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Options for Avoiding Re-Trials Following the Discharge of Jurors after Trial Commencement

Purpose

1. The purpose of this paper is to:
 - Seek views on the desirability of amending the law to allow greater flexibility for judges to continue a criminal jury trial when more than one juror has had to be discharged during the course of the trial; and
 - Seek comments from key interested parties on the preferred option for any future amendment.
2. The paper covers the following areas:
 - The problems arising when the jury size is reduced below the permitted minimum after the commencement of a criminal trial;
 - The applicable New Zealand statutory and case law;
 - The relevant law in similar overseas jurisdictions;
 - Possible solutions to this problem based on the approaches taken in similar overseas jurisdictions; and
 - A preferred option.
3. To assist in facilitating comments, there is a list of questions attached in Appendix 1.

Executive Summary

4. This paper seeks comments from interested parties on whether the law should be amended to allow greater flexibility for judges to continue a criminal jury trial when more than one juror has been discharged during the course of the trial. It also seeks comment on the preferred option for amendment set out in this paper.
5. The law prescribes that a jury must be made up of 12 persons. If one juror is discharged during the course of the trial the case can continue at the discretion of the judge. When two jurors are dismissed, however, the Supreme Court has clarified that, in the absence of the consent of the

parties, judges will rarely be able to continue a criminal jury trial¹ (see paragraphs 37 to 47). The law provides that “exceptional circumstances” must exist and the Supreme Court has said this creates a high threshold.

6. In jurisdictions similar to New Zealand judges are given wider latitude to proceed with criminal jury trials when jury numbers are reduced in the course of the trial. All the Australian states and Canada allow trials to continue with 10 jurors, and England permits trials to continue as long as there are 9 jurors.
7. The Australian states also have provision for selecting alternate jurors at the beginning of lengthy trials. These extra jurors are then available to take the place of any jurors who might be incapable of continuing.
8. In this paper we make the assumption that the longer a trial lasts the more it is likely one or more jurors will be discharged. Discharge may be because of illness (the juror or a member of their family) or for some other reason. While the number of cases that are affected by falling jury numbers is small the impact on all those affected by a mistrial can be significant. Further, having to abandon longer trials part way through may have a disproportionate effect in undermining confidence in the justice system, as these same cases are more likely to be complicated high profile cases.
9. As with overseas jurisdictions, New Zealand might allow alternate jurors to be chosen at the outset, allow for larger juries, and/or allow more flexibility for trials to continue with fewer jurors to reduce the risk of mistrials. However, an analysis of these options has shown that the alternate juror and larger juries options have a number of problems associated with them – relating to concerns about the deliberation process and costs. These are therefore not currently favoured as approaches.
10. By contrast the problems associated with the option of allowing more flexibility for trials to continue with 10 jurors are less; and this option is very common in other jurisdictions. As a jury of 10 is still large enough to be representative and provide robust decision making, there seems little reason why a jury that has reduced to 10 should not continue unless there are circumstances relating to the particular case that would make it unfair.
11. The Ministry proposes, as an initial preference for addressing the issue of mistrials due to falling juror numbers, that the law be reformed to provide that a trial must continue so long as the jury numbers do not decline below 10 members (this would be subject to the existing power of the court to dismiss the whole jury where there was reason to do that). This follows the English model – except in England trials can continue with 9 jurors.
12. However, in order to make a final decision about whether such a reform should be pursued, input from all key stakeholders is required. In particular, members of the judiciary are asked about the current difficulties they are experiencing in this area to assist in assessing the strength of the case for reform.

¹ *Rajamani v The Queen* SC ;8/2007 [2007] NZSC 68; *Wong v The Queen* SC 53/2007 [2008] NZSC 29

Introduction

13. Two recent Supreme Court decisions have highlighted how the law in New Zealand provides only very limited ability for criminal jury trials to continue when the original 12 person jury reduces below 11² (see paragraphs 37 to 47). This restrictive approach in New Zealand has recently led to a number of trials being declared mistrials, and is in contrast to the relevant law in similar jurisdictions (see paragraphs 56 to 59).
14. With limited financial and human resources available to the court system, it is important that it operates as efficiently and fairly as possible to accommodate the growing demands on it. To this end, the Ministry of Justice has a number of projects underway, looking at how court processes can be improved and modernised. However, when trials have to be abandoned (sometimes at the 11th hour) because more than one juror has had to be discharged, this adds to the pressure on the system. It would be useful to minimise this additional pressure.
15. Although the issue of mistrials due to falling jury numbers has been canvassed by the Law Commission in the course of its work on juries within the last few years, the recent clarification of the applicable New Zealand law by the Supreme Court makes it timely to take a fresh look at the current legislative settings in this area. While the fairness and integrity of trials must not be sacrificed for the sake of efficiency, it is useful to compare how other similar countries have provided for this situation and ask whether New Zealand could be more flexible in its approach.

The Problem

16. During the course of a jury trial it is possible that individual jurors become incapable of continuing to serve and are discharged (for example, if a close family member dies, if they become ill, etc.). As discussed in greater detail below, there is provision for trials to continue when jury numbers fall. However, a trial cannot continue with fewer than 11 jurors unless:
 - a. Both parties consent (in which case no lower limit is specified); or
 - b. There are 'exceptional circumstances' (in which case 10 is the required number).³
17. If jury numbers fall below 11 and neither of these situations apply, a mistrial is declared and the case must be re-heard. There is always a risk that jury numbers may fall, but generally it can be assumed that the risk is greater the longer the trial. Further, if a jury does fall below 11 there may be an incentive for the defence (if not the prosecution) to delay the case rather than to consent to 10 jurors and, as the two recent Supreme Court decisions have now clarified, the 'exceptional circumstances' test means that Courts have very limited ability to allow the trial to proceed with less than 11.

² Ibid.

³ Section 374 (4A) Crimes Act 1961

18. Any mistrial imposes a cost on both the justice system and on the individuals involved in the particular case. Costs to the system include the real costs of resources expended progressing a trial that is then abandoned, and also opportunity costs as other cases are delayed while the case abandoned is reheard.
19. In addition, there are costs imposed on individuals as they have to attend Court for a further period. Some of these costs are financial including, for example, loss of income, travel costs, and accommodation (if the hearing is too far away from an individual's residence). Many of these financial costs are also borne by jurors, for while jurors have a civic obligation and are compelled to attend jury duty⁴, jury fees are not designed to compensate them for loss of income incurred as a result of attending Court for jury service⁵.
20. Other costs to individuals are less tangible but nevertheless real. For example, having to repeat evidence or hear it again can be distressing and even traumatising for victims and witnesses (and for another set of jurors); and the additional delay in having a case resolved may, by itself, be enough to cause further anxiety for victims, witnesses, and the defendant.
21. The effect of mistrials can also extend beyond those directly involved in them. Trials disrupt the normal private and family lives of individuals involved (for example, by hampering their ability to fulfil obligations regarding childcare, putting additional strain on relationships, etc.). Therefore, not only victims, witnesses and defendants might be affected by mistrials, but also their families, friends and supporters may need to carry additional burdens (for example, covering for their absence while in court, providing emotional support, etc.).
22. These costs to individuals affected by mistrials need to be reckoned along with the costs to the system. The jury system must be fair and efficient, not only for the accused, but also for victims, witnesses, jurors and the community generally. Further, these costs will be among the concerns of ordinary people and may impact on public perceptions and confidence in the justice system.
23. Public confidence in the justice system might be diminished⁶ as a result of one or two high profile cases being declared mistrials; and it is assumed mistrials due to falling jury numbers are more likely in the longer, more complex cases that attract a greater amount of public scrutiny.
24. While the Courts keep a record of the number of mistrials, mistrials can occur for various reasons and these reasons are not recorded, except on the individual case files. It is therefore currently difficult to accurately identify the number of mistrials declared as a result of reduced jury numbers in either the High Court or District Courts jury trial jurisdiction.

⁴ While there is provision for potential jurors to be excused from jury duty in appropriate circumstances, avoiding jury duty can result in a fine of up to \$1,000.

⁵ Jurors are currently paid at a rate of only \$31 per half day, although the rate is higher if jurors sit after 6.00 p.m. or where trials are long.

⁶ This point was made in decisions of the High Court of Australia – *Wu v R* (1999) 166 ALR 200; *Brownlee v The Queen* (2001) 75 ALJR 1180.

25. On the evidence that is available and anecdotally, the number of mistrials caused by reduced jury numbers is small. However, the risk of mistrial due to falling jury numbers may be increasing as there is also evidence that the number of very long trials is growing, and this impression is, again, supported by anecdotal reports from many in the courts system. (See Appendix 2 for supporting data and a discussion of the number of mistrials and trial length).
26. However, while, statistically, the problem of mistrials caused by reduced jury numbers may seem small, this is not necessarily the best indication of the size of the problem. As discussed above, one mistrial may have a significant impact on the individuals involved and if the trial is a high profile one (which is quite likely) the resulting publicity could undermine confidence in the justice system. But also, Judges report that they frequently have to work very hard to keep a jury together (for example, adjourning cases on certain days to allow jury members to attend to personal business) and this too can represent additional costs and delay within the system (although they are difficult to quantify).
27. Mitigating against the risks of increasing numbers of mistrials due to juror attrition are two recent changes within the courts. The first is the Crimes Amendment Act 2008⁷, which allows for Judge-alone trials in cases that are likely to be long and complex. This provision, which comes into force on 26 December 2008, will apply where the penalty faced by the accused is less than 14 years' imprisonment, and where the trial is likely to last longer than 20 days. The amendment also allows for dispensing with a jury where there is likely to be juror intimidation.
28. These provisions can be expected to reduce the risk of mistrials due to juror attrition in some cases where this risk is currently relatively high. However, it will only be clear how often these powers are invoked, and therefore how effective they might be in avoiding mistrials, once they have come into effect.
29. The second change is the progressive roll-out of new (more efficient) transcription technologies in the courts. Previously speakers presenting evidence at trial have needed to speak slowly to allow time for stenographers to record their words. However, the new technology now enables evidence to be heard at regular talking pace, and it is estimated that it reduces court hearing time by between 20-30%.
30. Currently the availability of this technology is limited. However, it will be more widely implemented across courts over the next 12 months (approximately), and this is likely to have a significant effect in reducing the duration of trials. Shorter trials are likely to lower the risks of mistrials due to juror numbers falling.

