

EXECUTIVE COUNCIL

CONFIDENTIAL

Title of Report: Administration of Justice (Amendment) Bill
Paper No: 39/13
Date: 20 February 2013
Report of: Attorney General

1.0 Purpose

The purpose of this paper is to inform Executive Council about the outcome of consultation on the Administration of Justice (Amendment) Bill and to seek approval for the tabling of Government amendments to the Bill.

2.0 Recommendations

Executive Council is recommended to approve the amendments to the Administration of Justice (Amendment) Bill set out in Annex B as Government amendments to be tabled and moved at the appropriate point in the proceedings of the Legislative Assembly on the Bill.

3.0 Summary of Financial Implications

None

4.0 Background

4.1 In October 2012, Executive Council considered ExCo Paper 255/12 and approved the drafting of new legislation to make a number of specific amendments to the Administration of Justice Ordinance.

4.2 An Administration of Justice (Amendment) Bill had – indicatively – been scheduled for presentation to the Legislative Assembly in May 2013.

4.3 However, because of concerns expressed about the pressing need for the changes to be made, the decision was taken for the Bill to be presented to the Legislative Assembly in February 2013 instead.

4.4 At its meeting on 23 January 2013, Executive Council considered ExCo paper 30/13 and approved the publication of the Administration of Justice Bill.

4.5 It was also explained in section 6 of ExCo paper 30/13 that a process of consultation was being carried out and that this might result in approval having to be sought for Government amendments to the Bill.

4.6 For ease of reference, copies of ExCo papers 255/12 and 30/12 are attached to this paper as Annexes D and E. These papers contain more detail about the analysis behind the policy and about the Bill.

5.0 Consultation

Process

5.1 Stakeholders had already been consulted in relation to the policy issues before ExCo paper 255/12 was submitted to Executive Council.

5.2 Had ExCo paper 30/13 not been submitted in January 2013 (so that the Bill could be presented to Legislative Assembly in February 2013 rather than in May 2013, as originally envisaged), further consultation on the draft Bill would have been carried out before it was submitted to Executive Council.

5.3 However, with the change of timing, that was not been possible and consultation was carried out in parallel with the legislative process:

- Stakeholders (the judiciary, legal practitioners and the police) were consulted on the draft Bill at the same time as ExCo paper 30/13 was submitted to Executive Council.
- The media were also being consulted on the provisions about reporting restrictions.
- Stakeholders and the media were asked to provide their initial views as soon as possible so that an oral report will be made to Executive Council on 23 January 2013.
- However, since that allowed little more than a week for consultation on a 34 page Bill (including the Objects and Reasons). Stakeholders and the media were asked to provide their more detailed comments in time for the meetings of Executive Council and Legislative Assembly in February.
- A follow-up e-mail was circulated in advance of the deadline for ExCo papers to remind those who had been consulted and inviting those who not responded by that time about the deadline for consultation responses.

5.4 Responses (in various forms) were received prior to the deadline from: the Director of Emergency Services; two legal practitioners; and two media organisations.

5.5 Separately, one minor query was raised by telephone by a justice of the peace who had read ExCo paper 30/19 when it had been published.

5.6 The Senior Magistrate had indicated at an early stage that he would be making comments on the Bill but no comments had been received from him by the original deadline for ExCo papers.

5.7 Given the nature of the Bill, it was thought essential to have input from the Senior Magistrate and so an extension to the deadline for submitting this ExCo paper was obtained and a further request for comments from the Senior Magistrate was made to him.

5.8 In response to that further request, the Senior Magistrate provided what he described as “preliminary comments”, in which he raised a number of concerns about the Bill (and also about what was not in it). It was considered that some (though not all) of the comments needed to be addressed by means of Government amendments to the Bill.

5.9 In case the Senior Magistrate wanted to comment further in the light of the amendments, a further extension to the deadline for submitting this ExCo paper was obtained and the Senior Magistrate was given an opportunity to comment on the proposed Government amendments and a note responding to the concerns he had raised. However, no further comments were received from the Senior Magistrate.

Summary of responses

5.10 Copies of the consultation responses (or notes about the ones that were not made in writing) are being made available to Members of the Legislative Assembly in Gilbert House.

5.11 A detailed analysis of the consultation responses are set out in Annex A.

5.12 In addition, the following summary of the key points may be useful:

- (1) The Senior Magistrate expressed concern that the Bill did not go far enough and that the Administration of Justice Ordinance needed to be fundamentally reformed and completely replaced.

That need is well recognised.

Executive Council has already approved the commissioning of work by a specialist drafter on new criminal justice legislation and that work is now underway.

It is accepted that work will then need to be undertaken on civil procedure, but proposals on that will have to be made separately at a later date.

The current Bill is indeed limited in scope. However, it has only ever been intended to deal with a number of specific but pressing changes that need to be made urgently and that cannot wait for longer-term projects.

- (2) The Senior Magistrate also made a number of specific comments on the current Bill.

It is considered that some of these would be better dealt with in other ways and they do not require amendments to be made to the Bill.

It is considered that some others would be better dealt as part of the longer term projects and, since the immediate priority is to deal with the immediate problems, amendments to the Bill to deal with these points should not be made at this stage (but that the points should be raised with the specialist drafter).

However, it was considered that some of his concerns do need to be addressed at this stage and Government amendments have been drafted to deal with these.

- (3) One of the legal practitioners made a number of detailed comments on the Bill at a meeting with the Legislative Drafter, who has taken instructions on them from those responsible for the policy.

Again, it is considered that some of these would be better dealt with in other ways and they do not require amendments to be made to the Bill.

Likewise, it is considered that some others would be better dealt as part of the longer term projects and, since the immediate priority is to deal with the immediate problems, amendments to the Bill to deal with these points should not be made at this stage (but that the points should be raised with the specialist drafter).

However, there are two specific issues that could usefully (and readily) be dealt with by means of Government amendments at this stage.

- (4) When considering consultation responses, further research has been carried out that has led to a number of other consequential amendments that are needed to other legislation.

These could be dealt with separately by relying on the proposed power for the Governor to make consequential amendments by order (see clause 16 of the Bill).

Although that power will remain useful for consequential amendments that might still have been overlooked, it is thought more appropriate to deal with those that have been identified by Government amendments instead.

It is also now considered that a general provision should also be included to deal with references to committal that have still been overlooked in other legislation.

6.0 Draft Government amendments

6.1 The possibility that it might be necessary to table Government amendments to the Administration of Justice (Amendment) Bill was mentioned in ExCo paper 30/19.

6.2 The proposed amendments are set out in Annex B and a marked up version of the Bill showing the effect of those amendments is attached to this paper as Annex C.

6.3 *Amendment 1* would make a number of changes to the new Part 3A that would be added to the Administration of Justice Ordinance to allow cases to be transferred between the Summary Court and the Magistrate's Court:

- (a) The provision about practice directions would be removed from new section 35A – it would be replaced by expanded provisions in new sections 35B and 35C.
- (b) New section 35B is intended to deal with concerns that the Senior Magistrate had raised about the risk of a “standoff” between the Summary Court and Magistrate's Court about which of the two is to hear a case.

It would allow the Chief Justice, the Senior Magistrate (as an acting judge of the Supreme Court) or another acting judge of the Supreme Court to break the deadlock by ordering that the Summary Court must get the approval of a Supreme Court judge before it can take over a case.

It would also allow the Chief Justice, the Senior Magistrate (as an acting judge of the Supreme Court) or another acting judge of the Supreme Court to create one or more categories of cases in which the approval of a Supreme Court judge is needed before the Summary Court can take over a case in that category.

- (c) New section 35C is also intended to address concerns raised by the Senior Magistrate.

It would allow the Chief Justice as well as the Senior Magistrate to issue practice directions about the power to transfer cases and that power would be expanded to allow differences in procedure between the Summary Court and Magistrate's Court to be overcome. It would also be made clearer that practice directions should be followed and are not merely advisory.

These provisions are intended to strike a balance between flexibility and control by ensuring that cases cannot ever get “stranded” in the Magistrate's Court (if the Senior Magistrate is not available) but that cases are determined at the appropriate level and in an appropriate way.

There is a potential difficulty in allowing the Senior Magistrate to have such control over the jurisdiction of the courts (an objection which applies to any judge and not to any individual). However, it is considered that this is the best solution that can be devised in the time available.

It will be possible to review the practical operation of these provisions as part of the longer term projects now underway.

6.4 *Amendment 2* would amend the Children Ordinance to allow the Summary Court to deal with cases about care and supervision orders relating to children:

The Senior Magistrate had expressed concern that the power to transfer cases from the Magistrate's Court to the Summary Court would still not allow a child care case to be transferred to the Summary Court.

That is correct and the reason why is that the Summary Court does not have jurisdiction in such cases. The proposed new power to transfer cases was not intended to expand the jurisdiction of the Summary Court.

Amendment 2 would deal with the specific issue in relation to child care cases by removing the restriction in section 37(5)(c) of the Children Ordinance on the Summary Court dealing with care or supervision orders.

There is a risk that this merely deals with one specific problem and that others may yet be encountered.

For that reason, consideration was given to a more ambitious solution that would involve an amendment to the Bill to allow cases to be transferred to the Summary Court even if the Summary Court does not currently have jurisdiction in those cases.

However, that was dismissed as a possibility at this stage because it goes so much further than the existing policy approval and the time available before Legislative Assembly would not allow the breadth or depth of debate necessary for such a radical and fundamental change. If such a change is to be made, it would be better made as part of the longer term projects.

Consideration was also given to the possibility of the Chief Justice making rules of court under section 37(5) of the Children Ordinance that would have the effect of removing the specific restriction on the Summary Court's jurisdiction (which is an interim provision pending rules of court being made). However, it was considered that it would be more appropriate to deal with the issue by an amendment to the legislation.

6.5 *Amendment 3* would make a number of consequential amendments that have been identified in other legislation since the draft Bill was submitted to Executive Council for approval.

6.6 *Amendment 4* would introduce a general provision to deal with references to committal that have been overlooked in other legislation.

6.7 *Amendment 5* would make a number of changes in the proposed new Schedule 4 to the Administration of Justice Ordinance (which contains the detailed provisions of the new sending procedure):

- (a) Paragraph 8 would be amended to make it clear that applications for extensions of the time within which evidence must be served on an accused person and sent to the Supreme Court could be dealt with in writing (and, if need be, outside the Falkland Islands).

Consideration was given to the alternative of allowing the Summary Court or a single justice of the peace to deal with these applications but it is considered that they should be dealt with in the Supreme Court (but with flexibility in case the Senior Magistrate is not available).

- (b) A similar amendment is made in relation to applications for dismissal that are being dealt with in writing (rather than orally) and, if need be, outside the Falkland Islands.
- (c) Paragraph 16 (which deals with depositions and the production of exhibits) would be amended to make it clear that someone who is committed to custody for contempt and/or fined for the contempt has a right of appeal to a Supreme Court judge.

To ensure that appeals can be dealt with urgently (even if the Senior Magistrate is unavailable), provision is made for appeals to be dealt with in writing and, if need be, outside the Falkland Islands.

- (d) Paragraph 19 would be amended to remove wording that had been adapted from the corresponding UK legislation but which has since been identified as serving no purpose because of differences in the powers of the Magistrate's Court in the Falkland Islands and Magistrates' Courts in England and Wales.

6.8 *Amendment 6* is a technical amendment to the long title of the Bill to reflect the fact that *Amendment 2* makes a change that is within the scope of the Bill but is not reflected in its long title. (It is considered that, provided the long title is amended, *Amendment 2* does not offend Annex A to the Constitution because it has proper relation to the other matters in the Bill.)

7.0 Financial Implications

None

8.0 Legal Implications

The legal implications of this paper are set out elsewhere in this paper.

9.0 Human Resources Implications

None

ANNEX A: ANALYSIS OF CONSULTATION RESPONSES

Director of Emergency Services

The Director of Emergency Services said that he had no comment (other than support) to make in relation to the proposals related to process within the criminal justice system. He also said that he was pleased to see the inclusion of the sexual offences within the Bill.

Media organisations

One media organisation indicated that the proposals on reporting restrictions in relation to applications for dismissal would not have much impact on what they did already.

The other media organisation only commented that it would be helpful for there to be guidance from the courts on the effect of the reporting restrictions on specific cases (in other words, what – on a particular occasion- could be reported and what could not).

Justice of the peace

A justice of the peace who had read ExCo paper 30/13 when it was published telephoned to query a minor error in the draft Bill. That error has been corrected in the version of the Bill published in the *Gazette*.

Legal practitioners

One of the legal practitioners told Senior Crown Counsel orally that he had no comments to make about the Bill on the basis that it reflected policy proposals on which he had already commented prior to the original ExCo paper (30/19).

The other legal practitioner made a number of comments on the Bill orally in a meeting with the Legislative Drafter (on which he took instructions from colleagues responsible for policy).

These comments mostly concerned the operation of the sending procedure from a defence lawyer's perspective:

- In relation to clause 16 (which would become clause 18), the legal practitioner queried whether the power to make consequential amendments could be used retrospectively.

In relation to this query, the Interpretation and General Clauses Ordinance does allow for legislation to be made retrospectively but the Criminal Justice Ordinance and the Constitution both make it clear that criminal liability cannot be imposed retrospectively.

The ability to make retrospective consequential amendments does exist and may well be useful and there are appropriate safeguards in place, so it is not considered that an amendment is necessary to deal with this issue.

- In relation to paragraph 5 of new Schedule 4 (and also in relation to paragraph 8), the legal practitioner noted that the sending notice and prosecution evidence have to be served on the accused person but there is no provision requiring them to be sent to the defence lawyer.

He did say that he assumed that service of the sending notice on the person being sent to the Supreme Court for trial would – in practice – be done via the person’s lawyer, which is the case.

It is not considered than an amendment is necessary to deal with this issue.

- In relation to paragraph 7 of new Schedule 4, the legal practitioner commented that an appeal against a refusal of bail would have to be made to the Supreme Court and that there is no expedited procedure.

Section 141(8) of the Criminal Justice Ordinance does enable applications to vary bail conditions or to impose bail conditions where bail has been granted unconditionally to be dealt with by the court which originally granted bail (or, where the case has been committed to the Supreme Court, by either the original court or the Supreme Court).

Section 145 of the Criminal Justice Ordinance also allows the Attorney General to apply to either the Summary Court or the Magistrate’s Court for reconsideration of bail decisions in certain circumstances.

These provisions limit the number of occasions when bail would need to be appealed to the Supreme Court.

There may be wider issues in relation to bail generally, even in summary cases before the Magistrate’s Court (and these will have to be dealt with as part of the longer term project). However, this provision does at least allow the first instance applications to be dealt with locally (whether or not the Senior Magistrate is available).

For these reasons, it is not considered that an amendment to deal with the issue is necessary at this stage.

- In relation to paragraph 8 of new Schedule 4, the legal practitioner queried why the provisions requiring service of evidence after sending did not also deal with service of unused material.

Having researched this, the Criminal Procedure and Investigations Ordinance (CPIO) would still cover that aspect of procedure. The sending procedure and disclosure under the CPIO will need to be integrated as part of the ongoing criminal procedure review project.

It is not considered that an amendment is necessary to deal with this issue.

However, it did emerge from this that consequential amendments to the CPIO do need to be made and that these had been overlooked.

Amendment 3 would make the necessary consequential amendments.

- Also in relation to paragraph 8 of new Schedule 4, the legal practitioner queried whether, in case the Senior Magistrate might not be available, there should be provision for the Summary Court or a single JP to deal with time extensions for service of evidence (and not just the Chief Justice or an acting judge).

A number of possible solutions were identified but it was considered that the most appropriate would be to allow for applications for time extensions to be dealt with in writing (and, if need be, outside the Falkland Islands).

Amendment 5(a) would make the necessary amendment to paragraph 8 (and *Amendment 5(b)* would make a corresponding amendment to paragraph 9, in relation to applications for dismissal made in writing).

- In relation to paragraph 10 of new Schedule 4, the legal practitioner asked if the new wider provisions about reporting restrictions were intended to cover general chatting about cases or just “journalistic” reporting.

The provisions were adapted from corresponding provisions that apply in England and Wales: first, to adapt the provisions about journalistic reporting to deal with how the media works here; and, secondly, to make an attempt to address social media. The provisions are not intended to catch private conversation.

It is worth noting that there would be a disparity between the new provisions and the ones that apply under the CPIO. However, updating the CPIO is beyond the scope of this Bill and will have to be dealt with as part of the longer term criminal procedure review project.

It is also worth noting that the media seem to have been broadly content with the reporting restrictions: the only comment from the media was a request for guidance on what can and cannot be reported in specific cases – that could be dealt with as a matter of practice by the courts.

For these reasons, it is not considered that an amendment to deal with these issues is necessary at this stage.

- In relation to paragraph 16 of new Schedule 4, the legal practitioner made the point that the provisions about depositions and exhibits are one-sided because the prosecution can apply for a summons or warrant but not the defence.

He also suggested that there was a risk of the provisions about depositions and exhibits being used for fishing trips.

However, he did suggest that the defence could request the prosecution to apply for a summons or warrant and also that, if need be, the defence could apply to the court for a direction requiring the prosecution to do that.

The prosecution do have ongoing duties:

- to keep the evidence under review,
- to disclose anything that may assist the defence or weaken the prosecution; and
- to investigate lines of defence brought to their attention by the defendant or his lawyer.

These duties should be sufficient safeguard to ensure the prosecution seek depositions when requested by the defence.

Indeed, if the prosecution refuse to cooperate, the defence could always raise this at trial and seek a stay on the basis that there has been an abuse of process.

- Also in relation to paragraph 16, the legal practitioner made the point that there is no provision for an appeal against a summons or against an order for committal and asked about the situation in which someone is ordered to produce an exhibit that they do not have.

There is a defence of “just excuse” for failing to give a deposition or for failing to produce an exhibit. This would enable the court to decide whether or not it believes that the person does not have the exhibit (since genuinely not having an exhibit should be a just excuse for not producing it).

However, since the power to grant a summons or a warrant or commit to custody rests with a single justice (which could be a lay justice or the Senior Magistrate sitting as a justice), it is accepted that it would be prudent to provide for a right of appeal to a judge of the Supreme Court.

Amendment 5(c) would make the necessary amendment to paragraph 16.

In case the Senior Magistrate might not be available (or there is an appeal from a decision by the Senior Magistrate) and to allow an appeal to be dealt with urgently, the amendment would allow for an appeal to be made in writing and dealt with outside the Falkland Islands.

- In relation to paragraph 17 of new Schedule 4, the legal practitioner asked what weight would be given to a deposition.

That would be entirely a matter for the trial judge to determine.

It is not considered that an amendment is necessary to deal with this issue.

- In relation to paragraphs 19 and 20 of new Schedule 4, the legal practitioner asked if the power of the Supreme Court to proceed in the absence of the accused would apply generally. (NB: The Senior Magistrate asked a similar question.)

The answer is that, as drafted, paragraph 20 (which allows proceedings in the absence of the accused but only subject to conditions) only applies to proceedings under paragraph 19 (disposal of linked summary offences), not to trials on indictment.

It is not considered that an amendment is necessary to deal with this issue.

- Also in relation to paragraph 19 of new Schedule 4, the legal practitioner queried the provision in brackets in paragraph 19(6)(b) which limits the powers of the Supreme Court to those of the Magistrate's Court.

Since the Magistrate's Court is not limited in its sentencing powers, it is correct that the bracketed words would not serve any purpose.

The only way in which a limitation on the powers of the Supreme Court would serve any purpose would be if the powers were limited to those of the Summary Court. However, that is not considered appropriate.

Amendment 5(d) would make the necessary amendment.

Senior Magistrate

The Senior Magistrate provided what he described as "preliminary comments" in writing.

- The Senior Magistrate made a number of general comments about the limited scope of the Bill, describing it as a "lost opportunity".

He indicated that, having consistently lobbied (as the person charged with administering Justice on a day to day basis) for a complete revision of the Administration of Justice Ordinance, he was disappointed to note that this had been ignored yet again.

