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31 October 2022

Section (9) (2) (a)

Our ref: OIA 100246

Tēnā koe Section (9) (2)

Official Information Act request: Full copy of report

Thank you for your email of 19 October 2022, following on from your previous Official Information Act 1982 (the Act) request (our reference 99080). You have now requested the following:

> *Can I please have an unredacted copy of "A Qualitative Insight into the Increase in Later Guilty Pleas and Election of Jury Trials" - without redactions*

As your original request was for research about later guilty pleas, we provided you with a copy of the report *A Qualitative Insight into the Increase in Later Guilty Pleas and Election of Jury Trials* with out-of-scope information removed. Attached to this letter is the report, which is released to you in full.

If you require any further information, please contact Ministry of Justice Media and Social Media Manager, Joe Locke, at media@justice.govt.nz.

If you are not satisfied with my response, you have the right to complain to the Ombudsman under section 28(3) of the Act. The Ombudsman may be contacted by email at info@ombudsman.parliament.nz or by phone 0800 802 602.

Nāku noa, nā

RParish

Rebecca Parish
Acting General Manager, Sector Insights

RESEARCH FIRST

Ministry of Justice

A QUALITATIVE INSIGHT INTO THE INCREASE IN LATER GUILTY PLEAS AND ELECTION OF JURY TRIALS

Research Report June 30th 2021

Research First Ltd

CONTENTS

1. KEY INSIGHTS

This document provides a qualitative insight into why participants in the justice system believe there are increases in **later guilty pleas** and the **election of jury trials**. It is based on four focus groups conducted in June 2021 at the Christchurch, Auckland, and Manukau District Courts.

The key insights from this research suggest that both phenomena are increasing because of a combination of the following factors:

- Later guilty pleas and electing jury trials are seen as the emerging 'default' setting in the system. Here 'default' is taken to mean a setting that takes effect if nothing else is specified by the decision makers[1]. This means the participants in these focus groups see making later guilty pleas and electing jury trials as a 'new normal', with considerable inertia seen to be driving the behaviours.
- The system encourages and rewards later guilty pleas and electing jury trials because the Criminal Procedure Act (2011) has not been implemented as intended, leading to a range of unintended consequences.
- These unintended consequences are magnified because of inconsistencies in how the justice system operates and a lack of clarity about who is responsible for monitoring the behaviour of the various actors.

[1] Following Thaler, R. H., & Sunstein, C. (2008). *Nudge: Improving decisions about health, wealth, and happiness.* New Haven, CT: Yale University Press.

2. CONTEXT

The Ministry of Justice is interested in better understanding why the proportion of people lodging **later guilty pleas** and the electing **jury trials** are increasing.

The Ministry knows that:

- Between 2016 and 2019 the likelihood of a later guilty plea increased by approximately 20 % (from 50% to 60%), and
- Between 2017 and 2020 the likelihood of a defendant of a category 3 case electing a jury trial increased by over 10 % (from 25% to 28% of cases). This increase has resulted in significantly more category 3 cases awaiting jury trials.

These increases undermine the efficiency of the justice system and run counter to the aims of the Criminal Procedure Act (2011). From the Ministry of Justice's data analysis alone it is not clear what is causing this increase.

As part of its research programme looking at these phenomena, in May 2021 the Ministry of Justice contracted Research First Ltd to conduct qualitative research with professionals in the Justice system to capture their perceptions about why these increases were happening.

The results from that qualitative research p oject are presented here.

3. RESEARCH APPROACH

3.1 RESEARCH DESIGN

The research reported here draws from four focus groups conducted in June 2021 at the Christchurch, Auckland, and Manukau District Courts. Two of these groups concentrated on the question of why the proportion of people making **later guilty pleas** is increasing; with the other two groups concentrating on understanding why more people are **electing trial by jury.**

The participants were recruited by the Ministry of Justice, who worked with the heads of the appropriate services in each location to identity suitably skilled and experienced candidates. This result in the following groups and participants:

Later Guilty Pleas Focus Groups by Location and Participants

Christchurch June 4th	**Manukau** June 14
2 X Public Defenders 1 X Crown Prosecutor 1 X NZ Police 2 x Court Registry Officers	2 X Police Prosecution Service 2 x Public Defenders 2 X Crown Prosecutors 2 X Court Registry Officers 1 X Private Defence Lawyer