⁷ The Criminal Procedure Bill 2004 inserted section 361D of the Crimes Act.

The Relevant New Zealand Statutory and Case Law

Relevant Statutory Provisions

31. There has been a longstanding right under common law for a person accused of a criminal offence to be judged by a jury of his or her peers. The jury size was fixed at 12 persons by the middle of the fourteenth century. While the number is regarded, at least by some, as an historical accident⁸, 12 is, nevertheless, the common starting point for the size of a jury in most common law countries.
32. The mechanisms and procedures relating to the jury system are now set out in statute in New Zealand. In particular, the Juries Act 1981 and the Crimes Act 1961⁹ govern aspects of the law relevant to the size and constitution of juries.
33. The Juries Act requires the size of the jury to be 12 persons¹⁰. There is, however, power under this Act¹¹ for the Judge to discharge a juror before the trial begins if he or she is personally concerned in the facts of the case or is closely connected with one of the parties or prospective witnesses. Where discharge occurs at this early stage the Judge may require a further juror to be selected from the original panel¹².
34. The Crimes Act¹³ also gives power for the Judge to discharge individual jurors or discharge the whole jury for certain reasons. The jury can be discharged prior to giving their verdict in the case of an emergency or casualty, or where the Judge is of the opinion that it is in the interests of justice to do so¹⁴. Where an individual juror is incapable of continuing to perform his or her duty, or is disqualified, or his or her partner or partner's family is ill or has died, the Judge may discharge the whole jury, or continue without the affected juror(s)¹⁵.
35. Jurors cannot be replaced after the trial starts.¹⁶ To bring a new juror in half way through a trial is clearly not a practical proposition. However, as noted above, there is power to continue a trial with a reduced number of jurors in certain limited circumstances.
36. A trial can continue with 11 jurors at the Judge's discretion. Where the number falls below 11 the trial can only proceed with a lower number of jurors if :

⁸ Stated by the US Supreme Court in *Williams v Florida*, 399 US 78 (1970).

⁹ The recent amendments to the Juries Act contained in the Criminal Procedure Bill 2004 mean that some of the powers currently in the Crimes Act have been transferred to the Juries Act – these amendments come into force on 26 November 2008.

¹⁰ Section 17

¹¹ Section 22(1)

¹² Section 22(1) Juries Act 1981

¹³ This power is now located in the Juries Act but will not come into force until 26 November 2008 – the Crimes Act provision is therefore still in force at the time of writing.

¹⁴ Section 374 (1) Crimes Act 1961

¹⁵ Section 374 (3) and (4) Crimes Act 1961

¹⁶ The current Crimes Act provision has no power to allow for replacement jurors and the new provision in the Juries Act clearly spells out that jurors cannot be replaced after the trial begins.

- The prosecutor and the accused consent, in which case there does not appear to be any statutory minimum prescribed; or
- There are ‘exceptional circumstances’ relating to the trial and the Judge decides it is in the interests of justice for the trial to proceed, in which case the trial can continue with a jury of 10.¹⁷

Recent Case Law

37. As also noted in the introduction, there have been two recent Supreme Court cases that have considered the application of section 374(4A) of the Crimes Act, which allows the Judge to continue the trial with 10 jurors where there are exceptional circumstances relating to the case. The first of these cases is *Rajamani v The Queen*¹⁸. The appellant in this case had been found guilty of murder. He appealed to the Supreme Court after the dismissal of his appeal by the Court of Appeal. One of the grounds of his appeal, and the one that was found to be determinative by the Supreme Court, was that his trial miscarried because it was improperly completed with only 10 jurors.
38. The Supreme Court held that whether exceptional circumstances existed was a matter of fact and in this instance ‘exceptional circumstances’ had not existed. It therefore upheld the appeal.
39. In determining how ‘exceptional circumstances’ should be interpreted, the Supreme Court took note of the policy intent behind the insertion of this section in the principal Act, as expressed in Parliamentary debates at the time of the amendment. It noted that its enactment was prompted by the impending trial of Malcolm Rewa on 40 mainly sexual counts involving 27 complainants. That trial was expected to last some five months and there was a real risk of more than one jury member becoming incapable or unable to continue sitting.
40. The Minister of Justice at the time stated when introducing the Amendment Bill that if the trial had to start again the emotional cost to the victims would be considerable and that it would also impose significant financial and opportunity costs for the justice system.¹⁹ The Supreme Court stated that it was appropriate to construe the meaning of ‘exceptional circumstances’ against that background²⁰.
41. The Court found that the facts of the case did not amount to ‘exceptional circumstances’ in the sense intended by the amendment to the principal Act. The judgment notes that when the trial Judge discharged the second juror, the two week murder trial was into its second week and that at two weeks, the length of the trial, and hence the potential retrial could not be regarded as exceptional.

¹⁷ Section 374 (4A) Crimes Act 1961 – the amendments to the Juries Act replicate this provision.

¹⁸ *supra* at note 1

¹⁹ See para 6 of the Supreme Court Majority Judgment – reference to Hon D A M Graham (6 November 1997) 564 NZPD 5208.

²⁰ Paragraph 6 of the Supreme Court majority judgment.

42. Nor was the fact that 37 witnesses had already been called and that one of those witnesses was from Sydney regarded as exceptional. The Court held that to find the circumstances of this case exceptional would set the standard significantly low.
43. The second Supreme Court decision dealing with this question was *Wong v The Queen*²¹. The appellant had been found guilty by a jury of 10 (two having been discharged in the course of the trial) on charges of drug dealing and money laundering. The issue on appeal was again whether 'exceptional circumstance' existed.
44. The *Wong* trial had been scheduled for two weeks, but ran substantially over time. Two jurors were discharged in the fourth week – one while the Crown Counsel was part way through a closing address. The trial Judge decided to complete the trial with 10 jurors.
45. The Court expanded on its comments in the *Rajamani* case and noted the importance of the right to a jury trial, confirmed as it was now in section 24(e) of the New Zealand Bill of Rights Act 1990. The judgment states that the right is of such importance that Parliament should not be taken to have intended to abridge it more than is necessary to prevent confidence in the system being undermined by the need to abort very long trials when jurors are unable to continue.
46. The judgment states that for subsection 374 (4A) to apply the circumstances need not be rare but in combination they must be distinctly out of the ordinary. The Supreme Court noted, however, that they need not approach the circumstances of the case which was the genesis of the legislative amendment in 1997, which it noted was a very rare situation.
47. The judgment mentioned a number of features of Mr Wong's trial that did not amount to exceptional circumstances. These included the *four week length* of the trial; that a retrial would not be of particular difficulty for the court system to accommodate; and that there was no real likelihood of witnesses becoming unavailable.

Recent Legislative Amendment

48. As noted above, amendments in the recent Crimes Amendment Act (No 2) 2008, which come into force on 26 December 2008, enable the court to dispense with a jury completely where the duration of the trial is expected to be more than 20 days in certain cases (that is, where the penalty for the offence is less than 14 years).²² In making this determination the Judge must be satisfied that in the circumstances of the case, the accused person's right to trial by jury is outweighed by the likelihood that potential jurors will not be able to perform their duties effectively.
49. This creates a somewhat incongruous situation in that, while the Supreme Court has found that the fact a trial has continued for four weeks is not grounds under the 'exceptional circumstances' test for continuing with 10

²¹ supra at note 1

²² supra at note 19

jurors, the legislature has now decided that for some categories of cases a trial of the same potential duration is lengthy enough to consider dispensing with a jury altogether.

50. This situation may cause unintended consequences. Firstly, given the high threshold for continuing a trial with 10 jurors, there may be an incentive for judges in relevant cases to favour proceeding without a jury rather than risk having to declare a mistrial if more than one juror needs to be discharged. Secondly, to mitigate against this possibility there may be a restrictive interpretation of new section 361D of the Crimes Act, consistent with the recent interpretation of 'exceptional circumstances' in section 374 (4A) of the Crimes Act.
51. This is another reason why the legislative settings in this area of the law need to be reviewed comprehensively – so that there is an overall consistency of approach. If this is not done the judiciary is left in the difficult position of sorting out conflicting legislative policy approaches.

Comment

52. Given the two Supreme Court judgments it is clear that there will be few occasions where the 'exceptional circumstances' test is met.
53. The Supreme Court ruling is already having a wider impact on trial decisions. Judges are naturally being more cautious. An example of the wider affects of these decisions was the discharge on 25 June 2008 of the jury in the re-trial of murder accused Antonie Ronne Dixon on the third day of the trial. The Judge said that although the trial could continue with 11 jurors, the probability of losing a second juror to accident, illness, or family crisis was just too high. Presumably it was decided it was better to abort the trial near the beginning than keep going and risk having to abort it near the end when more time would have been wasted. Ironically on 17 July 2008 a juror was discharged in the new trial – meaning the jury was again back to 11. Fortunately, the trial was completed the second time with 11 jurors.
54. The larger ramifications of prescribing an 'exceptional circumstance' test were probably not considered when the policy work was being undertaken for the development of subsection 374 (4A). At that time the focus was on the problem of one exceptional case. In that situation wider considerations such as the general approach in other similar jurisdictions and the importance of ensuring the court system was as efficient and fair as possible may not have been considered.
55. It is therefore useful to take a fresh look at the issue of how to manage the problem of mistrials arising from discharge of jurors after the commencement of a trial. There are other viable options that, without undermining the integrity of the jury trial system, would mean mistrials could be avoided in more cases than is currently possible.

