GRAND COURT OPENING 2011.

THE CHIEF JUSTICE'S REPORT

As these occasions each year in January, coincide with the advent of a new year, we try to reflect, like Janus, for whom this month is named, both backwards upon events of the past year and forwards upon events to come.

This is what you the movers of the motion for the opening of the Court have done. For my part, given the usual limitations of time on these occasions, I will only briefly touch upon the usual topics in my report and so will have a few words to say about (1) Law Reform; (2) the development of the Divisional work of the Court with special mention of the FSD and the planned Family Division; (3) the work of the Rules Committees and Summary Court initiatives, including the Drug Rehabilitation Court; (4) the Use of Information Technology by the Courts; (5) Law Reporting; and (6) Legal Aid.

I will conclude, as usual, with a brief statistical overview of the disposition of cases before the Courts.

LAW REFORM

The demand for Legislative Reform will often be a response to the pressing social concerns of the day. In this regard the past year was no exception as the urgent need for a response to the apparent increase in gun crime and to the problems of a faltering economy, saw a number of legislative measures being promoted.

As the Attorney has already explained, social concerns that drive legislative reform often find expression in cases which come before the courts.

For this reason, it is customary that the advice of the judiciary is often sought for the development of legislative policy, including in relation to changes in the fields of law enforcement and fiscal regulatory policy.

And so in the recent past the judiciary has been required to comment upon various measures which can fairly be described as novel for this jurisdiction. Such measures have included provisions for witness protection by way of relocation, witness protection by way of assurance of anonymity while testifying and after testifying in court; provisions for the imposition of minimum sentences for gun crimes and provisions which allow for the making of inferences from proof of and which penalize gang affiliation. Other draft provisions for the elimination of the right to trial by jury in certain cases are wisely no longer being pursued for what I believe are very good reasons advised by the judges as well as by the profession.

But taken as a whole, this range of measures tells the story of a society that perceives itself as faced with a crisis and determined to use every innovative legislative means at its disposal to respond. While such a response is understandable and even to be expected, the judicial perspective must nonetheless be objective as the legislative measures arise for interpretation, implementation and enforcement. And it is then that the realities that separate the expected benefits, from the practical limitations of this kind of legislation, are likely to be tested, explained and declared. Such realities will, indeed, often be reflected in the legislation itself which will be drafted to reflect the now accepted democratic orthodoxy that penal or punitive measures will go only so far as is reasonably necessary in a democratic society to protect the public interest, even while having due regard to fundamental individual rights.

A stark example of this dynamic arises from the recent judgment of the Court of Appeal in relation to an application for witness anonymity orders in which the reasons why such orders are likely only ever to be made in exceptional circumstances were explained fully. The same judgment also explained some of the reasons why a witness protection programme, in this our small Island community, is likely to have only limited practicability.

It is appropriate for the judiciary to add its voice to the public dialectic about such matters by helping to explain that the legislative response is not the only important response. Legislation is not meant to be a panacea to crime.

No matter how draconian the measure, it can provide no substitute for the will of society itself at large to confront the problem of crime and for the responsibility of each and every law abiding citizen to do his or her part to assist the law enforcement authorities in the response to crime. Strength in numbers is the ultimate recourse of lawful society. The profession's advice that the roll of jurors be widened from the voters list at present to include all adult persons lawfully resident in the Islands, recognizes this fact and, if adopted, would not only greatly increase the number of potential jurors, it would also spread all the burdens and responsibilities of jury duty across that wider base. And it follows, there would be even less to be gained for those with criminal intentions in seeking to intimidate jurors, if they were assured that the society at large refuses to be intimidated. The same sentiment must hold true for the protection of witnesses to crime.

On the contrary, any perceived attempt to retreat behind a legislative cloak of protection could send the wrong message to all concerned.

The corollary of all this must of course, be the assurance given to the public at large, that the law enforcement authorities will, in turn, ensure their personal security as they go about their daily lives and as they participate in the processes of law enforcement.

This must therefore include, in the appropriate and exceptional cases as explained by the Court of Appeal, even the making of witness anonymity orders and the

taking of all other precautionary measures advised by and made available under the law. These are considerations that I raised at the Opening of the Court last year and I think we should, from the Bench, reaffirm today. Similar views have more recently been expressed by the Attorney General in the Legislative Assembly.

Legislative reforms that are aimed at bolstering and protecting the economy are, of course, of a different order and are not only to be expected in difficult economic times but are also to be expected more readily to produce tangible results.

The ability to be both nimble and quick in response to the need for this kind of reform is essential to the protection of the jurisdiction's competitive edge. Among the Offshore jurisdictions, the Cayman Islands has, for a long time, striven and managed to remain at the leading edge of legislative innovation.

