



LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

Preliminary Paper 32

JURIES IN CRIMINAL TRIALS
PART ONE

A discussion paper

*The Law Commission welcomes your comments on this paper
and seeks your response to the questions raised.*

These should be forwarded to:
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by 30 September 1998

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Wellington, New Zealand

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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Preface

IN 1989 THE LAW COMMISSION was asked by the Minister of Justice to review procedure in criminal cases. This project is a continuing one. Its purposes are:

- To ensure that the law relating to criminal investigations and procedures conforms to the obligations of New Zealand under the International Covenant on Civil and Political Rights and to the principles of the Treaty of Waitangi.
- To devise a system of criminal procedure for New Zealand that will ensure the fair trial of persons accused of offences, protect the rights and freedoms of all persons suspected or accused of offences, and provide effective and efficient procedures for the investigation and prosecution of offences and the hearing of criminal cases.

With these purposes in mind the Law Commission was asked to examine the law, structures and practices governing the procedure in criminal cases from the time an offence is suspected to have been committed until the offender is convicted, including but not limited to:

- powers of entry, search and arrest
 - diversion – principles and procedures
 - decisions to prosecute and by whom they should be made
 - the rights of suspects and police powers in relation to suspects
 - the division of offences into summary and indictable offences
 - preliminary hearings and criminal discovery
 - onus of proof
 - evidence in sexual and child abuse and other special cases
 - payment of costs to acquitted persons
- and to make recommendations accordingly.

To deal comprehensively with the criminal procedure reference in a single report would mean considerable delay. The Commission therefore decided to proceed with the reference by stages. A report on *Disclosure and Committal* (NZLC R14) was published in June 1990. An issues paper on the prosecution of offences was published in November of that year (NZLC PP12) followed by the *Criminal Prosecution* discussion paper (NZLC PP28) in 1997. In 1992 the Commission published the *Criminal Evidence: Police Questioning* discussion paper (NZLC PP21), making its final recommendations in 1994 in *Police Questioning* (NZLC R31). There is also discussion of police powers in the *Final Report on Emergencies* (NZLC R22) published in December 1991. A discussion paper on *The Privilege Against Self-Incrimination* (NZLC PP25) was published in 1996.

The Law Commission first considered juries in criminal trials in 1995 when we published the *Juries: Issues Paper* (October 1995) as a prelude to a larger discussion document. The issues paper asked which matters were of primary concern to those who participate in, or work with, the system. Responses confirmed that the areas which form the subject of this paper need consideration.

This discussion paper is being published in two parts. This is because in 1998 work started on the juries decision-making research project undertaken by the Faculty of Law and the Institute of Criminology at the Victoria University of Wellington (through Victoria Link Ltd) in conjunction with the Law

Commission itself. Its results will bear directly on sections of the paper which deal with assisting jury deliberations, whether jury deliberations should remain secret and with the influence of media on juries. It has therefore been decided to publish these sections when they can incorporate the results of the research.

In order to elicit Māori opinion about the jury system the Law Commission held a hui in Wellington in December 1995. The following people attended: Melanie Baker, Stephen Clark, Tania Davis, Charles Hirschfeld, Gordon Matenga, James Johnston, Judge James Rota, Gina Rudland and Annette Sykes.

In 1996, the Law Commission had a number of meetings with journalists in the print and electronic media to discuss issues concerning pre-trial publicity, the influence of the media on jury deliberations, and media access to jurors once a trial has ended.

We have also been assisted by many individuals who have commented on drafts of this discussion paper including Scott Optican, Senior Law Lecturer, University of Auckland and Robert Lithgow, Barrister, who reviewed the final draft. We are grateful for their assistance.

Until August 1997 Les Atkins QC was Commissioner in charge of the criminal procedure project with particular responsibility for the juries discussion paper. He has been succeeded by Tim Brewer ED.

This paper does no more than discuss the issues and pose questions for consideration. It includes the Commission's provisional conclusions following research and consultation. Our provisional conclusions should not be taken as precluding further consideration of the issues.

Submissions or comments on this paper should be sent to Tim Brewer, Law Commission, PO Box 2590, DX SP23534, Wellington, by 30 September 1998, or by eMail to Susan Potter, Senior Researcher, SPotter@lawcom.govt.nz. We prefer to receive submissions by eMail if possible. Any initial inquiries or informal comments can be directed to Susan Potter: phone (04) 473 3453; fax (04) 471 0959. This paper is also available on the internet at the Commission's website: <http://www.lawcom.govt.nz>.



Glossary

Accused is the term used in the context of a jury trial to describe the person charged with a criminal offence. See also *defendant*.

Adversarial systems are systems of justice which require the judge to be an impartial arbitrator of facts presented in evidence by the parties to proceedings, and which imply some degree of equality between the parties. These systems are also known as accusatory systems, so named because a person or representative of the community makes an accusation of criminal offending against a suspect. (Compare the definition of *inquisitorial systems* below.)

Balloted potential jurors are those potential jurors who have their names selected in the courtroom to serve on the jury, and who then make their way to the jury box either to be challenged or to serve on the jury.

Common jury is the term sometimes used to describe the jury which hears the case at a criminal trial. The term is used to distinguish it from the *grand jury*, which has been abolished in New Zealand.

Common law is a phrase used to describe the body of law applying in jurisdictions modelled on the English system, which is judge-made rather than enacted by legislation.

Constituting a jury occurs once all 12 jurors are seated in the jury box.

Defendant is the term used in the summary jurisdiction (as opposed to in a jury trial) to describe the person charged. In this discussion paper the term defendant is used generally to mean a person charged with a criminal offence, whether in the summary or indictable jurisdiction. In chapter 3 of this paper we propose that the summary/indictable distinction be removed because it no longer determines the availability of jury trials in New Zealand.

Empanelling a jury describes the jury selection process which occurs in the courtroom, when individuals (*balloted potential jurors*) are randomly selected and called to the jury box. Prosecution or defence counsel may challenge a certain number of people before they sit down in the jury box. A jury is *constituted* once 12 jurors are sitting in the jury box.

Foreman is the term used in the Juries Act 1981 to describe the person elected by the other jurors to act as their representative. See also *jury representative*.

Grand jury describes a type of jury (no longer used in New Zealand) which decides whether or not a defendant should be tried on the particular charges. They were generally larger than *common juries*.

Inherent jurisdiction refers to the powers which the courts have to govern their own processes to ensure the overall fairness of proceedings and the proper administration of justice.

Inquisitorial systems are systems of justice in which the judge has an investigative as well as an adjudicative role, and proceeds with an inquiry on his or her own initiative (unlike *adversarial systems* where the parties conduct investigations and present the evidence).

Jury district is defined in s 5(3) of the Juries Act 1981 as including all those places within 30 kilometres, by the most practicable route from the court, where jury trials are held.

Jury list is the term for the list compiled by the Electoral Enrolment Centre of New Zealand Post Ltd for each jury court. It is drawn from the names of people on the electoral rolls (general and Māori) who live within each *jury district*.

Jury panel is a list of *potential jurors* compiled by the *registrar* for a particular week of jury service. The registrar sends a jury summons form to every qualified person on the jury panel. (See s 13 of the Juries Act 1981 and the Jury Rules 1990 (SR 1990/226).)

Jury pool has the same meaning as *pool of potential jurors*.

Jury representative is the non-gender specific term for *foreman*, the juror whose responsibilities include delivering the jury's verdict in open court. It is the term used in the *Information for Jurors* pamphlet published by the Department for Courts.

Peremptory challenges are a type of challenge exercised by defence and prosecution counsel to prevent *balloted potential jurors* from sitting in the jury box and therefore serving on that particular jury. See chapter 9.

Pool of potential jurors describes the group of people summonsed for jury service in a particular week who actually show up in court to serve on a jury, and who are not excused from jury service (see *Trial by Peers?: The Composition of New Zealand Juries* (Department of Justice, Wellington, 1995), 45). In the larger centres the pool for each jury trial is reduced to a more manageable size by a ballot conducted by the registrar according to rule 15 of the Jury Rules 1990 (SR 1990/226).

Potential juror is the term used to describe anyone who has been or can be summonsed for jury service.

Registrar is the title of the person whose primary responsibility is to maintain the register of the court's decisions. The registrar also manages other aspects of court proceedings, including the selection of jurors.

Summary of questions

Chapter 3 Trial by jury

- Q1 Should some offences always be tried by jury? If so, which offences?
- Q2 Should the maximum penalties assigned to offences in legislation be reviewed?
- Q3 Should s 43 of the Summary Offences Act 1981 be repealed?
- Q4 Should the distinction between summary and indictable offences, and the relevant legislation, be reviewed with the aim of codifying the law into a single enactment?
- Q5 Should the right to elect trial by jury be altered or limited in any respect?

Chapter 4 Trial without a jury

- Q6 Are some fraud trials so complex that they should not be tried by a jury? If so, what other options should be considered?
- Q7 Are certain other types of complex trials, for example, where there is complex scientific evidence, not suitable for trial by jury? If so, what other options should be considered?
- Q8 Are trials which attract extensive publicity more suitable for trial by jury or judge alone?
- Q9 Are trials involving sexual offences more suitable for trial by jury or judge alone?
- Q10 Should judge alone trials be mandatory for all complex fraud trials?
- Q11 Should the prosecution be able to object to a defendant's application for trial by judge alone?
- Q12 Should a defendant have a broader right to *elect* trial by jury or judge alone (rather than the present application procedure)?
- Q13 Should a judge be able to determine whether a complex fraud trial is tried by a jury or judge alone?
- Q14 Should defendants have a right of re-election, and, if so, in what circumstances?
- Q15 Should defendants be required to obtain legal advice before making an election?

Chapter 6 Making juries more representative

- Q16 Should jury districts be extended, or alternative jury districts created?
- Q17 Should judges be required to consider the demographic composition of the jury district population of the proposed venue in change of venue applications?
- Q18 Should judges have the power to direct, on the application of the defence or prosecution, that one or more people of the same ethnic identity as the defendant or victim serve on the jury?

Chapter 7 Māori representation on juries

- Q19 Should other sources be used, in addition to the electoral rolls, to compile jury lists? If so, which sources should be used and why?
- Q20 Should the Electoral Enrolment Centre ensure that the proportion of Māori selected for jury lists is the same as the proportion of Māori in the jury district population?
- Q21 Should registrars be required to ensure that the proportion of summonses sent to Māori is the same as the proportion of Māori in the jury district population?

Chapter 8 Disqualifications and excuses

- Q22 Should the minimum age qualification in s 6 of the Juries Act 1981 be lowered so that registered electors aged 18 years and over are qualified to serve as jurors?
- Q23 Should the maximum age qualification in s 6 of the Juries Act 1981 be removed?
- Q24 Should registrars have the power to excuse from jury service people aged 65 years and over?
- Q25 Should the disqualification in s 7(b) of the Juries Act 1981 be maintained or removed?
- Q26 Should the disqualification be extended to people who have been charged with criminal offences but who have not yet had those charges finalised?
- Q27 Should barristers and solicitors be permitted to serve on juries?
- Q28 Should disabled people be entitled to serve on juries? What restrictions should there be?
- Q29 Should there be express provision to disqualify jurors unable to speak and understand English or te reo Māori?
- Q30 Should such a provision also disqualify jurors who are unable to read and understand English or te reo Māori?
- Q31 Is further provision necessary relating to the use of interpreters?

Chapter 9 Challenging jurors

- Q32 Should peremptory challenges be abolished?
- Q33 Should the number of peremptory challenges be reduced?
- Q34 Should judges have the power to discharge the jury when the exercise of peremptory challenges has created the potential or the appearance of unfairness?
- Q35 Should the current law and practice of vetting jury lists be restricted in any way?

Chapter 10 Discharging jurors

- Q36 Should there be a single power to discharge jurors after the jury is constituted?
- Q37 Should specific grounds for discharge be included in the legislative provision?

- Q38 Should the judge also have the power to empanel a replacement juror before the case opens?
- Q39 Should there be an express provision permitting the jury to elect a new jury representative (foreman) if he or she is discharged?
- Q40 Should the defendant have the right to be present for all applications to discharge a juror?
- Q41 Should the power to discharge the *entire jury* be included in the single provision to discharge individual jurors?
- Q42 Should a judge have the power to question at least the jury representative (foreman) on an application to discharge a jury, on the ground that a biased juror has infected the remaining jurors?
- Q43 Should a judge be able to question any juror?
- Q44 Should we have a system of reserve jurors?
- Q45 Should it be possible to empanel a jury of 15 in appropriate cases?
-

1

Executive summary and proposals for reform

Introduction

- 1 **T**HE JURY IS A POPULAR AND RESILIENT INSTITUTION of criminal justice. Its role has changed significantly over the years, being shaped just as much by contingency as logic and principle. Yet throughout its long and varied history it has retained its essential feature as a forum for community participation in the resolution of disputes.
- 2 The common starting point for the history of the jury is its introduction into England by the Normans. However, it appears to have existed in various forms prior to that in other parts of Europe. At the time it was introduced to England the jury was a body of neighbours convened to answer some questions on oath. The custom soon developed where the jury delivered a verdict of guilty or innocent, although for many centuries the jury remained a body of men (of property) who gave their decision based upon their personal knowledge of the people, the case, or the locality. In this sense the jury resembled a body of witnesses. By the nineteenth century, however, the jury was expected to be entirely independent of the case it tried and to have no prior knowledge of it.
- 3 In terms of the total number of criminal cases heard in the courts, jury trials form a small percentage. For example, the Department for Courts reported that in the year to June 1997 there were 2,619 criminal jury trials (cases committed), compared to 293,229 summary informations filed. The question can be asked why the preservation of the jury is regarded as important. In the Law Commission's view the fundamental value underlying all functions and expectations of modern juries is their democratic nature. While juries are not democratic or representative in the parliamentary sense, they allow members of the community direct participation in the criminal justice system. In this sense, it is the political and symbolic importance of the jury in the criminal justice system which is worth preserving. We also believe that there is popular public support for juries in criminal trials, in spite of the recent difficulties with long and complex trials. Those difficulties are being addressed and are not insurmountable.
- 4 To some extent the idea that juries should be preserved is an act of faith. At present we know very little about how juries operate in New Zealand. Jury deliberations are secret and no reasons are given for verdicts. There has been some overseas empirical research, some of which may apply to New Zealand conditions, in particular research conducted in Australia and England. The Law Commission is very pleased that the Victoria University of Wellington Faculty of Law and Institute of Criminology (through Victoria Link Ltd), in collaboration with us, are undertaking a major research project examining the decision-making process of New Zealand juries. The project is fully supported by the Courts

Consultative Committee and is being funded jointly by the Ministry of Justice, the Department for Courts, the Legal Services Board and the Law Foundation. The results of the research project should be available later this year and will be discussed in detail in Part II of this paper (to be published following the completion of the research project). The project is described more fully in the appendix.

- 5 This discussion paper – Part I of our examination of the topic – considers the following aspects of the jury system in criminal trials:
- the right to trial by jury and trial by judge alone (chapters 3–4);
 - the selection and composition of juries, including qualifications for jury service, challenges and the discharge of jurors (chapters 5–10).

Part II will, with the results of the research project to draw on, examine:

- assisting the deliberations of juries;
- length of deliberations, hung juries and majority verdicts;
- the secrecy of jury deliberations and the effect of publicity on jury deliberations;
- cost and backlog issues.

We acknowledge that this discussion paper is lengthy and complex. Not all readers may have the time or inclination to read the whole of it. Each chapter considers a discrete set of issues, much like an essay, and is capable of being read on its own, and each concludes with a brief summary. There are also obvious links between certain chapters and we have included appropriate cross-references to guide readers. The following section summarises the content of each chapter in the paper and proposals for reform. It should be read together with the summary of questions at page xi.

Functions of the jury in criminal trials

- 6 The jury is expected to fulfil a range of functions in criminal trials and there is considerable debate about how well the jury fulfils any of them. Opinions can be found across the spectrum. Chapter 2 discusses those functions or expectations and provides an assessment of how well the jury in fact fulfils those functions. It is important to have a principled framework about why we regard juries as important before contemplating various issues for reform, which are the topics of the following chapters.
- 7 The core value underlying all the various functions of the jury is their democratic nature. They allow members of the community to participate in the criminal justice system and to bring a diverse range of perspectives, personal experiences and knowledge to bear in individual criminal cases.
- 8 The primary and most important function of the jury in a criminal trial is to determine the relevant facts of the case and to apply the law to reach a verdict of guilty or not guilty. Juries are generally assumed to be competent fact-finders, but some features of the adversarial trial system may need to be modified to assist juries in reaching their decisions.
- 9 The jury, because of its nature, acts as the community conscience in deciding criminal cases. However, this function is dependent on juries representing all members of the community, and deliberating in an impartial and democratic manner.

- 10 The jury is also regarded as a safeguard against arbitrary or oppressive government. However, it rarely operates actively in this sense. It plays an important role in legitimising and maintaining public confidence in the criminal justice system. In order to maximise that confidence, juries should appear to be, and in fact be, impartial and representative of the community. The jury also has a role in educating people about the workings of the criminal justice system.

Trial by jury

- 11 Chapter 3 considers the right to trial by jury, how that right is reflected in current law, and proposals for reform. At present not all defendants charged with a criminal offence have the right to elect trial by jury (or judge alone). In certain serious cases the defendant must always be tried by a jury. In some cases, where the maximum penalty is greater than 3 months' imprisonment, the defendant has no right to elect trial by jury even though s 24(3) of the New Zealand Bill of Rights Act 1990 provides for such a right of election. Current law is also complicated by rules categorising offences as summary or indictable, and other rules determining in which court certain trials must take place. The two central issues considered in this chapter are
- mandatory trial by jury – whether it can still be justified in certain kinds of cases; and
 - the circumstances in which the right to elect trial by jury is and should be available – we consider whether jury trials are too readily available, and in what other ways the current law should be rationalised.
- 12 The Law Commission's view is that jury trials are *desirable* when the decisions to be made throughout the trial are finely balanced and can lead to vastly different consequences, in terms of sentence, for the defendant. However, we doubt whether this necessitates *requiring* defendants to be tried with a jury “for their own good”, as distinct from enabling them to choose whichever mode of trial they perceive to be most beneficial to the case. Further, reliance on the maximum penalty of imprisonment for 14 years or more is not an accurate means of identifying which cases will involve difficult choices or require public validation of the verdict via trial by jury. The Commission proposes that the mandatory requirement for trial by jury for offences punishable by imprisonment for 14 years or more should be removed.
- 13 The legislation governing the availability of jury and judge alone trials is difficult to follow because it is located in several different Acts, has been subject to many amendments, and navigates around the division of offences into summary or indictable offences. The Commission proposes that the summary/indictable divide should be removed because it contributes to the complexity of the legislation and it no longer determines the availability of jury trials in New Zealand. The Department for Courts and Ministry of Justice should give consideration to redrafting the Summary Proceedings Act 1957 and making consequential amendments to other legislation.
- 14 Other jurisdictions similar to our own have a higher threshold for the availability of jury trials than New Zealand. The Commission is not in a position to propose an increase to the threshold for jury trial availability, as there is insufficient statistical information available to show that this is desirable and what the effects would be. In addition, the maximum penalty is a necessarily crude measure of when trial by jury will be beneficial in particular cases. It is unsafe, on the

information which is available, to base claims for restricting jury trials on generalisations about the number of cases carrying a right to trial by jury when the actual sentence imposed is non-custodial. The Commission proposes a review of maximum penalties for offences in legislation, enabling a reconsideration of whether imprisonment (and the right to trial by jury) is justified for offences such as minor property offences and non-violent offences against the person, and offences against public order and the administration of justice. Apparent discrepancies between similar offences regarding the availability of jury trials also suggest that the maximum penalties in the Crimes Act 1961 should be reviewed.

- 15 The Commission proposes that s 43 of the Summary Offences Act 1981, which creates an exception to the right to trial by jury for defendants charged with offences punishable by more than 3 months' imprisonment, should be repealed. It is inconsistent with the right to trial by jury guaranteed in s 24(e) of the New Zealand Bill of Rights Act 1990.

Trial without a jury

- 16 In chapter 4 we ask similar questions to those in chapter 3 but with an emphasis on a defendant's ability to choose trial by judge alone. Should defendants having a right to trial by jury be allowed to reject that option in favour of trial by judge alone, in some or all cases? In addition, we consider whether some cases are so complex that they should be tried by a judge alone and, if so, how this should be decided. Alternatives to trial by jury or by judge alone, such as special juries or expert panels, a bench of judges, and lay assessors assisting a judge alone, are also briefly examined, although they are not the main focus of the chapter.
- 17 In our view, defendants prosecuted indictably should be able to elect trial by judge alone. A broader right of election is preferable to an application procedure for trial by judge alone. The defendant should have a right to choose the mode of trial best suited to his or her case, and this is consistent with the way the right to trial by jury is expressed as a "benefit" to the defendant in s 24(e) of the New Zealand Bill of Rights Act 1990. The election should not be subject to the prosecution's consent, as this would undermine the defendant's right to trial by jury. We seek comment on:
 - whether there should be a right to re-elect and, if so, in what circumstances; and
 - whether an election should be contingent on the defendant first having sought legal advice.
- 18 If the Commission's proposal in chapter 3 that the division of offences into summary and indictable offences should be removed is implemented, new ways of determining the court in which particular offences should be heard, and how the right of election should be made, would need to be devised.
- 19 Despite the length and complexity of some trials, the Commission does not at this stage propose that defendants in such cases should be obliged to have a trial by judge alone. We accept that ultimately the issue must be one of competency of a jury to try a case, but believe that the discussion of this point should focus on a related issue: that evidence should be sifted and presented in a way which is comprehensible to "ordinary people". Ways should be found to improve:
 - the sifting of information and issues before the trial, and
 - the mode of presentation at trialbefore reducing the defendant's right to trial by jury.

- 20 Calls for trial by judge alone or a specialist tribunal to hear some fraud cases do not appear to be based on any evidence suggesting juror incompetence in these cases. Competency is difficult to measure, as is any correlation between complex trials and poor levels of understanding among juries. Concerns about juror competency also over-emphasise the need for legal skill and experience, and neglect the jury's role in reflecting democratic ideals of community participation in the justice system and bringing a range of experiences and values to the issues to be decided in a case.
- 21 The Law Commission does not favour trial by judge alone on the ground that the trial has attracted a great deal of media publicity, unless the defendant elects that option. The judge's power to instruct jurors to disregard prejudicial publicity should be a sufficient safeguard against pressure on jurors.
- 22 In relation to the need to minimise the trauma for complainants in trials involving sexual offences, the Law Commission has proposed in *The Evidence of Children and Other Vulnerable Witnesses* (NZLC PP26, 1996), that complainants and defendants may apply to the court to give evidence in an alternative way (eg, closed circuit television), based on the needs of the individual. Such options should be explored before consideration is given to depriving defendants of the right to trial by jury in cases involving sexual offending.

Goals of the jury selection process

- 23 Chapters 6 to 10 deal with the legal rules which govern the selection and composition of juries in criminal trials and particular aspects of the selection process:
- representation of all groups in the community on juries (chapter 6)
 - Māori representation on juries (chapter 7)
 - disqualifications and excusing people from jury service (chapter 8)
 - challenging potential jurors (chapter 9), and
 - discharging jurors once the jury has been empanelled (chapter 10).
- In each of those chapters the current law is discussed, important issues are outlined and reform options considered. It is important first to consider the goals underlying the legal rules which govern the selection process – chapter 5 considers those goals, and the balance between them.
- 24 In the Law Commission's view, individual jurors and juries should have the following characteristics:
- Individual jurors should be competent in the sense that they are mentally and physically capable of acting as jurors in the trial.
 - Jurors should also be independent of any obligation to the justice system or the government. Basic random selection techniques should be maintained so that the selection of individual jurors is beyond the control of court administrators and therefore the state.
 - Jurors should be impartial. However, in a modern media society, there are practical limits to selecting jurors who are absolutely impartial in the sense that they lack all knowledge about a particular case.
 - Selecting juries which are as inclusive as possible of all groups in the community is likely to enhance the goals of the system, and it is therefore important that all groups in the community should have the opportunity to

be represented on juries. The diversity of knowledge, perspectives and personal experiences of a representative jury enhances the collective competency of the jury as fact-finder, as well as its ability to bring common sense judgment to bear on the case. In a democratic society, the legitimacy of the jury system, and the wider criminal justice system, rests on all groups in the community participating in the jury system.

Making juries more representative

- 25 Some groups in our community are under-represented on juries in criminal trials. Aspects of both out-of-court and in-court jury selection procedures operate to produce this under-representation. Chapter 6 discusses aspects of the jury selection process which could be modified to enhance the representative nature of juries. Under-representation of Māori has been a particular problem and is discussed in chapter 7. Which proposals for reform should be adopted will depend on how important representation is considered to be, in relation to the other goals of the jury selection process, and on how we define the community which ought to be represented in certain cases.
- 26 The basic qualifications, disqualifications and grounds for being excused from jury service are discussed in chapter 8. Keeping qualifications for jury service to a minimum would help ensure that juries are drawn from the most representative pool. However, some qualifications are necessary to ensure that juries are impartial and independent, qualities which are equally legitimate goals of the selection process (see chapter 5). Abolishing peremptory challenges, one of the options discussed in chapter 9, would also improve the representation on juries of certain groups in the community.
- 27 The random selection process is compromised by various factors including the completeness and accuracy of electoral rolls and, consequently, jury lists, the ability to excuse people from jury service, and the use of peremptory challenges. A number of groups in our community are consistently under-represented on juries in criminal trials. Again, proposals for reform depend on how important representation is in relation to the other goals of the jury selection process.
- 28 At common law there is no principle that a jury should represent the community from which it is drawn, or that it should be racially balanced. The site of the court at which the trial will be held is paramount in defining the jury district, and therefore the population, from which potential jurors are drawn. In other jurisdictions the right to an impartial jury has been interpreted to mean the right to a jury drawn at random from sources representing a fair cross-section of the community. The Law Commission believes that, generally, a primary role of the jury selection process should be to select juries which broadly represent the local jury district population from which jurors are drawn.
- 29 The study published in *Trial by Peers?: The Composition of New Zealand Juries* (Department of Justice, Wellington, 1995) revealed that of those who attended for jury service some groups, including women, Māori and younger age groups, were under-represented. Following the selection process – primarily consisting of the peremptory challenge – Māori were under-represented on District Court juries, and men were under-represented on both District Court and High Court juries. Fewer than the expected number of potential jurors aged 50 and over served on juries.

- 30 To improve representation on the electoral rolls, the Electoral Enrolment Centre has targeted the young and ethnic groups for enrolment.
- 31 Rural populations – including the higher proportion of Māori who live outside urban areas – are to an extent excluded from jury service because of the way in which jury districts are defined. Extending the jury district boundaries would increase the representation of rural populations and Māori. We seek views on whether jury districts should be extended or alternative jury districts created.
- 32 With respect to change of venue applications, the demographic characteristics of jury district populations in New Zealand vary considerably. We seek views on whether judges should be required to consider the demographic composition of both the venue from which it is sought to remove the trial and the proposed venue, with a view to attempting to obtain a match.
- 33 Reforms have been suggested in some jurisdictions requiring the selection of a minimum number of jurors of the same ethnicity as the defendant and, sometimes, the complainant. We seek views on whether judges in New Zealand should have the power to direct, on the application of the defence or prosecution, that one or more people of the same ethnic identity as the accused serve on the jury. Related issues are whether the ethnicity of the complainant should be relevant, and whether the fact that such an application has been granted should be made known to the jury.

Māori representation on juries

- 34 Māori under-representation on juries is a problem which was highlighted more than a decade ago by the Advisory Committee on Legal Services in *Te Whaingā i te Tika: In Search of Justice* (1986). It has been reiterated in subsequent reports by Jackson for the Department of Justice (*The Māori and the Criminal Justice System – A New Perspective: He Whaiapaanga Hou: Part 2* (1988)), and the Courts Consultative Committee (*Report of the Courts Consultative Committee on He Whaiapaanga Hou*, October 1991). Under-representation of Māori on juries is cause for concern, particularly when set against the high proportion of Māori defendants appearing in the criminal courts, and indications that the Māori community lacks confidence in the criminal justice system.
- 35 It is important to remember that the Māori community, as well as the Pākehā community, is a diverse one. In a discussion paper prepared for the Māori Congress Executive, one of the principles suggested by Professor Mason Durie to guide te tino rangatiratanga in a modern society is ngā matatini Māori (Māori diversity). That principle recognises that, for example, some Māori people are closely linked to conservative Māori networks such as marae, iwi and hapū, while others are more closely aligned to other Māori institutions such as kōhanga reo, churches, cultural groups but have no significant links with iwi.
- 36 The issues involved are not only those relating to the purely quantitative representation of Māori on criminal juries. There is also a range of wider issues relating to the criminal justice system itself. The Law Commission acknowledges that some reform options might be criticised as only “minor tinkering” with the system. We invite submissions on the options presented, as well as the wider issues, and any other matters which we have not canvassed. At this stage we would like to encourage debate on the topic.

- 37 Māori are under-represented on juries. The methods of improving representation outlined in chapter 6 would improve the representation of Māori on juries. Another possible means is to improve the source lists for Māori potential jurors, by supplementing electoral rolls from such sources as iwi registers and Māori Land Court rolls. Ensuring the assembly of complete and up-to-date electoral rolls may, however, be the most effective means. The process of jury selection is such that both the peremptory challenge and challenges for cause may also operate to distort representation.

Disqualifications and excuses

- 38 Chapter 8 looks at the legal rules concerning eligibility to serve on a jury which operate prior to the selection of the jury in the courtroom. The rules fall into two categories: rules automatically disqualifying or excluding people from jury service; and powers to excuse people from jury service on various grounds. Particular issues arise in relation to age restrictions, the disqualification of people who have been sentenced to certain periods of imprisonment, the exclusion of all lawyers, and potential jurors who have a disability or are unable to understand the language in which the trial is conducted. In our view, it is desirable that a very wide range of people should have the opportunity to serve on a jury. People should not be excluded from doing so, unless the other goals of the selection process clearly require that.
- 39 The Commission proposes that the minimum age qualification in the Juries Act should be amended to allow people aged 18 years and over to serve on juries. The Commission sees no reason why people aged 18 years and over should not be considered responsible enough to serve on a jury when they are considered responsible enough to vote and have membership of the House of Representatives. Juries should be as representative as possible given the other goals of selection, such as competence. Further, the absence of people aged 18 and 19 on juries excludes a group in the community who could be regarded (on the basis of age) as the peers of younger defendants.
- 40 We also propose that the maximum age qualification in the Juries Act should be amended so that people aged 65 years and older are qualified for jury service. We seek views on whether people aged 65 years and older should be able to decide for themselves whether or not they want to serve as jurors, or whether there should be an upper age limit. We also seek comment on whether people aged 65 years and older should be entitled as of right to be excused from jury service.
- 41 Certain people who have been imprisoned are disqualified from jury service. The Commission offers two options for reform for consideration. The first option is to amend the disqualification so that only those people currently detained in prison serving their sentence for a criminal conviction are disqualified from jury service. The second option is to maintain the present disqualifications on the grounds that to reduce them in any way would compromise the integrity of the criminal justice system and possibly bring it into disrepute.
- 42 Disabled jurors should continue to be eligible for jury service unless their disability renders them incapable of serving on a jury. The Juries Act is unclear on this point and we propose that it should be amended.
- 43 An inability to understand English is not a disqualification under the Juries Act. The Law Commission proposes that the Act should be amended to provide

that people who cannot understand at least one of English or te reo Māori are disqualified from jury service. Māori is an official language of New Zealand. While in reality it is unlikely that a potential juror will be unable to understand English but will understand te reo, it should be possible in such a situation to provide an interpreter for that person. If jurors are to be provided with written material to assist their deliberations, consideration should also be given to including a literacy disqualification in the Juries Act.

Challenging jurors

- 44 The representation of the community on juries, while not an express goal, underpins some of the justifications for trial by jury. Chapter 9 describes the jury selection procedures which operate in the courtroom, including the stand by procedure and the different types of challenges to prospective jurors that can be made by counsel. The primary goals of these procedures are to ensure that competent and impartial jurors are selected. They may, however, compromise the representative nature of the jury.
- 45 Chapter 9 then examines one procedure in particular: the exercise of the peremptory challenge (also known as the challenge without cause). There is evidence that the use of peremptory challenges causes certain groups in the community to be under-represented on juries (see also chapter 7). The trend in law reform has been against the retention of this challenge. We consider the possibility of its abolition in the context of other changes, including modification of the challenge for cause and improving the information provided to both prosecution and defence counsel concerning potential jurors. An alternative to abolition is to formulate guidelines for the exercise of peremptory challenges by prosecution and defence counsel. The enforcement of guidelines would require a judicial power to discharge the entire jury if the exercise of peremptory challenges has created the potential for, or the appearance of, unfairness by compromising representivity.
- 46 It is also the practice for prosecution and defence counsel to vet jury panel lists before jury selection commences. Information gathered by jury vetting is used as a basis for the exercise of peremptory challenges. Concern has been expressed recently about the appropriateness of this practice, and in particular the disclosure of jury panel lists to defendants. This chapter considers current law and practice, and discusses possible options for reform.
- 47 The exercise of the peremptory challenge compromises the representative nature of the jury. The rationales of the peremptory challenge are:
- the removal of biased jurors;
 - the provision to the accused and the prosecution of some measure of control over the composition of the jury; and
 - the opportunity to influence the representation of different community groups in a positive manner to include minorities.

The peremptory challenge has not been demonstrated to have met the first and third rationales.

- 48 If the peremptory challenge were to be abolished, the challenge for cause would remain as a means to assist in the elimination of biased jurors. If so, access to information about potential jurors before exercising their challenge for cause may be required. The provision of greater information about potential jurors might be achieved by questionnaires about jurors. The provision and evaluation

of information concerning potential jurors and the exercise of the challenge for cause would be time consuming, adding to delay and cost. Despite the possible advantage of maintaining representation, the Law Commission does not propose the total abolition of the peremptory challenge. The retention of four peremptory challenges would be consistent with the trend in other jurisdictions and would be sufficient to enable counsel to deal with well founded concerns. There should also be guidelines for the exercise of peremptory challenges. We see merit in giving judges a power to discharge the jury when the exercise of peremptory challenges has created a potential for or the appearance of unfairness. We are interested in receiving submissions on these issues.

- 49 The Law Commission also seeks comment on the extent to which jury vetting by both the defence and prosecution should be restricted. Prohibiting defence counsel from giving copies of the jury panel list to defendants would address the recent issue regarding the potential for juror intimidation that this disclosure can generate. It does not, however, address current resource imbalances between the prosecution and defence. We seek views on whether the prosecution should be obliged to disclose information about prospective jurors to the defence, or whether jury vetting by the prosecution and defence should be prohibited outright.

Discharging jurors

- 50 Once a jury is constituted, counsel have no opportunity to challenge people off the jury. Circumstances may nonetheless arise which may raise questions about the ability of a juror or jurors to continue to serve. These circumstances may arise from considerations of fairness to the defendant or from the personal circumstances of the juror. To meet such circumstances the judge may discharge a single juror or the whole jury. The statutory power to discharge individual jurors is limited. In some cases the courts have had to either interpret the statute very liberally, or supplement the statutory power with the use of the court's inherent jurisdiction. In trials of some length the ability to complete the trial may be threatened by the discharge of jurors who are injured or who fall ill.
- 51 Chapter 10 examines the judicial powers to discharge jurors and the grounds on which they may be exercised. These powers directly affect the composition of the jury. The considerations underlying the exercise of powers to discharge jurors are largely the same as the goals of the jury selection process: competence, independence, impartiality, and representation. Our view is that these powers require rationalisation. This chapter also considers the use of reserve jurors and the power to discharge the whole jury in circumstances where the goals of jury selection have not been met, or have not been maintained.
- 52 A range of difficulties may arise during the course of a trial which may necessitate the discharge of a juror or the jury. These difficulties may arise from factors which may rob, or appear to rob, a juror of objectivity, or from an emergency affecting a juror or a member of the juror's family.
- 53 Once the jury is constituted, the trial judge's powers to discharge a juror or the jury are found in s 22(1) of the Juries Act and s 374 of the Crimes Act. The Law Commission favours a single power to discharge jurors, in which the ground to discharge is an inability to act as a juror by reason of illness or some other cause. The power should be exercisable at any time from the constitution of the jury to the point where the jury has indicated that it has reached a verdict or

verdicts. The judge should have the power to empanel replacement jurors if discharge of a juror or jurors occurs before the opening of the Crown case. There should be an express provision permitting the jury to elect a new jury representative (foreman) if he or she is discharged.

- 54 The Law Commission seeks views on whether the defendant should have the right to be present for all applications to discharge a juror.
- 55 The single power to discharge individual jurors should also include a power to discharge the entire jury. This power would arise in the event of an emergency, or the possible situation where the whole jury has been “contaminated” by prejudicial information which may be within the knowledge of a member of the jury. When making a decision whether to discharge the whole jury, there is an issue about whether the trial judge should have the express power to question at least the jury representative (foreman) to ascertain the extent of any contamination. We also seek views on whether we should have a system of reserve jurors and whether it should be possible to empanel a jury of 15 in appropriate cases.
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Functions of the jury in criminal trials

Introduction

- 56 **T**HIS CHAPTER DESCRIBES THE UNDERLYING FUNCTIONS of the jury in criminal trials, and provides an assessment of how well the jury fulfils those functions. The material is based on New Zealand and overseas jurisprudence, as well as overseas empirical research. To that extent, it is speculative regarding the New Zealand experience and if the juries research project provides New Zealand-specific material it will be incorporated into our final report. It is important to have a principled framework about why we regard juries as important before contemplating various issues for reform, which are the topics of the following chapters. This chapter does not, therefore, contain any suggestions for reform.
- 57 In the Law Commission's view, the main functions of the jury in criminal trials are to act as
- a fact-finder,
 - the conscience of the community,
 - a safeguard against arbitrary or oppressive government,
 - an institution which legitimises the criminal justice system, and
 - an educative institution.¹
- 58 Each of these functions is considered in this chapter. There is considerable debate about how well the jury fulfils any of them. Opinions can be found across the spectrum. For example, Baldwin and McConville observe that

the very conception of a jury might be thought absurd. Twelve individuals, often with no prior contact with the courts, are chosen at random to listen to evidence (sometimes of a highly technical nature) and to decide upon matters affecting the

¹ These functions are reflected in the jurisprudence of a range of countries. For example, they are the main functions ascribed to the jury by the Law Reform Commission of Canada in *The Jury in Criminal Trials* (Working Paper 27, 1980). This paper and the functions set out in it were noted by the Supreme Court of Canada in *R v Sherratt* (1991) 63 CCC (3d) 193, 203 by L'Heureux-Dube J for the majority: "These rationales or functions of the jury continue to inform the development of the jury and our interpretation of legislation governing the selection of individual jurors". See also, for example, Devlin, *Trial by Jury* (Methuen, London, 1966), 148–165; Parliament of Victoria Law Reform Committee, *Jury Service in Victoria* (Issues Paper 2, November 1995), paras 1.1–1.3, 1.19–1.20; the essays in Findlay and Duff (eds), *The Jury Under Attack* (Butterworths, London, 1988) for critical analyses of these functions by various authors; and *Taylor v Louisiana* 419 US 522,530 (1975): "The purpose of the jury is to guard against the exercise of arbitrary power – to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over-conditioned or biased response of a judge. . . . 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."

reputation and liberty of those charged with criminal offences. They are given no training for this task, they deliberate in secret, they return a verdict without giving reasons, and they are responsible to their own conscience but to no one else.²

- 59 In contrast, Lord Devlin in *Trial by Jury* agreed with Blackstone that the jury was the “grand bulwark of [people’s] liberties”, stating that:

Each jury is a little parliament . . . 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. (164–165)

The democratic nature of the jury

- 60 The jury, by allowing lay people to participate in the criminal justice system, is a powerful symbol of democracy. Some argue that this symbolic function far outweighs any practical significance, and that the jury fails adequately to fulfil any of the functions ascribed to it.³ However, when examining the jury system it is important to recognise the balance struck between different values and functions of the criminal justice system. In the case of the jury system, community participation is important because the jury collectively brings a diversity of life experiences and knowledge to criminal proceedings which judges may lack, allowing the jury more effectively to perform its functions. The benefits of community participation are seen by many to outweigh its disadvantages, such as a lack of legal training, and the advantages which other judicial tribunals, whose deliberations are not secret, have in terms of due process and public accountability.

