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DISCUSSION DOCUMENT: PROCEEDING IN THE ABSENCE OF THE DEFENDANT

INTRODUCTION

1. The Criminal Procedure (Simplification) Project is proposing a range of comprehensive reforms to criminal procedure. One of the Project's key objectives is to reduce court delays by reducing unnecessary adjournments and hearings, putting in place effective incentives and sanctions to comply with procedural requirements, and reducing the number of cases that fall over close to trial.
2. Defendants commonly cause delay by failing to appear at a pre-trial or defended hearing. The result is generally an adjournment (sometimes indefinitely, in cases where the accused has absconded) and the issue of an arrest warrant. Sometimes there is a valid reason for this non-appearance (such as illness or transport problems); more often it reflects deliberate or habitual non-cooperation.
3. Often, a defendant will make a voluntary appearance before the execution of the warrant and ask for their case to be called. While this may be preferable to the defendant not appearing at all, it can also cause problems for the courts – for example, because the court has to find time to deal with the defendant's unscheduled appearance. In many cases, the defendant will be bailed again without any adverse consequences arising to him or her from the initial non-appearance.
4. Particular problems occur when a defendant fails to appear at the commencement of, or during, a trial. The ability to make progress on a case is severely compromised and significant inconvenience is caused to victims, witnesses, jurors, judges and court staff.
5. One option to address these problems is to put in place more robust operational approaches to voluntary appearances and absent defendants. However, court staff already take a range of measures to ensure that defendants attend court as scheduled.¹ People are advised either in writing or

¹ For example, the Ministry of Justice's Northern Region has developed a new strategy for dealing with defendant's unscheduled appearances to try and minimise the number and impact of unscheduled appearances, and to ensure a consistent approach is taken to unscheduled appearances across the region.

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orally of their next appearance date and, in the majority of cases, by both methods.

6. The alternative option, which the courts are already doing in some cases, is to proceed in the defendant's absence. This paper proposes that the courts be given explicit statutory backing to do so.
7. Views on any parts of the paper are welcome. Particular questions for discussion are also included at Appendix One.

APPROACH IN NEW ZEALAND

8. Relevant statutory provisions in New Zealand reflect a general principle that proceedings should take place in the defendant's presence. However, these provisions also allow proceedings to take place without a defendant in specific circumstances. The primary provisions are:

- Section 158 of the Summary Proceedings Act 1957, which provides that the defendant is generally entitled² to be present in court during the whole of the preliminary hearing, unless he or she disrupts proceedings by misconduct;³
- Section 376 of the Crimes Act 1961, which provides that the accused is entitled to be present in court during the whole of his or her trial, unless he or she disrupt proceedings by misconduct;
- Section 61 of the Summary Proceedings Act 1957, which permits proceedings to commence in the defendant's absence in respect of non-electable offences;
- Section 25(e) of the New Zealand Bill of Rights Act 1990, which provides a right to be present at a criminal trial and present a defence; relevant also are the right to consult and instruct a lawyer in section 24(c) of the same Act, and the right to natural justice in section 27.

9. Since the mid-1980s, New Zealand courts have accepted that, in addition to continuing with a trial in the absence of a misbehaving accused, a trial may also continue where the accused has voluntarily absented himself or herself from proceedings (for example, by absconding while on bail) or is involuntarily absent for some other reason such as illness.⁴ More recently, the courts have relied on the House of Lords authority of *R v Jones*⁵ as authority for the position that a trial may also commence in the accused's absence, particularly if the accused was notified of the trial and voluntarily chose not to attend. This decision, and its application in New Zealand, is discussed further below.

² Subject to Summary Proceedings Act 1957, ss173A, 174, and 175.

³ Under new provisions in the Summary Proceedings Amendment Act 2008, there will be a new provision that entitles the defendant to be present during a committal hearing (if held) unless s/he interrupts proceedings to such an extent that it is impracticable to continue in his or her presence (see new s170(2)).

⁴ See *R v Hika* (1986) 2 CRNZ 245 (HC), *R v van Yzendoorn* [2002] 3 NZLR 758 (CA), and *R v Dunn* (4 June 2008) HC AK CRI 2008-404-000076.

⁵ *R v Jones* [2003] 1 AC 1 (HL).

