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REPRESENTATIVE CHARGES: OPTIONS AND ISSUES

Background

1. The Criminal Procedure (Simplification) Project is being jointly administered by the Ministry of Justice and the Law Commission. One of its key objectives is to reduce court delays. The other objective is to draft a new Criminal Procedure Act, to replace the Summary Proceedings Act 1957, and other procedural provisions in the Crimes and District Courts Acts.
2. In New Zealand, at present, the use of representative charges is envisaged in a small number of cases, in accordance with the following Practice Note issued in 2004: *Form of indictment – particulars of sexual offending* (21/11/04), and the criteria set out by the Supreme Court in *R v Qiu* [2008] 1 NZLR 1; (2007) 23 CRNZ 483 (SC).
3. There is anecdotal evidence that there has been an increase in recent years in the proportion of cases involving large numbers of multiple counts, and that this is contributing to delays and increases in the average length of trial. This is therefore an opportune time to consider the circumstances in which representative charges should be used in New Zealand (if at all), and whether provision for them should be included in the new Act.
4. This paper describes the issues and possible reform options. It is being distributed to key stakeholders, to facilitate consultation.

Current law and practice

5. Section 329(6) of the Crimes Act 1961 provides that, “[e]very count shall in general apply only to a single transaction”.
6. The Court of Appeal has consistently held that it is undesirable to include a large number of counts in an indictment. For example, in *R v Staples* 30/8/04, CA215/04, in which 425 charges had been laid, the Court of Appeal recorded its disapproval of including such a number of counts in any indictment, and noted that there was no reason in this case to depart from the conventional practice of limiting the indictment to “a moderate number of counts”. In *R v Tuckerman* 31/10/86, CA280/86, in which 55 charges were laid and severance of some was sought, the Court held that the proper course was for the Crown to select a number of counts “not exceeding 20” on which to proceed to trial. It would then be open to the Crown to consider whether another trial or trials were required to capture the alleged criminality.
7. There are two types of case in which these general rules cause difficulty:

- 7.1 **Insufficiency of evidence (type 1)** cases, which typically involve historical sexual offending, in which it is not possible (eg, because of the lapse of time and the frequency of alleged offending) to supply sufficient particulars to support a conventionally drafted indictment.
- 7.2 Cases such as *Staples* and *Tuckerman* with **numerous multiple charges (type 2)**, which are often repetitive fraud or theft cases, where particulars are available to support individual charges for each transaction as required by section 329(6), but the resulting number of charges would be “oppressive” (in the language of *Tuckerman*) or otherwise problematic. In our view, there are at least two reasons why proceeding with an indictment containing a very large number of counts might cause problems. First, as noted in *Staples*, the logistics for the jury in arriving at their verdict: specifically, the potential for complication and confusion as they attempt to deal individually with each count and its associated evidence, and the likelihood that they may resort to improperly “rubber stamping” verdicts if there appears to be a consistent pattern. Secondly, the implications for the length and complexity of the trial, which is potentially inimical to the administration of justice not only in the individual case, but other affected cases.
8. Representative charges offer an exception to the generally applicable rules, in an attempt to recognise these difficulties.
9. In *R v Qiu* [2008] 1 NZLR 1; (2007) 23 CRNZ 483 (SC) the Supreme Court held at para 8 that representative charges are appropriate in two situations (emphasis added):

Section 329(b) of the Crimes Act 1961 provides that every count shall in general apply only to a single transaction. However, it is not uncommon for a pattern of offending to be charged by one or more representative counts, *particularly when criminal acts of a similar character are alleged to have happened frequently and, for understandable reasons, a complainant is unable to distinguish between them in terms of their dates or details.* Further, it is appropriate and not unusual to charge as a single count a continuing course of conduct which it would be artificial to characterise as separate offences. But it is another thing to charge as a single count repetitive acts which can be distinguished from each other in a meaningful way. In such cases, it is appropriate to have distinguishing counts even if they relate to more than one act of a certain class or character. Separate counts facilitate fairness in the conduct of the trial by focusing attention on matters of fact and law which can and need to be distinguished for the purposes of different counts. In the event of conviction, they assist the sentencing judge by indicating the extent of culpability.

