



June 2009

Criminal Procedure (Simplification) Project: Proposals relating to restricting availability of jury trials

Purpose

1. The purpose of this paper is to set out, for consideration by the Criminal Procedure (Simplification) Steering Group, options to restrict the availability of jury trials.

Executive summary

2. The Criminal Procedure (Simplification) Project aims to:
 - reduce unnecessary court delay via legislative and operational change; and
 - create an accessible and simplified procedure.
3. The extensive availability of jury trials is one reason for some of the delays within the criminal justice system, and some argue that the availability of jury trials is no longer aligned with modern conceptions of 'serious offences that warrant a jury trial'.
4. This paper outlines proposals to restrict the availability of jury trials by:
 - removing prosecution discretion to lay a charge summarily or indictably in respect of particular offences; and
 - restricting the ability for the defence to elect trial by jury, by increasing the threshold at which jury trial may be elected.
5. The full impact of these proposals will need to be considered in the context of all policy options eventually proposed by the Steering Group.

Background to the Criminal Procedure (Simplification) Project

6. The Simplification Project was established in October 2007 to review and implement improvements to criminal procedure in the summary and indictable jurisdictions. It integrates a range of initiatives within key justice sector agencies to improve timeliness and promote efficiencies in the criminal Courts.
7. The Project is being undertaken to address problems with criminal procedure including:
 - long delays before final disposition of cases;
 - an inadequate incentive structure for parties to progress cases;

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- a trial system in which relatively minor cases may be heard before a full jury;
 - barriers to the use of modern technologies; and
 - an excessively complex and outdated legislative framework.
8. Principles underlying the changes, that officials are seeking to implement within the Project, include:
- where an offender intends to plead guilty, the plea is entered as soon as practicable;
 - hearings are held only when a judicial decision or other judicial intervention is required;
 - better information is exchanged between parties with out-of-court discussions becoming the standard way of progressing a case;
 - incentives and sanctions are in place to promote compliance with procedures;
 - unnecessary adjournments and the number of cases that fall over close to trial are minimised;
 - all pre-trial matters are adequately dealt with before trial;
 - there is proper focus on the issues in dispute at trial;
 - jury trial are reserved for only the most serious cases; and
 - modern technologies are utilised, as appropriate.
9. The proposals outlined in this paper to restrict the availability of jury trials are part of the range of proposed reforms currently being considered under the Project. For example, it is proposed that:
- changes to the pre-trial process (such as the introduction of defence identification of issues in dispute) would reduce the number of late guilty pleas and withdrawals of charges, thus increasing pre- and post-committal disposal rates
 - consistent use be made of sentence indications, which may increase early guilty pleas
 - some flexibility be introduced to allow judges to continue a criminal jury trial when more than one juror has been discharged, which may reduce the number of trials that must be abandoned due to juror discharges
 - police charging guidelines be reviewed, which may increase consistency in the laying of charges
 - counsel be encouraged to progress cases through the criminal justice system, with incentives and sanctions provided to increase compliance.
10. The impact of all the changes proposed as part of the Simplification Project will be considered as a whole as policy options are finalised.
11. An exposure draft Criminal Procedure Bill will be completed and released for consultation purposes at the end of 2009, before a final draft Bill is developed

for introduction. It is expected that a new Criminal Procedure Bill will be introduced in early 2010, and enacted by the end of 2010.

Current approach to jury trials in New Zealand

12. In New Zealand, whether or not a case is heard by a jury rather than a judge alone depends on the type of offence, as well as discretionary decisions by the prosecution and defence. Offences in New Zealand are typically organised into the following categories:
- Charges that **must** be laid indictably: these charges are the most serious criminal offences and are automatically tried by a jury.
 - Charges that **may** be laid indictably or summarily at the discretion of the prosecution ('summary/indictable discretionary'):
 - Prosecution lays indictably: trial by jury is automatic;
 - Prosecution lays summarily: the defendant has a discretion to elect trial by jury or to remain in the summary jurisdiction (where trial will be by way of defended hearing)
 - Charges which **must** be laid summarily but have a maximum sentence of imprisonment of more than 3 months:¹ the defendant has a right to elect trial by jury or to remain in the summary jurisdiction (where trial will be by way of defended hearing)
 - Charges which **must** be laid summarily where the maximum sentence is less than 3 months imprisonment: trial by defended hearing is automatic.
13. There are some limited exceptions to the right to trial by jury. In particular, the right to elect a trial by jury is specifically excluded for the Summary Offences Act offences of common assault and assault on a police, prison or traffic officer.² In addition, since 2008, there has been a judicial discretion to require a case to be heard by Judge alone in cases which are likely to be long and complex,³ and cases in which there is a significant risk of jury intimidation.

Costs of jury trials

14. Jury trials utilise significant court resource and capacity when compared to judge-alone defended hearings. For example, the cost to the District Court of processing a jury trial case from start to finish is approximately \$20,000⁴, whereas the average cost to the District Court of processing a summary defended hearing from start to finish is approximately \$2,000.

¹ Unless the enactment prescribing the offence provides otherwise.

² Summary Offences Act 1981, section 43.