Approaches in Similar Overseas Jurisdictions

56. Most comparable jurisdictions make provision for the continuation of a trial where more than one jury member needs to be discharged during the course of the trial. (These are summarised in the table in Appendix 3.) All the Australian states have legislation that gives a discretion to the Judge (without any guiding statutory criteria) to continue the trial with a reduced jury of 10 members. The Canadian federal legislation provides that a trial will continue with a jury of 10, unless the Judge orders otherwise – thus creating a presumption that trials should continue with the reduced number. The United Kingdom legislation provides that, as long as the jury is not less than 9, the trial must continue.²³ The Court maintains the discretion, however, to discharge the whole jury if it sees fit to do so.
57. All the Australian states also make provision for alternate jurors to replace discharged jurors in some cases (as explained in more detail below). The United States federal jurisdiction and various American states also have systems where alternate jurors can be chosen to replace jurors who cannot continue.
58. Neither the Canadian federal jurisdiction, nor the United Kingdom has provision for alternate jurors.
59. Compared to other similar jurisdictions, New Zealand has the most restricted approach in terms of allowing trials to continue with reduced jury numbers, and it has no provision for alternate jurors.

Options

60. We assume that Courts should always prefer to seek to maintain a jury of 12, if possible. However, when the size of a jury is unavoidably reduced after a criminal trial has commenced, the analysis of the relevant common law jurisdictions set out above, and consideration of the New Zealand law, suggest three main approaches for preventing the collapse of the trial. These are:
- The use of alternate jurors;
 - Larger juries; and
 - Allowing more flexibility for a trial to be completed with a smaller jury.

New Zealand might also opt to simply maintain the status quo.

61. Set out below is a fuller analysis of the three approaches, as well as consideration of the option of maintaining the status quo in New Zealand. Under the section on smaller juries the issues of how this approach might affect the fairness of the trial and the integrity of the jury system are also examined.

²³ The only exception is where the trial is for an offence punishable by death. It is unlikely any offences of that nature still exist on the UK statute book.

Alternate Jurors

62. As mentioned above, all the Australian states allow for a number of 'extra' or alternate jurors to be chosen at the start of a case. This provision is used where the case is likely to be lengthy and there is a greater danger of some jurors being unable to continue. The United States federal system and some individual US states also provide for this option.
63. Two main models for providing for alternate jurors can be identified. These are:
- Standby jurors; and
 - Additional jurors.

'Stand-by Jurors'

64. Additional 'potential' jurors are selected at the start of the trial but do not form part of the jury. They are on 'stand-by' in the court in case jurors are discharged and they are needed. This would mean that, while the potential jurors would need to be present in court to hear the trial as it proceeds, they would not be formally part of the jury until (and if) required.
65. Stand-by jurors may or may not be accommodated with the jury proper (eg, sit with them in the jury box, share facilities outside the courtroom, etc.).

'Additional Jurors'

66. Additional jurors are chosen at the outset and form part of the jury from the start of the trial. If at the time of deliberation the jury has not reduced to the statutory required size (usually 12) the additional jurors are discharged. A ballot is held at the end of the trial to select the jurors who are 'surplus' and the ones selected are discharged. All jury members (with, perhaps, an exception being made for the foreperson) are therefore aware throughout the trial that they may be discharged prior to final deliberations if the jury remains greater than 12.

The Use of Alternate Jurors

67. It will be assumed, for the sake of this discussion, that alternate jurors would only be used where there was a reasonable expectation at the outset that jury numbers might fall below 11 during the course of a trial. That is, any provision for alternate jurors in New Zealand would stipulate that they only be used in certain circumstances, specifically where the estimated length of the trial was long. In addition, to avoid risk of uncertainty, a 'long' trial would be clearly defined (for example, 20 days).
68. It is, of course, possible that jury numbers could fall below 11 in shorter trials and it is also true that costs associated with retrial for shorter cases may be reasonably significant. However, because the chances of jury numbers falling below 11 are much smaller in shorter trials and because many of the costs associated with retrials of shorter cases are smaller than those associated with retrial of longer cases, we anticipate that it would be difficult to justify the use of alternate jurors for all cases, including short trials, on a cost-benefit basis.

Advantages and Disadvantages of Alternate Jurors

69. The advantage of using alternate jurors is that they would reduce the risk that jury numbers fall below the current required level. However, as the Law Commission identified in their discussion paper, *Juries in Criminal Trials Part 1* (Preliminary Paper 23), they also raise a number of concerns in relation to:

- Jury selection;
- Cost and administration; and
- Problems in relation to deliberation.

Jury Selection

70. To implement use of alternate jurors, additional processes for jury selection would be required. For example, stand-by jurors would require provision for a second ballot of the jury, if required. This would require legislative change – but this is true of all the options except maintaining the status quo and it is not anticipated that these additional processes would create any significant problems.

Cost and Administration

71. The costs associated with the introduction of alternate jurors would include costs of implementing the changes and ongoing operational costs.

72. The most significant costs would be those associated with the implementation of any new provisions, including those associated with making the necessary changes to courts' IT jury management systems and with making alterations to courthouses (eg, increasing the capacity of jury boxes or otherwise modifying courtrooms to accommodate alternate jurors) to reflect the new courthouse design standards that would become necessary.

73. The ongoing operational costs are likely to be relatively less significant and small compared to the cost of abandoned trials.

74. Further costs would also be associated with the alternate jurors themselves. As noted above, jury service is a civic obligation that places a burden on those chosen to serve. This burden impacts, not only on the juror's time, but frequently on their finances, on their emotions, and potentially on their families and friends also. This burden might be considered unreasonable if, in the end, the input of alternate jurors is not required.

75. Additional stresses may also be created for jurors who are not required as it might mean they carry with them doubts or concerns about the trial that they would otherwise have been able to resolve as part of the deliberation process. Further, alternate jurors who are not used may feel that their time is wasted and this may undermine the willingness of the community generally to undertake this responsibility. However, these risks would need to be assessed against similar feelings and consequences on jurors who are discharged because jury numbers fall.

76. Use of alternate jurors would require greater administrative effort. However, this would not be significantly greater than currently, and, in any case, alternate jurors would only be needed for a limited number of cases, given the assumption, outlined in paragraph 67, that they would be reserved for long cases only.
77. Alternate jurors would also mean that more people carry the burden on jury duty placing greater pressure on the pool of potential jurors. However, again, the number of additional jurors required is expected to be small and, assuming they are used relatively infrequently, likely to be compensated for by fewer re-trials requiring entirely new juries to be sworn.

Deliberations

78. The Law Commission considered that the greatest difficulties in relation to the use of alternate jurors arise in respect to jury discussion and deliberation.
79. During morning and afternoon adjournments, jurors are likely to enter into discussions about a case and this may form a part of their deliberations. As the Commission has observed, difficulties arise if alternate jurors are allowed to be with other jurors, or if they are kept separate.
80. If alternate jurors are kept with the other jurors, the process is open to the objection that people who do not have ultimate responsibility for the verdict (because they are not needed when the jury determines the verdict) have been in a position to have a significant effect on the thinking of those who do.
81. If, however, alternate jurors are kept apart, they can not take part in the process of developing a view and this may also prove problematic if they are called on to participate in reaching a verdict. The introduction of one or more alternate jurors late in a trial may significantly alter the balance of jury thinking and may significantly increase the possibility of jury disagreement.
82. If jurors know they may not have to participate in the final decision making, this might also encourage them not to pay as much attention to a trial as if they were expecting to have to contribute to the decision making.
83. A Canadian report looking at the issue of introducing alternate jurors raised some other problems with the alternate jury option²⁴. The report stated that the removal of certain jurors just before deliberations posed significant problems, such as how the released jurors would be kept from commenting on the jury and its deliberations, and how the safety of released jurors could be ensured with respect to criminals who might want to extract information from them (eg, information in relation to the composition of the jury or the dynamics of the group).

²⁴ Final Report on Mega Trials of the Steering Committee on Justice Efficiencies and Access to the Criminal Justice System for the Federal/Provincial/and Territory Deputy Ministers Responsible for Justice (2004).

Larger Juries

84. A second option is to provide juries of more than 12 so there is a built in safety margin to take account of possible attrition in numbers during a trial. Under this option a jury of greater than 12 would be empanelled and all remaining jurors would take part in final deliberations, whether or not jurors have been discharged during the course of a trial. This means a case might be decided by a jury greater than 12, but that the risk of a case being decided by a jury less than 12 (and the risk of mistrial due to numbers falling below 11) is greatly diminished.
85. Like the alternate jurors model, the option of larger juries has associated with it problems in relation to jury selection, and cost and administration. These problems are essentially the same as those associated with the alternate juror model, as discussed above.
86. In contrast, the larger jury model does not have the problems associated with deliberations that are identified with the alternate juror model. However, the larger jury model does increase the possibility that juries of greater than 12 are required to reach a verdict. What impact bigger juries might have on deliberations, or whether the difference between 12 and, say, 14 is significant, is not clear. What is clearer is that larger juries are likely to face greater problems than smaller juries in terms of coordination and communication, higher levels of conflict, motivation (members are more likely to 'free-load' off others) and lower levels of participation.²⁵
87. Also, having a larger jury would put New Zealand out of step with most other jurisdictions. Of those jurisdictions comparable to our own, Scotland currently has the largest jury numbers at 15. But Scotland is about to review its jury size and it is reported to be contemplating reducing its jury numbers to 11 or lower²⁶. This would be consistent with trends in other jurisdictions relating to reduced jury size, as discussed below. Scotland's jury system also differs from New Zealand's in a number of other ways; in particular Scottish Courts accept majority verdicts.²⁷

Smaller Juries

88. The final option for avoiding mistrials due to reduced jury numbers is to allow more flexibility for a trial to be completed with a smaller jury. In most other jurisdictions similar to New Zealand a criminal trial can continue with a 10 person jury (or less in some cases) without the need for the existence of 'exceptional circumstances' as a pre-condition. The United Kingdom goes further and requires that in most cases trials must be completed so long as there are 9 of the original 12 jurors remaining.

²⁵ See, for example, Blamey, R.K.; McCarthy P. & Smith, R.; *Citizen's Juries and Small-group Decision-making*; Canberra, 2000; ISSN Number 086 740 521X

²⁶ BBC News 26 April 08, http://news.bbc.co.uk/2/hi/uk_news/scotland/7368294.stm; Scottish Law Reporter 25 April 08, <http://scottishlaw.blogspot.com/2008/05/kenny-macaskill-reduction-of-scots-jury.html>; *The Modern Scottish Jury in Criminal Trials*, The Scottish Government, September 18, 2008.

