



LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

Report 69

Juries in Criminal Trials

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The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

The Commissioners are:

The Honourable Justice Baragwanath – President
Judge Margaret Lee
DF Dugdale
Timothy Brewer ED
Paul Heath QC

The Executive Manager of the Law Commission is Bala Benjamin
The office of the Law Commission is at 89 The Terrace, Wellington
Postal address: PO Box 2590, Wellington 6001, New Zealand
Document Exchange Number: SP 23534
Telephone: (04) 473-3453, Facsimile: (04) 471-0959
Email: com@lawcom.govt.nz
Internet: www.lawcom.govt.nz

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Dear Ministers,

Allegations of serious crime within a community require a response that is just, efficient and fair both to the accused and to the community on whose behalf the prosecution is brought, so that public confidence in the rule of law is sustained. Your predecessor charged the Law Commission with devising a system of criminal procedure suiting New Zealand's values and needs. With the support of the judiciary, the Law Commission elected to undertake a root and branch review of the ancient institution of trial by jury.

The result has been reassuring, even if also at times disconcerting to some who thought they had mastered jury practice. The empirical research performed by Warren Young and his colleagues has shown that, in the great majority of cases, jurors are conscientious and their decisions are sound. The virtual absence of criticism of the conduct of juries, in even the most controversial cases, is striking. The essentially anonymous verdict of ordinary citizens chosen at random gives to the process the legitimacy of total independence; they are indeed the "little parliament" to which community decision making is delegated. The major lesson of the research is the validity of the system of trial by jury. The exceptions, of "rogue jurors" and of unduly burdensome cases, are exceptions which prove the rule; our recommendations, of 11:1 majority verdicts and of limited extension to the existing power to order trial by judge alone, are part of the Commission's response.

But the research provides a lesson in what should have been obvious: that as lay judges of all issues of fact, coming to an unfamiliar environment, jurors should receive every assistance that will allow them to perform their task effectively. Already counsel and judges have responded to that need, making a sustained effort to see the trial through the eyes of jurors and implementing such techniques as greater use of written and other illustrative materials.

Several issues remain for the consideration of the Government and of Parliament. One is the extension of the radius within which jury summonses are issued, to meet concerns by rural New Zealanders, many of them Māori, that they are excluded from jury service.

Another is the need both to accommodate those who have unavoidable commitments during the week for which they are summoned and to deal with those who fail to appear.

The Commission is satisfied that, with the essentially fine tuning which we propose, the institution of trial by jury will continue to be the best forum for the trial of almost all serious criminal cases in New Zealand.

Yours sincerely

The Hon Justice Baragwanath
President

The Hon Phil Goff
Minister of Justice
Parliament Buildings
Wellington

The Hon Margaret Wilson
Associate Minister of Justice and Attorney-General
Parliament Buildings
Wellington

Preface

IN 1989 THE LAW COMMISSION was asked by the Minister of Justice to review procedure in criminal cases. The project is a continuing one. Its purposes are:

- to ensure that the law relating to criminal investigations and procedures conforms to the obligations of New Zealand under the International Covenant on Civil and Political Rights and to the principles of the Treaty of Waitangi; and
- to devise a system of criminal procedure for New Zealand that will ensure the fair trial of persons accused of offences, protect the rights and freedoms of all persons suspected or accused of offences, and provide effective and efficient procedures for the investigation and prosecution of offences and the hearing of criminal cases.

With these purposes in mind, the Law Commission was asked to examine the law, structures and practices governing the procedure in criminal cases, from the time an offence is suspected to have been committed until the offender is convicted, including but not limited to:

- powers of entry, search and arrest;
- diversion – principles and procedures;
- the decision to prosecute and by whom it should be made;
- the rights of suspects, and police powers in relation to suspects;
- the division of offences into summary and indictable offences;
- preliminary hearings and criminal discovery;
- onus of proof;
- evidence in sexual and child abuse and other special cases; and
- payment of costs to acquitted persons

and to make recommendations accordingly.

To deal comprehensively with the criminal procedure reference in a single report would be almost impossible. The Commission therefore

decided to proceed with the reference by stages. The report *Disclosure and Committal*¹ was published in June 1990. An issues paper on the prosecution of offences was published in November of that year² followed by the *Criminal Prosecution* discussion paper³ in 1997 and the final *Criminal Prosecution* report in November 2000.⁴ In 1992 the Commission published the *Criminal Evidence: Police Questioning* discussion paper,⁵ making its final recommendations in 1994 in *Police Questioning*.⁶ There is also discussion of police powers in *Final Report on Emergencies* published in December 1991.⁷ A discussion paper on *The Privilege Against Self-Incrimination* was published in 1996,⁸ and final recommendations were included in the *Evidence Report* in August 1999.⁹ A discussion paper *Costs In Criminal Cases* was published in November 1997,¹⁰ and a final report *Costs In Criminal Cases* in May 2000.¹¹ A study paper *Simplification of Criminal Procedure Legislation* was published in January 2001.¹²

The Law Commission first considered issues surrounding juries in criminal trials in 1995 when we circulated the *Juries: Issues Paper*¹³ as a prelude to a larger discussion document. The issues paper asked

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- ¹ New Zealand Law Commission *Criminal Procedure: Part One: Disclosure and Committal: R14* (Wellington, 1990).
 - ² New Zealand Law Commission *The Prosecution of Offences: PP12* (Wellington, 1990).
 - ³ New Zealand Law Commission *Criminal Prosecution: PP28* (Wellington, 1997).
 - ⁴ New Zealand Law Commission *Criminal Prosecution: R66* (Wellington, 2000).
 - ⁵ New Zealand Law Commission *Criminal Evidence: Police Questioning: PP21* (Wellington, 1992).
 - ⁶ New Zealand Law Commission *Police Questioning: R31* (Wellington, 1994).
 - ⁷ New Zealand Law Commission *Final Report on Emergencies: R22* (Wellington, 1991).
 - ⁸ New Zealand Law Commission *The Privilege Against Self-Incrimination: PP25* (Wellington, 1996).
 - ⁹ New Zealand Law Commission *Evidence: R55* (Wellington, 1999).
 - ¹⁰ New Zealand Law Commission *Costs in Criminal Cases: MP12* (Wellington, 1997).
 - ¹¹ New Zealand Law Commission *Costs in Criminal Cases: R60* (Wellington, 2000).
 - ¹² New Zealand Law Commission *Simplification of Criminal Procedure Legislation: SP7* (Wellington, 2001).
 - ¹³ New Zealand Law Commission *Juries: Issues Paper* (unpublished paper, Wellington, 1995).

which matters were of primary concern to those who participate in, or work with, the system. The areas of concern expressed in the responses we received were used as the basis of a discussion paper which was published in two parts, *Juries in Criminal Trials: Part One*, (published in July 1998) (“*Juries I*”) and *Juries in Criminal Trials: Part Two* (published in November 1999) (“*Juries II*”). The discussion paper was divided into two parts because in 1998 work started on the juries decision-making research project undertaken by the Faculty of Law at the Victoria University of Wellington in conjunction with the Law Commission (“the Research”). The chief researchers were Warren Young, Neil Cameron, and Yvette Tinsley. A summary of the results of the Research is contained in a companion volume to *Juries II* (“*Juries II vol II*”). Our final recommendations on all the matters raised in both parts of the discussion paper are contained in this report. We wish particularly to acknowledge the role of the New Zealand Law Foundation, which provided substantial funding for the Research. Without that assistance, the Research could not have been undertaken.

One of the themes of this report is the need to improve the way that material, both factual and legal, is presented to the jury. This means that there is a need to improve the skills of counsel and judges, and ensure uniform practice throughout the country. We are pleased to note that as a result of the Research and the discussion in *Juries II*, the Criminal Practice Committee¹⁴ has established a Juries Research Implementation Subcommittee, which will prepare and maintain a jury trial manual of best practice (“the CPC Manual”). This subcommittee will be convened by Commissioner Brewer. The Research has also been extensively used in recent revisions to the *Criminal Jury Trials Bench Book* (“the Bench Book”), which is published by the Institute of Judicial Studies for the guidance of judges who conduct jury trials in both the High Court and the District Court. It is not yet decided exactly what the relationship and demarcation between the CPC Manual and the Bench Book will be, but we envisage that the CPC Manual will be a general set of guidelines for both lawyers and judges, while the Bench Book will

¹⁴ The Criminal Practice Committee was established in 1988 by the then Chief Justice, Sir Ronald Davison. It includes representatives of the judiciary, the prosecution and defence bars, the Solicitor-General, the Ministry of Justice, the Police, the Law Commission, the New Zealand Law Society, and the Department for Courts. Its function is to keep under review matters of criminal practice and procedure, and it may take such action as is required to carry out this function, including making recommendations to the Secretary of Justice and other government agencies as may be necessary for dealing with and remedying any practice defect.

remain exclusively for the use of judges. As the CPC Manual will be approved by the Criminal Practice Committee, which includes representatives of the judiciary, it will in effect have the same force and enforceability as a Practice Note or Direction.¹⁵

We have been greatly assisted by Mr Richard Earwaker and Mr Graham Lang, who reviewed this report in draft; Professor John Burrows, who provided assistance in relation to chapters 14 (Secrecy of jury deliberations) and 15 (Media and their influence on juries); and Mr John Yeabsley, who provided a report into the economic and public policy implications of some of the recommendations made in this report. We have also received submissions and assistance from many individuals and organisations. Those who made submissions are listed in appendix B. We are grateful for their contribution.

In April 2000 we circulated a questionnaire seeking detailed feedback from lawyers who participate in criminal trials on their response to the Research and how they have changed, or would like to change, the ways that trials are conducted. The responses were anonymous. We thank all respondents for their assistance.

In May 2000 the Crown Solicitors from around New Zealand travelled to Wellington to meet together and prepare their joint response to the issues raised in the preliminary papers. We thank them for their contribution.

Until August 1997, Les Atkins QC was Commissioner in charge of the criminal procedure project with particular responsibility for the juries discussion paper. He was succeeded by Timothy Brewer ED.

The Commission acknowledges the assistance of Louise Symons, senior researcher, who prepared the draft of this report.

¹⁵ For the status and enforceability of Practice Notes and Directions, see E Campbell *Rules of Court: A Study of Rule-Making Powers and Procedures* (Law Book Company Ltd, Sydney, 1985), 37–46.

1

Introduction

1 **I**N *JURIES I*¹⁶ WE DISCUSSED the functions of the jury. Those functions are:

- to determine the relevant facts of the case and to apply the law to reach a verdict of guilty or not guilty;
- to act as the community conscience in deciding criminal cases;
- to safeguard against arbitrary or oppressive government, and to legitimise and maintain public confidence in the criminal justice system;
- to educate the public about the workings of the criminal justice system.

2 In *Juries I*¹⁷ we said that our description of these functions, although based on jurisprudence, was speculative in relation to New Zealand, pending the outcome of the Research which was then under way. The Research has confirmed the ability of the jury to reach appropriate verdicts. It has shown that there are some problems in jurors' understanding of both the facts and the law, but it has also highlighted significant ways in which juries can be better assisted in their role as fact-finders. The Research showed no evidence that the jury is not impartial and democratic. Rather, it highlighted the care and commitment that jurors bring to their task, the crucial aspect of community and civic participation, and the educative function of jury service.

3 The Research and the consultation which we have undertaken provided strong confirmation that the jury system remains an essential and desirable feature of our criminal justice system. However, there are some serious problems with the jury system which need to be addressed. The need for better communication with juries, including better presentation of

¹⁶ *Juries I*, chapter 2.

¹⁷ Para 56.

evidence and law to them, is a central theme of this report. Another is the need to show respect for and appreciation of jurors and their role.

- 4 The core value underlying the functions of the jury is its democratic nature. The jury allows members of the community to participate in the criminal justice system and to bring a diverse range of perspectives, personal experiences and knowledge to bear on individual criminal cases. But although the jury trial system receives support both from the public and from the legal profession, jurors themselves are not treated with due respect, and proper account is not taken of their needs. Too many members of the public are reluctant to serve, and a large proportion are either excused or simply fail to answer their summons. If the democratic nature of the jury is to be maintained and reinforced, more must be done to encourage the public to serve on juries, and ensure that jury service is not an unreasonably onerous task. This means that those who serve must be treated better, and those who fail to serve must be sanctioned.
- 5 There is a school of thought that holds that a judge sitting alone would be better than a jury. In our modern world of extreme specialisation, where each area of work or knowledge seems closely guarded by its own group of professionals, it is tempting to think that criminal trials too should be “left to experts”. It is sometimes said that some cases, particularly fraud cases, are simply too complex for a jury to understand. In general, we do not agree. We maintain that the right to trial by jury should remain a central feature in our criminal justice system. It is true that there are trials where the evidence, scientific or financial, is complex. If the jury fails to understand the evidence then injustice can result. But in our view this does not indicate a need to abolish or, in general, to restrict trial by jury. Instead, it indicates a need for better procedures and better tools to ensure that complex evidence is presented clearly and in an understandable form.
- 6 However, the right to trial by jury is not an absolute right. The right of an accused person, or of the state, to demand that 12 citizens sit in judgment as a jury must be balanced against the right of those 12 citizens not to be diverted from the pursuit of their lives for an unreasonably long period of time. A very small proportion of trials, usually involving fraud or complex evidence, are too long and arguably too complex to be tried by a jury. These cases should be heard by a judge alone, and the prosecution should be able to apply for trial by judge alone in such cases even if the accused would prefer trial by jury.

7 The democratic nature of the jury process ensures public validation of verdicts. This is of the greatest importance in cases of the most serious crimes, which often receive much media attention both before and after the trial. An example is the case of David Bain, who in June 1995 was convicted by a jury of the murder of his parents, his two sisters and his brother. There has been considerable interest in that case and there have been attacks on the alleged shortcomings of police procedure and investigation methods.¹⁸ The decision of the jury however, has not been attacked. In fact, the author of a popular book on the topic has expressed absolute faith in the jury system:¹⁹

If David Bain were to be tried tomorrow before any jury in the world, on the facts as they are now known, it would acquit him as resoundingly as did the jury who heard the evidence in the recent defamation proceedings against me.

Had that trial (or the subsequent defamation action) been heard by a judge alone, criticism would have fallen on the judge's decision in a way that it has not on the jury's. Much the same could be said of other high profile trials, for example those of Scott Watson or Peter Ellis. We regard the public validation aspect as being very significant. It ensures that any debate on a controversial case is focused on the evidence and not on the deciders of fact. This helps maintain the integrity of the justice system.

The contents of this report

8 In chapter 2, "Trial by jury", we recommend that the current rule, that a person who is charged with an offence punishable by a maximum penalty of less than 14 years imprisonment can choose trial by judge alone instead of trial by jury, should be extended, so that in even the most serious crimes, including murder, the accused can apply for trial by judge alone. However, in relation to the most serious crimes the presumption of jury trial should remain, unless the accused can show that, because of the subject matter of the case or his identity, a fair trial by jury is not possible. At the other end of the spectrum of jury trials, we recommend a review of maximum penalties, to ascertain whether all offences which currently have a maximum penalty of more than three months and therefore an automatic right to jury trial, should retain that penalty level.

¹⁸ See generally J Karam *Bain and Beyond* (Reed Publishing (NZ) Ltd, Auckland, 2000).

¹⁹ Karam, above n 18, 20.

- 9 In chapter 3, “Trial without a jury”, we conclude that a very small proportion of trials, usually involving serious fraud or complex evidence, are too long and arguably too difficult to be tried by a jury. We therefore recommend that, for all but the most serious of crimes, if it seems that a trial will take more than 30 sitting days (six calendar weeks), the prosecution should be able to apply for trial by judge alone. Given that most complex trials are also lengthy, this proposal will lessen the risk of a jury being asked to hear a case which is too complex.
- 10 In chapter 4, “Making juries more representative”, we discuss ways in which the representation of the community on juries can be maintained and improved. We recommend that jury district boundaries should be increased from 30 to 45 kilometres, and that the maximum penalty for failing to answer the jury summons should be increased to a \$1000 fine and seven days imprisonment.
- 11 In chapter 5, “Māori representation on juries”, we discuss the under-representation of Māori on juries. We conclude that extending the jury boundaries will increase Māori representation, and that practical problems, particularly with transport and child care, form a barrier to Māori participation which should be alleviated by the measures recommended in chapter 16.
- 12 In chapter 6, “Disqualifications and excuses”, we conclude that the current provisions which exclude persons with serious criminal convictions should be retained, and that people who have been charged but not yet convicted should not be automatically disqualified for that reason. We reject a routine literacy requirement for jurors as impracticable and unnecessary, although it may be desirable in specific cases with substantial amounts of documentary evidence. We point out that inability to understand the English language is currently a significant problem, and recommend measures to ensure that persons who cannot understand English are disqualified from serving as jurors.
- 13 In chapter 7, “Challenging jurors”, we discuss the right of peremptory challenge and the practice of “jury vetting”, which is the obtaining of information about potential jurors in order to decide whether to challenge them or not. We conclude that the peremptory challenge should be retained, because it gives an accused person some measure of control over the tribunal which will sit in judgment on him, without which he may feel a considerable degree of injustice if convicted. It also allows the removal of persons who may be biased or prejudiced, or who are simply misfits, quickly and with a minimum of fuss and embarrassment. Jury vetting should be

allowed to continue, but the Crown should be obliged to disclose to the defence any information it has about a potential juror which may affect the ability to serve of the juror whom the Crown does not intend to challenge, so that the defence may challenge that person if they think fit.

- 14 In chapter 8, “Discharging jurors”, we recommend that the current provisions relating to discharge should be repealed and replaced with a single and general discharge provision, whereby the trial judge can discharge any juror who, because of illness or any other reasonable cause, should not continue to act. We do not favour the introduction of reserve jurors or larger juries, because the ability to allow for trial by judge alone in lengthy and complex cases (see chapter 3) will lessen any need for such measures.
- 15 In chapter 9, “Information and assistance before the trial”, we acknowledge the improvements that have been made to the jury summons and accompanying information. We recommend that a second informational video be made discussing standard matters such as the role of the foreman and how to approach the deliberations process, to be shown after the jury is empanelled. We recommend that more information be given on how to select the foreman and on the role and tasks that this person must undertake, and that the foreman should continue to be chosen at the outset of the trial, not later on.
- 16 In chapter 10, “Information and assistance at the beginning of the trial”, we discuss the judge’s preliminary remarks, and conclude that, although what judges can say in their preliminary remarks about the law is necessarily limited, to the greatest extent possible counsel should co-operate to identify issues before trial so that appropriate guidance can be included in the judge’s preliminary remarks. We discuss the recent legislative amendment which now allows the defence to make a brief opening statement, which we supported because it allows the defence to clarify the issues for the jury at an early stage. We support the increased provision of written copies of the judge’s directions (or a summary of them) to the jury, although the way that this is done will vary according to the type of trial and the personal style of the judge involved. We support the provision to the jury, where appropriate, of written guidelines or a flowchart for reaching a verdict.
- 17 In chapter 11, “Presentation of evidence”, we discuss proposed reforms to pre-trial disclosure regimes, and the use of admissions of fact to lessen the evidence that must be presented at trial. We endorse the use of new technology which will allow evidence to be

recorded at a natural speed, rather than at the slow and tedious speed of current stenographic recording. We recommend that the jury should receive a copy of the judge's typed notes of evidence to take into deliberations. We discuss the greater use of written and visual aids which has resulted from the Research findings, and recommend their increased use and the development of detailed guidelines for their appropriate use. We recommend that juries should be routinely advised of their right to ask the judge to put questions to a witness for the purpose of clarification, and actively encouraged to ask questions during deliberations.

- 18 In chapter 12, "Jury deliberation", we discuss the role of the foreman in deliberations and how the jury can be assisted to deliberate effectively. We recommend a revised version of the "Papadopoulos" direction, which is given to juries when they have been deliberating for a long time and appear to need assistance. We recommend a general guideline for jury deliberation not to go past 9.00pm, unless the trial judge considers it appropriate in the individual circumstances of the case, and that juries should no longer as a general rule be sequestered overnight during their deliberations.
- 19 In chapter 13, "Failure to agree – majority verdicts", we recommend that majority verdicts of 11:1 should be introduced. They should be available for both acquittals and convictions, and for all crimes, including murder. The jury should be required to deliberate for at least four hours before being permitted to return a majority verdict, and the fact that a verdict has been reached by a majority should not be publicly announced.
- 20 In chapter 14, "Secrecy of jury deliberations", we conclude that the law relating to the secrecy of jury deliberations should be codified to clarify the obligations of jurors and the media. The form of that legislation will require careful consideration, and should be dealt with in a separate reference together with the law relating to publication of trial information.
- 21 In chapter 15, "Media and their influence on juries", we conclude that there are a number of aspects of the law of publication of trial information which would benefit from legislation. This will be the subject of a separate project.
- 22 In chapter 16, "The experience of being a juror", we address practical problems of jury service. We note the continuing problems with inadequate jury facilities and recommend regular questionnaires for jurors on these issues to assist in planning improvements. We recommend that jurors should continue to be paid at a flat rate but that where a juror can demonstrate actual loss

in excess of that flat rate, the registrar should be able to increase the payment. Jury service can cause problems with employers, so we recommend that it should be an offence to terminate or prejudice a person's employment on the grounds that a person is, or might be, on jury service. To minimise disruption to jurors' personal lives, we recommend the right to defer service once, for up to 12 months, without having to give a reason for deferral. We note that transport costs are a barrier to service, particularly for Māori, and recommend changes to assist that. We discuss the provision of counselling for jurors who serve on traumatic trials, and endorse recent measures which ensure that jurors are aware of the availability of counselling.

2

Trial by jury

Introduction

23 **A**S A GENERAL RULE, anyone charged with an offence which carries a prison term of three months or more is entitled to trial by jury. Section 24(e) of the New Zealand Bill of Rights Act 1990 provides:

Everyone who is charged with an offence—

Shall have the right, except in the case of an offence under military law tried before a military tribunal, to the benefit of a trial by jury when the penalty for the offence is or includes imprisonment for more than 3 months.

This general rule is subject to two exceptions: common assault under section 9 of the Summary Offences Act 1981, and assault on a police, prison or traffic officer under section 10 of the Summary Offences Act. In both those cases the maximum penalty is six months imprisonment or a \$4000 fine, but the right to jury trial for offences with a penalty of more than three months is expressly excluded by section 43 of the Summary Offences Act (see paragraphs 80–84).

24 The procedural rules which govern when jury trial is available in criminal cases are complex. In brief, there are two types of criminal offence, summary (offences of a less serious nature) and indictable (offences of a more serious nature). The procedure for each differs, and only offences tried on indictment are tried before a jury. It used to be the case that all indictable charges were tried on indictment, by a jury, and in the High Court, but since 1979 the District Court has been given the power to hear jury trials for many indictable offences, and the defendant has been able to apply for trial by judge alone in indictable matters where the offence carries a maximum penalty of less than 14 years imprisonment.²⁰

²⁰ Crimes Act 1961 ss 361B–C. These sections do not apply to offences which carry a maximum sentence of 14 years imprisonment or more (such as murder, kidnapping, dealing in class A or B controlled drugs and sexual violation). Therefore such offences must always be tried before a jury.

- 25 Some indictable offences can be tried either on indictment or by summary procedure, and the decision as to which method will be used is made by the Police when they lay the charge. These offences are called “indictable offences triable summarily”. The most serious indictable offences can be tried on indictment only, and these are called “purely indictable” offences. Also, many summary charges can be tried on indictment on the defendant’s election.
- 26 The New Zealand Bill of Rights Act 1990 does not refer to the summary/indictable distinction.
- 27 A defendant charged with a summary offence (or charged summarily with an indictable offence triable summarily) may elect trial by jury²¹ except when the offence is punishable by a maximum sentence of three months imprisonment or less, or is subject to section 43 of the Summary Offences Act. In either case trial must be by judge alone.

The summary/indictable distinction

- 28 The Commission has long been of the view²² that the summary/indictable distinction is unhelpful and needlessly complex. The distinction does not determine whether there will be a jury trial or not, nor whether a trial will be heard in the District Court or the High Court.²³ In *Juries I*²⁴ we proposed that the summary/indictable distinction be revisited with a view to its removal and to the collection in one statute of the relevant statutory rules. The submissions which we received were all supportive of such a review. In October 2000, the Commission provided an advisory report to the Ministry of Justice outlining a proposed new structure for

²¹ Summary Proceedings Act 1957 s 66(1).

²² See New Zealand Law Commission *The Structure of the Courts : R7* (Wellington, 1989), paras 352–355.

²³ The distinction used to be clearer. Prior to 1979 any indictable offence tried in the High Court (then called the Supreme Court) had to have a jury trial, and anyone electing trial by jury would be tried in the Supreme Court. The District Court (then called the Magistrates Court) could try some indictable offences summarily (without a jury) but only had jurisdiction to impose no more than three years imprisonment. In response to recommendations of the Royal Commission on the Courts [1978] AJHR H.2, legislative amendments were made in 1979 and 1980 which allowed defendants to elect trial by judge alone (in the High Court only). In 1980 District Courts were empowered to try most crimes with a jury. A 1995 amendment to the District Courts Act 1947 gave defendants the same right as they have in the High Court to elect trial by judge alone. (Ministry of Justice submission.)

²⁴ Para 147.

criminal procedure. That paper has now been published.²⁵ For present purposes, the relevant recommendations in that report are:

- The distinction between summary and indictable offences should be eliminated.
- Some offences which can currently be tried only in the High Court²⁶ and those in the middle band²⁷ should be tried by jury unless the defendant successfully applies for trial by judge alone. In some limited cases the prosecution should also be able to apply for trial by judge alone.
- All other offences which carry a maximum penalty of over three months should be tried by judge alone unless the defendant elects trial by jury. This means that in many cases where under the current system the charge would be laid indictably and the defendant tried by jury unless he applies to be tried by judge alone, the defendant would be tried by judge alone unless he elects trial by jury.

²⁵ *Simplification of Criminal Procedure Legislation*, above n 12.

²⁶ The offences in this category are listed in appendix B of *Simplification of Criminal Procedure Legislation*, above n 12. They are: Anti-Personnel Mines Prohibition Act 1998, s 7 using etc an anti-personnel mine (7 years); Aviation Crimes Act 1972, s 3 hijacking (life), s 5 other crimes relating to aircraft (14 years), s 5A crimes relating to international airports (14 years/life); Chemical Weapons (Prohibition) Act 1996, s 6 chemical weapons (life), s 8 riot control agents (life); Crimes (Internationally Protected Persons, United Nations and Associated Personnel, And Hostages) Act (1980), s 3 crime against a protected person (3 years), s 4 crime against premises or vehicles (various), s 5 threats against persons (7 years), s 6 threatening premises or vehicle (3 years), s 8(1) hostage-taking (14 years); Crimes Act 1961, s 68(1) party to murder outside New Zealand (14 years), s 68(2) inciting murder outside New Zealand (not committed) (10 years), s 69(1) party to any other crime outside New Zealand (14 years), s 69(2) inciting treason outside New Zealand (not committed) (10 years), s 69(3) aiding and abetting crime outside New Zealand (7 years), s 73(a)–(f) treason or conspiracy to commit treason (14 years), s 74(3) attempted treason (14 years), s 76 accessory to or failure to prevent treason (7 years), s 77 endeavouring to seduce armed forces from duty (10 years), s 79(1) sabotage (10 years), s 92(1)(a) and (b) piracy (life/14 years), s 93 and 94 piratical acts (life/14 years), s 95 attempt to commit piracy (14 years), s 96 conspiring to commit piracy (10 years), s 97 accessory to piracy (7 years), s 98(1)(a)–(j) dealing in slaves (14 years), s 100(1) judicial corruption (14 years), s 100(2) judicial officer accepting bribe (7 years), s 101(1) bribing judicial officer (7/5 years), s 102(1) corruption and bribery of Minister of the Crown (14 years), s 102(2) bribing Minister (7 years), s 103 bribing member of Parliament (7/3 years), s 172 murder (life), s 173 attempted murder (14 years), s 174 attempting to procure murder (not committed) (10 years), s 175 conspiracy to murder (10 years), s 176 accessory after the fact to murder (7 years), s 177 manslaughter (life), s 178 infanticide

Should some offences always be tried by jury? If so, which offences?

- 29 Currently, offences which carry a maximum sentence of 14 years imprisonment or more must always be tried before a jury.²⁸ The mandatory jury requirement is usually justified by an argument that these offences are the most serious, and they require the community input and public validation of a jury trial.
- 30 In *Juries I*²⁹ we proposed that the mandatory requirement for trial by jury for offences punishable by imprisonment for 14 years or more should be removed. We offered two reasons for this. First, if trial by jury is a *right*, as section 24(e) of the New Zealand Bill of Rights Act 1990 indicates that it is, it may be that an accused person should be able to waive that right if, with legal advice, he or she considers that to be in their best interests. Secondly, reliance on the maximum penalty of imprisonment for 14 years or more is not an accurate means of identifying which cases will involve difficult choices or require public validation of the verdict via trial by jury. We suggested³⁰ that mandatory trial by jury should be removed even for murder, which is of all crimes the most serious.

(3 years), s 179 aiding and abetting suicide (14 years), s 180(2) surviving party of suicide pact (5 years), s 182 killing unborn child (14 years), s 183(1)(a)–(c) procuring abortion (14 years), s 238(1) extortion by certain threats (14 years), s 301 wrecking (14 years); Crimes of Torture Act 1989, s 3(1), acts of torture (14 years), s 3(2) torture offences by a public official (10 years); Geneva Conventions Act 1958, s 3(4) grave breaches of conventions or first protocol (life); Judicature Act 1908, s 56C(2) contempt of court (3 months), s 56O contempt of Federal Court of Australia (3 months); Maritime Crimes Act 1999, s 4(1)(a)–(h), s 4(2)(a) and (b), s 4(3)(a) and (b) crimes relating to ships (life/14 years), s 5(1)(a)–(e), s 5(2)(a) and (b), s 5(3)(a) and (b) crimes relating to fixed platforms (life/14 years); Misuse of Drugs Act 1975, s 6(2)(a) and (b) dealing with controlled drugs (Class A) (life/14 years), s 6(2A) conspiring to deal with controlled drugs (Class A) (14/10 years), s 10(1)(a) and (b) aiding offences against law of another country (14 years); New Zealand Nuclear Free Zone Act 1987, ss 5–8 and 14 offences against Act (10 years); Nuclear Test Ban Act 1999, s 5 offences against Act (10 years).

²⁷ “Middle band” offences are those listed in Part II of Schedule 1A of the District Courts Act 1947. They are initially committed for trial in the High Court, and a High Court judge will then determine on the papers whether the trial should remain in the High Court or whether it should be transferred for trial in the District Court. See further *The Laws of New Zealand* (Butterworths, Wellington, 1995) vol 9, Criminal Procedure, para 177.

²⁸ Crimes Act 1961 ss 361A–C do not apply.

²⁹ Para 114.

³⁰ *Juries II*, paras 106–107.

- 31 The first reason (that jury trial is a right which might be waived) is however challenged by an alternative view – that the mode of criminal trial is a matter not simply for the accused but also for the community, reflecting the role of public validation of verdicts that jury trials play. This public validation of verdicts is particularly important in the most serious and high profile crimes (see paragraph 7).
- 32 In *Juries I*³¹ we suggested that reliance on a maximum penalty to determine which offences should have a mandatory jury trial was a crude approach because of the complexity of sentencing decisions. This is because the maximum sentence may bear little resemblance to the sentence an offender actually serves, and two offenders who commit different crimes carrying the same maximum penalty may end up serving quite different sentences.³² The alternative is to specify offences to which any rule will or will not apply. In our *Simplification* paper (see paragraph 28) we have recommended that there be two categories of offences:
- (a) Middle band offences (see footnote 27) and a small group of serious offences which can currently only be heard in the High Court (listed in footnote 25). These offences would commence in the High Court and have a presumption of trial by jury.

³¹ Paras 109–112.

³² The example we gave (*Juries I*, paras 109–111) was the treatment of offenders who are convicted of a “serious violent offence” within the meaning of the Criminal Justice Act 1985 s 2. That section lists all the offences which are deemed to be serious violent offences; most of them have a 14-year maximum penalty and therefore a mandatory jury trial, but not all (wounding with intent to injure, commission of a crime with a firearm, and robbery carry maximum sentences of less than 14 years, and therefore are not subject to mandatory jury trial). An offender who is sentenced to 12 months or more for an offence which is not a serious violent offence may apply for discretionary release on parole after one third of the sentence has expired, but a serious violent offender does not have that privilege. In addition, a judge may, if the circumstances are “out of the ordinary range of offending of the particular kind” (but not necessarily exceptional), impose on serious violent offenders a minimum period of imprisonment, which will end three months before the expiry of the sentence, or after ten years, whichever is the lesser. The offender will not be eligible for release until the lesser of these periods has elapsed. The overall result is that offenders who have committed a “serious violent offence” will usually serve considerably longer periods of imprisonment than offenders who receive the same sentence for an offence which is not a “serious violent offence”, but which does carry a 14-year maximum penalty and is therefore subject to a mandatory jury trial (such as kidnapping, or dealing in class A or B controlled drugs).

- (b) All other offences which carry a maximum penalty of over three months imprisonment. These offences would commence in the District Court and have a presumption of trial by judge alone.
- 33 The Commission considers that once this simplified, two-tier structure is in place, any mandatory requirement for jury trial, or presumption in favour of jury trial, should relate only to the first of the two tiers, and not be measured by the crude line of whether the offence carries a maximum penalty of 14 years imprisonment. This is because the first tier comprises the most serious offences against the person and against the state, even though not all of those offences carry a maximum penalty in excess of 14 years. In any event, the new structure would result in less need for applications for trial by judge alone, because many offences which currently may be tried indictably will be in the lower tier of offences, and therefore automatically be tried by judge alone unless the accused exercises his or her right to elect trial by jury.
- 34 There are a number of issues to be determined:
- (a) Should some offences always be tried by jury, or should a defendant have the right to waive the right to jury trial in all cases?
 - (b) If a defendant may waive jury trial even in the most serious cases, should that be an absolute right or should the prosecution have some ability to either oppose or veto that decision? In other words, should the ultimate decision be with the defendant, the prosecution, or the court?
 - (c) If some offences must always be tried by jury, which ones? Is minimum sentence the best criterion?
- 35 The submissions were divided. Those who see jury trial as a right exclusive to an accused person tended to the view that there should be no offences that must always be tried by jury. The Auckland District Law Society Criminal Law Committee said:

The decision should be left to the accused and their counsel. The reality is that if the mandatory requirement were removed, the vast majority of trials would continue to be tried by Judge and jury. However, it is possible to envisage cases where the issues or subject matter are such that an accused person would wish to be tried by Judge alone. Such a choice should not be prevented.

Such cases might include a particularly horrific murder combined with sexual violence, where the accused felt that the jury might be unduly influenced by the graphic nature of the evidence.

- 36 On the other hand, those who saw trial by jury as being for the benefit of the community as well as the benefit of the accused, favoured the community input and public validation of a jury trial.

Historical background to right to jury trial, and comparisons with other jurisdictions

- 37 The right of the accused to trial by jury has traditionally been seen as a fundamental protection for the citizen against the Crown and a precious right and liberty: in Lord Devlin's often-quoted words,³³ it is "the lamp that shows that freedom lives". From the very earliest days of jury trial, the right to trial by jury was regarded as a right of the accused, rather than the right of the community. While it appears to have been accepted that no-one could be tried by jury without consent,³⁴ there was in effect no choice because there was no other mode of trial available.³⁵ Although there is some evidence of an ancient right to waive trial by jury,³⁶ it is not clear whether it applied to serious crimes or just misdemeanours, and it seems to have died out before the modern period.³⁷ It has never been the law in New Zealand.

The United States position

- 38 Article III (2) of the United States Constitution states:

The trial of all crimes, except in the cases of impeachment, shall be by jury . . .

³³ The Honourable Sir Patrick Devlin *Trial By Jury* (2 ed, Methuen & Co Ltd, London, 1966) 164.

³⁴ See Devlin, above n 33, 10; Sir James Fitzjames Stephen *A History of the Criminal Law of England* (MacMillan & Co, London, 1883; reprinted by William S. Hein & Co Inc, Buffalo, New York) vol 1, 299.

³⁵ By the doctrine of *peine forte et dure*, a felon who refused trial by jury was tortured until he did consent, or until he died. This practice was abolished in 1772, when a statute provided that "standing mute of malice" or refusing to submit to jury trial in a case of felony, was equivalent to a confession. In 1827 this was changed to make it equivalent to a plea of not guilty (see T Plucknett *A Concise History of the Common Law* (5 ed, Butterworths, London, 1956) 126; Radcliffe and Cross *The English Legal System* (5 ed, Butterworths, London, 1971) 68.

³⁶ E Griswold "The Historical Development of Waiver of Jury Trial in Criminal Cases" (1934) 20 Va L Rev 655.

³⁷ See *Singer v United States* (1965) 380 US 24; S Towne "The Historical Origins of Bench Trial for Serious Crime" (1982) 26 Am J of Legal History 123.

The Sixth Amendment of the Constitution states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour, and to have the assistance of counsel for his defense.”

39 Section 24(e) of the New Zealand Bill of Rights Act 1990 (see paragraph 23) equates to the Sixth Amendment, but we have no equivalent of Article III (2).

40 In the 1929 case of *Patton v United States*,³⁸ the Supreme Court established that a defendant has a constitutional right to waive trial by jury, a right which up until then had not been clearly established. In *Patton*, the defendants had been tried before a jury but some days into the trial one juror became seriously ill and could not continue to serve. The trial judge stated that both the defendants and the government are constitutionally entitled to a jury of twelve, and that the absence of one juror would mean a mistrial unless both sides would waive all objections and agree to a trial by the remaining eleven. Both sides consented. The defendants were convicted and appealed on the grounds that they had no power to waive their constitutional right to trial by a jury of 12.

41 It was held that “trial by jury” means trial by jury as understood by the common law, so there must be 12 jurors, neither more nor less; the trial must be in the presence and under the superintendence of a judge having power to instruct them on the law and advise them in respect of the facts; and the verdict must be unanimous. Therefore no distinction can be made between complete waiver of trial by jury and consent to be tried by 11 jurors; in substance they amount to the same thing.³⁹

42 The Court saw the question as firmly one between the right of the accused *per se* and a wider right:⁴⁰

Is the effect of the constitutional provisions in respect of trial by jury to establish a tribunal as part of the frame of government, or only to guaranty to the accused the right to such a trial? If the former, the question certified by the lower court [whether an accused can waive trial by jury] must, without more, be answered in the negative.

³⁸ *Patton v United States* (1930) 281 US 276.

³⁹ *Patton*, above n 38, 290.

⁴⁰ *Patton*, above n 38, 293.

43 The Court traversed some of the history to show that trial by jury had always been seen as a right and a privilege of the accused, a protection against the power of the King, and that the intent of the Constitutional provisions was to preserve that right to the accused.⁴¹ It concluded that Article III section 2 is not jurisdictional but confers a right on the accused which he can choose to forego. That leaves the question of whether the trial court is empowered to try the case without the jury, which the Court held that it is because if there is a right to waive trial by jury, it would be unreasonable to leave the court powerless to give effect to the waiver and dispose of the case. The Court also pointed out that the undoubted right of an accused person to plead guilty and thus dispense with a trial altogether, exposes the fallacy of the “public policy” argument:⁴²

. . . for if the state may interpose the claim of public interest between the accused and his desire to waive a jury trial, *a fortiori* it should be able to interpose a like claim between him and his determination to avoid any form of trial by admitting his guilt. If he be free to decide the question for himself in the latter case, notwithstanding the interest of society in the preservation of his life and liberty, why should he be denied the power to do so in the former?

44 The Court also approved (*obiter*) the argument that it has always been accepted that other rights enshrined by the Sixth Amendment (such as the right to the assistance of counsel) may be waived, so it should be possible to waive the right to jury trial too. The same argument may be made in relation to section 24 of the New Zealand Bill of Rights Act 1990.

45 Although the Court concluded that an accused must have the right to waive trial by jury, they were at pains to emphasise that trial by jury remains the norm, and that the right of waiver is not an absolute one but subject to the veto of the prosecution and court:⁴³

In affirming the power of the defendant in any criminal case to waive a trial by a constitutional jury and submit to trial by a jury of less than twelve persons, or by the court, we do not mean to hold that the

⁴¹ The Court accepted that in the Colonies waiver of jury trial and consequent trial by judge alone was known, even for serious offences, but did not consider it necessary to go into that. Whether the old common law rule requiring trial by jury was absolute or subject to exceptions, as it appears to have been, does not matter because the conditions which justified it no longer exist, and when the reason for a rule fails, so does the rule.

⁴² *Patton*, above n 38, 305.

⁴³ *Patton*, above n 38, 312–313. However, the practice in relation to veto is not at all uniform: see F DeCicco “Waiver of Jury Trials in Federal Criminal Cases: a Reassessment of the ‘Prosecutorial Veto’” (1983) 51 *Fordham LR* 1091.

waiver must be put into effect at all events. That perhaps sufficiently appears already. Trial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues of fact in criminal cases above the grade of petty offences. In such cases the value and appropriateness of jury trial have been established by long experience, and are not now to be denied. Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant. And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offences dealt with increase in gravity.

- 46 Therefore, despite recognition that trial by jury is a right of the accused, United States jurisprudence places definite limits on the extent to which that right can be waived. Those limits are not simply to protect the (perhaps misguided) accused but also to recognise the value to the community of having serious criminal charges determined by members of the community.

The Australian position

- 47 Australia is a federal state. Most criminal offences arise under the common law or statutes of individual States or Territories, and some, including the importation of drugs, under Commonwealth statutes.⁴⁴ Four Australian jurisdictions allow a person prosecuted on indictment to elect trial by judge alone for all indictable offences, including murder:⁴⁵ South Australia (since 1984),⁴⁶ New South Wales (since 1990),⁴⁷ Australian Capital Territory (since 1993),⁴⁸ and Western Australia (since 1994).⁴⁹ In all four, the judge has no

⁴⁴ See M Chesterman “Criminal Trial Juries in Australia: from Penal Colonies to a Federal Democracy” in N Vidmar (ed) *World Jury Systems* (Oxford University Press, New York, 2000) 125, 129–135.

⁴⁵ See J Willis “Trial By Judge Alone”(1998) 7 J Jud Admin 144; Hon Justice Heenan “Trial by Judge Alone” (1995) 4 J Jud Admin 240.

⁴⁶ Juries Act 1927 (SA) s 7.

⁴⁷ Criminal Procedure Act 1986 (NSW) s 16.

⁴⁸ Supreme Court Act 1933 (ACT) s 68B.

⁴⁹ Criminal Code Act Compilation Act 1913 (WA) Schedule 1 (Criminal Code) ss 651A–C.

power to veto the defendant's election for trial by judge alone, but in New South Wales and Western Australia the prosecution has the right to veto the defendant's choice. In New South Wales, the Director of Public Prosecutions has issued guidelines for the exercise of the discretion to veto.⁵⁰

48 There is little information on the effect of the right to waive trial by jury in these jurisdictions, but it appears⁵¹ that the right is not frequently exercised; is most commonly used in cases of murder, rape and unlawful sexual intercourse with a person under 12 years; and is particularly used by defendants with known bad records, or those who fear racial prejudice from a jury.

49 However, trial by judge alone is not possible for indictable Commonwealth offences. Section 80 of the Australian Constitution states:

The trial on indictment of any offence against any law of the Commonwealth shall be by jury . . .

The Australian Constitution has no equivalent of Article III (2) of the United States Constitution or section 24(e) of the New Zealand Bill of Rights Act 1990.

50 In *Brown v R*,⁵² the High Court of Australia considered the South Australian legislation which provides that an accused may elect trial by judge alone in indictable matters, and whether section 80 of the Constitution contains an imperative and indispensable requirement that the trial must be by jury whenever the accused is charged on indictment with an offence against a law of the Commonwealth, or whether the section is intended to secure for the benefit and protection of any person so charged a right or privilege which the accused may waive if the law governing the conduct of the trial permits it. The High Court was split, Brennan, Deane and Dawson JJ holding that section 80 precludes an election, Gibbs CJ and Wilson J dissenting.

51 Gibbs J approved *Patton v United States* and said the purpose of section 80, which is modelled on Article III of the US Constitution, was to safeguard the accused against "the corrupt or over-zealous prosecutor and against the compliant, biased, or eccentric judge", and the principle *quilibet potest renunciare juri pro se introducto* (a provision entirely for the benefit of the accused may be waived by him) applied. In addition, section 80 applies only to indictable

⁵⁰ Full text reproduced in Willis, above n 45, 146–147.

⁵¹ See Willis, above n 45, 149.

⁵² (1986) 160 CLR 171 (High Court of Australia).

matters, but it is open to Parliament to provide that any offence, however serious, is triable summarily – potentially making section 80 worthless. Wilson J looked at the Australian history and said that prior to 1900 (when the Constitution was signed) the procedure of waiver of jury trial seems to have been unknown, which explains the form of section 80 and the absence of any reference to waiver in the Convention debates.

52 Deane J, one of the majority in this case, emphasised the lack of an Article III equivalent in the Australian Constitution, and the inapplicability of United States law on the point.⁵³ He also emphasised however that his decision was based purely on statutory interpretation, not on the desirability in principle of an accused person being able to choose the mode of trial.

53 We find compelling Deane J's emphasis upon the public interest argument against any right to waive.⁵⁴

It is true that the peremptory prescription of trial by jury as the mode of trial on indictment of any offence against any law of the Commonwealth represents an important constitutional guarantee against the arbitrary determination of guilt or innocence. That constitutional guarantee is, however, for the benefit of the community as a whole as well as for the benefit of the particular accused . . . [R]egardless of the position or standing of the particular alleged offender, guilt or innocence of a serious offence should be determined by a panel of ordinary and anonymous citizens, assembled as representative of the general community, at whose hands neither the powerful nor the weak should expect or fear special or discriminatory treatment. That essential conception of trial by jury helps to ensure that, in the interests of the community generally, the arbitration of criminal justice is, and has the appearance of being, unbiased and detached.

54 Deane J also referred to his recent comments on the point in *Kingswell v R*.⁵⁵

Trial by jury also brings important practical benefits to the administration of criminal justice. A system of criminal law cannot be attuned to the needs of the people whom it exists to serve unless its

⁵³ That is because at the time the Australian Constitution was adopted the predominant view in the United States seems to have been that waiver of trial by jury of a serious offence was not permitted, and the subsequent decisions of the Supreme Court upholding the constitutionality of a limited right of waiver are based largely on special considerations – a history of state decisions upholding waiver is consistent with State constitutional provisions in the context provided by the Sixth Amendment.

⁵⁴ *Brown v R*, above n 52, 201–202.

⁵⁵ (1985) 159 CLR 264, 301–302.

administration, proceedings and judgments are comprehensible by both the accused and the general public and have the appearance, as well as the substance, of being impartial and just. In a legal system where the question of criminal guilt is determined by a jury of ordinary citizens, the participating lawyers are constrained to present the evidence and the issues in a manner that can be understood by laymen. The result is that the accused and the public can follow and understand the proceedings. Equally important, the presence and function of a jury in a criminal trial and the well-known tendency of jurors to identify and side with a fellow citizen who is, in their view, being denied a “fair go” tend to ensure observance of the consideration and respect to which ordinary notions of fair play entitle an accused or a witness. Few lawyers with practical experience in criminal matters would deny the importance of the institution of the jury to the maintenance or the appearance, as well as the substance, of impartial justice in criminal cases . . . The institution of trial by jury also serves the function of protecting both the administration of justice and the accused from the rash judgment and prejudices of the community itself. The nature of the jury as a body of ordinary citizens called from the community to try the particular case offers some assurance that the community as a whole would be more likely to accept a jury’s verdict than it would be to accept the judgment of a judge or magistrate who might be, or be portrayed as being, over-responsive to authority or remote from the affairs and concerns of ordinary people. The random selection of a jury panel, the empanellment of a jury to try the particular case, the public anonymity of individual jurors, the ordinary confidentiality of the jury’s deliberative processes, the jury’s isolation (at least at the time of decision) from external influences and the insistence upon its function of determining the particular charge according to the evidence combine, for so long as they can be preserved or observed, to offer some assurance that the accused will not be judged by reference to sensational or self-righteous pre-trial publicity or the passions of the mob.