- 61 In our view, the democratic nature of the jury, achieved through community participation, is precisely what gives practical value to each of the functions of the jury described below. If the jury at present fails properly to fulfil any of these functions, changes can and should be made to assist it to do so.

The jury as fact-finder

- 62 The primary and most practical function of the jury in a criminal trial is to determine the relevant facts of the case and apply the law to reach a verdict of guilty or not guilty.⁴ The jury is assumed to be a competent fact-finder, able to sift through the evidence, understand it, weigh it up, assess the credibility of witnesses, and apply the law to the facts (Findlay, 1994, 13). Juries are also assumed to have the advantages of diversity of life experiences and viewpoints (a collective “common sense”), the collective recall of 12 individuals, and a democratic deliberative process in which each detail is explored and subjected to the scrutiny of the group. A judge does not have these advantages (although the judge sitting without a jury does have advantages such as access to the

² Baldwin and McConville, *Jury Trials* (Clarendon Press, Oxford, 1979), 1. See also, for example, Bonnington, “The jury – a suitable case for treatment?” [1995] NLJ 847, 848; and Watkins, “Trial by jury: a time for re-appraisal” (1985) 16 *Cambrian LR* 5, 7.

³ Darbyshire, “The Lamp That Shows That Freedom Lives – Is it Worth the Candle?” [1991] *Crim LR* 740, 741.

⁴ Findlay, *Jury Management in New South Wales* (Australian Institute of Judicial Administration, 1994), 13; Law Reform Commission of Canada, Working Paper 27, 5. Jurors are required to swear or affirm that they will try the case before them to the best of their ability and give their verdict according to the evidence: see r 22 *Jury Rules 1990* (SR 1990/226).

transcript of evidence). Jurors are expected to be impartial, in the sense of having no personal connections with defendants, witnesses or complainants, and no personal knowledge of the facts of a case.

- 63 The trial judge, by enforcing evidentiary rules, to some extent controls the framework within which the jury is allowed to determine facts. The judge rules whether evidence is admissible, and gives directions relating to facts, the credibility of witnesses and even the form of verdicts:

Judicial intervention in order to construct what is fact for juror consumption is as much an expression of limited confidence in the “common sense” justice of the jury as it is a subtle attempt to expand the power and influence of the judge within the trial.⁵

In its work reforming the law of evidence, the Law Commission decided that although some special rules may be needed for jury trials, it would be inappropriate to create different laws of evidence based on whether a trial happens to be before a jury. Technical rules, such as the hearsay rule, may hinder rather than encourage the common sense fact-finding abilities of jurors (*Evidence Law: Principles for Reform* (NZLC PP13, 1991), 9–10).

- 64 Juries function as fact-finders in a particular sense by deciding which evidence presented in court during an adversarial trial is “true” or most believable. There are, however, many ways of determining “truth”. For example, in contrast to English ideas of individual criminal responsibility, in te ao Māori (the Māori dimension) the idea of collective responsibility is central. This view informs the processes for determining truth.⁶ In a further example, it has been recognised that Canadian aboriginal societies have very different methods and processes for “truth determination” from Western European societies:

Aboriginal methods of dispute resolution . . . would allow for any person to volunteer an opinion or make a comment. The “truth” of an incident would be arrived at through hearing many descriptions of the event. Because it is impossible to arrive at “the whole truth” in any circumstances, Aboriginal peoples would believe that more of the truth can be determined when everyone is free to contribute information.⁷

The Continental European situation is different again from the adversarial system. Under European inquisitorial trial systems, investigating judges direct an extended inquiry into the case. Courts can call their own expert witnesses, and the verdict is often given by a two-thirds majority of a panel of lay and professional judges.⁸

⁵ Findlay, “The Role of the Jury in a Fair Trial” in Findlay and Duff (eds), 164. Note that judges may be regarded as open to the influence of inadmissible evidence. In *R v Cullen and Waa* (1990) 6 CRNZ 28, 37, the police acknowledged that ensuring the judge hears inadmissible and “damning” evidence, even though the jury does not, is “half the battle”.

⁶ See, for example, Patterson, *Exploring Māori Values* (Dunmore Press, Palmerston North, 1992), chapter 6; see also chapter 7 of this paper.

⁷ Sinclair, “Aboriginal Peoples, Justice and the Law” in *Continuing Poundmaker and Riel’s Quest, Presentations made at a Conference on Aboriginal Peoples and Justice* (Purich Publishing, Saskatoon, 1994), 180–181, quoted in Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: a report on Aboriginal people and criminal justice in Canada* (1996), 201.

⁸ See, for example, Langbein, “Mixed court and jury court: could the Continental alternative fill the American need?” [1981] *American Bar Foundation Research Journal* 195.

- 65 Empirical studies can test the extent to which the assumptions about the fact-finding abilities of juries are reflected in reality. Some research has been conducted overseas, but a common weakness of such research is that jury verdicts are tested against the expert opinion of judges or lawyers.⁹ Commentators and researchers “celebrate the idea of the expert, of efficiency as against democracy”, and may overlook the view that another function of the jury is to act as conscience of the community and provide a lay perspective.¹⁰ The results of empirical studies need to be interpreted bearing in mind the other functions of the jury described below, and the democratic value in lay participation in the criminal justice system.
- 66 Many of the criticisms concerning the ability of juries to decide cases are not criticisms of lay participation in the criminal justice system. Rather they are fundamental criticisms about the nature of the adversarial trial, the complexity of the rules of evidence, the duration of the trial, and the formal procedures adopted within the trial itself (Findlay, 1994, 12). There is no one way to determine facts and hence the truth; as demonstrated, overseas and indigenous models provide examples of ways in which our trial procedures might be modified to assist juries in their decision-making. Juries determine facts in a complex environment, and reform initiatives should focus on assisting juries to perform their functions better.

The jury as conscience of the community

- 67 The jury sitting in a criminal trial makes its decision not only on the basis of the written criminal law but also in light of what has been termed “the community conscience”. Provided jury selection procedures enable the selection of juries which are representative of the community, jury decisions are likely to approximate the voice of the people and therefore what the community regards as fair and just (Findlay, 1994, 8).¹¹ This function is often connected with the jury’s fact-finding function, in that juries determine whether the facts fit within a particular legal definition according to community standards. For example, “indecent” in relation to the crime of indecent assault under the Crimes Act 1961 is an ordinary word of the English language and, as such, its meaning is not a question of law: *Cozens v Brutus* [1973] AC 854, 861. It is for a jury to

⁹ See, for example, the studies listed by Bankowski, “The Jury and Reality” in Findlay and Duff (eds), 19.

¹⁰ Bankowski, 22, 20: the implication of the methodology of using, in the main, legal “experts” to show whether acquittal rates are too high or too low, is that the good juror is one who is good as a lawyer, “one who accepts the prevailing courtroom norms of legal rationality and who is willingly incorporated into the social order of the courtroom and the trial”. But see the discussion at para 73 where the authors of the University of Chicago juries project interpreted the discrepancy between jury verdicts and expert opinion as an expression of the jury’s community conscience.

¹¹ See also, for example, Devlin, *The Judge* (Oxford University Press, 1979):

The jury is the means by which the people play a direct part in the application of the law. It is a contributory part. The interrelation between the judge and jury . . . secures that the verdict will not be demagogic; it will not be the simply uninhibited popular reaction. But it also secures that the law will not be applied in a way that affronts the conscience of the common man. (127)

consider whether the facts found amount to indecency. According to the New Zealand Court of Appeal:

[T]hat in our experience is the way in which juries have been directed for many years now. It results in juries applying current standards of what is indecent *and thereby reflecting the attitude of the community*. This we think is a proper function of the jury and one which it is right that they undertake. (*R v Nazif* [1987] 2 NZLR 122, 127) [emphasis added]

- 68 However, the function of the jury as the conscience of the community, as described, makes some significant assumptions: that all groups in the community are represented on the jury; that the community has fair and liberal attitudes; and that shared notions of fairness can be achieved through a democratic deliberative process.
- 69 It is only relatively recently that the jury has come to approximate representation: women were first permitted to serve on juries, in a limited capacity, in 1942, and Māori were not permitted to serve on ordinary juries until 1962.¹² Some groups are still under-represented. This concept of general representation of all groups in the community may run counter to the concept of trial by peers if the concept of “peers” is to be defined by reference to certain characteristics of the defendant, such as ethnicity (see chapters 6–7).
- 70 Different groups in the community may not share similar notions of fairness. For example, for some Māori, ideas of collective responsibility and kinship between the Māori equivalents of the “jury” or “judge”, the complainant and the defendant, are important (see chapter 7). Concepts of tikanga Māori are different from Pākehā laws and thinking which dominate the present legal system, for example, the cases of utu (recompense) known as muru.¹³ The notion of decisions being made by a disinterested and “independent” authority is also foreign to Māori customary law. Rather, legal procedures would be followed by the appropriate authorities but typically only involve interested parties.¹⁴ The dynamics of tribal society meant simply that the authorities within the tribe exercising its processes of justice would be as well known to the members involved as an old time English jury would have been known to the parties brought before it from the village.
- 71 Do juries undertake an impartial and democratic process of deliberation? Sixty percent of the respondents to a New South Wales survey indicated that the collective experience of jury service drew the members together as a group

¹² Women were first permitted to serve only after notifying the court registrar that they wished to do so: *Trial by Peers?: The Composition of New Zealand Juries* (Department of Justice, Wellington, 1995), 34. The Juries Amendment Act 1963 removed this disqualification, but until the Juries Amendment Act 1976 women could be excused solely on the ground of their sex: McDonald, “A jury of her silent peers” (1993) 9 *Women’s Studies Journal* 88, 109. Before 1962 there was limited provision for all-Māori juries.

¹³ In the case of muru, utu is taken in the form of plunder of a kinsman who has broken a tapu or suffered some accidental misfortune. Māori who have been the subject of muru can be expected to be pleased that the tribe has taken the trouble to execute muru, and pleased that they are regarded as important enough to merit this treatment. For a more in-depth explanation of these complex practices and the values underlying them see Patterson, *Exploring Māori Values*, 116 and following pages.

¹⁴ Patterson, “Utu and Punishment” (1991) 21 *VUWLR* 239, 247.

(although this is a rather imprecise measure of the nature of the jury's process of deliberation).¹⁵ Other overseas research using mock juries, and anecdotal evidence, suggest that juries do not always achieve the ideal of impartial democratic deliberation (see chapter 5 for discussion of the goals of the jury system). Without empirical research into actual jury deliberations it is impossible to be sure (see discussion in the appendix).

- 72 There are opposing views as to whether juries act as the conscience of the community. Baldwin and McConville found little evidence of the notion of jury equity in their 1979 survey: unexpected verdicts apparently occurred at random (130–131; see also Darbyshire, 1991, 748). The Canadian Law Reform Commission, on the other hand, cited in its Working Paper 27 the results of the 1996 University of Chicago Jury Project in support of the idea of the jury acting as the conscience of the community. The authors of the Chicago study concluded that while the jury's "revolt" against the law was minor, it did play a role in "correcting" the law in cases where a strict application would have led to an unjust result.¹⁶ This is not an unexpected result: the judgment of the community ought to mirror, to a large extent, the written law formulated by a democratically elected legislature.
- 73 Critics argue that there is a danger that juries will undermine the rule of law, leading to uncertainty and unequal treatment. They also say that juries may reach their decisions on the basis of emotional responses and personal prejudices (Law Reform Commission of Canada, Working Paper 27, 9; Darbyshire, 1991, 750). These criticisms may underestimate the ability of jurors; implicit is the expectation that jurors should behave more like judges or lawyers than lay participants in the criminal justice system. However, from some minority perspectives they have some validity: monocultural attitudes and majority viewpoints are more often represented on juries and may find expression in the jury's verdict.¹⁷
- 74 In the Law Commission's view, community participation, and the community input and common sense judgment that brings, are important and valuable components of the jury system. Prejudicial attitudes which are manifested in jury deliberations and particular jury verdicts may be dealt with by changes in the jury system, such as providing assistance to juries during their deliberations, and by community education.

¹⁵ Findlay, 1994, 98. Some of the explanations included:

Made us aware that everyone has a worthwhile opinion and it's worth being patient and listening.

We all had a great concern that the right decision be reached.

Varied occupations and life experiences help.

Yes, we all had different views which was eye opening.

12 percent of respondents indicated that they had negative feelings about jury service.

¹⁶ Kalven and Zeisel, *The American Jury* (Little Brown and Company, Boston, 1966).

¹⁷ Jackson, *The Māori and the Criminal Justice System – A New Perspective: He Whaiapaanga Hou: Part 2* (Department of Justice, Wellington, 1988), 139; *Trial by Peers?*, 35; United States cases and empirical research cited in Abramson, *We, The Jury: The Jury System and the Ideal of Democracy* (Basic Books, New York, 1994), 110–112.

The jury as safeguard against arbitrary and oppressive government

- 75 The jury can be regarded as a safeguard against arbitrary or oppressive government. In cases where it considers that the state is acting arbitrarily or oppressively in enforcing the law, or that the law itself is arbitrary or oppressive, a jury has the power to acquit a defendant without the prospect of that decision being challenged on appeal or being punished as a wrong verdict.¹⁸ In other words, this function allows the jury to ignore the strict application of the law without sanction. The rationale is that

the law sought to be applied does not conform to the common morality of the community, or is being used by the State in an oppressive fashion. . . . this function views the jury primarily as a political institution. (Law Reform Commission of Canada, Working Paper 27, 11)

- 76 One of the examples commonly used to support the existence of this function is a 1980s English case of a government official charged with breaching the Official Secrets Act (UK) 1911–1939 because he leaked documents about the Falklands War to a member of Parliament. The facts supported the charge but the jury found the defendant not guilty, presumably because the jury saw the prosecution, and possibly the law, as unjust.¹⁹ Juries do not, however, always take a civil libertarian view.²⁰ Juries have acquitted on grounds of discrimination both overseas and in our own jurisdiction (Abramson, 110 ff; Jackson, 1988, 138–140).

- 77 Arguing against the view that juries perform a function of safeguarding against arbitrary and oppressive government, Darbyshire cites the English cases of the Winchester Three, the Guildford Four, the Maguires and the Birmingham Six, cases in which jury trials failed to remedy the lack of due process at the pre-trial stage and thus did not safeguard the defendants against oppressive state activity (747–748). But this argument is an over-simplification. Juries are not a panacea. It would be unrealistic and unfair to expect juries to modify pre-trial abuses of process when evidence is withheld or fabricated, or confessions are extracted under duress, as happened in those cases.

¹⁸ A conviction can only be appealed against on the grounds that it was unreasonable or cannot be supported having regard to the evidence: see Crimes Act 1961 s 385.

¹⁹ See Blake, “The Case for the Jury”, in Findlay and Duff (eds), 141, and Findlay, 1994, 8, both citing Drewery “The Ponting Case – Leaking in the Public Interest” (1985) Public Law 203. See also the other examples cited by Blake, 141–142. A recent example which invites comparison is the United Kingdom case of the acquittal of four women Ploughshares peace activists for damaging a military aircraft being exported by the British government to the Indonesian government: Pilger, *New Statesman*, 19 July 1996, 23; “Hawk jury adds to ‘perverse’ cases” *Guardian*, 31 July 1996; Randle, “Direct action: ploughing a deep furrow” *Guardian*, 7 August 1996; Alderson, “Jet case verdict is hard to understand, says minister” *The Times*, 1 August 1996. However, this case was different in that the judge ruled that the women were entitled in law to put forward the defence that they had acted lawfully to prevent the crime of genocide. The jury apparently accepted that defence by acquitting the women.

²⁰ Blake, 142. See also the New Law Journal editorial, “Juries and the vigilante” [1996] NLJ 869, describing a case in which the jury acquitted a businessman who had been charged with assault of a man who had burgled his premises.

The jury's role in legitimising the criminal justice system

- 78 The number of criminal jury trials is small in relation to the total number of criminal proceedings heard by the courts.²¹ But even though the involvement of the jury is small and the power wielded by individual participants is restricted, lay participation is seen to strengthen the legitimacy of the criminal justice system. It is to be expected that all groups in society will place value on the justice system if they are able to participate in that system's processes.²²
- 79 Is there public confidence in jury trials? While in a 1995 survey 70 percent of those surveyed expressed total or a fair amount of confidence in the decisions of juries, an earlier survey of Māori reported that only 42.5 percent thought that the jury system ensured a fair trial for Māori defendants.²³ There are other indicators of dissatisfaction among Māori, including several appeals brought to test whether or not a remedy was available for under-representation of Māori on juries;²⁴ reports on the criminal justice system including under-representation

²¹ In the year to June 1997, 293,229 summary informations were filed (not including minor offences or infringement notices), and 2619 jury trials were committed to trial (2047 in the District Court and 572 in the High Court): *Annual Report: Department for Courts for the year ended 30 June 1997* 1997 AJHR E.60, 66. The number of jury trials actually heard would be slightly less. Available statistics do not provide a direct comparison of the number of jury trials to judge alone trials. In England just under 2 percent of criminal cases are tried by a jury (Darbyshire, 746). In Victoria, Australia, offences tried by juries represent less than half of one percent of all offences disposed of within the year. The frequency of criminal jury trials in other Australian states is at least double that of Victoria (Parliament of Victoria Law Reform Committee, *Jury Service in Victoria* (Issues Paper 2, 1995), 13–14).

²² See, for example, *Solicitor-General v Radio New Zealand* [1994] 1 NZLR 48, 54: "The system rests . . . on the community respect for their decision reached after a trial conducted in accordance with established procedures and principles".

²³ The 1995 survey was a UMR Insight Omnibus telephone survey of a nationally representative sample of 750 New Zealanders aged 18 years and over. The margin of error for a 50 percent figure at the "95 percent confidence level" is plus or minus 3.5 percent. The figures were not broken down according to race or ethnicity. Note that the figure is similar to the New South Wales survey of jurors asking whether they found jury service a rewarding experience. The survey of 2000 Māori in 1987 analysed their attitudes towards the criminal justice system (see Jackson, 1988, appendix 3).

²⁴ See, for example, the following failed appeal cases: *R v Kohu and others* (unreported, 2 August 1990, CA 107/90, CA 108/90, CA 109/90, CA 119/90, CA 177/90) in which the defendants appealed against their convictions on the ground that they were convicted by an all European jury after the prosecution challenged every prospective Polynesian or Māori juror, and were therefore not convicted by a jury of their peers (in the sense that no member of the jury shared the same Māori cultural heritage); *R v Pairama* (unreported, HC, Hamilton, 20 December 1995, T 21/95) in which the defendant appealed his conviction on the ground that jury should consist of six Māori and six Pākehā, on the basis that the Treaty of Waitangi represents an equal partnership between Māori and Pākehā; *R v Cornelius* [1994] 2 NZLR 74 in which the judge held that an error in the compilation of the jury list (which resulted in fewer Māori being included) did not affect the jury's verdict, and that the defendant had been tried by a jury of his peers (ie, a qualified and apparently impartial jury drawn by chance and at random from a quite closely populated area within the defined jury district). See also Hill, *Policing the Colonial Frontier* (Historical Publications Branch, Department of Internal Affairs, Wellington, 1986), 169, describing the trial and jury acquittal of Richard Cook for the murder of Rangihaua Kuika and her infant son, an early example of Māori dissatisfaction with the European criminal justice system.

of Māori on juries;²⁵ the views expressed at several small hui on criminal procedure sponsored by the Law Commission;²⁶ and the consultations undertaken on the Law Commission's Women's Access to Justice project which raised a range of specific concerns about the operation of the jury system. These indicators collectively show a disparity of confidence in the system between Māori and non-Māori, a disparity which also relates to the criminal justice system as a whole.

- 80 If the “legitimising” function of the jury is to be realised, public perceptions should be weighed in assessing the representativeness and impartiality, as well as independence, of juries. To maximise public confidence in and respect for the administration of justice, the process should ensure that juries both “appear” to be and in fact are impartial and representative.²⁷ Increasing the confidence of the public may also require other changes, such as allowing juries in certain circumstances to be less representative of the general community and more representative of a particular group in the community. We examine some of these issues further in chapters 6 to 9, dealing with the selection and composition of juries.

The jury as an educative institution

- 81 Jury service provides an opportunity for members of the community to contribute to the criminal justice process, and to educate others about it (Findlay, 1994, 7). Participation may have a number of particular consequences:
- it informs people about the workings of the criminal justice system;
 - it educates them about the values of procedural due process;
 - it encourages judges and lawyers to proceed in a manner understandable to lay people, rendering the operation of the system generally more accessible to lay assessment; and
 - it reduces some of the mystique of the criminal justice system and increases its acceptability.
- 82 The way in which jurors rate their experience serving on a jury may also indicate whether they found the experience to be an educative one or not. The survey in New South Wales found that 73 percent of respondents found the experience of jury service rewarding (78 percent of those surveyed stated that it was their first time serving on a jury). Only five percent disagreed (Findlay, 97).

²⁵ For example Advisory Committee on Legal Services, *Te Whaingā i Te Tika: In Search of Justice* (Wellington, 1986); Jackson, 1988; *Report of the Courts Consultative Committee on He Whai-paanga Hou* (Wellington, 1991); *Trial by Peers?*. Note that the team of researchers on *He Whai-paanga Hou* sought the views of 6,000 Māori in total (including the 2,000 surveyed): “Alternative System for Māori did not deserve rebuff” (1989) 14 (1) Northern Law News 1.

²⁶ For example, at the prosecutions hui it was said that in smaller communities Māori know each other and are effectively excluded from jury service if the defendant is Māori.

²⁷ Pomerant, *Multiculturalism, Representation and the Jury Selection Process in Canadian Criminal Cases* (working document for the Department of Justice, Canada, 1994), 20.

- 83 It is debatable whether the involvement of lay people as jurors encourages judges and lawyers to proceed in ways which are more understandable. The New South Wales survey found that a significant number of jurors did not understand various aspects of the trial process, from the prosecution and defence opening addresses, to legal jargon, cross-examination and the judge’s summing up.²⁸

SUMMARY

- 84 The core value underlying all the various functions of the jury is their democratic nature. They allow members of the community to participate in the criminal justice system and to bring a diverse range of perspectives, personal experiences and knowledge to bear in individual criminal cases.
- 85 The primary and most important function of the jury in a criminal trial is to determine the relevant facts of the case and to apply the law to reach a verdict of guilty or not guilty. Juries are generally assumed to be competent fact-finders, but some features of the adversarial trial system may need to be modified to assist juries in reaching their decisions.
- 86 The jury, because of its nature, acts as the community conscience in deciding criminal cases. However, this function is dependent on juries representing all members of the community, and deliberating in an impartial and democratic manner.
- 87 The jury is also regarded as a safeguard against arbitrary or oppressive government. However, it rarely operates actively in this sense.
- 88 The jury plays an important role in legitimising and maintaining public confidence in the criminal justice system. In order to maximise that confidence, juries should appear to be, and in fact be, impartial and representative of the community. The jury also has a role in educating people about the workings of the criminal justice system.
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²⁸ Findlay, 80–88. For example, 85 percent considered the prosecution’s opening address was helpful, 82 percent indicated that it explained the case clearly; but 20 percent had difficulties understanding the evidence presented by the prosecution (80). Only 20 percent of respondents indicated that they understood the legal terms in the case thoroughly; the majority, 56 percent, understood these terms “most of the time”; around 15 percent had an understanding “some of the time” or “not at all” (83).

3 Trial by jury

INTRODUCTION

- 89 **T**HIS CHAPTER CONSIDERS THE RIGHT TO TRIAL BY JURY, how that right is reflected in current law, and proposals for reform. At present not all defendants charged with a criminal offence have the right to elect trial by jury (or judge alone). In certain serious cases the defendant must always be tried by a jury. In some cases, where the maximum penalty is greater than 3 months' imprisonment, the defendant has no right to elect trial by jury even though s 24(3) of the New Zealand Bill of Rights Act 1990 provides for such a right of election. Current law is also complicated by rules categorising offences as summary or indictable, and other rules determining in which court certain trials must take place. The two central issues considered in this chapter are
- mandatory trial by jury – whether it can still be justified in certain kinds of cases; and
 - the circumstances in which the right to elect trial by jury is and should be available – we consider whether jury trials are too readily available, and in what other ways the current law should be rationalised.

CURRENT LAW

The right of election

- 90 Whether a particular defendant is tried by a jury or by judge alone depends on a variety of factors, including the defendant's preference, the maximum penalty for the offence charged and the type of offence, and the way proceedings are commenced. Not everyone is able to elect trial by jury and not everyone is able to choose trial by judge alone.
- 91 The right to elect trial by jury is set out in s 66(1) of the Summary Proceedings Act 1957 and confirmed in s 24(e) of the New Zealand Bill of Rights Act 1990. Section 66(1) gives defendants prosecuted summarily, and charged with an offence punishable by a maximum penalty exceeding 3 months' imprisonment, a right to elect trial by jury. Section 24(e) of the Bill of Rights Act provides that everyone who is charged with an offence:
- shall have the right, except in the case of an offence under military law tried before a military tribunal, to the benefit of a trial by jury when the penalty for the offence is or includes imprisonment for more than three months.

Defendants charged with offences punishable by a maximum sentence of imprisonment of 3 months or less will always be tried by a judge alone, rather than by a jury.

The summary/indictable divide

- 92 Although neither s 66(1) of the Summary Proceedings Act nor s 24(e) of the New Zealand Bill of Rights Act make specific reference to the distinction, criminal offences are categorised as either summary or indictable. Indictable offences are the more serious, but in procedural terms the distinction is very complex. All offences in the Crimes Act 1961 are indictable offences (s 2 and 2(2)), although other Acts also contain indictable offences. The most serious of the indictable offences can *only* proceed by way of indictment, in which case an information (ie, a document filed to begin the proceeding) is laid by the police in the District Court in indictable form (Form 2 of the Summary Proceedings Act 1957, Schedule 2). All other indictable offences in the Crimes Act are indictable offences *triable summarily* (these are listed in the Summary Proceedings Act, Schedule 1, Part I). Other Acts containing indictable offences follow a similar pattern, and also contain indictable offences triable summarily; they are set out in the Summary Proceedings Act, Schedule 1, Part II).
- 93 Indictable offences which can *only* be dealt with by way of indictment will always be tried by a jury unless the defendant applies for a trial by judge alone under s 361B of the Crimes Act (see chapter 4 for a detailed discussion of what that entails and the reform issues arising). Some offences, however, are considered so serious that they must invariably be tried by a jury: namely, indictable offences punishable by imprisonment for life or a term of 14 years or more (s 361B(5)). Offences in this category include treason, judicial corruption, sexual violation, murder, manslaughter, aggravated wounding, endangering transport, aggravated robbery, kidnapping, arson, wilful damage, dealing in class A or class B controlled drugs, extortion by certain threats, and compelling the execution of documents by force.
- 94 These offences proceed by way of a preliminary hearing (also referred to as a depositions hearing). The preliminary hearing is held in the District Court to determine whether there is sufficient evidence against the defendant to bring him or her to trial before a jury. If there is sufficient evidence, the defendant is committed for trial and a document – the indictment – is prepared as the basis for the charges on which the trial will later take place.
- 95 For indictable offences *triable summarily*, the prosecution may elect to proceed by way of an information in indictable form or, alternatively and more commonly, by way of an information in summary form. If the former course is adopted, the matter proceeds in the same way as a purely indictable offence. If the latter, the case will proceed summarily (ie, before a judge alone in the District Court) unless the defendant exercises the right to elect trial by jury on the basis that the offence is punishable by imprisonment for more than 3 months. In that event, the matter proceeds, as with purely indictable offences, to a preliminary hearing and, if committed, to trial by jury.
- 96 Summary offences are defined in s 2 of the Summary Proceedings Act as:
- [any] offence for which the defendant may not, except pursuant to an election made under section 66 of this Act, be proceeded against by indictment; and, where the enactment creating an offence expressly provides that it may be dealt with either summarily or on indictment, includes such an offence that is dealt with summarily.

A variety of Acts – including the Summary Offences Act 1981 – contain summary offences. The procedure governing summary prosecutions is set out in Part II of the Summary Proceedings Act. Summary prosecutions are commenced and tried in the District Court.

The court in which jury trials will take place

- 97 Trial by jury may take place either in the High Court or the District Court. There are three categories (or “bands”). The District Court will deal with those proceedings involving the indictable offences referred to in the District Courts Act 1947, Schedule 1A, Part I. These include seditious offences, bribery, blasphemous libel, bestiality, aggravated robbery, and arson (see the Summary Proceedings Act s 168A(1)(a) and the District Courts Act s 28A(1)(d)).
- 98 The second category consists of the indictable offences referred to in the District Courts Act, Schedule 1A, Part II, and includes sexual violation, kidnapping, wounding with intent, and aggravated robbery. These are known as “middle band” offences. Following committal for trial, a High Court judge will determine in which court these offences should be tried by considering, among other things, the briefs of evidence. If the judge decides the case should be tried in the District Court, it will be transferred there (see the District Courts Act s 28A(1)(e), and the Summary Proceedings Act s 168AA). The judge must consider:
- the gravity of the offence charged;
 - the complexity of the issues likely to arise in the proceedings;
 - the desirability of the prompt disposal of trials; and
 - the interests of justice generally (s 168AA(3)).
- 99 The third category consists of the most serious indictable offences, most notably murder. Offences in this category are always tried in the High Court. Also included in this category are treason and other crimes against the state, piracy, slave dealing, manslaughter, procuring abortion, and killing of an unborn child.

Offences exempted from the right to elect trial by jury

- 100 Parliament has exempted certain offences from the right to elect trial by jury, even though they are punishable by imprisonment for more than 3 months. An example of this is found in s 43 of the Summary Offences Act 1981, which concerns the offences of common assault and assault on a law enforcement officer, each of which is punishable by up to 6 months’ imprisonment. In *Reille v Police* [1993] 1 NZLR 587, the High Court considered the effect of s 24(e) of the Bill of Rights Act on the exclusion in s 43. The court held that s 43 clearly abrogated the right to jury trial for offences under ss 9 and 10 (592). In considering the origin of s 43, Eichelbaum CJ noted:

Thus a discretion was conferred on the police who could lay a charge under one Act or the other depending on the perceived seriousness of the offence. As Fisher J said in *Birch v Ministry of Transport* (Auckland, AP 54/92, 31 March 1992), apparently the only case in point, no doubt behind the legislative policy was the view that the Court system could not accommodate the luxury of jury trials for the very common type of prosecution for assault suitably brought under the Summary Offences Act. (591)

Summary

- 101 The following summarises the effect of the various provisions referred to above. Summary offences carry a right to elect trial by jury except when:

- they are punishable by a sentence of 3 months' imprisonment or less (offences in this category will be tried by a judge alone); or
- they are subject to legislation which expressly precludes trial by jury (for example, s 43 of the Summary Offences Act).

Indictable offences will be tried by a jury except when:

- they are punishable by a sentence of 3 months' imprisonment or less – see, for example, certain theft offences in s 227(d) of the Crimes Act in which case they are tried by a judge alone; or
- they are indictable offences triable summarily, in which case:
 - if prosecuted summarily, they are treated as summary offences unless the defendant elects trial by jury under s 66(1) of the Summary Proceedings Act, or
 - if prosecuted indictably, the defendant loses the right to trial by judge alone other than by application under ss 361A–361C of the Crimes Act; or
- the defendant applies for trial by judge alone under ss 361A–361C of the Crimes Act (see chapter 4 for a discussion of judge alone trials).

MANDATORY TRIAL BY JURY

- 102 As already noted, some offences (ie, those punishable by imprisonment for 14 years or more) are always tried by a jury, regardless of the defendant's wishes. In the following discussion, we consider the justifications for this approach and whether mandatory trial by jury should be abolished.

The justifications

Community input and public validation

- 103 In *R v Maguire* (unreported, HC, Auckland, 8 December 1992, T 267/90) Williams J referred to the thinking behind the requirement that offences punishable by 14 years' imprisonment or more should always be tried by a jury, saying:

Doubtless this is because the jury system has the advantage of bringing into the courtroom representatives of the community and the belief is that it is the best way to ensure that justice is done in relation to the most serious offences. (3)

- 104 The advantages of community input were referred to in the Parliament of Victoria Law Reform Committee's *Jury Service in Victoria*. The Committee noted that some issues, such as "reasonableness, provocation, self-defence, dishonesty and indecency" raise community values. The Committee observed:

Although judges are used to applying community standards, one of the best reasons for having a jury to determine issues relating to community values is the acceptance by the community of a jury's verdict. (Issues Paper 2, para 2.27)

- 105 Issues of community values, or verdicts needing the application of the community's conscience and community acceptance, can also arise in cases involving offences punishable by less than 14 years' imprisonment. They may not always be linked to the seriousness of the offence, or be detectable in advance of the trial. Therefore, the application of the community's conscience through trial by jury is not, in the Law Commission's view, a compelling reason to *require* trial by jury in some cases and not others.

Murder as a special case

- 106 In Australia, the crime of murder was singled out by White J in *R v Marshall* (1986) 43 SASR 448 as one which should always be tried by a jury:

In a murder case, community values are reflected in a special way on such subject matters as provocation, self-defence, intention and manslaughter; in the latter case, the jury has a “constitutional right” to bring in a merciful verdict of manslaughter even where the elements of murder are proved. That merciful verdict belongs to the jury. . . . There are also great difficulties in putting to one side, in a case as serious as murder, the kind of prejudicial material which is often introduced into a voir dire²⁹ hearing. It is true that magistrates in minor cases and judges in civil cases often hear evidence on the voir dire . . . and put out of their minds the prejudicial matter discovered in the course of provisional hearings. Nevertheless in murder trials, where the sentencing consequences of an often finely-balanced decision can be so extraordinarily different, it is most important that the case be decided only upon properly admissible evidence or upon evidence which has been independently adjudged more probative than prejudicial upon long-established and clearly developed principles. The trial judge acts as a filter against this polluting evidence which is capable of influencing or inflaming a jury unfairly against the accused, and less capable, but still capable, of influencing a judge sitting alone in a murder trial, perhaps sub-consciously and in spite of his training and rigorous efforts to exclude such evidence from his mind. (449)

- 107 Should murder cases be treated differently from trials for other offences? It is doubtful that there is any one feature of murder trials which suggests so (apart, perhaps, from sentence). Many of the features identified by White J are also present in other trials.

Finely balanced issues

- 108 Jury trials are desirable when the decisions to be made throughout the trial may be finely balanced and can lead to vastly different consequences, in terms of whether the defendant is convicted and, if convicted, as to the sentence imposed. The readily apparent independence of the jury, and the fact that it enables consideration of the issues by a number of individuals with no direct interest in either the alleged crime or the criminal justice system, are features of jury trials which ensure that the defendant obtains a fair trial both in appearance and in fact. However, these features do not necessitate mandatory trial by jury. The Law Commission suggests that it should be left to the defence to assess whether trial by jury is likely to be beneficial to it in the particular case, except perhaps in cases of particular complexity. This is consistent with the description of trial by jury in s 24(e) of the Bill of Rights Act as a “right” and a “benefit” for the defendant.

The threshold for mandatory trial by jury

- 109 Reliance on the maximum penalty of imprisonment for 14 years or more is not, in itself, a valid way to identify those cases which may involve difficult choices or require public validation of the verdict. Sentencing decisions in relation to a number of offences, in addition to murder, have become complex, particularly as a result of the 1993 amendment to the Criminal Justice Act 1985. Some of these offences are not punishable by imprisonment for 14 years or more and, therefore, a jury trial is not mandatory for them.

²⁹ A trial within a trial to decide evidentiary issues in the absence of the jury.

- 110 An example can be found in the treatment of serious violent offenders as a special category. If an offender is convicted of a “serious violent offence”, within the meaning of s 2 of the Criminal Justice Act, and is sentenced to imprisonment for more than 2 years, he or she will be ineligible to apply for parole until the expiry of two-thirds of the sentence. In addition, the judge has powers on sentencing offenders for exceptional, serious, violent offences to impose a minimum period of imprisonment under s 80(4) of the Act. The minimum period will end 3 months before the expiry of the sentence, or after 10 years, whichever is the lesser (s 80(6)). In other words, the offender will not be eligible for release until the lesser of these periods has elapsed.
- 111 The serious violent offences are sexual violation, manslaughter, attempted murder, wounding with intent to cause grievous bodily harm, wounding with intent to injure, injuring with intent to cause grievous bodily harm, injuring with intent to injure, using a firearm against a law enforcement officer, commission of a crime with a firearm, robbery, and aggravated robbery. Of these, wounding with intent to injure, commission of a crime with a firearm, and robbery are not within the category of offences referred to in s 361B(5) of the Crimes Act which must be tried by a jury.
- 112 This discussion of various offence categories, and sentencing and statutory options, reveals that offenders who have committed similar offences can be treated very differently from each other, depending on which statutory category applies. This differential approach illustrates that reliance on the 14 year maximum penalty as a means of determining which offences should *always* be tried by a jury is a somewhat crude approach.

