SUBMISSIONS BY DR DONALD STEVENS QC TO LAW AND ORDER SELECT COMMITTEE ON CRIMINAL PROCEDURE BILL

(This submission was made to the select committee at Parliament Buildings on 15 September 2004)

Introduction

I have practiced criminal law in Wellington for over 25 years. I hold a Ph.D. in law and I was appointed a Queen's Counsel in 2002.

Contents

This submission deals with the following aspects of the Bill:

- Restrictions on the right to trial by jury.
- Reduction in number of challenges without cause during jury selection.
- Inroads into protection against double jeopardy.
- Committal hearings.
- Criminal Disclosure.

1. The Criminal Procedure Bill makes inroads into a number of fundamental civil rights. Several of these are rights of long standing.

RESTRICTIONS ON RIGHT TO TRIAL BY JURY

Submission: There should be no restriction on the constitutional right to trial by jury.

Discussion

2. The right to trial by jury is a fundamental constitutional right. It is a right of the first importance.

3. The right is enshrined in both the New Zealand Bill of Rights Act and also in Magna Carta.

4. The restrictions on this right proposed by the Bill violate both the Bill of Rights and the Magna Carta. S 24 of the Bill of Rights provides that everyone charged with an offence shall have the right to the benefit of trial by jury when the penalty for the offence is or includes imprisonment for more than 3 months. S 29 of the Magna Carta guarantees the right to trial by one's peers.

5. It is extraordinary that the New Zealand Parliament is considering restricting this right. It has no electoral mandate to do so. The right is so important that it could only be limited with the clearest mandate.

6. As an indication of the significance of this right it is interesting to note, from an historical perspective, that attempts by King George III and his government to restrict it in North America in the eighteenth century gave rise to one of the principal grievances leading to the American Declaration of Independence. Indeed, the Declaration itself records that one of the "injuries and usurpations" inflicted upon the American colonies was the removal "in many cases of the benefits of Trial by Jury."

7. As a result the Sixth Amendment to the United States Constitution has guaranteed since 1791 the right to trial by jury. Legislation of the type contemplated by the present Bill would be struck down as unconstitutional in the United States, and also in Canada. Why should New Zealanders have fewer constitutional rights than North Americans?

8. "Why do we love this trial by jury?" American Patrick Henry asked over 200 years ago. His reason remains ringingly true today: "It prevents the hand of oppression from cutting you off."

9. This right protects the liberty of the individual, it helps to prevent abuse of power and it helps to secure the independence of the courts.

10. One of the great strengths of jury trial is that it provides trial by a tribunal intended to represent a fair cross-section of the community. Trial by judge alone can never equal that. Judges come from a limited section of society. They lack the range of life experience that will be reflected in a jury. It is this range of life experience that is so crucial in the determination of guilt or innocence.

11. Trial by judge alone is arbitrary. So much depends on who the judge is who hears the case: his or her attitudes, values, understanding of social issues, prejudices and life experience. These can vary greatly from one judge to another. Every criminal lawyer knows that the outcome of a defended hearing before a judge alone often depends on which judge tries the case; lawyers can predict when they leave the office to go to court that the prospects are that if Judge A hears their case that day there will be a conviction, but if Judge B hears the case there will be an acquittal.

12. The arbitrariness of trial by judge alone is greatly reduced by jury trial, where the tribunal of fact represents a cross-section of the community. Moreover, a panel of 12 presents less scope for the expression of individual idiosyncrasy than does a tribunal of fact comprising only one person.

13. There is a danger, as well, that judges, because they are exposed so much in their work to the more base side of human nature, can develop a skewed view of human affairs, inclining them to focus unduly on the less positive features of situations. Hence, it is sometimes said that some district court judges hearing defended cases (without a jury) have lost sight of the importance of reasonable doubt in a criminal trial.

14. We are fortunate to have in our country at this time a judiciary that is fiercely independent. But, it cannot be guaranteed that this will always be the case. Judges, after all, are paid and appointed by the state. Judicial promotion can be dependent on the judge not being out of favour with the executive. It is not inconceivable that at some time in the future these factors could lead to a loss of judicial independence. In such a situation it is possible for the state to influence the outcome of a criminal trial that is conducted by a judge alone.[1] That trial by jury affords a protection against this is one of its greatest strengths.

