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Report of the

# ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act 1990  
on the proposed amendment to s 24(e) of the  
New Zealand Bill of Rights Act 1990 in the  
*Criminal Procedure (Reform and Modernisation)*  
Bill

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*Presented to the House of Representatives pursuant to  
Section 7 of the New Zealand Bill of Rights Act 1990 and  
Standing Order 261 of the Standing Orders of the House of  
Representatives*

1. I have considered this Bill for consistency with the New Zealand Bill of Rights Act 1990 and reported separately to the House that in three respects it appears to be inconsistent with the rights affirmed by s 25 of the New Zealand Bill of Rights Act 1990.
2. The Bill also proposes an amendment to the New Zealand Bill of Rights Act 1990.
3. This will be only the second time the Bill of Rights Act has been amended since it came into force in 1990. The other amendment came as a consequence of the prohibited grounds of discrimination being reorganised in the Human Rights Act 1993. Section 19 of the Bill of Rights Act was amended to reflect that.
4. The amendment proposed by this Bill, unlike the earlier amendment, will have the effect of limiting the protection offered by an existing right, namely the right of a person charged with an offence to have their guilt or innocence determined by a Judge and jury. Currently any person charged with an offence punishable by more than three months imprisonment may elect a trial by jury.<sup>1</sup> The proposal is to increase that threshold to three years imprisonment.
5. The proposed amendment is necessarily inconsistent with the section that it seeks to amend.
6. The significance of that inconsistency is qualified, both because the jury trial right is not provided in international human rights law and because the proposed three year threshold remains consistent with broad practice in comparable jurisdictions.

#### **Necessary inconsistency with the Bill of Rights Act**

7. As the current threshold of three months is set by s 24(e) of the Bill of Rights Act, the proposed changes are inconsistent with that right. Further, as a general limitation of the right – in contrast to specific or discretionary exceptions, as recently upheld by the Court of Appeal and Supreme Courts in *R v Wenzel* in respect of long and complex trials<sup>2</sup> – the changes are not open to justification under s 5 of the Bill of Rights Act.

#### **The constitutional importance of jury trials**

8. Any proposed amendment to the jury trial threshold deserves careful consideration. As well as being recognised in s 24(e), the constitutional character of the right to jury trial is broadly and forcefully recognised across common law jurisdictions, as for example in the 2004 comment of Lord Steyn in *R v Mirza*:<sup>3</sup>

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<sup>1</sup> Section 43 of the Summary Proceedings Act 1957 specifically provides that there is no right to a jury trial for the offence of common assault or assault on a law enforcement officer, even though the maximum penalty for either offence is 6 months imprisonment.

<sup>2</sup> [2009] NZCA 130, [2009] 3 NZLR 47 at [35] (observing that the provision for judge alone trials in such cases in s 361D of the Crimes Act 1961 is justified as a means of promoting fair trial outcomes); [2009] NZSC 58, [2009] 3 NZLR 56 (leave) at [5] (observing that limitation of the jury trial right by way of judicial discretion under s 361D is justifiable in terms of s 5).

<sup>3</sup> [2004] 1 AC 1118, 1131-1132. (HL)

Lord Devlin observed 'that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives' ... The jury is an integral and indispensable part of the criminal justice system. The system of trial by judge and jury is of constitutional significance. The jury is also, through its collective decision-making, an excellent fact finder. Not surprisingly, the public trust juries.

9. In New Zealand, juries have been described as "always ... central in New Zealand law".<sup>4</sup>
10. In the United States, the Supreme Court has described juries as "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant or biased or eccentric judge"<sup>5</sup> and has commented further:<sup>6</sup>

Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage, but is also critical to public confidence in the fairness of the criminal justice system.

11. In Australia, the High Court of Australia has described the right as "the chief guardian of liberty under the law and the community's guarantee of sound administration of criminal justice" and, further, as reflecting:<sup>7</sup>

... the deep seated conviction of free men and women about the way in which justice should be administered in criminal cases, namely that, regardless of the position of the particular alleged offender, guilt or innocence of a serious offence should be determined by a panel of ordinary and anonymous citizens, assembled as representative of the general community at whose hands neither the powerful nor the weak should expect or fear special or discriminatory treatment.