The same is true not only of legislation, but also of innovation in the offering of financial products. That leading position was attained because of the consultative efforts between the private and public sectors and so it is encouraging to hear Mr Jennings' report on the work of the Financial Services Legislative Committee.

As a primary function of the common law is to be declaratory of the law and of legal relationships under the law, it follows that the judges must themselves be reasonably well acquainted with the innovations that drive

the market and must be completely informed about all legislative innovations. The financial markets must have confidence in the judges.

The fact that the financial industry has grown exponentially over the past decades is duly recognized as testimony to the fact that that confidence has long been reposed in the judiciary of these Islands, as well. As already mentioned [by Mr. Bergstrom and Mr. McKie], the growing acceptance of Cayman jurisprudence around the Commonwealth speaks in similar terms.

And so, it is appropriate that I should observe that the courts of these Islands are well placed to continue to build on the reputation by which they have earned the trust and confidence of the client public, both at home and abroad. The cause for this expectation of continued success is, of course, in no small part due to the introduction of the Financial Services Division of this Court and to the fact that we now have six experienced judges serving on that Division, each with a dedicated cadre of cases.

THE DIVISIONS OF THE GRAND COURT

The formalization of the business of the Grand Court into Divisions by Rules of Court in November 2009, has brought about other tangible benefits as well. One such is the ability to make Rules of Practice which are designed to suit the particular needs of the business of each Division.

Another is the scope provided for the assignment of judges to the work of the Divisions according to their availability and specialisms.

In the first full year of its operation, the FSD has already begun to realize these benefits. An informal survey of the profession in November 2010 noted that there was already improved case management and increased availability of judicial time and access to the judges. These are factors that should result in a much improved rate of disposition of cases, and so also in the saving of costs for the parties and time for the courts; considerations which also impact upon the choice of Cayman as a forum for the resolution of complex commercial disputes.

Court statistics show that some 419 cases were handled by the FSD up to end 2010, with some 67 of those having been filed in and transferred over from the general civil jurisdiction of the Court after the formation of the FSD. While, because of their complex and involved nature, not all of these cases could have been resolved within a year, the fact that each FSD case remains throughout until conclusion under the direction and management of a single judge, helps to ensure the timely and cost efficient disposition which is the aim.

The public of these Islands would also no doubt be interested to know that these benefits brought by the FSD have come with little additional costs to the public. This is due to a large extent to the special terms and conditions under which our additional judges have agreed to serve and

to the fact that the reasonable fees that are charges in relation to FSD cases largely offset any additional costs.

USERS' COMMITTEES AND RULES COMMITTEES

Such an encouraging beginning notwithstanding, we may not rest on laurels but must always seek for improvement. To that end I can announce today, the intention to establish a User's Committee for the FSD. This will be a forum to which all users can bring their reasonable concerns for the enhancement of the work of the FSD.

While the concept of the Users' Committee is not new to this jurisdiction, that such a Committee dedicated to the enhancement of the work of a commercial court can be of real benefit, is a fact to which Justice Cresswell can especially attest as a judge who presided over the London Commercial Court as its senior judge for several years. I trust that he will forgive me for making special mention of the fact that the setting up of this Committee, as indeed the drafting of a Practical Court Users' Guide which we expect soon to be published, are initiatives proposed and led by him and in which Justice Foster has already ably assisted.

Consistent with this aim for improvement, the Rules Committees of the Court will be revitalized in 2011.

Justice Jones, who has served as the scribe of the Grand Court Rules Committee and primary draftsman of the Rules

of Court for many years, has kindly agreed to continue but in the more specialized role as Chairman of the Insolvency Practitioners Rules Committee, in place of myself. Having become a judge, he has had to relinquish his position as a legal practitioner member of the Grand Court Rules Committee, a distinguished mantle which Mr Colin McKie has now kindly agreed to assume.

THE FAMILY DIVISION

The public is entitled to expect that the benefits of increased efficiency and cost effectiveness realized in the work of the FSD will be realized in the work of the other Divisions of the Court as well.
Indeed, in the Family Division in particular, there is the further need for special treatment, because of the need for confidentiality and sensitivity attendant upon cases which involve the welfare of children.

These are concerns which have informed the proposal – under review for some time now – for the formalization of a Family Division of this Court which would exercise jurisdiction in relation to all matters involving the welfare of children or the family as a whole. For this, not only Rules of Court, but also legislative change would be required and so I intend to raise the matter again this year with the Executive through the Office of the Attorney General.

THE USE OF INFORMATION TECHNOLOGY

No plan for the improvement of the administration and management of cases through the courts can be complete without reliance on modern information technology.