He expressed the view that yet another amendment to the Ordinance (rather than wholesale reform) will confuse matters further.

He also expressed regret that the Bill fails to deal with a large number of very urgent matters and gave a number of specific examples:

- In his view, the Bill does not address how a care case could be dealt with if the Senior Magistrate is out of the Islands.

That specific concern would be addressed by *Amendment 2*.

- Nor, in his view, does the Bill address why the Summary Court applies a different procedure to the Magistrate's Court and he regards this as a fundamental issue now if there is to be provision for transfer between courts.

To some extent, that concern would be addressed by *Amendment 1*, which would widen the power to make practice directions in relation to the transfer of cases: practice directions could deal with the procedure to be applied in cases that have been transferred.

- He made the point that the Bill does nothing about other anomalies in legislation and he gave as an example that the Administration of Justice Ordinance allows the Senior Magistrate to deal with probate matters but the Administration of Estates Ordinance requires probate to be dealt with by the Supreme Court.
- He also noted that the Bill does not deal with different procedures for appeal.

The Bill is indeed limited in scope but it was only ever intended to deal with specific issues as an interim measure pending a wider review of criminal justice legislation (work on which is already underway) and subsequent work on civil procedure.

The Bill, in its current form, does allow cases to be transferred but only if they could have been started there in the first place. It does not expand the jurisdiction of the Summary Court into areas (such as certain care proceedings) where it does not already have jurisdiction.

A more general provision allowing the Summary Court to deal with cases even if it does not have jurisdiction would be a much more radical proposal and one that would have wider consequences that could well be unintended. It is considered far more sensible that the possibility of extending the Summary Court's jurisdiction should be looked at in the context of the longer term projects currently underway.

In the case of care proceedings, the provision that stops the Summary Court from dealing with care and supervision orders is an interim one that could be superseded by rules of court that the Chief Justice already has power to make. However, it is considered that it would be more appropriate to make the change directly by means of an amendment to the legislation.

Amendment 2 would make the necessary amendment.

- All but one of the Senior Magistrate's comments on the Bill itself were concerned with the operation of the proposed new power to transfer cases from the Summary Court to the Magistrate's Court (and vice versa):
 - The Senior Magistrate asked what procedures are to be applied in each court (and, given the differences in procedure between the Summary

Court and the Magistrate's Court, how these would be reconciled in a case already underway).

It is assumed that each court would apply its own procedures while the case is before it.

In the longer term, the differences in procedure between the Summary Court and the Magistrate's Court will have to be addressed as part of the longer term project.

The power to issue practice directions about the transfer of cases has been considered again and it is considered that it should be extended to allow for practice directions to be made to deal with the procedure to be applied in case that have been transferred. That should allow specific anomalies to be dealt with in a suitably pragmatic way.

Amendment 1 would make the necessary amendments.

- The Senior Magistrate asked what would happen in the event of a "standoff" between the Summary Court and the Magistrate's Court about which court should deal with a case.

He pointed out that a practice direction would not have the same force as an Ordinance and suggested that the legislation should allow for cases to be transferred only "unless directed otherwise by the Senior Magistrate".

Although a practice direction would not have the same force as a provision in the Ordinance itself, a practice direction could be used to lay down principles to be followed by the Summary Court in particular.

It is also considered that a balance needs to be struck between control and flexibility: it would cause as many problems if a case were to become stranded in the Magistrate's Court as it would if there were a "standoff" between the two courts.

In an effort to strike the necessary balance, a number of amendments are now proposed:

It is proposed that a provision should be included to make it clear that practice directions are to be obeyed and are not merely advisory.

It is also proposed that there should be a power for deadlocks to be broken but in such a way that it is still possible to avoid cases getting stranded. This would be achieved by provisions that allow a Supreme Court judge (who might be the Senior Magistrate as an acting judge of the Supreme Court) to order where a case is to be heard and to direct that the Summary Court needs the approval of a Supreme Court judge before it can transfer certain cases to itself.

Amendment 1 would make the necessary amendments.

- The Senior Magistrate asked if it is lawful at all to transfer one discrete part of proceedings from one court to another.

The point is, however, that the Bill will make it lawful for this to be done.

It is not considered that an amendment is necessary to deal with this issue.

- The Senior Magistrate asked what force preliminary rulings would have and, in particular, if the Senior Magistrate would be bound by a ruling of the Summary Court.

If an order is made by the Summary Court while a case is there, the order binds the parties to the case.

However, it would still be possible for there to be an appeal to the Magistrate's Court (which could not be transferred back to the Summary Court because it could not have been started there).

That would not preclude later stages of the case being "called in" by the Senior Magistrate. Nor would it be precluded by the case having been in the Magistrate's Court at an earlier stage.

It is not considered that an amendment is necessary to deal with this issue.

- In relation to paragraphs 19 and 20 of new Schedule 4, the Senior Magistrate asked whether this means that – in line with the procedure in the Crown Court in England and Wales – a Supreme Court judge would have a discretion to hold a trial on indictment in the absence of an accused person but the same judge could only try a summary offence in the absence of an accused person in more limited circumstances.

It is correct that different provisions would apply but they would apply in different situations.

If a linked summary offence is being tried as part of a trial on indictment, the Crown Court procedure would still apply to that trial.

Paragraphs 19 and 20 would only deal with a specific situation in which a plea to the charge of a summary offence is being taken from an accused person, not the actual trial.

It should also be pointed out that paragraphs 19 and 20 (like most of new Schedule 4) have been adapted from provisions that apply in England and Wales.

As with the rest of our criminal justice legislation, this is something that can be reviewed as part of the longer term project that is already underway.

For these reasons, it is not considered that an amendment to deal with this issue is necessary at this stage.

**ANNEX B: PROPOSED GOVERNMENT AMENDMENTS TO THE
ADMINISTRATION OF JUSTICE (AMENDMENT) BILL 2013**

1. That clause 10 be amended as follows —

(a) by omitting subsection (6) from new section 35A; and

(b) by adding the following sections to new Part 3A —

“35B. Transfer of cases: orders and directions

(1) A Supreme Court judge may (if the interests of justice require) do either or both of the following things —

(a) order that a case that is currently before the Summary Court or the Magistrate’s Court is to be transferred from one court to the other;

(b) direct (in relation to a specific case) that an order of the Summary Court transferring it from the Magistrate’s Court to the Summary Court may only take effect if it is approved by a Supreme Court judge.

(2) A Supreme Court judge may direct (in relation to a category of cases) that an order of the Summary Court transferring a case in that category from the Magistrate’s Court to the Summary Court may only take effect if it is approved by a Supreme Court judge.

(3) In this section, “Supreme Court judge” —

(a) means —

(i) the Chief Justice; or

(ii) an acting judge of the Supreme Court; and

(b) may include the Senior Magistrate, even if —

(i) the Senior Magistrate has already dealt with the same case in the Magistrate’s Court; or

(ii) the effect of an order or direction would be for the Senior Magistrate to hear that case.

35C. Transfer of cases: practice directions

(1) The Chief Justice or the Senior Magistrate may issue practice directions about —

(a) how the power for cases to be transferred from one court to another is to be exercised; and

(b) what procedures are to apply in cases that have been transferred from one court to another (which may be different from the procedures that would normally apply in the court to which the case has been transferred).

(2) When determining whether or not to transfer a case from one court to the other, the Summary Court and the Magistrate’s Court must have proper regard to practice directions that have been issued about how the power to do that is to be exercised.”

2. That —

(a) the following Part be inserted after clause 13; and

(b) the remaining Parts and clauses be renumbered accordingly —

**“PART 3
AMENDMENT OF CHILDREN ORDINANCE**

14. Section 37 of the Children Ordinance amended – Rules of Court

Section 37(5) of the Children Ordinance is amended by omitting “(save that proceedings for a care order or a supervision order or the discharge or variation of such an order shall be commenced in the Magistrate’s Court)”.

3. That —

(a) the following clauses be inserted after renumbered clause 15 (originally clause 14); and

(b) the remaining clauses be renumbered accordingly —

“16. Section 141 of the Criminal Justice Ordinance amended – General provisions (Bail in criminal proceedings)

Section 141(8) of the Criminal Justice Ordinance (which contains general provisions about bail in criminal proceedings) is amended by replacing “committed” with “sent”.

17. Amendment of the Criminal Procedure and Investigations Ordinance

(1) This section amends the Criminal Procedure and Investigations Ordinance (No 13 of 2003).

(2) Section 3(b)(i) is amended by replacing “committed for trial for” with “sent to the Supreme Court for trial in respect of”.

(3) Section 15(1) is amended by replacing “committed” with “sent to the Supreme Court”.

(4) Section 23(3) is amended by replacing “committed” with “sent to the Supreme Court”.

(5) Section 30(a) is amended by replacing “committed for trial for” with “sent to the Supreme Court for trial in respect of”.

(6) Section 32(1)(a) is amended by replacing “committed for trial at the Supreme Court” with “sent to the Supreme Court for trial”.

(7) Section 40(1)(a) is amended by replacing “committed for trial for” with “sent to the Supreme Court for trial in respect of”.

4. That —

(a) the following clause be inserted after renumbered clause 19 (originally clause 16); and

(b) the remaining clauses be renumbered accordingly —

“20. Interpretation of references to committal

(1) In subsection (2) —

“relevant legislation” means —

(a) a written law of the Falkland Islands; or

(b) United Kingdom legislation that applies in the Falkland Islands (as it applies in the Falkland Islands);

“relevant provision” means a provision in relevant legislation that —

(a) refers (in whatever way) to —

(i) the process of committing persons for trial in the Supreme Court which this Ordinance replaces with the sending procedure;

(ii) committal for trial in the Supreme Court; or

(iii) a person being committed for trial in the Supreme Court; and

(b) has not yet been amended either —

(i) by this Ordinance; or

(ii) by an order made under section 19; and

“sending procedure” means the process of sending persons to the Supreme Court for trial set out in —

(a) sections 27(3) and 27(4) of the Administration of Justice Ordinance (as amended by this Ordinance); and

(b) Schedule 4 to the Administration of Justice Ordinance (added by this Ordinance).

(2) References in relevant provisions (however made) to the process of committing a person for trial in the Supreme Court are to be interpreted instead as references to the sending procedure.

(3) References in relevant provisions (however made) to committal for trial in the Supreme Court are to be interpreted instead as references to sending to the Supreme Court for trial.

(4) References in relevant provisions (however made) to a person being committed for trial the Supreme Court are to be interpreted instead as references to a person being sent to the Supreme Court for trial.”

5. That the Schedule be amended as follows —

(a) in paragraph 8 of new Schedule 4, by adding the following sub-paragraph —

“(4) An application for an extension —

(a) may be made and dealt with —

(i) in writing; or

(ii) orally; and

(b) if dealt with in writing, may be dealt with by the Supreme Court judge while outside the Falkland Islands.”

(b) in paragraph 9(3)(a) of new Schedule 4, by adding “(and, if so, may be dealt with by the Supreme Court judge while outside the Falkland Islands)”;

(c) in paragraph 16 of new Schedule 4, by —

(i) inserting the following sub-paragraphs after sub-paragraph (14) —

“(15) Sub-paragraph (16) applies to a person if either or both of the following things have been done —

(a) the person has been committed to custody under sub-paragraph (11);

(b) a fine has been imposed on the person under sub-paragraph (14).

(16) A person to whom this sub-paragraph applies may appeal to a Supreme Court judge against the committal or fine (or both of them).

(17) An appeal under sub-paragraph (16) —

(a) may be made and dealt with —

(i) in writing; or

(ii) orally; and

(b) if dealt with in writing, may be dealt with by the Supreme Court judge while outside the Falkland Islands.

(ii) renumbering the remaining sub-paragraphs accordingly; and

(d) in paragraph 19(6)(b) of new Schedule 4, by omitting “(but only in a manner in which the Magistrate’s Court could have done)”.

6. That the long title of the Bill be amended by inserting “and the Children Ordinance (Title 38(1).2)” after “Administration of Justice Ordinance (Title 22.1)”.

**ANNEX C: MARKED UP VERSION OF ADMINISTRATION OF JUSTICE
(AMENDMENT) BILL (showing effect of proposed Government amendments)**

Administration of Justice (Amendment) Bill 2013

(No: of 2013)

ARRANGEMENT OF PROVISIONS

Clause

PART 1 – INTRODUCTION

1. Title
2. Commencement

**PART 2 – AMENDMENT OF ADMINISTRATION OF JUSTICE
ORDINANCE**

3. Amendment of the Administration of Justice Ordinance
4. Section 2 amended – Interpretation
5. Section 11 amended – Criminal jurisdiction of Summary Court
6. Section 16 replaced – Power of Summary Court to send person to Supreme Court for trial
7. Section 25 repealed – Application of certain provisions of Part 3 to Summary Court
8. Section 27 amended – General criminal jurisdiction
9. Section 32 amended – Clerk
10. New Part 3A inserted – Transfer of cases between Summary Court and Magistrate’s Court
11. New section 48A inserted – Practice and procedure: persons under age of 18 sent to Supreme Court for trial
12. Section 51 amended – Time for commencement of criminal proceedings
13. New Schedule 4 added – Procedure for sending persons to Supreme Court for trial and after persons are sent to Supreme Court for trial

PART 3 – AMENDMENT OF CHILDREN ORDINANCE

14. Section 37 of the Children Ordinance amended – Rules of Court

PART 4 – CONSEQUENTIAL AMENDMENTS

Deleted: 3

15. Section 4 of the Criminal Justice Ordinance amended – Trial of offences

Deleted: 14.

16. Section 141 of the Criminal Justice Ordinance amended – General provisions
(Bail in criminal proceedings)

17. Amendment of the Criminal Procedure and Investigations Ordinance

18. Section 40 of the Criminal Justice Act 1988 disapplied – Power to join in indictment count for common assault etc

Deleted: 15.

19. Power to make further consequential amendments by order

Deleted: 16.

20. Interpretation of references to committal

PART 5 – TRANSITIONAL PROVISIONS

Deleted: 4

21. Power to make transitional and saving provisions by order

Deleted: 17

Schedule – New Schedule 4 added – Procedure for sending persons to Supreme Court for trial and after persons are sent to Supreme Court for trial

ADMINISTRATION OF JUSTICE (AMENDMENT) BILL 2013

(No: of 2013)

(assented to: 2013)

(commencement on publication)

(published: 2013)

A BILL

for

AN ORDINANCE

To amend the Administration of Justice Ordinance (Title 22.1) and the Children Ordinance (Title 38(1).2); and for connected purposes.

BE IT ENACTED by the Legislature of the Falkland Islands —

**PART 1
INTRODUCTION**

1. Title

This Ordinance is the Administration of Justice (Amendment) Ordinance 2013.

2. Commencement

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

**PART 2
AMENDMENT OF ADMINISTRATION OF JUSTICE ORDINANCE**

3. Amendment of Administration of Justice Ordinance

This Part amends the Administration of Justice Ordinance.

4. Section 2 amended – Interpretation

In section 2, the following definition is inserted after the definition of “criminal proceedings” —

““indictment-only offence” means an offence declared by section 27(2) to be one that must be tried on indictment;”

5. Section 11 amended – Criminal jurisdiction of Summary Court

Section 11(1) is repealed and replaced with the following subsection —

“(1) The Summary Court has a like jurisdiction in criminal proceedings to the jurisdiction that the Magistrate's Court has under section 27(1), but the jurisdiction of the Summary Court is limited by —

(a) other provisions in this Part; and

(b) section 27(2).”

6. Section 16 replaced – Power of Summary Court to commit for trial before Supreme Court

Section 16 is repealed and replaced with the following section —

“16. Power of Summary Court to send person to Supreme Court for trial

(1) The Summary Court has the same power as the Magistrate’s Court to send a person for trial before the Supreme Court.

(2) The following provisions apply to the Summary Court in the same way as they do to the Magistrate’s Court —

- (a) section 27(3), (4) and (4A); and
- (b) Schedule 4.”

7. Section 25 repealed – Application of certain provisions of Part 3 to Summary Court

Section 25 is repealed.

8. Section 27 amended – General criminal jurisdiction

(1) This section amends section 27.

(2) Subsection (2) is amended by —

- (a) omitting “, subject to subsection (3),”;
- (b) omitting “and” from the end of paragraph (b); and
- (c) inserting the following paragraphs after paragraph (b) —

“(ba) an offence against section 5 of the Sexual Offences Act 1956 (as it applied in the Falkland Islands at the time of the offence);

(bb) an offence against section 2, 5 or 6 of the Sexual Offences Act 2003 (as it applied in the Falkland Islands at the time of the offence); and”.

(3) Subsection (3) is repealed and replaced with the following subsection —

“(3) When a person who has not yet reached the age of 18 appears before the Magistrate’s Court or the Summary Court (or is brought before it) and one or more of the circumstances listed in paragraphs (a) to (c) of subsection (4) applies —

- (a) the court must deal with that person in accordance with Schedule 4; but
- (b) the court must adapt its procedure in whatever way the interests of justice require to take account of the person’s age and level of understanding.”

(4) Subsection (4) is repealed and replaced with the following subsection —

“(4) When a person who is aged 18 or over appears before the Magistrate’s Court or the Summary Court (or is brought before it), the Court must deal with that person in accordance with Schedule 4 if one or more of the following circumstances applies in relation to that person —

- (a) the person is before the Court in relation to one or more indictment-only offences;
- (b) the person has already been sent to the Supreme Court in relation to one or more offences that have not yet come to trial;
- (c) the person is charged jointly with someone else who has been, is being or could be sent to the Supreme Court in accordance with Schedule 4.”

(5) The following subsection is inserted after subsection (4) —

“(4A) Schedule 4 also deals with —

- (a) the procedure that applies after a person is sent to the Supreme Court for trial (but not with the procedure for the trial itself); and
- (b) the powers of the Supreme Court in relation to summary offences.”

9. Section 32 amended – Clerk

Section 32 is amended by adding “(and that person will also be Clerk to the Summary Court)”.

10. New Part 3A inserted – Transfer of cases between Summary Court and Magistrate’s Court

The following new Part is inserted after section 35 —

**“PART 3A
TRANSFER OF CASES BETWEEN SUMMARY COURT AND
MAGISTRATE’S COURT**

35A. Transfer of cases between Summary Court and Magistrate’s Court

(1) This section applies to a case if —

- (a) it could have been brought in either the Summary Court or the Magistrate’s Court;
- (b) it has already been commenced in one of those courts; and
- (c) it has not yet come to trial in either of those courts.

(2) A case to which this section applies may (if the interests of justice require) be transferred —

- (a) from the Summary Court to the Magistrate’s Court; or
- (b) from the Magistrate’s Court to the Summary Court.

- (3) A case may be transferred from one court to the other even if it has been transferred on one or more previous occasions.
- (4) Either the Summary Court or the Magistrate's Court may make an order for a case to be transferred from one court to the other.
- (5) An order for a case to be transferred from one court to the other may be made —
- (a) on an application from one or more of the parties to the case; or
 - (b) of the court's own motion.

35B. Transfer of cases: orders and directions

(1) A Supreme Court judge may (if the interests of justice require) do either or both of the following things —

- (a) order that a case that is currently before the Summary Court or the Magistrate's Court is to be transferred from one court to the other;
- (b) direct (in relation to a specific case) that an order of the Summary Court transferring it from the Magistrate's Court to the Summary Court may only take effect if it is approved by a Supreme Court judge.

(2) A Supreme Court judge may direct (in relation to a category of cases) that an order of the Summary Court transferring a case in that category from the Magistrate's Court to the Summary Court may only take effect if it is approved by a Supreme Court judge.

(3) In this section, "Supreme Court judge" —

- (a) means —
 - (i) the Chief Justice; or
 - (ii) an acting judge of the Supreme Court; and
- (b) may include the Senior Magistrate, even if —
 - (i) the Senior Magistrate has already dealt with the same case in the Magistrate's Court; or
 - (ii) the effect of an order or direction would be for the Senior Magistrate to hear that case.