APPROACH IN OTHER JURISDICTIONS

Canada

10. It is a general principle in Canada that an accused is entitled to be present during the whole or his or her trial.⁶ The court may remove the accused if he or she disrupts the proceedings by misconduct, or if the issue being tried is whether the accused is unfit to stand trial and the court is satisfied that remaining in court would have an adverse effect on the accused's mental condition.⁷ The court may also permit the accused to be out of court on such conditions as the court thinks proper.⁸
11. An accused who absconds during the course of his or her trial is deemed to have waived his or her right to be present at the trial.⁹ The court may either complete the trial in the accused's absence and impose sentence if the accused is found guilty, or adjourn the trial and issue a warrant for the accused's arrest.¹⁰ If the court takes the latter course, it may continue the trial at any time whether or not the accused is apprehended if it is satisfied that it is no longer in the interests of justice to wait for the accused.¹¹ An adverse inference about the accused may be drawn from the fact that he or she has absconded.¹² If the trial has been continued and the accused is apprehended, the court may only re-open that portion of proceedings that has been conducted in the accused's absence if satisfied that, because of exceptional circumstances, it is in the interests of justice to do so.¹³
12. Similar provisions exist in relation to an accused who absconds during his or her preliminary inquiry¹⁴ or summary trial.¹⁵ In addition, an accused who has elected to be tried by a jury and then does not appear at the beginning of, or during, that trial may lose the right to be tried by a jury.¹⁶ He or she is instead deemed to have elected to be tried by a judge alone.¹⁷

Australia

13. Australian courts have also accepted jurisdiction to try (and sentence) an accused in his or her absence who has voluntarily absconded. For example, in *R v Jones*,¹⁸ the South Australian Supreme Court upheld the conviction of an offender for serious violence who had absconded on the second day of trial. The Court noted that the discretion to proceed in the accused's absence

⁶ Criminal Code, s650(1).

⁷ Criminal Code, s650(2)(a) & (c).

⁸ Criminal Code, s650(2)(b). In accordance with case law, the accused must be fully aware of his [or her] right to be present in court and freely give up that right without pressure of any kind. See *Martin's Annual Criminal Code 2009*, pg. 1197.

⁹ Criminal Code, s475(1)(a). As in New Zealand, there is a general principle that the accused is entitled to be present. See Criminal Code, s650.

¹⁰ Criminal Code, s475(1)(b).

¹¹ Criminal Code, s475(2).

¹² Criminal Code, s475(3).

¹³ Criminal Code, s475(4).

¹⁴ Criminal Code, s544.

¹⁵ Criminal Code, s803(2).

¹⁶ Criminal Code, s598(1). Unless the accused can establish that there was a legitimate excuse for the failure to appear, or the Attorney General directs otherwise. See Criminal Code, s598(1)(a) & (b).

¹⁷ Criminal Code, s598(2).

¹⁸ *R v Jones* [1998] SASC 7021.

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should be exercised sparingly.¹⁹ There have been similar decisions in other Australian states.²⁰

United Kingdom

14. The Magistrate's Court has a statutory discretion to commence or continue a trial in the accused's absence.²¹ In 2008, that discretion was extended to create a presumption that adult defendants will be tried in their absence unless the court considers there is an acceptable reason for their failure to appear.²² The Court's discretion to sentence a convicted defendant in his or her absence has also been extended to enable the Court to sentence an absent defendant.²³ These provisions are not yet in force.

15. The Crown Court may also commence or continue a trial in the accused's absence. However, this authority does not arise via a statutory discretion but is instead as a result of the House of Lords' decision in *R v Jones*.²⁴ In that decision, an accused who absconded while on bail before his trial was convicted and sentenced in his absence.

16. The Court of Appeal in *Jones*²⁵ noted that a defendant has, in general, a right to be present at his trial and a right to be legally represented.²⁶ However, the defendant may waive those rights – for example, by deliberately absenting himself or herself from the trial knowing when the trial is to take place. In those situations, the trial judge has discretion to commence or continue the trial in the defendant's absence.²⁷ The Court stated that the discretion "must be exercised with great care and it is only in rare and exceptional circumstances that it should be exercised in favour of a trial taking place or continuing, particularly if the defendant is unrepresented."²⁸

17. The Court articulated ten non-exhaustive factors that courts should take into account when exercising the discretion to commence or continue in the accused's absence. These factors were:

- a) The nature and circumstances of the defendant's behaviour in absenting himself from the trial or disrupting it, as the case may be, and in particular, whether his behaviour was deliberate, voluntary and such as plainly waived his right to appear;
- b) Whether an adjournment might result in the defendant being caught or attending voluntarily and/or not disrupting the proceedings;

¹⁹ *R v Jones*, above n18, para 96.

