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LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

ALTERNATIVE TRIAL PROCESSES

MEDIA BACKGROUNDER

How we came to have this project

In 2011 the Law Commission was asked by the Government to undertake a high-level review of pre-trial and trial processes in criminal cases and consider whether the adversarial framework within which those processes operate should be modified or fundamentally changed in order to improve the system's fairness, effectiveness and efficiency. Our terms of reference required us to include within our review:

- an examination of inquisitorial models and consider whether all or any part of such models would be suitable for incorporation into the New Zealand system.

And to:

- put particular emphasis upon the extent to which a new framework and/or new processes should be developed to deal with sex offence cases; and
- consider the desirability of alternative approaches in other categories of cases such as those involving child victims and witnesses and family violence, and it should consider the extent to which the system needs to be modified more generally.

Consultation and research

Over the past 12 months the Commission has undertaken extensive research and consultation both in New Zealand and overseas. The Commission has also worked closely with a steering committee comprising representatives of the judiciary, the Police, prosecution and defence counsel, and organisations working with both offenders and victims of sexual violence. Legal academics from Victoria University, Elisabeth McDonald and Yvette Tinsley, have been conducting related research and have also participated in the steering committee.

In the course of this consultation the Commission has been told that many participants in criminal trials, including both victims and defendants, find the process to be very alienating and disempowering. The Commission was told that processes are becoming viewed as increasingly artificial; for example juries must often decide verdicts using only partial information, based on what can be admitted due to the rules of evidence.

The Commission has considered the way in which criminal trials are run in other jurisdictions, including Germany, Austria, the Netherlands and Denmark, where there are a number of different approaches to elements of the criminal trial. It has concluded that some of these aspects of overseas practice are potentially preferable to aspects of our current system and might be usefully incorporated here, while other aspects are not likely to improve our system or do not fit with it.

Public debate and consultation

The way in which trials are conducted and the rules governing what evidence can be heard and how witnesses are questioned has evolved over centuries and is designed to protect fundamental rights.

Of necessity this backgrounder provides only high-level explanations of the problems and possible reforms which are available. Detailed analysis and rationales for possible reform are available in the online consultation materials on the Commission's website. (www.lawcom.govt.nz)

The Commission is presenting these high-level ideas to promote public debate and feedback. There are no firm proposals at this stage, and the Commission is seeking wide input from the community and the legal profession before determining its recommendations.

Some of the possible reforms being considered by the Commission are general ones that could apply to criminal trials for all types of offences, while others are reforms that might address some of the problems that are peculiar to sexual offences.

For this consultation, the Commission is trialling a new format on its website where the material is broken into shorter sections that can be read online, instead of a lengthy issues paper, with links to websites and other background resources. Members of the public can send their feedback on the possible reforms to the Commission via an online form.

POSSIBLE REFORMS OF POTENTIALLY GENERAL APPLICATION

Judge in control of the trial process

Currently, our criminal justice system involves each party presenting their cases and challenging the case put forward by the other party. A common criticism of the adversarial model is that it encourages and rewards aggressive and adversarial behaviour that may damage the interests of justice rather than promote them and can be traumatising for witnesses. It also relies to a large extent on the ability of the parties to present their cases as persuasively as possible, which may in practice be limited by various factors including lack of resources. Putting control of the process into the hands of the judge rather than the parties would help to address this.

Possible reform - the judge would be in control of the process during the trial and would be largely responsible for the way in which the evidence was given, with the parties having a more limited role. The judge would decide which witnesses would be heard and in what order. He or she would question the witnesses first with parties only asking questions after the judge had finished questioning.

Related possible reforms –

- *In order for the judge to be able to control the trial process and lead the questioning of witnesses, he/she would need to know what the case was about. Therefore, a case dossier would be prepared prior to trial by the prosecutor in consultation with the defence through a case management process similar to that put in place by the Criminal Procedure Act 2011.*

- *The judge would also decide prior to the trial whether the evidence was sufficient for the case to proceed to trial, which witnesses should be called, whether any expert evidence was required and, if so, which experts should be called, and how evidence should be given at trial.*

- *The judge would also be able to direct further investigation of the case, if necessary.*

Who determines the verdict

Research shows that juries may approach a criminal case with an array of myths and prejudices that impact on their assessment of the evidence and decision-making. Such myths and prejudices are arguably more pronounced in sexual offence cases. Juries also do not have to give reasons for their verdicts, so their decision-making lacks transparency. While judges may also have prejudices, they can receive training and education on an ongoing basis to address this.

Many of the rules of evidence are designed to prevent the admission of potentially prejudicial evidence based on the assumption that a jury comprised of twelve lay persons is less capable than a judge of identifying potential prejudice and taking it into account in assessing the evidence as a whole.

