of offences involving Class A drugs as well as noting the situation in which the crime occurred, before passing sentence.

Council accepts Recommendation 3, noting the evidence provided in the Report and the commentary above, and considers that the DHA should identify those offences for which the maximum sentence exceeds 10 years, in order to enable further consideration as to whether these are appropriate parameters for the consideration of cases by a 12 person jury.

Council accepts Recommendation 4, subject to changes in any relevant legislation to enable a majority verdict.

Recommendation 5

We recommend that the right of the prosecution or defence in criminal trials to peremptory challenges should be abolished.

Commentary/Response:

The DHA provided the following comments in relation to the potential need for legislative change:

The DHA will consider whether the Drafter should be asked to include the abolition of peremptory (i.e. challenges without “good and sufficient cause”) challenges in the Bill that is to follow the current consultation on proposals for Criminal Justice, Sentencing and Offender Management. Section 27 (1) & (2) of the Jury Act 1980 could be amended although it is accepted that the whole section is written in language that could benefit from updating.

It is, however, considered that the right be retained of both the prosecution and the defence to challenge the empanelling of a juror provided they have “good and sufficient cause” (i.e. that a prospective juror is known to a party, to the proceedings or is known to have prejudicial views etc.).

The Chief Registrar provided the following comment:

Consideration will need to be given whether certain information e.g. previous offences information is provided earlier than currently to the defence to enable it to challenge with “good cause” but it is acknowledged that there is a risk in providing information on jurors in advance.

Council accepts Recommendation 5, noting that challenges for “cause” should remain.

Recommendation 6

We recommend that specific provision be made to allow jurors to obtain counselling in difficult and emotionally draining cases and that any necessary changes to the law relating to non-disclosure be made to enable professional assistance to be given.

Commentary/Response:

The DHA provided the following comments:

The DHA welcomes the recommendation and sympathises with the case of jurors sitting on difficult and emotionally draining cases where they then have no statutory provision for counselling, unlike those who routinely are exposed to distressing evidence in the course of their professional lives.

There is nothing to prevent a juror seeking counselling, nor should what is spoken about in the privacy of a professional counselling session be questioned. The juror is bound by confidentiality, but so is the counsellor in terms of their professional training and as a condition of their accreditation by a recognised professional body – it is a fundamental tenet of counselling that what is spoken about is confidential. Confidentiality should be absolute on both sides.

The DHA will consider the necessity, or otherwise, of whether to progress legislative changes, and will invite interested parties to consider the risks associated with allowing a concession to appear in the duty of the juror to keep confidences.

Council accepts Recommendation 6, noting the commitment from the DHA to review existing provision and legislation.

Council notes the conclusions of the Committee in relation to updating the training video for jurors, providing guidance to juries on the use of social media, and the need to change the criminal law governing interference with juries to take into account the use of the internet and social media.

Recommendation 7

Recruitment of jurors should be modernised so that the names are collected from a centrally held universal list of citizens, not based on Sheadings, but with safeguards to allow a mixture of jurors from various parts of the Island.

Recommendation 8

Recruitment of jurors should be streamlined to allow early claims for deferral.

Recommendation 9

The Cabinet Office should lead a cross-Government working group to consider, investigate and propose the principles for a centralised Citizen Database as follows:

- **To consider the whole of the Public Service and identify any services in addition to electoral roll and jury service that could benefit from such a central register;**
- **To consider the method by which the database could be constructed automatically from existing systems to provide as accurate a record as possible;**
- **To consider the legal framework required to facilitate the creation and maintenance of such a database;**
- **To consider the costs and plan, together with the benefits, and report to Tynwald.**

Commentary/Response:

The Chief Registrar provided the following comment:

Currently a Deemster will order Coroners to summon a specific number of potential jurors from a particular Sheading, however the principle of a centralised Citizen Database provides for there to be a spread of representation across the island and a streamlined system for the recruitment of jurors.

The Cabinet Office provided the following comment:

The Cabinet Office will present a policy proposal to Tynwald in December 2016. This will set out steps towards the implementation of the proposed approach for a single citizen database, subject to Tynwald approval, including initial considerations relating to technology, legislation and consultation.

Council accepts Recommendations 7, 8 and 9, noting the ongoing work across Government on the consideration of a Citizen Database.

Recommendation 10

The maximum age for service on a jury should be raised to 75, with an option (as in Scotland) for excusal for those aged 71 and over.

Recommendation 11

Everyone should be eligible to serve on a jury, except those involved in the administration of justice (including police officers) and Members of Tynwald. Other persons with public duties should be allowed excusal for cause.

Commentary/Response:

The Chief Registrar provided the following comments:

The changes regarding eligibility and age criteria could be undertaken by Order, initially increasing the age to 70 from the current age of 65. Any changes could lead to an increase in the number of excusal requests.