35C. Transfer of cases: practice directions

(1) The Chief Justice or the Senior Magistrate may issue practice directions about —

Deleted: (6) The Senior Magistrate may issue practice directions about how the power for cases to be transferred from one court to another is to be exercised.

(a) how the power for cases to be transferred from one court to another is to be exercised; and

(b) what procedures are to apply in cases that have been transferred from one court to another (which may be different from the procedures that would normally apply in the court to which the case has been transferred).

(2) When determining whether or not to transfer a case from one court to the other, the Summary Court and the Magistrate’s Court must have proper regard to practice directions that have been issued about how the power to do that is to be exercised.”

11. New section 48A inserted – Practice and procedure: persons under age of 18 sent to Supreme Court for trial

The following new section is inserted after section 48 —

“48A. Practice and procedure: persons under age of 18 sent to Supreme Court for trial

(1) Subsection (2) applies whenever —

(a) a person who has not yet reached the age of 18 has been sent to the Supreme Court for trial in respect of one or more offences; and

(b) either —

(i) the person appears (or is brought) before the Supreme Court in connection with those offences; or

(ii) the person is being tried on indictment for those offences.

(2) Whenever this subsection applies, the Supreme Court must adapt its procedure in whatever way the interests of justice require to take account of the person’s age and level of understanding.”

12. Section 51 amended – Time for commencement of criminal proceedings

The definition of “indictment-only offence” is omitted from section 51(4).

13. New Schedule 4 added – Procedure for sending persons to Supreme Court for trial and after persons are sent to Supreme Court for trial

The Schedule adds Schedule 4.

PART 3

AMENDMENT OF CHILDREN ORDINANCE

14. Section 37 of the Children Ordinance amended – Rules of Court

Section 37(5) of the Children Ordinance is amended by omitting “(save that proceedings for a care order or a supervision order or the discharge or variation of such an order shall be commenced in the Magistrate’s Court)”.

PART 4
CONSEQUENTIAL AMENDMENTS

Deleted: 3

15. Section 4 of the Criminal Justice Ordinance amended – Trial of offences

Deleted: 14.

(1) This section amends section 4 of the Criminal Justice Ordinance (Title 24.1)

(2) Subsection (2) is repealed and replaced with the following subsection —

“(2) An offence which is triable summarily may instead be tried on indictment.”

(3) Subsection (3) is repealed and replaced with the following subsection —

“(3) An offence may only be tried on indictment under subsection (2) if the accused person is sent to the Supreme Court for trial in respect of that offence by the Summary Court or the Magistrate’s Court.”

(4) Subsection (4) is repealed and replaced with the following subsection —

“(4) Schedule 4 of the Administration of Justice Ordinance (Title 22.1) deals with the circumstances in which a person may be sent to the Supreme Court for trial on indictment in respect of an offence which is triable summarily.”

16. Section 141 of the Criminal Justice Ordinance amended – General provisions (Bail in criminal proceedings)

Section 141(8) of the Criminal Justice Ordinance (which contains general provisions about bail in criminal proceedings) is amended by replacing “committed” with “sent”.

17. Amendment of the Criminal Procedure and Investigations Ordinance

(1) This section amends the Criminal Procedure and Investigations Ordinance (No 13 of 2003).

(2) Section 3(b)(i) is amended by replacing “committed for trial for” with “sent to the Supreme Court for trial in respect of”.

(3) Section 15(1) is amended by replacing “committed” with “sent to the Supreme Court”.

(4) Section 23(3) is amended by replacing “committed” with “sent to the Supreme Court”.

(5) Section 30(a) is amended by replacing “committed for trial for” with “sent to the Supreme Court for trial in respect of”.

(6) Section 32(1)(a) is amended by replacing “committed for trial at the Supreme Court” with “sent to the Supreme Court for trial”.

(7) Section 40(1)(a) is amended by replacing “committed for trial for” with “sent to the Supreme Court for trial in respect of”.

18. Section 40 of the Criminal Justice Act 1988 disappplied – Power to join in indictment count for common assault etc

Deleted: 15.

Section 40 of the Criminal Justice Act 1988 no longer applies in the Falkland Islands.

19. Power to make further consequential amendments by order

Deleted: 16.

(1) The Governor may by order make further provision consequential on this Ordinance (or one or more of its provisions).

(2) An order made under subsection (1) may do one or more of the following things —

- (a) amend or repeal written laws of the Falkland Islands;
- (b) provide for United Kingdom legislation to apply in the Falkland Islands (with or without modifications);
- (c) modify the application in the Falkland Islands of United Kingdom legislation that already applies in the Falkland Islands;
- (d) provide that specific provisions of United Kingdom legislation no longer apply in the Falkland Islands.

20. Interpretation of references to committal

(1) In subsection (2) —

“relevant legislation” means —

- (a) a written law of the Falkland Islands; or
- (b) United Kingdom legislation that applies in the Falkland Islands (as it applies in the Falkland Islands);

“relevant provision” means a provision in relevant legislation that —

- (a) refers (in whatever way) to —
 - (i) the process of committing persons for trial in the Supreme Court which this Ordinance replaces with the sending procedure;
 - (ii) committal for trial in the Supreme Court; or
 - (iii) a person being committed for trial in the Supreme Court; and
- (b) has not yet been amended either —
 - (i) by this Ordinance; or
 - (ii) by an order made under section 19; and

“sending procedure” means the process of sending persons to the Supreme Court for trial set out in —

(a) sections 27(3) and 27(4) of the Administration of Justice Ordinance (as amended by this Ordinance); and

(b) Schedule 4 to the Administration of Justice Ordinance (added by this Ordinance).

(2) References in relevant provisions (however made) to the process of committing a person for trial in the Supreme Court are to be interpreted instead as references to the sending procedure.

(3) References in relevant provisions (however made) to committal for trial in the Supreme Court are to be interpreted instead as references to sending to the Supreme Court for trial.

(4) References in relevant provisions (however made) to a person being committed for trial the Supreme Court are to be interpreted instead as references to a person being sent to the Supreme Court for trial.

PART 5

TRANSITIONAL AND SAVING PROVISIONS

Deleted: 4

21. Power to make transitional and saving provisions by order

The Governor may by order make transitional or saving provision (or both) in connection with this Ordinance (or one or more of its provisions).

Deleted: 17.

SCHEDULE

NEW SCHEDULE 4 ADDED – PROCEDURE FOR SENDING PERSONS TO SUPREME COURT FOR TRIAL AND AFTER PERSONS ARE SENT TO SUPREME COURT FOR TRIAL

(section 13)

The following schedule is added as Schedule 4 —

“SCHEDULE 4

PROCEDURE FOR SENDING PERSONS TO SUPREME COURT FOR TRIAL AND AFTER PERSONS ARE SENT TO SUPREME COURT FOR TRIAL

PART 1

INTRODUCTION

1. Application of Schedule

(1) This Schedule deals with the procedure for sending persons to the Supreme Court for trial in respect of —

(a) indictment-only offences;

(b) offences that may be tried summarily but which are related to indictment-only offences that may have been committed by —

(i) persons charged with indictment-only offences; or

(ii) other persons charged jointly with them.

(2) It also deals with —

(a) the procedure after persons are sent to the Supreme Court for trial; and

(b) the Supreme Court's powers to deal with summary offences.

2. Interpretation

In this Schedule —

“appeal court” means either —

(a) the Court of Appeal for the Falkland Islands established by section 87(1) of the Constitution; or

(b) the Judicial Committee of the Privy Council;

“application for dismissal” means an application under paragraph 9 for one or more charges against a person to be dismissed;

“linked offence” means an offence that may be tried summarily but which arises out of circumstances that are the same as (or connected with) those giving rise to —

(a) an indictment-only offence in respect of which —

(i) that person has been (or is being) sent to the Supreme Court for a trial that has not yet taken place; or

(ii) another person (with whom the first person is jointly charged) has been (or is being) sent to the Supreme Court for a trial that has not yet taken place; or

(b) another offence that might otherwise have been tried summarily but in respect of which —

(i) that person has been (or is being) sent to the Supreme Court for a trial that has not yet taken place; or

(ii) another person (with whom the first person is jointly charged) has been (or is being) sent to the Supreme Court for a trial that has not yet taken place; and

“relevant issues” means —

- (a) the circumstances of the case;
- (b) if written notice has been (or was) given of an intention to apply for dismissal orally, the matters stated in that notice; and
- (c) the matters stated in the application for dismissal;

“summary offence” means an offence that might have been tried summarily (but for the fact that the person was sent to the Supreme Court for trial in respect of it);

“Supreme Court judge” —

(a) means —

- (i) the Chief Justice; or
- (ii) an acting judge of the Supreme Court; and

(b) may include the Senior Magistrate (even if the Senior Magistrate has already dealt with the same case in the Magistrate’s Court); and

“unrestricted information” has the meaning given to it by paragraph 11.

PART 2

PROCEDURE FOR SENDING PERSONS TO SUPREME COURT

3. Circumstances in which Summary Court or Magistrate’s Court must or may send persons to Supreme Court for trial

(1) This paragraph applies whenever —

- (a) a person appears before the Summary Court or the Magistrate’s Court (or is brought before it); and
- (b) the court is required by section 27(3) or 27(4) to deal with that person in accordance with this Schedule.

(2) The Summary Court or the Magistrate’s Court must send a person to the Supreme Court for trial in respect of an indictment-only offence.

(3) The Summary Court or the Magistrate’s Court may also send a person to the Supreme Court for trial in respect of an offence if —

- (a) it may be tried summarily; but
- (b) it appears to the Summary Court or the Magistrate’s Court that it is a linked offence.

4. Adjournment of summary trial

(1) Sub-paragraph (2) applies whenever a person is sent to the Supreme Court for trial in respect of a summary offence.

(2) If this sub-paragraph applies, the trial in respect of that offence will be treated as if it had been adjourned by the Summary Court or the Magistrate's Court without a date being fixed for its resumption.

(3) A date may be fixed for the resumption of the trial for a summary offence if the powers of the Supreme Court cease in respect of that offence under paragraph 19(10).

5. Sending notice

(1) This paragraph applies whenever the Summary Court or the Magistrate's Court sends a person to the Supreme Court for trial in respect of one or more offences.

(2) The Summary Court or the Magistrate's Court must issue a notice (a "sending notice") specifying the offence or offences for which the person is being sent to the Supreme Court for trial.

(3) Copies of the sending notice must be —

(a) served on the person being sent to the Supreme Court for trial; and

(b) forwarded to the Supreme Court.

(4) Sub-paragraphs (5) and (6) apply if the person is being sent to the Supreme Court for trial in respect of one or more summary offences (whether or not that person is also being sent to the Supreme Court for trial in respect of one or more indictment-only offences).

(5) The Summary Court or the Magistrate's Court must specify in the sending notice the indictment-only offence (or offences) in relation to which the summary offence appears to the Summary Court or the Magistrate's Court to be a linked offence.

(6) If the person is being sent to the Supreme Court in respect of more than one summary offence, the Summary Court or the Magistrate's Court must comply with sub-paragraph (5) in relation to each of the summary offences separately.

6. Transfer may be in custody or on bail

(1) The Summary Court or the Magistrate's Court may send a person to the Supreme Court for trial either —

(a) in custody (that is to say, by committing the person to custody to be kept there safely until delivered in due course of law); or

(b) on bail in accordance with the bail provisions of the Criminal Justice Ordinance (Title 24.1) (that is to say, by directing the person to appear before the Supreme Court for trial).

(2) When determining whether to send a person to the Supreme Court for trial in custody or on bail, the Summary Court or the Magistrate's Court must apply the bail provisions of the Criminal Justice Ordinance.

(3) Sub-paragraph (4) applies if a person is granted bail on condition of providing one or more sureties.

(4) If this sub-paragraph applies, the court may make an order remanding the person in custody until that condition is satisfied.

PART 3
PROCEDURE AFTER PERSONS ARE SENT TO SUPREME COURT
FOR TRIAL

7. Jurisdiction of Summary Court and Magistrate's Court in relation to further remand in custody or on bail

(1) This paragraph applies —

(a) even after a person has been sent to the Supreme Court for trial;

(b) whether the Summary Court or the Magistrate's Court sent that person to the Supreme Court for trial; and

(c) in relation to all offences in respect of which the person has been sent to the Supreme Court for trial (including indictment-only offences, as well as summary offences).

(2) The Summary Court and the Magistrate's Court both have jurisdiction to hear and determine applications relating to the further remand (in custody or on bail) of a person who has been sent to the Supreme Court for trial in respect of one or more offences.

(3) If the person has not yet reached the age of 18, the court must adapt its procedure in whatever way the interests of justice require to take account of the person's age and level of understanding.

8. Evidence

(1) Whenever a person is sent to the Supreme Court for trial in respect of one or more offences, copies of the documents containing the evidence on which the charge or charges are based must be —

(a) served on the person being sent to the Supreme Court for trial; and

(b) forwarded to the Supreme Court.

(2) An order or direction specifying the period within which the documents are to be served and forwarded may be made by —

(a) the Summary Court or the Magistrate's Court when sending the person to the Supreme Court for trial; or

(b) a Supreme Court judge after the person has been sent to the Supreme Court for trial.

(3) A Supreme Court judge may extend (and, if need be, further extend) the period specified in an order or direction.

(4) An application for an extension —

(a) may be made and dealt with —

(i) in writing; or

(ii) orally; and

(b) if dealt with in writing, may be dealt with by the Supreme Court judge while outside the Falkland Islands.

9. Applications for dismissal

(1) A person who has been sent to the Supreme Court for trial in respect of one or more offences may apply to the Supreme Court for one or more of the charges in the case to be dismissed.

(2) An application for dismissal may only be made —

(a) after the person is served with copies of the documents containing the evidence on which the charge or charges are based; but

(b) before either —

(i) the person has entered a plea to the charge or charges; or

(ii) a plea to the charge or charges has been entered for the person.

(3) An application for dismissal —

(a) may be made and dealt with in writing (and, if so, may be dealt with by the Supreme Court judge while outside the Falkland Islands); or

(b) may be made orally instead, but only if —

(i) the applicant has given written notice to the Supreme Court of an intention to make the application orally; and

(ii) a Supreme Court judge has decided (having had regard to the relevant issues) that the interests of justice require that the application should be made orally.

(4) Oral evidence may only be given on an application for dismissal —

(a) with the leave of a Supreme Court judge; or

(b) in accordance with an order of a Supreme Court judge.

(5) A Supreme Court judge may only give leave under sub-paragraph (4)(a) or make an order under sub-paragraph (4)(b) if it appears to the Supreme Court judge (having regard to the relevant issues) that the interests of justice require leave to be given or an order made.

(6) Sub-paragraph (7) applies if —

(a) a Supreme Court judge —

(i) gives leave permitting a person to give oral evidence; or

(ii) makes an order requiring a person to give oral evidence; but

(b) that person does not give oral evidence.

(7) If this sub-paragraph applies—

(a) the Supreme Court judge hearing or considering an application for dismissal may disregard a document indicating the evidence that the person might have given; or

(b) if there is more than one document indicating the evidence that the person might have given, the Supreme Court judge hearing or considering an application for dismissal may disregard —

(i) all of those documents; or

(ii) one or more of them.

(8) The Supreme Court judge hearing or considering an application for dismissal must dismiss a charge which is the subject of an application if it appears to the judge that the evidence against the applicant would not be sufficient for a jury properly to convict the applicant.

(9) If one or more charges against an applicant are dismissed —

(a) if the dismissed charge or charges relate only to one count in an indictment preferred against the applicant, the Supreme Court judge must quash that count;

(b) if the dismissed charge or charges relate to more than one count in one or more indictments, the Supreme Court judge must quash all of those counts;

(c) further proceedings may only be brought on the dismissed charge or charges by means of the preferment of a voluntary bill of indictment; and

(d) unless the applicant is in custody otherwise than on the dismissed charge or charges, the applicant must be discharged.

(10) A Supreme Court judge may —

- (a) issue practice directions about the conduct of applications for dismissal generally; and
- (b) make orders about the conduct of particular applications for dismissal.

(11) In particular, practice directions and orders may make provision about —

- (a) the time or stage in the proceedings at which things required (or allowed) to be done under this paragraph are to be done (unless a Supreme Court judge grants leave to do one or more of those things at some other time or stage);
- (b) the contents and form of notices or other documents;
- (c) the manner in which evidence is to be submitted; and
- (d) persons to be served with notices or other material.

10. Reporting restrictions

(1) This paragraph applies to reports of applications for dismissal and proceedings relating to them, including —

- (a) every written report published (either by itself or as part of a newspaper or periodical) for distribution or circulation to the public (or a section of it) in the Falkland Islands;
- (b) every report included in a radio or television broadcast intended for reception within the Falkland Islands;
- (c) every report included in an audio or video recording intended for distribution to the public (or a section of it) in the Falkland Islands; and
- (d) every report —
 - (i) made in another way (including by e-mail, the internet and other messaging services); and
 - (ii) intended to be received by the public (or a section of it) within the Falkland Islands.

(2) A person may only make a report to which this paragraph applies to the extent that —

- (a) it is not prohibited or restricted by another provision in —
 - (i) a written law of the Falkland Islands;
 - (ii) United Kingdom legislation (as it applies in the Falkland Islands); and
- (b) it is permitted under sub-paragraph (3).

(3) A report to which this paragraph applies is permitted under this sub-paragraph if —

- (a) it only contains unrestricted information; or
- (b) it contains additional information, but —
 - (i) an order has been under paragraph 12 and the report complies with that order;
 - (ii) paragraph 13(2) applies; or
 - (iii) paragraph 14(2) applies.

11. Reporting restrictions: unrestricted information

In paragraph 10 (and also in paragraphs 12 and 13), “unrestricted information” means the following information about an application for dismissal, proceedings relating to an application for dismissal or a case in which an application for dismissal is made —

- (a) the identity of the court and the name of the judge;
- (b) the following information in relation to the accused person (or each of them, if there is more than one) —
 - (i) the person’s name;
 - (ii) the person’s age;
 - (iii) the person’s address;
- (c) the offence or offences (or a summary of them) with which the accused person is (or the accused persons are) charged;
- (d) the names of legal practitioners engaged in the proceedings;
- (e) if the proceedings have adjourned, the date to which they have been adjourned;
- (f) the arrangements as to bail; and
- (g) whether legal aid has been granted to the accused person (or one or more of them).

12. Reporting restrictions: orders allowing additional information to be reported

(1) A Supreme Court judge dealing with an application for dismissal may make an order allowing additional information to be included in reports to which paragraph 10 applies.

- (2) An order allowing other information to be included in reports may —
- (a) specify what additional information may be reported (and what may not); and
 - (b) contain conditions about how that information is reported.
- (3) Sub-paragraph (4) applies if —
- (a) two or more persons are accused in the same case; and
 - (b) one or more of those persons objects to an order being made allowing other information to be included in reports.
- (4) If this sub-paragraph applies, the Supreme Court judge may only make an order allowing other information to be included in reports —
- (a) after each of the accused persons has been given the opportunity to make representations; and
 - (b) if the Supreme Court judge is satisfied that it is in the interests of justice that the order is made —
 - (i) at all; and
 - (ii) in those terms.
- (5) Proceedings about whether or not to make an order allowing other information in reports may not themselves be reported in reports to which this paragraph applies (even if the order is made), but the decision about whether or not to make an order may be included in a report to which this paragraph applies.

13. Reporting restrictions: lifting of restrictions following successful application for dismissal

- (1) Sub-paragraph (2) applies —
- (a) if —
 - (i) only one person is accused in a case;
 - (ii) that person makes an application for dismissal; and
 - (iii) the application is successful;
 - (b) if —
 - (i) more than one person is accused in a case; but
 - (ii) only one of those persons makes an application for dismissal; and

- (iii) the application is successful; or
- (c) if —
 - (i) more than one person is accused in a case;
 - (ii) more than one of those persons makes an application for dismissal; and
 - (iii) all of the applications are successful.