Type 1 Cases

10. The first category of case referred to by the Supreme Court is the insufficiency of evidence category that we have called “type 1”.

11. This category is covered by a Practice Note *Form of indictment – particulars of sexual offending* (21/11/2004), although the Court does not mention it, referring only to *R v Accused* (CA160/92) on which the Practice Note was based. In relevant part, the Practice Note addresses type 1 cases in relation to sexual offending by providing as follows:

Specimen charges

- (2) Where the prosecution evidence does not enable more particularity to be given than that the conduct alleged occurred a number of times over a period it is permissible to lay a specimen or representative charge. To obtain a conviction on such a count, the prosecution must prove that the accused committed at least one criminal act of the description alleged during the period stated: *R v Accused* (CA160/92) [1993] 1 NZLR 385; (1992) 10 CRNZ 152 (CA).
- (3) Section 329(6) Crimes Act 1961 provides that every count shall in general apply only to a single transaction. Notwithstanding the decision in *R v Accused* (CA160/92) the law remains that charges framed on the lines of “on diverse dates” are irregular: see 11(2) *Halsbury’s Laws of England* (4th ed), para 931; *R v Accused* (CA423/90) [1991] 3 NZLR 513 (CA), and *R v E T E* (1990) 6 CRNZ 176.
- (4) Specimen or representative charges should be clearly identified as such. A suitable formula is:
- “The Crown solicitor at charges, as a representative charge, [the accused] between [date] and [date] at. indecently assaulted the complainant.”
- Alternatively, the words “representative charge” may be shown at the end of the charge.
- The question of further particulars is dealt with below.

Particulars

- (5) Whether the count is of a representative nature, or relates to a single specific occasion, such further particulars as to place and circumstances as are available should be given: *R v Accused* (CA160/92). In relation to specific charges the Court said (at p 389):
- “If the evidence available to the Crown in the depositions or preliminary written statements enables a charge to be made with considerable specificity as to date or place — e.g. within a few days of the complainant’s 21st birthday in her bedroom in the family home in a certain town — the prosecution should word the count accordingly”.
- The same principle applies in regard to specimen charges, in respect of which the Court stated (also at p 389) that any further available descriptive particulars of the alleged offence should be added.
- (6) In the case of counts of unlawful sexual connection (s 128(5)) particulars should be given of the kind of sexual connection alleged, for example, “by penetrating her genitalia with his finger”, or “by connection between his mouth and her genitalia”.
- (7) Where specific criminal acts in the course of one episode are separately charged, alleging the same offence, sufficient particulars should be given to identify them: *R v Accused* 13/12/91, CA259/90.