Election of Jury Trials Focus Groups by Location and Participants

Christchurch June 8th	**Auckland** June 9th
2 X Public Defenders 1 X Crown Prosecutor 1 X Private Defence Lawyer 2 x Court Registry Officers[2]	2 X Police Prosecution Service 2 x Public Defenders 2 X Crown Prosecutors 1 X Court Registry Office

The groups were essentially structured around two questions:

1. **What** is happening (to drive an increase in later guilty pleas and in the election of jury trials)? And
2. **Why** is this happening?

These facilitated lunchtime discussions followed a 'root cause' analysis approach to identify 'the problem behind the problem'. A note-taker from

[2] The two Court Registry Officers were unable to attend the focus group and were interviewed together on June 15th.

Research First was present in each group, and a Ministry of Justice representative helped ensure that the conversations did not depart from what the data analysis had highlighted.

3.2 RESEARCH LIMITATIONS

Focus groups are a mature research technique and are commonly used to explore complex issues like these. The key to the focus group design is that it reflects how opinions and beliefs are created in the wider social world (i.e., through social interaction). The group setting engenders a spontaneity in the group discussion that reduces defence mechanisms and self-editing and encourages participants to share actual opinions.

At the same time social scientists talk about focus groups providing a way for them to 'get close to the data'. The method enables respondents to express their thoughts in their own words, using their own examples[3]. This added 'texture' to the data means qualitative research provides a powerful way to explore complex topics and 'drill down' into complex issues.

Equally, the semi-structured nature of the group allows the researcher to change course in response to novel or interesting suggestions from the participants. In this regard, they are much more accommodating towards novelty than conventional, quantitative research techniques (and, hence, provide the opportunity to uncover dimensions to the research question that would otherwise have been overlooked).

It is important to note that focus groups use a selection rather than a sampling design. That is, they are based on the deliberate selection of participants who typify (rather than represent) the population of interest. In other words, focus groups are not haphazard. The logic of focus groups builds on having a homogenous collection of participants precisely to start from their shared understandings. As a result, selecting the right participants and managing the process are crucial to the method's success[4].

However, qualitative research like this is fundamentally exploratory and illustrative. Its value is in the richness of the insights it provides the Ministry of Justice. But this richness is not the same as representativeness. The research does not claim to be a comprehensive overview of why the election of jury trials and later guilty pleas are increasing. Instead, it aims to provide an insight into how the participants in these four groups explained these phenomena.

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[3] Note that for this research no recordings were made, meaning the quotes used in this report come from notes taken in the groups. This means that the quotes used may not always precisely reflect what was said by the participants.

[4] Given the Ministry of Justice organised the recruitment of participants, it is possible that this skewed the mix of group participants. Also, private defence lawyers are under-represented in both sets of focus groups.

4. LATER GUILTY PLEAS

4.1 KEY INSIGHTS

The participants in this qualitative research believe that later guilty pleas are increasing because of a combination of the following factors:

1. There are **multiple incentives** to plead guilty later and few disincentives not to.
2. Pleading guilty later in the process is perceived to be an emerging **default setting** in the system (a 'new normal'), with considerable inertia driving the behaviour.
3. The system encourages and rewards later guilty pleas because the Criminal Procedure Act (2011) has not been **implemented as intended**, leading to some unintended consequences.
4. These unintended consequences are **magnified because of inconsistencies** in how the justice system operates and a lack of clarity about who is responsible for monitoring the behaviour of the various actors.

4.2 MULTIPLE INCENTIVES TO PLEAD GUILTY LATER

4.2.1 Little Reward for Ea ly Guilty Pleas

The participants in this research were clear that there are few rewards for early guilty pleas. In theory, under the Criminal Procedure Act (2011), the earlier a guilty plea is made, the greater the sentence reduction (or "discount") the offender receives. This reaches a maximum of a 25% discount for an early guilty plea. In practice these sentencing discounts are available at any stage in the proceedings (in some cases up to the day before the trial).