(2) If this sub-paragraph applies, reports to which paragraph 10 applies may include additional information about the successful application (or applications) and the proceedings relating to that application (or those applications).

14. Reporting restrictions: lifting of restrictions at end of case

(1) Sub-paragraph (2) applies —

- (a) if —
 - (i) only one person is accused in a case;
 - (ii) that person makes an application for dismissal; but
 - (iii) the application is unsuccessful;
- (b) if —
 - (i) more than one person is accused in a case; and
 - (ii) only one of those persons makes an application for dismissal; but
 - (iii) the application is unsuccessful; or
- (c) if —
 - (i) more than one person is accused in a case; and
 - (ii) more than one of those persons makes an application for dismissal; but
 - (iii) one or more of the applications is unsuccessful.

(2) If this sub-paragraph applies, information about the application (or applications) and the proceedings relating to that application (or those applications) may only be included in reports to which paragraph 10 applies —

- (a) if only one person was accused in the case, after the conclusion of that person's trial; or

(b) if more than one person was accused in the same case, after the conclusion of the trial of the last of those persons to be tried.

15. Reporting restrictions: offences and penalties

(1) If a report to which paragraph 10 applies is made in contravention of that paragraph, each of the following persons commits an offence —

(a) in the case of a publication of a written report as part of a newspaper or periodical, the proprietor, editor or publisher of the newspaper or periodical;

(b) in the case of a publication of a written report otherwise than as part of a newspaper or periodical, the person who publishes it;

(c) in the case of the inclusion of a report in a broadcast —

(i) the broadcaster; and

(ii) the person or persons who have functions in relation to the broadcast that correspond to those of the editor of a newspaper;

(d) in the case of the inclusion of a report in a recording —

(i) the publisher of the recording; and

(ii) the person or persons who have functions in relation to the recording that correspond to those of the editor of a newspaper;

(e) in the case of a report made in another way —

(i) the person making the report; and

(ii) if there is a person who has functions in relation to the report that correspond to those of the editor of a newspaper (or more than one person who has such functions), that person (or those persons).

(2) The penalty that may be imposed on a person convicted of an offence against sub-paragraph (1) is a fine of up to level 5 on the standard scale.

(3) Proceedings for an offence under sub-paragraph (1) may only be commenced —

(a) by the Attorney General; or

(b) in accordance with consent given by the Attorney General.

16. Power of justices to take depositions, etc.

(1) Sub-paragraph (3) applies if a justice of the peace is satisfied that —

(a) a person (“the witness”) is likely to be able to make on behalf of the prosecutor a written statement containing material evidence for the purposes

of proceedings for an offence for which a person has been sent to the Supreme Court for trial; but

(b) the witness will not voluntarily make that statement.

(2) Sub-paragraph (3) also applies if a justice of the peace is satisfied that —

(a) a person (“the witness”) is likely to be able to produce on behalf of the prosecutor one or more documents or other exhibits likely to be material evidence for the purposes of proceedings for an offence for which a person has been sent to the Supreme Court for trial; but

(b) the witness will not voluntarily produce them.

(3) If this sub-paragraph applies, the justice must issue a summons directed to the witness requiring the witness to —

(a) attend before a justice at the time and place appointed in the summons; and

(b) do either or both of the following things —

(i) have the evidence taken as a deposition;

(ii) produce the documents or other exhibits.

(4) Sub-paragraph (5) applies if a justice of the peace is satisfied (by evidence on oath) that —

(a) the witness is likely to be able to —

(i) make on behalf of the prosecutor a written statement containing material evidence for the purposes of proceedings for an offence for which a person has been sent to the Supreme Court for trial;

(ii) produce on behalf of the prosecutor one or more documents or other exhibits likely to be material evidence for the purposes of proceedings for an offence for which a person has been sent to the Supreme Court for trial; or

(iii) do both of those things;

(b) it is probable that a summons under sub-paragraph (3) would not procure the result required by it; and

(c) the person is within the Falkland Islands.

(5) If this sub-paragraph applies, the justice may (instead of issuing a summons) issue a warrant to —

- (a) arrest the witness; and
 - (b) bring the witness before a justice at the time and place specified in the warrant.
- (6) Sub-paragraph (7) applies if —
- (a) a witness fails to attend before a justice in answer to a summons issued under sub-paragraph (3);
 - (b) the justice is satisfied (by evidence on oath) that the witness is likely to be able to —
 - (i) make on behalf of the prosecutor a written statement containing material evidence for the purposes of proceedings for an offence for which a person has been sent to the Supreme Court for trial;
 - (ii) produce on behalf of the prosecutor one or more documents or other exhibits likely to be material evidence for the purposes of proceedings for an offence for which a person has been sent to the Supreme Court for trial; or
 - (iii) do both of those things;
 - (c) the justice is satisfied (by evidence on oath or in some other way) that —
 - (i) the witness has been duly served with the summons; and
 - (ii) a reasonable sum has been paid or offered to the witness for costs and expenses; and
 - (d) it appears to the justice that there is no just excuse for the failure.
- (7) If this sub-paragraph applies, the justice may issue a warrant to —
- (a) arrest the witness; and
 - (b) bring the witness before a justice at the time and place specified in the warrant.
- (8) Sub-paragraph (9) applies if —
- (a) a summons is issued under sub-paragraph (3) or a warrant is issued under sub-paragraph (5) or (7); and
 - (b) the summons or warrant is issued with a view to securing that the evidence of the witness is taken as a deposition.
- (9) If this sub-paragraph applies, the time appointed in the summons (or specified in the warrant) must be appointed (or specified) so that the evidence can be taken

as a deposition before the time by which copies of evidence must be served and forwarded under paragraph 8.

(10) Sub-paragraphs (11) to (14) apply if a person attending (or brought) before a justice in pursuance of this paragraph refuses (without just excuse) to —

- (a) have evidence taken as a deposition;
- (b) produce the documents or other exhibits; or
- (c) do either of those things.

(11) If this sub-paragraph applies, the justice may commit the witness to custody.

(12) A committal under sub-paragraph (11) must be ended once —

- (a) if the witness had attended (or been brought) before a justice for evidence to be taken as a deposition, that evidence has been taken as a deposition;
- (b) if the witness had attended (or been brought) before a justice to produce one or more documents or other exhibits, the documents or other exhibits have been produced;
- (c) if the witness had attended (or been brought) before a justice to do both of those things, both of those things have been done.

(13) A committal under sub-paragraph (11) also comes to an end after the witness has been in custody on that committal for a period of 1 month.

(14) If this sub-paragraph applies —

- (a) the justice may (instead of or as well as committing the witness to custody) impose a fine of up to level 5 on the standard scale on the witness;
- (b) that fine is to be treated as being a sum adjudged to be paid by a conviction.

(15) Sub-paragraph (16) applies to a person if either or both of the following things have been done —

- (a) the person has been committed to custody under sub-paragraph (11);
- (b) a fine has been imposed on the person under sub-paragraph (14).

(16) A person to whom this sub-paragraph applies may appeal to a Supreme Court judge against the committal or fine (or both of them).

(17) An appeal under sub-paragraph (16) —

- (a) may be made and dealt with —

(i) in writing; or

(ii) orally; and

(b) if dealt with in writing, may be dealt with by the Supreme Court judge while outside the Falkland Islands.

(18) If, in pursuance of this paragraph, a person has evidence taken as a deposition, the justice before whom the deposition was taken must arrange for copies of the deposition to be sent (as soon as is reasonably practicable) to —

Deleted: (15)

(a) the prosecutor; and

(b) the Supreme Court.

(19) If, in pursuance of this paragraph, a person produces an exhibit which is a document, the justice to whom the document was produced must arrange for copies of the document to be sent (as soon as is reasonably practicable) to —

Deleted: (16)

(a) the prosecutor; and

(b) the Supreme Court.

(20) If, in pursuance of this paragraph, a person produces an exhibit which is not a document, the justice to whom the exhibit was produced must arrange for the following information to be provided to the prosecutor and the Supreme Court as soon as is reasonably practicable —

Deleted: (17)

(a) the fact that the exhibit has been produced; and

(b) the nature of the exhibit.

17. Use of depositions as evidence

(1) Unless sub-paragraph (2) applies, a deposition taken under paragraph 16 may (without further proof) be read as evidence of the person from whom it was taken on the trial of an accused person for —

(a) an offence for which he was sent to the Supreme Court for trial; or

(b) another offence arising out of the same transaction or set of circumstances.

(2) This sub-paragraph applies (and a deposition may not be read as evidence) if one or more of the following apply —

(a) it is proved that the deposition was not signed by the justice by whom it purports to have been signed;

(b) the Supreme Court judge presiding over the trial orders that the deposition is not to be read as evidence; or

(c) a party to the proceedings objects to the deposition being read as evidence, unless the Supreme Court judge presiding over the trial —

(i) considers that the interests of justice require that the objection should have no effect; and

(ii) orders that the deposition may be read as evidence.

PART 4
POWERS OF SUPREME COURT TO DEAL WITH SUMMARY
OFFENCES

18. Application of Part 4

This Part applies whenever the Summary Court or the Magistrate's Court has sent a person to the Supreme Court for trial in respect of offences that include one or more summary offences.

19. Procedure following conviction on indictment or if no offence that must be tried on indictment remains

(1) This paragraph applies to a summary offence if —

(a) a person was sent to the Supreme Court for trial in respect of it;

(b) that person (or another person) has been convicted of one or more offences on an indictment;

(c) the Supreme Court judge considers that the summary offence is a linked offence in relation to one or more of those offences; and

(d) no trial has commenced in the Supreme Court in respect of the summary offence.

(2) This paragraph also applies to a summary offence if —

(a) a person was sent to the Supreme Court for trial in respect of it;

(b) no plea has been entered in relation to it (either by the person or on the person's behalf); and

(c) the person is charged on an indictment which (following amendment of the indictment, as a result of an application for dismissal or for any other reason) no longer includes an indictment-only offence.

(3) If the person was sent to the Supreme Court in respect of more than one summary offence, the provisions of this paragraph must be applied to each of the summary offences separately.

(4) If this paragraph applies to a summary offence, the Supreme Court judge must —

- (a) state to the person the substance of it; and
 - (b) ask the person to plead guilty or not guilty to the offence.
- (5) Sub-paragraph (6) applies to a summary offence if either —
- (a) the person pleads guilty to it; or
 - (b) a plea of guilty to it is entered on the person's behalf under paragraph 20(2)(b).
- (6) If this sub-paragraph applies to a summary offence, the Supreme Court judge —
- (a) must convict the person of it; and
 - (b) may deal with the person in respect of it.
- (7) The remaining provisions of this paragraph apply to a summary offence unless either —
- (a) the person pleads guilty to it; or
 - (b) a plea of guilty to it is entered on the person's behalf under paragraph 20(2)(b).
- (8) If this sub-paragraph applies to a summary offence, the Supreme Court judge must ask the prosecution if it intends to submit evidence on the charge relating to it.
- (9) If the prosecution inform the court that they do not intend to submit evidence on the charge, the Supreme Court must dismiss it.
- (10) If the prosecution inform the court that they do intend to submit evidence on the charge —
- (a) the powers of the Supreme Court cease in respect of the summary offence; and
 - (b) the Supreme Court must inform the Summary Court or the Magistrate's Court about the outcome of the proceedings under this paragraph.

Deleted: (but only in a manner in which the Magistrate's Court could have done)

20. Power of Supreme Court to proceed in absence of accused person in certain circumstances

- (1) Proceedings before the Supreme Court under paragraph 19 may take place in the absence of an accused person if —
- (a) the accused is represented by a legal practitioner;
 - (b) either —

- (i) the Supreme Court judge conducting the proceedings considers that, by reason of the person's disorderly conduct before the court, it is not practicable for the proceedings to be conducted in the person's presence; or
- (ii) the accused person's legal representative signifies to the court that the accused person consents to the proceedings being conducted in the person's absence; and

(c) the Supreme Court judge considers that the proceedings should continue in the accused person's absence.

(2) If proceedings do take place in the absence of the accused person, the Supreme Court judge —

(a) must state the substance of the summary offence to the accused person's legal representative (instead of stating it to the accused person); and

(b) ask the legal representative to enter a plea of guilty or not guilty to it on behalf of the accused person.

(3) If the legal representative enters a plea of guilty on behalf of the accused person, the Supreme Court will proceed under paragraph 19 as if —

(a) the substance of the summary offence had been stated to the accused person; and

(b) the accused person had pleaded guilty to it.

(4) Unless the legal representative enters a plea of guilty on behalf of the accused person, the Supreme Court will proceed under paragraph 19 as if —

(a) the substance of the summary offence had been stated to the accused person; and

(b) the accused person had not pleaded guilty to it.

21. Procedure following successful appeal against conviction for offence tried on indictment

(1) Sub-paragraph (2) applies to a summary offence if —

(a) a person was convicted of it under paragraph 19(6)(a); but

(b) an appeal court allows an appeal against conviction of an offence tried on indictment in relation to which it was a linked offence (or all of the offences tried on indictment in relation to which it was a linked offence, if there was more than one).

(2) If this sub-paragraph applies —

- (a) the proceedings before the Supreme Court in relation to the summary offence must be disregarded for all purposes;
- (b) the appeal court must —
 - (i) set aside the person's conviction of the summary offence; and
 - (ii) notify the Summary Court or the Magistrate's Court that it has done so;
- (c) the appeal court may direct that no further proceedings are to be undertaken in relation to the summary offence;
- (d) if the appeal court does that, it must notify the Summary Court or the Magistrate's Court about the direction."

EXECUTIVE COUNCIL

CONFIDENTIAL

Title of Report: Transfer of criminal cases to the Supreme Court

Paper No: 255/12

Date: 24 October 2012

Report of: Attorney General / Senior Crown Counsel

1.0 Purpose

To consider new provision for the transfer of serious criminal cases to the Supreme Court, to reclassify certain serious sexual offences, to provide for the transfer of cases between the lower courts, and to provide that the Clerk to the Magistrate's Court should also hold office as Clerk to the Summary Court.

2.0 Recommendations

- 2.1 Honourable Members are asked to approve the drafting of new legislation making fresh provision for the transfer of serious criminal cases to the Supreme Court, to resolve a technical impasse which has arisen because existing legislation requires the courts to follow an English procedure which is now being phased out in English courts and will shortly no longer exist.
- 2.2 Honourable Members are also asked to approve the drafting of the following amendments to the Administration of Justice Ordinance:-
- (a) an amendment to section 27(2) to provide that any offence under section 5 of the Sexual Offences Act 1956 or sections 2, 5 or 6 of the Sexual Offences Act 2003 is to be tried on indictment in the Supreme Court;
 - (b) new provision allowing for criminal and civil cases to be transferred between the Summary Court and the Magistrate's Court, and vice-versa, where this is in the interests of justice;
 - (c) an amendment to section 32 to provide that the Clerk to the Magistrate's Court also holds office as the Clerk to the Summary Court.

3.0 Summary of Financial Implications

None

4.0 Background – Falkland Islands Legislation

- 4.1 The *Administration of Justice Ordinance* ('AOJO') gives the Magistrate's Court, in which the Senior Magistrate sits, jurisdiction to try and determine any offence except an offence which must be tried on indictment in the Supreme Court. The Magistrate's Court has 'the like jurisdiction' to commit a defendant to trial in the Supreme Court as a magistrates court has in England to commit a defendant to trial in the Crown Court.
- 4.2 The Summary Court, in which the Justices of the Peace sit, has the same jurisdiction as the Magistrate's Court both to try offences (albeit with limited sentencing powers) and to commit the most serious cases to the Supreme Court.
- 4.3 The only offences which must be tried on indictment in the Supreme Court are (one) treason, murder, manslaughter, piracy, rape or arson with intent to endanger life (or any attempt to commit any of those offences); and (two) any other offence which is specified as indictable-only under Falkland Islands law or any law of the United Kingdom having direct effect in the Falkland Islands.
- 4.4 Special provision is made for defendants under the age of 18 years who are charged with an offence which would otherwise fall to be tried on indictment in the Supreme Court. Such young defendants will only be tried in the Supreme Court if (one) the offence is punishable by at least 14 years imprisonment and the court considers that the only sentence available to it if the defendant is convicted is one of detention; or (two) the young defendant is charged jointly with an adult and the court considers it necessary in the interests of justice to commit them both for trial in the Supreme Court.

5.0 Background – English Legislation

- 5.1 In the Falkland Islands all offences are either indictable (that is, a case which can only be heard in the Supreme Court) or summary (that is, a case which is usually heard in the Magistrate's Court or Summary Court). In England offences are classified as indictable (that is, a case which can only be heard in the Crown Court), summary (that is, a case which is usually heard in the magistrates' court) or either-way (a case which can be heard in the Crown Court or the magistrates' court depending on the facts and on any election made by the defendant).
- 5.2 When a defendant is charged with an offence in England, their first court appearance is in the magistrates' court. Historically, in cases involving indictable offences or either-way offences where the defendant opted for trial by jury in the Crown Court or the magistrates considered that the case on its facts was so serious or complex that the interests of justice required it to be dealt with in the Crown Court, the magistrates' court set a date for a committal hearing.
- 5.3 At the committal hearing the magistrates had to be satisfied that the prosecution had sufficient evidence to obtain a conviction. The defence could test the prosecution evidence and insist that key prosecution witnesses give evidence in person. Oral evidence in committal hearings was abolished in England in 1996 as it put unnecessary stress on witnesses in sexual and other sensitive cases to

require them to give evidence twice (at committal and then at trial). Now the evidence is tested 'on paper' only.

- 5.4 New provision for the transfer of cases from the magistrates' court to the Crown Court, known as the Sending Procedure, was introduced by *section 51 of the Crime and Disorder Act 1998* and its associated provisions. The Sending Procedure involves the automatic transfer of the case from the magistrates' court to the Supreme Court without the need for a committal hearing and without the magistrates being required to consider the strength of the prosecution case.
- 5.5 The defendant still has the opportunity to test the strength of the prosecution case under the Sending Procedure, but this is done by making an application for dismissal after the case has been transferred to the Crown Court. The judge must dismiss a charge if it appears to him that the evidence against the applicant would not be sufficient for him to be properly convicted. The test is the same as that used in a defence submission at trial that there is 'no case to answer' because the prosecution have not produced sufficient evidence of the commission of an offence. Oral evidence may be given in the Crown Court on the hearing of an application for dismissal only with the leave of the judge or by his order, if it appears to the judge that the interests of justice require this.
- 5.6 The purpose of the Sending Procedure is to speed up the progress of serious cases, by transferring the jurisdiction for management of such cases from the magistrates' courts to the Crown Court at the first available opportunity, so that the defendant enters a plea at an earlier stage and the Crown Court judge can manage the progress of the case towards trial.
- 5.7 Initially the Sending Procedure applied only to indictable offences, but the *Criminal Justice Act 2003* amended *section 51 of the Crime and Disorder Act 1998* so that the Sending Procedure will apply to both indictable and either-way offences. The phasing in of the new provisions commenced on 18 June 2012 with the abolition of committal proceedings in either-way cases in 12 court areas including the cities of Bristol and Liverpool. Once the new provisions are in force throughout England, the committal procedure will cease to exist.

6.0 The impact on the Falkland Islands, and proposals for new legislation

- 6.1 The problem which the Falkland Islands faces is that the jurisdiction of a magistrates' court in England to commit a person to the Crown Court for trial on indictment is in the process of being abolished as the Sending Procedure is extended across England.
- 6.2 Since *section 27(4) AOJO* (and *section 16 AOJO*) has the effect of giving the Magistrate's Court (and the Summary Court) the like jurisdiction as a magistrates' court in England to commit a person for trial, once the Committal Procedure is replaced in England by the Sending Procedure it is not clear what procedure should apply in the Falkland Islands.
- 6.3 The Senior Magistrate has given an informal indication that he considers that, once the Sending Procedure extends across the whole of England, the lower Falkland Islands courts will have no jurisdiction to transfer cases to the Supreme

Court for trial because there will be no ‘like jurisdiction’ remaining in the magistrates’ court in England to commit a person for trial. If this argument were accepted, it would mean the most serious cases could not be prosecuted because, by law, they could only be tried in the Supreme Court but there would be no mechanism to place the case before that court.