²⁷ Scottish courts accept a vote of eight jurors sufficient for a guilty verdict. Fewer votes result in acquittal. However, there are two forms of acquittal: 'not guilty'; and 'not proven'. The version of acquittal recorded is decided by majority vote.

89. In contrast to the alternate and larger juror options, allowing trials to be completed with a reduced jury would not involve any extra administrative burden, court refitting, extra financial cost or concerns about deliberation. Rather, concerns about this option relate to the fear that smaller juries may affect the fairness and integrity of the jury system; in particular adversely impacting juries' representative nature, their impartiality and quality of decision-making.

Representativeness

90. A key characteristic of juries is that they are representative of the community²⁸. Further, the notion that defendants might expect to be 'tried by their peers' is a deeply rooted one. The representative nature of juries gives rise to some of their perceived strengths, including, for example, that having members of the public decide on the guilt of a defendant gives greater legitimacy to that decision and allows for greater public acceptance of it.

91. Reducing the size of a jury may impact on its representative character. However, before making assumptions about how this might occur, it is useful to consider the meaning of 'representativeness' in relation to juries a little further.

92. Few people would argue that any particular jury was 'representative' in the sense that it should exhibit all the typical characteristics of the community. If juries were representative of the community in New Zealand in this way then each jury of 12 would, for example, be composed of half men/half women, would include one person of Māori descent, five who had a post-school qualification, two people whose incomes were greater than \$50,000, one who was over 65 years of age, and so forth.²⁹ Also, few people would argue that any particular jury was composed of a defendant's peers in the sense that the individual jurors were broadly equal to the defendant in their abilities, qualifications, age, background, and social status, for example. Rather, what is important for a jury to be representative is that it is drawn from a population of people that is representative and that selection from this population is random.³⁰

93. These features, which ensure that juries are representative (random selection from a representative population) are present in New Zealand as the jury pool is drawn randomly from the electoral roll (although selection processes do introduce some minor biases³¹). Reducing the number of jurors from 12 to 11 or 10 (or lower) in some cases would not change this

²⁸ The Law Commission, (in *Juries in Criminal trials part One*, Preliminary Paper 32, 1998) identifies the core value underlying all the function of juries as being their democratic nature.

²⁹ Based on census data from 2006.

³⁰ Neil Vidmar & Regina A. Schellar, *Chapter 5 The Jury: Selecting Twelve Impartial Peers in Introduction to Psychology and Law Canadian Perspectives*, Regina A. Schellar & James R.P. Ogloff, Ed.s, University of Toronto Press, 2001

³¹ For example, not all people are registered to vote, certain individuals such as justice officials are not eligible to serve as jurors, some rural areas fall outside jury district boundaries, and the powers of the court to excuse individuals from jury service mean that some groups are more likely to be excused than others.

and hence, would not significantly alter the representative character of juries.

94. While smaller juries would not significantly change the representative nature of juries in the sense described above, reducing the number of a jury may nevertheless influence public perceptions of the representativeness of juries. (While it is true that smaller juries would not be less representative generally, it would also be true that there would be slightly less likelihood of a member of a minority group, for example, being a member of a smaller jury.) This risk may need consideration in weighing up the advantages and disadvantages of allowing for a smaller jury, although it is likely to affect only few cases.

Impartiality and Quality of Decision-Making

95. A second key characteristic of juries is that they should be impartial. That is, juries must be able to determine fact, apply the law (as directed by the Judge) and reach a verdict in an open-minded, objective and measured way, free from situations where the force of personality (and potential prejudices) of one or more jurors can dominate and prevent the expression of differing viewpoints by other members, and free from outside attempts to intimidate or influence. It is also assumed (thirdly) that they should arrive at the correct verdict.
96. It is difficult to assess the level of impartiality and quality of decision making of jurors (ie, how often they 'get it right'). However, one way of assessing this may be to look at the outcomes of jury trials. While not saying anything directly about the quality and impartiality of jury decisions, studies of the outcomes of jury trials might be used as an indicator as to whether jury size affects these characteristics.
97. Most of this research seems to compare juries of six with juries of 12, and the results seem to be equivocal. Some studies show no difference in outcomes of juries of six and 12, while others suggest that six person juries may be more likely to convict than 12 person juries. A study comparing the outcomes of juries of 8 and 12 shows no real difference in verdicts reached.³² It has not been possible to identify research that specifically deals with the difference between a jury of 10 and 12.
98. This work suggests that, whether or not juries are impartial and make good decisions (and this includes juries with a full complement of 12 jurors), it may not matter if jury numbers fall from 12 to 8 and, perhaps, even as low as 6, because the outcomes are likely to be the same.
99. Research into groups in general can also inform the question as to whether the quality of decision-making of juries (if not their impartiality) is impacted by their size. There is a significant amount of literature in this area and it clearly demonstrates that the size of a group does affect its function, raising the notion of an 'optimum' group (or potentially 'jury') size.

³² *Improving the Jury System - Reducing Jury Size*, Margo Hunter Public Law Research Institute California, 2004; *Does Jury Size Matter? A Review of the Literature*, Nicole L. Waters, Judicial Council of California, August 2004

100. The optimal size of a group is likely to depend on the context of the group and the particular function(s) assigned to it. However, it is often suggested that the 'ideal' size for a task-orientated group is between 6 and 10 members, and perhaps as low as five.³³
101. The literature notes that, while larger groups have advantages such as a greater diversity of members, greater breadth of skill or knowledge for the task, more resources and, perhaps, greater legitimacy, larger groups also face more problems (as identified in paragraph 86 above) including greater difficulties holding the group to task, higher levels of conflict, and lower levels of participation. Further, they may not arrive at significantly better decisions than smaller groups.³⁴
102. Also of interest in relation to juries is a finding that more than seven people in a group find it difficult to make a decision based on consensus. Instead, in groups larger than seven, the group is likely to be dominated by an individual whose views will prevail.³⁵ This may be an issue if it is assumed that juries should reach their verdict by consensus.
103. Research focussed specifically on juries has suggested that the optimal size of a jury, for the purpose of minimising errors (ie, either conviction of an innocent person or failure to convict a guilty person), may be between six and eight.³⁶
104. These numbers seem low to those accustomed to juries of 12 and the statistical models on which they are based are open to challenge because, like all models of their kind, they necessarily rely on assumptions that may or may not hold true. However, what is perhaps not open to challenge, is that, while juries smaller than 6 or 8 appear to deliver less accurate and less predictable results, various research also indicates diminishing returns on increased jury numbers and that juries of 12 may themselves be overly large. Certainly it is difficult to identify research that indicates particular risks to the impartiality and quality of decision-making of jurors of moderately reducing jury numbers from 12.

Bill of Rights Act Implications

105. As noted above, 12 is the traditional size of the jury dating from the middle ages. It is for this reason that *Butler and Butler* have stated in their commentary on the Bill of Rights Act³⁷ that because 12 was the required number for a jury when the Bill of Rights Act was passed the right to a trial

³³ See, for example, the article at <http://www.intuitior.com/statistics/SmallGroups.html>, which on the basis of a statistical analysis, concludes that the optimal size of a group is five.

³⁴ See, for example, Blamey, R.K.; McCarthy P. & Smith, R.; *Citizen's Juries and Small-group Decision-making*; Canberra, 2000; ISSN Number 086 740 521X

³⁵ Fay N., Garrod S.C. & Carletta J. (2000) *Group discussion as interactive dialogue or as serial monologue: The influence of group size* Psychological Science 11(6) pp 481-486

³⁶ For example, such research was used by the U.S. Supreme Court in reaching its decision in *Ballew v Georgia*, 435 U.S. 223 (1978).

³⁷ *The New Zealand Bill of Rights Act a commentary* Andrew Butler and Petra Butler LexisNexis 2005

by jury³⁸ should be regarded as the *right to trial by 12 jurors* with any departure from that number requiring justification.

106. A number of cases from superior courts in other jurisdictions on the other hand have concluded that the right to trial by jury does not mean that it must be *trial by 12 jurors*.³⁹ The important point for current purposes though is that it is generally agreed that a reduced size is readily justified “on the basis of the need to proceed with trial to avoid unnecessary inconvenience to the accused, the jury and witnesses, and to the waste of judicial and other resources”.⁴⁰ The High Court of Australia has stated that requiring a full complement of 12 jurors for the whole trial would place considerable burden not only on the accused, but also on witnesses and juries - they were concerned to ensure that the institution remained an efficient instrument in the administration of justice⁴¹.

Comment

107. The Law Commission said that the judicial decision to proceed with as few as 10 jurors does not in its view threaten the representative nature of the jury or any of the other goals of the jury selection process.⁴² However, it considered that if the panel was reduced to 6 or 4, the smaller panel would rob the accused of a judgement being passed on him or her by a wider range of randomly chosen jurors and that this would make securing of a guilty plea perhaps more likely. Further, on the above analysis, a proposal to allow judges greater flexibility to complete a trial with 10 jurors would not be out of step with other common law jurisdictions, and should not raise Bill of Rights Act concerns.

Matters of detail that would need to be determined for any proposed amendment

108. As already outlined, the Crimes Act does allow a limited ability to complete trials with smaller juries (the relevant provision is now contained in the Juries Act and will come into force on 26 December 2008). However, any amendment to widen the power would also necessarily involve consideration of the following factors:

- What the lowest permissible size of the jury should be;
- Whether it should be a judicial discretion for the trial to continue when jury numbers reach the lowest permissible size, or whether it should be mandatory for the trial to continue (as in the United Kingdom) when no good reason exists to dismiss the whole jury;
- Whether there should be statutory guidelines for the exercise of any discretion;

³⁸ Section 24(e) provides that everyone charged with an offence punishable by more than 3 months imprisonment (other than a military offence) shall have the benefit of a trial by jury.

³⁹ *Burch v Louisiana* 441 US 130 (1979), *Brownlee v The Queen* (2001) 75 ALJR 1180.

⁴⁰ *Butler and Butler* (as cited in note 24) at page 791

⁴¹ Their Honours Gaudron, Gummow and Hayne in their joint judgment in *Brownlee v The Queen* (see note 26) at page 1193 and 1194.

⁴² New Zealand Law Commission discussion paper- Juries in Criminal Trials Part one; at para 452.