Council accepts Recommendations 10 and 11, subject to changes in any relevant legislation in relation to eligibility to serve on a jury and the maximum age criteria.

Recommendation 12

We recommend that section 39 of the Employment Act 2006 should be amended to impose a duty on employers to continue to pay those staff who serve as jurors as if it were a normal working day, with safeguards for employers with fewer than 40 employees. The general payment of expenses (other than travel and refreshment) should be abolished and the money saved should be used to compensate properly those whose employer will not pay them and who establish hardship.

Commentary/Response:

The DED have provided a full response to Recommendation 12 at Appendix B and conclude that the present system is unfair in that it leaves some people out of pocket. To remedy this situation either:

- a. employers should be required to continue to pay employees and possibly other workers during jury service; or
- b. the Government should continue to pay jurors, preferably at an enhanced rate.

DED consider that the best option is for the Government to continue to pay jurors but to enhance the rates contained in the Jurors Order 2003 and the Jurors (Supplementary Payments) Scheme 2003.

The Chief Registrar provided the following comments:

The General Registry and the Courts operate within the provisions of the Jury Act 1980; however it is not responsible for the relevant legislation.

The remuneration made by Treasury under the above Order and Scheme require consultation with the Deemsters and approval by Tynwald, and increasing fees would require additional funding.

If an employer were to pay the absent employee during jury service there might be a perception of influence and also the potential that there would be pressure on a juror to come to a quick decision so as to return to work as quickly as possible.

Council welcomes the evidence provided in the Report, the commentaries from the DED and the Chief Registrar, noting that the present system is perceived as unfair in that it leaves some jurors out of pocket.

On consideration, Council reject Recommendation 12, that the Employment Act 2006 be amended to impose a duty on employers to pay staff who serve as jurors, and that the general payment of expenses be abolished.

Recommendation 13

We recommend that the Government engage in a comprehensive overhaul of the 1872 Criminal Code provisions in relation to juries, which should include outlawing conscious use of the internet and social media in a way which undermines the jury process.

Commentary/Response:

The DHA provided the following comments:

It is accepted there is a need to reform the Code, noting that this is a sizeable task which can only be commenced when the reform of the criminal justice process, being undertaken through the Criminal Justice Board has been completed, which is subject to the Sentencing and Offender Management Bill and the Sex Offences Bill having been progressed to Royal Assent.

The DHA will undertake to review the Code in the future and ask the Drafter to look into the matter once the main provisions of the aforementioned Bills have been drafted and the judiciary consulted in respect of the other items they may submit.

There is already the ability to declare a mistrial where a juror has acted improperly and the potential to bring legal consequences for the juror, and the DHA note the need to change the criminal law governing the interference with juries to take into account the use of the internet and social media.

Council accept Recommendation 13 noting the commitment from DHA to review the Criminal Code 1872 in due course.

Appendix A

Summary of Responses to the Committee's Recommendations

	Recommendation	Response
1	We recommend that the option of a judge-only trial on information be allowed to defendants as a right.	Council accepts Recommendations 1 and 2 noting that in practise it is unlikely that a defendant would choose a judge-only trial on information, and also noting the need for further consideration on the provision of an adequate and relevant appeal structure.
2	We recommend that the option of a judge-only trial be available where, in the opinion of the court, it is not practicable to empanel a jury.	
3	The number of those serving on juries should be increased to 12 for all cases involving a maximum sentence of over ten years.	Council accepts Recommendation 3, noting the evidence provided in the Report and the commentary above, and considers that the DHA should identify those offences for which the maximum sentence exceeds 10 years, in order to enable further consideration as to whether these are appropriate parameters for the consideration of cases by a 12 person jury.
4	In cases where a twelve-member jury sits, a majority verdict of ten members should be allowed on the same basis as in England and Wales.	Council accepts Recommendation 4, subject to changes in any relevant legislation to enable a majority verdict.
5	We recommend that the right of the prosecution or defence in criminal trials to peremptory challenges should be abolished.	Council accepts Recommendation 5, noting that challenges for "cause" should remain.
6	We recommend that specific provision be made to allow jurors to obtain counselling in difficult and emotionally draining cases and that any necessary changes to the law relating to non-disclosure be made to enable professional assistance to be given.	Council accepts Recommendation 6, noting the commitment from the DHA to review existing provision and legislation. Council notes the conclusions of the Committee in relation to updating the training video for jurors, providing guidance to juries on the use of social media, and the need to change the criminal law governing interference with juries to take into account the use of the internet and social media.
7	Recruitment of jurors should be modernised so that the names are collected from a centrally held universal list of citizens, not based on Sheadings, but with safeguards to allow a mixture of jurors from various parts of the Island.	Council accepts Recommendations 7, 8 and 9, noting the ongoing work across Government on the consideration of a Citizen Database.
8	Recruitment of jurors should be streamlined to allow early claims for deferral.	

