

# THE NEW ZEALAND JURY

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## I

### INTRODUCTION

The colonial history of the courts in New Zealand is one of confusion and often makeshift adaptation. Legislative and ideological structures, including those surrounding the venerable institution of the common law jury, often meshed poorly with the realities of colonial society and everyday legal practice. Initial attempts to accommodate or incorporate the interests and customs of the majority indigenous population further clouded the picture. These attempts were largely nullified by settler antagonism and the cultural destruction wrought by the colonisation process.

Jury trial in New Zealand dates back to the earliest years of colonisation and initially represented an uninterrupted transmission of the English legal heritage. Both the Supreme Court and the lesser courts were established in 1841, the year following the formal annexation of the colony and its separation from the Australian colony of New South Wales. The new courts had their jurisdiction defined in terms of the existing jurisdiction of the English courts, drew their personnel from English-born and -qualified practitioners, and operated according to English procedure. Grand, common, special juries and even the ancient aliens jury, *de medietate linguae*, were all pressed into service.

Not surprisingly, the colonists soon adapted the English traditions and structures to the realities of their colonial setting. In this article, we briefly sketch the subsequent evolution of both the civil and criminal jury and of the attempts to incorporate the indigenous Maori people within a set of notionally separate arrangements which were nonetheless exclusively derived from European notions of criminal justice. We then outline the current structures and the issues and concerns that have emerged with some force over the last few years. As with many common law jurisdictions that still retain trial by jury, the civil jury in New Zealand is seldom used. However, the criminal jury has undergone something of a revival over the last decade and a half. This, in turn, has generated concerns at the political, judicial, administrative, and public levels that are currently being addressed by the New Zealand Law Commission and through a

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major research project that has been undertaken on behalf of the Commission. In particular, over the last few years, attention has focused on issues including the so-called "hung jury crisis" and the desirability of majority verdicts,<sup>1</sup> the availability of jury trial generally, the selection of jurors (especially the issue of Maori representation on juries), the use of juries in complex cases, the provision of proper assistance to jurors both at trial and during the decisionmaking process, and the problems of pretrial publicity and juror prejudice.

## II

### THE HISTORY OF JURY TRIAL IN NEW ZEALAND<sup>2</sup>

#### A. The Development of the Criminal Jury

The Supreme Court Ordinance of 1841 provided for a criminal jury of twelve men for all cases tried on indictment.<sup>3</sup> Sensibly, it also provided for any criminal case to be tried by judge alone should the need arise.<sup>4</sup> In the absence of a grand jury in the infant colony, cases were to be commenced by the presentation of an indictment under the signature of the Attorney General or a Crown Prosecutor "as if the same had been presented by a grand jury."<sup>5</sup> At the same time, the Sessions Courts Ordinance of 1841 constituted an intermediate tier of Courts of General and Quarter Sessions, presided over by Justices, which also had the jurisdiction to try indictable matters before a jury.<sup>6</sup> Summary matters were heard by Justices sitting alone,<sup>7</sup> or, from 1846, by a Resident Magistrate.<sup>8</sup>

In 1858, the Sessions Courts were replaced by a system of District Courts presided over by judges drawn from the practising legal profession.<sup>9</sup> The District Court handled the less serious jury trials on indictment in those districts for which they were proclaimed, while the Supreme Court dealt with the most serious cases.<sup>10</sup> The first major consolidating Act, the Juries Act of 1868, finally introduced the grand jury as an intermediate step in Supreme Court cases, although District Courts were left to proceed simply on the basis of an indictment signed by the Attorney General or a Crown Prosecutor.<sup>11</sup>

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1. See, e.g., JOHN GOULTER, *NO VERDICT: NEW ZEALAND'S HUNG JURY CRISIS* (1997).

2. Surprisingly, there is very little information available on the history of jury trial in New Zealand. For a brief but useful introductory discussion, see *REPORT OF THE ROYAL COMM'N ON THE COURTS* pt. 1 (AJHR Paper H2, 1978).

3. See Supreme Court Ordinance, 1841, § 19 (N.Z.).

4. See *id.* § 22.

5. *Id.* § 20.

6. See Sessions Courts Ordinance, 1841, § 6 (N.Z.).

7. See Summary Proceedings Ordinance, 1842, § 1 (N.Z.).

8. See Resident Magistrates Courts Ordinance, 1846, § 1 (N.Z.).

9. See District Courts Act, 1858, § 4 (N.Z.).

10. See *id.* § 29.

11. See *id.* § 145.

In practice, District Courts were only ever declared in five districts of the colony.<sup>12</sup> Hence, although in theory there were three distinct levels of criminal trial—one summary and two by jury—in most parts of the colony, the choice was between summary trial in the Resident Magistrates' Court and jury trial in the Supreme Court. By the end of the century, most District Courts had ceased to function, their jurisdiction cannibalised by the Supreme Court and the emergent Magistrates' Courts.<sup>13</sup> District Courts were effectively abolished in 1909 with the abolition of the court districts, although the 1858 Act itself was not finally repealed until 1925.<sup>14</sup>

Initially, eligibility for jury service in the Supreme Court, with the exception of those working in certain occupations, was restricted to male residents between twenty-one and sixty years of age who held an estate in fee simple in land or tenements.<sup>15</sup> The chaotic state of land titles in the early years of the colony, however, rendered the property qualification impractical, and as a temporary expedient the Supreme Court initially adopted the solution arrived at in the Sessions Courts Ordinance in 1841, whereby eligibility was based simply on British citizenship and residence in the colony for six months or more.<sup>16</sup> In any event, the property qualification was never in fact implemented.

From the first Juries Ordinance in 1841, a wide range of political, legal, civil service, and essential industries personnel were either disqualified or excused from jury service. These categories gradually expanded until most state employees could claim exemption. Women were excluded until 1942, and even then were not admitted on the same terms as men.<sup>17</sup> Characteristically, settler law also excluded Maori from the common jury,<sup>18</sup> although "half-castes" not living as part of a tribal group or community were classified as non-Maori for this purpose.<sup>19</sup> It was not until 1962, with the abolition of the last of the mixed race jury provisions, that Maori became eligible for service on common juries,<sup>20</sup>

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12. These districts were Hawke's Bay, Otago Goldfields, Taranaki, Timaru, and Westland. See REPORT OF THE ROYAL COMM'N ON THE COURTS, *supra* note 2, at 9.

13. See Magistrates' Courts Act, 1893, §§ 28-40 (N.Z.) (replacing the Resident Magistrates' Courts with Magistrates' Courts).

14. See District Courts Abolition Act, 1925, § 2 (N.Z.).

15. See Juries Ordinance, 1841, § 1 (N.Z.). The professions that were exempt from jury duty were legislators, appointed officials, judges, ministerial officers, coroners, constables, full-pay military men, clergymen, barristers, physicians, revenue officers, licensed pilots, and seamen. See *id.*

16. See Supreme Court Ordinance, 1841, § 6 (N.Z.).

17. Women had to be at least 25 years old and under 60, and to serve had to notify the Sheriff in writing of their desire to do so. See Women Jurors Act, 1942, § 2 (N.Z.). In comparison, men 21 to 65 years of age who were non-Maori were automatically eligible to serve. See Juries Act, 1908, § 3 (N.Z.).

18. See Jury Amendment Ordinance, 1844, § 1 (N.Z.).

19. More fully, "Maori" was defined as including all persons of the "Aboriginal New Zealand race, all Aboriginal Polynesian Melanesian and Australasian Natives, and all persons one of whose parents was a Native of such race and which persons are herein designated 'half-caste.' Provided that no half-caste shall be deemed to be a Maori for the purposes of this Act unless he shall be living as a member of some Native tribe or community." Jury Law Amendment Act, 1862, § 2 (N.Z.).

20. See Juries Amendment Act, 1962, § 2 (N.Z.).

and it was not until 1976 that women became eligible on the same terms as men.<sup>21</sup>

In the Supreme Court, the cumbersome grand jury process—which required a preliminary hearing before a magistrate or Justice to determine if there was a prima facie case, followed by the laying of an indictment before the grand jury,<sup>22</sup> and then the empanelling of a common, special, or Maori jury to hear the actual case—was abolished in 1961.<sup>23</sup> Indeed, although we have no information on the frequency of grand jury hearings prior to 1961, it seems likely that, because the preliminary hearing before the Justices effectively performed the same task as the grand jury hearing, many cases in the Supreme Court already largely bypassed the process. At the same time, the criminal jurisdiction of the Magistrates' Court was progressively expanded—most radically in 1952.<sup>24</sup> As a result, by the early 1970s, although criminal jury trials continued to increase in absolute terms,<sup>25</sup> the proportion of defendants eligible for jury trial who actually elected it was in fact dropping rapidly. By 1976, for example, only 0.24% of those charged with criminal offences and 2.6% of those with the right to elect trial by jury were actually being tried by jury.<sup>26</sup>

Nevertheless, the overall growth in the volume of criminal trials began to produce problems for the Supreme Court. In 1978, the Royal Commission on the Courts recommended the creation of a new District Court structure to reinstate elements of the old nineteenth century three-tier trial system and provide for two distinct levels of jury trial.<sup>27</sup> In the Commission's view, a structural change of this sort was clearly preferable to trying to cope with the problem simply by appointing more judges and would enable a "reallocation of the workload of the High Court and the District Courts so that judicial attributes match case importance."<sup>28</sup> As a result, a series of statutory amendments in 1979 and 1980 renamed the Magistrate's Court and the Supreme Court, which became the District Court and the High Court respectively, and provided for designated District Court judges to conduct jury trials in all but the most serious offences.<sup>29</sup> In 1991, the process of removing criminal jury trials from the

21. See *Juries Amendment Act, 1976*, § 2 (N.Z.).

22. For the procedure to select a grand jury, see *Juries Act, 1908*, §§ 51-60 (N.Z.).

23. See *Crimes Act, 1908*, § 407 (N.Z.). These provisions were repealed by the *Crimes Act, 1961* (N.Z.). For a succinct description of the relevant legislative provisions and the process in practice, see J.M.E. GARROW, *THE CRIMES ACT 1908 (ANNOTATED)* 185-86 (2d ed. 1927).

24. The *Summary Jurisdiction Act, 1952* (N.Z.), empowered magistrates, with the consent of the defendant, to try almost all indictable offences against property and all but the most serious sexual and violent offences. On summary conviction in such cases, the Magistrates' Court was, however, limited to the imposition of a maximum sentence of three years' imprisonment, whatever the nominal maximum sentence for the offence. See also *REPORT OF THE ROYAL COMM'N ON THE COURTS*, *supra* note 2, at 12.

25. The increase in criminal jury trials sparked concerns that the seriousness of offending and the greater availability of criminal legal aid had resulted in more defendants opting for jury trial.

26. See *REPORT OF THE ROYAL COMM'N ON THE COURTS*, *supra* note 2, at 366.

27. See *id.* at 113.

28. *Id.* at 98.

29. For a review of this legislation, see R.A. McGechan, *Trial by Triad—District Courts, Summary Proceedings and Crimes Amendment (No. 2) Acts 1980*, 10 N.Z. U. L. REV. 17 (1982).

High Court was accelerated by dividing those remaining offences exclusively within the High Court jurisdiction into two groups: a small group reserved only for High Court trial and a rather larger group of so-called "middle band" offences which, if the interests of justice or the demands of administrative convenience required it, could be transferred to the District Court for trial.<sup>30</sup>

The end product of this process has been the increasing simplification of the criminal jury and its transfer from the High Court to the District Court. At the same time, although the overall use of criminal juries seems to have initially increased with the introduction of jury trial in the District Court, the downward trend in the proportion of cases going to jury trial has probably resumed over the last couple of years. Unfortunately, it is virtually impossible to confirm these impressions on the basis of the available data on jury trial in New Zealand. While a crude ratio of jury trials to summary trials can be obtained, more sophisticated data, such as the proportion of offenders eligible to elect jury trial who actually elect it, are unobtainable at present. It seems that jury trials make up considerably less than one percent of total nontraffic criminal trials, and we know that whereas in 1990 only fifty-seven percent of the committals were to the District Court, by 1997 this had risen to seventy-eight percent; beyond that the data are either unavailable or ambiguous.<sup>31</sup>

## B. The Civil Jury

1. *Supreme/High Court Trial.* In addition to criminal cases tried on indictment, the Supreme Court Ordinance of 1841 provided for a jury of twelve men in all civil trials.<sup>32</sup> As in the criminal jurisdiction, however, special provisions were made for cases involving the indigenous inhabitants. The Jurors Ordinance of 1842 provided for the enrollment of Maori jurors to serve on mixed race juries in actions in which one party was Maori.<sup>33</sup> Not surprisingly, this provision and similar attempts to accommodate the interests of the majority population attracted considerable settler hostility and, as a result, seems to have remained largely if not entirely a dead letter.<sup>34</sup>

The first general step away from jury trial at this level came in 1860 with the provision that, with the consent of the parties, issues of fact could in the future be tried by judge alone.<sup>35</sup> In 1862, a system of "minor juries" was instituted to deal with cases under £100 in value. Minor juries consisted of six members balloted from a panel of twelve and were used at the discretion of the trial judge.<sup>36</sup> By 1882, this had been reduced to a jury of four, available at the re-

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30. See District Courts Act, 1947, § 28A(1)(e) (N.Z.).