There is already available on the Judicial-Legal information website a significant body of information for the assistance of the public and the profession in their access to and use of the Courts, but any visitor to that site since its launch in November 2006 would be aware that the portals for access to Electronic Filing and Searching of court documents and to the making of Electronic payments into court have remained inaccessible.

Having regard to improvements and advancements made last year to the Judicial Electronic Case Management System (JEMS), I am to report that this year should see the activation of e-filing, e-searching and e-payments.

E-payments will begin first with the processing of electronic traffic ticketing offences in conjunction with the RCIPS and with the electronic access for payments of tariffs directly into Court Funds by members of the public through the local banking system.

A more complex plan which will allow the profession - whether located here in Cayman or in offices overseas – to file pleadings and supporting documents into court and to serve them simultaneously on counterparties, to search for and inspect court documents and to make the related payments of fees; all electronically, will be the subject of a

pilot project this year. The pilot project will be started in the FSD and an outline proposal will be presented to the first meeting of the FSD User's Committee which is soon to be convened.

On the basis that the project will be shown to work for the FSD, the system and rules will be adapted for implementation in the other Divisions of the Court, and, it is to be expected, eventually, in the registries of the Summary and Court of Appeal as well.

LAW REPORTING

The subject of Law Reporting occupies a special place in the plans for the enhanced use of information technology. Already, as many of you are aware [and as mentioned by Mr. McKie to whom we are grateful for his report;] the website is populated with a nearly up to date online version of the law reports. Many of the unreported judgments are also on the site. This is all supported by a powerful search engine and provides the profession and indeed the public at large with an important research facility.
So far this has been done free of cost but that will have to change. The service must pay for itself and so a fee will be charged.

The Administration has received a proposal from a well established online law reporting service which proposal, along with other alternatives, will be discussed with the profession and considered by the Legal Advisory Council.

A final proposal must be put before Cabinet as the matter will involve the raising of public revenue.

NEW COURT BUILDING

While the pressure on staff of having to work in the confines of this building has been slightly alleviated by the transfer of some business to Kirk House, there is still the urgent need for the new building which has been recognized and accepted by Government for more than a decade now.

Given the significant amounts already spent in acquiring the land and developing the design of the building to the stage of planning approval, it is very much to be expected that the project will be allowed to proceed as soon as funding can be arranged. [We are grateful to Mr. Bergstrom for the views he has expressed on behalf of the profession on this subject as well.]

LEGAL AID

The continuing uncertainty over the subject of legal aid remains of great concern.

While the Law and the Constitution places the responsibility for legal aid and the duty of ensuring fair trials upon the Courts, no budget has been allocated to the Courts to allow them to fulfill these essential functions.

Instead, the entire budgetary allocation was again this fiscal year, transferred to the Ministry of Finance. While, as a purely administrative exercise, the bills are being paid as submitted by the Judicial Administration, we could not agree, as proposed by the Ministry, that the Ministry should be able to override the judiciary's decisions, made under the Law, to grant legal aid.

Now that the subject of legal aid has been thoroughly examined and the existing Judicare System found to work well, I join with the Profession for whom Mr. Bergstrom spoke, in urging the Executive to allow matters to return to normalcy. If there are necessary improvements to the existing system to be made (and some specifics have been identified, agreed and recommended through the Law Reform Commission), these can readily be addressed and a sense of permanence restored to the administration of justice for the Islands. This is vital to the ongoing ability of the Courts to ensure that there are fair trials in criminal cases in particular as it is also in respective of many cases involving the welfare of children and families.

CASE DISPOSAL

I now turn to the usual brief overview of case disposal by reference to Court statistics. A full statistical report has been developed and will be published with this report in due course.

The rates of disposal of criminal cases in both the Summary and Grand Courts were high in 2010; at 103% and 92% respectively. This means that while in the Summary Court there were 1304 criminal cases filed, 1344 were disposed of, 40 of which were from the backlog from the year before. There were also, of course, the serious traffic matters of which 9662 were disposed – a 97% disposal rate.

In the Grand Court, while 108 new indictments were filed, 100 were concluded – a 92% rate of disposal mentioned earlier. While these results may seem at first glance satisfactory, I am afraid they do not tell the full story.

In the Grand Court, there remains 77 indictments being carried forward into 2011. This is a significant backlog including 10 indictments which have been in the system since before 2010. And so, while the rates of disposal remain high by reference to the numbers of new indictments each year, the more important statistic, that which tells us the average time taken for disposal of a case, is less impressive. That last year, was an average of 348 days for an indictment in the Grand Court, nearly twice as long as the modern benchmark of 180 days or 6 months – a standard which we have managed to maintain until recently.