Reform options

- 113 Aside from the fundamental issue of whether some offences should always be tried by a jury, more cosmetic reform options are available. For example, it would be possible either to raise or to lower the current threshold requirement for mandatory jury trials. Section 361B(5) could be amended to require trial by jury for offences punishable by imprisonment for *more than* 14 years, such as murder, manslaughter, dealing in class A controlled drugs, and sexual violation. Alternatively, the provision could be amended to include those offences punishable by a term not exceeding 10 years within the category of offences which must be tried by a jury. Some of the offences in this group include inciting to mutiny, sabotage, conspiring to commit piracy, attempting to commit sexual violation, incest, indecency with a girl under 12, indecency with a boy under 12, counselling or attempting to procure murder, conspiracy to murder, impeding rescue, infanticide, injuring with intent, robbery, burglary, false statement by promoter, falsifying accounts relating to public funds, and forgery.
- 114 Such superficial changes would be without any principled foundation and are not proposed here. However, later in this chapter, the Law Commission suggests that there should be a review of the maximum penalties for offences. Such a review would necessitate some reconsideration of which offences fall into the “less than 14 years” and “14 years or more” categories. In addition to a review of maximum penalties, the Commission proposes removing the mandatory requirement for trial by jury for offences punishable by imprisonment for 14 years or more.
- 115 In conclusion, the Law Commission’s view is that the undesirable facets of the current system – namely, its complexity and arbitrariness – should not be

compounded by *requiring* trial by jury for some offences, based either on the maximum penalty ascribed to them by the statute or on categorisations of particular offences as serious or violent.

Should some offences always be tried by jury? If so, which offences?

THE RIGHT TO ELECT TRIAL BY JURY

- 116 Aside from the features discussed in paras 104–109 (ie, cases needing community input, murder cases, and cases where the issues may be finely balanced), what features should determine whether a defendant has a right to elect trial by jury? In *Trial by Jury*,³⁰ Lord Devlin suggested that there should be trial by jury where:
- there are credibility issues or issues concerning the reliability of a witness (140);
 - it is important to the defendant that he or she obtain a judgment that fits the merits of the particular case (158);
 - there needs to be a check on the power of the executive, for example, on the exercise of police discretion (162); or
 - it is desirable that legal and lay approaches be mixed, so that the jury's presence ameliorates a strictly legal approach (154).
- 117 Whether the above features are present in any one case will not always be discernible at the outset of a trial. In addition, it would not be easy to capture them in legislation and present them as prerequisites to be met before the defendant can elect trial by jury. Therefore, a more certain, if also more crude, mechanism is needed to determine when there will be a right of election. As already noted, that mechanism is the maximum penalty ascribed to the offence with which the defendant is charged. Is the present legislative qualification for a right of election (ie, offences punishable by more than 3 months' imprisonment) a satisfactory one?
- 118 The Law Commission is not aware of any calls for more jury trials. However, the reasons sometimes given for suggesting that jury trials are too readily available and that therefore the threshold should be higher include:
- Some offences punishable by more than 3 months' imprisonment are minor, particularly property offences, and are now less likely to result in a prison sentence. Therefore, they are not serious enough to warrant trial by jury.
 - There are discrepancies between the offences for which trial by jury is available and those for which it is not, suggesting there is no need for trial by jury for either category of offence.
 - Trial by jury is costly and generally takes longer than trial by judge alone. As a cost-efficiency measure, the minimum threshold for trial by jury should be raised above the current threshold.
 - Other jurisdictions similar to our own have higher maximum penalty thresholds for jury trials.

We consider each of these arguments in turn.

³⁰ *Trial by Jury* (Methuen, London, 1966).

The likelihood of imprisonment

- 119 It might be argued that jury trials should be used for a higher level of seriousness than at present, on the basis that the actual penalty imposed is in many cases far less than the maximum penalty for the offence specified in the legislation. In other words, many offences which currently carry a right of election, because they are punishable by a maximum of more than 3 months' imprisonment, will not result in a prison sentence, or will result in a prison sentence of 3 months or less.
- 120 The available data do not enable us to identify precisely what proportion of comparatively minor offences (eg, minor theft or wilful damage), carrying a right to trial by jury, result in a sentence of imprisonment. However, it is possible to gain a general impression of the proportion of convictions resulting in custodial sentences, the length of sentences, and how the pattern varies for particular offence categories and offences within those categories.
- 121 In *Conviction and Sentencing of Offenders in New Zealand 1985–1994* (Wellington, 1995), the Ministry of Justice presented statistics on the breakdown of different sentences for different types of offence. The figures for adult offenders show that:
- between 1985 and 1994, there was an overall increase in the number and length of custodial sentences (ie, imprisonment, life imprisonment, preventive detention, corrective training);
 - in 1985, 8.6 percent of all sentences were custodial and, in 1994, 10.7 percent;
 - custodial sentences of one year or more represented 11 percent of custodial sentences imposed in 1985, compared to 21 percent of such sentences in 1994;
 - in 1994, violent offences made up 27.1 percent of cases resulting in a custodial sentence, property offences made up 27.5 percent, traffic offences 22.7 percent, drug offences 7.1 percent, and the other categories of offences against the person and against justice and good order, each below 2 percent.
- 122 Many defendants charged with imprisonable offences carrying a right to trial by jury do not in fact receive prison sentences, although the likelihood of their doing so has increased in the last decade. Does the gap between the maximum and actual penalties then suggest that the threshold for the right of election should be raised? The Law Commission is doubtful that it does, for two reasons.
- 123 First, it is not possible with the data currently available to determine for which categories of offence, or for which specific offences, trial by jury should be removed. For example, convictions for property offences, which include some quite minor theft and wilful damage offences, are as likely to result in custodial sentences as convictions for violent offences. This is despite the presumption against imprisonment for property offenders in s 6, and against imprisonment when community safety is not at risk in s 7, of the Criminal Justice Act 1985. If it were possible to ascertain that minor theft and wilful damage offences, for example, infrequently lead to imprisonment for more than 3 months, then a case might be made for removing the right to trial by jury for them. This would be a different exercise from increasing the threshold qualification for the right of election across the board.
- 124 Second, as discussed, the maximum penalty is a somewhat crude but necessary mechanism for determining which offences will carry a right of election. The underlying rationales of trial by jury are applicable to some of the more minor

offences currently carrying a right of election. In other words, they can benefit from community input, involve finely balanced issues, and need the ameliorating effect of lay minds.

- 125 In the Commission's view, a more profitable exercise would be to conduct a general review of the maximum penalties assigned to offences in legislation, considering whether imprisonment for more than 3 months, and therefore the option of trial by jury, is warranted in all cases. The review would take account of the kinds of issues which arise in trying particular kinds of cases, and whether they would be suitable for trial by jury, as well as the level of seriousness of the offending. This would be a large undertaking, given the many statutes presently containing offences with maximum penalties of more than 3 months' imprisonment, and it is not at present clear which would be the appropriate organisation to undertake such a review. The Commission seeks submissions on these questions.
- 126 Particularly fruitful areas of review might include offences involving minor theft and property damage, offences against the administration of justice, and public order offences. As to the latter two categories, the findings discussed in para 123 above suggest that there is a big gap between the current maximum penalties and the actual penalties imposed, highlighted by the small percentage of custodial sentences.

Should the maximum penalties assigned to offences in legislation be reviewed?

Discrepancies in the availability of jury trials

- 127 In a letter to *LawTalk*, a correspondent said:

It could well be argued that the threshold for jury trials is too low, at 3 months imprisonment. It is difficult to see, for example, why those who steal from their employers should be able to elect trial by jury when those who steal from strangers should not. (465, October 1996, 8)

The difference between the two types of offences mentioned may be the added breach of trust involved in theft from an employer. The offences are nonetheless similar and the observation suggests that, because similar offences are sometimes treated differently in relation to eligibility for trial by jury, the current threshold qualification for trial by jury is too low. In the Law Commission's view, the first proposition does not justify the conclusion in the second. There may be no justification for precluding trial by jury for some theft offences while allowing it for others. However, in some instances, where like offences are treated differently, the preferable solution is to review the offences which are punishable by a maximum penalty of more than 3 months' imprisonment rather than to increase the threshold for trial by jury.

- 128 One notable example of like offences being treated differently is the offence of common assault. Earlier, we referred to s 43 of the Summary Offences Act 1981 and its effect on the offence of common assault in s 9 of that Act. Section 43 precludes trial by jury, despite the fact that s 9 contains an offence punishable by a maximum of 6 months imprisonment. The identical offence of common assault in s 196 of the Crimes Act is punishable by a maximum penalty of one year and the defendant has a right to elect trial by jury.

129 As noted in para 100, the court observed in *Reille v Police* that s 43 of the Summary Offences Act was intended by Parliament as a way of giving the police a discretion concerning whether there could be a jury trial. The Commission considers that this discretion is not appropriate, for two main reasons: that the defendant's right to elect trial by jury should not be removable via the exercise of police discretion;³¹ and that s 43 is in conflict with the right to trial by jury embodied in s 24(e) of the Bill of Rights Act. In addition, s 43 removes the right to elect trial by jury for offences against the police (eg, assault on a law enforcement officer); thus the allegation cannot be tested before a jury whose function it is to provide a protection between the citizen and the power of the state (see chapter 2).

Should s 43 of the Summary Offences Act 1981 be repealed?

- 130 Theft provides another example. Under s 227 of the Crimes Act, the availability of a right to elect trial by jury depends on the amount of the suspected theft. When there is no existing prescribed sentence, under s 227(c), theft of an object which exceeds \$100 in value is punishable by a maximum penalty of imprisonment for one year and carries a right to elect trial by jury. Theft of an object worth less than this amount is punishable by imprisonment for not more than 3 months and there is no right to trial by jury (s 227(d)). In this instance, the existence of a right to trial by jury may rest on less than a \$1 difference in the amount stolen. The suggested review of maximum penalties, if carried out, should include consideration of whether distinctions of this kind are warranted.
- 131 Fine distinctions and apparent discrepancies do not in themselves indicate that too many defendants are able to be tried by a jury. Again, the point about discrepancies is not an argument against jury trials, but rather a signal that there should be a review of maximum penalties for offences.

Costs and backlogs in jury trials

- 132 Jury trials are more expensive than trial by judge alone, primarily because of the costs of selecting jury members, and in some cases catering for jurors over a period of time. This makes the right to trial by jury susceptible to calls to raise the maximum penalty threshold.
- 133 In Part II of this paper we will be considering cost and backlog issues. Without more comprehensive information, it is not possible to ascertain whether jury trials are occurring too frequently, nor to assess the validity of arguments in favour of reducing the number of jury trials on cost and efficiency grounds. We suggest that, although the jury trial system could be streamlined to operate more cheaply and effectively, the right to trial by jury itself is too important to be

³¹ The *Report of Royal Commission on the Courts* 1978 AJHR H.2, para 352 states:

[T]he power of the prosecution to determine, at least initially, the forum and mode of trial should be reduced rather than extended. We agree with the conclusion reached by the James Committee in England that in the absence of a separate prosecuting authority wholly independent of the police . . . it is undesirable that the authority which has investigated the offence, apprehended the accused, and decided what offence he should be charged with, should also decide the place and type of trial.

subordinate to cost-efficiency considerations and that it would not be appropriate to reduce the right to trial by jury on those grounds.

Following other jurisdictions' lead

- 134 Based on comparisons with other jurisdictions similar to our own, the right to trial by jury is available for a lower level of offending in New Zealand than in other places. A brief summary of the position in the United Kingdom, Australia, the United States and Canada follows.
- 135 Jury trials are available in England and Wales for purely indictable offences, or otherwise at the court's discretion. Generally speaking, offences which carry a maximum penalty of more than 6 months are triable on indictment (Criminal Law Act 1977 s 15(1)(a)).
- 136 The Emergency Provisions (Northern Ireland) Act 1973 was enacted by the British Parliament to deal with suspected terrorists in Northern Ireland. Trials for scheduled and politically motivated offences are tried without a jury. They include most serious violent offences, such as murder and manslaughter. In 1986, Parliament extended the schedule to kidnapping, false imprisonment and firearms offences under the Firearms (Northern Ireland) Order 1981.
- 137 Under Australian federal law, the right to trial by jury is guaranteed for criminal offences (Constitution of Australia s 80). The High Court has decided, however, that s 80 should not be interpreted as meaning that all offences can be tried by a jury: *Kingswell v The Queen* (1985) 159 CLR 264; 60 ALR 1. A maximum sentence of at least 12 months' imprisonment is the threshold for the guarantee of trial by jury. Under federal law, if legislation says that an offence should be tried on indictment, then jury trial is mandatory: *Brown v The Queen* (1986) 160 CLR 171; 60 ALJR 257.
- 138 Under Australian state law, the form of trial for indictable offences will depend on the offence, on the defendant's election, or whether the defendant may elect a judge alone trial for the particular indictable offence. In Victoria, for example, indictable offences and offences punishable by 3 years or more imprisonment must be prosecuted in the Supreme or County Court, unless the offence is triable in the Magistrates Court. All trials in the former courts are jury trials. When indictable offences are tried summarily in the Magistrates Court, the maximum penalty which can be imposed for a single offence is 2 years, and for multiple offences, 5 years.
- 139 Under s 31 of the Criminal Procedure Act 1986 (NSW), criminal proceedings in the Supreme Court or the District Court are to be tried by a jury, except as otherwise provided in the Act (ie, the defendant elects trial by judge alone and the Director of Public Prosecutions consents).
- 140 A similar position pertains in South Australia (Juries Act 1927 ss 6 and 7), the Australian Capital Territory (Supreme Court Act 1933 s 68), and Western Australia (Criminal Code ss 622, 651A).
- 141 United States federal law provides that all crimes carry a right to trial by jury (United States Constitution, Article III, s 2 and Amendment VI). Although this guarantee technically applies only in federal court proceedings, case law has decided that it also applies to state courts when the maximum penalty exceeds 6 months' imprisonment: *Duncan v Louisiana* 391 US 145 (1968); *Baldwin v New York* 399 US 66 (1970).

- 142 The Canadian Charter of Rights and Freedoms guarantees the right to trial by jury for offences punishable by a minimum of five years imprisonment (s 11(f)). The right does not apply to proceedings by way of summary trial (where the maximum sentence is 6 months) or proceedings on indictment where the maximum penalty is less than 5 years' imprisonment. For offences triable summarily or indictably where the prosecution chooses to proceed by way of summary trial, the defendant no longer has a right to choose trial by jury.
- 143 Under the Canadian Criminal Code 1988, a defendant has a right to elect trial by jury for proceedings on indictment which are not in the absolute jurisdiction of the provincial court (Criminal Code 1988 s 536). A jury trial is mandatory for the offences of treason, mutiny, sedition, piracy and murder, except with the consent of the defendant and the provincial Attorney-General (s 427). For other indictable offences, according to s 483, the defendant may elect trial by judge alone. If the prosecution proceeds by information in a court of summary jurisdiction, the trial must be by judge alone.
- 144 The political and legal climate in those countries which have restricted the availability of jury trials may be different from that in New Zealand. The position in Northern Ireland is obviously radical and unusual, and as one commentator observes:
- In 10 months, Parliament had disposed of a mode of trial enshrined in Magna Carta and the Bill of Rights. . . . Again, very little evidence of jury intimidation or corruption was offered; there had been some cases of threats to witnesses but instead of better protection or even some exceptional measures guaranteeing anonymity for jurors the whole foundation of the English system of trial was altered. The speed with which a complicated package was prepared and enacted suggests that these considerations were by no means limited to Northern Ireland.³²
- 145 Overseas legislation referring to the summary/indictable division and to the prosecution of offences is also not the same as New Zealand's. For example, in Victoria, indictable offences tried summarily in the Magistrates Court will not be tried before a jury, and there is the corresponding protective measure for defendants that the court has limited sentencing jurisdiction. In New Zealand, as already noted, indictable offences tried summarily in the District Court carry a right of jury election when they are punishable by more than 3 months' imprisonment (see the Summary Proceedings Act s 66(1)). Therefore, the categorisation of offences into summary and indictable offences, and the mode of prosecution, do not alone determine whether there will be a jury trial. Nor does the summary/indictable divide necessarily determine whether the case will be heard in the High Court or the District Court. Summary offences will always be tried in the District Court, in addition to some indictable offences.
- 146 In *The Structure of the Courts* (NZLC R7 1989), para 352, the Law Commission said, commenting on its recommendation that District Court judges should generally have the same sentencing powers as High Court judges:

If such a broad equation of criminal jury jurisdictions and sentencing powers is made, the question arises whether there is any longer any need for the complex body of law arising from the distinction between indictable and summary offences. Others have commented on the obscurity of the legislation and the exhaustion and irritation it causes the reader. We think that the relevant law could be codified into a single enactment accessible to and comprehensible by all.

³² Blake, "The Case for the Jury" in Findlay and Duff (eds), *The Jury Under Attack* (Butterworths, London, 1988), 144.

- 147 Leaving aside sentencing matters, which have become more complex since the 1993 amendment to the Criminal Justice Act, the Commission remains of the view that the relevant law should be codified in one statute and that the summary/indictable divide should be revisited, with a view to its removal. This would necessitate redrafting the Summary Proceedings Act, and amending other legislation which refers to the summary/indictable divide.

Should the distinction between summary and indictable offences, and the relevant legislation, be reviewed with the aim of codifying the law into a single enactment?

- 148 The Commission does not propose that New Zealand follow the lead of jurisdictions which have reduced the availability of jury trials. The New Zealand Bill of Rights Act 1990 enshrines the right to trial by jury for offences punishable by more than 3 months' imprisonment. This being so, a review of maximum penalties, with the possible reduction of some maximum penalties to imprisonment for 3 months or less, is a preferable option. This leaves aside trials of particular complexity, which will be considered in the next chapter.

Should the right to elect trial by jury be altered or limited in any respect?

SUMMARY

- 149 In the Law Commission's view jury trials are *desirable* when the decisions to be made throughout the trial are finely balanced and can lead to vastly different consequences, in terms of the length of sentence, for the defendant. However, we doubt whether this necessitates *requiring* defendants to be tried with a jury "for their own good", as distinct from enabling them to choose whichever mode of trial they perceive to be most beneficial to the case. Further, reliance on the maximum penalty of imprisonment for 14 years or more is not an accurate means of identifying which cases will involve difficult choices or require public validation of the verdict via trial by jury. The Law Commission proposes that the mandatory requirement for trial by jury for offences punishable by imprisonment for 14 years or more should be removed.
- 150 The legislation governing the availability of jury and judge alone trials is difficult to follow because it is located in several different Acts, has been subject to many amendments, and navigates around the division of offences into summary or indictable offences. The Law Commission proposes that the summary/indictable divide should be removed because it contributes to the complexity of the legislation and it no longer determines the availability of jury trials in New Zealand. The Department for Courts and Ministry of Justice should give consideration to redrafting the Summary Proceedings Act 1957 and making consequential amendments to other legislation.
- 151 Other jurisdictions similar to our own have a higher threshold for the availability of jury trials than New Zealand. The Law Commission is not in a position to propose an increase to the threshold for jury trial availability, as there is insufficient statistical information available to show that this is desirable and

what the effects would be. In addition, the maximum penalty is a necessarily crude measure of when trial by jury will be beneficial in particular cases. It is unsafe, on the information which is available, to base claims for restricting jury trials on generalisations about the number of cases carrying a right to trial by jury in which the actual sentence imposed is non-custodial. The Law Commission proposes a review of maximum penalties for offences in legislation, enabling a reconsideration of whether imprisonment (and the right to trial by jury) is justified for offences such as minor property offences and non-violent offences against the person, and offences against public order and the administration of justice. Apparent discrepancies between similar offences regarding the availability of jury trials also suggest that the maximum penalties in the Crimes Act should be reviewed.

- 152 The Law Commission proposes that s 43 of the Summary Offences Act 1981, which creates an exception to the right to trial by jury for defendants charged with offences punishable by more than 3 months' imprisonment, should be repealed. It is inconsistent with the right to trial by jury guaranteed in s 24(e) of the New Zealand Bill of Rights Act 1990.
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4 Trial without a jury

INTRODUCTION

153 **I**N THE LAST CHAPTER, we considered the right to trial by jury in criminal cases and whether the right is too readily or not sufficiently available. In particular, we discussed whether some cases are so unimportant that they should not carry a right to trial by jury, or are so important that they must always be tried by a jury. In this chapter, we ask similar questions about a defendant's ability to choose trial by judge alone. Should defendants having a right to trial by jury be allowed to reject that option in favour of trial by judge alone, in some or all cases? In addition, we consider whether some cases are so complex that they should be tried by a judge alone and, if so, how this should be decided. Alternatives to trial by jury or by judge alone, such as special juries or expert panels, a bench of judges, and lay assessors assisting a judge alone, are also briefly examined, although they are not the main focus of the chapter.

CURRENT LAW

154 Defendants in New Zealand courts are tried at first instance either by a judge alone or by a judge sitting with a jury, regardless of whether they are tried in the District Court or High Court. There is no provision for trial by, or with, special juries, expert panels, a bench of judges, or lay assessors, in either court. Trial by a judge alone is available if the defendant is charged with:

- an offence (either summary or indictable) punishable by a maximum penalty of imprisonment of 3 months or less; there is no right, under either s 66(1) of the Summary Proceedings Act 1957 or s 24(e) of the New Zealand Bill of Rights Act 1990, to elect trial by jury;
- a summary offence or an indictable offence triable summarily and punishable by more than 3 months' imprisonment, and the defendant elects trial by judge alone under s 66(1) of the Summary Proceedings Act; or
- an indictable offence punishable by less than 14 years' imprisonment and the defendant applies for, and is granted, trial by judge alone under s 361B or s 361C of the Crimes Act 1961.

155 Section 361B(1) provides:

Subject to the succeeding provisions of this section, where any accused person is committed to the High Court or to a District Court Judge exercising jurisdiction under section 28A of the District Courts Act 1947 for trial for any offence other than one referred to in subsection (5) of this section, he may, within 28 days after the date on which he is so committed, give written notice to the Registrar of the High Court or of the District Court, as the case may require, at the place to which he is so committed of his wish to be tried before a Judge of that Court without jury.

156 Where co-defendants are tried together, s 361B(6) states that they must be tried by a judge and jury, unless each of them applies to be tried by a judge alone.

Leave will not be granted for a judge alone trial in this instance, except when each co-defendant has so applied (s 361C(4)). In all other cases involving an indictable prosecution (ie, the allegations against the defendant are presented to the judge after a preliminary hearing and committal for trial), the defendant will be advised of the right to apply to a High Court judge for trial by judge alone under s 361B (see Summary Proceedings Act 1957 s 168C).

- 157 The judge to whom the application is referred by the registrar will order trial by judge alone unless “having regard to the interests of justice, the judge considers that the accused should be tried before a judge with a jury, in which case the judge will order accordingly” (s 361B(4)). Therefore, if a defendant is eligible and applies for trial by judge alone, there is a presumption in favour of the judge granting the application.
- 158 In addition to the power to order trial by judge alone in s 361B, s 361C gives the judge authority, on the defendant’s application, to order trial by judge alone if the judge is satisfied that:
- the defendant was not given notice (under s 168C of the Summary Proceedings Act or s 361B of the Crimes Act) of his or her right to apply for trial before a judge alone; or
 - there were good and sufficient reasons why the accused did not exercise the right to apply under s 361B; or
 - it is in the interests of justice that leave be granted.
- 159 In *R v Narain* [1988] 1 NZLR 580 Heron J considered the words “in the interests of justice”:

The Court will generally assume that, on advice, the accused is the best judge of the interests of justice so far as he is concerned in making the decision that he does for a trial before a Judge alone. (589)

Heron J also weighed several factors before deciding that the defendant’s application should be granted. These included whether the case involved complex facts or complex matters of commercial documentation, particular difficulties in law, or substantial credibility issues regarding the witnesses (588). The first two factors would suggest that trial by judge alone might be appropriate, and the last factor, trial with a jury.

- 160 This legislation determines whether a defendant will be tried by a jury or by a judge alone. The court in which a defendant will be tried is initially determined by s 28A of the District Courts Act 1947, as discussed in chapter 3.

LEGISLATIVE HISTORY

- 161 Until 1979, all High Court cases were tried by a judge and jury, and defendants charged with indictable offences could not apply to be tried by a judge alone in any case.³³ In that year, the Courts Amendment Bill was introduced to Parliament and then enacted. Among other things, the Bill contained what became ss 361A–361C of the Crimes Act.
- 162 The Bill implemented many of the proposals made by the *Report of the Royal Commission on the Courts*, otherwise known as the Beattie report (1978 AJHR H.2). The Royal Commission considered at para 399 the following comments by the President of the Court of Appeal in *R v Jeffs and others* (unreported,

³³ This did not include indictable offences triable summarily, where there is a right of election under s 66(1) of the Summary Proceedings Act.

28 April 1978) concerning the Supreme Court jury trial of the case, for fraudulent offending:

This brings us to the end of a task which has demanded our exclusive attention for a period of three months. As a Court of three Judges we have enjoyed many advantages which were not shared by the members of the jury who tried the case in the Supreme Court. Unlike the jury we have had constant access to the transcript of the evidence which, as we earlier noted, comprises nearly 1800 pages. On hearing the appeals, in order to follow counsel's arguments we had constantly to compare passages in the notes of evidence with material in the exhibits and to study these and ask clarifying questions. These exhibits actually copied for the purposes of the appeal were contained in some 11 volumes, each of about 500 pages. Even with the advantages of being able to peruse the notes of evidence and ask counsel questions and with easier access to the exhibits than was enjoyed by the jury, we found this process as difficult as it was time consuming. The jury's problems would have been immeasurably greater and we are very conscious of that fact. We add that one of the matters currently under study by the Royal Commission on the Courts is whether trial by jury is an effective machinery for trying the sort of issues that arose in the present case. Our own difficulties have left us in no doubt that this is a question deserving of full consideration.

163 In response to these concerns, the Royal Commission recommended at para 400 that:

- subject to the following recommendations, every defendant charged with an indictable offence should be tried by a judge and jury;
- the Crimes Act should be amended to permit defendants charged with indictable offences (excluding treason, piracy, hijacking, murder, accessory after the fact to any of those offences, attempting to commit those crimes other than murder, or a conspiracy to commit any of those crimes) to *elect* trial before a High Court judge sitting without a jury;
- in a case involving an indictable offence where the defendant elected trial by judge alone, the Attorney-General should be able to apply to a High Court judge for the trial to be before a judge and jury; and
- if any one of several defendants jointly indicted elected trial by jury, then unless it was a proper case for severance, the trial should be before a judge and jury.

164 The Royal Commission noted at paras 395–400 that it was guided in its recommendations by, among others, the following factors:

- the vast majority of New Zealanders with a right of election were tried by a magistrate alone (District Court judges were called magistrates prior to the changes in 1980 to allow District Courts to conduct jury trials);
- company frauds and commercial conspiracy cases were examples of highly complicated cases where trials lasted several weeks or months;
- a defendant could elect trial before a magistrate for some quite serious offences; therefore, why not before a judge of the High Court;
- provided the choice remained with the defendant, arguably he or she should be able to be tried before a judge without a jury where there were difficult or technical questions of law or the facts may be exceptionally involved;
- in other countries, some white collar crime appeared to render the judge's directions to the jury, and the jury's comprehension of the intricacies of company law, an exceptionally difficult task;
- other jurisdictions, notably Australian states and Canada, supported the idea of judges sitting alone, particularly for white collar crime;

- in Canada, the Attorney-General had power to inhibit the defendant's right to trial by judge alone; the Royal Commission thought this preferable to an application procedure in which the prosecution's views on trial by judge alone in the particular case could be heard;
- trial by a jury was one way of providing lay participation in the administration of justice; and
- it was desirable to secure the "just, prompt, efficient, and economical disposal of the business of the courts".

165 The Bill as introduced to the House differed from the Royal Commission's recommendations in several notable respects. It provided for an application procedure rather than a right to elect. It limited the right of application for trial by judge alone to the defendant, without allowing the Crown any forum to object. Speakers on the Bill's introduction agreed with this approach and said that it better reflected the defendant's right to trial by jury. For example, the then Minister of Justice, the Hon Jim McLay said:

I think that in giving the Crown the right to object to that election the Royal Commission took the wrong course. The right to a jury trial is vested not in the Crown, but in the accused. In the circumstances it is appropriate that only the accused should be entitled to forgo that at his election, and his election alone. ((1979) 426 NZPD 3239)

166 Until s 28D(1) of the District Courts Act was amended by the Crimes Amendment (No 2) Act 1995, a District Court judge had no jurisdiction, when indictable offences were committed for trial in the District Court, to grant an application for trial by judge alone under s 361B(5) of the Crimes Act: *Boland v Laing* [1984] 2 NZLR 104; *R v Boland* [1986] 2 NZLR 742; *Attorney-General v McNally* [1993] 1 NZLR 550. Therefore, trial by jury was mandatory in this situation, unless the case was transferred to the High Court under s 28J of the District Courts Act when a High Court judge could consider such an application.

JUSTIFICATIONS FOR TRIAL WITHOUT A JURY

167 The discussion of present law and of the Royal Commission's report reveals that trial without a jury was seen as justified or desirable in fraud trials and when the facts, legal issues, mode of presentation, or type of offence involved might make the case complex. The following discussion examines these justifications. Two other situations are also considered: namely, trials attracting publicity; and trials involving sexual offending. The following questions arise:

- Do any of these factors, particularly complexity, justify trial by judge alone?
- Are juries necessarily unsuited to hearing cases where these factors are present?
- Is the application procedure in ss 361B and 361C of the Crimes Act an effective means of ensuring that the particular case is tried by the most appropriate procedure?
- How much weight should be given to the defendant's preferences?

Fraud trials

168 Fraud trials, in particular, are often said to be too complex for juries to grapple with (see the Court of Appeal's comments in *Jeffs*, noted at para 162). The complexity may arise from the fact that fraud is difficult to detect and prove, necessitating intricate examination of money trails or bogus transactions, or

consideration of a large amount of documentation. This complexity often necessitates trials of long duration, with many witnesses giving evidence. (For example, in *R v Adams and others* (unreported, HC, Auckland, 18 December 1992, T 240/91), known as the Equiticorp case, seven company directors were accused on an indictment containing 13 counts of fraud. All the defendants applied for, and were granted, trial by judge alone. The trial lasted 6 months, the Crown called 105 witnesses who gave oral evidence, and an additional 90 witnesses gave written briefs to the court.) There is also an argument that citizens should not be expected to perform such arduous and lengthy jury service which disrupts their lives, perhaps, for example, jeopardising their employment.³⁴

- 169 Tompkins J, the judge presiding in the Equiticorp case, has observed that because of its complexity the trial could not have been tried before a jury. In that case, if the defendants had not requested trial by judge alone, or one of them had insisted on his right to trial by jury, there would have been a jury trial. There is currently no prosecutorial or judicial mechanism by which to consider whether trial by judge alone is appropriate, without the defendant first making an application. In relation to co-defendants, s 361B(6) also provides that where two or more people are to be tried together, there will be a jury trial unless *each* of them applies to be tried by a judge alone. The justification for this position was the importance of preserving the defendant's right to choose the mode of trial, implicit in his or her right to trial by jury.

Other jurisdictions

- 170 In the United Kingdom, dissatisfaction with mandatory trial by jury in complex fraud cases led to the establishment of the Fraud Trials Committee, chaired by Lord Roskill.³⁵ The Committee recommended the complete abolition of trial by jury in long and complex fraud cases, and its replacement with trial by a judge and two lay assessors. This is quite different from New Zealand's legislation, which presumes that there will be a jury trial for indictable prosecutions unless the defendant applies and is granted trial by judge alone. The United Kingdom has no equivalent to ss 361A–361C of the Crimes Act. All fraud trials are currently heard with a jury because they involve indictable offences.
- 171 The Committee envisaged that the lay assessors would be business people of proven integrity (recommendations 82 and 86); determinations of guilt would be made by a simple majority and dissenting opinions would not be disclosed (recommendation 96); and the judge alone would determine the sentence (recommendation 97). The thinking behind the recommendations is explained at paras 8.23 and 8.24 of the *Fraud Trials Committee Report*:

[I]n almost every area of the law, society has accepted that just verdicts are best delivered by persons qualified by training, knowledge, experience, integrity or by a combination of these four qualifications. Only in a minority of cases is the delivery of a verdict left in the hands of jurors deliberately selected at random without any

³⁴ See further chapter 10 which discusses the law concerning the discharge of jurors and the use of reserve jurors. The recent change amending s 374 Crimes Act 1961 (made by the Crimes Amendment Act 1997) permits judges on certain grounds to discharge up to two jurors while continuing the trial. The prosecution and defence may also consent to proceeding with fewer than 10 jurors. See also Corns, *Anatomy of Long Criminal Trials* (Australian Institute of Judicial Administration, 1997), paras 1.2.4, 1.2.8, and 6.2–6.3.

³⁵ *Fraud Trials Committee Report* (HMSO, London, 1986).

regard for their qualifications. Thus, those who advocate that complex fraud trials should be conducted before a select, as opposed to a random, tribunal are arguing not that such cases should be treated in any special or unique fashion, but that they should be treated in a manner more akin to the way the vast majority of all other legal cases are treated today.

In our opinion the absence from the jury box in a complex fraud case, except by chance, of persons with the qualities described in the preceding paragraph seriously impairs the prospect of a fair trial.

- 172 The British Government implemented several of the Committee's recommendations aimed at improving the efficiency of fraud trials (eg, changes in the procedures for the analysis of complex cases, early intervention of leading counsel, and expanding investigating resources), without adopting the central proposal that complex fraud trials should be heard by a judge with two lay assessors.
- 173 More recently, trial by jury has come under attack in England because of several high profile fraud cases which have continued for months, costing many thousands of dollars.³⁶ A recent and well-publicised example is the Maxwell trial against six company directors. Ten fraud charges against Kevin Maxwell and five co-defendants were, for manageability, split into separate trials by Mr Justice Phillips (now Lord Justice Phillips), the presiding judge. Counts four and ten of the indictment constituted the first trial. Even so, 61 days were spent in the preparatory hearing before trial, and the jury heard evidence at the trial for 131 days. All of the defendants were acquitted. (See *R v Lord Chancellor ex parte Maxwell*, *The Times*, June 1996, which describes the events of the trial.)
- 174 Since the acquittals in the Maxwell trial and other cases, various suggestions have been put forward for trying complex fraud trials in the United Kingdom, including dispensing with juries altogether. In response the Home Office published a consultation document in 1998, *Juries in Serious Fraud Trials*, which canvassed several reform options including special juries, tribunals (of judges and specialist lay members) and trial by a single judge with a jury for key decisions.
- 175 Australia has also looked closely at whether juries are capable of satisfactorily deciding fraud cases. In 1978, the New South Wales Attorney-General's Department produced a report recommending that jury trials should no longer be mandatory in some corporate and "white collar" cases.³⁷ It proposed that the Attorney-General, or his or her nominee, should be able to order trial by a Supreme Court judge alone (paras 9.1, 9.2). This proposal was not implemented. Instead, defendants in New South Wales, the Australian Capital Territory, Western Australia and South Australia can elect trial by judge alone for any offence where there is a right to be tried by a jury (see Criminal Procedure Act 1986 (NSW) ss 31, 33; Supreme Court Act 1993 (ACT) ss 68 and 68A; Criminal Code (WA) ss 622 and 651A; and Juries Act 1927 (SA) ss 6 and 7).

³⁶ The Davie Group was set up to review the possibility of a merger between the United Kingdom Serious Fraud Office and the fraud divisions of the Crown Prosecution Service. The group's main recommendation was that there should be a revised set of criteria for referring cases to the Serious Fraud Office.

³⁷ *Report on Summary Prosecution in the Supreme Court of Corporate and "White Collar" Offences of an Economic Nature* (New South Wales Attorney-General's Department, 1978).

Common assumptions

- 176 The concerns expressed about jury trials in fraud cases span several jurisdictions and have continued over at least the last decade. Nevertheless, several untested assumptions have been made about the capabilities of juries, compared to those of a judge sitting alone, which need to be identified and, in some cases, challenged.
- 177 First, the United Kingdom Fraud Trials Committee and Royal Commission on the Courts reports reached their conclusions about the need for fraud trials without a jury in the absence of any empirical data suggesting juries are not competent to try fraud. For example, the *Fraud Trials Committee Report* said:
- There has been no accurate evidence that there has been a higher proportion of acquittals in complex fraud cases than in fraud cases or other criminal cases generally. Nevertheless we do not find trial by a random jury as a satisfactory way of achieving justice in cases as long and complex as we have described. We believe that many jurors are out of their depth. (para 8.35)
- 178 Secondly, how is competency to be assessed? It is inadequate to base an assessment of the jury's competence solely on the number of acquittals in complex fraud cases. Acquittal may, for example, reflect either that the defendants are innocent or that evidence gathering or presentation has been inadequate.
- 179 Thirdly, it is assumed that there will always be a direct correlation between the complexity of a trial, or its features, and the level of juror comprehension and capability. Other factors, such as the way in which the evidence is presented and how much evidence is presented, will have an impact on juror comprehension.³⁸ Problems in comprehension may be due to contradictory, confusing, bulky, and inadequately presented evidence, and both judges' and jurors' understanding is impaired as a result.
- 180 Fourthly, the reports did not compare the jury's capabilities with those of a judge alone or lay assessors. Because juries are randomly selected, the capabilities and comprehension levels of individual jurors will vary. Some of the empirical research on jury competency generally relies on the responses and perceptions of individual jurors, without taking sufficient account of the benefits which may be derived from the collective wisdom and experience of 12 people. As the court in the United States case *In re Financial Securities Litigation* 609 F 2d 411 (9th Cir 1979) observed:
- While we express great confidence in the abilities of judges, no one has yet demonstrated how one judge can be a superior fact-finder to the knowledge and experience that citizen-jurors bring to bear on a case. We do not accept the underlying premise . . . that a single judge is brighter than the jury collectively functioning together. (430–431)
- 181 The Beattie report did refer to the Court of Appeal's comments in *Jeffs*, on the judge's comparatively easy access to lengthy transcripts and exhibits which would not be so readily available to a jury. Reducing the documentation, by minimising the amount of evidence and modernising transcript recording techniques, might address some of the difficulties juries are thought to experience in fraud trials.

³⁸ Findlay, *Jury Management in New South Wales* (Australian Institute of Judicial Administration, 1994), 11.

182 The focus on jury competency in fraud cases should not obscure the constitutional principles behind, and other advantages of, trial by jury. Competency is essential but is not the only measure of whether trial by jury is desirable or appropriate. As discussed in the preceding chapters, trial by jury enables community values, rather than merely a technical, legal, or (in the fraud context) a commercially oriented approach to be applied in the trial. In addition, the United Kingdom Fraud Trials Committee's suggestion that fraud trials might be heard by experienced business people does cut across the jury's role as a component of the democratic process, enabling representatives from the whole community to participate in the administration of justice:

[A] danger with trial by judge and expert assessors or by special jury is that acquittal may be viewed as "the Establishment looking after its own", producing artificial pressure to convict or public cynicism after acquittal.³⁹

The juries research project will be analysing some fraud trials from which assistance with these issues might be obtained. In the meantime we ask:

Are some fraud trials so complex that they should not be tried by a jury? If so, what other options should be considered?