31. See Unpublished Statistics for June 1990 to June 1997, Dep't for Courts, Wellington (on file with authors).

32. See Supreme Court Ordinance, 1841, § 19 (N.Z.).

33. See Jury Law Amendment Act, 1862, § 9 (N.Z.).

34. See REPORT OF THE ROYAL COMM'N ON THE COURTS, *supra* note 2, at 14.

35. See Supreme Court Amendment Act, 1860, § 22 (N.Z.).

36. See Supreme Court Amendment Act, 1862, § 7 (N.Z.).

quest of either party, in cases involving sums of more than fifty pounds and less than £500.<sup>37</sup> The “minor jury” was finally abolished in 1977.<sup>38</sup>

Prior to 1880, civil juries essentially had to reach a unanimous verdict, as they were discharged only if they failed to reach agreement after twelve hours’ deliberation.<sup>39</sup> In 1898, this statute was amended to allow hung juries to be discharged after a “reasonable” period of deliberation, provided that it was not less than four hours.<sup>40</sup> In the meantime, the Juries Act of 1880 had provided for all civil juries to render a three-quarters majority verdict after a minimum of three hours’ deliberation if unanimity could not be achieved.<sup>41</sup> In 1980, the minimum deliberation time was increased to four hours.<sup>42</sup>

At the same time as the power to conduct judge-alone trials was extended and alternatives to the cumbersome jury of twelve were devised, the provision of special juries was restricted and finally abolished. Although special juries seem to have been available since the inception of the Supreme Court in 1841, formal recognition of their availability did not occur until 1844,<sup>43</sup> and it was not until 1868 that it was made clear that the parties could demand one as of right in all civil cases.<sup>44</sup> Nevertheless, by the Juries Act of 1908, a special jury could be empanelled only by leave of the Court when a party petitioned, or alternatively a judge could order it on a requirement of loosely defined “expert knowledge.”<sup>45</sup> In 1937, this requirement was tightened by limiting special juries to cases in which the judge was satisfied that “difficult questions in relation to scientific, technical, business or professional matters are likely to arise.”<sup>46</sup> Special juries could consist of either twelve or four jurors in the usual way.<sup>47</sup> They were abolished by the Juries Act of 1981.

In 1980, the Supreme Court became the High Court.<sup>48</sup> The availability of civil juries in the High Court is now governed by sections 19A and B of the Judicature Act of 1908. In theory, jury trial is available in most civil trials at the

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37. See Supreme Court Act, 1882, sched. 2, cl. 251 (N.Z.).

38. See Judicature Amendment Act, 1977, § 9(i) (N.Z.).

39. See Juries Act, 1868, § 53 (N.Z.).

40. See Juries Amendment Act, 1898, § 13 (N.Z.).

41. See Juries Act, 1880, § 156 (N.Z.).

42. See Judicature Amendment Act, 1980, § 5 (N.Z.) (inserting a new § 54A that increased the deliberation time to four hours).

43. Prior to 1844, no specific rules relating to special juries existed in New Zealand. In the absence of such rules, the Supreme Court followed the “practice of Her Majesty’s Superior Courts at Westminster,” which included special juries at the request of the parties. See Juries Amendment Ordinance, 1844, § 6 (N.Z.). The Supreme Court Rules Ordinance of the same year formally recognised such juries by providing for a Special Jury List to be compiled for use “[w]hensoever a special jury shall be allowed by a Judge of the Supreme Court.” Supreme Court Ordinance, 1844, §§ 74-75 (N.Z.).

44. See Juries Act, 1868, § 20 (N.Z.).

45. Juries Act, 1908, § 71 (N.Z.).

46. Statutes Amendment Act, 1937, § 37 (N.Z.).

47. See Juries Act, 1889, § 71 (N.Z.).

48. See Judicature Amendment Act, 1979, § 2 (N.Z.). This legislation came into force on April 1, 1980.

request of either party.<sup>49</sup> In practice, it is so rare that the Department for Courts no longer even keeps statistics on it.

2. *The District Court.* In 1858, a number of civil courts, presided over by Justices of the Peace and Commissioners, were abolished and a simplified three-tier trial court system was established. Minor civil suits were to be heard by Justices at Petty Sessions and by Resident Magistrates without benefit of jury.<sup>50</sup> Suits involving sums of not less than twenty pounds and not more than £100 were to be heard in the District Court; more serious matters went to the Supreme Court.<sup>51</sup> At the District Court level, either party could require a jury trial. From the start, District Court juries consisted of only four members,<sup>52</sup> selected by the parties from a panel of twelve by a series of alternating challenges.<sup>53</sup> By 1893, the jurisdiction of the District Court had been extended to £500 but, as previously noted, District Courts had never been proclaimed in all districts of the colony, and their civil business seems to have been gradually usurped by the consent jurisdiction of the Resident Magistrates Court. By the time the Magistrates Courts Act of 1893 was enacted,<sup>54</sup> District Courts had largely ceased to function and were effectively abolished in 1909.<sup>55</sup>

When, in 1980, the Magistrates' Court was redesigned and became the new District Court with the ability to conduct jury trials in some criminal cases, the civil side of its jurisdiction was left largely untouched.<sup>56</sup> Hence, while criminal trials may take place before a jury in either the District or the High Court, civil jury trial is confined to the High Court.

### C. The Trial of Maori Cases<sup>57</sup>

In 1841, the embryonic colonial administration had little claim or desire to deal with the affairs of the indigenous population. Settler Justices were initially instructed simply to "compromise or adjust" minor disputes involving natives in accordance with native custom.<sup>58</sup> In theory at least, more serious matters were, from the start, subject to settler law and procedure, but the practical realities of

49. See Judicature Act, 1908, §§ 19A-19B (N.Z.).

50. See Petty Sessions of the Peace Act, 1858 (N.Z.); Resident Magistrates' Courts Acts, 1858 (N.Z.).

51. See District Courts Act, 1858, § 15 (N.Z.).

52. See *id.* § 62.

53. See *id.* § 66.

54. The Magistrates Courts Act of 1893 replaced the Resident Magistrates Court with a court of record presided over by a stipendiary magistrate.

55. In 1909, all the remaining court districts were abolished by proclamation. The District Courts Act, 1858, itself was not, however, formally repealed until 1925. See REPORT OF THE ROYAL COMM'N ON THE COURTS, *supra* note 2, at 9.

56. See *generally* McGechan, *supra* note 29.

57. See *generally* REPORT OF THE ROYAL COMM'N ON THE COURTS, *supra* note 2; ALAN WARD, A SHOW OF JUSTICE: RACIAL "AMALGAMATION" IN NINETEENTH CENTURY NEW ZEALAND (1983).

58. See REPORT OF THE ROYAL COMM'N ON THE COURTS, *supra* note 2, at 14. Maori methods of conflict resolution and the behavioural standards that informed them were almost always referred to in colonial literature and legislation as "native custom," thus clearly distinguishing it from the "legal" codes and procedures of the European colonists.

life in the emergent colony meant that few such cases came to notice. Furthermore, from 1844 onward, minor civil disputes in which one or both parties were Maori and criminal cases in which both parties were Maori were subject to special procedures that made use of tribal authority structures and native assessors.<sup>59</sup> In addition, the Juries Amendment Ordinance of 1844 provided for mixed race juries in both civil and criminal cases in all courts where jury trial was available where “the property or person of any Aboriginal Native of New Zealand may be affected.”<sup>60</sup>

Parallel to the development of the District Court in the “European” arena, the Native Circuit Courts’ Act of 1858 provided for a system of Native Circuit Courts to deal with disputes involving Maori in those districts in which native land title had not yet been extinguished. These courts were staffed by Resident Magistrates—whose jurisdiction in the “European” domain was exclusively judge alone—who sat with Maori assessors and, if the parties requested it, with all-Maori juries in both civil and criminal cases.<sup>61</sup> However, the potential impact of these provisions was limited because they applied only in those outlying districts for which they had been proclaimed by the Governor in Council. Indeed, even where they were in force, they are likely to have been a relatively cost-free gesture toward indigenous justice, since it was clear that the government-appointed Resident Magistrate was to largely control the process.<sup>62</sup> Furthermore, it seems likely that in some districts, at least, Maori juries were seldom, if ever, used. In any event, although the use of Maori assessors in civil cases was retained in the Circuit Court until 1893, the provision for Maori juries in civil cases was abolished in 1867.<sup>63</sup> In criminal cases the jurisdiction of the Native Circuit Court seems to have remained, at least in theory, until 1891, when it was abolished as obsolete, like the District Court, its function usurped by the Magistrates’ Court.<sup>64</sup>

In theory, all-Maori juries were available in both civil and criminal cases in the Supreme Court. In civil cases, Maori juries were available if both parties were Maori and if both concurred. In criminal cases, they were available if both parties were Maori and the accused requested it. In addition, in civil cases where one party was Maori and requested an all-Maori jury, or both parties were Maori and one wanted a Maori jury but the other did not, the court could

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59. See Native Exemption Ordinance, 1844 (N.Z.); see also Resident Magistrates’ Court Ordinance, 1846 (N.Z.).

60. Juries Amendment Ordinance, 1844, § 1 (N.Z.).

61. See Native Circuit Courts’ Act, 1858, §§ 2, 6-10 (N.Z.).

62. For example, although the jury list was compiled by the native assessors, the initial panel of 12 was selected by the resident magistrate. See *id.* § 6 (N.Z.). Furthermore, on conviction by the jury, the court was free to disregard the verdict if it thought fit, and, in the event of jury disagreement, the court could simply decide the case itself. See *id.* § 10.

63. See Resident Magistrates’ Act, 1867 (N.Z.). This Act consolidated the powers of resident magistrates but did not reenact the provisions of the Native District Courts Act, 1858, for Maori juries in civil cases between Maori.

64. A process that culminated in the Magistrates’ Courts Act, 1893 (N.Z.), which repealed the special provisions of the 1867 Act relating to Maori.



order trial by a mixed jury composed of six jurors drawn from the Maori roll and six from the common roll.<sup>65</sup> We have little information on the extent to which Maori and mixed juries were ever used. However, a Maori or mixed jury would be available only to the parties if Maori jurors were available on that day. As there was never any requirement that the authorities compile or maintain a Maori jury roll, and the legislation was always quite clear that if Maori jurors were not available the jury could be drawn from the available common jurors,<sup>66</sup> the use of such juries probably was rare. By the time of their abolition in 1962, Maori juries were already described as obsolete—in spite of the fact that an all-Maori jury had been used in a criminal trial the year before.<sup>67</sup> The abolition of Maori and mixed juries in 1962 accompanied the belated extension to Maori of the right to sit on ordinary juries.<sup>68</sup>

In describing these structures, it may be correct to conclude, as the Report of the Royal Commission on the Courts does, that

a principal thread of development during the nineteenth century involved a difficult question of whether special tribunals, judicial officers, and rules should govern disputes involving the Maori people; particularly in districts where the Maori formed a majority population. By the end of the century this issue had been settled, if not resolved. Except in respect of Maori land and certain related matters, the Maori people were to be governed almost completely by the English derived law.<sup>69</sup>

However, in so far as trial by jury was concerned, the issue was effectively settled in the first few years of colonisation. In practice, the provision of mixed and Maori juries seems to have been little more than a perfunctory gesture intended, at the most, to justify a system that progressively destroyed the indigenous legal structures while denying Maori the right to participate as full citizens in the administration of the new system of justice to which they were to be subjected. Furthermore, as noted above, the extension of “special” procedures to Maori always took place in the context of a system that was founded exclusively on values derived from the English common law. Indeed, the very concept of the jury, generously extended to the Maori people by the colonial authority, was a concept alien to the legal and social culture of the indigenous race.