- 55 Despite the High Court’s views, New South Wales, Western Australia and the Australian Capital Territory have, since *Brown*, enacted legislation similar to that of South Australia.

The Canadian position

- 56 Section 11(f) of the Charter of Rights and Freedoms, upon which the New Zealand Bill of Rights Act 1990 is based, provides:⁵⁶

Any person charged with an offence has the right: . . . except in the case of an offence under military law tried before a military

⁵⁶ Note the difference between Canada’s five years and our three months; three months was chosen because it reflected the status quo at the time the New Zealand Bill of Rights Act 1990 was passed: see letter from Department of Justice to Justice and Law Reform Select Committee 29 May 1990 (Parliamentary Library, Box 1990/29, JL/90/145).

tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment.

- 57 Like New Zealand, Canada provides for the *right* to jury trial and, like New Zealand but unlike either Australia or the United States, it has no constitutional *requirement* of trial by jury. But what it does have, unlike New Zealand, is provision in its Criminal Code for trial by judge alone in all indictable matters.⁵⁷ The exclusions for the most serious crimes, which influenced our 1978 Royal Commission for the Courts (see paragraphs 59–60), were removed in 1985. However, in relation to the most serious offences,⁵⁸ an accused will be granted trial by judge alone only if the Attorney-General consents.⁵⁹ Therefore, in Canada also, the ability of accused to waive trial by jury is tempered by the need to consider the public interest in having the trial of serious offences by jury.

The New Zealand position

- 58 Provision for an accused to apply for trial by judge alone rather than trial by jury⁶⁰ was enacted in 1979 as a result of recommendations made by the 1978 Royal Commission on the Courts.⁶¹ The Commission was particularly concerned at the practical difficulties of conducting complex white-collar crime cases with juries, and noted that while the Commission's report was being prepared the Court of Appeal delivered its judgment in *R v Jeffs*,⁶² in which the Court commented on how impossible that case must have been for the jury. The Royal Commission said that those who supported trial by judge alone put their case on four bases:

- A defendant may elect trial by magistrate for some quite serious offences, so why not trial by High Court judge.
- Little civil jury work is done in the High Court any more, most civil actions being tried before a judge alone.

⁵⁷ Canadian Criminal Code, RSC 1985, c C-46, ss 473, 476.

⁵⁸ Treason; alarming her Majesty; intimidating Parliament or a legislature; inciting to mutiny; seditious offences; piracy; piratical acts; murder; being an accessory after the fact to high treason or treason or murder; bribery by the holder of a judicial office; and some attempts and conspiracies relating to these offences: see Canadian Criminal Code ss 469, 473.

⁵⁹ Canadian Criminal Code s 473(1).

⁶⁰ Crimes Act 1961 ss 361A–C.

⁶¹ [1978] AJHR H.2, 122–125.

⁶² Unreported, Court of Appeal, 28 April 1978.

- *Provided the choice remains with the accused*, he should be able to choose trial by judge alone where there are difficult or technical questions of law or the facts may be exceptionally involved.
- White-collar crime renders the judge's directions to the jury and the jury's comprehension of the intricacies of company law, exceptionally difficult.

59 The Royal Commission said they derived particular help from the Canadian position, which at that time was that, in all Canadian provinces except Alberta, a defendant had the choice of trial by jury or by judge alone, except for certain offences of the most grievous kind. (In Alberta, the defendant had that choice in all cases, even the most serious. The Albertan position was extended to all other provinces in 1985). As to the issue of prosecutorial veto, the Royal Commission said:⁶³

We learned of the [Canadian] safeguard that on any crime carrying five years or more imprisonment the Crown may require that the trial should be heard before a judge and jury . . . The Criminal Law Reform Committee suggested that it would not be appropriate to inhibit the accused's right to trial by judge alone on the authority of the Attorney-General (as in Canada): they would prefer that the Crown should be represented by individual Crown prosecutors and be entitled to be heard on any application for trial by judge alone. The decision would be made by the presiding judge. We were told that in Canada the tendency is for accused persons to choose trial by judge alone.

60 On the question of whether the right to waive should be exclusively the defendant's or whether there is also a public interest, the Royal Commission expressed favour in principle for the former, yet recommended that there should be an exception for treason, piracy, hijacking, murder, accessory after the fact to any of those offences, attempting to commit those crimes other than murder, or conspiracy to commit any of those crimes. This conclusion was clearly based on the Canadian model, which has since been liberalised in this regard. However, the recommendation that these most serious of crimes be exempted implies recognition of the community interest in ensuring trial by jury in these cases. The Royal Commission concluded:⁶⁴

We would reiterate that in making our recommendations we are not removing the basic and fundamental right of trial by jury; we are providing persons accused of indictable offences with an option. Many accused will no doubt continue to use their right of trial by jury; if our proposal is accepted, others may, in what could at first be special

⁶³ Royal Commission on the Courts, above n 61, 124.

⁶⁴ Above n 61, 124–125.

categories of cases, exercise their choice for a trial by judge alone. While we recognise that trial before a jury is one way of ensuring lay participation in the administration of justice, we as a Commission are required to look at any proposal that is said to be necessary or desirable to secure the just, prompt, efficient and economical disposal of the business of the courts. It seems to us that this suggestion satisfies all those criteria.

- 61 The Royal Commission recommended that persons charged with indictable offences (other than murder and some other very serious offences) should be able to elect trial by judge alone, but that if the accused did elect trial by judge alone, that the Attorney-General be able to apply to the High Court for a trial before judge and jury.⁶⁵ So the accused should not have an absolute right to waive trial by jury, and the Attorney-General should not have a veto. This is reflected in section 361B, which provides that if an accused applies for trial by judge alone, the judge who hears that application:

. . . shall order that the accused be tried before a Judge without a jury unless, having regard to the interests of justice, the Judge considers that the accused should be tried before a Judge with a jury, in which case he shall order accordingly.

- 62 Although that wording is clearly designed to ensure that there is not an absolute right to trial by judge alone, so that a balance between the rights of the accused and the rights of the community can be maintained, there is authority that the defendant's wish is decisive:⁶⁶

The Court will generally assume that, on advice, the accused is the best judge of the interests of justice so far as he is concerned in making the decision that he does for a trial before a Judge alone.

- 63 Such a subjective interpretation is difficult to reconcile with the objective language of the section, although it may be acceptable for cases under the present section 361B, which excludes offences for which the maximum penalty is imprisonment for life or imprisonment for a term of 14 years or more.⁶⁷ If the ability to apply for trial by judge alone is to be extended to the most serious crimes, which are currently excluded, the public interest in having jury trials in those matters will need to be given greater weight. We suggest that there should in such cases be a presumption that trial will be by jury, but that the accused should be permitted to apply for trial by judge alone if, because of the subject matter of

⁶⁵ Royal Commission on the Courts, above n 61, 125.

⁶⁶ *R v Narain* [1988] 1 NZLR 580, 589.

⁶⁷ Section 361B(5).

the trial or the identity of the accused, a fair trial by jury is not reasonably possible.

64 We note that if the accused's right to apply for trial by judge alone were extended to all offences, this would resolve the problem⁶⁸ that although section 361B deals with the difficulty where two persons are jointly charged,⁶⁹ it does not deal with the situation where charges which cannot be tried by judge alone (because section 361B(5) excludes them) are sought to be tried with those that are. This can lead to a need for an extra trial on the separate charges, adding to expense and imposition on witnesses. If there are multiple charges, all charges should be tried together (subject to the usual rules of severance), and any application for trial by judge alone determined according to the most serious of the charges. We note that in our *Simplification* report⁷⁰ we have recommended that the court should be empowered to determine that an election of trial by jury on one charge applies to all related charges.

Conclusion and recommendations

65 The Law Commission proposes adoption of the views of Deane J (quoted at paragraphs 53–54). The right to trial by jury is a component of the constitutional right to a fair trial. In particular case the right to trial by jury has immediate significance both for the accused in that case and for the community, and works for the benefit of each. In a wider sense, trial by jury helps to maintain the confidence of the community in the justice system. Therefore, whether an accused may waive trial by jury is not necessarily a decision to be made by the accused alone. The right may be restricted, but only to the extent that restriction is demonstrably justifiable.

66 Under the simplified system we propose the defendant will not have to apply for trial by judge alone if the charge is in the lower tier.⁷¹ The charge will automatically be heard by a judge alone unless the defendant elects trial by jury. There will be no provision for the prosecution to apply to have a case tried by a jury. It will be different for the higher tier of charges (for example, rape,

⁶⁸ Identified by Heron J in *R v Narain*, above n 66, 589.

⁶⁹ Section 361B(6) provides: Where 2 or more persons are to be tried together, they shall be tried before a judge with a jury unless each of them applies to be tried by a judge without a jury.

⁷⁰ Above n 12, para 30.

⁷¹ See para 28, 3rd point.

murder, dealing in class A controlled drugs). A charge in this tier will go to trial by jury automatically unless the defendant applies for trial by judge alone. The prosecution will have the right to oppose, but not veto, such an application. The decision as to mode of trial will be made by a judge. This structure balances the right of a defendant to waive trial by jury with the right of the community, in the more serious cases, to argue that the public validation of a verdict, with the underlying implication for confidence in the justice system, requires trial by jury.

The simplified procedure recommended in the Commission's *Simplification of Criminal Procedure Legislation* report should be adopted.

Under the new simplified criminal procedure, many cases will commence in the District Court with a presumption of trial by judge alone, the accused having an automatic right to elect trial by jury. Section 361B will be redundant in relation to these offences.

Under the new simplified criminal procedure, a small group of specified serious offences will commence in the High Court with a presumption of trial by jury. We recommend that in these cases the accused should be able to apply to be tried by a judge alone, rather than by a jury. In relation to these offences the public interest in trial by jury is high, and the presumption that trial will be by jury should not be displaced unless the accused can show that, because of the subject matter of the case or the identity of the accused, a fair trial by jury is not possible. As with any application, the prosecution will have the right to be heard and to oppose the application. Section 361B should be amended to reflect this.

Statutory amendment will be required.

Should defendants have a right of re-election?

- 67 At present an accused may apply for trial by judge alone within 28 days after committal at the preliminary hearing.⁷² After that time and right up until he is given in charge to the jury, the accused may still apply for trial by judge alone, although he must seek leave first.⁷³ However, once that application has been made and granted, the statute does not provide any right for the accused to change his

⁷² Section 36B(1).

⁷³ Section 361C.

or her mind and choose trial by jury again. Although the High Court does have the inherent jurisdiction to overturn the order and allow the accused to choose trial by jury again, it can only do so if there has been a change of circumstances which in the interests of justice compels that order.⁷⁴ Such applications appear to be rare in practice. As the District Court has no inherent jurisdiction, it is unlikely that it has an equivalent power.

68 In *Juries I*⁷⁵ we noted that it might be desirable to allow re-election when the circumstances of the case have changed after the defendant's original election. On the other hand, a right of re-election could be cumbersome and might be used to delay or complicate proceedings unduly. We invited submissions on the issue, most of which supported a right of re-election, as long as it is not used to delay proceedings. However, likely developments in pre-trial disclosure mean that a right of re-election is less desirable than it may have been previously.

69 When the legislation permitting applications for trial by judge alone was first enacted there was no comprehensive pre-trial disclosure regime. The first effective disclosure of the prosecution evidence was at the preliminary hearing. Therefore, it made sense to allow a defendant to apply, post-committal, for trial by judge alone. But there is now, in practice, effective disclosure in writing of the prosecution case before a preliminary hearing. It also appears that a comprehensive statutory disclosure regime will be enacted shortly (see paragraphs 324–325). Under the proposed simplification of procedure a defendant facing a lower tier charge will have to decide whether to elect trial by jury. He will make that decision after discovery of the evidence in the prosecution case. If he does elect trial by jury and is committed for trial it would be needlessly complicated for him to have a further opportunity to apply for trial by judge alone.

The Law Commission recommends that there should be no ability for a defendant to re-elect trial by jury after he has applied successfully for trial by judge alone under section 361B. As the High Court currently exercises an inherent jurisdiction to allow such re-election, which the District Court does not have, section 361B requires amendment to provide that there is no right of re-election in either court.

Statutory amendment will be required.

⁷⁴ *R v Anderson* [1986] 2 NZLR 745, 749.

⁷⁵ Para 220.

Should defendants be required to obtain legal advice before making an election?

- 70 In some Australian states the right to elect trial by judge alone is subject to the court being satisfied that the defendant has received legal advice before making the election.⁷⁶ A requirement that an election for trial by judge alone be made only after receipt of legal advice would move away from the general approach in New Zealand that defendants can choose to represent themselves. Such a requirement might be overly cumbersome if it applied to the right of election for jury trial for summary offences currently contained in section 66(1) of the Summary Proceedings Act 1957. It will be unnecessary if the proposed simplified procedure is introduced because the only election available will be for trial by jury in the lower tier of offences.
- 71 Our preliminary paper did not express a view on the issue, but sought submissions on the point. None of the submissions firmly favoured making legal advice mandatory. As the Legal Services Board pointed out, being given legal advice does not mean a defendant will take it, but judges should advise unrepresented defendants when an election or even a plea is made that they have the right to obtain legal advice from either the duty solicitor or to apply for criminal legal aid, which is the current practice.

On balance, we do not consider that there is a need for a statutory provision that the defendant receive legal advice. While legal advice is always desirable, the practice is to remind defendants that they have the right to that advice, and that is sufficient.

Review of the maximum penalties assigned to offences in legislation

- 72 It is sometimes suggested that trial by jury is too readily available because it is available for offences carrying a penalty of three months imprisonment or more. This can mean that juries are used for relatively minor offences, including cases where, in the event of conviction, imprisonment is most unlikely. There are two ways to address this:

⁷⁶ Supreme Court Act 1933 (ACT) s 68B(b); Juries Act 1927 (SA) s 7(1)(b); Criminal Procedure Act 1986 (NSW) s 16(1)(b).

- increase the threshold for jury trials (this would be in line with comparable jurisdictions, in particular the Canadian Charter of Rights and Freedoms⁷⁷ provides for the right to jury trial for offences punishable by five years imprisonment or more); or
- review the maximum penalties assigned to offences with a view to reducing the penalty to three months or under where appropriate. This is because it is arguable that jury trial is only required where there is a real risk of the accused receiving a custodial sentence. Some offences which have a penalty of over three months imprisonment are in fact quite minor, and seldom if ever actually result in a custodial sentence. Arguably such crimes do not require the right to jury trial.

73 In *Juries I*⁷⁸ we did not favour the option of raising the threshold, because:

- (a) The available data do not enable us to identify precisely the proportion of comparatively minor offences that result in imprisonment. For example, although section 6 of the Criminal Justice Act 1985 provides that persons convicted of an offence against property punishable by seven years or less should not serve a custodial sentence unless there are special circumstances involved, there appears to be a small increase over the last decade in the proportion of this type of property offending which does result in a custodial sentence.⁷⁹ However, the data are not sufficiently detailed to allow clear comparison.⁸⁰
- (b) Some of the underlying rationales for jury trials, such as the need for community input, the fine balance of issues, and the ameliorating effect of lay minds, are just as applicable in less serious cases.

74 Because of these difficulties with simply raising the threshold, we suggested⁸¹ a general review of the maximum penalties assigned to

⁷⁷ Section 11(f). The New Zealand Bill of Rights Act 1990 is to a large extent based upon the Canadian Charter.

⁷⁸ Paras 119–126.

⁷⁹ P Spier *Conviction and Sentencing of Offenders in New Zealand: 1989 to 1998* (Ministry of Justice, Wellington, 1999) para 3.7.

⁸⁰ For example, the offence “wilful damage” can include an offence against Crimes Act 1961 s 298, which has a maximum penalty of 14 years, and Summary Offences Act 1981 s 11, which has a maximum penalty of three months or a \$2000 fine.

⁸¹ *Juries I*, para 125.

offences in legislation to consider whether imprisonment for more than three months, and therefore the option of trial by jury, is warranted in all cases. The review would take account of the kinds of issues which arise in trying particular kinds of cases, and whether they would be suitable for trial by jury, as well as the level of seriousness of the offending. We must emphasise that although the review is prompted by the perception that some offences could be downgraded, and we consider that it is likely that a review would confirm that, we cannot pre-empt the outcome of any review. It is possible that a review might show that some offences should be upgraded, not downgraded.

- 75 The submissions we received were generally in favour of such a review, and there was also support⁸² for the review to consider the threshold itself. One option is to increase the threshold in line with comparable jurisdictions. Alternatively, the threshold test could be discarded and replaced by schedules listing which offences should carry the right to trial by jury.
- 76 In *Juries I*⁸³ this Commission suggested that New Zealand should not follow the lead of those jurisdictions which have raised the threshold for trial by jury, and that a review of maximum penalties, with the possible reduction of some maximum penalties to imprisonment for three months or less, is a preferable option. This view received some support, including that of the Ministry of Justice, who point out that increasing the threshold would actually have very little effect: in 1997, in just 0.2 per cent of the six-month offence cases and 1.36 per cent of the 12-month offence cases was trial by jury elected. However, others were strongly of the view that a review of maximum penalties should also include a review of the threshold itself:⁸⁴

It is a perception that some juries are more inclined to acquit obviously guilty people charged with relatively minor crimes because the full procedural process of a jury trial does not seem to be warranted. There are instances where some juries have appeared to have considered that, although guilty, an accused person has suffered enough by having been put through the lengthy process of a jury trial. Jurors of course do not understand the process or procedure by which an accused person has come to stand trial by jury.

However it is this very process of uncertainty where relatively minor crime (in terms of penalty) is involved, that will persuade a defendant (often on counsel's advice) to make the election.

⁸² From the Auckland District Law Society and New Zealand Law Society.

⁸³ Para 148.

⁸⁴ Submission of Auckland District Law Society.

- 77 We note that, since *Juries I*, there have been moves in England to restrict the right to trial by jury in so-called “either-way” cases, a group of offences of middling severity.⁸⁵ The proposed legislation received strong popular and professional criticism, and was defeated,⁸⁶ but may be reintroduced.⁸⁷
- 78 Upon reflection, it appears to us that a review of maximum penalties is preferable to a review of the threshold itself, but the issue of the threshold level should not be precluded from discussion in a review of maximum penalties. It is certainly the case that the threshold for jury trials in New Zealand is low by international standards (see footnote 56). Our threshold of three months appears to have been selected because it reflected the position under section 66 of the Summary Proceedings Act 1957, which grants the right to jury trial for offences punishable by imprisonment for a term exceeding three months, even though this threshold was perceived at the time that the New Zealand Bill of Rights Act 1990 was drafted as “generous”.⁸⁸ However, there are two reasons why we do not consider that there is any pressing need to change the threshold. First, the three months threshold is well established and does not appear to be causing any practical difficulties, mainly because the right to trial by jury is seldom claimed in lower level cases. A right enshrined in the New Zealand Bill of Rights Act can be limited or derogated from if that is “demonstrably justified in a free and democratic society”, but that is not the case here. Secondly, the Research has confirmed the strong function which juries play in legitimising verdicts and maintaining public confidence in the criminal justice system, which in our view is an important argument against altering the threshold.
- 79 The Ministry of Justice has been undertaking a review of the legislative framework for sentencing. It is anticipated that this will lead to a Sentencing and Parole Reform Bill, which will set out the purposes of sentencing, sentencing principles (including aggravating and mitigating factors) and presumptive sentencing guidelines. That review does not include consideration of maximum penalties for individual offences at the lower end of the scale, but once the current review is completed a review of maximum penalties would be appropriate.

⁸⁵ See Criminal Justice (Mode of Trial) (no 2) Bill (session 1999–2000) (UK); Narey *Review of Delay in the Criminal Justice System* at <www.homeoffice.gov.uk/cpd/pvu/crimrev.htm> (last accessed 8 January 2001); L Bridges “Criminal Justice (Mode of Trial) Bill: Counter Briefing Note” at <www.law.warwick.ac.uk/lawschool/mot.html> (last accessed 8 January 2001).

⁸⁶ “Straw Faces Humiliation on Jury Trial” *The Times*, London, 28 August 2000, 1.

⁸⁷ “Curbs on Jury Trial Unlikely to Reach Statute Book” *The Times*, London, 7 December 2000, 15.

A review of maximum penalties, to ascertain whether offences which currently have a penalty of more than three months and therefore an entitlement to trial by jury should retain that penalty level, should be carried out once the review of the legislative framework for sentencing currently being undertaken by the Ministry of Justice is completed. While a review of maximum penalties is preferable to increasing the threshold for entitlement to jury trial, the possibility of such an increase should not be precluded from any review of maximum penalties.

Should section 43 of the Summary Offences Act 1981 be repealed?

80 There are a number of offences which relate to assault. They include:

- common assault under section 9 of the Summary Offences Act 1981, which carries a maximum penalty of six months imprisonment or a \$4000 fine;
- assault on a police, prison or traffic officer under section 10 of the Summary Offences Act, which carries the same penalty; and
- common assault under section 196 of the Crimes Act 1961, which carries a maximum penalty of one year imprisonment.

The Police decide under which section to charge an offender, and charge under the Crimes Act when the assault is more serious.

81 Section 43 of the Summary Offences Act provides that section 66 of the Act (which provides for the right to elect trial by jury for offences with penalties exceeding three months) shall not apply to the offences under sections 9 or 10 of the Summary Offences Act. These are the only exceptions to the general rule that all offences with a penalty exceeding three months have the right to a jury trial. So by choosing which section to charge under, the Police effectively choose whether an offender shall have the right to trial by jury or not. It has been suggested that the reason for this apparent anomaly is that:⁸⁹

. . . the Court system could not accommodate the luxury of jury trials for the very common type of prosecution for assault suitably brought under the Summary Offences Act.

⁸⁸ Letter from Department of Justice to Justice and Law Reform Select Committee, 29 May 1990, above n 56.

⁸⁹ *Reille v Police* [1993] 1 NZLR 587, 591.

82 In *Juries I* the Commission proposed the repeal of section 43 because:

- it conflicts with the right to trial by jury embodied in section 24(e) of the New Zealand Bill of Rights Act 1990;
- the defendant's right to elect trial by jury should not be removable by the exercise of police discretion;
- one of the functions of the jury is to protect citizens from the power of the state (see paragraph 37), yet section 43 removes the right to elect trial by jury for an offence against the police. It is strongly arguable that is not a limit which is "demonstrably justified in a free and democratic society".⁹⁰

83 On the other hand, the penalty under sections 9 and 10 is still substantially lower than the threshold for jury trial in Canada, whose legislation was the model for our New Zealand Bill of Rights Act.

84 The submissions were broadly in support of this proposal, but it was also suggested that the matter should not be dealt with alone but should be included in the general review of maximum penalties, which we recommend should be conducted by the Ministry of Justice.

On balance, the Commission is of the view that it would be premature to review section 43 of the Summary Offences Act 1981 until a review of maximum penalties is completed.

⁹⁰ As required by New Zealand Bill of Rights Act 1990 s 5.

3

Trial without a jury

Introduction

85 **A**LTHOUGH TRIAL BY JURY has traditionally been recognised as a fundamental right of the accused, there is a view that some types of cases are inappropriate for jury trial. It is often said that some fraud trials and trials involving complex scientific evidence are too difficult for juries to understand, or that they take so long that it is unreasonable to expect citizens to take so much time away from their normal lives for jury service. Sometimes it is argued that misconceptions or prejudices regarding sexual offending are prevalent in the community and raise the risk of bias in juries. The purpose of this chapter is to consider whether there are any circumstances in which it is justifiable for these types of concerns to outweigh the right of the accused to choose (or the interest of the public in requiring) jury trial. While the right to trial by jury is of very great importance, it is subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.⁹¹ The question is whether the problems raised by these cases provide demonstrably justifiable grounds for limiting the right to trial by jury.

Are some trials not justiciable by a jury?

Individual juror competence

- 86 The Research indicated three areas of individual incompetence:⁹²
- eight jurors did not understand English well enough to participate properly, or at all, despite the clear requests in the jury booklet and introductory video, in a number of languages, to

⁹¹ New Zealand Bill of Rights Act 1990 s 5.

⁹² *Juries II vol II*, paras 3.18–3.19.

advise court staff if jurors cannot understand English. This problem is dealt with at paragraphs 196–201;

- in five cases there were one or more jurors who, through intellectual or other limitations, could not grasp the evidence; and
- in five cases involving technical evidence, a lack of knowledge or experience impeded at least some jurors. These limitations seem to have contributed to perverse or compromise verdicts in two cases and a hung jury in a third.

87 On the other hand, the Research also indicated that the reason for a substantial number of jurors having difficulty understanding evidence is the confusing and unsatisfactory way in which it is presented to them. In particular, the manner and sequence in which evidence was given was frequently inconsistent with the jury’s need to construct a narrative “framework”.⁹³

88 There is no specific crime of “fraud”, but crimes which contain elements popularly associated with fraud are contained in Part X of the Crimes Act 1961.⁹⁴ None of these crimes has a penalty exceeding 14 years, so persons charged with them may apply for trial by judge alone under section 361B of the Crimes Act. However, under the current law, no-one can be forced to apply for trial by judge alone, so an accused who chooses not to do so will be tried by jury.

89 In *Juries I*⁹⁵ we pointed out that ultimately the issue must be one of competency of juries to try cases. We suggested that, rather than obliging defendants to be tried by judge alone, evidence should be sifted and presented in such a way that it is comprehensible to ordinary people, before reducing the defendant’s right to trial by jury.

90 The Research indicated that fraud per se is not the problem. Some juries did have particular difficulty in fraud trials, but fraud and lack of comprehension were not necessarily associated; in other words, some fraud trials posed no problem while others did, and some non-fraud trials posed serious problems.⁹⁶ While this suggests that

⁹³ *Juries II vol II*, para 3.13(3).

⁹⁴ They include obtaining by false pretence (s 246, maximum penalty seven years); false statement by a promoter, director, manager or officer of a company (s 250, maximum ten years); false accounting (ss 252–253, maximum seven years); money laundering (s 257A, maximum seven years); and uttering forged documents (s 266, maximum ten years).

⁹⁵ Paras 224–225.

⁹⁶ *Juries II vol II*, para 3.19.

fraud should not in itself be the criterion for a trial by judge alone, it must be remembered that none of the sample cases approached were extremely long or complex. The best recent example of such a case is *R v Adams and Ors*,⁹⁷ which arose out of the collapse of Equiticorp Holdings Limited in 1989 (usually known as the *Equiticorp* case). The trial of that case was by judge alone (because all defendants agreed to that). The trial lasted five months. The Crown called 105 witnesses, the evidence of a further 90 was presented in the form of written briefs, the transcript of evidence ran to 4254 pages, and some 45 000–50 000 pages of exhibits were produced (these were made available on computer, leading to a substantial time saving). The trial judge’s Verdicts and Reasons for Verdicts, which set out the factual narrative and the matters relevant to the particular charges in sufficient detail for the reasons for the decisions to be apparent, without recording every matter taken into account nor dealing with every factual issue raised,⁹⁸ ran to 139 pages, including diagrams. On appeal, the Court of Appeal stated:⁹⁹

The trial was long and complex with a multiplicity of counts. It was dealt with competently by a Judge sitting alone, demonstrating the superiority of such a mode of trial over a jury. There would have been virtually no prospect of [a jury] being able to comprehend the almost incredibly complicated financial arrangements made by these appellants, or to follow the cash flows in and out of the transactions which formed the subject of the charges.

- 91 Audio-digital evidence recording (see paragraphs 336–340) has the potential to reduce hearing time by up to 25 per cent. This might have reduced the *Adams* trial to a little less than four months, which is still an enormous imposition on a jury.
- 92 The submissions on this issue were divided. All recognised the practical difficulties that juries may face in these cases, but some considered the principle of the right to trial by jury too important to be abrogated.
- 93 “Complexity” is not the only problem. It is difficult for most people to take extended time away from their everyday lives to attend jury service. This is particularly so for professional and self-employed

⁹⁷ *R v Adams and Ors* (18 December 1992) unreported, High Court, Auckland Registry, T 240/91, Tompkins J; on appeal *R v Gunthorp and Ors* (9 June 1993), unreported, Court of Appeal, CA 46/93 (and ors).

⁹⁸ *R v Adams*, above n 97 (High Court), 14. This is in accordance with the guidance given by the Court of Appeal in *R v Connell* [1985] 2 NZLR 233, 237.

⁹⁹ *R v Gunthorp and Ors*, above n 97, 86.

people. The length of some trials also makes it very difficult to comprehend and mentally retain the sheer bulk of evidence. The written materials may be voluminous. The High Court judges' submission took this view:

[*Juries I*] suggests that an accused's right to elect trial by jury should not be restricted solely because the trial is complex, and that the determination of this issue should not focus on juror competency, but rather, the real issue is "that the evidence should be sifted and presented in a way which is comprehensible to 'ordinary' people". Whilst agreeing with this statement in principle, we nevertheless think it may be unattainable in practice.

What is apparent is that the prosecution of complex fraud trials usually requires the presentation and analysis of a large number of documents and, in some cases, quite involved legal arguments. A number of factors emerge from this.

- (1) Notwithstanding that efforts are commonly made to simplify the presentation of documents and the analysis of these by graphs and schedules, when a jury is present the presentation of a case is more cumbersome and time-consuming.
- (2) More importantly, the sheer bulk of evidence produced in such trials creates a risk to both prosecution and defence that the outcome will be determined on the basis of simplistic propositions rather than on a careful analysis of the evidence.
- (3) Experience suggests that complex fraud trials are more likely to take significantly longer when a jury is involved.
- (4) It is not realistic to say that the presentation of complex fraud trials can be made more amenable to trial by jury simply by sifting and presenting evidence differently. In order to prove charges there is a certain minimum of evidence required. This is frequently sifted down to the minimum required by the prosecution, very often, with the assistance of the defence.

94 The New Zealand Law Society, on the other hand, is firmly of the view that the right to a jury trial is so fundamental that it should not be abrogated. Juries may have difficulties grappling with some issues, but these are usually overcome. Despite fraud trials and trials involving complex scientific evidence imposing a heavy burden on jurors by occupying considerable amounts of time, the Society does not consider that any change to the present system is necessary or desirable. The present system enables the defendant to initiate the process of a judge alone trial in many of the relevant cases.

95 It is arguable that removing the right of defendants to jury trial in any cases would be premature. The results of the Research have highlighted the need for improvements in the way that cases are

presented to juries, and a number of changes to courtroom practice have already happened, or are recommended in this report (see chapters 9–11). There is a real need to increase the quality of jurors by convincing able people to serve. This implies better payment for jurors and the ability to defer service (see paragraphs 481–487, 490–494), and also increased penalties for those who fail to answer the jury summons (see paragraphs 161–164). It is to be hoped that the net effect of these changes will be to improve the comprehension of jurors and the ease of jury trials. There is evidence other than our Research¹⁰⁰ which indicates that when juries make mistakes in deciding complex cases, the mistakes can be due to problems in understanding judicial instructions or to the error of judges or counsel, rather than difficulty in understanding the implications of complex or massive amounts of evidence. It is therefore arguable that we should wait to see the effects of these improvements before taking the drastic step of limiting the right to jury trial.

- 96 There is an obligation on the Crown to ensure that the number of counts in an indictment is kept to a manageable level.¹⁰¹ However, in the more complex cases it may not be possible to limit the number of counts or the scope of evidence without obscuring the true nature and range of the conduct alleged.
- 97 The Serious Fraud Office, who prosecute the most serious and complex fraud cases, generally support the retention of the jury in these cases, but agree that alternatives need to be found for “those extraordinary trials, with which juries have difficulties”.
- 98 Lord Phillips MR¹⁰² is of the view that juries are not satisfactory in serious fraud because:
- (a) The effect of the length of the trial on both jury selection (those who want to get out will, and those who are most competent will be those who have most reason to escape to avoid clashes) and on the jurors who are selected can impair the ability of the jury to make a proper assessment of the evidence:

¹⁰⁰ Parliament of Victoria Law Reform Committee *Jury Service In Victoria* (final report, vol 3, Government Printer, Melbourne, 1997) para 2.204.

¹⁰¹ *R v Tuckerman* (31 October 1986) unreported, Court of Appeal, CA 280/86. But see also *R v Arbuckle* [2000] 3 NZLR 49, 51.

¹⁰² The Right Honourable Lord Justice Phillips “Challenge for Cause” (1996) 26 VUWLR 479, 493–497. Lord Phillips was the trial judge in *Maxwell* (see paras 130–104). The experience of the President of this Commission, as counsel in the JBL jury trial and the *Adams* (above n 97) trial before a judge alone, has been to similar effect.

... I have spoken to colleagues who have experienced juries which have manifestly been riven by dissent and mutual dislike. In one fraud case recently, which had lasted for months, the judge was driven to discharge the jury because it was clear that they had lost all grip on the case.

(b) Sheer complexity:

I believe that it will normally be possible for a competent judge, with the co-operation of competent and conscientious counsel for both prosecution and defence, by a process of severing counts and ring-fencing evidence, to reduce the case to a dimension that the jury can comprehend. But this presupposes a high degree of competence on the part of those concerned, perhaps higher than one can reasonably expect to be widely available, and if a defence counsel sets out to spoil rather than to co-operate (not happily a situation that I have experienced) I believe such a course is likely to render a trial unmanageable. But this process only renders the trial manageable by removing from the jury a large (sometimes even the major) part of the evidence that is relevant to the central issue – the honesty of the defendant. Often the evidence that is ring-fenced from the jury is cogent. I believe that a trial process that requires one to remove from the tribunal a large part of the relevant evidence, because it would otherwise overwhelm the tribunal, is seriously flawed and, so far as I am concerned, this is the primary reason why I consider that complex fraud cases should not be trial by juries.

(c) The trial process is different when there is a judge alone; counsel's conduct is more restrained and they stick to the issues (he uses the comparison of Diplock trials; see paragraphs 113–115).

(d) Complex fraud involves issues which are susceptible to reasoned analysis, based usually on documentary evidence. A reasoned judgment is therefore particularly appropriate.

99 One consideration which goes against trial by judge alone in these cases is the role of the jury in publicly validating verdicts. Complex fraud trials are often subject to public and media interest, and media “soundbites” are not well suited to conveying the complexity of the issues involved. There is a danger that an acquittal from a judge may be viewed with public cynicism, and that it could be perceived as a soft option for white-collar criminals while traditional offenders (who are much more likely than white-collar offenders to come from the lower socio-economic classes and from minority ethnic groups) still have to face the jury. On the other hand, if the trial were by judge (either alone or assisted by lay assessors) a written judgment would be prepared which identifies what evidence was accepted or rejected, and the reasoning by which conclusions were reached on each charge (see paragraph 112).

The English position

100 In England, all indictable charges are tried by a jury. There is no equivalent of section 361B of our Crimes Act 1961, so the defendant has no ability to choose trial by judge alone.¹⁰³ In 1986, a committee chaired by Lord Roskill produced a comprehensive report about fraud trials.¹⁰⁴ Research conducted on behalf of the Roskill Committee¹⁰⁵ drew the following conclusions:

- (a) Jurors' comprehension of fraud trials can be improved by providing them with information about the technical, legal and financial terms they will encounter during the trial. A glossary giving detailed explanations in everyday language of the key technical terms that may be used during the trial is particularly helpful. A glossary should be given to the jurors before the trial begins and a minimum of 15 minutes study time given for every 10 words in the glossary. Giving the glossary at the time that the information is heard, without a chance for prior study, is not helpful.¹⁰⁶
- (b) Presentation of numerical information can be improved by:
 - using graphs to present time series information;
 - ensuring all graphs are well designed (have informative captions, clearly labelled axes, grid lines, appropriate use of colour);
 - providing explicit cues to the internal structure of balance sheets, showing the relations between subtotals and other figures;
 - using simpler terminology where possible.¹⁰⁷

¹⁰³ There is a group of “either way” offences, which does not include fraud, where the defendant can effectively elect to be tried in the Crown Court (by a jury), or by a Magistrate sitting alone: Magistrates’ Courts Act 1980 (UK) ss 17–27 and Schedule 1. Until recently there was a Bill before Parliament which proposed to remove this right of election: Criminal Justice (Mode of Trial) (no 2) Bill but it has lapsed (see para 77). See also Bridges, above n 85.

¹⁰⁴ Fraud Trials Committee Report (Chairman: Lord Roskill) (London, Her Majesty’s Stationery Office, 1986).

¹⁰⁵ Fraud Trials Committee *Improving the Presentation of Information to Juries In Fraud Trials: a Report of Four Research Studies by the MRC Applied Psychology Unit, Cambridge* (London, Her Majesty’s Stationery Office, 1986).

¹⁰⁶ Fraud Trials Committee, above n 105, 7.

¹⁰⁷ Fraud Trials Committee, above n 105, 30.

- (c) An experiment in which mock jurors were asked to listen to a recorded summing up, either in a continuous 1.5 hour session or for four periods of 20 minutes with 5–10 minute breaks, indicated that rest breaks did *not* significantly increase the amount of information recalled or reduce memory lapses.¹⁰⁸
- (d) In an experiment to compare the effectiveness of summing-up by *either* presenting all the points made by the first speaker then all those made by the second, *or* re-organising their material around issues and presenting all the points made by both speakers on that issue, the former was found to be more effective. This is consistent with other research on memory which shows that maintaining chronological sequence makes it easier to recall information.¹⁰⁹

101 The Roskill Committee recommended that in serious fraud trials juries be replaced by a Fraud Trials Tribunal consisting of a judge and a small number of qualified lay people. This recommendation was not acted upon, but other recommendations for changes in fraud trials were, including the establishment of a Serious Fraud Office to investigate and prosecute the most serious frauds. It was argued that there should be a period of assessment to see whether the changes made were effective in remedying the problems perceived in fraud trials, before removing the right to trial by jury.¹¹⁰

102 In February 1998 the Home Office published a discussion paper on juries in serious fraud trials,¹¹¹ which pointed out that despite the changes implemented as a result of Lord Roskill's committee, dissatisfaction about these trials continued to be expressed. The discussion paper invited submissions on whether there should be an alternative to trial by jury in complex fraud cases, and what those alternatives might be (special juries, judge alone, panel of judges, judge sitting with lay experts, or judge with a jury for key issues only). No final report has yet been produced. However, the possibility of removing trial by jury in serious fraud cases is being considered by the review of the practices and procedures of the criminal courts currently being undertaken by Lord Justice Auld.¹¹²

¹⁰⁸ Fraud Trials Committee, above n 105, 45–51.

¹⁰⁹ Fraud Trials Committee, above n 105, 58.

¹¹⁰ Home Office *Juries In Serious Fraud Trials A Consultation Document* (February 1998) at <www.homeoffice.gov.uk/cpd/pvu/jsft.htm> (last accessed 9 January 2001), para 1.4.

¹¹¹ *Juries In Serious Fraud Trials A Consultation Document*, above n 110.

¹¹² Fraud Advisory Panel Working Party C "Proposals for Procedural Reform in Cases of Serious Fraud Pre-trial Procedures – Part 1" (2000) 150 *New Law J* 398.

It appears likely that review will endorse trial by judge alone in such cases, although the question of how to determine which trials should be by judge alone is still unclear.¹¹³

- 103 English courts have been willing to be quite creative in handling long fraud trials in ways that better facilitate jury trial. In the 1995 *Maxwell* case:¹¹⁴

. . . Justice Phillips was innovative in several respects, and highlighted procedures already within the powers of the judge that could enable juries to deal more easily with complex cases, some of which reflected the findings of the Cambridge Research for the Roskill Committee. Justice Phillips began by reducing the number of charges from ten to two, considering this to be more manageable for the jurors in a single trial. He also reduced the length of the Court day to 9.30am–1.30pm and reserved the afternoons for legal argument. This not only meant that jurors had to concentrate for a shorter day, but also that counsel discussed legal points in the jury’s absence without the need for the jury to keep leaving and returning to the courtroom. The judge also made extensive use of the court computer system. Prosecuting counsel produced a “road map” of documents that would be called and highlighted specific passages to be examined. Several monitors in the courtroom then all displayed the highlighted passages. Finally, before the jury retired to consider its verdict, the judge provided the jurors with a written summary of his three-and-a-half-day summing up, although his refusal to allow jurors to have daily transcripts was controversial.¹¹⁵

- 104 In *Maxwell*, the jury were screened for literacy, for possible prejudice arising from media publicity, and asked about their ability to “stay the course of a trial lasting several months”.¹¹⁶ Jury selection took two weeks:

Jury selection . . . reduced 700 potential jurors to 70 by using lengthy questionnaires and oral questioning. Potential jurors were asked questions regarding their jobs, what papers they read, what they had read about the Maxwells, whether they had heard about the

¹¹³ “Fewer Juries Set to Bring Faster Justice”, *The Times*, London, 9 October 2000, 1.

¹¹⁴ The defendants were Kevin and Ian Maxwell, sons of the flamboyant entrepreneur Robert Maxwell. Robert Maxwell’s death precipitated an investigation into his business affairs which uncovered extensive illegal activity including misuse of pension funds. Kevin and Ian were charged with conspiracy to defraud a company pension scheme. After a lengthy jury trial they were acquitted in January 1996. See S Lloyd-Bostock and C Thomas “Decline of the ‘Little Parliament’: Juries and Jury Reform in England and Wales” (1999) 62 *Law and Contemporary Problems* 7, 18.

¹¹⁵ S Lloyd-Bostock and C Thomas, above n 114, 19.

¹¹⁶ S Lloyd-Bostock and C Thomas, above n 114, 22.

accusations against the Maxwells, and whether they would be able to be dispassionate. The initial questionnaires excluded 550 potential jurors for a variety of reasons, such as poor health or previously booked holidays. The replies of the remaining 150 potential jurors was screened by the judge as well as the lawyers for both parties and a quarter of them were excluded “on grounds of literacy and ‘in the interests of justice’”. Nearly three-quarters of the potential jurors had given answers that were incomplete, ambiguous, or otherwise inconsistent, and were further questioned by the judge in the presence of both sets of lawyers in order to create a final “short list” from which twelve jurors could be chosen at random.¹¹⁷

105 It is not unknown in England for cases to collapse because they are simply too huge and difficult for a jury. In one case just months before *Maxwell*, a major fraud trial which had already run for six months and which was scheduled to continue for another six months, was stopped by the judge because it had become “oppressive and unmanageable”.¹¹⁸

106 In October 1998, the Fraud Advisory Panel Working Party C submitted proposals to the Lord Chancellor’s Department for procedural reform in cases of serious fraud following the establishment of a review of pre-trial procedures.¹¹⁹ That Working Party reached no consensus as to whether trial by jury should be removed in serious fraud cases and accordingly did not make any recommendation in this regard. However, it did recommend¹²⁰ that extensive procedural reforms should be made before further consideration is given to the removal of the right to jury trial in serious fraud cases. Their recommendations included:

- The screening procedure adopted in *Maxwell* be formalised and expanded in order to set a basic threshold of literacy and numeracy for jurors in serious fraud cases, and that Rules of Court should provide for a jury questionnaire that would test these skills in potential jurors.
- Greater use of information technology in trials.

¹¹⁷ S Lloyd-Bostock and C Thomas, above n 114, 22–23.

¹¹⁸ “Judge Stops Trial That Jury Cannot Understand”, *Daily Telegraph*, 23 March 1995, 1.

¹¹⁹ For extracts from the report, see Fraud Advisory Panel Working Party C, above n 112, and Fraud Advisory Panel Working Party C “Proposals for Procedural Reform in Cases of Serious Fraud Pre-Trial Procedures – Part 2” (2000) 150 New Law J 435.

¹²⁰ “Proposals for Procedural Reform in Cases of Serious Fraud Pre-Trial Procedures – Part 2”, above n 119.

- A system called “live-note”, where shorthand notes are fed onto a personal computer operated by the judge, barristers and solicitors who can flag passages as they appear on the screen (in New Zealand, this function can be played by the audio-digital recording system, see paragraphs 336–340).
- Rules empowering the judge to set time limits on counsel’s opening and closing speeches, because the Roskill Committee¹²¹ found counsel’s prolixity lengthens trials considerably. The Roskill Report did not favour this, but the Working Party did:

We believe that, once the issues have been properly defined and clarified during the pre-trial process set out above, it should be a relatively straight-forward task for the judge – who by this time will also have become fully acquainted with the papers – to set realistic time limits tailored to the requirements of the case . . . To further assist in the jury’s comprehension of the issues in the case, the trial should begin with a clear statement by both parties of their case. To this end, the defence should be required to make an opening speech after the prosecution’s opening speech; the right of the defence to make a speech at the close of the prosecution’s case if they intend to call evidence as to fact other than that of the defendant should be removed. Skeletons of all speeches should be prepared for the jury.

- The jury should get a written copy of the judge’s directions on the law.
- Judges should get their own legally trained assistants, assigned one on one, to assist them in the preparation for and management of serious fraud trials.
- Judicial training should include more exposure to accounting techniques and the types of financial practices commonly used in serious fraud. Judges should have practical experience in both criminal and civil jurisdictions. Continuing education for assigned judges should be encouraged and particular attention paid to how to sum up serious fraud trials.

107 We would endorse these proposals and note that the CPC Manual (see preface) should address several of them. Although we have rejected the proposal that there should be a general literacy test for all jurors (see paragraphs 207–209) there is no reason why an exception cannot be made in cases which involve more documentary evidence than usual.

¹²¹ Fraud Trials Committee Report, above n 104, para 9.40.

Trials involving the most serious offending against the person and the state

- 108 We have already concluded (see paragraphs 65–66) that in the case of the most serious offences against the person and against the state, there should be a presumption of trial by jury, which should only be displaced if the accused can show that a fair trial by jury is not possible. This is because of the public interest in jury trial (see paragraphs 53–54) and the need for the public validation of jury trial in the most serious cases. In such cases, the public interest in jury trial must outweigh any inconvenience to jurors or any other considerations. The prosecution should not be able to apply for trial by judge alone in these cases.

Whether or not one takes the view that some trials are simply too complex for a jury, there is a need for procedures and tools that will assist counsel to make clear the complexities of the case. This paper (chapter 11) discusses ways in which this can be done. However, there are some trials that will simply be too long for a jury. It is unfair to require 12 citizens to be disrupted in their lives for unreasonably long periods. Experience shows that those cases which may be too complex for a jury are invariably also too long for it to be reasonable to ask a jury to hear them, and for practical purposes the matter should be approached on the basis of length rather than the more debatable one of complexity. We propose (see paragraphs 128–132) that other than for the most serious crimes the prosecution will be able to apply for trial by judge alone if the trial will likely take longer than 30 sitting days (six calendar weeks) if it is heard by a jury. In practice, this will limit the number of unreasonably complex trials being put before juries.

Statutory amendment will be required.

Alternatives to trial by jury

- 109 If it is accepted that some trials are too long to be tried by jury, the question is what is the best alternative. The possibilities are a judge alone, a panel of judges, or a judge sitting with one or more lay experts.
- 110 One commentator¹²² has pointed out a difficulty likely to arise if complex fraud trials were tried by lay experts with a judge – that professional people do sometimes have strong views about technical

¹²² R Rhodes QC “Juries in Fraud Trials” (1998) 148 New LJ 239.

points;¹²³ questions of fraud may merge with these technical considerations, introducing flaws into the assessor's overall view.