³ Crimes Act 1961, section 361D. However, this section does not apply where the person is charged with an offence for which the maximum penalty is imprisonment for 14 years or more or life, or the person is charged with an offence of attempting or conspiring to commit, or of being a party to the commission of, or of being an accessory after the fact to an offence for which the maximum penalty is imprisonment for 14 years or more or life.

⁴ Excluding building costs, and costs to defendants, victims, witnesses, counsel, and Department of Corrections.

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15. On average, the jury trial process takes 12 months (and even longer if an actual jury trial is undertaken), whereas the average summary process for defended matters takes six months.⁵
16. While some of this difference in cost and time can be attributed to the greater seriousness and complexity of the typical case that proceeds to a jury trial, the jury trial process is nevertheless more expensive and lengthy in itself. There are greater costs involved in ensuring that the evidence is sufficiently strong to warrant a jury trial, and the involvement of jurors increases the cost and length of trial itself.

Rationale for jury trials

17. The rationale for the involvement of juries in any criminal justice system revolves around the ability for juries to:
 - act as the community conscience in deciding criminal cases
 - safeguard against arbitrary or oppressive government, and to legitimise and maintain public confidence in the criminal justice system
 - educate the public about the workings of the criminal justice system.
18. The jury trial is considered by many to be an important element of common law legal systems (and some civil law legal systems – see Appendix 1). In particular, some view the right to a jury trial as inextricably linked to the right to a fair trial. Historically, a trial before one's peers was seen as a protection against the arbitrary exercise of state power.
19. However, others argue that the jury trial now has only symbolic value in the criminal justice system, and that defenders of the jury system inflate its importance by portraying the “right” to a jury trial as central to the criminal justice system and as a guardian of due process and civil liberties.⁶ They argue that fundamental changes since then, including the development of an independent judiciary, means the traditional rationale has less application in the modern criminal justice system. A trial no longer needs to be before a jury in order for an accused to receive a fair trial. A fair trial is just as likely to occur before a judge alone.
20. A short history of jury trials is included in Appendix 2. In New Zealand, an important development in the history of jury trials was the enactment of the Indictable Offences Summary Jurisdiction Bill in 1900, which introduced the ability for defendants to elect to be tried by a jury when charged with an offence punishable by more than three months' imprisonment.

⁵ In some cases, delays have contributed to a loss of the ability to prosecute. In 2007/08, 19 cases were stayed under section 25(b) of the New Zealand Bill of Rights Act 1990 (the right to be tried without undue delay). Delays in proceedings also impacts on time spent on remand (averaging 58 days at December 2008).

⁶ Penny Darbyshire, “The Lamp That Shows That Freedom Lives – Is It Worth the Candle?”, 1991, *Crim LR*, p. 740-752.

Prosecution choice of forum in respect of indictable/summary discretionary offences

Current position

21. The indictable/summary (discretionary) category of offences comprises approximately 700 offences that are listed in Schedule 1 of the Summary Proceedings Act 1957.⁷ These are offences that the prosecution can choose to lay summarily or indictably.
22. The decision to lay a charge summarily or indictably is the decision of an individual police officer supported by internal police guidance. This guidance identifies a range of considerations that are relevant to this decision including, for example, the seriousness of the particular instance of an offence and whether the sentence that will be imposed is likely to be near to, or exceed, the sentencing limit that currently applies to cases in the summary jurisdiction (five years imprisonment).
23. Appendix 3 provides a breakdown of the national total of “jury track” cases according to offence category, and their respective contribution to post-committal workload. In 2007, there were 3624 cases in the indictable/summary discretionary category that the prosecution chose to lay indictably rather than summarily. This group of cases represents the largest feeder group for trial work in 2007. There were an additional 361 cases which the prosecution chose to lay summarily for which the defendant later elected to be tried by jury.

Issues associated with prosecution choice of forum

24. There is no reason in principle for the prosecution to be able to choose the way in which a charge should be heard. The right to trial by jury is fundamentally a right of the defence. In some very serious cases, jury trial is always appropriate to ensure that there is public confidence in the system. However, there is nothing in the purposes of a jury system that justifies a prosecution choice of forum in respect of less serious matters.
25. In addition, such discretion (whether exercised appropriately or inappropriately)⁸ has the potential to lead to inconsistency across the country in the approach taken to the laying of like charges. Decisions as to the form in which charges are laid are taken by Police without input from Crown solicitors, who must ultimately take a matter through a trial.
26. A number of the offences in Schedule 1 arguably do not warrant the additional time and resource that are required for a case to proceed through the jury trial

⁷ Schedule 1 refers to 342 sections under which charges may be laid either indictably or summarily. Many of these sections list more than one offence.

⁸ For example, some note that laying charges with the summary sentencing limit (5 years) in mind is an irrelevant consideration. Whether a charge is laid summarily or indictably will often not dictate whether the summary sentencing limit will apply. For example, whether a person pleads guilty under section 153A of the Summary Proceedings Act 1957 to a charge laid indictably, the summary limit will apply. The District Court can also decline jurisdiction to sentence. As part of the Simplification Project it is also proposed that the maximum sentencing limit in the District Court be abolished.