15. Hence, any proposal to restrict the right to trial by jury must be viewed with alarm, in fact great alarm.

16. The Bill would allow a judge to order trial by judge without a jury if a case was going to take too long and there was a likelihood that "potential jurors will not be able to perform their duties effectively" (s 361D(3). An order could also be made if there

[1] This is what George III and his government were doing in North America and there are many examples of it happening in diverse parts of the World ever since.

were reasonable grounds to believe juror intimidation "has occurred, is occurring, or may occur" and that it can only be avoided by trial without a jury (s 361E).

17. That a trial may take too long is no argument to deprive a person charged with an offence of the right to trial by his peers.

18. To suggest that a case may be too complex for a jury is to under-rate the intelligence of the community and those who make up juries. In my experience juries do not have undue difficulty in getting to grips with complex cases.

19. The test to be employed by the judge in deciding whether an order should be made for judge alone trial is vague. How does a judge decide whether it is likely that jurors will not be able to perform their duties effectively? How could he or she possibly know? How high a threshold does the word 'likely' connote? The criteria that the judge is to have regard to in making the decision (subs. (4)) afford little assistance.

20. To empower a judge to deprive a person of a right as fundamental as the right to trial by jury is unacceptable in a country that prizes individual liberty. To empower a judge to do so on vague criteria involving an assessment that must, of its nature, be subjective is nothing short of frightening.

21. Juror intimidation is rare in New Zealand. The answer to such a problem, to the very limited extent it exists, if it exists at all, is not the removal of a fundamental right. Rather it is to limit the opportunities for it to arise. In an appropriate case sequestration of a jury would be the solution, as is recognized in the United States of America.

22. Again the vague nature of the proposed empowering provision is objectionable. All that is required is reasonable grounds to believe that intimidation (which can be avoided only by trial by judge alone) *may* occur. That contemplates a mere possibility. And how is the assessment to be made of the likely effectiveness of alternative means of avoiding intimidation? Again, a judge is to be empowered on vague criteria, involving subjective assessment, to deprive a person of his or her fundamental right of trial by his or her peers. Again, this must be unacceptable in New Zealand.

REDUCTION IN NUMBER OF CHALLENGES WITHOUT CAUSE DURING JURY SELECTION

Submission: There should be no reduction in the number of challenges without cause available to each party during jury selection. Rather, the number of challenges available should be increased.

Discussion

23. The Bill proposes the reduction from 6 to 4 of the number of challenges each party can make with out cause in the selection of a jury. No reason has been given for this reduction.

24. Challenges without cause serve an important purpose.

25. Every person charged with a criminal offence has the right to a fair trial by an impartial court (s 25(a) New Zealand Bill of Rights Act). This envisages, in the case of trial by jury, a jury that represents a fair cross-section of the community. There are two mechanisms employed to achieve this. The first is the random manner in which members of the panel summoned for jury service are called to the jury box. The second is the right each party has to challenge six members of the panel with out cause.

26. The right of challenge is used effectively to ensure that the jury empanelled to hear a case does represent a fair cross-section of the community. A reduction in the number of challenges will threaten the right to a jury representing a fair cross-section of the community and thus the right to an impartial trial.

27. If there is to be any alteration in the number of challenges without cause it should be in the opposite direction, ie the number of challenges without cause available to each party should be increased. This would reinforce, rather than threaten, the right to an impartial trial.

28. It is instructive to consider the number of challenges available in two other common law jurisdictions.

29. In North America the law of California allows each side 10 challenges with the number increased to 26 if the offence charged is punishable by death or life imprisonment.[2] In the Federal criminal jurisdiction[3] each side has 20 challenges in the case of a capital offence with the defence having 10 challenges in other cases where the offence charged is punishable by one or more years in prison. If the offence charged is punishable by less than one year in prison there are three challenges.

30. The number of challenges now proposed in New Zealand would be less than half those available in California in a case other than murder. And a Californian charged with murder would have more than six times the number of challenges available to a New Zealander facing the same charge. A rather similar unfavourable comparison exists with the US Federal jurisdiction.

31. It has to be said that it is disturbing that the existing law in New Zealand does less than the law in at least two other common law jurisdictions to protect the right to trial by a jury representing a fair cross-section of the community, and alarming that it is proposed to make the position worse.