- 111 A more serious problem with the use of lay assessors is that in effect it will lead to the judge receiving expert evidence in private and without the parties having the opportunity of cross-examination.¹²⁴ While parties may agree to such a procedure in commercial arbitration, it is not acceptable in the criminal context, when the liberty of the accused is at risk.
- 112 An obvious advantage for the defendant¹²⁵ would be the availability of a written judgment that identifies the evidence accepted or rejected by the judge in reaching the verdict on each charge. As well as informing the defendant how the verdict was arrived at, this would provide comfort and public confidence that the trier of fact understood the case and approached the issues in a reasoned way, and alleviate the current concern that in trials of multiple charges the jury may have reached compromise verdicts on some of the charges simply because of the complexity of the issues.
- 113 In considering whether it would be more appropriate for these matters to be tried by judge alone, or by another method such as lay assessors, it is interesting to consider the example of Northern Ireland, where since 1972 certain trials of serious violent offences have been tried by judge alone because of a fear of jury intimidation by political terrorists. Such trials are commonly called "Diplock trials".¹²⁶ A recent study of Diplock trials¹²⁷

¹²³ For example, an accountant lay assessor may feel strongly that a particular matter should be disclosed in the body of a company's accounts rather than in the notes.

¹²⁴ The director of the United Kingdom Serious Fraud Office (R Wright "The Investigation and Prosecution of Serious and Complex Fraud in the 21st Century" (February 2000) *The Reformer* 10) suggests that to avoid such assessors effectively acting as expert witnesses they should not be specialists from the area of the case but "financially or commercially-aware". However, "financially and commercially aware people" typically do have accounting or economic qualifications and experience, and are likely to provide what is in effect expert evidence.

¹²⁵ Serious Fraud Office submission.

¹²⁶ So-named because they were instituted as a result of a report from a Commission chaired by Lord Diplock; see Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland (1972) Cmnd 5185 ("the Diplock Report").

¹²⁷ J Jackson and S Doran *Judge Without Jury: Diplock Trials In the Adversary System* (Clarendon Press, Oxford, 1995). For a shorter summary, see J Jackson and S Doran "Juries and Judges: A View From Across the Atlantic" (1997) 11 *Criminal Justice* 15.

concluded that there are a number of ways in which judge alone trials differ from jury trials:

- (a) certain judges tend to make their views known to counsel before making a final decision, and for there to be argument between counsel and the judge on the strength of the evidence;
- (b) judges are less inhibited about questioning witnesses;
- (c) there is less scope for counsel to put forward broad, sympathy-based arguments;
- (d) counsel tend to agree on more of the evidence, thus paring the evidence down more than in jury trials.¹²⁸

114 The Diplock Report, which recommended the introduction of this mode of trial, firmly rejected the idea of a panel rather than judge alone:¹²⁹

Non-jury trials in civil actions are always conducted by a single judge alone. Our oral adversarial system of procedure is ill-adapted to the collegiate conduct of a trial of fact. In criminal proceedings, in particular, immediate rulings on admissibility of evidence and other matters of procedure have constantly to be made by the single judge when sitting with a jury. It would gravely inconvenience the progress of the trial and diminish the value of oral examination and cross-examination as a means of eliciting the truth, if a plurality of judges had to consult together, albeit briefly, before each ruling was made.

115 It is not clear yet whether Diplock trials will survive in Northern Ireland if the Peace Accord is successful. The United Kingdom government has clearly stated its intent to return to jury trial in Northern Ireland in all cases tried on indictment as soon as possible.¹³⁰ A recent review of Diplock trials has agreed that jury trial should be restored as soon as possible, although this is not immediately possible because the risk of juror intimidation remains high.¹³¹

¹²⁸ That was the experience in the *Adams* trial (see above n 97).

¹²⁹ Diplock Report, above n 126, 18.

¹³⁰ Diplock Review Group *Diplock Review Report* (Northern Ireland Office, May 2000), Annex A.

¹³¹ The whole criminal justice system in Northern Ireland has recently been extensively reviewed (Criminal Justice Review Group *Review of the Criminal Justice System in Northern Ireland* (Her Majesty's Stationery Office, 2000). Although the question of whether Diplock trials should remain was specifically excluded from their brief the report was clearly in support of jury trial (para 7.3):

In those cases which are too long for a jury, the best alternative is trial by judge alone. That is the method already used as an alternative under section 361B, and it has proved satisfactory in practice. There is no need of expert assessors, because expert witnesses will be called by the parties where appropriate.

Trials which attract extensive publicity

- 116 In *Juries I*¹³² we asked whether trials which attract extensive publicity are more suitable for trial by jury or judge alone. Some incidents of serious offending attract very considerable media attention. That attention may start at the time that the offence is discovered, possibly long before any suspect is charged in relation to it. There is always conflict between, on one hand, free speech and the right to report on crime and criminal trials, and the right of an accused to a fair trial on the other. This is discussed further in chapter 15, Media and their influence on juries.
- 117 In *Juries I*¹³³ we did not favour trial by judge alone on the ground that the trial has attracted a great deal of media publicity, unless of course the defendant elects that option. Often crimes which attract the most media attention are the most serious ones, such as murder or sexual violation, in which the defendant does not currently have the right of waiver, but to which we have recommended (see paragraphs 65–66) that the right to apply for trial by judge alone should be extended. The judge’s power to instruct jurors to disregard prejudicial publicity should be a sufficient safeguard against pressure on jurors. That view is supported by the Research, which found no evidence that pre-trial publicity or publicity during the trial had any real influence on jurors.¹³⁴ In its submissions, the Auckland District Law Society said:

“It was apparent throughout our work that the principle of jury trial in Northern Ireland was not at issue; and many people positively looked forward to the time when it would no longer be necessary to have guilt or innocence in scheduled cases determined by a single judge in trials conducted under the provisions of emergency legislation. It is not for us to comment on when that position might be reached or on the issue of so-called Diplock courts. However we wish to say at the outset that **we fully endorse the principle of jury trial in cases tried on indictment at the Crown court**, which brings lay people to the very heart of the criminal justice process and, particularly in the circumstances of Northern Ireland, constitutes a symbol of normality with all that means for public confidence.”

¹³² Para 190–193.

¹³³ Para 191.

¹³⁴ *Juries II vol II*, paras 7.46–7.57.

We submit that juries have sat on trials with enormous public and media interest for many years and, provided there is a responsible reporting by the media, we see no reason why juries cannot continue to do this. The recent granting of a retrial in the *Wickcliffe* case shows that the media are not being responsible in all situations, but it seems more appropriate to educate the media rather than restrict trial by jury.

118 We respectfully agree with the submission of the High Court judges, who said:

. . . the situation must not be allowed to eventuate where, in effect, the media do, or appear to, dictate the mode of trial.

119 It may be that some highly publicised cases ought to be tried by judge alone for reasons of length and complexity, based on the criteria set out in paragraphs 129 and 131. However, given the results of the Research, and our recommendation that defendants' right to waiver be extended, we recommend that the fact that a case has received extensive publicity should not of itself be a factor in deciding whether a trial should be heard by jury or by a judge alone.

Trials involving sexual offences

120 In *Juries I*¹³⁵ we asked whether trials involving sexual offences are more suitable for trial by jury or judge alone. There are two bases on which it can be argued that sexual cases should be heard by a judge alone. First, that jurors are not sufficiently competent or impartial, and secondly, that jury trial is too traumatic for complainants. We shall deal with these in turn.¹³⁶

Jury ability to try sexual cases

121 In *Juries I*¹³⁷ we pointed out that there are a number of important advantages of jury trial in sexual cases. First, in many cases involving allegations of sexual offending the central issue is credibility: should the complainant be believed? Twelve jurors together are arguably better equipped to determine that than a lone judge or expert. Secondly, sexual offending crosses the line between acceptable social and sexual interaction and violence. Because there is a continuum, with sexual offending located at one end and acceptable interaction

¹³⁵ Paras 194–198.

¹³⁶ We also note that most serious sexual offences, including sexual violation, are “middle band offences” and therefore the prosecution would not be able to apply for trial by judge alone (see para 108).

¹³⁷ Paras 195–196.

at the other, sexual offending is relevant to the community in a way that some other offences are not. We suggested that these characteristics make it particularly desirable that there be community input in a sexual offence trial. Thirdly, it may be that, through juror participation in trials involving allegations of sexual offending, stereotypical thinking and myths¹³⁸ are more likely to be identified, challenged and debunked.

122 The Research's conclusions were very tentative in this area. There were a few cases¹³⁹ in which individual male jurors expressed strongly sexist views about either their fellow jurors or the nature of the case, and one in which a male juror was reluctant to find guilt in an indecent assault case for precisely the sort of "myths and stereotypes" reasons that Rape Prevention Group Inc cite (see paragraph 123). However, the rest of the jury over-rode him and the accused was convicted. In addition, there were four cases in which a more general gender split occurred in the jury, two of which were sexual offences; however in both cases the misunderstandings or myths were clarified by other jurors.

123 In their submissions, Rape Prevention Group Inc were strongly in favour of trial by judge alone.¹⁴⁰ They do not agree that a jury is well-equipped to deal with the issue of credibility. They argue that:

Experts who have a thorough knowledge of rape trauma would understand aspects such as shock, impact, further contact with rapist etc, (an area that all those in the justice system need further education on). Only those who are thoroughly educated in the area of rape trauma are properly equipped to make informed judgments – a jury is not.

They suggest that rape cases be tried by a specialised panel including a counsellor or psychologist who has clientele experience in the area of rape trauma, and for this system to replace juries for a period of ten years, and then be reviewed. In summary, their reasons are:

(a) the community's lack of education and the prevalence of rape myths;¹⁴¹

¹³⁸ See below n 141.

¹³⁹ Unpublished Research data.

¹⁴⁰ Their submissions were endorsed by Victim Support.

¹⁴¹ For example, the idea that acquaintance rape (often called "date rape") is not a true rape, or that any woman walking home alone late at night or dressed provocatively is asking for it. The prevalence of these myths mean that many people are, often unconsciously, biased against rape complainants. For a detailed discussion of community attitudes to rape, see D Shapcott *The Face of the Rapist* (Penguin, Auckland, 1988).

- (b) gender bias, because sexual violence and domestic assault against women are very common.¹⁴² They argue that it is in men's interest (of power and pleasure) to ensure the continuance of rape, and because of social conditioning against complainants, women are not likely to be biased in favour of their own gender, even when they themselves have been victims of sexual violence. Rape victims are also more likely to avoid jury service, particularly in rape cases;
- (c) juror inability to weigh evidence: general prejudice against rape complainants, combined with tiredness, legal jargon, stress or arousal from the sordidness of the case, may mean that jurors are not in a position to make a clear decision.

124 However, other submissions were supportive of the view expressed in *Juries I*. The Legal Services Board pointed out that it is not tenable to make a blanket statement that sexual trials are more suitable for either juries or judge alone. While juries may have little experience of such matters, they bring collective common sense and life experience. Others were of the opinion that other ways of reducing the complainant's trauma should be emphasised.

Jury trial too traumatic for complainants

125 The Rape Prevention Group Inc emphasised the difficulty that complainants have in giving evidence, particularly in small towns.¹⁴³

¹⁴² A Morris *Women's Safety Survey 1996* (Victimisation Survey Committee, Wellington, 1997), 35, showed that 15 per cent of women with current partners reported experiencing at least one act of physical or sexual abuse in the past year. Women's Refuge consider this to be a very conservative figure.

¹⁴³ Their submission said:

It is very difficult to give evidence of a traumatic and sexually graphic nature in front of a jury. Soiled underwear, clothes, or any soiled sanitary napkins or tampons the victim was wearing at the time of the attack will also be on display or in clear plastic bags. Sometimes articles are held up for everyone to get a better view, or to draw attention to certain aspects . . . The jurors, having knowledge of sexually explicit and humiliating details about the victim are then dispersed back into the community . . . As the complainant is not usually shown the juror list and has no say in peremptory challenge, a complainant may find on court day that she has slight acquaintance with one or more jurors, and consequently feel very humiliated about this. She may, for example recognise a man who has sexually harassed her in the past. In small towns the problem is highlighted. After the case, she may bump into jurors, which is not only humiliating and may cause avoidance behaviour, but is also very painful particularly if she lost her case . . . In the preface to *The Face of the Rapist* [above n 141]

In *The Evidence of Children and Other Vulnerable Witnesses*,¹⁴⁴ the Law Commission proposed that, in addition to children, other witnesses including complainants and defendants might apply to the court to give evidence in an alternative way (for example, closed circuit television), based on the needs of the witness. In the *Evidence* report¹⁴⁵ we noted that although those original proposals were confined to cases of “vulnerable” witnesses, like sexual complainants, the grounds in the proposed Evidence Code should be extended to include consideration of efficiency or necessity (for example, hospitalised witnesses). Reform was strongly supported, especially by groups who work with children and with victims of sexual abuse and domestic violence. The main criticism was that increasing the availability of alternative ways of giving evidence could lead to these alternatives becoming the norm and undermine the adversarial system. There were fears that using alternative methods prevents assessment of credibility based on demeanour. However our research showed such concerns to be largely unfounded.¹⁴⁶

Recent investigations into the extent to which these methods assist witnesses and increase the amount of reliable evidence available to fact-finders, have all resulted in recommendations for greater use of alternative ways of giving evidence, in particular closed-circuit television and video links. This move is consistent with recent jurisprudence and other law reform initiatives. Interested community groups are clearly in favour of increasing the availability of other means of testifying. Academic comment on the Law Commission’s proposals has also been extremely favourable.

126 Accordingly we have proposed section 103 of the draft Evidence Code, which provides for directions about alternative ways of giving

David Shapcott gives a true account about a New Zealand town in the eighties, in which three young men from respectable homes have attempted to rape a seventeen year old acquaintance. The young woman, bloodied and bruised, somehow manages to escape and reports it to the police. The community, sympathising with the young men, turned against the woman, calling her a liar and a ‘dirty slut’ etc. The police have to warn her family to keep her safe lest she is physically harmed. On the day of the court case, the young woman did not turn up; she had committed suicide the night before. In court, there were smiles all around, and the community was overjoyed that the young men had been acquitted.

¹⁴⁴ New Zealand Law Commission *The Evidence of Children and Other Vulnerable Witnesses*: PP26 (Wellington, 1996) paras 123–135.

¹⁴⁵ New Zealand Law Commission *Evidence: Reform of the Law: R55 (vol 1)*, paras 450–453.

¹⁴⁶ *Evidence*, above n 145, para 453.

evidence. While that section is not expressly limited to sexual complainants, the factors listed (including trauma suffered by the witness, witness' fear of intimidation, and the nature of the evidence that the witness is expected to give)¹⁴⁷ will be applicable in most serious sexual cases.

Conclusion

- 127 As a matter of general principle, it is most important to use juries in those trials where the matters alleged are most serious, most grievously offend community values, and most affect the rights of citizens in a free and liberal democratic society. Sexual violation is in this category; the right of citizens to be free from such attack is fundamental. There is a very powerful community interest in having this type of crime judged by members of the community, even where trial by jury is difficult for the victim.

The recommendations in our proposed Evidence Code are sufficient to protect complainants in sexual offending cases, and abrogation of the right to trial by jury is not justified.

Criteria for determining which cases are appropriate for trial by judge alone

- 128 If our recommendations in *Simplification of Criminal Procedure*¹⁴⁸ are accepted, all fraud trials will commence in the District Court with a presumption of trial by judge alone but with the right for the accused to elect trial by jury. However, if the accused does elect jury trial, we recommend that the prosecution should have the ability to apply for trial by judge alone if the case before a jury would take longer than 30 sitting days.
- 129 If it is accepted in principle that compulsory trial by judge alone should occur in some lengthy cases, the question would be in which cases. Statutory criteria would be required. The first criterion should obviously be length of trial because:
- (a) that recognises jurors' right not to be asked to serve for an excessive time; and

¹⁴⁷ New Zealand Law Commission *Evidence: Code and Commentary: R55 (vol 2)*, ss 103(3)(c), (d), and (g).

¹⁴⁸ See para 28.

- (b) it is possible to calculate with some accuracy in advance how long at least the prosecution's case will take, so that a reasonably accurate assessment of its length can be made. (It is not usually possible to calculate in advance how long the defence case will take, as that will often vary according to how the prosecution's case unfolds, but the prosecution's case is the minimum.)

130 There should be no set length of time which if exceeded would give rise to a trial by judge alone. It is a matter for discretion. However, there should be a threshold or minimum length of time that must be exceeded before the prosecution can seek to overturn an accused's election of trial by jury. We suggest that threshold should be 30 sitting days (six calendar weeks).

131 Other criteria would include:

- The complexity of the legal issues.
- The number of defendants.
- The number and nature of the charges, such as being laid in the alternative and whether there are conspiracy charges. It is an important function of the judge to seek to streamline an excessively complex case. That may be achieved by splitting one indictment into two or more, but such a course may not be practicable. The Serious Fraud Office has indicated¹⁴⁹ that its longer and more complex trials tend to involve multiple charges, often laid in the alternative and, in some cases, also involve conspiracy charges along with substantive charges.
- The nature of the offence. We consider that the more serious the offence the more the public interest lies in having the charge determined by a jury. For this reason we have proposed that for the higher tier (of more serious offences) the presumption will be trial by jury and an accused would be required to overcome that presumption in order to secure trial by judge alone. Because of this public interest factor in the higher tier of cases, we do not propose that length of trial should enable the prosecution to apply for trial by judge alone. For higher tier offences, if the accused wants trial by jury, then it is reasonable to require members of the public to accept the disruption to their lives if they are chosen as jurors. Accordingly, we would restrict the ability of the prosecution to apply for judge alone trial in lengthy

¹⁴⁹ Serious Fraud Office submissions.

cases to the lower tier of offences. But even within that tier the nature of the offence will be a factor the judge will take into account when deciding whether or not to grant an application. For example, we would expect a judge to be less likely to grant a prosecution application where the offence involved relatively serious violence as opposed to an offence against property.

- The volume of evidence which the parties intend to adduce, and the number of witnesses they intend to call (again, something which the prosecution can ascertain more easily than the defence).

While length of trial is the primary criterion, clearly in almost all lengthy trials these other criteria are likely to apply.

- 132 In practice, if the application was being made by the prosecution, they would have to show that everything reasonably possible had been done to limit the number of witnesses, the scope of the evidence, the length of the indictment, and any other circumstance that could affect the duration of the trial. It is likely that in practice such applications would rarely be granted other than in cases of property crime.

In all cases except high tier offences, if the court is satisfied that, having made all reasonable procedural orders to facilitate the shortening of the trial, it is probable that the duration of the trial will exceed 30 sitting days it may, on the application of the Crown, order trial by judge alone. Before making such an order the court must be satisfied that in the circumstances of the case the imposition on members of the public if required to sit as jurors for the predicted duration of the trial outweighs the entitlement of the accused to trial by jury. The circumstances of the case to be considered by the court would be those set out in paragraphs 129 and 131.

Statutory amendment will be required.

4

Making juries more representative

Introduction

133 **I**N *JURIES I*¹⁵⁰ WE IDENTIFIED four goals of the jury selection process. These goals are:

- Competence: individual jurors should be competent in the sense that they are mentally and physically capable of acting as jurors in the trial.
- Independence: jurors should also be independent of any obligation to the justice system or the government. Basic random selection techniques should be maintained so that the selection of individual jurors is beyond the control of court administrators and therefore the state.
- Impartiality: jurors should be impartial. However, given the pervasiveness of the media in modern society, there are practical limits to selecting jurors who are absolutely impartial in the sense that they lack any knowledge about a particular case. This is discussed further in chapter 15.
- Representation of the community: in a democratic society, the legitimacy of the jury system, and the wider criminal justice system, rests on all groups in the community participating on juries. The diversity of knowledge, perspectives and personal experiences of a representative jury enhances the collective competency of the jury as fact-finder, as well as its ability to bring common sense judgment to bear on the case.

134 The purpose of this chapter is to discuss ways in which representation of the community on juries can be maintained and improved.

135 In response to *Juries I*, one submission¹⁵¹ expressed concern at what was perceived as an underlying assumption that in order to be

¹⁵⁰ Paras 253–256.

¹⁵¹ From the High Court judges.

representative a jury needs to include representatives of particular groups within the community. The Commission agrees that this is not necessary, and indeed that it should not be attempted, which is why we have rejected the proposition that judges should be able to direct that one or more persons of the same ethnic identity as the defendant (or the victim) serve on the jury (see paragraph 160). What is required is that all persons who are eligible to serve on juries, including those who are younger or older, or from ethnic minorities, do have an equal *opportunity* to serve.

136 In *Juries I*¹⁵² we discussed five options aimed at improving representation of the community on juries:

- improving representation on the electoral rolls (at that time being considered by the Electoral Enrolment Centre and Department for Courts);
- extending jury district boundaries;
- considering representation as a factor in change of venue applications;
- guidelines for excusing jurors (also then being considered by the Electoral Enrolment Centre and Department for Courts); and
- a judicial power to determine the composition of the jury.

137 We shall discuss each of these in turn. We shall also discuss the problem of people who fail to turn up to court when they have been summoned for jury service. Broadly, it is our view that too many people are failing to answer their summons for jury service, and a two-fold approach is needed to deal with this. First, it must be made easier for people to serve. To that end jurors need better payment, proper reimbursement of travel costs, the ability to defer service, and protection of employment (all of which are discussed in chapter 16). Secondly, it must be made clear that failure to answer a jury summons without seeking to be excused is not acceptable. That means that those who fail to answer the summons should be identified and subjected to realistic penalties (see paragraphs 161–164).

Improving representation on the electoral rolls

138 Jury lists are compiled from the electoral rolls. If eligible voters fail to enrol, not only are they unable to vote, they cannot be summoned for jury duty. Efforts to update the electoral roll and to encourage people who are not yet enrolled to do so are ongoing, and

¹⁵² Paras 282–304.

not confined merely to election time.¹⁵³ As young people and ethnic minorities are traditionally less likely to enrol, the Electoral Enrolment Centre particularly targets them in its advertising and takes positive steps to contact and enrol them, for example by employing members of ethnic minorities to go into workplaces, churches and community places to enrol people. In the 1999 General Election, 91.1 per cent of the eligible voting population was enrolled, a figure which compares favourably with Australia (86.3 per cent), the United States (74.4 per cent), Canada (83 per cent), and Germany (91.7 per cent), but not with Sweden (94.7 per cent).¹⁵⁴

139 Until recently, the list of jurors was supplied by the Chief Registrar of Electors to the Registrar of the Court just once a year, on or before 1 November.¹⁵⁵ As the lists rapidly became outdated as people move house (or die), this clearly required improvement. The Juries Act 1981 has now been amended¹⁵⁶ so that the lists can be provided more often. Initially at least the lists will be provided quarterly, but as computerisation has made the selection process quick and easy, there is no technical barrier to the lists being provided much more often if required.¹⁵⁷ Because the electoral roll is constantly updated, it is anticipated that this change will significantly decrease the number of people who currently do not receive their jury summons because they have moved house.

140 The Department for Courts has made considerable progress in recent years in improving its management of the jury selection procedure. The computerised jury management system was launched on a pilot basis in May 1997 and is now in use in all jury trial courts – the Juries Amendment Act 2000 allows for its full implementation. In addition to getting updated jury lists more frequently, it is now possible:

- for jury lists to be provided initially to a central point rather than being supplied to all courts individually, with the courts having access to the list either electronically or in hard copy,

¹⁵³ For example, the Electoral Enrolment Centre receives notice of every change of address form which is completed at a Post Shop, and both sends an enrolment pack to the person at their new address and checks to ensure that the new occupant of the address they have left is also enrolled.

¹⁵⁴ “Enrolment Centre Pleased with Registration results” (March 2000) Issue 15 Electoral Brief 1.

¹⁵⁵ Juries Act 1981 s 9 (repealed by Juries Amendment Act 2000).

¹⁵⁶ Juries Act 1981 ss 9–12A, inserted by Juries Amendment Act 2000.

¹⁵⁷ Personal communication with Murray Wicks, Electoral Enrolment Centre.

enabling the computerised system of management to be cost-effective for all courts;

- for different systems for selecting and summoning jurors to operate in different courts – a pilot computerised system for randomly selecting jurors, replacing the current method of drawing numbers out of a barrel, can run in one or more courts while the current system is operational in the rest;
- to update references to people ineligible to serve as jurors more frequently.

141 The Commission wholeheartedly endorses the efforts which have been made by the Department for Courts and the Electoral Enrolment Centre in practical measures to increase representation on the electoral roll and to improve the accuracy of the jury lists.

Women on the electoral roll

142 It has been pointed out in response to *Juries I*¹⁵⁸ that some women, including Māori women, do not enrol either because they have been the victims of violence and fear being located by their abusers, or because they fear reprisals if they sit on a jury. The Chief Registrar may¹⁵⁹ direct that a person be privately registered (so that personal details are not published) if publication would be prejudicial to that person's personal safety or the safety of his or her family. However, problems may arise because:

- (a) the Registrar only accepts private registration if there is a specific reason for the fear. A general fear of reprisals is insufficient;
- (b) the application for privacy must be renewed each time enrolment is renewed, that is every three years, and the normal supporting evidence for the application is a letter from the Police. A victim of violence may suffer life-long fear, but the Police may be reluctant to renew the letter if a number of years have passed without further incident.

143 While a fear of enrolling on the electoral roll at all is outside the scope of this paper, we should point out that persons who are

¹⁵⁸ Submission of Rape Prevention Group Inc.

¹⁵⁹ Electoral Act 1993 s 115.

privately registered are not summoned for jury service at all.¹⁶⁰ A potential juror who is not privately registered but has reason to fear danger by attending court for jury service, can ask the Registrar to be excused,¹⁶¹ on the grounds that, because of personal circumstances, attendance would result in undue hardship or serious inconvenience.

Extending jury district boundaries

- 144 Jurors are summoned to serve in the court in their jury district. A jury district includes all places within 30 kilometres by the most practicable route from the courthouse in the town in which jury trials may be held.¹⁶² Therefore anyone who lives more than 30 kilometres from a court where jury trials are held is never required to serve on a jury. The distance was originally 10 miles,¹⁶³ which was increased to 15 miles (or 25.35 kilometres) in 1951,¹⁶⁴ but only for Auckland, Wellington, Christchurch and Dunedin. The distance was increased to 15 miles in all areas in 1957,¹⁶⁵ and to 30 kilometres in 1976.¹⁶⁶ Thus the distance has not increased significantly in over 30 years, despite the very considerable improvement in roading and increased car ownership. In *Juries I*¹⁶⁷ we asked whether these districts should be extended, or alternative jury districts created.
- 145 Although a slightly greater proportion of Māori live in rural areas than of non-Māori,¹⁶⁸ extending the boundaries is unlikely to increase significantly the proportion of Māori eligible for service. This was the conclusion reached in 1995 by the (then) Department

¹⁶⁰ Juries Act 1981 s 9(4)(b) (previously s 9(3)(c), amended by the Juries Amendment Act 2000). One submission (from the Ministry for Justice) suggested that persons on the private roll could be permitted to serve on juries if they notified their willingness to do so. For the reasons set out in para 150 we do not consider that it is appropriate for anyone to have the right to “opt in”.

¹⁶¹ Juries Act 1981 s 15(1)(b).

¹⁶² Juries Act 1981 s 5(3).

¹⁶³ Juries Act 1908 s 12(a).

¹⁶⁴ Juries Amendment Act 1951 s 3.

¹⁶⁵ Juries Amendment Act 1957 s 2.

¹⁶⁶ Juries Amendment Act 1976, s 3.

¹⁶⁷ Paras 288–289.

¹⁶⁸ In 1996, 16.9 per cent of Māori lived in a rural centre or other rural area, as compared to 14.1 per cent of non-Māori: Statistics New Zealand *New Zealand Now: Māori* (Statistics New Zealand, Wellington, 1998) 28.

of Justice in *Trial By Peers?*¹⁶⁹ That study considered the effects of increasing the radius of jury districts from 30 kilometres to 45 or 60 kilometres, and found that for the Māori population, while there was variability in the Court areas:¹⁷⁰

The increase in the proportion of Māori in the *total* pool of people aged 20 to 65 years was 0.4 per cent between radii of 30 and 45 kilometres, and a further 0.6 per cent when the radius was extended to 60 kilometres.

146 We note that the upper and lower age limits have now changed. While the upper limit is unlikely to make a difference, because the number of Māori in that age group is proportionately low, the lowering of the minimum age limit to 18 years may make a difference over time as Māori form a larger proportion of that age group than they do of older age groups.

147 However, it is interesting that the same study found that, for the overall population, increasing the boundaries would increase the proportion of the population available for jury service. The increase varied very considerably from one court district to another (from 2.7 per cent in Dunedin to 78.7 per cent in Rotorua) – overall the larger centres (with the exception of Hamilton) showed a smaller increase, while smaller centres showed a proportionately larger increase.¹⁷¹ The Research conducted on behalf of the Commission indicated that people in smaller centres are more likely to be called for jury service;¹⁷² in smaller centres it was not uncommon to find two or three jurors on a jury who had served previously, often on a number of occasions:¹⁷³

I usually get called up every six months and it seems to rotate – myself, my daughter, my son.

148 While it must be borne in mind that the small number of cases used in our research means that the data on this point are not statistically

¹⁶⁹ S Dunstan, J Paulin and K Atkinson *Trial By Peers? The Composition of New Zealand Juries* (Department of Justice Policy and Research Division, Wellington, 1995), para 6.4.

¹⁷⁰ *Trial By Peers?* above n 169, para 6.4.

¹⁷¹ *Trial By Peers?* above n 169, table 6.1.

¹⁷² Fifteen per cent of jurors in metropolitan areas (Auckland, Otahuhu, Wellington, Hamilton, Christchurch) had served previously, compared to 30 per cent of jurors in provincial areas (Palmerston North, Napier, Rotorua, Greymouth, Nelson). The most extreme example was Rotorua, where 19 out of 41 jurors had served before, some up to four times. (Figures extracted from unpublished Research data.)

¹⁷³ Unpublished data.

reliable, taken together with the *Trial By Peers?* findings they do suggest that increasing the boundaries would make more people eligible for service in smaller centres, thereby decreasing the chance of others being called for service repeatedly.

- 149 The submission of the National Council of Women was most useful on this point because they represent a large number of groups throughout New Zealand. Their members' opinions were clearly and geographically divided, with those in main centres supporting an increase to the boundaries, seeing it as an advantage to increase the pool from which jurors could be drawn, and thus render it more representative of the community. But those in smaller centres were opposed, on the basis of the practical difficulties involved, especially with transport. However, it was also noted that people in smaller centres already have practical difficulties with attendance, and that such people are routinely granted exemption by the court registrars.
- 150 Some submissions suggested that jury service could be performed voluntarily by persons outside the 30 kilometre boundary. While there is no technical difficulty in doing this,¹⁷⁴ it is preferable, as far as practicable, not to have to rely on a voluntary system. Jury service is a civic duty, sometimes a very onerous one, and it should fall equally on everyone unless there is a specific reason otherwise. People who volunteered from outside the boundary would be easily identified by counsel and likely to be peremptorily challenged by counsel suspecting them, rightly or wrongly, of excessive zeal or improper motives.¹⁷⁵ It would also add to transport costs.
- 151 The question of the cost of transport is a problem even now (see paragraphs 497–499) and, as noted by the National Council of Women, transport difficulties are already an accepted basis for excusal from service. However, we consider that it is reasonable to expect people to travel further now than in 1976, especially if it helps to spread the burden of jury service among more people. The exact extent of the boundary must necessarily be arbitrary, but we suggest 45 kilometres as being a reasonable distance to travel.

The Commission recommends that the jury district boundary be extended from 30 to 45 kilometres.

Statutory amendment will be required.

¹⁷⁴ Personal communication with Murray Wicks, Electoral Enrolment Centre.

¹⁷⁵ This was the experience when women were first permitted to sit on juries. Women had to advise the sheriff of their willingness to serve before they were included on the list (Women Jurors Act 1942, ss 2–3) and were frequently challenged.

Considering representation as a factor in change of venue applications

- 152 A judge may order that the venue of a trial be changed to another location if that is “expedient for the ends of justice”.¹⁷⁶ In applying that test, there are five principles to consider:¹⁷⁷
- (a) the only test is a broad one of expediency for the ends of justice;
 - (b) it is undesirable to put any gloss on the statutory test;
 - (c) in applying the test, the usual approach is to consider whether there is a real risk that a fair and impartial trial may not be possible at the place at which the person has been committed for trial;
 - (d) strong local prejudice is a well established ground;
 - (e) if possible, justice should be seen to be done in the area where the offence occurred.
- 153 The question of considering the demographic composition of the jury district populations when considering change of venue applications was raised in *Juries I*¹⁷⁸ because of some highly publicised cases in the United States where a change of venue had significantly altered the racial composition of juries. Overall, the submissions were in favour of judges being able, but not required, to consider demographic composition in change of venue applications. There is little indication that the need for such a power has arisen here. The Commission would oppose any generic assumption that a particular ethnic group is predisposed to prejudice. However, if in a specific case there was evidence that persons of a particular group in that jury district were likely not to be impartial, the Commission supports the view that a judge should be entitled, but not required, to consider this factor in a change of venue application. Demographic composition could only be relevant if it can be shown to be causally connected to actual prejudice. As that ability already exists under the broad provision in section 322, no legislative change is required.

¹⁷⁶ Crimes Act 1961 s 322(1).

¹⁷⁷ *R v Holdem* (1989) 3 CRNZ 103,104; for a recent example, see *R v Middleton*, (26 September 2000) unreported, Court of Appeal, CA 218/00.

¹⁷⁸ Para 291.

Guidelines for excusing jurors

- 154 The registrar may excuse any person who is summoned from jury service if satisfied that:¹⁷⁹
- (a) the nature of that person’s occupation or business, or of any special and pressing commitment arising in the course of that person’s occupation or business; or that person’s physical disability; or that person’s state of health, or family commitments, or other personal circumstances, attendance on that occasion would cause or result in undue hardship or serious inconvenience to that person, or to any other person, or to the general public;
 - (b) the person is a practising member of a religious sect or order that holds service as a juror to be incompatible with its tenets; or
 - (c) the person is of or over the age of 65; or
 - (d) the person has served, or (having been summoned) has attended for service, as a juror at any time within the preceding period of two years; or
 - (e) the person has been excused from jury service for a period that has not yet expired.
- 155 In *Juries I*¹⁸⁰ we noted that, according to the 1995 report *Trial By Peers?*, 56 per cent of summoned potential jurors are excused from jury service. Further unpublished research by the Department for Courts¹⁸¹ indicates that 53.9 per cent of excusals relate to employment, 16.6 per cent to family commitments, 10.9 per cent to health, 5.6 per cent to travel or holidays, and 2.9 per cent to language difficulties. Other categories comprise 2.8 per cent or less each.
- 156 As the greatest proportion of excusals is for employment or family related matters, we suggest our recommendation that potential jurors be allowed to defer jury service rather than be excused from it (see paragraphs 490–494) would be more effective than stricter guidelines for excusing jurors. Once a deferral system is in place, we expect that the existing criteria for excusal will be interpreted much more strictly, because many people who claim that “attendance on that occasion would cause or result in undue hardship or serious inconvenience” will be able to defer to a more convenient time rather than be excused altogether.

¹⁷⁹ Juries Act 1981 s 15.

¹⁸⁰ Para 292.

¹⁸¹ Department for Courts *Juror Excusals Project – Research Report* (unpublished paper, draft only, 1997) 22.

A judicial power to determine the composition of the jury

- 157 In England, the Court of Appeal has clearly stated that a trial judge cannot interfere with the composition of the jury panel in order to secure a jury with a particular ethnic origin or from a particular section of the community.¹⁸²

At common law a judge has a residual discretion to discharge a particular juror who ought not to be serving on the jury. This is part of the judge's duty to ensure that there is a fair trial. It is based on the duty of a judge . . . "to prevent scandal and the perversion of justice". A judge must achieve that for example by preventing a juror from serving who is completely deaf or blind or otherwise incompetent to give a verdict. It is important to stress, however, that that is to be exercised to prevent individual jurors who are not competent from serving. It has never been held to include a discretion to discharge a competent juror or jurors in an attempt to secure a jury drawn from particular sections of the community, or otherwise to influence the overall composition of the jury. For this latter purpose the law provides that "fairness" is achieved by the principle of random selection.

- 158 An application to interfere with the composition of a jury on racial grounds was made in this country in *R v Pairama*¹⁸³ and dismissed shortly on the grounds that there was no jurisdiction to make such an order as the make-up of the jury is determined by chance, subject to the rights of challenge.

- 159 In the United Kingdom in 1993, the Royal Commission on Criminal Justice recommended that:¹⁸⁴

In exceptional cases where compelling reasons can be advanced for such a course, it should be possible for either the prosecution or the defence to apply to the judge before the trial for the selection of a jury containing up to three people from ethnic minority communities.

It should be open to the defence or prosecution to argue the need for one or more of the three jurors to come from the same ethnic minority as the defendant or the victim. The judge should be able to order this in appropriate cases.

These recommendations have not been enacted in the United Kingdom.

¹⁸² *R v Ford* [1989] QB 868, 871.

¹⁸³ (1995) 13 CRNZ 496, 501–502.

¹⁸⁴ Royal Commission on Criminal Justice Report (1993) Cm 2263, recommendations 222 and 223.

160 In *Juries I*¹⁸⁵ this Commission expressed its firm opposition to any such measure, but did pose the question for the purpose of consultation. The submissions were strongly in agreement with the Commission's initial view. There are several reasons, both practical and in principle, why interfering with the composition of a jury in this way would be untenable. Those reasons include:

- (a) the random selection of jurors should ensure that a diverse range of views and life experiences is present in the jury. While there is some problem with ensuring that members of minority groups get onto juries, that problem is best addressed by encouraging them onto the electoral roll (see paragraphs 138–141) and removing practical barriers to service (see chapter 16);
- (b) it assumes bias on the part of the jurors being excluded, when no such bias has been proved;
- (c) it would present the juror who has been appointed on the basis of their ethnicity with an unfair burden to represent a community, and their views are likely to be given unfair weight;
- (d) if there are ethnic issues in the trial, it is the job of counsel, not the jury, to raise those issues and present relevant evidence;
- (e) ethnicity is a vague and very diverse term – just because two people are members of the same ethnic group does not necessarily mean they share common values or beliefs;
- (f) such a system may work particularly against the interests of female victims.¹⁸⁶

Judges should not have any power to direct that persons of the same ethnic identity as the defendant or victim serve on the jury.

¹⁸⁵ Para 295.

¹⁸⁶ In their submission, the Rape Prevention Group Inc said:

In some cultures it is socially acceptable to beat or rape one's wife, to pour acid on a woman's face for not having it covered, to marry and impregnate a nine year old girl, to practise female genital mutilation, and to murder a rape victim for bringing shame on her family. Is it just that minority cultures, manipulated by a system to be over-represented on a jury should judge rape trials and other trials such as domestic violence, or even female genital mutilation?

Failing to answer jury summons

- 161 The proportion of summoned jurors who actually attend for service can be as low as 17 per cent.¹⁸⁷ The reasons for that vary, but probably include the low rate of fees paid to jurors and pressure from employers not to serve. Those problems are discussed at paragraphs 480–489. The other side of the coin is the punishment of those who fail to come to court when summoned.
- 162 If a juror fails to attend when they are summoned, they are liable to a maximum fine of \$300,¹⁸⁸ which is not imposed until the juror has had a reasonable opportunity to explain why they failed to attend,¹⁸⁹ and which is seldom imposed. From time to time however, courts do take steps to punish non-attendance, because the resultant publicity may encourage others to attend. In one recent incident in Rotorua, 34 people were fined the maximum \$300 for failing to appear in the High Court at Rotorua to explain their failure to attend, and five others were fined between \$20 and \$200 for not having sufficient reason for their absence.¹⁹⁰
- 163 In *Juries II*¹⁹¹ we pointed out that summonses are no longer sent by registered post, so jurors who have changed address may simply never receive them. The reason for the change from registered to ordinary post was made simply because of the additional cost of registered post.¹⁹² Approximately 13 per cent of all summons issued receive no response at all.¹⁹³ It is these people who would be targeted by greater penalties. The recent change to more frequently updated lists (see paragraphs 139–140) may help to ensure that summonses reach their intended recipient, but it is impossible to know what number of summonses never do because they are no

¹⁸⁷ *Juries II*, para 337.

¹⁸⁸ Juries Act 1981 s 32(1). The Juries Amendment Act 2000, which came into effect on 30 July 2000, amends this section to make it clear that jurors commit an offence only if they fail to attend for service as required by the summons, not if they just fail to follow other incidental directions on the summons. The amendment does not however increase the penalty for failure to appear.

¹⁸⁹ Juries Act 1981 s 32(2).

¹⁹⁰ “Lack of Faith Among Jury Absence Pleas” *The Dominion*, Wellington, 10 February 2000, 3; “Jury Absentees Called To Court” *The Dominion*, Wellington, 3 February 2000, 7.

¹⁹¹ Para 337.

¹⁹² Advice from Department for Courts.

¹⁹³ Unpublished figures supplied by Department for Courts. Nineteen per cent of those who are summoned attend; eight per cent of summonses are returned unclaimed; and 60 per cent are excused from service.

longer sent by registered post. We understand that lists of summonses are not routinely checked against those who attend at court to find out who has answered their summons and who has not.

- 164 The \$300 maximum fine was set by the Juries Act 1981 and has never been amended since. It is no disincentive to, for example, a busy professional or businessperson, who may well see it as cost-effective to incur the fine rather than lose a day's working time. In order to provide a realistic deterrent, we recommend that the maximum penalty be raised to \$1000 and seven days imprisonment. While we do not envisage that the latter will be frequently imposed, it is intended as an indication of the importance of jury service as a civic responsibility, and would be available in flagrant cases. However, the penalty cannot be increased unless the use of registered post is re-adopted, because without that it is not possible to prove that the person did receive the summons. While we recognise that will involve a considerable cost, it is in our view a necessary one.

Jury summonses should be sent by registered post rather than ordinary post. The maximum penalty for failing to answer the jury summons should be raised to a \$1000 fine and seven days imprisonment.

Statutory amendment will be required.

5

Māori representation on juries

Introduction

165 IT IS CLEAR THAT MĀORI are under-represented on juries,¹⁹⁴ a matter which is of particular concern given that Māori are over-represented as a proportion of defendants in criminal proceedings.¹⁹⁵ In addition to the submissions that were received on this topic, in November 1998 the President of the Commission and two Commissioners attended a hui at Owae Marae at Waitara to discuss the juries paper generally and the problems of Māori representation in particular.¹⁹⁶

It was emphasised to us that many Māori feel very strongly that juries are not representative of Māori society, and this contributes to a general feeling of alienation from the criminal justice system. The Research recorded the ethnicity of respondent jurors but did not address any specific questions to Māori or other ethnic minorities. Issues affecting Māori representation (including the exclusion of persons who live in rural areas, which has a particular impact on Māori, who are more likely than non-Māori to live in rural areas) will be dealt with more fully in our final report.

While the suggestions for ways of improving representation generally made in chapter 4 should also have some effect in improving Māori representation, we discussed in *Juries I* a number of other ways in which Māori under-representation might be specifically addressed.

- 166 There are three additional reasons why Māori may not get on to juries:
- (a) if they are not on the Electoral Roll;
 - (b) if once summoned they are excused or disqualified. Excusals and disqualifications are discussed in chapter 6; or

¹⁹⁴ See reports cited in *Juries I*, para 305.

¹⁹⁵ Speir, above n 79, para 2.13.

¹⁹⁶ *Juries II*, para 329.

- (c) if once balloted onto the jury panel, they are subject to challenge. This is discussed in chapter 7.

This chapter deals only with the issue of Māori not being on the electoral roll and therefore not being available for selection for jury service.

- 167 As we discussed in paragraph 138, ethnic minorities, including Māori, are traditionally less likely to enrol, and the Electoral Enrolment Centre makes particular efforts to encourage them to enrol. It appears¹⁹⁷ that the reasons for this reluctance to enrol include disinterest, apathy, and cynicism about the ability of “the system” to effect any improvement in their lives.

Should sources other than the electoral rolls be used to compile jury lists?

- 168 Although it is compulsory to enrol on the electoral roll,¹⁹⁸ because of under-representation of Māori on that roll we tentatively suggested¹⁹⁹ that other sources, such as iwi registers and Māori Land Court rolls also be used.
- 169 The submissions which we received agreed that this would be undesirable. The practical process of using other sources would be cumbersome and potentially expensive. Resources would be better directed at encouraging Māori to enrol as voters.

Ensuring that the proportion of Māori selected for jury lists is the same as the proportion in the jury district population

- 170 In *Juries I*²⁰⁰ it was suggested that the proportion of Māori selected for jury lists could be matched to the corresponding proportion of Māori in the jury district population to address any under-representation caused by non-enrolment on the electoral rolls. Unfortunately, we do not know exactly what proportion of Māori are on the electoral roll, because persons on the general roll are asked but not required to state their ethnicity. However, current extraction report statistics²⁰¹ show that the random selection process

¹⁹⁷ Personal communication with Murray Wicks, Electoral Enrolment Centre.

¹⁹⁸ Electoral Act 1993 s 82.

¹⁹⁹ *Juries I*, para 310.

²⁰⁰ At para 312.

²⁰¹ Personal communication with Murray Wicks, Electoral Enrolment Centre.

extracts Māori at around the same proportion as they are enrolled and identified²⁰² for the area concerned.

- 171 This confirms the findings of *Trial By Peers?* which showed that the proportion of Māori attending court as potential jurors, at 10 per cent of the pool, was as expected of this group, taking into account the variables of age, geographic location and electoral enrolment. This suggests that it is the processes after summoning (such as the exercise of peremptory challenges) that actually compromise Māori representation on juries. However, for the reasons set out at paragraph 229, we do not recommend the abolition of peremptory challenges.
- 172 It has been pointed out to us by the Ministry of Justice that the recent lowering of the age of eligibility for jury service from 20 to 18 years may go some way to increase the number of Māori in the pool of potential jurors, given the relative youth of the Māori population.
- 173 In any event, proportional adjustment is contradictory to the principle of random selection, and once an exception is made for one group there is no reason in principle why it should not be made for all other ethnic minorities and any other group. For that reason, in addition to the more practical reasons set out above, this Commission does not recommend any proportional adjustment.

Should registrars ensure that the proportion of summonses sent to Māori is the same as the proportion of Māori in the jury district population?

- 174 This was suggested on the same basis as the last question, but also shares the drawbacks of the last question. It is not recommended.

Possible solutions

- 175 It was clear from the submissions and our discussions at Ouae Marae that practical issues – lack of child care facilities and transport expenses in particular – are a barrier to Māori attendance. These matters are discussed at paragraphs 495–499.

²⁰² The voter registration form asks the voter to identify his or her ethnicity, but it is not compulsory to complete that question and not all do.

Māori are under-represented on juries. The Electoral Enrolment Centre is making particular efforts to encourage Māori to register on the electoral roll and thereby make themselves available to be summoned. Other methods to increase the proportion of Māori summoned are both impractical and contrary to principle.

Increasing the radius for jury districts (see paragraphs 144–151) could increase the number of Māori serving on juries.

Practical problems, particularly with child care and transport, are a barrier to Māori participation and measures should be taken to alleviate those (see recommendations in chapter 16).

6

Disqualifications and excuses

Introduction

176 **P**ERSONS SUMMONED TO ATTEND AS A JUROR may, for a number of reasons, fail to get on to a jury, as they may:

- (a) simply fail to answer the summons (see paragraphs 161–164);
- (b) be automatically disqualified or excluded from service;
- (c) be eligible to be excused from service;
- (d) be chosen by ballot for a jury but challenged before they take their seat. Challenges are addressed in chapter 7.

177 In this chapter, we shall discuss certain aspects of disqualifications and eligibility for excusal. Since our preliminary paper was published, the law in this area has been altered in some respects by the Juries Amendment Act 2000, which came into force on 30 July 2000. In *Juries I*²⁰³ we recommended that:

- (a) the minimum age for jury service should be reduced from 20 to 18 years; and
- (b) the maximum age limit of 65 years should be removed and registrars should have the power to excuse persons over that age.

Both of these changes have now been achieved by the Juries Amendment Act 2000. Any person over 65 years may apply for excusal on the basis of their age and the registrar must grant that excusal,²⁰⁴ so that people over this age may choose whether they wish to serve or not.