Other complex cases

183 In 1990, the Tasmanian Law Reform Commissioner presented a paper to the Tasmanian Parliament entitled *Alternative Methods of Trial in Complex Criminal Cases* (Report 63, 1990). In addition to fraud trials, the Commissioner concluded that juries face "perhaps insuperable difficulties" in the following cases:

- where a very significant part of the evidence is hard evidence in the form of documentation, and the documentation is massive;
- those involving computer fraud, where the mechanisms by which the fraud is hidden are likely to be unfamiliar to the jury and incomprehensible to some of them; and
- where the expert evidence involves concepts or formulae which are unfamiliar and difficult to understand (10).

184 The Commissioner's preferred alternative to trial by jury in such complex cases was trial by judge alone. He considered and rejected the following options, for the reasons given:

- a *special jury* (ie, special by class, such as ethnic origin or gender) is not any more equipped to decide complex cases than is a randomly selected jury;
- a *jury of specialists* (eg, biochemists for forensic evidence) would be "extremely difficult to find . . . [and] inordinately expensive and inconvenient to the community to keep it engaged for any length of time. Further, the verdict of such a jury would always be accompanied by the lingering doubt that it was based on some theory or analysis of the evidence which had not been subjected to the scrutiny and criticism of counsel and/or the presiding judge";
- a *trial by judge with assessors* would be an efficient method of trial, but such a numerically small tribunal could be costly as it would only be acceptable if it

³⁹ Levi, "Moot Point" (1990) 134 *Solicitors Journal* 1126.

produced reasoned judgments and there was an unlimited right of appeal; and

- a trial by a *bench of judges* has no advantage over trial by judge alone and is expensive (10).

185 The Commissioner recommended trial by judge alone in complex cases, over the other options, for the reason that this is a method of trial which is known and accepted by the community (although, for completeness, we note that so is trial by jury). The Commissioner envisaged that in complex trials, the prosecutor should be able to apply for trial by judge alone. The judge should make an order for trial by judge alone only if satisfied that the case is not fit for trial by jury, and should in deciding the issue be able to require full disclosure of the prosecution's evidence. Reasons should be given for the decision to order trial by judge alone, and this decision would be subject to appeal by either party. The Commissioner singled out cases which involve complex concepts or formulae as the only category among complex cases which must require both parties' consent for trial by judge alone (11). In other complex cases, such as fraud trials, the defendant's wishes could be overruled.

186 Other features which may make trials complex for jurors include cases in which the judge must give a larger than usual number of legal directions to the jury; or where there is expert evidence. In relation to the former, Cecil, Hans and Wiggins observe that

if the jury has an Achilles heel, it is the comprehension of legal instructions. A number of studies have discovered that individual jurors' comprehension of the law is often imperfect. Experts ascribe these difficulties in understanding judicial instructions about the law to the typically obscure, linguistically complex style of writing and the fact that the judge typically presents them only once, orally at the end of the trial.⁴⁰

A discussion of ways to enable jurors to understand judicial instructions will be included in the second part of this paper to be published once the juries research project is completed.

187 Expert evidence, particularly scientific expert evidence, can cause comprehension difficulties for jurors. According to Kobus, this is particularly so with cases which require inferences to be drawn from the scientific evidence (eg, the meaning of a bloodstain on the suspect's clothing, or textile fibres on a murder weapon). The jury must be satisfied not only that the scientific tests have been correctly performed, but also that the assumptions made about the significance of the evidence are the correct ones. Kobus indicates that juror confusion can also result from the mismatch between the adversarial trial process and the need for scientific accuracy:

A scientific problem left unsolved leaves questions unanswered, the jury confused, and the court misinformed. Although this approach may achieve a desired goal, the best interests of justice are not served.⁴¹

⁴⁰ Cecil, Hans and Wiggins, "Citizen comprehension of difficult issues: Lessons from civil jury trials" (1991) 40 *American University LR* 727, 749.

⁴¹ Kobus, "Presenting Scientific Evidence in Court" in Challenger (ed), *The Jury: Proceedings of Seminar on the Jury 10-22 May 1986* (Australian Institute of Criminology, 1986), 216.

Assessing the degree of complexity

- 188 Among the difficulties in removing trial by jury in complex cases are the question of how the judge is to determine, in advance, whether a case will be too complex for a jury to hear; and what factors should be taken into account in that determination. Different kinds of cases involve different complexities, and what is complex to one juror may not be so to another. The type of offence and the nature of the facts, concepts and evidence are not the only indicators of complexity. Cases involving morality, or what is socially or sexually appropriate behaviour, may be equally challenging.
- 189 The difficulties of removing trial by jury for fraud cases also apply to other complex cases. The Tasmanian Commissioner's conclusion that in the identified complex cases jurors face "perhaps insuperable difficulties" is not based on any empirical evidence. The Commissioner acknowledged this, saying, "[o]f course it must be admitted that the above-mentioned criticisms are mere hypotheses due to the nature of each jury's deliberations in the jury room" (Report 63, 15).

Are certain other types of complex trials, for example, where there is complex scientific evidence, not suitable for trial by jury? If so, what other options should be considered?

Trials attracting publicity

- 190 The Tasmanian Commissioner considered and discounted the option of requiring trial by judge alone in cases involving publicity, or a sensational element, where the jury is under pressure from the public to return a particular verdict. He cited the trial of Lindy Chamberlain for the murder of her baby daughter Azaria as an example of such a case, and quoted Blackstone's *Commentaries on the Laws of England*:

A jury coming from the neighbourhood is in some respects a great advantage; but is often liable to strong objections: especially in small jurisdictions . . . or where the question in dispute has an extensive local tendency; where a cry has been raised and the passions of the multitudes have been inflamed; or where one of the parties is popular, and the other a stranger or obnoxious . . . In all those cases, to summon a jury labouring under local prejudices, is laying a snare for their consciences; and, though they should have virtue and vigour of mind sufficient to keep them upright, the parties will grow suspicious, and resort under various pretences to another mode of trial.

Despite Blackstone's observations, the Commissioner concluded that juries have shown themselves able to cope with "sensational" trials, and regarded jury trials as particularly suitable in cases involving personal violence (10).

- 191 The issues of representation and change of venue reflected in Blackstone's observations are discussed in chapter 6. For present purposes, the specific issue is whether there should be a procedure for trial by judge alone when members of the jury are likely to experience considerable public pressure to decide a case a certain way. In the Law Commission's view, the answer is no. In Part II of this paper the effect of publicity on jury deliberations will be examined in detail and with the benefit of the results of the juries research project.

- 192 Trial by jury may be better able to forestall public doubts about the soundness of a verdict, given that those who decide the defendant's fate are members of the community from which the pressure may be coming. In *R v Harawira* [1989] 2 NZLR 714, the Court of Appeal considered whether or not publicity surrounding the trial of employees of the Whare Paia at Carrington Hospital (for injuring with intent a committed patient) cast doubt upon the reliability of the jury's verdict. The court held that there was no miscarriage of justice by virtue of adverse pre-trial publicity. Richardson J said:

Our system of justice operates in an open society where public issues are freely exposed and debated. Experience shows that juries are quite capable of understanding and carrying out their role in this environment, notwithstanding that an accused may have been the subject of widespread debate and criticism. A ready example – far removed from this case factually – is the way charges of serious violence against gang members are dealt with. Undoubtedly there is widespread prejudice against them, yet juries still acquit or fail to agree on occasions, indicating that when confronted with an actual case, they can be expected to carry out their task responsibly in the light of the evidence.

- 193 With the increasing interest of the media in criminal trials, fostered by recent developments such as the use of television cameras in courts, it is likely that many of the more serious cases will be widely publicised. Defendants who feel disadvantaged by publicity may apply for trial by judge alone. The Law Commission does not see why defendants should, at the instigation of the Crown, forfeit their right to choose the mode of trial when there is such publicity.

Are trials which attract extensive publicity more suitable for trial by jury or judge alone?

Sexual offences

- 194 In its submission on the Law Commission's 1995 *Juries: Issues Paper*, the National Collective of Rape Crisis and Related Groups of Aotearoa Inc asked whether trial by jury was the best option for trying sexual offences. The submission said:

The facts about rape and sexual abuse are poorly understood by the community. Unlike any other crime, myths and stereotypes persist which means that possibly a majority of jury members are misinformed and unable to make a reasonable judgement on this issue. For example, many people still believe that rape is a violent act by a stranger. Rapes or sexual abuses by acquaintances (75% to 90% of cases) are often not seen as "real rapes".

This belief is so prevalent that in some conservative communities of New Zealand the Police, aware of the trauma of the rape trial for complainants and knowing the likelihood of a "not guilty" verdict by the jury, are dissuading victims of acquaintance rape from pressing charges. These victims, whose ordeal represents the most common form of sexual offending, are effectively denied justice.

I have been informed by a senior police officer that there has yet to be a successful prosecution for "date rape" in New Zealand, despite this being probably the most common form of sexual violence experienced by young women.

...

The adversarial nature of a rape trial by jury is such an appalling experience for the complainant that most victims of sexual offences do not report to the Police. Thus

justice is denied. Would a panel of “experts” be a better alternative to a jury of misinformed individuals? Or something akin to a Commission of Inquiry? At least there would be transparency in their decision.

- 195 An assessment of all these arguments – and the comments and views attributed to the police – is not possible within the context of a paper on juries. In respect of the points directly bearing on trial by jury of sexual offences, there is some risk of stereotypical thinking, and resort to myths, in any forum (whether jury or judge alone). In addition, although we understand the reasons for a special commission or panel of experts in place of trial by jury, we think there are a number of advantages of jury trial in sexual cases, which ought not to be overlooked.
- 196 First, the basic issue in cases involving allegations of sexual offending is whether the defendant or the complainant should be believed. The jury is just as well-equipped to determine that matter as a judge or an expert. Secondly, sexual offending crosses the line between acceptable social and sexual interaction and violence. Because there is a continuum, with sexual offending located at one end and acceptable interaction at the other, sexual offending is relevant to the community in a way that some other offences are not. We suggest that these characteristics make it desirable that there be community input in a sexual offence trial. Thirdly, it may be that, through juror participation in trials involving allegations of sexual offending, the stereotypical thinking and myths referred to are more likely to be identified, challenged and debunked. The results of the Victoria University/Law Commission juries decision-making research project may reveal the extent to which this occurs during jury deliberations.
- 197 A stronger case can be made for trial by judge alone in sexual cases by reference to the trauma which complainants can experience in giving evidence of an intimate and painful nature before a group of strangers. Little is known empirically about the effect the jury’s presence has on complainants in sexual cases. However, there is some impressionistic evidence to suggest that complainants view the jury’s presence as a factor contributing to their trauma in testifying. A paper presented to the Rape: Ten Years Progress? conference, concerning a study of the experience of women rape complainants in the court process, illustrates the nature of the complainants’ trauma:

Apart from vividly bringing back painful memories, having to go through the incident in such explicit detail may just prove too much for some women. They may be unfamiliar with some of the sexual terminology involved, and find it inordinately difficult to convey what happened in the intimidating and formal setting of a court.

I felt uncomfortable and awful about the presence of other people in the court . . . I felt it was awful giving evidence because of the things I didn’t want to say but had to say . . .

I’d have preferred just me and the lawyers or I was somewhere else . . . some of the questions they ask are really upsetting and embarrassing.

What I found so difficult was having to say and I couldn’t see why this had to be said. Why, when they have forensic evidence, do they need people to say things so bluntly.

I didn’t want anyone else in there, or my family. I just felt really dirty . . . I didn’t like talking in front of the jury about what happened to me.⁴²

⁴² McDonald, “Women Rape Complainants’ Experience of the Court Process”. The conference was held in Wellington from 27–30 March 1996.

- 198 There are difficult issues to be balanced here: fairness to the defendant, and the need to minimise trauma to complainants. In *The Evidence of Children and Other Vulnerable Witnesses* (NZLC PP26, 1996), the Law Commission proposed that, in addition to children, complainants and defendants may apply to the court to give evidence in an alternative way (eg, closed circuit television), based on the needs of the witness. The Commission's view is that such means of reducing the complainant's trauma should be explored before consideration is given to depriving defendants of the right to trial by jury.

Are trials involving sexual offences more suitable for trial by jury or judge alone?

REFORM OPTIONS

- 199 We have already suggested that there should be no special provision for trial by judge alone on the ground of adverse publicity or cases involving sexual offending. In relation to the other justification for trial by judge alone – the complexity of fraud and other cases – the issues are not so clear cut.
- 200 As the discussion of the history behind ss 361A to 361C of the Crimes Act reveals, the provisions were primarily designed to facilitate trial by judge alone, on the defendant's application in indictable prosecutions, in fraud and other complex cases. The aim was to improve the quality of decision making and avoid the costs and delays of jury trials. However, the defendant's right to apply for trial by judge alone is not limited under those sections to fraud and other complex cases. In some situations, judges might interpret "the interests of justice" to include factors other than the complexity of the proceeding. Because judge alone trial depends upon the defendant's application, trial by judge alone in complex cases is not guaranteed. Where there are co-defendants who wish to be tried by a jury, an application will be declined.
- 201 The sections safeguard the choice implicit in the defendant's right, in s 24(e) of the New Zealand Bill of Rights Act 1990, to trial by jury for offences punishable by more than 3 months' imprisonment. The option of giving the prosecution a right to apply to a judge for trial by jury or object to the defendant's application for trial by judge alone, recommended by the Royal Commission on the Courts, was deliberately rejected when the Bill was introduced, in favour of the defendant's right to choose. The legislation could have gone further in this direction, and allowed the defendant a right of election rather than application to a judge. The right of election (for trial by jury) is currently limited to summary offences, including indictable offences tried summarily, under s 66(1) of the Summary Proceedings Act 1957. Sections 361A–361C of the Crimes Act 1961 can therefore be seen as a compromise, between the need to permit very complex cases to be tried by a judge alone and maintaining the defendant's right to choose the mode of trial.
- 202 If changes were to be made to the current position, the main options for reform are:
- requiring that *all* trials involving fraud be heard by a judge alone;
 - maintaining the defendant's ability to apply for trial by judge alone, while allowing the prosecution to object, with or without statutory criteria;

- allowing the defendant a right to elect trial by judge alone in respect of indictable as well as summary offences; and
- providing a new application procedure, open to both the prosecution and defence or on the judge’s own motion, on the ground that the case is too complex for a jury.

These options are now discussed.

Mandatory judge alone trials for fraud

- 203 Mandatory trial by judge alone for all fraud offences would be in conflict with s 24(e) of the Bill of Rights Act, and unlikely to satisfy the “reasonable limits” test in s 5. In *Ministry of Transport v Noort* [1992] 3 NZLR 260, 284, Richardson J elaborated on s 5’s criteria. Those supporting mandatory trial by judge alone in all fraud cases would be required to establish that such limits on the right to trial by jury were reasonable after weighing:
- the significance, in the particular case, of the values underlying the right;
 - the importance, in the public interest, of the intrusion on the particular right;
 - the limits sought to be placed on the application of the right in the particular case; and
 - the effectiveness of the intrusion in protecting the interests put forward to justify those limits.
- 204 Competency, and the enhanced efficiency which usually accompanies it, is an essential objective in the administration of justice. However, the Law Commission suggests that it should not prevent the input of community values, through the defendant’s right to choose trial by jury, being considered. In addition, as noted, not *all* fraud trials are likely to be too complex for a jury.

Should judge alone trials be mandatory for all complex fraud trials?

Defendant’s application and prosecution’s objection

- 205 Allowing only the defendant to apply for trial by judge alone would mean that the objective of enabling trial by judge alone in fraud and other complex cases is less likely to be met, although it is consistent with s 24(e) of the Bill of Rights Act (which refers to trial by jury as both a “right” and a “benefit” for the *defendant*). The right to trial by jury is the defendant’s rather than the prosecution’s, and to require prosecution *consent* would be inconsistent with that right. Where trial by jury is not in accord with the defendant’s wishes or not in his or her best interests, why should he or she then still be required to take up this right? As Hammond J observed in *R v Perks* [1993] 3 NZLR 572, “there is much to be said for the notion that an accused should have a fundamental right to be tried in that forum which fits her sense of where justice to her will best be done” (575).
- 206 Providing for an objection would enable the prosecution to indicate those cases which it regarded as likely to benefit from the input of community values. The criteria would be vague, and this would cause difficulty not only for the prosecution in deciding to object but also for the judge in dealing with such an objection.

Should the prosecution be able to object to a defendant's application for trial by judge alone?

A broader right to elect

- 207 In some Australian states, the defendant is able to elect trial by judge alone for any offence where there is a right to be tried by a jury (see Supreme Court Act 1993 (ACT) ss 68–68A; Criminal Code (WA) ss 622 and 651A; Criminal Procedure Act 1986 (NSW) ss 31–33; and Juries Act 1927 (SA) ss 6–7). In the Australian Capital Territory Supreme Court, trial will be by jury unless the defendant elects in writing to be tried by judge alone. A certificate must be produced stating that the election was made freely after legal advice was given. The election must be made before the court first allocates a date for the trial. Co-defendants cannot elect trial by judge alone unless each makes such an election for all the offences with which each is charged. At any time before the arraignment (ie, the process of the defendant stating guilt or innocence at the bar of the court), a defendant who has elected trial by judge alone can elect a jury trial but cannot make a further election for trial by judge alone. Similar arrangements apply in Western Australia, New South Wales, and South Australia. The legislation in these jurisdictions also has some different features.
- 208 South Australia precludes the right to trial by judge alone for minor indictable offences tried in the Magistrates Court, unless the defendant elects trial in a superior court (Summary Procedure Act 1921 ss 5 and 103). According to the Parliament of Victoria Law Reform Committee's report, *Jury Service in Victoria*, the intention appears to be to prevent defendants from being tried by a judge alone in the District Court, rather than by a magistrate alone in the Magistrates Court (Issues Paper 2, 1995, para 2.36).
- 209 In Western Australia, the election for trial by judge alone must be made in open court and before the identity of the trial judge is known. This is designed to prevent "forum shopping" for a favourably disposed judge. Section 651A(5) provides that an election for trial by judge alone will not result in a trial of this kind unless the Crown agrees. There is no right to elect trial by jury after an election for trial by judge alone has been made. In New South Wales and Western Australia, the defence cannot elect trial by judge alone without the prosecution's consent. There is nothing in the applicable legislation limiting or guiding the prosecution's exercise of the right to withhold consent.
- 210 We propose that consideration be given in New Zealand to a broader defence right of election, taking in both indictable offences and summary offences punishable by more than 3 months' imprisonment. This approach would be compatible with s 24(e) of the Bill of Rights Act. In some instances, the defendant may have good reasons to prefer trial by judge alone, which might have nothing to do with the complexity of the proceedings. Some of these were suggested in *Jury Service in Victoria*:

The option of trial by judge alone may appear attractive to an accused because of the repugnant nature of the offence itself or of the surrounding circumstances, where his or her background will necessarily be revealed and is likely to be unattractive to a jury, where a "technical" defence or a complex explanation will be relied upon, or where there is a fear that pre-trial publicity may affect the ability of the jury to act impartially. In New South Wales judge alone trials are very common in diminished responsibility cases. (para 2.27)

It may, therefore, be less complex to allow the defendant a right of election for indictable as well as summary offences, rather than to require an application procedure. Improving the summary trial procedure in the District Court might also encourage defendants to elect trial by judge alone.

- 211 We have already suggested removing the mandatory requirement for trial by jury for offences punishable by imprisonment for 14 years or more (see paras 103–116). If this step were taken, a right to trial by judge alone for indictable offences triable summarily would arise if the prosecution were prevented from electing to proceed by way of an information in indictable form. If this course were adopted ss 361B–361C of the Crimes Act 1961 would only be required to provide defendants with a right of re-election. Conceivably a right of re-election on application might be fair and desirable when the circumstances of the case have changed after the defendant’s original election.

Should a defendant have a broader right to *elect* trial by jury or judge alone (rather than the present application procedure)?

- 212 If a broader right to elect were provided there are some procedural matters which would need to be dealt with – namely, multiple trials for separate but related incidents, and trials involving co-defendants.

Multiple trials

- 213 In *R v Narain* [1988] 1 NZLR 580, Heron J considered whether the cost and inconvenience of two trials, for separate charges where only one required trial by jury under s 361B(5) but both related to the same incident, were sufficient reasons to order trial by jury for both charges. He found that they were not sufficient in the particular case to go against the defendant’s wishes. However, he envisaged that there might be some cases where lesser charges are included in an indictment, together with a charge involving an offence for which the sentence is 14 years or more, where it would be manifestly contrary to the interests of justice to have more than one trial. In chapter 3, we suggested that s 361B(5), requiring trial by jury for certain offences, should be repealed. If this proposal is implemented, the difficulty alluded to by Heron J would no longer arise.

Co-defendants

- 214 What of the situation where there are co-defendants who make different elections concerning the mode of trial? Currently, s 361B(6) prevents the trial of indictable offences by judge alone on a defendant’s application, when one of the defendants wishes to be tried by a jury. This result could also apply if one of the defendants *elects* to be tried by judge alone and the others prefer to be tried by a jury.

Judicial decision in a case too complex for jury

- 215 In chapter 3 we noted that it should be left to the defence to assess whether trial by jury is likely to be beneficial to it in the particular case, except perhaps in cases of particular complexity. The difficulties implicit in trial by jury in fraud cases, and other cases of complexity, are issues which have attracted comment and concern.

- 216 We have referred to the observations of the Court of Appeal in *Jeffs* to the effect that (see para 163), even with the advantages of being able to peruse the notes of evidence and ask counsel questions, the judges found the process difficult and time consuming. We have also noted the observations of Tompkins J in the *Equiticorp* case (see para 169) to the effect that, because of its complexity, the trial could not have been heard before a jury. The Tasmanian Law Reform Commissioner, in recommending trial by judge alone, took the view that in fraud trials, including, for example, computer fraud and trials involving volumes of hard evidence in the form of documentation, juries faced “perhaps insuperable difficulties” (see para 184). The 1978 report of the New South Wales Attorney-General’s Department took a similar approach, as did the United Kingdom Fraud Trials Committee.
- 217 Despite these observations, there has been reluctance to allow complex trials to be heard by a judge alone except where the defendant requests it. As already observed, the right to trial by jury has been regarded as a defendant’s right and this is recognised in the New Zealand Bill of Rights Act 1990. We have already indicated that mandatory trial by judge alone for alleged fraud offences is unlikely to satisfy the “reasonable limits” test in s 5 of that Act.
- 218 In our view, a more refined approach to complexity, founded on a judicial assessment, would be more likely to satisfy the “reasonable limits” test.

Should a judge be able to determine whether a complex fraud trial is tried by a jury or judge alone?

Nature of the election

- 219 The right of election in s 66(1) of the Summary Proceedings Act 1957 is a right “to elect trial by jury”. If the right of election were extended to defendants charged with indictable offences under the current legislative framework, then it would comprise an election for “trial by judge alone”. In chapter 3, we suggested that the division between summary and indictable offences be removed as a precursor to procedural reform. If that proposal is implemented, a single form of election would be sufficient.
- 220 Should defendants then have a right of re-election? Conceivably, this might be fair and desirable when the circumstances of the case have changed after the defendant’s original election. On the other hand, a right of re-election could be cumbersome and might be used to delay or complicate proceedings unduly. We invite submissions on this issue.

Should defendants have a right of re-election, and, if so, in what circumstances?

Legal advice

- 221 As already noted, the right of election for indictable offences in the Australian states can be subject to the court being satisfied that the defendant has received legal advice before making an election for trial by judge alone. In New Zealand, defendants can in most cases choose to represent themselves. A requirement

that an election for trial by judge alone be made only after receipt of legal advice would move away from that approach. Such a requirement might be overly cumbersome if it applied to the right of election for jury trial for summary offences currently contained in s 66(1) of the Summary Proceedings Act. Again, we welcome submissions on this issue.

Should defendants be required to obtain legal advice before making an election?

SUMMARY

- 222 Defendants prosecuted indictably should be able to elect trial by judge alone. A broader right of election is preferable to an application procedure for trial by judge alone. The defendant should have a right to choose the mode of trial best suited to his or her case. This is consistent with the way the right to trial by jury is expressed as a “benefit” to the defendant in s 24(e) of the New Zealand Bill of Rights Act. The election should not be subject to the prosecution’s consent, as this would undermine the defendant’s right to trial by jury. We seek comment on whether there should be a right to re-elect and, if so, in what circumstances, and on whether an election should be contingent on the defendant first having sought legal advice.
- 223 If our earlier proposal that the division of offences into summary and indictable offences should be removed is implemented, new ways of determining the court in which particular offences should be heard, and how the right of election should be made, would need to be devised.
- 224 Despite the length and complexity of some trials, we do not at this stage propose that defendants in complex cases should be obliged to have a trial by judge alone. We accept that ultimately the issue must be one of competency of a jury to try a case, but believe that the discussion of this point should focus on a related issue, which is that evidence should be sifted and presented in a way which is comprehensible to “ordinary people”. Ways should be found to improve
- the sifting of information and issues pre-trial, and
 - the mode of presentation at trial,
- before reducing the defendant’s right to trial by jury.
- 225 Calls for trial by judge alone or a specialist tribunal to hear some fraud cases do not so far appear to be based on any evidence suggesting juror incompetence in these cases. Competency is also difficult to measure, as is any correlation between complex trials and poor levels of understanding among juries. Concerns about juror competency also over-emphasise the need for legal skill and experience, neglecting the jury’s role in reflecting democratic ideals of community participation in the justice system and bringing a range of experiences and values to the issues to be decided in a case. The Commission awaits with interest the results of the juries research project in this area.
- 226 We do not favour trial by judge alone on the ground that the trial has attracted a great deal of media publicity, unless the defendant elects that option. The judge’s power to instruct jurors to disregard prejudicial publicity should be a sufficient safeguard against pressure on jurors. Again, the juries research project will inform Part II of this paper.

227 In relation to the need to minimise the trauma for complainants in trials involving sexual offences, the Commission has proposed in *The Evidence of Children and Other Vulnerable Witnesses* (NZLC PP26, 1996) that complainants and defendants may apply to the court to give evidence in an alternative way (eg, closed circuit television), based on the needs of the individual. Such options should be explored before consideration is given to depriving defendants of the right to trial by jury in cases involving sexual offending.

5

Goals of the jury selection process

INTRODUCTION

- 228 **C**HAPTERS 6 TO 10 DEAL WITH THE LEGAL RULES which govern the selection and composition of juries in criminal trials and particular aspects of the selection process: representation of all groups in the community on juries (chapter 6); Māori representation on juries (chapter 7); disqualifications and excusing people from jury service (chapter 8); challenging potential jurors (chapter 9); and discharging jurors once the jury has been empanelled (chapter 10). In each of those chapters the current law is discussed, important issues are outlined and reform options considered.
- 229 It is important first to consider the goals underlying the legal rules which govern the selection process. This chapter considers those goals, and the balance between them, without discussing options for reform.

THE JURY SELECTION PROCESS

- 230 The Juries Act 1981 and the Jury Rules 1990 (SR 1990/266) set out the system for selecting people for jury service. The first step in the process is the compilation, by random selection, of jury lists from the electoral rolls (general and Māori) for each jury district. From the jury lists a number of potential jurors are randomly selected by the registrars of individual courts, and sent a summons to appear in court for jury service. Those people who attend court for jury service are the pool of potential jurors. Certain people are disqualified or excluded from jury service because of their age, occupation or criminal record, or if they suffer a mental disorder. Potential jurors can be also excused from jury service for a variety of other reasons, for example, because of a disability (see chapter 8). At court, unless dispensed with by the trial judge, a preliminary ballot is conducted by the registrar, randomly drawing from the ballot box a sufficient number of jury cards to provide a jury pool from which the jury may be selected.
- 231 In the courtroom a ballot then takes place, and the 12 jurors for the trial are randomly selected from the people in the jury pool. However, before they sit down in the jury box, they may be challenged by counsel for the prosecution or defence. If a person is challenged, he or she may not serve on the jury (see chapter 9). The jury is constituted once 12 people have sat down in the jury box. A juror may still be discharged on a limited number of grounds after the jury is constituted (see chapter 10).

THE GOALS OF THE PROCESS

- 232 The goals of the jury selection process can be gleaned from the juries legislation and from the New Zealand Bill of Rights Act 1990. Broadly speaking, the rules aim to obtain a jury which is competent, independent, impartial, and representative of the community.
- 233 Representation of the community is the least clearly articulated and developed goal of the jury selection process. It is not expressly referred to in the Bill of Rights Act, the Juries Act or the Jury Rules. What representation might mean is a complex issue. It is complicated by the various meanings ascribed to the phrase “a jury of peers”: for example, does it mean 12 people randomly drawn from the jury lists, or 12 people from the same iwi or hapū as the defendant, or 12 people of a similar age and background? Why we might consider representation a goal of the jury selection process is intimately connected with the other goals of jury selection, and the wider, more general, functions of juries in criminal trials which we discussed in chapter 2.

Competence

- 234 Section 25(a) of the Bill of Rights Act provides that “everyone who is charged with an offence has, in relation to the determination of the charge, *the . . . right to a fair and public hearing by an independent and impartial court*”.⁴³ The Bill of Rights Act was enacted to affirm New Zealand’s commitment to the International Covenant on Civil and Political Rights, although the Covenant’s corresponding provision (article 14(1)) provides the right to a “fair and public hearing by a *competent, independent and impartial tribunal*”.⁴⁴
- 235 Section 25(a) should be interpreted in light of its purpose and context.⁴⁵ The competency of the jury in criminal trials is an implicit requirement of the right in s 25(a) to a fair hearing by an independent and impartial court.
- 236 The position of a juror is a responsible one. As part of a 12 person jury, a juror decides the facts of a case and the verdict. A juror must be able to give full attention to, and understand, the trial and the jury’s decision-making process in order to ensure that the defendant receives a fair hearing.
- 237 Many of the legal rules concerning the selection of jurors operate to identify and exclude individuals who, for a variety of reasons, are regarded as physically or mentally incapable of acting as jurors: see, for example, the disqualifications in s 8(i)–(j) of the Juries Act; the powers to excuse potential jurors in s 15 of the Act; and the judicial power to discharge a juror in s 374(3) of the Crimes Act 1961.

⁴³ Emphasis added. “Court” in a criminal jury trial includes both the judge and the jury.

⁴⁴ See the preamble to the Act; but see also Cooke P’s comments: “[A] Parliamentary declaration of human rights and individual freedoms, intended partly to affirm New Zealand’s commitment to internationally-proclaimed standards, is not to be construed narrowly or technically”: *R v Butcher* [1992] 2 NZLR 257, 264.

⁴⁵ Acts Interpretation Act 1924 s 5(j): legislation “shall accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning, and spirit”. See also, for example, *Tavita v Minister of Immigration* [1994] 2 NZLR 257 and the reference to the Balliol Declaration of 1992 by Commonwealth judges, Kirby, “International Legal Notes: Judicial Colloquium at Balliol College, Oxford, on the Judiciary and Basic Rights, September 1992” (1993) 67 ALJ 63.

- 238 In this sense, representation on juries of various community groups (defined according to age, gender, ethnicity, occupation, etc) enhances the collective competency of the jury by including people who have different personal experiences, knowledge and perspectives, from a broad cross-section of the community.

Independence

- 239 The need for juries and individual jurors to be independent of any obligation to the justice system or the government is a requirement of s 25(a) of the Bill of Rights Act. Independence is also the primary rationale of s 7 of the Juries Act, which excludes people who work in the government and the criminal justice system from jury service (see chapter 8). It is also the rationale for the random selection of jurors.⁴⁶
- 240 As lay people with a diverse range of opinion, views and personal experiences, juries in theory assert their independence by the provision of the common sense judgment of the community, as well as providing a safeguard against arbitrary or oppressive government. Whether juries are in fact independent, in this sense, is a question of degree;⁴⁷ jurors may be unduly and unconsciously influenced by the judge in a criminal trial.⁴⁸ The degree of independence of juries from the court system may also depend on one's perspective. For example, from some Māori perspectives, a trial by jury dominated by Pākehā, in which the form of proceedings is grounded in English common law and culture, does not guarantee a fair hearing.⁴⁹ Defendants of lower socio-economic status may have a similar opinion of juries composed of largely middle class jurors.⁵⁰
- 241 Although the law requires juries to be independent, there is no mechanism enabling them to be publicly accountable for their decisions. There is only a limited power to appeal against the "perverse" verdict of a jury.⁵¹ Some of the implications of this position will be discussed further in Part II of this paper.

Impartiality

- 242 Various procedures and powers under the Juries Act and the Crimes Act, together with the courts' inherent jurisdiction, enable the exclusion of biased jurors or jurors who give the appearance of bias. But it is probably impossible for any

⁴⁶ In principle, the selection of the jury is beyond the control of court administrators, and therefore the state. In reality, however, prosecution and defence counsel can and do influence the composition of juries through the exercise of peremptory challenges, to exclude jurors perceived to be unfavourable to their client (see chapter 9).

⁴⁷ Findlay, *Jury Management in New South Wales* (Australian Institute of Judicial Administration, 1994), 7.

⁴⁸ Darbyshire "The Lamp That Shows That Freedom Lives – Is it Worth the Candle?" [1991] Crim LR 740.

⁴⁹ Jackson, *The Māori and the Criminal Justice System – A New Perspective: He Whaiapaanga Hou: Part 2* (Department of Justice, Wellington, 1988), 139.

⁵⁰ See, for example, *Grant* [1972] VR 423 cited in Dickey, "The jury and trial by one's peers" (1973–1974) 11 Western Australian LR 205.

⁵¹ A "perverse" verdict is a verdict which is regarded as contrary to the law or the evidence. See s 385(1)(a) of the Crimes Act 1961, *Keeley* [1962] NZLR 565, *Drury* (1971) 56 Cr App R 104, *Irvine* [1976] 1 NZLR 96.

juror or jury to be completely impartial (Findlay, 1994, 6). In *R v McCallum and Woodhouse* (1988) 3 CRNZ 376 the Court of Appeal recognised that

[i]t is inevitable, particularly in the circuit Courts, that from time to time a member of the jury panel will have some acquaintance with the accused or the witnesses or persons associated with them. Whether it is appropriate for such a person to serve on a jury will depend on the closeness of the acquaintanceship and the degree of knowledge of relevant facts and circumstances. (379)⁵²

Nationwide media coverage of criminal trials also means that absolute impartiality or lack of knowledge is probably impossible. The impact of the media on jury deliberations will be considered in Part II of this paper.

- 243 Jurors will be considered biased if, for example, a juror has obtained prejudicial knowledge about the defendant prior to trial: *R v Tinker* [1985] 1 NZLR 330. (The source of this prejudicial knowledge may include a private individual or media reports). However, the courts have held that a juror will not be judged as biased merely because she or he
- is acquainted in some way with a person who participated in the events on trial: *R v Pearson*, *R v McCallum and Woodhouse*, *R v Te Pou* [1992] 1 NZLR 522;
 - has had a similar personal experience to those events arising in the trial: *R v Sampson* (unreported, 19 July 1994, CA 451/93); *R v Saba* (unreported, HC, Christchurch, 18 September 1986, T 25/86); or
 - once worked in the criminal justice system, for example, as a police officer: *R v Ryder* (unreported, HC, Christchurch, 28 September 1994, T 68/94).

The exercise of a peremptory challenge (see chapter 9) could of course exclude a juror on any of the grounds listed above if that knowledge comes to the attention of counsel, and if counsel decides to exercise such a challenge.

- 244 There is a view that a jury which broadly represents the community is also more likely to be impartial. A question arises as to how a jury can be regarded as representing various community interests and yet be impartial at the same time. (Note that the question elevates the quality of representation to a more political level.) Courts in the United States have used the concept of “diffused impartiality”⁵³ to reconcile these two ideas, suggesting that the representation of diverse perspectives and prejudices produces balance. Impartiality in this sense does not mean that individual jurors, representing different community interests, should be without prejudice. Rather it means that the balance of prejudices or views in the community should be reflected in the jury. In any event, people’s personal politics and views are not necessarily reflected by their external identities. Juries are more likely to achieve a degree of impartiality by an open, democratic, deliberative process in which all jurors feel free to discuss their views and have them considered by the whole jury.
- 245 “Diffused impartiality” and an “open, democratic, deliberative process” are both ideal concepts based on the assumption that equal power relations exist inside jury rooms: in other words, that each individual will have the same ability to

⁵² See also a similar but more recent statement in *R v Pearson* [1996] 3 NZLR 275.

⁵³ “Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case. . . . the broad representative character of the jury should be maintained, partly as assurance of a *diffused impartiality* and partly because sharing in the administration of justice is a phase of civic responsibility”: *Thiel v Southern Pacific Co* 328 US 217 (1946) quoted in *Taylor v Louisiana* 419 US 522, 530–531.

express views and persuade fellow jurors. Yet even if a representative jury is obtained, cultural and social factors may influence the jury's deliberative process. For example, the jury representative (foreman), whose responsibility it is to guide jury deliberations, is disproportionately likely to be male.⁵⁴ Empirical studies and anecdotal evidence suggest that men tend to participate more than women in jury deliberations, and that women jurors can be intimidated by male jurors (Findlay, 1994, 114). Study and evidence in New Zealand is limited but does suggest that the situation here is no different.⁵⁵ Māori women, in particular, may feel isolated on a jury if the general perception is that they are favouring a Māori defendant.⁵⁶ Jackson argues:

the realities of population distribution mean that most potential jurors are Pākehā whereas a large proportion of the accused are Māori. The apparently "culturally-neutral" method of selection thus results in an actual predominance of monocultural attitudes in a situation where the behaviour and values of the accused may be defined by a quite different cultural context. . . . trial by one's peers is not a culturally-neutral act, but an inherently culturally-specific one. It implies a degree of empathy and cultural understanding to ensure a fair hearing. (1988, 139)

For the concept of "diffused impartiality" to work all groups in the community must have the opportunity and, as far as the challenge system allows, be able to participate fully on juries.

Representation of the community

- 246 Representation of the community is not an express goal of the jury selection process in New Zealand. Indeed random selection operates at various points in the process and does not guarantee that any particular community will be represented. But recent reports and research into the selection and composition of juries have focused on representation.
- 247 In *Trial by Peers?*, the composition of juries was measured by how representative they were of certain groups in the jury district population from which they were drawn (ie, groups broken down according to age, gender, ethnicity, occupational group and employment status).⁵⁷ One of the report's recommendations was that consideration be given to the extent to which juries should be representative of the eligible jury district population (172). This has implications not only for the out-of-court selection process (eg, the compilation of jury lists and the

⁵⁴ In a study of juries conducted in England, 78 percent of jury representatives (foremen) were male (Zander and Henderson, *Royal Commission on Criminal Justice: Crown Court Study* (HMSO, London, 1993), 234) and in a similar study in New South Wales two out of three were male (Findlay, 1994, 92). In the English study the age range of jury representatives was not very different from that of the jury as a whole (236). There are no statistics for New Zealand juries.