13	We recommend that the Government engage in a comprehensive overhaul of the 1872 Criminal Code provisions in relation to juries, which should include outlawing conscious use of the internet and social media in a way which undermines the jury process.	Council accept Recommendation 13 noting the commitment from DHA to review the Criminal Code 1872 in due course.
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Appendix B

Commentary on Recommendation 12

Provided by the Department of Economic Development

1. Isle of Man employment rights

- 1.1 Employees in the Isle of Man have a statutory right to take time off for jury service (Employment Act s. 39(1)). In contrast to the position in the UK the right is not qualified.
- 1.2 Employees are protected from any detriment and dismissal for exercising the right (Employment Act ss. 70 and 119). Dismissal of an employee for exercising any statutory right is automatically unfair.
- 1.3 These rights do not extend to workers who are not employees (for example casual workers, contract workers and agency workers).
- 1.4 Employers have no statutory obligation to pay employees or other workers who take time off for jury service though some employers may nevertheless pay employees for any such time taken.

2. Isle of Man payment rights

- 2.1 As pointed out in paragraph 107 of the Report, section 32 of the Jury Act 1980 already provides a system of payments for jurors.
- 2.2 The Jurors Order 2003 sets the rate of payments payable under section 32(1) of the Act. The rates are £56 for a full day's jury service and up to £28.50 for a half day's service.
- 2.3 The Order sets the subsistence allowances payable to jurors
 - Up to 5 hours £2.15
 - 5 to 10 hours £4.35
 - Over 10 hours £9.55
- 2.4 All jurors are entitled to the payments, whether they are working or not. This is helpful to, for example, carers.
- 2.5 In addition, the Jurors (Supplementary Payments) Scheme 2003 sets the rate of supplementary payments, which are additional to payments made under the Jurors Order. Such supplementary payments are made to jurors in criminal trials which last over 10 days. The payments reimburse jurors for loss of earnings or benefits (after taking account of statutory payments under the Jury Act 1980), up to a maximum of £57 for a full day and £36 for a half day's service.
- 2.6 Some people may be excused jury service. The Isle of Man Courts of Justice website advises:

If you are an employee, work commitments are not considered a sufficient reason to be excused from jury service. If there are, however, exceptional

circumstances which would cause severe difficulties at work an excusal may be considered. You should complete a Jury Excusal form and send it together with supporting documents to the court explaining those circumstances. If you are self-employed and jury service would cause you substantial personal or financial hardship, you can apply to the Chief Registrar to be excused at his/her discretion.

- 2.7 As regards the length of jury service, the website advises that "Trials can last from days to weeks depending on the individual case."
- 2.8 In 2015/16 the cost of jurors' fees was approx. £41,000.¹
- 2.9 In relation to the level of payments, the General Registry has advised that towards the ends of 2015 an increase was considered but was put on hold due to this Select Committee.

3. Arrangements in England and Wales

- 3.1 As in the Island, employers in England and Wales are not obliged to pay employees or other workers who take time off for jury service unless there is a contractual obligation. However, a claim for loss of earnings can be made to the court.
- 3.2 Financial support and benefits (such as Jobseeker's Allowance) are unaffected for the first 8 weeks while on jury service and jurors may claim payments for:
- travel
 - lunch and refreshments
 - loss of earnings and other expenses, (e.g. employing a child-minder or carer outside the juror's usual care arrangements)
- 3.3 The maximum daily amount which can be claimed each day for loss of earnings and other expenses is as follows:

Length of jury service	Time spent each day	Maximum daily amount which can be claimed
First 10 days	4 hours or under	£32.47
First 10 days	Over 4 hours	£64.95
Day 11 to day 200	4 hours or under	£64.95
Day 11 to day 200	Over 4 hours	£129.91
After day 201	4 hours or under	£114.03
After day 201	Over 4 hours	£228.06

- 3.4 The Department is unaware of any plans to alter the existing system in England and Wales.

¹ Source: the General Registry

4. Commentary

Other options

- 4.1 The report recommends that the Employment Act 2006 should be amended to impose a duty on employers to continue to pay their staff as if it were a normal day. However, while it is appreciated that jurors should not be out of pocket there is no analysis of alternative options.
- 4.2 The Employers' Federation, Chamber of Commerce and individual employers may well have views about the impact of making employers responsible for paying jurors especially on smaller business.
- 4.3 The option of the Government continuing to pay such costs does not appear to have been investigated and, in particular, the simple idea of increasing the amount of the payment made under the Jury Act does not appear to have been considered.