²⁰ See, for example, *R v Mokbel* [2006] VSC 119, *R v Cornwell* (1972) 2 NSWLR 1 and *R v McHardie & Danielson* (1983) 2 NSWLR 733.

²¹ Magistrates' Courts Act 1980, s11(1).

²² Criminal Justice and Immigration Act 2008, s54 amending s11. The court's current discretion remains in relation to defendants aged under 18 years.

²³ Under current provisions, the Magistrate's Court cannot sentence an absent offender to imprisonment or detention in a detention centre, activate a suspended sentence, or impose disqualification unless certain conditions are met. See Magistrates' Court Act 1980, s11(3).

²⁴ *R v Jones*, above n 5.

²⁵ *R v Jones* [2001] 3 WLR 125 (CA).

²⁶ *Ibid.*, para 22 Rose LJ.

²⁷ *Ibid.*

²⁸ *Ibid.*

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- c) The likely length of such an adjournment;
- d) Whether the defendant, though absent, is, or wishes to be, legally represented at the trial or has, by his conduct, waived his right to representation;
- e) Whether an absent defendant's legal representatives are able to receive instructions from him during the trial and the extent to which they are able to represent his defence;
- f) The extent of the disadvantage to the defendant in not being able to give his [or her] account of events, having regard to the nature of the evidence against him;
- g) The risk of the jury reaching an improper conclusion about the absence of the defendant;
- h) The seriousness of the offence, which affects defendant, victim and public;
- i) The general public interest and the particular interest of victims and witnesses that a trial should take place within a reasonable time of the events to which it relates;
- j) The effect of delay on the memories of witnesses;
- k) Where there is more than one defendant and not all have absconded, the undesirability of separate trials, and the prospects of a fair trial for the defendants who are present.²⁹

18. In upholding the Court of Appeal's decision, the House of Lords noted that there was a well-established discretion to continue a trial in the defendant's absence due to his or her illness, misbehaviour, or voluntary absence.³⁰ It considered that there was no distinction in principle between continuing a trial in those circumstances and commencing a trial.³¹ However, the discretion to commence a trial should be exercised rarely, if ever, if the defendant's absence was attributable to involuntary illness or incapacity unless the defendant was represented and wished the trial to begin.³²

19. *Jones* has been applied in subsequent decisions in the United Kingdom.³³ The only remaining area of contention appears to be the likelihood that counsel will withdraw when the accused absconds and the extent to which this may compromise the accused's right to a fair trial. This issue is discussed further below.

²⁹ Ibid.

³⁰ *R v Jones*, above n 5, para 6 Lord Bingham.

³¹ Ibid., above n 5, para 10 Lord Bingham. However, Lord Bingham noted that the practical considerations may differ – for example, the waste of time and money are likely to be greater if a trial is stopped than if the trial had never begun.

³² *R v Jones*, above n 5, para 13 Lord Bingham.

³³ See, for example, *R v Boodhoo* [2007] EWCA Crim 14 and *R v O'Hare* [2006] EWCA Crim 471.

Application of Jones in New Zealand

20. The House of Lords' decision in *Jones* is the primary authority that New Zealand courts now rely on when deciding whether to commence or continue a trial in the accused's absence.³⁴

21. In *R v Paraku*,³⁵ the first New Zealand decision since *Jones*, Judge Dalmer in the District Court decided it was appropriate to commence a trial in the absence of one of five accused facing charges of serious violence. The accused, Pehi, knew when the trial was to start. Twenty-nine witnesses had made themselves available for the trial, two of whom had travelled from Australia. It was in the interests of everyone, including the witnesses, co-accused, Crown, court and jurors, that the case was resolved. Pehi's lawyer was prepared to represent his interests at trial and the other co-accused did not object to proceeding. There was no suggestion that the co-accused would be prejudiced by Pehi's absence. The Court noted that "in a suitable case, the Court system must work around a foolish, negligent or wilful accused."³⁶

22. In *R v Sthmer*,³⁷ an accused facing charges relating to the importation and supply of LSD and MDMA absconded before the start of his trial. Ellen France J confirmed that there was discretion to commence a trial in the absence of an absconding accused, but decided not to exercise the discretion in that case. While there was a similar number of witnesses (35) to be called as in *Jones*, the only problem suggested was that the memories of these witnesses would fade if the trial was delayed. The trial, involving drugs charges, "did not involve the same considerations for victims as was the case in *Jones*".³⁸ Nor was there any suggestion that the co-accused would abscond.