⁵⁵ McDonald, "A Jury of Her Silent Peers" (1993) 9 *Women's Studies Journal* 88, 97–103; Palmer, "Jurors: Victims of the Criminal Justice System", submission to the Minister of Justice for Wellington Victim Support Group.

⁵⁶ Accounts to this effect were offered to the Law Commission's Women's Access to Justice project.

⁵⁷ *Trial by Peers?: The Composition of New Zealand Juries* (Department of Justice, Wellington, 1995). The research was undertaken in response to the Courts Consultative Committee recommendation that the under-representation of Māori on juries should be studied. The Committee's recommendation in turn was made in response to Jackson, *He Whaipanga Hou*. The issues are discussed in more detail in chapters 6–7.

sending of summonses), but also the in-court selection process, in particular the process of challenging potential jurors.

- 248 Representation may have a number of benefits in relation to the other goals of jury selection (competence, impartiality and independence), and the wider functions of the jury in criminal trials.
- 249 First, the diversity of perspectives of a jury drawn from representative sources is likely to enhance the competence of the jury as fact-finder, as well as its ability to bring its common sense judgment to bear on the case. Jurors have a range of life experiences and knowledge to assist them in reaching their decision. To quote Justice Marshall in the United States Supreme Court case of *Peters v Kiff* 407 US 493 (1972):

[W]e are unwilling to make the assumption that the exclusion of Negroes has relevance only for issues involving race. When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case . . . (503–504)

- 250 This passage refers to the elusive, and ultimately unmeasurable, impact that the participation of different groups can have on the qualities of the jury and its deliberations. While there is some empirical research suggesting that the participation of women and ethnic minorities increases the acquittal rate in jury trials, others have found no evidence that gender, at least, makes any predictable difference to verdicts (*Trial by Peers?*, 35). The review of the literature in *Trial by Peers?* concluded with the following passage:

It is extremely difficult to predict the response or behaviour of a given individual to a concrete situation on the basis of such gross characteristics as occupation, education, sex or age. In any situation what a person thinks or does is a function of who he is, the exigencies of the situation, how strongly he feels about the problem, and a host of other factors. (37)⁵⁸

- 251 Secondly, regardless of the nature of the impact of different groups in the community participating in jury trials, representation further legitimises the jury system and the wider criminal justice system. The legitimacy of the jury system rests on concepts akin to those of democratic government. Public confidence in the fairness of the jury system may rest on all groups in the community participating in that system.
- 252 Community participation on juries is an essence of the jury system in a democratic society. It is therefore important that all groups in the community have the opportunity to be represented on juries. We discuss the meaning of representation, “trial by peers”, and options for reform in chapters 6 and 7. Chapter 8 considers whether the legal qualifications for jury service, which restrict eligibility and therefore representation of the community, are justified in light of the (sometimes competing) goals of the selection process.

⁵⁸ Quoting Simon, *The Jury and the Defence of Insanity* (Little, Brown & Co, Boston, 1968), 118.

SUMMARY

- 253 Individual jurors should be competent in the sense that they are mentally and physically capable of acting as jurors in the trial.
- 254 Jurors should also be independent of any obligation to the justice system or the government. Basic random selection techniques should be maintained so that the selection of individual jurors is beyond the control of court administrators and therefore the state.
- 255 Jurors should be impartial. However, in a modern media society, there are practical limits to selecting jurors who are absolutely impartial in the sense that they lack any knowledge about a particular case.
- 256 Selecting juries which are as inclusive as possible of all groups in the community is likely to enhance the goals of the system, and it is therefore important that all groups in the community should have the opportunity to be represented on juries. The diversity of knowledge, perspectives and personal experiences of a representative jury enhances the collective competency of the jury as fact-finder, as well as its ability to bring common sense judgment to bear on the case. In a democratic society, the legitimacy of the jury system, and the wider criminal justice system, rests on all groups in the community participating on juries.
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6

Making juries more representative

INTRODUCTION

- 257 **S**OME GROUPS IN OUR COMMUNITY ARE UNDER-REPRESENTED on juries in criminal trials. Aspects of both out-of-court and in-court jury selection procedures operate to produce this under-representation. This chapter discusses aspects of the jury selection process which could be modified to enhance the representative nature of juries. Under-representation of Māori has been a particular problem and is discussed in chapter 7. Which proposals for reform should be adopted will depend on how important representation is considered to be, in relation to the other goals of the jury selection process and on how we define the community which ought to be represented in certain cases.
- 258 The basic qualifications, disqualifications and grounds for being excused from jury service are discussed in chapter 8. Keeping qualifications for jury service to a minimum would help ensure that juries are drawn from the most representative pool. However, some qualifications are necessary to ensure that juries are impartial and independent, qualities which are equally legitimate goals of the selection process (see chapter 5). Abolishing peremptory challenges, one of the options discussed in chapter 9, would also improve the representation on juries of certain groups in the community.

THE CURRENT LAW

- 259 The phrase “trial by peers” (rather than the terms “representation” or “community”) is commonly used in discussions about the selection and composition of juries. In law, “trial by peers” has no particular meaning except that ascribed to it by Parliament in the legislation governing the jury selection process. “Peers” on a jury in a criminal trial are the 12 people drawn randomly from the population living in the court’s jury district.⁵⁹ It is statistically possible to have any number of random samples, none of which is representative of the population from which they are drawn. A random sample of names from a jury list is not necessarily a representative sample of the jury district population (or of the general population).⁶⁰ In other words, we cannot always expect “individual

⁵⁹ See, for example, the ruling in *R v Cornelius* [1994] 2 NZLR 74, 82. See also *R v Kohu* (unreported, 2 August 1990, CA 107/90, CA 108/90, CA 109/90, CA 119/90, CA 177/90). The Canadian approach, for example, is the same. All Canadians of age and qualified to act as jurors are the peers of their fellow citizens: Monnin CJM in *R v Kent, Sinclair and Gode* (1986) 27 CCC (3d) 405 (Manitoba Court of Appeal) at 410.

⁶⁰ Darbyshire, “The Lamp That Shows That Freedom Lives – Is it Worth the Candle?” [1991] Crim LR 740; New Zealand Law Commission, *Juries: Issues Paper* (October 1995), para 18.

juries” to reflect the distribution of different groups in the jury district population.⁶¹ In practice, the random selection process is also compromised by various factors including the completeness and accuracy of electoral rolls (and therefore jury lists), the ability to excuse people from jury service, and the use of peremptory challenges.

- 260 At common law there is no principle that a jury should represent the community from which it is drawn, or that it should be racially balanced: *R v Ford* [1989] 3 All ER 445. When there have been administrative errors in constructing jury lists, resulting in a significant proportion of the jury district population being excluded from the selection process, the courts have not been prepared to hold that a trial was unfair or that the jury was biased: *R v Cornelius* [1994] 2 NZLR 74. Nor is a trial regarded as unfair, or the jury biased, if people of the same ethnic group as the defendant are not represented on the jury: *R v Kohu & others*; *R v Pairama* (unreported, HC, Hamilton, 20 December 1995, T 21/95).

THE CHANGING MEANING OF “TRIAL BY PEERS”

- 261 In the past, in New Zealand and overseas, the “peers” of a defendant, and therefore the community represented on the jury, have been defined in a variety of ways. The following examples illustrate that “peers”, or “community”, can be defined by reference to locality, or to certain other characteristics that people have in common, or both.
- 262 The traditional starting point in English common law for defining the community from which jurors should be drawn was the neighbourhood where the alleged offence occurred. Jurors were required to have local knowledge of the circumstances of the alleged offence, and ignorant jurors were disqualified. (They were also limited to men of property.) They were witnesses rather than members of a judicial tribunal. The functions of juries have changed, and jurors are now required to be impartial. A juror who has any particular knowledge of the alleged offence may be excused, challenged or discharged from a jury (see chapters 8 to 10).
- 263 The need for specialised knowledge in part led to the introduction of special juries. For example, juries composed of fishmongers or cooks operated in medieval England. Before the end of the twelfth century, English charters promised Jews that disputes between Jews and English subjects would be resolved by mixed juries; these charters are the origin of the jury *de medietate linguae* (a mixed jury of English subjects and foreigners) which was preserved for some years in New Zealand (a mixed jury of foreigners or “aliens” and British subjects, excluding Māori).⁶² From the late nineteenth century until 1962, all-Māori juries were able to try criminal cases involving Māori complainants and defendants (see chapter 7).

⁶¹ *Trial by Peers?: The Composition of New Zealand Juries* (Department of Justice, Wellington, 1995), 29; Fukerai, Butler and Krooth, “Cross-sectional jury representation or systematic jury representation? Simple random and cluster sampling strategies in jury selection” (1991) 19 *Journal of Criminal Justice* 31.

⁶² See Darbyshire, 1991, 87 and 92. In New Zealand the jury *de medietate linguae* was abolished in 1880. In England the jury *de medietate linguae* was abolished on the ground that no alien need fear for a fair trial in England.

THE MAGNA CARTA AND “TRIAL BY PEERS”

- 264 The phrase “trial by peers” does not appear in the New Zealand Bill of Rights Act 1990 in reference to the right to trial by jury (s 24(e); see para 92). Rather, its primary origin is chapter 29 of the Magna Carta:

No freeman shall be taken or imprisoned, or disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or nay other wise destroyed; nor will we not pass upon him, nor [condemn him], but by *lawful judgment of his peers*, or by the law of the land. [emphasis added]⁶³

- 265 The term “peers” was used in the Magna Carta in the general sense of social equals. When the Magna Carta was signed, the jury had not evolved into an institution akin to the modern criminal trial jury: they were a body of witnesses, and each person was expected to have personal knowledge of the alleged crime. The provision has nothing specifically to do with trial by jury, nor even a jury of peers in any of the different senses we might mean.⁶⁴ However, reference to the Magna Carta is useful in one respect: it draws attention to the openness of the provision relating to “trial by peers” which has allowed it to be interpreted in a variety of fashions. While the Magna Carta occupies a significant position in English legal and political history, it cannot be relied upon as a constitutional document guaranteeing the right of a defendant to “trial by peers”; nor does it assist us in giving meaning to the term “peers” or defining the community which should be represented when selecting juries. Modern international and domestic human rights law is more important.⁶⁵

THE NEW ZEALAND BILL OF RIGHTS ACT 1990 AND REPRESENTATION OF THE COMMUNITY

Defining “community”

- 266 It is necessary to understand the meaning of the term “community” (the defendant’s “peers”). In practice and in law, the community is usually determined by the sources from which the jury is drawn. But once the sources are defined, selection techniques and other rules can impact on the representative nature of juries.
- 267 Section 24(e) of the Bill of Rights Act makes no reference to the sources from which juries should be drawn or the community which the jury should rep-

⁶³ We refer to “primary origin” because ch 29 simply asserted a generally recognised axiom of the time: see Holt, *Magna Carta* (2nd ed, Cambridge University Press, 1992), 75–76. This provision of the Magna Carta has been reaffirmed as part of New Zealand law; see the First Schedule to the Imperial Laws Application Act 1988 which lists the Magna Carta (1297) 25 Edw 1, ch 29. Section 3(1) of the Act provides that the imperial enactments listed in the First Schedule are declared to be part of the laws of New Zealand.

⁶⁴ It is clear from the earliest specific identification of the words “judicium parium” with trial by jury by Lambarde in 1582, through to a statement by Blackstone, that ch 29 of the Magna Carta has traditionally been deemed to provide only for trial by jury in general and not for trial by a jury composed specifically of “peers” of the parties in any narrow sense: Dickey, “The jury and trial by one’s peers” (1973–1974) 11 *Western Australian LR* 205, 210; see also Darbyshire, 1991.

⁶⁵ There is no New Zealand case law on ch 29 of the Magna Carta.

resent.⁶⁶ The boundaries of a jury district are ultimately defined *arbitrarily*, and are *fixed* as those places within 30 kilometres by the most practicable route from a courthouse in the town or city in which jury trials may be held.⁶⁷ The site of the jury court is therefore paramount in defining the jury district and, consequently, the population from which potential jurors are drawn. Practical and administrative convenience, and fiscal considerations, underlie this modern approach.

- 268 The use of local jury districts, centred upon a jury court, has parallels with the boundaries of electoral districts and the election of constituency members of Parliament to represent local interests. A similar principle is in operation: people have a strong interest in the administration of criminal justice in their own local community, and their interests and sense of community values should be represented on local juries.⁶⁸
- 269 Despite the change over time in the functions of juries and the goals for their selection, the principle that juries should be drawn from the place where the alleged offence occurred remains immediately relevant in New Zealand in one respect. If a place falls within the boundaries of two or more jury districts, the final boundaries must be determined by considering the principle that juries should be drawn from the “community in which the alleged offence occurred”.⁶⁹

The meaning of “representation” of the community

- 270 There is, at present, little developed case law on the meaning of the right to trial by jury, or the requirement that courts (ie, juries and judges) be impartial (New Zealand Bill of Rights Act 1990 ss 24(e) and 25(a)). However, in other jurisdictions where the constitutional right to trial by an impartial jury exists, that right has been interpreted to mean the right to a jury drawn at random from sources representing a fair cross-section of the community. The community is the population of the local jury district, as defined by each particular jurisdiction.
- 271 In *Taylor v Louisiana* 419 US 522 (1975), the United States Supreme Court stated that the selection of a jury from a fair cross-section of the community is

⁶⁶ Similarly, s 11(f) of the Canadian Charter makes no such reference. In contrast, the Sixth Amendment of the United States Constitution states that the right is to trial by a “jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law”. The principle that juries be drawn from the place where the alleged offence occurred has a much stronger constitutional foundation in the United States. See *Alvarado v State of Alaska* 486 P2d 891 (1971) (Alaska SC), casenote 28, Blume, “The place of trial in criminal cases” (1944) 43 Michigan LR 59.

⁶⁷ Section 5(3) of the Juries Act 1981. It is obvious that in reality there is no guarantee that the scene of an alleged crime will fall within a jury district. Even if an alleged crime occurs within a jury district, the trial may be transferred to another jury district, for example, if there has been prejudicial pre-trial publicity in the area.

⁶⁸ Whether jury district boundaries should be altered or extended to include more of the rural and Māori population, and change of venue applications and their implications for representative juries, are both discussed at paras 288–291.

⁶⁹ See s 5(5)(b) of the Juries Act. This situation only arises in cities where, for example, there is more than one District Court.

an essential component of the Sixth Amendment right to an impartial jury trial:

[sources such as] jury wheels, pools of names, or venires from which juries are drawn must not systematically exclude distinctive groups and thereby fail to be reasonably representative thereof. (538)⁷⁰

The Canadian Supreme Court has made a similar observation about representation.⁷¹ In both the United States and Canada, the predominant approach holds that representation in this sense is not an end in itself, but is regarded as one means of ensuring an *impartial* jury.⁷²

- 272 The cases emphasise that a requirement that juries be selected from representative sources does not mean that the juries actually chosen must mirror the community. All that is required is the fair possibility of a representative jury. This has implications for the existence of peremptory challenges, some commentators contending that peremptory challenges are therefore unconstitutional because of their distorting impact on the representation of certain groups in the community (see chapter 9). Others also contend that the logical extension of the case law developed by the United States Supreme Court is that individual juries ought to be representative of the community from which they are drawn.
- 273 The right to trial by an impartial jury in New Zealand cannot be regarded as a constitutional right in the same sense as in the United States or Canada (whose constitutions are entrenched). However, the New Zealand Bill of Rights Act is a declaration of rights. The case law of those jurisdictions provides some guidance about the scope of representation as a goal of the jury selection process in New Zealand.⁷³ The Law Commission believes that, generally, one goal of the jury selection process should be to select juries which broadly represent the local jury district population from which they are drawn. As discussed in chapter 2, representation in this sense is necessary if juries are to function both democratically and as a genuine conscience of the community.

⁷⁰ See also, for example, *Duren v Missouri* 439 US 357, 367 (1979), 363–364. The Federal United States Jury Selection and Service Act 1968 established that federally there must be a “fair cross-section of the community” on the jury, and that there must be no discrimination in jury selection.

⁷¹ See *R v Sherratt* (1991) 63 CCC (3d) 193. At the provincial level see, for example, *R v Nepoose* (1991) 85 Alta LR (2d) 8.

⁷² In *Holland v Illinois* 493 US 474, 477 (1990), the majority of the court held that the fair cross-section requirement is not explicit in the text of the Constitution but is derived from the traditional understanding of how an impartial jury is assembled; the requirement is a means of ensuring not a representative jury (which the Constitution does not demand) but an impartial jury (which it does). In *R v Biddle* (1995) 96 CCC (3d) 321 (SCC), Gonthier J concurred in the majority judgment of Sopinka J and stated:

[R]epresentativeness is a characteristic which furthers the perception of impartiality even if not fully ensuring it. While representativeness is not an essential quality of a jury, it is one to be sought after. The surest guarantee of jury impartiality consists in the combination of the representativeness with the requirement of a unanimous verdict. (339–340)

⁷³ See Rishworth, “Human Rights and the Bill of Rights” [1996] NZ Law Review 298, 306: “Jurisprudence of countries such as Canada and the United States is directly relevant and potentially helpful, although obviously not dispositive.”

- 274 Constitutional law in the United States and Canada reflects the trend in Commonwealth jurisdictions to widen the sources from which jurors are drawn, and to abolish any type of special or expert jury. However, reforms have also been suggested requiring the selection of a minimum number of jurors of the same ethnicity as the defendant (and sometimes the complainant) with the aim of achieving juries with a meaningful representation of the defendant's community. In New Zealand, one suggestion (not favoured by the Commission) is that Māori defendants have the right to elect trial by an all-Māori jury.⁷⁴
- 275 Such proposals may be intended to achieve the goal of having trial by a jury drawn at random from a fair cross-section of the community. They may also be considered a reasonable limit on the rights in ss 24 and 25 of the Bill of Rights Act.⁷⁵ We consider these matters further in our discussions below, and in chapter 7, of the various proposals to enhance the representative nature of juries.

Random selection of jurors

- 276 Random selection does not ensure that individual juries are representative of the community. However, as a selection technique it has two important advantages:
- it protects against the possibility of deliberate government interference; and
 - it avoids the practical and political difficulties of defining the different groups within the community which should be represented on juries.

Most submissions on the Law Commission's 1995 juries issues paper supported the retention of random selection of juries.

THE COMPOSITION OF NEW ZEALAND JURIES

- 277 In 1993 the Department of Justice conducted an extensive research project into the selection and composition of juries. The results were reported in *Trial by Peers?: The Composition of New Zealand Juries* (1995). The initial impetus for the project was provided by a report by Moana Jackson, *The Māori and the Criminal Justice System: A New Perspective – He Whaiapaanga Hou: Part 2*. That report expressed concern that Māori defendants were often faced with non-

⁷⁴ Jackson, *The Māori and the Criminal Justice System – A New Perspective: He Whaiapaanga Hou: Part 2* (Department of Justice, Wellington, 1988), 235; see further chapter 7.

⁷⁵ In terms of s 5:

Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Richardson P has twice suggested (*Ministry of Transport v Noort* [1991] 3 NZLR 260, 284; *R v B* [1995] 2 NZLR 172, 183) that consideration of s 5 is a matter of weighing:

- (1) the significance in the particular case of the values underlying the Bill of Rights Act;
- (2) the importance in the public interest of the intrusion on the particular right protected by the Bill of Rights Act;
- (3) the limits sought to be placed on the application of the Act provision in the particular case; and
- (4) the effectiveness of the intrusion in protecting the interests put forward to justify those limits.

Māori juries which exhibited monocultural attitudes, denying Māori fair trials. It suggested that this monocultural bias existed because of the way jury lists were compiled from the electoral rolls, and because of the way in which peremptory challenges were being exercised. The *Report of the Courts Consultative Committee on He Whaipāanga Hou* (1991), stressed the importance of ensuring that more Māori serve on juries, and recommended that the Department of Justice study their under-representation.

- 278 The *Trial by Peers?* research was based on the existing qualifications for jury service. The results of that research, and whether or not particular groups in the community are under-represented, can be measured at two points: the out-of-court and the in-court selection processes.
- 279 To measure the effect of out-of-court selection processes, the characteristics of the potential jurors in the jury pool were compared to the jury district population. In the period surveyed, only 26 percent of people summoned appeared in court for jury service.⁷⁶ Of those who did not attend, 56 percent were excused by the registrar.⁷⁷ The remaining 18 percent were unaccounted for. There may be further reasons – other than disinclination – why people do not attend for jury service (eg, the information received with the summons was not clear, or the travel costs may be too high for some).
- 280 Of the 26 percent of people summoned who attended for jury service (the jury pool), some groups were under-represented compared to the jury district population:
- There was some under-representation of Māori on a district by district basis: Māori were most poorly represented in Palmerston North, where the actual number of Māori in the pool was only half that expected.⁷⁸
 - Women were under-represented: 48.1 percent compared to 50.7 percent in the jury district population. In particular, Māori women were under-represented: 4.6 percent compared to 5.0 percent in the jury district population (48–49).
 - The younger age groups, particularly 20 to 29 year olds, were under-represented: 21.9 percent compared to 29.2 percent in the jury district population (50).
 - Five out of the ten occupational groups had lower than expected proportions in the jury panel (legislators, administrators and managers, professionals, agriculture and fishery workers, trades and elementary occupations).⁷⁹ The

⁷⁶ Even this figure may still be too high. Other data collected by the Department for Courts indicate that the figure is more likely to be around 20–22 percent. The period surveyed in *Trial by Peers?* was 13 September to 8 October 1993 (42–43).

⁷⁷ This group would include anyone who was disqualified or ineligible to serve and who informed the registrar of this.

⁷⁸ The actual number of Māori in the pool of potential jurors in each jury district was less than the expected number given the proportion of adult Māori living within each jury district, except for Whangarei where the numbers were equal (*Trial by Peers?*, 47). For seven out of the thirteen districts, however, the difference between the expected number and the actual number of Māori was smaller than the number of people in the jury pool for whom their ethnicity was not known. If these people were Māori then the under-representation is slight. On the other hand, if they were non-Māori, then the under-representation is of more significance (*Trial by Peers?*, 48).

⁷⁹ “Legislators” are not eligible (see the Juries Act s 8).

difference between the expected and actual proportion was most striking for the elementary occupations: 3.4 percent, compared to 6.7 percent in the jury district population (52).

- There were some differences in the employment status of Māori and non-Māori potential jurors. The main difference was the much higher rate of unemployment for Māori: 21.3 percent of Māori potential jurors were unemployed compared to 8.6 percent of non-Māori potential jurors (52–53).

281 With regard to in-court selection processes (especially the effect of the peremptory challenge), *Trial by Peers?* found that compared to the pool of potential jurors:

- Fewer Māori served on District Court juries: 7.8 percent, compared to 10.1 percent in the jury pool. The expected proportion served on High Court juries (68–69).
- Men were under-represented on juries: 48.8 percent, compared to 51.9 percent in the jury pool. In particular, significantly fewer than the expected number of Māori men served on a jury: 3.6 percent, compared to 5.4 percent in the jury pool (70).
- More potential jurors in the younger age groups served on a jury: 23.5 percent, compared to 21.9 percent in the jury pool. Conversely, fewer than the expected number of potential jurors aged 50 and over served on juries: 25.6 percent, compared to 29.4 percent in the jury pool (73).
- There were fewer than the expected number of unemployed jurors. This was particularly noticeable for Māori: 13 percent of Māori jurors were unemployed, compared to 21.3 percent of Māori potential jurors. The proportion of unemployed non-Māori jurors was 6.4 percent, compared to 8.6 percent unemployed non-Māori potential jurors (78).

The findings of *Trial by Peers?* in relation to peremptory challenges are discussed more fully in chapter 9.

OPTIONS FOR REFORM

282 We now discuss several options for reform, aimed at improving general representation of the community on juries. They are:

- improving representation on the electoral rolls;
- extending jury district boundaries;
- considering representation as a factor in change of venue applications;
- guidelines for excusing jurors; and
- a judicial power to determine the composition of the jury.

The first and fourth options are at present being addressed by the Electoral Enrolment Centre and the Department for Courts. Each option is aimed at ensuring that juries represent a fair cross-section of the community from which they are drawn. The last option, however, also requires consideration of the defendant's and complainant's ethnicity when considering whether the jury represents the community.

283 A number of state and county jurisdictions in the United States have suggested, and sometimes implemented, more complex legal and administrative procedures for ensuring that juries are drawn from representative sources. For example, jury commissioners in one county divide the population into 36 demographic

groups, and then select the jury panel from each of those groups in proportion to their number in the jury district population.⁸⁰ Such procedures are more complex to administer and their outcome is not certain, because jurors will still be randomly selected from the jury panel. For these reasons, we have not considered options of this type in this paper.

Improving representation on the electoral rolls

- 284 The electoral rolls are the source for the compilation of jury lists. Subject to certain disqualifications and exclusions (described in chapter 8), s 6(b) of the Juries Act provides that all people registered as electors in accordance with the Electoral Act 1993 are “qualified and liable” to serve as jurors within the jury district in which they live. New Zealand citizens and permanent residents qualify as electors if they have lived in New Zealand for at least one year (see the Electoral Act 1993 ss 74 and 80). In addition, people qualified to vote are required to enrol (Electoral Act s 82). Jury lists are drawn up once a year by the Electoral Enrolment Centre of New Zealand Post Ltd (the organisation responsible for maintaining the electoral rolls). A computer is used to select names at random from the general and Māori electoral rolls for each jury district. The jury lists are then sent to the appropriate court. (The Department of Corrections vets the list before this and removes the names of all current inmates: *Trial by Peers?*, 21.)
- 285 Under-enrolment of eligible voters affects the representativeness of jury lists. A Department of Justice paper mentioned in *Trial by Peers?* estimated that 17.9 percent of people with Māori ancestry were not enrolled.⁸¹ The Electoral Enrolment Centre monitors the enrolment on the electoral rolls of the eligible voter population. According to the Centre’s latest research on “late responders”, the population which has not enrolled or re-enrolled is significantly younger than the electorate in general, by almost 10 years on average. A Business Research Centre survey for the Electoral Enrolment Centre in July 1996 found that a significantly greater proportion of late responders are either Māori (47 percent) or Pacific Islanders (16 percent), compared to the electorate in general (10 percent and 1 percent respectively). The Electoral Enrolment Centre also records the proportion of electors of Māori descent randomly selected for each jury list.

⁸⁰ Alschuler, “Racial quotas and the jury” (1995) 44 Duke LJ 704, 711. A judicial task force in a county in Michigan recommended that “jury panels from which prospective trial jurors are selected have minority representation, Black and Hispanic in particular, of at least 25 per cent to re-enfranchise the minority citizens who have been systematically excluded for at least the past five years” (King, “Racial jurymantering: cancer or cure? A contemporary review of affirmative action in jury selection” (1993) 68 NYULR 707, 725 n 64). Other courts in the United States send their summons forms to targeted areas of the jury district with a high proportion of African-Americans, to increase their representation on the jury panel (King, 724, n 55).

⁸¹ The term “Māori ancestry” is used in this instance because the definition of “Māori” for electoral purposes is whether or not a person has Māori ancestry rather than whether the person identifies themselves as Māori (Electoral Act 1993 s 2). When people enrol they are asked only if they have any Māori ancestry. They are not compelled to respond, but if they do respond affirmatively they can choose whether to enrol on the general roll or the Māori roll. The other possibility is self-identification as Māori, either alone or with other ethnic groups. When considering issues such as the number of Māori called to jury service, challenges to balloted Māori, the number of Māori on juries, and whether Māori defendants are tried by their peers, it is more meaningful to use a definition of ethnicity based on self-identification rather than on ancestry (*Trial by Peers?*, 26).

- 286 In the 1996 election year the Electoral Enrolment Centre targeted for enrolment the young and ethnic groups, traditionally the hardest to enrol. Special purpose enrolment groups also exist to encourage Māori and Pacific Islanders to enrol (*The Circular* No 351, 15 May 1996). The Law Commission fully supports the efforts of the Electoral Enrolment Centre to monitor and increase registration of groups at present under-represented on the electoral rolls.
- 287 The Department for Courts has also been in the process of improving its management of the jury selection procedure. The jury management system was launched in May 1997 and is operational in the seven largest courts. It will eventually be extended to all 23 jury trial courts.⁸² The Juries Amendment Bill 1997 allows for full implementation of the electronic jury management system.⁸³ Under the new legislation the Chief Executive of the Department for Courts will be able to request jury lists, most likely on a quarterly basis, from the Electoral Enrolment Centre, with the intended result that jury lists will be more accurate and up-to-date.

Extending jury district boundaries

- 288 As already noted, rural populations are excluded from jury service because of the way in which jury districts are defined. This and the smaller proportion of Māori compared to non-Māori living in main urban areas, where a large majority of trials are held, may bring about a lower proportion of Māori names on the jury list. In the 1991 census, 61 percent of Māori were counted as living in main urban areas compared with 70 percent of non-Māori. Because a comparatively higher proportion of Māori than non-Māori live outside urban areas, it has been suggested that extending the jury district boundaries would increase the proportion of Māori eligible for jury service. The *Trial by Peers?* report considered this suggestion, but after studying the increase in the general and Māori populations with an extension of each jury district boundary to 45 kilometres and 60 kilometres, concluded that there was little to gain from generally increasing the size of jury districts (85–89).
- 289 A Canadian commentator has argued that:

One may question whether the administrative convenience of the courts should outweigh the right of residents of remote or rural locations, which may be far from a place of trial convenient to the courts, to be selected to sit in judgment of people charged with crimes committed in their communities.⁸⁴

There are two possible options which may meet this point: increasing the size of jury districts, or creating alternative jury districts in more rural areas. But the advantage of the present definition of jury districts is that there is likely to be a greater population to draw upon than in rural areas. Defining a new jury district would still, to some extent, be arbitrary. Whether jury district boundaries are extended or new ones created, greater cost and effort would be required of those who live in the outer edges of jury districts or in sparsely populated rural areas.

⁸² *Annual Report: Department for Courts for the year ended 30 June 1997* 1997 AJHR E.60, 16–17.

⁸³ The Bill had its second reading on 9 December 1997. The Justice and Law Reform Select Committee is considering submissions on the Bill and its report date has been extended to 2 September 1998.

⁸⁴ Pomerant, *Multiculturalism, Representation and the Jury Selection Process in Canadian Criminal Cases* (Working Document for Department of Justice, Canada, 1994), 35.

Should jury districts be extended, or alternative jury districts created?

Considering representation of the community as a factor in change of venue applications

- 290 Changing the venue of a jury trial can have a significant impact on the composition of the jury. The demographic characteristics of jury district populations in New Zealand vary considerably. For example, 31.7 percent of the Gisborne jury district population are Māori aged between 20 and 65 years, compared to 9.1 percent in the Auckland jury district.⁸⁵ In the United States, following some highly publicised cases where a change of venue significantly altered the racial composition of the jury pool, several states passed laws requiring courts to consider race when evaluating a request for change of venue. In Florida, for example, trial judges must now “give priority to any county which closely resembles the demographic composition of the county wherein the original venue would lie” (King, 1993, 720).
- 291 There is little indication that similar problems have arisen in New Zealand. At present, an application for a change of venue will be granted if expedient for the ends of justice (Crimes Act 1961 s 322). The usual approach is to consider whether there is a real risk that a fair and impartial trial may not be possible at the place at which the defendant has been committed for trial.⁸⁶ Most cases seem to involve local prejudice or adverse pre-trial publicity. Because the test is quite open, it may already be possible for judges to consider the demographic composition of the jury district population of the proposed venue as a factor which might affect the fairness and impartiality of the trial.

Should judges be required to consider the demographic composition of the jury district population of the proposed venue in change of venue applications?

Guidelines for excusing jurors

- 292 Registrars and judges have powers to excuse jurors from jury service, on various grounds. As already noted, according to *Trial by Peers?*, 56 percent of summoned potential jurors are excused from jury service. This has a significant impact on the representation of particular groups in the community. While that figure was not broken down in any way, some court staff interviewed during the research project commented that certain groups are always excluded before arriving in court: in particular, women at home with children; teachers; and the self-employed (99). In 1996, the Department for Courts conducted research and reported on why people do not attend jury service. The *Report of the New Zealand Judiciary 1996* states that:

⁸⁵ *Trial by Peers?*, table 6.2 – although the data does have certain limitations (86).

⁸⁶ *R v Tuckerman* (unreported, 19 April 1986, CA 48/86) cited in *Adams on Criminal Law*, para CA322.10.

The report argued that there was considerable scope for the Department to take a more proactive role in encouraging people to participate in the jury system, but that tightening the criteria for excusal was likely to be counter-productive (except possibly with regard to work-related exemptions).

The Department for Courts is conducting ongoing work in this and other areas as part of its overall management of jury selection procedures (see, for example, para 287).

A judicial power to determine the composition of the jury

- 293 In the 1980s, there were a number of cases in the United Kingdom in which the judge, with the co-operation of counsel, engineered the racial composition of the jury to include jurors of the same ethnic background as the defendant.⁸⁷ Defence counsel supplemented the use of peremptory challenges by persuading judges to “stand by” potential jurors, move trial venues, draw jury panels from different districts, or adjourn cases in the hope that more racially balanced juries might be achieved. But in *R v Ford* [1989] 3 All ER 445 the Court of Appeal held that there is no common law power for a judge to alter the composition of the jury pool or the jury, nor to authorise the empanelling of a multi-racial jury.⁸⁸
- 294 In 1993, the United Kingdom *Report of the Royal Commission on Criminal Justice* recommended that in certain situations a judge should have the power to secure a designated number of jurors from a similar racial background to the defendant. Recommendations 222 and 223 provided that, on the application of the prosecution or defence, and in exceptional circumstances, a judge should be able to order that a jury include up to three representatives of racial minority communities, and that counsel should be able to ask the court to designate that one of the three be of the same racial background as the defendant or the complainant.
- 295 The precise purpose of the recommendations is unclear. If the aim was to improve the representation of the defendant’s particular racial minority community on the jury, the designation that only one person on the jury be of the same minority community as the defendant would be inadequate. It is also unclear why only one juror of the same minority community as the defendant or the complainant should be empanelled, but not both. While members of racial minorities may have some common experiences as minorities in a particular society, care must be taken not to assume that all racial or ethnic minorities are the same for the purposes of minority representation on juries, or that members of those minority groups would wish to be put in the same “minority” category.

⁸⁷ See, for example, *R v Broderick* [1970] Crim LR 155; *Binns and others* (1982) Cr LR 522; *Bansal* (1985) Cr LR 151; *Fraser* (1987) Cr LR 418; *Simon Thomas and others* (1989) 88 Cr App R 370.

⁸⁸ The rule in *Mansell* (1857) 8 E&B 37, 81 “had never been held to include a discretion to discharge a jury drawn from particular sections of the community, or otherwise to influence the overall composition of the jury”. The court did accept that a trial judge, as part of the duty to ensure that there is a fair trial, could discharge an individual juror to prevent scandal or perversion.

- 296 These recommendations have not been adopted in the United Kingdom and the Law Commission has a firm view that they not be adopted in New Zealand. Any New Zealander otherwise qualified must be treated as fit to try any other New Zealander. However, we still pose the question:

Should judges have the power to direct, on the application of the defence or prosecution, that one or more people of the same ethnic identity as the defendant or complainant serve on the jury?

SUMMARY

- 297 A number of groups in our community are consistently under-represented on juries in criminal trials. Proposals for reform depend on how important representation is in relation to the other goals of the jury selection process.
- 298 The random selection process is compromised by various factors including the completeness and accuracy of electoral rolls and, consequently, jury lists; the ability to excuse people from jury service; and the use of peremptory challenges.
- 299 At common law there is no principle that a jury should represent the community from which it is drawn, or that it should be racially balanced. The site of the court at which the trial will be held is paramount in defining the jury district, and therefore the population, from which potential jurors are drawn. In other jurisdictions the right to an impartial jury has been interpreted to mean the right to a jury drawn at random from sources representing a fair cross-section of the community. The Law Commission believes that, generally, a primary role of the jury selection process should be to select juries which broadly represent the local jury district population from which jurors are drawn.
- 300 The *Trial by Peers?* study revealed that of those who attended for jury service some groups, including women, Māori and younger age groups, were under-represented. Following the selection process – primarily consisting of the peremptory challenge – Māori were under-represented on District Court juries, and men were under-represented on both District Court and High Court juries. Fewer than the expected number of potential jurors aged fifty and over served on juries.
- 301 To improve representation on the electoral rolls, the Electoral Enrolment Centre has targeted the young and ethnic groups for enrolment.
- 302 Rural populations – including the higher proportion of Māori who live outside urban areas – are to an extent excluded from jury service because of the way in which jury districts are defined. Extending the jury district boundaries would increase the representation of rural populations and Māori. We seek views on whether jury districts should be extended or alternative jury districts created.
- 303 With respect to change of venue applications, the demographic characteristics of jury district populations in New Zealand vary considerably. We seek views on whether judges should be required to consider the demographic composition of both the venue from which it is sought to remove the trial and the proposed venue, with a view to attempting to obtain a match.
- 304 Reforms have been suggested in some jurisdictions requiring the selection of a minimum number of jurors of the same ethnicity as the defendant and, some-

times, the complainant. We seek views on whether judges in New Zealand should have the power to direct, on the application of the defence or prosecution, that one or more people of the same ethnic identity as the defendant serve on the jury. Related issues are whether the ethnicity of the complainant should be relevant, and whether the fact that such an application has been granted should be made known to the jury.

Māori representation on juries

INTRODUCTION

305 **M**ĀORI UNDER-REPRESENTATION ON JURIES is a problem which was highlighted more than a decade ago by the Advisory Committee on Legal Services in *Te Whaingā i te Tika: In Search of Justice* (1986). It has been reiterated in subsequent reports by Jackson for the Department of Justice, *The Māori and the Criminal Justice System – A New Perspective: He Whaipāanga Hou: Part 2* (1988), the Courts Consultative Committee, *Report of the Courts Consultative Committee on He Whaipāanga Hou* (1991), and in the Department of Justice's *Trial by Peers?: The Composition of New Zealand Juries* (1995).⁸⁹ Under-representation of Māori on juries is cause for concern, particularly when set against the high proportion of Māori defendants appearing in the criminal courts, and there are indications that the Māori community lacks confidence in the criminal justice system (see chapter 2).⁹⁰

306 It is important to remember that the Māori community, as well as the Pākehā community, is a diverse one. In a discussion paper prepared for the Māori Congress Executive, one of the principles suggested by Professor Mason Durie to guide te tino rangatiratanga in a modern society is ngā matatini Māori (Māori diversity). That principle recognises that

Māori live in a diversity of everyday realities. Some Māori people are closely linked to conservative Māori networks such as marae, iwi and hapū. Others are more closely aligned to other Māori institutions such as Kōhanga, churches, cultural groups but have no significant links with iwi. Still others are quite alienated from Māori networks and Māori society. Yet they are all Māori and will resist efforts to be disenfranchised. Any notion of tino rangatiratanga, which does not encompass all Māori, regardless of Iwi affiliation, or lack of Iwi affiliation will fail to capture the reality of modern Māori.⁹¹

⁸⁹ The Courts Consultative Committee (CCC) report on *He Whaipāanga Hou*, and its ongoing work concerning Māori and the criminal justice system, are referred to in the *Report of the New Zealand Judiciary 1995*, 18. The CCC is not at present working on Māori representation on juries, on the understanding that this discussion paper considers the issues.