4.2.2 Later Guilty Pleas Reward Lawyers

The participants in these focus groups thought an important contributor to later guilty pleas was simply workload pressure. By entering a later guilty plea, defence lawyers are buying themselves time to deal with the case later.

One lawyer in Christchurch was clear that guilty pleas were happening later because of 'the pressure' lawyers were under due to caseloads. This lawyer said that both prosecutors and defence have too much work on and so it is convenient for both 'sides' to let things drift along. Another participant in the Christchurch simply noted:

> *There's pressure in the system.*

The lawyers in both Christchurch and Manukau were clear that in this regard the system encourages 'discounting the future' ('hyperbolic discounting') where it easier for participants to deal with the issue in future rather than immediately. The benefits of not doing something today are psychologically much greater than the costs they might have to pay in future.

Given their workloads, it makes sense for lawyers to focus on the urgent tasks in front of them and deal with the others when they need to. Pleading guilty later is one way they can do this. One participant in the Christchurch group observed:

> *Lawyers can get a long way through the process without doing any work.*

The paradox here is that by having trial dates a long way in the future lawyers think they will have lots of time to prepare their case but then "leave it to the last minute".

Later guilty pleas may also reward lawyers directly by paying them more when cases travel through the process. One non-lawyer in the Christchurch group said:

> *There is a huge financial motive not to deal with something straight away. If you deal with it quickly you might get $1000, but if you take it to trial you might get $5000.*

In the Manukau focus group, a lawyer made the same point:

> *Are there incentives for legal aid lawyers? YES.*

Another participant in that group said:

> *You get a big fee for filing a CMM if you're a private lawyer.*

4.2.3 Later Guilty Pleas Reward Offenders

Making a later guilty plea also rewards offenders. By waiting to plea, defendants get a chance to see how the case against them will unfold. There is also a chance that the case against them might not progress, with some offenders believing this likelihood increases the longer the case can be dragged out (because witnesses can't be found or no longer wish to testify etc.).

In this regard there is a measure of 'loss aversion' and 'optimism bias' baked into the system (i.e., a sense that acting too soon will lead to a loss, and a belief that things will be better in future)[5].

The Police, in particular, believed that later guilty pleas were a way offenders could 'play' the system. In the Christchurch group we heard the Police say:

> *If you're not guilty then you want to get it dealt with quickly. But if you' e guilty, you want to drag it out.*

The Police (in both groups) were also the participants most likely to talk about the impact of later guilty pleas on the victims and witnesses.

Another way that later guilty pleas reward some offenders is that the time served on remand is taken as time served at sentencing. In Christchurch there was a sense that time served on remand is much less aversive for offenders than the time they will spend in the general prison popula ion. One of the Christchurch participants was clear:

> *Remand in Christchurch is pretty cushy.*

This may be an unintended (and perverse) consequence of the new Christchurch Justice and Emergency Services Precinct which brings together all justice and emergency services in one purpose-built precinct in central Christchurch. In contrast, in Manukau and Auckland there was a clear message that time on remand was not at all 'cushy' and, in many ways, more aversive than being in the general prison population.

[5] Optimism bias is also known as 'unrealistic optimism' is a cognitive bias that things are more likely to turn out well (and less likely to turn out worse) for ourselves than for others. There is evidence that optimism bias is stronger for negative events ('the Valence Effect').

4.3 LATER GUILTY PLEAS ARE SEEN AS THE DEFAULT

4.3.1 Later Guilty Pleas are Perceived to be Normal

When asked to explain why later guilty pleas are a growing, many of the participants in these focus groups saw these pleas as an emerging 'new normal'. That is, later guilty pleas have become a default setting in many cases because lawyers do not have enough information early in the proceedings to make a sensible plea recommendation and because cases against clients may weaken over time. As a result, as one of the lawyers in the Manukau group put it:

> *You would never find a lawyer who would recommend* [pleading guilty early].

This emerging default approach is compounded by the workload pressure that the various actors in the justice system report operating under (see above).

Critically, this is happening even while those in the system recognise that the inefficiencies this creates in the system contribute to the problem of inertia. This means many in the focus groups were resigned to the fact that there will be a lack of preparation from those involved in handling a case in the early stages of proceedings. As one of the Manukau participants noted, this means that it's easy to become 'complacent' in the process with all its inefficiencies.