23. In *R v Williams*,³⁹ the accused, who was one of thirteen co-accused facing methamphetamine charges, failed to appear for the start of his trial. Heath J noted that the discretion to commence a trial in an accused's absence should only be exercised in rare cases, with each case to be considered on its facts. In this case, it was appropriate to proceed without the accused. Williams knew when his trial was going to proceed and deliberately absented himself despite being warned of the risk the trial would proceed in his absence. The trial was scheduled to take eight weeks and, if rescheduled, was unlikely to take place for at least another six months. Even if severance was possible, it would not save much trial time with a trial against Williams alone likely to take 3–4 weeks. There was no prejudice to the other accused from proceeding in Williams' absence, and no issues that could not be dealt with by directions to the jury from the judge. An accused who was facing a joint conspiracy charge with Williams supported the Crown application to proceed.

³⁴ See *R v Paraku* [2002] DCR 699, *R v Sthmer* (17 June 2003) HC WN T064/01, *R v Williams* (10 September 2004) HC AK CRI 2003-404-025445, *R v McFall* (7 April 2005) HC HN CRI 2004-019-20514, *R v Guo and Hui* (22 February 2006) HC AK CRI 2004-004-18566, and *R v Dunn*, above n 4.

³⁵ *R v Paraku*, above n 34.

³⁶ *Ibid*, para 12.

³⁷ *R v Sthmer*, above n 34.

³⁸ *R v Sthmer*, above n 34, para 30.

³⁹ *R v Williams*, above n 34.

24. In *R v McFall*,⁴⁰ four of thirteen co-accused facing methamphetamine charges absconded before the trial. Priestley J considered that it was in the interests of justice to proceed in the absence of the four co-accused. All four were aware of the trial date and had made no attempt to inform the court or counsel of the reason for their absence. The trial was likely to take 12–16 weeks and there would be huge logistical difficulty (for example, in re-scheduling and empanelling a jury) if it did not proceed. To require the Crown to re-jig its case to try the remaining nine alone would be unfair to those accused, difficult, and impose further delay. The trial date had been set 10 months ago and all accused had been waiting for the trial for 21 months. A lengthy adjournment would be required if the trial did not proceed. There was no prejudice or injustice to the remaining nine accused if the trial proceeded. Three of the absent accused were represented by counsel. Priestley J would ensure that any matters favourable to the fourth unrepresented accused would not be overlooked. The seriousness of the offending and the general public interest also weighed in favour of the trial proceeding.
25. In *R v Guo and Hui*,⁴¹ Hui failed to appear on the first day of his trial in relation to ecstasy importation charges. Courtney J considered that there were compelling reasons to continue in Hui's absence. Hui knew of the trial date. An adjournment wouldn't help matters; it was likely Hui had left New Zealand on false documents and he was unlikely to be apprehended. There were 30 Crown witnesses, many of whom would give evidence in person and one of whom had travelled from Belgium. The charges against Guo and Hui could not be severed and Guo wished to proceed in Hui's absence. Courtney J also considered that any disadvantages to Hui could be adequately managed so as to ensure a fair trial. In particular, any concerns about the jury's perception of the situation could be dealt with by specific directions in the judge's opening remarks and summing up. He also noted that there may be other steps that he could take during the trial to minimise the disadvantages to Hui. Courtney J was concerned about Hui's lack of representation but did not consider this a reason not to proceed.⁴²
26. In *R v Dunn*,⁴³ Andrews J exercised her discretion to continue the trial in the absence of a self-represented accused who was temporarily unable to attend court due to illness. The accused (Teo) was one of seven co-accused facing methamphetamine-related charges. Andrews J noted that the decision to continue in an accused's absence is more difficult when the absence is involuntary rather than voluntary, and that Teo had not consented to the trial continuing in her absence. However, she considered that Teo would not be prejudiced if the trial continued and her right to a fair trial would not be at risk. The Crown case was almost complete and evidence that would be given in Teo's absence did not concern her case, any witnesses whom Teo may have wished to cross-examine would be left until her return, an amicus had been appointed to assist Teo, and it was also necessary to consider fairness to the prosecution. In addition, the length of the required adjournment was uncertain meaning that the jury would be required to return each day, and the delay may be prejudicial to the co-accused. Andrews J concluded that it was in the

⁴⁰ *R v McFall*, above n 34.