²⁰³ Para 329–337.

²⁰⁴ Juries Act 1981 s 15(2)(aa), as amended by the Juries Amendment Act 2000.

Should people who have a criminal conviction be able to serve on juries?

- 178 No-one may serve on a jury who has:²⁰⁵
- (a) at any time, been sentenced to imprisonment for life or for a term of three years or more, or to preventive detention;
 - (b) at any time in the preceding five years been sentenced to a term of imprisonment of three months or more, or to corrective training.
- 179 This exclusion is based on the assumption that a person who has a conviction will have a bias against the criminal justice system and in favour of the defendant. It is also arguable²⁰⁶ that those who have broken the law should not sit in judgment upon others. Although this may be seen as stern, it must also be pointed out that a juror known to have a criminal record is likely to be perceived as biased, and therefore exposed to criticism for the verdict. The need for the appearance of justice is probably the strongest argument in favour of the retention of this exclusion.
- 180 In relation to the statutory permanent exclusion of persons who have been sentenced to imprisonment for life or for a term of three years or more, or to preventive detention, it must be noted that the measure is of the actual sentence imposed rather than the maximum possible, and actual sentences are usually very much less than the maximum. For example, theft of a thing valued at over \$300 carries a maximum of seven years imprisonment,²⁰⁷ but only six per cent of theft convictions result in a custodial sentence,²⁰⁸ and the average length of a custodial sentence for theft is 6.6 months.²⁰⁹
- 181 It is not possible to predict whether an individual with a conviction will in fact be biased against the justice system. One who regrets conduct which resulted in conviction may feel strongly against criminal behaviour. Moreover, a person who has served a sentence may be said to have paid the debt to society and entitled not to be punished further. Recent work in the area of restorative justice²¹⁰

²⁰⁵ Juries Act 1981 s 7.

²⁰⁶ High Court judges' submissions.

²⁰⁷ Crimes Act 1961 s 227.

²⁰⁸ Speir, above n 79, table 3.25.

²⁰⁹ Speir, above n 79, table 3.26.

²¹⁰ See generally H Bowen and J Consedine (eds) *Restorative Justice: Contemporary Themes and Practice* (Ploughshares Publications, Lyttleton, 1999); Law Commission of Canada *From Restorative Justice to Transformative Justice: Discussion Paper* (Ottawa, 1999).

stresses that crime is a violation of relationships among the offender, the victim and the community, and that there exists a need for the restoration of those relationships and the reintegration of offenders into society. Legal barriers to social and civic participation, such as disqualification from jury service, not only serve as a constant reminder to offenders that they are not permitted to truly re-integrate, but may help to persuade them that any efforts to do so are wasted.

- 182 Nevertheless, on balance, the Commission is of the view that the current provisions are justified. Only serious offenders are permanently excluded; most offenders are excluded for five years, if at all. Considerations of possible bias, the need for the appearance of a neutral jury, and the potential distraction of a juror with recent convictions outweigh the desire for more prompt reintegration.
- 183 We note that there are periodic calls for criminal records to be erased after a period of time without reoffending. That would not affect our recommendation on this point, as we do not envisage that any such regime would include crimes sufficiently serious to come within the permanent exclusion criteria, or erase records with less than three years delay. We would indeed support further inquiry into the erasure of criminal records after an appropriate period without further reoffending.

The current provisions excluding persons with certain criminal convictions from jury service should be retained.

Should people who have been charged with criminal offences but not yet convicted be disqualified?

- 184 Under the present law, only people who have been convicted and sentenced are excluded from serving on a jury. The suggestion that this exclusion should be extended to those who have been charged but not yet convicted was raised because it is arguable that a current association with the criminal justice system may also be a biasing factor. In our preliminary paper²¹¹ we disagreed with this approach because it goes against the principle of the presumption of innocence, and once that is discarded there is no line to prevent the exclusion of, for example, the child, spouse, parent or sibling of an accused or convicted person, who may also have a close and current association with the criminal justice system. Such a person, actually in custody awaiting trial or sentence,

²¹¹ *Juries I*, para 343.

could apply for excusal under section 15(1)(b) of the Juries Act 1981.²¹² The more difficult question is whether the Crown should be able to apply to have the person disqualified.

- 185 There was some support among the submissions for such an exclusion, on the grounds of practicality. It was pointed out²¹³ that a person who is awaiting trial is under great pressure, and it may be unrealistic to expect that they could be impartial. Also, they are as open to criticism and the perception of bias as those who have actually been convicted.²¹⁴ Those who opposed such a disqualification did so on the grounds of the presumption of innocence.
- 186 This is a difficult issue but on balance we do not consider that any change is required, for the reasons stated in paragraph 184. Persons who are in this position can be excused on their own application on the grounds already provided in the Act. In addition, the Crown can if appropriate peremptorily challenge such people.

Persons who have been charged with criminal offences but not yet convicted should not be automatically disqualified from jury service for that reason.

Should lawyers be able to serve on juries?

- 187 Certain categories of person are always exempted from serving on juries.²¹⁵ They include people who work in various capacities within the criminal justice system, such as judges, police officers, employees of the Ministry of Justice, Department of Corrections and Department for Courts, and barristers and solicitors holding current practising certificates. Although similar exemptions exist in Commonwealth countries,²¹⁶ they have been removed in many jurisdictions in the United States.²¹⁷
- 188 Many lawyers who hold practising certificates do not in fact have any association with the criminal law or the courts. They may work

²¹² This section provides that a person may be excused if their personal circumstances are such that attendance would cause or result in undue hardship or serious inconvenience.

²¹³ By the High Court judges.

²¹⁴ Victim Support submission.

²¹⁵ Juries Act 1981 s 8.

²¹⁶ For example, Schedule 1, Part 1, Group B Juries Act 1974 (UK).

²¹⁷ C McMahon and L Sharp "A Jury of Your Peers" (October 1995) ABA Journal 40; S Goldberg "Caution: No Exemptions" (February 1996) ABA Journal 64.

as conveyancers, or in government departments, or in large corporations, or as teachers in university law faculties. It is arguable that such people have no real involvement with the criminal justice system and should not be automatically excluded.

- 189 One argument made against lawyers being able to serve on juries is that they are likely to be unduly influential. While this is true, that of itself does not necessarily mean they should be excluded. It will often be the case that one juror is particularly influential; for example, other professional people. However, it is likely that a jury would naturally look to a lawyer for guidance on both legal and factual issues, so that the role of the judge would be usurped,²¹⁸ and the democratic nature of the jury (see paragraph 4) undermined. Therefore this Commission recommends that the exclusion of barristers and solicitors holding current practising certificates should remain.

The exclusion from jury service of barristers and solicitors who hold current practising certificates should remain.

The ability of disabled people to serve on juries

- 190 In *Juries I*²¹⁹ we asked whether disabled people should be entitled to serve on juries, and what restrictions there should be. At that time, a disabled person was excluded from jury service only if they were:²²⁰

. . . incapable of serving because of blindness, deafness, or any other permanent physical infirmity.

- 191 That provision was revoked by the Juries Amendment Act 2000. There are now four points in time at which a person may be excluded or removed from a jury on the grounds of physical disability:

- (a) Having been summoned a person may apply to the registrar to be excused on the grounds that, because of physical disability, attendance on that occasion would cause or result in undue hardship or serious inconvenience.²²¹
- (b) Before the jury is constituted (sworn in), a judge may discharge a potential juror if the judge is satisfied that, because of physical disability, the person is not capable of acting effectively as a juror.²²²

²¹⁸ This argument was made by the Auckland District Law Society.

²¹⁹ Paras 347–350.

²²⁰ Juries Act 1981 s 8(j), now revoked by the Juries Amendment Act 2000.

²²¹ Juries Act 1981 s 15(1)(aa).

²²² Juries Act 1981 s 16AA.

- (c) Either of the parties may challenge a juror for cause on the grounds of incapacity to act effectively as a juror in the proceedings because of physical disability.²²³
- (d) After the jury is constituted but before the case is opened or the accused given in charge, the judge may discharge a juror if it is brought to the judge's attention that the juror is not capable of acting effectively as a juror because of physical disability.²²⁴

192 The term “physical disability” is not defined except to include visual or aural impairment.²²⁵ Disability, which includes physical disability, is one of the prohibited grounds of discrimination under the Human Rights Act 1993.²²⁶ The right to freedom from discrimination on the grounds of disability is also enshrined in the New Zealand Bill of Rights Act 1990.²²⁷

193 The submissions which we received were generally of the view that disabled persons should be able to serve as long as they are capable of doing so properly and their ability to comprehend the evidence and participate in the deliberation is in no way impaired. That ability will vary according to the individual's impairment and also according to the facilities available; modern courtrooms have, for example, wheelchair access and hearing loops, while older courtrooms may not. In our opinion, the over-riding considerations are that:

- (a) a defendant is entitled to a fair trial by a capable tribunal. No-one should serve as a juror unless capable of fulfilling that function adequately;
- (b) jury service is a civic responsibility and a duty from which no-one should be exempt without good reason.

194 The changes which have been made by the new Act are, in our opinion, satisfactory. They focus on ability to serve rather than category of disability, and we do not consider that any further recommendation is necessary.

The ability for physically disabled people to serve on juries has been adequately addressed by the Juries Amendment Act 2000. No further amendment is required.

²²³ Juries Act 1981 s 25(1)(b).

²²⁴ Juries Act 1981 s 22(1)(b).

²²⁵ Juries Act 1981 s 2(1).

²²⁶ Human Rights Act 1993 s 21.

²²⁷ New Zealand Bill of Rights Act 1990 s 19.

Non-physical “disability”

- 195 People who have themselves been victims of serious crimes, such as sexual abuse or domestic violence, may find it extremely onerous to have to serve on a jury, particularly if the case they are being asked to hear contains facts which are similar to events in their own lives. It is sometimes suggested that there should be specific provision to allow such people to be excused from service. Before the jury is constituted, a judge may excuse a person from attendance if satisfied that because of that person’s personal circumstances, attendance on that occasion would result in undue hardship to that person.²²⁸ However, once the jury has been constituted the judge’s power to discharge is more restricted, and does not appear to extend to discharge on this basis. We consider that it should, and this matter is dealt with in chapter 8, Discharging jurors.

Excluding people who cannot understand English or te reo Māori

Ability to understand English

- 196 Under common law, jurors or potential jurors were incompetent and therefore disqualified if they were unable to understand the language in which the trial was conducted.²²⁹ The Juries Act 1981 does not contain any specific disqualification on the grounds of inability to understand English to a reasonable level, although registrars appear to have the power to exclude such persons within the general terms of section 15(1). Moreover, judges probably have the power to do so as part of their inherent jurisdiction to ensure a fair trial.
- 197 In practice, the inability to understand English is a real problem. In the Research conducted for this report, eight jurors in seven trials²³⁰ either said they had failed, or were reported by other jurors to have failed, to comprehend the evidence fully because of a problem with understanding English, which was their second language.²³¹ This is despite the clear requests in the jury booklet and introductory video, in a number of languages, for potential jurors to advise court staff if they cannot understand English.

²²⁸ Juries Act 1981 ss 15(1)(a), 16(a).

²²⁹ *Ras Behari Lal and Ors v King-Emperor* (1933) 50 TLR 1.

²³⁰ Out of 48 trials, or in 15 per cent of trials studied.

²³¹ See *Juries II vol II*, para 3.18.

198 One submission²³² suggested that the summons and video (and the booklet) should say not that you can ask to be excused, but that there is a positive duty to declare a lack of conversational English:

It might be possible to tie this to a suitable everyday test eg “Can you fully understand the network news on TV in the evening? If not, you must declare it” . . .

199 The Department for Courts’ submission pointed out that it is very difficult in practice to detect these people:

The system relies on people volunteering information, or court staff noticing that a juror appears to be having difficulty understanding. This can be difficult in a crowded jury assembly room when staff are focusing on administrative procedures . . . The booklet *Information for Jurors* says that it is “*important that you find English easy to understand*”. This may mislead some jurors who understand simple day-to-day language but who have difficulty with the level of English required in a courtroom.

One option is to change the information currently given to advise jurors that they need to understand English to a reasonably high level, that they need to be able to easily understand a large amount of oral evidence, and that language used may consist of complex ideas and legal and technical terms. Any such information would need to provide a balance between adequately informing jurors of the language skills needed and providing a disincentive to potential jurors.

200 It appears to us that a further screening process is required, but clearly further testing by court staff would be quite impracticable. We recommend that, when the jury retires to choose a foreman, the judge should direct them to talk among themselves and ensure that each of them is able to speak and understand English, and to advise the judge if any juror appears unable to do so. At that stage they have already been empanelled, but the case has not been opened. We have recommended (see paragraphs 265–268) that there should be a broad single provision governing discharge of jurors. Inability to understand English sufficiently well will fit within this general power.

201 One criticism which might be made of this proposal is that it puts the burden on the jury, and requires jurors to determine the competency of others in their group. It may make other jurors feel uncomfortable, or open to criticisms of racism. Although the jurors would simply point such people out, the judge would be the one to finally determine whether they serve or not. But there is nevertheless potential for embarrassment and ill-feeling.

²³² A High Court judge.

When the jury retires to choose a foreman, the judge should invite them to talk among themselves and ensure that each of them is able to speak and understand English, and advise the judge if any juror appears unable to do so. The proposed second informational video should also emphasise this issue. If the judge is satisfied that a juror cannot speak English sufficiently well, the juror should be discharged (see paragraphs 265–268).

Ability to understand te reo Māori

- 202 New Zealand has two official languages, English (by convention) and te reo Māori (by virtue of section 3 of the Māori Language Act 1987). The Māori Language Act²³³ allows any member of the court, any party or witness, any counsel, or any other person with leave of the presiding officer, to speak Māori in legal proceedings, whether or not they are able to understand or communicate in English or any other language. The section does not however entitle any person to insist on being addressed or answered in Māori, or entitle any person other than the presiding officer to require that the proceedings or any part of them be recorded in Māori. The section does not apply to jurors.
- 203 In our report *Justice: the Experiences of Māori Women*²³⁴ the Law Commission set out the principles of the Treaty of Waitangi which were considered to be particularly relevant to the functioning of the justice system by Māori women we consulted, namely that:
- the values of Māori must be respected and protected (Article II);
 - Māori should form part of New Zealand society and feel as much at home in New Zealand and its institutions as other New Zealanders (Article III, reinforced by the Preamble).
- 204 In *Juries I*²³⁵ we asked whether jurors who are unable to speak or understand English or te reo Māori should be disqualified. This raises the question of what should happen if a potential juror cannot understand English but can understand te reo Māori. The starting point in considering this matter must be the fundamental right of the defendant and the Crown to a fair trial,

²³³ Section 4.

²³⁴ New Zealand Law Commission *Justice: The Experiences of Māori Women; Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei*: R53 (Wellington, 1999), para 4.

²³⁵ Paras 351–358.

and the need for jury deliberations to be secret (discussed further chapter 14).

- 205 The submissions were divided on this issue. It was pointed out that the point is in effect academic, that almost all Māori can in fact understand English;²³⁶ those who speak Māori also understand English. We agree that the point is unlikely to arise in practice; we have not received any submissions indicating that there are persons who speak Māori but are unable to understand English.
- 206 If an interpreter for a juror were required it would entail considerable expense and delay, since the interpreter would be required at all stages of the trial from the opening until the verdict. But the more fundamental difficulty with having a juror who could understand Māori but not English would be the conflict with the principles of direct juror participation in the process of jury discussion and of the secrecy of jury deliberations (see chapter 14). An interpreter would be required in order for the juror to participate in deliberation and would clearly have to be present in the jury room. There would be a considerable risk that such an interpreter would influence, even subtly, the deliberations. That would mean that the verdict was not necessarily properly that of the jury alone. On that basis, such a step cannot be permitted.

Persons who cannot understand English should not be permitted to serve on juries.

Literacy

- 207 Because of the possibility of reforms which include the increased use of written material given to jurors (see chapter 11) we asked²³⁷ whether there is a need for a test of literacy and the exclusion of persons who cannot read to a reasonable standard. A significant number of people would not pass such a test; over a million New Zealand adults are below the minimal level of English literacy competence required to meet the demands of everyday life, and 20 per cent of adults have “very poor” literacy skills.²³⁸
- 208 Although superficially attractive, there are two reasons why there should be no test for literacy. First, it would impose considerable

²³⁶ High Court judges’ submission.

²³⁷ *Juries I*, para 358.

²³⁸ Ministry of Education *Adult Literacy in New Zealand* (Wellington), based on International Adult Literacy Survey conducted in March 1996.

practical problems on the courts. There would be the question of what level of literacy would be required, which would probably differ from case to case depending on the amount of written material which is intended to be given to the jurors. The only way to test for literacy would be through written tests, which would be time-consuming and potentially embarrassing for jurors. Secondly, people who cannot read often develop other skills to compensate for that:²³⁹

. . . being literate is not a test of intelligence or of analytical ability. Many illiterate people are extremely astute, have good memories, a heightened level of observation and an awareness of the way spoken information is conveyed.

209 There may however be cases, particularly cases involving documentary evidence, where literacy is required to properly understand the evidence. In such a case a judge has the discretion to arrange for a literacy test for the jury pool, and persons who do not pass it can be stood aside by the judge or challenged by counsel.²⁴⁰

There should be no standard literacy requirement for jurors.

²³⁹ Submission from National Council of Women.

²⁴⁰ See *Maxwell*, para 104.

7

Challenging jurors

Introduction

- 210 **A** PERSON SUMMONED to attend for jury service who has not been automatically excluded, disqualified, or excused from service (see chapter 6), and who has answered the summons by coming to court on the appointed day, will be greeted by the registrar or court clerk, shown an introductory video or given a booklet describing what jury service is about (see chapter 9), and taken in a group to the court room. This group is called the “jury pool”. In the court, the registrar selects names from the jury pool at random, and calls them out. A person whose name is called stands up, walks to the jury box, and sits down. Before the potential juror sits down, either the prosecutor or the defence counsel may exercise their right of peremptory challenge, simply by calling out “challenge”. If this is done, the person does not sit down, but returns to the back of the court (and may be asked to join the jury pool for another trial). Counsel does not have to give any reason for peremptory challenge. Counsel may also challenge for cause, in which case they must give a reason for the challenge, but this right is seldom used.
- 211 “Jury vetting” is the practice of obtaining information about potential jurors prior to trial, in order to decide whether to challenge the potential juror or not.
- 212 This chapter discusses the peremptory challenge and the practice of jury vetting.

The peremptory challenge

- 213 Peremptory challenge and jury vetting are inextricably linked. The 1995 *Trial By Peers*?²⁴¹ study surveyed the jury vetting practice of prosecutors and defence counsel. The key points were :

²⁴¹ Above n 169.

- With the exception of one major city (Auckland), the police provided the prosecution with information on potential jurors' previous criminal convictions.
- The police officer in charge of the case would at times go through the prosecution's jury list to see if there was anybody they did not want on the jury.
- The jury list might be annotated by the police indicating that a potential juror is an associate of repeat offenders.
- Prosecution counsel either included or excluded potential jurors with previous convictions, depending upon what they perceived to be in the best interests of their case.
- The defence had limited resources with which to vet the jury. Concern was expressed over the disparity of resources between the Crown and defence. Police information was thought to benefit the prosecution and give them an advantage over the defence.
- Counsel would go through the jury list with their client to see if any person should be excluded. At times information from the jury list was also discussed, particularly gender, occupation, and address of potential jurors.
- Defence counsel would challenge on the basis of jury vetting if they had managed to discover any relevant information.
- All counsel (prosecution and defence) would identify people with whom they had had previous dealings as some of these people might hold a grudge or be personal friends.
- In smaller centres counsel might make use of personal contacts, or circulate the jury list around the office, to try and discover information on potential jurors.

214 *Trial By Peers?* also found that prosecutors were more likely to challenge Māori, manual or trade workers and the unemployed, and the defence (who challenge twice as often as the prosecution) more likely to challenge non-Māori, clerical or service workers and professionals. Challenges are often based on assumptions, stereotypes and prejudices.

215 In July 1994, as a result of research which had already been conducted for the *Trial By Peers?* report, the Solicitor-General issued a direction to Crown Solicitors that they should take whatever steps are necessary to ensure male Māori jurors are not disproportionately challenged. To ascertain what effect this direction had had we contacted Crown solicitors to seek their views. The overwhelming

response was that they challenge only for good reason, usually because the juror has relevant criminal convictions, or knows the accused or another participant in the trial.

- 216 There is no doubt that challenging for these reasons makes a high number of challenges against Māori likely, because Māori are considerably more likely to have a conviction which disqualifies them from jury service under section 7 of the Juries Act 1981 than are non-Māori. Māori make up 15.1 per cent of the New Zealand population,²⁴² but account for 53 per cent of offending which results in imprisonment.²⁴³ Prosecution counsel may also challenge on the basis of convictions which do not actually disqualify the potential juror under section 7, but which indicate that person's likely bias against the prosecution or police. This is the case particularly if the conviction is recent.
- 217 Some Crown solicitors indicated that in their experience Māori jurors, particularly older Māori, are generally critical of Māori offenders and may judge them quite harshly, which is to the benefit of the prosecution. One Crown solicitor from an area which has a relatively high proportion of Māori residents pointed out that the number of Māori in the jury pool is considerably lower than their proportion in the general population of the area. He suggested that this was in part because many of the Māori in the area live outside the jury list boundaries (see our recommendations as to extending those boundaries, paragraphs 144–151), and in part because a very large proportion of defendants are Māori, so potential jurors know them and are excused on that basis before balloting.
- 218 There are three reasons usually given for peremptory challenges:
- to remove biased jurors;
 - to allow the parties, in particular the defendant, to have some control over the composition of the jury, enabling greater acceptance of the jury's verdict as fair; and
 - to influence the representation of different community groups in a positive manner to include minorities (although this could be considered an aspect of the second reason).
- 219 The second reason has been criticised²⁴⁴ on the grounds that defendants cannot object to the judge in a summary trial, so there

²⁴² *New Zealand Now: Māori*, above n 168, 13.

²⁴³ Speir, above n 79, 37.

²⁴⁴ N Cameron, S Potter, and W Young "The New Zealand Jury" in Vidmar, above n 44, 167, 192.

is no reason for them to be able to object to a juror without good grounds. However, there is no logical parallel between the two. Judges are presumed from training and selection to be capable of assessing, comprehending and adjudicating on the facts presented to them. They are also presumed to be impartial, and to be able to maintain that impartiality even when issues in the case have specific significance to the judge's age, gender, ethnicity or social class. The same presumptions cannot necessarily be made of members of the jury panel, and the parties must retain the right to challenge those whom they believe may not be impartial.

220 The underlying rationale for peremptory challenges is that, in the absence of any formal procedure for assessing actual or potential bias, peremptory challenge is the only means of removing jurors about whose impartiality the defendant or the prosecutor is in doubt, where such doubt falls short of justifying challenge for cause.²⁴⁵

221 In *Juries I*²⁴⁶ we identified the following options for reform:

- abolishing the peremptory challenge together with:
 - modifying the challenge for cause, and
 - providing better information for the exercise of challenges;
- reducing the number of peremptory challenges;
- providing guidelines for the exercise of peremptory challenges;
- reforming the practice of jury vetting.

Should peremptory challenges be abolished?

222 Peremptory challenges were abolished in England and Wales in 1988.²⁴⁷ The decision to do this appears to have been made because of a number of well-publicised trials in which it was suspected that defendants had pooled their challenges to weight the jury in their favour,²⁴⁸ despite research conducted by the Home Office which

²⁴⁵ J Vennard and D Riley "The Use of Peremptory Challenge and Stand By of Jurors and Their Relationship to Trial Outcome" [1988] Crim LR 731, 732.

²⁴⁶ Paras 401–422.

²⁴⁷ Criminal Justice Act 1988 (UK).

²⁴⁸ S Lloyd-Bostock "The Jury in the United Kingdom: Juries and Jury Research in Context" in G Davies, S Lloyd-Bostock, M McMurrin, and C Wilson *Psychology, Law and Criminal Justice – International Developments in Research and Practice* (Walter de Gruyter, Berlin, 1996) 349, 353.

found no evidence of this alleged pooling.²⁴⁹ It has been said of the abolition of the peremptory challenge in England and Wales:²⁵⁰

Jury selection is now usually a quick and straightforward process. The peremptory challenge when used to attempt to tailor a jury having regard to the perception of defence counsel as to the type of juror who would or would not be favourable to the defence case or the defendant was inappropriate, unattractive and, I suspect, usually misguided. There is, however, one snag about the withdrawal of the right of peremptory challenge. Sometimes one has only to look at a juror, or to hear the manner in which the oath is read, to appreciate that the juror is totally unsuitable to be entrusted with the responsibility for determining a verdict or any responsibility. In the past defence counsel could be expected to challenge such a juror. In a recent case, it was only the combined weight of defence counsel that persuaded prosecuting counsel that it was appropriate for the prosecution to exercise their right to stand by such a juror. It is certainly easier and less embarrassing for the defence to exclude the obviously inadequate juror by peremptory challenge.

- 223 Although the peremptory challenge has been abolished in England and Wales, the Crown retains the right to stand jurors by, although only in very narrow circumstances. It can do this only if:²⁵¹
- (a) a properly authorised jury check (which can only be done in cases involving national security or terrorism) reveals information justifying exercise of the right to stand by, and the Attorney-General personally authorises the standby;
 - (b) the person is manifestly unsuitable and the defence agree that the exercise by the prosecution of the right to stand by would be appropriate.
- 224 However, the English solution might be unacceptable in New Zealand, as open to challenge under the New Zealand Bill of Rights Act 1990 on the grounds that it provides the Crown with an unfair advantage over the accused.²⁵²
- 225 The other alternative if peremptory challenges were abolished would be greater use of the challenge for cause. That would not necessarily be to the extent of the United States *voir dire*; in Canada for example, challenges for cause seem to be far more common, but still

²⁴⁹ J Vennard and D Riley, above n 245, 738.

²⁵⁰ Phillips, above n 102, 482–3.

²⁵¹ Practice Note [1988] 3 All ER 1086.

²⁵² See *R v Bain* [1992] 1 RCS 91.

well below the United States level.²⁵³ However, more challenges for cause would add considerably to the length of the trial, and would add to expense. It would also encourage the growth of a trial-consulting industry (see paragraphs 249–250) which in our view could lead to serious breach of juror privacy. Such a change is not supportable unless there is a manifest need for it, which there is not.

226 One advantage which peremptory challenges have over challenges for cause is that the latter are more demeaning, as counsel must publicly articulate their reasons for asserting a jurors' unsuitability. Prior to empanelling, some judges explain to the jurors the peremptory challenge process and tell them that the reasons for challenge are not to be regarded as personal. This takes most of the sting out of peremptory challenges, and the Commission would endorse this practice.

227 The majority of the submissions received on this point were opposed to abolition. One senior judge said:²⁵⁴

The peremptory challenge . . . is absolutely essential. Of course, I do not suggest that one can at first glance form a reliable opinion as to the suitability of a person to a jury and it is not the first glimpse principle I advocate. But there are some cases where it is necessary that this right exists . . . [A] police officer in charge of a case, particularly an experienced detective, will have had a glance at the jury as they assemble. Such a person will soon pass a quick note to indicate that a potential juror would be unsuitable in a criminal case because of previous hostility to the police or even previous conviction. Counsel should have the opportunity to consider such information. One can attach no weight to the answer which is given in the [preliminary] paper that the challenge for cause is all that is needed. I was in practice in the Criminal Courts for 20 years and was a Judge for 30 years and the challenge for cause has only been used once in Auckland to my recollection. The reason is that it is too risky unless one can prove something which is very damning to the person thus challenged. The risk of the challenge for cause not succeeding is, of course, obvious. If the challenge is disallowed and the juror sits, the case of the challenging party is lost at that very

²⁵³ See A Cooper QC "The ABCs of Challenge For Cause in Jury Trials: To Challenge or Not To Challenge and What To Ask If You Get It" (1994) 37 CLQ 62, 65, where the author advises that counsel should apply to challenge each juror for cause whenever the racial or religious status of the accused or the nature of the charges may engender prejudice in jurors having regard to prevailing attitudes in the community, including all cases of alleged sexual abuse, sexual assault or exploitation. An application should also be made where the case has had considerable publicity in the local media which might affect the jury's partiality.

²⁵⁴ Submission of Sir Graham Speight.

moment. Incidentally the only time, in my experience, it was ever used was a trial of a man named Rau, for murder. He was a Māori and he had killed his young wife. Counsel for the accused [had] just learned of the provisions which then existed to claiming a Māori jury. He then had the assistance of the redoubtable Peter Awatere as his adviser and Justice T A Gresson allowed challenge for cause to take place. I think he shortly thereafter regretted it because the challenging process lasted two days while Peter Awatere advised counsel and counsel advised the Judge of all sorts of intricacies and prejudices which supposedly existed between the iwi of the accused and of the potential juror and interrogated each person called. Much of it was guesswork but eventually we did succeed in getting a jury.

228 In their submission, Te Puni Kokiri favoured the abolition of peremptory challenges on the grounds that they contribute to the under-representation of Māori on juries. With respect, we do not agree. The reasons that Māori are under-represented on juries appear to be:

- (a) the fact that they are more likely than Pākehā to have disqualifying criminal convictions, or to know people in the trial process (see paragraphs 216–217). These are not matters which can be remedied by any alteration to the jury system;
- (b) a sizeable proportion of Māori find that practical obstacles are a barrier to their serving on juries (see paragraph 175). These are matters which can and should be addressed as a matter of priority.

Conclusion

229 The Commission's view is that the peremptory challenge should be retained. It is valuable because:

- (a) It allows the defence to eliminate persons who are perceived, rightly or wrongly, to be potentially prejudiced against the defence. It therefore gives the accused person some measure of control over the composition of the tribunal who will sit in judgment on him. If that measure were lost, the accused would be likely to feel a considerable degree of injustice upon conviction.
- (b) It allows the prosecutor to eliminate, speedily and without fuss, people who might have bias or prejudice.
- (c) It allows either side to eliminate obvious misfits.

The peremptory challenge serves a useful function and should not be abolished.

Should there be guidelines for the use of the peremptory challenge?

- 230 In *Juries I*²⁵⁵ we raised, without enthusiasm, the possibility of guidelines for the exercise of peremptory challenge. The submissions we received were not in favour of strict guidelines. As the Ministry of Justice pointed out, there would be no appropriate mechanism to ensure compliance and redress any departure from them. Moreover, peremptory challenges are by definition “challenges without cause”, so the idea of guidelines would appear to be a contradiction. We agree, and do not suggest that there should be any such guidelines for the defence. However, we do recommend that, for the purposes of prosecution counsel, the Solicitor-General’s Prosecution Guidelines²⁵⁶ be amended to include an explanation of the bases on which it is or is not appropriate to use the peremptory challenge.

Binding guidelines on the use of the peremptory challenge are not necessary or practicable, but for the guidance of prosecution counsel the Solicitor-General’s Prosecution Guidelines should contain an explanation of the bases on which it is or is not appropriate to use the peremptory challenge.

Should the number of peremptory challenges be reduced?

- 231 This has happened in some Australian jurisdictions. The justification for such an option is that counsel would still be able to remove biased potential jurors while it would be made more difficult for either side to reduce representation and thus select the jury of their choice – arguably, there would be less ability for counsel on either side to exclude people of minorities from the jury.
- 232 Most of the submissions did not support a change to the number of peremptory challenges, especially in the absence of clear evidence that it would make an appreciable difference. There was concern that such a change would be no more than tinkering.
- 233 It has been suggested²⁵⁷ that a cap be placed on the total number of defence challenges allowed in a multiple-defendant trial (currently the prosecution is restricted to 12 challenges when there are two or

²⁵⁵ Paras 419–422.

²⁵⁶ A copy of the Solicitor-General’s Prosecution Guidelines is contained in *Criminal Prosecution*, above n 4, appendix C.

²⁵⁷ *Trial By Peers?*, above n 169, para 13.9.

more defendants, while each defendant has six challenges).²⁵⁸ However, we would not support such a change. Defendants are sometimes tried together for the sake of convenience, but they usually each have their own counsel and they must each retain equal rights.

- 234 While a reduction in the number of challenges would probably do no harm, there is no clear and demonstrable reason to reduce the number. Six challenges is enough to fulfil the functions set out in paragraph 229, while not being enough to upset the random nature of the balloting process.

No change should be made to the number of peremptory challenges.

Should judges have the power to discharge the jury when the exercise of peremptory challenges has created the potential for or the appearance of unfairness?

- 235 This question was asked in *Juries I*²⁵⁹ because of a recommendation by the New South Wales Law Reform Commission to that effect.²⁶⁰ They argued that such a power already exists and derives from the inherent jurisdiction of the court, although it has rarely been exercised in Australia. While there was some doubt as to the actual existence of that power, that Commission felt that clarification and codification would be beneficial.
- 236 All submissions were opposed to this proposal. It was pointed out that the judge would have no real information on which to make such a decision; it would be simple speculation. The number of challenges which the parties have is not great enough to give such control over the composition of the jury that this sort of power could be justified. Judges already have the power to discharge a jury, a power which we are proposing to widen (see chapter 8, Discharging jurors) but a *specific* power of this sort is unnecessary.

²⁵⁸ Juries Act 1981 s 24(1)–(2).

²⁵⁹ Para 422.

²⁶⁰ New South Wales Law Reform Commission *The Jury in a Criminal Trial*: R48 (Sydney, 1986) 57.

Should the current law and practice of vetting jury lists be restricted in any way?

237 In *Juries I*²⁶¹ we reviewed the English and Australian positions and proposed three possible options:

- prohibition of jury vetting by both the prosecution and defence, and a power for court registrars to vet jury lists using information provided by the police. If this were the case, it would probably not be appropriate for the registrar to have a discretionary vetting power. Instead, all disqualifications should be expressed in the Juries Act 1981; or
- an obligation on the prosecution to disclose any information on prospective jurors to the defence; or
- a prohibition on defence counsel giving copies of the jury panel list to defendants, while still permitting defence counsel and defendants to examine the list. This would address public concerns regarding the disclosure of copies of jury panel lists to defendants and the potential for juror intimidation.

238 Since our preliminary paper was published, the law in relation to jury vetting in Victoria has changed. Jury vetting used to be accepted in Victoria, and the practice was²⁶² that the Commissioner of Police would draw up two lists:

- the first was of those persons who had convictions which disqualified them under the Juries Act 1967 (Vic), which was given to the sheriff who would remove them from the panel; and
- the second was of persons with non-disqualifying convictions, or who had no convictions but whom he considered to be antagonistic to the police or prosecuting authorities, which was given to the Director of Public Prosecutions to use to challenge. An express direction to do this was contained in the *Victoria Police Manual*.

239 The High Court of Australia, in *Katsuno v R*,²⁶³ held that the Juries Act 1967 (Vic) did not give the Commissioner the power to give the second list. The practice of jury vetting was thus stopped overnight.

²⁶¹ Paras 423–429.

²⁶² See M Groves “Case and Comment” (1998) 22(6) Crim LJ 353, 354.

²⁶³ (1999) 166 ALR 159; however *Katsuno*’s appeal was unsuccessful (although the practice is wrong, it was not sufficient to quash the conviction).

240 The Parliament of Victoria Law Reform Committee prepared an extensive report which formed the basis of the Juries Act 2000 (Vic) (replacing the Juries Act 1967 (Vic)). Their report recommended that vetting to detect disqualified persons and persons with non-disqualifying convictions should continue, and that the information should be provided not only to the prosecution but also to the defence and the trial judge.²⁶⁴ The original Bill,²⁶⁵ allowed the Commissioner to investigate non-disqualifying offences and pass that information to the Director for Public Prosecutions, but this was removed before the legislation was passed, so that now potential jurors can be excluded from service only on the grounds of disqualifying convictions, and the Commissioner of Police may pass this information to the Juries Commissioner only.²⁶⁶ There was some criticism of this, particularly because it means people who are on bail will not be identified and excluded. There is some confusion evident in the parliamentary debates,²⁶⁷ a legislative exclusion of persons on bail is expressly rejected, because it offends the presumption of innocence, yet there is a clear desire to exclude such persons in practice, which is not possible once jury vetting is removed.

241 In New South Wales, following amendment to the legislation in 1997,²⁶⁸ jurors' names are not disclosed even when they are sworn; they are called up by number, although their names are made known to the parties so they can decide whether to challenge. It is an offence to disclose any information likely to lead to the identification of a juror or former juror without their consent. The new Victorian legislation also has provision that, if the court considers that for security or other reasons the names on a panel should not be read out in open court, the jurors can be identified by number only.²⁶⁹ However, we do not recommend such a provision in New Zealand. It could only be justified if there is a genuine threat to juror safety. There is also some evidence²⁷⁰ that juror anonymity may affect jury verdicts, with anonymous jurors more likely to convict.

²⁶⁴ *Jury Service In Victoria*, above n 100, vol 1, paras 5.16–5.37.

²⁶⁵ Juries Bill 1999 (Vic) (532173B.11, 27/5/99) clause 26.

²⁶⁶ Juries Act 2000 (Vic) s 26.

²⁶⁷ Available at <www.dms.dpc.vic.gov.au> (last accessed 10 January 2001).

²⁶⁸ See Chesterman, above n 44, 163.

²⁶⁹ Juries Act 2000 (Vic) s 31(3).

²⁷⁰ D Hazelwood and J Brigham "The Effects of Juror Anonymity on Jury Verdicts" (1998) 22 *Law & Human Behaviour* 695.

242 In New Zealand, jury vetting does certainly occur, although its practice varies around the country. Under the Juries Act 1908,²⁷¹ jurors had to be of “good fame and character”. Criticism of police enquiries as to character led to the Juries Act 1981, which has no “good character” requirement, but which does give both parties access to jury lists and the right to peremptory challenge and thus clearly envisages vetting.

Should there be a complete ban on jury vetting by both parties?

243 The Commission does not support a complete ban on jury vetting, which would leave it to the registrar to obtain information about jurors and disqualify them according to strict statutory criteria. The main objection to that is that the registrar does not have the knowledge that the Crown and the defence do on factors potentially leading to prejudice or bias. Moreover, it would deprive the defence of that degree of control which they currently have, and which we have concluded (see paragraph 229) is one of the major justifications for the peremptory challenge.

Should there be an obligation to disclose information?

244 It is not suitable to place an obligation on both defence and prosecution to advise the other of any information they have on prospective jurors which might indicate that those jurors could be biased. First, it does not respect the privacy of jurors. For example, the prosecution may be aware that a potential juror is having an affair with a police officer involved in the case, and decide to make a peremptory challenge on that basis. Or a potential juror may have been the victim of a crime similar to that in the trial, but not have sought to be excused. The prosecution should not be obliged to share that information with the defence if they have decided to challenge on the basis of it, because that potential juror will be removed without any reason being publicly expressed. Secondly, there is a strict and well-established principle that there is an obligation on the prosecution to eliminate jurors who may not be impartial.

245 We would make two exceptions to this. The first is if the prosecution have information about the potential juror which may affect that jurors’ ability to serve, but decide not to challenge on the basis of it. This should be revealed to the defence so that the

²⁷¹ Section 3.

defence can consider whether they wish to challenge on that basis. The second is if the prosecution are given a list of the jury panel's non-disqualifying convictions. This should be revealed because opinions may vary as to whether these convictions might cause bias and should therefore be the basis of a challenge, and the defence should have the opportunity to consider whether they will challenge the person if the prosecution do not. These matters will be dealt with in the CPC Manual.

Should the list be shown or given to the accused?

246 At any time not earlier than five days before the commencement of the week for which the jurors are summoned to attend for jury service, any party to the proceedings (including the defendant) or any person acting on their behalf, may inspect and receive a copy of the jury list.²⁷² The usual practice is for the defendant's solicitor or counsel to collect a copy of the list, and show it to the defendant to ascertain whether there is anyone on the list who is connected with the defendant and ought therefore to be peremptorily challenged.

247 It is a matter of particular concern to the public that jury lists may sometimes come into the hands of the defendant. In one highly publicised case, four Black Power gang members on trial for murder had a copy of the jury list delivered to them in jail by their lawyer.²⁷³ In their submission, Rape Prevention Group Incorporated supported a prohibition on counsel giving lists to defendants, and would prefer addresses not to be on the list at all, as they can be memorised or copied.

With all the emphasis on the Privacy Act and confidentiality in other areas of society, it is absurd that men charged with rape, murder, or other violent offences, should not only know the names of female jurors and others, but also their addresses. We know of women that are not willing to serve on juries for this reason.

248 There is no effective way to meet these concerns because it is fundamental to an open system of justice that the accused know who is to sit in judgment on him. He must be able to challenge (either for cause or peremptorily) those who he believes might be prejudiced against him. To do that, he must be able to see the list. There is no reason for a defendant represented by counsel to keep a copy of the list, and we consider it undesirable for that to occur.

²⁷² Juries Act 1981 s 14.

²⁷³ "MP Calls For Jury Lists to be Kept Secret in Gang Trials", *The Dominion*, Wellington, 22 October 1997, 2.

Counsel, while of course obliged to accept instructions to hand the list to the client, should endeavour to avoid it. This is a matter which will be addressed in the CPC Manual. In the case of an accused who chooses to represent himself, there is no option but that the accused must be able to get the list. Fortunately, self-representation at the jury trial level is rare.

There should be no increased restrictions on the ability of either the Crown or the defence to vet jurors.

The Crown should disclose to the defence:

- any information it has about a potential juror which may affect his or her ability to serve but upon the basis of which the Crown does not intend to challenge;
- any list which it has of the potential jurors' non-disqualifying convictions.

Trial consultants

249 In response to *Juries II*, the Privacy Commissioner expressed concern about the existence of “jury vetting consultants”. In the United States, “trial consulting” is now a multi-million dollar, controversial, and totally unregulated, industry.²⁷⁴ According to one New York attorney, “[i]t’s gotten to the point where if the case is large enough, its almost malpractice not to use [trial consultants]”.²⁷⁵ The services they offer are:

- (a) pre-trial research (using community attitude surveys, focus groups and mock jury simulations to get a sense of the prevalent values and views of the community from which the jury will be chosen);
- (b) jury selection (investigation of prospective and actual jurors, formulation of voir dire questions, change of venue studies);
- (c) courtroom presentation and strategy (assistance with opening and closing arguments, witness preparation,

²⁷⁴ Discussed at length in F Strier and D Shestowsky “Profiling the Profilers: A Study of the Trial Consulting Profession, Its Impact on Trial Justice and What, If Anything, To Do About It” (1999) *Wisconsin Law Rev* 441; see also F Strier “Whither Trial Consulting? Issues and Projections” (1999) 23 *Law & Human Behaviour* 93.

²⁷⁵ Strier and Shestowsky, above n 274, 443.

courtroom observation, shadow juries, developing case theory and presentation);

(d) post-trial services, including education of the bar.

250 Much of this could not happen in New Zealand because we do not have the United States voir dire system and therefore the ability to find out about jurors is much more limited. However, it appears that there is a small but emerging “trial consulting” industry here. There are now several psychologists who observe the jury pool and advise counsel on who to challenge. They use public records (including credit checks) to advise on who should be challenged, and they also observe the trial to advise on how jurors appear to be reacting.²⁷⁶

Trial consultants are rare in New Zealand and, given the differences between our systems and those of the United States, likely to remain so. Where they are present, they are simply supporters of the accused and, like anyone else, subject to the laws of contempt. In the absence of any evidence that they are causing a problem, the Commission sees no need to regulate them beyond the existing laws of contempt.

²⁷⁶ “Mental Experts Vet Jurors” *New Zealand Herald*, Auckland, 9–10 October 1999, 1.

8

Discharging jurors

Introduction

251 **T**HE JURY IS CONSTITUTED once twelve people from the jury pool have been chosen by ballot and taken their seat in the jury box without being challenged.²⁷⁷ Then the jury is sworn in, and retires from the courtroom to select its foreman.²⁷⁸ When the jury has selected its foreman, the accused is put in the charge of the jury; this is the formal start of the trial. Then the judge makes some preliminary remarks, and the prosecutor opens the case. Challenges may only be made before the juror is seated; once the juror has sat down, the parties no longer have the right to challenge.²⁷⁹ The only way to subsequently remove a juror (or, in extreme cases, the whole jury) is if the judge discharges them. This chapter discusses the power of the judge to dismiss one or more jurors, and recommends some alterations to those powers.

The power to discharge

252 There are four sources for the power to discharge jurors: section 22 of the Juries Act 1981,²⁸⁰ section 374 of the Crimes Act 1961, section 54B of the Judicature Act 1908, and the inherent jurisdiction or power of the court. After the jury is constituted, but before the case is opened or the accused is given in charge, jurors may be discharged if they are:

- (a) personally concerned with the facts of the case;
- (b) closely connected with one of the parties or one of the prospective witnesses;

²⁷⁷ Juries Act 1981 s 19.

²⁷⁸ Juries Act 1981 ss 20–21.

²⁷⁹ Juries Act 1981 s 26.

²⁸⁰ As amended by the Juries Amendment Act 2000.

- (c) not capable of acting effectively as a juror because of physical disability.²⁸¹

Any time before the verdict is given, the judge may discharge the whole jury if:

- (a) emergency or casualty renders it highly expedient for the interests of justice to do so;²⁸²
- (b) where the jury has deliberated for a reasonable time, not less than four hours, and is unable to agree on a verdict, the judge may discharge the jury without their giving a verdict.²⁸³ In this case the jury is “hung”. Hung juries are discussed in chapter 13, Failure to agree – majority verdicts.

253 The judge may also discharge a juror at any time before a verdict is given if:²⁸⁴

- (a) the juror is incapable of continuing to perform his or her duty;
- (b) the juror is disqualified (that is, they are disqualified under sections 7 and 8 of the Juries Act 1981, and should therefore not have been balloted onto the jury in the first place);
- (c) the juror’s spouse or family member, or a family member of the juror’s spouse, is ill or has died;
- (d) the juror is personally concerned in the facts of the case;
- (e) the juror is closely connected with one of the parties or with one of the witnesses or prospective witnesses.

If a juror is discharged under these provisions, the judge may either discharge the whole jury, or proceed with fewer jurors. The trial may proceed with as few as ten jurors, or fewer if the prosecutor and the accused consent.²⁸⁵

254 In addition to these statutory powers, the court has an inherent power to govern its own processes to ensure overall fairness. The court may exercise that power in its inherent jurisdiction to supplement a statutory provision, where to do so would be in the interests of justice and consonant with the purpose of the provision.

²⁸¹ Juries Act 1981 s 22. The power to discharge on the grounds of physical disability was added by the Juries Amendment Act 2000.

²⁸² Crimes Act 1961 s 374(1).

²⁸³ Crimes Act 1961 s 374(2).

²⁸⁴ Crimes Act 1961 s 374(3).

²⁸⁵ Crimes Act 1961 ss 374(4)–(4A).

The power may be exercised, even in respect of matters regulated by statute, provided that the exercise of the power does not contravene any statutory provision.²⁸⁶ In *Juries I*²⁸⁷ we pointed out that although section 22 of the Juries Act 1981 and section 374 of the Crimes Act 1961 replace the common law rules governing the discharge of jurors, those statutory provisions present difficulties which may require recourse to the inherent jurisdiction. The example we gave was where the court becomes aware, after the jury is selected but before the accused is given in charge, that a juror is intoxicated. The judge has no power to discharge the juror under section 22(1) of the Juries Act because, although the time period is within that contemplated by the section, intoxication does not come within that section. Intoxication might come under section 374(1) of the Crimes Act (emergency or casualty), but that is a strained interpretation of the section and in any event would require the discharge of the whole jury, not just the intoxicated juror.

255 In *Juries I*²⁸⁸ we suggested that the overlap between section 22(1) of the Juries Act and section 374 of the Crimes Act causes problems and, and in the interests of clarity and practicality, the court's powers to discharge jurors need to be more clearly articulated in legislative provisions. In that way, courts would need to have resort to the inherent jurisdiction only in the most unusual and unforeseeable cases. We suggested that the power to discharge jurors should be codified into a single provision. The few submissions that were received on this point were short and agreed with that suggestion.