4.3.2 Many Actors in the System Know Nothing Else

This sense of resignation (or complacency) might be compounded by having a younger skew for PDS lawyers, meaning the current settings are the only ones they have experienced. There is clearly a great deal of 'inertia' in the current system, meaning it is easier for any one actor to keep doing what they do. Inertia leads to (but is distinct from) 'status quo' bias, which is the preference not to change course or act, but for things to stay as they are. When asked about the increase in later guilty pleas, one of these younger PDS lawyers in Manukau noted:

> *You can't really see it on a day-to-day basis… I don't notice it.*

4.4 THE SYSTEM ENCOURAGES LATER GUILTY PLEAS

4.4.1 Pleas Need to be Entered Early in the Process

The Criminal Procedure Act 2011 requires defendants to enter pleas at an early stage of proceedings. But the participants in this research were clear that this comes too early to make an informed choice. The plea needs to be entered where there is frequently insufficient information for lawyers to understand the merits of a case. Given this, pleading not guilty makes sense as it buys time to see how a case develops. As we saw in 4.2.1 there is also little or no reward for an early guilty plea (and little or no cost for changing to a guilty plea later in the proceedings). As one of the Manukau group participants put it:

> *It comes down to disclosure - that is usually the hold up.*

4.4.2 CMMs and CRHs are Not Working as Anticipated in the CPA

The Criminal Procedure Act 2011 builds in the use of Case Management Memoranda and Case Reviews. The Case Management Memorandum (CMM) is jointly filed by the defendant and the prosecutor and is supposed to tell the court all the details that relate to the case and what the issues will be at the trial. The Case Review Hearing (CRH) occurs before the case goes to trial to see if a resolution can be resolved without a trial.

The participants in this research suggest that neither are working the way the Act anticipated. This means there are few opportunities to short-circuit a later guilty plea. One of the participants in the Christchurch focus group said:

> *The CMM process is a rubber stamping process and the parties are not engaging in it … there are no conversations just an email to sign.*

Another participant called CRHs:

> *A waste of time for everyone.*

In both groups the participants talked about how the CPA was supposed to work and what was 'meant' to happen. In reality, few were engaging in the CMM or CRH in this way because there were neither the incentives for the actors to engage in the process nor any disadvantages for the defendants. Instead focus group participants in both locations told us that it was difficult to engage in discussion at any step in the process.

4.4.3 Delays Fuel Further Delays

The inertia in the system also creates a chain reaction because the longer someone is on bail awaiting trial, the more opportunity there is for them to breach their bail conditions (adding to the amount of work needed for each case). But delays are caused because the experts needed for some cases are also operating under considerable pressure. As one of the Manukau participants put it:

> *All the experts are backlogged too* [meaning] *delays in every area that contributes.*

This means that evidence like psychological reports are coming in later.

Some of the focus groups expressed frustration that the churn in the system added to their workloads, leading to people holding onto files much longer and unable to close existing files. One of the lawyers in the Manuka group thought this was all a predictable result of the CPA. S/he said:

> *The general drafting of the CPA had all of these consequences … it's process driven and it's not working.*

4.4.4 Police Prosecution Behaviour May Have Changed

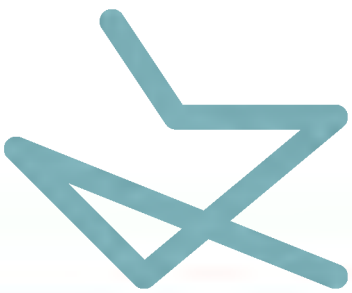
Many of the participants in these two focus groups saw later guilty pleas as a natural response to how the Police Prosecution Service manages it files. This goes to both the perception that (i) Police overcharge (and particularly in domestic violence and sex crime cases), and (ii) the lack of an 'officer in charge' of a file means there is no one for the lawyer to talk to about the file before a plea is entered.