Type 2 cases where there has been a continuing course of conduct

12. The second category is where there has been a “continuing course of conduct *which it would be artificial to characterise as separate offences*” (emphasis added).
13. It therefore appears that the Court does not envisage the use of representative charges in type 2 cases more generally – ie, solely in response to an unmanageable number of charges. It is also doubtful whether the Court would regard them as appropriate in the whole range of continuing course of conduct cases – ie, those in which charging separate offences would not necessarily be “artificial”, because the circumstances of the case do offer a meaningful opportunity to distinguish between the charges.
14. In our view, there is room for considerable debate about what constitutes a “continuing course of conduct” in the circumstances of any given case, and what the defining criteria are for artificiality and thus the appropriateness (or not) of using representative charges. There may be little room for argument in a case where an offender inflicts five blows on a single victim as part of an ongoing assault. But other cases are not so clearcut. For example, if an offender rampages down the main street with a softball bat and breaks five shop windows, there is on the one hand an argument to say that this was part and parcel of a continuing course of conduct, but on the other hand, five separate criminal acts against five different victims. If the offender throws a handful of stones and breaks five shop windows, is the answer different? Why? In England, for example, one of the defining criteria is that the alleged victim of the repetitive acts was the same, which would tend to suggest that a representative charge would not be available in this instance. But the five outcomes are triggered by a single instance of conduct so that it would seem artificial and indeed unfair to lay five separate charges.
15. There is also a lack of clarity in another respect. The Court in *Qiu* did not refer to *Staples*, in which the Court of Appeal talked of “limiting the indictment to a moderate number of counts, *even if by use of schedules*” (emphasis added).
16. We are aware that schedules are not infrequently used in the event of a guilty plea in such cases, for sentencing purposes. Their use in this context, we suggest, is essentially analogous to an agreed summary of facts; or alternatively, a basis for disputing facts in accordance with the Sentencing Act procedure. We do not regard this as akin to representative charging.
17. Schedules are also used in the summary jurisdiction, in accordance with provision made in certain statutes (eg, tax and accident compensation legislation) for an information to refer to an attached schedule listing all the individual charges. However, this is an administrative procedure to avoid the consequences for the court and others of dealing with hundreds of individual informations. It does not alter the fact that individual charges are

laid. (Representative charges are not available in the summary jurisdiction, which is mentioned below at paragraph 74.)

18. It seems that the Court of Appeal may have had something different in mind – that is, the use of schedules to (somehow) support an indictment of appropriate scope in cases where there would otherwise be multiplicity of charges. In the light of the Supreme Court decision in *Qiu*, this may no longer be a viable approach. The Court may possibly have had the former English practice of “specimen charges” in mind (see paragraph 26 below). However, *Staples* was decided in 2004. In 1998, in *Kidd* [1998] 1 WLR 604, the use of specimen charges was abolished in England, on the basis that it was contrary to fundamental principles.

Reasons for reviewing the use of representative charges in NZ

19. The present review of the use of representative charges in New Zealand is desirable for three reasons.
20. First, it is unsatisfactory that such a fundamental aspect of criminal process is addressed only by way of a Practice Note. In correspondence with the Ministry of Justice, the Chief Justice has identified a need for policy and legislative consideration of this issue. Furthermore, the Practice Note addresses only type 1 cases that involve sexual offending. It would be desirable to review the scope of the Practice Note and also clarify the law relating to type 2 cases.
21. Secondly, the Criminal Procedure (Simplification) Project has been established to undertake a comprehensive review of criminal procedure, and produce a Criminal Procedure Act that is, essentially, a Code. This makes it an opportune time to review the use of representative charges. If their continued use is supported, it would be logical to include provision for this in the Act.
22. Thirdly, the use of representative charges has attracted adverse comment. For example, on appeal from a single judge (Judge Madgwick) of the Federal Court of Australia, the Full Federal Court of Australia in *New Zealand v Moloney* [2006] FCAFC 143 reversed Judge Madgwick’s decision which declined the extradition of alleged offenders to New Zealand. The Full Federal Court concluded that while there are differences between Australian and New Zealand law in respect of how charges of a sexual nature are dealt with, the conclusion of Judge Madgwick that it would be unjust to return the respondents to New Zealand was unwarranted. Nevertheless, it is important to note the Full Federal Court’s reference to the cases of *S v Queen* (1989) 168 CLR 266 and *KBT v The Queen* (1997) 191 CLR 417 (paragraph 120) where the High Court of Australia rejected the use of representative charges on the ground that the lack of specificity with such charges could result in the undesirable situation where although the jury might not agree on a single particular instance alleged to have occurred, a conviction could result. The Full Federal Court also made reference to a previous decision of the Full Federal Court in *Bannister v New Zealand* (1999) 86 FCR 417 (paragraph 122) where the Court was

critical of the New Zealand decision of *R v Accused* (CA160/92), observing that the New Zealand Court of Appeal had given virtually no consideration to the concerns expressed by the majority in *S*, and had simply accepted the dissenting views that were consistent with longstanding New Zealand practice.