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system. In addition, the use of jury trials in minor matters risks irritating and alienating jurors, in a way that may compromise public confidence in the criminal justice system.⁹

Proposal: removing prosecution discretion as to forum

27. It is therefore proposed that the prosecution's ability to choose whether to lay a charge summarily or indictably in respect of the offences in Schedule 1 of the Summary Proceedings Act be removed. All offences in this category would instead be laid summarily, with the defence able to elect trial by jury when the jury trial threshold was reached.¹⁰

Likely impacts of the proposal on jury trial workload

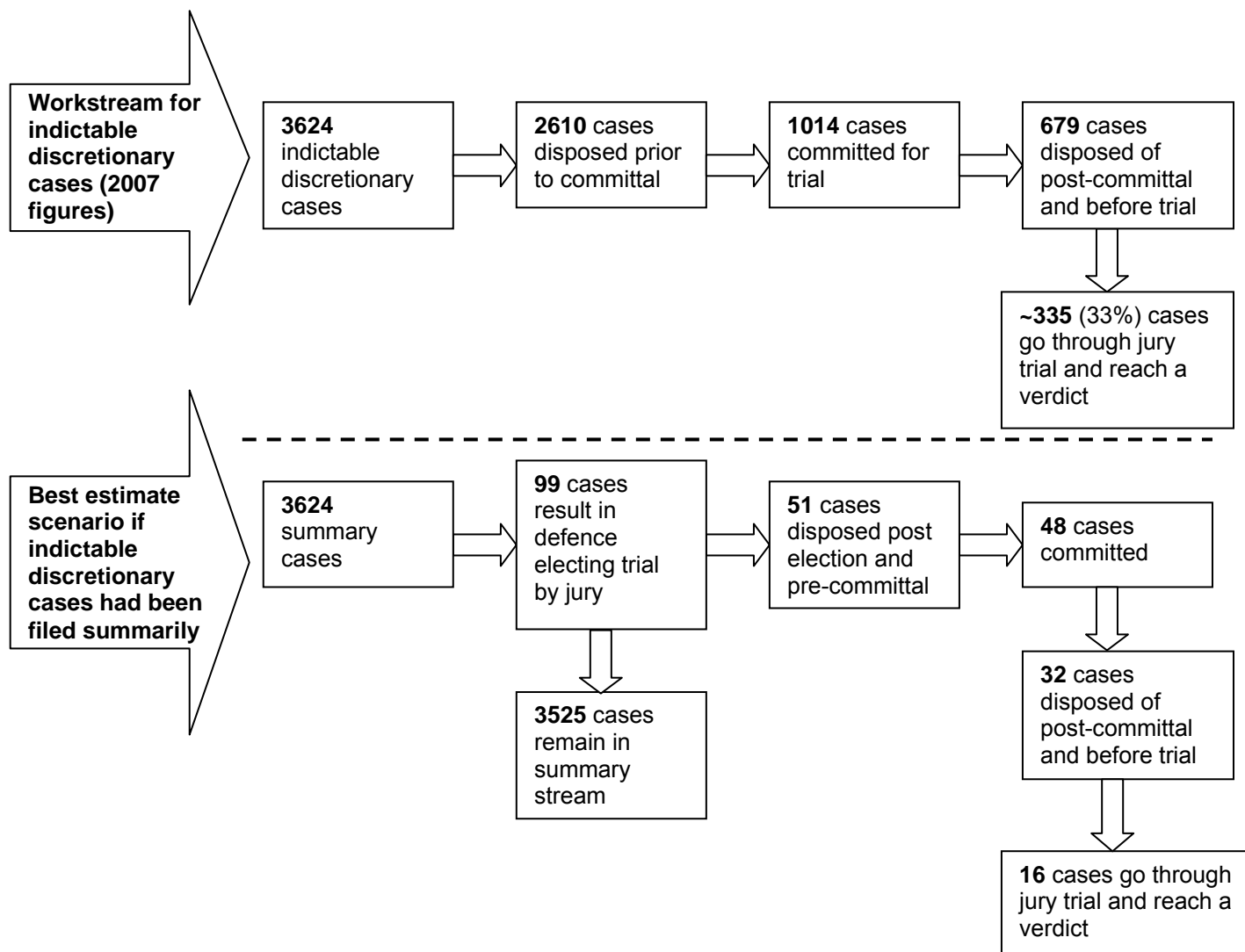
28. The Ministry of Justice has undertaken an analysis to model the impact on jury trial caseloads if the prosecution choice of forum was removed. A range of possible scenarios have been considered. The scenario that we consider provides the best estimate of the proposal's impact is presented below. That estimate applied the 2007 election rates and disposal rates by offence category for cases in the indictable/summary discretionary category that were laid summarily to the 3624 cases that were laid indictably.¹¹ It indicates that removing the prosecution choice of forum would have led to 966 fewer cases being committed for trial in 2007. There would also have been savings to the court system prior to committal due to the smaller number of cases progressing through the indictable track.

⁹ Warren Young, Neil Cameron and Yvette Tinsley, *Jury Trials in New Zealand: A Survey of Jurors*, October 1999.