256 Section 54B of the Judicature Act 1908 was enacted in 1980 and repeats section 374 of the Crimes Act as that section was before it was amended in December 1997. It was not mentioned in any of the submissions, and does not appear to be used in practice.²⁸⁹ As it is duplicative, we recommend that it be repealed when the single provision we recommend is enacted.

²⁸⁶ This principle was re-stated in *R v Turner* (25 July 1996) unreported, Court of Appeal, CA 439/95, 4.

²⁸⁷ Paras 455–456.

²⁸⁸ Paras 458–461.

²⁸⁹ The 1978 Report of the Royal Commission on the Courts, (above n 61) recommended a number of changes to the court system, including for District Courts to have jurisdiction to hear jury trials for certain offences. We are advised by the Ministry of Justice that it was decided at the time to re-write and consolidate the Juries Act 1908, but some changes, including this one, were proceeded with before the new Juries Act was completed. So there was a need to make changes to cover criminal trials in the interim and to make specific provision for civil trials in the High Court. Thus, both the Crimes Act (for criminal trials) and the Judicature Act (for civil trials) provisions were amended in 1979 to allow for discharge.

Discharging persons with a non physical “disability”

- 257 It is sometimes suggested that people who have themselves been the victims of serious violent or sexual offending should not be required to sit on juries considering similar cases, and should be eligible for discharge if they wish.
- 258 There would be a number of difficulties with such a provision. The first is what the extent of any such exception should be: should it be limited to sexual abuse cases, or include, for example, people who have been victims of non-sexual violent assault? Should people whose relatives or friends have been murder victims be excused from murder trials? Should the partners or family of rape victims be excused from similar trials? Many jurors in cases of serious violence do suffer intense emotional stress, whether or not there are any experiences in their own lives which closely resemble the facts in the trial, but arguably that is part of the duty of being a juror: to serve no matter how unpleasant the facts and evidence. Another problem is purely practical: we know that many people try to avoid jury duty, and it would be difficult to ensure that only those people whose ability to serve was genuinely impaired, or who were going to suffer very great distress, were exempted. Unlike physical disability, objective proof of this sort of problem may be difficult or impossible to provide.
- 259 On the other hand, there are compelling arguments for the allowing of such an exemption in deserving cases. The first is that a person in this situation is unlikely to be impartial, or able to concentrate fully on the evidence before them. In the Research, there was one sexual abuse case where four jurors were themselves victims of sexual abuse, a fact which may have contributed to the hung jury in that case.²⁹⁰ The second reason is humanitarian – although many jurors find jury service emotionally difficult, because of the harrowing nature of the evidence and the responsibility of having to make a decision which will drastically alter another person’s life (see chapter 16, The experience of being a juror), those who have themselves been the victims of crime may suffer much more than others, and for them the burden of jury service may be too great.
- 260 On balance, the Commission is of the view that the risk to impartiality and the undue hardship on the juror in these circumstances justifies the enactment of a discretionary power to excuse such people. The new provision which we recommend (see paragraphs 265–268) will allow this to happen.

²⁹⁰ *Juries II vol II*, para 10.20.

- 261 It is apparent from our consultation with both judges and the legal profession, that in some cases judges do already excuse such people. The legal basis for this is unclear, and discussions on this issue at conferences of High Court and District Court judges in April 2000 revealed definite confusion about the scope of the sections and disparity in their use. Before the jury is constituted, a judge may excuse a person from attendance if satisfied that because of that person's personal circumstances, attendance on that occasion would result in undue hardship to that person.²⁹¹ However, once the jury has been constituted the only ability to discharge such a person is arguably under section 374(3)(a), on the grounds that the juror is "incapable of continuing to perform his or her duty". We do not consider that these people are necessarily "incapable", rather as a matter of policy it is desirable that they are not obliged to serve.
- 262 The actual procedure to be followed in discharging jurors is also the source of some confusion. One judge commented:
- I think the whole process by which jurors seek to be excused should be revamped: it takes quite a lot of courage for panel members to seek to be excused (though I advise them of their right to do so). We consider the requests in a hurried and often non-private way (do we all remember to push the mute button on our mike?) and we therefore probably get only the "easy" requests (eg pressure at work) and not those we should get (eg I was abused in a sexual case).
- 263 Another makes it a practice in cases involving unpleasant facts to inform the jurors after they are seated, but before they are sworn, that if for any reason any juror feels difficulty about trying the case, that juror should speak to the judge. On several occasions, jurors have then been excused because of trauma resulting from prior experience.
- 264 A general power of the type suggested below will clarify the matter. It would also be useful if the procedure to be followed in the courtroom would be set out in the CPC Manual.

A general discharge provision

- 265 The Canadian Criminal Code²⁹² has recently been amended to contain a simple discharge provision:²⁹³

²⁹¹ Juries Act 1981 ss 15(1)(a), 16(a).

²⁹² Section 644(1).

²⁹³ This differs from the proposed amendment suggested in Law Reform Commission of Canada *The Jury: R16* (Ottawa, 1982), 21 which we suggested as a model in *Juries I*:

Where in the course of the trial the judge *is satisfied* that a juror should not, because of illness or other *reasonable* cause, continue to act, the judge may discharge the juror. [emphasis added]

266 The advantages of such a codification are that:

- the power is contained in one provision;
- it is simple and clear; and
- it refers to the present status of the juror, which includes the case where the status of the juror has changed as well as that where knowledge only comes to the attention of the court after the jury has been constituted.

267 The new provision should cover the period from the constitution of the jury to the point when the jury indicates that it has reached a verdict or verdicts.

268 In order to provide clear guidance, we suggested that it would be useful to specify the likely grounds for discharge and also provide a general power. However, it seems to us now that the enacted Canadian provision, which focuses on whether for reasonable cause a juror *should* be required to serve, is preferable. It is essentially an “interests of justice” provision, and can safely be left to judges and counsel to apply.

Empanelling a replacement juror before the case opens

269 In *Juries I*²⁹⁴ we suggested that the power to discharge jurors should, in the event of the discharge of any juror or jurors before the prosecution opens, be accompanied by a power to empanel a replacement juror or jurors before the case opens, with the jury panel remaining until that point.²⁹⁵ Subsequent to that point, the

“Where in the course of a trial a juror is, in the opinion of the judge, by reason of illness or some other cause, unable to continue to act, the judge may discharge [the juror].

With respect, we consider that the provision actually enacted is preferable to that suggested by the Law Reform Commission of Canada, because it does not require *inability*. A person who has themselves been a victim may be so greatly affected that they are actually unable to be a juror, or they may be able to serve but simply find it very unpleasant and difficult. The test in the enacted provision allows latitude to deal with the different variations that occur in practice.”

²⁹⁴ Para 462.

²⁹⁵ This power is currently contained in *Juries Act 1981 s 22(1B)* (as amended by *Juries Amendment Act 2000*).

power to discharge two jurors without the consent of the prosecution or defence would arise. All the submissions agreed, shortly, with this proposition. It should be included in the new discharge provision.

An express provision permitting the jury to elect a new foreman if he or she is discharged

- 270 In *Juries I*²⁹⁶ we suggested this to cover the situation where the discharged juror is the foreman. Again, all submissions were short and agreed with this proposition. It should be included in the new discharge provision.

Sections 22 of the Juries Act 1981, 374 of the Crimes Act 1961 and 54B of the Judicature Act 1908 should all be repealed and replaced with a single discharge provision. That single provision should be in a new section 22, Juries Act 1981.

The new discharge provision should be modelled on section 644(1) of the Canadian Criminal Code. It should include the power to empanel a replacement juror before the case opens, and to elect a new foreman if the foreman is discharged.

Statutory amendment will be required.

The defendant's right to be present for all applications to discharge a juror

- 271 In *Juries I*²⁹⁷ we asked whether the defendant should have the right to be present in all circumstances when consideration is given to discharging a juror or the entire jury. This is a difficult issue, because on one hand the courts have taken as a general principle the view that all communications between the judge and jury touching on the trial should take place in open court in the presence of the jury, counsel and accused,²⁹⁸ but on the other there are the juror's interests to be considered. A judge's consideration of discharging a juror may be perceived as a trial of that juror, and the juror may need to divulge personal and intimate information.

²⁹⁶ Para 463.

²⁹⁷ Para 464.

²⁹⁸ *Ramstead v R* [1999] 1 NZLR 513, 516 (PC); *R v Childs* (24 August 2000), unreported, Court of Appeal, CA 165/00, 3.

272 We note that under the new section 16AA of the Juries Act 1981 (judge may discharge summons of person with physical disability)²⁹⁹ an application for discharge of summons must be heard in private.³⁰⁰ However, an application under that section can only be made before the jury is constituted, so the person making the application is not yet a juror.

273 In the Commission's view, the right of the accused to be present at the hearing of an application to discharge a juror is paramount. It is in principle wrong for the accused to be excluded from any matter which bears upon his own trial. The right of the accused to be present at trial is provided for both by the Crimes Act 1961³⁰¹ and the New Zealand Bill of Rights Act 1990,³⁰² which would arguably be infringed if the accused were excluded from a decision to alter the tribunal of fact. Counsel must also be present. It may be appropriate, if sensitive and private matters are being discussed, to exclude other jurors and for the matter to be discussed in chambers (that is, without the public present).

A power to discharge the entire jury

274 In *Juries I*³⁰³ we suggested that (like sections 374(3) and (4)), a single power to discharge individual jurors should include the power to discharge the entire jury, so that if the rest of the jury is "contaminated" by prejudicial information possessed by one juror being passed to others, the whole jury could be discharged. Although we have no formal empirical evidence on this point, the extensive jury trial experience of the Commissioners indicates that it will be most unusual for this to arise in practice. The majority of the submissions were in favour of such a provision.

Questioning the foreman or any other juror on an application to discharge

275 It used to be the case that the Juries Act 1981 contained no express provision permitting judges to question the foreman or other members of the jury when considering an application to discharge a

²⁹⁹ This section came into force on 30 July 2000.

³⁰⁰ Section 16AA(4).

³⁰¹ Section 376, but the accused may be removed from the court if "he misconducts himself by so interrupting the proceedings as to render their continuance in his presence impracticable" (s 376(1)).

³⁰² Section 25(e).

³⁰³ Paras 466–467.

juror. That has been remedied by the Juries Amendment Act 2000. Section 22(1A) of the Juries Act 1981 now provides:

When considering whether to discharge a juror, the Judge may conduct the hearing, and may consider such evidence, as he or she thinks fit.

276 In *Juries I*³⁰⁴ we asked whether the judge should have the power to question the foreman, or any other juror, on an application for discharge. These suggestions received support in the submissions. The new section 22(1A) gives the judge the clear power to consider the evidence of any juror, as well as any other relevant evidence. A similar provision should be included in the amended discharge provision.

The new discharge provision should:

- confirm the defendant's right to be present for all applications to discharge a juror;
- allow the discharge of one juror or the whole jury;
- allow the judge to conduct the hearing, and consider such evidence, as he or she thinks fit.

Reserve jurors or larger juries

277 In *Juries I*³⁰⁵ we discussed these as possible options to deal with the situation where long trials fail because jurors have to be discharged during the course of the trial. Reserve jurors raise a number of practical difficulties. For example, reserve jurors may not pay attention, knowing they are likely not to have to deliberate. Moreover, during long trials, there is a great deal of discussion among jurors during the trial, and reserves may influence those discussions and therefore the final outcome, even though they do not participate in the final deliberation. We expressed the view that section 374(4A), which allows trials to continue with ten or fewer jurors, and the flexibility to delay trials during a brief illness of one juror, are sufficient safeguards without these additional measures. The proposals met little favour in the submissions.

278 Our recommendations in paragraphs 128–132, to allow for trial by judge alone in cases which are too lengthy or too complex for a jury, should eliminate any need for reserve jurors or larger jury panels.

There is no need to use reserve jurors or empanel larger juries.

³⁰⁴ Para 468.

³⁰⁵ Paras 469–476.

9

Information and assistance before the trial

Introduction

279 **T**HE PROVISION OF INFORMATION and assistance to jurors before trial is largely an administrative matter and the responsibility of the Department for Courts. The Department has advised us that the findings of the Research have provided a very valuable resource for them to better understand the needs of jurors. The Department has established a working group to review the content and delivery of information provided to jurors in light of the Research. Given the work that is planned by the Department for Courts, this chapter will simply set out briefly the issues raised in *Juries II*, and our conclusions on them.

Jurors' knowledge prior to service and the jury summons

280 In *Juries II*³⁰⁶ we noted that most jurors appear to have little prior contact with or knowledge of the criminal justice system, the way in which a trial functions, or the exact nature of the task they are being asked to perform. The knowledge they do have is often vague or not useful, so the first real information that most potential jurors get about being on a jury is the jury summons and any accompanying information.

281 The jury summons was updated to the form in use during the period of the Research as a result of a 1992 report.³⁰⁷ In most centres, the summons was accompanied by information such as the location of the court, convenient parking, and a telephone number for further information. There was some variation from district to district in

³⁰⁶ Para 13.

³⁰⁷ Courts Consultative Committee, *Jurors' Concerns and the Jury System* (Wellington, 1992).

the information provided and also in the style and tone used. In *Juries II*³⁰⁸ we recommended minor amendments to the summons and accompanying information:

- to give more information on practical matters such as juror fees, parking, smoking policy, the fact that sitting hours may be altered and that there may be delays and, where relevant, that jurors may be required to stay overnight;
- to emphasise more strongly the need for jurors to understand English;
- to ensure that all districts use an informal and friendly tone; and
- to extend nationally the practice of some districts of including information on confidentiality, note-taking, asking questions, the role and selection of the foreman, and the deliberation process.

282 As a result of the Research, the Department for Courts have now produced a standardised summons and information form for use in all trial courts, thus addressing the problem of regional inconsistency, as well as the other matters raised in *Juries II*. The new forms came into use on 30 July 2000.³⁰⁹ The Commission endorses these changes.

The jury summons and accompanying information was improved and standardised nationwide in 2000 by the Department for Courts as a result of the Research conducted for this report. The Commission endorses these changes.

More effective delivery of information contained in the *Information for Jurors* booklet and introductory video

283 All potential jurors are meant to see the booklet *Information for Jurors* and watch the introductory video before balloting. While the Research indicated that those who did see these found them very helpful, a significant number did not see either, usually for practical reasons – insufficient copies to go around, or inadequate video facilities.

284 The Department for Courts have advised us that they do not support including a copy of the booklet with the jury summons because

³⁰⁸ Para 17.

³⁰⁹ This coincided with other practical reforms under the Juries Amendment Act 2000, which came into force on 30 July 2000.

only 15–25 per cent of jurors who are summoned actually attend for service. They consider that this is not a cost-effective use of the booklets, and would prefer to give them only to those who actually attend for service. They argue that the jurors would still have adequate opportunity to study the booklet prior to empanelling, and would be more likely to be focused on the information. The Department is also considering having the booklet posted electronically on its website, so that jurors could access it before they attend court if they so wish.

285 We suggest that a simple measure would be to put one booklet on every seat in the jury box, ensuring that each juror has a personal copy to take away and study at leisure.

The Department for Courts should take measures to ensure that the booklet *Information for Jurors* and the introductory video are seen by all jurors.

286 The Ministry of Justice suggests that a second, more specialised video should be developed for jurors to view once they have been empanelled. By that time jurors will know that they are actually going to serve and should be more able to focus on the information provided in the video. This second video could be shown in the court room immediately before the short recess when the jury normally retires to select a foreman. At that stage the rest of the jury panel is still present and would watch the video too, so that if when the jury returns from selecting the foreman a juror must be discharged, a replacement juror can be ready to be balloted on, having already seen the video. Proper facilities must be provided to view the video: this may seem so elementary it need not be mentioned, but given the Research finding that 22 per cent of jurors surveyed did not see the initial video,³¹⁰ it seems that this must be emphasised. The second video could address many of the issues raised by the review and Research, including:

- the need to understand English, and to identify any juror who appears not to understand English;
- what to expect from the trial process, in practical and emotional terms;
- what the role of the foreman is in the trial and during deliberations;
- how they might go about selecting a foreman;

³¹⁰ *Juries II vol II*, 2.16–2.18.

- note-taking and asking questions during trial; and
- how they might approach the deliberations process.

After watching the video the jurors would go on to select a foreman and then return to court for the opening addresses.

The Commission believes that a second video, to be shown after empanelling, would be most helpful to jurors, and recommends that such a video be developed by the Department for Courts.

More information on the selection of the foreman and the role and tasks of the foreman

287 Information on the role and selection of the foreman is given in the booklet and the video, and by the judge, but it is too general to be of real assistance. Many jurors do not recall receiving any information on this.³¹¹ The Research indicated that jurors were obliged to choose their foreman very quickly and were not given time to get to know each other sufficiently well to make an informed decision. Consequently, the choice was almost random and, undesirably, physical appearance or gender could be a significant factor.³¹² Many foremen seem ineffective in their role and sometimes the decision-making process either produces errors or is unduly prolonged because of the foreman. This could be because the foreman either has no real understanding of his or her role, and so does not behave appropriately, or discovers that he or she is not suited to the role and is unable to fulfil it.³¹³

288 In *Juries II*³¹⁴ we suggested that jurors should be given more guidance on selection and a reasonable time to make the choice, and that there be a brochure or poster in the jury room advising foremen on how to discharge their functions, including such matters as:

- the foreman should guide rather than dominate the discussion;
- every juror must have a chance to speak;
- it is not acceptable for any juror (including the foreman) to attempt to harass or intimidate other jurors;

³¹¹ *Juries II vol II*, 2.48–2.50.

³¹² *Juries II vol II*, 2.52.

³¹³ See *Juries II*, para 26.

³¹⁴ Para 27.

- rather than starting the deliberations with a vote on the verdict, it is better first to discuss the issues and allow everyone to speak before anyone is asked to express an opinion on the final verdict;
- if the jury wishes to communicate with the judge, either during the trial or during deliberations, the foreman should write a message and give it to the court clerk to deliver to the judge.

289 These matters should also be addressed in the second video proposed above (paragraph 286). However, we recommend that posters also be provided, so that they are clearly before the jury as they deliberate. The final content of the posters should be determined by the Department for Courts' working group (see paragraph 279).

Information on how to select the foreman and the role and tasks of the foreman should be included in the second video and printed on a poster to be displayed in jury rooms.

Is it necessary to select the foreman at the start of the trial?

290 In *Juries II*³¹⁵ we suggested that it might be better for the foreman to be chosen once the evidence is concluded so that the jurors have had a chance to assess each other, with any communication from or to the jury before then being through a court official.

291 Later selection of a foreman would allow jurors time to become acquainted with each other and to settle into the trial before having to make a decision on a foreman. It would mean that when the jury has questions which they wish to put to witnesses through the judge, or wishes to communicate with the judge about any problem they may have, which is currently done through the foreman, another method would be required. While this could be accommodated, this procedure would lead to a more serious problem: the foreman is not just a spokesperson, but also a leader. He or she takes responsibility for identifying and advising the court of any problems. If no-one holds this responsibility, it is likely that problems will not be identified and communicated early enough for them to be resolved without a mistrial. The foreman can also lead the preliminary discussions which inevitably arise amongst the jury.

³¹⁵ Para 28.

292 Judges to whom this question was put were predominantly of the opinion that the foreman must continue to be chosen at the beginning of the trial. Several pointed out that the better alternative is to give the jury more time and help at the start to pick their foreman, rather than waiting until later:

I am one of a number of judges who take a little time to explain to the jury not only what the foreperson's role is but also the skills involved. That seems to assist. Adjusting to a longer time to select a foreperson (and thus to learn of any late problems about jury membership) can be done by choosing (say) three alternate jurors who would not retire with the 12 but who are the only members of the panel required to remain after the 12 first retire. In the case of any fallout these 3 (in the order chosen) could fill any gaps arising in the 12. Get it done before they start their disagreeing.

293 Another said:

In my experience, particularly in longer trials, foremen usually take charge of the jury, review the day's evidence at day's end or start of each day and generally have things so that their ultimate work is streamlined. Not to have a foreman from the start would be disastrous.

294 We agree that it is preferable for the foreman to be chosen at the beginning of the trial. Rather than choosing a foreman later in the trial, the better solution is to retain the practice of choosing the foreman at the beginning but provide more guidance on how to make that choice and more time in which to make it. In *Juries II*³¹⁶ we suggested that if the practice of choosing the foreman at the start of the trial is to be continued, jurors need more time and guidance: perhaps a standard presentation about the role and qualities required of a foreman, and more time (up to an hour) to choose one.

295 The information could be provided in the second informational video (see paragraph 286) and also by way of a poster in the jury room.

296 In their submission, the High Court judges said:

The Juries Report concluded that trial Judges provided inadequate information on effective decision-making procedures to juries. A possible solution was for the foreperson to be provided with some simple written guidelines on techniques for effective decision-making: how to structure discussions, how to deal with dominant jurors, and how to resolve divergent viewpoints. There was no clear consensus in favour of this proposal at the [Judges'] Conference. And

³¹⁶ Para 29.

indeed Judges may not be sufficiently knowledgeable about group dynamics to instruct juries how to go about their deliberations.

A prescriptive approach is not advocated. What is required is an awareness on the part of trial Judges. How Judges could best help jurors in this regard might be the subject of further research.

- 297 Providing extra time for selection of the foreman would also mean that jurors had more time to settle in generally, to get used to what may be a very unfamiliar environment and to the fact that they are now on a jury. The Research showed that juries are often very rushed in selecting their foreman; the average time taken was four minutes. They also often came under pressure from court staff to make a quick choice.³¹⁷ This is not appropriate. Although we understand the pressures of court time constraints, the process of selecting a foreman is a very important one, and rushing the jury at this point may not only lead to wasted time later (if a poorly chosen foreman causes longer deliberations) but also shows a lack of respect to jurors.
- 298 The Research has led judges to invite jurors to take time over the selection of the foreman and to advise jurors of the qualities required and the functions this person must perform.
- 299 The Commission understands that some judges have adopted the practice of combining the morning tea adjournment with the selection of the foreman. This gives the jury more time, and also allows the jurors to relax and socialise a little before they have to make their decision. They can also make telephone calls to organise their own work and personal lives, now that they know that they are definitely on the jury and approximately how long the trial will take.

The foreman plays an important role from the beginning of the trial and should continue to be appointed then. However, jurors need more information on how to choose a foreman and more time in which to make their decision.

They need to be told what is required of a foreman, and what sort of experience could assist a foreman in performing his or her role. The jury should be allowed a reasonable period of time in which to choose their foreman. Where practicable, the jury should retire to choose their foreman at the same time as a scheduled adjournment, so that they are not hurried.

³¹⁷ *Juries II vol II*, 2.51–2.52.

Better equipping juries for the emotional impact of the trial

- 300 The Research indicated that a small number of jurors found their task emotionally difficult, especially in violent and sexual cases, and especially where jurors had themselves been the victim of a similar offence. Others found very burdensome the gravity of sitting in judgment on another person and giving a verdict that will so drastically affect that person's life. In *Juries II*³¹⁸ we suggested that while there is little practical help that can be given, *Information for Jurors* might acknowledge the problem and advise that, in particularly onerous trials, counselling is available. In this report we also recommend (see paragraphs 257–264) clarifying the power of the court to discharge a juror who has a serious problem in this regard.
- 301 While it is desirable to warn jurors of potential difficulties, it would be undesirable to do that so stridently that people are upset or reluctant to serve. We agree with the submission of the Department for Courts:

As the report highlights, service on a jury can have a considerable impact on individuals. Our view is that there needs to be a careful balance between information that prepares jurors for some emotional impact but does not unduly discourage jurors or increase their nervousness about attending. Individuals react differently to different types of cases, however information of a general nature about common reactions to jury service, for example feelings of responsibility, tiredness, general stress, could be helpful.

In appropriate cases, jurors should be warned of the possible emotional impact of trials, of the availability of counselling if required, and (if the proposals adopted in paragraphs 265–268 are accepted) of the ability to apply to be discharged if they are unable to serve for emotional reasons. This warning should be given in the proposed second video (see paragraph 286) and by the judge in their opening.

It should be made clear that the power to discharge is discretionary; the intent of this warning is to prepare jurors, not encourage frequent applications for discharge.

³¹⁸ Para 21.

Information and assistance at the beginning of the trial

Introduction

302 **O**NCE THE FOREMAN HAS BEEN SELECTED and the jury returns to the courtroom, the trial begins. The judge makes some brief preliminary remarks, and then the Crown prosecutor opens the Crown case by explaining what the case is about and what the Crown has to prove, and describing the evidence which the Crown will call to prove its case. Traditionally, after the Crown prosecutor has made this opening he or she will call the prosecution witnesses, and it is only once all the prosecution witnesses have given evidence that defence counsel opens the defence case and calls the defence witnesses. However, a recent amendment to the Crimes Act 1961 (see paragraph 311) now allows the defence to open their case after the prosecution opens theirs, and before the first prosecution witness is called. This chapter discusses the openings of judge and counsel, and other information and assistance given to the jury at the beginning of the trial.

The judge's preliminary remarks

303 The judge's preliminary remarks currently include basic housekeeping matters (such as the times when the court sits and when the breaks will be) and a number of fundamental rules (such as the need for confidentiality and not to discuss the case except with the rest of the jury, and the burden and standard of proof).³¹⁹ Although the advice given on these matters seems to be fairly consistent, the extent to which judges give advice on matters such as note-taking, access to the judge's notes of evidence, and asking questions, varies considerably.³²⁰ Most of these matters could be included in the second video (see paragraph 286), which would

³¹⁹ *Juries II vol II, 2.22.*

³²⁰ *Juries II vol II, 2.22.*

ensure consistency. As the judge's preliminary remarks are recorded, putting them into a video would also decrease work for the judge's associate. Alternatively, some uniform instructions might be provided.³²¹ Judges would still have to advise on matters particular to the trial, such as likely duration and special features such as screens for witnesses or the use of closed circuit television to give evidence.

304 In addition to these more mundane matters, some judges include directions on the law in their preliminary remarks. The extent to which this is done varies, but in the trials included in the Research, where the judge did give even a minimal direction on the law at this stage, the jurors found it very helpful.³²² It is apparent from the Research that jurors are not blank slates; they are constantly interpreting what they hear and need clear frameworks to do so effectively. Directions at this early stage can help to provide that framework. In *Juries II*³²³ we asked whether judges should give preliminary directions before the prosecution case commences, in addition to directions in the summing-up at the end of the trial, and if so what sort of directions should be given. We suggested that at this point judges could introduce the legal concepts likely to be relevant in the trial, including the essential elements of the charges, and where possible provide written directions. The few submissions that were received on this point were generally in agreement with these proposals, although it was pointed out that these must be tailored to each individual case.

305 When opening the case for the Crown, the prosecutor will explain what the case is about, the evidence which will be given, the way that this evidence will establish the essential elements of the charges, and also general matters such as the onus and burden of proof. It is therefore convenient for counsel to be informed in advance of the judge's intention to give preliminary directions and the substance of those directions.

306 Uniform general instructions could be provided on legal matters such as the elements of the offence (broken down into bullet points where appropriate), the burden and standard of proof, the significance of multiple or alternative charges, and definitions of key legal terms which will be used in the trial. The submissions we

³²¹ The latest *Criminal Jury Trials Bench Book* does provide a check list on what should be commented on by a judge, but it is a list of points to be covered and there is no guidance on what should actually be said about each point.

³²² *Juries II vol II*, 2.25.

³²³ Para 35.

received indicated support for a model to provide a standard approach which can then be tailored as required. We agree that a non-prescriptive approach is best, as each case differs, and some judges are more comfortable than others following such guidelines. Some defence counsel will be willing to state quite clearly what matters are at issue in the trial, while others will put the prosecution to the proof of all elements; the extent to which the judge can define issues in advance will to a large extent depend upon this.

- 307 It can be of advantage, in a major trial, for Crown counsel to provide the judge and defence with copies of the indictment and a list of what the Crown see as the issues well in advance. If the defence then advise of any additional issues, or of matters which are not contested, the judge will be able to prepare preliminary directions that are of optimum assistance to the jury.
- 308 The amount that judges can say about the law in their preliminary remarks will necessarily be limited, especially if the defence elect not to divulge any part of their case.

To the greatest extent possible, counsel should co-operate to identify issues in advance of trial. Directions for best practice will be included in the CPC Manual.

Defence opening statement and opening address

- 309 In *Juries II*³²⁴ we expressed support for a planned legislative amendment to clearly allow the defence to make an opening statement immediately after the prosecution, because:
- the issues at the trial will be more clearly defined, saving court time;
 - the jury will be more aware of the points of contention from the outset. This should help provide a clearer ‘framework’ for the jury, which the Research has indicated is particularly required; and
 - the defence’s cross-examination of prosecution witnesses may be given a context, making that part of the trial (which is often an area of confusion for jurors) more comprehensible.
- 310 Section 367(1) of the Crimes Act 1961 provides:

Upon the trial of any accused person, counsel for the prosecution may open his case and after such opening (if any) shall be entitled to

³²⁴ Para 39.

examine such witnesses as he thinks fit; and the accused person, whether he is defended by counsel or not, shall be allowed at the end of the case for the prosecution, if he thinks fit, to open his case, and after such opening (if any) shall be entitled to examine such witnesses as he thinks fit.

Although this provision does not specifically contemplate that the defence should be permitted to make any opening statement until the prosecution's case is finished, some judges do let defence counsel make a brief opening statement immediately after the prosecution opens its case and before the first prosecution witness is called.³²⁵

311 A recent amendment to the Crimes Act³²⁶ inserts after section 367(1) the following:

(1A) Without limiting subsection (1), the Court may give an accused person leave to make an opening statement, after any opening by the prosecution and before any evidence is adduced, for the purposes only of identifying the issue or issues at the trial.

(1B) Nothing in an opening statement made under subsection (1A) limits the rights of an accused person to raise any other issue or issues at the trial.

312 We consider that this amendment will be of considerable use in allowing defence counsel to clarify the issues for the jury from the outset of the trial. Clearly it is not intended to allow the defence to give two opening addresses, and some judicial control will be required to ensure that defence counsel are limited at this stage to a short statement of the matters at issue.

A written copy (or summary of the key points) of the judge's directions

313 In those cases in the Research in which the jurors were given written directions, most jurors found them helpful, and a majority in other cases agreed that they would have found a written summary useful because:³²⁷

- it was difficult to absorb all of the judge's instructions at the time they were given, and a written summary could have been digested at a more leisurely pace back in the jury room;

³²⁵ But note the view expressed by Hammond J in *R v Joseph* [1994] 2 NZLR 702, 703, that s 367 represents a delicate balance between the interests of the Crown and the interests of the accused, and that s 367(1) specifically states the time that the defence may make an opening statement, so to read in a discretion on the part of a trial judge to vary that timing flies in the face of the statutory provision.

³²⁶ Crimes Amendment Act 2000.

³²⁷ *Juries II*, para 51.

- some jurors differed in their interpretation of what the judge said, even when jurors had themselves made notes; and
- some jurors felt that written instructions would have reduced deliberation time.

314 In their submissions, the High Court judges said:

The Juries Report recommended an increased emphasis upon the provision of written directions to juries. This is already increasingly common in both the District Court and the High Court. There are some significant differences of approach both as to when the directions are provided and as to their content. There seems to be a substantial practice in the District Court of providing a jury booklet of materials which includes written directions as to the elements of the offence and any other legal issues likely to arise but in a general and abstract way. The general view of High Court Judges was that written directions referable to the case (and particularly to the legal elements of the offence) should be given, if at all, at the end of the case. Further, there was a preference for the directions to be focused on the issues raised by the case rather than in the abstract. Particularly useful is provision of a suggested step-by-step approach to the issues raised by the case.

It is not practical to be prescriptive as to when directions in writing should be given or as to their nature. Practice is likely to vary depending upon the nature of the case and the personal style of the judge and the extent to which the matters truly in issue are identified at an early stage, perhaps through a defence opening or early admissions of fact . . . Where a judge proposes to give written directions or identify a series of questions for the jury to answer, these should be submitted in draft to counsel wherever possible prior to their closing addresses. The written directions should be treated as an integral part of the summing-up and should be referred to as oral instructions are given.

The Commission agrees with the approach of the High Court judges.

Special verdicts

315 In *Juries II*³²⁸ we asked whether special verdicts should be introduced, or whether it would be more useful to simply encourage the use of flowcharts. A special verdict is where the trial judge asks the jury to answer specific questions of fact, as they find them to be proved, leaving it to the Court to say whether or not, on those facts, the

³²⁸ Paras 61–63.

accused is guilty.³²⁹ Although the power appears to be rarely used, it is clear that the Court has an inherent power to request a jury to answer issues instead of or in addition to giving a general verdict.³³⁰

The [question] involves the right of the Judge on the trial of a criminal case to submit issues to the jury. There is no reference in the Crimes Act to this point, except [for section 380(2) of the Crimes Act 1961];³³¹ but I think that the same inherent power resides in the Court in New Zealand as in England. In New Zealand, issues have, in fact, been submitted in several cases, particularly where the case would otherwise have involved directions on more or less complicated questions of law which it would have been difficult to make intelligible to a jury of laymen . . . In my opinion, there is nothing to prevent the Judge putting specific questions to the jury, but the jury are not bound to answer them. In other words, a jury may be invited, but cannot be compelled, to answer specific issues. As was said by the Lord Chief Justice in *R v Davies* [1897] 2 QB 199, it is better to leave the general issue to the jury, save, I would add, in exceptional circumstances where in the interests of justice [it] seems desirable that specific questions should be put. Even when they are put, however, the jury are entitled, if they think fit, to return a general verdict instead of answering the issues.

316 It is often said³³² that special verdicts should be found only in the most exceptional of cases. However, the case generally cited in support of this

³²⁹ See generally *The Laws of New Zealand* (Butterworths, Wellington, 1995) vol 9, Criminal Procedure, para 265; Hon Bruce Robertson (ed) *Adams on Criminal Law* (Brooker's Ltd, Wellington, 1992), Ch 5.15.

³³⁰ *R v Storey* [1931] NZLR 417, 439–441 (CA), 439–401; confirmed in *R v Currie & Ors* [1969] NZLR 193, 207–208 (CA); see also *R v Clark* [1946] NZLR 522 (CA) and *DPP v Stonehouse* [1978] AL 55.

³³¹ Section 380 (which is equivalent to Crimes Act 1908 s 442, quoted in *R v Storey* [1931] NZLR 417, 441) provides:

(1) The Court before which any accused person is tried may, either during or after the trial, reserve for the opinion of the Court of Appeal, in manner hereinafter provided, any question of law arising either on the trial or on any of the proceedings preliminary, subsequent, or incidental thereto, or arising out of the direction of the Judge, [other than a question arising on any of the proceedings preliminary to the trial and already determined by the Court of Appeal under section 379A of this Act].

(2) If the decision of the question may in the opinion of the Court depend on any questions of fact, the Court may in its discretion ask the jury questions as to the facts separately, and the Court shall make a note of those questions and the findings thereon.

³³² *Halsbury's Laws of England*, (4 ed Reissue, Butterworths, London, 1990) vol 11(2), Criminal Law, Evidence and Procedure, para 1034; P Richardson (ed) *Archbold: Criminal Pleading, Evidence & Practice* (2001 ed, Sweet & Maxwell, London) 4-465–4-467; Criminal Procedure, above n 329, para 265.

proposition,³³³ while stating this proposition baldly, gives no reason for it. Moreover, while the Court of Criminal Appeal criticised the practice of special verdicts and indicated that it should not have been used in the trial of this case, they nevertheless refused to overturn the conviction, holding that the special verdict actually returned by the jury (at the request of the trial judge) showed that they accepted the essential evidence.³³⁴ A virtue of special verdicts is their transparency, as the jury's opinion on each issue is revealed rather than just their final conclusion, but care is needed with them (see *R v Clark*, footnote 330).

- 317 There were no cases involving special verdicts covered by the Research, but in two cases the jury was given a flowchart to work through to reach their verdict which they found very helpful. Using a flowchart is very similar in effect to a special verdict: the judge sets out the questions to be answered and the answers to those questions then lead to a verdict of either guilty or not guilty. The only difference is that with special verdicts the jury only answers the questions and then the judge announces what verdict those answers lead to; with flow charts, the jury announces the verdict and does not reveal the answers it found to the questions in the flow chart. An example of a flow chart is included on page 122.³³⁵
- 318 The exact method of doing this should be left to judges in individual cases. The flowchart is one method, another would be a list of sequential questions. These will not be necessary in every or even many cases, but where there are complex issues, or multiple charges and defendants, they may be useful. Their use will of course require preparation time from the judge, and may mean a delay after the defence closing before the judge is ready to sum up. The consent of counsel will as a matter of practice be required, and if this is not obtained is likely to be the subject of an appeal.

While the residual power to use special verdicts should remain, in practice they will continue to be seldom used as flowcharts and sequential questions can play largely the same function. The use of flowcharts and sequential questions to assist the jury is to be encouraged, especially in complex cases.

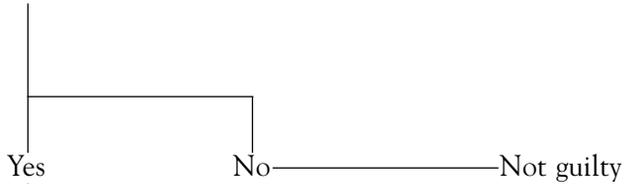
³³³ *R v Bourne* (1952) 36 Cr App R 125.

³³⁴ Note that in the United Kingdom there is some suggestion that special verdicts may be resuscitated to accommodate the requirements of Article 16 European Convention on Human Rights (now incorporated into United Kingdom domestic law by the Human Rights Act 1998 (UK)). See R Verkaik "New Law Will Force Juries to Give Reasons For Verdicts" *The Independent*, London, 25 August 2000.

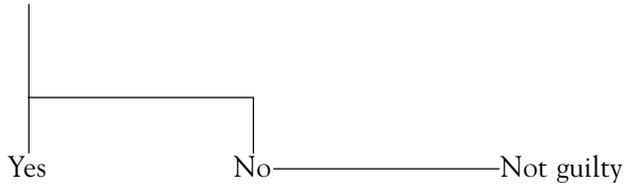
³³⁵ From Institute of Judicial Studies *Criminal Jury Trials Bench Book 2000* (unpublished, Wellington, 2000) 3.13.

An example of a flow chart

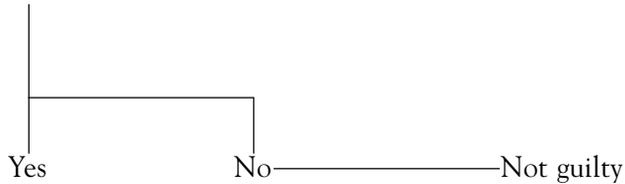
Has the Crown proved that the accused was in possession of the plant material?



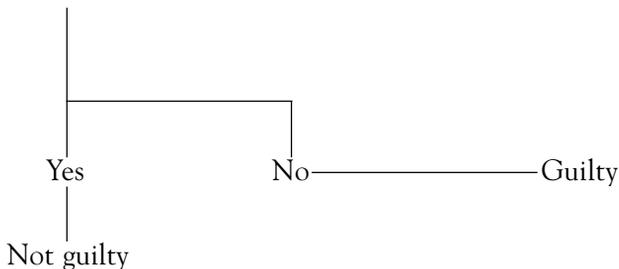
Has the Crown proved that the plant material was cannabis?



Has the Crown proved that the weight of the cannabis was more than 28 grams?



Has the Defence satisfied you that the accused was in possession of the cannabis for a purpose other than supply or sale?



Presentation of evidence

Introduction

- 319 **O**NCE THE PROSECUTOR has opened the prosecution case,³³⁶ the prosecutor will call the prosecution witnesses one by one (unless by consent the evidence is read). Each witness is examined by the prosecutor and cross-examined by defence counsel, and the judge may also ask questions. The jury may ask questions of the witness, by writing the questions down and giving them to the judge, who, if the question is appropriate (relevant and not infringing any rule of evidence), will either put the question to the witness or ask counsel to do so. After the prosecution witnesses have all given evidence, defence counsel may open the defence case and call the defence witnesses.³³⁷ After all witnesses have given evidence, each counsel may make a closing address, the defence always having the final right of address.
- 320 This chapter discusses issues relating to the way that evidence is presented to the jury, and jurors' ability to ask questions during the evidence and later during deliberation.

Pre-trial disclosure

- 321 This issue is raised because pre-trial disclosure has the potential both to clarify points of agreement and dispute between the parties, so that the evidence which is to be put to the jury is clarified,³³⁸ and to reduce trial time.³³⁹
- 322 The defence is not required to disclose any of its case before trial, except notification of an alibi defence under section 367A of the

³³⁶ Note that the defence may make an initial opening statement at this point, see para 311.

³³⁷ If the defence does not wish to call any witnesses counsel will not open; in that event the prosecution counsel will straightaway give their closing address.

³³⁸ See *Juries II*, paras 68–75.

³³⁹ See *Juries II*, paras 139–143.

Crimes Act 1961, and indeed does not have to indicate before the close of the prosecution case whether he intends to call evidence at all. In our draft Evidence Code, the Commission has also recommended that there should be a requirement for written notice of a proposal to offer hearsay evidence³⁴⁰ or expert evidence,³⁴¹ and of the contents of that evidence. These requirements would apply to both prosecution and defence. The Commission does not consider that further obligations of disclosure on the defence³⁴² are necessary.

323 The defence also has the option, under section 369 of the Crimes Act 1961, of formally admitting any fact alleged, in which case the prosecution is not required to prove that fact. Such admissions are purely voluntary. They are used with reasonable frequency, often initiated by the prosecution, who will prepare the documentation and send it to the defence in advance of call-over for their consideration and admission by consent without formal proof. Prosecutors do not do this in every appropriate case, and should be actively encouraged to do so by judges at call-over. There is no need for any new procedure or special hearing to accommodate this.

324 The law relating to pre-trial disclosure of evidence still lacks comprehensive legislative foundation. The Commission first pointed out the need for a comprehensive disclosure statute in 1990.³⁴³ It was raised again in our recent *Criminal Prosecution* report,³⁴⁴ and the Government has recently announced its intention to ensure such legislation is introduced.³⁴⁵ In addition, we suggested a significant change in practice, namely that:

- discovery of expert opinion obtained by the defence and intended to be used as evidence at trial should be made at least 14 days prior to the trial.³⁴⁶ A provision to this effect is contained in section 25 of the draft Evidence Code;

³⁴⁰ *Evidence: Code and Commentary*, above n 147, s 20

³⁴¹ *Evidence: Code and Commentary*, above n 147, s 25.

³⁴² Of the sort enacted, for example, in Victoria: Crimes (Criminal Trials) Act 1999 (Vic); see generally G Flatman QC and M Bagaric “Accused Disclosure – Measured Response or Abrogation of the Presumption of Innocence?” (1999) 23 Crim LJ 327.

³⁴³ *Criminal Procedure: Part One: Disclosure and Committal*, above n 1.

³⁴⁴ *Criminal Prosecution*, above n 4, chapter 8.

³⁴⁵ Media statement from Minister of Justice and Minister for Courts “Criminal Prosecution Reform Announced” (2 November 2000).

³⁴⁶ *Criminal Procedure: Part One: Disclosure and Committal*, above n 1, para 110.

- the notification of intended use of the alibi defence should apply to both summary and indictable proceedings;³⁴⁷ and
- the alibi precedent should not be extended to other defences (for example insanity, provocation, automatism, intoxication, self-defence, accident, and compulsion).³⁴⁸

325 In their submission in response to *Juries II*, the Ministry of Justice indicated the proposed structure of the new legislation:

The proposed statutory Criminal Disclosure Regime would have the following features relevant to the issue of clarity of evidence:

- Full prosecution disclosure would be automatically triggered at the time of entry of a not guilty plea or election for trial by jury in the case of informations laid summarily, or by first appearance for informations laid indictably. All relevant information would be required to be disclosed and the obligation to make disclosure would be ongoing until the trial is over.
- Attempts to introduce undisclosed evidence at trial would be dealt with by the exclusion, or imposition of conditions upon acceptance, of such evidence.
- It would require defence disclosure of alibi or expert evidence.

The benefits of a ‘full’ defence disclosure regime were considered not sufficiently convincing to warrant the costs that it would incur, both in terms of its establishment and its operation. The risk of prejudicing the principles of the presumption of innocence, the right to silence, the privilege against self-incrimination, and the burden of proof resting with the prosecution were highlighted as arguments against full disclosure by the defence, as was the traditionally adversarial nature of New Zealand’s criminal justice system.

326 It is in the area of expert evidence that increased defence disclosure would contribute to a more just and efficient trial, by reducing the issues, and consequently the amount of evidence, put before the jury. It would also reduce delay because, if the defence first discloses expert evidence only once the trial has begun, delays are inevitable while the prosecutor locates an appropriate expert and obtains advice from them in response to the defence’s expert. This is better done pre-trial. We see no injustice to the defence resulting from such change.

327 The Commission does not consider that formal notice requirements on the defence should be extended beyond alibi and expert evidence

³⁴⁷ *Criminal Procedure: Part One: Disclosure and Committal*, above n 1, para 115.

³⁴⁸ *Criminal Procedure: Part One: Disclosure and Committal*, above n 1, para 113.

because, in practice, there are few cases in which the prosecution is not capable of anticipating the defence's position. To require defence disclosure of "positive" defences other than alibi or expert evidence would be arbitrary, given the difficulty of distinguishing such defences from general defences. Moreover, such disclosure would create difficulties because, prior to the presentation of the prosecution case, the defence may not know whether a positive defence should be raised.

Should there be a pre-trial disclosure regime for both prosecution and defence aimed at identifying for the jury the disputed issues?

- 328 This question was included in our survey of trial practitioners (see preface). The majority indicated that they would not support any further change in this area, although a number also pointed out that the defence may choose to disclose information or make section 369 admissions of fact, and that this is a useful and responsible thing to do. The primary reason given for not supporting any further change was that it would fundamentally alter the burden of proof, which should rest entirely on the prosecution, and infringe the right to silence. Moreover, the Crown has more resources than the defence – one respondent made the point that the defence's advantage of the burden of proof balances the Crown's advantage in resourcing:

The defence is entitled to take issues as they appear at trial and to "see how the prosecution goes" before deciding how to close. The adversarial system only works when it is balanced. The resources of the state must be balanced by the burden of proof and the defence should not be required to make it easier for the prosecution.

- 329 There would also be serious practical difficulties, because it is often difficult or impossible for defence counsel to get firm instructions from the client prior to trial.³⁴⁹

What concerns me about having a pre-trial disclosure regime is that as defence counsel you might end up by being committed to a particular line of defence and committed to conceding certain things well in advance of the trial. However much it might seem to be reasonable to have that good a grasp of the trial months in advance of the trial actually having been set down, the reality is quite different. I am sure most defence counsel start working furiously and feverishly once the trial has been set down and in the week or weeks preceding the trial, depending on how long the trial is. If a pre-trial disclosure regime has been required, then I can simply foresee the situation where as defence

³⁴⁹ Submission in response to survey of practitioners.

counsel you have conceded matters that you ultimately wished that you had not. I am not opposed to some regime where, closer to the trial date, such matters could be discussed. Although, I am still concerned that that requires revealing to the Crown details of the defence which I feel somewhat uncomfortable with.

- 330 The New Zealand Law Society submitted that in most cases identification of issues is reasonably obvious to both parties and there is no pressing need for any formalisation of the process. There already exist adequate procedures for identification of issues for the jury, through the opening statements of the prosecution and defence.

There is no need for a formal or compulsory pre-trial disclosure regime. Section 369 admissions of fact are an efficient and sensible means of lessening the evidence that must be presented at trial, and should be encouraged by active judicial inquiry at call-over.