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[2] See Weems, *A Comparison of Jury Selection Procedures for Criminal Trials in New South Wales and California* (1984) 10 Sydney Law Review 330

[3] Rule 24(b) of the Federal Rules of Criminal Procedure

32. A reduction in the number of challenges without cause could be expected to encourage litigation challenging convictions on the grounds that the jury that tried the case did not represent a fair cross-section of the community.

INROADS INTO PROTECTION AGAINST DOUBLE JEOPARDY

Submission: The proposal to make inroads into the rule against double jeopardy is fundamentally flawed.

Discussion

33. The right to be free from double jeopardy is time honoured and a right of very great importance.[4] The rule is designed to protect individuals from the excessive use of state power. It is simply wrong, and contrary to fundamental notions of justice, to allow the state to subject an individual to repressive and repeated prosecutions. It is equally wrong to require a person acquitted of a criminal charge to have to live with the possibility of a renewed criminal investigation and a possible further prosecution.

34. The proposal to allow the retrial of a person acquitted as a result of an administration of justice offence is the result of one case, viz the acquittal, as a result of perjured evidence, of Black Power member Kevin Moore, who had been charged with murder.

35. It is often said that a law change made on the basis of one case makes for bad law.

36. While Kevin Moore was said by the sentencing judge to have "literally got away with murder" the answer does not lie in altering the double jeopardy rule. Rather the answer, for the rare case where it occurs, lies in increasing the maximum penalties for administration of justice offences. The law could provide that a person convicted of an administration of justice offence, where that offence had secured the person's acquittal of another offence, would be liable to a much higher penalty than the usual penalty for the administration of justice offence. This principle is already recognized by the punishment provided by s 109 of the Crimes Act for perjury. The penalty for perjury is 7 years imprisonment, but if the perjury is committed to procure the conviction of a person in certain circumstances the penalty is 14 years. Such an approach would overcome the problem posed by the *Moore* case without making inroads into a principle of constitutional importance.

37. There is no justification for allowing retrials because new and compelling evidence has become available. Such a proposal is contrary to fundamental principle. Not only does it invite abuse of state power and oppressive conduct on the part of the state, but it will also undermine the integrity of acquittals. The stigma that attaches to an innocent person charged with a crime will no longer be fully extinguished by

[4] In the USA the right is recognized to be of such importance that it is protected by the Fifth Amendment to the Constitution.

an acquittal. It will always be known an investigation can be re-opened and a prosecution recommenced. It needs to be remembered that it is not only the guilty who are subject to prosecution.

38. The proposal will also excuse and encourage inadequate police investigations. At present there is an incentive for the police to ensure that an investigation is properly and fully conducted before an accused person is put on trial. The proposal will signal to the police that they can take a less than thorough approach to an investigation because if there is an acquittal the matter may be able to be re-opened.

39. One of the few principal safeguards proposed in the Bill is a requirement that the Court of Appeal, when considering whether to order a retrial, must consider whether, before the trial that led to the acquittal, "all reasonable efforts were made to obtain and present all relevant evidence then available." (s 378D(2)(a)). This will be no protection to an acquitted person at all. The notion of 'all reasonable efforts' is nebulous to say the least. It will be a simple matter for the police, who will be the only people thoroughly conversant with the minutiae of the investigation, to advance a sophistic contention that 'all reasonable efforts were made' to investigate the matter, and exceptionally difficult for those lacking this detailed understanding of the investigation to expose the sophistry and demonstrate that all reasonable steps were not taken.

40. Obviously it is undesirable that a guilty person should be acquitted and remain legally unaccountable for his or her actions, if new and compelling evidence implicating that person comes to light. But, as a matter of policy, that must be less objectionable (particularly given the limited extent of any problem with the existing law) than the oppressive use of state power that will become possible under the proposed law. The proposed safeguards are inadequate and t is difficult to think of any safeguards that would be truly effective. It is for good reason that for centuries the rule against double jeopardy has existed. It should not be lightly discarded. The rule of *res judicata* (no retrial of the same issues) exists also in civil proceedings (for sound policy reasons) and there is no good reason to limit it in criminal proceedings.

COMMITTAL HEARINGS

Submission: An oral evidence hearing should be held whenever either party certifies to the court that such a hearing is necessary.