¹⁰ When there are a mix of charges, some of which might be heard by a jury in the indictable jurisdiction and some which could be heard by a judge in the summary jurisdiction, it is intended that the charges be heard together before a jury.

¹¹ This analysis is available from the Ministry of Justice.

Diagram 1: Comparison of case numbers, committals and jury trials



29. Had all 3624 indictable discretionary cases been laid summarily in 2007, a best estimate scenario suggests that this would have led to the removal of around 300 jury trials from the system. This would result in increased court capacity (such as judicial and staff time), which could be utilised for other work, only a portion of which would be the additional summary work arising from the extra cases that would previously have been laid and disposed in the indictable jurisdiction.

Jury trial threshold

Current position

30. With some limited exceptions, a defendant has a right to elect trial by jury when he or she is charged with an offence that is punishable by a term of more than three months' imprisonment.¹²

¹² It should be noted that there are a variety of reasons why a defendant might elect trial by jury (or prefer trial by judge alone), including the type and seriousness of the alleged offending, perceptions as to the likelihood of a fair trial, among others.

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Proposal

31. It is proposed that the ability for the defence to elect trial by jury be restricted by, for example, increasing the threshold at which jury trial may be elected.

Issues associated with the current threshold

32. The availability of jury trials in New Zealand, as reflected in the jury trial threshold, may not be aligned with modern conceptions of the seriousness of offending warranting a jury trial.
33. At the heart of the issue is what society considers to be a 'minor' or 'serious' offence, and the point at which particular serious offences warrant an ability for defendants to elect to be tried by a jury. A full discussion of what might constitute a 'serious' or 'minor' offence is not possible within the context of this paper. However, it can be said with a degree of certainty that if the original threshold of three months imprisonment was intended to reflect what was considered to be a 'serious' offence at the time, this could no longer be said to be the case.
34. The current threshold (when it was first introduced) was set at three months imprisonment only because that was the threshold at the time in the United Kingdom. We presume that the three month imprisonment threshold was a proxy for indicating that only more serious offences warranted a trial by jury. A number of changes have occurred since this threshold was first set, and it can be argued that the threshold now no longer corresponds to modern expectations of what a 'serious' offence is.¹³ Many relatively minor offences have a maximum penalty of three, or even six months imprisonment. The extensive availability of jury trials has led to claims that New Zealand has a "Rolls Royce jury trial system of unnecessary complexity"¹⁴, and that the threshold for electing a jury trial is too low.
35. The exceptions that are already in place to the right to elect trial by jury illustrate that the right to trial by jury is not absolute. A jury trial is the largest direct investment the community makes in our system of justice. Arguably, therefore, it should only be reserved for serious cases. Even if the threshold was moved, Parliament would still be able to determine that a right to jury trial should exist for a particular class of offending, even if it carries a lesser maximum imprisonment threshold.
36. In comparison with other countries who do prescribe a jury trial threshold, New Zealand's threshold is relatively low. For example, in those countries in which a threshold is used, the threshold is at least six months imprisonment¹⁵, and

¹³ Changing conceptions of seriousness was one reason for the Law Commission's recommendation in 2004 that the jury trial threshold should be moved to offences with a maximum penalty of more than 5 years imprisonment.

¹⁴ Chief District Court Judge Russell Johnson, "Challenges for Criminal Courts", speech at *Addressing the Underlying Causes of Offending; What is the evidence?*, 26-27 February 2009.

¹⁵ In the United States, the Sixth Amendment to the US Constitution guarantees jury trials in all criminal prosecutions. However, this right does not extend to "petty" offences, which the US Supreme Court has defined as offences which do not carry a sentence of more than six months

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ranges through one¹⁶ and two¹⁷ years, up to five years¹⁸ or more. Appendix 1 provides an outline of the availability of jury trials in other countries. The availability of and triggering mechanism for jury trials in other countries will form part of future consideration should the Steering Group support further work on restricting the availability of jury trials.

Potential impacts of increasing the threshold on jury trial workload

37. Figure 1 below illustrates the potential savings that could be made if the jury trial threshold was moved, based on elected caseload volumes if the threshold had been moved for the 2007 data. In terms of the number of cases committed for trial:

- If the election threshold was set at more than three years, an estimated 184 fewer cases would have been committed for trial in 2007.
- If the election threshold was set at more than five years (as recommended by the Law Commission in 2004¹⁹), an estimated 271 fewer cases would have been committed for trial in 2007.
- If the election threshold was set at more than seven years, an estimated 392 fewer cases would have been committed for trial in 2007.

imprisonment (*Lewis v United States* (1996) 518 US 322). The Fifth Amendment provides that no one shall answer for a capital or infamous offence other than on presentment or indictment of a grand jury.