One of the participants in Manukau thought the way the Police was managing their files was a result of them being under-resourced, noting:

> *The Police being understaffed is a massive issue.*

4.4.5 No-one is Monitoring Behaviour

There was a strong sense in both Christchurch and Manukau that there is no real accountability in the system. This means that poor behaviour isn't being policed, which in turn leads to the normalisation of deviance (as the social expectations and social norm compliance change). Some participants believed that only the judiciary had the power to enforce consistent standards and clear expectations (while other participants thought that the judges were a major contributor to the inconsistent application of the CPA).



4.5 THE SYSTEM OPERATES INCONSISTENTLY

4.5.1 Inconsistency in Judicial Operation

In this research there was a common perception that judges are inconsistent in the behaviour they allow from lawyers about case filing and the effort they put into resolution. This means – while there are processes in place to try to create early resolutions – these are not being consistently enforced and there is no shared understanding of what 'acceptable practice' should look like.

In those rare cases when an attempt is made to discipline those who behave poorly, participants in the focus group felt these either fail or are seen to be pursued with little enthusiasm. This is a serious risk given the inertia in the system because it may lead to what is known as 'ethical drift'. Ethical drift is the gradual erosion of standards within an organisation or setting but it is called 'drift' to capture the idea that it often happens without those it affects realising they have changed their notions of acceptable behaviour.

One of the Manukau participants said:

> *There is inconsistency in every court.*

4.5.2 Inconsistency in Policing Practice

There is frustration that Police procedures change from district to district. One of the Manukau participants said:

> *Every district commander decides how their resource and disclosure is used.*

And another participant in the same group noted:

> *It creates inconsistency in how disclosure is done*

4.5.3 Inconsistency in Location

This research was conducted in Christchurch and Manukau and revealed that there are some notable differences between the two locations. These have been discussed throughout this section.

4.6 WHY ARE LATER GUILTY PLEAS MORE COMMON?

As we have seen, the participants in these focus groups believe later guilty pleas are happening because of a combination of workload pressures, because the CPA has not been implemented as intended and because other actors or organisations are creating the inefficiencies in the system. When asked why

they think later guilty pleas are increasing, two common explanations are provided:

4.6.1 It's Taken a While to Learn how to "Game" the CPA

The first explanation is that it has taken those in the system a while to understand how to" work the system". As one of the participants said:

> *It might just be years of people trying to figure out how to exploit it and figuring it out.*

4.6.2 Cases are Getting More Complex

The second common explanation is that cases have become more complex over time, with different kinds of evidence now commonly used (such as CCTV footage, DNA, phone records, cyber records). This means the files just need more time to process. A participant in the Christchurch group said:

> *Files are more complex than they were years ago.*

And one in the Manukau group added:

> *TELCO and CCTV is always time consuming, they're always very delayed.*

But the last word on later guilty pleas goes to a prosecutor in the Christchurch group who said:

> *From our perspective it doesn t matter **when** they plead guilty … as long as we get the plea*

5. ELECTION OF JURY TRIALS

5.1 KEY INSIGHTS

The participants in this qualitative research believe that the election of jury trials is increasing because of a combination of the following factors:

1. There are **multiple incentives** to elect jury trials and **few disincentives** not to.
2. Electing jury trials is perceived to be an emerging **default setting** in the system (a 'new normal'), with considerable inertia driving the behaviour.
3. The system encourages and rewards the election of jury because the Criminal Procedure Act (2011) has not been **implemented as intended**, leading to some unintended consequences.
4. These unintended consequences are magnified because of **inconsistencies in how the justice system operates** and a lack of clarity about who is responsible for monitoring the behaviour of the various actors.

5.2 MULTIPLE INCENTIVES TO ELECT JURY TRIALS

5.2.1 Election Comes Too Early to Make an Informed Choice

The election of a jury t ial occurs at an early stage of proceedings where there is frequently insufficient information for lawyers to understand the merits of a case. Given this, electing a jury trial instead of a Judge Alone Trial (JAT) provides the Defence more time to see how a case will develop. As one of the Auckland group participants put it:

> *It's often in the best interest of the defendant to delay.*

And in Christchurch one participant said:

> *You are put in a position to advise to go before a judge or jury before you have all the information.*