- Whether there should be a presumption that the trial continue;
- What implications there are with regard to the recent amendments in the Juries Amendment Act 2008⁴³ that allow for majority verdicts, where all but one juror are agreed, and specifically whether smaller juries might be required to return unanimous verdicts.

109. Ostensibly the most obvious amendment would be to replace the 'exceptional circumstances' test with a less rigorous test. However, it is likely to be very difficult to craft a test that does not in some way cause unintended problems. Almost inevitably, it is likely that unanticipated situations will arise that fall outside the criteria and that unduly (and unintentionally) fetter the discretion of the court in this area.

110. There is, then, a risk that in attempting to widen the current provision to lower the threshold for a jury of less than 11, the policy objective of having significantly more trials completed may not be achieved (or at least may be too limited). We set out below a recommended amendment which is broader in approach than simply replacing the 'exceptional circumstances' test, but which we think is clearer and more likely to achieve the outcome desired. We are open to suggestions on how the test could be re-crafted, however.

The Status Quo

111. New Zealand may, of course, do nothing to change provisions relating to jury size. Change always involves cost (tangible and intangible) so the advantage of this option is that it eliminates the need to expend the effort that would be required to change the traditional approach to the jury system in New Zealand.

112. Conversely, this has to be weighed against the concerns, discussed above, that there are likely to be more mistrials in the future and that, while the scale of the problem may not be large, for those involved in affected cases the consequences can be very significant. This could undermine confidence in the system in the longer term.

113. Also, if the status quo is maintained, New Zealand remains out of step with all other comparable jurisdictions in this area of the law.

Recommended Option

114. Given current circumstances and the considerable work that is now being undertaken to ensure that the court system is as efficient as possible, it seems appropriate to have a broader review of the legislative setting.

⁴³ These amendments were contained in the Criminal Procedure Bill and will come into force by Order in Council. Current expectation is that this will be around June 2009.

115. The Ministry of Justice's initial preference to address the problem of mistrials due to falling jury numbers is to amend the Juries Act to provide more flexibility for Judges to continue a trial with 10 jurors when jury numbers fall after the start of a trial. On balance, the Ministry considers this to be the most sensible option for avoiding the need for re-trials where jury size is reduced during the course of a trial.
116. The option of providing for alternate jurors has more disadvantages than advantages overall and is not recommended. Both the United Kingdom and Canada have rejected this option, and when the Law Commission asked for submissions on this matter very few people supported it.
117. The *status quo* is an option if a consensus can not be reached that the problem is important enough to warrant amendment to the law. At present, our view is that an amendment can be justified even if it is only used occasionally. It is part of keeping our law practical and up to date for all foreseeable eventualities.
118. In terms of the form of the proposed amendment, as an initial position, it is recommended that trials should continue with 10 jurors as 10 jurors provides a sufficiently large body of people to adequately carry out the deliberation. This follows the English model, except that the English model allows jury numbers to fall to 9.
119. As with England, there should remain the possibility that the reason for discharging one (or more) juror(s) is a reason for discharging the whole jury – where, for instance, a juror has passed on significant information, which means the rest of the jurors will not be able to approach the trial impartially.
120. The ability to proceed with the trial with less than 10 jurors where the parties consent should also be retained.
121. Bearing in mind amendments in the Juries Amendment Act that allow for majority verdicts where all except one agree, it is not proposed that juries of 10 be required to return a unanimous verdict⁴⁴. The purpose of permitting majority verdicts is to ensure appropriate verdicts are not subverted by single rogue jurors, to reduce hung juries (and so reduce stress for all participants) and to reduce costs to society by reducing retrials. We consider these policy objectives just as relevant to 10 member juries as for larger juries, and that the agreement of 9 is sufficient in the circumstances prescribed for accepting majority verdicts.

Conclusion

122. Recent Supreme Court cases have highlighted a weakness in the legislative provisions relating to the ability of judges to complete a trial with reduced jury numbers. This has focussed attention on whether a better

⁴⁴ These amendments were contained in the Criminal Procedure Bill and will come into force by Order in Council. Current expectation is that this will be around June 2009.

approach could be adopted to enhance the efficiency and fairness of the court system.

123. There is currently considerable work being carried out on looking at how the court process can be simplified to maximise the efficiency of what is now an overburdened system. The problem of mistrials caused by falling jury numbers adds to the difficulties, and an appropriate solution could play its part in relieving pressure on the courts. However, it is difficult to estimate the scale of the problem involved and more information from the judiciary in particular would be useful in assessing how necessary an amendment to the law in this area is.

124. The recommended option would bring New Zealand into line with other similar jurisdictions and avoid unnecessary re-trials in future.

Appendix 1: Consultation Questions.

The following questions may help to facilitate your response to this document:

1. Is there a good case for amending the current law? Why (what is your experience of the problem?)/ Why not?
2. If you agree the law should be amended what option set out in the paper do you prefer?
3. Is there another option that has not been canvassed which you support?
4. If you support provision for alternate jurors what model do you prefer and why?
5. If you support more flexibility for judges to continue trials with a reduced jury what are your views on the minimum permitted size of the jury?
6. Should a reduced jury have to return a unanimous verdict?
7. Any other comments?

COMMENTS

Please provide comments on this paper by
5 February 2009 to:

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Appendix 2: Quantifying the problem of mistrials due to juror attrition.

Introduction

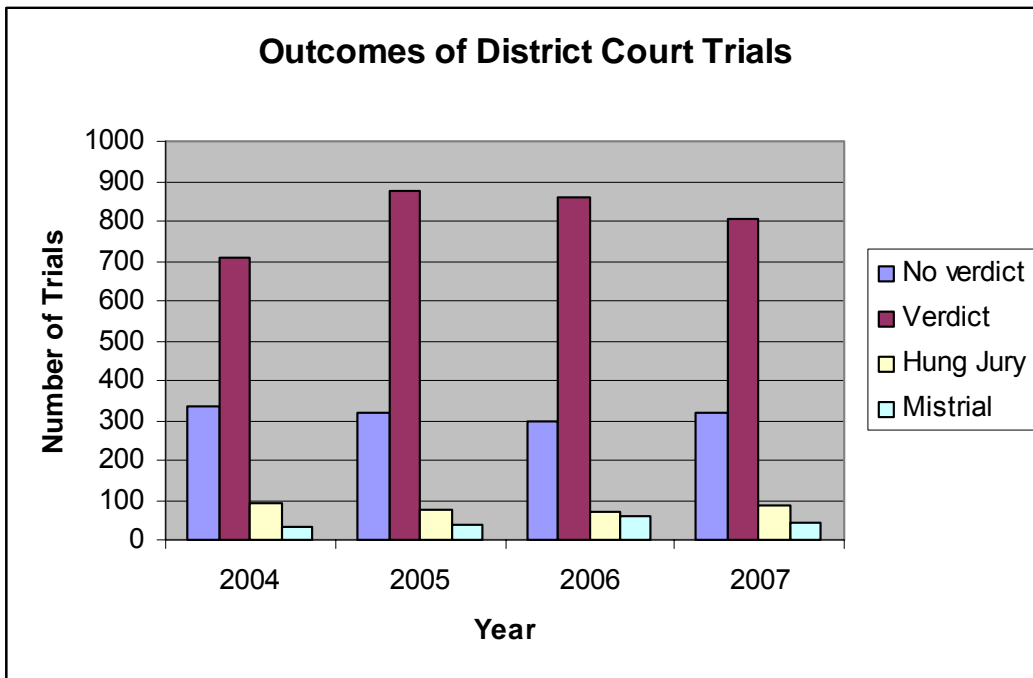
1. Two questions are important in terms of quantifying the problem of mistrials due to falling jury numbers. These questions are:
 - How many mistrials arise because of falling numbers; and
 - Is the number increasing, decreasing, or remaining stable?
2. An assessment of the current and future risks of juror attrition is also relevant. Many of the circumstances that lead to falling jury numbers are both difficult to define and difficult to measure. However, one factor, trial duration, can be measured and is useful as it can be assumed that the longer a trial the more likely it is that a mistrial due to juror attrition may be declared (although it has not been possible to identify data to support this assumption). Therefore, we might also ask:
 - How many long jury trials are there; and
 - Is the number of long trials increasing, decreasing, or remaining stable?
3. Only limited data is currently available to answer these questions, and more data is available for District Courts cases, than for High Court cases. Despite the limitations of the data, however, the information is interesting and illustrates that, in purely numerical terms, the size of the problem of mistrials due to falling jury numbers is currently relatively small, although it is likely to be increasing because of a trend towards more trials of longer duration.

Numbers of Mistrials

4. While courts collect information on the number of mistrials, they do not record the reasons for mistrials. It is therefore not possible to report with a high degree of specificity on the numbers of mistrials due to falling jury numbers.
5. Nevertheless, the graphs below illustrate the total number of mistrials recorded in the District Courts for the period 2004 to 2007, and in the High Court for the period 2003 to 2007. They show that each year in the District Courts a small (but significant) number of trials end in a mistrial (ranging from 30 to 57 trials; or 2.6% to 4.4% of all trials from 2004 to 2007). In the High Court the number of mistrials is also small (3 to 15 trials; or 1.3% to 5.4% of all trials from 2003 to 2007)
6. Anecdotally, the proportion of mistrials declared because of falling jury numbers is a small proportion of the total number of mistrials overall (no more than a few across the country each year). This view may be reflected in the data available from the District Courts (although not from the High Court), which shows that approximately 75% of all the mistrials recorded in the period 2004 to 2007 in the District Courts were declared in the first week of trial (i.e. before the risk of jury numbers falling was likely to have been significant).
7. The trend appears to be for an increasing number of mistrials in the District Courts and a decreasing number in the High Court. However, the numbers are relatively small and quite variable so that it is not possible to have a high degree of confidence in these trends. Also, as already noted, the reasons for mistrials are unknown and

the variability of the numbers is likely to be attributable to a variety of factors other than the issue of jury numbers.

Figure 1



Notes:

'No verdict' indicates that the trial was most likely ended as a result of a guilty plea being entered or charges being withdrawn (most often the former).