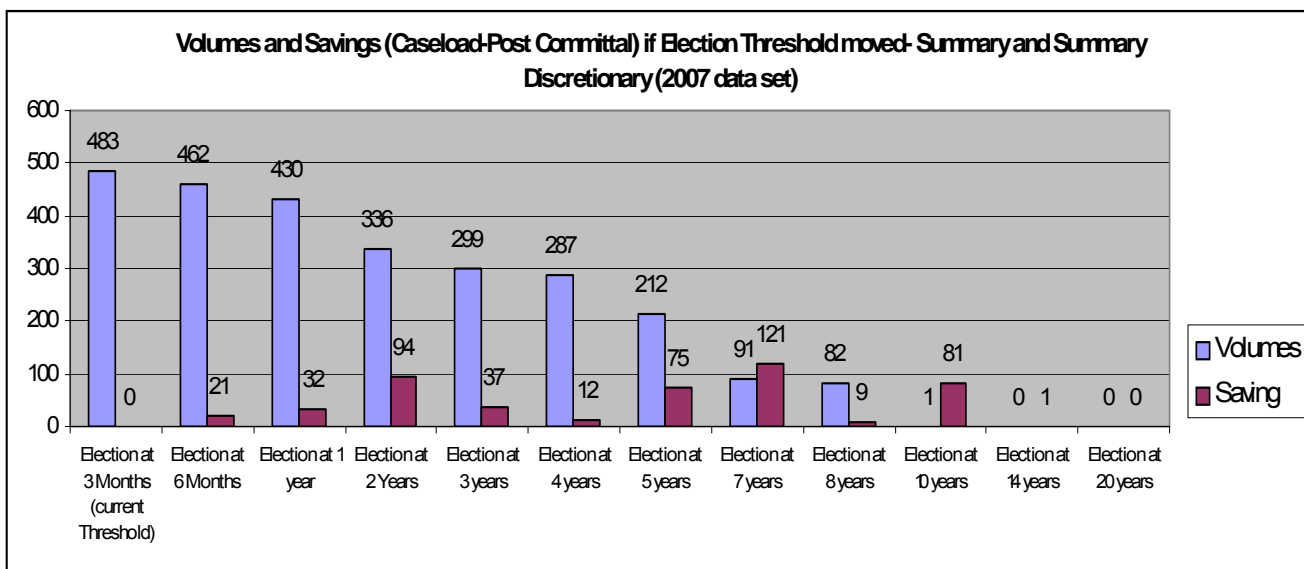
¹⁶ In Mexico, Art 20 (VI) of the Constitution reads, "He shall be entitled to a public trial by a judge or jury of citizens who can read and write...provided the penalty for such offence exceeds one years' imprisonment. The accused shall always be entitled to a trial by jury for all offences committed by means of the press against the public peace or against the domestic or foreign safety of the nation."

¹⁷ The State of Victoria, in Australia, has a threshold of two years.

¹⁸ In Canada, the Canadian Charter guarantees the right to trial by jury if the maximum penalty with which an offender is charged is 5 years imprisonment or more. New South Wales' threshold is also set at five years.

¹⁹ Law Commission, *Delivering Justice for All: NZLC R85*, Wellington, 2004, p. 181-184. The Law Commission also recommended a review of how penalty levels are set for offending.

Figure 1: Volumes and saving if election threshold moved



38. The two proposals in this paper (removal of the prosecution choice of forum in respect of indictable/summary discretionary offences and changing the jury trial threshold) are independent proposals. However, analysis indicates that the savings associated with changing the election threshold would be greater if the prosecution choice of forum was also removed (because some of the cases that would otherwise have been committed for trial could only proceed summarily). Removing the prosecution choice of forum and changing the election threshold to:

- over three years would have led to an estimated 1153 fewer cases being committed for trial in 2007
- over five years would have led to an estimated 1253 fewer cases being committed for trial in 2007
- over seven years would have led to an estimated 1387 fewer cases being committed for trial in 2007.

Implications for New Zealand Bill of Rights Act

39. Section 24(e) of the New Zealand Bill of Rights Act (NZBORA) specifically provides that everyone charged with an offence (except those charged under military law) has a right to the benefit of a trial by jury when the penalty for the offence is or includes imprisonment for more than three months.

40. It should also be noted that proposals to restrict the availability of jury trials may enhance the performance of the justice system in terms of other rights under the NZBORA. For example, reducing delays for individuals within the system means that the right to be tried without undue delay (section 25(b) of NZBORA)

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is arguably enhanced. Reducing delays also reduces distress for victims, and inconvenience for other witnesses and counsel.

41. Further policy work needs to be done to determine the human rights implications of these proposals, and address the issues under the NZBORA.

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Appendix 1: International human rights law and availability of jury trials in other countries

International human rights law

The right to a fair trial in article 14(1) of the International Covenant on Civil and Political Rights is in the following terms:

[all] persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal²⁰ established by law.

Similarly, article 6(1) of the European Convention on Human Rights provides that:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Other countries

Australia – Section 80 of the Commonwealth of Australia Constitution Act states, “The trial on indictment of any offence against any law of the Commonwealth shall be by jury”. Offences that are not specifically identified as being required to be tried by jury are eligible to a jury trial by reference to their maximum penalty. Although there are variations from state to state, the threshold is typically more than one year’s imprisonment (when provided). Victoria’s threshold is two years, and New South Wales’ threshold is set at five years.