Caseflow management

- 331 In *Juries II*³⁵⁰ we said that developments in caseflow management (pre-trial conferences and status hearings, which may be extended to the indictable jurisdiction) were positive and increase the efficiency of proceedings by narrowing the focus of the trial. There are obvious links between pre-trial disclosure and caseflow management, and the latter could be used to reduce the volume of evidence put before juries.

Should one objective of caseflow management be to streamline the evidence put before the jury?

- 332 The Commission believes that one objective of caseflow management should be to streamline the evidence, particularly in more difficult cases, but this must not be carried too far. The Research indicates that jurors often find the evidence of at least one of the parties to be confusing or poorly organised, or to be following irrelevant or peripheral lines of questioning, and that judges rarely intervene to prevent this.³⁵¹ To the extent that this problem can be lessened by better identification of issues and streamlining of the evidence in advance, judicial case management is a useful thing.

³⁵⁰ Paras 76–78.

³⁵¹ *Juries II vol II*, paras 5.25–5.27.

- 333 Another matter which gives rise to juror confusion is evidence that is called out of sequence of the natural narrative flow.³⁵² Although witnesses cannot always be called in such a way as to preserve the narrative flow, the jurors' need to hear witnesses in a coherent order should in general be a higher priority than the convenience of the witnesses. This is something that can be addressed as a matter of caseflow management.
- 334 However, excessive streamlining of evidence might remove details which are crucial to a jury's sense of background and narrative structure. Not infrequently (nor unreasonably) jurors come to the conclusion that information is being withheld, and this can create difficulties for them.³⁵³ Moreover, issues can never be fully determined before a trial, because the evidence is not determined until witnesses actually give their testimony and are questioned on it.
- 335 A number of the practitioners we surveyed expressed concern at the intrusion of "management" concepts and concerns into the process of deciding what evidence will go before the jury, and particularly at the possibility that the desire to reduce trial time and pare down the evidence to a minimum may lead to an excessive refinement of evidence, removing background information that helps to create the overall picture. It was pointed out that the starting point is always that all relevant evidence is admissible, subject only to proper and defined exceptions, and that evidence that is not relevant is not admissible.³⁵⁴

Streamlining the evidence for the jury is one valid objective of caseflow management, and the focus of this should be the elimination of irrelevant or repetitious evidence. But it must be done cautiously and with regard for the circumstances of each case.

Speed of evidence and alternatives to stenographic recording

- 336 The evidence given by witnesses is taken down in writing. This is usually done by the judge's associate on a word processor in the court. As each page of evidence is finished it is printed out and

³⁵² *Juries II vol I*, paras 79–81.

³⁵³ *Juries II vol II*, paras 4.8–4.10.

³⁵⁴ This is confirmed in the Commission's draft Evidence Code, above n 147, s 7.

copies are distributed by the court clerk to the judge and counsel. The typed transcript is commonly referred to as “the judge’s notes”.³⁵⁵ Any rulings by the judge and the judge’s summing-up to the jury are recorded, but not transcribed unless they are required for an appeal.

337 In *Juries II*³⁵⁶ we pointed out that the traditional method of typing the evidence as it is delivered is too slow; jurors in the Research found it irritating and distracting, and many found that it seriously impeded the trial process and their ability to concentrate on the evidence.³⁵⁷ The delay also allows dishonest witnesses time to fabricate their stories, and nervous or young witnesses may find the frequent pauses so upsetting that they do not answer.

338 One alternative to traditional stenographic recording, “Machine Shorthand Recording/Computer-Aided Transcription” (known as the CAT system) was used in nine cases in the Research and was very effective; no adverse comments on evidence speed were made by any juror in those cases. However, because they require highly skilled operators CAT systems are expensive, so much so that the system is now being used only in Wellington, and will not be extended further. However, another alternative is audio-digital recording. This also allows evidence to be recorded at the speed of natural speech, but the recording is electronically removed from the courtroom and transcribed in another room (or indeed in another town or city, allowing efficient use of court staff time). The typed notes are not available immediately, as stenographic or CAT notes are, but they are usually available within the hour. Parts of the recording can also be played back, so that the intonation of the speech can be heard again.

339 Systems which allow the recording of evidence at the speed of natural speech can cut trial time by up to 25 per cent.³⁵⁸ Apart from the obvious savings in trial costs, this means that trials are less of an imposition upon jurors’ lives.

340 We have been advised by the Department for Courts that they intend to implement audio-digital recording facilities to allow real-time evidence recording in all courts (including, but not limited to,

³⁵⁵ They are so called because it used to be the case that the judge would write the notes himself by hand, but in modern times the practice has been for a court employee to type what is said as it is being said.

³⁵⁶ Paras 94–97.

³⁵⁷ *Juries II vol II*, paras 3.10–3.12.

³⁵⁸ Information provided by Department for Courts.

jury trials) by 2003. The Commission supports technical improvement, which has the potential to considerably improve jurors' ability to understand and follow the evidence. The decrease in time will also have other benefits: reduced stress for witnesses, whose evidence can be given more quickly and naturally, a shorter trial for victims to endure, and reduced costs for counsels' time. However, we have been advised by a number of counsel who have experienced the new system that it suffers technical problems. They are concerned by a lack of accuracy in the notes, unreasonable delay in obtaining the notes, and instances of the equipment failing to record what is being said. We expect that these are problems that will be resolved with further staff training and systems improvement.

Technological systems that allow evidence to be recorded at the speed of natural speech make evidence easier to follow and understand, and decrease the time required for jury service. The audio-digital recording system, which will be implemented in all courts by 2003, currently suffers some technical problems, which should be urgently addressed.

Giving the jury a copy of the judge's notes

- 341 The jury take into their deliberations the written materials which they have been given by counsel, which usually include as a minimum a copy of the indictment, a list of witnesses and the relevant sections of the Crimes Act 1961. They may also be given copies of written statements and transcripts (from pre-trial interviews) that have been presented in evidence.³⁵⁹ The jurors in the Research found these helpful but, as these materials included no statements made *during* the trial, expressed concern that it is unfair to get the defendant's statement but not the complainant's.³⁶⁰
- 342 The jurors in the Research expressed a strong wish to receive a copy of the judge's notes.³⁶¹ In terms of one of the major lessons of the juries Research – that jurors should be treated with the respect due to their important office, and assisted in discharging it – jurors should have access to that which a professional judge would regard

³⁵⁹ The Court of Appeal has held that it is permissible for juries to take these transcripts into their deliberations (*R v Szeto and Anor* (26 May 1999) unreported, Court of Appeal, CA 449/98 and CA 10/99, 6) and for some judges it is now routine for them to do so, but not all trial judges permit the practice in their courtrooms.

³⁶⁰ *Juries II vol II*, para 3.7(1).

³⁶¹ *Juries II vol II*, para 3.9(1).

as an essential aid. The usual reasons against this – that jurors will be absorbed in the notes and sidetracked from issues of credibility and demeanour, and that they will get immersed in irrelevant details and prolong the deliberations – were not borne out by the Research.³⁶² Many juries already spend a lot of time trying to agree on a version of the evidence from the notes they have collectively taken, and search their own notes or the notes of others when they cannot recall a section of the evidence critical to the discussions. They also frequently need to have portions of the evidence read back to them. It is likely that the provision of a copy of the judge's notes will eliminate the current, sometimes lengthy, arguments about what evidence has actually been given, enabling discussions to become more focused and reducing deliberation time. This proposal was supported by the majority of High Court judges.

343 The practical problems of note-taking were illustrated by one juror who responded to our preliminary paper:

I took about 400 pages of notes during the trial, which proved very useful during deliberations, but were not complete; and the note-taking aggravated my existing OOS, and meant that I could not observe witnesses' demeanour and body language much of the time. No one can possibly remember all the details of evidence in a lengthy trial, and the importance of a particular piece of evidence is not always apparent until related evidence is given later. How can a jury give a verdict on the basis of the evidence if they do not have it available to them in a more reliable form than their memories and whatever notes they have managed to take?

344 As the use of technological systems for evidence recording at the pace of natural speech becomes widespread (see paragraph 340), the increased speed of evidence will make it much harder for jurors to take their own notes. The provision of a copy of the judge's notes would compensate for this difficulty.

345 There was cautious support for this proposal among the submissions, with one reservation being a concern about the accuracy of the notes and who would be responsible for their checking and verification. We agree that could be a concern, but believe it is one that can be overcome. It should be the responsibility of counsel to ensure that any mistakes in the notes are picked up promptly and corrected.

346 Another concern is that the jury may concentrate on only part of the judge's notes, maybe on the evidence of one witness to the exclusion that of others. However, this can happen just as easily if

³⁶² See *Juries II*, para 88.

the jurors are themselves taking the notes; the problem can be addressed by appropriate directions.

347 Instructions to the jury would need to include:

- (a) that the notes must not be taken out of the jury room; and
- (b) that the notes are just the written record of the evidence and provided for their convenience so that they can observe the witnesses at leisure rather than having to concentrate on note-taking. They should not substitute the notes for their own assessment of the witness' testimony and demeanour in the courtroom.

In appropriate cases, it may be desirable for an index to be prepared for the notes to assist the jurors. We recommend that model directions on these issues be included in the Bench Book.

348 One issue which arises from this proposal is that of when the notes should be provided to the jury. The notes are currently provided to the judge and counsel page by page as they are produced, but we do not consider that they should be provided at the same time to the jury, because counsel need time to identify any errors. The jurors do not require the notes until they begin to deliberate, and therefore we recommend that they be given the notes at that point. They should also be encouraged to take notes of their own; although they do not need to take down detail, it will still be helpful to record their impression of witnesses generally. That way the traditional focus on the witnesses will be maintained. However, in longer trials judges may choose to disseminate the notes before deliberation. That is a matter of discretion.

349 Other practical issues were raised by the High Court judges in their submission:

In light of the views expressed at the Conference the Bench Book Committee is in the process of preparing a form of direction to be used when a jury is provided with the transcript. One of the issues which has been addressed is that the transcripts of evidence in chief will now have to be recorded in question and answer form rather than in the narrative form which has been preferred by some Associates. Other matters will arise: an index will be required, counsel will have an added responsibility to ensure that the record is accurate, and evidence given in a voir dire will need to be severed from the notes provided to the jury.

350 One suggestion made in the submissions³⁶³ is that witnesses should be recorded on video to be replayed to the jury if necessary. This

³⁶³ Serious Fraud Office; and also at Crown Solicitors' conference.

would avoid the inaccuracies of transcription and allow the jurors to review facial expressions, pauses and other non-verbal elements of communication that are crucial for assessing the credibility of a witness. However, it would be an imposition on witnesses, especially complainants, and may make it harder for them to give their evidence candidly. It would also be costly and cumbersome. While this may ultimately be desirable, we consider investment in modern evidence recording apparatus (see paragraphs 336–340) would be more useful in assisting juries.

Should the notes be given as a matter of course or only in lengthy or complex trials?

- 351 While it is tempting to say that the notes of evidence need only be provided in lengthy or complex cases, in our view if notes are to be provided at all they should be provided in all cases. Juries require evidence to be read back in many trials, not just lengthy or complex ones. Moreover, although length can be quite easily determined, it is difficult to predict which cases a jury will or will not find complex, and the threshold will in practice be difficult to draw. In simpler cases, the jury is unlikely to need to use the notes but should be provided with them in case.

Should the jury have access to a computer to facilitate searching of the judge's notes?

- 352 In *Juries II*³⁶⁴ we suggested that if the jury is to be given the judge's notes, they might also be given the use of a computer to search them and locate relevant material. This proposal met widespread opposition in the submissions. The Department for Courts pointed out the practical difficulties:

Currently the notes can only be provided to juries by means of paper copy. Court processing has, until now, been largely manual and paper based. The department is currently undergoing a modernisation programme, a significant part of which is increased use of technology. The changes in courts do not currently extend to placing computers in jury rooms, and any requirement to do so would result in significant financial implications for the department. This does not preclude the department from considering the use of computers in the jury room in the longer term.

- 353 The trial practitioners we surveyed were overwhelmingly opposed to computer search facilities being made available to jurors, despite

³⁶⁴ Para 88.

considerable support for their getting the transcript in hard copy. There were concerns about:

- jurors not having the skills to use the computer;
- deliberations being hijacked by those who did have computer skills;
- court staff who tried to assist influencing deliberations, unwittingly or otherwise;
- spelling mistakes in transcripts making searching inaccurate; and
- giving the notes undue emphasis.

354 After further consideration, and in light of the submissions, the Commission considers that providing computer search facilities is unnecessary and impracticable at this stage. That does not mean that the idea should not be reconsidered in the future, as computer technology evolves and once the routine use of real-time evidence recording is firmly established, or that a judge might not decide that it would be appropriate in a particular case.

The jury should be provided with a copy of the judge's notes, at the beginning of their deliberation, although judges should have the discretion to provide the notes earlier if appropriate in longer or more complex cases. It is not practical or necessary for courts to provide computer search facilities for the jurors to use with the notes, but this issue may be reconsidered in the future once other changes have been embedded.

Use of written aids and visual representations

355 The Research showed that jurors found these very useful, although counsel did not always use them as effectively as possible. In *Juries II*³⁶⁵ we supported their use whenever they can accurately and efficiently encapsulate evidence put before the jury, with the caveat that care needs to be taken to ensure that, in presenting charts to the jury, neither counsel nor the judge cross the line between assisting the jury's comprehension and supplanting the jury's role.

356 The submissions and views of the practitioners surveyed were overwhelmingly in support of the proposal that greater use should be made of written and visual aids. Many of the practitioners report that they are already doing this. Some submissions expressed the need for

³⁶⁵ Paras 89–91.

caution against their excessive use, and it was also pointed out that resource constraints on defence counsel make it harder for them to prepare this sort of material. While we are conscious of the restraints that legal aid levels put on the amount of time that defence counsel can devote to trial preparation, that inverts the priorities. Justice and efficiency should drive procedures. The advantages of being able to more clearly and forcefully present the parties' cases will mean that counsel will use these methods where possible.

357 Problems have arisen in practice because the scope of what is acceptable for written and visual aids is unclear.³⁶⁶ In one recent case,³⁶⁷ counsel were refused permission to use a Powerpoint electronic slideshow presentation in a closing address because of a need to develop clear guidelines first. It is intended that guidelines for the use of written materials, and explanations of what is and is not acceptable, will be included in the CPC Manual.

358 In its submission, the Serious Fraud Office suggested that written aids and visual presentations should be used whenever they can accurately and efficiently encapsulate evidence put before the jury. They consider that the following written aids should be made available to the jury to provide them with a framework for the case:

- copy of the indictment;
- charts illustrating transactions and the involvement of parties;
- summaries of the charges and elements of the charges;
- the witness list;
- chronologies and other non-controversial summary documents;
- flow charts for jurors to work through when deliberating.

They suggest a practice note directing that copies of the indictments, the exhibits and the witness list (although this should not tie either counsel to the order in which the witnesses are to be

³⁶⁶ An example is *R v Murphy* [1996] DCR 998. There defence counsel sought to use selected portions from the video of the defendant's police interview as part of his final address. The application was declined:

In practical terms the innocent-sounding submission that playing selected portions of videotape in the course of a final address would be only the modern equivalent of reading passages from a written statement seems to me to open Pandora's box in a way which it is far beyond my jurisdiction to do. Counsel has the right to give an address, not to put forward a multimedia presentation. (1001)

³⁶⁷ *R v Haanstra* (16 November 2000) unreported, High Court, Wellington Registry, T 1155/00 (Minute (No 3)).

called) should be made available to the jury as a matter of course. In relation to other written aids such as chronologies, family trees and the like, the directive should state the presumption that they are available to the jury unless there is good reason not to make them available, such as prejudicial effect. The prosecution should disclose to the defence prior to the pre-trial call-over those written aids it proposes to use. Defence counsel should be required, at that call-over, to raise any objections to the presentation of that material to the jury. In this regard, it would be helpful if the trial judge were available for the pre-trial call-over.

359 We endorse the tenor of Serious Fraud Office's suggestions. It is very desirable for all pre-trial matters to be resolved pre-trial. But it must still be a matter for the trial judge's discretion if defence counsel seek to re-litigate issues already pronounced on at pre-trial call-over. We note that it is also desirable for the prosecution to provide information as early as possible, so that agreement between counsel can be reached before the pre-trial call-over, for if agreement cannot be reached, an extra pre-trial hearing may be required. We have some concern over inequality of arms; a number of submissions have expressed the view that while written aids are an excellent idea, legal aid does not pay for them. The prosecution is likely to have the resources to prepare comprehensive and attractive written aids, while the defence is unlikely to have the resources to do so, or to do anything other than check the aids proposed by the prosecution and raise necessary objections. The Research indicated³⁶⁸ that juries already have a less favourable view of defence counsel as compared to prosecution counsel, and are more likely to see them as disorganised. Greater use of written aids by the prosecution but not by the defence may exacerbate that. However, that is a question of legal aid resourcing. In principle, there should be equality of arms.

The use of written and visual aids has increased as a result of the Research, and the Commission recommends that their use should be encouraged. We recommend that consideration be given to a practice note which would direct that:

- copies of the indictments, the exhibits and the witness list be made available to the jury as a matter of course;
- other written and visual aids should be made available to the jury unless there is good reason not make them available;

³⁶⁸ *Juries II vol II* paras 5.8–5.10.

- the prosecution should disclose to the defence prior to the pre-trial call-over those written and visual aids it proposes to use. Defence counsel should be required, a reasonable time prior to trial, to raise any objections to the presentation of that material to the jury;
- the CPC Manual should contain detailed guidelines on the appropriate use and presentation of written and visual aids.

Asking questions during the trial

360 The issue of jury questions was considered in the *Evidence* report,³⁶⁹ where it was concluded that, if properly controlled, jury questions would promote the rational ascertainment of facts, which is one of the primary purposes of the draft Evidence Code. In judge alone trials, judges routinely question witnesses to clear up uncertainties. The draft Evidence Code³⁷⁰ allows for the continued practice of jurors putting questions to witnesses through, and at the discretion of, the judge.

361 Juries seldom ask questions during the trial and are not encouraged to do so. This was because of a perception by judges and counsel that jurors will disrupt proceedings with irrelevant or inadmissible questions, and also because asking questions is seen as contrary to the adversarial process. However, in five of the six cases in the Research in which questions were asked during the trial, they were clearly relevant.³⁷¹ This suggests that juries are quite capable of asking useful questions, and that the traditional approach is at odds with the need which we have identified (see paragraphs 1–4) to treat jurors with respect and to recognise their role as judges of fact. We do not suggest that jurors be invited to interrogate witnesses or usurp the role of counsel; the purpose of juror questions is clarification only. The formality of the procedure (see paragraphs 365–368) will ensure that this remains so.

362 American research,³⁷² covering both civil and criminal jury trials, indicates:

³⁶⁹ *Evidence: Reform of the Law: R55 (vol 1)*, above n 145, paras 443–444.

³⁷⁰ Above n 147, s 101.

³⁷¹ *Juries II vol II*, para 4.16.

³⁷² L Heuer and S Penrod “Increasing Juror Participation in Trials Through Note Taking and Question Asking” (1996) 79 *Judicature* 256.

- Juror questions to witnesses did promote juror understanding of the facts and issues and did alleviate their doubts about evidence (that is, jurors were more confident they had sufficient information to reach a responsible verdict).
- Juror questions did not however help to get to the truth.
- Counsel felt that the questions had not brought up information that they had deliberately omitted.
- The questions did not, as had been expected, help alert counsel or the judge to issues that required further development.
- Jurors did not ask inappropriate questions.
- Counsel were not reluctant to challenge where required, and where they did challenge the jurors were not embarrassed or angry, and typically understood why the challenge had been made.
- When a successful objection was made, jurors did not draw adverse inferences from the unanswered question.
- Jurors who ask questions do not tend to become advocates rather than neutral fact-finders.
- Juror questioning did not have an effect on verdicts, nor on the rate of agreement between judge verdict preferences and jury verdicts.
- Jurors did not over-emphasise answers to their own questions at the expense of other trial evidence.
- Judges and lawyers had no serious objections to juror questioning, and tended to be more favourably disposed towards it after participating in trials where it was permitted.

363 While there was little support in the submissions for extending the right to ask questions, there was some grudging acceptance that juries should be informed of the right that they already have. There was also concern about how questioning should work in practice.

364 The High Court judges in their submission said:

The Juries Report recommended that an opportunity should be extended to the jury to submit written questions at the conclusion of the evidence of each witness . . . to be put through the trial Judge and at his/her discretion. There was little support for this proposal from the High Court judiciary. We note the comment in Archbold³⁷³ at para 8-250:

³⁷³ Above n 332.

The practice of inviting a jury to ask questions is generally speaking to be deprecated. Jurors are not familiar with the rules of evidence and might ask questions which would be difficult to deal with.

Many Judges will embrace these observations, but it must be acknowledged that the general practice of saying nothing to juries concerning their ability to ask questions is unsatisfactory.

We understand that the District Court subcommittee is minded to recommend that a number of trial Judges institute a process for the jury to ask questions on a trial basis. We do not consider that approach appropriate. Any questions the jury has can (as at present) be submitted to the Judge. The Judge or counsel will ask the question if it is thought appropriate. Jurors should be told that counsel decides what matters need to be covered in evidence and that in general questions from Judge or jury are not appropriate unless they seek to clarify evidence given. The Judge may if he or she thinks it appropriate ask a question submitted by the jury. But jurors should be told that there may be good reasons for not asking a question submitted by them.

365 The Serious Fraud Office favour retaining the formality of the jury putting questions during the trial to the judge, which may be then asked of witnesses at the judge's discretion. The formality is required to control the flow of the trial, and to maintain relevance; relaxing that formality may lead to a more inquisitorial system, even without the conscious decision to move in that direction. Jury questions should only be asked after both prosecution and defence have finished with the witness, as the question may be answered later in the witness' evidence.

366 One practitioner who routinely appears before a judge who informs the jury of their right to ask questions gave an interesting view on this point:

I think that the jury should be encouraged to ask questions throughout the trial . . . Judge Atkins QC is the judge I normally appear in front of and he always tells the jury that they are allowed to ask questions. They do sometimes and although I find it inconvenient, I think it is better for them because it gives them a better understanding as the trial proceeds. Therefore the questions are more in context and don't get lost in the rest of the evidence. However, I think that the judge needs to explain to them before any questions are asked, that not all questions will be able to be answered, so that they understand that it is not a matter of anybody trying to suppress evidence but it is simply the way the trial process proceeds.

367 This response indicates that routinely reminding jurors of their right to ask questions might encourage more questions but not to the extent that the trial process is interfered with.

368 The New Zealand Law Society pointed out that jurors' current right to ask questions could be clarified by judicial direction to ensure jurors know what their role is (that is as judges of fact and not as investigators) and when and of whom they can ask questions. We add that such a right is empty if the jury are unaware of it.

Jurors have the right to submit questions to the judge which the judge may then put to the witness. This right is seldom used because juries are often not aware that they may do this. We recommend that juries should be routinely advised of their right to ask the judge to put questions to the witness, and that these questions are only for the purpose of clarification. The process should remain formal, with written questions. Details of the process will be contained in the CPC Manual.

Asking questions during deliberations

369 Jurors receive more encouragement to ask questions during deliberations than they do during the trial, and they do ask more questions at this stage. However, in a significant number of cases, the formality of asking a question deters them from doing so.³⁷⁴ The Commission believes that encouraging jurors to ask questions may enhance their comprehension of the case and decrease deliberation time, as well as increasing jurors' sense of involvement and satisfaction in jury service. There is not the same risk of excessive questioning or incursion into the role of counsel that could arise if jurors were more readily able to ask questions during trial. In *Juries II*³⁷⁵ we suggested that the *Information for Jurors* booklet could be modified to:

- advise the jury that it may, through the judge, ask a witness questions when aspects of the witness' evidence are not understood or when information which they believe to be relevant has not been elicited;
- give examples of the types of questions it may be appropriate to put to witnesses through the judge;
- advise that the jury may ask questions of the judge during deliberations, and these can be more wide-ranging, and may include, for example, clarification of legal instructions and the elements of the charge;

³⁷⁴ *Juries II*, para 103.

³⁷⁵ Para 104.

- explain how and when jurors can question witnesses through the judge; and
- explain that when the judge does not put a juror's question to the witness it is most likely because of limitations on certain questions imposed by the rules of evidence, rather than reflecting adversely on the questioner.

370 Questions during deliberations should be encouraged. The Serious Fraud Office anticipates that most of the questions that will arise once the judge's notes are made available will relate to the definition of legal terms and elements of charges. These questions may also be limited if all directions are given to the jury in writing. Public confidence in the final verdict is likely to be strengthened if the jury is encouraged to ask questions to clarify the legal position before arriving at their verdict.

The procedure for asking jury questions

371 The current procedure for asking questions is formal, because the question has to be written down and delivered by the foreman to the court crier, who delivers it to the judge. However, the only alternative would be verbal questions, and that could too easily become unmanageable. The questions must first be checked by the judge to ensure that the questions can be properly asked at all. Although there is some indication in the Research that jurors were deterred from asking questions by the formality of the procedure,³⁷⁶ the more common reason for not asking was because the jurors did not realise that they could do so. If they are formally advised of their right to ask questions and the procedure for doing so, they should be able to ask questions if they feel a real need to do so.

The formal procedure of written questions should be retained. Juries should be actively encouraged to ask questions during deliberation, as that is likely to decrease deliberation time and confusion.

Expert testimony

372 The Research indicated that although some jurors had difficulty understanding expert evidence, they were a minority and other jurors were able to assist them. As with other evidence, expert evidence was not always presented as well as it could have been.

³⁷⁶ *Juries II vol II*, para 4.14.

Although jurors placed considerable weight on expert evidence, they did seem able to weigh it and, where necessary, reject it.³⁷⁷

- 373 In *Juries II*³⁷⁸ we asked what could be done to make expert evidence more comprehensible to jurors, and suggested³⁷⁹ that one useful measure would be to call the defence's expert immediately after the prosecution's.
- 374 Most of the submissions on this point, particularly from the trial lawyers we surveyed, came down to three points:
- (a) it is the responsibility of counsel and their expert to ensure the expert is properly briefed and that their evidence is comprehensible;
 - (b) charts, diagrams and handouts, carefully prepared, are helpful (see paragraphs 355–359);
 - (c) the lack of educated and skilled jurors exacerbates difficulties in understanding expert evidence, and that should be addressed.
- 375 We agree that there is a real need to increase the number of educated people on juries, and persuade to serve those who currently evade service (see chapters 4 and 16).

Calling the defence's expert immediately after the prosecution's

- 376 This suggestion received considerable support from practitioners but somewhat less from the judges surveyed. The Crown Solicitors suggested that experts should file a joint memorandum setting out what they agree on and what they disagree on, and the reasons why.
- 377 Another possibility advanced was for a court-appointed expert to give jurors an introduction to the new terminology and concepts, before the evidence was given. The expert would give the jury a “tutorial” and introduce them to the terminology and concepts of the relevant discipline in an abstract way, without embarking at all on the actual facts or merits of the case. In our view however, it is the task of the prosecution, who will be the first called, to perform this function. A court-appointed expert would add to expense and detract from the adversarial nature of the trial. It is

³⁷⁷ *Juries II*, para 106.

³⁷⁸ Paras 105–107.

³⁷⁹ Para 81.

also unnecessary, if counsel and experts are doing their jobs properly. A number of submissions agreed, often forcefully, with this view.

- 378 Arguably the provisions of section 367(1) (see paragraph 310) preclude calling the defence's expert immediately after the prosecution's. However, we are aware that in practice it is not unknown, in rare cases, to call defence witnesses before all prosecution witnesses have been called, because witness availability makes this more convenient.

The Commission agrees that counsel bear the primary onus to make evidence comprehensible to jurors. In rare cases the calling of defence expert evidence immediately after the prosecution expert may facilitate better understanding by jurors of the issues between the competing experts. Although this is already done with the permission of the trial judge, it is arguably not permissible under section 367 of the Crimes Act 1961. That section should be amended to make it clear that the court has this discretion.

Statutory amendment will be required.

Glossaries of legal terms and concepts

- 379 Although legal jargon and inaccessible terms and concepts should be avoided, the reality is that they are unlikely to be completely eliminated. It was clear from the Research that jurors have significant problems with legal terms.³⁸⁰ Therefore, in *Juries II*³⁸¹ we indicated support for the use of glossaries. The *Introduction to Jurors* booklet contains a glossary of legal terms but does not include any explanation of legal concepts arising commonly in trials. We therefore suggested that brief definitions of some concepts, such as “burden of proof”, “admissibility” and “intent”, should be inserted in the glossary, while recognising that this is no substitute for accurate judicial directions and explanations. We asked whether jurors should be given a glossary defining legal terms and expressions, and if so whether it should be of general application or one produced by the judge for the particular trial.
- 380 Many of the respondents to these questions were uncomfortable with glossaries: they felt that it would be preferable for counsel to go to more effort to make themselves understood, and noted that judges

³⁸⁰ *Juries II vol II*, para 2.58.

³⁸¹ Paras 108 and 109.

already sum up on the law, including the meaning of technical terms if required. While we agree that counsel should use plain English, we do not see that principle as inconsistent with the provision of glossaries. Glossaries are not a substitute for plain English; they are simply a reminder for the jury of how the words should be used. The Serious Fraud Office pointed out that having standard definitions of legal terms is more efficient and eliminates the prospect of appeals based on a judge's non-standard definition of a term.

- 381 If glossaries are required, they should be tailor-made for the case by the prosecutor, who has a better knowledge at the early stages of how the case will be run.
- 382 We agree that this is a matter which should be dealt with on a case by case basis, and that any glossary that is provided must be by consent. The CPC Manual will include a list of legal terms with definitions, which can be used to compile glossaries suitable for the case at hand.

Glossaries may be helpful to the jury, although they should never be seen as a substitute for plain English and clear explanations from counsel and judges. Where required, glossaries should be compiled by the prosecutor with the consent of defence counsel and the trial judge. The CPC Manual will include a list of legal terms with definitions, which can be copied into glossaries.

12

Jury deliberation

Introduction

383 **O**NCE THE DEFENCE HAS FINISHED ITS CASE, the judge sums up the case for the jury. The jury then retires to deliberate and reach a verdict. In this chapter we discuss how the deliberation process can be improved.

Methods of deliberation

384 The Research confirmed overseas jury research which indicates that there are two main styles of jury deliberation: some juries discuss the evidence before taking a vote (“evidence-driven”), and others vote first (“verdict-driven” or “poll-driven”). The Research³⁸² confirmed that there are difficulties in the poll-driven approach: it focuses attention on divisions within the jury and encourages jurors to call on minority voters to justify their views, rather than the jury discussing all aspects of the case, and the poll tends to be a substitute for a systematic discussion of the issues. While the Research was unable to conclude that evidence-driven juries necessarily work better than poll-driven juries, it did indicate that the most important factor in effective decision-making is adopting a systematic structure for assessing the evidence and applying the law. This finding reinforces the need to:

- provide juries with an effective framework from the beginning of the trial;
- encourage the selection of a foreman who has the skills to follow a systematic structure; and
- provide guidance to the foreman and the jury on how to conduct deliberations.

³⁸² *Juries II vol II*, paras 6.1–6.9.

Jury resolution of legal issues

385 Juries are good at fact-finding but less good at handling questions of law. The Research concluded that jurors made a strong and conscientious effort to apply the law as they understood it, and seldom consciously departed from the law as they understood it,³⁸³ but that there were widespread misunderstandings about certain aspects of the law.³⁸⁴ However, most of these errors were redressed by the collective deliberations of the jury. The researchers concluded that legal errors resulted in hung juries or questionable verdicts in four of the 48 trials, two of which were acquittals on only some of a large number of counts.³⁸⁵ Thus, in only two cases can misunderstandings of the law be said to have significantly affected the outcome.

386 In *Juries II*³⁸⁶ we suggested that the jury would be assisted by receiving a written copy of the judge's directions (or its key points) or a flowchart to work through to reach the verdict. We have discussed flowcharts and special verdicts at paragraphs 315–318. They appear to be receiving more use since the Research indicated their usefulness, and we would endorse their continued development. It is also extremely important that juries be encouraged to ask questions during deliberations on any point that they wish to (see paragraphs 369–371).

The role of the foreman

387 Clearly a good foreman has to actively facilitate and structure the discussions in deliberations, and a good foreman is particularly important in longer or more difficult cases. The Research showed that there is a lack of understanding among jurors of the role of the foreman. Difficulties arise when:

- foremen are overbearing or dictatorial;³⁸⁷
- the foreman does not have leadership skills (another juror may or may not step in and assist);³⁸⁸

³⁸³ *Juries II vol II*, para 7.11.

³⁸⁴ *Juries II vol II*, paras 7.12–7.25.

³⁸⁵ *Juries II vol II*, para 7.25.

³⁸⁶ Para 128.

³⁸⁷ *Juries II vol II*, para 6.27.

³⁸⁸ *Juries II vol II*, paras 6.28–6.30.

- the foreman is in the minority or the last person dissenting from an otherwise unanimous verdict:³⁸⁹ no direction is given on handling this situation; or
- the jury contains one or more unreasonably dominating individuals and the foreman is not able to contain them.³⁹⁰

388 In *Juries II*³⁹¹ we suggested that these problems could be alleviated by more careful selection of the foreman. More extensive advice on how to structure deliberation would also be useful. In relation to the deliberations themselves, the jury, particularly the foreman, could be advised:

- how to structure the discussion;
- how to deal with dominant personalities during the deliberations;
- how to ensure that all jurors have the opportunity to speak without feeling intimidated;
- of the foreman's responsibility to guide rather than dominate the discussion;
- what to do if a juror (including the foreman) behaves in an inappropriate manner towards other jurors;
- what to do if the foreman is the dissenter in an otherwise unanimous jury (or, if our recommendations in chapter 13 are accepted, where there would otherwise be a majority verdict);
- at what point in the deliberations to take a vote;
- how to communicate with the judge, both during the trial and during deliberations;
- how to identify when the jury is ready to reach a verdict, and how to facilitate the reaching of a verdict; and
- the appropriate language to be used in conveying the verdict.

389 This information should be put on a poster to be displayed in all jury rooms, and included in an informational video to be shown to the jury once they are empanelled. It should also be covered in the judge's preliminary remarks.

³⁸⁹ *Juries II vol II*, para 6.32.

³⁹⁰ *Juries II vol II*, paras 6.35–6.39.

³⁹¹ Para 132.

390 In *Juries II*³⁹² we asked whether, following empanelling, jurors should undergo a standard training session on the role of the jury and the foreman before retiring to choose their foreman. This met general agreement in the submissions. The Department for Courts said:

It is clear from the research that juries currently receive insufficient information on the role of the foreman and skills required to be effective in that role. The Commission has suggested that juries undergo a standard training presentation after empanelling and before retiring to select the foreman.

The Department agrees that information should be given to the jury on the foreman's role and what skills to look for in choosing the appropriate person. We believe that any such information is best delivered after the jury is empanelled because the information is directly relevant to the jurors at that point so the jury are more likely to focus and absorb the information. Any decision on this matter would need to involve consultation with the judiciary.

We have considered options for delivery of information on this topic such as:

- Oral information given by the judge
- A short video to be played in the jury room
- Written information available in the jury room

The Ministry of Justice has suggested that a second video be made and shown to the jury after they are empanelled. This video would provide more specific information on selection of the foreman and how to structure deliberations. The Department for Courts supports this suggestion.

We note that the time taken to provide a presentation will extend the overall length of the trial. This will have a greater impact on short trials than lengthy ones. While written information may appear desirable in reducing the extra time taken, the jury would still need to be given sufficient time to carefully consider both the information and their choice of foreman.

We believe that the extra time taken to select the foreman would be balanced by the possibility of reduced deliberation time through having an effective foreman. The research shows that a poor choice of foreman significantly affects the length and success of the deliberations.

391 We also suggested that the judge should encourage the jury to begin their deliberations with a discussion rather than a vote (that is, encourage an evidence-driven rather than poll-driven approach). This recommendation should also be included in the second video.

³⁹² Paras 130–132.

Assisting juries during deliberation

392 If it appears that a jury has been deliberating for a long time and may need assistance, the judge may call the jury back into court and address them on the need to come to a verdict. Exactly what the judge should say at this point has been the subject of some discussion in case law.³⁹³ In the case of *R v Papadopoulos*,³⁹⁴ the New Zealand Court of Appeal approved a particular direction to be given. That direction was modified in *R v Accused*,³⁹⁵ but the modified direction is still commonly referred to as a “Papadopoulos direction”. The direction which is currently used (approved by the Court of Appeal in *R v Accused*) is as follows:³⁹⁶

Members of the Jury:

I have been told that you have not been able to reach a verdict so far. That sometimes happens, and it is no reflection on any of you. I have the power after you have been in retirement for four hours to discharge you from giving a verdict, but not unless and until I am satisfied that it should be done. Judges always hesitate to discharge a jury, because it usually means that the case has to be tried again before another jury and experience has shown that juries are often able to agree in the end if given more time.

Each of you has sworn or affirmed that you will try the case to the best of your ability and give your verdict according to the evidence. It is important that you do your best to accept that responsibility and not pass it over to another jury. You are here as representatives of the community with the responsibility on behalf of the community of trying to reach a collective decision of all of you.

One of the strengths of the jury system is that each member takes into the jury room his or her individual experience and wisdom and is expected to judge the evidence fairly and impartially in that light. You are expected to pool your views of the evidence and you have a duty to listen carefully to one another. Remember that a view honestly held can equally honestly be changed. So, within the oath, there is scope for discussion, argument and give and take. That is often the way in which in the end unanimous agreement is reached.

But of course no one should be false to his or her oath. No one should give in merely for the sake of agreement or to avoid inconvenience. If in the end you honestly cannot agree, after trying to look at the case calmly and objectively and weighing carefully the opinions of others,

³⁹³ See *Juries II*, paras 145–153.

³⁹⁴ [1979] 1 NZLR 621 (CA).

³⁹⁵ [1988] 2 NZLR 46 (CA).

³⁹⁶ [1988] 2 NZLR 46, 59.

you must say so. If regrettably that is the final position, you will be discharged and in all probability there will have to be a new trial before another jury.

Therefore I am asking you, as is usual in such cases, to be good enough to retire again and see whether you can reach a unanimous verdict in the light of what I have said.

393 In the Research, Papadopoulos directions (or a modified version thereof) were given in nine of 48 trials, possibly a higher incidence than usual because of the Research's bias towards complex and lengthy trials. The directions seemed to have mixed outcomes, sometimes helping to focus discussions, in some cases having no impact or even making matters worse.³⁹⁷ In *Juries II*³⁹⁸ we pointed out that any attempt by the judge to provide further assistance beyond a Papadopoulos direction is unlikely to be helpful, without a clear indication of the nature of the jury's difficulties. Some indication may be provided by jury questions, but in the absence of such questions, judicial inquiry would be necessary – occasionally, such inquiries are made. However, in deference to jury secrecy (see chapter 14) and the need to maintain judicial impartiality, such inquiries must be very general: usually as to whether progress is being made and/or whether any assistance may be required. We asked whether, during the course of deliberation, the trial judge should actively inquire as to the extent and nature of any jury difficulty. The submissions supported this, on the basis that if the jury were encouraged to state clearly what the problem is, the judge would then be able to provide them with more directed and timely assistance.

394 Once a jury has retired to consider its verdict, the role of the judge is necessarily limited to clarifying the law and helping to identify relevant evidence. If the jury is having difficulty in deliberations, the judge can help it in these ways. The question is, how can this be done most effectively, and how can the jury be reminded that this help is available?

395 The existing Papadopoulos direction exhorts jurors to come to a verdict but it does not remind them of the help that is available. We suggest that the jury should, in general terms, be reminded that they can ask questions and be invited to do so if that would be of any assistance.³⁹⁹ We recommend the following direction:

³⁹⁷ *Juries II vol II*, paras 8.6–8.14.

³⁹⁸ Para 152–153.

³⁹⁹ We note that in Arizona, as a result of recent reforms (see B Dann and G Logan "Jury Reform: The Arizona Experience" (1996) 79 *Judicature* 280, 283) when the jury first indicates they have a problem, the judge now gives the following direction:

Members of the Jury:

I have been told that you have not been able to reach a verdict so far. That sometimes happens, and it is no reflection on any of you. I have the power after you have been in retirement for four hours to discharge you from giving a verdict, but not unless and until I am satisfied that it should be done. Judges always hesitate to discharge a jury, because it usually means that the case has to be tried again before another jury and experience has shown that juries are often able to agree in the end if given sufficient time and assistance.

I would like to remind you that you can ask me questions about the evidence and about the law. It is up to you to decide the facts of what occurred, and I cannot tell you my opinion on what the facts were, or on the credibility of any witness. But if you are unsure, I can go to the evidence and remind you what evidence was given on any point of fact. If you are unsure about the law, or about the meaning of any word or term which has been used in the trial, I can explain those matters to you. Shortly I am going to ask you to retire again and continue your deliberations, but when you do I ask that you consider what are the areas where you disagree with each other, and whether there is anything that you would like to ask me that could help to resolve that disagreement. If there is, please write the question down and give it to the crier to give to me.

One of the strengths of the jury system is that each member takes into the jury room his or her individual experience and wisdom and is expected to judge the evidence fairly and impartially in that light. You are expected to pool your views of the evidence and you have a duty to listen carefully to one another. Remember that a view honestly held can equally honestly be changed. So, within the oath, there is scope for discussion, argument and give and take. That is often the way in which in the end unanimous agreement is reached.

“This instruction is offered to help your deliberations, not to force you to reach a verdict. You may wish to identify areas of agreement and areas of disagreement. You may then wish to discuss the law and the evidence as they relate to areas of disagreement.

If you still have disagreement, you may wish to identify for the court and counsel which issues or questions or law or fact you would like counsel or court to assist you with. If you elect this option, please list in writing the issues where further assistance might help bring about a verdict.

I do not wish or intend to force a verdict. We are merely trying to be responsive to your apparent need for help. If it is reasonably probable that you could reach a verdict as a result of this procedure, it would be wise to give it a try.”

The Arizona courts also use a variety of novel procedures when jurors do present a question (such as supplemental closing arguments by counsel, and calling additional evidence) which we do not consider to be necessary. However, an invitation along these general lines may be more likely to elicit questions from the jury so that they can be assisted where possible.

But of course no one should be false to his or her oath. No one should give in merely for the sake of agreement or to avoid inconvenience. If in the end you honestly cannot agree, after trying to look at the case calmly and objectively and weighing carefully the opinions of others, you must say so. If regrettably that is the final position, you will be discharged and in all probability there will have to be a new trial before another jury.

Therefore I am asking you, as is usual in such cases, to be good enough to retire again and consider whether there is anything you would like to ask me, or whether you can reach a unanimous verdict in the light of what I have said.

The Commission recommends that the jurors be strongly encouraged at the start of their deliberation to seek help from the judge if they are having difficulty, and that the standard (Papadopoulos) direction, given to juries which appear to be having difficulty coming to a verdict, should be amended to remind them of the type of questions that they can ask the judge to assist them in their deliberations.

The length and hour of deliberation

396 In *Juries II*⁴⁰⁰ we concluded that it would be difficult to regulate legislatively the length of deliberation because of the variation between trials, and the pressure that would be created as the deadline hour approached, but that 10.00pm–11.00pm is the outer limit at which juries should normally be asked to deliberate. We asked whether jury deliberation should be permitted to continue after 11.00pm.

397 The submission of the Department for Courts was:

The department agrees that it is necessary to ensure that jurors are not made to continue deliberations to the point of exhaustion. We note that alertness and tiredness are related to a number of factors besides lateness of the hour for example, facilities, ventilation, number of breaks. We consider that rather than legislating for an arbitrary finish time, the question of when to cease deliberations for the night is better left to the discretion of the presiding judge.

If deliberations are not to continue past 11.00pm (or some other time), then as that time approaches jurors are likely to feel increasing pressure to reach a verdict and avoid an overnight stay. Such pressure may result in compromise verdicts or in jurors giving in to the majority in order to go home. This has the potential to increase the number of jurors who feel a lack of confidence in their verdict.

⁴⁰⁰ Para 157.

We note that if proposed reforms do not decrease the length of jury deliberations and these are not permitted to continue past 11.00pm, there is potential for increased overnight stays. This would have financial and resource implications for the department.

398 The New Zealand Law Society agreed that there should be a time limit, but pointed out that the jury should not be informed of it, to avoid any premature decision. Other submissions were in agreement that there should be a time limit, although it should not be inflexible, as it must remain open to the court to use its discretion in a particular case. A similar view has recently been expressed by the Court of Appeal:⁴⁰¹

Whether a stage has been reached when deliberations will cease will depend upon an assessment of the particular circumstances of the case, and no firm guidelines can be laid down. Deliberations lasting into the night are in general undesirable, but there are occasions where that can be appropriate – for example sometimes the jury will indicate that good progress is being made, and further time to reach agreement is desired.

399 A related question is the time at which the jury retires to deliberate. If the summing-up finishes in the afternoon, the trial judge must consider whether it would be reasonable to ask the jury to retire then, and maybe risk their deliberations continuing into the evening, or to send them home at that point and let them return to start their deliberations in the morning. This is entirely a matter of discretion, and will depend on the circumstances of the case (for example, whether it appears that the case is a simple one which can be quickly decided, and whether there is an administrative need for this trial to finish that day). However, experience indicates that this is a very difficult matter to judge; a case which appears to the judge and counsel as straightforward may nevertheless result in lengthy deliberations. The Commission suggests that, as a general guideline, if the summing-up would finish later in the afternoon, after around 3.00pm, it would be preferable to defer summing-up until the morning.

The Commission recommends that, as a general guideline, deliberation should end at 9.00pm, but continue longer if the trial judge considers it appropriate in the circumstances of the individual case.

⁴⁰¹ *R v Mullins* (24 May 2000) unreported, Court of Appeal, CA 513/99, para 9.

Should juries continue to be sequestered during deliberation?

- 400 In *Juries II*⁴⁰² we proposed that sequestration during deliberation should continue; without it there is scope for allegations of improper influence, which cannot be easily investigated because of the principles of jury secrecy. Juries are sequestered during deliberation (although not during the trial). They are put up in a hotel and have no access to a telephone (although the court attendants will make calls on their behalf to arrange domestic matters) nor to television or newspapers. They do often have access to radios, as these can be difficult to remove.
- 401 Most of the submissions we received were in favour of continuing sequestration, for the reasons set out in the preliminary paper, namely that it is necessary to preserve secrecy, to void apparent or actual jury tampering, and to uphold public confidence that deliberations are removed from any outside influence. However, the District Court Jury Trials Committee submitted that sequestration, at least on a routine basis, should be abandoned. They point out that if someone is going to try to “noble”, or interfere with, a juror, they will not leave that to the last hours of the trial, and that the removal of sequestration will remove much unnecessary stress and inconvenience for jurors, particularly those who have child care responsibilities.
- 402 When the point was raised for discussion at the High Court and District Court judges’ conferences, a small majority of High Court judges⁴⁰³ and a large majority of District Court judges⁴⁰⁴ supported the proposal that if deliberations are obviously not going to be concluded at a reasonable hour, then jurors should be sent home in the usual way, perhaps with an additional caution not to discuss the case with anyone other than jury members.
- 403 Most jurisdictions in the United States do not sequester juries. The removal of most sequestering in New York state in 1995⁴⁰⁵ is of interest because a subsequent report⁴⁰⁶ concluded that the change

⁴⁰² Para 158–159.

⁴⁰³ 14:10 in favour.

⁴⁰⁴ 22:8 in favour.

⁴⁰⁵ Except for certain serious felonies.

⁴⁰⁶ Hon Jonathan Lippman *Separation and Sequestration of Deliberating Juries in Criminal Trials – Report to the Governor and the Legislature* (State of New York, 1 March 1997).

had been successful; the mistrials⁴⁰⁷ and increased costs which had been predicted had not in fact occurred. There had been significant cost savings and many people who had previously been unable to serve for domestic or religious reasons had been able to serve, often for the first time. Not only was the experience of jury service improved, but jury pools had become more representative.⁴⁰⁸ There had been no allegations of tampering with separated jurors.⁴⁰⁹ The average length of deliberations had increased, but only by eight per cent.⁴¹⁰

404 Jury sequestration is no longer compulsory in England and Wales. Their statute was amended in 1994, and now provides:⁴¹¹

If, on the trial of any person for an offence on indictment, the court thinks fit, it may at any time (whether before or after the jury have been directed to consider their verdict) permit the jury to separate.