5.2.2 There is No Cost for Electing a Jury Trial

Not choosing a JAT at the early point in the proceedings is incentivised because there is **no cost** for electing a jury trial. That is, in practice it is easy to move from a jury trial to a JAT while it is much more difficult to move the other way. The participants in both focus groups noted that it was much easier to get leave granted to withdraw the election of a jury trial. One of the Christchurch participants said:

> *You can go to judge alone after you have picked jury but not vice versa.*

This means that by electing a jury trial early in the proceedings, what lawyers are really doing is not choosing a JAT early in the process. This is an important distinction – it's not that lawyers are choosing jury trial so much as not want ng to choose a JAT at the point in the proceedings when the election needs to be made. Electing a jury trial (that can then be subsequently changed to a JAT simple gives lawyers more time to see how a case develops. In Auckland one of the participants said:

> *You choose jury because you can't hurt yourself.*

For this reason, in both groups participants believed that the volume of jury trial elections could be reduced if the election could be made later in the process when there was more information available about the merits of the cases.

5.2.3 Some Cases and Some Defendants Work Better in front of Juries

Defence lawyers (both private and those in the Public Defence Service) are also clear that there are many types of cases that work better in front of juries than judges. This is particularly so for cases of 'minor domestic violence' or 'sex crimes' where the question of intent is difficult to establish. In these cases the Police often default to the most serious charge possible (see below) and, as these are now Category 3 offences, they can be defended in front of a jury. In these cases in particular, lawyers think their clients will 'get a better deal' from a jury. One lawyer in Christchurch said:

> *You'd be mad to go JAT on sex cases.*

Similarly, some clients simply do not trust that they will get a fair hearing from a judge because of their previous offending, or the way they look, or their affiliations. One lawyer in Christchurch said:

> *A lot of clients don't trust judges.*

Another added:

> [Some clients] *say to us 'I don't want a judge alone trial because all the judges in Christchurch know me and they all hate me'*

In Auckland the participants were clear that many clients would rather take their chances with a jury. As one of the group participants put it:

> *They want to tell their story to the members of the public and not the judge.*

5.2.4 Lawyers are Rewarded for Jury Trials

It is possible that lawyers are rewarded in a number of ways for electing a jury trial. One reward is that they have more opportunity to do their job. That is, by electing a jury trial there are often more opportunities to talk to a judge about a case – meaning more opportunities to negotiate and reach a resolution. One lawyer in Christchurch noted:

> *You can go all the way to a JAT without appearing in court.*

It also gives lawyers a sense that they have more control over the process because they get more chance to understand a case before they need to argue it. One said;

> [With a jury trial there is] *a lot more opportunity for resolution if you select jury.*

Another lawyer, in Auckland, noted that jury trials provide more opportunity for them to demonstrate the innocence of clients arguing:

> *Juries are the best defence of innocence we have.*

But lawyers are rewarded for electing jury trials in more prosaic ways too. It is likely that many lawyers simply find jury trials more interesting than JATs. And legal aid lawyers may make more money from jury trials than JATs (although one lawyer in Auckland disputed this as a motivation[6]). One Auckland lawyer said:

> *Most criminal defense lawyers love doing jury trials, they are a lot of fun.*

Junior lawyers may be motivated to elect jury trials because they need the experience to progress through their Prosecutor Classification levels. As someone in Christchurch put it:

> *Junior lawyers need jury trial experience.*

An Auckland participant added:

> *Since the arrival of PDS* [there has been] *a lot of junior staff coming through and doing jury trials.*

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[6] The suggestion was that this could be tested by a comparison of jury trial elections by salaried and unsalaried (i.e. legal aid) lawyers.

5.3 JURY TRIALS ARE SEEN AS THE DEFAULT

5.3.1 Jury Trials are perceived as the Default Choice

The participants in these focus groups felt that electing a jury trial had become the new default. One of the Auckland participants declared:

> *The culture at the PDS is to go jury unless there is a good reason not to.*

Another said:

> *The attitude of the bar in Auckland is elect jury.*

In both groups the lawyers present were clear that there was only a small subset of cases where they would recommend a JAT. One said:

> *I'd recommend a JAT in very few cases … mostly for clients who are anxious about a public hearing or where the offending is at a very low level.*

Another added:

> *Or if there is a big hole in the evidence you might want to get the case in front of a judge quickly.*

The PDS participants tended to be young enough not to remember how the system operated previously and so thought the current model was 'how things always worked'.