- 6.4 The view of the Attorney General is that *section 27(4) and section 16 AOJO* should be applied in a purposive manner to achieve their object in accordance with *section 17 of the Interpretation and General Clauses Ordinance*, and that accordingly the lower courts would still have jurisdiction to commit or send a person to the Supreme Court for trial notwithstanding the changes in England.
- 6.5 However, to ensure that there is clarity as to what procedure should apply, new legislative provision is required. It is proposed to adopt the Sending Procedure now in force in England as this is a tried and tested procedure which ensures effective case management while protecting the rights of the defendant.
- 6.6 Since under the Sending Procedure the management of the case would be transferred from the lower courts to the Supreme Court at an early stage in proceedings, the only issue for the lower court at the first hearing would be to decide whether the defendant should be released on bail or remanded in custody.
- 6.7 Any application for dismissal would be heard in the Supreme Court by the Chief Justice, or by the Senior Magistrate in his capacity as Acting Judge of the Supreme Court.
- 6.8 As in England, it is proposed that the lower court would have power to send to the Supreme Court any summary offence which is linked to and charged alongside the indictable offence (eg. where a defendant accused of rape is also accused of the summary offence of assault occasioning grievous bodily harm) so that both offences can be tried together.
- 6.9 At present a person under the age of 18 can only be tried on indictment in the Supreme Court in the limited circumstances set out in paragraph 4.3 above. These measures are similar to those which apply in England where a defendant under the age of 18 is charged with an indictable-only offence. However, the range of indictable-only offences in England is far wider and includes offences such as robbery and blackmail which in the Falkland Islands would be tried summarily.
- 6.10 It is proposed that in future all persons under the age of 18 should be tried on indictment in the Supreme Court like any other defendant. At any stage in the court proceedings the presiding judge can adapt court procedure as they consider appropriate in light of the young defendant’s age or understanding. This change in procedure would reflect the very serious nature of all offences which in the Falkland Islands are triable on indictment, and would give the young defendant an absolute right to elect trial by jury (a right which they are deprived of by the current procedures) thereby honouring the spirit of section 6 of the Constitution which provides that any person charged in the Supreme Court should have the right to trial by jury or trial by judge alone, as they choose.

7.0 Related provisions

- 7.1 In the past the offences colloquially referred to as ‘statutory rape’, namely an offence under *section 5 of the Sexual Offences Act 1956* (intercourse with a girl under 13) or *section 5 of the Sexual Offences Act 2003* (‘SOA 2003’) (intentional penile penetration of the vagina, anus or mouth of a person under 13), have been regarded in the Falkland Islands as amounting to rape and prosecuted in the Supreme Court. The maximum penalty is the same as for the offence of rape, namely life imprisonment. It is proposed that the matter be put beyond doubt by expressly providing that these offences are to be tried on indictment in the Supreme Court.
- 7.2 An offence under *section 2 SOA 2003* (intentional penetration of the vagina or anus without consent) or *section 6 SOA 2003* (intentional penetration of the vagina or anus of a person under 13) is very similar to the concept of rape or statutory rape. The maximum penalty is the same as for the offence of rape or statutory rape, namely life imprisonment. It is proposed that the law be changed so that in future such offences are to be tried on indictment in the Supreme Court.
- 7.3 At present, apart from the power of the Summary Court to remit defendants to the Magistrate’s Court for sentencing in certain circumstances, there is no power to transfer a criminal case from the Summary Court to the Magistrate’s Court or vice-versa, unless legislation makes specific provision for this. (For example, section 8 of the Prohibited Goods Ordinance enables an appeal against the seizure by FIG officers of prohibited goods which has been commenced in the Magistrate’s Court to be heard by the Summary Court if the Senior Magistrate is unavailable.)
- 7.4 There are many situations where it would be in the interests of justice for a case to be transferred from one court to the other, perhaps because the gravity or complexity of the case means it is ill-suited to the Summary Court, or because the Senior Magistrate is unavailable but a bail hearing is required. It is proposed that the *Administration of Justice Ordinance* be amended to make new provision for the transfer of criminal cases from the Summary Court to the Magistrate’s Court and vice-versa between the Summary and Magistrate’s Courts where this is in the interests of justice.
- 7.5 *Section 32 AOJO* makes provision for the appointment of a Clerk to the Magistrate’s Court. There is no statutory authority for the appointment of a Clerk to the Summary Court, although *section 5A of the Licensing Ordinance* provides that the Clerk of the Summary Court may grant certain licensing applications. Accordingly it is recommended that *section 32 AOJO* be amended to provide that the Clerk to the Magistrate’s Court also holds office as Clerk to the Summary Court.

8.0 Consultation

- 8.1 A formal consultation has been carried out with key stakeholders in the administration of justice, namely the Chief Justice, the Senior Magistrate, the defence practitioners and the Royal Falkland Islands Police. (A copy of the 11-

page consultation paper is available from the Attorney General's Chambers for anyone interested in the detailed legislative provisions.)

- 8.2 Detailed responses have been received from most consultees, endorsing the proposed introduction of new procedures based on the Sending Procedure as originally introduced in England but without cross-reference to English legislation so as to avoid future problems for the Falkland Islands arising from further changes in English law and practice.
- 8.3 It should be noted that the proposed abolition of the current provisions regarding mode of trial for persons under the age of 18 charged with indictable-only offences (see paragraphs 6.9 and 6.10) has been adopted after considering representations from the Chief Justice and the Senior Magistrate. There has been no response from legal practitioners to this proposal.
- 8.4 All consultees are broadly in favour of the proposals set out in paragraphs 7.1 and 7.2 above concerning the reclassification of certain offences as indictable. One response noted that an offence under *section 2 SOA 2003* could on the facts be relatively minor depending on the applicable circumstances (eg. where non-consensual digital penetration took place during consensual intercourse) but this would be reflected in the sentence imposed on conviction.
- 8.5 There has also been strong support for the proposals set out in paragraphs 7.4 and 7.5 above concerning the transfer of cases between the Summary Court and Magistrate's Court (and vice-versa) and the appointment of a Clerk to the Summary Court.
- 8.6 One legal practitioner recommends the abolition of the Summary Court, but such a radical overhaul of the structure of administration of justice in the Falkland Islands is not advocated by the Attorney General at this time.

9.0 Financial Implications

There are no financial implications.

10.0 Legal Implications

Criminal law and procedure in the Falkland Islands are in need of extensive revision (see ExCo paper 247/12) but the transfer of cases to the Supreme Court is a significant and important matter which needs to be dealt with expeditiously. The Attorney General recognises the demands on the legislative drafting programme, which is currently under review, but will try to fit the necessary provisions into the existing programme by using either internal or external resource. If the recommendations of paper 247/12 are approved, the work could be picked up as part of a larger review of criminal procedure legislation depending on the timescales involved.

11.0 Human Resources Implications

There are no human resources implications.

EXECUTIVE COUNCIL

CONFIDENTIAL

Title of Report: Administration of Justice (Amendment) Bill
Paper No: 30/13
Date: 23 January 2013
Report of: Attorney General

1.0 Purpose

The purpose of this paper is to seek Executive Council's approval for a draft Bill that would make a number of changes to the administration of justice that have already been approved as a matter of policy.

2.0 Recommendations

2.1 Executive Council is recommended to approve the publication in the *Gazette* of the Administration of Justice (Amendment) Bill. A draft of that Bill is attached to this paper as Annex A.

2.2 Executive Council is also recommended to approve the presentation of the Administration of Justice (Amendment) Bill to Legislative Assembly in February 2013.

3.0 Summary of Financial Implications

None

4.0 Background

4.1 In October 2012, Executive Council considered ExCo Paper 255/12 and approved the following recommendations:

“2.1 Honourable Members are asked to approve the drafting of new legislation making fresh provision for the transfer of serious criminal cases to the Supreme Court, to resolve a technical impasse which has arisen because existing legislation requires the courts to follow an English procedure which is now being phased out in English courts and will shortly no longer exist.

2.2 Honourable Members are also asked to approve the drafting of the following amendments to the Administration of Justice Ordinance:-

(a) an amendment to section 27(2) to provide that any offence under section 5 of the Sexual Offences Act 1956 or sections 2, 5 or 6 of the Sexual Offences Act 2003 is to be tried on indictment in the Supreme Court;

(b) new provision allowing for criminal and civil cases to be transferred between the Summary Court and the Magistrate's Court, and vice-versa, where this is in the interests of justice;

(c) an amendment to section 32 to provide that the Clerk to the Magistrate's Court also holds office as the Clerk to the Summary Court."

4.2 Although it was not highlighted in the Recommendations, the paper also referred to a proposal to make changes to the provisions relating to under-18s charged with serious offences for which an adult would have to be tried on indictment.

4.3 For ease of reference, a copy of ExCo paper 255/12 is attached to this paper as Annex B. That paper sets out the analysis behind the policy recommendations that were accepted by Executive Council.

4.4 An Administration of Justice (Amendment) Bill to implement these recommendations was included among the Legislative Drafting Priorities for the second half of 2012/13 and the Bill had – indicatively – been scheduled for presentation to the Legislative Assembly in May 2013.

4.5 However, concerns about the imminent final phasing out of the committal procedure in England & Wales (and the consequent effect on our own law) have become increasingly pressing. There have also been concerns about the effect of the Senior Magistrate's absence from the Islands on overseas leave and the need to be able to transfer cases from the Magistrate's Court to the Summary Court (and back again).

4.6 For these reasons, the decision was taken to submit this paper sooner rather than later to allow for the Administration of Justice (Amendment) Bill to be presented to the Legislative Assembly in February 2013 rather than May 2013.

5.0 Draft legislation

5.1 The draft Bill is attached to this paper as Annex A.

5.2 There is a detailed set of Objects and Reasons at the end of the draft Bill, which is intended to explain the provisions of the Bill.

Key issues

5.3 The Bill is intended to implement the changes approved as a matter of policy by Executive Council:

- replacing the existing committal procedure with a new sending procedure (based on but adapted from the one being phased in in England & Wales);
- adding a number of sexual offences to the list of serious offences that have to be tried in the Supreme Court (rather than summarily in the Summary Court or the Magistrate's Court);
- providing that under-18s accused of serious offences for which an adult would have to be tried on indictment will always be tried on indictment (rather than just in certain cases) and will have the right to jury trial; but also providing that the courts will have to adapt their procedure according to the age and experience of the accused under-18;
- creating a new power for cases to be transferred (in both directions) between the Summary Court and the Magistrate's Court; and
- providing that the Clerk to the Magistrate's Court will also be the Clerk to the Summary Court.

5.4 The original policy decisions about these changes are not re-visited in this paper. However, there are some matters of detail that have had to be worked up. These are highlighted in this paper, along with other key issues.

Sending procedure

5.5 The main provisions that would implement the change from the committal procedure to the sending procedure are as follows:

- *clauses 8(4) and 8(5)*, which would amend section 27(4) of the Administration of Justice Ordinance and insert a new section 27(4A);
- *clause 13* and the *Schedule*, which would add a new Schedule 4 to the Administration of Justice Ordinance
- *clause 14*, which would amend section 4 of the Criminal Justice Ordinance
- *clause 15*, which would disapply section 40 of the Criminal Justice Act 1988

5.6 At present, the transfer of cases from the Summary Court or the Magistrate's Court to the Supreme Court is handled by a committal procedure and, in some cases, the Summary Court or Magistrate's Court may have to decide whether or not a person should be committed for trial.

5.7 That would be replaced with a new sending procedure (adapted from a similar procedure being phased in in England & Wales) in which a person has to be sent to the Supreme Court for trial in respect of indictment-only offences (and can also be sent to the Supreme Court for trial in respect of linked offences that could be tried summarily).

5.8 As part of a new procedure, a person who is sent to the Supreme Court for trial would be able to make an application for dismissal before trial – applications would be made in the Supreme Court but could be dealt with by the Senior Magistrate (as an acting judge of the Supreme Court).

5.9 There is provision for practice directions to be made about when and how applications for dismissal are to be conducted. In the current draft, practice

directions could be issued by an acting judge of the Supreme Court as well as by the Chief Justice. In practice, this would allow the Senior Magistrate to issue practice directions and this is intended to allow for flexibility – however, the Chief Justice and/or Senior Magistrate may have views about whether or not this is appropriate.

5.10 The new versions of section 27(3) of the Administration of Justice Ordinance and section 4 of the Criminal Justice Ordinance would deal with the circumstances in which the new sending procedure would apply. The new Schedule 4 deals with the new sending procedure and the procedure that would apply after a person is sent to the Supreme Court for trial.

5.11 The new Schedule 4 is largely based on the provisions of section 51 of the Crime and Disorder Act 1998 – however, the provisions have been adapted in a number of places to reflect our court system and they have also been amended quite considerably in an effort to make them clearer and easier to read.

5.12 One area worth highlighting relates to the reporting restrictions that will apply when applications for dismissal are made.

- The provisions about reporting restrictions are set out in *paragraphs 10 to 15* of the new Schedule 4 and they are necessary to reduce the risk that a fair trial is prevented by the reporting of information while a case is pending trial.
- The new provisions go further than the provisions that apply in England & Wales in that they do not just apply to media reports but to all reports (however they are made) that are made to the public (or sections of it). This is intended to take account of the other ways in which news is distributed (eg e-mail updates) and also of the growth in social media (eg Facebook and Twitter). Although the reporting restrictions impinge on freedom of expression and the freedom to receive information, it is considered that the reporting restrictions are necessary and proportionate to protect the right of an accused person to a fair trial.

Adding sexual offences to the list of offences that must be tried on indictment

5.13 The current list of offences that must be tried on indictment in the Supreme Court includes treason, murder, manslaughter, piracy, rape, arson endangering life and attempts to commit those offences.

5.14 Clause 8(2)(c) would add the following sexual offences to that list:

- An offence against section 5 of the Sexual Offences Act 1956 – the old offence of intercourse with a girl under 13
- An offence against section 2 of the Sexual Offences Act 2003 – assault by penetration
- An offence against section 5 of the Sexual Offences Act 2003 – rape of a child under 13
- An offence against section 6 of the Sexual Offences Act 2003 – assault of a child under 13 by penetration

Changing the rules about trial on indictment for under-18s

5.15 At present, special provision is made for accused persons who are under the age of 18 and who are charged with an offence which would otherwise have to be tried on indictment in the Supreme Court. Under-18s can only be tried in the Supreme Court if either:

- the offence is punishable by at least 14 years imprisonment and the court considers that the only sentence available to it if the defendant is convicted is one of detention; or
- the young defendant is charged jointly with an adult and the court considers it necessary in the interests of justice to commit them both for trial in the Supreme Court.

5.16 The law as it stands deprives under-18s who are charged with a serious offence of the right to trial by jury unless one of these conditions applies. For this reason, it is proposed to amend the law so that under-18s are given the same protections as adults. However, to safeguard the interests of young persons, the courts will be required to adapt their procedure according to the age and experience of the young person.

5.17 The main provisions that would implement this proposal are:

- *clauses 8(3) and 8(5)*, which would amend section 27(3) of the Administration of Justice Ordinance
- *clause 11*, which would insert a new section 48A into the Administration of Justice Ordinance
- *clause 14*, which would amend section 4 of the Criminal Justice Ordinance

5.18 The new Schedule 4 to the Administration of Justice Ordinance would apply to under-18s as well as to adults.

Transfer of cases from the Summary Court to the Magistrate's Court (and vice versa)

5.19 The provision that would implement the proposal to allow for cases to be transferred from the Summary Court to the Magistrate's Court (and from the Magistrate's Court to the Summary Court) is *clause 10*, which would insert a new Part 3A (consisting of a single new section, section 35A) into the Administration of Justice Ordinance.

5.20 The new power would allow for cases to be transferred in either direction and, if need be, on more than one occasion.

5.21 It would also allow for the possibility that cases could be “pulled” as well as “pushed”: either court could order that a case in the other court is transferred from the other court, as well as either court being able to order that a case is transferred to the other court. That is intended to provide flexibility in two situations:

- It could be used by the Senior Magistrate to “call in” a case from the Summary Court.
- It could also be used to avoid a stalemate situation in which a case needs to be transferred from the Magistrate’s Court to the Summary Court but (eg because the Senior Magistrate is away or unavailable for some other reason or because there is a vacancy in that office) the Magistrate’s Court cannot transfer the case itself.

5.22 To provide guidance on when cases should be transferred from one court to the other, the Senior Magistrate will have the power to issue practice directions.

Providing that the Clerk to the Magistrate’s Court will also be the Clerk to the Summary Court

5.23 The provision that would implement the proposal that the Clerk to the Magistrate’s Court should also be the Clerk to the Summary Court is *clause 9*, which would amend section 32 of the Administration of Justice Ordinance.

Consequential amendments and transitional/saving provisions

5.24 A number of consequential amendments (reflecting changes made elsewhere and “tidying up behind them”) are already included in the draft Bill.

5.25 However, *clause 16* would allow the Governor to make further consequential amendments by order (without the need for a further Bill). That is intended to allow for the possibility that other consequential amendments are needed but have been overlooked. (In practice, unless one of the constitutional exceptions were to apply, the Governor could only make consequential amendments by order on the advice of Executive Council.)

5.26 Powers to make consequential amendments are quite common in UK legislation but are not routinely included in Falkland Islands legislation. However, including such a provision on this occasion is thought to be a sensible precaution in case anomalies are discovered.

5.27 *Clause 17* would also allow the Governor to make transitional and saving provisions by order. (Again, in practice, unless one of the constitutional exceptions were to apply, the Governor could only do this on the advice of Executive Council.) Transitional and saving provisions are only likely to be needed if there are one or more cases pending when the new Ordinance comes into force.

6.0 Consultation

6.1 Stakeholders were consulted in relation to the policy issues before ExCo paper 255/12 was submitted to Executive Council.

6.2 Had this paper been submitted later in the year, further consultation on the draft Bill would have been carried out before it was submitted to Executive Council. However, with the change of timing, that has not been possible.

6.3 Instead, consultation is being carried out in parallel with the legislative process:

- Stakeholders (the judiciary, legal practitioners and the police) are being consulted on the draft Bill at the same time as this paper is submitted to Executive Council.
- The media are also being consulted on the provisions about reporting restrictions.
- Stakeholders and the media are being asked to provide their initial views as soon as possible and an oral report will be made to Executive Council on 23 January 2013.
- However, this would allow little more than a week for consultation on a 34 page Bill (including the Objects and Reasons). In recognition of that, stakeholders and the media will be asked to provide their more detailed comments in time for the meetings of Executive Council and Legislative Assembly in February.
- If changes do need to be made in the light of the consultation exercise (or comments made following publication of the Bill in the *Gazette*), it is envisaged that these will be made by tabling Government amendments when the Bill is presented to Legislative Assembly in February 2013 – approval for these amendments would be sought from Executive Council at its meeting in February 2013.

7.0 Financial Implications

None

8.0 Legal Implications

The legal implications of this paper are set out elsewhere in this paper.