#### D. The Juries Act of 1981

The Juries Act of 1981 marks something of a watershed in the history of the jury in New Zealand. In particular, the Act significantly extended the democratic reach of the jury by sweeping away many of the old occupational exemptions and limiting the grounds on which citizens could apply to be excused from jury service. Jury procedure was simplified and largely removed from the stat-

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65. The provisions dealing with Maori and mixed juries in both the civil and the criminal jurisdiction were consolidated by the Juries Act, 1868, §§ 45-52 (N.Z.), and retained that form largely unchanged until their abolition in 1962.

66. See Juries Act, 1868, § 50 (N.Z.).

67. See PETER WILLIAMS, *A PASSION FOR JUSTICE* 89-91 (1997).

68. See Juries Amendment Act, 1962, § 2 (N.Z.).

69. REPORT OF THE ROYAL COMM'N ON THE COURTS, *supra* note 2, at 2.

ute into a comprehensive set of Jury Rules, thus reducing the length of the statute from 184 sections to thirty-seven. Special juries were finally abolished, and the jury of twelve was declared as the only form of jury available.

### III

#### THE AVAILABILITY OF JURY TRIAL

##### A. Civil Trials

In any civil case heard in the High Court, section 19A of the Judicature Act provides that either party may request a jury trial where the only relief claimed is payment of a debt, pecuniary damages, or recovery of a chattel to the value of more than \$3,000.<sup>70</sup> Where the case does not fall within section 19A, trial is to be by judge alone unless the court orders otherwise on the ground that any proceedings or issue "can be tried more conveniently" before a jury.<sup>71</sup> The right to jury trial under section 19A is, however, not absolute. The judge may still, on the application of either party, direct trial of the whole case or of any particular issue before a judge alone if one of two conditions are satisfied: The case or issue involves the consideration of difficult questions of law, or the case involves the prolonged examination of documents or accounts or difficult questions of a scientific, technical, business, or professional nature which "cannot conveniently be made with a jury."<sup>72</sup>

For most of its history, the use of the civil jury in New Zealand, while not rare, has been limited to a number of specific types of case. Since the turn of the century, its use has largely been confined to defamation and personal injury cases, and the occasional action against governmental bodies, such as the police. The effective abolition of the vast majority of personal injury actions in 1972 (and their replacement with a comprehensive "no-fault" state-administered compensation scheme) has now relegated the civil jury to only one or two cases per year.<sup>73</sup> While recent changes to the accident compensation scheme may have begun to open the door to a revival of some forms of per-

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70. See Judicature Act, 1908, § 19A(1)-(2) (N.Z.), amended by Judicature Act, 1977, § 6 (N.Z.). The \$3,000 lower limit means that in practice all damages claims that are likely to reach the court will be eligible for jury trial—what research we have indicates that the minimum level at which litigation through the courts becomes economic is \$15,000. This is undoubtedly an understatement. See REPORT OF THE NEW ZEALAND JUDICIARY 16 (1997).

71. Judicature Act, 1908, § 19B(2) (N.Z.).

72. *Id.* § 19A(5). However, the High Court has recently confirmed that § 19A does not confer a "general discretion" on the court in this area. Even though a trial would "be much more sensibly, economically and conveniently managed and conducted before a judge alone," a jury trial cannot be refused unless the factors specifically identified in § (5)(a)-(b) are made out by the party resisting trial by jury. *M & Ors v. L & Ors* [Mar. 3, 1998] High Court, Auckland Registry, CP. 226-229/96, CP. 279-80/96, at 23 (unreported).

73. In 1960, civil jury trials accounted for 35.75% of the total civil actions heard in the Supreme Court. By 1976, after three years of operation of the accident compensation scheme, see Accident Compensation Act, 1972, §§ 4-5 (N.Z.), the number had fallen to 12.65%. See REPORT OF THE ROYAL COMM'N ON THE COURTS, *supra* note 2, at 125-26.

sonal injury action, the High Court seems likely to adopt a cautious approach to the application of jury trial under such instances.<sup>74</sup>

The future of the civil jury is unclear. On the one hand, if personal injury claims and, in particular, exemplary damages and Bill of Rights Act claims are permitted to develop,<sup>75</sup> plaintiffs may well continue to press for jury trial. On the other hand, neither defendants nor the judiciary are likely to evince much enthusiasm for the process. However, given the iconic status of jury trial in general, there is unlikely to be much enthusiasm for outright abolition, either. The likelihood seems to be that New Zealand will continue to retain a theoretical right to jury trial in civil cases, which will continue to be rarely, if ever, exercised effectively.

## B. Criminal Trials

Criminal offences in New Zealand can be divided into two basic categories: the more serious indictable offences, which can be tried on indictment before a judge and jury, and the lesser summary offences, which can be tried summarily before a District Court Judge or before Justices. The picture is, however, complicated by the fact that many indictable offences also can be tried summarily and that some summary offences may, if the accused so elects, be tried on indictment. In broad terms, therefore, a case may proceed to jury trial for one of three reasons: it involves an offence which by statute is laid on indictment; it involves an offence which may be laid either summarily or on indictment but which the prosecution has chosen to lay indictably; or the charge has been laid summarily but the accused has exercised a right to elect jury trial.

Jury trial may take place either before a District Court presided over by a trial judge<sup>76</sup> or before the High Court. The District Court has jurisdiction to conduct jury trials in the following situations:

- (1) where the accused elects trial by jury, having either been charged with a summary offence carrying a maximum penalty in excess of three months imprisonment,<sup>77</sup> or with an indictable offence in which the prosecution has chosen to proceed in summary form;<sup>78</sup>

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74. See, for example, the comments of Elias, J., in *Innes v. Attorney-General* [1997] 4 H.R.N.Z. 251, 256.

75. Currently, the view of the Court of Appeal is that public law compensation under the Bill of Rights Act is not "pecuniary damages" and is accordingly not covered by the "right" conferred by § 19A of the Judicature Act of 1908. In addition, the consideration of compensatory damages is not appropriate for jury determination and accordingly should not be ordered under § 19B. See *Simpson v. A-G (Baigent's Case)* [1994] 3 N.Z.L.R. 667, 677.

76. That is, a District Court Judge appointed by the Governor-General under § 28B of the District Courts Act of 1947 to exercise the jurisdiction of the District Court in respect to trials on indictment.

77. See Summary Proceedings Act, 1957, § 66(1) (N.Z.); see also New Zealand Bill of Rights Act, 1990, § 24(e) (N.Z.). There are a few notable exceptions to this right. The offences of common assault and assault on a law enforcement officer under sections 9 and 10 of the Summary Offences Act of 1981, which both carry a maximum penalty of six months' imprisonment, can only be tried summarily.

78. Those indictable offences in respect of which the prosecution may choose to proceed either on indictment or summarily are listed in section 6(2) and in the First Schedule of the Summary Proceedings Act of 1957.

(2) where the accused has been charged with an indictable offence which may be laid summarily but the prosecution elects to proceed by way of indictment;

(3) where the accused has been charged with one of the twenty-seven offences listed in Part I of Schedule 1A of the District Courts Act of 1947.<sup>79</sup> These offences comprise a band of the less serious offences under the Crimes Act of 1961 and are triable only on indictment;

(4) where the accused has been charged with one of the seventeen so-called "middle band" offences listed in Part II of Schedule 1A of the District Courts Act of 1947, such as rape, kidnapping, and wounding with intent, and the proceedings have been transferred from the High Court to the District Court following a determination by a High Court Judge on the papers that in the interests of justice or administrative convenience it is more appropriate for the trial to be held in the District Court.<sup>80</sup>

The High Court has jurisdiction to try all indictable offences and all offences where the accused is proceeded against summarily and elects jury trial. However, in practice most of these cases now proceed to the District Court and the High Court will hear cases only in the following situations:<sup>81</sup>

(1) where the offence falls in the "middle band" and a High Court Judge has determined that trial in the District Court is not appropriate;

(2) where the offence is indictable and is neither triable summarily nor listed as a "middle band" offence in Part II of Schedule 1A of the District Courts Act of 1947. This small group of offences, all carrying maximum penalties of fourteen years imprisonment or more, essentially comprises the most serious offences in the Crimes Act of 1961 and must be tried in the High Court;

(3) where, on the application of either party, a High Court Judge orders the transfer of the case from the District Court.

Although trials on indictment at both levels still generally involve jury trial, in all but a relatively small number of offences, the accused may now apply for trial by judge alone.<sup>82</sup> There is a statutory presumption in favour of granting the application,<sup>83</sup> and the courts have taken the view that, in general, the accused is to be seen as the best judge of the situation.<sup>84</sup> Unlike a number of other jurisdictions, there is no requirement that the prosecution consent to the

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79. District Courts Act, 1947, § 28A(1)(d) (N.Z.).

80. *See id.* § 28A(1)(e); Summary Proceedings Act, 1957, § 168A(a)(1) (N.Z.).

81. *See* District Courts Act, 1947, § 28J(1)-(2) (N.Z.).

82. *See* Crimes Act, 1961, § 361B (N.Z.). An application for trial by judge alone may not be made where the accused is charged with an offence punishable by imprisonment for life or a term of 14 years or more, such as homicide or sexual violation. *See id.* § 361B(5).

83. *See id.* § 361B(4).

84. *See* R. v. Narain [1988] 1 N.Z.L.R. 580, 589.

application, nor is there any requirement that the accused obtain legal advice prior to the application.

In practice, whether an accused is tried by jury, and, to a lesser extent, where the trial takes place, depends on a number of factors and distinctions which frequently seem arbitrary. These factors range from the maximum penalty for the offence charged, whether the offence is classified as summary or indictable (which may well be largely a matter of historical accident), the form (summary or indictable) in which the prosecution has chosen to commence the proceedings, and whether the accused elects to be tried by jury or seeks trial by judge alone. The result is that offenders who have committed similar offences can have very different levels of control over the form and venue of their trial, as well as the potential penalties to which they will be exposed.

Leaving aside the question of the availability of trial by jury in complex or otherwise exceptional cases,<sup>85</sup> the current rules as to the availability of jury trial raise a number of distinct issues. First, as noted above, the present law provides for mandatory jury trial in all cases where the maximum penalty is fourteen years imprisonment or more.<sup>86</sup> While there are certainly good arguments for a presumption of jury trial in such cases,<sup>87</sup> it is difficult to see a justification for a blanket rule that applies whether the case raises issues which are particularly appropriate to jury resolution. We would accordingly agree with the New Zealand Law Commission in its recently published discussion paper on criminal jury trials when it suggests that in all such cases it should in the future be left to the accused to assess whether jury trial is the appropriate forum for the case.<sup>88</sup>

Secondly, as noted above,<sup>89</sup> although the Summary Proceedings Act provides for an accused to have the right to elect jury trial in a civilian court if charged with an offence punishable by more than three months' imprisonment, and although this right is confirmed by the New Zealand Bill of Rights Act of 1990,<sup>90</sup> persons charged with either assault or assault on a law enforcement officer face a maximum penalty of six months imprisonment and yet may not elect trial by jury.<sup>91</sup> While the precise rationale for this exclusion is unclear, the High Court has recently linked it to "the view that the [c]ourt 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."<sup>92</sup> The logic of

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85. See *infra* Part III.C.

86. See *supra* text in note 82.

87. See, for example, the comments of Williams, J., in *R. v. Maguire* [Dec. 8, 1992] High Court, Auckland Registry, T. 267/90, at 3 (unreported), the VICTORIAN LAW REFORM COMMITTEE, JURY SERVICE IN VICTORIA ¶ 2.27 (Issues Paper No. 2, 1995), and, in relation to murder, the comments of White, J., in *R. v. Marshall* [1986] 43 S.A. St. R. 448, 449.