⁴¹ *R v Guo and Hui*, above n 34.

⁴² *R v Guo and Hui*, above n 34, para 28.

⁴³ *R v Dunn*, above n 4.

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public interest for the trial to continue and to be completed in a reasonable time.⁴⁴

27. No court has considered that the statutory provisions in either the Crimes Act 1961 or the Summary Proceedings Act 1957 prohibit the ability to proceed in the accused's absence. Nor have the courts considered that any provisions of the New Zealand Bill of Rights Act 1990 prohibit the courts from doing so.⁴⁵ This conclusion is consistent with overseas jurisprudence, which suggests that similar rights provisions, including the Canadian Charter of Rights and Freedoms⁴⁶ and the European Convention of Human Rights,⁴⁷ do not prohibit a trial from commencing or continuing in the accused's absence.

PROPOSAL

28. Since at least the mid-1980s, New Zealand courts have been willing to exercise their discretion to commence or continue a trial in an accused's absence. In that sense, while the House of Lords' decision in *Jones* provided the courts with additional and useful guidance, it did not lead to a significant change in the approach the courts were already beginning to take.
29. Neither the House of Lords in *Jones* nor any court in New Zealand has found any reason in principle why proceedings should not be able to proceed in the accused's absence. Instead, as discussed in paragraphs 33–43 below, there may be more reasons to proceed without the accused than to adjourn proceedings in the hope that the accused will turn up. In light of the need to conduct its business fairly and efficiently, we believe that judges should be willing to proceed with hearings when confronted with an absent accused more frequently than has previously occurred, and that courts should be backed by legislation in the exercise of such decisions. To that end, we propose a new process under which:
- (a) If the accused does not attend court and fails to provide a reasonable excuse for his or her absence, there is a statutory presumption that the court will commence or continue the proceedings in the accused's absence, unless satisfied that it would be manifestly unjust to do so in light of the following factors:
- (i) The issues that the defence identified pre-trial as being in dispute;
 - (ii) The likely length of an adjournment, given the particular interests of victims and witnesses that a trial should take place within a reasonable time of the events to which it relates and the effect of delay on the memories of witnesses;

⁴⁴ *R v Dunn*, above n 4, para 14.

⁴⁵ See, in particular, *R v van Yzendoorn*, above n 4, para 22; *R v Sthmer*, above n 34, paras 16–33; and *R v Williams*, above n 34, para 43.

⁴⁶ In relation to Canada, see the discussion in *Martin's Annual Criminal Code 2009* in which it is noted that s475 does not offend the guarantee to fundamental justice in s7 of the Charter (*R v Czuczman* (1986) CCC (3d) 43) nor the right to a fair trial (*R v Tzimopoulos* (1986) 29 CCC (3d) 304); s598 infringes right to jury trial as guaranteed by s11(f) but constitutes reasonable limit on that right (*R v Lee* [1989] SCR 1384; s803(2)(a) does not offend rights guaranteed in ss7 and 11(d) of the Charter (*R v Tarrant* (1984) 13 CCC (3d) 2191 *R v Rogers* [1984] 6 WWR 89).

⁴⁷ *R v Jones*, above n 5, para 9 Lord Bingham.