9.0 Human Resources Implications

None

Administration of Justice (Amendment) Bill 2013

(No: of 2013)

ARRANGEMENT OF PROVISIONS

Clause

PART 1 – INTRODUCTION

1. Title
2. Commencement

PART 2 – AMENDMENT OF ADMINISTRATION OF JUSTICE ORDINANCE

3. Amendment of the Administration of Justice Ordinance
4. Section 2 amended – Interpretation
5. Section 11 amended – Criminal jurisdiction of Summary Court
6. Section 16 replaced – Power of Summary Court to send person to Supreme Court for trial
7. Section 25 repealed – Application of certain provisions of Part 3 to Summary Court
8. Section 27 amended – General criminal jurisdiction
9. Section 32 amended – Clerk
10. New Part 3A inserted – Transfer of cases between Summary Court and Magistrate’s Court
11. New section 48A inserted – Practice and procedure: persons under age of 18 sent to Supreme Court for trial
12. Section 51 amended – Time for commencement of criminal proceedings
13. New Schedule 4 added – Procedure for sending persons to Supreme Court for trial and after persons are sent to Supreme Court for trial

PART 3 – CONSEQUENTIAL AMENDMENTS

14. Section 4 of the Criminal Justice Ordinance amended – Trial of offences
15. Section 40 of the Criminal Justice Act 1988 disapplied – Power to join in indictment count for common assault etc

16. Power to make further consequential amendments by order

PART 4 – TRANSITIONAL PROVISIONS

17. Power to make transitional and saving provisions by order

Schedule – New Schedule 4 added – Procedure for sending persons to Supreme Court for trial and after persons are sent to Supreme Court for trial

ADMINISTRATION OF JUSTICE (AMENDMENT) BILL 2013

(No: of 2013)

(assented to: 2013)
(commencement on publication)
(published: 2013)

A BILL

for

AN ORDINANCE

To amend the Administration of Justice Ordinance (Title 22.1); and for connected purposes.

BE IT ENACTED by the Legislature of the Falkland Islands —

**PART 1
INTRODUCTION**

1. Title

This Ordinance is the Administration of Justice (Amendment), etc Ordinance 2013.

2. Commencement

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

**PART 2
AMENDMENT OF ADMINISTRATION OF JUSTICE ORDINANCE**

3. Amendment of Administration of Justice Ordinance

This Part amends the Administration of Justice Ordinance.

4. Section 2 amended – Interpretation

In section 2, the following definition is inserted after the definition of “criminal proceedings” —

““indictment-only offence” means an offence declared by section 27(2) to be one that must be tried on indictment;”

5. Section 11 amended – Criminal jurisdiction of Summary Court

Section 11(1) is repealed and replaced with the following subsection —

“(1) The Summary Court has a like jurisdiction in criminal proceedings to the jurisdiction that the Magistrate's Court has under section 27(1), but the jurisdiction of the Summary Court is limited by —

(a) other provisions in this Part; and

(b) section 27(2).”

6. Section 16 replaced – Power of Summary Court to commit for trial before Supreme Court

Section 16 is repealed and replaced with the following section —

“16. Power of Summary Court to send person to Supreme Court for trial

(1) The Summary Court has the same power as the Magistrate’s Court to send a person for trial before the Supreme Court.

(2) The following provisions apply to the Summary Court in the same way as they do to the Magistrate’s Court —

(a) section 27(3), (4) and (4A); and

(b) Schedule 4.”

7. Section 25 repealed – Application of certain provisions of Part 3 to Summary Court

Section 25 is repealed.

8. Section 27 amended – General criminal jurisdiction

(1) This section amends section 27.

(2) Subsection (2) is amended by —

(a) omitting “, subject to subsection (3),”;

(b) omitting “and” from the end of paragraph (b); and

(c) inserting the following paragraphs after paragraph (b) —

“(ba) an offence against section 5 of the Sexual Offences Act 1956 (as it applied in the Falkland Islands at the time of the offence);

(bb) an offence against section 2, 5 or 6 of the Sexual Offences Act 2003 (as it applied in the Falkland Islands at the time of the offence); and”.

(3) Subsection (3) is repealed and replaced with the following subsection —

“(3) When a person who has not yet reached the age of 18 appears before the Magistrate’s Court or the Summary Court (or is brought before it) and one or more of the circumstances listed in paragraphs (a) to (c) of subsection (4) applies —

(a) the court must deal with that person in accordance with Schedule 4; but

(b) the court must adapt its procedure in whatever way the interests of justice require to take account of the person’s age and level of understanding.”

(4) Subsection (4) is repealed and replaced with the following subsection —

“(4) When a person who is aged 18 or over appears before the Magistrate’s Court or the Summary Court (or is brought before it), the Court must deal with that person in accordance with Schedule 4 if one or more of the following circumstances applies in relation to that person —

- (a) the person is before the Court in relation to one or more indictment-only offences;
- (b) the person has already been sent to the Supreme Court in relation to one or more offences that have not yet come to trial;
- (c) the person is charged jointly with someone else who has been, is being or could be sent to the Supreme Court in accordance with Schedule 4.”

(5) The following subsection is inserted after subsection (4) —

“(4A) Schedule 4 also deals with —

- (a) the procedure that applies after a person is sent to the Supreme Court for trial (but not with the procedure for the trial itself); and
- (b) the powers of the Supreme Court in relation to summary offences.”

9. Section 32 amended – Clerk

Section 32 is amended by adding “(and that person will also be Clerk to the Summary Court)”.

10. New Part 3A inserted – Transfer of cases between Summary Court and Magistrate’s Court

The following new Part is inserted after section 35 —

**“PART 3A
TRANSFER OF CASES BETWEEN SUMMARY COURT AND MAGISTRATE’S
COURT**

35A. Transfer of cases between Summary Court and Magistrate’s Court

(1) This section applies to a case if —

- (a) it could have been brought in either the Summary Court or the Magistrate’s Court;
- (b) it has already been commenced in one of those courts; and
- (c) it has not yet come to trial in either of those courts.

(2) A case to which this section applies may (if the interests of justice require) be transferred —

(a) from the Summary Court to the Magistrate’s Court; or

(b) from the Magistrate’s Court to the Summary Court.

(3) A case may be transferred from one court to the other even if it has been transferred on one or more previous occasions.

(4) Either the Summary Court or the Magistrate’s Court may make an order for a case to be transferred from one court to the other.

(5) An order for a case to be transferred from one court to the other may be made —

(a) on an application from one or more of the parties to the case; or

(b) of the court’s own motion.

(6) The Senior Magistrate may issue practice directions about how the power for cases to be transferred from one court to another is to be exercised.”

11. New section 48A inserted – Practice and procedure: persons under age of 18 sent to Supreme Court for trial

The following new section is inserted after section 48 —

“48A. Practice and procedure: persons under age of 18 sent to Supreme Court for trial

(1) Subsection (2) applies whenever —

(a) a person who has not yet reached the age of 18 has been sent to the Supreme Court for trial in respect of one or more offences; and

(b) either —

(i) the person appears (or is brought) before the Supreme Court in connection with those offences; or

(ii) the person is being tried on indictment for those offences.

(2) Whenever this subsection applies, the Supreme Court must adapt its procedure in whatever way the interests of justice require to take account of the person’s age and level of understanding.”

12. Section 51 amended – Time for commencement of criminal proceedings

The definition of “indictment-only” offence is omitted from section 51(4).

13. New Schedule 4 added – Procedure for sending persons to Supreme Court for trial and after persons are sent to Supreme Court for trial

The Schedule adds Schedule 4.

**PART 3
CONSEQUENTIAL AMENDMENTS**

14. Section 4 of the Criminal Justice Ordinance amended – Trial of offences

(1) This section amends section 4 of the Criminal Justice Ordinance (Title 24.1)

(2) Subsection (2) is repealed and replaced with the following subsection —

“(2) An offence which is triable summarily may instead be tried on indictment.”

(3) Subsection (3) is repealed and replaced with the following subsection —

“(3) An offence may only be tried on indictment under subsection (2) if the accused person is sent to the Supreme Court for trial in respect of that offence by the Summary Court or the Magistrate’s Court.”

(4) Subsection (4) is repealed and replaced with the following subsection —

“(4) Schedule 4 of the Administration of Justice Ordinance (Title 22.1) deals with the circumstances in which a person may be sent to the Supreme Court for trial on indictment in respect of an offence which is triable summarily.”

15. Section 40 of the Criminal Justice Act 1988 disapplied – Power to join in indictment count for common assault etc

Section 40 of the Criminal Justice Act 1988 no longer applies in the Falkland Islands.

16. Power to make further consequential amendments by order

(1) The Governor may by order make further provision consequential on this Ordinance (or one or more of its provisions).

(2) An order made under subsection (1) may do one or more of the following things —

(a) amend or repeal written laws of the Falkland Islands;

(b) provide for United Kingdom legislation to apply in the Falkland Islands (with or without modifications);

(c) modify the application in the Falkland Islands of United Kingdom legislation that already applies in the Falkland Islands;

(d) provide that specific provisions of United Kingdom legislation no longer apply in the Falkland Islands.

**PART 4
TRANSITIONAL AND SAVING PROVISIONS**

17. Power to make transitional and saving provisions by order

The Governor may by order make transitional or saving provision (or both) in connection with this Ordinance (or one or more of its provisions).

**SCHEDULE
NEW SCHEDULE 4 ADDED – PROCEDURE FOR SENDING PERSONS TO SUPREME
COURT FOR TRIAL AND AFTER PERSONS ARE SENT TO SUPREME COURT FOR
TRIAL**

(section 13)

The following schedule is added as Schedule 4 —

**“SCHEDULE 4
PROCEDURE FOR SENDING PERSONS TO SUPREME COURT FOR TRIAL AND
AFTER PERSONS ARE SENT TO SUPREME COURT FOR TRIAL**

**PART 1
INTRODUCTION**

1. Application of Schedule

(1) This Schedule deals with the procedure for sending persons to the Supreme Court for trial in respect of —

- (a) indictment-only offences;
- (b) offences that may be tried summarily but which are related to indictment-only offences that may have been committed by —
 - (i) persons charged with indictment-only offences; or
 - (ii) other persons charged jointly with them.

(2) It also deals with —

- (a) the procedure after persons are sent to the Supreme Court for trial; and
- (b) the Supreme Court’s powers to deal with summary offences.

2. Interpretation

In this Schedule —

“appeal court” means either —

- (a) the Court of Appeal for the Falkland Islands established by section 87(1) of the Constitution; or
- (b) the Judicial Committee of the Privy Council;

“application for dismissal” means an application under paragraph 9 for one or more charges against a person to be dismissed;

“linked offence” means an offence that may be tried summarily but which arises out of circumstances that are the same as (or connected with) those giving rise to —

- (a) an indictment-only offence in respect of which —
 - (i) that person has been (or is being) sent to the Supreme Court for a trial that has not yet taken place; or
 - (ii) another person (with whom the first person is jointly charged) has been (or is being) sent to the Supreme Court for a trial that has not yet taken place; or
- (b) another offence that might otherwise have been tried summarily but in respect of which —
 - (i) that person has been (or is being) sent to the Supreme Court for a trial that has not yet taken place; or
 - (ii) another person (with whom the first person is jointly charged) has been (or is being) sent to the Supreme Court for a trial that has not yet taken place; and

“relevant issues” means —

- (a) the circumstances of the case;
- (b) if written notice has been (or was) given of an intention to apply for dismissal orally, the matters stated in that notice; and
- (c) the matters stated in the application for dismissal;

“summary offence” means an offence that might have been tried summarily (but for the fact that the person was sent to the Supreme Court for trial in respect of it);

“Supreme Court judge” —

(a) means —

(i) the Chief Justice; or

(ii) an acting judge of the Supreme Court; and

(b) may include the Senior Magistrate (even if the Senior Magistrate has already dealt with the same case in the Magistrate’s Court); and

“unrestricted information” has the meaning given to it by paragraph 11.

**PART 2
PROCEDURE FOR SENDING PERSONS TO SUPREME COURT**

3. Circumstances in which Summary Court or Magistrate’s Court must or may send persons to Supreme Court for trial

(1) This paragraph applies whenever —

(a) a person appears before the Summary Court or the Magistrate’s Court (or is brought before it); and

(b) the court is required by section 27(3) or 27(4) to deal with that person in accordance with this Schedule.

(2) The Summary Court or the Magistrate’s Court must send a person to the Supreme Court for trial in respect of an indictment-only offence.

(3) The Summary Court or the Magistrate’s Court may also send a person to the Supreme Court for trial in respect of an offence if —

(a) it may be tried summarily; but

(b) it appears to the Summary Court or the Magistrate’s Court that it is a linked offence.

4. Adjournment of summary trial

(1) Sub-paragraph (2) applies whenever a person is sent to the Supreme Court for trial in respect of a summary offence.

(2) If this sub-paragraph applies, the trial in respect of that offence will be treated as if it had been adjourned by the Summary Court or the Magistrate’s Court without a date being fixed for its resumption.

(3) A date may be fixed for the resumption of the trial for a summary offence if the powers of the Supreme Court cease in respect of that offence under paragraph 19(10).

5. Sending notice

- (1) This paragraph applies whenever the Summary Court or the Magistrate’s Court sends a person to the Supreme Court for trial in respect of one or more offences.
- (2) The Summary Court or the Magistrate’s Court must issue a notice (a “sending notice”) specifying the offence or offences for which the person is being sent to the Supreme Court for trial.
- (3) Copies of the sending notice must be —
 - (a) served on the person being sent to the Supreme Court for trial; and
 - (b) forwarded to the Supreme Court.
- (4) Sub-paragraphs (5) and (6) apply if the person is being sent to the Supreme Court for trial in respect of one or more summary offences (whether or not that person is also being sent to the Supreme Court for trial in respect of one or more indictment-only offences).
- (5) The Summary Court or the Magistrate’s Court must specify in the sending notice the indictment-only offence (or offences) in relation to which the summary offence appears to the Summary Court or the Magistrate’s Court to be a linked offence.
- (6) If the person is being sent to the Supreme Court in respect of more than one summary offence, the Summary Court or the Magistrate’s Court must comply with sub-paragraph (5) in relation to each of the summary offences separately.

6. Transfer may be in custody or on bail

- (1) The Summary Court or the Magistrate’s Court may send a person to the Supreme Court for trial either —
 - (a) in custody (that is to say, by committing the person to custody to be kept there safely until delivered in due course of law); or
 - (b) on bail in accordance with the bail provisions of the Criminal Justice Ordinance (Title 24.1) (that is to say, by directing the person to appear before the Supreme Court for trial).
- (2) When determining whether to send a person to the Supreme Court for trial in custody or on bail, the Summary Court or the Magistrate’s Court must apply the bail provisions of the Criminal Justice Ordinance.
- (3) Sub-paragraph (4) applies if a person is granted bail on condition of providing one or more sureties.
- (4) If this sub-paragraph applies, the court may make an order remanding the person in custody until that condition is satisfied.

PART 3

PROCEDURE AFTER PERSONS ARE SENT TO SUPREME COURT FOR TRIAL

7. Jurisdiction of Summary Court and Magistrate's Court in relation to further remand in custody or on bail

(1) This paragraph applies —

(a) even after a person has been sent to the Supreme Court for trial;

(b) whether the Summary Court or the Magistrate's Court sent that person to the Supreme Court for trial; and

(c) in relation to all offences in respect of which the person has been sent to the Supreme Court for trial (including indictment-only offences, as well as summary offences).

(2) The Summary Court and the Magistrate's Court both have jurisdiction to hear and determine applications relating to the further remand (in custody or on bail) of a person who has been sent to the Supreme Court for trial in respect of one or more offences.

(3) If the person has not yet reached the age of 18, the court must adapt its procedure in whatever way the interests of justice require to take account of the person's age and level of understanding.

8. Evidence

(1) Whenever a person is sent to the Supreme Court for trial in respect of one or more offences, copies of the documents containing the evidence on which the charge or charges are based must be —

(a) served on the person being sent to the Supreme Court for trial; and

(b) forwarded to the Supreme Court.

(2) An order or direction specifying the period within which the documents are to be served and forwarded may be made by —

(a) the Summary Court or the Magistrate's Court when sending the person to the Supreme Court for trial; or

(b) a Supreme Court judge after the person has been sent to the Supreme Court for trial.

(3) A Supreme Court judge may extend (and, if need be, further extend) the period specified in an order or direction.

9. Applications for dismissal

- (1) A person who has been sent to the Supreme Court for trial in respect of one or more offences may apply to the Supreme Court for one or more of the charges in the case to be dismissed.
- (2) An application for dismissal may only be made —
 - (a) after the person is served with copies of the documents containing the evidence on which the charge or charges are based; but
 - (b) before either —
 - (i) the person has entered a plea to the charge or charges; or
 - (ii) a plea to the charge or charges has been entered for the person.
- (3) An application for dismissal —
 - (a) may be made and dealt with in writing; or
 - (b) may be made orally instead, but only if —
 - (i) the applicant has given written notice to the Supreme Court of an intention to make the application orally; and
 - (ii) a Supreme Court judge has decided (having had regard to the relevant issues) that the interests of justice require that the application should be made orally.
- (4) Oral evidence may only be given on an application for dismissal —
 - (a) with the leave of a Supreme Court judge; or
 - (b) in accordance with an order of a Supreme Court judge.
- (5) A Supreme Court judge may only give leave under sub-paragraph (4)(a) or make an order under sub-paragraph (4)(b) if it appears to the Supreme Court judge (having regard to the relevant issues) that the interests of justice require leave to be given or an order made.
- (6) Sub-paragraph (7) applies if —
 - (a) a Supreme Court judge —
 - (i) gives leave permitting a person to give oral evidence; or
 - (ii) makes an order requiring a person to give oral evidence; but
 - (b) that person does not give oral evidence.

(7) If this sub-paragraph applies—

(a) the Supreme Court judge hearing or considering an application for dismissal may disregard a document indicating the evidence that the person might have given; or

(b) if there is more than one document indicating the evidence that the person might have given, the Supreme Court judge hearing or considering an application for dismissal may disregard —

(i) all of those documents; or

(ii) one or more of them.

(8) The Supreme Court judge hearing or considering an application for dismissal must dismiss a charge which is the subject of an application if it appears to the judge that the evidence against the applicant would not be sufficient for a jury properly to convict the applicant.

(9) If one or more charges against an applicant are dismissed —

(a) if the dismissed charge or charges relate only to one count in an indictment preferred against the applicant, the Supreme Court judge must quash that count;

(b) if the dismissed charge or charges relate to more than one count in one or more indictments, the Supreme Court judge must quash all of those counts;

(c) further proceedings may only be brought on the dismissed charge or charges by means of the preferment of a voluntary bill of indictment; and

(d) unless the applicant is in custody otherwise than on the dismissed charge or charges, the applicant must be discharged.

(10) A Supreme Court judge may —

(a) issue practice directions about the conduct of applications for dismissal generally; and

(b) make orders about the conduct of particular applications for dismissal.

(11) In particular, practice directions and orders may make provision about —

(a) the time or stage in the proceedings at which things required (or allowed) to be done under this paragraph are to be done (unless a Supreme Court judge grants leave to do one or more of those things at some other time or stage);

- (b) the contents and form of notices or other documents;
- (c) the manner in which evidence is to be submitted; and
- (d) persons to be served with notices or other material.

10. Reporting restrictions

(1) This paragraph applies to reports of applications for dismissal and proceedings relating to them, including —

- (a) every written report published (either by itself or as part of a newspaper or periodical) for distribution or circulation to the public (or a section of it) in the Falkland Islands;
- (b) every report included in a radio or television broadcast intended for reception within the Falkland Islands;
- (c) every report included in an audio or video recording intended for distribution to the public (or a section of it) in the Falkland Islands; and
- (d) every report —
 - (i) made in another way (including by e-mail, the internet and other messaging services); and
 - (ii) intended to be received by the public (or a section of it) within the Falkland Islands.

(2) A person may only make a report to which this paragraph applies to the extent that —

- (a) it is not prohibited or restricted by another provision in —
 - (i) a written law of the Falkland Islands;
 - (ii) United Kingdom legislation (as it applies in the Falkland Islands); and
- (b) it is permitted under sub-paragraph (3).

(3) A report to which this paragraph applies is permitted under this sub-paragraph if —

- (a) it only contains unrestricted information; or
- (b) it contains additional information, but —
 - (i) an order has been under paragraph 12 and the report complies with that order;
 - (ii) paragraph 13(2) applies; or

(iii) paragraph 14(2) applies.