Issues of principle

23. The use of representative charges requires a balance to be struck between two issues of principle.
24. On one hand, it arguably does not serve the overall interests of justice if an accused can escape liability merely because the generally applicable criminal procedure is not sufficiently flexible to accommodate the totality of the offending, or to recognise the reality of the complainant's position as regards evidential recall.
25. On the other hand, the rights of due process require that an accused is offered adequate opportunity to respond to allegations, which in turn requires charges to be set out with sufficient particularity. They also require that an accused is sentenced only for offending of which he or she has been convicted. A representative charge is indicative of proof of only one instance of the alleged offending; beyond that, it is silent about the extent to which the jury considered guilt proved.

Approach in comparable jurisdictions

United Kingdom

26. Prior to *R v Canavan & Kidd* [1997] EWCA Crim 1773; [1998] 1 WLR 604 "specimen" or "sample" charges were utilised in England as follows (as described in *Kidd*):

For very many years prosecuting authorities have framed indictments including a small number of specimen or sample counts said to be representative of other criminal offences of a like kind committed by the defendant. This may, for example, be done where a defendant is said to have sexually abused a child victim frequently over a period, but the child is unable to particularise any specific occasions on which abuse occurred. Two or three counts, perhaps, may be included in the indictment; the prosecutor will make plain that there are specimen counts; and the victim will give evidence of the frequency with which the abuse occurred. The practice may also be adopted where, for example, a defendant is said to have obtained money by deception on numerous occasions: instead of burdening the indictment with numerous counts charging all the instances relied on, a few counts only may be included, and it will be made plain to the court and the jury that these are relied on as representative of a more extensive course of similar conduct. If, in a situation such as this, the jury convicts the defendant on one or more specimen counts, the practice of the court has been to pass a sentence which takes account not simply of the isolated instances specified in the counts but also of the conduct of which, on the evidence adduced by the prosecution, those counts are representative.

27. However, in *Kidd*, Lord Bingham LCJ held that this practice was contrary to fundamental principles; specifically, the accused should not be sentenced for offences that had not been the subject of a guilty verdict or plea.
28. Since *Kidd*, two lines of authority have developed at common law, described in *Barton v DPP* [2001] EWHC Admin 223 at paragraphs 5-6, that permit a single count to be charged in relation to aggregate activity even though the allegation is that the offending occurred on two or more occasions. *Barton* was a theft case, and both lines of authority referred to relate to the appropriation of property. The first is where there is “general deficiency”, where individual items cannot be traced in detail but where it is clear on the evidence that there has been a large amount of property taken. The second is cases that constitute a “continuous offence”, where the individual transactions are known but there are many transactions of the same type, frequently individually of small value, against the same victim, and it is convenient in order to reflect the overall criminality to put them together in one count.
29. We suggest that the “general deficiency” concept described in *Barton* is in essence the same as the concept addressed by the New Zealand Practice Note *Form of indictment – particulars of sexual offending* (21/11/2004). Both are referring to instances where it is possible to determine the overall nature of the criminality without being specific as to particular details on particular occasions, although *Barton* is doing so in the context of property offending while the Practice Note is doing so in the context of sexual offending.
30. The “continuous offence” concept, as described in *Barton*, appears somewhat looser than that envisaged by our Supreme Court. It is expressed in terms of “convenience”, whereas in *Qiu* the Supreme Court referred to “conduct which it would be artificial to characterise as separate offences”. However, the English Law Commission (in *The Effective Prosecution of Multiple Offending*, October 2002, Law Com No 277) has described that jurisdiction’s continuous offence concept as follows, and has said that this would be a straight codification of existing common law:
 - a. Two or more similar offences;
 - b. Connected by time and place of commission or common purpose (typically, the same act committed against the same victim), so that;
 - c. They can fairly be recognised as forming part of the same transaction or criminal enterprise; and
 - d. Having regard to the allegations made and the defence put forward that, save for particular marginal issues, it may fairly be said to be an “all or nothing” case.
31. Overall, therefore, the post-*Kidd* law and practice relating to representative charges in England is very similar to the position in New Zealand (although it should be reiterated that the “general deficiency” concept has been confined to property offences in England and Wales, but applied to sexual offences in New Zealand).