Discussion

41. Traditionally a depositions hearing has served two purposes. They were identified by Justice Hansen in *R v Haig* [1966] 1 NZLR 184:

- The primary purpose is to establish whether or not there is a *prima facie* case warranting committal for trial.

- An important secondary purpose is to provide an opportunity to the defence to test the strength and weaknesses of the prosecution case.

42. The Bill recognizes the first of these purposes, but it does not adequately do so.

43. It is proposed to replace the present right to an oral evidence hearing with a hearing at the discretion of a judge. An oral hearing should be a matter of right, not discretion.

44. The Bill provides that a judge can order an oral evidence hearing if satisfied that such a hearing is necessary to determine whether there is sufficient evidence to commit the defendant for trial (S 180(1)). But the Bill is silent on the issue of the basis on which the judge is to be satisfied of this. Will it be sufficient that defence counsel suspect that the witness may not come up to brief, or that cross-examination may fatally undermine the prosecution case? Often, it is not until the evidence is called that this becomes apparent. Or will the judge require a higher threshold to be met than a mere suspicion or sense on the part of counsel that the witness may not come up to brief? If a higher threshold is to be required how could it be met, when it is only when the evidence is given that the problem becomes apparent?

45. The Bill, as presently worded, could see judges refuse to make oral evidence orders in circumstances where, if oral evidence were to be given, it would become apparent, following cross-examination or because the witness did not come up to brief, that there was not a case justifying committal for trial.

46. Considering the consequences to an innocent citizen of being sent for trial (and having as a result to meet the expense of the process, not to mention the emotional stress and anxiety and the disruption to his or her life, the harm to reputation and the humiliation of being put on trial) it is quite wrong that there should be a committal for trial if an oral hearing would demonstrate that there was no case to go to trial.

47. It will thus be wrong to leave it to a judge's discretion whether there should be an oral hearing; a discretion that could be exercised against a defendant simply because he or she could not demonstrate, prior to an oral evidence hearing, that the evidence might be shown by such a hearing to be insufficient for committal.

48. Those who suggest that written statements on their own are sufficient, in most cases, to determine whether there is a case to go to trial over look the frequency with which witnesses fail to come up to brief or or retreat from their statement in cross-examination or are otherwise shown in cross-examination to be unreliable.

49. The right to challenge the evidence at a committal hearing so as to demonstrate that it is insufficient for committal for trial is a fundamental right of long standing. It is an essential part of due process. Indeed the Observance of Due Process of Law Statute 1368 (Imp) (which is part of the law of New Zealand) provides that none shall be put to answer without due process of law. It mandates that "no man be put to answer without presentment before justices, or matter of record, or by due process…" (s3).[5]

[5] A similar injunction is to be found in Civil and Criminal Justice Statute 1354 and the Petition of Right 1627.

50. This right is so fundamental that it cannot be left to the discretion of a judge whether a person is accorded the right or not.

51. Consequently the Bill should provide that the judge *must* make an oral evidence order if the prosecutor or the defendant, or his or her counsel, certifies that he or she believes that it is necessary to hear the witness in order to determine whether there is sufficient evidence to commit the defendant for trial.

52. The Bill fails to recognize the second important purpose of a committal hearing; viz. the opportunity such a hearing affords the defence to test the strength and weaknesses of the prosecution case. This is important for several reasons.

53. First, it is important to know prior to trial precisely what the evidence is that the defence has to answer. Witnesses may not come up to brief in circumstances other than those where there is not a case to go to trial. Their evidence when given orally may be quite different from what is recorded in their written statement.

54. Secondly, there may be issues not dealt with at all in the witness' written statement that should be explored prior to trial. In civil proceedings each side to litigation has the right, prior to trial, to ask questions of the other in a process known as interrogatories. This recognizes that it is important to be able to ask questions prior to the trial. It is not an adequate substitute to simply provide a written statement, without an accompanying right to ask questions. What the Bill proposes is to put a defendant in a criminal case in a less advantageous position than a party to civil proceedings. This must be wrong.

55. The third important purpose served by an oral hearing is to enable the defence to explore issues that may give rise to pre-trial applications. It is not unusual for cross-examination at depositions to either identify pre-trial issues (eg issues relating to the admissibility of evidence) which would not necessarily be apparent on the written statements or to indicate that issues that defence counsel thought might possibly be available are not available because there is not an evidential basis for them.