'Verdict' indicates that the trial ended with a verdict of 'guilty' or 'not guilty'

'Hung jury' indicates that the trial ended after the jury could not agree on a verdict (in which case a retrial was likely).

'Mistrial' indicates that the Judge declared a mistrial (in which case a retrial was likely).

Figure 2

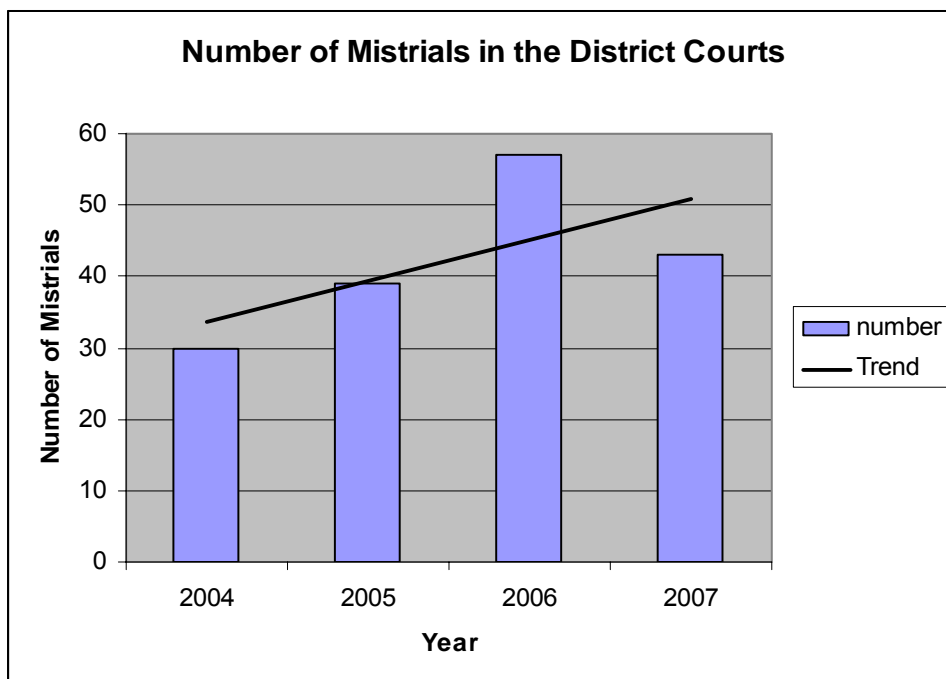


Figure 3

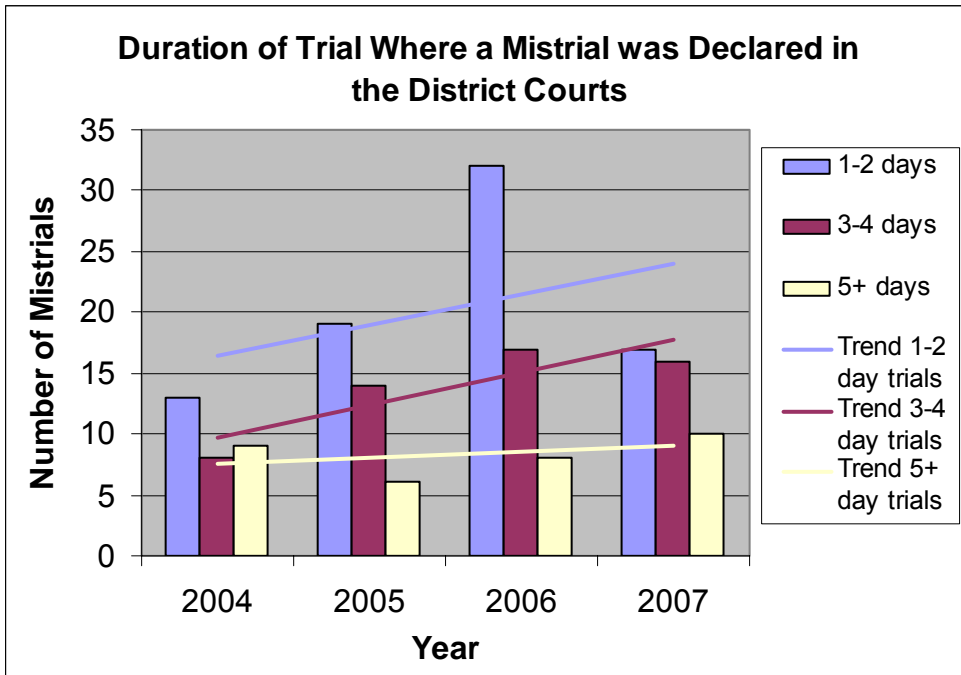
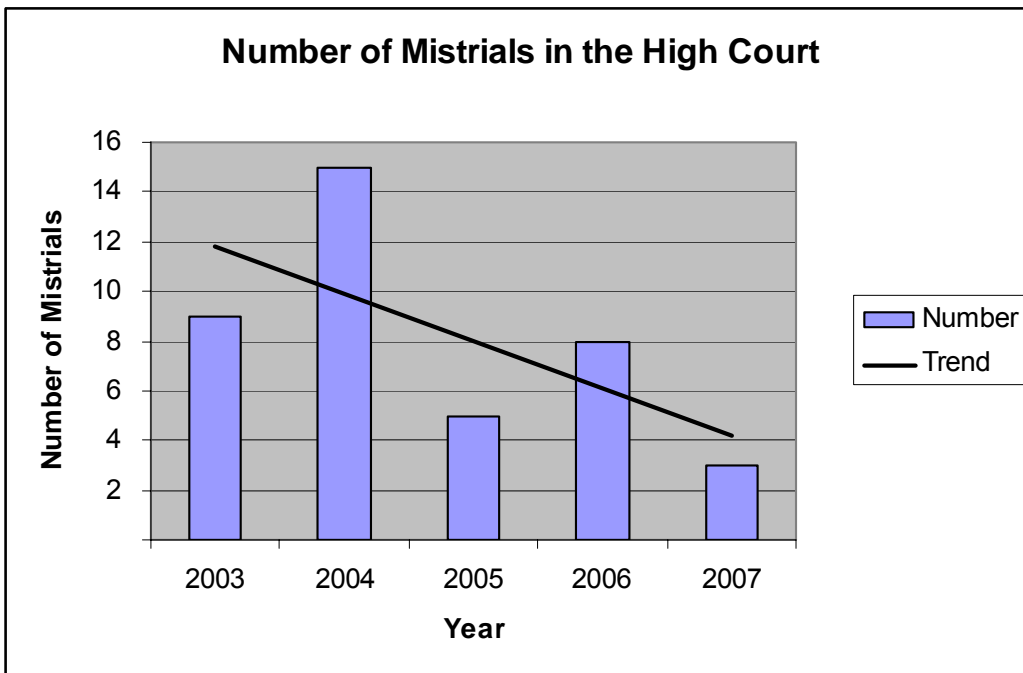


Figure 4



Trial Duration

8. The data that has been collected suggests that, since 2004, in the High Court the number of all trials one week (5 days) or longer is getting smaller while in the District Courts the number of trials one week or longer is increasing. When trial numbers are combined (High Court and District Court trials) the number of trials one week or longer appear relatively stable.
9. Looking in more detail at trials longer than four weeks (20 days), however, the pattern is different. There appears to be a trend for an increasing number of these very long trials in the District Courts, although this trend is not evident in the High Court where the numbers of trials longer than four weeks appears to be relatively stable. While some caution must be attached to these apparent trends as the number of trials longer than four weeks is relatively small (ranging from a total of just 6 across both High and District Courts jurisdictions in 2005, to 19 in 2007) they are indicative that the risk of falling jury numbers may be becoming greater, on the assumption that the longer the trial, the greater the risk that jurors will need to be discharged.

Different Jurisdictions, Different Trends

10. It is notable that the apparent trends relating to trial duration in the District Courts and High Courts are different. These differences may be, in part at least, a function of the high number of short duration methamphetamine trials that have had to be conducted in the High Court.
11. Recent amendments to the middle band now enable the High Court to refer the less serious of these types of cases to the District Courts for trial. This, in turn, will enable the High Court to retain more of the complex and longer middle band cases that may in the past have been referred to the District Courts for trial. The impact of this recent amendment might therefore be some change in the pattern of longer trials across the two jurisdictions (i.e. fewer long trials in the District Courts and more in the High Court).
12. The data is presented in the graphs below.