### **The right to trial by jury is not recognised in international law**

12. Raising the jurisdictional threshold for trial by jury would not make our law inconsistent with the International Covenant on Civil and Political Rights because the ICCPR does not contain any guarantee of trial by jury. The reason for that is that not all legal systems around the world use juries and the Covenant implicitly recognises that the constitutional function that they serve in New Zealand and elsewhere may be achieved by different means.
13. The European Convention on Human Rights does not refer to jury trials either, and for the same reason. As the Human Rights Act 1998 (UK) gives effect to the European Convention on Human Rights, there is no express provision for the right to a jury trial in the United Kingdom.<sup>8</sup>

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<sup>4</sup> *Siemer*, above.

<sup>5</sup> *Duncan v Louisiana* (1968) 391 US 145, 156.

<sup>6</sup> *Taylor v Louisiana* (1975) 419 US 522.

<sup>7</sup> *Brown v R* (1986) 160 CLR 171, 197.

<sup>8</sup> Current proposals for a United Kingdom Bill of Rights Act include a right to trial by jury for all indictable offences.

## Other comparable jurisdictions have different thresholds

### *The United States*

14. In the United States, the Sixth Amendment guarantees the right to trial by jury for all “crimes”, which has been interpreted to encompass offences punishable by six months imprisonment or more.<sup>9</sup>

### *Canada*

15. In Canada, s 11(f) of the Canadian Charter of Rights and Freedoms provides that “[a] Any person charged with an offence has the right ... except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment.”

### *Australia*

16. The Constitution of Australia has no equivalent to s 24(e) although it does provide that any trial on indictment of an offence against Commonwealth law must be by jury. Neither of the two state bills of rights contain an express jury trial right.<sup>10</sup>

## Why the jury trial threshold was set at three months

17. Indictable offences in New Zealand have always been triable by jury. Section 66 of the Summary Proceedings Act 1957 provides that the defendant may elect to be tried by jury for any summary offence for which the penalty exceeds three months imprisonment. Section 66 re-enacted a provision that can be traced back to 1900.<sup>11</sup>
18. In *A Bill of Rights for New Zealand: A White Paper*,<sup>12</sup> then Minister of Justice the Hon. Geoffrey Palmer suggested that the threshold for the right to jury trial be set at three months imprisonment, adopting the existing threshold set out in s 66. He expressed concern that if it was set at six months imprisonment, in order to accommodate the pre-existing statutory exceptions for common assault and assault on a law enforcement officer, the tendency would be for that to become the standard rather than three months. There was no evaluation of whether the three month threshold properly represented the minimum standard that should be guaranteed to the defendant in a Bill of Rights. There was no comparative analysis of other jurisdictions, particularly the Canadian Charter, where the threshold is considerably higher.
19. In my opinion it was unnecessary to specify a threshold for trial by jury in the Bill of Rights Act. The real issue is that an accused person has a fundamental entitlement to a fair and just trial, which may or may not be by jury depending on the circumstances.

<sup>9</sup> *Lewis v United States* 518 US 322 (1996).

<sup>10</sup> Human Rights Act 2004 (ACT); Charter of Human Rights and Responsibilities Act 2006 (Vic).

<sup>11</sup> Indictable Offences Summary Jurisdiction Act 1900, s 6.

<sup>12</sup> Geoffrey Palmer *A Bill of Rights for New Zealand: A White Paper* [1984-85] AJHRA 6.

20. The specification of a three month threshold for trial by jury has had a profoundly negative effect on the conduct of criminal litigation in this country, causing serious delays in the criminal justice system which may raise far more serious concerns about access to justice.

#### **Observation by the Supreme Court**

21. In *Siemer v Solicitor General* the New Zealand Supreme Court ruled that a person could not be imprisoned for more than three months for contempt of Court, without having the opportunity to exercise their right to trial by jury, as guaranteed by s 24(e). In the course of that ruling Blanchard J observed:<sup>13</sup>

...it is obviously open to Parliament to amend s 24(e) by substituting a longer period. There seems to be nothing particularly sacrosanct about three months: in Canada the equivalent period is five years ...

#### **Summary**

22. While necessarily inconsistent with s 24(e) of the Bill of Rights Act, the proposed increase in the threshold at which a defendant is entitled to a trial by jury would neither put New Zealand in breach of its international obligations, nor would it place defendants in this country at any comparative disadvantage to those in comparable jurisdictions.



Hon Christopher Finlayson  
Attorney-General  
15 November 2010

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<sup>13</sup> *Siemer v Solicitor General* [2010] NZSC 54 (Blanchard J at [67]).