88. See NEW ZEALAND LAW COMM'N, JURIES IN CRIMINAL TRIALS PART ONE, at 22-30 (1998).

89. See *supra* text accompanying note 77.

90. New Zealand Bill of Rights Act, 1990, § 24(c) (N.Z.). This section also provides, however, that there is no right to a jury trial where the offence is under military law and tried before a military tribunal. See *id.*

91. See Summary Offences Act, 1981, § 43 (N.Z.).

92. *Reille v. Police* [1993] 1 N.Z.L.R. 587, 591.

the exclusion of these two offences from the right recognised in the Bill of Rights is not compelling. If the offence is properly considered to be a minor one for which summary trial is appropriate, then it should be visited only with the generally accepted "minor" penalty of three months imprisonment or less. If it is a serious offence which merits a potential penalty of six months imprisonment, then, like similar offences in that penalty range, it should attract the right to jury trial. In its discussion paper, the New Zealand Law Commission proposes the repeal of section 43 of the Summary Offences Act of 1981 to remedy this anomaly.<sup>93</sup> Although we agree with the Commission's criticism of the provision, and although we recognise the political difficulties involved, it would be preferable in our view to deal with the anomaly by reducing the maximum penalty for the offences in question to three months imprisonment, thus rendering section 43 redundant.

Thirdly, the current system, whereby a large number of offences are *prima facie* indictable but may, at the discretion of the police, be charged either indictably or summarily, enables the police to dictate jury trial in circumstances where the accused might well prefer the case to be tried by judge alone. At present there are no guidelines, legislative or otherwise, for the exercise of this discretion, and little or no input into police decisionmaking by the Crown Prosecutor, who, if the case does eventually go to trial before a jury, will be responsible for drawing up the indictment and presenting the case in court. As a result, practice seems to vary considerably between police districts and even police investigators within the same district,<sup>94</sup> with the decision being made primarily on the basis of the individual officer's perception of the seriousness of the accused's conduct.

While the prosecution will always have a choice over the precise charge to lay, and this may sometimes dictate the mode of trial and limit the choices available to the accused, permitting the prosecution to determine directly the mode of trial by choosing the *form* in which the charge is laid is anomalous. This is a view which has been consistently taken by the New Zealand Law Commission and is repeated in its current discussion paper on criminal jury trials.<sup>95</sup> In our view, this power should be removed and the offences currently subject to it treated simply as summary offences. Hence, the accused would retain the right to elect jury trial and, where the accused declines this right, the court would retain the residual power to decline summary jurisdiction where appropriate.<sup>96</sup>

If it is accepted that a blanket provision for mandatory jury trial is inappropriate, not least because crude statutory criteria based on maximum sentence

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93. See NEW ZEALAND LAW COMM'N, *supra* note 88, ¶ 128.

94. See WARREN YOUNG ET AL., NEW ZEALAND DEP'T OF JUSTICE, THE PROSECUTION AND TRIAL OF ADULT OFFENDERS IN NEW ZEALAND 23-26 (1989); see also NEW ZEALAND LAW COMM'N, CRIMINAL PROSECUTION 40-41 (1997).

95. See NEW ZEALAND LAW COMM'N, THE STRUCTURE OF THE COURTS (1989).

96. See Summary Proceedings Act, 1957, § 44 (N.Z.). This enables the court, for example, to deal with the situation where defendants in multiple defendant trials choose different modes of trial.

length or general offence categories are essentially arbitrary in their operation, and that the prosecution generally should not have the power to dictate the mode of trial, the historical distinction between indictable and summary offences becomes largely irrelevant. Consistent with the provisions of the New Zealand Bill of Rights Act, offences carrying three months imprisonment or less should continue to be triable summarily. All other offences should also be triable by a judge alone unless the defence elects trial by jury. As in the civil jurisdiction, it may, however, be desirable to give the court power to decline jury trial in cases of particular complexity.<sup>97</sup>

### C. Jury Trial in Complex Cases

The principal debate in relation to criminal cases is whether the right to jury trial should be removed in some or all complex cases. At present, there is no provision in New Zealand law for complex trials, such as fraud cases, to be tried automatically by judge alone, or indeed by any other form of special tribunal. It is the defendant's decision whether to make an application for a judge-alone trial.<sup>98</sup>

This procedure was inserted into the Crimes Act in 1979 in response to concern expressed by the Court of Appeal that in complex fraud cases some mechanism was needed to permit trial by judge alone.<sup>99</sup> More recently, the difficulties experienced by the judge and parties in *R. v. Adams*,<sup>100</sup> otherwise known as "the Equiticorp case," led the trial judge to observe that such trials should never be tried by jury.<sup>101</sup> In this case, seven company directors were accused on an indictment containing thirteen counts of fraud. All the defendants applied for, and were granted, trial by judge alone. The trial lasted six months, and the Crown called 105 witnesses who testified. An additional ninety witnesses presented written briefs to the court. The evidence raised complex factual issues and difficult points of civil and criminal law.

The problems produced by complex and often lengthy cases have been considered by both the New Zealand Law Commission and reform bodies in a number of other commonwealth jurisdictions. Most recently, the English government has published a consultation document outlining various alternatives to trial by jury in complex cases.<sup>102</sup>

Proponents of judge-alone trials in these cases argue that such a procedure is desirable because juries are not competent to cope with complex and exten-

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97. See *infra* Part III.C.

98. See *supra* text accompanying notes 82-84.

99. See *R. v. Jeffs & Others* [Apr. 28, 1978] (Court of Appeal), *quoted in* REPORT OF THE ROYAL COMM'N ON THE COURTS, *supra* note 2, ¶ 399. The legislation enacted did not follow the Royal Commission's recommendation in paragraph 400 that the defendant be able to *elect* trial by judge alone and that the Crown be able to object to that election.

100. [Dec. 18, 1992] High Court, Auckland Registry, T 240/91 (unreported).

101. See NEW ZEALAND LAW COMM'N, *supra* note 88, at 40.

102. See HOME OFFICE, JURIES IN SERIOUS FRAUD TRIALS: A CONSULTATION DOCUMENT (1998).

sive evidence, often from expert witnesses, especially where the case extends over a lengthy period of time. However, professional opinion on this is divided, in terms of both the nature of the problem and its significance. Furthermore, what research we have is equivocal. While some "complex" cases undoubtedly produce perverse jury verdicts through the failure of juries to understand the evidence, this is likely to be true for some noncomplex cases as well. On the other hand, the provision of special judge-alone or specialist tribunal regimes for a limited range of predominantly white collar offences runs the risk of giving the appearance of the establishment "looking after its own" or conversely, of an establishment exercise in scapegoating. In other words, such cases, however defined, may well be precisely the ones in which the political or symbolic value of the jury as an avenue for community input is most significant. Moreover, it may be that at least some of the difficulties juries confront in such cases result from aspects of trial procedure, such as the way in which evidence is presented, the lack of explanation of legal terms, unhelpful or untimely judicial instructions, and reliance on oral proceedings.<sup>103</sup>

Notwithstanding these considerations, there is a strong argument that some cases are simply unsuited to the jury process. The problem lies in defining which cases fall into this category. Fraud trials are not the only kind of complex trial, and as a blanket category, not all fraud trials are automatically complex. Scientific evidence may make a murder trial complex and the evidence difficult to understand, or myths regarding female sexuality in a rape trial may cloud issues of consent and sexual behaviour. It would be neither possible nor desirable, therefore, to eliminate the problem of complex trials solely by reference to the offence category or the length of trial. It would be possible to do so only by giving judges the discretion to order a judge-alone trial where they believe that, because of the complexity of the case, a jury trial would be contrary to the interests of justice. Although, if implemented, the exercise of such discretion would likely become a fruitful area for pretrial litigation or appeals, it would go a long way toward eliminating the problems that stem from trial by jury in complex cases.

#### IV

##### THE SELECTION OF JURORS IN CRIMINAL TRIALS

###### A. Eligibility for Jury Service

Prior to the selection of the jury at court, a number of legal rules determine who is able to serve on a jury. The Juries Act of 1981 states positively that registered electors between twenty and sixty-five years of age are qualified to serve on juries within the jury district in which they reside.<sup>104</sup> This includes

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103. How procedures in these respects might be modified to enhance jury decisionmaking is discussed *infra*, text following note 173.

104. See Juries Act, 1981, § 6 (N.Z.).



noncitizens who are permanent residents and are registered on the electoral rolls.<sup>105</sup>

As in other jurisdictions, those individuals with a close connection to either the administration of the law or the criminal justice system cannot serve.<sup>106</sup> Such individuals excluded from service include members of the Executive Council of New Zealand, Members of Parliament, judges, certain Justices of the Peace, barristers and solicitors, police officers,<sup>107</sup> and certain employees in the justice system. Persons who have been convicted of a criminal offence and imprisoned<sup>108</sup> for life or a term of three years or more, or sentenced to preventive detention, are also disqualified from serving on a jury, as are those who, within the last five years, have been either imprisoned for three months or more or sentenced to corrective training.<sup>109</sup>

#### B. The Out-of-Court Selection Process

The first step in the selection process is the compilation, by random selection, of jury lists from the General and Maori electoral rolls for each jury district.<sup>110</sup> From the jury lists, a number of potential jurors are randomly selected by the Court Registrars of individual courts (the jury panel) and sent a summons to appear in court for jury service. Jurors are summoned to appear at the beginning of the working week (usually Monday morning) and must remain available to be selected for any jury commencing during that week. The Registrar may ask potential jurors not selected on the first day, or persons who serve on a jury for one or two days, to return later in the week for another jury empanelment. Summoned potential jurors may apply to the Registrar to be excused from jury service. The Registrar may grant that application if

- (1) the potential juror, another person, or the general public may suffer a serious inconvenience or hardship because of the nature of the person's occupation or business or any commitment arising from it, or because of the person's health, family commitments, or other personal circumstances;
- (2) the potential juror has either served as a juror or attended for jury service within the last two years;

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105. See Electoral Act, 1993, § 74 (N.Z.).

106. See Juries Act, 1981, § 8 (N.Z.).

107. There is no statutory prohibition on former police officers serving on juries, but in practice counsel apply for the discharge of the juror or the jury if such information comes to hand. See, e.g., *R. v. Ryder* (No. 3) [Sept. 28, 1994] unreported, High Court, Christchurch, T 68/94; *R. v. Turner* [July 25, 1996] Court of Appeal, CA 439/95 (unreported).

108. Prior to 1981, section 5 of the Juries Act, 1908 (N.Z.) disqualified people who had been convicted of any offence punishable by death or imprisonment for a term of three years or more.

109. See Juries Act, 1981, § 7 (N.Z.).

110. The Juries Act, 1981 (N.Z.), and the Jury Rules, S.R. 1990, No. 226 (N.Z.), set out the system for selecting persons for jury service. The Electoral Enrolment Centre compiles the jury lists and the Department for Courts screens the lists for potential jurors who may be disqualified. A jury district is defined arbitrarily 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. See Juries Act, 1981, § 5(3) (N.Z.).

(3) the potential juror has been excused from jury service for a period that has not yet expired; or

(4) the potential juror is a member of a religious sect or order that holds jury service to be incompatible with its beliefs.<sup>111</sup>

Potential jurors are excused fairly readily on these grounds. A survey conducted by the then-Department of Justice in 1993<sup>112</sup> found that only twenty-six percent of persons summoned appeared in court for jury service;<sup>113</sup> fifty-six percent were excused by the Registrar before or on the day of court;<sup>114</sup> and the remaining eighteen percent did not turn up, either because they ignored the summons or because residential or postal addresses were out of date.<sup>115</sup>

Excusing more than half of the summoned potential jurors from jury service has a significant impact on the representation of particular community groups. Anecdotal evidence suggests that professional groups, teachers, the self-employed, and women at home with children are particularly likely to be excused. Similarly, the significant numbers who fail to turn up without contacting the court are no doubt drawn disproportionately from some groups—probably the unskilled and the highly mobile.

Consequently, of the quarter of summoned jurors who turn up for jury service, some demographic groups are seriously under-represented compared to the jury district population. In particular, in the *Trial by Peers* study, Maori, Maori women, women in general, and younger age groups were under-represented. 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”). The difference between the expected and actual proportion was most striking for the elementary occupations.<sup>116</sup>

Under-enrollment of eligible voters, a significant proportion of whom are Maori and Pacific Islanders compared with the general electorate, is being addressed by the Electoral Enrolment Centre by the use of special enrolment campaigns.

Based on the assumption that jury representativeness is a desirable goal, it appears that the proportions either being excused or failing to turn up pose a significant problem. It may not be worth tackling the problem of “no-shows”; many fail to turn up because their addresses on the electoral roll are out of date, and it would be time-consuming, difficult, and resource-intensive to bring

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111. *See id.* § 15.