32. Since 2004, England has introduced a new procedure under sections 17 to 19 of the Domestic Violence, Crime and Victims Act 2004, for dealing with cases with multiple charges that do not meet the “continuous offence” requirements. However, this does not involve the use of representative charges; it is designed to avoid their use. It is described further below, under option 4.

Australia

33. The Australian approach is considerably more conservative. While Australian jurisdictions use sample counts in situations where guilt is acknowledged, the Australian High Court decisions of *S* and *KBT* discussed above have made it clear that Australian Courts reject the use of representative charges for the purposes of trial.

Reform options

Option 1: Discontinue all use of representative charges

Pros

34. The main argument in favour of discontinuing all use of representative charges has already been expressed above, in the description of issues of principle. That is, the rights of due process require that an accused is offered adequate opportunity to respond to allegations, which in turn requires charges to be set out with sufficient particularity. They also require that an accused is sentenced only for offending of which he or she has been convicted. Representative charges are arguably problematic in both respects.
35. Furthermore, in the event of a conviction, representative charges give inadequate guidance to the sentencing judge about the totality of offending as assessed by the finder of fact. In jury trial cases (and, perhaps, occasional cases in which the sentencing judge differs from the trial judge), this is a problem. The prosecution only has to establish one criminal act of the kind alleged within the alleged period to prove a representative charge. The sentencing judge is therefore left to assess whether in fact there was only one act, or a number.

Cons

36. The main argument against discontinuing all use of representative charges has again been expressed above. That is, it arguably does not serve the overall interests of justice if an accused can escape liability merely because the generally applicable criminal procedure is not sufficiently flexible to accommodate the totality of the offending, or recognise the reality of the complainant’s position as regards evidential recall.
37. There seems to be a degree of consensus both here and in England about the need for this kind of charge to be available in very limited circumstances.

38. It is debatable whether the wide discretion conferred on judges in representative charge cases is improper. To the extent that sections 24 and 25 of the New Zealand Bill of Rights Act 1990 might seem to apply, they are silent about what constitutes (for example) a jury trial. Does a jury trial on a less specific charge suffice for the purposes of section 24(e), when regard is had to the competing considerations? Beyond the Bill of Rights, sentencing judges are well-accustomed to finding facts extrinsic to the elements of the offence. Section 24 of the Sentencing Act 2002 establishes a process for dealing with this where the facts are disputed, in which the level and burden of proof are the same as at trial. Arguably, representative charge cases are no more than an extension of the same approach. They differ somewhat, in the sense that what needs to be assessed is the number of instances of offending, and thus the totality of the offending, rather than the circumstances of (for example) a murder. But as a practical matter, the nature of the exercise may not be very different. If it is not improper in one context, why is it in the other?

Option 2: Codify the existing New Zealand position

39. The option 2 proposal is to include provision in the Criminal Procedure Act for the use of representative charges, by codifying (as a minimum) the Practice Note and the *Qiu* criteria.
40. However, this is less simple than it sounds. There are a number of variations of approach that could, arguably, fall under the rubric of “codifying the existing position”. We would appreciate comment on these if option 2 is preferred.
41. In relation to type 1 (evidential insufficiency) cases, would provision for the use of representative charges be confined to sexual offending cases, or framed in terms of evidential insufficiency more generally, in the whole range of cases? If confined to sexual offending, why, in policy terms, should this be? Is the position essentially that, in such cases, we judge that an inability on the part of the complainant to provide details is both inevitable and understandable, and the associated risks are overridden by the need to bring alleged offenders to justice, whereas in any other circumstances the balance of considerations somehow changes?
42. In relation to type 2 cases, if our assessment of the unclear state of the current law is correct, it poses some difficulties for codification. What, exactly, would/should we be codifying?
43. The first and most obvious option is simply to codify the *Qiu* criteria of a continuing course of conduct that it would be artificial to characterise as separate offending. But, as may be apparent from the discussion above at para 14, we doubt that this is a bright line category of cases, and it is also a very narrow category of cases that has the potential to arbitrarily discriminate. There is also a question about what any legislative provision should say. Should it attempt to define “continuing course of conduct” or what is “artificial”? If so, how? If definition is either impossible or not attempted, what consequences would this have in application?