56. There will be two unfortunate consequences that will flow from the loss of the right to identify at depositions the availability or otherwise of such pre-trial issues.

57. The first will be that the issues, without an oral committal hearing in which they can be explored and identified, may only become apparent for the first time when evidence is given and cross-examination undertaken at the trial. This will result in delays during trials while the judge is called upon to hear *voir dire* evidence on the issue and make legal rulings. Such delays will disrupt court trial schedules and greatly inconvenience juries. In recent years there has been much emphasis on reducing the inconvenience that is caused to juries when they are required to be out of court while admissibility issues are argued or other legal issues debated. This has been achieved by increasing the use of pre-trial hearings. If the issue cannot be identified at an oral committal hearing (because no such hearing is held) and becomes apparent for the first time at trial, a pre-trial hearing will not be an option. There will be the prospect, as well, of extended delays during trials while legal research on the issue is undertaken.

58. Secondly, defence counsel deprived of the opportunity to explore the evidentiary basis of a possible admissibility issue at depositions, may do so at a pre-trial hearing; only to learn, when the evidence is given at the pre-trial hearing before a judge, that the evidence does not give rise to the issue he or she thought it would. The present depositions system enables that to be discovered at the depositions; but without an oral committal hearing the time of a judge will be wasted hearing an application that for evidentiary reasons comes to nothing.

59. If the purpose of the proposed law change is to save court time it will be counter-productive. There will be fewer hearings before justices of the peace but more hearings before judges.

60. Questions asked at a depositions hearing can limit the amount of trial preparation required. A prosecution witness may concede issues in oral evidence that are not conceded in a written statement. When this occurs at a depositions hearing it is no longer necessary for the defence to seek evidence to establish the issue at trial. Without the benefit of an oral committal hearing there will be no opportunity to obtain such concessions. This will mean that the defence will have to prepare for the trial on the basis that the defence has to call evidence on the issue. This may involve inquiries being conducted and the summonsing and transportation of witnesses to give evidence for the defence; only for it to be discovered, when the prosecution witness is cross-examined at the trial, that the point is not in dispute. When that happens the defence expend unnecessary time and expense in preparing for trial. With so many criminal trials being conducted on legal aid the taxpayer will be funding this unnecessary expense.

61. The proposal to limit oral hearings has not been properly thought through by the proponents of the Bill. There has been a failure to appreciate the importance of oral committal hearings. There has been a failure to understand their importance to due process. There has been a failure to understand the dual purpose of depositions as described by Justice Hansen.

62. The legislation should provide that an order *must* be made for an oral committal hearing whenever the defence or the prosecutor certifies that such a hearing is necessary.

CRIMINAL DISCLOSURE

Notice of alibi

Submission: The time limits proposed for a defendant to give notice of alibi are unrealistic.

Discussion

63. The Bill would require (s 37) a defendant relying on an alibi to give notice of the particulars of the alibi to the prosecutor within 14 days of making his or her first appearance in court, in the case of a person charged indictably.

63. This time limit is unrealistic and unworkable. Often a person who has been charged indictably will not have obtained legal advice within 14 days of first appearing in court, and even if advice has been obtained it may only have been of a preliminary nature. In many cases there would not have been an adequate opportunity within that time to have explored the defence and to have identified that an alibi defence was available.

64. The 14-day period in which advice has to be given should run from the date of committal for trial.

65. So also, in the case of a person who elects trial by jury under s 66 of the Summary Proceedings Act, the 14-day period should run from the date of committal for trial, rather than from the date of the election of trial, which the Bill currently provides for.

CONCLUSION

66. It is sobering to realize that two of the proposals in this Bill would, if they were enacted in the United States, be struck down as unconstitutional. These provisions and others variously offend against the New Zealand Bill of Rights Act, the Magna Carta, the Observance of Due Process of Law Statute of 1368 and other traditional legal principles. It is seldom that a Bill is introduced into the New Zealand Parliament that makes this number of inroads into important civil rights.

67. John Philpot Curran observed in 1790*: Eternal vigilance is the price of liberty*. The Committee is exhorted to display that vigilance.