112. *See* NEW ZEALAND DEP'T OF JUSTICE, TRIAL BY PEERS?: THE COMPOSITION OF THE NEW ZEALAND JURY 45-54 (1995) [hereinafter TRIAL BY PEERS]. The period surveyed was September 13 to October 8, 1993.

113. 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%. *See id.* at 42.

114. This group included anyone who was disqualified or ineligible to serve and who informed the Registrar of this fact.

115. *See* TRIAL BY PEERS, *supra* note 112, at 42.

116. This classification included labourers, cleaners, building caretakers, messengers, door-keepers, and refuse collectors. *See id.*

successful prosecutions against those who deliberately ignore the summons. The existing liberal policy in relation to excuses, however, is another matter; for citizens to take jury service seriously as a duty for which they should make themselves available, it is untenable to operate a system which excuses more than half of those called upon. Mindful of this problem, the Department for Courts is at present conducting research on excusing jurors, and will be investigating the usefulness of providing guidelines to court registrars. It remains to be seen whether this will prove to be enough to remedy the problem.

### C. Selection at Court

Upon arrival at court, summoned jurors normally have their attendance noted by a court official and are then shown an introductory video.<sup>117</sup> They are also told, in a number of languages, that they must be able to speak and understand English, and if they do not, they are excused by the Registrar.<sup>118</sup>

There is an initial ballot for each jury trial commencing on that day which selects about thirty potential jurors for the case. Those thirty or so jurors are then taken to the courtroom. Before final balloting, counsel read the full names of the defendant(s) and all witnesses to be called by the prosecution and the defence, and the potential jurors are asked to disclose whether they know any of the people whose names have been read out and, if so, the nature of that knowledge. The judge then decides whether to excuse any potential juror on the basis of such personal knowledge.<sup>119</sup> Following that, there is a final ballot to select the twelve jurors who will serve on the case.

As each juror is called, they may be challenged by prosecution or defence<sup>120</sup> before they sit down in the jury box, or they may be directed by the judge to "stand by."<sup>121</sup> There are three different types of challenges: challenge for want of qualification, challenge for cause, and peremptory challenge. Before we consider each of these, however, it should be noted that information upon which challenges can be based is very limited.

Any party to the proceedings can request that the Registrar make available a copy of the jury panel for inspection or copying up to five working days before the jurors are due to be summoned for the week in which the proceedings are scheduled to start.<sup>122</sup> Any other person may inspect and copy the jury panel during the same period with the court's permission.<sup>123</sup> However, the panel list is drawn from the electoral roll entry and lists only names, addresses, and occupa-

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117. See *infra* text accompanying notes 167-169.

118. Although Registrars have no specific powers to excuse on this ground, it is likely that they can do so within the general terms of the statutory provision giving them the power to excuse jurors. See *Juries Act, 1981, § 15(1)(b)* (N.Z.).

119. See *id.* § 16(b).

120. See *id.* § 19.

121. See *id.* § 27. Jurors who are stood by (either by consensus between the parties or on the judge's own motion if he or she believes that there is a difficulty with that juror) may be recalled if the number of potential jurors is exhausted before a panel of 12 has been selected.

122. See *id.* § 14(1).

123. See *id.* § 14(2).

tions. In addition, in most centres, the police provide the prosecution with information on each potential juror's previous criminal convictions. In a few cases, the police officer in charge of the case will also go through the prosecution's jury list to see if there is anybody he or she does not want on the jury. The police may also annotate the jury list to indicate that a potential juror is an associate of repeat offenders.

The defence has more limited resources with which to check out the jury. Counsel may review the jury list with their client to see if any person should be excluded. At times, information from the jury list is also discussed. In smaller centres, counsel may make use of personal contacts, or may try to discover information on potential jurors by circulating the jury list around the office.

Hence, although jury vetting is not prohibited, the reality is that the scope for it is very limited. Furthermore, only in exceptional circumstances may a judge allow counsel to cross-examine jurors before they take their seats.<sup>124</sup> Indeed, there is no reported New Zealand case in which such questioning has been permitted, and in practice it does not occur. The effective absence of a *voir dire* procedure at this stage, coupled with the very restricted nature of any vetting that might take place, means that in the vast majority of cases, there is little or no opportunity to assess the knowledge, attitudes, and prejudices of potential jurors prior to challenge.

1. *Challenge for Want of Qualification.* While all jury lists are screened by the Department for Courts with regard to disqualifications and exclusions, counsel for both prosecution and defence are entitled to challenge any balloted potential juror "for want of qualification," that is, on the basis that sections 6-8 of the Juries Act of 1981 prevent the person from serving. This kind of challenge occurs very rarely<sup>125</sup>—presumably because either the pretrial screening process is generally effective or nobody at court is aware of the features that may disqualify a juror under these sections.

2. *Challenge for Cause.* The prosecution and defence may challenge potential jurors for cause on the ground that they are not "indifferent between the parties." By virtue of section 25 of the Juries Act of 1981, such challenges are to be determined by the Judge in private and in such manner and on such evidence as he or she thinks fit. Because of the absence of information upon which to determine whether such bias exists, challenges for cause are also very rare. The *Trial by Peers* study recorded none, and as far back as 1957, the Court of Appeal described them as obsolete.<sup>126</sup> Where possible prejudice may exist—for example, because the potential juror is known to be an associate of repeat offenders—he or she is instead subject to a peremptory challenge.

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124. See *R. v. Sanders* [1995] 3 N.Z.L.R. 545, 549.

125. None was recorded in the *Trial by Peers* study. See TRIAL BY PEERS, *supra* note 112.

126. See *R. v. Greening* [1957] N.Z.L.R. 906, 914.

Rather oddly, other grounds available at common law on which a juror could be challenged for cause, such as intoxication, the impersonation of a juror, or an inability to understand the language in which the trial is being conducted, are not available under the Juries Act of 1981. If such cases occur, counsel must rely on using a peremptory challenge or the stand-by procedure.<sup>127</sup> The latter option is not entirely satisfactory, however, since the person stood by may still be called for jury service if there are no prospective jurors left and the jury does not yet number twelve. In that case, the judge would have to rely on the court's inherent jurisdiction to discharge the juror.<sup>128</sup>

3. *Peremptory Challenge.* The prosecution or defence may also challenge a limited number of potential jurors without the need to give any reason for doing so. Generally, the prosecution and defence may each challenge six potential jurors in this way. In trials involving more than one defendant, the Crown has a maximum of twelve challenges, while defence counsel may challenge six potential jurors for each defendant. It appears that defence counsel challenge twice as often as prosecutors.<sup>129</sup> There is no law prescribing the proper and nondiscriminatory exercise of peremptory challenges; they may be exercised on any basis and are not open to scrutiny or objection.

Peremptory challenges are sometimes exercised by prosecution counsel on the basis of information about criminal convictions or criminal associations provided to them by the police. Because of the absence of other information about the background and attitudes of potential jurors, such challenges are usually based on perceived age, address, occupation, gender, ethnicity, general appearance, and demeanour. The stereotypes derived from these characteristics—for example, that manual or trade workers are more likely to be pro-defence than professional or service occupations, and that schoolteachers cause hung juries<sup>130</sup>—have little or no empirical foundation. It must therefore be concluded that, for the most part, the peremptory challenge in New Zealand is in essence exercised arbitrarily.

Once the jury pool has been assembled at court, the peremptory challenge is the most significant courtroom procedure affecting the composition, and hence the representativeness, of juries. The *Trial by Peers* study in 1993 found that, compared to the jury pool

- (1) fewer Maori men served on District Court juries, while the expected proportion served on High Court juries;
- (2) men, and particularly Maori men, were under-represented;

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127. See J.N. Finn, *Aspects of the Law Relating to Jury Trials*, 2 CANTERBURY L. REV. 206, 206-07 (1984).

128. See *id.* at 207. Although there is no authority on the matter, it may also be open to the judge to discharge such a juror. See Crimes Act, 1961, § 374(3) (N.Z.). However, that section seems intended primarily to deal with jurors who become incapacitated during the trial, rather than those who are incapacitated when initially called.

129. See TRIAL BY PEERS, *supra* note 112, at 56.

130. These and other stereotypes were highlighted in the *Trial by Peers* study, which was based on both the observation of actual trials and interviews with prosecution and defence counsel. See *id.*

- (3) younger age groups were more likely to serve, while those aged fifty and over were under-represented; and
- (4) there were fewer than expected unemployed jurors.<sup>131</sup>

Concern about the results of this study led the Solicitor General to issue an instruction to Crown Counsel to take whatever steps were necessary to ensure that Maori men were not challenged disproportionately by the prosecution. There is no information on the extent to which this instruction has modified prosecution practice—and it is, of course, unknown how far the under-representation of this group is actually due to prosecution practice. However, regardless of whether the situation has changed, it is likely that there is still a strong perception amongst Maori,<sup>132</sup> and perhaps other groups, that peremptory challenges have a discriminatory effect and exacerbate the unrepresentativeness of juries already produced by the system of disqualifications and excuses.

The rationale for peremptory challenges, especially in the absence of a *voir dire* procedure, is questionable. To the extent that they are used to alter the socio-demographic composition of the jury so as to produce an outcome favourable to one party or the other, they are surely unjustified. Similarly, the argument<sup>133</sup> that peremptory challenges give defendants confidence in the system by allowing them to eliminate those whom they do not wish to try the case is a spurious one: If they cannot object to a judge in a summary trial, why should they be able to object to a juror without good grounds for doing so?

The New Zealand Law Commission in its discussion paper has suggested reducing the number of peremptory challenges to four. This, it is argued, would still allow biased jurors to be removed, but would make it more difficult for either side to influence the representative nature of the jury and select the jury of their choice. However, this suggestion appears to be a compromise solution with little merit. As we have said, the peremptory challenge is at best a weak and haphazard procedure for removing biased jurors, and it is difficult to see why a party who has evidence of possible bias should not be required to challenge for cause and satisfy the court of the grounds for their objection. Thus, leaving in place a right to exercise four peremptory challenges does not effectively address the bias issue, and, since it is axiomatic that most minorities are easier to remove from the jury through a challenging process, it will continue to undermine jury representativeness.

#### D. Maori Representation

The issue of Maori representation on juries in New Zealand is a pressing one for at least two reasons. In the first place, while we do not know what pro-

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131. *See id.* at 67.

132. *See generally* MOANA JACKSON, NEW ZEALAND DEP'T OF JUSTICE, THE MAORI AND THE CRIMINAL JUSTICE SYSTEM: HE WHAIPAANGA HOU—A NEW PERSPECTIVE PART 2, at 138-41 (1988).

133. *See* LAW REFORM COMM'N OF CANADA, WORKING PAPER 27, THE JURY IN CRIMINAL TRIALS, 1980, at 54.

portion of defendants in jury trials are Maori, we do know that Maori are significantly over-represented in the convicted population.<sup>134</sup> Secondly, in political terms, the lack of Maori representation on central legal institutions like the jury forms part of the debate about the need to recognise indigenous forms of justice and, perhaps, separate legal institutions for Maori.<sup>135</sup>

Clearly there are a number of levels at which the issue of Maori under-representation can be tackled. To date, mainstream concern has focused on administrative measures designed to ensure that a higher proportion of Maori are entered on the electoral roll, and hence are available for jury service, and that the prosecution does not challenge Maori jurors disproportionately.<sup>136</sup> Although measures of this sort may have considerable potential to deal with the extremes of under-representation, so long as the Maori population is characterised by high rates of unemployment, low educational and skill levels, and high geographical mobility, they are unlikely to provide the whole answer. Furthermore, attempts to assert control over the process of challenge, whether through simply exhorting prosecutors to challenge even-handedly or through banning challenges based on ethnic, gender, or status grounds,<sup>137</sup> are not likely to be successful either. Faced with the ability of lawyers to find alternative rationalisations for their challenges, and being in no position to assess them, judges are unlikely to be either willing or able to police such requirements effectively. In our view, the only effective way of controlling peremptory challenges is to abolish them.

In addition to efforts to improve the selection process, some jurisdictions have also seen overt judicial attempts to “engineer” the racial composition of

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134. Although rather more concentrated in the younger age groups, persons identifying themselves as Maori make up approximately 13% of the New Zealand population. See STATISTICS NEW ZEALAND, NEW ZEALAND NOW CRIME TABLES (1996). However, persons described as Maori account for roughly 37% of the offenders apprehended by the police, 40% of the total number of non-traffic criminal cases which are prosecuted, 42% of convicted nontraffic cases, 50% of the male prison population, and 56% of the female prison population. See PAULINE SIDDLE, RESPONDING TO OFFENDING BY MAORI: SOME CRIMINAL JUSTICE STATISTICS 20 (1996); Juan Tauri & Allison Morris, *Re-forming Justice: The Potential of Maori Processes*, 30 AUSTL. & N.Z. J. CRIMINOLOGY 149, 149 (1997).