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- (iii) The extent to which an absent accused's counsel has received instructions and is generally able to run the defence;
 - (iv) The interests of any co-accused;
 - (v) The extent to which the accused's evidence is critical to an evaluation of the issues identified as being in dispute.
- (b) The courts may set aside a conviction when the accused can establish that he or she has a defence that would have had a reasonable prospect of success if he or she were present at the hearing or trial.
30. The process would apply in both the summary and indictable jurisdictions from the stage at which the defendant enters a plea. There is little to be gained in proceeding in the defendant's absence before a plea has been entered, because a high percentage of defendants plead guilty when they eventually do appear.
31. We are not, at this stage, proposing that an offender should be able to be sentenced in his or her absence. There is statutory ability to do so in Canada and in the United Kingdom (see paragraphs 10 and 13). In addition, there are some examples of this occurring in Australia.⁴⁸ In those cases, the courts appear to view their discretion to sentence an offender in his or her absence as a natural extension of their common law discretion to commence or continue a trial in the offender's absence.⁴⁹
32. In *R v van Yzendoorn*, the only reported case in New Zealand of an offender being sentenced in his absence, the Court of Appeal quashed the sentence and remitted the matter back to the District Court for re-sentencing.⁵⁰ The basis for the Court of Appeal's decision was the offender's lack of input into the sentencing process, and the risk that he was deprived of the opportunity to give instructions to counsel on the matters to be advanced in mitigation.⁵¹ In the Australian cases, a lack of input by an absent offender into sentencing seems to be viewed in a similar way to the disadvantages to the accused from not being present at the trial; in essence, that this is an inevitable consequence of the offender's decision to absent himself or herself from the proceedings.⁵²
33. As a practical matter, there seems little point imposing a sentence that cannot be effected until the offender is apprehended.⁵³ In addition, deferral of the

⁴⁸ See *R v Mokbel*, above n 20 and *Flavel v van Reesema* [2005] SASC 418.

⁴⁹ In *Flavel v van Reesema*, above n 48, the Supreme Court noted at para 36 – "...it is well established that, in the event that a defendant voluntarily waives the right to be present at the trial or sentence by absconding, the court has a discretion as to whether it will proceed with the matter in his or her absence..."

⁵⁰ *R v van Yzendoorn*, above n 4.

⁵¹ *R v van Yzendoorn*, above n 4, para 24.

⁵² See *Flavel v van Reesema*, above n 48 at para 38 – "...[T]he decision to proceed has not resulted in a miscarriage of justice. The respondent forfeited the opportunity to put further material before the magistrate in addition to that which had been put before the court previously. The sentence eventually imposed was well within the sentencing discretion."

⁵³ In addition, it may require an additional court process if the offender is also charged with breaching bail or escape from custody.

sentencing process does not have the same impact on the administration of justice as deferral of the pre-trial process or defended hearing. The remaining co-accused can readily be sentenced despite an accused's absence. Additional stress may be caused to victims by the inability to conclude the proceedings. However, there is much less inconvenience caused to others; in particular, jurors and witnesses are unaffected by the delay.

RATIONALE FOR PROCEEDING IN THE ABSENCE OF THE DEFENDANT

34. The Court of Appeal in *Jones* argued that a defendant who deliberately and voluntarily absents himself from the trial, knowing (or having the means to know) when that trial takes place waives his or her right to be present at the trial and to be legally represented.⁵⁴ The House of Lords did not fully support the Court of Appeal's conclusion on the issue of waiver.⁵⁵ However, it did not consider there to be any reason in principle why a trial should not proceed in the defendant's absence:

“...if a criminal defendant of full age and sound mind, with full knowledge of a forthcoming trial, voluntarily absents himself, there is no reason in principle why his decision to violate his obligation to appear and not to exercise his right to appear should have the automatic effect of suspending the criminal proceedings against him until such time, if ever, as he chooses to surrender himself or is apprehended.”⁵⁶

35. As a matter of policy, it seems inappropriate for a defendant to be able to frustrate the course of justice by absconding. The alternative is to allow the defendant to dictate when the case against him or her is to proceed. In some cases, the accused will wish to delay a trial – for example, in the hope that this will wear down one or more witnesses. In those cases, it is not in the interests of justice for the trial to be delayed.

36. There are also more practical reasons for allowing a trial to proceed. These include, for example, the inconvenience that is otherwise caused to victims, witnesses, and jurors; the risk that witnesses' memories will fade thereby reducing the reliability and credibility of the evidence they eventually give; and the inability for victims, particularly in serious cases, to move on from the offence.

37. Particular problems are posed by an absent defendant in cases that involve multiple defendants:

“...it is only necessary to consider the hypothesis of a multi-defendant prosecution in which the return of a just verdict in relation to any and all defendants is dependent on their being jointly indicted and tried. On the eve of the commencement of the trial, one defendant absconds. If the court has no discretion to begin the trial against that defendant in his absence, it faces an acute dilemma: either the whole trial must be delayed until the absent

⁵⁴ *R v Jones*, above n 25, para 22 Lord Rose LJ.