The figures for the Summary Court show a backlog of equally significant proportions, the precise numbers for which are not yet settled because the categorization of some cases in the JEMS System is not yet complete. Nonetheless, it is clear that the crucial benchmark of

average time to disposal – which in the Summary Court must be measured in days or weeks rather than months – has been slipping there also.

The average time for disposal is the crucial benchmark because it measures the length of time before an accused person knows the outcome of the case. In many cases that will involve defendants being incarcerated in the meantime. The implications for the State's obligation to ensure the right to a fair and timely trial are therefore clear and everything that can reasonably be done to comply with that obligation must be done.

One obvious response, from the point of view of this Administration, would be to convene more trials simultaneously both in the Grand and Summary Courts and certainly that would be made possible by the appointment of a 4th Magistrate and by the continued reliance on the assistance from time to time of our colleagues who visit from Jamaica to serve primarily on the Grand Court Criminal Division.

But the availability of additional judicial personnel is only one aspect. Criminal trials cannot be taken in camera and so, to reiterate the concern already mentioned, more dedicated Court rooms are needed for criminal trials. At present there are only three such Court rooms available and these are always being used.

Another important consideration is, of course, the availability of defence lawyers. While at the best of times

the number of lawyers who have been willing and able to take on criminal cases has been very small relative to the overall size of our Bar; that number has dwindled recently in response to reasonable concerns over the legal aid system. As all but a few of the criminal defendants facing serious charges qualify under the Law and so must be given legal aid, the defence lawyers are called upon to dedicate themselves to a practice that depends almost entirely on legal aid funding. It is simply unreasonable therefore, to expect them to do so in a prolonged climate of uncertainty. Indeed, I must take this opportunity to publicly thank those determined and dedicated practitioners who have been wiling to carry on, regardless.

THE DRUG COURT AND OTHER SERVICES

The Drug Rehabilitation Court, as a division of the Summary Court, continued to make progress last year which saw 23 participants graduating following on their successful completion of the Programme. This brings to 40 the total number of graduates since the inception of the Programme in October 2007. While this is an encouraging result, the fact that more than 308 persons have applied but only 169 accepted into the Programme, is indicative of the fact that the Programme is by no means a "soft option" to a trial and sentence for the drug consumption offences which are involved and which are mitigated when the treatment is deemed to be successfully completed. Moreover, although there has been significant success with 40 graduates, as a

proportion of those admitted into the Programme, only 25% of those admitted manage to satisfy its strict requirements.

Other treatment initiatives undertaken in the Summary Court and announced last year have been continuing also with notable success. These presently involve 134 cases in which the defendants are required to undergo one form or another of supervised treatment while the case is kept pending before the court to allow for the satisfactory completion of treatment. These are cases which involve drunk driving, domestic violence or mental health issues.
Initiatives led by the Hon. Chief Magistrate, after two years of testing before the court, it is now felt that these Programmes are sufficiently well proven to justify being formalized by legislation which will, as in the case of the Drug Rehabilitation Court, define the respect, roles and responsibilities of all concerned, including the courts, the treatment providers and the respondents themselves. The intention is therefore to seek the promotion of the appropriate legislation this year.

APPEALS TO THE COURT OF APPEAL AND PRIVY COUNCIL

As usual the report on case disposal is concluded by a brief report on the number of appeals to the Court of Appeal and Privy Council.

Last year there were 38 criminal appeals taken in the Court of Appeal, up from 28 in 2009. There were 26 civil appeals,

including, of course, a number of cases from the FSD. Although up from 2009, these figures are consistent with the average number of appeals filed on the yearly basis over the past ten years viewed as a whole.

There were 3 appeals filed in the Privy Council, again about the average number filed on the yearly basis over the past decade.

In acceding to the motion of the Opening of the Court, that concludes my report this morning and but for a very special item of signal importance that remains, please allow me here to extend, on behalf of all my colleagues and members of staff, our thanks to you for having taken the time to attend this morning and our very best wishes for a happy and successful New Year.

Allow me also to note our appreciation for the dedicated service of Magistrate Donalds who, as you were told, retired last year and of Mrs. Ezmie Smith who also retired recently after some 37 years of public service. Mr Foldats' sterling service as Clerk of Courts also ended upon his resignation at the end of last year but he continues to serve as a magistrate pro tem and so it may be premature of me to bid him farewell, as yet.

On their behalf, I thank you for the welcome you have extended to the new Clerk of Court, Ms. Tabitha Philander and your good wishes extended to all members of staff.
I also extend to the Commissioner of Police, on behalf of the Judiciary, our usual appreciation to his men and women

in uniform for their resplendent turn out this morning. The importance of their symbolic support for the Administration of justice is immeasurable.