However, it is worth noting that data analysis shows that in 2020 only 28% of defendants elected jury trial. While this is a significant increase from 25% in 2017 it does mean that the majority still elect Judge Alone Trial.

5.3.2 Inertia in the System Encourages Jury Trials

The participants in these focus groups thought an important contributor to the election of jury trials was simply workload pressure. By electing a jury trial (or by entering a later guilty plea), they are buying themselves time to deal with the case later. In this regard the system encourages 'discounting the future' ('hyperbolic discounting') where it easier for participants to deal with the issue in future rather than immediately. The benefits of not doing something today are psychologically much greater than the costs they might have to pay in future.

This inertia in the system also creates a domino effect because the longer someone is on bail awaiting trial, the more opportunity there is for them to breach their bail conditions.

This inertia is multiplied because in both Christchurch and Auckland there have been dedicated efforts to clear the backlog of jury trials created by COVID. This

means it is easier to get a jury trial in both places than it is to get a JAT. One Auckland lawyer said:

> *JATs used to be faster but not anymore.*

5.4 THE SYSTEM ENCOURAGES ELECTING JURY TRIALS

5.4.1 Jury Trials Can Be a Safe Choice

As we have seen (above) the election of a jury trial is made early in the process when there is often little information available to determine the merits of the case. As one lawyer in Christchurch said:

> *The election is usually at second hearing and we might only have a summary of facts.*

For this reason, many of the participants in this research thought the way to reduce jury trial elections is to make that election later in the process when more is known about the case:

> *If we could defer the election that would be helpful but the CPA doesn't allow it.*

5.4.2 Jury Trials Enable More Judicial Engagement

We have also seen (above) that by electing a jury trial, lawyers often have more opportunities to talk to a judge about a case than they would in a JAT (meaning more opportunities to negotiate and reach a resolution). They note that they are (paradoxically) likely to get **more** judicial intervention in a jury trial than a JAT because there are more opportunities for call over. One of the Christchurch participants said:

> *Judges can shake up a file, have a robust conversation, give a realistic sentence indication* [and help] *move a file to resolution.*

The lawyers explained that this occurs because in the jury environment the judges 'take ownership' of a file and are hence better informed about the cases.

In Christchurch there was also a sense that the judges who sit on jury trials are more experienced than those who preside over JATs. This meant that some lawyers believe jury trials deliver fairer outcomes and more consistent sentencing. In Auckland the lawyers did not think the problem was between jury and JAT judges but about the inconsistency among judges in general. As one lawyer put it:

> *There is just an unevenness amongst judges… a jury is more consistent.*

Jury trials are also seen as the smart choice when a guilty plea is made. This was described in the following way:

> *You're also more likely to get credit for a guilty plea in the jury system than the JAT because with a JAT the first plea is in the hearing.*

5.4.3 CMMs and CRHs are Not Working as Anticipated in the CPA

As noted in the previous section about later guilty pleas (see 4.4.2) Case Management Memoranda and Case Review Hearings are not working as the Criminal Procedure Act 2011 anticipated. This means there are few opportunities to short-circuit a later guilty plea. One of the participants in the Christchurch focus group said:

> *The CMM process is a rubber stamping process and the parties are not engaging in it … there are no conversations just an email to sign.*

In both groups the participants talked about how few were engaging in the CMM or CRH in this way because there were neither the incentives for the actors to engage in the process nor any disadvantages for the defendants not to.

5.4.4 Police Prosecution Behaviour May Have Changed

Another factor driving election of jury trials is that it provides a response to how the Police Prosecution Service manages it files. First, there is a sense that the Police are overcharging. In particular, in cases of domestic violence where there is little evidence, the Police are perceived to be choosing the most serious charge they can. Because these often come with the possibility of jail time and not home detention, people are choosing not to plead guilty and to take their chances with the Crown. One lawyer noted:

> *You can have a more reasoned conversation with the Crown than the Police… that's often enough reason to send it to the Crown.*

Others noted that there are no incentives in the system for the Police Prosecutors to resolve cases early. In Christchurch one lawyer explained:

> *Previously the Police wouldn't charge for really low-level offences* [and] *would seek other resolutions, but now that's all going through the courts*[7]

Another said:

> *Due to new domestic violence laws, minor domestic violence,* [the Police] *are charging the higher charges. Defendants are then making*

[7] The Police, on the other hand, see this as part of a broader societal shift in how Police and the Courts are viewed by many offenders. See 5.6.4, below.

the decision to go before a jury as before they had a chance to get home detention.