⁵⁵ Neither Lord Hoffman nor Lord Rodger were comfortable with the idea that the defendant had waived his rights. Both considered that there could only be a waiver if it could be shown that the defendant knew of the rights to be waived and the consequences if he did not exercise them (i.e. that the trial would continue in his absence). See *R v Jones*, above n 5, para 19 Lord Hoffman and paras 47–53 Lord Rodger.

⁵⁶ *R v Jones*, above n 5, para 10 Lord Bingham.

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defendant is apprehended, an event which may cause real anguish to witnesses and victims; or the trial must be commenced against the defendants who appear and not the defendant who has absconded. This may confer a wholly unjustified advantage on that defendant. Happily, cases of this kind are very rare. But a system of criminal justice should not be open to manipulation in such a way.”⁵⁷

38. Similarly, in *McFall*, Priestley J noted that:

“It is not fantasy on my part to hypothesise the situation (although there is no suggestion that the attending accused fall into this category) whereby a number of accused (say eight to ten) jointly facing charges, could devise a plan of rolling absconding, thus delaying a trial indefinitely if the court were prepared to countenance the situation that every absconding accused would be entitled to force the court to adjourn the trial to another date.”⁵⁸

39. It may not be possible or desirable to sever the charges against the absent accused from those against the remaining co-accused. Often, the case against one accused is closely connected to the case against another, and the evidence is more appropriately presented in a “cohesive manner that adequately conveys to the jury the full circumstances of the alleged offending.”⁵⁹ The position of the remaining co-accused must also be considered – those who are present are entitled to have the trial proceed and the case against them dealt with.

40. In one sense, the ability to proceed in the absence of an absconding accused can also be viewed as a consequence of an accused being on bail over the course of the proceedings. For example, in *Jones*, the House of Lords noted that, in the United Kingdom, the more restrictive approach taken towards bail in the past may have helped to ensure defendants attended their trial.⁶⁰ Similarly, the South Australian Supreme Court has noted that if the discretion to proceed in the defendant’s absence did not exist, it would be necessary to revoke the bail of all accused from the outset of the trial.⁶¹ In complex cases, where a long period of remand is likely, it is clearly desirable for an accused to be on bail whenever appropriate.⁶²

41. The primary concern about proceeding in the absence of the defendant is that it puts the defendant’s right to a fair trial at risk. However, where the defendant is voluntarily absent, the courts have tended to have little sympathy for this concern. In *R v Chatha*,⁶³ the Court of Appeal noted that an accused who is voluntarily absent “cannot complain about the inevitable consequences of a trial held in his or her absence.”⁶⁴ Similarly, the House of Lords has noted that:

⁵⁷ *R v Jones*, above n 5, para 12 Lord Bingham.

⁵⁸ *R v McFall*, above n 34, para 55.

⁵⁹ *R v Guo and Hui*, above n 34, para 25.

⁶⁰ *R v Jones*, above n 5, para 7 Lord Bingham.

⁶¹ *R v Jones*, above n 18, para 104.

⁶² See, for example, the discussion in *R v McFall*, above n 34 at para 54 in which Priestley J noted that the period the accused would have had to spend in remand awaiting trial would be tantamount to a sentence of 4½ years. The likely length of time before the matter comes to hearing or trial is also a relevant consideration under section 8(2) of the Bail Act 2000.

⁶³ *R v Chatha* [2008] NZCA 547.

⁶⁴ *Ibid*, para 67. See also *R v O’Hare*, above n 33, para 38.

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“...one who voluntarily chooses not to exercise a right cannot be heard to complain that he has lost the benefits which he might have expected to enjoy had he exercised it. If a defendant rejects an offer of legal aid and insists on defending himself, he cannot impugn the fairness of his trial on the ground that he was defended with less skill than a professional lawyer would have shown...If he voluntarily chooses not to exercise his right to appear, he cannot impugn the fairness of the trial on the ground that it followed a course different from that which it would have followed had he been present and represented.”⁶⁵