135. See, e.g., COURTS CONSULTATIVE COMMITTEE, REPORT OF THE COURTS CONSULTATIVE COMMITTEE ON HE WHAIPAANGA HOU (1991); JACKSON, *supra* note 132; Tauri & Morris, *supra* note 134.

136. See ADVISORY COMMITTEE ON LEGAL SERVICES, NEW ZEALAND DEP'T OF JUSTICE, TE WHAINGA I TE TIKA: IN SEARCH OF JUSTICE 42 (1986). See generally COURTS CONSULTATIVE COMMITTEE, *supra* note 135.

137. See, for example, *Batson v. Kentucky*, 476 U.S. 79 (1986), which is the leading U.S. case holding race-based challenges to be unconstitutional under the Equal Protection Clause of the 14th Amendment. The Supreme Court held that a defendant could overcome the presumption that peremptory challenges were used legitimately by making a prima facie case that the challenges in the particular case were race-motivated, after which the burden shifts to the prosecutor to articulate a neutral reason for the challenge. The rule applies regardless of the race of the potential juror or the defendant, *Powers v. Ohio*, 499 U.S. 400 (1991), to defence as well as to prosecution challenges, *Georgia v. McCollum*, 505 U.S. 42 (1992), to gender-based challenges, *J.E.B. v. Alabama*, 511 U.S. 127 (1994), and in civil cases, *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).

juries so as to match the ethnic background of the accused.<sup>138</sup> Even though, in its usual form, this manipulation tends to consist of relatively minor interference designed simply to get some representation on the jury of the group in question, if it were to be done in New Zealand, it would probably require a specific legislative amendment.<sup>139</sup>

In 1993, the U.K. Royal Commission on Criminal Justice recommended such an amendment. On the application of the defence or prosecution, and in exceptional circumstances, a judge would be able to order that a jury include up to three representatives of racial minority communities. In addition, counsel should be able to ask the court to designate that one of the three be of the same racial background as the accused or the victim.<sup>140</sup> As the New Zealand Law Commission has pointed out in its 1998 discussion paper, this recommendation fails to address either the issue of representativeness or the lack of jurors of the same ethnic background as the accused.<sup>141</sup> Three jurors randomly selected from three different minority racial groups will not necessarily render the jury "more representative," nor will one juror of the same racial background as either the accused or the complainant satisfy the demands of the accused for a more appropriate tribunal of fact. Furthermore, the need to show "exceptional" circumstances, which the Royal Commission defines as existing only where the accused can persuade the court that the "unusual and special" features of the case are such that it is reasonable to believe that the defendant will not get a fair trial from an all-white jury, suggests that there will be very few cases indeed in which the procedure would even be arguable let alone available.<sup>142</sup>

In any case, judicial tinkering of this sort is both undesirable and unnecessary. For one thing, it is likely to compromise the integrity of both the judiciary and the jury system in the eyes of jurors and of the general public. For another, if the concern is with the representativeness of the jury or with whether the jury adequately reflects the ethnic and cultural background of the accused, then, in principle, juries should be selected so as to achieve this in all cases—not just where the accused is Maori. Any such system would be impracticable and would, in any event, be unlikely to be much of an improvement on the present system—for either Maori or other minority groups. Numbers would inevitably be small, and ethnic "representatives" would be unlikely to be either representative or a significant force in the dynamics of the jury.

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138. The developments in England and Wales in the 1980s reflected a similar problem in the United Kingdom. See, e.g., *R. v. Broderick*, 1970 CRIM. L. REV. 155; *R. v. Binns*, 1982 CRIM. L. REV. 522; *R. v. Bansal*, 1985 CRIM. L. REV. 151; *R. v. Fraser*, 1987 CRIM. L. REV. 418; Simon Thomas & Others, 88 Crim. App. 370 (1989).

139. The English developments were brought to an end by the Court of Appeal in *R. v. Ford*, 3 All E.R. 445 (Eng. C.A. 1989), which held that a judge has no common law power either deliberately to alter the composition of the jury pool or the jury, or to authorise the empanelling of a multi-racial jury. New Zealand courts would be likely to adopt a similar view.

140. See REPORT OF THE ROYAL COMM'N ON CRIMINAL JUSTICE, 1993, Cm. 2263, at 207-08.

141. See NEW ZEALAND LAW COMM'N, *supra* note 88, at 73-74.

142. REPORT OF THE ROYAL COMM'N ON CRIMINAL JUSTICE, *supra* note 140, at 133.



More significantly, perhaps, we doubt that the current concern with Maori under-representation would be met by simply ensuring that the jury contains some Maori jurors or even that it reflects the proportion of Maori in the (local) community. Rather, the underlying criticism of the present system is based on the assertion that Maori defendants can be appropriately judged only by a body that reflects Maori cultural values and attitudes. Achieving this result would require more than one or two Maori jurors on each jury where the defendant is Maori and, unless it is to be extended to all cultural minorities, would need to be based on some principled argument derived from the status of Maori as the indigenous race of New Zealand. In other words, it is a demand for the revival of the all-Maori jury, or at least a strong version of the old mixed jury.

The abolition of the right to an all-Maori jury in 1962 was justified on the basis that New Zealand was governed by “one law for all” and the belief that under that law no section of the population should receive any “special privileges.” It was also argued that the right was essentially arbitrary in that it discriminated between defendants whose victims were Maori and those whose victims were not.<sup>143</sup> Maori Members of Parliament and some influential Maori figures outside Parliament opposed the reform, arguing that the right at least ensured that Maori values would be taken into account in some cases. Recent proponents of reviving the right to an all-Maori jury in all cases where the defendant identifies as Maori base their arguments on a rejection of the “one law for all” ideology, and of the view that the right constitutes a “privilege” for Maori. Hence, in *He Whaipanga Hou*, Moana Jackson attempts to develop an argument for a return to the all-Maori jury based on the right to trial by a jury of “one’s peers” flowing from Magna Carta and, more significantly, on the guarantee of Maori *rangatiratanga* (self-government, self-determination, or sovereignty) in Article Two of the Treaty of Waitangi.<sup>144</sup>

However one views the arguments made by Jackson in principle, there are clearly a number of significant practical difficulties that any such system would face. The small and often densely interrelated nature of Maori communities in many areas, the loss of contact between many Maori and their cultural roots, and the need to counter majority suspicions of partial juries all present real problems for any such development. Furthermore, if one accepts that the “right” to an all-Maori jury is part of a more general claim to Maori sovereignty over things Maori, it is difficult to see how one can justify leaving Maori defendants with a choice as to jury composition. More significantly, however, the notion of an all-Maori jury operating within a court and prosecution structure that is still almost entirely based upon European values is something of a contradiction in terms and is not in fact the sort of development that Jackson is advocating. The institution of the jury is itself alien to Maori culture and Maori law.<sup>145</sup> In its modern form, at least, it is a product of centralised, professional,

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143. See 332 N.Z.P.D., H.R. 2750-51 (1962); 328 N.Z.P.D., H.R. 2840 (1961).

144. See JACKSON, *supra* note 132, at 259-79.

145. See *supra* text accompanying notes 67-69.

and primarily retributive justice systems. If the demand by Maori for all-Maori juries is to make any sense, it can only do so within the context of a discrete Maori justice system—shaped and informed by Maori values and, perhaps, those European institutions that Maori regard as appropriate or useful. It remains unclear whether the jury is likely to be one of those. What does appear clear is that if proposals for an alternative Maori criminal justice system were ever to be taken seriously, changes to the jury structure would be one of the more minor concerns it would generate.

#### E. Discharging Jurors

Once a jury is constituted, counsel no longer have the opportunity to challenge persons off the jury. However, counsel may apply to the judge to discharge a juror under section 22 of the Juries Act of 1981, or section 374 of the Crimes Act of 1961.

A judge may discharge a juror who is disqualified from serving as a juror under the Juries Act of 1981, or who is or gives the appearance of being biased,<sup>146</sup> or who is unable to continue to serve by reason of the illness or death of a member of the juror's family. There is also a broad discretionary power to discharge a juror who is "incapable" of continuing to serve, for example, because of some language difficulty or mental or physical incapacity, or because the juror refuses to perform his or her duty. The Court of Appeal has stated that an "incapable" juror includes one whose continued presence on the jury would jeopardise the fairness of the trial to either side, or make the verdict abortive or seriously vulnerable.<sup>147</sup>

In determining whether the entire jury should be discharged on any of the grounds already mentioned, the judge will primarily consider whether the bias of one juror has tainted the other jurors, or whether a juror who gives the impression of bias will cause the jury's verdict to be perceived as unfair. Determining whether the jury has been contaminated by an individual juror is a matter of inference; jurors may not be questioned about discussions between them, whether in retirement or during the course of the trial.<sup>148</sup>

No alternate or reserve jurors are selected at the commencement of the trial. If a juror is discharged, the court may proceed with eleven jurors, or fewer than that number if the prosecution and accused consent. Moreover, under the recently inserted section 374(4A) of the Crimes Act of 1961, the court may proceed with as few as ten jurors if there are exceptional circumstances relating to the trial, including, without limitation, the length or expected length of the trial, and it is in the interests of justice to do so. The amendment was made as a direct result of expressions of concern about the possibility that some

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146. That is, the juror is personally concerned with the facts of the case or is closely connected with one of the parties or with one of the witnesses or prospective witnesses. See Crimes Act, 1961, § 374(3)(d)-(e) (N.Z.); Juries Act, 1981, § 22 (N.Z.).

147. See *R. v. M.* [1991] 7 C.R.N.Z. 439, 441-42.

148. See *R. v. Coombs* [1985] 1 N.Z.L.R. 319, 324; *R. v. Papadopoulos* [1979] 1 N.Z.L.R. 621, 626.

jurors would fail to cope with and have to be excused from a forthcoming trial, scheduled to last five months and involving a large number of serious criminal offences including sexual violation and murder.

At least one commentator has expressed concern publicly about the amendment and suggested that legislators ought to have considered reserve juror systems more carefully.<sup>149</sup> However, reserve jurors would involve additional administrative and financial costs and, more importantly, would impose the burden of jury duty upon a significant number of citizens without generally permitting them to participate in the decisionmaking process. When that is set against the fact that fewer than twelve jurors has been accepted historically within New Zealand, and that there is no evidence that smaller numbers (especially ten or eleven instead of twelve) detract from the quality of decisionmaking, the case for introducing reserve jurors is a decidedly weak one.

## V

### JURY SECRECY AND THE INSCRUTABILITY OF JURY VERDICTS

New Zealand has a tradition of jury secrecy which has been designed to protect the deliberations of juries in individual cases from outside scrutiny. However, there is no statutory equivalent of the provisions of the English Contempt of Court Act of 1981 to enforce this tradition.<sup>150</sup> Unless the court gives leave, section 370(2) of the Crimes Act of 1961 does prohibit any communication with the jury by any person other than the officer of the court who has charge of them after they have retired to consider their verdict. A breach of this prohibition where the communication goes to the merits of the case or might appear to an onlooker to do so may result in the jury's discharge and the declaration of a mistrial or the overturning of the verdict on appeal.<sup>151</sup> Beyond this, the convention is created by case law and broadly enforced in a number of ways.

In the first place, the courts have firmly established that evidence of jury discussions, both during the trial and after the jury has retired to consider its verdict, is inadmissible whether for the purposes of an appeal or otherwise. Similarly, juries cannot be required to give reasons for their decision, or to indicate or agree on any particular view of the facts. In other words, although the jurors can reach a unanimous verdict for radically different reasons and on quite different interpretations of the facts, they cannot be asked to explain what those reasons or interpretations are.

Just as importantly, an approach to one or more jurors during or after a trial may amount to a contempt of court and result in prosecution.<sup>152</sup> The issue of

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149. See Trevor Morley, *What About Jury Alternatives?*, COUNCIL BRIEF, Mar. 1998, at 6.