Austria – Under Art 91(2) of the Austrian Constitution a “jury returns a verdict in crimes entailing severe penalties to be specified by law, and in all cases of political felonies and misdemeanours.”

Belgium – No constitutional right to be tried by a jury but juries are used in serious crimes.

Canada - Although the right to a fair trial in section 11(d) of the Canadian Charter of Rights and Freedoms does not require a jury as an element of ‘fairness’, section 11(f) provides that any person charged with an offence has the right, “to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment”, except for offences under military law which are tried before a military tribunal.

Denmark- S65(2) of the Constitution states “Laymen shall participate in criminal proceedings. The cases and the form in which such participation shall take place,

²⁰ The UN Human Rights Committee’s definition of ‘tribunal’ in article 14(1) (from General Comment No 32 (2007)) does not incorporate any requirement for jury involvement: “a body, regardless of its denomination, which is established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independent in deciding legal matters in proceedings that are judicial in nature.”

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including which cases shall be tried by Jury shall be provided by statute.” Offences are provided in the Administration of Justice Act.

France – No right provided in either the French Constitution or the Declaration on the Rights of Man. Juries only exist in the Cour D’Assises (Assize Court), which only hears cases involving offences punishable by more than 10 years imprisonment.

Greece – No constitutional right. For serious crimes, there is a jury consisting of four judges and three lay people.

Hong Kong – Art 86 of the Constitution reads “the principle of trial by jury previously practised in Hong Kong shall be maintained. Section 14A(1) of the Criminal Procedure Ordinance, “where any provision in any Ordinance creates, or results in the creation of an offence, the offence shall be triable summarily only, unless – (a) the offence is treason; (b) the words “upon indictment” or “on indictment” appear; (c) the offence is transferred to the District Court in accordance with Pt VI of the Magistrate’s Ordinance.

Ireland – Art 38.5 of the Constitution provides that no one shall be tried without a jury unless the offence is a “minor” one or is an offence against military law, or unless the offence is tried in special criminal courts established for the trial of offences when, in accordance with statute, the ordinary courts are deemed inadequate to secure the effective administration of justice and the preservation of public peace and order.

Italy – No constitutional right. Juries only in cases in the Court of Assizes, which hears offences carrying a maximum penalty of 24 years’ imprisonment or life imprisonment, and other serious offences.

Japan – No constitutional right. Juries were introduced for serious crimes in May 2009.

Mexico – Art 20 (VI) of the Constitution reads, “He shall be entitled to a public trial by a judge or jury of citizens who can read and write...provided the penalty for such offence exceeds one years’ imprisonment. The accused shall always be entitled to a trial by jury for all offences committed by means of the press against the public peace or against the domestic or foreign safety of the nation.”

Norway – No constitutional right and no right at first instance, but on appeal, if the offence carries a penalty of at least six years’ imprisonment, the appeal will be heard by a jury – section 352 of the Criminal Procedure Act.

Russia – Art 20(2) of the Constitution of the Russian Federation reads “capital punishment may, until its abolition, be instituted by the federal law as exceptional punishment for especially grave crimes against life with the accused having the right to have his case considered in a law court by jury. All cases that the *krai* and *oblast* courts are authorized to handle fall within the jurisdiction of the jury court. Those are cases of the most serious crimes such as murder under aggravating circumstances, terrorism, grave abuse by officials, and some crimes against state power and justice.

Spain – Jury trials are relatively rare in Spain and there is no established jury system although Art 125 of the 1978 Constitution states, “Citizens may exercise popular action and participate in the Administration of Justice through the institution of jury in

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the manner that the law may determine for certain criminal trials, as well as in the customary and traditional courts.

Sri Lanka – No constitutional right but juries are available for serious offences.

Switzerland – Juries are currently available but there is no constitutional right and juries will be abolished when the Swiss Code of Criminal Procedure comes into force in 2011.

United Kingdom - The Human Rights Act 1993 does not provide for right to trial by jury. In practice, the right to a jury trial in the United Kingdom is only available for prosecutions for offences tried on indictment. Minor criminal cases are tried summarily in the Magistrates' Courts. Middle ranking ("triable either way") offences may be tried summarily or the defendant may elect trial by jury in the Crown Court. Serious ("indictable") offences, however, must be tried before a jury in the Crown Court.

United States – The Sixth Amendment to the US Constitution states, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury". However, this right does not extend to "petty" offences, which the US Supreme Court has defined as offences which do not carry a sentence of more than six months imprisonment (*Lewis v United States* (1996) 518 US 322). The Fifth Amendment provides that no one shall answer for a capital or infamous offence other than on presentment or indictment of a grand jury.

Venezuela – Art 49 (4) of the Constitution states, "Every person has the right to be judged by his or her natural judges of ordinary or special competence, with the guarantees established in the Constitution and by law. No person shall be put on trial without knowing the identity of the party judging him or her, nor be adjudged by exceptional courts or commissions created for such purpose.

Cases for which the prison sentence is greater than 4 years and no more than 16 years are heard by a trial judge and two lay judges. Cases for which the prison sentence is greater than 16 years are heard by a trial judge and a nine member jury.