44. Alternatively, the *Qiu* criteria could be slightly expanded upon as proposed by the English Law Commission (above paragraph 30). This has the potential (for better or worse) to capture a broader range of continuing course of conduct cases than can presently be dealt with by way of representative charge in New Zealand. It may be that it increases the likelihood of capturing everything that can fairly and properly be described as a continuing course of conduct, without unduly and arbitrarily discriminating. (Although it may well be a stretch to describe this as “codifying the existing New Zealand position”, we have dealt with it here in an attempt to simplify the discussion.)

Pros

45. This approach would confirm and clarify current practice (or something arguably close to it), in an appropriate legislative vehicle, as opposed to case law and Practice Note.
46. It would mean that, in a very small number of cases, and only two quite distinct types of cases (continuing offending and evidential insufficiency – or further to the discussion above, perhaps even narrower subclasses of these, ie *Qiu* and historical sexual offending), the need for a flexible approach would be recognised as serving the overall interests of justice.
47. This would be to all intents and purposes consistent with the present English approach, and might well end up being narrower. Thus, while New Zealand would continue to take a somewhat more liberal approach than Australia, which has been the subject of criticism from Australian courts, the approach would not be aberrant by comparison with England.

Cons

48. Whether codification of current practice is considered appropriate depends to a large extent on the weight that is attributed to the arguments in principle against any use at all of representative charges.
49. There are a number of difficulties associated with this option, which have been addressed above (see paragraphs 40-44).

Option 3: An extension of Option 2, providing for the use of representative charges in a broader category of Type 2 cases

50. Option 3 expands upon option 2, by proposing that in addition to codification of the status quo (whatever that might mean), there should also be provision for the use of representative charges in at least some other type 2 (numerous multiple charge) cases, not just continuing course of conduct cases.
51. Because we suspect that there is not a bright line between cases that can fairly be described as a continuing course of conduct and other cases in which there are simply lots of charges, and because we have in fact mooted various approaches under the option of “codifying the status quo”, there may be no meaningful distinction between options 2 and 3. They are perhaps, instead, different points on a spectrum. However, one pragmatic

reason for addressing option 3 separately here is that, unlike option 2, there is no precedent for it.

Pros

52. The number and types of cases in which representative charges were employed would still be quite small and confined.
53. England now has greater flexibility to deal with cases of multiple offending, not confined to continuing course of conduct cases. But this is only by way of a special “sample count” trial procedure, not the use of representative charges: see sections 17 to 19 of the Domestic Violence, Crime and Victims Act 2004, and option 4 discussed below.

Cons

54. As above, the arguments in principle against any use at all of representative charges are again relevant here.
55. In addition, even if representative charges are justified in some circumstances, the arguments in favour of them become increasingly difficult to sustain if they are applied to charges that are quite distinct from each other in character, since it will not be possible for the judge to know the basis upon which the jury has convicted. While, as we have noted above (para 39), the judge may in those circumstances determine the facts by way of a disputed facts hearing, that is arguably problematic if it is for the purpose of determining the essential nature and scope of the criminality.
56. To our knowledge, there is no precedent for this broader approach, in the absence of a special trial procedure such as that now envisaged in England which we have proposed in option 4.