150. Contempt of Court Act, 1981, § 8 (Eng.).

151. See *R. v. Parkinson* [1915] 34 N.Z.L.R. 636, 639; cf. *R. v. Davis*, 44 Crim. App. 235, 240 (1960).

152. Contempt proceedings are in fact quite rare. The Solicitor General attempts to work cooperatively with the media to establish the parameters of appropriate publication, and prosecutes only when the case is a serious one and the breach is considered to be a blatant and gross one.

contempt was considered quite recently<sup>153</sup> in the 1993 prosecution of Radio New Zealand, which had sought to interview jurors about their reaction to the discovery of new evidence after the trial and whether, if this new evidence had been available, it would have affected their verdict. Holding Radio New Zealand in contempt, the High Court noted that such behaviour was likely to injure the administration of justice both by removing the protection of confidentiality from jury deliberations and by weakening community confidence in jury verdicts. The Court also stated that publicity about jury deliberations would impede frank discussions amongst jurors through fear of subsequent exposure to public criticism or ridicule, and might discourage juries from bringing in unpopular verdicts.

Compelling though the reasons for jury secrecy have been, it has until now been a significant obstacle in the path of jury reform. It is frequently argued that jury decisionmaking is problematic: that many jurors have difficulty in understanding the law and in following or assimilating complex or technical evidence; that some jurors tend to dominate deliberations; and that intimidation within the jury room of jurors with minority opinions is commonplace. Yet these assertions are based on mere anecdote; the shroud of jury secrecy has prevented the collection of systematic information about how New Zealand juries really operate.<sup>154</sup>

This mystery shrouding the New Zealand jury is now dissipating. With the full support of the government and the judiciary, two of the authors are in the process of undertaking, in collaboration with the New Zealand Law Commission, a research project on jury decisionmaking that involves interviews with jurors in a sample of fifty trials throughout the country about not only their own approach to and understanding of the issues in the case, but also the collective deliberations of the jury. It is intended that the results from this study will inform the Law Commission's report to the government on possible reforms to the jury system, and in particular will provide an empirical basis for recommendations on how to both enhance the effectiveness and efficiency of jury decisionmaking and reduce or eliminate any prejudice arising from pretrial or trial publicity.

The New Zealand Law Commission has also suggested that the law regarding jury secrecy should be clarified through codification. It has argued in its draft Evidence Code<sup>155</sup> that the rigorous enforcement of jury secrecy may sometimes conceal a miscarriage of justice, and that, while evidence of jury deliberations concerning the substance of the case should generally remain inadmissible, evidence disclosing irregularities in the conduct of the deliberations—for

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153. See *Solicitor-Gen. v. Radio N.Z.* [1993] 10 C.R.N.Z. 641.

154. Similar criticisms have been made of the Contempt of Court Act, 1981 (Eng.), which has effectively barred academic research into jury decisionmaking in that country. See, e.g., REPORT OF THE ROYAL COMM'N ON CRIMINAL JUSTICE, *supra* note 140, at 2; Penny Darbyshire, *The Lamp That Shows That Freedom Lives—Is It Worth the Candle?*, 1991 CRIM. L. REV. 740, 751.

155. This Evidence Code is as yet unpublished and subject to change following a consultation process presently being undertaken.

example, intimidation of a juror during deliberations—should be admissible when it may disclose such a miscarriage.

Beyond this codification, however, the New Zealand Law Commission has not suggested any liberalisation of the law on jury secrecy. For example, it has rejected submissions from journalists, who have contended that the media should be able to interview jurors following a trial about the experience of being a juror, as distinct from interviewing jurors about their deliberations. In fact, there is no reason to believe that the former constitutes a threat to the functioning of the jury system, and it is unclear whether it even constitutes contempt of court under the existing law.<sup>156</sup> This confusion demonstrates that the law in this area is decidedly vague. That, at least, has been recognised by the Commission, which has recommended that legislation should clarify the circumstances under which media contact with consenting jurors after trial is permissible.

## VI

### THE JURY TRIAL PROCESS

#### A. Hung Juries and Majority Verdicts

Jury verdicts in favour of conviction or acquittal must be unanimous. Provided that the jury has been deliberating for at least four hours,<sup>157</sup> it may be discharged if the court believes that it is unlikely to reach agreement. In that event, a new trial will generally be ordered, subject to the Solicitor General's power to stay proceedings. However, if the jury reports that it is having difficulty in agreeing, it will usually be given a direction to try again. That direction (known as a *Papadopoulos* direction) incorporates words to the following effect:

One of the strengths of the jury system is that each member takes into the jury room his or her individual experience and wisdom and is expected to judge the evidence fairly and impartially in that light. You are expected to pool your views of the evidence and you have a duty to listen carefully to one another. Remember that a view honestly held can equally honestly be changed. So, within the oath, there is scope for discussion, argument and give and take. That is often the way in which in the end unanimous agreement is reached.

But, of course, no-one should be false to his or her oath. No-one should give in merely for the sake of agreement or to avoid inconvenience. If in the end you honestly cannot agree, after trying to look at the case calmly and objectively and weighing carefully the opinions of others, you must say so. If regrettably that is the final position, you will be discharged and in all probability there will have to be a new trial before another jury.

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156. For an example of a journalistic account of the experience of being a juror, see Llewelyn Richards, *Two Trials in One*, NORTH AND SOUTH, Nov. 1997, at 28. There seems to have been no suggestion that this article, which provides details of the jury discussion in a rape case, might amount to contempt.

157. See Crimes Act, 1961, § 374(2) (N.Z.).

Therefore I am asking you, as is usual in such cases, to be good enough to retire again and see whether you can reach a unanimous verdict in the light of what I have said.<sup>158</sup>

Anecdotal evidence suggests that the length of jury deliberations has increased significantly in recent years.<sup>159</sup> However, there is no reliable evidence on deliberation time and whether it has in fact increased. What is more certain is that trials involving jury disagreements ("hung juries") have increased in recent years, both numerically and in proportionate terms.<sup>160</sup> Some of the recent hung juries, too, have occurred in particularly high-profile and lengthy trials, and have attracted considerable media comment. In particular, the prosecution of a Wellington businessman, John Barlow, on two charges of murder, resulted in two hung juries and a conviction at his third trial; each trial lasted for approximately four weeks.

Not surprisingly, this trend has prompted calls for majority verdicts, similar to those permitted in England and Wales and a number of Australian states.<sup>161</sup> In fact, as far back as 1984, the then-Minister of Justice, in response to a perceived increase in the number of jury disagreements, suggested that the idea of majority verdicts deserved serious consideration. Now the New Zealand Law Commission has stated its provisional view that, if current rates of hung juries are either maintained or increased during 1998 until the time that it publishes its final report, it will recommend introducing majority verdicts.

The problem in assessing the merits of majority verdicts is that we have no reliable evidence on the nature of hung juries or the reasons why they might be increasing. Majority verdicts are often mooted on the assumption that hung juries result from the obstinacy of one or two irrational "rogue" jurors who hold out against the reasoned views of the majority. That assumption, however, is unproven. If it is instead the case that minority jurors rarely stick to their view without some initial support and that hung juries usually occur when there is a substantial division of initial opinion amongst jurors,<sup>162</sup> the case for majority verdicts becomes considerably weaker. The nature of the deliberation process and the reasons for jury disagreements are being explored in the empirical research on jury decisionmaking that we are currently undertaking.<sup>163</sup> Until the

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158. *R. v. Accused* [1988] 2 N.Z.L.R. 46, 59.

159. See, for example, the comments of the Court of Appeal in *R. v. Hapeta* [1995] 1 N.Z.L.R. 6, 10.

160. In 1997, there was considerable public and political concern, inspired in part by the release of John Goulter's book *No Verdict: New Zealand's Hung Jury Crisis*, *supra* note 1, over-reports that the rate of hung juries had increased rapidly from 4% or so in 1991 to 10% in 1997. This 10% figure subsequently proved to be somewhat misleading. While the rate of hung juries has certainly increased in the last decade or so, the most recent figures available show that, in 1997, only 3.8% of all cases committed for trial resulted in a jury disagreement on all charges. See Unpublished Statistics for 1992 to 1997, Business Information Section, Dep't for Courts, Wellington (on file with authors).

161. See, e.g., Michael Chesterman, *Criminal Trial Juries in Australia: From Penal Colonies to a Federal Democracy*, 62 LAW & CONTEMP. PROBS. 69, 91-93 (Spring 1999).

162. Overseas research evidence provides some support for this proposition. See, e.g., VALERIE HANS & NEIL VIDMAR, *JUDGING THE JURY* 168 (1986).

163. See *supra* text accompanying notes 154-155.

findings of that research have been reported and properly considered, it is unlikely that any change to the current unanimity requirement will be made.

## B. Assisting Jury Deliberations

Although there is no direct systematic evidence on how well juries perform their task in New Zealand, there is anecdotal information that suggests that juries sometimes misunderstand or misapply the law, become confused about the facts, draw unwarranted inferences or conclusions from them, or take irrelevancies into account. These problems are more often associated with lengthy or complex trials and are said to arise not only from the varying educational and intellectual levels of jurors, but also from deficiencies in the way in which they are prepared for their role and in which the facts and the law are presented to them.

There is some overseas research evidence about the extent and causes of such problems, but it is mostly derived from studies of mock or shadow juries<sup>164</sup> or from self-report questionnaires filled in by actual jurors after the trial.<sup>165</sup> We therefore do not know the degree to which these problems even exist, let alone the reasons for them.<sup>166</sup>

However, to the extent that there are problems attributable to court procedure, it might be expected that improvement in the quality of the information presented to juries and the aids provided to them during the trial would go some way toward mitigating those problems. In recent years, therefore, this area has received considerable attention. The process of reform began in 1992, when the Courts Consultative Committee<sup>167</sup> published a report entitled *Jurors' Concerns and the Jury System*, which reviewed the facilities, information, and services provided to jurors and made recommendations for change. Since then, a number of improvements to the facilities, information, and services provided to jurors have been gradually introduced. For example, every jury summons sent to potential jurors now includes standard information dealing with such subjects as the functions of juries, the selection process, and the duties of jurors.<sup>168</sup> In addition, the Department for Courts has prepared a booklet, entitled *Information for Jurors*, which is available to jurors when they first arrive at court and in the jury room. It deals with the subject matters covered in the summons form in more detail, as well as some additional matters jurors need to

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164. See, e.g., REID HASTIE ET AL., *INSIDE THE JURY* (1983); David Rosenhan et al., *Notetaking Can Aid Juror Recall*, 18 *LAW & HUM. BEHAV.* 53 (1994).

165. See, e.g., MICHAEL ZANDER & PAUL HENDERSON, *ROYAL COMM'N ON CRIMINAL JUSTICE, STUDY NO. 19, CROWN COURT STUDY, 1993*, at 249.

166. A gap which our current research on jury decisionmaking, described *supra* text accompanying notes 154-155, is designed to fill.

167. The Courts Consultative Committee is a committee of judges, lawyers, and officials established in 1986 to advise the Minister of Justice on the operation of all aspects of the court system.

168. The information in the summons form is set out under various question headings such as "What is a jury?," "How was I chosen for jury service?," and "What happens if I do not report to court?"

consider, such as choosing a jury representative<sup>169</sup> and the need for confidentiality. The booklet includes a glossary of terms commonly used in criminal proceedings. The Department has also prepared a short introductory video for jurors covering similar matters. Although the video is not always used, both the booklet and video are distributed throughout New Zealand jury courts.

At the start of a trial, judges may make introductory remarks to the jury. It is not uncommon at this preliminary stage for judges to instruct the jury on, for example, the prosecution's burden of proof and the need for the jurors to set aside any feelings of sympathy or prejudice. However, there is some variation in the extent to which this instruction occurs. The prosecution's opening address covers the charges against the defendant and a summary of the facts that the prosecution intends to prove. Section 367 of the Crimes Act of 1961 envisages that the defence will not open its case until the prosecution has presented its evidence and prosecution witnesses have been cross-examined. There is case law suggesting that section 367 precludes the defence from making an opening statement following the prosecution's.<sup>170</sup> Despite this, some judges do allow defence counsel the opportunity to make an opening statement, which the defence is free to decline. The defence's opening statement may define the issues without analysing the evidence.