Payments under the Jury Act 1980

- 4.4 As pointed out in paragraph 107 of the Report, section 32 of the Jury Act 1980 already provides a system of payments for jurors, though it is apparent that there has been no increase in payments since 2003, an interval of 13 years.
- 4.5 Whereas the Jury Act provides for a flat rate payment, which can be increased by an order which requires the approval of the Treasury, it would be possible to either:
 - (a) amend the Act so as to pay staff serving as jurors as if it were a normal working day; or
 - (b) increase the rate set by secondary legislation perhaps basing the new rate on the value of median earnings.
- 4.6 Having said that, the General Registry has advised that if levels were increased it would be likely any increase would be relatively small to keep payments broadly in line with those in other jurisdictions. While this would be a matter for Treasury, the General Registry is doubtful that any increase would be in line with earnings.

Self-employed workers and carers

- 4.7 Paragraph 111 states that *there is a particular problem with the self-employed and especially those in small businesses, who can suffer considerable financial loss*. Yet one drawback of relying on employers to pay employees is that persons who are self-employed would lose any entitlement to payment for jury service.
- 4.8 Persons who do not work but who have caring responsibilities would also lose any entitlement to payment for jury service if the system were to change so that employers would pay jurors only for loss of earnings.

Time off rights under IOM employment law

- 4.9 Employees in the Isle of Man only have a right to paid leave in a very limited number of cases. For example, while employees have a right to reasonable time off for undertaking public duties, such time off is unpaid (as it is in England and Wales).
- 4.10 Workers who are not employees such as casual workers, contract workers and agency workers have no right to either paid or unpaid time off in IOM employment law.
- 4.11 If the Department were to introduce a right to paid time off for jury service then it would be necessary to consider whether the right should extend to employees or to all workers.
- 4.12 If the right was not extended to all workers then workers other than employees would be worse off than they are at present under existing arrangements.
- 4.13 If the right was extended to all workers then the approach would be anomalous vis-à-vis the treatment of such workers in relation to other employment rights.

Advantages of the recommended approach

- 4.14 Requiring employers to pay their staff rather than the Government might offer the following advantages:
 - (a) direct savings to Government
 - (b) removal of administration costs.

Employers with fewer than 40 employees

- 4.15 The Committee suggests that while employers should be required to pay their staff as if it were a normal day there should be safeguards for employers with fewer than 40 employees. While the report does not expand on what this means it is suggested that some system should be put in place to reduce the payments made by small employers.

- 4.16 The existing system of redundancy rebates² could provide a model which might provide safeguards for small employers. However, such rebates have long been abolished in England and Wales and the Treasury may seek to abolish or limit them in the Island once amendments, contained in the Equality Bill, have been made to the Redundancy Payments Act 1990.
- 4.17 Setting up a rebate system would also remove some of the savings to Government which could otherwise be expected. It would also require some administrative resource.

Compensating those whose employer will not pay them and who establish hardship

- 4.18 Part of the recommendation suggests using savings to compensate those whose employer will not pay them and who establish hardship. Arguably this idea is flawed for the following two reasons.
- 4.19 The usual remedy in the Island's employment law (and also that of England and Wales) where an employer will not pay an amount owed to an employee (e.g. paid time off for ante-natal care, holiday pay etc.) is to bring a claim to the Employment Tribunal. Where a claim is successful the Tribunal will order the employer to pay the amount owing (and possibly an additional amount).
- 4.20 Secondly, some kind of hardship fund would remove some of the savings to Government which could otherwise be expected. It would also require some administrative resource including a possible review or appeal procedure.

² A small employer who makes a statutory redundancy payment to an employee is entitled to a rebate from the Manx National Insurance Fund of a certain proportion of the payment, subject to certain administrative requirements. A small employer is one whose workforce, with that of any associated employers, is not more than 40. The amount of the rebate depends on the size of the workforce of the employer and any associated employers:

<i>Employees</i>	<i>Rebate</i>
up to 5	60%
6 – 10	50%
11 – 20	40%
21 – 30	35%
31 – 40	30%

5. Conclusions

- 5.1 The present system is unfair in that it leaves some people out of pocket. To remedy this situation either:
 - (a) employers should be required to continue to pay employees and possibly other workers during jury service; or
 - (b) the Government should continue to pay jurors, preferably at an enhanced rate.
- 5.2 For the reasons given at 4 above the Department does not consider that recommendation 12 is necessarily the best solution to the problem.
- 5.3 In the Department's view the best option is for the Government to continue to pay jurors but to enhance the rates contained in the Jurors Order 2003 and the Jurors (Supplementary Payments) Scheme 2003.