Figure 5

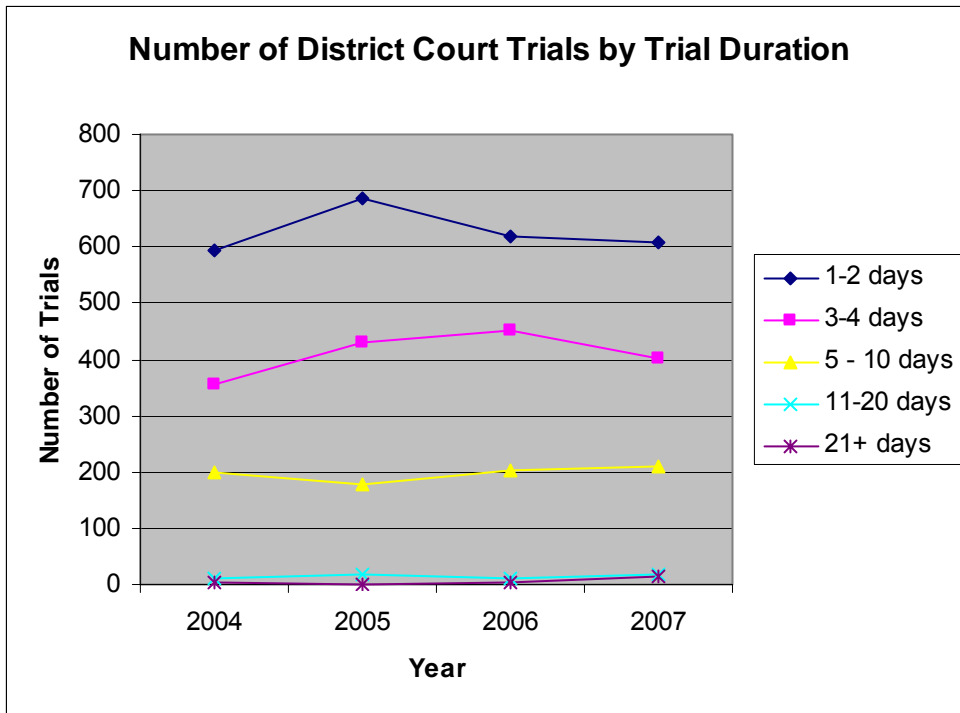


Figure 6

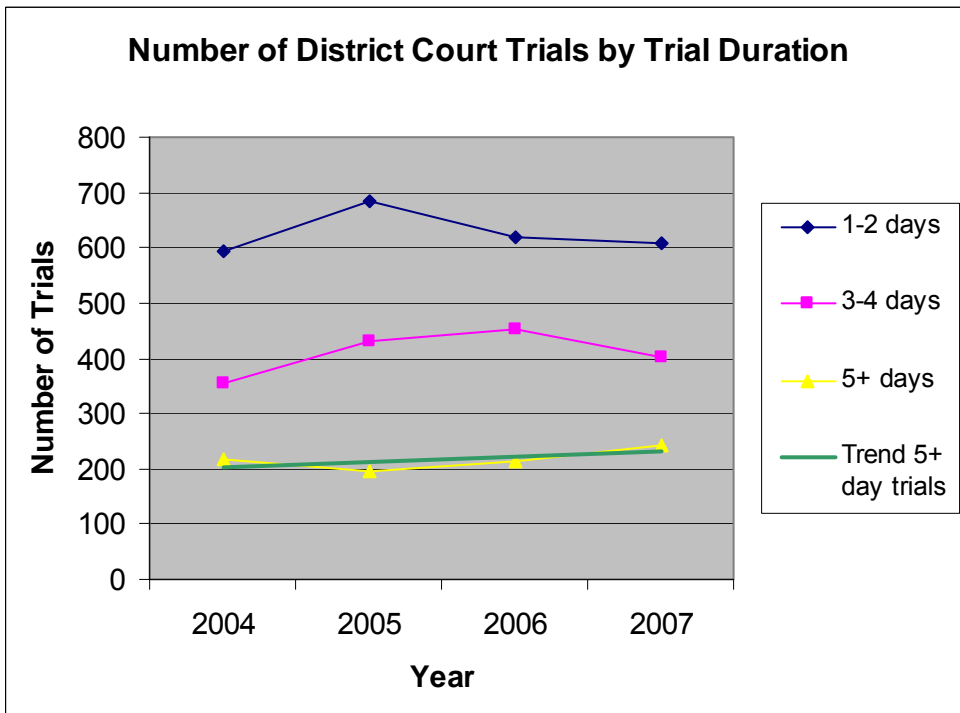


Figure 7

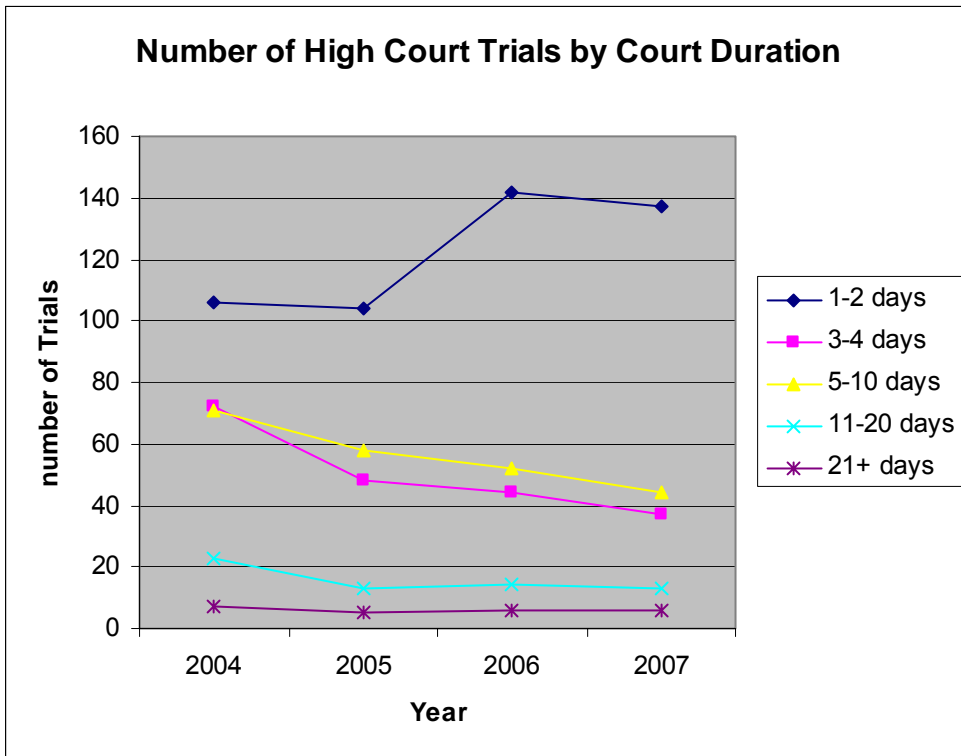


Figure 8

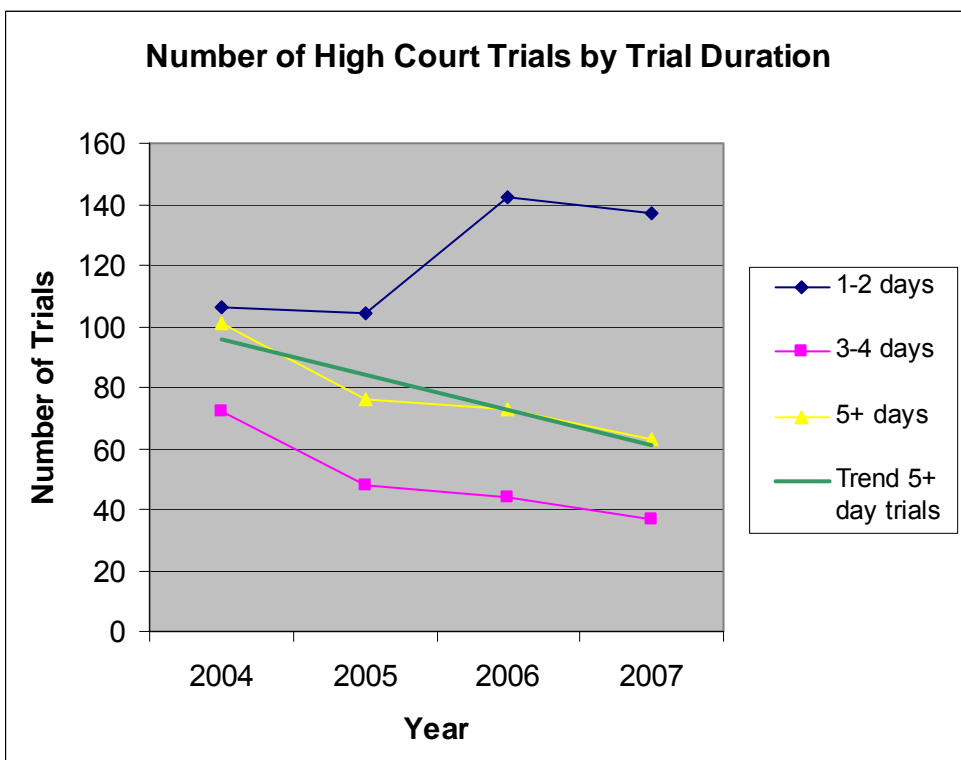


Figure 9

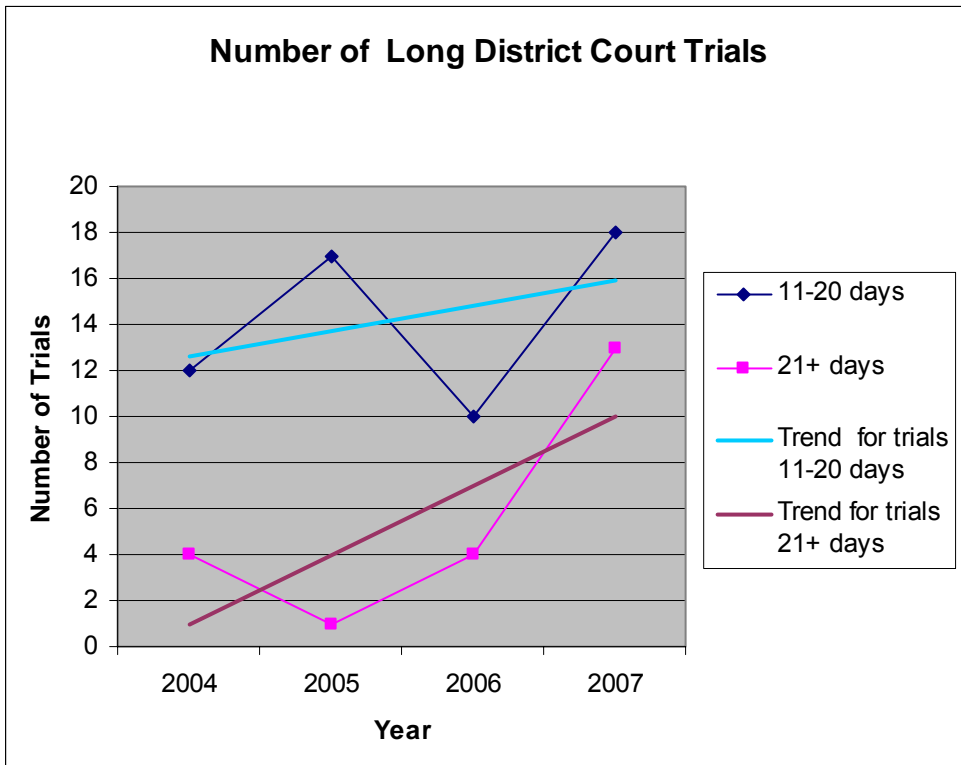


Figure 10

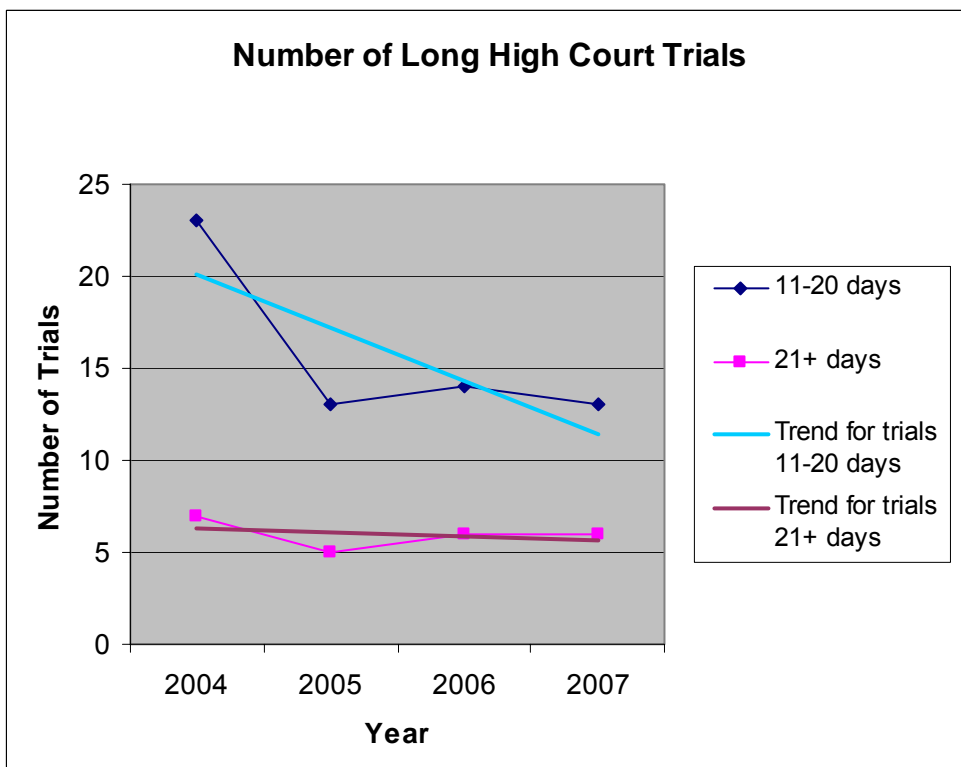


Figure 11

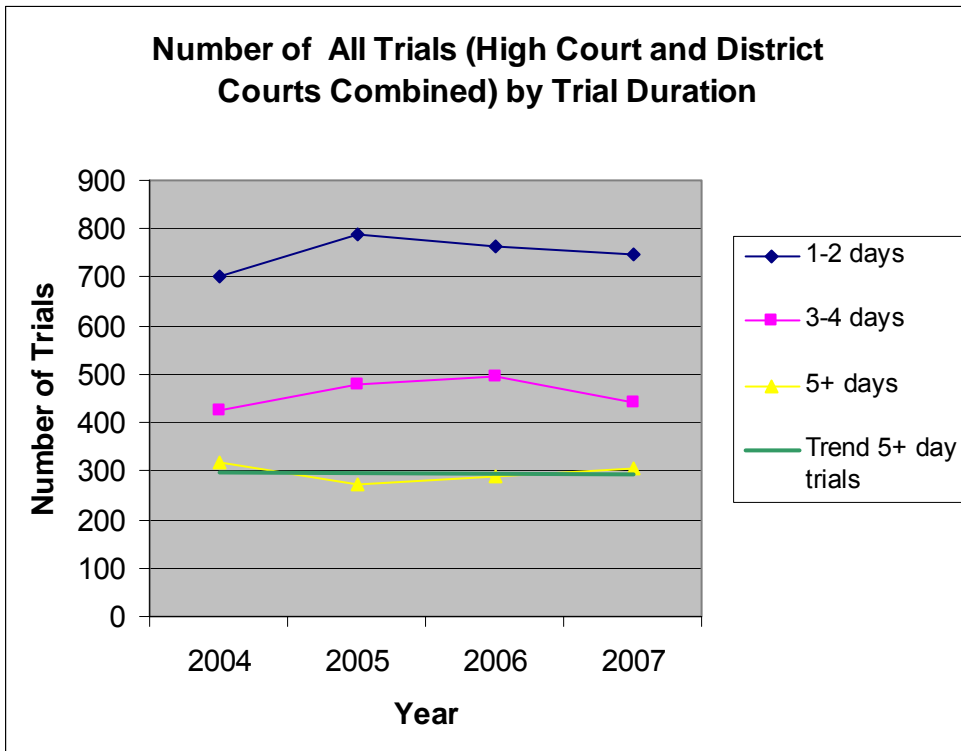
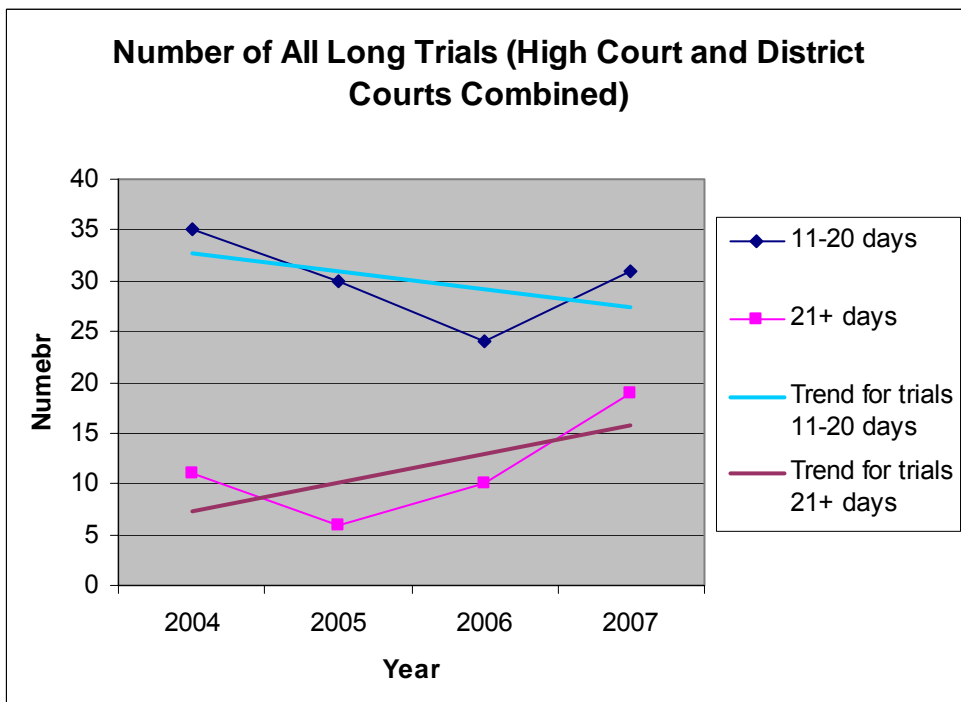


Figure 12



Appendix 3: Table comparing jury provisions for different jurisdictions.

Jurisdiction	Size of jury	Minimum jury number without consent	Minimum jury number with consent	Provision for alternate/ reserve jurors?	Number of alternate jurors	Model for alternate jurors*	Majority Verdicts?	
New Zealand	12	11(or 10 in 'exceptional circumstances')	No limit	No	N/A	N/A	Yes (one dissenting after deliberating 4 hrs - from Dec 2008)	
Australia	New South Wales	12	10 (or 8 in trials >2 months)	No limit	Yes	Up to 3 (defined circumstances)	2	Yes, if jury not less than 11 (one dissenting after deliberating 8 hrs)
	Victoria	12	10	10	Yes	Up to 3 (Judge's discretion)	2	Yes, with some exceptions (one dissenting after reasonable period of time)
	Queensland	12	10	10	Yes	Up to 3 (Judge's discretion)	1	No
	Western Australia	12	10	10	Yes	Up to 6 (Judge's discretion)	2	Yes, with some exceptions (decision of 10 accepted after deliberating 3 hrs)
	South Australia	12	10	10	Yes	Up to 3 (Judge's discretion)	2	Yes, with some exceptions (one dissenting after deliberating 4hrs)
	Tasmania	12	10	10	Yes	Up to 2 (Judge's discretion)	1	Yes (decision of 10 after 2 hrs deliberation or 6 hrs deliberation in some cases)
	Northern Territory	12	10	10	Yes	Up to 3 (Judge's discretion)	1	Yes (decision of 10 if jury consists of 11 or 12; decision of 9 if jury consists of 10)