Possible reform *- the facts in a trial, including the final verdict, would be determined by a judge sitting alone or by a judge and two jurors. The jurors would be fixed term appointees with some training in criminal trial procedure. Semi-professional jurors can receive training and education in a way that is not practical with jurors who sit on a one-off basis.*

Related possible reforms –

- *Many of the rules of evidence could be dispensed with.*
- *Where the decision-maker was a judge sitting with two jurors, the panel would all need to be satisfied of guilt beyond reasonable doubt (i.e. there would be no majority verdicts). The decision-maker (whether a judge and two jurors or a judge alone) would need to give reasons for their decision, something that is not possible with the current jury model.*
- *The judge (and jurors, if present) would need to ensure that the facts of the offending, on which the sentencing will be based, were determined before the end of the trial.*

Role/participation of the victim pre-trial and at trial

The Victims' Rights Act 2002 requires that a victim must be given information about charges laid or the reasons for not laying charges, and any changes to the charges laid. For various reasons it is not uncommon for initial charging decisions to be amended by way of alterations to, or dropping of, charges at a later point. While a victim must be informed of such changes, there is no general process to ensure that victims are consulted about or their views sought on decisions to amend or withdraw a charge. Nor is there any mechanism by which victims may seek a review of such changes.

Possible reform *– the victim would be able to request a review of any decision to amend or drop charges. If the decision was that of a police prosecutor, the review would be carried out by a senior prosecutor. If the decision was that of a Crown Solicitor, the review would be carried out by a Crown Solicitor based in a different area. The right of review would not apply to decisions to amend or drop charges in the context of a court appearance where the decision is made in front of a judge.*

There are currently some protections for vulnerable witnesses through the availability in certain cases of alternative means of giving evidence, such as behind a screen or by way of video link from outside of the court room. Communication assistance (including translation services, written, technological or other assistance) is available for witnesses who do not have sufficient proficiency in English to understand the proceedings or give their evidence or who have a communication disability. While

changes to put the judge in control of the trial process may alleviate some of the distress and confusion that results from cross-examination, it will not wholly obviate the problems that some witnesses experience in giving evidence in court, particularly in sexual offence cases and where witnesses have limited competency through age or disability.

Possible reform – cases involving vulnerable witnesses should be fast tracked wherever possible. Where fast tracking is not possible, pre-recording of evidence (including cross examination) ought to be considered. An amendment to the definition of "communication assistance" in the Evidence Act should also be made so that assistance in the process of answering questions would be available for a wider group. This would allow for the use of "intermediaries", who would assist with communication and the formulation of questions, rather than actually questioning witnesses themselves.

Role/participation of the defendant pre-trial and at trial

Even after the coming into force of the Criminal Procedure Act 2011, there will still be a number of court hearings which the defendant is required to appear but is not an active participant. Arguably, the expensive resource of a courtroom will continue to be used to deal with matters that are essentially preliminary to the trial and do not necessarily require the full trappings of open justice in the public forum of a court. Unnecessary appearances also create inconvenience and stress for all parties.

Possible reform – unless a hearing potentially required the input of the accused, the issue would be resolved by the judge and counsel without a formal court hearing. Formal court hearings would be limited to where the interests of justice require the defendant to be present.

Currently, there is no requirement for the defendant to give evidence at trial and no inference may be drawn from his or her failure to do so. When the defendant does give evidence, he or she does so only after the prosecution case has been presented. This can lead to the perception that the focus is on the complainant's actions rather than those of the defendant. This is particularly so where the complainant has been subject to vigorous and aggressive questioning and the defendant does not need to even present his or her version of events.

Possible reform – any evidence that the defendant chose to give would be provided at the beginning of the trial, unless the judge decided otherwise. The defendant would be subject to questions by the judge, but would not be obliged to answer them.

POSSIBLE REFORMS APPLYING TO SEXUAL OFFENCES ONLY

Improving pre-trial decision-making

While there is some oversight of prosecution decisions by supervisors and by the prosecutor, there is no formal system for oversight/review of decisions not to lay charges. This is a particular problem in sexual offence cases, where due to the nature of the available evidence in many cases, judgements are required as to the relative credibility of the witnesses.

Possible reform – the complainant would be able to request a review of initial charging decisions (whether or not to charge and which charge is laid). The review would be conducted by a senior prosecutor who specialises in sexual offence cases.

Current *Prosecution Guidelines* issued by the Crown Law Office apply to the prosecution of all offences. There are no separate guidelines covering the prosecution of sexual offences. The

Guidelines require that a prosecution should only proceed if the evidence is sufficient to provide a reasonable prospect of conviction. Recent research shows that only 42% of prosecutions result in a conviction for a sexual offence and that, of cases that go to trial, about 50% result in acquittal. This would suggest that many prosecution decisions are not well aligned with the criteria in the generic guidelines.

Possible reform – separate guidelines for the prosecution of sexual offence cases would be developed. These would specify the particular approach to be taken to the decision to prosecute in sexual offence cases. They would not necessary change the threshold for evidential sufficiency, but rather spell out the factors to be considered in applying it in sexual offence cases.