There are no jury trials in the following jurisdictions: Columbia, Costa Rica, Germany, Ghana, Hungary, India, Kenya, Nigeria, Pāpua New Guinea, South Africa, Singapore, Sweden, and Taiwan.

Appendix 2: A short history of the jury trial

Various forms of trial by jury existed in ancient Greek and Roman civilisations and in many medieval societies including the Vikings, Normans and Franks. In England, the earliest origins of the jury trial are thought to have been imported in the Norman Conquest, in the form of “a body of neighbours summoned by a public officer to give an oath as answer to some question”.²¹ By the end of the twelfth century, a person accused of crime by another could, on payment, obtain the right to be tried by jury. With the abolition of other methods of establishing guilt²² in 1215, jury trials were embraced by the judiciary, and the right to trial by jury was set out in the Magna Carta that same year. Clause 39 of the Magna Carta, as translated from the original Latin, provides that:

“No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way... except by the lawful judgement of his equals or by the law of the land.”²³

The application of jury trials to specific types of offences has its origins in offences categorised as felonies being tried “on indictment” with a jury, in which the accused had to consent to jury trial.²⁴ Trial on indictment by a judge and jury remained the normal mode of trial for criminal offences until the middle of the nineteenth century²⁵, when in 1855 an Act “for diminishing Expense and Delay in the Administration of Criminal Justice in certain cases” permitted certain cases of larceny (a felony) to be tried by magistrates rather than by a judge and jury, as long as the accused person consented to this type of trial. These arrangements were later extended to other offences. The Summary Jurisdiction Act 1879 consolidated earlier legislation and listed, for the first time, those indictable offences which were triable summarily with the accused’s consent. Section 17 of the 1879 Act also set out, for the first time, a general right to claim trial by jury, exercisable where the maximum sentence on summary conviction exceeded three months’ imprisonment.

The availability of the jury trial in New Zealand follows a similar course, jury trials having always been available for offences Parliament classifies as “indictable”. Since the Indictable Offences Summary Jurisdiction Act 1900, a person charged with a summary offence punishable by a term of more than three months’ imprisonment also

²¹ David M. Walker, *The Oxford Companion to Law*, 1980, p. 943.

²² Such as trial by ordeal, and compurgation (involving an accused seeking to clear himself by his own oath, bolstered by the oaths of others, usually friends and neighbours, who testified to his character rather than the facts).

²³ Translation from the Latin by the British Library at <http://www.bl.uk/diglib/magna-carta/magna-carta-text.html>.

²⁴ The Statute of Westminster I (1275) provided that felons who refused jury trial should be committed to “a hard and strong prison” (prison forte et dure). Walker notes that the words “prison forte et dure” became transformed into “peine forte et dure”, a form of torture whereby, in the sixteenth century, the prisoner was placed between two boards on which increasingly heavy weights were placed until he “consented” to trial by jury or died. The last recorded case of crushing a prisoner to death is reported to have been at Cambridge in 1741, and the practice was abolished in 1772. From 1827 onwards a plea of not guilty was entered if an accused person declined to plead.

²⁵ As noted by the James Committee in its 1975 report on *The Distribution of Criminal Business between the Crown Court and the Magistrates’ Court*.

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had the right to elect to be tried by a jury.²⁶ Curiously, the primary intent of this Act was to widen the jurisdiction of the Magistrates' Court (now known as the District Court) to hear some indictable offences in the summary jurisdiction, with the consent of the accused (and not at all in cases of previous conviction). The extension of the availability of jury trials, with these clauses only inserted at the Committee Stage of the Whole House, was intended to address variations in Magistrates' treatment and sentencing of offences.²⁷

The introduction in 1900 of jury trials for offences of more than three months imprisonment – both the idea and the three-month imprisonment threshold – could be viewed as a matter of historical accident rather than by specific design on the part of the government of the day. The jury trial provisions in the Indictable Offences Summary Jurisdiction Bill were introduced by Supplementary Order Paper at the Committee Stages of the Whole House by an opposition member. The extension of the availability of jury trials was intended to address variations in Magistrates' treatment and sentencing of offences, and was a direct copy of the UK provisions in force at the time.²⁸

The 1985 White Paper on *A Bill of Rights for New Zealand*²⁹ identified two statutes that provided for offences punishable by a maximum term of imprisonment of more than three months that did not carry the right to trial by jury.³⁰ The authors of the White Paper chose to continue the three month threshold as they were concerned that the existing summary offences providing for 6 months imprisonment without the right to a jury trial would be used as the basis for a de facto threshold for a jury trial. Section 24(e) of the New Zealand Bill of Rights Act 1990 thus expressed the right to a jury trial as “the right...to the benefit of a trial by jury when the penalty for the offence is or includes imprisonment for more than three months”.

²⁶ Indictable Offences Summary Jurisdiction Amendment Act 1900, s 6. Section 66 of the current enactment – the Summary Proceedings Act 1957 – contains two exceptions relating to common assault and assault on a police, prison or traffic officer (see section 43, Summary Offences Act 1981).

²⁷ Refer Hansard, 21 September 1900, p. 121.