11. Reporting restrictions: unrestricted information

In paragraph 10 (and also in paragraphs 12 and 13), “unrestricted information” means the following information about an application for dismissal, proceedings relating to an application for dismissal or a case in which an application for dismissal is made —

- (a) the identity of the court and the name of the judge;
- (b) the following information in relation to the accused person (or each of them, if there is more than one) —
 - (i) the person’s name;
 - (ii) the person’s age;
 - (iii) the person’s address;
- (c) the offence or offences (or a summary of them) with which the accused person is (or the accused persons are) charged;
- (d) the names of legal practitioners engaged in the proceedings;
- (e) if the proceedings have adjourned, the date to which they have been adjourned;
- (f) the arrangements as to bail; and
- (g) whether legal aid has been granted to the accused person (or one or more of them).

12. Reporting restrictions: orders allowing additional information to be reported

(1) A Supreme Court judge dealing with an application for dismissal may make an order allowing additional information to be included in reports to which paragraph 10 applies.

(2) An order allowing other information to be included in reports may —

- (a) specify what additional information may be reported (and what may not); and
- (b) contain conditions about how that information is reported.

(3) Sub-paragraph (4) applies if —

- (a) two or more persons are accused in the same case; and
- (b) one or more of those persons objects to an order being made allowing other information to be included in reports.

(4) If this sub-paragraph applies, the Supreme Court judge may only make an order allowing other information to be included in reports —

(a) after each of the accused persons has been given the opportunity to make representations; and

(b) if the Supreme Court judge is satisfied that it is in the interests of justice that the order is made —

(i) at all; and

(ii) in those terms.

(5) Proceedings about whether or not to make an order allowing other information in reports may not themselves be reported in reports to which this paragraph applies (even if the order is made), but the decision about whether or not to make an order may be included in a report to which this paragraph applies.

13. Reporting restrictions: lifting of restrictions following successful application for dismissal

(1) Sub-paragraph (2) applies —

(a) if —

(i) only one person is accused in a case;

(ii) that person makes an application for dismissal; and

(iii) the application is successful;

(b) if —

(i) more than one person is accused in a case; but

(ii) only one of those persons makes an application for dismissal; and

(iii) the application is successful; or

(c) if —

(i) more than one person is accused in a case;

(ii) more than one of those persons makes an application for dismissal; and

(iii) all of the applications are successful.

(2) If this sub-paragraph applies, reports to which paragraph 10 applies may include additional information about the successful application (or applications) and the proceedings relating to that application (or those applications).

14. Reporting restrictions: lifting of restrictions at end of case

(1) Sub-paragraph (2) applies —

(a) if —

- (i) only one person is accused in a case;
- (ii) that person makes an application for dismissal; but
- (iii) the application is unsuccessful;

(b) if —

- (i) more than one person is accused in a case; and
- (ii) only one of those persons makes an application for dismissal; but
- (iii) the application is unsuccessful; or

(c) if —

- (i) more than one person is accused in a case; and
- (ii) more than one of those persons makes an application for dismissal; but
- (iii) one or more of the applications is unsuccessful.

(2) If this sub-paragraph applies, information about the application (or applications) and the proceedings relating to that application (or those applications) may only be included in reports to which paragraph 10 applies —

(a) if only one person was accused in the case, after the conclusion of that person's trial;
or

(b) if more than one person was accused in the same case, after the conclusion of the trial of the last of those persons to be tried.

15. Reporting restrictions: offences and penalties

(1) If a report to which paragraph 10 applies is made in contravention of that paragraph, each of the following persons commits an offence —

- (a) in the case of a publication of a written report as part of a newspaper or periodical, the proprietor, editor or publisher of the newspaper or periodical;
- (b) in the case of a publication of a written report otherwise than as part of a newspaper or periodical, the person who publishes it;
- (c) in the case of the inclusion of a report in a broadcast —
 - (i) the broadcaster; and
 - (ii) the person or persons who have functions in relation to the broadcast that correspond to those of the editor of a newspaper;
- (d) in the case of the inclusion of a report in a recording —
 - (i) the publisher of the recording; and
 - (ii) the person or persons who have functions in relation to the recording that correspond to those of the editor of a newspaper;
- (e) in the case of a report made in another way —
 - (i) the person making the report; and
 - (ii) if there is a person who has functions in relation to the report that correspond to those of the editor of a newspaper (or more than one person who has such functions), that person (or those persons).

(2) The penalty that may be imposed on a person convicted of an offence against sub-paragraph (1) is a fine of up to level 5 on the standard scale.

(3) Proceedings for an offence under sub-paragraph (1) may only be commenced —

- (a) by the Attorney General; or
- (b) in accordance with consent given by the Attorney General.

16. Power of justices to take depositions, etc.

(1) Sub-paragraph (3) applies if a justice of the peace is satisfied that —

- (a) a person (“the witness”) is likely to be able to make on behalf of the prosecutor a written statement containing material evidence for the purposes of proceedings for an offence for which a person has been sent to the Supreme Court for trial; but
- (b) the witness will not voluntarily make that statement.

- (2) Sub-paragraph (3) also applies if a justice of the peace is satisfied that —
- (a) a person (“the witness”) is likely to be able to produce on behalf of the prosecutor one or more documents or other exhibits likely to be material evidence for the purposes of proceedings for an offence for which a person has been sent to the Supreme Court for trial; but
 - (b) the witness will not voluntarily produce them.
- (3) If this sub-paragraph applies, the justice must issue a summons directed to the witness requiring the witness to —
- (a) attend before a justice at the time and place appointed in the summons; and
 - (b) do either or both of the following things —
 - (i) have the evidence taken as a deposition;
 - (ii) produce the documents or other exhibits.
- (4) Sub-paragraph (5) applies if a justice of the peace is satisfied (by evidence on oath) that —
- (a) the witness is likely to be able to —
 - (i) make on behalf of the prosecutor a written statement containing material evidence for the purposes of proceedings for an offence for which a person has been sent to the Supreme Court for trial;
 - (ii) produce on behalf of the prosecutor one or more documents or other exhibits likely to be material evidence for the purposes of proceedings for an offence for which a person has been sent to the Supreme Court for trial; or
 - (iii) do both of those things;
 - (b) it is probable that a summons under sub-paragraph (3) would not procure the result required by it; and
 - (c) the person is within the Falkland Islands.
- (5) If this sub-paragraph applies, the justice may (instead of issuing a summons) issue a warrant to —
- (a) arrest the witness; and
 - (b) bring the witness before a justice at the time and place specified in the warrant.

(6) Sub-paragraph (7) applies if —

(a) a witness fails to attend before a justice in answer to a summons issued under sub-paragraph (3);

(b) the justice is satisfied (by evidence on oath) that the witness is likely to be able to —

(i) make on behalf of the prosecutor a written statement containing material evidence for the purposes of proceedings for an offence for which a person has been sent to the Supreme Court for trial;

(ii) produce on behalf of the prosecutor one or more documents or other exhibits likely to be material evidence for the purposes of proceedings for an offence for which a person has been sent to the Supreme Court for trial; or

(iii) do both of those things;

(c) the justice is satisfied (by evidence on oath or in some other way) that —

(i) the witness has been duly served with the summons; and

(ii) a reasonable sum has been paid or offered to the witness for costs and expenses; and

(d) it appears to the justice that there is no just excuse for the failure.

(7) If this sub-paragraph applies, the justice may issue a warrant to —

(a) arrest the witness; and

(b) bring the witness before a justice at the time and place specified in the warrant.

(8) Sub-paragraph (9) applies if —

(a) a summons is issued under sub-paragraph (3) or a warrant is issued under sub-paragraph (5) or (7); and

(b) the summons or warrant is issued with a view to securing that the evidence of the witness is taken as a deposition.

(9) If this sub-paragraph applies, the time appointed in the summons (or specified in the warrant) must be appointed (or specified) so that the evidence can be taken as a deposition before the time by which copies of evidence must be served and forwarded under paragraph 8.

(10) Sub-paragraphs (11) to (14) apply if a person attending (or brought) before a justice in pursuance of this paragraph refuses (without just excuse) to —

- (a) have evidence taken as a deposition;
- (b) produce the documents or other exhibits; or
- (c) do either of those things.

(11) If this sub-paragraph applies, the justice may commit the witness to custody.

(12) A committal under sub-paragraph (11) must be ended once —

- (a) if the witness had attended (or been brought) before a justice for evidence to be taken as a deposition, that evidence has been taken as a deposition;
- (b) if the witness had attended (or been brought) before a justice to produce one or more documents or other exhibits, the documents or other exhibits have been produced;
- (c) if the witness had attended (or been brought) before a justice to do both of those things, both of those things have been done.

(13) A committal under sub-paragraph (11) also comes to an end after the witness has been in custody on that committal for a period of 1 month.

(14) If this sub-paragraph applies —

- (a) the justice may (instead of or as well as committing the witness to custody) impose a fine of up to level 5 on the standard scale on the witness;
- (b) that fine is to be treated as being a sum adjudged to be paid by a conviction.

(15) If, in pursuance of this paragraph, a person has evidence taken as a deposition, the justice before whom the deposition was taken must arrange for copies of the deposition to be sent (as soon as is reasonably practicable) to —

- (a) the prosecutor; and
- (b) the Supreme Court.

(16) If, in pursuance of this paragraph, a person produces an exhibit which is a document, the justice to whom the document was produced must arrange for copies of the document to be sent (as soon as is reasonably practicable) to —

- (a) the prosecutor; and

(b) the Supreme Court.

(17) If, in pursuance of this paragraph, a person produces an exhibit which is not a document, the justice to whom the exhibit was produced must arrange for the following information to be provided to the prosecutor and the Supreme Court as soon as is reasonably practicable —

(a) the fact that the exhibit has been produced; and

(b) the nature of the exhibit.

17. Use of depositions as evidence

(1) Unless sub-paragraph (2) applies, a deposition taken under paragraph 16 may (without further proof) be read as evidence of the person from whom it was taken on the trial of an accused person for —

(a) an offence for which he was sent to the Supreme Court for trial; or

(b) another offence arising out of the same transaction or set of circumstances.

(2) This sub-paragraph applies (and a deposition may not be read as evidence) if one or more of the following apply —

(a) it is proved that the deposition was not signed by the justice by whom it purports to have been signed;

(b) the Supreme Court judge presiding over the trial orders that the deposition is not to be read as evidence; or

(c) a party to the proceedings objects to the deposition being read as evidence, unless the Supreme Court judge presiding over the trial —

(i) considers that the interests of justice require that the objection should have no effect; and

(ii) orders that the deposition may be read as evidence.

PART 4

POWERS OF SUPREME COURT TO DEAL WITH SUMMARY OFFENCES

18. Application of Part 4

This Part applies whenever the Summary Court or the Magistrate's Court has sent a person to the Supreme Court for trial in respect of offences that include one or more summary offences.

19. Procedure following conviction on indictment or if no offence that must be tried on indictment remains

- (1) This paragraph applies to a summary offence if —
 - (a) a person was sent to the Supreme Court for trial in respect of it;
 - (b) that person (or another person) has been convicted of one or more offences on an indictment;
 - (c) the Supreme Court judge considers that the summary offence is a linked offence in relation to one or more of those offences; and
 - (d) no trial has commenced in the Supreme Court in respect of the summary offence.
- (2) This paragraph also applies to a summary offence if —
 - (a) a person was sent to the Supreme Court for trial in respect of it;
 - (b) no plea has been entered in relation to it (either by the person or on the person's behalf); and
 - (c) the person is charged on an indictment which (following amendment of the indictment, as a result of an application for dismissal or for any other reason) no longer includes an indictment-only offence.
- (3) If the person was sent to the Supreme Court in respect of more than one summary offence, the provisions of this paragraph must be applied to each of the summary offences separately.
- (4) If this paragraph applies to a summary offence, the Supreme Court judge must —
 - (a) state to the person the substance of it; and
 - (b) ask the person to plead guilty or not guilty to the offence.
- (5) Sub-paragraph (6) applies to a summary offence if either —
 - (a) the person pleads guilty to it; or
 - (b) a plea of guilty to it is entered on the person's behalf under paragraph 20(2)(b).
- (6) If this sub-paragraph applies to a summary offence, the Supreme Court judge —
 - (a) must convict the person of it; and

(b) may deal with the person in respect of it (but only in a manner in which the Magistrate's Court could have done).

(7) The remaining provisions of this paragraph apply to a summary offence unless either —

(a) the person pleads guilty to it; or

(b) a plea of guilty to it is entered on the person's behalf under paragraph 20(2)(b).

(8) If this sub-paragraph applies to a summary offence, the Supreme Court judge must ask the prosecution if it intends to submit evidence on the charge relating to it.

(9) If the prosecution inform the court that they do not intend to submit evidence on the charge, the Supreme Court must dismiss it.

(10) If the prosecution inform the court that they do intend to submit evidence on the charge —

(a) the powers of the Supreme Court cease in respect of the summary offence; and

(b) the Supreme Court must inform the Summary Court or the Magistrate's Court about the outcome of the proceedings under this paragraph.

20. Power of Supreme Court to proceed in absence of accused person in certain circumstances

(1) Proceedings before the Supreme Court under paragraph 19 may take place in the absence of an accused person if —

(a) the accused is represented by a legal practitioner;

(b) either —

(i) the Supreme Court judge conducting the proceedings considers that, by reason of the person's disorderly conduct before the court, it is not practicable for the proceedings to be conducted in the person's presence; or

(ii) the accused person's legal representative signifies to the court that the accused person consents to the proceedings being conducted in the person's absence; and

(c) the Supreme Court judge considers that the proceedings should continue in the accused person's absence.

(2) If proceedings do take place in the absence of the accused person, the Supreme Court judge —

- (a) must state the substance of the summary offence to the accused person's legal representative (instead of stating it to the accused person); and
 - (b) ask the legal representative to enter a plea of guilty or not guilty to it on behalf of the accused person.
- (3) If the legal representative enters a plea of guilty on behalf of the accused person, the Supreme Court will proceed under paragraph 19 as if —
- (a) the substance of the summary offence had been stated to the accused person; and
 - (b) the accused person had pleaded guilty to it.
- (4) Unless the legal representative enters a plea of guilty on behalf of the accused person, the Supreme Court will proceed under paragraph 19 as if —
- (a) the substance of the summary offence had been stated to the accused person; and
 - (b) the accused person had not pleaded guilty to it.

21. Procedure following successful appeal against conviction for offence tried on indictment

- (1) Sub-paragraph (2) applies to a summary offence if —
- (a) a person was convicted of it under paragraph 19(6)(a); but
 - (b) an appeal court allows an appeal against conviction of an offence tried on indictment in relation to which it was a linked offence (or all of the offences tried on indictment in relation to which it was a linked offence, if there was more than one).
- (2) If this sub-paragraph applies —
- (a) the proceedings before the Supreme Court in relation to the summary offence must be disregarded for all purposes;
 - (b) the appeal court must —
 - (i) set aside the person's conviction of the summary offence; and
 - (ii) notify the Summary Court or the Magistrate's Court that it has done so;
 - (c) the appeal court may direct that no further proceedings are to be undertaken in relation to the summary offence;
 - (d) if the appeal court does that, it must notify the Summary Court or the Magistrate's Court about the direction."

OBJECTS AND REASONS

This Bill would make a number of amendments to the Administration of Justice Ordinance (Title 22.1). It also deals with consequential amendments to other legislation.

The Bill deals with five main proposals:

- to replace the current committal procedure with a new sending procedure adapted from the procedure that now applies in England & Wales;
- to include a number of serious sexual offences in the list of offences that must be tried on indictment (ie in the Supreme Court);
- to provide that accused persons who are under 18 must now be tried on indictment in the Supreme Court when charged with an offence for which adult would have to be tried in the Supreme Court (but that the courts must adapt their procedures to take account of the age and experience of young accused persons);
- to allow for cases to be transferred (in both directions) between the Summary Court and the Magistrate's Court; and
- to provide that whoever is appointed as the Clerk to the Magistrate's Court will also be the Clerk to the Summary Court.

Part 2 deals with the amendments to the Administration of Justice Ordinance.

Clause 4 would insert a new definition of "indictment-only offence" into the Interpretation section of the Ordinance. The new definition would replace a definition included in section 51(4) by the Administration of Justice (Amendment) Ordinance 2012 (No 4 of 2012) – that definition would be omitted from section 27 by *clause 12*. The term "indictment-only offence" is currently only used in section 51 but, if the Bill is passed, the term would be used elsewhere in the Ordinance as well. The definition also needs to be amended to reflect other changes that would be made by the Bill.

Clauses 5 and 6 would replace section 11(1) and section 16 with new versions of those provisions that are intended to be clearer and to reflect other changes that would be made by this Bill.

Clause 7 would repeal section 25. Section 25 would be replaced by the new versions of section 11(1) and section 16 (see *clauses 5 and 6*).

Clause 8 would make a number of amendments to section 27:

- *Clause 8(2)(a)* would make an amendment to section 27(2) which is consequential to the changes being made to section 27(3).
- *Clause 8(2)(c)* would extend the list of offences that must be tried on indictment in the Supreme Court:

The list currently includes treason, murder, manslaughter, piracy, rape, arson endangering life and attempts to commit those offences.

The following sexual offences would be added to the list —

- An offence against section 5 of the Sexual Offences Act 1956 – the old offence of intercourse with a girl under 13
 - An offence against section 2 of the Sexual Offences Act 2003 – assault by penetration
 - An offence against section 5 of the Sexual Offences Act 2003 – rape of a child under 13
 - An offence against section 6 of the Sexual Offences Act 2003 – assault of a child under 13 by penetration
- *Clause 8(3)* would replace the existing version of section 27(3) with a new version. The existing version of section 27(3) provides that a young person under the age of 18 accused of an offence that could only otherwise be tried on indictment in the Supreme Court would have to be tried summarily in some cases (and would be deprived of the right to a jury trial in those cases). The new version of section 27(3) would provide instead that the only difference for young persons under the age of 18 would now be that the court would have to adapt its procedure to reflect the age and experience of the young person.
 - *Clause 8(4)* would replace the existing version of section 27(4) with a new version. The existing version of section 27(4) provides for a committal procedure (which is how serious cases are transferred from the Summary Court or the Magistrate’s Court to the Supreme Court). The committal procedure used here is based on the committal procedure that was formerly used in England & Wales but which is being phased out there. The new version of section 27(4) would deal with the circumstances in which a new sending procedure (set out in a new Schedule 4, which would be added by *clause 13* and *the Schedule*) would apply – the proposed new sending procedure is adapted from the procedure being phased in in England & Wales.
 - *Clause 8(5)* would insert a new section 27(4A) which also deals with Schedule 4.

Clause 9 would amend section 32 to provide that whoever is the Clerk to the Magistrate’s Court will also be the Clerk to the Summary Court.

Clause 10 would insert a new Part 3A (consisting of a single section, section 35A) which would allow for cases to be transferred (in both directions) between the Summary Court and the Magistrate's Court whenever it is necessary in the interests of justice to do that.

Clause 11 would insert a new section 48A, which would provide that the Supreme Court would have to adapt its procedure to the age and understanding of a young person under the age of 18.

Clause 12 would make an amendment to section 51 consequential on *clause 4*. The existing definition of "indictment-only offence" in section 51 would be replaced by a new definition in section 2.

Clause 13 is a formal provision which would give effect to the *Schedule*, which (in turn) would add a new Schedule (Schedule 4) to the Administration of Justice Ordinance

Part 3 deals with consequential amendments to other legislation.

Clause 14 would make consequential amendments to section 4 of the Criminal Justice Ordinance.

Clause 15 would disapply section 40 of the Criminal Justice Act 1988 (UK legislation that currently applies in the Falkland Islands). Section 40 makes provision in relation to a number of specific offences that would be superseded by the new sending procedure for all offences.

In addition to these consequential amendments, *clause 16* would allow for further consequential amendments to be made by order, if necessary.

Part 4 deals with transitional and saving provisions..

Clause 17 would allow for transitional and saving provisions to be made by order.

The Schedule would add a new schedule (Schedule 4) to the Criminal Justice Ordinance.

Paragraph 1 summarises the purpose of the new Schedule.