	A.C.T.	12	10	10	Yes	Up to 5 (Judge's discretion)	2	No

Jurisdiction		Size of jury	Minimum jury number without consent	Minimum jury number with consent	Alternate/ reserve jurors?	Number of alternate jurors	Model for alternate jurors*	Majority Verdicts?
U.K.	England and Wales	12	9	9	No	N/A	N/A	Yes (in Crown Court or High Court - decision of 10 if jury consists of 11 or 12; decision of 9 if jury consists of 10. In County Court – 7. Only after reasonable time for deliberation)
	Scotland	15	12	12	No	N/A	N/A	Yes – simple majority but at least 8 for ‘guilty’ verdict
Canada		12	10	10	No ¹	N/A	N/A	No
U.S.A.	Federal Courts	12	11	No limit	Yes	Up to 6 (Judge’s discretion)	1	No
	State Courts: Misdemeanour - Felony -	Mostly 6 or 12 ² Mostly 12 ³	–	–	Yes in most	Varies	Varies	No (some exceptions)

*** Key to models for alternate jurors:**

‘Additional’ jurors are selected but these jurors are discharged just prior to final deliberations if the jury number remains greater than 12;

1: The ‘additional’ jurors are identified at the start of the trial.

2: If the jury is greater than 12 prior to final deliberations, ‘additional’ jurors are identified by ballot.

¹The Canadian Criminal Code has provision for alternate jurors (at section 631(2.1). However, if not used, alternate jurors must be discharged before any evidence is heard, meaning that they are not available if jurors are discharged after commencement of a trial (refer section 642.1).

² Most (37) states permit juries less than 12. Usually the number is 6, although in Utah juries of 4 are permitted in some cases, and in Ohio the number of jurors is 8.

³ Some examples of juries of 6 or 8 in a few states.