Specialist judges and counsel

In difficult areas like sexual offending, there is a great deal of community misunderstanding and prejudice. Accordingly, it is desirable that those working closely with sexual offence cases have appropriate training to address this. Judges do not necessarily come to the bench with extensive criminal law experience and judicial training and education is “on the job”. Similarly, there are no requirements for counsel in sexual offence cases to have particular experience of such cases or to have undergone specialist training.

Possible reform - specialist judges would sit on sexual offence cases. There would be specialist training that judges would elect to participate in before they were able to preside over such cases. After completion of the initial training, judges would be required to undergo ongoing training to ensure they were up-to-date with recent developments.

Both prosecution and defence counsel would also be required to be accredited before they could act on sexual offence cases. Gaining accreditation would involve undergoing specialist training. Guidelines would provide transparency by setting out the standards against which accreditation would be judged and the obligations applying to counsel.

This reform would be implemented in the modified trial process suggested in the possible reforms outlined above, and in the special sexual violence court discussed below.

Participation/role of the victim at trial

The complainant is not a party to a criminal proceeding and as such has no right to be represented in the proceeding. While the Victims’ Rights Act requires that the victim be provided with relevant information throughout the trial, there are limited opportunities for victims to have input into the way that the prosecution case is run.

Possible reform – a victim of sexual offending would have an Independent Sexual Violence Advisor (ISVA) allocated from the first point of contact with the Police or another agency. The ISVA would provide assistance, support and advice to the victim until the complaint was resolved and would liaise with the Officer in Charge of the case and the prosecutor during the investigation and any resulting prosecution.

Child protection orders

There is no mechanism to ensure systematic follow-up in cases where sexual offending against children is alleged. The Family Court can act only if an application is made to it, and even then, the

focus is on the risk posed by the alleged abuser to the particular child identified in the application rather than the risk he poses more generally.

<u>*Possible reform*</u> *– where a criminal case involved child complainants, the trial court would be required to refer the case for an assessment of risk, regardless of the outcome of the trial. This could happen by the trial court retaining jurisdiction as a "one stop shop" and making an assessment of whether any further order was required to protect children at the conclusion of the trial. Alternatively, there could be a referral to the Family Court for the risk assessment (with the trial court able to make a temporary safety order in the interim). If satisfied on the balance of probabilities that the defendant had offended and that children (whether the victim or other children) were at risk, the court would be able to make a child protection order in relation to the defendant.*

Specialist sexual violence court

The outcome of a conviction for a sexual offence is an inflexible one (usually a lengthy sentence of imprisonment), meaning defendants may be reluctant to admit guilt or take responsibility for their offending. It may also mean police/prosecutors are reluctant to pursue cases where the evidence turns on assessments of credibility. Such outcomes may do little to satisfactorily resolve the matter for a victim and may not provide an opportunity for the offender to address the causes of their offending. There is a need for a more flexible response to a sexual offence than the current system allows and to provide incentives for offenders to accept responsibility for their offending.

<u>*Possible reform*</u> *- a specialist post-guilty plea court. Suitable cases would be referred after a guilty plea had been entered, with victim agreement and the suitability of the offender for participation in some form of intervention being the governing criteria. A team of specialists would assess the case to ensure suitability and develop an intervention plan. This team would oversee the intervention plan but would have the ability to bring the matter back before the Court. At the end of the intervention, the offender would receive a sentence that reflected his participation in and progress after the intervention. This is likely to encourage more guilty pleas (sexual offences currently have a higher rate of not guilty pleas than other types of offences). It is also likely to provide a more effective mechanism for addressing the causes of the offending and preventing its recurrence.*

Alternative process for sexual offence cases

Research, both in New Zealand and overseas, shows that only a small proportion of complaints of sexual offences ever reach the criminal justice system. An even smaller proportion of complaints result in a conviction. Many victims are reluctant to make a complaint to the police because although they may wish for the offender to be confronted about the nature and consequences of the offending, they do not want to be subjected to the inevitable hardships of a trial under the formal system. Therefore, the system is failing to hold to account many offenders who are committing sexual offences. This is despite many changes to the criminal justice system in recent years. It seems that reform of the system alone will not radically change this problem. There is a need to find alternatives to the traditional criminal justice process.

<u>*Possible reform*</u> *- an alternative process outside of the traditional investigation and trial process. The victim would choose for the case to enter into the alternative process instead of the criminal justice system. The accused person would need to agree to participate in the process and accept that there had been a sexual encounter. The case would be assessed by specialists to determine whether it was suitable for an alternative process, with cases raising particular public safety issues being*

excluded. Specialist providers would develop a process to fit the individual case to meet the needs of the victim and to ensure her safety. The process would involve the development of an outcome agreed between the victim and the accused which could be tailored to meet the particular needs of the victim and the dynamics of the case.