Once both sides have presented their evidence, cross-examined witnesses, and given closing addresses, the judge will not only give directions to the jury about the relevant law, but also sum up and make limited comment on the factual evidence presented by both sides. Judicial directions are given at this stage on such matters as the prosecution's burden and standard of proof, the relevance of circumstantial evidence, the defendant's right of silence, and the jury's use of exhibits. Judges have access to what is known as a bench-book, containing guidelines on some of the more commonly used instructions as well as other trial matters. However, they make varying use of it.<sup>171</sup> Some prefer to formulate their own instructions, others use the bench-book as a guide on substance but not on style, and yet others follow the model directions more closely. The foreword indicates that it is entirely a matter for individual judges to determine the extent to which they make use of the bench-book. In general, the New Zealand Court of Appeal's approach to jury directions has been to encourage brevity.

Jurors are able to ask questions of the witnesses during the trial by forwarding the questions in writing to the judge, who determines whether the

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169. The jury representative is otherwise known as the "foreman." The term "jury representative" is used in the booklet *Information for Jurors*.

170. See *R. v. Joseph* [1994] 2 N.Z.L.R. 702, 703-04. Hammond, J., further noted that he doubted that Parliament intended to give the defence both the advantage of blunting the prosecution's opening statement and the last word in the closing addresses. See *id.*

171. The current bench-book for New Zealand judges was produced in 1994 by judges of the High Court and District Court, with the assistance of the then-Department of Justice. Parts of it have been updated subsequently, and it currently is being reviewed. The bench-book contains guidance on pre-trial applications and other procedural matters as well as practice notes, advice on summing up, and model directions.



questions will be put. However, this practice is rare and is not encouraged in the information supplied to potential and selected jurors; in fact, the *Information for Jurors* booklet describes this practice as “most unusual.”<sup>172</sup> The jury may also ask the judge questions during deliberations.

While hearing the evidence, individual jurors can take notes and refer to them in the course of deliberations. The jury is given a copy of the indictment and exhibits, and sometimes of the relevant statutory offence provisions that can be taken to the jury room. Transcripts of videotaped police interviews with defendants are technically exhibits and often are provided to the jury as the videotape is being shown. However, they are normally recovered before deliberation commences. The trial transcript—the record of all the evidence—is never given to the jury. Instead, the jury may ask to have passages of the transcript read out in open court during the course of deliberations. Juries are never given written copies of either the judge’s directions or counsel’s closing addresses, although during deliberations the jury may ask for the judge’s directions on a particular topic to be given again orally, and enlarged upon or clarified. Where the complexity of the case warrants it, the Court of Appeal has approved the use (including during deliberations) of charts and summaries supplementing oral presentation.<sup>173</sup>

Despite these strategies for enhancing jury decisionmaking, it is arguable that jurors still find particular aspects of trial procedure difficult or confusing, and that much more could still be done to improve the quality of the decision-making process. For example, greater use of visual aids or written material could significantly improve the comprehensibility of the evidence; despite some use of such devices in complex cases, evidence and instructions are still presented largely in oral form and require concentration for lengthy periods of time by jurors who may be quite unused to assimilating information imparted in this form. Jurors could also be given more advice about how to undertake their functions—for example, how to select a foreman and how to structure their decisionmaking—since they are largely left to their own devices at present. Similarly, the judge could encourage them to depart from their role as passive participants in the process by specifically telling them that they can and should ask questions, both during the trial and at the conclusion of the summing up, in order to clarify points of fact or law about which they are uncertain. We expect that the findings of our current research project will enable us to make some assessment of the possible impact of these sorts of reforms.

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172. The New Zealand Law Commission has recommended an express provision in its proposed Evidence Code codifying the right of jurors to ask questions through the judge, but it may be doubted whether this in itself will make the practice more common.

173. See, e.g., *R. v. Egden* [Feb. 17, 1995] Court of Appeal, CA 211/94, at 5-6 (unreported).

## VII

## PRETRIAL PUBLICITY AND PREJUDICE

In the absence of a *voir dire* procedure for jury selection in New Zealand, it is virtually impossible to eliminate from the jury those who might be prejudiced as a result of prior knowledge of the case.<sup>174</sup> Given this problem, it might be expected that the courts would have imposed stringent controls on the nature and extent of pretrial publicity, so as to minimise the likelihood that bias will arise on that account. In fact, however, this is not the case. Although the rules relating to pretrial and trial publicity are more restrictive than those in the United States, the media are nevertheless generally free to report on pretrial court proceedings. Such reporting includes, in the case of charges laid on indictment and proceeding to a jury trial, the preliminary hearing at which the prosecution's evidence is presented in order to determine whether there is a *prima facie* case. Name suppression also is granted only infrequently (although more often prior to trial than subsequent to it), and rarely on the ground that it will prejudice the subsequent trial.

Improper or inaccurate reporting of court proceedings, or the publication of material reflecting on the character and credibility of the accused, may amount to contempt of court. So too may any other publicity about any aspect of the investigation, the arrest and charging of the suspect, or the evidence in the case, which may suggest that the accused committed the offence or which otherwise may prejudice the chances of a fair trial. The test, however, is a vague and arguably an unduly liberal one: In striving for a balance between the freedom of the press and the accused's right to a fair trial, the courts have in fact created a presumption in favour of the former, which can be rebutted in contempt proceedings only by proof to the criminal standard that there is a "real risk"<sup>175</sup> or a "substantial risk,"<sup>176</sup> as distinct from a remote possibility, of interference with a fair trial. Thus, they have not found contempt or unfairness in circumstances where there has been a significant lapse of time between the publication and the trial or where the circulation of the publication has been in an area 200 kilometres from the area in which the trial is to take place.<sup>177</sup>

Not surprisingly, contempt proceedings in such circumstances are rare. The vagueness of the test, and the difficulty in identifying when publication might amount to contempt, encourages media reporting in borderline cases. It is not uncommon, for example, for the media to report that a defendant arrested for a particular offence was already on bail on other charges. Furthermore, the development in recent years of a more competitive news market has likely contributed to this process, with television in particular being more prepared to push the limits than previously.<sup>178</sup>

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174. See *supra* text accompanying note 127.

175. *Solicitor-Gen. v. Wellington Newspapers Ltd.* [1995] 1 N.Z.L.R. 45, 47.

176. *R. v. Coghill* [1995] 3 N.Z.L.R. 651, 662.

177. See *Gisborne Herald Ltd. v. Solicitor-Gen.* [1995] 3 N.Z.L.R. 563, 568.

178. For example, in a recent paper, the Solicitor-General, John McGrath QC, has commented that

Apart from preventing inappropriate pretrial publicity through the law of contempt, the effects of such publicity also may be mitigated by changing the venue of the trial to an area where potential jurors are less likely to have been exposed to it.<sup>179</sup> However, applications for change of venue are granted only sparingly, and even where the possibility of prejudice seems fairly clear, the courts are notably reluctant to accede to such requests. For example, in *R. v. Parsons*,<sup>180</sup> the Court of Appeal upheld a decision to refuse a change of venue where a son was charged with killing his father, a prominent local businessman, despite significant local media coverage of the charge and of the fact that bail had been denied at least partly on the basis of affidavits from the police and from the family detailing concerns that the accused would abscond or would attempt to intimidate witnesses if bailed. The court professed itself satisfied that there was no "real risk" that this publicity would preclude a fair and impartial trial, and noted that the refusal of bail and publication of the reasons for it occurred some fifteen months before the trial was scheduled to commence. Given that counsel cannot question potential jurors in order to explore the possibility that some prejudice may still linger, and bearing in mind the likely lack of impact of warnings to the jury not to let such publicity intrude on their decisionmaking,<sup>181</sup> the court's reluctance to order a change of venue in such cases seems unduly risky. Coupled with vague, uncertain contempt laws, and an increasingly rampant market-driven media, defendants in New Zealand do appear likely to be at an increasing risk of prejudice with little or no opportunity to detect its existence, let alone combat it.

The New Zealand Law Commission has suggested the enactment of a statutory offence of contempt, applying to publicity that occurs where the commencement of proceedings is highly likely and that results in a substantial risk of prejudice to a fair trial. It has also suggested that there should be a "public interest" defence, of the type proposed by the Australian Law Reform Commission, where the publisher can show:

- (1) that the publication was made in good faith, in the course of "a continuing public discussion of a matter of public affairs (other than

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over the last fifteen years the conventional acceptance of the media that it needs to function in a way that protects the needs of the criminal justice system has come under pressure. Some would argue it is no longer workable. This attitudinal change appears, to this observer, to be due to the emergence of real competition in the news market, in itself linked to the corporatisation of State television and the arrival of TV3 as a competing private broadcaster.

LEGAL RESEARCH FOUNDATION SEMINAR, CONTEMPT AND THE MEDIA: CONSTITUTIONAL SAFEGUARD OR STATE CENSORSHIP? 23 (1998).

179. See Crimes Act, 1961, § 322 (N.Z.). On adverse publicity as a ground, see *R. v. Brown* [1987] 3 C.R.N.Z. 132 (C.A.), and *R. v. Holdem* [1987] 3 C.R.N.Z. 103 (H.C.).

180. [July 19, 1995] Court of Appeal, CA 127/95 (unreported).

181. Most of the empirical research on the impact of judicial instructions to ignore prejudicial material suggests that they are largely ineffective in achieving their objectives. Indeed, in many cases, judicial commentary may well exacerbate the problem by focusing jurors' attention on the prejudicial material. For an overview, see HANS & VIDMAR, *supra* note 162; J. Alexander Tanford, *The Law and Psychology of Jury Instructions*, 69 NEB. L. REV. 71 (1990).

the trial itself), or otherwise of general public interest and importance"; and

(2) that "the discussion would have been significantly impaired if the statement creating a substantial risk of prejudice to the relevant trial had not been published at the time when it was published."<sup>182</sup>

It has to be said, though, that the proposed statutory offence would do little to promote greater certainty in the law or to curb unwarranted publicity. Part of the difficulty arises from the fact that the nature of the "public interest" in potentially prejudicial pretrial publicity has not been clearly articulated either in court decisions or in the Law Commission's discussion of the issue. While publicity about some matters relating to the charge or the defendant may occasionally be desirable—for example, to obtain evidence or to prevent suspicion falling on others—it is difficult to see why the public generally has an "interest" in the publication of material which has the potential, however slight, to prejudice a fair trial.

### VIII

#### CONCLUSION

It is certainly the case that in New Zealand, as in many other common law jurisdictions, the recent history of the jury has been one of fairly steady decline. This is particularly so of the civil jury which, for all practical purposes, now has become virtually extinct with little realistic prospect of revival. In the criminal area, the extension of jury trial to the District Court produced a brief resurgence, but the previous trends seem now to have largely reasserted themselves. Again, as with other jurisdictions, the pressures have been largely fiscal but, given the opportunity, defendants have shown no great enthusiasm for jury trial either.

Nevertheless the jury has retained a large part of its historic role as an ideological centrepiece of New Zealand criminal justice. In spite of the perception in some quarters of a "hung jury crisis" and a corresponding interest in moving toward majority verdicts, there is no constituency at all for radical change or even for any significant restriction on the right to jury trial. At the most, there are occasional calls for a reconsideration of the availability of jury trial in complex or very lengthy cases, which can be accommodated with only relatively minor adjustments.<sup>183</sup> In addition, it is important to note that emerging concerns in New Zealand about wrongful or dubious convictions in a number of recent cases focus largely on failings in the investigatory and prosecution processes rather than on any failings in the jury or trial system.

On the other hand, New Zealand is currently in the throes of a series of developments designed to improve jury selection processes (particularly in relation to Maori jurors), upgrade jury facilities, enhance juror education, and pro-

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182. AUSTRALIAN LAW REFORM COMM'N, REPORT NO. 35, CONTEMPT, 1987, at 175.

183. See *supra* text following note 103; *supra* text following note 173.

vide appropriate assistance, both during the hearing and in the decisionmaking phase. The New Zealand Law Commission also is considering these issues, and to assist it in this task, an extensive piece of research is being undertaken on District and High Court juries. This research, which is largely the result of an initiative by the judiciary, is focusing on jury competence, the impact of pretrial and trial publicity, juror responses to complex, expert, or potentially prejudicial evidence, the dynamics of the decisionmaking process, and the impact of current attempts to improve jurors understanding of their role and of the trial. The concern of all this effort is primarily to ensure that, whether the actual use of the criminal jury continues to decline, it will remain as a central plank in the ideology of criminal justice in New Zealand, effectively symbolising a number of traditional values. How far these efforts will succeed and how significant the values traditionally associated with the jury will turn out to be in the future, is another question.