⁹⁰ Māori were involved in 39.6 percent of the total number of non-traffic criminal cases which were *prosecuted* in 1995, and 42.4 percent of *convicted* non-traffic cases in 1995 (Siddle, "Responding to Offending by Māori: Some Criminal Justice Statistics" (for Strategic Responses to Crime Group, Ministry of Justice, Wellington, 1996), 20). Jackson at the 11th Annual Conference of the Australian and New Zealand Society of Criminology in 1996, in a paper entitled "Sovereignty and Restorative Justice", pointed out that in the world-wide context of imprisoned indigenous populations, the figures for Māori are not disproportionate.

⁹¹ Durie, "Tino Rangatiratanga: A Discussion Paper", in the *Report for the Congress Executive*, 13 May 1995 (Māori Congress, Wellington) referred to in Durie, "Tino Rangatiratanga: Māori Self-determination" (1995) 1 *He Pukenga Korero/ A Journal of Māori Studies* 44, 47. An example of a non-traditional Māori organisation is the urban Māori organisation, Te Whanau o Waipareira, providing services for urban Māori, many of which would traditionally have been provided by hapū and iwi.

307 The issues involved are not only those relating to the purely quantitative representation of Māori on criminal juries. There is also a range of wider issues relating to the criminal justice system itself. The Commission acknowledges that some reform options might be criticised as only “minor tinkering” with the system. We invite submissions on the options presented, as well as the wider issues, and any other matters which we have not canvassed. At this stage we would like to encourage debate on the topic.

IMPROVING REPRESENTATION GENERALLY

- 308 Chapter 6 discussed ways of improving generally the representation on juries of under-represented groups in the community. The options considered were:
- improving representation on the electoral rolls;
 - extending jury district boundaries;
 - considering representation of the community as a factor in change of venue applications;
 - guidelines for excusing jurors; and
 - a judicial power to determine the composition of the jury.

Although these proposals are not targeted solely at improving Māori representation, each would have a beneficial effect for representation of the Māori population on juries.

CHANGES TO ADMINISTRATION AND PRACTICE

- 309 A number of changes could be made to the administrative and practical aspects of the present system, which would encourage Māori to serve on juries:
- the employment of more Māori court staff;⁹²
 - the use of te reo Māori as well as English in court documents: for example, information included in the jury summons form, *Information for Jurors* (the explanatory booklet given to jurors), and the video shown to jurors;
 - the formulation of guidelines for the jury representative (foreman) and jurors, emphasising the need for impartial deliberations and to hear everyone’s views; and
 - as suggested at the juries hui, more community education aimed at Māori about the value of jury service and participation in the criminal jury system, and encouraging Māori to attend court for jury service.

IMPROVING SOURCE LISTS FOR MĀORI POTENTIAL JURORS

- 310 The electoral rolls include all people eligible for jury service. People eligible to vote are also legally required to enrol (Electoral Act 1993 s 82). It is a matter of administrative practice to ensure that in fact they do so. It was suggested at the Law Commission’s hui on juries that other sources be used to supplement the electoral rolls to improve Māori representation, such as iwi registers (these include name, age, address, tribal affiliation, family), tax or social welfare records, and Māori Land Court rolls.⁹³ Some of these sources contain more information,

⁹² A concern raised at the juries hui was that in some areas court staff were not very welcoming to Māori potential jurors.

⁹³ Māori Land Court rolls tend not to be complete and do not include addresses. There is also a proposal for an iwi heritage scheme which, if implemented, would enable each iwi to maintain up-to-date registers of their members. If iwi are willing, this may provide a source list for people able to serve as jurors.

and are more accurate, than others. We understand, however, that there are issues of confidentiality associated with iwi registers which may make using them for jury selection purposes difficult. Furthermore, it may be administratively difficult to combine the electoral rolls with additional sources to form one list from which jury lists are compiled for individual courts. Resources may be used most effectively if they are spent on ensuring that the electoral rolls are as up-to-date as possible.

Should other sources be used, in addition to the electoral rolls, to compile jury lists? If so, which sources should be used and why?

- 311 A factor which contributes to the under-representation of Māori in jury pools is the higher rate of geographic mobility of the Māori population. Of the 372 846 Māori⁹⁴ aged 5 years and over counted in the 1991 census, 60.9 percent said they had lived at their usual address for 5 years or less, compared to 51.5 percent of the non-Māori population.⁹⁵ This means that people might change address by the time they are summoned for jury service. To address this problem, the Department for Courts is instituting a new computerised jury management system, using quarterly updates of the electoral rolls (see para 288).

MĀORI JURY LISTS AND MĀORI JURY POOLS

- 312 An alternative solution might be for the Electoral Enrolment Centre to ensure that jury lists are drawn up so that they are representative of the Māori jury district population. The basic random selection technique would be maintained, but the proportion of Māori selected for jury lists would be matched to the corresponding proportion of Māori in the jury district population. This would circumvent any under-representation caused by non-enrolment on the electoral rolls.
- 313 The same could be required of registrars sending out summonses for jury service, but a number of difficulties might arise. Registrars would not be able ensure that all summonses were responded to. There would also be the effect of excuses on the composition of the jury pool, from which the jury is selected. Guidelines for registrars on excusing jurors (see chapter 8), increasing awareness of who is disadvantaged by jury service, and providing for travel expenses, free creche and kōhanga reo, may alleviate some of the factors which operate at this stage of the process to exclude Māori from jury service.⁹⁶

⁹⁴ At the 1991 census, information was collected using two definitions of ethnicity (ie, ancestry, the definition still used in the Electoral Act 1993, and self-identification).

⁹⁵ *Trial by Peers?: The Composition of New Zealand Juries* (Department of Justice, Wellington, 1995), 27.

⁹⁶ See *Sunday Star Times*, 25 September 1994, quoting Gina Rudland, President of the New Zealand Māori Law Society, on why Māori, especially Māori women, do not attend for jury service. See also *Trial by Peers?*.

Should the Electoral Enrolment Centre ensure that the proportion of Māori selected for jury lists is the same as the proportion of Māori in the jury district population?

Should registrars be required to ensure that the proportion of summonses sent to Māori is the same as the proportion of Māori in the jury district population?

SUMMARY

- 314 Māori are under-represented on juries. The methods of improving representation outlined in chapter 6 would improve the representation of Māori on juries. Another possible means is to improve the source lists for Māori potential jurors, by supplementing electoral rolls from such sources as iwi registers and Māori Land Court rolls. Ensuring the assembly of complete and up-to-date electoral rolls may, however, be the most effective means of increasing Māori representation on juries. The process of jury selection is such that both the peremptory challenge and challenges for cause may also operate to distort representation.
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Disqualifications and excuses

INTRODUCTION

315 **B**EFORE THE SELECTION OF THE JURY in the courtroom, a number of legal rules determine who is able to serve on a jury. The rules fall into two categories:

- rules automatically disqualifying or excluding people from jury service; and
- powers to excuse people from jury service on various grounds.

Particular issues arise in relation to age restrictions, the disqualification of people who have been sentenced to certain periods of imprisonment, the exclusion of all lawyers, and potential jurors who have a disability or are unable to understand the language in which the trial is conducted. In the Law Commission's view, it is desirable that a very wide range of people should have the opportunity to serve on a jury. People should not be excluded from doing so, unless their exclusion is required by other goals of the selection process.

THE CURRENT LAW

316 It is only relatively recently that the “juror franchise” has become more inclusive of all people in our community. In New Zealand in the 1840s, jurors were limited to male British subjects (excluding Māori) who were property owners of “good fame and character”. Women were first permitted to serve on juries in 1942 but only after notifying the registrar that they wished to do so.⁹⁷ The Juries Amendment Act 1963 removed this disqualification, but until the Juries Amendment Act 1976 women could be excused solely on the ground of their sex.⁹⁸ Māori were excluded from the ordinary jury system until 1962. Before then there was limited provision for all-Māori juries under the Juries Act 1908 ss 4 and 141–151 (repealed by the Juries Amendment Act 1962). Since the enactment of the Juries Act 1981, clergy, teachers, doctors, dentists, pharmacists, soldiers, sailors, and fire officers, among others, are no longer exempt from jury service (see the now repealed s 6 of the Juries Act 1908).

Disqualifications and exclusions

317 Certain people are disqualified from jury service, or are not permitted to serve.⁹⁹ The Juries Act 1981 reduced disqualifications and exclusions to a minimum compared to earlier provisions. Many of those formerly automatically exempt from jury service may now apply to be excused from jury service.

⁹⁷ *Trial by Peers?: The Composition of New Zealand Juries* (Department of Justice, Wellington, 1995), 34.

⁹⁸ McDonald, “A jury of her silent peers” (1993) 9 *Women's Studies Journal* 88, 109.

⁹⁹ People not permitted to serve on juries used to be “exempt” from jury service; however, that term no longer appears in the Juries Act 1981. Instead the Act lists certain people who “shall not serve on any jury”: s 8.

- 318 The starting point is s 6(a) of the Juries Act, which states that registered electors who have reached 20 years of age, but are under 65 years old, are qualified to serve on juries within the jury district in which they reside. Under the Electoral Act 1993 permanent residents are qualified to register as electors after living continuously in New Zealand for a year (ss 74 and 80). Permanent residents may therefore be eligible for jury service if they are registered on the general electoral roll and are within the age parameters in s 6 of the Juries Act.
- 319 Certain people who have been convicted and sentenced to imprisonment for criminal offences are disqualified from serving on a jury. Section 7 of the Juries Act disqualifies anyone who has been:
- sentenced to imprisonment for life or for a term of 3 years or more;
 - sentenced to preventive detention; and
 - sentenced within the previous 5 years to imprisonment for 3 months or more.¹⁰⁰
- 320 The justification put forward for these disqualifications is that there is an unacceptable risk that those who have been convicted and imprisoned for certain offences are not able to be impartial. Convicted offenders are thought more likely to have criminal associates and a criminal “lifestyle”, with a correspondingly biased view towards the criminal justice system. It is less likely, but nonetheless arguable, that a reformed former offender may judge more harshly. Neither of these views appears to have been justified empirically.
- 321 Under s 8 of the Juries Act, certain people are not to serve on juries because of the close connection of their occupations to the administration of the law and the criminal justice system. They may lack, or give the appearance of lacking, the necessary impartiality or independence required of jurors. A further principle underlying at least some of these exclusions, suggested by the Victorian Parliamentary Law Reform Committee, is the separation of the legislative, executive and judicial branches of government.¹⁰¹ Section 8 provides that the following people shall not serve on juries:
- members of the Executive Council;
 - members of the House of Representatives;
 - judges of the High Court, judges and members of the Arbitration Court, judges and commissioners of the Māori Land Court, District Court judges;
 - certain justices of the peace;
 - barristers and solicitors;
 - police officers; and
 - certain employees in the justice system.¹⁰²

¹⁰⁰ Section 5 of the former Juries Act 1908 disqualified people who had been convicted of any offence punishable by death or imprisonment for a term of 3 years or more. Section 7 of the Juries Act 1981 also excludes those “sentenced to borstal training”, however, borstal training was abolished with the implementation of the Criminal Justice Amendment Act (No 2) 1980 on 1 April 1981. The Juries Amendment Bill 1997 aims to correct this by amending the Juries Act so that it refers to “corrective training”.

¹⁰¹ Parliament of Victoria Law Reform Committee, *Jury Service in Victoria* (Final Report, vol 1, 1996).

¹⁰² People are only exempt from jury service under s 8 if at the time of being summoned and required to serve they fall within one of the categories listed: *R v Everitt* (unreported, 19 December 1994, CA 333/93), 5. Under s 8(e) “Justices who have agreed to make themselves available from time to time to exercise the summary jurisdiction of the District Courts” are exempt from jury service. In *R v Everitt*, the jury representative (foreman) was a justice of the peace who had exercised summary jurisdiction in the District Court in Hamilton. However, he had asked for his name to be taken off the panel 3 months before the trial and receiving a

322 Mentally disordered persons are not permitted to serve on juries (see s 8(i) and definition of “mentally disordered” in s 2); nor are people who are incapable of serving because of blindness, deafness, or any other permanent physical infirmity (s 8(j)).

323 Under s 33, a jury verdict will not be affected merely because a person who was not permitted to serve under ss 6–8 of the Act nevertheless served on the jury.¹⁰³

Excusing jurors

324 Registrars and judges have powers to excuse people who have been summoned for jury service on certain grounds. Some of those grounds are the same as, or similar to, the grounds on which potential jurors can be either challenged in court before taking a seat in the jury box or discharged after the jury has been empanelled.

325 The registrar has power under the Juries Act to excuse people from jury service on the following grounds:

- jury service would cause serious inconvenience or hardship to the potential juror, or another person, or the general public because of
 - the nature of the person’s occupation or business, or of any special or pressing commitment arising in the course of his or her work, or
 - the person’s health or family commitments or other personal circumstances (s 15(1));
- the potential juror has served, or has attended for service, within the last 2 years (s 15(2)(b));
- the potential juror has been excused from jury service for a period that has not yet expired (s 15(2)(c)); and
- the potential juror is a member of a religious sect or order that holds jury service to be incompatible with its tenets (s 15(2)(a)).

326 Judges may excuse potential jurors from jury service on the same grounds and also on the grounds that the person:

- is personally concerned in the facts of the case, or is closely connected with one of the parties or with one of the prospective witnesses (s 16(b)); or
- the person objects to jury service on the grounds of conscience, whether religious or otherwise (s 16(c)).

327 Under s 16A the trial judge has the power to order that a trial be held at another venue if no courtroom is available. No person is required to attend for jury service at the new venue if it is outside the jury district and is more than 30 kilometres by the most practicable route from that person’s place of residence (see also *Adams on Criminal Law*, ch 5.1.03).

summons for jury service. The trial judge ruled that trial could continue: *R v Everitt (No 2)* (1993) 10 CRNZ 529; the Court of Appeal upheld that ruling.

There is no statutory prohibition on former police officers serving on juries, however, counsel usually apply for the discharge of the juror or the jury if such information comes to hand. In *R v Ryder* (unreported, HC, Christchurch, 28 September 1994, T 68/94) defence counsel sought the discharge of the entire jury because the foreman had been a police officer 20 years previously. The court held that a fair-minded observer of the trial would not reasonably have concluded that the trial verdict would not be a fair one and refused the application. See also the appeal case *R v Turner* (unreported, 25 July 1996, CA 439/95).

¹⁰³ See *Adams on Criminal Law* ch 5.1.02; and Finn, “Aspects of the law relating to jury trials” (1984) 2 *Canterbury Law Review* 206.

OPTIONS FOR REFORM

- 328 This part of the chapter explores various options for reform. We discuss those qualifications and disqualifications which we consider need reform, or which have been the topic of debate here and overseas, in the order in which they appear in the Juries Act.

The minimum age limitation

- 329 The current minimum age limit for jurors is 20 years. In contrast, the eligibility age in the United Kingdom is 18 years and over (Juries Act 1974 (UK) s 1(a)). In the Australian states the minimum age is bound by the age of majority in each jurisdiction. For example, in Victoria the Constitution Act 1975 sets the age at 18 years. In Canada the minimum age qualification varies between provinces. It is 19 years in the Northwest Territories (Juries Act 1985 (Northwest Territories) s 5(a)).
- 330 In New Zealand the age limit was lowered from 21 years to 20 years by s 6 of the Age of Majority Act 1970. The Act was the result of a general review of the age of majority, undertaken as a consequence of lowering the voting age from 21 to 20 years and the lowering of the drinking age on licensed premises ((1970) 367 NZPD 1707, Hon DJ Riddiford). The age of majority affects the law on guardianship, marriage, contracts, minimum wages, voting, and the disposing of property, unless another Act specifies a different age (eg, the Electoral Act 1993).
- 331 Four years after the Age of Majority Act was passed, the age at which people qualified to vote was lowered from 20 years to 18 years by the Electoral Amendment Act 1974 (see the definition of “adult” in the Electoral Act 1993 s 2). The issue was the subject of debate: on the second reading of the Bill, the Rt Hon Bill Rowling quoted from the 1967 report of the Committee on the Age of Majority (UK):
- By 18 most young people are ready for these responsibilities and rights and would greatly profit by them, as would the teaching authorities, the business community, and the administration of justice, and the community as a whole. ((1974) 394 NZPD 4271)
- 332 Today the right to vote and to be qualified for membership of Parliament is enshrined in s 12 of the New Zealand Bill of Rights Act 1990. If people aged 18 years and over are considered responsible and competent enough for these purposes, what is it that makes them not competent to serve on a jury? The Law Commission proposes that the minimum age qualification for jury service should be lowered to 18 years, the same age at which people qualify to vote.
- 333 Furthermore, lowering the age qualification would benefit representation of the community on juries.¹⁰⁴ The age of defendants who can potentially be tried by jury is 14 years and older.¹⁰⁵ A significant proportion of the population who could be described as a defendant’s “peers” in terms of age would be eligible for jury service if the minimum age qualification were lowered to 18 years.

¹⁰⁴ Although not the reason in principle for a change to the law, a consequential benefit may be increased representation of Māori. This is because the Māori population is relatively young: 49 percent of the Māori population are under the age of 20, compared to 29 percent of the non-Māori population.

¹⁰⁵ See the definition of “young person” in s 2 and Part IV of the Children, Young Persons and Their Families Act 1989.

Should the minimum age qualification in s 6 of the Juries Act 1981 be lowered so that registered electors aged 18 years and over are qualified to serve as jurors?

The upper age limit

- 334 Section 36 of the Statutes Amendment Act 1945 extended the upper age limit for jurors from 60 years to 65, to increase the size of the pool from which jurors could be drawn.¹⁰⁶
- 335 The issue arose again in New Zealand more recently when a Member's Bill was introduced to enable people 65 years and over to serve on juries if they wished. Clause 2 of the Juries (Entitlement to Serve) Amendment Bill 1995 would amend s 6(a) of the Juries Act by omitting the words "but has not attained the age of 65 years", thus allowing anyone aged 65 years and over to serve on juries. Clause 6 would give registrars the power to excuse a person aged 65 and over from jury service on that person's application (by amending s 15(2) of the Juries Act).¹⁰⁷
- 336 Other jurisdictions provide other models for reform. The upper age limit could be increased to 70 years (as in Queensland and New South Wales), or those aged between 65 and 70 years could be entitled to be excused as of right.¹⁰⁸
- 337 Juries should be as representative of the community as possible. There seems to be no reason in principle why people aged 65 and older should not be qualified for jury service. Such people should decide for themselves whether or not they want to serve on a jury. The Law Commission supports the proposed reform.

Should the maximum age qualification in s 6 of the Juries Act 1981 be removed?
Should registrars have the power to excuse from jury service people aged 65 years and over?

Disqualifying jurors who have been imprisoned

- 338 Any disqualification diminishes the representative nature of juries. The particular type of disqualification set out in s 7 of the Juries Act 1981 may have more of an impact on the representation of the Māori population compared to the non-Māori population. The Department of Justice's *Trial by Peers?* suggested that roughly 4 percent of the Māori population may be disqualified from jury service because of their criminal history. Given the generally higher rate of conviction for Māori compared to non-Māori, it is very likely that the proportion

¹⁰⁶ (1945) 272 NZPD 337. In its submission on the Juries (Entitlement to Serve) Amendment Bill 1995 the Law Commission noted that the original reason for disqualifying those over 65 was a recognition that people over 65 will have served the community for many years and therefore deserve a respite from jury service.

¹⁰⁷ In contrast to s 15(1) of the Act, s 15(2) does not require a written application to the registrar. Presumably people aged 65 and over should be able to make an application to the registrar by phone or in writing.

¹⁰⁸ In the United Kingdom the upper age limit is 70 years (Juries Act 1974 (UK) s 1(a)), and jurors over 65 years can be excused as of right (Criminal Justice Act 1988 (UK) s 19).

of the Māori population disqualified from jury service by s 7 is similarly higher.¹⁰⁹ However, these are only estimates and it would be useful to have more accurate figures. In the following paragraphs we consider the rationales for the disqualification, and discuss the options for reform.

- 339 Before the enactment of the Juries Act 1981, the corresponding provision in the Juries Act 1908 disqualified anyone of “bad fame or repute” as well as people who had previous criminal convictions (s 5(d) Juries Act 1908). This was emphasised in s 3 of the 1908 Act, providing that only those people of “good fame and character” qualified as jurors. The inclusion of the “bad fame or repute” disqualification in the same provision disqualifying people with previous convictions suggests a common rationale for both – a rationale which may still underlie the disqualification based on previous imprisonment for an offence. The rationale may be characterised in terms of impartiality: that there is a risk of bias if a person who has been convicted and imprisoned for a criminal offence is permitted to serve on a jury.¹¹⁰
- 340 How do we know that a person who has been convicted and imprisoned for a criminal offence will be biased? The answer is that we do not, any more than we know that such a person will not be biased. It is impossible to predict accurately the attitudes of an individual based on their personal characteristics and history (see chapter 9).
- 341 It is part of the philosophy of the criminal justice system that the punishment is proportionate to the crime. The disqualification may further alienate offenders who have already been convicted and punished, by denying them an opportunity to participate in an important civic and community duty. Also, the participation of a wide range of people in the community must be beneficial to the jury system. As part of a collective decision-making body, individual jurors contribute their own personal perspective and experiences, broadening the collective knowledge of the jury.
- 342 A primary justification for retaining the present disqualification would be to preserve the integrity of the jury system, rather than attempting to exclude arbitrarily jurors assumed to be biased because of their criminal history. The integrity or legitimacy of the jury system may be compromised if juries include people who have themselves been convicted and punished for criminal offences. If a jury acquits a defendant, and one or more people on the jury had previously been sentenced to imprisonment for serious crimes, then public confidence in the integrity of that verdict could be undermined.
- 343 It has been suggested by the New South Wales Law Reform Commission in *The Jury in a Criminal Trial* (1986) that people who have been charged with criminal offences, but who have not yet had those charges finalised, should also be disqualified from jury service (35). The presumption of innocence suggests that a person should not be disqualified because of what an accusation of criminal offending may say about his or her character. The New South Wales suggestion

¹⁰⁹ *Trial by Peers?*, 32, citing Lovell and Norris, “One in Four: Offending From Age Ten to Twenty Four in a Cohort of New Zealand Males” (Department of Social Welfare, Wellington, 1990); Braybrook and Southey, “Census of Prison Inmates 1991” (Department of Justice, Wellington, 1992); Atkinson, “Trends in Māori Offending” (unpublished paper, Department of Justice, Wellington, 1993). No corresponding figure is provided for non-Māori. See also note 90.

¹¹⁰ See, for example, the New South Wales Law Reform Commission, *The Jury in a Criminal Trial* (Report 48, 1986), 35.

was that disqualification should arise because of the “currency of their association with the criminal justice process”. That association may be a biasing factor.¹¹¹ However, we disagree with this approach. A person who has not been convicted should not be disqualified. Being the spouse, a sibling, parent or offspring of a convicted or accused person may be an equally biasing factor. Considerations such as that suggest that drawing the line at any point other than the presumption of innocence would be a difficult exercise, and devoid of principle. If a person summoned for jury service is in custody awaiting trial or sentence, then prison authorities could apply to the registrar for that person to be excused within the terms of s 15(1) of the Juries Act.

Should the disqualification in s 7(b) of the Juries Act 1981 be maintained or removed?

Should the disqualification be extended to people who have been charged with criminal offences but who have not yet had those charges finalised?

Lawyers on juries

- 344 The Juries Act 1981 significantly reduced the categories of people in occupations who were automatically excluded from jury service. Of those listed in s 8, only barristers and solicitors continue to be excluded. Yet that occupation includes members who may never practise criminal law or work as prosecutors or defence lawyers. When the issue arose in 1981 it was considered that lawyers should be excluded because they might be unduly influential in jury deliberations. Is this an adequate justification?
- 345 Other Commonwealth jurisdictions exclude lawyers from jury service.¹¹² In contrast, in the United States at least 35 states have removed the exemption.¹¹³ There is still debate about the issue although it appears that the removal of the exemption enjoys the support of a majority of lawyers (Goldberg, 1996, 66).
- 346 On balance, the Commission considers that the present law should not be changed: lawyers should not be permitted to serve on juries because their training means that they may be unduly influential. Further, the presence of lawyers on a jury is contrary to the benefits of lay participation in the criminal justice system discussed in chapter 2.

Should barristers and solicitors be permitted to serve on juries?

¹¹¹ See the New South Wales Law Reform Commission discussion paper, *The Jury in a Criminal Trial* (1985), para 3.21. See also s 40(1) of the Criminal Justice and Public Order Act 1994 (UK) which provides that “a person who is on bail in criminal proceedings shall not be qualified to serve as a juror in the Crown Court”. That section implemented a recommendation of the *Report of the Royal Commission on Criminal Justice* (HMSO, London, 1993).

¹¹² The New South Wales Law Reform Commission, for example, considered that barristers and solicitors should continue to be excluded from jury service because of their “likely association with the administration of justice and the probability that because of their training they will exert an undue influence over the balance of the jury” (*The Jury in a Criminal Trial*, 1986, 43).

¹¹³ McMahon and Sharp, “A Jury of Your Peers” (1995) *ABA Journal*, 40; see also Goldberg, “Caution: No Exemptions” (1996) *ABA Journal* 64, which describes lawyers’ experience of jury service in the United States.

Disabled jurors

- 347 There are occasions when a disability, such as impaired vision or deafness, will not be a barrier to jury service. For example, a deaf juror may be able to lip read. However, even with modern technology and advances in overcoming disabilities, there will still be people whose disability means that they are not capable of serving as jurors, and situations where a person's disability cannot be compensated for by technology.¹¹⁴ There may also be people whose disability can only be compensated for at great cost, and where the methods of compensation may be overly disruptive to the trial process.
- 348 Strictly speaking, physical disability is not an automatic exclusion under s 8(j) of the Juries Act 1981. People are precluded from serving only if their physical disability renders them incapable of serving on a jury. This judgment is commonly made by disabled people themselves, or registrars. However, a judge may make the same decision under s 16 (excusing jurors) or s 23 (challenge for want of qualification).
- 349 In 1995 the Juries (Entitlement to Serve) Amendment Bill was introduced. The Bill proposed the repeal of s 8(j) and amendment of s 15(1)(b) to allow registrars to excuse people with disabilities. The Law Commission submitted to the Justice and Law Reform Select Committee that s 8(j) should be clarified rather than repealed: as introduced, the Bill did not address the problem of a person who was incapable of serving on a jury because of the nature of his or her disability but who did not notify the registrar of that disability. The Commission suggested the following provision to replace s 8(j):
- Persons who are incapable of serving because of the nature of their disability whether or not the disability is age-related [shall not serve on a jury].
- 350 The use of pre-trial juror questionnaires would assist in the identification of potential jurors who are incapable of serving because of a disability (see chapter 9, para 426).

Should disabled people be entitled to serve on juries? What restrictions should there be?

Jurors' language ability

- 351 It is the practice of registrars to excuse potential jurors who do not have a reasonable understanding of English.¹¹⁵ This is a practical and responsible approach, since jurors must be able to understand the language in which proceedings are conducted to fulfil their role effectively. However, this practice does raise some legal and constitutional issues.

¹¹⁴ For example, a blind person in a trial where photographic evidence is central to the case, or a person who is severely physically or intellectually disabled.

¹¹⁵ The information sent with every summons form states that "[t]o be a juror you must have a good understanding of English. If you do not understand English you should tell the Jury Officer at the court and you will be excused from jury service". This warning is repeated in various languages, including Māori.

- 352 At common law, jurors or potential jurors were incompetent and therefore disqualified if they were unable to understand the language in which the trial was conducted: *Ras Behari Lal v King-Emperor* (1933) 50 TLR 1. Today, an inability to understand English to a reasonable level is not a statutory disqualification for jury service. Although registrars have no specific legal power under the Juries Act to excuse jurors on this ground, it is likely that they have the power to do so within the general terms of s 15(1). In any event, judges probably have the power to do so as part of their inherent jurisdiction (see chapter 10).
- 353 An express provision for the disqualification of potential jurors who are unable to understand the language in which the proceedings are conducted would be helpful. However, registrars should only be able to excuse those people who cannot understand English or te reo Māori. Both English and Māori are official languages of New Zealand: English by convention, and Māori by s 3 of the Māori Language Act 1987. The Māori Language Act (as its preamble states) recognises that the Treaty of Waitangi confirmed and guaranteed to Māori, among other things, all their taonga (treasures), and that te reo Māori is one such taonga.
- 354 In addition to the wider constitutional issue, an anomaly is created if, for example, a jury representative (foreman) has the right to speak te reo in legal proceedings (as provided under s 4(1) of the Māori Language Act) “whether or not [he or she is] . . . able to understand or communicate in English”, but is disqualified from jury service if he or she does not understand English. There are likely to be few Māori in urban jury districts who do not understand English, but this practical reality should not dictate the legal principle. A juror who cannot understand English but can understand te reo Māori ought to be provided with an interpreter during the course of the trial and jury deliberations.
- 355 Such a rule would have some procedural difficulty but the problem has been considered in the Northwest Territories in Canada, and was not considered insurmountable:
- We have been encouraged in our consideration of the viability of juries composed of persons speaking differing languages, or “mixed” juries, by the long history of such juries in Canada and England before that . . .¹¹⁶
- 356 The main point of concern is that jurors should not be influenced by outsiders. The Northwest Territories Law Reform Committee was concerned that verdicts may be challenged if clear procedural safeguards were not established. The Committee recommended that the particular amendment it was considering (that the inclusion of jurors who could only understand an aboriginal language) be premised upon the consent of the accused. The situation in the Northwest Territories does not entirely mirror that in New Zealand, and in the Law Commission’s view the defendant’s consent would not be necessary if the proper procedural safeguards were implemented.
- 357 If a juror is empanelled who cannot understand English but can understand te reo (or vice versa if the proceedings are being conducted in te reo), the court

¹¹⁶ *An Act to Amend the Jury Act* (Northwest Territories Committee on Law Reform, Canada, Working Paper 1, 1987, 18).

should make adequate provision for an interpreter to provide a translation of the evidence and proceedings to the juror. In the jury room the interpreter would be obliged to take an oath or affirmation to translate the debates of jurors and to offer no comment or other influence.

- 358 The discussion so far has avoided any mention of a literacy test for jurors. However, if there are to be reforms to assist jurors in their deliberations, which rely on jurors' ability to read (eg, providing jurors with a written transcript in some trials), it would be sensible to have a disqualification related to literacy. The test would be whether jurors are able to read and understand English or te reo to a certain standard.

Should there be express provision to disqualify jurors unable to speak and understand English or te reo Māori?

Should such a provision also disqualify jurors who are unable to read and understand English or te reo Māori?

Is further provision necessary relating to the use of interpreters?

SUMMARY

- 359 The Law Commission proposes that the minimum age qualification in the Juries Act 1981 should be amended to allow people aged 18 years and over to serve on juries. The Commission sees no reason why people aged 18 years and over should not be considered responsible enough to serve on a jury when they are considered responsible enough to vote and have membership of the House of Representatives. Juries should be as representative as possible given the other goals of selection, such as competence. Further, the absence of people aged 18 and 19 on juries excludes a group in the community who could be regarded (on the basis of age) as the peers of younger defendants.
- 360 The Law Commission also proposes that the maximum age qualification in the Juries Act should be amended so that people aged 65 years and older are qualified for jury service. We seek views on whether people aged 65 years and older should be able to decide for themselves whether or not they want to serve as jurors, or whether there should be an upper age limit. We also seek comment on whether people aged 65 years and older should be entitled as of right to be excused from jury service.
- 361 Certain people who have been imprisoned are disqualified from jury service. The Commission offers two options for consideration. The first is to amend the disqualification so that only those people currently detained in prison serving their sentence for a criminal conviction are disqualified from jury service. The second option is to maintain the present disqualifications on the grounds that to reduce them in any way would compromise the integrity of the criminal justice system and possibly bring it into disrepute.
- 362 Disabled jurors should continue to be eligible for jury service unless their disability renders them incapable of serving on a jury. The Juries Act is unclear on this point and we propose that it should be amended.

363 An inability to understand English is not a disqualification under the Juries Act. The Law Commission proposes that the Act should be amended to provide that people who cannot understand English or te reo Māori are disqualified from jury service. We include Māori as it is an official language of New Zealand. While it is unlikely that many potential jurors will be unable to understand English but will understand te reo, it should be possible to provide an interpreter for these people. If jurors are to be provided with written material to assist their deliberations, consideration should also be given to including a literacy disqualification in the Juries Act.

Challenging jurors

INTRODUCTION

- 364 **T**HE REPRESENTATION OF THE COMMUNITY ON JURIES, while not an express goal, underpins some of the justifications for trial by jury. This chapter describes the jury selection procedures which operate in the courtroom, including the stand by procedure and the different types of challenge to prospective jurors that can be made by counsel. The primary goals of these procedures are to ensure that competent and impartial jurors are selected. They may, however, compromise the representative nature of the jury.
- 365 The chapter examines one procedure in particular: the exercise of the peremptory challenge (also known as the challenge without cause). There is evidence that the use of peremptory challenges causes certain groups in the community to be under-represented on juries (see also chapter 7). The trend in law reform has been against the retention of this challenge. We consider the possibility of its abolition in the context of other changes, including modification of the challenge for cause and improving the information provided to both prosecution and defence counsel concerning potential jurors. An alternative to abolition is to formulate guidelines for the exercise of peremptory challenges by prosecution and defence counsel. The enforcement of guidelines would require a judicial power to discharge the entire jury if the exercise of peremptory challenges has created the potential for, or the appearance of, unfairness by compromising representivity. We are interested in receiving submissions on these issues.
- 366 It is the practice for prosecution and defence counsel to vet jury panel lists before jury selection commences. Information gathered by jury vetting is used as a basis for the exercise of peremptory challenges. Concern has been expressed recently about the appropriateness of this practice, and in particular the disclosure of jury panel lists to defendants. This chapter considers current law and practice, and discusses possible options for reform.

THE CURRENT LAW

- 367 The jury is the first 12 people selected from the jury pool who remain after all proper challenges have been allowed (Juries Act 1981 s 19). All the potential jurors assemble in the courtroom in the presence of all the parties to the proceedings. A jury card (with the name of the potential juror) is drawn from a box by the registrar and is read out. As the named person stands and moves towards the jury box, counsel for the prosecution or defence may challenge.¹¹⁷ In some circumstances the judge may direct a juror to stand by (see paras 381–383).

¹¹⁷ Counsel will stand and say the word “challenge” before the balloted potential juror takes a seat in the jury box. People who are successfully challenged are still eligible to act as jurors for any other trial commencing in the week they are called for jury service. They may be asked to return the next day for another empanelment, or, after serving on a jury in one trial for one or 2 days, be asked to return later in the week (*Trial by Peers?: The Composition of New Zealand Juries* (Department of Justice, Wellington, 1995), 23–24).

Challenge for want of qualification

- 368 All jury lists are vetted by the Department for Courts for the disqualifications and exclusions in ss 6–8 of the Juries Act (see chapter 10). Counsel for both the prosecution and defence are entitled to challenge any balloted potential juror if that person is not permitted to serve under those provisions (Juries Act s 23). This kind of challenge occurs rarely, if at all. None was recorded in *Trial by Peers?*

Challenge for cause

- 369 The prosecution and defence may challenge potential jurors on the ground that they are not “indifferent between the parties”: that is, they are biased towards one party (Juries Act s 25). The few cases on this point do not clearly state what is regarded as bias. A number concern the involvement of the same jurors, in separate trials, of people being tried for offences arising out of the same event. However, there is no clear New Zealand authority about whether a challenge for cause is available in such cases.¹¹⁸
- 370 There is no limit to the number of challenges for cause. Under s 25 of the Juries Act, the judge determines challenges for cause in private, in such manner and on such evidence as he or she sees fit. Only in exceptional circumstances would a judge allow counsel to cross-examine potential jurors.¹¹⁹
- 371 A number of common law grounds on which a juror could be challenged for cause are not available under s 25:¹²⁰ for example, intoxication: *ex parte Morris* (1907) 72 JP 5; the impersonation of a juror: *R v Wakefield* [1918] 1 KB 216; or the inability to understand the language in which the trial is being conducted: *Ras Behari Lal v King-Emperor* (1933) 50 TLR 1. In such cases counsel must rely on a peremptory challenge or the stand by procedure (Finn, 1984, 207). The latter is not entirely satisfactory, however, since the person stood by may still

¹¹⁸ *R v Pyke and McGill* (1909) 29 NZLR 376 is authority that a challenge for cause for prejudice does not lie where a juror has sat on an earlier trial of a person associated with the accused in the same events. In *R v Greening* [1957] NZLR 906, Gresson J stated that “it is difficult to see why that cannot be fairly regarded as likely to engender a predisposition in respect of the matters to be tried” (913). However, an earlier judgment of Gresson J, *R v Pratt* [1949] NZLR 425 (not cited in *Greening*), citing *Pyke and McGill* as an authority, states that although it was “preferable” for such a person not to sit on the jury such a situation was not enough to sustain a challenge for cause. According to *Gash* [1967] 1 All ER 811, a challenge for cause will lie if the accused’s companion (previously convicted by the same jurors) will appear as a witness for the defence.

¹¹⁹ In *R v Sanders* [1995] 3 NZLR 545 the Court of Appeal stated that the course of supporting challenges for cause by examination by counsel of a juror before she or he is seated in the jury box is very rare; there is no directly relevant New Zealand authority (549). After canvassing overseas authority, the court stated: “One can only remain unconvinced that any novelty should be introduced into ordinary New Zealand criminal practice, while recognising that in wholly exceptional cases a trial Judge may properly exercise the judicial discretion of allowing jurors, whose names have been called, to be cross-examined before taking their seats” (550). The legal systems of England, Canada, Australia and Scotland do not permit cross-examination of jurors before they are empanelled: see Buxton, “Challenging and Discharging Jurors – 1” [1990] Crim LR 225, 226.