The Court of Appeal of England and Wales has indicated⁴¹² the appropriate directions to be given when the jury is permitted to separate after they have retired.

The following elements should be contained in such a direction: (1) that the jury should decide the case on the evidence and arguments presented in court and not on anything that they had seen or heard or might see or hear outside court; (2) that the evidence had been completed and that it would be wrong for a juror to seek or receive any further evidence or information of any sort about the case; (3) that the jury must not talk to anyone about the case except other members of the jury and then only when deliberating in the jury room, and they must not allow anyone to talk to them about the case unless that person was a juror in the jury room deliberating about the case; (4) that when they left court the jury should try to set the case on one side until they returned to court and retired to the jury room to continue the process of deliberating about their verdict. The judge need not use any precise form of words provided that the

⁴⁰⁷ There were two mistrials out of a total sample of 688; in one it was ultimately held that the trial judge had declared a mistrial prematurely and erroneously without due inquiry as to the missing juror's whereabouts, and in the other case a deliberating juror improperly visited the crime scene (which they could have done during the evidence in any event): Lippman, above n 406, 11–13.

⁴⁰⁸ Lippman, above n 406, 17.

⁴⁰⁹ Lippman, above n 406, 18.

⁴¹⁰ Lippman, above n 406, 9.

⁴¹¹ Juries Act 1974 (UK) s 13.

⁴¹² *R v Oliver* [1996] 2 Cr App R 514 (headnote); see also *Archbold*, above n 332, para 4-425.

matters set out above were properly covered. It would be desirable for the direction to be given in full the first time the jury dispersed, with a brief reminder being given on each subsequent dispersal. There might be particular circumstances in a particular case where it would be appropriate for the judge to give further directions.

405 The Research indicated⁴¹³ that in some cases the desire to go home puts pressure on jurors to come to a verdict before they are necessarily ready to do so. In one case⁴¹⁴ jurors felt pressured into a quick decision on the last charges because they were desperate to avoid another night in a hotel, especially as they had no clean clothes or underwear.

406 Although there are good reasons for jury sequestration, it is a heavy imposition on juries and may affect the way they deliberate, especially if they come to a verdict too quickly in order to avoid having to spend the night away from home. Comparable jurisdictions have disposed of the process, apparently without harm. The restrictions on media reporting (see chapter 15) mean that jurors are most unlikely to be exposed to prejudicial material if they are not sequestered. Therefore we recommend that the practice of routine sequestration be ended, although the court should retain the discretion to sequester if in the circumstances of the case (including high media interest) that is appropriate.

The Commission recommends that the practice of routine sequestration during deliberation should end, but the court should retain the discretion to sequester during deliberation if in the circumstances of the case that is appropriate. A provision similar to section 13 of the Juries Act 1974 (UK) should be included in our Juries Act 1981 to effect this.

Statutory amendment will be required.

Sequestration during trial

407 In *Juries II*⁴¹⁵ we asked whether there are circumstances in which sequestration of the jury during trial should occur.

408 The New Zealand Law Society were of the view that there may be very limited circumstances in which sequestration during trial would be justified:

⁴¹³ *Juries II vol II*, para 8.15.

⁴¹⁴ Unpublished data.

⁴¹⁵ Paras 158–159.

. . . [T]here are some circumstances where sequestration during trial will be necessary such as, but not confined to, cases where safety is an issue as in gang trials, where jury tampering is likely or cases where there is intense public feeling. While the pervasiveness of the media is of concern, the Committee emphasises that this is likely to be necessary only in rare cases where, in the interests of justice, circumstances require it.

- 409 The Ministry of Justice, on the other hand, were of the view that there is no need to extend sequestration during trial. The conclusions of the Research regarding effects of the media on juries show no need for it, and it would be expensive and cause jurors great inconvenience.
- 410 It is estimated that in the United States, no more than 100 jury trials a year (out of 150,000 civil and criminal state and federal trials) are sequestered during the trial period.⁴¹⁶ The OJ Simpson jury was sequestered for nine months at the cost of just over \$3 million (and enormous mental and emotional strain for the jurors).
- 411 We do not believe that sequestration during jury trials can generally be justified. It would be too great an imposition on jurors, and any security issues can be dealt with in other ways. Unless the scope of allowable media coverage is expanded, sequestration during trial should not be required. However, we cannot rule out the possibility that exceptional circumstances may arise in which it is required, and therefore there should be legislative provision to permit it.

There is no need for sequestration to occur during trials before deliberation except in the most exceptional circumstances. In such circumstances, the court should be able to sequester.

Statutory amendment will be required.

⁴¹⁶ M Strauss “Sequestration” (1996) 24 Am J Crim L 63, 68.

13

Failure to agree – majority verdicts

Introduction

412 **U**NDER OUR PRESENT LAW, all jury verdicts must be unanimous. If all jurors cannot agree on a verdict of either guilty or not guilty, the jury is said to be hung. When this happens, the jury is discharged and the case may be tried again before a new jury. In some countries, particularly England and some (but not all) Australian states, if a jury is unable to reach a unanimous verdict it may be allowed to return a majority verdict. In this chapter we summarise the arguments for and against the requirement for unanimity, and recommend that New Zealand should adopt majority verdicts of 11:1 in all criminal jury trials.

Arguments in favour of retaining unanimous verdicts

- 413 Although the requirement that all twelve jurors must agree can be traced at least to the fourteenth century,⁴¹⁷ that unanimity was not necessarily principled. Indeed, the requirement gave rise to the coercion of jurors by such means as the deprivation of food and heating. It was not until the nineteenth century that it was finally established that unanimity must be achieved by the choice of the jurors, rather than as a consequence of pressure imposed upon them, and the ability of judges to discharge a jury unable to agree was confirmed.⁴¹⁸
- 414 In *Juries II*⁴¹⁹ we summarised the arguments in favour of retaining the unanimity rule as follows:

⁴¹⁷ Devlin, above n 33, 48–49.

⁴¹⁸ *Winsor v R* (1866) 1 QBD 289, 305–306.

⁴¹⁹ Paras 176–179.

- It underpins the burden and standard of proof in criminal trials because it reflects a central principle of the criminal law: that a defendant should be given the benefit of any reasonable doubt. It also increases the likelihood that guilty verdicts will be accurate.
- It encourages careful discussion and increases the likelihood of each juror participating and being listened to.
- It ensures that the representative character of the jury is implicit in the verdict, minimising any risk of bias.
- It increases community confidence in the verdict and in the criminal justice system.

Arguments in favour of adopting majority verdicts

415 On the other hand, there are a number of arguments in favour of abandoning the unanimity rule in favour of majority verdicts:

- (a) The unanimity requirement provides an incentive to intimidate, corrupt or otherwise improperly persuade jurors. This was the basis for the introduction of majority verdicts in England in 1967. While we believe that jury tampering is unusual, we are aware of possible instances of it (see paragraph 416) and this is a significant factor in our recommendation to move to majority verdicts.
- (b) Unanimity is often the result of attrition – the wearing down of minority jurors by gradual exhaustion. Although the Research shows that considerable pressure is brought to bear on minority jurors, it is not clear that they are forced into verdicts by this pressure. If attrition, rather than reason, does push minority jurors towards verdicts, the effect of introducing majority verdicts may not be to do away with attrition but rather only to reduce the amount of it required to produce a verdict.
- (c) The unanimity rule is undemocratic. This argument is met by two considerations. First, while the jury should be democratic in the way it is constituted – that is, it should be representative of the community – the jury has never been an institution intended to decide by way of simple majority. Secondly, the will of both factions – the minority as well as the majority – is frustrated if no decision is reached. The proper functioning of the criminal justice system is not frustrated, as a new trial will usually follow. But the cost, in resources, time and emotional strain on complainants and witnesses, is increased.

- (d) The unanimity rule increases personal and financial costs. This is inescapable. However, with respect to financial costs in particular, Lord Cooke's comment "inconvenience and expense should not be measured against justice"⁴²⁰ applies.
- (e) The unanimity rule gives rise to compromise verdicts or hung juries. While the Research indicates that compromise verdicts are not infrequent, it is however arguable that majority verdicts would not reduce the incidence of compromise verdicts as there will still be divisions of opinion within juries. Majority verdicts may simply mean that attempts to compromise start sooner, because one or two stubborn dissenters can be ignored as they are not required for the majority verdict.

Jury tampering

416 This is a matter on which it is virtually impossible to obtain firm evidence, or to know in what proportion of cases it may occur. We asked a number of Crown prosecutors whether there have been any cases in which they knew, or had strong grounds to suspect, that jury tampering had occurred. As they observe jury trials regularly, they are in a good position to develop an instinctive "feel" for when a juror seems to be behaving in an unusual way or displaying unusual body language. Such behaviour may coincide suspiciously with a verdict that is clearly against the weight of the evidence, or a case in which the accused has the resources, help and motivation to bribe jurors for a favourable verdict. The prosecutors' view was that it is neither unknown nor particularly common, and that the risk of it is not great.

The rate of hung juries

417 In *Juries II*⁴²¹ we set out figures which appeared to indicate that between 1993 and 1999 the rate of hung juries rose from under four per cent to just over nine per cent. Subsequent investigations have shown that those figures were probably inaccurate. The most recent figures for hung juries are set out below.⁴²² We note that "hung juries" includes all trials in which the jury is hung on a charge, whether they are hung on all charges or just one of many.⁴²³ Where the jury is hung on just one or a few of many charges, there will often be no retrial. Therefore the total rate of trials which must be retried, with all the stress to victims and witnesses and costs that retrials entail, will be somewhat lower than these totals indicate.

⁴²⁰ *R v Accused*, above n 395, 58.

⁴²¹ Paras 170–172.

⁴²² Unpublished figures provided by the Department for Courts.

⁴²³ The Department for Courts' computer system is unable to make this distinction.

Hung juries for the 12 months to:

	<i>High Court</i>	<i>District Court</i>	<i>Total</i>
June 1999	11.3%	8.1%	8.7%
July 1999	11.0%	7.8%	8.4%
August 1999	11.3%	7.4%	8.1%
September 1999	12.1%	7.6%	8.4%
October 1999	12.4%	7.7%	8.6%
November 1999	12.4%	7.6%	8.6%
December 1999	11.7%	7.4%	8.2%
January 2000	11.7%	7.4%	8.2%
February 2000	12.7%	7.6%	8.6%
March 2000	12.2%	7.4%	8.3%
April 2000	12.7%	7.3%	8.3%
May 2000	12.3%	6.9%	7.9%
June 2000	12.2%	6.8%	7.8%
July 2000	11.6%	7.0%	7.8%
August 2000	10.9%	7.0%	7.7%
September 2000	12.2%	7.6%	8.4%
October 2000	13.1%	7.8%	8.7%

418 The striking statistic of 13.1 per cent of hung juries in the High Court, where the most serious cases are heard, is not comparable with the High Court's figure of 4.7 per cent in the period 1974–1976⁴²⁴ which, prior to the District Court receiving jury jurisdiction, included all indictable cases. Rather, the 4.7 per cent figure is comparable with the current 8.7 per cent figure for hung juries in all jury courts. While there is no evidence besides the Research as to the percentage of disagreements which are due to the irrationality of one or more jurors, the statistics do nothing to refute the desirability of allowing for a single rogue juror.

⁴²⁴ As noted in 1978 by the Royal Commission for Courts, see *Juries II*, para 170.

419 In *Juries II*⁴²⁵ we suggested that if hung jury rates increase prior to the publication of this report, that would be a basis for the introduction of majority verdicts. While it is not clear that there has been a substantial increase over all jury trials, the high rate of hung juries in the High Court is certainly a matter for concern and supports the view that majority verdicts should be introduced.

“Rogue” jurors

420 One argument which can be made in favour of majority verdicts is that in a randomly chosen group of twelve it is possible that at least one will be simply unreasonable and unwilling to participate properly or at all. Of the five fully hung juries in the Research sample,⁴²⁶ two involved a single “rogue” who refused to consider a guilty verdict but made little attempt to participate in deliberations and was unable or unwilling to articulate any rational argument in favour of a not guilty verdict. However, in these particular cases, other jurors had reasoned doubts which were not addressed because the presence of the rogue made discussion futile. The other three hung juries in the sample involved jurors who dissented for genuine and rational reasons.

The Australian position⁴²⁷

421 Trials for crimes against the Commonwealth (federal crimes) require a unanimous verdict.⁴²⁸ New South Wales,⁴²⁹ Queensland⁴³⁰ and Australian Capital Territory⁴³¹ require unanimous verdicts. Majority jury verdicts are permitted in Victoria,⁴³² Tasmania,⁴³³ South Australia,⁴³⁴

⁴²⁵ Para 210.

⁴²⁶ *Juries II vol II*, para 9.12. A “fully hung” jury is one that is hung on all charges; a “partially hung” jury is hung on just some charges but able to give a verdict on others. Cases in which the jury has been partially hung are less likely to be reheard than those where the jury has been fully hung.

⁴²⁷ See generally Chesterman, above n 44.

⁴²⁸ *Cheatle and Anor v R* (1993) 116 ALR 1.

⁴²⁹ Jury Act 1977 (NSW) s 57 provides for majority verdicts in civil proceedings, but there is no equivalent in criminal proceedings.

⁴³⁰ Jury Act 1995 (Qld) s 59.

⁴³¹ Juries Act 1967 (ACT) ss 38–39 provide for majority verdicts in civil proceedings, but there is no equivalent in criminal proceedings.

⁴³² Juries Act 2000 (Vic) s 46 (previously Juries Act 1967 (Vic) s 47).

⁴³³ Jury Act 1899 (Tas) s 48.

⁴³⁴ Juries Act 1927 (SA) s 57.

Western Australia⁴³⁵ and the Northern Territory.⁴³⁶ However, there are differences in detail. For example, exceptions are made with respect to murder and treason cases in Victoria,⁴³⁷ Tasmania, South Australia and, for murder and other crimes punishable with strict security life imprisonment, Western Australia. However, in South Australia and Tasmania the exception is limited to findings of guilt in murder cases; whereas in Western Australia the limitation seems to apply for findings of guilt or innocence. In the Northern Territory, on the other hand, majority jury verdicts appear to operate in relation to all criminal cases. Furthermore, in Victoria a majority of 11:1 is required, whereas in the other relevant jurisdictions a majority of 10:2 is accepted. The number of hours of deliberation required before a majority verdict is accepted also vary, from two hours in Tasmania (except for murder or treason trials, where the period is six hours) to six hours (in all cases) in Victoria.

422 In July 1997 the New South Wales Bureau of Crime Statistics and Research released a study of hung juries and majority verdicts in criminal trials.⁴³⁸ The research was based on the evidence of 343 trials involving 853 charges. The Bureau had been asked to report on four key questions:

- What proportion of jury trials end in a hung verdict? It was found that around ten per cent of criminal jury trials end with the jury hung on one or more charges.
- Are juries more likely to be hung after a long trial? It was found that long trials are more likely to be hung, with such cases having a mean duration about 33 per cent higher than trials which are not hung.
- Are juries more likely to be hung after a sexual assault trial? The evidence suggests they are not: the percentage of sexual assault trials which were hung was 9.2 per cent.

⁴³⁵ Juries Act 1957 (WA) s 41.

⁴³⁶ Criminal Code Act, REPC033 (NT) s 368.

⁴³⁷ The Juries Bill 1999 (Vic), above n 265, (cl 44) would have extended majority verdicts to cases involving murder and treason. However, this did not survive the Second Reading stage and the Juries Act 2000 (Vic) s 46(4) maintains the exclusion.

⁴³⁸ P Salmelainen, R Bonney and D Weatherburn, *Hung Juries and Majority Verdicts* (New South Wales Bureau of Crime Statistics and Research, July 1997) at <www.legalaid.nsw.gov.au/bocsar1.nsf/pages/hungjuriestext> (last visited 11 January 2001).

- In what proportion of hung trials and of trials overall is the jury vote split either 11:1 or 10:2? In the majority of cases where the jury was hung, the vote was evenly divided. Around 33 per cent of cases involved one dissident voter. A further 10 per cent of cases involved two dissident voters.

- 423 On balance, the New South Wales study did not find in favour of introducing majority jury verdicts in criminal trials. It found that while long trials are more likely to be hung, the Director of Public Prosecutions proceeds to a retrial after a hung jury in only about 57 per cent of cases. A change to majority verdicts would result in savings in criminal court time of only around 2.1 per cent where either a 11:1 or 10:2 majority is permitted (one or two dissenting voters), and around 1.4 per cent where only a 11:1 majority is accepted (one dissenting voter). Furthermore, these figures fell to 1.7 per cent and 1.1 per cent respectively when it was recognised that six of the 33 hung trials studied involved Commonwealth offences and would therefore require a unanimous verdict in any event.
- 424 The Leader of the Opposition in New South Wales has recently introduced a Bill which would provide for 11:1 majority verdicts.⁴³⁹ No further empirical research has been undertaken there.

The English position

- 425 Majority verdicts were introduced in England and Wales by the Criminal Justice Act 1967, to prevent the intimidation or bribing of jurors.⁴⁴⁰ Recent figures show that 20 per cent of convictions in the Crown Court following a plea of not guilty are majority verdicts.⁴⁴¹ England permits a verdict by a majority of ten (if the jury has eleven or twelve members; if it has been reduced to ten members a majority of 9:1 is required).⁴⁴² A majority verdict cannot be accepted until the jury has deliberated for a period of time that the court thinks reasonable, having regard to the nature and complexity of the case, which must be not less than two hours.

⁴³⁹ Jury Amendment (Dissenting Juror) Bill 2000 (NSW).

⁴⁴⁰ S Lloyd-Bostock and C Thomas "The Continuing Decline of the English Jury" in Vidmar, above n 44, 53, 86. In 1968, Lord Stonham, then Minister of State at the Home Office, claimed in the House of Lords that jurors were being "got at" less frequently as a result of the new legislation: (30 July 1968) 256 GBPD 158.

⁴⁴¹ Lord Chancellor's Department *Judicial Statistics – England and Wales for the Year 1997* (The Stationery Office Ltd, 1997) table 6.11.

⁴⁴² Juries Act 1974 (UK) s 17(1). The jury can be reduced to as few as 9 members (Juries Act 1974 (UK) s 16), but it appears that in such a case a unanimous verdict is then required.

The Canadian position

- 426 There is no provision for majority verdicts under the Canadian Criminal Code. All verdicts must be unanimous.⁴⁴³

Should majority verdicts be introduced?

- 427 Although the submissions were divided, there was clear support for majority verdicts from those who practice in the criminal courts.
- 428 At the Crown Solicitors' conference, the overwhelming majority supported majority verdicts (two-thirds favouring an 11:1 majority, and one-third favouring 10:2). Those who have practised in overseas jurisdictions which have majority verdicts were of the view that there are no difficulties with them, that they are well accepted by the public and that they do reduce the number of hung juries.
- 429 The Serious Fraud Office also supports majority verdicts, as long as they are permitted only after the jury has been given adequate time to try to reach a unanimous verdict (the appropriate time period being at the discretion of the judge in each case).
- 430 The High Court judges were of the view that it is not appropriate for the judiciary to adopt the lead role in an area of reform where issues of policy abound. However, they noted that, at the High Court judges' conference, a majority of judges were in favour of allowing majority verdicts of 11:1 after the jury has deliberated for a minimum of four hours. Several judges have commented that the possibility of a majority verdict should not be raised with the jury until those four hours have elapsed, but generally they suggest that timing is best left to a judge's discretion.
- 431 The New Zealand Law Society are opposed to majority verdicts. They note that in other jurisdictions majority verdicts are accepted only for certain crimes, which results in the uneasy co-existence of two different systems of justice, which is most undesirable. The Commission would agree that a two-tier system is undesirable (see paragraphs 437–438). The Law Society is also concerned that there is minimal evidence of “rogue jurors” whose presence might justify majority verdicts.
- 432 The New Zealand Council of Victim Support Groups, on the other hand, supports majority verdicts:

⁴⁴³ N Vidmar “The Canadian Criminal Jury: Searching For A Middle Ground” in Vidmar, above n 44, 211, 219.

Our victim advocates have found that protracted proceedings and lack of finality in criminal cases impose serious hardships on victims. These hardships are not limited to the emotional need for closure, but extend to the imposition of physical and financial burdens as a result of their duties as witnesses for the Crown. Repetitive trials constitute an unreasonable imposition on victims whose continued participation in the process often serves the needs of the community to the detriment of their own well-being. We assume that the alternative to retrials after hung juries – that is, dismissal of the cases – does not comport with anyone’s idea of justice. It is in the public’s best interest, and of particular service to victims, to avoid mistrials wherever possible.

[The Council] is not indifferent to arguments that majority verdicts will have a negative impact on the integrity of jury decisions. We simply find no evidence to support that conclusion. For example, the accused and their lawyers would no doubt prefer having to convince one juror, rather than three, to secure a hung jury. But the rule, properly applied, would work both ways. Three votes rather than one would also be necessary to block an acquittal. In fact, the mere alteration in numbers required to convict or acquit is unlikely to have any effect on the probity of the process.

Should majority verdicts be available for both acquittal and convictions?

433 Some submissions in response to our original issues paper⁴⁴⁴ suggested that majority verdicts should be considered for acquittal alone, on the grounds that this would be consistent with the burden and standard of proof in criminal trials. In *Juries II*⁴⁴⁵ we pointed out that this is not necessary, as it is already easier for a jury to agree unanimously on acquittal rather than conviction, because to acquit they only need a reasonable doubt as to guilt. If majority verdicts are to be introduced it must be on the basis that they produce safe verdicts. If they were introduced only for acquittals, that would indicate that they were unsafe and cast public doubts on acquittal. The few submissions we received on this point were in agreement with our view.

Should the majority be 11:1 or 10:2?

434 In *Juries II*⁴⁴⁶ we noted that:

The usual provision in other jurisdictions is a majority of 10:2. However, there may be little effective difference between 10:2 and 11:1.

⁴⁴⁴ Above n 13.

⁴⁴⁵ Para 201.

⁴⁴⁶ Paras 202–203.

As already noted the state of Victoria has selected 11:1. The Victorian arrangement more closely reflects one of the arguments often put forward in favour of majority verdicts: that hung juries can result from the actions of one perverse juror. Further, it is arguable that perversity is unlikely to arise more than once on a single jury, and that the disagreement of two jurors goes some way to suggest the presence of a reasonable doubt.

There is no purely logical basis on which a distinction between 11:1 and 10:2 majorities can be made. However, the fact that most jurisdictions opting for majority verdicts have adopted the 10:2 position is persuasive: unanimity should only be abandoned if it is likely to produce benefits, and the 11:1 majority is likely to effect a lesser reduction in the number of hung juries than 10:2.

435 We consider that the primary reason why majority verdicts are justifiable is that there is sometimes one member of the group who is simply unreasonable or unwilling to properly take into account the views of the others – the rogue juror. It is to eliminate the influence of these people that majority verdicts are arguably required. If two jurors are opposed to the views, of the majority, there is a greater chance that their views are not simply unreasonable but reflect some genuine basis for doubt which should be debated rather than ignored. For this reason, we recommend a majority of 11:1.

436 There is also the issue of what majority would be allowed if the jury has decreased to eleven or less. For the reasons given in the preceding paragraph, the pattern should be that of allowing one juror to be set aside, so if the jury is eleven, the majority must be 10:1; if the jury is ten, 9:1; and so on (if it drops below ten under section 374(4A)(b)(ii) of the Crimes Act 1961).

Should unanimity remain a requirement for the most serious offences?

437 In *Juries II*⁴⁴⁷ we rejected this, although it exists in some jurisdictions (see paragraph 421) because we do not perceive any principled argument for such a distinction. If majority verdicts are not safe, then they should not be allowed in any case. But if, as we have argued above, they are safe and reasonable, then they should be available in all cases.

438 The few submissions that we received on this point were in agreement. The Ministry of Justice also pointed out that such a distinction would create difficulties in multiple charge cases, where some charges might qualify for a majority verdict and others not.

⁴⁴⁷ Para 205.

Minimum deliberation time

439 In *Juries II*⁴⁴⁸ we pointed out that there must still be a proper opportunity for deliberation, and suggested that there should be an absolute minimum (such as two hours, as in England), but that beyond that time the judge should determine what period is reasonable in the circumstances of the case. Any minimum period chosen must necessarily be arbitrary. In the Australian states which have majority verdicts, the period of time varies between two and six hours.⁴⁴⁹ In England, the minimum period is two hours.⁴⁵⁰ On balance, the Commission recommends that the minimum period should be four hours.

Disclosure of the fact of a majority verdict

440 In *Juries II*⁴⁵¹ the Commission suggested that the fact of a majority verdict should be disclosed by the jury on conviction but not acquittal, as is the case in England,⁴⁵² and in the case of acquittal a majority verdict should be recorded for statistical purposes but not publicly announced (because it may cast some doubt in the public mind over the validity of a verdict of acquittal). On reflection, the Commission considers that this would be undesirable. Again this comes back to the point (see paragraphs 437–438) that majority verdicts are acceptable because they are as safe as unanimous verdicts, and therefore must be treated as unanimous verdicts. While it would be interesting to know this information, it is inappropriate to record information which cannot be publicly announced.

441 As to the procedure to be followed, the Commission suggests that the question which is currently put to the jury after the foreman has announced the verdict (“and is that the verdict of you all?”) should, where a majority verdict is permitted, be changed to “and is that the verdict of at least 11 of you?”.

Majority verdicts of 11:1 should be introduced. They should be available for both acquittals and convictions, and in all cases, including murder. The jury should be required to deliberate for at least four hours before being permitted to return a majority verdict. The fact that a verdict has been reached by majority will be known only to the jury.

Statutory amendment will be required.

⁴⁴⁸ Paras 206–208.

⁴⁴⁹ See para 421.

⁴⁵⁰ Juries Act 1974 (UK) s 17(4).

⁴⁵¹ Para 209.

⁴⁵² Juries Act 1974 (UK) s 17(3).

Secrecy of jury deliberations

Introduction

442 **I**N *JURIES II*⁴⁵³ WE DISCUSSED the current law on jury secrecy in New Zealand. The law in this area is common law rather than statute, and was expressed in the case of *Ellis v Deheer*,⁴⁵⁴ as follows:

It has for many years been a well accepted rule that when once a verdict has been given it ought not to be open to an individual juror to challenge it, or to attempt to support it if challenged. I have spoken of this as a rule of law, but it has also been generally accepted by the public as a rule of conduct, that what passes in the jury room during the discussion by the jury of what their verdict should be ought to be treated as private and confidential.

443 In brief, the main reasons for maintaining jury secrecy are:

- to promote free and frank discussion among jurors;
- to prevent jurors from being exposed to pressure from, or on behalf of, the defendant;
- to protect jurors' privacy;
- to preserve the finality of verdicts; and
- to avoid any temptation for jurors to capitalise on disclosure.

Jurors are not required to take an oath of secrecy, although they are directed by the trial judge to discuss the case only with other jurors. To protect the secrecy of jury deliberations, evidence relating to jury deliberations is inadmissible on appeal (with some very limited exceptions).

444 Currently the law distinguishes between juror impropriety which happens outside the jury room, evidence of which can be given to the court, and juror impropriety which happens inside

⁴⁵³ Chapter 8.

⁴⁵⁴ [1922] 2 KB 113, 118.

the jury room, evidence of which cannot be given. In our draft Evidence Code⁴⁵⁵ we recommended the following provision:

A person cannot give evidence about the deliberations of a jury concerning the substance of a proceeding except in so far as that evidence tends to establish that a juror has acted in breach of the juror's duty.

- 445 It is a contempt of court for the media to approach a juror to elicit comment on what happened during the deliberations, or to broadcast such information. The leading case is *Solicitor-General v Radio New Zealand Ltd.*⁴⁵⁶ In that case the jury had convicted the accused of the murder of two people whose bodies had not been found at the time of the trial. Nearly a year later, one of the bodies was found, and an employee of Radio New Zealand contacted jurors and sought comment from them. Some of those comments were later broadcast on radio.
- 446 New South Wales,⁴⁵⁷ Victoria,⁴⁵⁸ Canada⁴⁵⁹ and England⁴⁶⁰ have all legislated to make it a criminal offence to disclose jury deliberations. In *Juries II*⁴⁶¹ we asked whether New Zealand needs similar legislative provision or codification, to clarify the legal situation in relation to the secrecy of jury deliberations. Such legislation could clarify which aspects of a jury's deliberations are admissible or disclosable, and detail the allowable exceptions to jury secrecy (for example, to cover miscarriage of justice, or bribery or threats made in the jury room). Legislation could also clarify, both for the media and for jurors, what constitutes contempt of court, and what contact is permissible, for example, with a consenting juror after trial.
- 447 In their submission, the Privacy Commissioner agreed with our exposition of the reasons for jury secrecy, but considered that insufficient consideration had been given to jury members as individuals involuntarily drawn into the criminal justice system. Although we did note⁴⁶² that the secrecy of jury deliberations protects jurors from exposure to pressure from a convicted

⁴⁵⁵ Above n 147, s 77.

⁴⁵⁶ [1994] 1 NZLR 48.

⁴⁵⁷ Jury Act 1977 (NSW) s 68B.

⁴⁵⁸ Juries Act 2000 (Vic) s 78.

⁴⁵⁹ Canadian Criminal Code s 649.

⁴⁶⁰ Contempt of Court Act 1981 (UK) s 8.

⁴⁶¹ Para 270.

⁴⁶² *Juries II*, para 245.

defendant, and acknowledge⁴⁶³ that secrecy protects the privacy of jurors who might be compromised by others attempting to capitalise on disclosures for pecuniary gain, the Privacy Commissioner points out that jury secrecy goes further than that, and allows ordinary people to participate in the extraordinary task of jury deliberation with the least fuss and intrusion on their private lives. It protects them from being pestered by journalists, or having their picture shown on television or in the newspapers. Although their employer will know that they are doing jury service, their co-workers need not become aware unless a juror chooses to divulge the fact. Similarly, friends, relatives and neighbours may all be quite unaware of the drama in the individual's life unless that person decides to reveal it.

448 It was also pointed out⁴⁶⁴ that there are a number of questions which the existing case law does not answer, and which would benefit from legislative clarification:

- (a) Is a media approach to a juror a contempt of court if the subject of the interview is something other than jury deliberations or the safety of the verdict? What if, for example, the juror is simply asked for his or her opinion about how the trial was conducted, or the behaviour of the judge or counsel? Such an approach would not compromise the secrecy of the deliberations or attack the finality of the verdict, but it would arguably be an invasion of the juror's privacy.
- (b) Whether it is the media or the juror who makes the approach, what if the juror expresses concern about the verdict or the discovery of new evidence, without revealing any aspect of the jury deliberations?
- (c) What if a juror approaches the media to say that he or she had access to information not disclosed at the trial, or had been subjected to threats or intimidation from a third party? Would it make a difference if the media approached a juror seeking such information?
- (d) The court in *Solicitor-General v Radio New Zealand*⁴⁶⁵ suggested that the fact that the revelations broadcast lacked "any contributing virtue or merit" was significant. This implies that if the revelations had been significant and a real matter of public concern, their publication might not have been contempt.

⁴⁶³ *Juries II*, para 247.

⁴⁶⁴ By Professor John Burrows.

⁴⁶⁵ Above n 456, 58.

Permissible disclosure

- 449 Any legislative prohibition on disclosure of jury deliberations cannot be absolute. The Research indicated that the experience of being a juror can be a very powerful one, and some jurors suffer a considerable amount of stress and emotional upheaval as a result of their service.⁴⁶⁶ As a result, increased effort is being made to ensure counselling is available for jurors if they need it (see paragraphs 507–508). Such counselling will inevitably involve some disclosure of what happened in deliberations, and this must be acceptable. Other jurors will not feel the need of professional counselling, but will feel the need to discuss their experiences privately with family or close friends. It would not be possible, or desirable, to prevent such discussions.
- 450 In addition, if there is cause to suspect that jurors have been approached in an effort to persuade them to bring in a particular verdict, the Police must be able to investigate such allegations. While such investigations are unlikely to focus on the deliberations themselves, they may have some relevance. Any legislation should make it clear that the Police may investigate where appropriate, but only with the permission of the trial judge.

Jury research

- 451 The restrictions of the conventions relating to jury secrecy make it very difficult, although not impossible, to undertake empirical research about the way that juries function. The Research which was undertaken on the Commission's behalf required the permission of the Chief Justice, the Chief District Court Judge, and the trial judge in each case. It was subject to very strict procedures to protect jury secrecy, and the oversight of an ethical committee.⁴⁶⁷ Although the Research has provided valuable information about the way that juries function, it is necessarily limited because just 48 cases were investigated – while that is enough to get a good indication of trends, it is far from comprehensive. But for the convention of jury secrecy, academic research could be carried out with considerably greater ease, and the Department for Courts could widen the scope of its record-keeping markedly. In *Juries II*⁴⁶⁸ we recommended that responsible academic research be permitted under any code. This view received widespread support in the submissions.

⁴⁶⁶ *Juries II vol II*, 10.13–10.26.

⁴⁶⁷ See *Juries II vol II*, preface.

⁴⁶⁸ Para 262.

452 While jury research must be possible, it should be very tightly controlled. It is a considerable imposition on jurors, quite apart from the challenges of ensuring that information is kept confidential. There is considerable academic interest in jury research, and indeed we have received a number of inquiries from postgraduate students seeking to undertake their own research in this area, who were disappointed to learn that this would not be possible. We consider that the tight restrictions placed on the Research carried out on our behalf were appropriate, and could not appropriately be lessened. Any legislation in this area should ensure that research is possible but only with the permission of the Chief Justice and/or the Chief District Court Judge.

Legislation should apply to jurors and media

453 Although the leading New Zealand case was one in which the media approached jurors (see paragraph 445), it is of course possible for jurors to approach the media. In the United States, there is an emerging problem of individuals wishing to become jurors in high-profile cases in order to sell at a later date details of the trial from the jury's point of view, including details of the jury's deliberations. Some states, including New York and California, have enacted laws to prohibit jurors selling their stories during the course of the trial.⁴⁶⁹ We are not aware that these circumstances have yet arisen in New Zealand, although there is always the potential that the influence of American media may inspire such an attempt.

Potential problems

454 Any attempt at legislation in this area must proceed very carefully because of the potential for anomalies and difficulties. The case of *R v Young*⁴⁷⁰ illustrates the sort of difficulties that can arise. Section 8 of the Contempt of Court Act (1981) (UK) provides:

. . . it is a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings.

Stephen Young was convicted of a double murder. Shortly afterwards a juror told a solicitor that the jury, when considering their verdict, had tried by occult means to make contact with the spirit of one of

⁴⁶⁹ M Strauss "Juror Journalism" (1994) 12 Yale Law & Policy Review 389.

⁴⁷⁰ [1995] 2 Cr App R 379; discussed in J Spencer "Seances, and the Secrecy of the Jury-Room" [1995] Cambridge LJ 519.

the victims. Inquiries revealed that in the hotel where the jury had stayed, the foreman and three others – who had been drinking – had set up a ouija board and believed they had received a spirit message that “Stephen Young done it”. On the basis of this, the Court of Appeal quashed the conviction and ordered a retrial.

- 455 The section provides for some limited exceptions, none of which cover inquiries made or information supplied with a view to overturning the jury’s decision on the basis of the illegal or improper way it went about its job. But because the incident happened at the hotel, it was held not to be “in the course of their deliberations” and thus could be acted on; if the jury had consulted the ouija board during deliberations, no inquiry could have been made. So although the section is aimed at stopping newspapers publishing interviews with jurors, it acts, undesirably, to block the investigation of gross misbehaviour of a type that makes a conviction unsafe.
- 456 In the following chapter, *Media and their influence on juries*, we recommend that some aspects of the law relating to the publication of trial information should be codified, and that the Commission undertake a reference to determine the exact form that legislation should take. It would be appropriate for legislation relating to the secrecy of jury deliberations to be included in that project.

The law relating to the secrecy of jury deliberations should be codified to clarify the obligations of jurors and of the media. The form of that legislation will require careful consideration, and should be considered in a separate reference together with the law relating to the publication of trial information.

15

Media and their influence on juries

Introduction

457 **I**N *JURIES II*⁴⁷¹ WE DISCUSSED the tension between the right to freedom of expression and the freedom of the media, as against the accused's right to a fair trial. Subsequently we discussed:

- the control over publication of material which might prejudice trial by jury;
- the test for contempt and its application;
- juror susceptibility to prejudicial material;
- dealing with contempt (both punishing the offender and measures to protect the trial); and
- suggested reforms in England and Australia.

458 We have concluded that there is no pressing need for change to the law relating to publication of trial information. The Research clearly indicates⁴⁷² that publicity both before and during the trial currently has little, if any, effect on jurors, so from the point of view of this study of jury trials, there is no need for change. More generally however, it is arguable that legislation in regard to some matters would help to clarify for the media what they may and may not do. However, designing the scope of any such legislation is beyond the scope of this paper. On the other hand, there is some evidence (see paragraph 473) that material is from time to time published that may lead to the identification of jurors, and this should be made an offence.

Background

459 Like the law relating to the secrecy of jury deliberations, the law of contempt is not codified in New Zealand, although there are some

⁴⁷¹ Chapter 9.

⁴⁷² *Juries II vol II*, paras 7.51–7.57.

statutory provisions which relate to it.⁴⁷³ Those provisions usually preserve the law of contempt, and the attitude of the Courts has been to do the same.⁴⁷⁴ As a general rule, any words spoken or otherwise published, and any acts done, outside Court which are intended or likely to interfere with or obstruct the fair administration of justice, are a contempt.⁴⁷⁵ In the particular context of media publications and jury trials, the test to determine whether a particular publication amounts to contempt was stated in the case of *Solicitor-General v Wellington Newspapers Ltd*⁴⁷⁶ (and later confirmed by the Court of Appeal in *Gisborne Herald Co Ltd v Solicitor-General*⁴⁷⁷):⁴⁷⁸

[Whether] as a matter of practical reality the actions of the particular respondent caused a real risk, as distinct from a remote possibility, of interference with the administration of justice; here, specifically, interference with a fair trial. Risk is assessed not by the actual outcome but by the tendency of the publication, although subsequent events may form part of the evidence. While the meaning of publications is decided by the impression made on the hypothetical ordinary reasonable reader (or, in the case of radio, listener) the tendency is assessed by the Court.

460 Several law reform agencies around the common law world have reviewed the law of contempt,⁴⁷⁹ the latest review being completed very recently by the New South Wales Law Reform Commission.⁴⁸⁰ The only one of those reviews to actually result in legislation led to the Contempt of Court Act 1981 (UK). That Act imposes a “strict liability rule”⁴⁸¹ which provides that conduct may be contempt regardless of any intent to interfere with the course of justice. The rule is directed only at publications which:⁴⁸²

⁴⁷³ J Burrows and U Cheer *Media Law In New Zealand* (4 ed, Oxford University Press, Auckland, 1999) 270.

⁴⁷⁴ *The Laws of New Zealand* (Butterworths, Wellington, 1993) vol 7, Contempt of Court, para 1.

⁴⁷⁵ Contempt of Court, above n 474, para 10.

⁴⁷⁶ [1995] 1 NZLR 45.

⁴⁷⁷ [1995] 3 NZLR 563, 567.

⁴⁷⁸ *Solicitor-General v Wellington Newspapers Ltd*, above n 476, 47.

⁴⁷⁹ New South Wales Law Reform Commission *Contempt By Publication: DP 43* (Sydney, 2000) paras 1.28–1.43.

⁴⁸⁰ Above n 479.

⁴⁸¹ Contempt of Court Act 1981 (UK), s 1.

⁴⁸² Contempt of Court Act 1981 (UK), s 2(2).

. . . [create] a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.

The clarity of this legislation has been criticised and there have been calls for a Royal Commission to study the operation of the Act. Lord Justice Phillips notes⁴⁸³ that the two-fold requirement of “substantial risk of serious prejudice” does not apply to individual publications which are unlikely to come to the notice of potential jurors, which:

. . . [raises the] almost insoluble problem of the incremental effect of publications, no single one of which can be said to create a substantial risk of serious prejudice but which, when taken together, certainly do so.

461 Lord Phillips also notes that there have been English cases in which stays of prosecution have been granted on the basis that media publicity has been so intense that any jurors selected are likely to be prejudiced. However, the expedient that he adopted, of using a questionnaire to identify jurors who might have been so prejudiced, has been soundly rejected by our Court of Appeal in *R v Sanders*.⁴⁸⁴

462 In 1987 the Law Reform Commission of Australia, in a wide-ranging report on the law of contempt, concluded that the common law was too vague and should be replaced by specific statutory offences. It identified nine categories of “prescribed statements” capable of creating, by virtue of the influence they exert on jurors, a substantial risk that a fair trial might be prejudiced (for example, statements from which it can be inferred that the accused is innocent or is guilty of the offence, or that the jury should acquit or should convict, or that the accused had one or more prior criminal convictions, or that the accused has a good or bad character, either generally or in a particular respect).⁴⁸⁵ That Commission’s report recommended that liability should only arise if:

- within the sub judice period, a publication contained at least one of the prescribed statements; and
- that statement, in the particular circumstances of the case, created a substantial risk that the trial would be prejudiced by virtue of possible influence on the jury; and
- the statement did not fall within any of the exceptions or defences outlined.

⁴⁸³ Phillips, above n 102, 483.

⁴⁸⁴ (1995) 13 CRNZ 222, 228–229.

⁴⁸⁵ Law Reform Commission of Australia *Contempt: R35* (Australian Government Publishing Service, Canberra, 1987) 174.

463 In *Juries I*⁴⁸⁶ we said that in our opinion the proposed Australian provisions (which have not been enacted) are detailed and complex. The nine categories of prescribed statements would provide greater guidance than the English and New Zealand tests, but there would be difficulties in application. For example, statements from which it might reasonably be inferred that the defendant has a good or bad character continue to involve what would be, in some cases, a difficult exercise of judgment. Furthermore, in assembling such prescribed statements, it is difficult to ensure that all categories of statement that may meet the test have been included. The categories may not, for example, cover the publication of photographs of the defendant when it is apparent that a question of identity may arise. We pointed out that the criticisms made of the current law in New Zealand may arise not from the law itself but from the difficulty of applying any general test to the wide range of situations which arise. The reforms suggested by the Australian Law Reform Commission would provide greater guidance, but they may also bring increased complexity and lack the flexibility to cover situations not presently foreseen. They may not, therefore, resolve the difficulties which the media in New Zealand experience.

Codification of the law relating to publication of trial information

464 In *Juries II*⁴⁸⁷ we asked whether the law relating to publication of trial information should be codified, and if so what the appropriate test for assessing whether a particular publication amounts to contempt should be. We did not express a clear opinion on the desirability of codification, noting⁴⁸⁸ that any attempt to provide detailed statutory tests is likely to result in a level of complexity which would not clarify the task of journalists; if there is to be codification, a general test is preferable.

465 We received extensive and detailed submissions from the Newspaper Publishers' Association. In their view, the Research shows that past assumptions about the effect of publicity are incorrect, and juries are not affected by publicity before or during a trial. This means that the traditional approach to publication contempt can no longer be justified and a new approach needs to be developed. A new approach is also needed to rectify the problems created by the common law rules and procedures – the common law offence of

⁴⁸⁶ Paras 302–303.

⁴⁸⁷ Paras 303–304

⁴⁸⁸ *Juries II*, paras 303, 304.

contempt by publication involves the application of vague and uncertain rules, an abnormal procedure and unlimited and severe penalties. The common law, therefore, has a “chilling effect” on the media’s coverage of the justice system. In summary, the Association’s position is that:

- a more prescriptive test for contempt needs to be adopted (like that recommended by the Australian Law Reform Commission) or, alternatively, there should be a general test that better balances the rights to a fair trial and free speech (rather than favouring one right);
- the period for contempt needs to be clearly defined and certain (starting when proceedings are actually instituted and finishing when a verdict or judgment is given);
- contempt by publication should be an indictable offence with a maximum penalty so the defendant has the same rights as all other defendants.

466 The Newspaper Publishers’ Association expressed concern about the practical difficulties that the law of contempt currently creates for journalists:

Newspapers have to deal with contempt on a frequent basis – often daily. Most newspapers have systems, training and access to lawyers in place to minimise the risk of infringement. A commitment by the media to systems to manage contempt results in constraints on news reporting – this reduces the volume of information that is otherwise available to the public. Therefore, the observance of contempt and the fear or risk of being in contempt are factors “chilling” publication and denying the public freedom of information.

It is very difficult for the media to apply the common law in this area and decide whether or not a particular publication is likely to be held in contempt. In particular:

- The test for contempt is vague, uncertain and focuses on tendencies rather than evidence of actual prejudice. Journalists cannot predict what subjective assessment a Court may make about the effect of a particular publication.
- The contempt period is similarly vague and uncertain. It is difficult to assess when proceedings are “highly likely”. Also, while there is more scope for comment after a verdict has been delivered (although the matter is sub judice), the limits are unclear.
- Even with the benefit of legal advice, it is not possible to identify clearly what can be safely published. This often forces journalists to err on the side of caution, suppressing publications that are probably not in contempt.

- The consequences of being found in contempt are often severe, with no limits to the Court’s power to punish. The media cannot predict what penalty may be imposed in any case. This forces the media either to suppress publications or to risk imprisonment or fines.
- The media have to suppress the discussion of matters of public importance at the time they are most prominent in the public mind. If publication is delayed until after the trial, the immediacy of the story is lost and it may no longer be worthwhile to publish it. Justice delayed is justice denied. Likewise, information and news.
- The difficulties faced by the media are compounded by the need to make decisions in a short-time frame and in highly competitive and global media market where other media (eg international news organisations) may not be similarly constrained.
- There are apparent differences in enforcement – particularly relating to photographs. Those elements of the media that exercise restraint are disadvantaged by comparison with those who publish when identity is an issue.
- It is a difficult situation where Government enforcement agencies supply press releases or information to the press when that information is in contempt. This situation is illustrated by the facts in the *Gisborne Herald* case.

467 The Newspaper Publishers’ Association submits that its pro-reform view is supported by the Research, because it establishes that the degree of concern expressed by the Courts about the effect of publicity on juries cannot be sustained, and shows that the modern juror is able to discharge his or her duties properly by putting publicity out of mind and to give effect to such a direction from the trial judge. With respect, we do not agree. The only conclusion that can be drawn from the Research is that jurors are not generally affected by the current level of pre-trial or during-trial publicity. An increase in the current level of publicity could mean a greater impact and a different result (although a change of venue can reduce that effect). Thus while legislation might be beneficial because it would clarify the law for journalists, altering the level of publicity permitted would not necessarily be beneficial. A recent meta-analysis of United States empirical research⁴⁸⁹ clearly indicates that pre-trial publicity significantly affects jurors’ decisions about the culpability of the defendant. The degree of pre-trial publicity permitted in the United States is very much greater than here, but it can be assumed that the more we permit pre-trial publicity, the more effect it will have on jurors, and the more we would move away from the current low-impact position. This does not appear to the Commission to be a desirable development.

⁴⁸⁹ N Steblay, J Besirevic, S Fulero, and B Jimenez-Lorente “The Effects of Pretrial Publicity on Juror Verdicts: A Meta-Analytic Review” (1999) 23 *Law and Human Behaviour* 219.

468 In relation to the balance between the right to a fair trial and the right to free speech, in *Juries II*⁴⁹⁰ we pointed out that traditionally the former has prevailed, because where the right to a fair trial is compromised, a particular accused may suffer permanent harm, whereas any inhibition of media freedom ends with the conclusion of legal proceedings. The Newspaper Publishers' Association is of the view that a different balance needs to be struck:

The relevant provisions of the New Zealand Bill of Rights Act [1990] are section 5 (justified limitations), section 14 (freedom of expression) and section 25(a) (fair trial). Both the right to freedom of expression and the right to a fair trial are accorded equal status. Both are subject to "justified limitations". Both rights, therefore, need to be balanced.