42. In addition, when considering whether to exercise the discretion to proceed in the accused's absence, courts tend to consider what steps, if any, can be taken to mitigate any unfairness to the accused. For example, in *Williams*, Heath J noted his intention to inform the jury during his preliminary remarks, as part of his summing up, and during the trial as required that no adverse inference was to be drawn from the accused's absence.⁶⁶ A similar approach has been taken in other cases.⁶⁷ The right to appeal against conviction and, in our proposal, the ability to set aside a conviction in specified circumstances, also provide an additional safeguard.
43. Arguably, the risk of an unfair trial is higher when the accused is unrepresented. In *Jones*, the House of Lords did not consider the lack of representation to mean a trial could never proceed in the accused's absence, although it did consider the presence of counsel to act as a valuable safeguard.⁶⁸ In the United Kingdom, it appears to be the normal practice for counsel to withdraw when a defendant absconds, on the basis that the counsel has no instructions upon which to continue to act.⁶⁹ This concern is presumably the reason for counsel in Canada being given explicit statutory authority to continue to act when an accused has absconded during a trial.⁷⁰ In New Zealand, it appears more likely that counsel will continue to act despite the accused's absence.⁷¹ In addition, our proposal to proceed in the accused's absence must be considered in the light of accompanying proposed reforms to criminal procedure. In particular, if the defence has identified the issues in dispute at the pre-trial stage,⁷² the concern that counsel would be acting without instructions carries much less weight. This is because counsel will have already received instructions from the accused about the nature of the case to be run.
44. It could be argued that a conviction entered in the accused's absence is less reliable and may compromise public confidence in the criminal justice system. For that reason, proceeding in the accused's absence may not be in the public interest. However, we are not convinced that a conviction entered in the accused's absence is less reliable. In particular, unless the accused intends to give evidence (which only occurs in a minority of trials), the accused's presence arguably has little impact. Counsel will already know the

⁶⁵ *R v Jones*, above n 5, para 11 Lord Bingham.

⁶⁶ *R v Williams*, above n 34, para 3.

⁶⁷ See, for example, *R v Guo and Hui*, above n 34, para 26 and *R v McFall*, above n 34, para 49.

⁶⁸ *R v Jones*, above n 5, para 15 Lord Bingham.

⁶⁹ See, for example, *R v O'Hare*, above n 33 and *R v Boodhoo*, above n 33.

⁷⁰ Criminal Code, s475(4). Section 544(4) gives counsel authority to continue to act when an accused has absconded during a preliminary inquiry and requires that counsel be given an opportunity to call witnesses on behalf of the accused at the conclusion of the prosecution evidence.

⁷¹ See, for example, *R v Paraku*, above n 34 and *R v McFall*, above n 34.

⁷² See discussion document on identification of the issues in dispute.

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issues in dispute (if that proposal proceeds) and will be able to conduct the trial on that basis. In addition, this concern must be weighed against the public interest in proceeding, particularly where the accused's absence is voluntary. It is clearly not in the public interest to allow an accused to frustrate the conduct of criminal proceedings in this way.

CONCLUSION

45. Clearly, the preferable approach is for a hearing or trial to take place with the accused present. However, where that is not possible, particularly in the light of a wilful decision by an accused, it is appropriate that courts have the ability to proceed in his or her absence. We believe that the courts should be willing to proceed in the accused's absence more frequently than in the past, and have proposed a process that should lead to this occurring more often. We are interested in your views.

COMMENTS

Please provide written comments on this paper by 15 June 2009 to either:

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QUESTIONS FOR DISCUSSION

1. Do you agree with the proposal (to apply in both the summary and indictable jurisdictions from the stage at which the defendant enters a plea) that:
 - (a) If the accused does not attend court and fails to provide a reasonable excuse for his or her absence, there is a statutory presumption that the court will commence or continue the proceedings in the accused's absence, unless satisfied that it would be manifestly unjust to do so in light of the following factors:
 - (i) The issues that the defence identified pre-trial as being in dispute;
 - (ii) The likely length of an adjournment, given the particular interests of victims and witnesses that a trial should take place within a reasonable time of the events to which it relates and the effect of delay on the memories of witnesses;
 - (iii) The extent to which an absent accused's counsel has received instructions and is generally able to run the defence;
 - (iv) The interests of any co-accused;
 - (v) The extent to which the accused's evidence is critical to an evaluation of the issues identified as being in dispute.
 - (b) The courts may set aside a conviction when the accused can establish that he or she has a defence to the charge(s) that would have had a reasonable prospect of success if he or she were present at the hearing or trial.
2. Do you agree that the proposal should not be extended to allow a judge to sentence an offender in his or her absence?