¹²⁰ Finn, “Aspects of the Law Relating to Jury Trials” (1984) 2 Canterbury Law Review 206, 206–207.

be called for jury service if there are no prospective jurors left and the jury does not yet number 12.

- 372 Like challenges for want of qualification, challenges for cause are very rare in New Zealand. None were recorded in *Trial by Peers?*.¹²¹ In 1957 the Court of Appeal described them as obsolete: *R v Greening* [1957] NZLR 906, 914. If the peremptory challenge were to be abolished, the procedure for challenges for cause could be modified in which case their use would become more commonplace.

Peremptory challenge

- 373 Using a peremptory challenge (also called a challenge without cause), the prosecution or defence may challenge a potential juror without giving any reason for doing so (Juries Act 1981 s 24). Generally, the prosecution and defence may each challenge six potential jurors without cause. In trials involving more than one defendant, the Crown has a maximum of 12 challenges, while defence counsel may challenge six potential jurors for each defendant. *Trial by Peers?* reported that 36.5 percent of balloted potential jurors were peremptorily challenged by the defence or prosecution (56).
- 374 In chapter 5 we identified the goals of jury selection and noted that one of the goals is a jury which is representative of the community, noting also that representivity is the least clearly articulated and developed goal of the jury selection process. The challenging of 36.5 percent of balloted jurors must have a major impact on the composition of juries, and we therefore examine the use of peremptory challenges in some detail in paras 386–405.

Direction to stand by

- 375 During the courtroom selection process, the judge may direct a potential juror to stand by until all the other jurors are called and challenged (Juries Act s 27). The judge will usually undertake this procedure:
- if the potential juror advises the judge of a difficulty, or
 - on the application of one of the parties with the consent of the opposing party.
- 376 However, the judge may also stand by jurors on his or her own initiative if satisfied that it is in the interests of justice to do so.
- 377 There is no limit to the number of potential jurors that can be stood by, although obviously the number of the assembled pool of potential jurors imposes its own limit. As with the peremptory challenge, there is no requirement to state a reason for standing by. However, the constraints of the procedure mean that it is not totally equivalent to the peremptory challenge. The potential juror is unlikely to be called again. *Trial by Peers?* found that 2.7 percent of balloted potential jurors were stood by in the period surveyed.

¹²¹ See also O'Donovan, *Courtroom Procedure – A Practitioner's Survival Kit* (CCH, Auckland, 1989) para 714; *R v Sanders* [1995] 3 NZLR 545, 548–549 (CA): challenges for cause have been rare in New Zealand because of the existence of peremptory challenges and the former right of the Crown to require jurors to stand by (now a consensual procedure or dependent on the judge's own motion under s 27 of the Juries Act).

- 378 There is a possibility that, at this stage of the empanelling process, trial judges have inherent jurisdiction to exclude altogether (rather than just stand by) a potential juror if satisfied that justice requires it.¹²² The power may be limited to excluding biased jurors. This suggests, for two reasons, that the inherent jurisdiction will rarely be utilised. First, the Juries Act has provided a statutory scheme, enabling counsel to challenge for cause on the ground of bias and judges to discharge jurors and swear in replacements before the trial commences on the ground that the juror has some connection with the case (Juries Act s 22(1)). Secondly, at common law, if counsel has knowledge of bias but does not challenge for cause then he or she is held to have waived the objection to the juror on this ground.¹²³
- 379 One writer has argued that this inherent power does extend to other forms of incapacity, for example intoxication (Finn, 1984, 208–209). If this is so, the power exercised in the court’s inherent jurisdiction supplements the limited provisions of the Juries Act for challenge for cause and discharging jurors under s 22(1): *R v Turner*, (unreported, 25 July 1996, CA 439/95), 4.

THE PEREMPTORY CHALLENGE IN PRACTICE

Jury vetting

- 380 The term jury vetting is sometimes used in a number of different senses. Here it is used in the widest sense to mean the checking of the list of potential jurors, by both the prosecution and the defence, for jurors who may be regarded in some way as biased or unsuitable for jury service. This information may then be used by counsel to determine which potential jurors to challenge. The Juries Act 1981 does not prohibit jury vetting. Section 14(1) provides that any party to the proceedings can request the court registrar to make available a copy of the jury panel for inspection or copying up to 5 working days before the jurors are due to be summoned for the week in which the proceedings are due to start. Any other person may inspect and copy the jury panel during the same period with the court’s permission (s 14(2)). Therefore it is legal for both prosecution and defence counsel to inspect the jury panel list prior to the trial.
- 381 The 1995 *Trial by Peers?: The Composition of New Zealand Juries* study surveyed the jury vetting practice of prosecutors and defence counsel. The key points were summarised at page 113 as follows:
- With the exception of one major city, the police provided the *prosecution* with information on the potential juror’s previous criminal convictions.
 - The police officer in charge of the case would at times go through the prosecution’s jury list to see if there was anybody they did not want on the jury.

¹²² *R v Greening* [1957] NZLR 906, 915–917 (CA). Gresson J acknowledged that “[t]he authority for the existence of such a power is somewhat meagre, but, in our opinion, it is sufficient; and it is acted upon from time to time both in criminal and in civil trials.”

¹²³ *Ras Behari Lal v King-Emperor* cited in *R v Greening*, 912. See also *R v Turner* (unreported, 25 July 1996, CA 439/95), 5; the court held that counsel had waived the right to appeal on the ground that the foreman was or gave the appearance of being biased (his former occupation was as a police officer) because counsel had not applied for the foreman to be discharged at the time that the knowledge came to his notice a few days into the trial.

- The jury list might be annotated by the police indicating that a potential juror is an associate of repeat offenders.
- Prosecution counsel either included or excluded potential jurors with previous convictions, depending upon what they perceived to be in the best interests of their case.¹²⁴
- The *defence* had limited resources with which to vet the jury. Concern was expressed over the disparity of resources between the Crown and defence. Police information was thought to benefit the prosecution and give them an advantage over the defence.
- Counsel would go through the jury list with their client to see if any person should be excluded. At times information from the jury list was also discussed, particularly, gender, occupation, and address of potential jurors.
- Defence counsel would challenge on the basis of jury vetting if they had managed to discover any relevant information.
- *All counsel* (prosecution and defence) would identify people with whom they had had previous dealings as some of these people might hold a grudge or be personal friends.
- In smaller centres counsel might make use of personal contacts, or circulate the jury list around the office, to try and discover information on potential jurors.

The exercise of peremptory challenges by prosecution and defence counsel

- 382 Some of the main findings of *Trial by Peers?* in relation to how prosecution and defence counsel exercise peremptory challenges were:
- defence counsel were twice as likely to challenge as the prosecution;
 - counsel for the prosecution were
 - twice as likely to challenge Māori compared with non-Māori in the High Court, and three times as likely to challenge Māori in the District Court,
 - more likely to challenge Māori men than any other group,
 - least likely to challenge non-Māori women,
 - more likely to challenge manual or trade workers compared with those in professional, or clerical and service occupations, and
 - more likely to challenge the unemployed;
 - counsel for the defence were
 - more likely to challenge non-Māori compared with Māori, in the ratio of about two to one,
 - most likely to challenge non-Māori women,
 - least likely to challenge Māori men,
 - more likely to challenge those belonging to the clerical and service occupations, and professional groups, and
 - less likely to challenge the unemployed (*Trial by Peers?*, 66).

¹²⁴ Legally, however, people with previous convictions are not disqualified from jury service unless they fall within s 7 of the Juries Act 1981 (see chapter 8).

- 383 As well as information obtained by vetting the jury list, counsel use the following when deciding whether to challenge:
- information obtained directly from the jury list, primarily the address and occupation of potential jurors;
 - ethnicity;
 - general appearance and demeanour; and
 - the reputation that groups bring with them to jury duty.

Other factors counsel will endeavour to consider will be the type of argument they will be advancing, and the age, gender or occupation groups to which the argument might most and least appeal.

- 384 Counsel vary in the way they use the information they have, but the following results from the interviews with counsel in *Trial by Peers?* illustrate that the use of the information is often based on assumptions, stereotypes or prejudices:
- The address of a potential juror was most important to defence counsel because they considered that it was an indicator of the range of attitudes held by the individual. For example, there was an assumption that people from middle class suburbs would be unduly biased against certain types of offending such as burglary, because they themselves felt vulnerable to this offence (115–116).
 - A few prosecution counsel used the information about occupation to challenge occupations that they disliked having on a jury. Usually those mentioned were law students and school teachers. This assumption was said to be based on previous experience with hung juries, where it appeared to counsel that a law student or school teacher was either holding out against the other eleven jurors, or was actively trying to swing the vote (118). School teachers were an occupational group that many defence counsel would also tend to challenge. Their reasons were similar to those given by the prosecution (119).
 - Prosecution counsel said they would often consider the appearance of a potential juror when deciding whether to challenge. Defence counsel also used the appearance of a potential juror to assess whether that person would be suitable to the defence case. As indicated by prosecution counsel, defence counsel stated that they looked for RSA or pro-Springbok tour badges, three piece suits, and other features that they believed indicated the person might have conservative views. Some counsel acknowledged that these challenges were based on stereotypes, and therefore could be quite wrong (120–121).¹²⁵

Peremptory challenges against Māori potential jurors

- 385 The main reason given by prosecution counsel for challenges of Māori men was that a higher proportion had previous criminal convictions than men of other ethnic groups (*Trial by Peers?*, 131). These convictions did not disqualify the potential juror, but were used by prosecution counsel as an indicator of the person's likely bias against the prosecution or police. Only a few prosecution counsel in the survey conducted in *Trial by Peers?* said that they were aware of the danger of creating a perception that challenges of Māori were discriminatory, and that they tended to positively discriminate by not challenging.

¹²⁵ See also McDonald, "A Jury of Their Silent Peers" (1993) 9 *Women's Studies Journal* 88, 88–89 which lists some of the stereotypes of women used to justify peremptory challenges.

386 Other issues also appear to influence the exercise of peremptory challenges against Māori. Some prosecution counsel tend to assume that it would be more difficult to obtain a conviction with a Māori person on the jury, especially when the defendant is Māori. If the Māori potential juror is from the same socio-economic grouping as the defendant, then the chances of being challenged also seem to increase (*Trial by Peers?*, 139). The view which seems to underlie this approach is that trial by one's cultural or racial peers carries the potential of bias or favouritism towards the defendant:

Unfortunately, Māori people are left to wonder about the validity of this view when all potential Pākehā jurors are not challenged [by the prosecution] in the trial of a Pākehā offender.¹²⁶

387 One concern, raised in a hui on criminal prosecution sponsored by the Law Commission, is the belief that in smaller centres Māori are excluded because they are often acquainted with or related to the defendant (*Criminal Prosecution* (NZLC PP28 1997), para 252(4)). In the interviews conducted in *Trial by Peers?*, one judge said that Māori may not be perceived as independent jurors by the prosecution when there is a Māori defendant, given their wider kinship obligations (135). According to *He Whaiapaanga Hou*, Māori jurors are also frequently challenged on this basis when *the complainant* is Māori. The Court of Appeal has stated that, even accepting that kinship between Māori may not infrequently be more important than many Europeans are accustomed to see it, a remote relationship between the deceased and a juror is not a disqualification, and does not require the juror to be discharged.¹²⁷

388 The issue may not just arise in relation to Māori potential jurors. One prosecution counsel in the *Trial by Peers?* survey thought that the issue was one which arose in smaller communities. One defence counsel considered that Māori potential jurors were challenged because they often lived in the same or a similar suburb as the defendant. However, it is not clear whether the same approach is in fact taken towards non-Māori potential jurors.

389 In 1994, after the *Trial by Peers?* study had been completed but before its publication, the Solicitor-General issued a direction to Crown solicitors to take whatever steps were necessary to ensure that male Māori jurors were not disproportionately challenged by prosecutors (14 July 1994 direction (SOL 115/79)). There is no available statistical information on the effect of that direction, although advice from both defence and prosecuting counsel indicates that it has been followed.

The effect on representation

390 Between the assembly of the jury pool and the constitution of the jury, the use of the peremptory challenge is the most significant courtroom selection procedure affecting the composition of juries. *Trial by Peers?* (80) found that, *compared to the pool of potential jurors*:

- Fewer Māori served on District Court juries, while the expected proportion served on High Court juries. (In 1993 there were 1579 jury trials in the District Court and 437 in the High Court.)

¹²⁶ Jackson, *The Māori and the Criminal Justice System – A New Perspective: He Whaiapaanga Hou: Part 2* (Department of Justice, Wellington, 1988) 139.

¹²⁷ *R v Ratu* (unreported, 31 August 1995, CA 62/95, CA 68/95) 2. The deceased was the juror's grandmother's cousin's son.

- Men were under-represented. In particular, significantly fewer than the expected number of Māori men served on juries.
- More potential jurors in the younger age groups served on juries. Conversely, fewer than the expected number of potential jurors aged 50 and over served.
- There were fewer than the expected number of unemployed jurors. This was particularly noticeable for Māori.

RATIONALES FOR THE PEREMPTORY CHALLENGE

- 391 The following rationales are commonly given for the existence of the peremptory challenge:
- removing biased jurors;¹²⁸
 - allowing the parties, in particular the defendant, to have some control over the composition of the jury, enabling greater acceptance of the jury's verdict as fair;¹²⁹ and
 - influencing the representation of different community groups in a positive manner to include minorities (although this could be considered an aspect of the second rationale).¹³⁰

Removing biased jurors

- 392 Removing biased potential jurors is one of the two primary rationales for peremptory challenges. Supporters regard the peremptory challenge as one of the principal safeguards of an impartial jury.¹³¹ However, the role of the peremptory challenge in this respect may in fact be limited for the following reasons:
- In practice, in addition to attempting to eliminate biased jurors, lawyers also have in mind the aim of securing a jury favourable to their case by retaining those jurors whose bias may be in their favour. Although two opposing counsel exercising challenges may approximate a balance, the information and resources available to each may not be equal (Gobert, 1989, 529–530).
 - While in smaller centres a party may know something specific about prospective jurors, the information on which challenges are based is usually meagre and therefore unlikely to identify those who are not impartial (*The Jury in a Criminal Trial*, 1986, 51; *Trial by Peers?*, 33, 105–109).

¹²⁸ Pomerant, *Multiculturalism, Representation and the Jury Selection Process in Canadian Criminal Cases* (Working Document for the Department of Justice, Canada, 1994), 62–63; Findlay, *Jury Management in New South Wales* (Australian Institute of Judicial Administration, 1994), 50; Kawaley, “Abolishing the peremptory challenge” (1988) 85 No 2 Law Society's Gazette 22.

¹²⁹ Law Reform Commission of Canada, *The Jury in Criminal Trials* (Working Paper 27, 1980), 54. Of the peremptory challenge, the working paper stated:

Its importance lies in the fact that justice must be seen to be done. The peremptory challenge is one tool by which the accused can feel that he or she has some minimal control over the makeup of the jury and can eliminate persons, for whatever reason, no matter how illogical or irrational, he or she does not wish to try the case.

See also Parliament of Victoria Law Reform Committee, *Jury Service in Victoria* (Issues Paper 2, 1995), 46; and Blake, “The Case for the Jury” in Findlay and Duff (eds), *The Jury Under Attack* (Butterworths, London, 1988), 147.

¹³⁰ Blake outlines English cases where peremptory challenges were used to influence the inclusion of racial minorities on juries (157). See also chapter 6.

¹³¹ For example, Gobert, “The Peremptory Challenge – An Obituary” [1989] Crim LR 528.

- Supporters of the peremptory challenge argue that lawyers have learnt through experience how to identify jurors who are biased, for example, in the sense that a juror who has a predisposition to convict regardless of the evidence and the presumption of innocence (see Gobert, 1989, 529). Research, however, suggests that it is very difficult, if not impossible, to predict the values, attitudes or behaviour of an individual on the basis of personal characteristics such as age, gender, or ethnicity.¹³² Complex group dynamics in the jury room add to the difficulty of such predictions.
- Peremptory challenges have a significant impact on the representation of different groups in the community. The results of *Trial by Peers?* indicate that certain groups have been under-represented because of the use of peremptory challenges. The resulting lack of balance may create a type of bias.

Allowing parties some control over jury selection

- 393 The second primary rationale for peremptory challenges is that they allow parties some control over the composition of the jury.¹³³ This is perceived to have benefits in terms of the confidence – of both the defendant and the public – in the jury, its verdict and, ultimately, the criminal justice system. Confidence in jury verdicts is very important. Measuring it is, however, difficult and measuring the contribution made to it by devices such as the peremptory challenge even more so. However, in the absence of any unfettered input – save the number of challenges – criticism may be expected from those disappointed by jury decisions. Such criticism may be difficult to counter against the backdrop of a right removed, unless the removal of the right were undertaken for pressing reasons.
- 394 Concern has arisen recently about the practice of defence counsel showing jury panel lists to defendants before the trial begins, and copies of the list being given to defendants.¹³⁴ The possible dangers are intimidation of jurors as a means of influencing the final verdict in the case or retaliation against jurors after conviction. While there is no real evidence of deliberate jury intimidation in New Zealand, there is some anecdotal evidence that it exists.¹³⁵ The rationale for such access to the jury list, especially for the defence, is to enable the identification of those people who may not be impartial, for example, because of former contact with the defendant or associates of the defendant. Further, under the *Rules for Professional Conduct for Barristers and Solicitors* (5th ed, 1998), counsel have a duty to disclose relevant information to the client, and to act in the best interests of the client.¹³⁶

¹³² For example, Kagehiro and Laufer (eds), *Handbook of Psychology and Law* (Springer-Verlag, New York, 1992), 61; *Trial by Peers?*, 37; Findlay, 1994, 51; McDonald, 1993.

¹³³ For example, Blackstone quoted in the *Cloutier* case in Pomerant, 1994, 63.

¹³⁴ See for example “Killers ‘had jury list in jail’ – claim”, *The Dominion*, 18 October 1997, 2; “Govt stomping on gang heavies”, *NZ Herald*, 18 October 1997, A3; “Jury protection vital”, *NZ Herald*, 24 October 1997, A12.

¹³⁵ See, for example, the cases mentioned in “Jury protection vital”, *NZ Herald*, 24 October 1997, A12.

¹³⁶ *Rules for Professional Conduct for Barristers and Solicitors*, 18–19, and 57–58. Rule 8.01 provides that the overriding duty of a practitioner is to the court in which he or she is acting, but that subject to that the practitioner has a duty to act in the best interests of the client. Rule 1.09 provides that in most circumstances a practitioner is bound to disclose to his or her client all information received by the practitioner which relates to the client’s affairs. The exceptions to this general rule do not specifically include grounds relevant to the vetting of jury lists.

Influencing the representation of minorities

- 395 The third rationale, as argued by some commentators, is that the peremptory challenge allows defence counsel to try to improve representation of minorities who may have been excluded or under-represented earlier in the selection process. This is closely related to the second rationale, above. As noted in chapter 6, in the United Kingdom in the 1970s and 1980s peremptory challenges as well as other procedures and powers were used, often in co-operation with prosecution counsel, to increase the representation of ethnic minorities on juries. Such a practice has not been evident in New Zealand. The exercise of peremptory challenges may have contributed to the under-representation of certain groups on New Zealand juries.
- 396 The peremptory challenge may, on the other hand, be a means of *excluding* members of minorities, because statistically fewer of them are likely to be in the jury pool. The peremptory challenge actually favours majority interests while handicapping the person (often the defendant, but also the complainant) who would benefit from minority representation on the jury. For example, given the small percentage of Māori on the jury panel in some jury districts, it would be relatively easy for either counsel to eliminate Māori from a jury, if so minded. Conversely, it is difficult for a Māori defendant either to significantly reduce the number of non-Māori potential jurors or to prevent the elimination of Māori potential jurors. It is argued that whether or not the peremptory challenge is exercised, this unequal distribution of power between the defence and prosecution may threaten to undermine the legitimacy of the jury system. In the Law Commission's view the peremptory challenge is not an appropriate mechanism by which to influence the ethnic composition of the jury.

Summary

- 397 The removal of biased jurors using the peremptory challenge is not able to be demonstrated. That does not mean, however, that it does not occur. The belief that biased jurors may be or are removed by the exercise of the peremptory challenge is likely to be of significance to the defendant and the general public. The representation of minorities may be affected by the exercise of the peremptory challenge, either positively or negatively. While use of the peremptory challenge by the prosecution is subject to some control by the Solicitor-General, defence use of the peremptory challenge is not controllable. The Australian Institute of Judicial Administration's report on *Jury Management in New South Wales* summarised the perceived benefit of the peremptory challenge as follows:

The peremptory challenge is useful not because it secures impartial juries, or even allows the participation of the accused, but because it gives the impression that some procedural safeguard is being deployed, providing a facade of rigorous jury selection where such rigour cannot exist. (cited by Findlay, 1994, 57)

In the Law Commission's view, it cannot be demonstrated that the exercise of peremptory challenges meets any of its purported rationales.

THE BILL OF RIGHTS AND PEREMPTORY CHALLENGES

- 398 If the peremptory challenge were to be examined afresh in the light of the right to an impartial jury in the New Zealand Bill of Rights Act 1990, it is possible that it would not comply with the requirements of the Act. New Zealand case law in this area is undeveloped at present.

399 The United States constitutional case law is much more extensive, however, the United States courtroom jury selection procedure is also more complicated. For example, questioning of potential jurors by counsel is permitted, and peremptory challenges may not be exercised in a discriminatory manner. In the United States the right to be tried by an impartial jury is interpreted to mean several things including the right to the fair possibility of a representative jury, and the right to a jury drawn at random from sources which represent a fair cross-section of the community. The right to the fair possibility of a representative jury may mean that the peremptory challenge is of itself an unconstitutional procedure. This has been the opinion expressed in some minority judgments of the United States Supreme Court (and supported by academic commentators), however, as yet that court has not made such a ruling.

OPTIONS FOR REFORM

400 We noted that representative community participation is an essence of the jury system in a democratic society, and that the diversity of experience and viewpoint implied in a representative jury enhances the competency of juries as fact-finders. Any form of challenge threatens to compromise the representivity of a jury. This part of the chapter discusses the following options for reform:

- abolishing the peremptory challenge together with:
 - modifying the challenge for cause, and
 - providing better information for the exercise of challenges;
- reducing the number of peremptory challenges; and
- providing guidelines for the exercise of peremptory challenges.

We also consider the law and practice in some overseas jurisdictions in relation to jury vetting, and discuss possible options for reform.

Abolishing the peremptory challenge

401 The abolition of the peremptory challenge would:

- eliminate the unreviewable ability of counsel to make decisions according to racial, social and gender stereotypes in excluding potential jurors;
- compel counsel to articulate proper reasons under a modified challenge for cause procedure; and
- eliminate the advantage of counsel who seek to exclude members of minorities over counsel who seek to include them, thereby better protecting the interests of minority groups by improving their representation on juries.

402 Some cost and administrative benefits add weight to the abolition argument. Not only would the financial cost of summoning jurors be reduced, but also the personal inconvenience caused to greater numbers of people.

403 A jury selected purely at random from the jury pool is likely to be more representative than one produced from the exercise of 12 peremptory challenges. The abolition of peremptory challenges would mean that there would be no mechanism for counsel to exclude potential jurors who have a non-specific bias which may affect their judgment. This is discussed further in relation to a modified challenge for cause procedure.

404 The Parliament of Victoria Law Reform Committee posed abolition as an option in its issues paper, *Jury Service in Victoria*, without expressing support for it. In its final report, the Committee recommended a return to the position where

the Crown has no right of peremptory challenge but can stand jurors aside (para 6.32). Other law reform agencies have been reluctant to recommend abolition and have usually recommended a reduction in the number of peremptory challenges, the use of guidelines, or no change at all.¹³⁷

- 405 Peremptory challenges have been abolished in England and Wales.¹³⁸ However, no empirical research has been conducted since abolition to determine the extent of changes in practice. The only research has been a survey of barristers and judges, conducted for the Royal Commission on Criminal Justice,¹³⁹ in which a slight majority (56 percent) of defence barristers thought that peremptory challenges *should* be restored; the same proportion of prosecution barristers, and a larger majority of judges (82 percent) thought that it should *not* be restored.

Modifying the challenge for cause

- 406 If the peremptory challenge were to be abolished, another procedure would be required to enable biased potential jurors to be eliminated. The logical option would be to modify the challenge for cause, making it easier to use and more effective. In England and Wales, abolition of the peremptory challenge, and the limitations on the prosecution's right to stand by jurors, gave new practical importance to the challenge for cause.¹⁴⁰
- 407 Substantiating a challenge for cause is perceived as extremely difficult. The lack of accurate information is a common reason given for avoiding the challenge for cause procedure and instead utilising the peremptory challenge. Ensuring that better information about potential jurors is available to both counsel on an equal basis would be essential to any effective reform of the challenge for cause procedure.
- 408 The provisions governing the procedure, which formerly existed in s 363 of the Crimes Act 1961, were greatly simplified by the Juries Act 1981. Prior to the 1981 Act, challenge for cause was a much more formal procedure modelled on the English common law approach. The only reported decision on s 25 of the present Juries Act, *R v Sanders* [1995] 3 NZLR 545, essentially maintained that approach to questioning jurors (ie, it is only permissible at the court's discretion in the most exceptional circumstances).
- 409 Other than *Sanders*, there is no guidance from any source about the procedure to be followed, or the permissible grounds for a challenge covered by the phrase "not indifferent between the parties" used in s 25(1) of the Juries Act. Because counsel are able to utilise the peremptory challenge, the challenge for cause is so rarely used that there is also little anecdotal information about practice.

¹³⁷ For example, Law Reform Commission of Canada, Report 16: codification of common law practice; New South Wales Law Reform Commission: reduction in number; Findlay: no change.

¹³⁸ The peremptory challenge was abolished by the Criminal Justice Act 1988 (UK) s 118(1). For a brief outline of the events leading to abolition see Gobert, 1989, 530–531. Abolition occurred in response to a verdict which the government thought was unjustified and followed a recommendation that the challenge be abolished in relation to fraud trials only: *Fraud Trials Committee Report* (HMSO, London, 1986), 130–131. See also Pomerant, 1994, 66.

¹³⁹ Zander and Henderson, *Royal Commission on Criminal Justice: Crown Court Study* (HMSO, London, 1993).

¹⁴⁰ See Buxton, "Challenging and Discharging Jurors – 1" [1990] Crim LR 225, and "Challenging and Discharging Jurors – 2" [1990] Crim LR 284.

- 410 The change from s 363 of the Crimes Act 1961 to s 25 of the Juries Act indicates a departure from common law procedures and evidential requirements. In the Commission's view, abolition of the peremptory challenge would necessitate the development of the law and procedure concerning challenges for cause.
- 411 The basis for a challenge for cause – that the potential juror is “not indifferent between the parties” – is relatively simple. On its face it seems to require that the potential juror be “not indifferent”, that is, biased *in fact*. It is not clear from s 25 whether a potential juror could be challenged if his or her presence on the jury gave the *appearance* of bias. The type of situation which might arise is where the person has a personal connection to one of the parties. While the person may not be biased in fact, he or she can be excused or discharged by the judge under ss 16 and 22 of the Juries Act. It would seem illogical if counsel could not also challenge for cause in this situation.
- 412 An argument against greater use of challenge for cause is that counsel are unable to challenge a potential juror about non-specific biases relating to the race or class of the defendant, or the activity the defendant allegedly engaged in. An example of such a non-specific bias would be a belief that anyone arrested and charged by the police must be guilty of the crime charged. Some argue that in a less homogeneous society it may be appropriate that general beliefs and prejudices are relevant in assessing the impartiality of potential jurors (see Pomerant, 1994, 61). It may also be regarded an acceptable cost to conduct careful questioning of potential jurors, to demonstrate publicly that discrimination is not permitted. The Law Commission's view is that, if challenges for cause were to be modified, counsel should not be able to challenge potential jurors on the ground that they have a non-specific bias. It would be impossible to eliminate all such potential jurors.

Better information for the exercise of challenges

- 413 If challenges for cause were to be exercised on a principled and rational basis, then counsel for the defence and prosecution should have accurate information about potential jurors on which to base their challenges. A number of methods could be adopted to achieve this goal:
- a voir dire (trial within a trial) system permitting extensive questioning of potential jurors, regulated by the judge in accordance with established rules, and modelled on the United States system;
 - a questionnaire sent to summoned jurors or given to members of the jury pool and then distributed to both prosecution and defence counsel; and
 - limited questioning by counsel, based on information in questionnaires, and controlled by the judge.
- 414 The United States voir dire system is time consuming, complicated, and based on extensive constitutional jurisprudence (see, for example, the description in Findlay, 1994, appendix 8). The use of a questionnaire for potential jurors in the Maxwell trial in the United Kingdom provides another model for the provision of information about potential jurors. The questionnaire was divided into two parts. The first part was designed to identify those with good reason to be excused. The second part contained questions designed to show whether any potential juror had been, or may have been, “infected with bias as a result of pre-trial publicity”.¹⁴¹ The judge asked questions he considered appropriate in

¹⁴¹ *R v Maxwell*, unreported ruling of 27 April 1995, cited in *Jury Service in Victoria* (Issues Paper 2, 1995), 8.

considering whether to exercise the power to excuse or discharge the juror concerned. Counsel also participated. While the focus in Maxwell was on prejudicial pre-trial publicity, the focus of a general questionnaire could be broadened to include other questions about the impartiality of potential jurors.

- 415 The New Zealand Court of Appeal stated in *R v Sanders* [1995] 3 NZLR 545 that, with regard to more regular questioning of jurors,

New Zealand law should not go down that road. Moreover the quality of a jury obtained after such a process as is suggested would be questionable. The perspicacity of the jury which acquitted in the *Kray* case may be doubtful. (551)

- 416 A process of the kind discussed in the preceding paragraphs would be more costly than the procedures presently used and, more importantly, it would be more complex and more time consuming. It seems likely that, if challenges for cause were to become the only means of affecting the composition of the jury, counsel would inevitably seek (at trial and on appeal) to expand the scope of any enquiry into the attitudes of potential jurors. These consequences must be judged against the likelihood that challenges for cause would continue to compromise representivity. The gain in representivity may therefore be small.

- 417 For these reasons the Commission does not propose the abolition of the peremptory challenge, but it seeks submissions.

Should peremptory challenges be abolished?

Reducing the number of peremptory challenges

- 418 Reducing the number of peremptory challenges would mirror the trend in other jurisdictions.¹⁴² The justification for such an option is that counsel would still be able to remove biased potential jurors while making it more difficult for either side to reduce representivity and select the jury of their choice. Certainly, with fewer challenges there would be less ability for counsel on either side to exclude people of minorities from the jury. In the Commission's view the retention of four peremptory challenges should enable counsel to deal with well-founded concerns.

Should the number of peremptory challenges be reduced?

Guidelines for the exercise of peremptory challenges

- 419 There is no question that the peremptory challenge is firmly established in criminal procedure. The value that prosecution and defence counsel place on

¹⁴² The number of peremptory challenges have been reduced in various Australian state jurisdictions (*Jury Service in Victoria*, 1995, 45). The New South Wales Law Reform Commission made a recommendation for a reduction in the number of challenges in its report on *The Jury in a Criminal Trial* and a number of submissions on our *Juries: Issues Paper* (October 1995) made the same suggestion. Before peremptory challenges were finally abolished in England in 1988, the number available was reduced in 1977 from 7 to 3 (Blake, in Findlay and Duff (eds), 1988, 146–147).

the peremptory challenge must be recognised, and it must be acknowledged that there may be valid reasons, if only psychological, political or symbolic, for parties to retain the right at least in some form.¹⁴³

- 420 The New South Wales Law Reform Commission considered that, in circumstances where it is proper for the Crown to exercise the peremptory challenge, guidelines should be formulated and published by the Attorney-General to prevent any improper use. The terms of the guidelines would provide that prospective jurors are not to be challenged purely on the grounds of, for example, race, sex, or age. The guidelines would also set out the grounds on which the prosecution could make peremptory challenges. Guidelines would encourage both consistency and the making of challenges on legitimate grounds. If there were to be such guidelines, they should be publicly available.¹⁴⁴ In New Zealand guidelines could be formulated by the Crown Law Office, as part of the prosecution guidelines (see *Criminal Prosecution* (NZLC PP28, 1997), appendix B). Guidelines for defence counsel could be formulated by the New Zealand Law Society, in conjunction with the Crown Law Office, and incorporated in the Rules of Professional Conduct for Barristers and Solicitors.
- 421 Other commentators, especially in the United States, have gone further, suggesting that there should be statutory regulation of peremptory challenges. However, it must be borne in mind that proposals by United States commentators are made in the context of a system which allows counsel to question potential jurors extensively. We do not favour this approach.
- 422 The New South Wales Law Reform Commission, in conjunction with its recommendation for guidelines, also recommended that judges have the power to discharge the jury where the process of exercising peremptory challenges has created the potential or the appearance of unfairness (*The Jury in a Criminal Trial*, 57). The fact that an unobjectionable selection process has left the jury lacking a member of a particular group within the community should not, of itself, be a ground for exercising the power to discharge. The power derives from the inherent jurisdiction of the court and has been exercised in Australia, but only rarely.¹⁴⁵ While there is some doubt about the existence of the power, the Commission felt that clarification and codification would be beneficial. It had in mind the need to give the courts a specific and effective power to enforce the observance of the guidelines on exercising peremptory challenges. We see merit in this proposal.

Should judges have the power to discharge the jury when the exercise of peremptory challenges has created the potential or the appearance of unfairness?

¹⁴³ Pomerant, 1994, 70. While the Findlay report leads towards the conclusion that peremptory challenges should be abolished (1994, 47–57) the report recommended that they be retained, recognising that prosecution and defence counsel highly value the peremptory challenge (177).

¹⁴⁴ Similar guidelines have been made public in Victoria, Australia: New South Wales Law Reform Commission, *The Jury in a Criminal Trial* (Report 48, 1986), 57.

¹⁴⁵ New South Wales Law Reform Commission, *The Jury in a Criminal Trial* (Discussion Paper, 1985), para 4.13; Scutt, “Trial by a jury of one’s peers” (1982) 56 ALJ 209.

Reforming the law and practice of jury vetting

- 423 The issue of jury vetting has arisen in a number of ways, and been dealt with differently, in a variety of jurisdictions. In the United Kingdom for example the issue of jury “nobbling” was dealt with by the government of the day by introducing majority verdicts.¹⁴⁶
- 424 In Victoria, the issue has arisen in relation to the proper role of the prosecution in vetting jury lists. For many years the practice has been that the Chief Commissioner of Police provided the Director of Public Prosecutions with a list of people on the jury panel who had non-disqualifying criminal convictions, findings of guilt, and even acquittals, which might make them unsuitable in the Commissioner’s opinion for jury service. The Parliament of Victoria Law Reform Committee in its final report on *Jury Service in Victoria* (vol 1, 1996, 117–121) noted that the Victoria Full Court in *R v Robinson* [1989] VR 289 considered that the role of the Crown in vetting jurors was a desirable one in order to secure an impartial jury. In *Robinson* and subsequent lower court decisions the courts have stated that it is for the legislature to change the law if it is regarded as unfair. After considering submissions, the Committee concluded that although it is for Parliament through legislation to define the categories of people who are considered unsuitable for jury service by reason of past criminal behaviour, jury vetting of non-disqualifying criminal convictions was necessary in order to protect the integrity of the system (*Jury Service in Victoria*, vol 1, 121). The Committee noted, however, that vetting should be restricted to this class of jurors and kept to a minimum.
- 425 The Parliament of Victoria Law Reform Committee also considered whether the defence should have access to the information gathered by the prosecution about non-disqualifying criminal convictions. The Committee recommended in its final report that information obtained from jury vetting by the prosecution should be provided to the trial judge prior to the jury empanelling process, and that the defence should also have access to that information with leave of the trial judge (*Jury Service in Victoria*, vol 1, 122–123). In addition, the Committee recommended that the sheriff (responsible for preparing jury panels, etc) be responsible for jury vetting rather than the Chief Commissioner of Police (124).
- 426 In New South Wales the Jury Act 1977 prohibits inspection of the jury panel list by anyone before the trial. The New South Wales Law Reform Commission, in its 1986 report, *The Jury in a Criminal Trial*, considered the practice of jury vetting in any form to be inherently improper, primarily on the ground that it offends against the principle of random selection (para 4.45). In addition, they opposed jury vetting because it is a secret exercise, there is no demonstrated need, and it is exclusively in the hands of prosecution authorities who have the advantage in the process of jury selection. Under s 75B of the Jury Amendment Act 1996 (NSW) the sheriff has the power to obtain information from the Commissioner of Police for the purposes of determining whether a person is liable for jury service.
- 427 In Queensland opposition to the practice of jury vetting was expressed by the Litigation Reform Commission in its report on *Reform of the Jury System in*

¹⁴⁶ See Castles, “‘Boot-eaters’ and majority verdicts in criminal trials” (1992) 66 ALJ 290, 292, citing Cornish, *The Jury* (1968), 258–259.

Queensland.¹⁴⁷ As a result of that and other reports on the Queensland criminal justice system, Queensland has introduced the following reforms in the Jury Act 1995 (Qld):

- A list of people summoned for jury service must, on request, be given to the lawyer representing a party. This includes information which identifies people who have been instructed to attend. The request can be made no earlier than 4.00pm on the business day immediately before the trial. After the jury is selected the list must be returned to the sheriff. It is an offence to release information contained in the list to other people (s 30).
- Questioning of people summoned for jury service (or other people) is prohibited, unless authorised by the Jury Act 1995 (Qld) or by a judge (s 31).
- If one party obtains information which may show that a person is unsuitable then it must be disclosed to the other party as soon as practicable (s 35).

428 In the United States the peremptory challenge system, and the process of asking jurors questions on voir dire about their personal and political beliefs, can at times impose much greater invasions into an individual juror's privacy.¹⁴⁸ We do not examine that system in detail.

429 In the Law Commission's view there are three options for reform depending upon the view taken of the relative value and propriety of jury vetting:

- prohibition of jury vetting by both the prosecution and defence, and a power for court registrars to vet jury lists using information provided by the police;
- an obligation on the prosecution to disclose any information on prospective jurors to the defence; and
- a prohibition on defence counsel giving copies of the jury panel list to defendants, while still permitting defence counsel and defendants to examine the list.

The third option would address the immediate issue of concern regarding the disclosure of copies of jury panel lists to defendants and the potential for juror intimidation. However, it does not address resource imbalances in the present system. We seek views on the option of prohibiting jury vetting except by the court registrar (using information provided by the police), or the alternative of obliging the prosecution to disclose any information on prospective jurors to the defence. In the former case, it would probably not be appropriate for the registrar to have such a discretionary vetting power. Instead, all disqualifications should be expressed in the Juries Act. In the latter case there may be some value in limiting the type of jury vetting which the police and prosecution are authorised to conduct. For example, the Parliament of Victoria Law Reform Committee suggested that jury lists only be vetted with regard to non-disqualifying criminal convictions.