Option 4: Same as Option 2, with provision for the English “sample count” trial procedure in multiple offending cases

57. The English “sample count” trial procedure has been introduced for cases with multiple charges that do not meet the “continuous offence” requirements.
58. It is based on a recommendation of the English Law Commission (*The Effective Prosecution of Multiple Offending*, October 2002, Law Com No 277) but, as introduced, differs slightly from their proposal. The Law Commission proposed a two-stage trial, first by jury on the sample counts, then by judge alone in the event of any guilty verdicts, on scheduled offences linked to the guilty verdicts. Sections 17 to 19 of the Domestic Violence, Crime and Victims Act 2004 seem to envisage something slightly different, and to offer a preferable approach. There is no reference to a subsequent trial. The intention appears to be that there will be one trial, on one indictment containing all charges. For some counts (the “sample counts”), the jury will be the fact-finder, and for the others it will be the judge. The pre-requisites for this to occur include a pre-trial ruling that a trial by jury of the number of counts included in the indictment would be impracticable, an order would be in the interests of justice, and there is a

nexus between the sample counts and those to be dealt with by judge alone.

59. We have considered whether this approach might offer an alternative to the use of representative charges in the whole range of problematic cases. However, in our view, the approach is likely to be impracticable where there is insufficiency of evidence or a continuing course of offending, and is appropriately confined to the “other multiple offending” category for which the English have introduced it.

Pros

60. This approach would ensure that there is greater flexibility to deal with cases of multiple offending, whilst limiting the use of representative charges to the two categories where that practice is already well-established (and accepted?).
61. It might be considered a better approach than option 3, because if greater flexibility in multiple offending cases is desired, this method of achieving it would require the Crown to set out all of the alleged charges, and convictions would be entered on each. This level of specificity and transparency is not achieved with a representative charge.

Cons

62. The English procedure would add some complexity to New Zealand’s existing processes. It is a novel procedure.
63. If, in the light of section 24(e) of the New Zealand Bill of Rights Act 1990, the mode of trial (trial by jury) is considered to be a determining factor that gives cause for concern about the use of representative charges, it should be noted that the English procedure does not address this.
64. As well as complexity, the English procedure may give rise to a risk of apparently inconsistent verdicts. This is because of the nexus between the jury and judge-alone charges, arising from the requirement in section 17(4) that each count or group of counts to be tried with a jury can be regarded as a sample of counts to be tried without a jury. The jury trial counts are specimen charges. If the jury convicts, and the judge having heard the same evidence does not, there is a possible risk of perceptions of inconsistency.
65. It offers no benefit as regards the length and complexity of trials in multiple offending cases. Even though, if this procedure was introduced, the jury would be asked to reach a verdict on only a small selection of the charges, evidence would be called in relation to all charges.

Option 5: Either Option 2 or Option 3 (whichever is preferred), plus the use of special verdicts

66. A further option is the use of special verdicts, which is again based on a recommendation of the English Law Commission.

67. The essence of the proposal is that, in relation to offending that has been committed on a large number of occasions, usually against the same victim, in the same way and raising the same issues between prosecution and defence, the prosecution should lay a single indictment, with a schedule setting out the occasions on which it is alleged that the offending occurred. In order to convict, the jury would need to satisfy themselves of guilt in respect of one of the alleged occasions of offending. However, they would go on to further consider and inform the judge about any allegation (or group of allegations) where they were unable to agree that the allegation was proved beyond reasonable doubt. The judge would then ignore any such allegation in determining the appropriate sentence.

Pros

68. The rationale for proposing the special verdict procedure is essentially that it gives juries an opportunity to offer guidance to the sentencing judge about their view of the extent of criminality, by identifying instances of alleged offending that in the jury's view are unproven.