Equally, the way the Police manage case files is seen as encouraging the election of jury trials. Today there is no notion of an 'office in charge' of a file. This means there is no one for the lawyer to talk to about the file before a plea is entered (or a trial election made). Lawyers report not being able to find someone to talk to about the case early.

5.5 THE SYSTEM OPERATES INCONSISTENTLY

5.5.1 Inconsistency in Judicial Performance

A common theme in this research is that the problems outlined above are magnified because of inconsistencies in how the justice system operates and a lack of clarity about who is responsible for monitoring the behaviour of the various actors. We have seen above that lawyers believe they get more consistent outcomes from juries, and in particular:

- That sentencing outcomes are more consistent,
- That juries treat certain kind of offences/offenders more consistently, and
- The quality of judges is more consistent in the jury courts.

As one lawyer in Christchurch put it:

You see much more consistency with sentencing at jury trials... that's another good reason to send it to a jury.

And:

Election of jury trial gives you so much more control over potential outcomes.

While a lawyer in Auckland was clear:

If we could choose our judge we would go JAT every day of the week.

5.5.2 Inconsistency by Location

This research was conducted in Christchurch and Auckland and revealed that there are notable differences between the two locations.

Christchurch	Auckland
• Case reviews are used inconsistently and rarely meaningfully • Many of the clients in the system do not trust judges and are known to them, meaning they think they will get a fairer hearing from their peers	• The volume of cases and the (post-Covid) emphasis on clearing jury trials means you can get a jury trial faster than a JAT. • In Auckland the case review process is working better, and in Auckland the review takes place in front of a judge (meaning there

• There is a lack of trial-suitable rooms in the new court building • There have been a number of police operations that have resulted in a number of multi defendant trial cases	are incentives to negotiate early in the process). • There is a lack of judges as well as court rooms

5.6 WHY HAVE ELECTIONS INCREASED?

The themes offered above explain why the current system incentivises the election of jury trials but they do not explain why jury trial elections have **increased**. Given the Criminal Procedure Act 2011 fully commenced on 1 July 2013, how do the focus group participants explain the recent increase in jury trial elections?

5.6.1 Some of the Settings in the CPA Drive Jury Trials

The participants in this research believe the Criminal Procedure Act 2011 is largely responsible for the increase in jury trials. It has done this first by increasing the number of cases that can go to jury trial because of the changed definition of Category 3 offences. One lawyer said:

> *The CPA means that Cat 3 can go to jury but there is a huge amount of 'lower level' Cat 3 offences going to juries.*

The CPA is also seen as increasing the election of jury trials because it has made earlier resolution of cases (in practice) more difficult not less.

5.6.2 It's Taken a While to Learn how to "Game" the CPA

Some participants in both these focus groups believe that the recent increase in jury trials is because it has taken a while to work out how to 'game' the CPA. Lawyers are now familiar with how the system works on the ground and what is acceptable.

5.6.3 Cases are Getting More Complex

Another common explanation is that cases are more complex and require more time. This might be down to new kinds of evidence (cyber records, CCTV footage etc.) which take longer to gather, analyse, and integrate into a case.

5.6.4 A Decline in the Systems Social Licence to Operate

The Police, in particular, wondered if the increase in jury trials was because many people in the community no longer trust 'the system'. In particular, widespread trust that judges will be impartial seems to be lower among some

in the community. The hypothesis here is that there has been a culture shift among some in the community.

5.6.5 Focus of Police

Some lawyers thought the Police's focus had moved from evidence-gathering to situation de-escalation. They perceive that police on the front line are not as effective as they used to be in collecting evidence at the time, and there is a need to go back and collect evidence months later.

- **Research First Ltd**
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