Paragraph 2 defines a number of words and phrases that are used elsewhere in the new Schedule 4.

Part 2 of the new Schedule 4 deals with the procedure for sending persons to the Supreme Court for trial in respect of offences that have to be tried on indictment and offences that could be tried summarily but are linked to offences that have to be tried on indictment.

Under *paragraph 3*, the Summary Court or Magistrate's Court would have to send a person to the Supreme Court for trial in respect of an offence, if it is one that has to be tried on indictment. That would replace the current committal procedure.

Also under *paragraph 3*, the Summary Court or Magistrate's Court could also send a person to the Supreme Court for trial in respect of an offence, even if it is one that could be tried summarily, if it is a linked offence because it arises out of the same circumstances (or connected ones) as another offence that will be tried in the Supreme Court.

Paragraph 4 provides for cases sent to the Supreme Court to be adjourned indefinitely in the Summary Court or the Magistrate's Court. Adjournments could still be lifted if a case is sent back under *paragraph 19*.

Paragraph 5 deals with the sending notices that would have to be issued whenever a person is sent to the Supreme Court for trial.

Paragraph 6 would allow for a person to be released on bail pending trial in the Supreme Court or held in custody pending trial.

Part 3 of the new Schedule 4 deals with the procedure after persons are sent to the Supreme Court for trial.

Paragraph 7 would allow for the Summary Court and the Magistrate's Court to deal with bail and custody applications relation to a person who has been sent to the Supreme Court for trial.

Under *paragraph 8*, the prosecution would have to serve copies of the evidence on the person being sent to the Supreme Court for trial. The time by which this has to be done could be determined either by the Summary Court or the Magistrate's Court or by the Supreme Court. The Chief Justice or an acting judge of the Supreme Court could extend that time limit.

Paragraph 9 deals with the new procedure under which a person who has been sent to the Supreme Court could make an application for dismissal to the Supreme Court. That would replace the existing procedure in which challenges can be made in the Summary Court or the Magistrate's Court at the committal stage.

The default position would be for applications to be made in writing and considered on paper on the basis of written evidence. It would be possible to apply for oral argument to be made in support of an application and/or for oral evidence to be given in support – however, these things could only happen when the Chief Justice or an acting judge of the Supreme Court decides that they are required in the interests of justice.

Under *paragraph 9(8)*, an application for dismissal would succeed if the judge considers that a jury could not properly reach a guilty verdict on the basis of the evidence submitted. (That would not pre-empt whether or not the jury would reach a guilty verdict.)

Paragraphs 9(10) and 9(11) would allow for practice directions to be made by the Chief Justice or an acting judge of the Supreme Court.

Paragraphs 10 to 15 deal with reporting restrictions relating to applications for dismissal – this is intended to prevent prejudice before a possible jury trial.

Under *paragraph 10(1)*, reporting restrictions would apply not just to reports in the media but to reports made to the public (or sections of it) in other ways (eg by e-mail or on the internet).

The effect of *paragraphs 10(2)* is that reporting restrictions under these provisions would be in addition to prohibitions and restrictions under other provisions.

Paragraph 10(3) would allow for:

- certain, limited information (listed in *paragraph 11*) to be reported at any time
- additional information to be reported in accordance with an order made under *paragraph 12*
- additional information could also be reported once reporting restrictions come to an end

Paragraph 11 lists the basic information that could be reported at any time.

Paragraph 12 would allow for applications to be made for orders allowing additional information to be reported. The court would be able to control the reporting of additional information.

Paragraphs 12(3) and 12(4) would provide safeguards for the interests of co-defendants.

Under *paragraph 12(5)*, the fact that an application for an order allowing additional information to be reported could be reported but not the proceedings relating to the application.

The effect of *paragraph 13* would be that reporting restrictions would no longer apply to an application for dismissal if it is successful (but only if there were no unsuccessful applications in the same case). However, prohibitions and restrictions under other provisions would remain in force.

The effect of *paragraph 14* would be that reporting restrictions would be lifted in all other cases once they are completely at an end. However, again, prohibitions and restrictions under other provisions would remain in force.

Paragraph 15 deals with the offences and penalties for breaches of reporting restrictions. *Paragraph 15(1)* deals with who would be responsible for the breach in each situation and, under *paragraph 15(2)*, the maximum penalty would be a fine of level 5 on the standard scale (currently, £4,000).

Paragraph 16 would allow for evidence to be taken as a deposition and/or for exhibits to be produced for use as evidence.

The first stage would be the issue of a summons under *paragraph 16(3)* or the issue of an arrest warrant under *paragraph 16(5)*. The circumstances in which these things could be done are listed in *paragraphs 16(1), 16(2) and 16(4)*.

If a summons rather than a warrant is issued at the first stage and the witness does not answer to it, an arrest warrant could still be issued as a second stage under *paragraph 16(7)*.

Paragraphs 16(10) to 16(14) would deal with the situation in which a witness does not give evidence and/or produce an exhibit when required to do so: the witness could be committed into custody for contempt of court for up to 1 month and/or a fine of up to level 5 on the standard scale (currently, £4,000) could be imposed.

Paragraphs 16(15) to 16(17) would deal with what would be done once evidence is taken and/or exhibits produced.

Paragraph 17 deals with the use of depositions as evidence at trial.

Part 4 of the new Schedule 4 deals with the powers of the Supreme Court to deal with offences that could have been tried summarily.

Paragraph 19 would provide for the procedure in relation to linked summary offences (offences that could have been tried summarily but which are being tried on indictment because they are linked to an offence that does have to be tried on indictment).

Either at the end of the trial (or at an earlier stage, if none of the offences left are ones that have to be tried on indictment), the Chief Justice or an acting judge of the Supreme Court would have to ask the accused person to plead guilty or not guilty to each summary offence:

- if the accused person pleads guilty, the Supreme Court could deal with the person in the same way that the Magistrate's Court could have done;
- if the accused person pleads not guilty and the prosecution indicates that it intends to submit evidence, the case will be sent back to the Summary Court or the Magistrate's Court (and the adjournment under *paragraph 4* could be lifted).
- if the accused person pleads not guilty but the prosecution indicates that it does not intend to submit evidence, the charge must be dismissed.

Paragraph 20 would allow for proceedings about summary offences to take place without the accused person being present (but only in certain circumstances). If this happens, the accused person's legal representative would be asked to enter a plea on behalf of the accused person.

Paragraph 21 would deal with the situation in which a person is convicted by the Supreme Court of a linked summary offence but the conviction for the offence to which it was linked is overturned on appeal. In that situation, the conviction for the linked summary offence would also be overturned and the appeal court would have the power to direct that no further proceedings are to take place in relation to the summary offence.

EXECUTIVE COUNCIL

CONFIDENTIAL

Title of Report: Transfer of criminal cases to the Supreme Court

Paper No: 255/12

Date: 24 October 2012

Report of: Attorney General / Senior Crown Counsel

1.0 Purpose

To consider new provision for the transfer of serious criminal cases to the Supreme Court, to reclassify certain serious sexual offences, to provide for the transfer of cases between the lower courts, and to provide that the Clerk to the Magistrate's Court should also hold office as Clerk to the Summary Court.

2.0 Recommendations

- 2.1 Honourable Members are asked to approve the drafting of new legislation making fresh provision for the transfer of serious criminal cases to the Supreme Court, to resolve a technical impasse which has arisen because existing legislation requires the courts to follow an English procedure which is now being phased out in English courts and will shortly no longer exist.
- 2.2 Honourable Members are also asked to approve the drafting of the following amendments to the Administration of Justice Ordinance:-
- (a) an amendment to section 27(2) to provide that any offence under section 5 of the Sexual Offences Act 1956 or sections 2, 5 or 6 of the Sexual Offences Act 2003 is to be tried on indictment in the Supreme Court;
 - (b) new provision allowing for criminal and civil cases to be transferred between the Summary Court and the Magistrate's Court, and vice-versa, where this is in the interests of justice;
 - (c) an amendment to section 32 to provide that the Clerk to the Magistrate's Court also holds office as the Clerk to the Summary Court.

3.0 Summary of Financial Implications

None

4.0 Background – Falkland Islands Legislation

- 4.1 The *Administration of Justice Ordinance* ('AOJO') gives the Magistrate's Court, in which the Senior Magistrate sits, jurisdiction to try and determine any offence except an offence which must be tried on indictment in the Supreme Court. The Magistrate's Court has 'the like jurisdiction' to commit a defendant to trial in the Supreme Court as a magistrates court has in England to commit a defendant to trial in the Crown Court.
- 4.2 The Summary Court, in which the Justices of the Peace sit, has the same jurisdiction as the Magistrate's Court both to try offences (albeit with limited sentencing powers) and to commit the most serious cases to the Supreme Court.
- 4.3 The only offences which must be tried on indictment in the Supreme Court are (one) treason, murder, manslaughter, piracy, rape or arson with intent to endanger life (or any attempt to commit any of those offences); and (two) any other offence which is specified as indictable-only under Falkland Islands law or any law of the United Kingdom having direct effect in the Falkland Islands.
- 4.4 Special provision is made for defendants under the age of 18 years who are charged with an offence which would otherwise fall to be tried on indictment in the Supreme Court. Such young defendants will only be tried in the Supreme Court if (one) the offence is punishable by at least 14 years imprisonment and the court considers that the only sentence available to it if the defendant is convicted is one of detention; or (two) the young defendant is charged jointly with an adult and the court considers it necessary in the interests of justice to commit them both for trial in the Supreme Court.

5.0 Background – English Legislation

- 5.1 In the Falkland Islands all offences are either indictable (that is, a case which can only be heard in the Supreme Court) or summary (that is, a case which is usually heard in the Magistrate's Court or Summary Court). In England offences are classified as indictable (that is, a case which can only be heard in the Crown Court), summary (that is, a case which is usually heard in the magistrates' court) or either-way (a case which can be heard in the Crown Court or the magistrates' court depending on the facts and on any election made by the defendant).
- 5.2 When a defendant is charged with an offence in England, their first court appearance is in the magistrates' court. Historically, in cases involving indictable offences or either-way offences where the defendant opted for trial by jury in the Crown Court or the magistrates considered that the case on its facts was so serious or complex that the interests of justice required it to be dealt with in the Crown Court, the magistrates' court set a date for a committal hearing.
- 5.3 At the committal hearing the magistrates had to be satisfied that the prosecution had sufficient evidence to obtain a conviction. The defence could test the prosecution evidence and insist that key prosecution witnesses give evidence in person. Oral evidence in committal hearings was abolished in England in 1996 as it put unnecessary stress on witnesses in sexual and other sensitive cases to

require them to give evidence twice (at committal and then at trial). Now the evidence is tested 'on paper' only.

- 5.4 New provision for the transfer of cases from the magistrates' court to the Crown Court, known as the Sending Procedure, was introduced by *section 51 of the Crime and Disorder Act 1998* and its associated provisions. The Sending Procedure involves the automatic transfer of the case from the magistrates' court to the Supreme Court without the need for a committal hearing and without the magistrates being required to consider the strength of the prosecution case.
- 5.5 The defendant still has the opportunity to test the strength of the prosecution case under the Sending Procedure, but this is done by making an application for dismissal after the case has been transferred to the Crown Court. The judge must dismiss a charge if it appears to him that the evidence against the applicant would not be sufficient for him to be properly convicted. The test is the same as that used in a defence submission at trial that there is 'no case to answer' because the prosecution have not produced sufficient evidence of the commission of an offence. Oral evidence may be given in the Crown Court on the hearing of an application for dismissal only with the leave of the judge or by his order, if it appears to the judge that the interests of justice require this.
- 5.6 The purpose of the Sending Procedure is to speed up the progress of serious cases, by transferring the jurisdiction for management of such cases from the magistrates' courts to the Crown Court at the first available opportunity, so that the defendant enters a plea at an earlier stage and the Crown Court judge can manage the progress of the case towards trial.
- 5.7 Initially the Sending Procedure applied only to indictable offences, but the *Criminal Justice Act 2003* amended *section 51 of the Crime and Disorder Act 1998* so that the Sending Procedure will apply to both indictable and either-way offences. The phasing in of the new provisions commenced on 18 June 2012 with the abolition of committal proceedings in either-way cases in 12 court areas including the cities of Bristol and Liverpool. Once the new provisions are in force throughout England, the committal procedure will cease to exist.

6.0 The impact on the Falkland Islands, and proposals for new legislation

- 6.1 The problem which the Falkland Islands faces is that the jurisdiction of a magistrates' court in England to commit a person to the Crown Court for trial on indictment is in the process of being abolished as the Sending Procedure is extended across England.
- 6.2 Since *section 27(4) AOJO* (and *section 16 AOJO*) has the effect of giving the Magistrate's Court (and the Summary Court) the like jurisdiction as a magistrates' court in England to commit a person for trial, once the Committal Procedure is replaced in England by the Sending Procedure it is not clear what procedure should apply in the Falkland Islands.
- 6.3 The Senior Magistrate has given an informal indication that he considers that, once the Sending Procedure extends across the whole of England, the lower Falkland Islands courts will have no jurisdiction to transfer cases to the Supreme

Court for trial because there will be no ‘like jurisdiction’ remaining in the magistrates’ court in England to commit a person for trial. If this argument were accepted, it would mean the most serious cases could not be prosecuted because, by law, they could only be tried in the Supreme Court but there would be no mechanism to place the case before that court.

- 6.4 The view of the Attorney General is that *section 27(4) and section 16 AOJO* should be applied in a purposive manner to achieve their object in accordance with *section 17 of the Interpretation and General Clauses Ordinance*, and that accordingly the lower courts would still have jurisdiction to commit or send a person to the Supreme Court for trial notwithstanding the changes in England.
- 6.5 However, to ensure that there is clarity as to what procedure should apply, new legislative provision is required. It is proposed to adopt the Sending Procedure now in force in England as this is a tried and tested procedure which ensures effective case management while protecting the rights of the defendant.
- 6.6 Since under the Sending Procedure the management of the case would be transferred from the lower courts to the Supreme Court at an early stage in proceedings, the only issue for the lower court at the first hearing would be to decide whether the defendant should be released on bail or remanded in custody.
- 6.7 Any application for dismissal would be heard in the Supreme Court by the Chief Justice, or by the Senior Magistrate in his capacity as Acting Judge of the Supreme Court.
- 6.8 As in England, it is proposed that the lower court would have power to send to the Supreme Court any summary offence which is linked to and charged alongside the indictable offence (eg. where a defendant accused of rape is also accused of the summary offence of assault occasioning grievous bodily harm) so that both offences can be tried together.
- 6.9 At present a person under the age of 18 can only be tried on indictment in the Supreme Court in the limited circumstances set out in paragraph 4.3 above. These measures are similar to those which apply in England where a defendant under the age of 18 is charged with an indictable-only offence. However, the range of indictable-only offences in England is far wider and includes offences such as robbery and blackmail which in the Falkland Islands would be tried summarily.
- 6.10 It is proposed that in future all persons under the age of 18 should be tried on indictment in the Supreme Court like any other defendant. At any stage in the court proceedings the presiding judge can adapt court procedure as they consider appropriate in light of the young defendant’s age or understanding. This change in procedure would reflect the very serious nature of all offences which in the Falkland Islands are triable on indictment, and would give the young defendant an absolute right to elect trial by jury (a right which they are deprived of by the current procedures) thereby honouring the spirit of section 6 of the Constitution which provides that any person charged in the Supreme Court should have the right to trial by jury or trial by judge alone, as they choose.

7.0 Related provisions

- 7.1 In the past the offences colloquially referred to as ‘statutory rape’, namely an offence under *section 5 of the Sexual Offences Act 1956* (intercourse with a girl under 13) or *section 5 of the Sexual Offences Act 2003* (‘SOA 2003’) (intentional penile penetration of the vagina, anus or mouth of a person under 13), have been regarded in the Falkland Islands as amounting to rape and prosecuted in the Supreme Court. The maximum penalty is the same as for the offence of rape, namely life imprisonment. It is proposed that the matter be put beyond doubt by expressly providing that these offences are to be tried on indictment in the Supreme Court.
- 7.2 An offence under *section 2 SOA 2003* (intentional penetration of the vagina or anus without consent) or *section 6 SOA 2003* (intentional penetration of the vagina or anus of a person under 13) is very similar to the concept of rape or statutory rape. The maximum penalty is the same as for the offence of rape or statutory rape, namely life imprisonment. It is proposed that the law be changed so that in future such offences are to be tried on indictment in the Supreme Court.
- 7.3 At present, apart from the power of the Summary Court to remit defendants to the Magistrate’s Court for sentencing in certain circumstances, there is no power to transfer a criminal case from the Summary Court to the Magistrate’s Court or vice-versa, unless legislation makes specific provision for this. (For example, section 8 of the Prohibited Goods Ordinance enables an appeal against the seizure by FIG officers of prohibited goods which has been commenced in the Magistrate’s Court to be heard by the Summary Court if the Senior Magistrate is unavailable.)
- 7.4 There are many situations where it would be in the interests of justice for a case to be transferred from one court to the other, perhaps because the gravity or complexity of the case means it is ill-suited to the Summary Court, or because the Senior Magistrate is unavailable but a bail hearing is required. It is proposed that the *Administration of Justice Ordinance* be amended to make new provision for the transfer of criminal cases from the Summary Court to the Magistrate’s Court and vice-versa between the Summary and Magistrate’s Courts where this is in the interests of justice.
- 7.5 *Section 32 AOJO* makes provision for the appointment of a Clerk to the Magistrate’s Court. There is no statutory authority for the appointment of a Clerk to the Summary Court, although *section 5A of the Licensing Ordinance* provides that the Clerk of the Summary Court may grant certain licensing applications. Accordingly it is recommended that *section 32 AOJO* be amended to provide that the Clerk to the Magistrate’s Court also holds office as Clerk to the Summary Court.

8.0 Consultation

- 8.1 A formal consultation has been carried out with key stakeholders in the administration of justice, namely the Chief Justice, the Senior Magistrate, the defence practitioners and the Royal Falkland Islands Police. (A copy of the 11-

page consultation paper is available from the Attorney General's Chambers for anyone interested in the detailed legislative provisions.)

- 8.2 Detailed responses have been received from most consultees, endorsing the proposed introduction of new procedures based on the Sending Procedure as originally introduced in England but without cross-reference to English legislation so as to avoid future problems for the Falkland Islands arising from further changes in English law and practice.
- 8.3 It should be noted that the proposed abolition of the current provisions regarding mode of trial for persons under the age of 18 charged with indictable-only offences (see paragraphs 6.9 and 6.10) has been adopted after considering representations from the Chief Justice and the Senior Magistrate. There has been no response from legal practitioners to this proposal.
- 8.4 All consultees are broadly in favour of the proposals set out in paragraphs 7.1 and 7.2 above concerning the reclassification of certain offences as indictable. One response noted that an offence under *section 2 SOA 2003* could on the facts be relatively minor depending on the applicable circumstances (eg. where non-consensual digital penetration took place during consensual intercourse) but this would be reflected in the sentence imposed on conviction.
- 8.5 There has also been strong support for the proposals set out in paragraphs 7.4 and 7.5 above concerning the transfer of cases between the Summary Court and Magistrate's Court (and vice-versa) and the appointment of a Clerk to the Summary Court.
- 8.6 One legal practitioner recommends the abolition of the Summary Court, but such a radical overhaul of the structure of administration of justice in the Falkland Islands is not advocated by the Attorney General at this time.

9.0 Financial Implications

There are no financial implications.

10.0 Legal Implications

Criminal law and procedure in the Falkland Islands are in need of extensive revision (see ExCo paper 247/12) but the transfer of cases to the Supreme Court is a significant and important matter which needs to be dealt with expeditiously. The Attorney General recognises the demands on the legislative drafting programme, which is currently under review, but will try to fit the necessary provisions into the existing programme by using either internal or external resource. If the recommendations of paper 247/12 are approved, the work could be picked up as part of a larger review of criminal procedure legislation depending on the timescales involved.

11.0 Human Resources Implications

There are no human resources implications.