Cons

69. This recommendation, unlike the English Commission's other recommendation for a special "sample count" trial procedure outlined in option 4, has not to our knowledge been implemented.
70. The English Commission explicitly proceeds on the basis that a "compound allegation" (where the same conduct has occurred repeatedly on a series of separate occasions) is synonymous with a continuing course of offending as described in *Qiu*. However, we doubt the accuracy of this view; the two concepts are better regarded as different points on a continuum (as described above in paragraphs 14, 30, 51).
71. In continuing course of conduct cases in the *Qiu* sense, where it would be artificial to characterise the conduct as separate offences, it is hard to see how the proposed "schedule of allegations" approach could work, since the very essence of such cases is that the allegations cannot be sensibly separated. It is equally hard to see how it could apply to Type 1 cases involving insufficiency of evidence as to precise occasions when the offending occurred.
72. The English Commission appear to have had in mind a rather different category of case – those in which there are multiple and distinct offending occasions that are nevertheless sufficiently closely related that a guilty or not guilty verdict in relation to one allegation will generally mean a guilty or not guilty verdict in relation to all. Accordingly, they seem to have proceeded on the basis that the special verdict would come into play on only a small minority of occasions, and that a guilty verdict on the indictment (in the absence of a special verdict) would enable the judge to sentence on the basis that the offender was guilty of all the alleged offending.
73. We doubt that it can be lightly assumed, even in cases of closely related counts, that guilt on one charge generally means guilt on all charges. Even if the assumption were correct, juries may not necessarily take the same view. It is therefore difficult to see what the special verdict would achieve.

Even though not required to return a verdict on all schedule charges, the jury would still generally consider them all, so that it could identify and notify the judge about those on which it could not agree. There might be some small saving resulting from the fact that only one count would need to be put to the accused at the commencement of the trial, but that would arguably be substantially outweighed by the additional complexity of a special verdict procedure, particularly in terms of the judge's directions to the jury.

Option 6: The status quo

74. The final option is to make no change to the use of representative charges, and instead continue with the status quo.

Pros

75. Options 1–5 all present difficulties and their effects may be difficult to predict. Maintaining the status quo would leave the issues that surround the use of representative charges to be dealt with by the courts on a pragmatic basis.

Cons

76. Maintaining the status quo will perpetuate the difficulties and uncertainties with the use of representative charges that have been identified in this paper. There will continue to be inconsistencies in approach between regions. In addition, the apparent discrepancy between section 329(6) of the Crimes Act 1961 and case law and practice will remain.

The use of representative charges in the summary jurisdiction

77. Representative charges are not currently available in the summary jurisdiction. We would like to know whether they should be, and why.

Consultation process

78. We would be happy to receive comments on any or all aspects of this paper either in writing, or in person if that is more convenient.

Questions:

- a. How often are representative charges in fact laid in New Zealand? If the numbers are very small, what does this indicate about the appropriate way forward?
- b. How strictly is the *Tuckerman* rule applied and/or enforced? If representative charges are rarely used, is this in part because indictments containing somewhat more than 20 charges (although perhaps not as many as the 425 laid in *Staples*) are now regarded as acceptable?

- c. If longer indictments are in fact being employed, is this approach preferable to the use of representative charges, or might it instead be attributable to the limited availability of representative charges?
- d. Have we correctly assessed and described the current law in relation to type 2 cases, and is our impression of its overall lack of clarity accurate?
- e. Which reform option is preferred?

Option 1: discontinue all use of representative charges (see paragraphs 34-38)

Option 2: codify the existing New Zealand position (with several possible variations of approach: see paragraphs 39-49)

Option 3: an extension of Option 2, providing for the use of representative charges in a broader category of “numerous multiple charge” cases (see paragraphs 50-56)

Option 4: same as Option 2, with provision for the English “sample count” trial procedure in multiple offending cases (see paragraphs 57-65)

Option 5: Either Option 2 or Option 3 (whichever is preferred), plus the use of special verdicts (see paragraphs 66-73)

Option 6: The status quo (see paragraphs 74-76).

- f. If you prefer Option 3, what broader category would you envisage?
- g. Whichever reform option is preferred, should the same procedure be applicable to both summary and indictable jurisdictions?

COMMENTS

Please provide comments on this paper by
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