The analysis adopted by the Canadian Supreme Court in *Dagenais* (1995) 94 CCC (3d) 289 gives some guidance. That case concerned the test for a publication ban. Nevertheless, the case is relevant because the test for determining whether a ban should be ordered is the same as the test for determining contempt. With respect to the balance that the common law had previously drawn in these cases, Lamer CJ observed that (paragraph 72):

In my view, the balance this rule strikes is inconsistent with the principles of the Charter, and in particular the equal status given by the Charter to ss 2(b) and 11(d). It would be inappropriate for the Courts to continue to apply a common law rule that automatically favored the rights protected by s 11(d) over the rights protected by s 2(d). A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the Charter and when developing the common law.

The Supreme Court, therefore, modified the test for ordering a publication ban. The new test did not favor one right over another but instead sought to balance both rights.

469 There are a number of issues on which legislative clarification could be useful. However, upon reflection and consultation with John Burrows, an expert in media law, we have concluded that they require further consideration which is not appropriate in this paper. Accordingly, we intend to deal with them in full in a separate preliminary paper. The issues that will be addressed in that paper will include:

- (a) When the sub judice period should commence. The Court of Appeal has said that the commencement of proceedings must be "highly likely",⁴⁹¹ but that test was enunciated in a case in

⁴⁹⁰ Para 289.

⁴⁹¹ *Television New Zealand Limited v Solicitor-General* [1989] 1 NZLR 1, 3.

which the question was whether an injunction should issue. It is at least arguable that, if the question was whether a penalty should be imposed on a media defendant after the event, then the stricter Australian test of whether judicial proceedings have actually commenced, usually as the result of an arrest,⁴⁹² would apply.

- (b) When the sub judice period should end.
- (c) What the test for contempt should be. While the *Wellington Newspapers Ltd* test (see paragraph 459) appears clear, its application in practice appears to create considerable difficulty for the media (see paragraph 466). The question is whether it would be better to have a general test, as England does, or more detailed provision, as advocated by the Australian Law Reform Commission.
- (d) Who is responsible for the contempt. Most cases have involved the media corporation as the defendant. The question of whether the editor should also be personally responsible, even if he or she did not have detailed or actual knowledge of the item in question, is one that has not been resolved in this country.⁴⁹³
- (e) Whether criminal intent is required. It is usually assumed that all that is required is proof that the defendant intentionally issued a statement with the required prejudicial tendency.⁴⁹⁴ However, there is some common law authority which suggests that liability may not be absolute.⁴⁹⁵ It would be open to a New Zealand Court to hold that a publisher may exonerate itself by demonstrating ignorance of relevant facts due to no fault on its part.⁴⁹⁶
- (f) What tribunals are covered. While this is not an issue in relation to juries, there is considerable uncertainty as to the extent to which the law of contempt applies to tribunals other than the courts.⁴⁹⁷

⁴⁹² *James v Robinson* (1963) 109 CLR 593.

⁴⁹³ *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225, 238–242.

⁴⁹⁴ *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225, 232; *Solicitor-General v Radio New Zealand Ltd*, above n 456, 55.

⁴⁹⁵ For example, *R v Daily Mirror and Ors ex parte Smith* [1927] 1 KB 845.

⁴⁹⁶ Such a finding has recently been made in the cognate subject of breach of a suppression order: *Karam v Solicitor-General* (20 August 1999) unreported, High Court, Auckland Registry, AP 50/98.

⁴⁹⁷ *Burrows and Cheer*, above n 473, 316.

There are a number of issues relating to publication of trial information which would benefit from legislative clarification, but we would prefer to deal with them in a separate paper. In considering what the law should be, it should not be overlooked that the Research indicates that the law as it stands adequately protects jurors from prejudicial information.

The publication of material that may lead to the identification of a juror should be an offence

- 470 In some jurisdictions (including New South Wales⁴⁹⁸ and Victoria⁴⁹⁹) it is an offence to publish material which may lead to a juror being identified. Our Juries Act 1981 contains no such provision, but does restrict access to jury lists by persons other than the registrar and his or her staff. Parties to the proceedings may obtain a copy of the panel list from the registrar, but not earlier than five days before the commencement of the week in which a case is to be tried.⁵⁰⁰ The court may also allow any other person to obtain a copy during the same period.⁵⁰¹ This protects jury anonymity prior to the trial while at the same time allowing the parties to make inquiries about prospective jurors to decide whether they wish to challenge them (see paragraphs 246–248). There is, however, no specific prohibition of the publication of material that may lead to the identification of a juror or prospective juror. Members of the jury pool are called to the jury box (see paragraph 210) by having their name called out in open court. Moreover, the name of the foreman is always disclosed in open court once he or she is selected.
- 471 For the reasons set out in paragraph 248, it is not possible for jurors to remain anonymous. The parties and the court must know who they are. Although we do not recommend any change to the practice of obtaining jury lists, there is no legitimate reason to identify any juror once the challenging process is over and the jury is empanelled, and to do so would be a serious breach of that juror's privacy.
- 472 One argument in favour of making the identification of jurors a statutory offence is that the District Court, which now deals with the bulk of jury trials, lacks inherent jurisdiction and

⁴⁹⁸ Jury Act 1977 (NSW) s 68.

⁴⁹⁹ Juries Act 2000 (Vic) s 77.

⁵⁰⁰ Juries Act 1981 s 14(1).

⁵⁰¹ Juries Act 1981 s 14(2).

therefore has only limited powers in regard to contempt.⁵⁰² A statutory offence would could empower the District Court to deal with this matter.

473 A 1998 report into the impact of media coverage of court proceedings,⁵⁰³ found disturbing evidence of breach of security rules by the media which led to identification of jurors:

The issue of identification of jurors by cameras both inside the court and outside the courtroom is of prime concern to jurors and to the continuation of cameras in court. Despite the existence of [a rule expressly forbidding the practice] the researchers know of at least three instances in six trials where jurors complained to the court about being filmed, either during the trial or afterwards. In one of these cases the juror was shown in the broadcast coverage, the other two cases are unclear as they depended upon jurors recognising themselves, rather than the researchers being able to recognise them as jurors.

The Commission recommends that it should be a statutory offence to publish material which may lead to a juror being identified, and that the power to punish this contempt be extended to the District Court.

Statutory amendment will be required.

⁵⁰² Contempt of Court, above n 474, paras 6, 49.

⁵⁰³ K Allan, J McGregor, and S Fountaine *The Impact of Television, Radio and Still Photography Coverage of Court Proceedings* (prepared for Department for Courts, unpublished, April 1998), 190.

16

The experience of being a juror

Introduction

474 **I**N *JURIES II*⁵⁰⁴ WE NOTED that the overwhelming majority of jurors in the Research felt positive about their experience, that they had gained a greater understanding of the criminal justice system and felt satisfaction at having done their civic duty. The role of jury service as a cohesive force in society is clear. However, the Research also highlighted a number of serious practical problems which made jury service more difficult and less rewarding than it should be.

475 The original scope of our review of juries excluded an examination of the facilities available to jurors on the grounds that it is an administrative matter rather than a legal issue.⁵⁰⁵ However, in the light of the Research we believe that these matters are actually of fundamental importance and therefore we have chosen to make some comment on them. Juries serve a vital function in our criminal justice system, and must be treated properly and with respect. Failing to attend to their practical needs, sometimes in so basic a matter as failing to provide drinking water to them in a courtroom where it is provided to everyone else, shows a fundamental lack of respect and appreciation for their contribution. It may also interfere with the deliberation process itself – for example, how can jurors concentrate on a trial properly, if they are all the while concerned that if the trial goes on too long they will lose their jobs? Moreover, it is clear that many citizens try to avoid serving on juries. We have suggested (see paragraphs 161–164) that the penalty for failing to answer the jury summons should be increased. On the other side of the coin, practical impediments and nuisances must be removed or reduced as much as possible.

⁵⁰⁴ Paras 328–330.

⁵⁰⁵ *Issues Paper*, above n 13, para 10.

Excessive delays

476 In *Juries II*⁵⁰⁶ we noted that jurors are usually accepting of the fact that delays happen, but resent excessive delays and not being told of the reason for the delay and how long it is likely to be. We did not seek submissions on the issue, because this is clearly a point which can only be dealt with by individual judges being aware of jurors' feelings and taking what steps they can in the circumstances, for example by explaining the reasons for the delay as far as possible. However, it is something that should be included in the CPC Manual.

The CPC Manual should contain a direction that, where practicable, juries should be given such explanation as possible of the reason for any delay, and an indication of how long the delay may be.

Facilities

477 The problems with jury facilities have been highlighted before,⁵⁰⁷ and the Research reaffirmed that facilities are still totally inadequate.⁵⁰⁸ In particular:

- jury deliberation rooms are too small, airless, too hot or cold, or lacking in natural light;
- there is inadequate provision for smokers during deliberations;
- jurors do not have access to the jury room during breaks, so have no private space;
- toilet facilities can be seriously inadequate; and
- inadequate refreshments are given and there is no water for jurors in the court.

478 In their submission in response to our preliminary paper, the Department for Courts said:

The Department for Courts adopted design standards for court buildings in 1996. These standards apply to buildings constructed after that time. While these standards represent the ideal for our buildings, we note that many of our buildings are very old (almost half are over 50 years old) and therefore do not comply with the design standards.

⁵⁰⁶ Paras 331–332.

⁵⁰⁷ Courts Consultative Committee, above n 307.

⁵⁰⁸ *Juries II vol II*, paras 10.28–19.39.

Some of the issues raised are management issues, for example temperature of air-conditioning, provision of crockery [and] cleaning, and part of the Department's move towards improving service to jurors will be to raise awareness of these issues so that service is improved.

- 479 In many courts in the United States, jurors are routinely asked to fill out a questionnaire after their trial about practical issues such as facilities.⁵⁰⁹ This provides a quality check for the court and the lawyers and also a database useful when considering what further resources are needed. It would be useful for these questionnaires to be gathered regularly.

The Department for Courts should consider preparing a questionnaire about the adequacy of facilities, and give it to jurors in all courts at periodic intervals. The results should be kept centrally by the Department and used by both the court manager and the executive judge to review whether facilities at the court are adequate and what improvements are required.

Employment problems

- 480 The Research shows⁵¹⁰ that employment issues were the most common inconveniences experienced by jurors – 53.9 per cent of excusals are employment related (see paragraph 155). If we are to reduce the number of people who avoid jury service, and encourage skilled people to sit on juries, we need to make it easier for employed people to serve. This can be done by improving rates of jury fees, making it an offence for an employer to prejudice the position of an employee on account of that employee's absence on jury service, and allowing people to defer their service to a more convenient time rather than be excused from it altogether.

Rates of payment for jury service

- 481 In their submission, the Department for Courts pointed out the high proportion of work-related excusals:

⁵⁰⁹ Sample questionnaires in the Commission's possession are one or two pages long, and ask questions such as: How long did you have to wait?; How many times were you assigned to a trial for selection?; How many times were you actually selected?; How do you rate orientation/courtroom instructions/physical comfort/time scheduling?; Did you lose income as a result of your service?; How much?; What form of transport did you use to get to court?

⁵¹⁰ *Juries II vol II*, para 10.

The question of paid leave for jury service raises the issue of where the cost for jury service should rest. If legislation is enacted providing that all employees are entitled to paid leave for jury service then arguably the cost of jury service is being borne by employers and not by the Government. This is a matter of policy for determination.

A number of potential jurors are excused because they are self-employed or contract workers. These workers would not be assisted by provision of paid leave.

Anecdotal evidence suggests that there may be a need to provide some form of protection for jurors whose employment is at risk because of their jury service. For example we are aware of a juror who was discharged part way through a trial because her employer had told her that she expected to lose her job as a result of her jury service.

- 482 There was a clear perception among the jurors in the Research⁵¹¹ that payment rates are too low. Several of the jurors in the Research did suffer actual financial loss as a result of their service. There is no way to know how many people avoid service for this reason (as opposed to other employment pressures, such as the need to meet client deadlines), but the number of excusals granted on account of employment problems indicate that low rates of payment may be a significant factor.
- 483 The level of fees paid to jurors was last amended in 1996.⁵¹² The current rates of payment are broadly consistent with the minimum wage, but they are substantially lower than the average wage. The chief executive of the Department for Courts may authorise payment in excess of the usual amounts if he or she “considers that, by reason of exceptional circumstances, it is desirable to do so”.⁵¹³ However, very few applications for payments in excess of scale are received, and such a payment is clearly to be the exception not the norm.
- 484 Under the old national award system, awards used to provide for top-up wages for jury service. Since the Employment Contracts

⁵¹¹ *Juries II vol II*, paras 10.42–10.45.

⁵¹² Jury Rules 1990, Second Schedule, Part A. They are: for the first five days of attendance, attendance for less than three hours on a day, \$25; more than three hours but not after 6.00pm, \$50; more than three hours but not after 9.00pm, \$70; more than three hours and after 9.00pm, \$100. For the sixth and subsequent days of attendance, the rates are: attendance for less than three hours on a day, \$35; more than three hours but not after 6.00pm, \$70; more than three hours but not after 9.00pm, \$100; more than three hours and after 9.00pm, \$140.

⁵¹³ Jury Rules, Second Schedule, clause 3.

Act 1991,⁵¹⁴ those provisions have largely disappeared from employment contracts.⁵¹⁵ While it may be tempting to say that employers should continue to top-up wages, or provide paid jury leave, that is a political decision on which the Commission is not able to express a view. As was the case in the recent debate regarding the Paid Parental Leave Bill 1998,⁵¹⁶ the question of who should pay for an acknowledged social benefit will be a vexed political issue. Putting the cost onto employers, particularly for long periods of service, would be a significant burden for them, especially for small businesses. It is possible that this could lead to more employers seeking to have their staff excused from jury service rather than paying for the leave. Given that jury service is a benefit to the community, it seems reasonable that the community, through taxes, should pay for that benefit, rather than putting the burden onto employers.

485 One possibility would be to pay jurors their actual loss, rather than a flat rate. One difficulty with this is that it could create the appearance of unfairness; if some jurors were to receive higher fees than others, that may suggest that their contribution was valued more highly than that of other jurors.⁵¹⁷ On the other hand, some people really do suffer greater financial hardship than others as a result of jury service. This is particularly the case for self-employed people, although it is also true of employees if they have to take unpaid leave to serve.

486 In their submission, the Department for Courts said:

The policy intention behind the determination of jury payment rates is that jury service is a civic duty imposed on citizens. Therefore payment is designed to provide some compensation for jurors rather than equate to a normal wage or actual loss. However, it is not intended that carrying out a civic duty will create severe hardship for jurors, and the present provisions for increased payment provide protection for jurors in this position.

If jury payments are linked to actual loss for jurors the cost of jury trials could be expected to increase significantly as the research shows that a number of jurors are financially worse off after jury service than if they had worked their normal jobs. This would be the case particularly in long trials.

⁵¹⁴ Now repealed by the Employment Relations Act 2000.

⁵¹⁵ Lianne Dalziel, commenting on amendments to Crimes Act 1961 s 374 (discharge of jurors) (27 November 1997) 565 NZPD 5773.

⁵¹⁶ See, for example, the debate on the second reading of that Bill, (9 September 1998) 571 NZPD 11866–11880.

⁵¹⁷ This was the view of the submission from the Ministry of Justice.

Practical issues in linking payment to actual loss are:

- Determination of loss for self-employed or commission workers.
- Potential delays in processing payment for jurors who do not supply proof of loss promptly.
- Whether or how to assess indirect loss, for example jurors who are required to take annual leave for their service.
- Appropriate mechanisms for calculating and proving actual loss.

487 A compromise solution would be to retain a flat rate of payment but take a more liberal approach to the circumstances in which the flat rate can be increased, where a juror could prove that they had suffered actual financial cost in excess of the flat rate of payment. While this would no doubt add to the cost of jury trials, we consider that it is necessary if we are to achieve the goal of encouraging more people, especially more skilled people, to serve on juries.

Jurors should continue to be paid at a flat rate as set out in the Jury Rules 1990, but where a juror can demonstrate actual financial loss in excess of that flat rate, the registrar should have the discretion to increase the payment to cover or contribute to the juror's actual loss.

Amendment to the Jury Rules 1990 will be required.

Legislation to protect jurors whose employment may be compromised by jury service

488 Many jurors have employment problems as a result of service. They often have to fit in work requirements outside court hours. There is no statutory provision for jury service leave. We are aware of employment contracts which, for example, provide that employees must use their annual leave entitlement for jury service, and further, that the employee must pay any juror fees they receive to the employer. There is currently no statutory protection for jurors whose employment is compromised by jury service, although preventing one's employee from attending for jury service is probably a contempt of court at common law. In Victoria, the new Juries Act 2000⁵¹⁸ creates an offence which provides:

- (1) An employer must not
 - (a) terminate or threaten to terminate the employment of an employee; or

⁵¹⁸ Section 76.

(b) otherwise prejudice the position of the employee because the employee is, was or will be absent from employment on jury service.

Penalty: In the case of a body corporate, [\$6000];⁵¹⁹

In any other case, [\$1200] or imprisonment for 12 months.

- (2) In proceedings for an offence against sub section (1), if all the facts constituting the offence other than the reason for the defendant's action are proved, the onus of proving that the termination, threat or prejudice was not actuated by the reason alleged in the charge lies on the defendant.
- (3) If an employer is found guilty of an offence against sub section (1), the court may
 - (a) order the employer to pay the employee a specified sum by way of reimbursement for the salary or wages lost by the employee; and
 - (b) order that the employee be reinstated in his or her former position or a similar position.
- (4) If the court considers that it would be impracticable to re-instate the employee, the court may order the employer to pay the employee an amount of compensation not exceeding the amount of remuneration of the employee during the 12 months immediately before the employee's employment was terminated.
- (5) An order under sub section (3)(a) or (4) must be taken to be a judgment debt due by the employer to the employee and may be enforced in the court by which it was made.
- (6) The amount of salary or wages that would have been payable to an employee in respect of any period that his or her employer fails to give effect to an order under sub section (3)(b) is recoverable as a debt due to the employee by the employer in any court of competent jurisdiction.

489 Given the difficulties which the Research has shown that jurors do suffer, and the need to encourage more skilled and employed people to serve, we recommend making it an offence for an employer to terminate or threaten to terminate the employment of an employee, or otherwise prejudice an employee's position, because that employee is, was, or will be absent because of jury service.

It should be an offence for an employer to terminate or threaten to terminate the employment of an employee, or otherwise prejudice an employee's position, because that employee is, was, or will be absent because of jury service.

Statutory amendment will be required.

⁵¹⁹ The penalty is 600 "penalty units", each penalty unit being worth \$A100 (Sentencing Act 1991 (Vic) s 110).

Deferring jury service

- 490 In *Juries II*⁵²⁰ we suggested that in order to minimise the disruption to jurors' lives that jury service causes, consideration should be given to allowing jurors to defer their service. This would enable people to choose a time convenient to them, avoiding times when family or work requirements make it onerous to serve. We asked for submissions on this issue, and on how it would work in practice.
- 491 It is clear from the submission from the Department for Courts that a deferral system, while it would necessitate extra costs, could be made to work in practice:

South Australia operates a system of deferred service whereby a juror who applies to be excused may instead have their service deferred at the discretion of a judge. The deferral is either to a period of the juror's choice or a period determined by the court.⁵²¹ The juror is advised at the time of deferral when their new period of service is to be, and they are summoned again at that time.

A similar system operates in England. The English system differs slightly from that in South Australia in that English jurors have a right of deferral on one occasion whereas Australian jurors must satisfy a judge that they have good reason for deferring their service.

A system of deferral could operate in New Zealand along similar terms to those described. This would require legislative change. Consideration would need to be given to who makes the decision to defer service, how many times and how long it can be deferred for, and guidelines for determining whether or not service should be deferred.

A move to a system of deferred service would have financial implications for this department. The major costs would be in development of the selection and excusal processes in our computerised Jury Management System, and associated training of staff.

- 492 We understand that many jurisdictions in the United States have moved to a "one trial, one day" system, whereby jurors are summoned to appear on a nominal date but told that they will not be actually required to attend unless telephoned the previous night.⁵²² Once the juror is called in and attends on a particular day, if balloted into a jury, that completes the attendance requirement, whether the trial goes for a day or for months. If not balloted on that day, the attendance requirement is deemed complete; jurors

⁵²⁰ Paras 338–339.

⁵²¹ The period of jury service in South Australia is one month rather than one week as it is here.

⁵²² Submission of Judge Thompson.

appreciate this system as it provides certainty for them. However, the Department for Courts have advised us that this would not be practicable because the number of persons who would have to be summoned would increase to such an extent as to create difficulties, particularly in some provincial areas where it is already difficult to get a sufficient jury pool (see paragraph 147).

- 493 The Privacy Commissioner supports deferral because it minimises disruption to jurors' private lives. They support an automatic right to defer, because that allows individuals to keep their domestic and private affairs to themselves rather than having to justify themselves to a registrar. An automatic deferral would also mean that registrars do not have the extra work of having to consider the merits of each request for deferral.
- 494 Once the deferred date arrives, it would still be possible for a juror to seek to be excused. As discussed in paragraphs 154–156, we would expect that excusals would not be readily granted to a juror who has already had the opportunity to defer to a more convenient time. However, circumstances may have arisen after deferral which necessitate excusal and it should be granted where appropriate.

The Commission recommends that jurors be allowed to defer their service to a time more convenient to them. While the exact procedures should be determined by the select committee with the assistance of the Department for Courts, we envisage that each juror should have the right to defer their serve once, to a date not more than 12 months in the future. This should be an absolute right, so that jurors do not have to explain why they are seeking it.

Statutory amendment will be required.

Disruption to family and social routines

- 495 In *Juries I*⁵²³ we suggested an ability to defer service to minimise this disruption. We consider that the ability to defer is amply justified both on this basis and to minimise disruption to employment, and have dealt with it in the previous section. As we have recommended that jurors should have an automatic entitlement to one deferral without stated justification, they could defer for whatever reason they wish.
- 496 In addition, we consider that a child care allowance would also be appropriate. We note in particular that problems of child care are an

⁵²³ Paras 338–339.

impediment to some Māori serving on juries (see chapter 5, Māori representation on juries). While an ability to defer should solve some of these problems, in situations where a person wishes to serve and is unable to do so because of child care responsibilities, an allowance should be paid to cover child care.

An ability to defer jury service should minimise disruption to family and social routines, but where necessary a child care allowance to cover the actual reasonable cost of child care should be payable.

Amendment to the Jury Rules 1990 will be required.

Transport

- 497 A minority of jurors in the Research complained about transport costs and parking problems. The Jury Rules allow the payment of the actual cost of public transport, the cost of travelling by taxi (but only in “special circumstances, where the registrar thinks fit”) and, if no public transport is available and no allowance is made for a taxi, of 38 cents per kilometre of travel (if the distance travelled exceeds three kilometres one way).
- 498 The need for transport makes it harder for some people to serve, especially those on low incomes or in rural areas where public transport is not easily available. In particular, we have been told (see paragraph 175) that transport costs are a barrier to Māori serving on juries. This barrier should be removed. This can be done by providing for the reimbursement of the actual cost of public transport; where no public transport is reasonably available and the juror can demonstrate that they do not have practical access to a car, reimbursement of the actual cost of a taxi;⁵²⁴ and a mileage allowance for those who do have access to a car (but not to public transport), which reflects actual cost (including parking costs). We accept that this will add to the costs of administering jury trials, but we consider that the goal of increasing democratic participation in jury service, and in particular Māori participation, is sufficiently important that the additional cost must be borne.
- 499 We also note that it may be possible, depending on the circumstances of an individual court, to find other solutions. We

⁵²⁴ One problem that may arise is with persons who are unable to pay for a taxi even though they will later be reimbursed. However, paying money for taxis in advance of their actual use is impractical and open to abuse. Such persons must either find an alternative mode of transport to the court, or seek excusal on the grounds that they are unable to get to court.

understand, for example, that in some United States jurisdictions the summons is printed with a detachable bus voucher to pay for transport into the courthouse on the first day of duty.⁵²⁵ In rural areas without public transport, hiring a van for court staff to collect jurors who require transport could be another option.

Transport costs are a barrier to jury service which must be removed. The Jury Rules should be revised to provide for reimbursement of the actual cost of public transport; where no public transport is reasonably available and the juror can demonstrate that they do not have practical access to their own car, the actual cost of a taxi should be reimbursed. The mileage allowance for those who do have access to a car should reflect actual cost.

Amendment to the Jury Rules 1990 will be required.

Security

- 500 In *Juries II*⁵²⁶ we noted that there is some concern about the practice of jury lists, which contain each person's full name, occupation and address, being given to the defence. Defence counsel are obliged to disclose the list to their client, and indeed must do so for the practical purpose of identifying anyone on the list who their client knows. However, for the reasons discussed in paragraphs 246–248, we are unable to recommend any change to this practice.
- 501 There is evidence that the media sometimes identifies jurors in television coverage of trials. As a result we have already recommended (see paragraphs 470–473) that it should be an offence to identify jurors.

Need for counselling

- 502 The Research indicated that a significant minority of jurors had real difficulties dealing with the stress of service and would have appreciated counselling:⁵²⁷

On a number of occasions, jurors being interviewed for the Research were visibly upset and tearful, and were anxious for an opportunity to discuss their experiences. In other words, they used the interview as a debriefing or counselling session. It should, however, be noted that the

⁵²⁵ Submission of Judge Thompson.

⁵²⁶ Para 341.

⁵²⁷ *Juries II*, para 343.

interviews were in most cases conducted immediately after the trial, when jurors had not yet had a chance to relax and put the experience behind them.

503 Although counselling is available its use appears to be unusual, and the frequency with which it is offered varies from court to court. There is no national co-ordination and Department for Courts does not account for it separately. It does however happen on occasion; for example, the jury in the murder trial of David Bain received counselling, which, according to the Dunedin registrar, was the first time in his 12 years at the court that it had been offered.⁵²⁸ When a reporter approached one of the jurors to interview her about the effects of jury service,⁵²⁹ nine of the others wanted to be interviewed too. They had “bonded” very well as a group and continued to offer each other emotional support. They found that the counselling “helped enormously” but, even so, were still clearly suffering considerably from the after-effects of the trial. Such effects included inability to discuss their experience with spouses and family, nightmares, fear of the dark and so on. They had also suffered financially – one had been about to start a new job but, when she told her new employer she had been chosen for a two-to-three week trial, he told her not to come back. Another, married with two small children, had had to use his holiday leave (see paragraph 484).

504 In one United States example,⁵³⁰ after a lengthy and stressful murder trial the judge called in two psychiatrists from the local university to debrief the jury immediately after the trial, because they were showing visible signs of stress. Eleven of the jurors, the judge, the jailer, the court reporter⁵³¹ and the bailiff all attended. The psychiatrists concluded that the participation of the judge was useful because the jury was initially difficult to engage but able to participate once the judge had shared his own feelings on the case. They deemed the session successful because it allowed the jurors to vent the powerful feelings that had built up over the trial and provided them with information on how to deal with stress and how to get further help, and with perspective on and acceptance of their role in the trial. The psychiatrists concluded:

⁵²⁸ “Jury Offered Counselling After 16-day Trial” *The Dominion*, Wellington, 31 May 1995, 7.

⁵²⁹ “The Ongoing Trial of Being a Bain Juror” *The Dominion*, Wellington, 8 July 1995, 19; the article is careful to make it clear that the interview did not deal with any aspect of the evidence nor with the deliberation process, as that would be a contempt of court (see chapter 14).

⁵³⁰ T Feldmann and R Bell “Crisis Debriefing of a Jury After a Murder Trial”(1991) 42 *Hospital & Community Psychiatry* 79, 81.

⁵³¹ In New Zealand, this person is known as the “judge’s associate”.

As the judge and jurors shared their perceptions and reactions, they gained perspective on the trial and began to accept their role in it. With acceptance came a further decrease in feelings of frustration and guilt. Although the group remained troubled by the trial, they were clearly more comfortable with their feelings. We believe that this type of debriefing is very important for jurors and should be applied to similar types of court proceedings.

505 One United States discussion of jury debriefing says the process may serve several purposes⁵³² as it:

- (a) Provides opportunity for jurors to vent feelings and release emotions that may have been suppressed during the trial, in a controlled environment with professional help. Jurors may find out for the first time that other jurors share their feelings and responses.
- (b) Promotes or strengthens the bonding between the jurors that often occurs in any event, so they can support each other.
- (c) Helps jurors accept their role.
- (d) Helps deal with fears, for example that they were not sufficiently objective; that the community will reject them because of their decision; that others will think they did not do a good job.
- (e) Enables jurors to recognise stress response syndromes they might be experiencing or might experience soon, which might cause problems if not foreseen and identified, and provides information on how to cope with those.

506 In *Juries II*⁵³³ we suggested that greater efforts could be made to inform jurors that counselling is available, and asked what changes should be made to make jurors aware of counselling services. We do not suggest that debriefing should be required after every trial, nor even after every serious trial, but it should be considered on a case by case basis.

507 In their submission, the Department for Courts said:

It is difficult to determine from the research findings when is the best time to provide such information. One option that may be effective is to provide written information (such as a poster or pamphlet) in the jury room that jurors can access when they wish. The information should give details about the counselling service available including

⁵³² M Dabbs "Jury Traumatization in High Profile Criminal Trials: a Case for Crisis Debriefing?" (1992) 16 Law & Psychology Review 201, 210–212.

⁵³³ Para 345

how to access the counselling. As a matter of principle the information should be routinely available to all jurors.

We note that some jurors mentioned a desire for some form of group debriefing rather than individual counselling. This is an option that could be very helpful for jurors in long trials, as a way to help them move on from their jury service and resume their lives. The Department will consider how this might work in practice.

We note that the introduction of debriefings and increased use of counselling will have financial implications for the Department.

508 The Department for Courts have now issued best practice guidelines on counselling to all trial courts, which include a leaflet to be given to all jurors advising them of the availability of counselling and how to obtain it through the Department if required. We applaud these measures to ensure that counselling is available where required. We also note that the CPC Manual will contain a section on counselling, to ensure that judges are aware of the need for it and consider offering it in appropriate cases.

In appropriate cases, juries may benefit from counselling after traumatic trials. The Commission endorses recent measures by the Department for Courts to ensure that jurors are aware of the availability of counselling. The CPC Manual will also contain a discussion on counselling, to ensure that it is offered where appropriate.

APPENDIX A

Summary of recommendations

Preface

- A1 The Commission is pleased to note that as a result of the Research and the discussion in *Juries II*, the Criminal Practice Committee has established a Juries Research Implementation Subcommittee, which will prepare and maintain a jury trial manual of best practice (“the CPC Manual”).

Chapter 2: Trial by jury

- A2 The simplified procedure recommended in the Commission’s *Simplification of Criminal Procedure Legislation* report should be adopted.
- A3 Under the new simplified criminal procedure, many cases will commence in the District Court with a presumption of trial by judge alone, the accused having an automatic right to elect trial by jury. Section 361B of the Crimes Act 1961 will be redundant in relation to these offences.
- A4 Under the new simplified criminal procedure, a small group of specified serious offences will commence in the High Court with a presumption of trial by jury. In these cases the accused should be able to apply to be tried by a judge alone, rather than by a jury. In relation to these offences the public interest in trial by jury is high, and the presumption that trial will be by jury should not be displaced unless the accused can show that, because of the subject matter of the case or the identity of the accused, a fair trial by jury is not possible. As with any application, the prosecution will have the right to be heard and to oppose the application. Section 361B of the Crimes Act 1961 should be amended to reflect this. Statutory amendment will be required.
- A5 There should be no ability for a defendant to re-elect trial by jury after he has applied successfully for trial by judge alone under section 361B. As the High Court currently exercises an inherent

jurisdiction to allow such re-election, which the District Court does not have, section 361B requires amendment to provide that there is no right of re-election in either court. Statutory amendment will be required.

- A6 We do not consider that there is a need for a statutory provision that the defendant receive legal advice before making an election for trial by judge alone. While legal advice is always desirable, the practice is to remind defendants that they have the right to that advice, and that is sufficient.
- A7 A review of maximum penalties, to ascertain whether offences which currently have a penalty of more than three months and therefore an entitlement to trial by jury should retain that penalty level, should be carried out once the review of the legislative framework for sentencing currently being undertaken by the Ministry of Justice is completed. While a review of maximum penalties is preferable to increasing the threshold for entitlement to jury trial, the possibility of such an increase should not be precluded from any review of maximum penalties.
- A8 It would be premature to review section 43 of the Summary Offences Act 1981 until a review of maximum penalties is completed.

Chapter 3: Trial without a jury

- A9 Whether or not one takes the view that some trials are simply too complex for a jury, there is a need for procedures and tools that will assist counsel to make clear the complexities. This paper (chapter 11) discusses ways in which this can be done. However, there are some trials that will simply be too long for a jury. It is unfair to require 12 citizens to be disrupted in their lives for unreasonably long periods. Experience shows that those cases which may be too complex for a jury are invariably also too long for it to be reasonable to ask a jury to hear them, and for practical purposes the matter should be approached on the basis of length rather than the more debatable one of complexity. We propose that other than for the most serious crimes the prosecution will be able to apply for trial by judge alone if the trial will likely take longer than 30 sitting days (six calendar weeks) if it is heard by a jury. In practice, this will limit the number of unreasonably complex trials being put before juries. Statutory amendment will be required.
- A10 In those cases which are too long for a jury, the best alternative is trial by judge alone. That is the method already used as an

alternative under section 361B of the Crimes Act 1961, and it has proved satisfactory in practice. There is no need of expert assessors, because expert witnesses will be called by the parties where appropriate.

- A11 The recommendations in the proposed Evidence Code are sufficient to protect complainants in sexual offending cases, and abrogation of the right to trial by jury in sexual cases is not justified.
- A12 In all cases except for a specified group of the most serious offences, if the court is satisfied that, having made all reasonable procedural orders to facilitate the shortening of the trial, it is probable that the duration of the trial will exceed 30 sitting days it may, on the application of the Crown, order trial by judge alone. Before making such an order the court must be satisfied that in the circumstances of the case the imposition on members of the public if required to sit as jurors for the predicted duration of the trial outweighs the entitlement of the accused to trial by jury. The circumstances of the case to be considered by the court would include the complexity of the legal issues, the number of defendants, the number and nature of the charges, the nature of the offence, and the volume of evidence which will be adduced. Statutory amendment will be required.

Chapter 4: Making juries more representative

- A13 The Commission recommends that the jury district boundary be extended from 30 to 45 kilometres. Statutory amendment will be required.
- A14 Judges should not have any power to direct that persons of the same ethnic identity as the defendant or victim serve on the jury.
- A15 Jury summonses should be sent by registered post rather than ordinary post.
- A16 The maximum penalty for failing to answer the jury summons should be raised to a \$1000 fine and seven days imprisonment. Statutory amendment will be required.

Chapter 5: Māori representation on juries

- A17 Māori are under-represented on juries. The Electoral Enrolment Centre is making particular efforts to encourage Māori to register on the electoral roll and thereby make themselves available to be summoned. Other methods to increase the proportion of Māori summoned are both impractical and contrary to principle.

- A18 Increasing the radius for jury districts could increase the number of Māori serving on juries.
- A19 Practical problems, particularly with child care and transport, are a barrier to Māori participation and measures should be taken to alleviate those. These matters are dealt with by our recommendations in chapter 16.

Chapter 6: Disqualifications and excuses

- A20 The current provisions excluding persons with certain criminal convictions from jury service should be retained.
- A21 Persons who have been charged with criminal offences but not yet convicted should not be automatically disqualified from jury service for that reason.
- A22 The exclusion from jury service of barristers and solicitors who hold current practising certificates should remain.
- A23 The ability for physically disabled people to serve on juries has been adequately addressed by the Juries Amendment Act 2000. No further amendment is required.
- A24 When the jury retires to choose a foreman, the judge should invite them to talk among themselves and ensure that each of them is able to speak and understand English, and advise the judge if any juror appears unable to do so. If the judge is satisfied that a juror cannot speak English sufficiently well, the juror should be discharged.
- A25 Persons who cannot understand English should not be permitted to serve on juries.
- A26 There should be no standard literacy requirement for jurors.

Chapter 7: Challenging jurors

- A27 The peremptory challenge serves a useful function and should not be abolished.
- A28 Binding guidelines on the use of the peremptory challenge are not necessary or practicable, but for the guidance of prosecution counsel the Solicitor-General's Prosecution Guidelines should contain an explanation of the bases on which it is or is not appropriate to use the peremptory challenge.
- A29 No change should be made to the number of peremptory challenges.
- A30 There should be no increased restrictions on the ability of either the Crown or the defence to vet jurors.

A31 The Crown should disclose to the defence:

- any information it has about a potential juror which may affect his or her ability to serve but upon the basis of which the Crown does not intend to challenge;
- any list which it has of the potential jurors' non-disqualifying convictions.

A32 Trial consultants are rare in New Zealand and, given the differences between our systems and those of the United States, likely to remain so. Where they are present, they are simply supporters of the accused and, like anyone else, subject to the laws of contempt. In the absence of any evidence that they are causing a problem, the Commission sees no need to regulate them beyond the existing laws of contempt.

Chapter 8: Discharging jurors

A33 Sections 22 of the Juries Act 1981, 374 of the Crimes Act 1961 and 54B of the Judicature Act 1908 should all be repealed and replaced with a single discharge provision. That single provision should be a new section 22 of the Juries Act 1981.

A34 The new discharge provision should be modelled on section 644(1) of the Canadian Criminal Code. It should include the power to empanel a replacement juror before the case opens, and to elect a new foreman if the foreman is discharged. Statutory amendment will be required.

A35 The new discharge provision should:

- confirm the defendant's right to be present for all applications to discharge a juror;
- allow the discharge of one juror or the whole jury;
- allow the judge to conduct the hearing, and consider such evidence, as he or she thinks fit.

A36 There is no need to use reserve jurors or empanel larger juries.

Chapter 9: Information and assistance before the trial

A37 The jury summons and accompanying information was improved and standardised nationwide in 2000 by the Department for Courts as a result of the Research conducted for this report. The Commission endorses these changes.

- A38 The Department for Courts should take measures to ensure that the booklet *Information for Jurors* and the introductory video are seen by all jurors.
- A39 A new second video to be shown after empanellment would be most helpful to jurors, and such a video should be developed by the Department for Courts.
- A40 Information on how to select the foreman and the role and tasks of the foreman should be included in the second video and printed on a poster to be displayed in jury rooms.
- A41 The foreman plays an important role from the beginning of the trial and should continue to be appointed then. However, jurors need more information on how to choose a foreman and more time in which to make their decision. They need to be told what is required of a foreman, and what sort of experience could assist a foreman in performing his or her role. The jury should be allowed a reasonable period of time in which to choose their foreman. Where practicable, the jury should retire to choose their foreman at the same time as a scheduled adjournment, so that they are not hurried.
- A42 In appropriate cases, jurors should be warned of the possible emotional impact of trials, of the availability of counselling if required, and (if our proposals in relation to discharge are accepted) of the ability to apply to be discharged if they are unable to serve for emotional reasons. This warning should be given in the proposed second video and by the judge in his or her opening. It should be made clear that the power to discharge is discretionary; the intent of this warning is to prepare jurors, not encourage frequent applications for discharge.

Chapter 10: Information and assistance at the beginning of the trial

- A43 To the greatest extent possible, counsel should co-operate to identify issues in advance of trial. Directions for best practice will be included in the CPC Manual.
- A44 Giving the jury a written copy of the judge's directions, or a summary of the key points, is often helpful. This practice is becoming more common, partly as a result of the Research conducted for this report. The Commission approves of this practice in appropriate cases. It is not possible to be prescriptive as to when such written directions should be given or what form they should take, and it should be left to the trial judge to decide what is appropriate in each case.

A45 While the residual power to use special verdicts should remain, in practice they will remain seldom used as flowcharts and sequential questions can play largely the same function. The use of flowcharts and sequential questions to assist the jury is to be encouraged, especially in complex cases.

Chapter 11: Presentation of evidence

A46 There is no need for a formal or compulsory pre-trial disclosure regime. Section 369 (of the Crimes Act 1961) admissions of fact are an efficient and sensible means of lessening the evidence that must be presented at trial, and should be encouraged by active judicial inquiry at call-over.

A47 Streamlining the evidence for the jury is one valid objective of caseflow management, and the focus of this should be the elimination of irrelevant or repetitious evidence. But it must be done cautiously and with regard for the circumstances of each case.

A48 Technological systems that allow evidence to be recorded at the speed of natural speech make evidence easier to follow and understand, and decrease the time required for jury service. The audio-digital recording system, which will be implemented in all courts by 2003, currently suffers some technical problems, which should be urgently addressed.

A49 The jury should be provided with a copy of the judge's notes, at the beginning of their deliberation, although judges should have the discretion to provide the notes earlier if appropriate in longer or more complex cases. It is not practical or necessary for courts to provide computer search facilities for the jurors to use with the notes, but this issue may be reconsidered in the future once other changes have been embedded.

A50 The use of written and visual aids has increased as a result of the Research, and the Commission recommends that their use should be encouraged. We recommend that consideration be given to a practice note which would direct that:

- copies of the indictments, the exhibits and the witness list be made available to the jury as a matter of course;
- other written and visual aids should be made available to the jury unless there is good reason not make them available;
- the prosecution should disclose to the defence prior to the pre-trial call-over those written and visual aids which it proposes to use. Defence counsel should be required, a reasonable time

prior to trial, to raise any objections to the presentation of that material to the jury;

- the CPC Manual should contain detailed guidelines on the appropriate use and presentation of written and visual aids.

A51 Jurors have the right to submit questions to the judge which the judge may then put to the witness. This right is seldom used because juries are often not aware that they may do this. We recommend that juries should be routinely advised of their right to ask the judge to put questions to the witness, and that these questions are only for the purpose of clarification. The process should remain formal, with written questions. Details of the process will be contained in the CPC Manual.

A52 The formal procedure of written questions should be retained. Juries should be actively encouraged to ask questions during deliberation, as that is likely to decrease deliberation time and confusion.

A53 The Commission agrees that counsel bear the primary onus to make evidence comprehensible to jurors. In rare cases the calling of defence expert evidence immediately after the prosecution expert may facilitate better understanding by jurors of the issues between the competing experts. Although this is already done with the permission of the trial judge, it is arguably not permissible under section 367 of the Crimes Act 1961. That section should be amended to make it clear that the court has this discretion. Statutory amendment will be required.

A54 Glossaries may be helpful to the jury, although they should never be seen as a substitute for plain English and clear explanations from counsel and judges. Where required, glossaries should be compiled by the prosecutor with the consent of defence counsel and the trial judge. The CPC Manual will include a list of legal terms with definitions, which can be copied into glossaries.

Chapter 12: Jury deliberation

A55 Jurors should be strongly encouraged at the start of their deliberation to seek help from the judge if they are having difficulty. The standard (Papadopoulos) direction, given to juries which appear to be having difficulty coming to a verdict, should be amended to remind them of the type of questions that they can ask the judge to assist them in their deliberations. The proposed wording of the amended direction is at paragraph 395.

A56 As a general guideline, jury deliberation should end at 9.00pm, but continue longer if the trial judge considers it appropriate in the circumstances of the individual case.

A57 The practice of routine sequestration during deliberation should end, but the court should retain the discretion to sequester during deliberation if in the circumstances of the case that is appropriate. A provision similar to section 13 of the Juries Act 1974 (UK) should be included in our Juries Act 1981 to effect this. Statutory amendment will be required.

A58 There is no need for sequestration to occur during trials before deliberation except in the most exceptional circumstances. In such circumstances, the court should be able to sequester. Statutory amendment will be required.

Chapter 13: Failure to agree – majority verdicts

A59 Majority verdicts of 11:1 should be introduced. They should be available for both acquittals and convictions, and in all cases, including murder. The jury should be required to deliberate for at least four hours before being permitted to return a majority verdict. The fact that a verdict has been reached by majority will be known only to the jury. Statutory amendment will be required.

Chapter 14: Secrecy of jury deliberations

A60 The law relating to the secrecy of jury deliberations should be codified to clarify the obligations of jurors and of the media. The form of that legislation will require careful consideration, and should be considered in a separate reference together with the law relating to the publication of trial information.

Chapter 15: Media and their influence on juries

A61 There are a number of issues relating to publication of trial information which would benefit from legislative clarification, but we would prefer to deal with them in a separate paper. In considering what the law should be, it should not be overlooked that the Research indicates that the law as it stands adequately protects jurors from prejudicial information.

A62 It should be a statutory offence to publish material which may lead to a juror being identified. Both the High Court and the District Court should have the power to punish this contempt. Statutory amendment will be required.

Chapter 16: The experience of being a juror

A63 The CPC Manual should contain a direction that, where practicable, juries should be given such explanation as possible of the reason for any delay, and an indication of how long the delay may be.

- A64 The Department for Courts should consider preparing a questionnaire about the adequacy of facilities, and give it to jurors in all courts at periodic intervals. The results should be kept centrally by the Department and used by both the court manager and the executive judge to review whether facilities at the court are adequate and what improvements are required.
- A65 Jurors should continue to be paid at a flat rate as set out in the Jury Rules 1990, but where a juror can demonstrate actual financial loss in excess of that flat rate, the registrar should have the discretion to increase the payment to cover or contribute to the juror's actual loss. Amendment to the Jury Rules 1990 will be required.
- A66 It should be an offence for an employer to terminate or threaten to terminate the employment of an employee, or otherwise prejudice an employee's position, because that employee is, was, or will be absent because of jury service. Statutory amendment will be required.
- A67 Jurors should be able to defer their service to a time more convenient to them. While the exact procedures should be determined by the select committee with the assistance of the Department for Courts, we envisage that each juror should have the right to defer their serve once, to a date not more than 12 months in the future. This should be an absolute right, so that jurors do not have to explain why they are seeking it. Statutory amendment will be required.
- A68 An ability to defer jury service should minimise disruption to family and social routines, but where necessary a child care allowance to cover the actual reasonable cost of child care should be payable. Amendment to the Jury Rules 1990 will be required.
- A69 Transport costs are a barrier to jury service which must be removed. The Jury Rules should be revised to provide for reimbursement of the actual cost of public transport; where no public transport is reasonably available and the juror can demonstrate that they do not have practical access to their own car, the actual cost of a taxi should be reimbursed. The mileage allowance for those who do have access to a car should reflect actual cost. Amendment to the Jury Rules 1990 will be required.
- A70 In appropriate cases, juries may benefit from counselling after traumatic trials. The Commission endorses recent measures by the Department for Courts to ensure that jurors are aware of the availability of counselling. The CPC Manual will also contain a discussion on counselling, to ensure that it is offered where appropriate.

APPENDIX B

List of submitters

The following persons and organisations made submissions on Parts One and Two of the preliminary paper:

Mr Arrandale	New Zealand Council of Victim Support Groups
Auckland District Law Society Criminal Law Committee	New Zealand Law Society Criminal Law Committee
Department for Courts	Mr L Newhouse
District Court Jury Trials Subcommittee	Mr Brian Peat
Mr E Eriwatea	Mr Colin Perrior
Mr M D and Mrs N M Gillespie	Privacy Commissioner
Mr Anthony Guy	Rape Prevention Group Incorporated
High Court Judiciary Subcommittee	Mr A Read
Ms Sandra Jacobs	Mr C W Richardson
Legal Services Board	Serious Fraud Office
Hon J K McLay QSO	Ms Roslyn Smith
Ministry of Justice	Hon Sir Graham Speight
National Council of Women of New Zealand	Mr Donald Stewart
Newspaper Publishers' Association of New Zealand	Te Puni Kokiri (Ministry of Māori Development)
New Zealand Council of Civil Liberties	Judge Craig Thompson

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