¹⁴⁷ Litigation Reform Commission, Supreme Court of Queensland, *Reform of the Jury System in Queensland: Report of the Criminal Procedure Division* (Brisbane, 1993), cited in Parliament of Victoria Law Reform Committee, *Jury Service in Victoria* (vol 1, 1996), 119–120.

¹⁴⁸ See, for example, Weinstein, "Protecting a juror's right to privacy: constitutional constraints and policy options" (1997) 70 Temple LR 1.

Should the current law and practice of vetting jury lists be restricted in any way?

SUMMARY

- 430 The exercise of the peremptory challenge compromises the representative nature of the jury. The rationales of the peremptory challenge are:
- the removal of biased jurors;
 - the provision to the defendant and the prosecution of some measure of control over the composition of the jury; and
 - the opportunity to influence the representation of different community groups in a positive manner to include minorities.
- 431 The peremptory challenge has not been demonstrated to have met the first and third rationales.
- 432 If the peremptory challenge were to be abolished, the challenge for cause would remain as a means to assist in the elimination of biased jurors. If so, access to information about potential jurors before exercising their challenge for cause may be required. The provision of greater information about potential jurors might be achieved by questionnaires about jurors.
- 433 The provision and evaluation of information concerning potential jurors and the exercise of the challenge for cause would be time consuming, adding to delay and cost. Despite the possible advantage of maintaining representation, the Commission does not propose the abolition of the peremptory challenge. The retention of four peremptory challenges would be consistent with the trend in other jurisdictions and would be sufficient to enable counsel to deal with well-founded concerns. There should also be guidelines for the exercise of peremptory challenges. We see merit in giving judges a power to discharge the jury when the exercise of peremptory challenges has created a potential for or the appearance of unfairness.
- 434 We also seek comment on the extent to which jury vetting by both the defence and prosecution should be restricted. Prohibiting defence counsel from giving copies of the jury panel list to defendants would address the recent controversy but it does not address current resource imbalances between the prosecution and defence. We seek views on whether the prosecution should be obliged to disclose information about prospective jurors to the defence, or whether jury vetting by the prosecution and defence should be prohibited outright.
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Discharging jurors

INTRODUCTION

435 **O**NCE A JURY IS CONSTITUTED, counsel have no opportunity to challenge people off the jury.¹⁴⁹ Circumstances may nonetheless arise which may raise questions about the ability of a juror or jurors to continue to serve. These circumstances may arise from considerations of fairness to the defendant or from the personal circumstances of the juror. To meet such circumstances the judge may discharge a single juror or the whole jury. The statutory power to discharge individual jurors is limited. In some cases the courts have had to either interpret the statute very liberally, or supplement the statutory power with the use of the court's inherent jurisdiction. In trials of some length the ability to complete the trial may be threatened by the discharge of jurors who are injured or who fall ill.

436 This chapter examines the judicial powers to discharge jurors and the grounds on which they may be exercised. These powers directly affect the composition of the jury. The considerations underlying the exercise of powers to discharge jurors are largely the same as the goals of the jury selection process: competence, independence, impartiality, and representation. Our view is that these powers require rationalisation. This chapter also considers the use of reserve jurors and the power to discharge the whole jury in circumstances where the goals of jury selection have not been met, or have not been maintained.

THE CURRENT LAW

437 Individual jurors or the whole jury may be discharged by the judge under s 22 of the Juries Act 1981 or s 374 of the Crimes Act 1961. Apart from discharge arising out of inability to agree, which will be discussed in Part II of this paper, the grounds are that:

- the juror is, or may appear to be, biased because of an association with someone involved in the case or the events giving rise to the charge (Juries Act s 22);
- an emergency or casualty renders discharge of the jury highly expedient for the ends of justice (Crimes Act s 374(1));
- a juror is incapable of continuing to serve, for example, because of some mental or physical incapacity, or because the juror refuses to perform his or her duty (Crimes Act s 374(3)(a));
- the juror is disqualified under one of the provisions of the Juries Act (Crimes Act s 374(3)(b));

¹⁴⁹ Section 19 of the Juries Act 1981 is headed "Constitution of jury" and provides that "the jury to try the case shall comprise the first 12 persons selected under section 18 of the Act who remain after all proper challenges have been allowed."

- the juror is unable to continue to serve by reason of the illness or death of a member of the juror's family (Crimes Act s 374(3)(c));
- a juror is personally concerned with the facts of the case (Crimes Act s 374(3)(d)); or
- a juror is closely connected with one of the parties or with one of the witnesses or prospective witnesses (Crimes Act s 374(3)(e)).

438 To reduce the need for discharge arising, it is the practice of trial judges to have the names of Crown witnesses read by the prosecuting counsel to the jury panel prior to jury selection. Any prospective juror who considers that being on the jury may be inappropriate is invited to come forward and advise the trial judge of the difficulty. The judge may direct the juror to stand by.¹⁵⁰

439 Once the jury is constituted, if a juror should be discharged the judge must select the appropriate power by which to do so. The one used will depend on the stage the proceedings have reached and the grounds for the discharge.

*Section 22(1) of the Juries Act*¹⁵¹

440 The power to discharge a juror under this provision is restricted to the period between when the jury is constituted and when the defendant is given in charge to the jury, or the case is opened.¹⁵² During this time the jury has retired only to select a jury representative (foreman), and the opportunity for discussion among jurors is limited. The grounds for discharge are that it has been brought to the attention of the trial judge that a juror either is personally concerned with the facts of the case or is closely connected with one of the parties or prospective witnesses.

441 The power is to discharge the juror rather than the whole jury, with whom the single juror will have had little contact. Following the discharge of the juror another person is selected from the panel. By this means the judge is able to exclude jurors whose presence on the jury may create a risk of the trial being aborted or the judgment appealed.¹⁵³

¹⁵⁰ Section 27 of the Juries Act. See *R v Turner* (unreported, 25 July 1996, CA 439/95). Jurors will usually be unaware whether defence witnesses are known to them or not, although it is the practice of some judges to ask the defence to supply a list of potential witnesses which is then shown to the selected jurors, while other members of the jury panel are still in the courtroom: "Why some people are excluded from jury service", *The Dominion*, 11 October 1995, 13.

¹⁵¹ Section 22 was included in the Juries Act as a consequence of the judgment in *Re Kestle* (No 2) [1980] 2 NZLR 353; (1981) 437 NZPD 398; *R v Te Pou* [1992] 1 NZLR 522, 525.

¹⁵² After the jury is constituted and a foreman selected the registrar reads the charge or charges to the jury and instructs jurors that it is their duty to decide the defendant's guilt or innocence, to listen to the evidence and give their verdict in accordance with it. This process is described as the defendant being *given in charge to the jury*. The case is then opened when the prosecutor makes the opening address.

¹⁵³ See *Adams on Criminal Law* (Robertson (ed) Brooker & Friend, Wellington, 1992), ch 5.1.02, citing *R v Te Pou*. In that case the Court of Appeal held that discharge under s 22 would have been justified where a juror was acquainted with the police officer in charge of the case, although they were not close friends and apparently had not discussed the case.

Section 374(1) of the Crimes Act

- 442 Whereas the power given under s 22(1) of the Juries Act is limited both in time (to a brief period after the constitution of the jury) and in grounds (to a juror's association with the case, a party or a witness), the power given under s 374 of the Crimes Act is more widely based and allows the judge to discharge individual jurors or the whole jury. In the event of discharge of the whole jury, provision is made for the empanelling of a new jury. If, however, a juror is discharged, no provision is made for a replacement juror. In this respect the provision differs from s 22 of the Juries Act which allows the selection of a replacement juror. A justification for this difference is that the Juries Act provision covers a very limited period at the beginning of the trial during which no evidence is heard. A replacement juror will therefore have missed neither evidence nor significant jury discussion.
- 443 Section 374(1) does not specify the point at which the power to discharge the whole jury arises, but provides that the jury may be discharged "without there being a verdict" if *any emergency or casualty* renders it highly expedient for the ends of justice to do so. Following discharge, the court may immediately order the empanelling of a new jury or alternatively postpone the trial (s 374(6)).
- 444 Discharge of the whole jury under s 374(1) was the approach taken in *R v Farquhar* [1994] DCR 260, which was expected to be a 6-week trial. After the jury had been constituted but before the defendant was given in charge to the jury, a juror complained of illness and a deaf ear. The grounds provided in s 22 of the Juries Act – a juror's association with the case, a party or a witness – did not apply. The judge considered that the juror's situation was a "casualty if not an emergency" under the terms of s 374(1), discharged the jury and, the remainder of the panel not having been released, ordered a new jury to be empanelled.

Section 374(3) and (4) of the Crimes Act

- 445 The trial judge also has a power to discharge individual jurors or the entire jury under the recently amended s 374(3) and (4) of the Crimes Act.¹⁵⁴ Again, the provision does not specify the point at which the power to discharge arises, but provides that the jury may be discharged at any time before the verdict is taken.¹⁵⁵ Subsections (3) and (4) provide:
- (3) Subsection (4) applies if, at any time before the verdict of the jury is taken, the Court is of the opinion that
- (a) A juror is incapable of continuing to perform his or her duty; or
 - (b) A juror is disqualified; or
 - (c) A juror's spouse or family member, or a family member of a juror's spouse, is ill or has died; or
 - (d) A juror is personally concerned in the facts of the case; or
 - (e) A juror is closely connected with 1 of the parties or with 1 of the witnesses or prospective witnesses.

¹⁵⁴ The Crimes Amendment Act 1997 amended s 374 (3)–(5) and inserted a new subs (4A).

¹⁵⁵ This period of time includes the jury's deliberations. The words of s 374(3) replaced the phrase "before the jury retire to consider their verdict": Crimes Amendment (No 2) Act 1979, s 3(a).

- (4) Where this subsection applies, the Court, having regard to the interests of justice, may
- (a) Make an order discharging the jury without their giving a verdict; or
 - (b) Subject to subsection (4A), make an order to proceed with the remaining jurors and take their verdict.

Subsection (3)(a)–(c) reflect the grounds contained in the repealed subsection (3). Subsections (3)(d)–(e) are new, and mirror the grounds in s 22(1) of the Juries Act. The addition of these new grounds, and the use of the present tense in drafting the provisions, has remedied some of the problems of strained interpretation that existed under the now repealed subsection (3): see *R v Nuttall and others* (unreported, HC, Rotorua, 13 June 1996, T77/94).

446 “Disqualified” in s 374(3)(b) means disqualified according to s 7 (dealing with persons who have served terms of imprisonment) or s 8 (dealing with certain occupations, mental disorder and some types of physical infirmity) of the Juries Act (see chapter 8).¹⁵⁶

447 The term “incapable” in the repealed s 374(3) was discussed by the Court of Appeal in *R v M* (1991) 7 CRNZ 439:

“Incapable” must therefore include the case of a juror whose continued presence on the jury would jeopardise the fairness of the trial to either side, or make the verdict abortive or seriously vulnerable. It could hardly be said that a juror is “capable” of continuing to act if the inevitable result is a suspect trial. (441)

According to the High Court in *R v Ryder* (unreported, HC, Christchurch, 28 September 1994, T 68/98), “incapable” is not restricted to physical incapacity but extends to the fairness of the trial *and* the potential that a trial may become the subject of a successful appeal if the juror is not discharged. The juror will be “incapable” under s 374(3) if he or she dissociates from the other jurors and declines to join in deliberations.¹⁵⁷ While such a juror will not, strictly speaking, be performing the juror’s duty, there is a danger of discharging a juror who simply disagrees with the other jurors. There is no indication that the meaning of “incapable” in the new s 374(3)(a) is intended to mean anything different from earlier interpretations.

448 In determining whether the *entire jury* should be discharged under the now repealed s 374(3)(a), rather than the single juror giving rise to the difficulty, the primary considerations were:

- whether the bias of one juror had tainted the other jurors: *R v Tinker* [1985] 1 NZLR 330, 332; or
- whether a juror who gives the impression of bias would cause the jury’s verdict to be considered unfair: *R v Ryder* (1991) 7 CRNZ 439.

The new provisions in s 374(3) and (4) do not appear to alter this interpretation. Where a juror may have been influenced by the improper transmission of information concerning the case, and may have brought that to bear on other jurors, discharge of the whole jury is likely.

¹⁵⁶ *R v M* (1991) 7 CRNZ 439, 441. Presumably a juror would also be disqualified if he or she did not come within the terms of s 6 of the Juries Act which sets out qualifications in respect of age and registration as an elector in accordance with the Electoral Act 1993. Note, however, that s 33 of the Juries Act provides that a jury verdict is not affected if a person not eligible to serve under ss 6–8 of the Juries Act nevertheless served on the jury.

¹⁵⁷ See, for example, *R v Campbell* (unreported, 4 September 1989, CA 239/89). See also McDonald, “A Jury of their Silent Peers” 89 (1993) *A Women’s Studies Journal* 88, 101–102.

- 449 Determining whether the jury has been contaminated by an individual juror is a matter of inference: *R v Coombs* [1985] 1 NZLR 318. Jurors may not be questioned about discussions between them, whether in retirement or during the course of the trial.
- 450 The Court of Appeal has recently given guidance in *R v Pearson* [1996] 3 NZLR 275, about the appropriate process for dealing with the possible discharge of a juror during the trial:

The general approach must be that communications with the jury should be in open Court, meaning in the presence of counsel and the accused. . . . Where it is necessary to question a juror about some possibly disqualifying knowledge, it will often be desirable to do this in the absence of the other jurors.¹⁵⁸ The Judge will have in mind that even if the knowledge is such that the juror must be discharged, it may be possible to avoid a retrial by continuing with the remaining 11, although concern whether the juror may have already infected others will require consideration. . . . Clearly, proceeding in open court will not always be practicable. The matter giving the juror concern may be personal or embarrassing. . . . Where appropriate the interview may take place in chambers, with counsel present. We have already spoken about the necessity for a record to be made. (279–280)¹⁵⁹

There may be exceptional circumstances where it is appropriate for the judge to interview the juror in the absence of counsel.¹⁶⁰ In those circumstances, the Commission understands the usual practice is to have the registrar, an associate or a stenographer present.

- 451 If the entire jury is discharged under s 374(4), the judge has the power under s 374(6) to “either direct that a new jury be empanelled during the sitting of the Court, or postpone the trial on such terms as justice requires”. If a juror is discharged the court may proceed with 11 jurors. Under the newly enacted s 374 (4A) the court may not proceed with fewer than 11, except in the following circumstances:

- (4A) The Court must not proceed with fewer than 11 jurors except in the following cases:
- (a) If the prosecutor and the accused consent;
 - (b) If the Court considers that, because of exceptional circumstances relating to the trial (including, without limitation, the length or expected length of the trial), and having regard to the interests of justice, the Court should proceed with fewer than 11 jurors; and in that case
 - (i) The Court may proceed with 10 jurors whether or not the prosecutor and the accused consent;
 - (ii) The Court may proceed with fewer than 10 jurors only if the prosecutor and the accused consent.

This requirement may unnecessarily restrict the ability of the court to proceed, opening the possibility of consent being withheld by either the prosecution or

¹⁵⁸ See, for example, *R v Coombs*, 323–324.

¹⁵⁹ See the more recent case of *R v Jenner* (unreported, 1 October 1997, CA 92/97) where the court stated that it was unfortunate that the *Pearson* procedure had not been followed.

¹⁶⁰ This was the situation in *R v Pearson* itself, and the practice adopted in the ruling in *R v Nuttall and others*. In *R v M* the judge first spoke to counsel in chambers, and then spoke to the two men involved (the accused’s relative and the juror’s spouse) in chambers without counsel present. The judge told counsel about the outcome of the discussion and his decision to discharge the juror (440).

the defence solely on the basis of a perception as to the way in which the trial is balanced, and/or the belief in an ability to alter that balance in fresh proceedings.

- 452 The cost involved in abandoning a trial is not restricted to financial loss, or to the loss of use of court facilities. Witnesses and other participants in the trial process are inconvenienced and will often be obliged to relive what may be extremely painful experiences. There will be a point at which the reduction of the number of jurors will threaten the integrity of the process by compromising representation and the impartiality to which representation makes a contribution. That point, however, is difficult to define, as is the precise nature of the threat. A judicial decision to proceed with as few as 10 jurors does not, in the Commission's view, reach that point and does not threaten either the representative nature of the jury or any of the other goals of the jury selection process.
- 453 Under s 374(8), the judge's decision to discharge a juror, or the jury, is not reviewable in any court. However, the inviolability of this discretion does not affect the obligation of a court under s 385 to allow an appeal where it is satisfied that there has been a substantial miscarriage of justice: *R v Coombs*.

Inherent jurisdiction and the relationship with s 22(1) of the Juries Act and s 374 of the Crimes Act

- 454 Aside from the legislative provisions described above, the court also has an inherent jurisdiction to govern its own processes to ensure the overall fairness of proceedings: *R v Turner*, citing *R v Ryder*. More particularly, the court may exercise power in its inherent jurisdiction to supplement a statutory provision, where to do so would be in the interests of justice and consonant with the purpose of the provision. A power may be exercised, even in respect of matters regulated by statute, provided that the exercise of the power does not contravene any statutory provision: *R v Turner*.
- 455 The provisions in the Juries Act and Crimes Act replace the common law rules governing the discharge of jurors. There are, however, difficulties with them, which may necessitate the use of the inherent jurisdiction. For example, the provision in the Juries Act applies to a different, or more restricted, time period than those in the Crimes Act. As noted in para 446, s 22(1) of the Juries Act applies to the period between jury selection and the defendant being given in charge (or the case being opened). The period covered by ss 374(1) and 374(3) of the Crimes Act ends later than that covered by s 22 of the Juries Act (ie, with a verdict). The point at which the period begins, however, is not explicit: it seems most likely that it is completion of selection of the jury – in which case it overlaps with the period in s 22(1) of the Juries Act which commences at the same time – or it may be at the point when the defendant is given in charge. Either way, the point of commencement and the point of completion in s 374 of the Crimes Act cover almost all of the life of the jury.
- 456 An example of the difficulties which may arise is where the court becomes aware, after a jury is selected but before the defendant is given in charge, that a juror is intoxicated. The judge has no power to discharge that juror under s 22(1) of the Juries Act because although the situation is within the time period contemplated by s 22(1), intoxication does not fall within the grounds specified in that provision. Intoxication may, on a strained interpretation, fall within the ground contemplated by s 374(1): emergency or casualty. The use of that provision, however, requires the discharge of the whole jury. Section 374(3)

applies more readily now that the phrase “*becomes . . . incapable*” has been amended to “*is incapable*” (see paras 451–453). If the discharged juror is the jury representative (foreman), the Juries Act makes no specific provision for the election of another. Difficulties such as these may be negotiated by the court relying on its inherent jurisdiction. Legislative clarity is, however, the more desirable course.

Summary

- 457 The amendment of s 374 of the Crimes Act by the Crimes Amendment Act 1997 has gone some way towards remedying the previous difficulties and strained interpretations of the now repealed s 374(3). However, because of the overlap between s 22(1) of the Juries Act 1981 and s 374 of the Crimes Act, some problems still remain. In the interests of clarity and practicality, the powers to discharge jurors need to be more clearly articulated in legislative provisions. The courts should only be required to have resort to their inherent jurisdiction in the most unusual and unforeseeable cases.

OPTIONS FOR REFORM

A single power to discharge jurors

- 458 The state of the present law arises out of the intricacies of the common law and the incomplete codification of powers to discharge jurors. In the Commission’s view, there would be benefit in codifying the power to discharge jurors into a single provision. The Canadian Law Reform Commission, in its 1982 report, *The Jury* (Report 16), proposed a restatement of s 576.1 of the Criminal Code. Its proposed s 19 stated:

Where in the course of a trial a juror is, in the opinion of the judge, by reason of illness or some other cause, unable to continue to act, the judge may discharge [the juror].¹⁶¹

- 459 The advantages of this type of provision, compared to s 22(1) of the Juries Act and s 374 of the Crimes Act, are that:
- the power, and all the grounds on which it may be exercised, are contained in one provision;
 - it is simple and clear; and
 - it refers to the present status of the juror, which includes the case where the status of the juror has changed as well as that where knowledge only comes to the attention of the court after the jury has been constituted.
- 460 The phrase “some other cause” would allow judges to discharge jurors who:
- are disqualified;
 - are affected by the illness or death of a spouse or de facto partner, including a de facto partner of the same sex (in accordance with s 19 of the New Zealand Bill of Rights Act 1990);
 - are biased, or give the appearance of being so;
 - have a personal connection to the facts or close connection to a party or witness; or
 - are intoxicated.

¹⁶¹ Compare the earlier working paper provision: “Where in the course of the trial the judge is *satisfied* that a juror should not, because of illness or other *reasonable* cause, continue to act, the judge may discharge the juror” (emphasis added).

In order to provide guidance, however, it might be useful to specify some of these grounds while retaining the phrase “some other cause”.

- 461 The phrase “in the course of a trial” could be defined to cover the period from the constitution of the jury to the point when the jury indicates that it has reached a verdict or verdicts.

Should there be a single power to discharge jurors after the jury is constituted?
Should specific grounds for discharge be included in the legislative provision?

- 462 The Law Commission also suggests that the power to discharge jurors should, in the event of discharge of any juror or jurors before the prosecution opens, be accompanied by a power to empanel a replacement juror or jurors before the case opens with the jury panel remaining until that point. Subsequent to that point, the power to discharge two jurors without the consent of the prosecution or defence would arise.

Should the judge also have the power to empanel a replacement juror before the case opens?

- 463 The situation can also arise where the discharged juror is the jury representative (foreman). We propose a specific provision, permitting the jury to select another if the jury representative is discharged for any reason. The Commission’s view is that this issue should be resolved by the exercise of judicial discretion.

Should there be an express provision permitting the jury to elect a new jury representative (foreman) if he or she is discharged?

- 464 The issue arises whether the defendant should have the right to be present in all circumstances when consideration is given to discharging a juror or the entire jury. Some commentators consider that the defendant should have such a right, because the courts have taken the view that all important communications with the jury should take place in open court in the presence of the defendant.¹⁶² However, the dynamics of relationships within a trial setting are complex. To some, a judge’s consideration of discharging a juror may be seen as a trial of that juror. The effect of that consideration on the juror may be to cause discomfort. If the juror is not discharged, the possible effect on that juror and other jurors of the judge’s consideration of discharge in the presence of the defendant is unpredictable. There may also be privacy issues. The Commission’s view is that the issue should be resolved by the exercise of judicial discretion.

¹⁶² For example, Finn, “Aspects of the Law Relating to Jury Trials” (1984) 2 Canterbury LR 206.

Should the defendant have the right to be present for all applications to discharge a juror?

- 465 The determination whether to proceed with as few as 10 jurors is, in the Commission's view, best left to the trial judge after having heard argument from the prosecution and the defence. Any reduction below that figure should require the consent of both the prosecution and the defence, as is the case under the recently enacted s 374(4A) of the Crimes Act.

Discharging the entire jury

- 466 Like the power to discharge individual jurors in s 374(3) and (4) of the Crimes Act, the single power to discharge individual jurors should also include the power to discharge the entire jury. The issue of discharging the whole jury will usually arise where there may be jury "contamination", in other words where prejudicial information one juror possesses may have been passed to other members of the jury. The alternative to discharging the jury is to direct the jury on the matter in question.
- 467 The discharge of the whole jury means that a significant amount of time and expense will have been wasted. At present there is little information available about discharging juries, and the following questions arise:
- How often is more than one juror discharged, requiring the consent of both the prosecution and defence to continuation of the trial?
 - How often does the bias, or perceived bias, of a juror lead to a successful application for the entire jury to be discharged?
 - In New Zealand, has an entire jury ever been discharged on grounds relating to the composition of the jury?

Should the power to discharge the *entire jury* be included in the single provision to discharge individual jurors?

Questioning jurors

- 468 On considering the discharge of a jury on a ground relating to the qualities of an individual juror, judges are permitted only to question the individual juror directly concerned and not other members of the jury. The presence of a biased juror gives rise to the possibility of contamination of the jury and, therefore, the prospect of the jury being discharged. Assessment of this possibility may be assisted by a power to question the jury representative (foreman) or, if the discharge of the jury representative is being considered, one other juror.

Should a judge have the power to question at least the jury representative (foreman) on an application to discharge a jury, on the ground that a biased juror has infected the remaining jurors? Should a judge be able to question any juror?

The use of reserve jurors

- 469 In some jurisdictions, rather than continuing with a smaller jury after the discharge of a juror or risking the discharge of the entire jury, provision is made for reserve jurors. The number varies, ranging from 3 to 6. For example, in Queensland there is provision for up to 3 reserve jurors. A reserve juror may take the place of a juror who is discharged after the trial begins, but before deliberation commences.¹⁶³ In some United States jurisdictions reserve jurors may only be empanelled if the trial is anticipated to be a long one.¹⁶⁴
- 470 The use of reserve jurors raises issues in three areas: jury selection; cost and administration; and jury discussion and deliberation. The issue with respect to jury selection concerns peremptory challenges. If, as is the Commission's view, there is justification for the retention of the peremptory challenge, consistency would require that additional challenges be provided with respect to reserve jurors. The number of additional challenges should be in similar proportion to the number of reserve jurors as the number of peremptory challenges to the first 12 jurors empanelled. If there were to be 3 reserve jurors then one additional challenge each for the Crown and the defence would be required.¹⁶⁵
- 471 Questions of cost do not create great difficulty, particularly if the use of reserve jurors were limited to trials which were expected to be lengthy. The overall cost involved would be small compared to the cost of abandoned trials. With respect to administration, the increased number of prospective jurors would require greater, but not significantly greater, administrative effort. Although the accommodation of jurors within the courtroom itself is limited to 12 in the jury box, provision for reserve jurors outside the jury box could be made, although this would not be entirely satisfactory.
- 472 The greatest difficulty arises with respect to jury discussion and deliberation. In long trials in particular, significant discussion between jurors is likely to occur during the course of afternoon and morning adjournments, and during the course of those parts of the proceedings when the jury may be excluded while evidential issues are resolved. If, during such times, reserve jurors are permitted to be with the first 12 empanelled jurors and are not subsequently required for deliberation, the process is open to the objection that people who do not have ultimate responsibility for the verdict have been in a position to have a significant effect on the thinking of those who do. That objection is given greater force when consideration is given to the fact that it is expected that the process of jury deliberation will be affected by the final addresses of counsel and the directions of the trial judge. Addresses, directions, and deliberation itself may alter views formed during the course of the trial. Views expressed by reserve jurors, prior to

¹⁶³ Jury Act 1995 (Qld), s 34(1). United States Federal courts may direct that up to 6 alternate jurors be called and empanelled (Rule 24 of the Federal Rules of Criminal Procedure). See also, for example, Juries Act 1957 (Western Australia) s 18; Juries Act 1967 (Victoria) s 14: 3 extra jurors may be empanelled for any reason that appears "good and sufficient" (in practice this means long trials).

¹⁶⁴ For example, in California there is provision for alternate jurors when the trial is likely to be protracted (California Penal Code s 1089).

¹⁶⁵ For example, s 42 of the Jury Act 1995 (Qld) allows one extra peremptory challenge per party if there are one or two reserve jurors, or two extra challenges per party if there are three reserve jurors. In other jurisdictions, for example, Western Australia, no extra peremptory challenges are permitted.

the time when addresses and directions occur, may not reflect the final view of the reserve jurors. While judicial directions could warn remaining jurors against giving weight to views expressed by reserve jurors, allegiances formed during the course of trials of some length may significantly reduce the impact of such directions.

- 473 If, however, reserve jurors are kept apart from the first 12 empanelled, other difficulties arise. The reserve jurors do not take part in the process of developing a view, which may occur during morning and afternoon adjournments in a long trial. The introduction of one or more reserve jurors late in a trial may significantly alter the balance of jury thinking and may significantly increase the possibility of jury disagreement.
- 474 A further option, in trials expected to be lengthy, is to empanel not reserve jurors but a greater number of jurors, for example 15, all of whom could constitute the jury and would continue to do so until verdict. This would allow for a greater number of withdrawals during the trial before a minimum number (which could be fixed at a higher number than 10) is reached.
- 475 When considering the issue of reserve jurors, the Canadian Law Reform Commission considered that it would be a burden for extra jurors to sit through long trials and also considered that it was possible that reserve jurors would not pay close attention to the case, knowing that they may not have to deliberate. The Canadian Commission was also of the view that a system of reserve jurors would add to the financial and administrative costs of the jury selection system, and considered that the system of continuing the trial with fewer jurors, without the use of reserve jurors, was preferable.
- 476 We favour that view, for the reasons expressed in the preceding paragraphs. The recent amendment to s 374 of the Crimes Act (see para 457) allows a trial to proceed with as few as ten jurors without the consent of the prosecution or the defence. We believe that will provide sufficient flexibility to meet emergencies which are likely to arise, particularly when that ability is supplemented by the ability to proceed with fewer jurors with the consent of the prosecution and the defence. The Commission is aware of cases in which, in preference to discharging a juror, judges have elected to halt proceedings for a limited period to enable a juror to recover from a brief illness. This course should continue to be available, as well as other administrative measures to ensure that jurors do not have to be discharged during the course of the trial.¹⁶⁶

Should we have a system of reserve jurors?

Should it be possible to empanel a jury of 15 in appropriate cases?

¹⁶⁶ Corns, *Anatomy of Long Criminal Trials* (Australian Institute of Judicial Administration, 1997) recommended strategies such as the careful selection of jurors taking into account potential social, physical and emotional effects of a long trial; the provision of at least a half-day break each fortnight; and the provision of aids (summaries, tables, schedules) to assist in their decision making. Salmon J in the 1997 *Phillips* fraud trial attended the pre-balloting of jurors, ensured that all potential jurors were aware of the length of the trial, and had flexible sitting times. The Department for Courts also arranged to increase payments to jurors in that particular trial because of its length and the disruption caused to the lives of jurors.

SUMMARY

- 477 A range of difficulties may arise during the course of a trial which may necessitate the discharge of a juror or the jury. These difficulties may arise from factors which may rob, or appear to rob, a juror of objectivity, or from an emergency affecting a juror or a member of the juror's family.
- 478 Once the jury is constituted, the trial judge's powers to discharge a juror or the jury are found in s 22(1) of the Juries Act and s 374 of the Crimes Act. The Commission favours a single power to discharge jurors, in which the ground to discharge is an inability to act as a juror by reason of illness or some other cause. The power should be exercisable at any time from the constitution of the jury to the point where the jury has indicated that it has reached a verdict or verdicts. The judge should have the power to empanel replacement jurors if discharge of a juror or jurors occurs before the opening of the Crown case. There should be an express provision permitting the jury to elect a new jury representative if he or she is discharged.
- 479 We seek views on whether the defendant should have the right to be present for all applications to discharge a juror.
- 480 The single power to discharge individual jurors should also include a power to discharge the entire jury. This power would arise in the event of an emergency, or of the possibility of the whole jury being "contaminated" by prejudicial information which may be within the knowledge of a member of the jury. When making a decision whether to discharge the whole jury, there is an issue about whether the trial judge should have the express power to question at least the jury representative to ascertain the extent of any contamination. We also seek views on whether we should have a system of reserve jurors and on whether it should be possible to empanel a jury of 15 in appropriate cases.
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APPENDIX
Empirical studies of juries
and jury trials

A1 **O**VERSEAS, COMPREHENSIVE JURY RESEARCH has been conducted in England and Wales, New South Wales, Hong Kong, and to a lesser extent in the United States. This appendix discusses the methodology of some of the more recent overseas research, as well as research conducted in New Zealand.¹⁶⁷

England and Wales

A2 In England and Wales, the Royal Commission on Criminal Justice conducted an extensive survey of judges, counsel, the Crown Prosecution Service, police, defendants and jurors in every case in every Crown Court for a 2-week period in February 1992. The Contempt of Court Act (UK), while barring questions to jurors about their deliberations on the issue of the accused's guilt, did not prohibit more general questions to jurors about jury service.¹⁶⁸ The response rate of all but the defendant to the questionnaires was very good and therefore statistically valid. It was broadly representative of the caseload in the Crown Courts and of the various categories of respondent. Jurors were asked to provide information on a number of issues, including their understanding of the evidence (including scientific evidence); their memory of the evidence in lengthy trials; whether they took notes and how useful that was; their understanding of the legal language used in trials; asking questions during the trial; the judge's summing up; the length of the trial; the length of deliberations; and their experience of jury service.¹⁶⁹

New South Wales

A3 In New South Wales, the Australian Institute of Judicial Administration (AIJA) published a report on jury management based on a detailed study of juries by Associate Professor Mark Findlay of the University of Sydney. Questionnaires were administered to District and Supreme Courts in Sydney's central business

¹⁶⁷ Findlay, *Jury Management in New South Wales* (Australian Institute of Judicial Administration, 1994), 26, describes the Hong Kong jury research project. It involved surveys of jurors, judges, barristers and members of the public. Unlike the research conducted in England and Wales, NSW, and Hong Kong, most United States research involves the use of mock juries.

¹⁶⁸ Zander, "The Royal Commission's Crown Court Survey" [1992] NLJ 1730. See also the earlier and more limited study by Baldwin and McConville, *Jury Trials* (Clarendon Press, Oxford, 1979) conducted in the Birmingham Crown Court from February 1975 to September 1976.

¹⁶⁹ Zander and Henderson, *The Royal Commission on Criminal Justice: Crown Court Study* (HMSO, London, 1993), 203–244.

district and suburbs, and two country sittings in the Dubbo and Lismore District Courts. The data collection periods were usually over 3 weeks and occurred in blocks in May–June, July, and August 1993 (Findlay, 1994, 29).

- A4 There were two questionnaires: one for jurors and one for those called to jury service but who did not serve. The questionnaires were structured to provide a range of different types of information. Some questions sought quantified responses (eg, age, percentage of trial understood); others sought graded responses (eg, did you understand legal language? – “thoroughly” through to “not at all”); some required positive/negative responses, (eg, were you being asked to decide guilt or innocence?). Other questions were designed to obtain a free and subjective response (eg, in what ways do you think that the administration of jury service might be improved?) (Findlay, 29–30).
- A5 The New South Wales study was similar to the project in England and Wales but the questionnaires were more expansive (Findlay, 60). Matters covered included:
- personal data (eg, age, gender, occupation, education, and language);
 - attitudes to the jury (eg, awareness of and confidence in the jury system);
 - jury empanelling and selection (eg, helpfulness of summons and information provided, travel arrangements);
 - jury selection (eg, awareness of duties and responsibilities);
 - the trial (eg, length, problems with the presentation of evidence, knowledge of procedure, and problems and pressures during decision making/deliberations);
 - jurors’ experience (eg, inconveniences, expectations, rewards, and suggestions and views on the jury system generally); and
 - court comforts and facilities (eg, treatment by court personnel).
- A6 Any method of research has its limitations. According to the Findlay report, the use of questionnaires means that certain impressions of jurors’ experiences may not be adequately conveyed (138). The project supplemented that survey data with other material, including an analysis of media portrayals of juries, letters from jurors, and a United States telephone survey (chapter 7). Professor Michael Zander, in charge of the Crown Court survey for the Royal Commission on Criminal Justice, also stated that while questionnaires given to jurors without the assistance of interviewers is not the ideal method of investigating problems, the results of the survey based on a well-designed and tested questionnaire still provided valuable information (Zander, 1992, 1730).

New Zealand

- A7 In New Zealand the most significant research conducted on jury trials to date is *Trial by Peers?: The Composition of New Zealand Juries*. The aim of the research was to provide baseline data on the composition of New Zealand juries (Department of Justice, Wellington, 1995, 20). The survey sample in *Trial by Peers?* consisted of those people summonsed and attending for jury service at all District and High Courts throughout New Zealand, for trials starting during the period of 13 September to 8 October 1993. A questionnaire was completed by potential jurors asking them to specify their ethnicity, gender, occupation, employment status and date of birth.

- A8 Court staff provided information about which people were challenged or stood by (41–42). In response to the findings of the initial jury composition survey, further qualitative research was conducted by interviewing a range of judges, court staff, and defence and prosecution counsel (93–94).¹⁷⁰
- A9 In a submission on the Law Commission’s 1995 *Juries: Issues Paper* a committee of High Court judges proposed that research should be undertaken into the New Zealand jury system. The Commission proceeded to explore that option. In 1997 the Commission agreed to collaborate with the Victoria University of Wellington Faculty of Law and Institute of Criminology (through Victoria Link Ltd) in undertaking a research project on jury decision-making. The project is fully supported by the Courts Consultative Committee and is being funded jointly by the Ministry of Justice, the Department for Courts, the Legal Services Board and the New Zealand Law Foundation.
- A10 The project is currently conducting research on jury decision-making which will be used to inform Part II of the Law Commission’s discussion paper – in relation to three areas of possible reform:
- enhancing the decision-making ability of the jury;
 - ensuring that jury deliberations are not unduly prolonged and that the number of failures to agree (hung juries) are kept to a minimum; and
 - ensuring that pre-trial and trial publicity does not have a prejudicial impact.
- A11 The objectives of the research project are:
- to examine the extent to which, and the way in which, each individual juror identifies the issues in a case;
 - to assess the extent to which individual jurors understand the law as it relates to the cases in which they are involved, and to investigate how their perception of the “law” modifies and influences their own approach to the “facts”;
 - to explore the process used by the jury to reach a decision;
 - to explore the impact and effects of pre-trial and trial publicity by the media on the attitudes and responses of each individual juror to the case he or she is dealing with; and
 - to explore the difficulties encountered by each individual juror in fulfilling his or her function as a juror.
- A12 Part II of our discussion paper on juries in criminal trials will describe the methodology of the research project in more detail. A number of procedures ensure that the methodology is appropriate and will minimise the risk that any information about an identifiable case will get into the public domain:
- An advisory committee has been established, with representation from the judiciary and other agencies funding the research. It is overseeing the research and has the right to veto any methodology or questioning having the potential to jeopardise the anonymity which must necessarily be preserved in relation to the jury deliberation process.

¹⁷⁰ Appendix I of *Trial by Peers?* fully explains the methodology of the survey and interview research.

- The researchers collecting the data identify trials, and the areas in which they occurred, by code numbers and will destroy that list of codes at the end of the period of data collection. The codes are not available to any other member of the research team.
- The names and addresses of the jurors being interviewed will be destroyed at the end of the interviews relating to that trial and again will not be available to other members of the research team.
- The data is being recorded in such a manner that no individual trial can be identified from the raw data. If this is not possible in relation to any particular case, that case will be excluded from the sample.
- The raw data is being kept secure and will be destroyed at the conclusion of the research.

Given that the anonymity of jurors and of trials will be scrupulously protected, in our view the interests of justice will not be jeopardised and will ultimately be enhanced.

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