²⁸ Refer Hansard, 21 September 1900, p. 121.

²⁹ *A Bill of Rights for New Zealand: a white paper*, Appendix to the journals of the House of Representatives of New Zealand, 0110-3407; A.6, Presented to the House of Representatives by leave by the Hon. Geoffrey Palmer, Minister of Justice.

³⁰ These were the Summary Offences Act 1981 (common assault and assault on a law enforcement officer) and the Undesirable Immigrants Exclusion Act 1919 (subsequently repealed by the Immigration Act 1987).

Appendix 3: Breakdown of national total of “jury track” cases

Figure 2 provides a breakdown of the national total of “jury track” cases according to offence category, and their respective contribution to post-committal court workload. Figure 3 provides information on the number of cases in each group that were disposed prior to the committal event and those cases that proceeded past committal into the trial stage.

Figure 2: Breakdown of national total of jury track cases

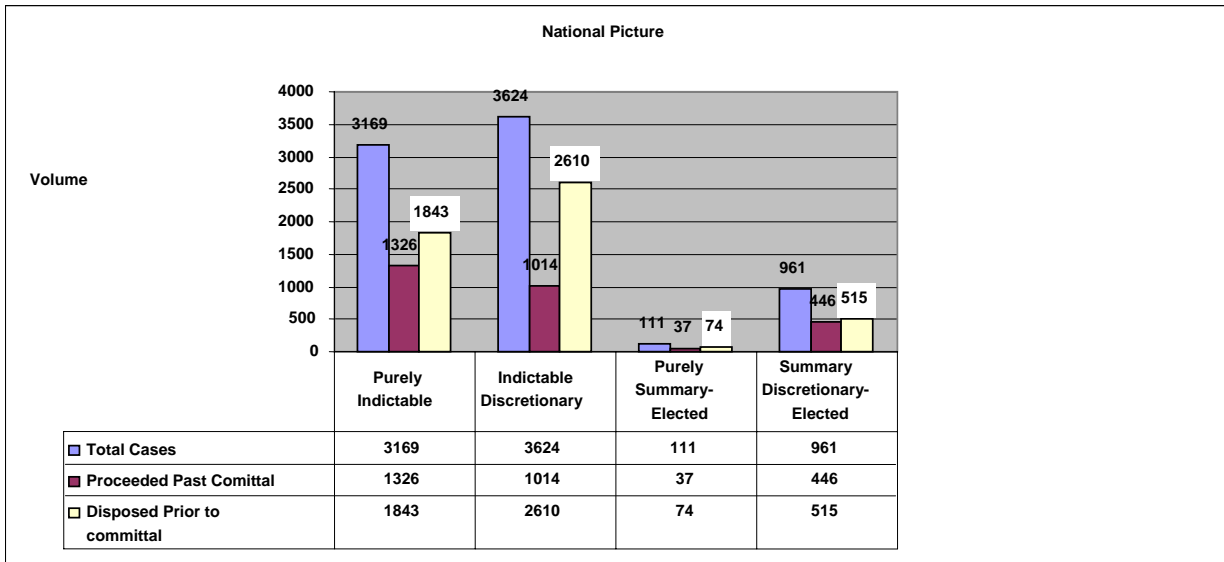
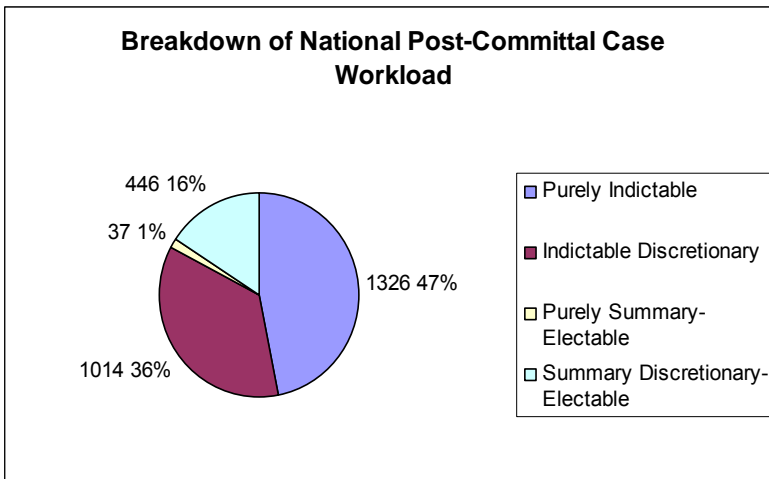


Figure 3: Breakdown of national post-committal case workload



From the above, it can be noted that cases involving indictable discretionary charges were nationally the largest feeder group for trial work in 2007, but have the highest disposal rate pre-committal with 72% of those cases being disposed before reaching the trial jurisdiction. Cases involving indictable discretionary charges account for 36% of the total national post-committal workload. Summarily laid discretionary charges on which an election was taken account for 16% of the national total of post committal case workload. Purely summarily laid charges on which an election was made account for the smallest percentage of work proceeding post committal at only 1% of

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the workload. Of the 111 purely summary cases that included a charge on which an election was made, only 37 passed the committal stage.